IN THE

SUPREME COURT OF FLORIDA

CASE NO. 74,172

LARRY DONNELL BROWN,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Brown's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Brown's claims without conducting an evidentiary hearing.

The following symbols will be used to designate references to the record in the instant cause:

"R" -- Record on Direct Appeal to this Court;

"T" -- Record on 3.850 Appeal to this Court

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On February 5, 1981, Anna Jordan was found dead in her St. Petersburg home. Her portable television was missing, and there were signs of a sexual assault.

During the first week of March, 1981, Larry Brown was arrested on unrelated charges. At that time Detective Hitchcock who was investigating Ms. Jordan's death got in touch with Mr. Brown's wife to see if Mr. Brown knew or had heard of any information regarding Ms. Jordan's death. Detective Hitchcock had known Mr. Brown for nine years and had used him "as a confidential informant" (R. 1315). Detective Hitchcock had found Mr. Brown to provide "reliable information about criminal activity" (R. 1316). At the time of his contacting Mr. Brown's wife, Detective Hitchcock had no suspects in Ms. Jordan's death (R. 1314). Detective Hitchcock received word back that Mr. Brown wished to see him.

Detective Hitchcock spoke with Mr. Brown who related that George Dudley had had possession of Ms. Jordan's television. Ultimately, Mr. Dudley was confronted with this accusation. Mr. Dudley responded that he had been present at the murder with Mr. Brown, but that Mr. Brown had planned the burglary and committed the murder and sexual assault.[1] Mr. Dudley pled to second-degree murder and agreed to testify against Mr. Brown.[2]

On June 10, 1981, Mr. Brown was charged by indictment with first degree murder and burglary (R. 28-29). Mr. Brown pled not guilty to both charges. On October 26, 1982, Mr. Brown's trial commenced. During the trial, Judge Crockett Farnell presided. On October 1, 1982, Judge Farnell had been

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[1]At Mr. Brown's trial, Mr. Dudley testified that Mr. Brown did not commit the sexual assault. He stated that he told the police otherwise "[b]ecause he [Brown] told a lie on me" (R. 943).

[2]The plea agreement occurred the day Mr. Dudley's capital trial was set to begin (R. 968). Mr. Dudley had a conviction for a prior crime of violence and was under sentence of imprisonment at the time of the homicide. He was thus at risk for a sentence of death.

suspended suspended from the practice of law. He was not reinstated until November 15, 1982 after the conclusion of the trial.

At trial Mr. Dudley claimed that Mr. Brown did not commit the sexual assault but another person by the name of Ricky did. Mr. Dudley maintained that he, himself, did nothing but stand around and watch while the burglary, sexual assault, and murder occurred. The jury found Mr. Brown guilty as charged.

On October 29, 1982, the jury returned an advisory sentence of life imprisonment. On November 15, 1982, the judicial sentencing occurred. After reviewing a presentence investigation report recommending a death sentence, the judge overrode the jury's recommendation of life and sentenced Mr. Brown to death. The judge specifically said, "I don't know why the jury made the recommendation that they did." (R. 279). He, however, disagreed with the recommendation and felt that "the factors considered and weighed in this case require[d]" a death sentence. Formal judgment and sentence was entered on November 15, 1982 (R. 203). Notice of appeal was filed November 16, 1982 (R. 212).

On November 16, 1982, the St. Petersburg Times published an article regarding Mr. Brown's death sentence. This article, not part of the record on direct appeal, quoted Judge Farnell:

> Monday, Farnell sentenced his first man to death. "It is really frustrating. There is a substandard element of society down there that is following that same level of conduct. It's a tragedy," said Farnell, when it was over. "They are like rabid rats running around in a hamster cage, running 'round and 'round and every once in a while they run out of that sphere of influence and bit somebody to death."

Over a month later, on December 17, 1982, the sentencing judge entered his written findings in support of the death penalty (R. 209). In these findings the judge noted that he had considered the presentence investigation in

determining to override the jury's recommendation.[3] In fact, the presentence investigation had been ordered "to gain additional insight into the Defendant's background" (R. 209). In finding no mitigation present, the judge specifically relied upon "the Presentence Investigation" (R. 211).

Mr. Brown raised eleven issues in his direct appeal. However, this Court denied relief. Brown v. State, 473 So. 2d 1260 (Fla. 1985). In affirming the override, this Court found the judge's conclusion that mitigation did not exist controlled over the jury's recommendation of life. This recommendation resulted after the jury considered evidence that Mr. Dudley, a co-defendant, received a life sentence. In affirming, this Court presumed that the judge was correct and presumed that the jury did not have a reasonable basis for finding disparate treatment or any other mitigation warranted a life sentence. This Court did strike an aggravating circumstance, but concluded the error was harmless.

On December 16, 1985, the United States Supreme Court denied Mr. Brown's petition for writ of certiorari. Brown v. Florida, 474 U.S. 1038 (1985). Mr. Brown filed a motion to vacate judgment and sentence on December 16, 1987. This motion was amended on July 8, 1988. Mr. Brown filed a motion to disqualify the trial judge from presiding over the Rule 3.850 motion since he was a necessary and material witness. This motion was denied. The circuit court refused to hold an evidentiary hearing and summarily denied Rule 3.850 relief on February 24, 1989. Thereafter, Mr. Brown timely filed a notice of appeal and this appeal was perfected.

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[3]The presentence investigation reported that the victim's family was "extremely upset and distraught" and believable a death sentence was appropriate.

SUMMARY OF ARGUMENTS

I. Mr. Brown received ineffective assistance of counsel at the penalty phase of his capital trial when his counsel failed to investigate, develop and present the wealth of available mitigation. After receiving a life recommendation, counsel failed to do anything to provide the trial court with a reasonable basis for that recommendation and insure a life sentence was in fact imposed. Counsel failed to act as an advocate for Mr. Brown.

II. Mr. Brown was deprived of conflict-free representation when his attorney was under a continuing obligation of confidentiality to the State's star witness, George Dudley. Mr. Brown's counsel had previously represented Mr. Dudley on a prior crime of violence. Because of counsel's conflict, no questions were asked of Mr. Dudley about the prior conviction and whether it influenced his decision to avoid trial and a possible death sentence by testifying against Mr. Brown. Thus counsel failed to insure an adversarial testing by exposing Mr. Dudley's motives for testifying against Mr. Brown.

III. Mr. Brown was denied the effective assistance of counsel at the guilt phase of the proceedings against him when his counsel failed to investigate, prepare and present exculpatory and impeachment evidence.

IV. Mr. Brown was tried before a judge suspended from the practice of law. The proceedings are therefore void under Article V of the Florida Constitution.

V. The override of the jury's life recommendation must be declared unconstitutional in light of the new non-record evidence establishing that the override was arbitrary and capricious. Judge Farnell explained to a newspaper reporter that death sentence was justified because Mr. Brown left his "sphere of influence," his black neighborhood, to kill the white victim.

VI. Presentation of an impermissible "victim impact" statement to the court, the prosecution's reliance upon this victim impact evidence, and the judge's use of victim impact as the basis for the override constituted

fundamental eighth amendment error which rendered Mr. Brown's capital sentencing proceedings fundamentally unreliable and unfair and which abrogated Mr. Brown's eighth amendment rights to a reliable and individualized capital sentencing determination.

VII. The prosecutor improperly injected radical prejudice into Mr. Brown's trial by repeatedly noting the fact that the victim was white, thereby focusing the jury's and the judge's attention on the racial aspect of the case.

VIII. The circuit court judge was in error in refusing to disqualify himself from presiding over the 3.850 proceeding.

IX. Mr. Brown's sentencing by the court was contaminated by the presentation of improper and inadmissible opinion evidence that a death sentence was warranted despite the jury's recommendation of life.

X. The introduction of nonstatutory aggravating factors so perverted the sentencing phase of Mr. Brown's trial that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the eighth and fourteenth amdnements of the United States constitution.

XI. Mr. Brown's sentencing proceedings were tainted by the introduction of his post-Miranda silence as evidence that a death sentence should be imposed because of Mr. Brown's lack of remorse and cooperation with the authorities.

XII. The instructions to the jury in the guilt phase of the trial and the prosecutor in closing argument improperly commented upon the defendant's failure to testify.

XIII. The State's intentional withholding of material exculpatory evidence and its reliance on false and/or misleading testimony in furtherance of a deliberate pattern of nondisclosure violated Mr. Brown's rights under the fifth, sixth, eighth, and fourteenth amendments.

XIV. The trial court improperly refused to consider the lack of intent to kill as a mitigating circumstance.

XV. The court's findings as to aggravating and mitigating circumstances in support of the death penalty failed to consider any factors beyond those set forth by the parole and probation officers who prepared Mr. Brown's presentence investigation report. This violated Hitchcock v. Dugger, 107 S. Ct. 1821 (1987).

ARGUMENT I

MR. BROWN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985). Trial counsel here did not meet these rudimentary constitutional standards. Counsel did not adequately investigate Mr. Brown's background and mental health. Counsel had no valid reason for not doing so. Counsel had no valid reason for not presenting to the jury or to the judge in support of the life recommendation the wealth of readily available mitigation. See Stevens v. State, 552 So. 2d, 1082 (Fla. 1989). Moreover counsel failed to know eighth

amendment jurisprudence and object to the introduction of inadmissible evidence and improper argument.

In his Rule 3.850 motion, Mr. Brown alleged that his trial counsel provided deficient performance in failing to adequately investigate, prepare and present mitigation at the penalty phase proceedings. The circuit court refused to hold an evidentiary hearing because in its opinion it was obligated to "indulge in a strong presumption that trial counsel's representation was effective." On the basis of this presumption alone without benefit of an evidentiary hearing, the circuit court denied relief. However, the circuit court was in error under Mills v. Dugger, ___ So. 2d ___, 15 F.L.W. 114 (Fla. March 1, 1990). There this Court said:

> In his Rule 3.850 motion Mills claimed that his counsel rendered ineffective assistance by not developing and presenting evidence of his mental impairment and deficiency in an attempt to mitigate his sentence. He now argues that the trial court erred in not holding an evidentiary hearing on this claim. Treating the allegations as true except to the extent rebutted by the record, Harich v. State, 484 So.2d 1239 (Fla.), cert. denied, 476 U.S. 1178 (1986), we find that a hearing on this issue is needed. Therefore, we direct the trial court to hold an evidentiary hearing in regards to counsel's failure to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances. See Gorham v. State, 521 So.2d 1067 (Fla. 1988); Jones v. State, 446 So.2d 1059 (Fla. 1984).

Mills, 15 F.L.W. at 114. See also Heiney v. Dugger, ___ So. 2d ___, 15 F.L.W. 47 (Fla. 1990). Here Judge Farnell failed to treat the allegations contained in the Rule 3.850 motion as true. The judge ignored them, finding he was obligated to presume counsel was effective.

Mr. Brown's penalty phase resulted in a jury recommendation of life. The trial judge, however, overrode the jury's recommendation, and imposed a sentence of death, stating:

> The only mitigating circumstance which could have been found as a result of the testimony presented in [sic] behalf of the defendant and the presentence investigation, was that the Defendant was 27 years old at the time the crime was committed. However, this Court does not feel that this constituted a mitigating circumstance in this case.

The trial court made no references to the jury's recommendation nor his reasons for overriding it.[4] Mr. Brown's court-appointed counsel presented no evidence whatsoever at the judge sentencing (R. 260-81). This despite the sentencing judge's expressed desire for "additional factors" (R. 279).

But for the unreasonable and non-tactical decisions of trial counsel, the sentence imposed by the court would have been life. The only reason this Court sustained the override was because counsel unreasonably failed to investigate, develop, and present the evidence and argument which would have prohibited an override. Stevens v. State, supra. As demonstrated below, upon a constitutionally sufficient investigation and presentation, the override would not have been sustained. This is particularly true here where the judge was specifically and expressly wanting additional information regarding Mr. Brown.

Effective assistance of counsel in any criminal case includes a thorough investigation by counsel into all matters relevant to guilt/innocence and to sentencing. A thorough investigation includes one into "information concerning the defendant's background . . . [I]n criminal litigation, as in other matters, information is the key guide to decisions and actions." ABA Standards Relating to the Defense Function, Standard 4-3.2, Commentary, 4.33 (1979). Mitigation at sentencing cannot be effectively presented without thorough and independent investigation. Information concerning "the defendant's background, education . . . mental and emotional stability, family relationships, and the like, will be relevant . . ." Id., 4.55.

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[4]Though the jury did have before it evidence that Mr. Dudley, a co-defendant, received a life sentence, the judge did not address this potential mitigating circumstance. No consideration was given to the fact that the jury may reasonably have concluded that, despite, Mr. Dudley's protestations to the contrary, he and Mr. Brown were equally culpable and deserving of equal sentences. In fact Mr. Dudley admitted that when he initially implicated Mr. Brown in the murder it was because "he [Brown] told a lie on me." (R. 943).

Mr. Brown does not concede that there was no reasonable basis for the jury's recommendation (See Argument V, infra). However, to the extent that this Court affirmed the override, it was because trial counsel unreasonably failed to provide an adequate basis to sustain it, although the evidence which would have established such a basis was amply available. Had trial counsel undertaken any efforts to investigate, develop and present this evidence to the jury, their recommendation could not have been overridden -- as demonstrated below, this evidence would have compelled a sentence of life imprisonment, much less established a reasonable basis for such a sentence. Moreover, whether or not this evidence was presented to the jury, it could have been presented to the judge. The judge's expressed purpose for ordering a presentence investigation report was to find "additional factors" (R. 279). The preparer of the report in fact invited the defense to present mitigating factors for the judge's consideration, but trial counsel simply "reserved" comment. Then at sentencing, he presented no evidence.

In Stevens v. State, supra, this Court reversed a death sentence because trial counsel was ineffective in not presenting to the sentencing judge mitigating evidence which would have provided a reasonable basis for the jury's life recommendation:

> The sentencing decision is to be made based on evidence which supports the aggravating and mitigating circumstances. Thus, when counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the state. Francis v. State, 529 So. 2d at 677 (Barkett, J. dissenting); Amazon v. State, 487 So. 2d 8, 13 (Fla.), cert. denied, 479 U.S. 914, 107 S. Ct. 314, 93 L.Ed.2d 288 (1986). Moreover, if the trial judge views the case as one without any mitigating circumstances when in fact those circumstances exist, then confidence in the trial judge's decision to reject the jury's recommendation is undermined. Porter v. Wainwright, 805 F.2d 930, 936 (111th Cir. 1986), cert. denied, 482 U.S. 918, 107 S. Ct. 3195, 96 L.Ed.2d 682 (1987). At that point it cannot be said that no reasonable person could differ as to the appropriate penalty. Id.

552 So. 2d at 1086-87.

An investigation into Mr. Brown's background, history, and mental health should have been undertaken by counsel. Moreover, once a life recommendation had been obtained, counsel should have continued to investigate in order to find mitigation which would have convinced the judge that a reasonable basis for a life sentence existed. Trial counsel failed to exert even minimal efforts, and as a result Mr. Brown's sentencing judge was deprived of compelling evidence establishing a plethora of mitigating factors, factors which would have compelled a life sentence. Upon obtaining a life recommendation, counsel in essence abandoned his client. He failed to prepare for judicial sentencing. He failed to do his job. As a result, Mr. Brown was prejudiced by the judge's decision to override the life recommendation.

As even the simplest of investigative efforts would have revealed, Larry Brown was the product of a thoroughly horrible childhood. He grew up in "Methodist Town," one of the most notorious slums in the St. Petersburg area, amid the most abject poverty, deprivation, and degradation imaginable:

> The worst ghetto in St. Petersburg was located on the north side of town, a rectangle of filth and crime bordered by 9th Street N, 16th Street N, 1st Avenue and 5th Avenue. It was called Methodist Town. It was a sleazy, broken-down, poverty-stricken slum neighborhood breeding troubles that plagued this city for more than half a century.
>
> Bolita numbers were scrawled on the sidewalks. Drugs were sold openly in the alleys. Trash was burned in the street. It was a lawless frontier where the human rats preyed on each other, raising the crime rate higher other sector of the city. There were junkies, thieves, hungry children, mad dogs and unwed mothers. No one moved into Methodist Town. Everyone was just there, descendants of some of St. Petersburg's first black settlers, crammed away from the white part of town.
>
> "When you patrolled there, they threw bricks at you. It was a bad, bad place," recalls Sgt. Nero, who used to cover the area . . . .

("The Dismal, Inevitable Path to Murder," St. Petersburg Times, November 16, 1982, Section D, pp. 1-2, T. 282).

Larry Brown's relatives, friends, and contemporaries could have and would have testified with regard to the difficulties and dangers encountered by

youths who were forced to live and grown up in Methodist Town:

> Larry grew up in an area of St. Petersburg, known as "Methodist Town." It was a very violent place, where stealing and robbing happened all the time, because no one had enough money.
>
> While Larry was growing up in Methodist Town, everyone knew that blacks had to stay in a three (3) block area, after dark. If they didn't stay in that area, they would risk being arrested, just because they were black and out of the area in which they were supposed to stay in.
>
> If you were poor and black and grew up in Methodist Town, you knew that you would eventually have run-ins with the Police. You also knew that you would never have any hope of getting out of the poverty and racism of that area. People had to do what you had to do to survive and many times, that included taking things that weren't yours.
>
> Children like Larry, in Methodist Town, never really received any kind of good community support. What support was available didn't do anything to really help the people.
>
> The police sent out mixed signals to the young, poor, black children. They would use them as "informants," in exchange for not arresting them or convicting them for the crimes that they had been caught for. So, the children learned that they could steal, if they would help the police.

(T. 283).

Others would have testified with regard to the specific difficulties and disabilities imposed upon Larry Brown by his environment and his familial circumstances:

> My name is DORIS JEAN BANKS and I am LARRY DONNELL BROWN'S first cousin. I am the daughter of Larry's mother's sister, Gertrude. I am six (6) years older than Larry and have known Larry all of his life.
>
> I am married to Reverend W. C. Banks and have been since 1972. I have five (5) children. I have been in nursing for approximately twenty (20) years.
>
> I have lived with my mother, my aunts and cousins, including Larry, which was a total of nineteen (19) people, in a three (3) room chicken coop, with a tin roof, in Methodist Town. Methodist Town was also known as "Death Alley," because of all of the violence, and as "Bolita Street," due to all of the gambling. Methodist Town was an over-crowded slum, with people packed in so close, you could hardly move.
>
> Most of the time, while growing up, the family, including Larry, could only get enough food for one meal, which would be mostly rice and neck bone and sometimes beans. Most of the time, we had no money at all and would have to struggle just to survive. We were forced to steal,

just so we could have something to eat.

Most of the time, we had no water or electricity. Once when the rent could not be scraped together by our mothers, after they had worked at Tramore's Cafeteria for $19.00 per week, the landlord took all of the doors and windows off of the house. We were scared and desperate, so the family, including all of the children, left Methodist Town and became migrant workers. At this time, Larry was approximately six (6) years old. After about two (2) years, we returned to Methodist Town, because, as migrant workers, things were just as bad. We didn't know how to work in the fields and were paid based on the amount of crops we picked. The family borrowed money to leave Methodist Town, and we came back broke. Every day we would pray, just hoping we would make it to the next day. We were scared to death all of the time.

(T. 284).

My name is GERTRUDE BROWN. I am LARRY DONNELL BROWN'S aunt and his mother, Jeanette's sister.

I have known Larry ever since he was born.

Jeanette, my sister, had Larry, when she was fifteen (15) or sixteen (16) years old, when she was so poor she hardly had enough money to feed herself. Me and my sisters lived with Jeanette and her children, in a three (3) room shack, in Methodist Town. With all of the adults and children, there were a total of nineteen (19) people in this small shack.

Methodist Town was a slum and very over-crowded. It was a hard, hard place to live. You just tried to survive from one day to the next, but it was really hard. I remember drinking, fighting and gambling, going on around us all the time.

Larry had no positive influence or guidance in his early life. Jeanette, who loved him very much, was still only able to concentrate on trying to feed herself and her children. Larry suffered from not having someone to teach him things and give him guidance.

(T. 284).

My name is LEONARD BROWN, and I am LARRY DONNELL BROWN'S half-brother. Jeanette was our mother.

I lived with Larry and seventeen (17) other relatives in a house in Methodist Town. The house was a 'chicken coop." It was a three (3) room shack, built off the ground, on blocks. It was over-run [sic] with roaches and rats. Most of the time there was no electricity or water.

I felt Methodist Town was like "Gun Smoke," on television, because there was so much violence.

Our families were so poor that we didn't have any food to eat sometimes. I just thank God for fishing poles, salt water, hooks and line, or we would have starved.

Larry is two (2) years older than I am and when he was about six (6) years old, he had to work in the field, picking crops, to help feed the family. As children, we had to fight just to get to school. Other kids would be waiting to jump on us, so we had to travel in groups of six (6) or so, in order to protect ourselves.

I remember that white kids would leave a penny on the ground and spit on it. Then they would say, "I wonder which 'nigger' will pick it up." Larry and I didn't care how bad the white kids put us down, because we needed anything we could get, to survive, so we would pick up the money. Sometimes fights would start and we would be sent to the office and be given a beating by a white man. We didn't like that and would say something and be thrown out of school. The white kids never got in trouble, for what they had done.

(T. 285).

My name is BEULAH POWELL, and I am LARRY DONNELL BROWN'S aunt. I am his mother, Jeanette's sister. I have known Larry ever since he was born.

Jeanette, my sister, Larry's mother, got pregnant with Larry when she was about fifteen (15) years old. Jeanette was very sick during the pregnancy and didn't have much food. Jeanette mostly ate rice. My sister also got severe headaches that would cause her to be laid up in bed for days.

Larry lived in Methodist Town and it was a slum. Sometimes his mother was so poor, that they all went hungry. There was very little food and there were times that they had only one meal a day.

(T. 285).

My name is RUBY TURNER, and I am LARRY DONNELL BROWN'S aunt, his mother's sister. I have known Larry ever since he was born.

My sister, Jeanette, loved Larry and she did what she could for him, while he was growing up. We lived in Methodist Town, which was a bad, hard place to live and everyone was dirt poor and everyone just tried to survive. Jeanette used to try to feed her kids by fishing, but sometimes they had to go without food. Other times, Jeanette wouldn't eat, so that the children could.

(T. 286).

My name is VIRGIL HAYWOOD and I am LARRY DONNELL BROWN'S first cousin and I have known Larry all of his life.

I grew up with Larry and we all lived together in a small three (3) room shack in Methodist Town. There were about nineteen (19) people living in this shack.

Our mothers drank a lot and sometimes we were forced to go out an take things that weren't ours, to get food for the family to eat. When we would try to get help from the local Service Agencies, we were told to

make an appointment and come back later. When we would go back for the appointment, we were told it would take a couple of weeks before they could get us any help. This was a real problem, because we were hungry now and had to do something ourselves, just to survive. the family would get a food box once a month, sometimes, but that was not enough food for everyone and it would not last long.

(T. 286).

Professional social workers who encountered the Brown family during Larry Brown's formative years would have presented tragically cogent and compelling testimony concerning the unbelievable social, economic, and cultural deprivation faced generally by black residents of Methodist Town, and specifically by Larry Brown and his family:

My name is JESSIE M. WELLS and I was a Social Worker for the Health and Rehabilitative Services in St. Petersburg, Florida for twenty-two (22) years. I retired in September of 1987. I was assigned to work with the Browns in 1965. I was very familiar with Methodist Town and I did a lot of work in that area. I knew and worked with LARRY DONNELL BROWN, as a young boy.

Larry Brown's family lived in Methodist Town, in sub-standard housing, which I would describe as "shacks with tin roofs." Larry's family, of nineteen (19) people, were living in a shack designed for a family of four (4) to five (5) people.

Larry's family was living like animals. The mothers cared and tried, but were culturally retarded. Larry's mother and her sisters did not know how to take care of themselves or their children. their houses were filthy dirty, and so were the children. There was rarely enough food for them to eat and there was no clothing, and what clothing they had, was ragged. Many times, they would not have electricity or water. When the mothers were able to obtain money for food, through food stamps, they couldn't manage it and would buy too much. It would spoil, due to the lack of refrigeration and would be found rotting in the house. No matter how hard I worked with the mothers, to be able to manage money, and any other resources they had, they just could not seem to understand.

The conditions in which the Brown children were brought up in were extreme. The children all slept on a bare floor and, at times, when I would visit, I would find the children sitting in their own waste, with dirty diapers strewn all over the floor. Rats, roaches and snakes infested the home. Many times I was never sure that they were even going to be able to eat. The children were physically abused by their mothers, as it was the only way that the mothers knew how to deal with children. It was just accepted that that was the "way it was." The children were left to fend for themselves, with no guidance, supervision, or role models, but, instead, they lived with violence, deprivation, alcoholism and abuse.

The Brown family were desperate, depraved people, who would take things to survive. They had to bite, scratch and claw, to get anything. It was not surprising when young people from that area ended up in a penal institution.

There were no systems in place to help black people then, as segregation was still going on strong and there was no community support. The Brown children, including Larry, were taken out of the home at one point, because the mothers could not care for them, but by then, it was too late, as the damage had already been done.

Out of all the families that I have worked with, the Brown family stands out in my mind, over the past twenty-two (22) years. They were emotionally and culturally crippled. They were labeled by other kids, police and store owners, as "undesirables." As a result, the Brown children, especially the boys, were always running scared. I tried to work with the mothers who were cooperative and tried, but they just didn't understand. It was like taking people who lived in the jungle all of their lives and attempting to get those people to manage resources and adjust to a world of affluence. If you were black, you were in trouble, but, if you were black and a Brown boy, you were doubly handicapped.

Today, the children would have a much better chance at life. They would have been removed from the home sooner. Better training would have be available for the mothers and a better support program would have been available to the family.

In addition to all of the other problems that the children experienced, they were also used as a tool by the police, to inform on others, in an effort to stop the crime in that area. This sent the wrong signals to the children, telling them that "it is okay to steal, if you help us."

(T. 286-88).[5]

Larry's natural father was never married to his mother, and never lived with the family. The family reports that to the best of their knowledge, Larry's father was in and out of prison for most of Larry's life. As a result, there was no male role model in the home during Larry Brown's crucial formative years. His mother married when Larry was eleven, but as the testimony reproduced below indicates, Larry and his siblings would have been better off without a father in the home:

Jeanette married David Osley, when Larry was about eleven (11) years old. Osley didn't care how or what he hit the children with,

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[5]Larry Brown did in fact, have a long history as a police informant, as revealed at his trial (see R. 1121).

fists included. He beat Jeanette so terribly bad that she would be in bed for days and couldn't go to work. Osley especially picked on Larry, because Larry used to try to keep him from beating up his mother, Jeanette. Because Larry would try to save his mother from the beating, Osley would really go after Larry and beat him.

(T. 288).

Our Step-father, David Osley, would get drunk and beat our mother real bad. Osley hated Larry, because Larry would try to protect our mother, when Osley was beating her. When Larry would try and protect her, Larry would get beaten too. Sometimes Larry would be accused of stealing something and be beaten by Osley, but then, later, it would be discovered that the thing that Larry was supposed to have stolen, wasn't gone after all. Osley would threaten to kill Larry and the other family members with his gun. He would even put a gun to Larry's head and once, he shot at Larry. Osley would shoot guns off in the house, which made us very scared and frightened. When we would try to lock the door to keep him from getting to us, he would shoot at the door. One time he shot my baby brother, Jerry, in the foot. Osley also killed our pet with his gun.

Sometimes things got so bad for Larry at home, that he couldn't take the abuse any more, so he ran away. Because he ran away, they put him in a foster home. Me and our mother, Jeanette, would have to sneak away without knowing, so we could see Larry, but it was not very often that we could get away.

(T. 289).

Jeanette became a very heavy drinker, after she met David Osley. That was when Larry was about eleven (11) years old. Osley drank a lot and used to beat up on Larry's mother Jeanette, badly. Larry was a real small child, but he would try to protect his mother from Osley. All he got in return, was a beating.

When Osley got drunk, he sometimes would throw the family out of the house, eat all the food, or invite friends into the house, to eat the food, while the family went without food. The family had a pet raccoon and Osley killed it with a gun in the house.

(T. 289).

Jeanette married David Osley when Larry was a young boy. Osley was a heavy drinker, who could drink a fifth of liquor faster than anyone I have ever known. When Osley got drunk, he got violent.

Osley used to beat my sister, Jeanette, so bad, that she would be laid up in bed for days. Osley had given Jeanette black eyes and bruises. Osley was a big man. He weighed about 300 pounds and was about 5 feet nine inches tall. Poor Jeanette was very little. She only weighed about 100 pounds. Larry was also a very small child and he would try to save his mother from the beatings by Osley, but he would be beat himself when he tried to help.

Osley would abuse all of the children, physically, but he was

especially cruel to Larry, because Larry would take up for his mama. He hated Larry.

Osley sometimes threatened to kill the whole family. He pointed guns at them. He shot the guns off in the house all the time. When people tried to help the family, Osley locked the doors and wouldn't let anyone in. Jeanette and the children would even run to my house for safety and sometimes Osley would bust in with his gun, threatening to kill everyone. The police were called a lot of times, but nothing was ever done.

(T. 289-90).

Not surprisingly, Mr. Brown dropped out of school after the seventh grade. It is apparent from his school records that he made it that far in school only through "social promotion" -- his grades throughout his school years were dismally failing. As with most youths from Methodist Town, Larry Brown spent a good deal of his youth in foster homes and juvenile institutions. Likewise, like most residents of Methodist Town, Larry Brown was unable to escape the vicious cycle of poverty, crime, and degradation that was their lot by virtue of the circumstances of their births (T. 290).

The judge who sentenced Larry Brown to death over the recommendation of the jury never heard any of this evidence. It was all highly mitigating and unquestionably relevant and admissible. Had it been presented, not only would there have been a more than reasonable basis for the jury's recommendation, and the judge therefore precluded from overriding the jury, there is a substantial probability that the sentencing judge would have imposed a life sentence irrespective of the jury's recommendation. It was not presented, because counsel failed in his duty to investigate and prepare. Where, as here, counsel unreasonably flouts that duty, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See Stevens v. State, supra.

Mr. Brown's court-appointed counsel failed in his duty. The wealth of significant evidence which was available and which should have been presented

never got to the court. Counsel operated through ignorance. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare.

The above-discussed unreasonable attorney conduct was not, however, the full extent, nor the least, of trial counsel's ineffectiveness here. Despite numerous signs and symptoms of intellectual deficiencies, psychological and emotional impairment, and organic brain damage, trial counsel made no effort to procure the appointment and assistance of a qualified mental health expert to evaluate Mr. Brown and develop and present the numerous mental health related mitigating factors which were extant in this case.

Minimally reasonable investigation would have alerted competent counsel that his client needed help, and that numerous mental health mitigating circumstances were available to be presented here. As previously discussed, reasonably adequate investigation of Mr. Brown's family history and background would have revealed a history of economic, social, cultural, and emotional deprivation. School records would have shown Mr. Brown's limited level of intellectual functioning and his borderline IQ; hospital records would have documented a history of closed head injury; Department of Corrections Records would have revealed a history of epileptiform seizure activity (T. 292). Counsel uncovered none of this, because he did no investigation. Mr. Brown's true mental state, and his lifelong intellectual, psychological, and emotional impairments, were never brought to the attention of the sentencer, because counsel unreasonably failed to obtain the assistance of qualified mental health experts.

Simply talking to Mr. Brown's family and friends would have revealed a history of strange behavior, head injury, and seizure activity, and hence demonstrated the need for mental health professional assistance. For example:

I remember once, when Larry was about sixteen (16) years old, when he fell to the ground and was shaking all over. He was drooling and foaming at the mouth and when it was over, Larry couldn't remember what had happened.

(T. 293).

When Larry was about eight (8) years old, he was hit by a car. I was not there when it happened, but I was at the house when they came and got our mother to go to the hospital. Larry came home a few days later and his head was all bandaged up. I am not sure what hospital that Larry was in.

Larry was about sixteen (16) years old, when he fell to the ground, shaking all over and foaming at the mouth. When it was over and it had stopped, Larry was dazed and confused and didn't remember what had happened.

When Larry was about twenty-three (23) years old, he came home, wearing a hospital gown. He had blood all over the back of his head and on the gown. He said that he did not remember how he got home, but he thought he had been in a car wreck. He acted real strange and seemed confused. He slept for an entire day.

(T. 293).

Larry was always a small child and even when he grew up, he was never as large as other children and young people his age. When he was about 21 years old, he had a seizure at my home. He was on the floor, shaking uncontrollably and crawled out the front door. The ambulance was called and they came and put something in his mouth. Larry did not know what he was doing and after it was over, he couldn't remember what happened.

(T. 293).

As a young adult, Larry would talk in a way that was confused and didn't make sense. Sometimes, he couldn't be understood. He wouldn't respond when he was talked to. At times, he looked dazed. At times, he had trouble staying on the same subject and would go off on things. Something was not quite right with Larry.

(T. 293).

Larry always seemed different to me, like he had a mental problem. Larry would say things that did not go with the conversation. When he talked, sometimes he made no sense and you couldn't understand him. Then, when I would ask him to repeat himself, he would just start singing, or, couldn't recall what he had said. All I had to do was talk to him and I could tell something was not right.

(T. 294).

Sometimes I would find Larry sitting all by himself, crying, for

no reason at all. The pressure was just too much for Larry and he just kept everything inside and sometimes it would hurt too much. Then he would cry.

(T. 294).

Family members could also have related the devastating effect that his mother's death had on Larry Brown's already unstable mental condition:

> Larry's mother, Jeanette, had severe headaches all of her life. She eventually died of a stroke, after being in a coma for a time. When she died, Larry was really badly depressed. He said that "all he had in this world was gone, now." He seemed to have changed afterwards. He was more withdrawn than before his mother died.

(T. 294).

> Larry had a very close relationship with his mother. He was devastated by her death. He said that "he had lost everything that he had in this world." I rode with my husband, Reverend Banks, and my mother, Gertrude, in the van to take Larry back to Work Release after Larry's mother's funeral and I have never heard from Larry since that day, which was very surprising, because we were close. When in the van, after the funeral, Larry kept singing a hymn, over and over, "Walk with me Lord." Larry seemed to slip away and change after that.

(T. 294).

> Larry got very depressed when his mother died. He thought he lost the only person in the world who really cared about him and loved him. He thought that everything that he had was gone. After that, he seemed confused and lost.

(T. 294).

All of this evidence was not only independently mitigating, but would have also, if submitted to and considered by competent mental health experts, resulted in the development and presentation of compelling mental health related mitigating evidence. A mental health evaluation would have revealed Organic Brain Syndrome, as evidenced by epilepsy, major mental disorders, acute psychotic symptoms, and low borderline intellectual functioning. All of this would have been, of course, highly mitigating, and would have provided an eminently reasonable basis for the jury's recommendation of life.

Dr. Harry Krop, a licensed clinical psychologist has performed tests upon Mr. Brown and considered his history. With adequate background information and the assistance of a competent mental health expert, a plethora of mental health mitigating circumstances would have arisen. In particular, Dr. Krop has determined that Mr. Brown suffered from a major mental disorder at the time of the offense. Whether organic, psychological or environmental in origin, Mr. Brown is similarly cognitively deficient in at least two significant areas; abstract reasoning and judgment. His I.Q. of 72 places him in the lower 3% of the population of the United States (T. 44-47).

A defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). Florida's capital sentencing statute, by its very nature makes the capital defendant's mental state relevant to the sentencing decision. What is required is an "adequate evaluation of his state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985).

Mr. Brown's lawyers knew nothing of their client's background and history. They did nothing with the overwhelming mitigation available from his client's mental health background. They ignored all of that evidence -- evidence which would have made a difference, as it would have precluded an override of the jury's recommendation of life. They therefore failed to present the tribunal charged with deciding whether their client should live or die with the incredibly tragic story of Larry Donnell Brown's life and of his mental deficits. They thus deprived their client not only of a meaningful and individualized sentencing determination, but also of a life sentence. Moreover counsel failed to know eighth amendment jurisprudence and actively oppose the presentation of inadmissible evidence and improper argument. Mr. Brown is entitled to an evidentiary hearing, and thereafter to the relief he seeks. See Mills v. Dugger, supra; Heiney v. Dugger, supra; Stevens v. State, supra.

This case must at a minimum be remanded for an evidentiary hearing.

ARGUMENT II

MR. BROWN WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL DUE TO A CONFLICT OF INTEREST ON THE PART OF ONE OF HIS TRIAL COUNSEL, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

At trial, Mr. Brown was represented by the office of the Public Defender for Pinellas County. Trial counsel were Mr. Dudley Clapp and Mr. Michael McMillan, both of the office of the Public Defender. At trial, the chief witness against Mr. Brown was his co-defendant, George Dudley. Pursuant to a plea bargain, Mr. Dudley had entered a plea of guilty to second degree murder in exchange for his testimony against Mr. Brown. Mr. Dudley did indeed testify at trial against Mr. Brown and was cross-examined by Mr. Clapp, with the assistance of Mr. McMillan.

On April 22, 1980, Mr. Dudley had entered a plea of no contest to the crime of aggravated battery. At the time, George Dudley was represented by Michael McMillan, the same Michael McMillan who served as counsel for Mr. Brown. Thus Mr. McMillan owed Mr. Dudley a continuing obligation to preserve his confidences. Nowhere in the record is there evidence that Mr. Brown waived the obvious conflict of interest. At the time of Mr. Brown's trial Mr. McMillan in effect had one hand tied behind his back. He was precluded from violating his continuing obligation to Mr. Dudley. In such circumstances there could not be zealous advocacy.

The sixth amendment guarantees the right to conflict free counsel. Alvarez v. United States, 580 F.2d 1251 (5th Cir. 1978). This right is violated when a conflict impairs an attorney's ability to vigorously defend his client. Stephens v. United States, 595 F.2d 1066 (5th Cir. 1979). The United States Supreme Court has forbidden attorneys to have such conflicting loyalties: "Joint representation of conflicting interests is suspect because of what it

tends to prevent the attorney from doing." Holloway v. Arkansas, 435 U.S. 475, 490 (1978). In this regard, ineffectiveness is presumed where counsel "actively represented conflicting interests." United States v. Cronic, 104 S. Ct. 2039, 2048 n.28 (1984); Cuyler v. Sullivan, 446 U.S. 335, 356 (1980). The dangers inherent in the representation of conflicting interests in a criminal trial are so extensive that in such cases a showing of prejudice is not required. Strickland v. Washington, 104 S. Ct. 2052, 2067 (1984); Cuyler, 446 U.S. at 345.

According to the Eleventh Circuit Court of Appeals, an evidentiary hearing is required on this issue when a habeas petitioner alleges an actual conflict of interest which adversely affected his lawyer's representation. Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). In such situations, no additional demonstration of prejudice is necessary. Prejudice is so potent that a defendant need not show, as he or she must in codefendant conflict situations, that counsel "actively represented conflicting interests," and that the conflict "adversely affected his lawyer's performance." Cuyler, 445 U.S. at 350:

> Defendants in such cases risk, to a greater extent than do jointly represented codefendants, the effects of an often undetectable erosion of zeal.

Comment, Conflict of Interest in Multiple Representation of Criminal Co-Defendants, 68 J. Crim. L & C, 226, 239 (1977), cited in Cuyler, 445 U.S. at 350 n.15. As is apparent from Mr. Brown's case:

> the situation is too fraught with the danger of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation of [defendant's] rights whether or not it in fact influences the attorney or the outcome of the case.

Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974).

It is clear that every criminal defendant is entitled to effective assistance of counsel. The duty of counsel is to vigorously defend his

client's interests to the best of his ability. Such representation must be unequivocal and unfettered by divided loyalties. Here Mr. McMillan owed Mr. Dudley a continuing obligation of loyalty and a duty to preserve his confidences. While at the same time his obligation to Mr. Brown was to impeach Mr. Dudley and to establish that Mr. Dudley was lying. This constituted the classic conflict of interest. In such circumstances there could not be zealous advocacy on Mr. Brown's behalf.

Fla. Bar. Reg. Rule 4-1.8(b) reads as follows: "a lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as required by Rule 4-1.6." None of the exceptions listed in Rule 4-1.6 would allow Mr. McMillan to divulge or use any information derived by virtue of his previous representation of Mr. Dudley. Thus it is clear that Mr. McMillan still had an ethical duty to Mr. Dudley at the same time Mr. Dudley was appearing as the chief prosecution witness against his then client Larry Brown. Absent any evidence that such conflict was divulged to Mr. Brown, and that Mr. Brown knowingly and intelligently waived the conflict of interest, it is readily apparent that the right to effective representation of counsel was interfered with by virtue of the trial counsel's conflict of interest.

The mere showing of such a fundamental conflict, together with the absence of any evidence that Mr. Brown was informed of the conflict, entitles Mr. Brown to relief. Since Mr. Dudley played such a key role in the State's case, it is fundamental to the adversary system that Mr. Brown's counsel be free of any restraints in his cross-examination of Mr. Dudley, and free of any lingering loyalty to the very witness which is the heart of the State's case. Mr. Dudley's previous criminal prosecution should have been used to impeach him.[6]

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[6]For example, Mr. Dudley testified that he agreed to plead guilty and testify against Mr. Brown the day that his capital murder trial was set to begin (continued...)

Certainly counsel not burdened by this conflict would have examined Mr. Dudley regarding the prior crime of violence. The fact that Mr. McMillan did not personally conduct the cross-examination did not cure the conflict. Mr. McMillan was co-counsel with Mr. Clapp and presumably played a fundamental role in trial strategy and tactics. Mr. Brown was entitled to independent counsel and to no less. By virtue of the conflict of interest, Mr. Brown was denied that fundamental right.

The dangers inherent in multiple representation are forbidden by the federal rules, which require the court to make an immediate inquiry into conflicting defenses when it appears that multiple representation is involved. See Fed. R. Crim. P. 44(c). The United States Supreme Court has noted:

> Seventy percent of the public defender offices responding to a recent survey reported a strong policy against undertaking multiple representation in criminal cases. Forty-nine percent of the offices responding never undertake such representation.

Cuyler, 446 U.S. at 346. In both Georgia and California, in all capital cases, each defendant is to be provided with separate, independent counsel. Fleming v. State, 270 S.E.2d 185 (Ga. 1980); People v. Mroczko, 672 P.2d 835 (Cal. 1983).

The dangers of multiple representation are so antagonistic to our concept of an adversarial system of criminal justice that the courts require close scrutiny of any case in which it occurs. See Cuyler, supra. Here, an actual

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[6](...continued)
(R. 969). He stated that his change of plea was not motivated by fear of the death penalty (R. 967-68). He certainly should have been asked if he knew that his prior conviction of aggravated battery would have established an aggravating circumstance, i.e. prior crime of violence. He should have also been asked if his three year probationary period had expired when Ms. Jordan was murdered one year and one month after his sentencing; because if it had not, he had a second aggravating factor against him, i.e. under sentence of imprisonment. Counsel without a conflict certainly could have pursued this line of questioning to show that Mr. Dudley entered his plea and claimed that Mr. Brown committed the murder in order to save himself. As it was, no questioning concerning this prior conviction on which Mr. McMillan represented Mr. Dudley was pursued at Mr. Brown's trial.

conflict of interest was allowed to exist. This conflict was an actual conflict, much more insidious than simply multiple representation of co-defendants not adverse to each other. This conflict adversely effected the representation Mr. Brown received. Counsel failed to zealously cross-examine Mr. Dudley about matters which would have established his motives and bias in assisting the State in order to save himself. See Davis v. Alaska, 415 U.S. 308 (1974). This claim requires an evidentiary hearing, Harich v. State, 542 So. 2d 980 (Fla. 1989), and thereafter relief.

ARGUMENT III

MR. BROWN WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon defense counsel. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliance adversarial testing process." Strickland, 466 U.S. at 688. Here, Mr. Brown was denied a reliable adversarial testing.

Teresena Brown and Annette Haywood both took the stand at Mr. Brown's trial and testified that they had heard Mr. Brown, in the course of an argument with his wife, make a statement to the effect that he had already "killed one white bitch" and that he would kill her (his wife, a black woman) too (See R. 1010, 1030). But for the wholly incredible testimony of George Dudley, this was the only evidence which even arguably linked Larry Brown to a murder.

Both women testified that the alleged statement occurred at Annette

Haywood's house, during the course of a card game and/or party, in the presence of numerous other persons (R. 1008-20, 1028, 1035). According to their testimony, Mr. Brown and his wife got into an altercation, during which Mrs. Brown attacked her husband with a knife and had to be physically restrained (R. 1015-30). It was during the course of this fight that the statement was allegedly made.

Defense counsel subpoenaed both women prior to trial for the purpose of taking discovery depositions, but neither responded and were not produced by the State for deposition purposes until October 25, 1982, the day before trial commenced. Annette Haywood stated in her deposition that she had heard Mr. Brown make such a statement, but she could not recall when she had heard it (T. 298). Teresena Brown testified in her deposition first that she had not heard Mr. Brown make such a statement, then that she had been told by Annette Haywood that he had made the statement, and ultimately that she had in fact heard the statement (T. 299). Both Teresena and Annette had earlier told investigators for the Public Defender's Office that they had not heard the statement made at all (T. 299).

The inconsistencies between these witnesses' prior statements, their deposition testimony, and their trial testimony indicated that there was something fundamentally amiss with their stories. There was -- they were lying. Virtually all of the other people who attended the party at which Mr. Brown allegedly made the incriminating statements at issue here heard no such statements, although they were in the same room with Mr. Brown at all relevant times. Rufus Brown, who restrained Gloria when she attacked her husband at the party, never heard the statement (T. 299). Virgil Haywood, at whose house the party took place, never heard the statements, although he was present at all relevant times. Moreover, Mr. Haywood would have testified that both his wife Annette and Teresena Brown were asleep at the time the fight between Larry

Brown and his wife occurred (T. 299). Gloria Brown, towards whom the statement was allegedly directed, never heard it (T. 299). Robert Dudley, who was present at the party when the altercation occurred, never heard the statement (T. 299).

Defense counsel spoke to at least three of these witnesses prior to trial. Rufus Brown was deposed prior to trial (T. 299). Counsel's investigators spoke to Virgil Haywood and Gloria Brown prior to trial (T. 299). Unlike the State's witnesses Annette Haywood and Teresena Brown, these potential witnesses remained consistent in their statements that they did not hear Larry Brown make any statement with respect to killing a "white bitch" or anyone else.

Incredibly enough, trial counsel did not present these witnesses at trial. Counsel's failure in this regard is inexplicable: their testimony would have literally destroyed the testimony of Annette Haywood and Teresena Brown. The testimony of George Dudley was barely credible, and the jury obviously had substantial questions with regard to his truthfulness. Had trial counsel effectively countered the testimony of Annette Haywood and Teresena Brown with the evidence that was already in his possession, there is a more than reasonable probability that the jury's verdict would have been different.

The impeachment value of the testimony of Virgil Haywood, Rufus Brown, and Gloria Brown alone would have been sufficient to change the outcome of Larry Brown's trial:

> The conviction rested upon the testimony of [Annette Haywood and Teresena Brown]. Their credibility was a central issue in the case. Available evidence would have had great weight in the assertion that [their] testimony was not true. There is a reasonable probability that, had [Virgil Haywood's, Rufus Brown's and Gloria Brown's testimony] been used at trial, the result would have been different. Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984).

Smith (Dennis) v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986).

At trial, a plethora of evidence was introduced through Dr. Joan Woods, the State's medical examiner. The very nature of the evidence was clear to trial counsel since Dr. Woods was deposed prior to trial. However, no effort was made to obtain the services of an independent pathologist to rebut the evidence presented by Dr. Woods. Had counsel obtained the services of a pathologist to advise counsel and assist in the defense, counsel could have established that Dr. Woods failed to observe proper protocol in her autopsy; that her examination was professionally inadequate; that her opinions as to cause of death were unsupportable under the prevailing professional standards; and that her evidence gathering techniques were lacking and unreliable. Counsel's failure to obtain the assistance of a pathologist denied Mr. Brown of the ability to counter a major part of the State's case. As a result, Mr. Brown was prejudiced by the failure to impeach Dr. Woods' testimony, which the court relied on to find an intent to kill and the jury relied upon to convict of first degree murder.

Counsel's deficiency in this regard was unreasonable and prejudicial: the central aspects of the State's case were never challenged. Counsel's failure was thus sufficient to undermine confidence in the outcome of these proceedings, for the law is clear that even if an attorney provides effective assistance in some areas, counsel may still be ineffective in his or her performance in other aspects of the proceedings. See Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982); see also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to establish the defendant's entitlement to relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it

alone causes the attorney's assistance to fall below the Sixth Amendment standard"); see also Strickland v. Washington, supra; Kimmelman, supra. The failure of counsel identified herein is of such a nature, and entitles Mr. Brown to relief. Certainly the files and records do not conclusively establish that Mr. Brown is not entitled to relief. Therefore an evidentiary hearing is required. Lemon v. State, 498 So. 2d 923 (Fla. 1986).

ARGUMENT IV

MR. BROWN WAS ILLEGALLY SENTENCED IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS SINCE DURING THE ENTIRE TRIAL THE SENTENCING JUDGE HAD BEEN SUSPENDED FROM THE PRACTICE OF LAW FOR FAILURE TO PAY THE ANNUAL BAR FEE.

Mr. Brown was denied his right to have the guilt-innocence phase of the trial and the penalty phase of the trial presided over by a judge who was duly authorized to carry out the function of a judge. In the case at bar, during the guilt- innocence phase as well as the penalty phase of the trial, the presiding judge, the Honorable Crockett Farnell, had been suspended from the practice of law by virtue of his failure to pay the required dues to the Florida Bar (T. 249). Judge Farnell was suspended form the practice of law on October 1, 1982. Mr. Brown's trial commenced on October 26, 1982. Judge Farnell was reinstated on November 15, 1982, the date of Mr. Brown's sentencing (T. 68). Judge Farnell did not at any time during the proceedings notify Mr. Brown or his counsel that he, the judge, had been suspended from the practice of law. Accordingly, unlike the situation in Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), neither Mr. Brown nor his attorney were on any notice of this jurisdictional defect nor of the availability of a motion to disqualify Judge Farnell. In such circumstances this issue not being of record could not have been raised. Moreover because the issue is jurisdictional in scope, it need not have been raised and is cognizible in post-conviction proceedings.

The Florida Constitution, Article V, section 8, provides as follows: "No person is eligible for the office of circuit judge, unless he is or has been for the preceding five years, a member of the Bar of Florida." Clearly Judge Farnell was constitutionally ineligible to be a judge while he was suspended. Judge Farnell was not a member of the bar at the time he presided over Mr. Brown's trial. A person cannot be a judge if he is not eligible for the office.

The trial court's lack of jurisdiction is a fundamental constitutional error. If a convicting court lacks jurisdiction, the conviction obviously violates the due process clause of the fourteenth amendment. See, e.g., Lowery v. Estelle, 696 F.2d 333, 337 (5th Cir. 1983)("An absence of jurisdiction in the convicting court is. . . a basis for federal habeas corpus relief cognizable under the due process clause."); see also Branch v. Estelle, 631 F.2d 1233 (5th Cir. 1980); Bueno v. Beto, 458 F.2d 457 (5th Cir. 1972), cert. denied, 409 U.S. 884 (1972); Murphy v. Beto, 416 F.2d 98 (5th Cir. 1969).

Jurisdiction of the convicting court, "the right and power to enter upon and determine the issues of a case," Hawk v. Hollowell, 1 F.Supp. 885 (S.D. Iowa 1932), is fundamental to due process. From the earliest days of fourteenth amendment jurisprudence, states have been required to obtain criminal convictions in courts of competent jurisdiction. Equal protection also demands no less. The writ of habeas corpus was in the past used primarily to review the jurisdiction of the state court that entered the challenged conviction. In Frank v. Magnum, 237 U.S. 309 (1915), the Supreme Court explained that the writ must issue where "the judgment under which the prisoner is detained is shown to be absolutely void for want of jurisdiction in the court that pronounced it, either because such jurisdiction was absent at the beginning, or because it was lost in the course of the proceedings." Id. at 310; see also Valentina v. Mercer, 201 U.S. 131 (1906).

The Florida Constitution establishes that judges must be members of the Florida Bar. This specific delineation of authority in the state constitution precludes any non-lawyer from acting as a judge because "Our state constitution is a limitation upon power. . . ," Prettyman v. Florida Real Estate Commission ex rel. Branham, 109 So. 2d 442, 445 (Fla. 1926). State ex. rel. Jones v. Wiseheart, 245 So. 2d 849, 852 (Fla. 1971)("when the Constitution prescribes the manner of doing an act, the manner prescribed is exclusive").

Florida courts have repeatedly voided judicial acts that failed to comply with Article V of the state constitution. See Klosenberg v. Klosenberg, 419 So. 2d 421 (Fla. 3d Dca 1982); State ex rel. Wesley Const. Co. v. O'Connell, 347 So. 2d 442 (Fla. 3d DCA 1977); Rose v. State, 9 F.L.W. 689, withdrawn on rehearing, 451 So. 2d 1067 (Fla. 5th DCA 1984); Jennings Const. Corp. v. Metropolitan Dade County, 373 So. 2d 79 (Fla. 3d DCA 1979). In Stearns v. Stearns, 143 So. 642 (Fla. 1932), the Florida Supreme Court held that the lack of an appointment order (under the predecessor provision of the state constitution, which gave the Governor of the state the exclusive authority to make temporary extra-circuit judicial appointments) rendered void a final judgment entered by an out of circuit judge.

The circuit court denied relief on this claim solely because of Dolan v. State, 469 So. 2d 142 (Fla. 3d DCA 1985). However in Dolan the issue was whether a defense attorney was per se ineffective for not paying his bar dues and for being under a suspension from the practice of law. Dolan did not implicate the Florida Constitution's limitation upon a circuit court judge's jurisdiction. It is thus not relevant to the issue here.

Accordingly, the proceedings over which Judge Farnell presided were and are void. Mr. Brown's fourteenth amendment due process rights were violated and his resulting conviction and sentence of death must be vacated.

ARGUMENT V

THE OVERRIDE OF THE JURY'S RECOMMENDATION THAT A LIFE SENTENCE BE IMPOSED MUST BE DECLARED UNCONSTITUTIONAL BECAUSE THE RECOGNIZED STANDARDS FOR A JURY OVERRIDE WERE NOT FOLLOWED IN THIS CASE AND THUS THE IMPOSITION OF THE DEATH SENTENCE WAS ARBITRARY AND CAPRICIOUS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

At the conclusion of the penalty phase of Mr. Brown's trial, the jury returned a verdict recommending the imposition of a life sentence. Before acting upon the recommendation, the sentencing court expressed its desire to have a presentence investigation conducted before sentencing. The court entered an order directing the preparation of a presentence report prior to sentencing set for November 15, 1982.

At the sentencing hearing, the prosecutor, relying on the recommendation contained in the presentence report and other lay opinions contained therein, stated: "I, on behalf of the people of the State of Florida, strongly urge you to make an independent determination and to sentence this man to death, which is clearly appropriate in this case" (R. 277). Thus it was the State's contention that the court could conduct an independent sentencing determination and ignore the jury's sentencing recommendation. The judge agreed and rejected the recommendation saying, "I took the oath of office to do what I felt to be right in situations like this." (R. 280).

The next day on November 16, 1982, the St. Petersburg Times published an article regarding Mr. Brown's death sentence. This article, not part of the record on direct appeal, quoted Judge Farnell:

> Monday, Farnell sentenced his first man to death. "It is really frustrating. There is a substandard element of society down there that is following that same level of conduct. It's a tragedy," said Farnell, when it was over. "They are like rabid rats running around in a hamster cage, running 'round and 'round and every once in a while they run out of that sphere of influence and bite somebody to death."

The justification of the override not part of the record on direct appeal established that the override occurred because Mr. Brown left his black

neighborhood and killed a white woman. The override in light of this new evidence was improper.

A jury recommendation is to receive great weight, and before overruling the jury, the trial court must find that the facts "suggesting a sentence of death should be [so] clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). As recently explained, "when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper"; i.e., "when there are valid mitigating factors discernible from the record which reasonable people could conclude outweigh the aggravating factors proven in a given case, an override will not be upheld." Torres-Arboledo v. State, 524 So. 2d 403 (Fla. 1988). Stated another way, "the facts justifying the death sentence must be so clear and convincing that the jury can be said to have acted unreasonably" in recommending a life sentence. Brown v. State, 526 So. 2d 903, 907 (Fla. 1988). Moreover, the judge must weigh "the recommendation of the jury" and explain why the jury's recommendation is being overridden. Lewis v. State, 398 So. 2d 432 (Fla. 1981). Here, the judge offered no rationale on the record for why he found no reasonable basis for the jury's recommendation. In fact, he showed no sign of knowing that deference was owed to the recommendation.

The United States Supreme Court has repeatedly scrutinized capital sentencing schemes in order to assure that they comply with constitutional requirements. The Court has held that "[a]lthough this Court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on its discretion." Booth v. Maryland, 107 S. Ct. 2529, 2532 (1987). In Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the Court examined Oklahoma's "heinous, atrocious, and cruel" aggravating circumstance to determine whether its application in Mr. Cartwright's case complied with the Constitution. The Court

did not take issue with Oklahoma's use or definition of that factor, but determined that the method by which the factor was applied in that case violated the eighth amendment. Maynard, supra. Thus, it is clear that states may adopt their own capital sentencing schemes and may define the components of those schemes, as long as the schemes and their application conform to constitutional requirements.

The same is true for the Florida jury override procedure. In Spaziano v. Florida, 468 U.S. 447 (1984), the Supreme Court upheld the facial validity of the jury override scheme, but at the same time examined that scheme's application in that case in order "to ensure that the result of the process is not arbitrary or discriminatory." Id. at 465. The Court described its responsibility in examining capital sentencing schemes as the "pursuit of the 'twin objectives' of 'measured, consistent application and fairness to the accused,'" id. at 459, and noted:

> Because the death sentence is unique in its severity and in its irrevocability, . . . the Court has carefully scrutinized the States' capital sentencing schemes to minimize the risk that the penalty will be imposed in error or in an arbitrary and capricious manner.

Id. at 460, n.7.

However, Spaziano's upholding of the jury override procedure and its application in that case does not forever insulate an override from review under the eighth amendment. In Spaziano the Court, while upholding the validity of the scheme, also assessed the petitioner's challenge to the application of the Tedder standard. Finding that the standard provides capital defendants a "significant safeguard," that "the Florida Supreme Court takes that standard seriously," and that "there is no evidence that the Florida Supreme Court has failed in its responsibility to perform meaningful appellate review," Spaziano, supra, 468 U.S. at 465-66, the Court concluded that the override was constitutional in that case. Id. at 467. Clearly, the Supreme Court did not

consider its task at an end once it determined the facial validity of the override scheme, but found it necessary and proper to determine the constitutionality of the scheme's application in the particular case. The Eleventh Circuit has explained:

> Procedures that result in the constitutional application of the death penalty if followed correctly may result in the unconstitutional application of the death penalty if followed incorrectly. . . .
>
> As in Spaziano, the present case involves the application of Florida's override scheme. Because the Court in Spaziano upheld the general constitutionality of the scheme, we need not re-examine this issue. Rather, we must examine the application of these procedures in this case.

Parker v. Dugger, 876 F.2d 1470, 1474 (11th Cir. 1989). See also Lusk v. Dugger, 890 F.2d 332 (11th Cir. 1989). Simply because the Supreme Court found the override procedure properly applied in Spaziano does not mean this Court can apply inconsistent and erratic standards of review.

This is further borne out by the recent Supreme Court decision in Penry v. Lynaugh, 107 S. Ct. 2934 (1989). There, the Court was presented with a claim that the Texas death penalty statute failed to ensure that the sentencing jury was adequately instructed to consider all of the defendant's mitigating evidence. Id. at 4961. The Texas death penalty statute had been upheld in Jurek v. Texas, 428 U.S. 262 (1976), on the "assurance" that "the special issues [which the jury decides in determining the appropriate penalty] would be interpreted broadly enough to enable sentencing juries to consider all of the relevant mitigating evidence a defendant might present." Id. at 4962. However, the petitioner argued that "those assurances were not fulfilled in his particular case." Id. at 4962 (emphasis in original).[7] The Court agreed and

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[7]In the course of its discussion, the Penry Court noted that Proffitt v. Florida, 428 U.S. 242 (1972), had sustained the facial validity of the Florida capital sentencing scheme, but that an "as applied" challenge to that statute had been sustained in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Penry, supra, 109 S. Ct. at 2946.

ordered resentencing.

The same analysis applies to Mr. Brown's claim: the override scheme and the application of the Tedder standard were upheld in Spaziano on the basis of the "significant safeguard" provided by the Tedder standard, the Court's satisfaction that this Court took that standard seriously, and the lack of evidence that this Court had failed in its responsibility to perform meaningful appellate review. Spaziano, supra, 468 U.S. at 465-66. Mr. Brown's claim is that in his case the assurances upon which the Court relied in Spaziano have not been fulfilled. On the contrary, although an ample "reasonable basis" for the jury's life recommendation was present, the trial judge overrode that recommendation, and this Court failed to provide Mr. Brown the "significant safeguard" of the Tedder standard, failed to take that standard seriously, and failed to provide Mr. Brown with the meaningful appellate review to which he was entitled. See Spaziano, supra; see also Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987)("Although Spaziano indicates that a state may allocate the sentencing power as it wishes between the judge and jury, it does not stand for the proposition that the state may arbitrarily alter this allocation as it applies to particular defendants.").

This Court has admitted as much in a recent opinion. See Cochran v. State, 547 So. 2d 928 (Fla. 1989). In Cochran, supra, both the majority and the dissent agreed that the Tedder standard has been inconsistently applied. Dissenting from the reversal of the override in Cochran, Chief Justice Ehrlich cited three cases in which overrides were affirmed despite the presence of information which could have influenced the jury to recommend life, and argued that a "mechanistic application" of the Tedder standard "would have resulted in reversals of the death sentences in these cases." Cochran, 547 So. 2d at 935. Though Chief Justice Ehrlich argued that the Tedder standard as construed today and as applied by the majority in Cochran is wrong and that the court should

return to the standard employed in the earlier cases which he cited, he correctly noted that the shift in the standard has resulted in an eighth amendment violation under Furman v. Georgia, 408 U.S. 238 (1972). Cochran, supra. In response to Chief Justice Ehrlich's dissent, the majority wrote:

> Finally, we agree with the dissent that "legal precedent consists more in what courts do than in what they say." However, in expounding upon this point to prove that Tedder has not been applied with the force suggested by its language, the dissent draws entirely from cases occurring in 1984 or earlier. This is not indicative of what the present court does, as Justice Shaw noted in his special concurrence to Grossman v. State, 525 So.2d 833, 851 (Fla. 1988)(Shaw, J., specially concurring):
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> > During 1984-85, we affirmed on direct appeal trial judge overrides in eleven of fifteen cases, seventy-three percent. By contrast, during 1986 and 1987, we have affirmed overrides in only two of eleven cases, less than twenty percent. This current reversal rate of over eighty percent is a strong indicator to judges that they should place less reliance on their independent weighing of aggravation and mitigation . . . .
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> Clearly, since 1985 the Court has determined that Tedder means precisely what it says, that the judge must concur with the jury's life recommendation unless "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So.2d at 910.

Cochran, supra, 547 So. 2d at 933.

Today, "Tedder means precisely what it says." In 1985, at the time of Mr. Brown's direct appeal, and at the time of Spaziano, Tedder did not mean what it says, although the United States Supreme Court relied upon Tedder and this Court's assurances that it would give the Tedder standard effect in upholding the validity of Florida's jury override scheme. Today, Mr. Brown's death sentence would not be affirmed. In 1985, that death sentence was affirmed, and it stands today as "the law of the case." This is arbitrary. This is capricious. The resulting death sentence is not a reliable result.

In some override cases the trial judge has simply refused even to speculate as to the jurors' reasons for recommending a life sentence, and on appeal, this Court has affirmed the jury override without any discussion of possible

mitigating circumstances. See, e.g., Heiney v. State, 447 So. 2d 210 (Fla. 1984); Douglas v. State, 328 So. 2d 18 (Fla. 1976). In other jury override cases, like the present case, some of this Court's justices have written dissents in which they have noted possible mitigating circumstances which were not acknowledged or addressed by the court. See, e.g., Brown v. State, 473 So. 2d 1260 (Fla. 1985)(jury could have reasonably believed that both defendants were equally culpable and should not receive disparate sentences); Mills v. State, 476 So. 2d 172 (Fla. 1985)(jury could have found impoverished childhood, positive employment history, disparate treatment of equally culpable defendants); Miller v. State, 415 So. 2d 1262 (Fla. 1982)(psychologist testified that defendant is a follower who does whatever he thinks others want him to do); Stevens v. State, 419 So. 2d 1058 (Fla. 1982)(jury could have found that defendant participated in robbery and rape but that co- defendant was sole perpetrator of homicide); Brown v. State, 393 So. 2d 1069 (Fla. 1980)(evidence revealed that victim initiated shooting incident after defendant had completed robbery and was leaving and that defendant spared life of two other occupants of premises). In other cases where the trial judge has found (but subsequently rejected) mitigating factors to support the jury's recommendation, this Court has reversed the jury override. See, e.g., Brown v. State, 526 So. 2d 903 (Fla. 1988) (youth, mental and emotional handicap, impoverished background); Caillier v. State, 523 So. 2d 158 (Fla. 1988)(disparate treatment of contractor and triggerman); Perry v. State, 522 So. 2d 817 (Fla. 1988)(relative youth, peaceful character, psychological stress due to unemployment and wife's pregnancy); Holsworth v. State, 522 So. 2d 348 (Fla. 1988)(alcohol and drug abuse, peaceful character, physical abuse as child, good candidate for rehabilitation in light of employment history and positive character traits); Brookings v. State, 495 So. 2d 135 (Fla. 1986) (disparate treatment of equally culpable accomplices); McCampbell v. State, 421 So. 2d 1072 (Fla.

1982)(disparate treatment of co-defendants). This Court has also reversed the jury override in some cases where it found mitigating factors which were not discovered by the trial court. See, e.g., Amazon v. State, 487 So. 2d 8 (Fla. 1986)(jury could have found history of drug abuse, characterization of defendant as emotional "cripple," negative family environment, and crime committed under extreme mental or emotional disturbance); and Barclay v. State, 470 So. 2d 691 (Fla. 1985)(jury apparently distinguished between defendant [follower] and co- defendant [leader]).

In the present case, both the trial court and this Court found no mitigating circumstances. However, as noted in Justice McDonald's dissent, the jury could have believed that Mr. Brown and Mr. Dudley were equally culpable and that they should not receive disproportionate sentences. The jury could have believed that Mr. Dudley did more than just stand there while the crimes occurred around him.[8] During the penalty phase, Mr. Claude Hudson, a subsequent assault and battery victim, testified that both Mr. Brown and Mr. Dudley attacked him with a broom and a cue stick. The incident ended when Mr. Hudson shot and wounded Mr. Dudley. Mr. Kosares, the detective assigned to the case, then testified that when interviewed Mr. Dudley accused Mr. Brown of striking Mr. Hudson while simultaneously asserting that he, Mr. Dudley, was an innocent bystander. From the evidence, the jury reasonably could have concluded that Mr. Dudley was in the habit of consistently denying his own substantial involvement in these crimes. At trial, Mr. Dudley said he stood by while Mr. Brown and someone else committed the crimes. This is exactly what he said with respect to Mr. Hudson, but because Mr. Hudson testified during the penalty

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[8]In fact, Mr. Dudley admitted that his original statement to the police indicating that Mr. Brown raped the victim was a lie. He told this lie "[b]ecause [Brown] told a lie on me" (R. 943). The jury could have believed much of Dudley's testimony was a self-serving lie and that in fact he and Mr. Brown were equally culpable.

phase, we know that Mr. Dudley was equally as guilty as Mr. Brown. This evidence would clearly support a finding by the jury that Mr. Dudley's participation in the murder of Anna Jordan was comparable to that of Mr. Brown, notwithstanding some uncorroborated evidence presented solely by Mr. Dudley, himself. The jury also knew that Mr. Dudley was to receive a life sentence in exchange for his testimony. During closing argument in the penalty phase, defense counsel stressed the disparate treatment of Mr. Dudley and Mr. Brown and specifically asked the jury whether they thought it was right for one person to live and another to die when both were involved in the same crime. Had the jury been required to make factual findings to support its recommendation of life, neither the trial judge nor the reviewing court could have ignored the presence of this mitigating factor. The question is not whether the judge believed Dudley's version of the offense in toto. "The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). In other words could Mr. Brown's jury have believed Mr. Dudley was lying and that Mr. Brown and Mr. Dudley were equally culpable.

DuBoise v. State, 520 So. 2d 260 (Fla. 1987), reflects override law "as it now exists":

> The trial judge's findings failed to take into account the standard we enunciated in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." One of the factors upon which a jury can reasonably base a recommendation of life imprisonment is the disparate treatment of others who are equally or more culpable in the murder. E.g., Brookings v. State, 495 So. 2d 135 (Fla. 1986); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982). According to the only direct evidence of the circumstances of the murder (appellant's statements to cellmate Butler), appellant's two companions were the actual perpetrators of the killing. These principal perpetrators of the murder were never arrested or charged for the crime. This fact could reasonably have influenced the jury and was a reasonable basis for the jury to recommend life imprisonment. Moreover, although we note that the jury, in finding appellant guilty of first-degree murder, could have based its verdict either on the felony murder doctrine or on

> circumstantial evidence of appellant's joiner in the premeditated intent of the others to kill the victim, in making its sentencing recommendation the jury could have been influenced by the lack of direct evidence of such premeditated intent on the part of the appellant. We therefore conclude that the trial court should have followed the jury's recommendation.

And so it is here. Not only did Mr. Dudley get life, but there was a third party. Mr. Dudley testified that it was the third party present, Ricky, who raped Ms. Jordan. Yet Ricky was not arrested and charged, but was walking a free man at the time of Mr. Brown's trial. If the jury was reasonable in DuBoise, it was reasonable in Mr. Brown's case. It is quite plain that "reasonable people could differ as to the propriety of the death penalty in this case, [and so] the jury's recommendation of life must stand." Brookings v. State, 495 So. 2d 135, 143 (Fla. 1986). See also Wasko v. Florida, 505 So. 2d 1314 (Fla. 1987) ("[T]he jury may have questioned the respective roles of Wasko and Pierson in this homicide. These [and other] factors gave the jury a reasonable basis for recommending life imprisonment.")

In Ferry v. Florida, 507 So. 2d 1373 (Fla. 1987), this Court stated: [W]hen there is a reasonable basis in the record to support a jury's recommendation of life an override is improper . . . .

> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

In Harmon v. State, 527 So. 2d 182, 188-89 (Fla. 1988), this Court overturned an override and explained its grounds as follows:

> Harmon contends that the trial court erred in sentencing him to death for the murder of Charles Germany when the jury recommended a sentence

> of life imprisonment. Harmon argues that the override violates the standard set forth in Tedder v. State, 322 So. 2d 908 (Fla. 1975). The principal enunciated in Tedder, that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ," id. at 910, has been consistently interpreted by this Court to mean that when there is a reasonable basis in the record to supply a jury's recommendation of life, an override is improper. See Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987). "When there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation an override may not be warranted." Id.
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> This Court has recognized that "the degree of participation and relative culpability of an accomplice or joint perpetrator, together with any disparity of the treatment received by such accomplice as compared with that of the capital offender being sentenced, are proper factors to be taken into consideration in the sentencing decision." Craig, 510 So. 2d at 870. We find, based on a review of the record, that the jury could have reasonably questioned the degree of participation by Bennett in the murder, together with the disparity between the maximum sentence possible for Bennett (seventeen years) and a recommendation of death for Harmon. See Malloy v. State, 382 So. 2d 1190 (Fla. 1979). Compare Eutzy, 458 So. 2d 755 (argument that jury's recommendation of life could reasonably have been based on the disparate treatment of witnesses and appellant rejected where record was devoid of any evidence which would show that witness was a principal in the first degree).
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> Reasonable people could conclude that the mitigating factors presented, the disparate treatment of Harmon in comparison with Bennett viewed in conjunction with the nonstatutory mitigating factors set forth in the testimony of the psychiatrist, outweigh the proven aggravating factors. Because the facts are not so clear and convincing that no reasonable person could differ that death was the appropriate penalty, the trial court erred in overriding the jury recommendation of life. Amazon v. State, 487 So. 2d 8, 13 (Fla.), cert. denied, 107 S. Ct. 314 (1986) (emphasis added) 13 FLW at 334-36.

There was no attempt here to ascertain whether the jury had a reasonable basis for its recommendation of life. The trial judge simply rejected the jury's recommendation saying he found no mitigation present and he disagreed with the jury's recommendation. However, "i[t] is of no significance that the trial judge [found no mitigation]. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). If the

proper standard had been applied, it would have been clear that the jury had more than a reasonable basis for its recommendation. The jury could have accepted Dudley's testimony to the extent that it established that Mr. Brown was an accomplice, but rejected Dudley's self-serving assertions as to the three participants' respective roles. On the facts, the jury could have concluded that the three participants were equally culpable and that it would thus be improper to sentence Mr. Brown to death while Dudley had pled to second degree murder and at most faced a life sentence, and while Ricky remained at large.

Additionally, the jury knew that the police had had no leads in the homicide until Larry Brown came forward and indicated that he might be able to recover the stolen television for the police. Larry Brown had been known to the police before that time as a reliable confidential informant (R. 1316). Mr. Brown's information and assistance led the police to Dudley, who in anger implicated Mr. Brown as his accomplice (R. 943).

The jury also received limited evidence of Mr. Brown's deprived background. He began working at a young age picking tomatoes in order to get rent money for his family. His father had abandoned the family, and Larry as the oldest had tried to look after his young brothers. Larry's mother had died shortly before the homicide and her death had been very hard on Larry (R. 1337-38). Evidence was also presented that Larry was a father. He loved his child and tried to provide for the baby. He would spend as much time as he could with the baby (R. 1339).

The jury under the circumstances had a reasonable basis for recommending life. The jury in its factfinding capacity could have concluded that there were mitigating factors present which warranted a sentence of less than death. Under the applicable standards developed in Tedder and its progeny, it was not proper to override the jury's recommendation. The failure in this case to

correctly apply the Tedder standard resulted in the arbitrary and capricious imposition of a death sentence. The trial court was provided "the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972)." Maryland v. Cartwright, 108 S. Ct. 1853 (1988). In fact Judge Farnell's off the record statements to a newspaper reporter indicated the override resulted because Mr. Brown, a black man, left "his sphere of influence" and killed the elderly white victim. This is an impermissible basis for an override. This newspaper article is new evidence which makes this claim cognizible in post-conviction proceedings. The death sentence imposed in Mr. Brown's case is unconstitutional under the eighth and fourteenth amendments. It must be vacated and a sentence of life imprisonment must be imposed instead.

ARGUMENT VI

PRESENTATION OF IMPERMISSIBLE "VICTIM IMPACT" STATEMENT TO THE COURT, THE PROSECUTION'S RELIANCE UPON THIS VICTIM IMPACT EVIDENCE, AND THE JUDGE'S USE OF VICTIM IMPACT AS THE BASIS FOR THE OVERRIDE CONSTITUTED FUNDAMENTAL EIGHTH AMENDMENT ERROR WHICH RENDERED MR. BROWN'S CAPITAL SENTENCING PROCEEDINGS FUNDAMENTALLY UNRELIABLE AND UNFAIR AND WHICH ABROGATED MR. BROWN'S EIGHTH AMENDMENT RIGHTS TO A RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION.

Following the jury's verdict recommending the imposition of a life sentence, the sentencing court ordered the preparation of a presentence investigation. This report was prepared and filed on November 10, 1982, barely two weeks after the conclusion of the penalty phase of the trial. Part IV of the report was entitled "Court Official and Other Personal Statements." It contained the following statement:

> Julie Evans, victim's daughter, 532 Cherry St., Scranton, Pa. (717-342- 8465) was contacted in July during the PSI of George Dudley and at that time was extremely upset and distraught. She believed death would be appropriate for the defendant and the co-defendant but also indicated she would rely on the justice of the court.

The prosecutor in her remarks at sentencing before the court specifically relied on the statement by the victim's daughter: "The victim's daughter believes death is appropriate, but she will rely on your justice" (R. 277). The judge

in overriding the life recommendation said "I did not want to be unduly influenced by the fact that an eighty-one-year-old woman had been removed from life on earth" (R. 280), but obviously was. No other basis was given for the override. However, as the judge explained to newspaper, Mr. Brown was "like [a] rabid rat[] running around in a hamster cage, running 'round and 'round and every once in a while [] run[ning] out of that sphere of influence [the black neighborhood and bit[ing] somebody to death." Obviously, the judge relied upon victim impact factors in deciding to override the life recommendation.

In Booth v. Maryland, 107 S. Ct. 2529 (1987), requires the exclusion of evidence of the opinions of the victim's family members as to the appropriate sentence in a capital case. This is because the presentation of this information "can serve no other purpose than to inflame" and divert attention away from relevant inquiries. The Court found the introduction of this information to be improper constitutional error. It violated the well established principle that the discretion to impose the death penalty must be 'suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983).

In Booth, the Court stated: "Although this court normally will defer to a state legislature's determination of what factors are relevant to the sentencing decision, the Constitution places some limits on this discretion." Booth, supra at 2532. The Court ruled that the sentencer was required to render an "individualized determination" of what the proper sentence should be in a capital case. This determination should turn on the "character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis in original). See also Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). The Court in Booth noted that it has not limited the

permissible sentencing considerations to the defendant's record, characteristics, and the circumstances of the crime. However, "a state statute that requires consideration of other factors must be scrutinized to ensure that the evidence has some bearing on the defendant's 'personal responsibility and moral guilt.' Enmund v. Florida, 458 U.S. 782, 801 (1982)." Booth, supra at 2533. A contrary approach would run the risk that the death penalty will be imposed because of considerations that are "constitutionally impermissible or totally irrelevant to the sentencing process." See Zant v. Stephens, supra, at 885.

The Booth court explained that there would be cases where "the victim will not leave behind a family, or the family members may be less articulate in describing their feelings even though their sense of loss is equally severe." Booth, supra at 2534. In those circumstances the chances of a death sentence would be reduced if victim impact was admissible evidence. This would interject the risk of a death sentence being returned for wholly arbitrary reasons. Thus the Booth court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Id. at 2535. "[T]he introduction of [a victim impact statement] at the sentencing phase of a capital murder trial violates the Eighth Amendment." Id. at 2536. The victim impact statement in Booth contained descriptions of the personal characteristics of the victim, the emotional impact of crimes on the family, and opinions and characterizations of the crimes and the defendant, "create[ing] a constitutionally unacceptable risk that the [sentencer] may [have] impose[d] the death penalty in an arbitrary and capricious manner." Id. at 2533 (emphasis added).

In South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-

innocence phase of the trial from which the prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal where the sentencer is contaminated by victim impact evidence or argument. Mr. Brown's trial contained not only victim impact evidence and argument but, in addition, characterizations and opinions of the crimes such as what was condemned in Booth. The judge relied on the victim impact evidence in overriding the jury's life recommendation. The court not only condoned but considered the victim impact evidence presented. He considered that the fact that Mr. Brown, a black man, had left his "sphere of influence" and killed an elderly white woman. Here, the judge justified the death sentence through an individualized consideration of the victim's personal characteristics and impact of the crime on her family.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 349 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty [may be] meted out arbitrarily or capriciously' . . ." Caldwell v. Mississippi, 472 U.S. 320, 344 (1985)(O'Connor, J., concurring). Here, the proceedings violated Booth and Gathers, thus calling into question the reliability of Mr. Brown's penalty phase. The State's evidence and argument was a deliberate effort to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

Gathers makes clear that error occurs when the victim's characteristics are paraded before the sentencer. As in Gathers, these personal and family characteristics were purely fortuitous. The family's desire for a death sentence did not provide any information relevant to Mr. Brown's culpability. Gathers, supra at 2211. See Hayes v. Lockhart, 881 F.2d 1451 (8th Cir. 1989);

Rushing v. Butler, 868 F.2d 800 (5th Cir. 1989).

This record is replete with Booth error. Mr. Brown was sentenced to death on the basis of the very constitutionally impermissible "victim impact" evidence and argument which the Supreme Court condemned in Booth and Gathers. Here, as in Booth, the victim impact information "serve[d] no other purpose than to inflame the judge and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, supra at 2536. The decision to impose death must be a "reasoned moral response." Penry, 109 S. Ct. at 2952. The sentencer must be properly guided and must be presented with the evidence which would justify a sentence of less than death.

In Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985), the Supreme Court discussed when eighth amendment error required reversal: "Because we cannot say that this effort had no effect on the sentence decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Id., 105 S. Ct. at 2646. As in Booth and Gathers, contamination occurred, and the eighth amendment will not permit a death sentence to stand where there is the risk of unreliability.

Victim impact information is a patently unreliable basis for a death sentence. Its introduction is a violation of the eighth and fourteenth amendments. Since the improper factors not only "may" have but in fact did affect the sentencing decision, Booth, supra, and because the admission of victim impact evidence certainly cannot be said to have had "no effect" on the imposition of the death sentence, Caldwell, supra, the sentence must be vacated, and a life sentence imposed instead.

Moreover the claim is cognizible now in a Rule 3.850 motion. Here, the Booth error occurred when the judge overrode the life recommendation because he had more sympathy for the victim than for Mr. Brown. This Court does not require a capital defendant to object to a sentencing court's reasoning for overriding a life recommendation in order to preserve a challenge for review. The purpose of the contemporaneous objections rule is to require errors that can be fixed at trial to be brought to the attention of the trial court so that the proper remedial action can be taken. In State v. Whitfield, 487 So. 2d 1045 (Fla. 1986), this Court ruled that a "contemporaneous objection" is not required where the sentence on its face is illegal. Sentencing errors apparent on the face of the record are cognizable and preserved. State v. Rhoden, 448 So. 2d 1013 (Fla. 1984); Walker v. State, 462 So. 2d 452 (Fla. 1985); State v. Snow, 462 So. 2d 455 (Fla. 1985). No contemporaneous objection is necessary so long as the claim involves factual matters that are apparent or determinable from the record on appeal. Dailey v. State, 488 So. 2d 532 (Fla. 1986); Forehand v. State, 537 So. 2d 103 (Fla. 1989). Here, the trial court in overriding the jury's life recommendation relied upon its sympathy for the victim and her family. This Court has never held an objection to an override is necessary to preserve a challenge to the override for appeal. A judge's erroneous decision to override a life recommendation is reviewable on direct appeal. At the time of this direct appeal, this Court had erroneously believed victim impact could be properly considered as a basis for a death sentence. Under Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), the error is thus cognizible now. Moreover, additional evidence not of record at the time of the direct appeal also makes this claim cognizible at this time. Judge Farnell's explanation to a newspaper reporter of the reason for his override established that Booth was violated. This new evidence is properly raised in the Rule 3.850 motion. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

Accordingly, the rule of Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), applies; a resentencing is required.

ARGUMENT VII

THE PROSECUTOR IMPROPERLY INJECTED RACIAL PREJUDICE INTO MR. BROWN'S TRIAL BY REPEATEDLY NOTING THE FACT THAT THE VICTIM WAS WHITE AND FOCUSING THE JURY'S AND THE JUDGE'S ATTENTION ON THE RACIAL ASPECT OF THE CASE.

At Mr. Brown's trial the prosecution began early its attempt to play up to any latent racial bigotry in the factfinders. During the voir dire, one prospective juror recalled the case because she remembered "black people were involved" (R. 362). Later one of the prosecutors said:

> The victim in this case is going to be -- I think you'll hear, is a 79-year-old white woman. Now, naturally, I think a lot of people, all of the sudden, that changes the complexion of the case. And what I need to ask each and every one of you is, Is [sic] the mere fact that we have charged this man, along with one other person, with murder in the first degree of a 79-year old white woman, can you give both sides a fair trial?

(R. 463). Later, the prosecutor reiterated his point:

> All victims are victims. But in this case, we're talking about a 79- year-old white woman.

(R. 463-464). He continued on with this theme:

> Is that the same for everyone, that even though she is an elderly white woman, that you can give both sides a fair trial?

(R. 464). Later in the voir dire the prosecutor returned to this subject matter and again stated:

> You've heard the victim in the case is an elderly white female.

(R. 629).

Despite the introduction of photos of the victim which clearly established her race, the prosecutor pursued the matter with the State's witnesses. An emergency medical technician who responded to the crime scene was asked: "All right. And could you describe the body? What was the race?" The technician responded: "White female." The prosecutor then echoed: "White female?" (R.

707). The subject of race was similarly pursued with a paramedic who had been at the scene: "What was the race of that lady?" "White" (R. 717).

The prosecutor presented the testimony of Detective San Marco. In the course of direct examination, testimony was elicited on the racial characteristics of the victim's neighborhood:

> Q All right. Now, could you characterize the neighborhood? What type of people lived in the neighborhood?
>
> A The immediate neighborhood, where the victim lived, was, basically, elderly, white people, and they occupied both the large apartment complex that is just adjacent to these ten single-family residences.

(R. 840). During the testimony of George Dudley, the prosecutor asked, "Was [the victim] white or black?" (R. 930).

Clearly, the prosecutor sought to use latent racial bigotry against Mr. Brown. The prosecutor tried to inflame any prejudice present in the judge or jury in order to lessen his burden and ease the way to a prosecutorial victory. The prosecutor was obviously successful in delivering this message to Judge Farnell. In his conversation with a newspaper reporter, Judge Farnell justified the override because Mr. Brown left his "sphere of influence" and killed an elderly white woman.

Recently this Court firmly denounced such prosecutorial tactics:

> Racial prejudice has no place in our system of justice and has long been condemned by this Court. E.g., Cooper v. State, 136 Fla. 23, 186 So. 230 (1939); Huggins v. State, 129 Fla. 329, 176 So. 154 (1937). Nonetheless, race discrimination is an undeniable fact of this nation's history. As the United States Supreme Court recently noted, the risk that the factor of race may enter the criminal justice process has required its unceasing attention. McCleskey v. Kemp, ___ U.S. ___, 107 S.Ct. 1756, 1775, 95 L.Ed.2d 262 (1987). We cannot, however, by rule of law so quickly eradicate attitudes long held and deeply entrenched. Thus, despite "unceasing" efforts, discrimination on the basis of race persists. As the United States Supreme Court acknowledged in Rose v. Mitchell, 443 U.S. 545, 558-59, 99 S.Ct. 2993, 3001, 61 L.Ed.2d 739 (1979):
>
> [W]e ... cannot deny that, 114 years after the close of the War Between the States ..., racial and other forms of discrimination still remains a fact of life, in the administration of justice as in our society as a whole. Perhaps today that discrimination takes a form

more subtle than before. But it is not less real or pernicious.

The situation presented here, involving a black man who is charged with kidnapping, raping, and murdering a white woman, is fertile soil for the seeds of racial prejudice. We find the risk that racial prejudice may have influenced the sentencing decision unacceptable in light of the trial court's failure to give a cautionary instruction. Our courts consistently have held that the trial judge should not only sustain an objection to such improper conduct but also should reprimand the offending prosecuting officer in order to impress upon the jury the gross impropriety of being influenced by improper argument or testimony. Gluck v. State, 62 So.2d 71, 73 (Fla. 1952); Deas v. State, 119 Fla. 839, 845, 161 So. 729, 731 (1935); Edwards v. State, 428 So.2d 357, 359 (Fla. 3d DCA 1983). Our cases also have long recognized that improper remarks to the jury may in some instances be so prejudicial that neither rebuke nor retraction will destroy their influence, and a new trial should be granted despite the absence of an objection below or even in the presence of a rebuke by the trial judge. Pait v. State, 112 So.2d 380, 385 (Fla. 1959); Ryan v. State, 457 So.2d 1084, 1091 (Fla. 4th DCA 1984); Peterson v. State, 376 So.2d 1230, 1234 (Fla. 4th DCA 1979), cert. denied, 386 So.2d 642 (Fla. 1980); Ailer v. State, 114 So.2d 348, 351 (Fla. 2d DCA 1959).

We emphasize that the risk of racial prejudice infecting a criminal trial takes on greater significance in the context of a capital sentencing proceeding. In Turner v. Murray, 476 U.S. 1, 106 S.Ct. 1683, 1688, 90 L.Ed.2d 27 (1986), in which the United States Supreme Court held that capital defendants accused of interracial crimes have a constitutional right to question prospective jurors on the issue of racial bias, the Court based its decision on two factors unique to the capital sentencing proceeding. First, in a capital sentencing proceeding before a jury, the jury is called upon to make a "highly subjective, 'unique, individualized judgment regarding the punishment that a particular person deserves.'" Id. 106 S.Ct. at 1687 (citations omitted).

* * *

Second, the Turner Court pointed out that although there is some risk of racial prejudice whenever there is a crime involving interracial violence, the risk of improper sentencing in a capital case is "especially serious" due to the complete finality of the death sentence. Id. at 1688.

Accordingly, under the circumstances of this case, particularly in the absence of a cautionary instruction, we cannot presume that the prejudicial testimony did not remain imbedded in the minds of the jurors and influence their recommendation. Because we cannot say beyond a reasonable doubt that the jury's recommendation was not motivated in part by racial considerations, we cannot deem the error harmless. See Chapman v. State, 386 U.S. 18, 24, 87 S.Ct. 824, 828, 17 L.Ed.2d 705 (1967); State v. DiGuilio, 491 So.2d 1129, 1139 (Fla. 1986). We thus reverse the death sentence and remand to the trial court to hold a new sentencing proceeding before a jury.

Robinson v. State, 520 So. 2d 1,7-9 (Fla. 1988).

Due process under the fourteenth amendment does not permit the State to use racial bigotry against a criminal defendant. "Purposeful racial discrimination in selection of the venire violates a defendant's right to equal protection because it denies him the protection that a trial by jury is intended to secure." Batson v. Kentucky, 106 S. Ct. 1712, 1717 (1986).

In Turner v. Murray, 106 S. Ct. 1683, 1688 (1986), the United States Supreme Court held:

> The risk of racial prejudice infecting a capital sentencing proceeding is especially serious in light of the complete finality of the death sentence. "The Court, as well as the separate opinions of a majority of the individual Justices, has recognized that the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S. 992, 998-999, 103 S.Ct. 3446, 77 L.Ed.2d 1171 (1983). We have struck down capital sentences when we found that the circumstances under which they were imposed "created an unacceptable risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim ... or mistake.'" Caldwell, supra, at ___, 105 S.Ct., at 2647 (O'CONNOR, J., concurring in part and concurring in judgment)(citation omitted). In the present case, we find the risk that racial prejudice may have infected petitioner's capital sentencing unacceptable in light of the ease with which that risk could have been minimized.

Here, the prosecutor's actions infected the entire proceedings, both the guilt- innocence and the penalty phases. Moreover the comments of the judge to the newspaper reporter reflect blatant racism in the decision to override the life recommendation. These comments are new evidence cognizible in a Rule 3.850 motion. See Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Under the eighth and fourteenth amendments, Mr. Brown's conviction and sentence of death must be vacated, and new proceedings conducted.

ARGUMENT VIII

THE CIRCUIT COURT JUDGE WAS IN ERROR IN REFUSING TO DISQUALIFY HIMSELF FROM PRESIDING OVER THE 3.850 PROCEEDING.

The Florida Rules of Criminal Procedure provide for the disqualification of a judge as follows:

> VII. DISQUALIFICATION AND SUBSTITUTION OF JUDGE
>
> RULE 3.230. DISQUALIFICATION OF JUDGE
>
> (a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state by consanguinity or affinity with the third degree; or that said judge is a material witness for or against one of the parties to said cause.
>
> (b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.
>
> (c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.
>
> (d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

(emphasis added).

This Court has repeatedly held that where a motion demonstrates a preliminary basis for relief, a judge "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978). The Code of Judicial Conduct emphasizes the importance of an independent and impartial judiciary in maintaining the integrity of the judiciary:

Canon 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPROPRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary

* * *

C. Disqualification.

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonable be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(emphasis added).

The purpose of the Code of Judicial Conduct and the Disqualification Rule is to prevent "an intolerable adversary atmosphere" between the trial judge and the litigant. Department of Revenue v. Golder, 322 So. 2d 1, 7 (Fla. 1975), as cited in Bundy v. Rudd, supra. The rule applies in a Rule 3.850 proceeding. Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988).

Counsel for Mr. Brown filed with the circuit court his motion to disqualify Judge Farnell. The motion was premised upon the fact that Judge Farnell was a necessary and material witness. Judge Farnell was a necessary and material witness as to Mr. Brown's claim that Judge Farnell was not a member of the

Florida Bar at the time of trial. He was also a necessary and material witness as to the comments attributed to him by the article in the St. Peterburg Times:

> An 81-year-old woman has been beaten, raped and strangled in her downtown St. Petersburg cottage. A jury had found Larry Brown guilty of that crime, suggesting the 27-year-old ex-convict be imprisoned for life instead of electrocuted. Farnell ordered a pre-sentence investigation. It came back bad. Probation and Parole recommended death. The woman's daughter called for death. The state would settle for no less. "He has led a parasitic existence since he has been on the face of this Earth," Farnell noted.
>
> In all of Larry Brown's background, most of which was spent in St. Petersburg, no reason could be found for mercy, said Farnell, "beyond the fact he's a young man."
>
> THAT WASN'T ENOUGH. "The jury was wrong," the judge decided. Monday, Farnell sentenced his first man to death. "It is really frustrating. There is a substandard element of society down there that is following that same level of conduct. It's a tragedy," said Farnell, when it was over. "They are like rabid rats running around in a hamster cage, running "round and 'round and every once in a while they run out of that sphere of influence and bite somebody to death."

Under Suarez v. Dugger, 527 So. 2d 190, 192 (Fla. 1988), the question is whether "these statements are sufficient to warrant fear on [Mr. Brown's] part he would not receive a fair hearing by the assigned judge." In Suarez, the judge had made a statement to the newspapers "demonstrating a special interest in the speedy execution of the death sentence." 527 So. 2d at 191. It is certainly "sufficient to warrant fear on [Mr. Brown's] part that he would not receive a fair hearing by the assigned judge." Suarez, 527 So. 2d at 192. See Stevens v. State, ___ So. 2d ___, 14 F.L.W. 513, 515 (Fla. Oct. 5, 1989). See also MacKenzie v. Breakstone, ____ So. 2d ___, 14 F.L.W. 2223, 2224 (Fla. 3d DCA 1989)("No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned," quoting Livingston v. State, 441 So. 2d 1083, 1085 (Fla. 1983), quoting Dickerson v. Parks, 140 So. 459, 462 (Fla. 1932)). Here, Judge Farnell's neutrality is much more than "shadowed".

Under the law, the circuit court erred in denying Mr. Brown motion to disqualify the judge. The motion should have been granted and a new judge assigned to the case. Mr. Brown was as a result denied a full and fair forum for presenting his claims for post-conviction relief.

Since this Court's decision in Bundy v. Rudd, the law in this state has been clear. Where a facially sufficient motion to disqualify has been presented, the judge may not refute the charges of partiality. His or her only choice is to grant the motion. Canady v. Johnson, 481 So. 2d 983 (Fla. 4th DCA 1986). When a judge attempts to refute the allegations contained in the motion to disqualify, "he [has] exceeded the proper scope of his inquiry and on that basis established sufficient grounds for his disqualification." Lake v. Edwards, 501 So. 2d 759, 760 (Fla. 5th DCA 1987). A judge's attempt to respond to the allegations contained in the motion and establish his or her own impartiality is itself cause for disqualification. A.T.S. Melbourne, Inc. v. Jackson, 473 So. 2d 280 (Fla. 5th DCA 1985). Such action by the judge causes the judge to assume "the posture of an adversary" and requires disqualification. Gieseke v. Moriarty, 471 So. 2d 80, 81 (Fla. 4th DCA 1985). Further, it matters not when in the proceedings the motion to disqualify is presented. As long as there is something further for the judge to do in the proceedings a motion to disqualify may be presented, and if sufficient "the judge 'shall proceed no further.'" Lake v. Edwards, supra, 501 So. 2d at 760, quoting Florida Rule of Civil Procedure 1.432(d)(emphasis in original). It should be noted that Florida Rule of Criminal Procedure 3.230(d) contains virtually identical language.

This Court has explained at length the purpose behind the rule permitting disqualification of a judge:

> The Code of Judicial Conduct sets forth basic principles of how judges should conduct themselves in carrying out their judicial duties. Can 3-C(1) states that "[a] judge should disqualify himself

> in a proceeding in which his impartiality might be reasonably questioned . . . ." This is totally consistent with the case law of this Court, which holds that a party seeking to disqualify a judge need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.
>
> When a party believes he cannot obtain a fair and impartial trial before the assigned trial judge, he must present the issue of disqualification to the court in accordance with the process designed to resolve this sensitive issue. The requirements set forth in section 38.10, Florida Statutes (1981), Florida Rule of Criminal Procedure 3.230, and Florida Rule of Civil Procedure 1.432 were established to ensure public confidence in the integrity of the judicial system as well as to prevent the disqualification process from being abused for the purposes of judge-shopping delay, or some other reason not related to providing for the fairness and impartiality of the proceeding. The same basic requirements are contained in each of these three processes. First, there must be a verified statement of the specific facts which indicate a bias or prejudice requiring disqualification. Second, the application must be timely made. Third, the judge with respect to whom the motion is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations. Section 38.10 and Florida Rule of Criminal Procedure 3.230 also require two affidavits stating that the party making the motion for disqualification will not be able to receive a fair trial before the judge with respect to whom the motion is made, as well as a certificate of good faith signed by counsel for the party making the motion.
>
> * * * *
>
> What is important is the party's reasonable belief concerning his or her ability to obtain a fair trial. A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.

Livingston v. State, 441 So. 2d 1083, 1086-87 (Fla. 1983) (emphasis added).

Here, Judge Farnell did not address whether the motion set forth such facts as would "place a reasonably prudent person in fear of not receiving a fair and impartial [hearing]." Instead, Judge Farnell justified himself, and ridiculed Mr. Brown's claims. Judge Farnell assumed "the posture of an adversary." Gieseke, 471 So. 2d at 81. Certainly, the matters set forth in the motion would have placed anyone in Mr. Brown position in fear of not receiving a fair

and impartial hearing on his 3.850 motion. As a result, once the motion for disqualification was filed, it was incumbent upon Judge Farnell to disqualify himself.

In Livingston, supra, the issue arose in this Court on appeal from a conviction of first degree murder and the imposition of the death sentence. There, this Court concluded that the failure of the judge to disqualify himself was error. Consequently, this Court ruled that the resulting conviction and sentence of death had to be reversed and the matter remanded for a new trial presided over by a different judge. A fair hearing before a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing.

In this case, it was reversible error for the judge to refuse to recuse himself. At this point, the order denying Rule 3.850 relief must be vacated and the case remanded for new proceedings before another duly assigned judge. Moreover, the patent unconstitutionality attendant to a capital proceeding involving a biased judge also raises significant questions about the validity of Mr. Brown's capital conviction and sentence of death. The lack of impartiality herein at issue has infected the process. The conviction, sentence and post-conviction resolution in this action are invalid under the fifth, sixth, eighth and fourteenth amendments. Relief is proper.

ARGUMENT IX

MR. BROWN'S SENTENCING BY THE COURT WAS CONTAMINATED BY THE PRESENTATION OF IMPROPER AND INADMISSIBLE OPINION EVIDENCE THAT A DEATH SENTENCE WAS WARRANTED DESPITE THE JURY'S RECOMMENDATION OF LIFE.

Following the jury's verdict recommending the imposition of a life sentence, the sentencing court ordered the preparation of a presentence

investigation. This report was prepared and filed on November 10, 1982, barely two weeks after the conclusion of the penalty phase of the trial. Part IV of the report was entitled "Court Official and Other Personal Statements." It contained the following statements:

> Law Enforcement: Det. Gary Hitchcock, SPPD, indicated that the defendant should receive the death penalty, as this was a serious crime including burglary-assault, rape and murder.
>
> Michael Lambert, defendant's former Probation Officer, indicated that while under supervision the defendant was uncooperative and unsupervisable. He was only out a few months on parole when this happened. He is a danger to society and should be punished.

The report in Part VI included a "Summary and Analysis" which provided:

> The following are the aggravating and mitigating circumstances to be considered as set forth in Chapter 921.141.
>
> Aggravating Circumstances:
>
> A. A Capital Felony committed by a person under sentence of imprisonment.
>
> The defendant was on parole for burglary at the time of the offense.
>
> B. The defendant was previously convicted of another capital felony or of a felony involving the use of threat or violence to the person.
>
> Defendant was convicted of attempted 2nd degree arson in 1977 in which he had a physical fight with a woman and then returned and attempted to burn down her apartment. It should also be noted that 1 month after the instant offense the defendant performed aggravated battery upon a victim whose home he was burglarizing, and for this was sentenced to 2 years.
>
> C. The defendant knowingly created a great risk of death to many persons.
>
> Not applicable.
>
> D. The Capital Felony was committed while the defendant was engaged, or was an accomplice in the commission of, or an attempt to commit, or flight after committing, or attempting to commit, any robbery, rape, arson, burglary, kidnapping, or aircraft piracy or the unlawful throwing, placing or discharging of a destructive device or bomb.
>
> Offense was committed during a burglary and rape.
>
> E. The Capital Felony was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

Not applicable.

F. The Capital Felony was committed for Pecuniary gain.

The purpose was to steal a television and this television was sold several hours later.

G. The Capital Felony was committed to disrupt or hinder the lawful exercise of any governmental function or enforcement of laws.

Not applicable.

H. The Capital Felony was especially heinous, atrocious or cruel.

Eighty year old woman was found choked to death, beaten and raped.

I. The Capital Felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

Victim was in the home when it was broken into and the defendant beat her and caused her to be choked to death before leaving the home.

Mitigating Circumstances:

A. The defendant has no significant history of prior criminal activity.

Not applicable.

B. The Capital Felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

Not applicable.

C. The victim was a participant in the defendant's conduct or consented to the act.

Not applicable.

D. The defendant was an accomplice in the Capital Felony committed by another person and his participation was relatively minor.

Not applicable.

E. The defendant acted under extreme duress or under the substantial domination of another person.

Not applicable.

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.

Not applicable.

G. The age of the defendant at the time of the crime.

Defendant was 27 years old at the time of the instant offense.

Based on the above enumerated aggravating and mitigating circumstances, it would be this writer's recommendation that the court impose the death sentence.

The opinions of Detective Hitchcock, Michael Lambert, and the author of the report were improperly presented to the court. These were lay opinions going to the ultimate issue in the case. Further, the prosecutor urged the court to consider these opinions: "Judge, law enforcement in this case is recommending death. Even the probation and parole officer is recommending to this Court that the death penalty be imposed" (R. 277). By using the word "recommending," clearly the prosecutor was urging the court to balance these recommendations against the jury's recommendation. By stating "[e]ven the probation and parole officer," the prosecutor was arguing that those more knowledgeable with the criminal justice system than the jury believed that a death sentence was appropriate.

However, this opinion evidence was highly improper. First, it invaded the province of the sentencer as to the ultimate issue. It is improper "[t]o allow an expert ... to invade the province of the [sentencer]" Stewart v. State, ___ So. 2d ___, 15 F.L.W. 139 (Fla. March 15, 1990). Second, the opinions were not based upon proper sentencing factors. Detective Hitchcock did not even try to express his views in accord with Florida Statute 921.141. The probation and parole officer, himself, pretended to balance aggravating factors versus mitigating factors under the statute, but he failed to consider "any aspects of the defendant's character and record or any circumstances of his offense as an independently mitigating factor." Lockett v. Ohio, 438 U.S. 586, 607 (1978). He was obviously unfamiliar with the evidence presented at Mr. Brown's trial and thus could not conduct the proper analysis. Additionally, he considered

aggravating evidence that had not been produced at trial. He discussed Mr. Brown's arson conviction in 1977 even though the trial court had specifically ruled evidence of that crime could not be presented to the jury. He found that Mr. Brown was on parole at the time the capital felony was committed even though no evidence of that was presented to the sentencing jury. The defense did complain about the presentation of this opinion evidence:

> Your Honor, the opinion of law enforcement is not a valid consideration for this before this Court. The opinion of the probation officer is not valid under the laws.

(R. 277). Further these opinion evidence was based upon hearsay. As a result Brown "did not have the opportunity to confront and cross-examine" the witnesses against him. Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).

The presentation of this material to the sentencing court was error under the eighth and fourteenth amendments, and contaminated the court's decision to override the jury recommendation. See Stewart, supra; Rhodes, supra. Without this material the jury recommended life: with the opinions contained in the presentence report the court decided to impose a death sentence. "Because we cannot say that this [error] had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Caldwell v. Mississippi, 105 S. Ct. 2633, 2646 (1985). It is clear from the new non-record evidence cognizible in a Rule 3.850 motion such as this, that the sentencing judge premised the override upon this improper evidence. The judge told a newspaper reporter that the death sentencer resulted from his review of the information and opinions contained in the presentence investigation.

The United States Supreme Court has recently held, in a decision retroactive on its face, that capital sentencing discretion must be channeled. "Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential

if the [sentencer] is to give a 'reasoned moral response.'" Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). Improper factors affected the sentencing decision and is reflected in the newspaper article published the day after Judge Farnell override the life recommendation. This new evidence makes this claim cognizible in a post-conviction proceeding. See Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). The factors introduced through the presentence investigation created "an unguided emotional response in violation of the eighth amendment." The sentence must be vacated, and a life sentence imposed.

ARGUMENT X

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. BROWN'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In considering whether the death penalty constitutes cruel and unusual punishment in violation of the eighth amendment, Justice Brennan wrote:

> In determining whether a punishment comports with human dignity, we are aided also by a second principle inherent in the Clause--that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted:" The Original Meaning, 57 Calif.L.Rev. 839, 857- 860 (1969).

(footnote omitted). Furman v. Georgia, 408 U.S. 238, 274, 92 S. Ct. 2726, 2744 (1972)(Justice Brennan concurring).

When then faced with a challenge to Florida's capital sentencing scheme, the Supreme Court found that it passed constitutional muster:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Gregg v. Georgia, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976).

Thus, aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

> This court, in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:
>
> > We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
> >
> > Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. State, supra. See also Riley v. State, 366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Several nonstatutory aggravating factors were presented and argued to the sentencer in Mr. Brown's case. During the cross-examination of a defense witness in the penalty phase, the prosecutor, over objection, elicited information concerning Mr. Brown's reputation for truthfulness, or lack thereof. The objection, that the information was not relevant because it could not be argued in aggravation, not being one of those factors listed in the statute, was overruled (R. 1318). Following the direct examination of Detective Gary Hitchcock, which concerned Mr. Brown's cooperation in providing information to Detective Hitchcock concerning other crimes that Hitchcock had

investigated, and Mr. Brown's reliability as a confidential informant, the prosecutor proceeded to ask questions of the Detective such as the following:

> Q. [BY MCKEOWN]: And when you, once again, confronted him with the fact that that didn't quite jive, what did he, at that point, do?
>
> A. He corrected it and made an excuse for why he had said that particular statement.

(R. 1324-25). And,

> Q. All right. So at that time, you knew, in fact, that he had not been truthful with you about the incident surrounding the TV, is that true?
>
> A. That's true.

(R. 1328).

There were further objections that the prosecutor exceeded the scope of direct examination (R. 1328). The prosecutor's response was, "Your Honor, I don't believe there's any such objection, anymore, in the Evidence Code." (R. 1328-29). The court then allowed the prosecutor to proceed (R. 1329).

The prosecutor continued her cross-examination with questions such as:

> Q. . . . In fact, he was paid for turning his brother in on a robbery or burglary charge, is that true?
>
> A. On a burglary.

And,

> Q. All right. And during the course of your contact with people within the black community, have you had occasion to discuss Larry Brown or hear individuals discussing Larry Brown?
>
> A. Yes.
>
> . . . .
>
> Q. And have you had occasion to hear people speak of, or, yourself, speak of, in response to talking with individuals who have spoken of Larry Brown, his reputation in the community for truthfulness --

(R. 1333). After another objection and a bench conference, the prosecutor continued:

> Q. And what is his reputation for truthfulness in the community in which he lives?

A. That he's a liar.

(R. 1335-36).

This theme was then expounded upon in closing argument. The prosecutor argued that Mr. Brown should be executed because he was a liar. He even argued in aggravation that Mr. Brown was not able to show anything more in mitigation except that he sent church songs to a woman.

> You heard the Defense put on witnesses to try to tell you that there is a mitigating circumstance. Well, I submit to you the witnesses that were presented on behalf of the Defendant simply showed that he is a person who has been in and out of trouble all his life, that he is a liar and that the best that be said for the man is that he sends a woman church songs. That's not a mitigating factor.

(R. 1354).

Finally, the prosecutor argued to the jury that they could not trust the legislature, or the Parole Commission, to stick with the 25-year minimum mandatory sentence:

> Well, I ask you this. Can we be sure of that? The Parole Commission has nothing to do with this courtroom. Right now, the Parole Commission has said, "Larry Brown, if the jury recommends mercy, you cannot be released for twenty-five years." That's what they're saying now. Can we afford, the citizens of this community, to bet, if you will, that the Parole Commission is going to stay with that ruling? It's just food for thought. I don't know. We can't speculate. But ten years from now, perhaps that whole guideline system will be revamped.
>
> We just don't know, and that is why I'm saying the man cannot live in society, and it's time that he is told that, "You can no longer live among us anymore. You have been given a chance," many chances, ladies and gentlemen, and he cannot do it.

(R. 1357).

Clearly, these points raised by the prosecution are not listed in the aggravating circumstances authorized by statute. These impermissible arguments by the prosecutor "[remained] imbedded in the mind of the [judge] and influence[d] [his decision]." Robinson v. State, supra, at 8.

The judge's reason for imposing the death penalty may be best reflected in an interview that appeared in the St. Petersburg Times on November 16, 1982. In that article, Circuit Judge Crockett Farnell compared Mr. Brown to a "rabid rat." The article also indicated that Judge Farnell said:

> "I really hoped that the PSI...would find something good about this man," Farnell said later. "For every man there's got to be something good...In this case, I don't think there is."

And,

> The judge compared Brown -- and [his co-defendant] -- to "rabid rats" that spent their lives running on a spinning wheel, only stepping off once in a while to bite someone.

(T. 267). This newspaper article constitutes new evidence under Rule 3.850 which is cognizible in a post-conviction pleading such as this.

Because these nonstatutory aggravating circumstances influenced the judge to override the jury's recommendation of life, Mr. Brown's sentence of death must be reversed. The eighth and fourteenth amendments mandates that a life sentence be imposed.

ARGUMENT XI

MR. BROWN'S SENTENCING PROCEEDINGS WERE TAINTED BY THE INTRODUCTION OF HIS POST-MIRANDA SILENCE AS EVIDENCE THAT A DEATH SENTENCE SHOULD BE IMPOSED BECAUSE OF MR. BROWN'S LACK OF REMORSE AND COOPERATION WITH THE AUTHORITIES.

During the penalty phase of Mr. Brown's trial the defense called Detective Gary Hitchcock to the witness stand. On cross-examination the following exchange occurred between the prosecutor and Detective Hitchcock:

> Q All right. Detective, after obtaining that information, what did you, then, do?
>
> A Attempted to interview Larry Brown again and confront him with the information that I had.
>
> Q All right. Now, did you, again, read him his Miranda Rights?
>
> A Yes.
>
> Q All right. And when you confronted Larry Brown about the inconsistencies in his statements and what George Dudley had said about him, what, in fact, was his demeanor and what, in fact, did he

say?

A He got upset, turned away from the table where we were talking and said he would see me in court.

(R. 1331).

Trial counsel objected and asked for a mistrial:

MR. MCMILLAN: Judge, first of all, we would move for a mistrial and object to the prosecutor's eliciting the facts of our client's exercise of his Fifth Amendment privileges and not responding to the officer's questions.

(R. 1333). The trial court denied the motion without stating its grounds (R. 1335).

The United States Supreme Court has held that

> The warnings mandated by [Miranda] as a prophylactic means of safeguarding Fifth Amendment rights, see Michigan v. Tucker, 417 U.S. 433, 443-444, 94 S. Ct. 2357, 2363-2364, 41 L.Ed.2d 182 (1974), require that a person taken into custody be advised immediately that he has the right to remain silent, that anything he says may be used against him, and that he has a right to retained or appointed counsel before submitting to interrogation. Silence in the wake of these warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrest silence is insolubly ambiguous because of what the State is required to advise the person arrested. See United States v. Hale, supra, 422 U.S. at 177, 95 S. Ct. at 2137. Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial. Mr. Justice White, concurring in the judgment in United States v. Hale, supra, at 182-183, 95 S. Ct. at 2139, put it very well:
>
> "[W]hen a person under arrest is informed, as Miranda requires, that he may remain silent, that anything he says may be used against him, and that he may have an attorney if he wishes, it seems to me that it does not comport with due process to permit the prosecution during the trial to call attention to his silence at the time of arrest and to insist that because he did not speak about the facts of the case at that time, as he was told he need not do, an unfavorable inference might be drawn as to the truth of his trial testimony.... Surely Hale was not informed here that his silence, as well as his words, could be used against him at trial. Indeed, anyone would reasonably conclude from Miranda warnings that this would not be the case."

Doyle v. Ohio, 426 U.S. 610, 617-19 (1976)(footnotes omitted.)

This Court recently held:

> When presented with the motion to suppress, the trial judge initially indicated the the continuation of the questioning after the responses appeared to be a clear violation of Miranda, rendering the statements thereafter inadmissible. However, after reviewing the complete interrogation sessions, the judge concluded that the responses were not an invocation of the right to remain silent. The ruling of the trial court on a motion to suppress comes to us clothed with a presumption of correctness and we must interpret the evidence and reasonable inference and deductions in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978). The state urges that on the totality of the circumstances, we should affirm the ruling below. Counterposed to this argument is the well-established rule that a suspect's equivocal assertion of a Miranda right terminates any further questioning except that which is designed to clarify the suspect's wishes. See Long v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 108 S.Ct. 1754 (1988), and cases cited therein; and Martin, where although there was no violation of the fifth amendment by continuing questioning after an equivocal invocation of Miranda rights, the court held that the continued questioning was reversible error under Miranda. Given this clear rule of law, and even after affording the lower court ruling a presumption of correctness, we cannot uphold the ruling. The responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement. Such error is not, however, per se reversible but before it can be found to be harmless, beyond a reasonable doubt. Chapman v. State, 386 U.S. 18, 24 (1967); Martin v. Wainwright. Applying this standard, we are unable to say in this instance that the error was harmless beyond a reasonable doubt.

Owen v. State, ___ So. 2d ___, 15 F.L.W. 107, 108 (Fla. 1990).

The invocation of the right to silence following Miranda warnings may not be used in any fashion against an accused. Here that principle was violated as the State introduced the invocation of silence to negate nonstatutory mitigating factors and to establish nonstatutory aggravating factors. An objection was registered to the evidence, but no corrective action was taken by the court. Clearly the court believed the invocation of the right of silence was admissible and could be considered in overriding the jury's life recommendation. Certainly the judge did consider it.

Mr. Brown's sentence of death must be vacated under the fifth, eighth and fourteenth amendments, and a life sentence imposed.

ARGUMENT XII

THE INSTRUCTIONS TO THE JURY IN THE GUILT PHASE OF THE TRIAL AND THE PROSECUTOR IN CLOSING ARGUMENT IMPROPERLY COMMENTED UPON THE DEFENDANT'S FAILURE TO TESTIFY.

At the guilt phase of Mr. Brown's trial, the jury was instructed as follows:

> Proof of unexplained possession by an accused of property recently stolen by means of a burglary may justify a conviction of burglary with intent to steal that property, if the circumstances of the burglary and of the possession of the stolen property, when, considered in light of all the evidence in the case, convinces you beyond a reasonable doubt that the Defendant committed the burglary.

(R. 1216).

The fifth amendment to the United States Constitution provides in unequivocal terms that no person may "be compelled in any criminal case to be a witness against himself." The United States Supreme Court has explained "the effectuation of this protection is a relatively simple matter -- if the defendant chooses not to take the stand, no comment or argument about his failure to testify is permitted." Stewart v. United States, 366 U.S. 1, 2 (1961). The defendant's failure to testify cannot be used against him. United States v. Bright, 630 F.2d 804 (1980). Here, that is precisely what occurred. The instruction drew the jury's attention to Mr. Brown's failure to testify and explain his possession of the victim's television.

The prosecutor in closing made the comment even more pronounced when he stated:

> Ladies and gentlemen, that possession of that TV is very important. Very important, because, although Mr. McMillan went over a good bit of the law, he failed to mention that the Judge is going to instruct you on presumption, if you will, under the law. And I'm going to quote to you, "Proof of unexplained possession by an accused, a defendant, of property recently stolen by means of a burglary," which we know that came from a burglary of Anna Jordan's home, "-- may justify a conviction of the burglary with intent to steal that property, if the circum- stances of the burglary and of the possession of the stolen property, when considered in light of all of the evidence in the case, convinces you, beyond a reasonable doubt, that the Defendant committed a burglary."

(R. 1164-65).

In essence the prosecutor told the jury that the defendant's failure to explain the possession gave rise to a presumption of guilt. Besides violating the fifth amendment's right against self-incrimination, the prosecutor's argument violated the fourteenth amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt. The prosecutor told the jury that a presumption of guilt arose from unexplained possession. At least a reasonable juror could have construed his comments in such a fashion. Mills v. Maryland, 108 S. Ct. 1860 (1988). This violated Sandstrom v. Montana, 442 U.S. 510 (1979). See Lancaster v. Newsome, 880 F.2d 362 (11th Cir. 1989).

In Mr. Brown's case, the improper comment upon Mr. Brown's failure to testify and explain his possession of the TV along with the improper presumption argument "perverted" the factfinders deliberations upon Mr. Brown's guilt. Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). Accordingly, despite trial counsel's failure to object, the issue cannot be barred from consideration at this time.

To the extent that trial counsel failed to object to the fifth and fourteenth amendment error which occurred when comment was allowed upon "unexplained possession," Mr. Brown was deprived of the effective assistance of counsel in violation of the sixth and fourteenth amendments, and reversal is required. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). There counsel be no strategic reason for allowing such a blatant violation of Mr. Brown's rights to go unchallenged. Counsel's conduct could only have resulted from neglect or ignorance. It was fundamental error for both the judge and the prosecutor to tell the jury that Mr. Brown's failure to explain his possession of the TV was evidence of his guilt. The resulting conviction must be vacated.

ARGUMENT XIII

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE AND ITS RELIANCE ON FALSE AND/OR MISLEADING TESTIMONY IN FURTHERANCE OF A DELIBERATE PATTERN OF NONDISCLOSURE VIOLATED MR. BROWN'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

George Dudley provided the only evidence directly linking Larry Donnell Brown to the offense for which he was convicted and sentenced to death. Mr. Dudley's initial version of the events leading up to the death of Anna Jordan was that he followed Larry Brown to her house to "do a job"; that Mr. Brown broke into the house through a jalousie door then opened the back door and let him in; that he stood idly by while Mr. Brown tied the victim, raped her, and ransacked her house; and that Mr. Brown took a television set which he later that night sold for twenty dollars (T. 307). He and Mr. Brown split the proceeds from the sale of the set (T. 307).

By the time Dudley was deposed by the defense, his story had changed dramatically. His new version of the events was that he, Larry Brown, and an individual named "Ricky" went to the victim's home together (T. 307). Dudley testified that he did not know who Ricky was, having only seen him two or three times in the past (T. 308). According to Dudley's deposition testimony, it was now "Ricky" who had raped the victim, while Larry Brown ransacked the house (T. 308). The evidence collected from the scene supported this new aspect of Dudley's story: negroid hairs found on and about the victim were tested and shown not to have come from Dudley or Larry Brown (R. 804). The presumably unknown "Ricky", a participant in and an eyewitness to the crime, was not, however, located or arrested by the police. Dudley also testified at trial, contrary to his initial statements, that he neither requested nor received any of the proceeds from the sale of the television (R. 938, 967).

On the third day of trial, during the testimony of Detective Charles San Marcos, it was revealed that George Dudley and the State knew, and had known for

some time, exactly who "Ricky" was: he was Ricky Brown, the son of Larry Brown's common law wife (See R. 853). George Dudley had in fact told law enforcement officers who Ricky was, and identified a photo of him, some five months prior to trial, before giving his deposition testimony (See R. 860, 870-71). When it became apparent that the State was going to attempt to introduce through Detective San Marcos' testimony the identity of Ricky and the photopack from which Dudley had identified him to law enforcement, the defense immediately objected on the grounds that none of this information had been disclosed at any time, much less prior to trial (R. 853).

The trial court then held a Richardson hearing with regard to the prosecution's violation of state discovery rules. The prosecution initially argued that although it had known Ricky's last name for some time, it had not known that Dudley had identified him to law enforcement until that very morning (R. 856-59, 881). Detective Gary Hitchcock then took the stand, however, and testified that Dudley had identified Ricky Brown as the "third" participant on June 29, 1982, and that he (Hitchcock) passed that information on to the State Attorney's Office the following day (R. 870-73). Furthermore, Detective Hitchcock testified that he gave this information Assistant State Attorney McKeown, the trial prosecutor who had minutes earlier asserted that she had had no knowledge of Dudley's identification of Ricky Brown until that morning (R. 870).

The trial court found that a violation of state discovery rules had occurred and that it was "substantially prejudicial," and excluded testimony that "Ricky" was actually Ricky Brown and had been so identified prior to trial by George Dudley (R. 887-88). The court declined, however, to continue the trial in order to allow the defense to attempt to locate and interview Ricky Brown (R. 896), and denied the defense motion for an overnight recess to allow it to prepare to cross-examine Dudley in light of this new information (R.

911). Later, contrary to the Court's earlier rulings, Dudley was allowed to testify that Ricky was the son of Gloria Brown, who was Larry Brown's wife (R. 925-26). This even though the judge had specifically ruled that the defense was prejudiced by the discovery violation.

The prosecution's deliberate suppression of material, exculpatory evidence 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 U.S. 3375 (1985). Thus, the prosecutor must reveal to the defense 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. See Bagley, supra. It is of no constitutional significance whether the prosecutor or law enforcement is responsible for the nondisclosure. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). Here, it has been conclusively established that the prosecution and law enforcement actively and deliberately withheld information from the defense -- as discussed above, the record so establishes, and the trial court so found.

The next inquiry is thus materiality. Material evidence is evidence of a favorable character for the defense which would, with reasonable probability, affect the outcome of the guilt-innocence and/or capital sentencing proceeding. See Bagley, supra; Brady, supra; Agurs, supra; Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). The withheld evidence's materiality may derive from any number of characteristics of the suppressed evidence, ranging from 1) its relevance to an important issue in dispute at trial, to 2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to 3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967); see also Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Cary v. Black, 479

F.2d 319, 320 (6th Cir. 1973).

Because the evidence here at question, the identity of Ricky Brown, was withheld from the defense until the middle of trial, trial counsel did not know and were not given the opportunity to know its crucial importance (its "materiality") to the case. Defense counsel begged the court for a continuance to enable them to investigate and determine the materiality of Ricky Brown and the information he could provide, but were denied the opportunity to do so (R. 911).

We now know what trial counsel, because of the State's deliberate suppression, did not -- Ricky Brown has finally been arrested, although a warrant had never been issued, and has stated that he was present at the scene of the crime and that George Dudley was not (T. 310). Analysis and comparison of the unidentified negroid hairs found at the scene may well conclusively prove that Ricky Brown was indeed present. He was thus undeniably material to the defense: his testimony would have directly contradicted the testimony of the State's key witness, the only testimony directly linking Larry Brown to the scene of the crime. Had the prosecution not withheld the identity of "Ricky" from the defense, he could have been located and his testimony presented at trial.

The testimony of George Dudley was already only minimally credible, at best. All of the recorded statements and/or testimony given by him were inconsistent with the rest, and independently internally inconsistent (See, e.g., R. 940-68; cf. Statement of George Dudley, supra; Deposition of George Dudley, supra; compare R. 913-39). The jury's lengthy guilt-innocence deliberations (over 3 hours) were in all likelihood attributable to their difficulty in accepting George Dudley's highly questionable testimony. Under such circumstances, Ricky Brown's statements would, in all probability, have changed the outcome of the proceeding. Ricky Brown could have proved that

George Dudley was what his testimony indicated him to be -- a liar. Indeed, Dudley himself has since the time of trial admitted that he lied, and that he did because he had been led to believe that he would receive only a brief sentence if he did so, and a lengthy one if he did not (See T. 311).

It also now appears that Ricky Brown was in the custody of the state at the time of trial. Undersigned counsel has recently learned that Ricky Brown was arrested on February 19, 1981, and returned to prison for a parole violation on March 17, 1981. (T. 311). Although the DOC records do not clearly indicate when Ricky Brown was released from prison, the last entry in those records indicates that his presumptive parole date was set at November 9, 1982. If it is true that Ricky Brown was in state custody at the time of trial, the due process violations which occurred here are even more egregious.

Evidence which even tends to impeach a critical State witness is material and exculpatory under Brady. See Smith v. Wainwright, supra; Brown v. Wainwright, 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 . . . a defendant's life may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959); cf. Giglio v. United States, 450 U.S. 150 (1972). There can be no doubt of the impeachment affect that Ricky Brown's statements would have had on the evidence provided by George Dudley. The State's suppression of Ricky Brown's identity precluded the defense from investigating, obtaining, and employing this crucial evidence, and thus violated Larry Brown's rights under Brady v. Maryland.

As Mr. Brown alleges that the State's withholding of exculpatory evidence violated the sixth, eighth, and fourteenth amendments, an explanation of how each amendment's guarantees were denied him is appropriate. The cornerstone is the fourteenth amendment: as previously discussed, the government's suppression of exculpatory, impeachment, and/or otherwise useful evidence

deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment. Brady, supra. When the withheld evidence goes to the credibility and impeachability of a government witness, the accused's sixth amendment right to confront and meaningfully cross-examine witnesses against him is violated. See, e.g., Chambers v. Mississippi, 410 U.S. 284 (1973); cf. Davis v. Alaska, 415 U.S. 308 (1974)("Cross examination is the principle means by which the believability of a witness and the truth of his testimony is tested."); McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982)(there is a "particular need for full cross-examination of the State's star witness).

Of course, counsel cannot be effective when deceived, so hiding exculpatory and/or impeaching information violates the sixth amendment right to the effective assistance of counsel as well. See Strickland v. Washington, 466 U.S. 668, 687 (1984)(right to effective assistance of counsel violated when government "interferes . . . with the ability to make independent decisions about how to conduct the defense"); see also United States v. Cronic, 466 U.S. 648 (1984); Stano v. Dugger, 889 F.2d 962 (11th Cir. 1989); cf. Geders v. United States, 425 U.S. 80 (1976); Holloway v. Arkansas, 435 U.S. 474 (1979); Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tennessee, 406 U.S. 605 (1972); Ferguson v. Georgia, 365 U.S. 570 (1961). The unreliability of fact determinations resulting from such State misconduct also violates the eighth amendment requirement that no unreliable death sentences be imposed. See, e.g., Beck v. Alabama, 447 U.S. 625 (1980). All of the aforementioned constitutional rights, designed to prevent miscarriages of justice and ensure the integrity of fact finding, were violated in Mr. Brown's case.

This case, however, involves more than the mere withholding of evidence condemned by Brady. Not only did the prosecution here withhold from the defense the identity of "Ricky", they stood silently by while their star witness, Dudley, lied under oath about his knowledge of "Ricky's" identity. By the time

Dudley was deposed, the defense was aware that he had changed his story to include "Ricky". As discussed, however, the defense knew nothing more -- only the name Ricky. When trial counsel attempted to learn "Ricky's" identity, Dudley simply lied:

Q. Who is Ricky?

A. I don't know, just Ricky.

Q. Does he hang out at the bar?

A. No.

Q. Where had you seen him around?

A. He be with Larry.

Q. How many times have you seen this person Ricky?

A. Two or three times.

(Deposition of George Dudley, p. 8)(emphasis added). Of course, as was revealed later, Dudley did know exactly who "Ricky" was, and had told law enforcement: Detective Hitchcock testified at the Richardson hearing that Dudley told him in June of 1982 that Ricky was the son of Gloria, and that Gloria was Larry Brown's wife (R. 875). Hitchcock also testified that he relayed this information to the State Attorney's Office the day after he learned it from Dudley, and that he had relayed it to Assistant State Attorney McKeown (R. 870), who was present when Dudley was deposed.

It is thus clear that the State knew that George Dudley lied under oath at his deposition when he denied knowing who Ricky was. Dudley in fact testified at trial that he did know who Ricky was, and his relationship with Larry Brown, at the time he was deposed (R. 921). He knew, and the State knew he knew, yet stood silently by when George Dudley said under oath that he did not know who Ricky was (Deposition of George Dudley, p. 8). At trial, the prosecution continued its efforts to cover the tracks of their misdeeds -- according to Assistant State Attorney Runyan, Dudley truthfully answered the deposition

question regarding his knowledge of Ricky (R. 920). Of course, the version of the deposition related by Runyan is marked different from what actually occurred:

> He [defense counsel] simply asked him [Dudley] if he knew Ricky and he said, "Yeah. He hangs around. He be with Larry."

(R. 920). Again, what occurred at deposition was not as Runyan represented it:

> Q. Who is Ricky?
>
> A. I don't know.

(Deposition of George Dudley, p. 8)(emphasis added). The record speaks for itself - - Dudley lied and the State knew it. The prosecution thus not only withheld this crucial evidence from the defense, but also stood by silent when its star witness lied about his own knowledge of the evidence.

As long as fifty years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney 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." Berger v. United States, 295 U.S. 78, 88 (1935).

A prosecutor not only has the constitutional 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, but also to correct the presentation of false state witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of false evidence violates due process whether it relates to a substantive issue, Alcorta, supra, the credibility of a State's witness, Napue, supra; Giglio v. United States, 405 U.S. 150, 154 (1972), 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. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

In short, the State's knowing use of false or misleading testimony 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. at 103-04 and n.8. 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 testimony 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. Here, the demonstrably false testimony of George Dudley prevented the defense from discovering evidence which would have literally destroyed his testimony and the State's case. 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.

This claim is cognizible because of the new non-record material which established that the State has custody of Ricky Brown at the time of Larry Brown's trial and that Ricky Brown says George Dudly lied. As discussed, there is a substantial probability that the false testimony at issue here affected the jury's verdict, and Mr. Brown is thus entitled to the relief he seeks.

ARGUMENT XIV

THE TRIAL COURT IMPROPERLY REFUSED TO CONSIDER THE LACK OF INTENT TO KILL AS A MITIGATING CIRCUMSTANCE.

During the instruction conference at the penalty phase of Mr. Brown's trial the defense proffered an instruction informing the jury that the absence of an intent to kill could constitute a mitigating circumstance:

> MR. CLAPP: Your Honor, the lack of intent to kill is a mitigating circumstance, even though guilt of homicide can be shown through felony murder. This is the reverse of number 9 where cold, calculated is an aggravating factor, in that it is apparently trying to imply that its calculation over and above premeditation. We're just saying, if you find that, for example, it was felony murder, that there was not an intent to kill. That is a mitigating factor.

(R. 1291). The trial judge refused to give the instruction:

> THE COURT: I'm going to deny that. I don't think that's appropriate.

(R. 1291).

Since Mr. Brown's appeal, new case law on this point has been rendered. In Hitchcock v. Dugger, 107 S. Ct. 1021 (1987), the United States Supreme Court made clear that the jury must be properly advised as to the availability of non-statutory mitigating circumstances which may justify the imposition of a sentence of less than death. Hitchcock for the first time held that a Florida jury was a sentencer for eighth amendment purposes. Hitchcock further stands for the principle that a sentencer must know that it can consider nonstatutory mitigation.

Here the defense specifically asked to have the jury instructed on a specific non-statutory mitigating circumstance. However, the trial court denied the request and further stated during the instruction conference that he found that there was an intent to kill:

> MR. CLAPP: But you're assuming that, somehow, somebody intentionally did kill her.
>
> THE COURT: That's true. There's no question about that.

(R. 1282). Clearly, the judge decided that he would not and could not consider

lack of intent as mitigating.

Hitchcock is a change in law which makes this claim cognizible in a Rule 3.850 motion. This is true even where the jury has recommended a life sentence and the judge has overriden that recommendation. Spaziano v. Dugger, ___ So. 2d ___, 15 F.L.W. (Fla. March 15, 1990). The question under Spaziano is whether the judge demonstrated that he did not or would not consider nonstatutory mitigation. Here Judge Farnell indicated he would not consider lack of intent as mitigating even if the jury had found that Mr. Brown was an accomplice who did not commit the murder or did not intend that the murder occur.

The court's actions violated Hitchcock. Mr. Brown was prejudiced because the court's decision to override the jury was premised upon a mistake of law. He believed that the absence of an intent to kill was not a mitigating circumstance which the jury could have found to be present on the facts presented. Reasonable minds could have differed as to whether there was an intent to kill. See DuBoise v. State, 520 So. 2d 260 (1987). Thus the court's decision to override the life recommendation was in error and violated the eighth and fourteenth amendments.

ARGUMENT XV

THE COURT'S FINDINGS AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES IN SUPPORT OF THE DEATH PENALTY FAILED TO CONSIDER ANY FACTORS BEYOND THE STATUTORY AGGRAVATING AND STATUTORY MITIGATING FACTORS AS SET FORTH BY THE PAROLE AND PROBATION OFFICERS WHO PREPARED MR. BROWN'S PRESENTENCE INVESTIGATION REPORT IN VIOLATION OF MR. BROWN'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The trial court's FINDINGS AS TO AGGRAVATING AND MITIGATING CIRCUMSTANCES IN SUPPORT OF THE DEATH PENALTY tracked the exact language of the pre-sentence investigation report.[9] In neither document was consideration given to the

[9]These findings were entered more than a month after the notice of appeal was filed, at a time when the circuit court no longer had jurisdiction.