IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,248

JAMES FRANKLIN ROSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE SEVENTEENTH JUDICIAL CIRCUIT, BROWARD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Rose's Fla. R. Crim. P. 3.850 motion for post-conviction relief. This proceeding challenges both Mr. Rose's conviction and his death sentence imposed upon resentencing. References in this brief are as follows: The trial and original sentencing record is cited as "T. ___" with the appropriate page number following thereafter. The resentencing record is cited as "S. ___". The record on appeal in these post-conviction proceedings is cited as "R. ___". All other references are self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues involved in this action will determine whether Mr. Rose 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 is appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Rose, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Rose was charged with first degree murder and kidnapping, and entered a plea of not guilty. At the original trial, the jury could not reach a verdict and a mistrial was declared (T. 1480). At the retrial, the jury convicted after receiving an Allen-type charge, and a judgment of conviction was entered on May 6, 1977. The jury, after telling the trial court that it was deadlocked at a 6-6 vote on the recommendation of a penalty, was instructed with another Allen-type charge, and eventually returned a recommendation of death. Mr. Rose was sentenced to death. On appeal, this Court affirmed the convictions, but vacated the sentence of death, and directed that a new jury sentencing be held. Rose v. State, 425 So. 2d 521 (Fla. 1982).

Upon retrial of the penalty phase, the death penalty was reimposed and this Court affirmed. Rose v. State, 461 So. 2d 84 (Fla. 1984). On August 5, 1986, a death warrant was signed. On August 18, 1986, Mr. Rose filed an original habeas corpus petition and motion for stay of execution in this Court. This Court granted a stay of execution in order to consider the habeas petition, but subsequently denied relief. Rose v. Dugger, 508 So. 2d 321 (Fla. 1987).

Mr. Rose filed a 3.850 motion in the trial court presenting valid prima facie claims for relief. The State responded that as to a number of the factual claims presented, "[t]he State agrees that in order to determine the validity of [the claims] it is necessary to hold an evidentiary hearing" (R. 117, Response to Motion to Vacate). The trial court nevertheless denied a hearing and signed an order drafted by the State which contradicted the State's own earlier position that a hearing was necessary. Mr. Rose's counsel was not provided with any reasonable opportunity to object or respond to the State's order. A rehearing motion filed on behalf of Mr. Rose was summarily

denied by the trial court.

Timely notice of appeal was filed. This appeal follows.

SUMMARY OF ARGUMENT

1. The circuit court erred in the manner in which it treated the Rule 3.850 motion and in denying relief without conducting an evidentiary hearing. Mr. Rose's Rule 3.850 motion presented claims which have been traditionally resolved through an evidentiary hearing and detailed specific facts in support of these claims. The State's response agreed that an evidentiary hearing was required to resolve many of these claims. Nevertheless, the circuit court summarily denied relief by signing an order prepared by the State which contradicted the State's own position and which did not attach specific parts of the record refuting the claims. An evidentiary hearing was required on the Rule 3.850 motion because the files and records do not conclusively refute Mr. Rose's allegations.

Further, the trial court erred in its treatment of the Rule 3.850 motion. The motion was filed by an assistant public defender who was allowed to withdraw as counsel for Mr. Rose by the trial court. CCR then undertook Mr. Rose's representation, a fact known to the trial court and the State. However, when the State later prepared an order denying relief and presented the order to the trial court, CCR was not served with the order or provided any opportunity to object to it. The trial court signed the order, and a copy of the signed order was not provided to CCR by the court or the State, but by former counsel. The trial court's treatment of the Rule 3.850 motion violated fundamental principles of due process. This case should be remanded for a full and fair evidentiary hearing and for proper resolution of the issues.

2. Mr. Rose was deprived of the effective assistance of counsel at the guilt and penalty phases of his capital proceedings. At the guilt phase,

the State's case was weak and entirely circumstantial. One trial ended in a mistrial when the jury could not reach a verdict, and the second jury reached a verdict only after receiving an Allen charge. Substantial evidence was available which contradicted the State's case. This evidence would have undermined the State's theories as to the manner of death, the time of death, and the motive. Defense counsel, however, unreasonably and without a tactic failed to use this readily available evidence. There is more than a reasonable probability that presentation of this evidence would have affected the guilt verdict in this circumstantial case.

At resentencing, defense counsel failed to investigate, develop, and present available mitigating evidence. Defense counsel was completely unfamiliar with capital sentencing proceedings and was unprepared for the resentencing. Evidence regarding Mr. Rose's capacity for rehabilitation and adaptability to imprisonment, his impaired intelligence, his alcoholism, his schizoid personality disorder, his possible organic brain damage, and his difficult childhood was not presented because defense counsel failed to investigate and prepare. There is more than a reasonable probability that presentation of this evidence would have affected the outcome of the resentencing. An evidentiary hearing and relief are required.

3. The manner in which the victim was killed was misrepresented at trial, either because of an incompetent medical assessment, the State's use of false or misleading testimony, or both. The State's medical examiner testified that the victim died as a result of severe head injuries, and testified that these injuries could have been caused by a hammer. The State relied heavily upon this hammer theory. However, another medical examiner, who examined the same materials relied upon by the State's medical examiner, unequivocally testified in deposition that a hammer could not have caused the victim's injuries, which instead resulted from her head hitting a broad flat

surfact. The State knew that it could manipulate its medical examiner to say what the State wanted and knew about his lack of expertise. The false and misleading evidence infected both the guilt phase and the resentencing. An evidentiary hearing and relief are required.

4. The State knowingly used false testimony concerning Mr. Rose's statements to law enforcement, and trial counsel was ineffective in failing to fully challenge the admission of these statements. Police extracted several statements during extensive custodial questioning of Mr. Rose. Some of these statements were suppressed as violative of Miranda. Other statements, however, which were obtained in violation of Mr. Rose's right to counsel, were admitted at trial because the State misrepresented the facts surrounding Mr. Rose's invocation of his right to counsel. Police testimony indicated that Mr. Rose had asked to consult with counsel and was permitted to contract an attorney. Police portrayed Mr. Rose's phone call to counsel as a sham, and the State argued that the call was a fake. In fact, Mr. Rose had contacted private counsel, who refused to represent Mr. Rose because Mr. Rose owed counsel money from a prior representation. In fact, police knew that Mr. Rose had been refused representation, because a police officer called counsel, who told the officer he could not represent Mr. Rose due to the prior debt. Mr. Rose was thus denied counsel because of indigency, and the police initiated further questioning, obtaining statements admitted at trial. Mr. Rose did not waive his right to counsel. An evidentiary hearing and relief are required.

5. Mr. Rose's in-custody statements were obtained and admitted in violation of his right to counsel, and Edwards v. Arizona requires suppression of those statements. Mr. Rose's case was pending on apeal when Edwards was decided, but this Court did not apply Edwards. The Court should reexamine this claim and grant relief.

6. The resentencing court's refusal to allow evidence and argument regarding whether Mr. Rose's conviction rested upon premeditated or felony murder or to provide instructions defining premeditated and felony murder violated the sixth, eighth, and fourteenth amendments. During resentencing, the jury was repeatedly informed that Mr. Rose's guilt was not at issue, and the defense request that the jury be instructed on premeditated and felony murder was denied. Thus, Mr. Rose was denied the opportunity to present powerful evidence and argument bearing upon his degree of culpability and the propriety of a death sentence. The individual culpability of a capital defendant is the key to determining whether death is appropriate. Essential to determining individual culpability is the mental state with which the crime was committed. In Mr. Rose's case, the State's evidence was insufficient to establish any intent to commit murder or the underlying felony of kidnapping. It is no accident that the only jury forbidden from wrestling with the weakness of the State's case was also the only jury to recommend death by other than a bare margin. The resentencing jury was precluded from considering the circumstances of the offense as a basis for a sentence less than death. The death sentence is disproportionate and violates the eighth and fourteenth amendments. Relief is proper.

7. Several constitutional errors possibly occurred during the jury's deliberations at the guilt phase, but no record was made of that portion of the proceedings. An evidentairy hearing is necessary in order to reconstruct the record and in order to allow Mr. Rose to establish his entitlement to relief.

ARGUMENT

ARGUMENT I

THE CIRCUIT COURT ERRED IN THE MANNER IN WHICH IT TREATED THE MOTION TO VACATE AND IN ITS SUMMARY DENIAL OF RELIEF AND THIS CASE SHOULD BE REMANDED FOR A FULL AND FAIR EVIDENTIARY HEARING.

A. THE CIRCUIT COURT ERRED IN NOT ALLOWING AN EVIDENTIARY HEARING

Mr. Rose presented the Rule 3.850 trial court claims for relief which required an evidentiary hearing for their proper resoluution. The issues presented included claims of ineffective assistance of counsel at capital trial and sentencing, violations of Brady v. Maryland and its progeny, and other factual claims for relief. The claims presented specifically pled allegations of fact, including matters that are not of-record, while nothing in the files and records rebutted the allegations. This case thus involved classic Rule 3.850 evidentiary issues which have been traditionally resolved through evidentiary hearings in Florida capital cases. An evidentiary hearing was required in this case. Indeed, in its response to the motion to vacate, "[t]he State agree[d] that in order to determine the validity [of a number of the claims presented below and discussed herein] it is necessary to hold an evidentiary hearing ... (R. 117, Response to Motion to Vacate) (emphasis added). The trial court, however, summarily denied relief by signing an order prepared by the State (see section B, infra) which directly contradicted the State's own position and which did not "attach those specific parts of the record that directly refute each claim raised." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The failure to attach files and records was error, Hoffman, and is explainable by the fact that the files and records did not conclusively rebut the claims, as the State originally agreed. The error in the court's adoption of the State's order is discussed in section B, infra. The error in denying an evidentiary hearing is manifest in light of the fact that valid, factual prima facie claims for relief were presented, claims which

were not rebutted by the files and records, and which therefore required an evidentiary hearing for proper resolution.

Where, as here, the motion for post-conviction relief presents valid prima facie claims and the record does not conclusively show that relief is not appropriate, a capital defendant is entitled to an evidentiary hearing. Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). As noted, no portions of the files and records were attached to the order denying relief. See Hoffman; Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). It is not sufficient to direct the clerk of court to attach the entire record on appeal to the order, yet this is what the trial court did here (R. 487), when it signed the State's proposed order. This is the very same erroneous disposition of a motion to vacate which this Court recently discussed in Hoffman.

The granting of an evidentiary hearing is required when the defendant presents claims demonstrating "that he might be entitled to relief under rule 3.850." State ex rel. Russell v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985). Mr. Rose made that showing. A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986). Mr. Rose's verified Rule 3.850 motion alleged prima facie claims for relief based on non-record facts and supported those claims with factual allegations. No files and records conclusively rebutted the claims and no such records were attached to the order. The claims could only be resolved at a full and fair evidentiary hearing. Obviously, for example, the question of whether a capital inmate was

denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a classic example of a claim requiring an evidentiary hearing for its proper resolution. See Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990); Mills v. Dugger, 559 So. 2d 578 (Fla. 1990); Squires; O'Callaghan; Lemon; Groover v. State, 489 So. 2d 15 (Fla. 1986). Mr. Rose's claim that he was denied mental health mitigation due to failures on the part of counsel and the lack of professionally adequate mental health assistance is also a traditionally-recognized Rule 3.850 evidentiary claim. Mills; Groover; State v. Sireci, 502 So. 2d 1221 (Fla. 1987). Mr. Rose's claims involving violations of Brady and its progeny are also classic evidentiary claims requiring a full and fair hearing for their proper resolution. See Lightbourne v. State, 549 So. 2d 1304 (Fla. 1989); Hoffman; Squires; Gorham.

Here, the State conceded that an evidentiary hearing was needed on a number of the claims presented; as to other claims, the State contested the factual claims pled. The forum in which to resolve such contests is in a full and fair evidentiary hearing. A hearing is required to resolve contested factual claims where, as here, the facts which need to be considered in order for the claims to be resolved are not "of record." See O'Callaghan; Heiney; Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983).

The motion in this case alleged sufficient facts to show that Mr. Rose may be entitled to relief, O'Callaghan; the files and records do not conclusively demonstrate that Mr. Rose is entitled to no relief, Lemon; no such files and records were attached to the order denying relief, Hoffman; and the State agreed that a hearing was necessary on a number of the claims (R. 117). A full and fair evidentiary hearing is proper in this case, as was deemed proper by this Court in the various cases cited and by the State in its response to the motion to vacate. The trial court erred in denying an

evidentiary hearing.

B. THE CIRCUIT COURT ERRED IN ITS TREATMENT OF THE MOTION TO VACATE

On June 3, 1987, former counsel for Mr. Rose, Steven H. Malone, an Assistant Public Defender with the West Palm Beach Public Defender's office, filed a Motion to Vacate on Mr. Rose's behalf. After the State filed a motion to "determine" counsel, the Public Defender's Office responded that "we believe it is now necessary that conflict-free counsel be appointed to ensure that every issue is fairly pursued in this and future collateral proceedings in state, and if necessary, the United States courts" (Response to Motion to Determine Counsel, p. 2). Thereafter, on March 21, 1988, the Public Defender's Office withdrew from Mr. Rose's case, and the Office of the Capital Collateral Representative (CCR) undertook Mr. Rose's representation. A formal proceeding had been held on the withdrawal issue -- the Court and opposing counsel knew that CCR had undertaken Mr. Rose's representation.

On March 15, 1989, CCR received a letter from Mr. Malone to the Honorable M. Daniel Futch, Jr., with an attached proposed order (See R. 488-513, Motion for Rehearing and attachments, describing these circumstances). Mr. Malone had received the proposed order from the State; the State had prepared the order and forwarded it to the Public Defender's Office (Id.). Counsel was never notified whether there were any communications between the Court and the State's representatives, whether the Court had requested any proposed orders, or why it was that an order, out-of-the-blue, happened to be forwarded to the Court for its signature (Id.). The order not only was in conflict with the requirements of Rule 3.850 (e.g., by ruling on issues of fact without allowing an evidentiary hearing and without referring to any portions of the record conclusively showing that Mr. Rose was not entitled to relief, etc.), but also was in conflict with the State's own earlier

submission that an evidentiary hearing was necessary.

Mr. Malone, not the State and not the Court, forwarded the proposed order to the CCR office. No communication was received by CCR from the Court or the State. However, before CCR could prepare an objection to the State's order, CCR learned (not through opposing counsel and not from the Court) that an order denying relief had been issued (R. 488-513). This order was identical to the State's in every respect.

On March 22, 1989, CCR received the order signed by the Court denying Mr. Rose's Motion to Vacate. The Order is dated March 13, 1989 (i.e., almost immediately after the Court received it), and is identical to the proposed order prepared by the State. Also on March 22, 1989, CCR was copied a letter from Mr. Malone to the Honorable M. Daniel Futch, Jr., restating that the Public Defender's Office was no longer involved in Mr. Rose's case (R. 488-513). Absolutely no notice was provided to Mr. Rose's counsel that the Court was about to sign the proposed order. Indeed, the Court signed it well before counsel had any chance to respond. Not even the normal period of time for the filing of responses generally allowed under the rules of procedure was permitted.

In submitting a proposed order, the State presented to the Court findings and rulings in the light most favorable to its position. It used the order to amend and strengthen its arguments on the issues. The order is a self-serving document written without the benefit of any evidentiary resolution of the issues. And there was no reasonable opportunity to respond to it.

When a court is required to make findings of fact, "the findings must be based on something more than a one-sided presentation of the evidence . . . [and] require the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy,

but by both." Simms v. Greene, 161 F.2d 87, 89 (3rd Cir. 1947). A death-sentenced inmate deserves at least as much.

> [T]he reviewing court deserves the assurance [given by even-handed consideration of the evidence of both parties] that the trial court has come to grips with apparently irreconcilable conflicts in the evidence... and has distilled therefrom true facts in the crucible of his conscience.

E.E.O.C. v. Federal Reserve Board of Richmond, 698 F.2d 633, 640-41 (4th Cir. 1983), quoting Golf City, Inc. v. Sporting Goods, Inc., 555 F.2d 426, 435 (5th Cir. 1977). Rule 3.850 proceedings are governed by the principles of due process. Holland v. State, 503 So. 2d 1250 (Fla. 1987). Due process cannot be squared with the treatment that the motion to vacate received in this capital case. It is one thing for a court to adopt a proposed order on ministerial or procedural matters. It is quite another for a court to adopt wholesale one side's findings on the merits of what is at issue in the action, especially when little, if any, notice is given to the other side to respond. Mr. Rose was entitled to a full and fair independent resolution from the court; here, the claims were resolved by his party opponent. Courts have criticized such procedures consistently -- the taste of unfairness remains in such cases because findings should be made by the court, not "written by the prevailing party to a bitter dispute." Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 258 (5th Cir. 1980). See also Love v. State, 569 So. 2d 807 (Fla. 1st DCA 1990)(ex parte communication between trial judge and assistant attorney general concerning a pending criminal case mandates reversal where a request for recusal or mistrial is denied and judge sits as trier of fact); Shaw v. Martin, 733 F.2d 304, 309 n.7 (4th Cir. 1984). Given the heightened scrutiny which the eighth amendment requires in capital proceedings, a resolution such as the one involved in this case is even more distasteful.

Here, the court signed the State's order, without allowing Mr. Rose's

counsel a reasonable opportunity to review the order, or to object to misstatements of law or fact. The trial court was twice reminded by the Public Defender's Office that CCR was Mr. Rose's counsel (R. 488-513). Despite the fact that the Order denying Rule 3.850 relief was signed on March 13, 1989, CCR did not receive a copy until March 22, 1989. The copy was received from Mr. Malone. Neither the Court nor the State provided CCR with notice or an opportunity to respond.

Mr. Rose was entitled to all that due process allows -- a full and fair hearing by the court on his claims. Cf. Holland v. State, 503 So. 2d 1250 (Fla. 1987). These rights were abrogated by the trial court's adoption of the state's factually and legally erroneous order. This Court has also held that it is reversible error for a circuit court to deny a 3.850 motion without an examination of the files and records. See Steinhorst v. State, 498 So. 2d 414 (Fla. 1986). It is unclear here whether the trial court reviewed the record or whether that was done only by the State, Mr. Rose's party opponent. When Mr. Rose presented these matters, as well as the need for an evidentiary hearing, to the trial court through a motion for rehearing (R. 488-513), the trial court merely summarily denied the rehearing without further explanation (R. 516).

The resolution of the motion to vacate in this case was fundamentally erroneous and flawed. This case should be remanded for a full and fair evidentiary hearing and for a proper resolution of the issues.

ARGUMENT II

MR. ROSE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT AND PENALTY PHASES OF THESE CAPITAL PROCEEDINGS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. THE GUILT PHASE

This trial involved the improbability of Mr. Rose being able to

accomplish a murder and to dispose of the body in the time frame proposed by the State's case (T. 661), and the related conflicting testimony on the time the victim and Mr. Rose were last seen. The major issues were the weakness of the State's case on the manner of death (hammer blows), the time of death and the State's "jealous boyfriend" motive theory. Defense counsel, however, unreasonably failed to use readily available evidence which would have undermined the State's case and supported the defense on these very issues, and which reasonably likely would have affected the guilt verdict in this circumstantial case.

Trial counsel argued that the crime could not have happened at the time or in the manner proposed by the State, and that someone else was responsible for the murder. But counsel failed to use available and compelling evidence which would have substantially supported the defense case. As was pled in the 3.850 motion, these omissions were based on a failure to properly investigate and prepare, and were not based on tactics. An evidentiary hearing was necessary for this claim to be properly resolved, as the State originally agreed.

Mr. Rose was charged with the murder of Lisa Berry, the daughter of Barbara Berry (with whom Mr. Rose had been romantically involved). The State's case was wholly circumstantial. Effective assistance would have made a difference. Defense counsel, however, unreasonably neglected to introduce available, persuasive evidence relevant to the manner of death, the times James Rose and Lisa Berry were last sighted and Mr. Rose's lack of motive. These were the central aspects of the State's case. As pled in the motion to vacate, these omissions are reasonably likely to have affected the outcome of the trial.

(i) <u>The manner of death.</u>

Trial counsel was concerned about the reliability of Dr. Fatteh's (the

pathologist's) medical opinion; he filed a motion for appointment of a second pathologist. The motion was granted and Dr. Joseph Davis was appointed. After reviewing the autopsy pictures, diagrams and protocol of Dr. Fatteh, Dr. Davis was deposed by the State, a deposition attended by defense counsel Mr. Bush. Dr. Davis described his findings, to which he would have testified, rebutting the "repeated hammer blow" theory of the State:

a. The "laceration on the victim's" head to which Dr. Fatteh attested, was "a post-mortem deterioration" (Davis deposition at 26, 27).

b. The "hemorrhage" in the right temple area, which Dr. Fatteh thought was evidence of blows, was the result of post-mortem deterioration (Davis deposition at 26, 32).

c. The photographs of the head and brain area do not support a theory of localized "blunt force," such as a hammer blow, because there was no depressed area in the skull, and considerably more hemorrhage than visible (Davis deposition at 33).

d. Dr. Fatteh's testimony, and the State's "hammer blow or other blunt object" theory would have been persuasively rebutted by Dr. Davis, a highly competent expert. Dr. Davis testified during the pretrial depositions that it was unlikely that the injuries were caused by any object being forcefully applied to the head, not a "bare foot," or "shoed foot," but only a "weak blow," and, most importantly,

> "[i]t does not sound feasible with a hammer at all -- unless by some chance the hammer were very gently applied. In that particular part of the head, a blow with a hammer would cause an immediate punch right thorough the skull, and a full swing with a hammer would actually drive the hammer completely into the head, and that would be readily apparent in the photographs, which it is not."

(Davis Deposition at 34, 41-44).

Although Dr. Davis was available at time of trial and would have provided powerful evidence on the very issues defense counsel sought to argue,

he was never called. Mr. Rose's 3.850 motion pled that this omission was not tactical but was based on ineffectiveness of counsel. The evidence Dr. Davis would have provided would have been critical, would have rebutted the State's theory (presented during opening and closing argument and through Dr. Fatteh's testimony), and would have corroborated the defense's argument that two other suspects had killed the victim by hitting her head against the van. Dr. Davis' testimony was that the injuries to the back of the head more usually appear with the "head in motion striking a fixed object for this type of fracture" (Davis Deposition at 44), i.e., by hitting a broad surface (Id.). Defense counsel argued this very theory in his summation, but argued it without record support because of his failure to use the testimony of Dr. Davis. As the Rule 3.850 motion pled, other experts, such as a second highly qualified pathologist, Dr. Wright, would also have offered detailed corroborative testimony consistent with the defense case on the cause of death. The jury never heard credible evidence rebutting the State's case and compellingly supporting the defense theory because trial counsel unreasonably failed to present it.

In its response to the motion to vacate, the "State agree[d] that in order to determine the validity of [this claim] it is necessary to hold an evidentiary hearing" (R. 117, Response to Motion to Vacate). The trial court nevertheless summarily denied relief. The trial court erred. An evidentiary hearing, as the State agreed long ago, was and is necessary on this claim.

(ii) The whereabouts of James Rose and Lisa Berry at the crucial times.

The time at which events occurred was a central issue at the trial, as the State and defense informed the jury in argument (T. 661). The State's theory hinged on proof that Lisa Berry left the bowling alley with Mr. Rose between 9:30 and 10:00 p.m., and that between then and 10:23 p.m., Mr. Rose

killed Ms. Berry, drove a 21 mile round trip, and returned to the bowling alley around 11:00 or 11:30 p.m. (T. 644, 1213-18). Ms. Berry was first noticed missing between 11:30 and 11:45, after Mr. Rose had returned to the alley. "Time" was a crucial issue in this case, as all parties agreed at the trial. But available and persuasive evidence supporting the defense theory on the impossibility of guilt based on the times the decedent and the defendant were at the bowling alley, and rebutting the State's case on this issue, was inexplicably omitted from the jury's consideration because of defense counsel's failures. Mr. Rose's 3.850 motion pled that these failures were not based on tactical concerns. In its response the "State agree[d] that in order to determine the validity [of this claim] it is necessary to hold an evidentiary hearing" (R. 117). The trial court nevertheless summarily denied relief. An evidentiary hearing, however, was and is necessary, as the parties agreed below.

The prejudice resulting from counsel's failure to present this available evidence is profound. The evidence counsel failed to present was available and compellingly spoke to Mr. Rose's innocence. Indeed, at the trial, the State went to great lengths to try to offer explanations for discrepencies on this issue in the testimony of its witnesses. Available to the defense, but unreasonably not used, was both impeachment and substantive testimony that Lisa Berry was seen at the bowling alley between 11:00 p.m. and 11:45 p.m., well after Mr. Rose had returned, after he had already displayed the red stain on his leg, and at a time demonstrating that he could not have committed the offense. The evidence was consistent with Mr. Rose's statement to Barbara Berry -- that he saw Lisa at the alley with a man with a goatee at about 11:45 p.m. (The statement was used against Mr. Rose at trial to demonstrate that he was trying to fabricate a ghost killer.) The evidence available to trial

counsel, who unreasonably failed to present it, was pled in the 3.850 motion and can be summarized here as follows:

a. Walter Isler, a witness, provided a statement to law enforcement officers pretrial explaining that he had seen Lisa Berry in the bowling alley at some time "going on 11." Mr. Isler testified at trial that he last saw Jim Rose at 10 p.m. (T. 741). He testified that he "didn't remember" and "didn't recall" what his statement was about his seeing Ms. Berry (T. 757). During closing, the prosecutor (inaccurately) argued that Mr. Isler denied making a statement about Ms. Berry (T. 1215). Yet, Detective McClellan, who took the statement, had recorded the session with Mr. Isler. Counsel had been provided with the detective's name, the tape, and a transcript. On the tape Mr. Isler clearly states, without hesitation, that he last saw Lisa Berry around 11:00 p.m. that evening at the bowling alley. The transcript and recording, as well as the detective, were certainly available to counsel. As Mr. Rose pled in the motion to vacate, there was no reason for counsel to fail to provide to the jury such compelling evidence. Mr. Isler's seeing Lisa Berry at the bowling alley at 11:00 p.m. would have undermined the State's theory and supported the defense; it was compelling evidence of Mr. Rose's innocence.

b. Thomas Druksel provided a statement, under oath, to Detective Richard Hoffman on October 23, 1976, at 6:30 p.m. He swore he had seen Lisa Berry at 11:45 p.m. He knew the time because his friend had just looked at the clock. Mr. Druksel explained that Lisa Berry was the "little blonde girl [who] came out of the doorway of the snack bar, looking around and walked out." Mr. Druksel was later questioned closely by the detective about the time and identity of the girl he had seen:

Q. Did you know the girl to be Barbara Berry's daughter?

A. I didn't know her name but I saw her before.

Q. What was she wearing when you saw her?

A. Green sweater and pink pair of slacks.

Those were the clothes others testified at trial that Lisa Berry was wearing that evening. Mr. Druksel further corroborated his account as to the time involved by explaining that Barbara Berry came looking for her daughter at around midnight, fifteen minutes after he had seen Lisa. Defense counsel had access to the pretrial statement, but never asked what time Mr. Druksel had last seen Lisa Berry at Mr. Druksel's deposition and never called him at the trial.

c. Detective McClellan tape recorded Linda Nieves' statement on October 23, 1976. A transcript was provided to defense counsel and was in his file. Ms. Nieves was neither deposed nor called by the defense at the trial. Ms. Nieves, like Mr. Druksel, stated that she saw Lisa Berry at the bowling alley at 11:45 p.m. Her statement, pled in the 3.850 motion, included the following account:

> Q. Linda, how about telling me briefly what you know about the incident as it occurred this evening?
> A. About quarter to twelve her daughter came into the restaurant, stopped just a couple feet in toward the door and stopped, looked around, walked back out, it was getting pretty slow in there and I just happened to check the clock to see what time it was and it was exactly a quarter to twelve. I looked out to see if the bowlers were finished or almost finished because I wanted to start packing up because it was slow and I figured I'd be ready when it was time to close. Approximately 10-15 minutes at the tops her momma came in and asked me if I seen Lisa and I told her a few minutes ago she was at the door and right after that everybody started searching because we couldn't find her.

d. Faye Grebowski also provided a recorded statement to Detective McClellan on October 23, 1976. She saw Lisa as late as 11:00 on the evening of the offense. Her statement, pled in the 3.850 motion, included the following:

> Q. OK, now the little girl was there at 10:15, right?
> A. Right.
> Q. All right. When he left, did Lisa stay in the group or did she leave?
> A. No, she left.
> Q. You don't know where she went?
> A. No, I don't.
> Q. What time was it when she came back with the little

boy?
A. I would say it was about 11:00.

Defense counsel had her statement, but Ms. Grebowski was also not called at the trial.

e. Robert Autrey was also at the bowling alley on the night of the offense. He provided a sworn statement to Detective McClellan at 3 p.m. on October 23, 1976. This statement was recorded. It was also provided to counsel prior to trial. Mr. Autrey was not deposed or called at trial. In Mr. Autrey's sworn statement, pled in the 3.850 motion, he related:

> I take my kids there on Friday nights. And often we were finished bowling we were all just sitting around, this was about 20 minutes after 11, approximately, and I recalled seeing the girl at around that time, and one of our partners, you know those kids hang on Walt who is a boy that bowls with Barbara, like they were his grandkids. And we didn't think anything more about it and we were still setting [sic] there and guess it was about 10 minutes to 12, somewhere in that neighborhood that they called the girl and discovered that she was missing and started looking for her and we searched the entire bowling alley from one end to the other. I mean we didn't find her or anything. We went out and searched outside. Thought perhaps she might have gone outside.
>
> Q. Let me interrupt you for a second, Robert, when you make reference to "that girl" or "the girl," you are referring to Lisa Lyn Berry, am I correct?
>
> A. Yes, Lisa, Lisa Berry.

Mr. Autrey would have so testified at trial if he had been called.

f. John Hass was yet another witness who provided a recorded statement that Lisa was at the bowling alley well after Mr. Rose had left. His statement was also provided to defense counsel. The statement was taken and recorded by Detective Page on October 23, 1976, at 6 p.m., and, as pled in the 3.850 motion, provided the following exonerating information which the jury never heard:

> Q. At what time do you remember last seeing Lisa?
> A. She was still in the circle after Jim left and I last remember seeing her approximately 10:30 p.m.
>
> * * *
>
> Q. When Jim left at 10:05 p.m., Lisa was still there?
> A. Yes.

Mr. Hass was later deposed by Mr. Makemson, an attorney filling in for Mr. Bush. At the deposition Mr. Hass reiterated his recollection of seeing Lisa as late as 10:30 p.m., and that she was still there after Mr. Rose had left the bowling alley. Mr. Hass' account was not heard at the trial; the defense did not call him as a witness.

There should be no question about the need for an evidentiary hearing on these allegations of fact. They were specifically pled in the 3.850 motion. The State in its response conceded that an evidentiary hearing was needed for these claims of fact to be resolved (R. 117). This Court should direct that the trial court conduct the hearing which a proper resolution of these issues requires and which the parties long ago agreed is necessary in this case.

(iii) The "jealous boyfriend" motive.

Regarding this aspect of Mr. Rose's claim of ineffective assistance of counsel the State again agreed before the trial court "that in order to determine the validity of [the claim] it is necessary to hold an evidentiary hearing" (R. 117, Response to Motion to Vacate). Again, as to this aspect of the claim, there should be no question that a hearing was needed for proper resolution. The trial court erred in declining to allow a hearing.

The State tried to show that Mr. Rose killed Lisa Berry because he thought her mother was romantically involved with Walter Isler, the sponsor of the bowling team. The State's theory was that Mr. Rose became enraged when Lisa asked Isler if he was "going to breakfast" with her mother.[1] The State's

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[1]The State's theory at the first trial, which has resulted in a hung jury, was not this; rather, then, the State argued some kind of sex motive involving Lisa. The trial judge viewed this argument as so outrageous and unsupportable that he admonished the State not to use it at the retrial (T. 632). It was at the retrial that the State then presented the "jealous boyfriend" motive theory. This theory was then used by the State again (including the reading of transcripts from the retrial) at the second penalty

presentation of this theory was intended to convey to the jury that the breakfast comment meant Mr. Isler would be staying with Barbara Berry that night, and have breakfast the following morning. The actual statements made pretrial by the witnesses, however, demonstrate that the breakfast comment was much more innocuous than that represented by the State, and was certainly not evidence of motive. However, defense counsel, without a tactic, failed to use readily available evidence to show this. As pled in the 3.850 motion, the evidence included the following:

a. The State asserted that Mr. Rose became upset and angry when he heard the "breakfast" comment. Mr. Isler's recorded statement was taken on October 23, 1976, by Detective McClellan. Trial counsel had it. About the "breakfast" comment, the witness said, "[w]ell, [Mr. Rose] didn't get upset or anything". Mr. Isler further explained in this statement that he and Ms. Berry were not dating. Mr. Isler also stated in his deposition that "there was nothing unusual about his [Mr. Rose's] attitude [that night]," and that "nothing happened." This information was quite significant, given the State's motive theory, yet was not presented by defense counsel.

b. More importantly, the breakfast remark was misrepresented by the State, but the inaccuracies were not corrected by defense counsel, although he had the evidence which would have shown the jury that the facts were not as the State represented them. A number of witnesses testified pretrial about the remark. The witnesses unequivocally and clearly stated that Lisa had asked if they <u>all</u> were going to breakfast immediately after they finished bowling that evening. She was not suggesting anything along the lines of something

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...Continued...

phase ordered after this Court's remand for resentencing. This theory, which could and should have been shown to be factually inaccurate by defense counsel, thus infected the trial, sentencing, and resentencing proceedings.

going on between Ms. Berry and Mr. Isler. Mr. Isler himself told the detective in his recorded statement that there was nothing between him and Barbara Berry, and explained in that same statement that the customary practice was to "finish bowling; we go out to breakfast. She takes her car, I take my car, she goes home and I go home and that's it." John Hass also testified at deposition that "we usually go out every night after bowling to Denny's and eat breakfast, and that's all" (Hass Deposition at 5).

Every other witness who actually heard the statement stated that breakfast by the group would immediately follow bowling, as was the usual practice. Barbara Berry herself stated during deposition that she did not hear the statement, but that "Walt and Faye had told me that Lisa had asked Walt if we were going out to breakfast after bowling" (Berry Deposition at 13). Faye Grebowski said that the statement was actually, "Walt, are we going out to Denny's to eat when we get through bowling?" (Grebowski Statement of 10-23-76 at 1). She swore that this statement was only a reference to "breakfast after bowling" in her deposition as well (Grebowski deposition, p. 8).

Trial counsel had this information and easily could have provided to the jury, through the key witnesses, the accurate account of what the statement that night was all about. This evidence would have undermined the motive theory which was central to the State's presentation in this circumstantial case. Mr. Rose's motion to vacate pled that there was no tactic behind counsel's failure in this regard. The State agreed that an evidentiary hearing was necessary to resolve this aspect of the ineffective assistance of counsel claim (R. 117). The trial court erred in failing to allow evidentiary resolution.

(iv) Other evidence of innocence

Before the trial court, the State responded to this aspect of Mr. Rose's

claim by "agree[ing] that in order to determine the validity [of the claim] it is necessary to hold an evidentiary hearing" (R. 117, Response to Motion to Vacate). The 3.850 motion pled significant facts on this aspect of the claim, which are summarized immediately below. Here, as well, the trial court erred in declining to allow evidentiary resolution.

Compelling evidence was available to support the defense trial theory that two young men with a white van had committed the offense, yet this evidence was not presented by defense counsel. Jim Hughes, for example, in his deposition testified that he knew Mr. Rose's van, had previously seen it, and recalled that it had "monkey decals" on the windows (Hughes Deposition pp. 12-13). Those decals, he testified, were not on the windows of the white van he saw on the night of the offense (Hughes deposition, p. 13). Mr Hughes testified at trial and the State elicited that he saw a white van that night. Defense counsel did not use the evidence in his possession (from Hughes himself) demonstrating that the white van at issue was likely not Mr. Rose's.

Margaret Cobb also provided a recorded statement pretrial in which she stated that she had seen a white van parked near the area in which the victim's body was found. She stated that she saw this white van between 11:55 p.m. and 12:05 a.m. on the night of Lisa Berry's death (Cobb Statement, p. 1), a time at which no one disputes that Mr. Rose was at the bowling alley in the presence of others. The profound importance of evidence such as that related by Hughes and Cobb is obvious. Mr. Rose pled that, without a tactic, defense counsel failed to produce it. An evidentiary hearing was and is necessary.

(v) Other unreasonable errors of trial counsel

There were numerous other omissions by trial counsel that resulted in prejudice to Mr. Rose. Pled in the Rule 3.850 motion, these aspects of Mr. Rose's claim can be summarized as follows:

a. Trial counsel failed to object to the removal of jurors who were improperly excused under Witherspoon and its progeny and failed to attempt to rehabilitate these potential jurors (Robert Kendrick (T. 1591, 1605); Nellie Mills (T. 1662-3); Harley Peoples (T. 1662-4).)

b. Counsel failed to obtain an independent expert to examine the single crushed hair of Lisa Berry and testify concerning the fact that evidence that one hair was crushed meant nothing. Had trial counsel contacted an expert, testimony would have demonstrated that no reliable conclusion could be drawn from the fact the single hair was crushed, because of the Florida Department of Law Enforcement (FDLE) expert's failure to follow proper and well-established protocol: the hairs remaining on the victim's head had to be analyzed to determine if they were also crushed. The FDLE expert did not do that. Mr. Rose pled in his motion to vacate that he could establish the inaccuracies in the prosecutor's presentation regarding the crushed hair and that trial counsel should have done the same. The State responded that the State's presentation as to the crushed hair was not harmful to Mr. Rose (R. 118). In this circumstantial case, it was. An evidentiary hearing was needed to properly resolve the claim.

c. Counsel failed to move for a mistrial when the prosecutor during voir dire referred to witnesses', and hence to Mr. Rose's, prior convictions (T. 1633). A motion for mistrial would have resulted in a mistrial, or properly preserved the issue for appellate review.

d. Defense counsel failed to object to the prosecutor's improper suggestion to the jury that to "fulfill your obligation," Mr. Rose had to be convicted (T. 660).

e. Counsel failed to renew the defense objection to Dr. Fatteh's speculative conclusion that the death of the victim "could have been" caused by a hammer (T. 687).

f. Counsel failed to object to the prosecutor's improper elicitation of testimony from Barbara Berry that "she had three children" (T. 771), in an attempt to elicit sympathy.

g. Counsel failed to object to the trial court's extensive inquiry into the minor Tracy Berry's ability to tell the truth in the jury's presence and the implication by the trial court and State to the jury that what she said should be believed (T. 795).

h. Trial counsel failed to object to the prosecutor's repeated, improper buttressing of the State's case during closing argument by non-record and alleged assertions of personal knowledge that the State could have, but did not, manufacture evidence (T. 1214-1222).

i. Trial counsel failed to object to the prosecutor's misleading of the jury by understating the burden the State had to meet for the jury to find first-degree felony-murder -- that all that was necessary to prove the underlying "kidnapping" felony was a showing of lack of consent for Lisa Berry to be with Jim Rose by Lisa Berry's mother (T. 1228-9).

j. Counsel failed to make a record objection to the trial court's allowing the jury to separate during deliberation.

k. Counsel failed to make a record objection to the Court's colloquy with jurors outside his presence and outside the presence of Mr. Rose.

l. Trial counsel failed to object to the prosecutor's unlawful reference during closing argument to Mr. Rose's trial testimony as evidence of his guilt in violation of the fifth, sixth, and fourteenth Amendments, when his testimony was offered solely on the issue of the voluntariness of his statements (T. 1217-18) ("He can't even keep his story straight.").

m. Counsel failed to object to the admissibility of statements given while in jail (to Van Sant) as the unlawful product of a pretextual arrest.

(The arrest was for providing a false address to a police officer.)

In short, proper and timely objection would have preserved errors for appellate review, or caused their correction. Mr. Rose pled that trial counsel was ineffective in failing to object.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Chambers v. Armontrout, 907 F.2d 825, (8th Cir. 1990)(in banc); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).[2]

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance

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[2]Counsel have been found to be prejudicially ineffective for failing to impeach key State witnesses with available evidence, Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976), or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963; and for failing to interview witnesses who may have provided evidence in support of a partial defense, Chambers v. Armontrout, 907 F.2d at 828-30.

in his or her performance in other portions of the trial. 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 warrant 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"); Strickland v. Washington; Kimmelman v. Morrison.

In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court explained that the purpose of the right to counsel was to assure a fair adversarial testing:

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. as Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

466 U.S. at 656-57 (footnotes omitted)(emphasis added). See Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989).

Mr. Rose was deprived of his right to a fair adversarial testing of his guilt or innocence. Significant evidence and accounts never made it to the jury because of trial counsel's unreasonable omissions and errors. Prejudice

is apparent: had this evidence been presented, there is more than a reasonable probability of a different outcome.

Before the trial court, the State agreed to an evidentiary hearing on most facets of the ineffective assistance of counsel claim. Mr. Rose pled, with specificity, the errors and omissions of counsel and that he was prejudiced, and he requested evidentiary resolution. The State was correct that an evidentiary hearing was necessary, and Mr. Rose urges that this Court grant the hearing which the parties long ago agreed this case needs.

B. THE PENALTY PHASE

Mr. Rose pled in the motion to vacate and submits herein that counsel rendered ineffective assistance at capital sentencing because he failed to investigate, develop, and present available mitigating evidence and failed to develop and present statutory and nonstatutory mental health mitigation. This is a classic Rule 3.850 evidentiary claim which, as this Court's precedents make clear, requires an evidentiary hearing for proper resolution. See Argument I(A), supra (citing and discussing Heiney, Mills, Hoffman, inter alia). The State responded by arguing that mitigation was not relevant in this case because of the aggravating factors. Evidence such as that pled in the motion to vacate (including mental health evidence), however, would not only have established mitigation, but also would have rebutted and diminished the weight of the aggravating factors before the jury. Moreover, the State's argument, which made its way into the trial court's order (See Section I(B), supra), was in error under the eighth amendment. In arguing that because of the aggravating factors "no amount of ... mitigating evidence could change the result," the State presented an argument which "in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances." Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1987). As Knight noted, "[n]o authority has been

furnished for this proposition and it seems doubtful that any exitst." Id. Mitigating evidence which would have established a reasonable basis for a life verdict was available in this case, Hall v. State, 541 So. 2d 1125 (Fla. 1989), but was not developed and presented by trial counsel. Mr. Rose pled that this was ineffective assistance. An evidentiary hearing was and is necessary for the claim to be properly resolved.

When Mr. Rose's death sentence was remanded for a new penalty phase hearing, the trial court appointed new counsel, Michael Entin, to represent Mr. Rose.[3] Mr. Entin was appointed on April 18, 1983 (S. 30). He filed a motion to continue because he was not prepared and argued the motion on May 11, 1983 (S. 29). During the hearing, Mr. Entin accurately told the Court that the file was voluminous (S. 30), and that he had not yet even finished reading it. He also noted that there were a "number of issues" he needed to raise and discussed his unpreparedness and the complexity of the case (S. 33).

The new date for the penalty hearing indicated by the court was not suitable for Mr. Entin, he explained, because it was to come a short time after his upcoming marriage and honeymoon (S. 34), but the trial court refused to reset the date. As it happened, Mr. Entin was no more prepared at sentencing than he was at the time of the hearing on the motion to continue. Little, if anything, had been done to investigate and prepare mitigating evidence (including mental health mitigation). Counsel was also somewhat lost and confused -- he had not previously represented a defendant at the penalty phase of a capital murder trial (S. 825).

When the penalty phase trial date arrived, Mr. Entin again asked for a continuance, and discussed the fact that he had failed to adequately

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[3]Mr. Rose asked that Louis Carres, his appellate counsel, be appointed because of his familiarity with the case, but the Court refused.

investigate mitigating and other evidence (S 51-54). As defense counsel further explained,

> [i]t took me five weeks to read the case once or twice to get together the gist of what happened and I have diligently the last week and a half, since I've located this Judy Bunker and talked to Dr. Wright, tried to find evidence that existed from the first time this thing went around and I just can't find it yet.

(S. 54). The penalty phase began minutes after counsel explained that he was not prepared. As the 3.850 motion pled, Louis Carres, the appellate attorney, would have testifed that he tried to assist resentencing counsel but that counsel was woefully unprepared -- there had been almost no investigation into mitigating evidence, and resentencing counsel had little idea of what he was supposed to do at a capital sentencing proceeding.

Mr. Rose's 3.850 motion specifically pled that the testimony of Mr. Carres and other witnesses would have demonstrated that Mr. Entin did not know capital sentencing law and did not understand Florida law concerning aggravating and mitigating circumstances. Mr. Entin had never before tried the penalty phase of a capital case; he was not sufficiently experienced to handle this trial on his own. The situation was so bad that, at one point, Mr. Carres had to show Mr. Entin where the capital sentencing statute discussed aggravating circumstances.

Further, Mr. Rose's motion pled that personal matters were interfering with Mr. Entin's ability and time to prepare for the penalty trial. Mr. Entin's wedding was on June 7; he then took his planned honeymoon -- a trip to Europe -- which lasted several weeks. He did nothing to contact witnesses and prepare during this time period, although he himself acknowledged shortly before this that he had not yet even read the whole transcript, and had not read depositions or other extra-record evidence. During this time, Mr. Entin was also moving his law offices. Mr. Rose proffered that witnesses would also

testify at a hearing concerning Mr. Entin's serious degree of disorganization during this time period. All of this affected his performance in Mr. Rose's case.

In short, Mr. Entin was thoroughly unprepared for the penalty trial. He did not meet with Mr. Rose's mother until shortly before the penalty trial; he had undertaken no investigation into Mr. Rose's educational, medical, psychological, or social background; he had not contacted several important witnesses Mr. Carres had told him about; he had not developed mental health mitigation. Mr. Entin requested a continuance at sentencing because he was unprepared for the penalty phase. The request was denied. Counsel's inexperience, lack of preparation and investigation, and personal factors rendered the assistance he provided to Mr. Rose quite ineffective.

One obvious source of mitigation in this case was Mr. Rose's capacity for rehabilitation and adaptability to a prison setting. Mr. Carres tried to explain the significance of this type of mitigating evidence to Mr. Entin. Mr. Entin, because of the circumstances described above, did nothing about it. As proffered in the motion to vacate, Mr. Entin <u>never obtained</u> Mr. Rose's Department of Corrections (DOC) records. Those files contained helpful information, and Mr. Entin stated on the recond that he needed to get them (S. 40), yet he neither got them nor did anything else to develop and present the available mitigating evidence concerning Mr. Rose's adjustment to prison life.

The DOC files contained a wealth of mitigating information, including facts such as the following, pled in the motion to vacate:

- Reports beginning August 1977 showed no disciplinary reports and that Mr. Rose's inmate adjustment was good;

- A May 17, 1977 DC report shows that Mr. Rose's record from his previous prison time was good, that he was reading the Bible occasionally, and that his classification team thought he would make a satisfactory adjustment and not be any problem at the institution;

- A July 7, 1978 report reflects Mr. Rose's classification team

"feels inmate Rose will continue to be a well behaved inmate and not experience any problems ...";

- D.C. Psychological reports show a low I.Q. and reading level of grade 5-8;

- "Inmate Rose had a good attitude and did not have any requests" (6-5-78);

- By July 15, 1980, Mr. Rose was noted by his classification team to be the "recipient of satisfactory quarters reports from R-Wing officers, in addition [he] has maintained a clear disciplinary report record ...." He "appeared before the classification team in a polite and mature manner, was receptive to this interview." The team noted Mr. Rose was not a custody problem;

- On July 17, 1981, Mr. Rose received his next yearly progress review. The team said, "Wing officers stated that Inmate Rose has caused no problems and review of his disciplinary report record indicates he has maintained a clear disciplinary report record since March of 1979";

- The 1983 Progress Review explained that "Inmate Rose has made a satisfactory adjustment at this facility during this reporting period."

Correctional officers and mental health experts (including individuals who evaluated Mr. Rose at the prison) were available to testify about James Rose's positive adjustment, amenability to incarceration and rehabilitation, and lack of future dangerousness; about the fact that he did not cause problems for other inmates and officers; and about the absence of any violent conduct while incarcerated. These individuals, as well as mental health experts, could also have testified about Mr. Rose's diminished intellectual functioning and mental health difficulties, difficulties which he had taken steps to overcome while incarcerated.

Corrections psychiatric reports and reports introduced at the first penalty phase (but not at resentencing) were also available to defense counsel. Counsel never retained an expert to evaluate mental health mitigation, although he himself believes he should have done so. Statutory and nonstatutory mental health mitigation was available in this case, the indicia calling for an investigation were there, counsel was told by Mr.

Carres of the significance of such evidence, and counsel himself believed that he should do something about it, but nothing was done to develop and present mental health mitigation.

Psychiatric reports from Mr. Rose's incarceration indicated that Mr. Rose was "mentally ill", that his intelligence was impaired, that he was an alchoholic, and that he suffered from a schizoid personality disorder. Earlier reports also spoke to a marked difference between Mr. Rose's functioning and intelligence in all facets except for verbal communication -- a disparity which alerts competent psychologists to the potential presence of organic brain deficiencies. No evidence concerning brain damage or other psychological testimony was developed by defense counsel, who admittedly was not prepared at sentencing.

Mr. Entin failed to properly review Mr. Rose's history, which would have revealed statutory and nonstatutory mitigation and would have provided a needed, reliable basis for expert mental health evaluations. Significant mitigating information about Mr. Rose was available -- from previous psychological reports, DOC files and from Mr. Rose and his family. Counsel did not investigate and develop it.[4]

The motion to vacate also pled that had counsel conducted a reasonable investigation, the jury and court would have learned additional mitigating facts such as the following:

1) As a child, Jim Rose was subjected to severe beatings and other acts of physical and emotional abuse by his stepfather.

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[4]Mr. Entin's failure to obtain Mr. Rose's corrections file also resulted in his inadvertently opening the door to the fact that Mr. Rose was arrested for providing false information to a police officer, and that he had committed a violation of parole (S. 707-13). Counsel was ignorant of the violation, but all the information he needed to know was available in Mr. Rose's DOC file. The witness' prejudicial reference to the violation would have otherwise been inadmissible but for counsel's lack of preparation.

2) When Jim Rose was young, he was sexually battered by an insurance salesman and by his aunt.

3) Mr. Rose suffered head injuries and was emotionally troubled by family circumstances.

4) Mr. Rose had a medically documented history of blackouts.

5) Mr. Rose had a history of alcoholism, and was placed in a clinic for a period of time for treatment.

6) Mr. Rose was commended by a local state attorney's office for assisting in apprehending an armed robber at risk to his own life.

Mr. Rose was evaluated in 1976 by Drs. Eichert and Taubel on competency and sanity. However, counsel did not interview either doctor, and unreasonably failed to produce either of them to testify to the jury and judge about mitigation. More importantly, counsel did not request an updated examination, though the reports were nearly seven years old. Neither did he advise the psychologist whose reports he used (or any psychologist) of Mr. Rose's prior diagnoses, or of his background and history -- since he failed to investigate, he did not know of it himself -- and he failed to ask any mental health expert to conduct diagnostic testing. Indeed, counsel never asked that any expert evaluate the mental health statutory and nonstatutory mitigating circumstances which existed in this case. See State v. Michael, 530 So. 2d 929, 930 (Fla. 1988).

Counsel, unprepared, could do no more than submit the old reports. Counsel's deficiencies were thoroughly exploited by the prosecutor:

> On December 16th, Dr. Eichert and Taubel examined Jim Rose at the same time. At the same time. Saw him one time, they administered no psychological tests, nothing of an objective nature, or at least from their records it doesn't so indicate, and being men who can look into the mind of another human being and tell us all about in an hour or two-hour examination, they issued these reports.

(S. 845). Plenty of statutory and nonstatutory mental health evidence was available in this case. What counsel did about it did more harm than good.

Mr. Entin's ignorance of capital sentencing law and inadequate

investigation and preparation led to a multitude of errors at the penalty phase of trial. Counsel had not only failed to investigate the facts, but he was also unprepared on the law and thus failed to object numerous times to constitutional error. During his opening statement at the penalty phase, the prosecutor told the jury,

> The State does not feel necessarily it can prove that the act was cold, calculated, premeditated without legal or moral justification because only one person knows for sure exactly how this crime was committed and that's the accused.
>
> Thank you.

(R. 247)(emphasis supplied). There was no objection by defense counsel, and no motion for mistrial, even though comments on silence are constitutional error, and when objected to, reversible error. In Florida, comments on silence were per se reversible error at the time of the trial and appeal of this case. Had counsel objected, the error would have been corrected, or reversal would have resulted. This issue was in fact raised on appeal, but this Court held that it would not reach it because defense counsel failed to object.

While eighth amendment law is clear that mental health evidence cannot be used in aggravation, and Florida law is clear that aggravation is strictly limited to the factors listed in the statute, defense counsel did not object to the prosecutor's repeated use of information in the psychological reports as reasons for imposing death, and of mitigating circumstances as a springboard for irrelevant, inflammatory comments:

> Dr. Taubel ... says that he doesn't believe Jim Rose is a child molester. Well, maybe not, but I submit that the evidence shows that he's a child killer.

(S. 845). The prosecutor misrepresented (with personal opinion) the doctors' diagnoses (S. 846), used the fact that Mr. Rose was competent as a basis for aggravation, and argued an improper standard as to the jury's consideration of

mental health mitigating evidence (S. 846-48). The prosecutor used the psychological reports as a basis for nonstatutory aggravation -- that Mr. Rose was jealous and angry and took it out on Lisa Berry. (See also Argument II (A)(iii), supra discussing other aspects of this issue.)

The prosecutor's reference to the "breakfast" remark during the penalty phase of trial was also improper because it intentionally misled the jury as to the meaning of the remark and what was actually said, as described in Argument II(A)(iii), supra, but defense counsel had not prepared and thus did not challenge the prosecutor's argument -- he had not read the pretrial discovery.

Contrary to the eighth amendment and Florida law, the prosecutor distorted the Lockett requirement that any aspect of the defendant's character or record or any circumstances of the offense may be considered in mitigation (S. 849), and used such circumstances as aggravation. Defense counsel, unprepared, failed to object.

Under Florida law, the defense may waive the mitigating circumstance of no prior criminal history. Mr. Entin unreasonably failed to waive that circumstance, and as a result, the State was permitted to introduce and refer to prejudicial nonstatutory aggravating circumstances relating to Mr. Rose's record. Mr. Entin knew before the penalty phase that the State would rely on Mr. Rose's prior guilty plea to an attempted sexual battery charge as an aggravating circumstance. He was told by Mr. Carres, the appellate attorney, that the facts of the prior crime could be explained by the defense as mitigating. While questioning Floyd Templeton, counsel then asked:

> Q. Did there come a time when he talked to you about this supposed rape, this alleged assault that took place with this girl?
> A. You mean the prior one?
> Q. Yeah, that he was on parole for.
> A. Yes, he talked to me about it.
> Q. What did he tell you?

(S. 723). A relevancy objection was sustained (S. 723), then seconds later sustained again (S. 724), over defense argument that "there's some mitigating circumstances to this particular crime --" (S. 724). The court noted the objection, but told Mr. Entin to "appeal me." Defense counsel failed, however, to proffer the testimony he wished to present, and thus failed to properly preserve the issue for appeal.

Through either Mr. Templeton or other witnesses and documentation, counsel could have mitigated the facts of the prior crime by showing that Mr. Rose knew the victim and had been having an affair with her over an extended period of time. He had been in the victim's house on several occasions, and they had had consensual sexual relations. The victim had in fact advised Mr. Rose that her husband would not be in town the evening of the offense. He went to her house to meet her, and she changed her mind. Mr. Rose did not raise an invitation or consent issue at the time of his plea because of his desire to protect the victim -- he took a fall for her. Such evidence would have been substantial in the eyes of the jury, had it been allowed. Counsel should have proffered it.

Mr. Entin was also deficient with regard to Dr. Wright. Mr. Entin had only met with Dr. Wright for a short period, was unprepared, and had a limited knowledge of the case and capital sentencing law. At the penalty trial, he questioned Dr. Wright on whether it was his opinion that Lisa Berry died of head injuries -- which was undisputed. The questions showed how confused he was about the very reason Mr. Carres advised him to call Dr. Wright, the purpose of his testimony, and about the penalty phase theory itself. Dr. Wright was prepared to testify in detail why the head injuries were caused by an <u>accident</u> -- they resulted from Lisa's fall to the ground after being hit by a moving object. Such substantial evidence going to the heart of the charge

went unpresented because of Mr. Entin's unreasonable performance.

Mr. Entin could also have challenged the aggravating circumstance that Mr. Rose was on parole at the time of the crime. Department of Corrections parole records and records from state agencies demonstrate that Mr. Rose's statutory sentence (including gain time) ended before the offense occurred in this case. Counsel could and should have argued that the aggravating circumstance should not apply in this circumstance.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [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 and its companion cases, 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. Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these rudimentary constitutional standards.

In O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), this Court examined allegations that trial counsel ineffectively failed to investigate, develop, and mitigating evidence. 461 So. 2d at 1355. The Court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and remanded the case for an evidentiary hearing. The allegations presented herein are similarly sufficient to warrant Rule 3.850 relief and also require an pevidentiary hearing. See Mills v. Dugger, 559 So. 2d 578 (Fla. 1990); Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990). Mr. Rose's court-appointed counsel failed in his duty to investigate and prepare available mitigation. There was a wealth of significant mitigating evidence which was available and which should have been presented. However, counsel failed to adequately investigate. Mr. Rose was thus denied an individualized and reliable capital sentencing decision. His sentence of death is the prejudice resulting from counsel's unreasonable omissions. See Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

What emerged from defense counsel's lack of preparation and investigation was a defense case at penalty phase (including the defense closing argument) lacking in any cohesive or persuasive theory for life, although a great deal of significant mitigation was available. This claim necessitated an evidentiary hearing for proper resolution, as this Court's precedents demonstrate. Heiney; O'Callaghan; Hoffman. No files and records conclusively showing that the claim is rebutted exist and none were attached to the trial court's order. Hoffman. The failure of the trial court to allow an evidentiary hearing was error. The serious and substantial issues pled concerning counsel's deficiencies should have been resolved at an evidentiary hearing. Mr. Rose urges that this Honorable Court allow one.

ARGUMENT III

THE MANNER IN WHICH LISA BERRY WAS KILLED WAS MISREPRESENTED AT TRIAL, EITHER BECAUSE OF AN INCOMPETENT MEDICAL ASSESSMENT, THE STATE'S USE OF FALSE OR MISLEADING TESTIMONY, OR BOTH, RENDERING THE CONVICTIONS AND DEATH SENTENCE VIOLATIVE OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The case against Mr. Rose was circumstantial. Mr. Rose submitted in the motion to vacate that the State manipulated and misrepresented the facts and that an evidentiary hearing was necessary to resolve this claim. The trial court erred in declining to allow evidentiary resolution.

The State made much of finding a hammer in the canal in which the victim's body was found (T. 1057), and emphasized that Mr. Rose, a painter by trade, had no hammer in his van when it was searched. The jury and court heard that Mr. Rose was questioned about a hammer (T. 1057). Also, two witnesses were called by the State in an attempt to link Mr. Rose to the hammer by comparison of paint residue on the hammer with paint samples from Mr. Rose's van (T. 1117-1331; 1142-45). The State argued that Lisa Berry died because of three blows to the head in opening (T. 649) and closing (T. 1219), and that it was "reasonable to assume the hammer was thrown that night" (T. 12-13).

Linking the hammer to Mr. Rose would have been meaningless without showing that it was used in the offense. The State's medical examiner, Abdulleh Fatteh, testified that the cause of Lisa Berry's death was severe head injuries (T. 677). Those injuries, he testified, were caused by blunt force (T. 678). When the State first asked what type of blunt instrument caused Lisa's death, the defense objection to that testimony was sustained (T. 683). Dr. Fatteh then described the disfiguration of the body by post-mortem causes (T. 685), and again described the instrument used as blunt and with no sharp edge (T. 686). In response to the State's continued questions, Dr. Fatteh testified the instrument used "could be a hammer" (T. 686). The

defense's objection this time was overruled, and the State proceeded to develop this theory, later presented in summation.

On cross-examination, Dr. Fatteh continued with his hammer theory. He said that even if Lisa was hit by a hammer, there would not necessarily be a fracture to the skull (T. 699). Dr. Fatteh's testimony about the hammer and its use by the State in this case, as the 3.850 motion pled, involved the same improper use of forensic evidence by the State as that upon which relief was granted, after an evidentiary hearing, in Troedel v. Wainwright, 667 F.Supp. 1456 (S.D. Fla. 1986), affirmed 828 F.2d 670 (11th Cir. 1987).[5] An evidentiary hearing was also necessary to resolve the claim in Mr. Rose's case.

The evidence the State developed through Dr. Fatteh was misleading and inaccurate. Dr. Joseph H. Davis, an eminently qualified medical examiner, was provided all the materials Dr. Fatteh had at his disposal in making an assessment on the manner of death. He was appointed early on pursuant to a defense request, and his deposition was taken by the State on March 9, 1977. He related that the evidence was unequivocal that a hammer could not have been the instrument that killed Lisa Berry and that the nature of the injuries makes it clear that death occurred as the result of Ms. Berry's head hitting a broad flat surface. Under the State's questioning, Dr. Davis further testified:

> It's possible that there could have been a small defect in the skin, a very small one, which became a focus of attention by the maggots and allowed the enzymatic activity to digest the skin away and thus destroy the features of injury, but I'm talking here only

---

[5]In Argument II(A)(i), Mr. Rose also discussed the evidence which counsel had available to him which would have undermined the State's presentation but which counsel ineffectively failed to use. The fact that the defense can rebut the State's theory, however, does not excuse the use of misleading evidence.

of superficial injury. I'm not talking about a deep or severe blow type of injury.
Q. The blunt force that you talk about, would that be the striking of that area with a bare foot?
A. I would hesitate to equate that with a foot, even a shod foot, let alone a bare foot.
Q. How about a shod foot being a shoed foot?
A. That's correct.
Q. Would it be a foot with a shoe on it?
A. I doubt it.
Q. How about a fist?
A. Only if it were a very ineffectual, a weak blow.
Q. How about a hammer?
A. It does not sound feasible with a hammer at all -- unless by some chance the hammer were very gently applied.

In that particular part of the head, a blow with a hammer would cause an immediate punch right through the skull. That is some of the thinnest bone in the skull, and a real swing with a hammer would actually drive the hammer completely into the head, and that would be readily apparent in the photographs and readily apparent in the autopsy, which it is not.

Q. Would any of those objects that I indicated be capable of -- if it was a laceration: assuming that it was laceration -- inflicting the injury, if the force of the blow was not direct?
A. I'm not sure I understand what you mean by direct?
Q. You are talking about a solid blow, on target to that area, with the full force of the person that was striking the child; is that right?
A. Yes.
Q. You say, that it's not that full force, but is there a lesser degree of full force that either the foot, the hand, or a hammer could produce that: Let's say a glancing blow or one that was stopped in motion?
A. Well, yes. I mean you could reach out and just take the tip of the finger and just barely scratch the skin, produce a little, tiny abrasion, and that would be from a hand, but I would not equate that with a blow knowingly. It would serve as a situs for attracting maggots and then produce this type of lesion we see in the photograph, which is not obtained with blood and does not appear to be deep. It appears to be only right on the surface, involving the outer layer, the superficial portion, to wit: the skin.
Q. So that the force of the blow, if it was severe you would rule it out, but then as it gets further back from being a severe blow, then it would bring these things into --
A. Yes, one to the right of the mid line and one to the left, the left being larger than the one in the right, according to the measurements furnished in the autopsy.
Q. Is there any questionable other area of the head or body that you determined to be injured as a result of blunt force?
A. Not that I could see. When I talk about -- I'm talking about the place where force was applied, and I'm not indicating any significance as far as damage to the skull or the contents of the skull in reference to this lesion in the right temple.
Q. That was referred to before?

A. Yes.
Q. Give me that answer again; I'm sorry.
A. I would not equate any significance to that in terms of damage to the underlying skull or the brain.
Q. So you are saying that the lesion we talked about on the side, on the right side of the head, you are saying it is your opinion it was not caused by a result of a blunt force being applied?
A. No, I'm saying that if it were -- put the other way -- if it were due to some injury in part, applied in life, it certainly was so insignificant that it did not cause damage to the skull or the underlying brain.
Q. But what injury did you note but [sic] the two areas of blunt force to the back of the head.
A. These are characteristics of broad, flat type force, or force applied over a broad, flat area on the back of the head and it would appear twice.
Q. When you say broad, what do you mean by that?
A. Well, I'm stating that in opposition to, say, a hammer, or a pipe, or something else where force is applied in a concentrated form.

Here it appears to have been diffuse and the reason for that is that the scalp itself is not lacerated or broken, showing that whatever force was applied was sufficient to fracture the skull and yet was insufficient to impinge the scalp between the object and the bone in a narrow enough zone to actually split the scalp.

So if this child had been struck with a pipe, or some instrument that is commonly used for inflicting blows, with sufficient force to produce the damage to the base of the skull that we say in the photographs and in the diagrammatic sketch, it should have produced lacerations and there are not lacerations there.
Q. When you say a broad type instrument, would that be a wall?
A. It could be.
Q. Would it be a side of, an inside of a door of a truck or a van?
A. It could be, providing there is no sharp protruding substance.
Q. So anything of general -- just a broad area; is that right, that is hard in substance?
A. Yes.
Q. Do you have an opinion as to whether the force to the back, the blunt force to the back of the head resulted from the girl being taken and placed forcibly up against the object, or the object coming and striking her?
A. I can't be certain because the decomposition of the brain has destroyed any opportunity to analyze contusion full side, if such were visible on the brain in the first place.

The usual thing is head in motion striking a fixed object for this type of fracture.
Q. So the body going to the fixed object?
A. That is it. In my experience, that's been the most frequent circumstance associated with this pattern of injury.
Q. Did you see any injuries about the body that would be consistent with one forcibly grabbing, or holding and placing the child against the fixed object?
A. There was nothing that I could see in the photographs or in the description.

(Davis Deposition, pp. 41-44.)

Dr. Davis reviewed Dr. Fatteh's deposition testimony, which was essentially what Dr. Fatteh testified about at trial:

> A. There are two questions and answers that are cause for concern
> The question on line one pertains to a weapon, and the answer was "That the injuries were caused by a blunt force and that they should look for any blunt instrument that could explain the injuries."
> As I said before, the injury pattern on the head is not that which one sees with what is actually called a blunt force, in the sense of a hammer, a pipe, or a club, or anything of that nature.
> Q. So your difference then would be they should look not for a blunt instrument but some type of wide structure
> A. Something
> Q. As a wall, or as we went over, or a side of a car, or so; would that be the difference?
> A. Yes, with one proviso, and that is that this answer was apparently given early in the investigation, before the autopsy, at which time any type of speculation as to what might have happened to this person is even more speculative.
> Q. No problem.
>
> * * *
>
> On page twenty, the laceration in the right temple area is discussed.
> On page twenty, he just eludes [sic] to the laceration but does not say anything further. He is talking about the lesion in the temple.
> On page thirty, line twenty-four infers that, and going on to page thirty-one, infers that the bleeding, as far as vital evidence of bleeding, was on the back of the head with which I'm in agreement.
> On page thirty-five, starting at line one, and actually extending down through the entire page, there is reference to the laceration in the right temple, and then the questioning drifts away and then comes back to that area and talks about no fracture in that area, with which I would be in agreement, and then goes on: "There was separation of the bone, but no fracture."
> It says a fracture at the base of the skull, and that's all that is mentioned about that particular laceration other than in line two, where it says, "A slight hemorrhage in its under surface."
> The only thing, as I mentioned before, I could not see the hemorrhagic stain. That is very thin tissue there and I would think if there were vital bleeding in that area, it would be visible on the surface.
> For example, on the laceration, not laceration, but the contusions in the back of the head, the photographs of the back of the head, after this hair has slipped off, revealed the darkening caused by hemorrhage. It is something that is within the scalp tissue and staining it, but I can't see that on the right side.
> On page fifty-six, line fourteen again comes back to the right temple lesion, and on line nineteen, the answer is: "That particular

blow, again, was also caused by a blunt instrument."

My only disagreement would be that it does not leave enough room here for discussion as to this being mainly a postmortem artifact by maggot activity.

On page fifty-seven, a continuation of the same line of questioning. There is discussion that, "It tore up the skin in a fairly circular area, indicating that the point of impact had probably a roundish surface."

This would infer a specific instrument of a specific shape and appearance, and if a blow had been struck by such an instrument, with sufficient force to disrupt the skin and tissue, it seems unlikely that it would have not caused concomitant damage to the underlying, very thin temporal bone in that area. Some of the thinnest bone in the skull is in that portion of the skull.

The last case I had like this, the hammer was found almost completely buried in the head when this blow was struck in this area. And as far as any other area of, say, disagreement or alternative interpretation, there really isn't much else that I can see in this deposition, for the simple reason that some parts of the deposition, the questioning and the answers, were not as, not so detailed that points of departure opinion could be inferred.

Q. Typical deposition.

A. Right.

(Davis Deposition, pp. 48-51) (emphasis supplied).

The jury and court were misled by the State's presentation of Dr. Fatteh's' hammer-blow (or hand or foot) theory. Dr. Fatteh learned of this theory before his autopsy. The 3.850 motion pled that the State knew his interpretation was false but persuaded and/or allowed Dr. Fatteh to testify to it. The presentation of Dr. Fatteh's testimony, and the State's arguments based thereon, either through State manipulation or Dr. Fatteh's incompetence, deprived Mr. Rose of a fair trial.

The 3.850 motion also pled that the State knew it could manipulate Dr. Fatteh to say what the State wanted, and that information about the doctor's lack of expertise was known to the State but not provided to the defense. As the 3.850 motion discussed, evidence of this is reflected by transcripts of proceedings in other cases involving Dr. Fatteh and the same State Attorney's office that prosecuted Mr. Rose. In State v. Tucker, for example, the State attacked Dr. Fatteh's credibility and asserted that he was incompetent:

As to the cause of death; first of all, Dr. Gore, you have been

> acting in his official capacity, medical examiner, official report, public report, reasonable medical certainty. Now, on the other hand, you have Dr. Fatteh ... but I submit to you that Dr. Fatteh is a prostitute. That is a phrase that goes around for people like him. Some of you have been around and you know that. You have heard of these things called the battle of the experts and you know and I know there are people in this world who abuse the fact that they have a higher education and have occupied certain positions and for a price or whatever they come in and basically testify to whatever is called for for $125.00 an hour. Then I asked him about the circumstances of his resignation and he smiled at me and quite smugly he smiled and said, "No, I just wanted to go into private practice," and I left it at that. You consider his demeanor; if I wrongfully accused him, if he would have responded that way or if he would have responded quite angrily to my insinuation or accusation really as to why he is not the medical examiner, deputy medical examiner.
>
> Not just that, let's consider the contents of the testimony ..."

State v. Tucker, No. 80-9519, pp. 1048-9 (emphasis supplied).

As the 3.850 motion pled, the state thought the same at the time of Mr. Rose's trial, but used Dr. Fatteh's misleading testimony anyway. It is not the only time agents of the State tried to pressure Dr. Fatteh to testify favorably to their cause. Dr. Fatteh related such pressures in his resignation letter to the Medical Examiner's Office. This letter would have been produced at an evidentiary hearing, but no such hearing was allowed by the circuit court.

Years later, the State again used Dr. Fatteh's testimony at the penalty phase as a basis for arguing that Mr. Rose should be put to death. The State certainly knew that his testimony was unreliable at that time, as it did at trial.

The use of this unreliable testimony to establish the State's case and rebut the defense theory both as to guilt and penalty violated the sixth, eighth and fourteenth amendments. These facts were all pled in the 3.850 motion. Founded on Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and their progeny, this claim required an evidentiary hearing for proper resolution, as was the case with the claim in

Troedel. This Court has consistently held that evidentiary hearings are appropriate to resolve claims based on Brady and its progeny in 3.850 actions. See Squires; Gorham; Hoffman (dicussed in Argument I(A), supra). Nothing in the files and records conclusively rebutted this claim, and no such records were attached to the order denying Rule 3.850 relief. Hoffman. An evidentiary hearing should be ordered by this Honorable Court.

ARGUMENT IV

THE STATE'S KNOWING USE OF FALSE TESTIMONY CONCERNING, AND COUNSEL'S INEFFECTIVENESS IN FAILING TO CHALLENGE THE ADMISSION OF, MR. ROSE'S STATEMENTS VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Trial counsel challenged the voluntariness of all statements the police extracted from Mr. Rose during their extensive custodial questioning. After hearing the motion to suppress (T. 204-469), the trial court granted the motion in part, excluding all statements made to Sergeant LaValle as violative of Miranda. However, the trial court denied the motion as to statements made to the other officers (T. 54). On appeal, Mr. Rose challenged on fifth and sixth amendment grounds the admissibility of the statements made during the late evening and early morning hours of October 23, 1976 (Initial Brief of Appellant, pp. 37-41). This Court affirmed without discussing the statements claim. Rose v. State, 425 So. 2d 521 (1982).

Trial counsel questioned at length the officers involved in the various interrogations of Mr. Rose. But much was unknown to defense counsel. The most important aspect of what the State never disclosed to the defense involved the State's misrepresentation of the facts surrounding Mr. Rose's invocation of his right to counsel.

The police testimony at the suppression hearing revealed that Mr. Rose had asked to consult with counsel, and was permitted to contact an attorney, Don Fogan, at the outset of the 2:00 a.m. interrogation (T. 292-3). Sgt.

LaValle portrayed the call as a sham, saying he did not think Mr. Rose had actually made the call because he was on the phone "no more than five seconds" (T. 292-3). Sgt. LaValle's deposition testimony, not brought out at the suppression hearing, was that Mr. Rose told him he had asked his attorney whether to take the polygraph being offered. Following the phone call, Sgt. LaValle testified at the suppression hearing, he asked Mr. Rose "if he would mind talking to me, and he said he didn't" (T. 293).

The 3.850 motion pled that Sgt. LaValle testified falsely that after Mr. Rose spoke to Attorney Fagan, Sgt. LaValle asked for Mr. Rose's permission to talk to the attorney but Mr. Rose refused, saying the attorney was not going to represent him because Mr. Rose owed him some money. Through such testimony and its later use, the State deliberately deceived the court and defense counsel in its portrayal of Mr. Rose's phone call. The State argued that the call was a fake -- saying the call was a mere pretext to buy time. Documentary evidence obtained directly from Sheriff's Department files under the Public Records Act and proffered in the 3.850 motion demonstrates that the State, and its law enforcement officers, knew that Mr. Rose had contacted an attorney (because they checked), that Mr. Rose had invoked his right to counsel, and but for his indigency would have been represented by counsel.

Contained in trial counsel's file, and available for submission at an evidentiary hearing, are the police reports provided by the State to defense counsel. Trial counsel was provided with reports of the interrogation beginning at 2:30 a.m., completed by both LaValle and McClellan. Each page of every police report has on the upper left hand corner a control number assigned by the state attorney's office. The control numbers are assigned sequentially, and each page of each report shuold have a number in continuous numerical order. LaValle's report, dated 10-23-76, relates the following

information relevant to Mr. Rose's request for counsel at the initiation of questioning:

> the circumstances that I was sure he would give his approval for a polygraph examination. Mr. Rose then related that Mr. Fogan will not represent him and wants no part of him as he still owes him a lot of money from the last time he had gotten into trouble. Besides he had no intentions of ever taking a polygraph examination as all he was doing was buying some time. He related that he has taken polygraph tests before and .... He states that the minute he walks into a polygraph room he starts to shake.
>
> Mr. Rose was asked if he had any objections to just talking with the undersigned reference the investigation and he consented to conversation.

(LaValle Report, Control p. 6.)

Attorney Makemson, on behalf of trial counsel, deposed Sgt. LaValle on January 11, 1977. The deposition is important because it shows the information available to counsel pretrial (sworn testimony of police officers) upon which he formulated his challenges to the admissibility of the statements given by Mr. Rose.

At that deposition, Sgt. LaValle testified to the attorney conversation and implied that he did not believe Mr. Rose actually contacted an attorney:

> A. He wanted to call his attorney. I said, "Fine. Be my guest."
> Q. Did he have an attorney in mind at that time?
> A. He called a number
> Q. You don't know who it was?
> A. Later I was told by him supposedly who it was.
> Q. Who?
> A. He advised me. He was on the phone a very brief time. I wasn't listening to his conversation. He was on the phone a very brief time and he hung the phone down and he says his attorney advised him not to take a polygraph test.
> Q. Do you know who the attorney was?
> A. I didn't at that time. I said, "Who is your attorney?" and he said, "Robert Fogan." And I advised Mr. Rose that Mr. Fogan and I have known each other for years and due to that nature of this case, maybe he wasn't aware of it, because if he had nothing to do with this missing child, the easiest way we could eliminate him as a suspect would be to give him a polygraph test. This way we could concentrate our efforts elsewhere, and with his permission I would call up Mr. Fogan and speak to Bob and explain the circumstances. At that time he told me that Mr. Fogan was not going to be representing him because he had represented him one other time and he owed Mr. Fogan money, and I says, "Well, still let me talk to

him." He says, "Well, no," and as I got it down here, because it's been a while, his own statement was, "Besides he had no intention of ever taking a polygraph examination as all he was doing was buying some time."
Q. Those were his words?
A. Those were Rose's words, yes, sir.

(LaValle Deposition, pp 6-7.) At the end of the January 7th deposition, Sgt. LaValle was asked whether he talked to any other people and he said, "No, I don't think so."

Detective McClellan was deposed about two weeks later, on January 20, 1977. Det. McClellan described his involvement in the investigation, then was specifically questioned about Mr. Rose's phone call:

Q. Did you recommend that he or did you have any conversations with any other detectives and recommend he be interrogated any further?
A. Throughout the next day, Sergeant LaValle interrogated him with the possibility of him taking the polygraph, which he agreed to take. By the way, once we got back to the station he refused to take the test saying he had just told me that just to try and convince me he was telling the truth. He had a conversation with the lawyer that night, I believe, I think it was Bob Fogan.
Q. Did you call Bob for him?
A. He wanted to call an attorney and we allowed him to call an attorney, and it turned out to be Bob.
Pete LaValle spoke to Bob later and what went on, I don't know.

(McClellan Deposition, pp. 18-19) (emphasis supplied).

The sworn testimony of the officers pretrial thus was: a statement from LaValle 1) that he thought Mr. Rose was faking a call to his attorney, and 2) that he had spoken with no one else in the case; from McClellan, counsel was told only that it was his understanding LaValle had called Fogan, but he did not know what happened. Trial counsel could only surmise from these two statements that LaValle either did not call Fogan, or, more likely, LaValle had called Fogan and determined that Mr. Rose actually had not called him (because LaValle made it clear at deposition he did not believe Mr. Rose had called).

At the suppression hearing of February 28, 1977, McClellan was not asked about the call to Fogan, but LaValle was asked, and while under oath he

testified that Mr. Rose previously agreed to take a polygraph, but first made what he believed was a sham call:

> A. Well, when he first came in, he requested to make a phone call, which he was allowed to do.
> Q. Whom did he call? Do you know?
> A. He supposedly called an attorney by the name of Robert Fogan.
> Q. You say "supposedly". Do you know whether he called him, or not.
> A. I don't believe he did. I think he mentioned later he hadn't.
> Q. Tell us what he did. What do you mean?
> A. I was called in purposely for the purpose of taking a polygraph examination.
> Q. Then what happened?
> A. When the gentleman came in, he introduced himself.
> Q. Yes.
> A. I advised him I was the polygraph examiner. He said he wished to call his attorney, I said, "Fine. There's the phone." I allowed him to call.
>
> * * *
>
> Q. That was approximately what time?
> A. Approximately 2:30.
> Q. In the morning of Saturday ...
> A. October 23rd; right.
> Q. After you indicated what you just indicated to us, what did he respond?
> A. I allowed him to make the phone call. He was on no more than five seconds, and he hung up.
> He advised me that his attorney suggested that he not take a polygraph examination.
> Q. Did you ever conduct one?
> A. No.
> Q. What then occurred after you had that conversation, which you indicate was some attempt at a phone call?
> A. I asked him if he would mind talking to me, and he said he didn't....

(T. 292-3)(emphasis supplied).

Based on the State's sworn testimony that Mr. Rose had not made a real request for counsel, the challenge to Mr. Rose's statement did not focus on the invocation of that right. Mr. Rose's 3.850 motion pled that neither trial counsel nor the court knew that the State withheld evidence showing Mr. Rose had legitimately sought counsel, but was denied that right due to his indigency, and that LaValle had testified falsely on that point at deposition and at the suppression hearing. Documentary evidence produced pursuant to a

Public Records request (but withheld from trial counsel) shows that LaValle deliberately deceived the defense and the court, and that he in fact knew Mr. Rose had made a real attempt to obtain counsel. No counsel was made available without charge to Mr. Rose, as Miranda and its progeny require, although he was indigent and in custody. Mr. Rose's 3.850 motion alternatively pled that if the failure to develop this issue was not based on the State's (e.g., LaValle's) deception, then it was based on ineffective assistance of counsel. An evidentiary hearing was and is necessary for the claim to be properly resolved.

In a supplemental police report dated October 24, 1976, Detective McClellan related the following account of Mr. Rose's phone call:

> ...after talking to the attorney on the phone Mr. Rose advised Detective Sergeant Lovell [sic] that the attorney had advised him not to participate in the polygraph examination. When asked the name of the attorney that he had spoken to Mr. Rose replied that his attorney was Robert Fogan. Due to the fact that Mr. Fogan is well known to both myself and Sergeant Lovell, he was recontacted telephonically and he advised that he had talked to Rose, however he had refused to represent Rose mainly due to the fact that Rose still owed him money from a prior legal representation. When confronted with these facts Mr. Rose admitted to Sergeant Lovell that he had never intended to take the polygraph, that the only reason he had advised me that he would submit to this test was to stall for time. For further details as to conversation between Mr. Rose and Sergeant Lovell, please see supplements by Sergeant Lovell.

(Supplemental Report, p. 7) (emphasis supplied).

The reports obtained directly from the sheriff's department under Chapter 119, Fla. Stat., do not have the control numbers described above. While defense counsel had some pages of McClellan's supplemental report, the page quoted above was not provided. The withholding of this critical page from McClellan's report misled defense counsel, and ultimately the courts, and resulted in counsel's performance being deficient. As a result, Mr. Rose was deprived of his right to a full and fair hearing on the suppression issue

originally.

The circuit court declined to allow an evidentiary hearing on this issue in these 3.850 proceedings although the files and records proffered by Mr. Rose showed that he might be entitled to relief, and although the State contested the facts pled, and although the record did not rebut the claim. The trial court erred, Hoffman; Lemon, and this case should be remanded for a full and fair evidentiary hearing.

ARGUMENT V

MR. ROSE'S IN-CUSTODY STATEMENTS WERE OBTAINED AND ADMITTED OVER HIS ASSERTION OF HIS DESIRE TO CONSULT WITH COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

In the previous Argument, Mr. Rose discussed the questions involved in the statements issue which were not developed originally because of withholding of evidence by the State and ineffectiveness of counsel. As a result, Mr. Rose submitted in the trial court and submits here that those allegations require the redetermination of the suppression issue at a hearing or the vacation of the judgment and sentence. Mr. Rose invoked his right to counsel and tried to obtain counsel. Although he was indigent and in custody, counsel was not provided and the right to counsel was not scrupulously honored. There was no voluntary waiver of counsel on Mr. Rose's part -- he wanted a lawyer. Since the invocation of counsel occurred during LaValle's questioning, already found to be unconstitutional by the trial court, the state cannot demonstrate waiver.

Furthermore, Edwards v. Arizona, 451 U.S. 477 (1981), requires suppression of Mr. Rose's post-request statements, even on the basis of the record evidence (see e.g., T. 292-96; 318; 428; 459). Mr. Rose's case was pending on appeal when Edwards was decided. This Court did not apply Edwards, and Mr. Rose submits that the claim is now appropriate for review. Mr. Rose's single contact with an attorney does not cut off his rights to an attorney's

presence during questioning under Edwards. See Minnick v. Mississippi, 111 S. Ct. 486 (1990). This Court should examine this claim on its merits, and thereafter grant relief.

ARGUMENT VI

THE RESENTENCING COURT'S REFUSAL TO ALLOW EVIDENCE AND ARGUMENT REGARDING WHETHER MR. ROSE'S CONVICTION RESTED UPON PREMEDITATED OR FELONY MURDER OR TO PROVIDE INSTRUCTIONS DEFINING PREMEDITATED AND FELONY MURDER VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This issue was presented on direct appeal from Mr. Rose's resentencing (See Initial Brief of Appellant, pp. 12-13). This Court affirmed the death sentence without specifically addressing this argument. See Rose v. State, 461 So. 2d 84 (Fla. 1984). Mr. Rose respectfully urges the Court to reconsider the issue, as it goes to the fundamental fairness and proportionality of his death sentence.

The evidence of guilt in Mr. Rose's case was exclusively circumstantial. It is no accident that the only sentencing jury forbidden from wrestling with the weakness of the evidence of Mr. Rose's guilt was also the only jury to recommend death by other than a bare margin. The first jury to hear Mr. Rose's case deliberated over two days on the guilt determination, and eventually, after an unsuccessful Allen charge, a mistrial was declared (T. 1332-1478). At the second trial, the jury also deliberated for a lengthy time, and did not return a guilt verdict until it was also given an Allen charge (T. 1274). The jury then voted 6-6 on their sentencing recommendation, and did not reach a death decision until also receiving an Allen charge on that issue (T. 1302-03).

After this Court vacated the death sentence because of the improper Allen charge, a new jury was impaneled for a sentencing recommendation only. The jurors could not have been told more often that Mr. Rose's guilt of murder was not at issue -- that it had already been determined by another jury. The

trial judge made it clear during pre-trial proceedings there would be no disputing Mr. Rose's guilt of first degree murder and kidnapping during sentencing:

(i) In determining counsel, the Court noted it was "not talking about retrying the whole case" (S. 15). During the first continuance hearing in May, the trial judge stated his own limited view of the upcoming resentencing: "the Court is only going to consider the advisory phase and he's already been found guilty" (S. 2).

(ii) Just before resentencing, defense counsel moved for a continuance, citing his need to gather and prepare more evidence disputing Mr. Rose's guilt on the murder charge. In denying the motion, the trial judge noted: "well, the problem you lost sight of is you are going into aggravating and mitigating circumstances. The guilt has been affirmed" (S. 59). Defense counsel's efforts to convince the Court "innocence would be relevant" in mitigation were unsuccessful (S. 55). The court twice again repeated the limitation on presenting innocence evidence and argument during the hearing (S. 68-9), and the second penalty trial began that day.

Before they ever entered the box, prospective jurors were told their mission was limited:

(i) The Court's opening instructions were that Mr. Rose had already been found guilty of the first degree murder of an eight year old girl, and "you are not going to concern yourself with the question of Mr. Rose's guilt ... it's already been determined" (S. 76-7).

(ii) The State quickly and repeatedly reinforced the Court's admonition, telling prospective jurors that Mr. Rose was "already guilty," (S. 910), that they must "accept" the guilty verdict to be fair jurors (S. 95), and that they were not there to "re-decide guilt" (S. 170,

148, 210, 219, 221), only to recommend a sentence based on the statutory aggravating and mitigating circumstances (S. 120).

(iii) Defense counsel, laboring under the court directive, made statements during jury selection that "guilt [was] not at issue" (S. 123, 124, 125, 131), and that Mr. Rose "had committed this crime" (S. 132, 137).

(iv) When a juror expressed reluctance to recommend death unless guilt was shown "without even a shadow of a reasonable doubt" (S. 168), that opinion was quashed, with the State responding that jurors had to accept the fact Mr. Rose was guilty (S. 170, 171). Said the prosecutor, the jury was there only to "help the judge" in making a sentencing decision (S. 178).

Just prior to beginning the sentencing hearing, the trial court was presented with a request to instruct the jury on felony murder to preserve the opportunity to argue Mr. Rose's limited culpability. That request was denied: "Yeah, but we are not getting into that" (S. 82).[6]

There was no counterbalance to these restrictions on the defense. The State was permitted to repeatedly argue its theory that Mr. Rose had been found guilty of premeditated murder by the preceding jury, both during it opening and closing argument, over defense objection (S. 241). The State consistently argued those facts as if conclusively found but the defense was forbidden from countering that argument by the trial court's repeated ruling

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[6]This also involves the related issue of the failure of the trial court, at guilt/innocence, to inquire of the jury as to whether their verdict of guilt rested on premeditated or felony murder. The United States Supreme Court is currently considering a case which will shed light on this issue. In Schad v. Arizona, No. 90-5551. 48 Crim. L. 3040 (October 24, 1990), the question presented is whether, when the prosecution proceeds on alternative felony/premeditated murder theories in a capital case, the Constitution is violated by a trial court's failure to inform the jury (e.g., through instructions) that it must reach unanimity, or at least a 7-vote majority, as to one of the theories.

that guilt could not be questioned at the penalty phase. There was some argument by the defense raising doubt about guilt, but counsel noted his "hands were tied," because Mr. Rose had already been convicted (S. 249-57).[7] The State then proceeded to have the entire record of the guilt trial read to the jury, although they were repeatedly told that they could not reconsider guilt.

During closing, defense counsel was cautioned when he seemed, in the Court's words, to be "getting close" to arguing innocence (S. 854), even though the State argued the prior jury had found Mr. Rose guilty of murder in the course of a kidnapping (S. 844). While the defense argued Mr. Rose may only have been guilt of felony murder, and the circumstantial nature of the State's case, the Court's refusal to instruct on either, and its repeated admonition of guilt made the argument incomprehensible and ineffective.

Because of the trial court's proscriptions, the resentencing jury was not permitted to assess Mr. Rose's level of culpability in determining whether a life or death sentence was appropriate. "[T]he death penalty must be proportional to the culpability of the defendant." Jackson v. State, 575 So. 2d 181, 190 (Fla. 1991). In Jackson, this Court explained:

> Individualized culpability is key, and "[a] critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." . . . Hence, if the state has been unable to prove beyond a reasonable doubt that a defendant's mental state was sufficiently culpable to warrant the death penalty, death would be dispropotional punishment.

Jackson, 575 So. 2d at 190, quoting Tison v. Arizona, 481 U. S. 137, 156 (1987). After reviewing the evidence in Jackson, this Court remanded for

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[7]The only evidence the defense was permitted to present was that rebutting the hammer-blow theory (S 782-92; 799-801), but solely under the theory that it rebutted "heinous, atrocious, and cruel" evidence.

imposition of a life sentence, 575 So. 2d at 193, concluding:

> Although the evidence against Jackson shows that he was a major participant in the crime, it does not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder.

Jackson, 575 So. 2d at 192.

As in Jackson, in Mr. Rose's case, the evidence was wholly circumstantial and was insufficient to prove an intent to kill. Mr. Rose's conviction could only have been based upon felony murder.[8] The resentencing jury thus should have been allowed to consider Mr. Rose's level of culpability.

The State's theory was that Lisa Berry died from hammer blows, but bolstered the obvious weakness of that theory by strongly urging a first degree felony murder verdict. In fact, no one knows how Lisa Berry was killed and the record of this case contains few clues. No jury, and no court has ever found Mr. Rose guilty of anything more than felony-murder, and the evidence and jury finding reveals no more than, at most, Lisa Berry died while she was in Mr. Rose's custody without her mother's consent. There is no proof that Mr. Rose intended to commit any felonies, including first degree murder.

The State charged Mr. Rose in a two-count indictment with kidnapping and murder (T. 8). Under Florida law, first degree premeditated murder can be proven solely through a felony-murder theory, and the death during the felony can be accidental. The State vigorous defense motions made pretrial to require the State to to at least inform the defense which theory it was going to pursue (T. 32, 44, 187-96). The State argued felony-murder during its

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[8]Mr. Rose continues to contend that the evidence was also insufficient to establish the specific intent required to prove the underlying felony, kidnapping. See infra.

opening statement, and emphasized (incorrectly) the kidnapping here could be proven solely by showing Lisa Berry was with Mr. Rose without her mother's consent (T. 637-38), although kidnapping is a specific intent crime.[9] At closing, the State concluded its argument by urging the jury it could find Mr. Rose guilty of first degree murder on the theory the victim was killed during a kidnapping (T. 1230). It conceded the facts did not show a "Lindbergh-type" kidnapping and urged all that was necessary for first degree murder was that the State prove Lisa Berry died while with Mr. Rose without her mother's consent (T. 1228-29).

It is clear the jury's verdict of guilt on the first degree murder charge lacks a finding of premeditation. The jury was subjected to the State's argument on felony-murder, and was instructed on that theory (T. 1244, 1246, 1250, 1252, 1255). The verdict form does not reflect any finding of guilt of premeditated murder, only first-degree murder, and a finding of guilt of kidnapping, both consistent with a pure felony-murder verdict.

The trial court's findings in imposing the death sentence also

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[9]Kidnapping has three elements: (1) confinement of the victim against her will; (2) with no lawful authority; and (3) with intent to hold for ransom, commit a felony, inflict bodily harm, or interfere with the performance of any government function. See Fla. Stat. sec. 787.01. When the victim is a child under age 13, the confinement is considered to be against the victim's will if it is done without parental consent. Fla. Stat. sec. 787.01(10(b). Thus, confinement of a child under 13 without parental consent displaces only the first element of kidnapping, and does not obviate the need for proof of intent. The State never proved the third element of the kidnapping charge alleged in the indictment: i.e., that Mr. Rose acted "with intent to: 3. inflict bodily harm upon or to terrorize the victim or another person." Fla. Stat. sec. 787.01(a)(3). If the State were alledging that this kidnapping was separate but related to the commission of the murder, then the indictment would have charged Mr. Rose with a violation of Fla. Stat. sec. 787.01(a)(2). However, the State alleged that Mr. Rose's alleged kidnapping was separate from the murder, and the State failed to present any evidence of an intent to inflict bodiy harm or terrorize Lisa Berry separate from her eventual death. Thus, an essential element of kidnapping was never proved.

demonstrate the troubling issue of finding intent in this record. In the first death sentence finding, the court found the killing occurred during the course of a kidnapping, and refused to find that the killing was heinous, atrocious or cruel, or that it was cold and calculated. In addition, it refused to instruct the jury on heinous, atrocious, and cruel at the second penalty phase, finding insufficient evidence of the manner of death. Likewise, while the issue of premeditation was vigorously litigated on appeal, this Court said only that there was sufficient evidence to uphold the verdict of guilty of "kidnapping and first-degree murder," Rose v. State, 425 So. 2d 521, 523 (Fla. 1982), a finding of no more than felony murder. The evidence fairly read proves no more than the death of the victim while she was with Mr. Rose, a death as likely caused by a vehicular accident as anything. No view of the evidence results in a finding of intent.

(1) The physical evidence

The physical injuries to the victim reveal her death was caused by blunt force to the head. While Dr. Fatteh speculated that a hammer blow might have caused death (T. 686-7), he also testified that the head injuries could have been caused by the victim's head moving toward a blunt object "like a concrete floor" (T. 607). The testimony of qualified medical examiners at the second sentencing hearing is more revealing and credible. Both Dr. Davis and Dr. Wright testified that the nature of the injuries excluded the possibility of the victim being killed by blows from a hammer or other object. It is more likely the head injuries resulted from a hard fall, with the head moving toward a broad, flat surface.

The serology evidence shows blood consistent with the victim's inside Mr. Rose's van, on his pants, and on the right front fender wheel. Assuming the blood typing was accurate, this evidence shows no more than the victim's presence in Mr. Rose's van (possibly after death), and is consistent with a

drunken Mr. Rose accidentally hitting her in the bowling alley parking lot ("I heard a noise under the van"). The blood on the fender well is explained no other way.

A "crushed" hair similar to the victim's was found inside Mr. Rose's sock. That Mr. Rose was innocently with Lisa Berry the evening of the crime is not disputed. There was no testimony that hairs remaining on Ms. Berry's head were crushed and no reason why the pressure on the hair could not have happened after it left her head, or on her fall to the ground upon being hit by the van. The green fiber from Lisa Berry's sweater (found on Mr. Rose) should have been there, since she sat on his lap earlier in the evening.

Likewise, premeditation is not shown by the victim's blouse (assuming, again, it was hers) being found in Mr. Rose's van.

(2) The motive

While the state had apparently suggested a sexual murder motive in the first trial (which resulted in a mistrial), the State's theory at the second trial was a "jealousy" motive. The State's argument concerning this "motive" consists of testimony that (a) Mr. Rose was often jealous of Barbara Berry; (b) Mr. Rose had made a statement two months prior to the crime that he could hurt Barbara Berry (T. 786-7), and (c) the victim had asked another man in Mr. Rose's presence whether they were going to breakfast, producing a "quizzical" look from Mr. Rose. The premise of the motive is that through either a diabolical scheme to get back at Barbara Berry for her imagined unfaithfulness, or some Freudian "transference" of his anger, Mr. Rose in cold blood killed Lisa Berry, Barbara's daughter.

The State's suggested motive is unpersuasive (and is never sufficient of the testing of quantum of proof) in the face of the remoteness of the "I can hurt you" statement; that just two weeks prior to Lisa Berry's death, Jim Rose

and Barbara Berry had expressed their love for each other and discussed marriage; that Mr. Rose had always liked and been liked by Ms. Berry's children; and that the bowling alley meeting had been for the purpose of reconciliation (there was no evidence Barbara Berry actually was seeing the other man).

(3) The inconsistent statements and the suspicious actions of Mr. Rose

Mr. Rose's several inconsistent explanations of his whereabouts the evening of the death, and actions reflecting "guilty knowledge," do not mean he felt guilty of murder. They reflect as logically a tragic accident in which the "slightly intoxicated" Mr. Rose ran over Lisa as he pulled out of the bowling alley parking lot, together with an ill-conceived plan to hide Lisa's death.

The evidence also demonstrates the physical impossibility of Mr. Rose killing Lisa Berry, driving a round trip of twenty-one miles in twenty minutes, stopping to make a phone call and returning to the bowling alley, as the state contends.

This record does not support a finding of intent to kill. But the resentencing jury was not allowed to consider on what basis the guilt phase jury rested their findings of guilt as to kidnapping or first degree murder. The sentence of death is disproportionate to the crime. The jury was "precluded from considering, as a mitigating factor, . . . the circumstances of the offense [which Mr. Rose proffered] as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Mr. Rose's sentence is unconstitutional under the Eighth and fourteenth amendments to the United States Constitution.

ARGUMENT VII

THE GUILT PHASE PROCEEDINGS WERE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Errors occurring during the guilt phase of Mr. Rose's capital proceedings possibly rendered those proceedings and their result fundamentally unfair and unreliable. However, no record exists of this portion of those proceedings. An evidentiary hearing is necessary in order to reconstruct the record and in order to allow Mr. Rose to establish his entitlement to relief. The circuit court erred in denying an evidentiary hearing.

Among the possible legal errors in the missing record were that Mr. Rose may not have been personally present when, after retiring to deliberate, the jury reconvened in the courtroom and was admonished and separated overnight; and that Mr. Rose and/or his counsel may not have been notified of the jury's questions and the judge's responses, in violation of Ivory v. State, 351 So. 2d 26 (Fla. 1977). The circumstances concerning the jury's questions may have been relevant and persuasive, had those circumstances been known, as they pertain to the Court's determination on direct appeal of the error and prejudice resulting from the "Allen charge" given by the judge on the following morning.

A. THE POSSIBLE IVORY VIOLATION

The issue here is the lack of a complete record, not at this time the legal errors that may be revealed by that record when it is completed. The possible Ivory error is not fully supported by the present record, but there are sufficient indications of a possible Ivory violation to require completion and review of the record.

By statute, Mr. Rose was entitled to a complete record in the direct appeal of his capital case. Section 921.141(4), Fla. Stat. (1985). See Delap

v. State, 350 So. 2d 462 (Fla. 1977). Until news accounts were discovered, Mr. Rose had no indication that anything had occurred except that the jury had retired to deliberate at 2:43 p.m. and had been discharged overnight at 9:20 p.m. The record and the clerk's notes indicate only that the jury retired at 2:43 p.m. and that court recessed for the evening at 9:20 p.m. Since the news accounts reveal that something did occur during this period and that what occurred may have been important to his direct appeal, Mr. Rose seeks the right to a complete record, lest the decision on appeal be forever flawed.

This record gives no hint that any proceedings occurred, except the discharge of the jury overnight, after the jury retired to deliberate at 2:43 p.m. until discharge at 9:20 p.m. The record does show that the court reporter and the clerk each noted that court was recessed at 9:20 p.m. on May 5th but do not note any other proceedings. The trial court's statement the next morning indicates only that the jury was admonished[10] and court was recessed "at 9:20 last night" "with the consent of the State and the defense that we do that without a record last night" (emphasis added).

In contrast to the record maintained by the Clerk of the Court and the transcript of the proceedings, three separate contemporaneous news accounts by three different newspapers report that there was much activity after the jury retired for deliberations. All of the reports indicate that the jury, during deliberations, asked that the opening and closing arguments and testimony be read back -- one article states that the request was made "just before" the jury asked to be discharged, another article reports that it was a "short time" after the jury began deliberations, and the third does not

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[10]The standard understanding of an "admonition" is the instruction to the jurors not to talk to anyone or to let anyone talk to them about the case during the recess.

identify a time. One article further reports other communications. After two hours of deliberation the jury asked for charts to be sent into the jury room and at 8:00 p.m. the jury requested the photographs of the victim. Again, none of these proceedings appear in the record maintained by the clerk nor in the transcript and there are no written documents, such as written notes from the jury, that would reveal that questions were asked.

There is no indication on the record that there was an agreement to excuse the court reporter during the jury's deliberation. Even if the court reporter had somehow been excused, there is no indication that the clerk was also excused. Had the jury's questions been properly handled, there should have been some notation of them in the clerk's minutes. In fact, the appropriate procedure when a jury has a question, is to "re-convene[] court" with all parties, including the defendant and his attorney, present. Slinksy v. State, 232 So. 2d 451, 452 (Fla. 4th DCA 1970), quoted in Curtis v. State, 480 So. 2d 1277, 1278 (Fla. 1985).

Even if it were assumed that both the court reporter and the clerk had been excused for the entire period of deliberations and that everyone agreed therefore "to make a summary announcement for the record" when court began the next day, that "announcement" did not include any references to the jury's questions, nor to the answers provided during the prior afternoon and evening. Assuming that court did reconvene during deliberations to respond to the jury's questions, although by agreement that reconvention was off the record, it would be logical to conclude that an announcement for the record summarizing the off the record proceedings would also include the earlier reconvening of court to respond to questions.

The factual basis for this violation of Mr. Rose's right to a fair trial can be proven at an evidentiary hearing. There are several indications that

an Ivory violation occurred:

1) this case was tried two months before this Court's decision in Ivory which for the first time made explicit the error in ex parte communications with the jury.

2) independent news articles each reported the jury's questions during the period of deliberations, but the official records of the clerk and court reporter omit any notation of the occurrence. Had court been "reconvened" to answer the jury's questions, the clerk should have noted the proceedings in open court, and should have noted the presence of Mr. Rose.

3) one of the news articles reports on the jury's request to have testimony read back used a quote from the trial judge in the past tense, where the judge explained what he had done, "'I've denied that,' Futch said. 'I told them they would just have to rely on their memories.'" Had the question and answer taken place in a "reconvened court" as is required, then it can be assumed that the judge would not have been required to explain what had happened in the past tense. None of the news articles reported a reconvening of court for supplemental instructions to the jury.

4) there is an inference in the record that the jury did ask questions previously during deliberations because of the judge's inquiry whether the jury had questions that morning: "Do you have any questions this morning, before you go back and deliberate?" (OR 1274).

The circuit court's failure to hold an evidentiary hearing on this issue should be reversed, and this case should be remanded for further proceedings.

B. MR. ROSE'S POSSIBLE ABSENCE WHILE THE JURY WAS INSTRUCTED DURING DELIBERATIONS AND LATER PERMITTED TO SEPARATE DURING GUILT PHASE.

The record also implies that Mr. Rose was not present either when the jury's questions were answered by the judge and later when the jury was instructed and discharged for the night, and Mr. Rose affirmatively states he

was not present at either time. Neither is there a record -- or any other -- waiver of Mr. Rose's presence. Mr. Rose's right to be present at all critical stages of his capital trial is absolute both under Rule 3.180(a)(5) Fla. R. Crim. P. ("the defendant shall be present: ... At all proceedings before the court when the jury is present"), and pursuant to the sixth amendment. See Francis v. State, 413 So. 2d 1175 (Fla. 1982). A missing or ambiguous record is an insufficient basis to conclude that Mr. Rose was either present or waived voluntarily his right to be present, Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982) (record must "affirmatively demonstrate" a voluntary waiver). The remedy for a presence violation is a new trial. An evidentiary hearing at which the record may be reconstructed and Mr. Rose's entitlement to relief established is necessary.

CONCLUSION

This case presents issues of fact which require an evidentiary hearing for their proper resolution. The State conceded before the trial court that an evidentiary hearing was necessary on a number of the claims involved (R. 117). The trial court, however, denied an evidentiary hearing. The trial court erred.

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Appellant respectfully submits that he is entitled to an evidentiary hearing, and respectfully urges that this Honorable Court order a full and fair hearing, set aside his unconstitutional convictions and death sentence and grant all other relief which the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Celia A. Terenzio, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Room 204, West Palm Beach, Florida 33401 this 4th day of June, 1991.

Gail E. Anderson
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