IN THE

SUPREME COURT OF FLORIDA

74,691

MILFORD WADE BYRD,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE THIRTEENTH JUDICIAL CIRCUIT, IN
AND FOR HILLSBOROUGH COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceedings involves the appeal of the circuit court's denial of Mr. Byrd's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Byrd's claims following a limited evidentiary hearing.

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

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

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

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

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On October 13, 1981, at approximately 7:00 a.m., Mr. Byrd discovered his wife's body on the floor of the motel office that they managed. He then called the police (R. 271). It was determined that Debra Byrd had been strangled to death. She also had four gunshot wounds and four scalp lacerations. Time of death was estimated at between 9:00 p.m. and 3:00 a.m. (R. 759-767).

On October 27, 1981, Ronald Sullivan was arrested for a parole violation (R.712). At the time of Debra Byrd's death, Mr. Sullivan had been a guest at the Byrd's motel. Mr. Sullivan commenced living there in the middle of September, 1981 (R. 385). Mr. Byrd was providing him and another individual named James Endress with room and board in exchange for handy work (R. 524).[1] Mr. Sullivan had an extensive criminal record. He was picked up on the parole violation in order for the police to discuss with him whether he and Endress committed the murder (R. 712). When the police accused him of the murder, Mr. Sullivan gave a statement implicating Mr. Byrd. Mr. Sullivan claimed that Mr. Byrd had been looking for someone to murder his wife, but that he, Sullivan, had not been involved in the killing (R. 2079, 2114).

After the Sullivan interview, the police decided to arrest Mr. Byrd. Without obtaining an arrest warrant, the police went to Mr. Byrd's residence (R. 1412-42). According to the police report "[u]pon arrival we awakened W/M Byrd and advised that he was under arrest for 1st degree murder." At a pretrial suppression hearing, a police officer testified he knocked on the front door of Mr. Byrd's apartment at approximately 2:00 a.m., October 28, 1981. Several seconds later, Mr. Byrd peered out through the curtains on the door. The police officer who had been working the homicide held up his credentials and shouted,

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[1]There was testimony that, during the month prior to her death, Debra Byrd purchased marijuana from Mr. Sullivan and then sold it to another party (R. 342).

"It's Detective Newcome. You remember me?" (R. 1419). A short time later, Mr. Byrd opened the door. He had been asleep and had just put on a pair of pants. According to the police officer, Mr. Byrd took one step backwards.[2] The police then entered without a warrant and arrested Mr. Byrd (R. 1420-32). The police found a woman, Jodie Clymer, in Mr. Byrd's bed who they transported to the police station (R. 1422). Mr. Byrd was taken to police headquarters. There he was given Miranda warnings, and he signed a written waiver form which provided in pertinent part:

> I, Wade Byrd do hereby consent to being interviewed by Det. K.C. Newcomb Det. R.J. Reynolds concerning the offense of homicide. I understand that . . . I have the right to remain silent and not answer any questions asked of me relative to this crime . . . .

(State's Exh. #32).

For two and one half hours, Mr. Byrd maintained his silence while the police tried in vain to prompt a response. The State acknowledged this at trial, but argued that Mr. Byrd's long silence and subsequent statements were nonetheless admissible. "This Defendant at no time invoked his right to remain silent. Merely not saying anything is not an indication of a right to remain silent" (R. 699). Mr. Byrd finally broke his silence in order to obtain Ms. Clymer's release (R. 1009). He first asked to speak to her. When he was told he could not, he negotiated (R. 684). He would talk if he could have some time alone with Ms. Clymer. After speaking with a distraught Ms. Clymer, Mr. Byrd gave the police the confession they wanted.[3]

At 8:31 a.m., on October 28, 1981, a Criminal Report Affidavit was filed with Clerk of the Circuit Court. As required by Rule 3.130 of the Florida Rules of Criminal Procedure, Mr. Byrd was arraigned. At that time, Mr. Byrd indicated

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[2]Mr. Byrd's testimony disputed this step backwards (R. 1461-63).

[3]Mr. Byrd has testified at trial that this confession was given in order to secure Ms. Clymer's release. According to Mr. Byrd the confession was made up in order to clear Ms. Clymer and insure her immediate release (R. 1009).

he would be represented by counsel. Subsequently on October 30, 1981, law enforcement initiated further interrogation (R. 814). Mr. Byrd repudiated his confession and asserted his innocence. At trial, the State introduced evidence of Mr. Byrd's conduct and statements from both interrogations (R. 700).

Mark Ober was a prosecuting attorney in the case against Mr. Byrd (T. 128). At the time, Mr. Ober was division chief in the State Attorney's Office with supervisory authorities over others in his division including his co-prosecutor on the case Manuel Lopez (T. 129). Initially, Mr. Ober was lead attorney; however, at some point in late March of 1982, Mr. Lopez, who Mr. Ober supervised, was designated lead prosecutor (T. 105). Mr. Ober became friendly with the family of the victim early in the case. This included Linda Latham, Debra Byrd's sister. As he explained, "Throughout my tenure at the State Attorney's Office I kept in very close contact with the victims of all homicides, because I think they needed to be assured that they had a voice in the system that was taking place. And I kept in very constant contact with them" (T. 133).

Mr. Ober was aware from the beginning of the case that there was a hundred thousand dollar life insurance policy at issue (T. 141-42). Mr. Byrd was the primary beneficiary under the policy. The policy was alleged by the State to give Mr. Byrd motive to kill his wife. Under Florida law at the time, a conviction of Mr. Byrd for murder was conclusive proof which could be presented in a motion for summary judgment and cause him to be denied the proceeds of the insurance police (T. 79-80). The insurance policy named Linda Latham, the victim's sister, as contingent beneficiary. Linda Latham filed a claim in March of 1982 with the insurance company; this was sometime before the insurance company filed an interpleader action in federal court. The interpleader was filed May 14, 1982 and had attached the claim made by Linda Latham which initiated the dispute (T. 488,514).

James LaRussa, Mr. Ober's brother-in-law, represented Ms. Latham. He became Ms. Latham's lawyer prior to the filing of the lawsuit. ("There was no lawsuit pending at that time. I initiated the lawsuit")(T.77-78). Apparently Mr. LaRussa advised Ms. Latham in connection with the submission of her claim to the insurance company in March of 1982. Ms. Latham's claim was filed in response to Mr. Byrd's claim filed in December of 1981. Mr. Ober explained that Mr. LaRussa came to represent Ms. Latham on his, Mr. Ober's, advice. He told Ms. Latham to call Mr. LaRussa who was family to Mr. Ober (T. 134). Mr. Ober explained his relationship to Mr. LaRussa:

> Mr. LaRussa had been very good to my family throughout. He helped me get into law school. He helped me get my job with the State Attorney's Office. He was just, although we weren't related by blood, he was like a brother to me.

(T. 150).

In late April of 1982, a deal was struck with Ronald Sullivan (T. 106). Mr. Sullivan was given probation in exchange for testimony against Mr. Byrd, i.e. that Mr. Byrd hired him to kill Debra Byrd and that Mr. Byrd, Mr. Endress and Mr. Sullivan all participated in the actual killing. Mr. Sullivan testified at Mr. Byrd's trial in July, 1982, and a conviction was obtained. The prosecutors told the jury that in order to get evidence against Mr. Byrd, it was necessary to give Mr. Sullivan probation for aiding and abetting murder (R. 1206). The jury also returned a death recommendation. On August 13, 1982, Mr. Byrd was sentenced to death.

This conviction was used in federal court as a basis for summary judgment in favor of Linda Latham (T. 80). As a result, Mr. LaRussa obtained a judgment in June of 1983, and a contingent fee of approximately sixteen thousand dollars (T. 77). Immediately after Mr. LaRussa received his contingent fee around Labor Day of 1983, Mr. Ober received a check from Mr. LaRussa for approximately ten percent of Mr. LaRussa's contingent fee, "in the neighborhood of sixteen hundred

dollars" (T. 136). Mr. Ober and Mr. LaRussa both denied that this was a referral fee. However, Mr. Ober acknowledged he never spoke to Mr. LaRussa about why he was given this money. Mr. Ober never asked what's this sixteen hundred dollars for:

BY THE COURT:

Q: Mr. Ober, when you got this check from Mr. LaRussa, did you ever ask him what this was all about? Do you have a recollection of that?

A: No. Mr. LaRussa had been very good to my family throughout. He helped me get into law school. He helped me get my job with the State Attorney's Office. He was just, although we weren't related by blood, he was like a brother to me. I would only assume that throughout the years, that, you know, I had sent him a lot of things, he wanted to pay me in a way for it. But there was never any, that is my assumption. I never, he wasn't there. We met down in Sarasota or Long Boat Key that weekend. I never had any discussion with him regarding it.

THE COURT: Okay. Thank you, Mr. Ober. You may step down.

(T. 150).

Mr. Byrd appealed his conviction and sentence of death. This Court affirmed. Byrd v. State, 481 So. 2d 468 (Fla. 1985). Certiorari review was denied on May 27, 1986. Byrd v. Florida, 476 U.S. 1153 (1986).

On May 27, 1988, Mr. Byrd timely filed his Rule 3.850 motion. Mr. Byrd was allowed to supplement his motion. The circuit court summarily denied most of the claims, but ordered a limited evidentiary as to the remaining claims. This hearing was held March 22-23, 1989. On July 11, 1989, the circuit court denied relief. Thereafter this appeal from circuit court's denial of the Rule 3.850 motion was perfected.

SUMMARY OF ARGUMENT

I. Due process bars a prosecutor from having a personal, familial or financial interest in obtaining a conviction. In Mr. Byrd's case one of the prosecutors had a personal, familial and financial interest in convicting Mr. Byrd. That prosecutor received sixteen hundred dollars from his brother-in-law

who had received a sixteen thousand dollar contingency fee as a result of Mr. Byrd's conviction. This money resulted from the termination of Mr. Byrd's rights to life insurance proceeds. In order to obtain the conviction, a co-defendant was given probation for claiming he, along with Mr. Byrd, participated in the murder of Debra Byrd. The prosecutors lied to the jury that probation was awarded to the co-defendant even before it was known what the co-defendant would say. The prosecutor knew of this lie but perpetuated it in closing argument. The co-defendant had very clearly promised to get Byrd really good if the right offer was made. The prosecutor benefited and his family benefited from his exercise of prosecutorial discretion and from his violation of Brady and Giglio. Under the circumstances, due process was violated, and a new trial must be ordered.

II. Mr. Byrd did not receive a fair trial in which an adversarial testing occurred where the prosecution failed to disclose exculpatory evidence and allowed the star witness to lie to the jury that he had never indicated to the State what his testimony would be before he was given probation. The State also failed to disclose that it would intervene and prevent the star witness' parole from being revoked because of his participation in a murder. The discovery violations singly and as a whole undermine confidence in the outcome and a new trial is required.

III. Mr. Byrd received ineffective assistance of counsel at both phases of his capital trial. At the guilt phase his attorney failed to adequately prepare and test the State's case. Impeachment and exculpatory evidence was not discovered and presented to the jury. At the penalty phase, Mr. Byrd similarly failed to adequately investigate, prepare, and present evidence establishing mitigation and rebutting aggravation.

IV. Mr. Byrd was deprived of a fair trial when the prosecutor made improper and outrageous comments to the jury and his counsel failed to object

and combat the prosecutorial misconduct.

V. Mr. Byrd was deprived of his fifth amendment right to silence when the State failed to honor his equivocal invocation of silence (he did not speak for nearly two hours) and introduced his silence and subsequent statement into evidence. Moreover, the error was compounded by counsel's failure to adequately and correctly litigate the issue.

VI. Mr. Byrd's sixth amendment rights were violated when the police interrogated him after his arraignment and invocation of his right to counsel. Moreover, the error was compounded by his counsel's failure to litigate this issue.

VII. Mr. Byrd was deprived of his fourth amendment rights when police entered his home without an arrest warrant in order to effectuate his arrest. This error was compounded by counsel's failure to correctly and adequately litigate this issue.

VIII. Trial counsel's failure to assure Mr. Byrd's presence during critical states of his capital proceedings, and the prejudice resulting therefrom, violated the sixth, eighth, and fourteenth amendments to the United States Constitution.

IX. The exclusion of critical evidence rendered Mr. Byrd's sentence of death fundamentally unreliable and violated his rights under the sixth, eighth and fourteenth amendments. The rulings created circumstantial ineffective assistance of counsel.

X. Mr. Byrd was improperly denied his right to cross-examine key State's witnesses on matters that would have undermined their credibility, and as a result he was denied his right of confrontation in violation of the sixth, eighth, and fourteenth amendments to the United States Constitution.

XI. The trial court's unconstitutional shifting of the burden of proof in its instructions at sentencing deprived Mr. Byrd of his rights to due process

and equal protection of law, as well as his rights under the eighth and fourteenth amendments.

XII. Mr. Byrd's sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing in violation of the eighth and fourteenth amendments.

XIII. The jury instructions regarding aggravating factors so perverted the sentencing phase of Mr. Byrd's trial that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the eighth and fourteenth amendments of the United States Constitution.

XIV. The jury was misled and incorrectly informed about its function at capital sentencing, in violation of the eighth and fourteenth amendments.

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

XVI. Mr. Byrd was denied his rights to an individualized and fundamentally fair and reliable capital sentencing determination as a result of the presentation of information concerning the victim's family background and other constitutionally impermissible victim impact information, contrary to the eighth and fourteenth amendments.

XVII. The eighth and fourteenth amendments were violated by failing to consider non-statutory mitigating circumstances.

ARGUMENT I

MR. BYRD WAS DEPRIVED OF DUE PROCESS AND A FAIR TRIAL WHEN HE WAS PROSECUTED BY AN ASSISTANT STATE ATTORNEY WITH A PERSONAL, FAMILIAL, AND FINANCIAL INTEREST IN OBTAINING A CONVICTION.

Mark Ober, one of the prosecutors, had a personal, familial, and/or financial interest in Mr. Byrd's conviction. This violated due process in this

case because of the exercise of immense prosecutorial discretion in obtaining Mr. Byrd's conviction and sentence of death. Probation was given to a co-defendant who had promised the police he could give them Mr. Byrd "really good."

The fourteenth amendment to the United States Constitution guarantees that the State of Florida cannot deprive an individual of life, liberty or property without due process of law. This guarantee has been read to focus upon the concept of fundamental fairness. Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984); Engle v. Isaac, 456 U.S. 107, 131 (1982); Smith v. Phillip, 455 U.S. 209, 219 (1982). This concept is generally recognized as best explained in Rochin v. California, 342 U.S. 165, 169 (1952). There the United States Supreme Court observed:

> Regard for the requirements of the Due Process Clause inescapably imposes [ ] an exercise of judgment upon the whole course of the proceedings resulting in the conviction in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offense. [Citations omitted] These standards of justice are not authoritatively formulated anywhere as though they are specifics. Due process of law is a summarized constitutional guarantee of respect for those personal immunities which as Mr. Justice Cardozo twice wrote for the Court, are so rooted in the traditions and conscience of our people as to be ranked as fundamental, or are implicit in the concept of ordered liberty. [Citation and footnote omitted]

The United States Supreme Court has explained these notions of fundamental fairness may be violated when a personal interest is injected into the prosecutorial decisionmaking.

> We do not suggest, and appellants do not contend, that the Due Process Clause imposes no limits on the partisanship of administrative prosecutors. Prosecutors are also public officials; they too must serve the public interest. Berger v. United States 295 U.S. 78, 88, 55 S.Ct. 629, 633, 79 L.Ed. 1314 (1935). In appropriate circumstances the Court has made clear that traditions of prosecutorial discretion do not immunize from judicial scrutiny cases in which the enforcement decisions of an administrator were motivated by improper factors or were otherwise contrary to law. See Dunlap v. Bachowski, 421 U.S. 560, 567, n. 7, 568-574, 95 S.Ct. 1851, 1858, n. 7, 1858-1861, 44 L.Ed.2d 377 (1975); Rochester Telephone Corp. v. United States, 307 U.S. 125, 59 S.Ct. 754, 83 L.Ed. 1147 (1939). Moreover, the decision to enforce--or not to enforce--may itself result in significant burdens on a defendant or a statutory beneficiary, even if he is

> ultimately vindicated in an adjudication. Cf. 2 K. Davis Administrative Law Treatise 215-256 (2d ed. 1979). A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions. See Bordenkircher v. Hayes, 434 U.S. 357, 365, 98 S.Ct. 663, 669, 54 L.Ed.2d 604 (1978); cf. 28 U.S.C. sec. 528 (1976 ed., Supp. III)(disqualifying federal prosecutor from participating in litigation in which he has a personal interest). But the strict requirements of neutrality cannot be the same for administrative prosecutors as for judges, whose duty it is to make the final decision and whose impartiality serves as the ultimate guarantee of a fair and meaningful proceeding in our constitutional regime.
>
> > In this case, we need not say with precision what limits there may be on a financial or personal interest of one who performs a prosecutorial function, for here the influence alleged to impose bias is exceptionally remote. No governmental official stands to profit economically from vigorous enforcement of the child labor provisions of the Act. The salary of the assistant regional administrator is fixed by law. 5 U.S.C. sec. 5332 (1976 ed. and Supp. III). The pressures relied on in such cases as Tumey v. Ohio, supra; Gibson v. Berryhill, 411 U.S. 564, 579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973); and Connally v. Georgia, 429 U.S. 245, 250, 97 S.Ct. 546, 548, 50 L.Ed.2d 444 (1977)(per curiam), are entirely absent here.

(Footnotes omitted). Marshall v. Jerrico, Inc., 446 U.S. 238, 249-50 (1980).[4]

Subsequently the Supreme Court explained:

The requirement of a disinterested prosecutor is consistent with our recognition that prosecutors may not necessarily be held to as stringent a standard of disinterest as judges. "In an adversary system, [prosecutors] are necessarily permitted to be zealous in their enforcement of the law," Marshall v. Jerrico, Inc., 446 U.S. 238, 248, 100 S. Ct. 1610, 1616, 64 L.Ed.2d 182 (1980). We have thus declined to find a conflict of interest in situations where the potential for conflict on part of a judge might have been intolerable. See id., at 250-252, 100 S. Ct., at 1617-18 (fact that sums collected as civil penalties returned to agency to defray administrative costs presented too remote

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[4]In Tumey v. Ohio, 273 U.S. 510 (1972); Gibson v. Berryhill, 411 U.S. 564 (1973); and Connally v. Georgia, 429 U.S. 245 (1977); due process was found to be violated when judicial and administrative adjudicators were found to have personal and financial interest in the outcome of the proceedings at issue.

a potential for conflict in agency enforcement efforts). Ordinarily we can only speculate whether other interests are likely to influence an enforcement officer, and it is this speculation that is informed by appreciation of the prosecutor's role. In a case where a prosecutor represents an interested party, however, the ethics of the legal profession require that an interest other than the government's be taken into account. Given this inherent conflict in roles, there is no need to speculate whether the prosecutor will be subject to extraneous influence.[18]

Footnote 18 provided:

> An arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable. The determination of whether there is an actual conflict of interest is therefore distinct from the determination of whether that conflict resulted in any actual misconduct.

Young v. U.S. ex rel. Vuitton Et Fils S.A., 107 S. Ct. 2124, 2137 (1987).

Though considerable discretion is afforded a prosecutor's decisionmaking, there are constitutional limits upon the power to prosecute.

> The government is not entirely unconstrained in its choice of those whom it will prosecute. As long ago as Yick Wo v. Hopkins, 118 U.S. 356, 6 S.Ct. 1064, 30 L.Ed. 220 (1886), Justice Matthews wrote for the Supreme Court that "if [a law] is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the constitution." Id. at 373-74, 6 S.Ct. at 1073. To permit criminal prosecutions to be initiated on the basis of arbitrary or irrational factors would be to transform the prosecutorial function from one protecting the public interest through impartial enforcement of the rule of law to one permitting the exercise of prosecutorial power based on personal or political bias. "Nothing can corrode respect for a rule of law more than the knowledge that the government looks beyond the law itself to arbitrary considerations, such as race, religion, or control over the defendant's exercise of his constitutional rights, as the basis for determining its applicability." United States v. Berrios, 501 F.2d 1207, 1209 (2d Cir. 1974). It is the wisdom of our Constitution that such personal abuses of governmental power are proscribed.

(Footnote omitted). United States v. Torquato, 602 F.2d 564, 568 (3rd Cir. 1979).

A prosecutor's discretion normally extends to who to charge, when to do it, and what statute to assert was violated. So long as the prosecutor has charged an offense under state law, "the conscious exercise of some selectivity in enforcement is not in itself a federal constitutional violation." However, if the decisionmaking "was deliberately based upon an unjustifiable standard such as race, religion, or other arbitrary classification," a constitutional violation may arise. Oyler v. Boles, 368 U.S. 448 (1962). See also Bordenkircher v. Hayes, 434 U.S. 357 (1978). Similarly, fundamental fairness is violated when the prosecutor has a personal interest in the outcome of the criminal proceedings. In Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967), a prosecutor who had a civil practice on the side filed criminal charges against a civil client's husband. In reversing the state criminal conviction, the Fourth Circuit Court of Appeals stated:

> The Assistant Attorney General of Virginia concedes that the Commonwealth's Attorney should not have prosecuted the criminal case at the same time he was representing Ganger's wife in the divorce proceeding. We agree. Such a conflict of interest clearly denied Ganger the possibility of fair minded exercise of the prosecutor's discretion. Not every criminal case goes to trial. Prosecuting attorneys frequently decline to charge, or nol pros, criminal cases--especially ones arising out of domestic relations. Aside from the possibility of a favorable charge decision, including nol pros, there is always the prospect of plea bargaining.
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> Because of the prosecuting attorney's own self-interest in the civil litigation (including the possibility that the size of his fee would be determined by what could be exacted from defendant), he was not in a position to exercise fair-minded judgment with respect to (1) whether to decline to prosecute, (2) whether to reduce the charge to a lesser degree of assault, or (3) whether to recommend a suspended sentence or other clemency.
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> Representing Ganger's wife in the divorce proceeding suggests the strong possibility that the prosecuting attorney may have abdicated to the prosecuting witness (Ganger's wife) in the criminal case the exercise of his responsibility and discretion in making charge decisions. If she did not actually made the decision to prosecute for felonious assault, certainly her interests were influential, and those conflicting interests may have impeded appropriate plea bargaining.
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> * * *

The Supreme Court of Appeals of Virginia, in Macon v.

Commonwealth, 187 Va. 363, 373, 46 S.E.2d 396, 401 (1948), said:

> "While the laws of the State vest in this officer [prosecuting attorney] wide authority in instituting prosecutions, such authority carries with it a commensurate responsibility. It should be exercised with caution and only cases where, after a proper investigation, he is reasonably satisfied of the guilt of the person suspected of crime. It is just as much his duty to protect his fellow citizens from unjustified prosecutions as it is to prosecute those who are guilty."

In Macon, the Supreme Court of Appeals of Virginia reversed the murder conviction of the defendant on another ground, but intimated that the unfairness of the prosecuting attorney to the defendant may have disqualified him from acting as prosecutor in the case.

In Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935), the state prosecutor's knowing use of perjured testimony was held to be a denial of due process of law in violation of the Fourteenth Amendment. The Attorney General of California contended that "'the acts or omissions of a prosecuting attorney can never, in and by themselves, amount either to due process of law or to a denial of due process of law'." 294 U.S. at 111-112, 55 S.Ct. at 341. In a per curiam opinion, the Supreme Court said:

> "Without attempting at this time to deal with the question at length, we deem it sufficient for the present purpose to say that we are unable to approve this narrow view of the requirement of due process. That requirement, in safeguarding the liberty of the citizen against deprivation through the action of the state, embodies the fundamental conceptions of justice which lie at the base of our civil and political institutions." 294 U.S. at 112, 55 S.Ct. at 341-2.

The Court went on to say that "the action of prosecuting officers on behalf of the state, * * * may constitute state action within the purview of the Fourteenth Amendment." 294 U.S. at 113, 55 S.Ct. at 342.

In Tumey v. State of Ohio, a case involving the compensation of a mayor from costs and fines he imposed on those convicted of criminal offenses, the Supreme Court said:

> "That officers acting in a judicial or quasi judicial capacity are disqualified by their interest in the controversy to be decided is of course the general rule. * * * [I]t certainly violates the Fourteenth Amendment and deprives a defendant in a criminal case of due process of law to subject his liberty or property to the judgment of a court, the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in his case." 273 U.S. 510, 522, 47 S.Ct. 437, 441, 71 L.Ed. 749 (1927).

The prosecuting attorney is an officer of the court, holding a quasi judicial position. "[H]is primary responsibility is essentially

judicial--the prosecution of the guilty and the protection of the innocent, Griffin v. United States, 295 F. 437, 439-440 (C.A. 3, 1924); his office is vested with a vast quantum of discretion which is necessary for the vindication of the public interest." Bauers v. Heisel, 361 F.2d 581, 590 (3d Cir. 1966).

Although conceding that the prosecuting attorney should not have represented Ganger's wife in private litigation at a time when he was charged with the duty to fairly prosecute or otherwise fairly dispose of the criminal charge against Ganger, the State contends that the improper conduct resulted in no harm to Ganger. We cannot so assume. It is true that although charged with a serious assault that could have resulted in imprisonment to the extent of twenty years, Ganger was convicted of a lesser assault and sentenced to only six months. But we do not know and cannot now ascertain what would have happened if the prosecuting attorney had been free to exercise the fair discretion which he owed to all persons charged with crime in his court. "[B]efore a federal constitutional error can be held harmless, the court must be able to declare a belief that it was harmless beyond a reasonable doubt." Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705, 711 (1967).

We think the conduct of this prosecuting attorney in attempting at once to serve two masters, the people of the Commonwealth and the wife of Ganger, violates the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth Amendment. Mooney v. Holohan, 294 U.S. 103, 55 S.Ct. 340, 79 L.Ed. 791 (1935); see also Klopfer v. North Carolina, 386 U.S. 213, 87 S.Ct. 988, 18 L.Ed.2d 1 (1967) (prosecutor's arbitrary use of nol pros with leave held unconstitutional).

379 F.2d at 712-14.

State court's addressing this problem are in agreement with the Ganger court. In People v. Zimmer, 414 N.E.2d 705 (N.Y. 1980), the New York Court of Appeals held an indictment had to be dismissed where it had been obtained by a prosecutor with a conflict of interest. The indictment charged "white collar" crimes in connection with the management of a corporation to which the prosecutor was counsel and stockholder. The court there stated:

As his primary point, the defendant asserts that the District Attorney's involvement with the corporation disqualified him from representing the People at all stages of this matter and that, therefore, the denial of motions to dismiss the indictment, made both prior to and at the time of trial, was grievous error. Resisting the thrust of this contention, the position of the People in effect is that, absent demonstrative instances of "overzealousness, or overreaching attributable to the prosecutor's role," of which they insist there are none here, a "facial appearance of professional impropriety" would not constitute an impermissible imposition on defendant's entitlement to fundamental fairness.

Central to the issue so sharply drawn is the pivotal point at which a public prosecutor stands in the criminal justice system. Unlike other participants in the traditional common-law adversarial process, whose more singular function is to protect and advance the rights of one side, a District Attorney carries an additional and more sensitive burden. It is not enough for him to be intent on the prosecution of his case. Granted that his paramount obligation is to the public, he must never lose sight of the fact that a defendant, as an integral member of the body politic, is entitled to a full measure of fairness. Put another way, his mission is not so much to convict as it is to achieve a just result (Berger v. United States, 295 U.S. 78, 88 55 S.Ct. 629, 633, 79 L.Ed. 1314; People v. Petrucelli, 44 A.D.2d 58, 59, 353 N.Y.S.2d 194; Code of Professional Responsibility, EC 7-15).

These are more than noble sentiments. In large part to enable a public prosecutor to carry out his heavy responsibility in a fair and impartial manner, we and, increasingly, other nations (see Goldstein & Marcus, Myth of Judicial Supervision in Three "Inquisitorial" Systems: France, Italy and Germany, 87 Yale L.J. 240), have come to grant the office wide latitude in the allocation of its resources. Not the least feature of this flexibility is a discretion to investigate, initiate, prosecute and discontinue broad enough, conceptually and practically, to merit the observation that, overall, more control over individuals' liberty and reputation may thus be vested than in perhaps any other public official (Ganger v. Peyton, 379 F.2d 709, 712 (4th Cir. 1967); Note, Prosecutor's Discretion, 103 U. of Pa.L.Rev. 1057; Freedman, Professional Responsibility of the Prosecuting Attorney, 55 Georgetown L.Rev. 1030, 1037).

For example, almost invariably it is the prosecutor who decides whether a case is to be pressed or dropped and what the nature of the specific offense or offenses to be lodged against a defendant is to be. As a vital partner in the plea bargaining process or via his sentencing input (e. g., Penal Law, sec. 65.00), he heavily influences the sanction meted out. (See, generally, Report of the President's Comm. on Law Enforcement and the Administration of Justice, The Challenge of Crime In a Free Society, 11, 12, 134-135; ABA Project on Standards for Criminal Justice, The Prosecution Function and the Defense Function [Approved Draft, 1971], p. 7.) Of especial pertinence to the case before us now is "the crucial nature of the prosecutor's role vis-a-vis the Grand Jury" (People v. Di Falco, 44 N.Y.2d 482, 485, 406 N.Y.S.2d 279, 377 N.E.2d 732).

It would be simplistic therefore to think of the impact of a prosecutor's conflict of interest merely in terms of explicit instances of abuse. Even our thumbnail description of prosecutorial power is enough to indicate that resulting prejudice can at least as easily flow from an act of omission as from one of commission, from discretion withheld as from discretion exercised. In this context, whether abuse is express or implied may be difficult to determine. Suffice it to say that any presumption of impartiality tends to be undermined when there is a clear conflict of interest. Indeed, the judgmental nature of much of a District Attorney's conduct will put it beyond effective appellate review. And, no matter how firmly and

conscientiously a District Attorney may steel himself against the instruction of a competing and disqualifying interest, he never can be certain that he has succeeded in isolating himself from the inroads on his subconscious.

Thus, the practical impossibility of establishing that the conflict has worked to defendant's disadvantage dictates the adoption of standards under which a reasonable potential for prejudice will suffice (Commonwealth v. Dunlap, 233 Pa.Super. 38, 43, 335 A.2d 364 [Hoffman, J., dissenting]; cf. People v. Jones, 47 N.Y.S.2d 409, 416-417, 418 N.Y.S.2d 359, 391 N.E.2d 1335). Nor is the gravity of that potential lessened because it may cut either or both of two ways, against a defendant or against the People, toward each of whom the discharge of the District Attorney's duties of course should be uninhibited by subjective influences.

. . .

Moreover, even if the actuality or potentiality of prejudice were absent, what of the appearance of things (see Code of Professional Responsibility, Canon 9)? No matter the good faith and complete integrity of the District Attorney, under these circumstances what impression could the defendant have had of the fairness of a prosecution instituted by one with the personal and financial attachments of this prosecutor? Would it have been unreasonable for the defendant--or others--to doubt that the public officer, whose burden it was to screen the complaint for frivolousness and, if necessary, guide its destiny before the Grand Jury, would do so disinterestedly?

It was important that these responsibilities, carried out in the name of the State and under the color of the law, be conducted in a manner that fostered rather than discouraged public confidence in our government and the system of law to which it is dedicated. This concern, that those occupying prosecutorial office be jealous of the evidence as well as the substance of integrity, was not to be discounted. In particular, the District Attorney, as guardian of this public trust, should have abstained from an identification, in appearance as well as in fact, with more than one side of the controversy (People v. Superior Ct. of Contra Costa County, 19 Cal.3d 255, 137 Cal.Rptr. 476, 561 P.2d 1164; State v. Rosengard, 47 N.J. 180, 219 A.2d 857; ABA Project on Standards for Criminal Justice, The Prosecution and the Defense Function, Part I [1.2][(a)], [(b)].

For all these reasons, it would have been better had the District Attorney recused himself. He having failed to do so, it was error to deny the motion to dismiss the indictment he obtained.

(Footnotes omitted)(emphasis added) 414 NE 2d at 706-08.

In Commonwealth v. Tabor, 384 N.E. 2d 190 (Mass. 1978), the Massachusetts Supreme Court reached a similar conclusion finding that the state statutes prohibited a prosecutor with a conflict of interest from participating in a

criminal proceeding. There, in a homicide prosecution, the district attorney was also representing the widow's victim in a civil action. The court reversed the conviction and explained:

> Next, the defendant relies on a series of cases involving claims of ineffective assistance of counsel arising out of a joint or dual representation by defense counsel to support his assertion that the assistant district attorney's "conflict of interest" requires a new trial. See, e.g., Commonwealth v. Garaway, 364 Mass. 168, 170-73, 301 N.E.2d 814 (1973); United States v. Donahue, 560 F.2d 1039, 1040-1041 (1st Cir. 1977). The Commonwealth argues, and we think correctly, that these cases are inapplicable to a question of prosecutorial conflict of interest because each of them is grounded in a conflict of interest on the part of the defense counsel which may have divided his loyalty to his client. See Commonwealth v. Geraway, supra; United States v. Donahue, supra at 1043. Compare Commonwealth v. Davis, ___ Mass. ___, ___ ___ ___, 384 N.E.2d 181 (1978); Commonwealth v. Wright, ___ Mass. ___, ___ ___ ___, 382 N.E.2d 1072 (1978); id. at ___ ___ ___, 382 N.E.2d 1072 (Liacos, J., concurring). The Commonwealth argues that, even if the assistant district attorney's representation of the widow in the civil action created a "conflict of interest," the conflict does not divide the loyalties of the assistant district attorney, since "whatever conflict existed involved a purely unitary purpose, and not a situation in which a Counsel faced two distasteful alternatives in terms of dividing loyalties when clients assumed antagonistic postures." Accordingly, the Commonwealth argues, the defendant is not entitled to a new trial.
>
> However, in reviewing the defendant's claim we are confronted with an apparently unintentional violation of a statute. General Laws c. 12 section 30, provides that "[n]o prosecuting officer shall receive any fee or reward from or in behalf of a prosecutor for services in any prosecution or business to which it is his official duty to attend, nor shall he be concerned as counsel or attorney for either party in a civil action depending upon the same facts involved in such prosecution or business."
>
> In Commonwealth v. Gibbs, 4 Gray 146, 147 (1855), we held that a violation of the statute required a new trial. In that case, the prosecuting attorney represented persons in civil actions involving the defendants and depending on the same set of facts. We ordered a new trial without regard to whether there was actual prejudice to the defendants and without regard to whether the prosecutor received any fee in the civil actions. We stated that "propriety and fitness" required a new trial because violation of the statute is "irregular" and amounts to legal error. Id. at 147-148.
>
> Since the enactment of G.L. c. 12, section 30, we have held that in criminal proceedings neither the public prosecutor nor attorney assisting him could receive compensation from any private party. "In such cases the statute supposes that the prosecution will be conducted by the law officers, for their salaries, and without any other compensation whatever. Commonwealth v. Knapp, 10 Pick. 477, 481-482 (1830). See Commonwealth v. Williams, 2 Cush. 582, 585 (1849).

> Gibbs, Williams, and Knapp express the policy of this Commonwealth that the office of the district attorney is to be administered "wholly in the interests of the people at large and with an eye single to their welfare." Attorney Gen. v. Tufts, 239 Mass. 458, 489, 131 N.E. 573 91921). See Commonwealth v. DeChristoforo, 360 Mass. 531, 545-546, 277 N.E.2d 100 (1971)(Tauro, C.J., dissenting); Smith v. Commonwealth, 331 Mass. 585, 591, 121 N.E.2d 707 (1954). See also Berger v. United States, 295 U.S. 78, 88, 55 S.Ct. 629, 79 L.Ed. 1314 (1935).
>
> Further, we think it irrelevant that the defendant failed to show actual prejudice in his trial.[13] The legislative policy is clear, as is our construction of the statute. The purpose of our statute is to guard the district attorney's office from private interest and from private influence. A prosecuting attorney's obligation is to secure a fair and impartial trial for the public and for the defendant. His obligation to the defendant in this regard is as great as is his obligation to the public. The district attorney is vital to the administration of justice and to the vindication of constitutional rights. In view of his great responsibilities, a district attorney may not compromise his impartiality. See Attorney Gen. v. Tufts, 239 Mass. 458, 489, 131 N.E. 573 (1921). See also Smith v. Commonwealth, 331 Mass. 585, 591, 121 N.E.2d 707 (1954). We therefore require a new trial.

384 N.E.2d at 194-96 (footnotes omitted except as otherwise noted; emphasis added). Footnote 13 provided:

"[I]t is almost impossible to establish actual prejudice because of the vast discretion which we entrust to the prosecutor." Commonwealth v. Dunlap, supra 474 Pa. at 161, 377 A.2d at 978. Moreover, our cases impose no requirement that actual prejudice be shown where the statute has been violated. See Commonwealth v. Gibbs, supra at 147-148. Cf. Commonwealth v. Williams, 2 Cush. 582, 585 (1849); Commonwealth v. Knapp, 10 Pick. 477, 481-482 (1830).

Jurisdictions with statutes similar to G.L. c. 12, section 30, have ordered new trials without any showing of actual prejudice to the defendant. See, e.g., State v. Jensen, 178 Iowa 1098, 1104-1105, 1108, 160 N.W. 832 (1917); People v. Hillhouse, 80 Mich. 580, 583, 45 N.W. 484 (1890); State v. Basham, 84 S.D. 250, 258-259, 170 N.W.2d 238 (1969). Cf. Sinclair v. State, 278 Md. 243, 255 & N. 8, 363 A.2d 468 (1976)(new trial ordered absent statute); People v. Jiminez, 187 Colo. 97, 102, 528 P.2d 913 (1974)(judgment affirmed because defendant knew of

conflict and "conceal[ed] error during trial" from judge); State v. Detroit Motors, 62 N.J. Super. 386, 393-394, 163 A.2d 227 (1960). But cf. State v. Williams, 217 N.W.2d 573, 575 (Iowa 1974)(actual prejudice required in situation where it was not clear that the prosecutor had violated the Iowa statute). See also Idaho Code section 31-2602 (1948); Ill.Ann.Stat. c. 14, section 7 (Smith-Hurd 1963); Iowa Code section 336.5 (1977); Mich.Comp.Laws Ann. section 49,158 (1967); S.D. Complied Laws Ann. section 7-16-16 (1978 Supp.). See generally Mills, The Practicing Prosecutor--Beset with Conflicts, 54 Ill.B.J. 606-609, 615 (1966).

The Louisiana Supreme Court reversed a criminal conviction where it found the prosecutor to have also been associated with a civil lawsuit against the defendant. State v. Tate, 171 So. 2d 198 (La. 1936). The civil lawsuit was for damages arising out of the alleged criminal activity. The court said a prosecutor "should not be involved or interested in any extrinsic matters which might, consciously or unconsciously, impair or destroy his power to conduct the accused's trial fairly and impartially." Tate, 171 So. 2d at 112.

Similarly, the Virginia Supreme Court reversed a murder conviction where the prosecutor had been hired by the defendant's father-in-law to fight for custody of the defendant's son. Cantrell v. Commonwealth, 329 S.E. 2d 22 (Va. 1985). The court there noted that the murder conviction would facilitate the custody case and disinherit the defendant. "A conflict of interest on the part of the prosecution in itself constitutes a denial of a defendant's due process rights [] and cannot be held harmless error." Cantrell, 329 S.E. 2d at 26.

The South Dakota Supreme Court also found a prosecutor's conflict to constitute reversible constitutional error. State v. Basham, 170 N.W. 2d 238 (S.D. 1969). There, one of the prosecuting attorneys was hired to represent the victims while criminal proceedings were ongoing. The prosecuting attorney was hired to file a civil action only after the criminal proceedings had been

completed. The defense did not object because the defense did not know. Subsequently when the issue arose the court reversed saying it was "not necessary to identify specific prejudicial acts." Basham, 170 N.W. 2d at 242.

In Shuttleworth v. State, 469 N.E.2d 1210 (Ind. App. 1984), a conflict was not found. However, there the prosecutor had five years previously represented the defendant's wife during the defendant's divorce. The time factor thus negated the existence of a conflict. The court, however, noted:

> We do not deny the occasion may arise where a prosecutor must indeed be disqualified. It is clear that a prosecutor must not simultaneously prosecute a defendant and represent his victim in a civil suit. See, e.g., Jordan v. Commonwealth, (1963) Ky. App., 371 S.W.2d 632; Commonwealth v. Tabor, supra, 76 Mass. 811, 384 N.E.2d 190; People v. Zimmer, supra, 51 N.Y.2d 390, 434 N.Y.S.2d 206, 414 N.E.2d 705. There is also a problem when a prosecutor must withdraw his appearance from a civil case because he is prosecuting the related criminal case. See Davenport v. State, (1981) 157 Ga.App., 704, 278 S.E.2d 440. These situations simply do not exist here.

469 N.E.2d 1218.

In People v. Doyle, 406 N.W.2d 893 (Mich. App. 1987), the prosecutor was the defendant's brother-in-law. This familial relationship created a conflict requiring recusal pursuant to Canon 9 of the Code of Professional Responsibility and DR 5-101. The court there explained:

> "Courts around the country recognize two policy considerations underlying the disqualification of prosecuting attorneys for a conflict of interest. The first policy served is fairness to the accused. It is universally recognized that a prosecutor's duty is to obtain justice, not merely to convict. While the prosecutor must prosecute vigorously, he must also prosecute impartially."

406 N.W.2d at 893. The second policy consideration is "preservation of public confidence in the impartiality of integrity of the criminal justice system." 406 N.W.2d at 898-99.

The court in Doyle as have all others who have addressed this problem concluded that the defendant was entitled to relief where he demonstrated either

a conflict of interest or the appearance of impropriety.[5] A conflict was shown when the prosecutor's financial, familial, or personal interests were at stake in the prosecution. Once a conflict has been shown, "[a] defendant need not prove actual bad faith or unethical conduct on the part of the prosecutor and his staff." 406 N.W.2d at 899. State v. Hatfield, 356 N.W. 2d 872 (Neb. 1984)(actual conflict on prosecutor's part will cause a conviction to be set aside); State v. Knight, 285 S.E. 2d 40 (W. Va. 1981)(prosecutor's conflict of interest is reversible constitutional error). Sinclair v. State, 363 A.2d 468, 175 (Md. 1976)("any pecuniary interest or a significant personal interest in civil matter which may impair [prosecutor's] obligation in a criminal matter to act impartially" disqualifies prosecutor and will result in reversal). Hughes v. Bowers, 711 F. Supp. 1574, 1584 (N.D. Ga. 1989)(federal habeas relief granted where "the special prosecutor had a pecuniary interest in the outcome of the trial" because he had been hired as special prosecutor by victim's family and subsequently represented victim's family in its insurance claim).

In Florida, prosecutors are "quasi judicial officers." Gluck v. State, 62 So. 2d 71, 73 (Fla. 1952). "It is their duty to see that a defendant gets a fair and impartial trial." Id. "[P]rosecuting officers are clothed with quasi

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[5]In Jordan v. Commonwealth, 371 S.W.2d 632 (Ky 1963), the court chastised the prosecutor who subsequent to obtaining the criminal conviction represented the victims in a civil action.

> "The administration of justice must be above suspicion. The power and influence of a prosecuting attorney in a criminal proceeding are such that his civil employment in the same connection, either at the same time or thereafter, is inconsistent with the public interest in the good name of its courts."

371 S.W.2d at 635.

Similarly the court in Davenport v. State, 278 S.E.2d 440 (Ga App 1981) exclaimed:

> "In our opinion public policy prohibits a district attorney from prosecuting a case, even though he does not actually try the case himself, while representing the victim of the alleged criminal act in a divorce proceeding involving the accused."

judicial powers and it is consonant with the oath they take to conduct a fair and impartial trial." Stewart v. State, 51 So. 2d 494, 495 (Fla. 1951). See Oglesby v. State, 23 So. 2d 558 (Fla. 1945). As a result, due process prohibits a prosecutor from having a personal, familial, and/or financial interests in obtaining a criminal conviction.

Moreover, at the time of the filing of charges against Mr. Byrd and during the proceedings leading up to his conviction, prosecuting attorneys were obligated to comply with the Code of Professional Responsibility and the Code of Ethics for Public Officers and Employees. As noted in Doyle supra, the Code of Professional Responsibility precludes prosecutors from participating in cases where there is the appearance of a conflict. However Florida's Code of Ethics for Public Officers and Employees is even more explicit. Section 112.311 of the Florida Statutes provides in pertinent part:

> (1) It is essential to the proper conduct and operation of government that public officials be independent and impartial and that public office not be used for private gain other than the renumeration provided by law. The public interest, therefore, requires that the law protect against any conflict of interest and establish standards for the conduct of elected officials and government employees in situations where conflicts may exist.
>
> . . .
>
> (5) It is hereby declared to be the policy of the state that no officer or employee of a state agency or of a county, city, or other political subdivision of the state, and no member of the Legislature or legislative employee, shall have any interest, financial or otherwise, direct or indirect; engage in any business transaction or professional activity; or incur any obligation of any nature which is in substantial conflict with the proper discharge of his duties in the public interest. To implement this policy and strengthen the faith and confidence of the people of the state in their government, there is enacted a code of ethics setting forth standards of conduct required of state, county, and city officers and employees, and of offices and employees of other political subdivisions of the state, in the performance of their official duties. It is the intent of the Legislature that this code shall serve not only as a guide for the official conduct of public servants in this state, but also as a basis for discipline of those who violate the provisions of this part.
>
> (6) It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hold their positions for the benefit of the public. They are bound to

> uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code and the advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the respect of the people in their government must be of foremost concern.

Mark Ober was one of two prosecuting attorneys in the case against Mr. Byrd. (T. 128). At the time, Mr. Ober was division chief in the State Attorney's Office with supervisory authorities over others in his division including his co-prosecutor on the case, Manuel Lopez. (T. 129). Mr. Ober, the prosecuting attorney, befriended the victim's family early in the case. (T. 133). Mr. Ober knew of the existence of the hundred thousand dollar life insurance policy naming Mr. Byrd as the beneficiary. Mr. Ober acknowledged that it was this insurance policy which made Mr. Byrd a suspect. (T. 140). It is basic, black letter law that a murderer is cut off from inheriting from the victim. Mr. Ober had to have known that if Mr. Byrd was shown to be the murderer, the insurance proceeds, one hundred thousand dollars, would pass to the contingent beneficiary, the victim's sister, whom Mr. Ober had befriended. Mr. Ober knew that a civil lawsuit or at least the assistance of a lawyer may be needed to assist the contingent beneficiary in receiving the proceeds. Mr. Ober knew that any attorney who was hired would stand to make a large fee if the criminal prosecution was successful. Mr. Ober was indebted to his brother-in-law, Mr. LaRussa, for among other reasons helping him "get in law school" and then later "get [his] job with State Attorney's Office." (T. 150). Mr. LaRussa, who was a practicing attorney in Tampa, was like a brother to Mr. Ober, they both felt indebted to each other and "wanted to pay [each other] in a way" for the mutual kindness. (T. 150). Clearly Mr. Ober and Mr. LaRussa had a quid pro quo relationship. Mr. Ober's indebtedness caused him to send the contingent beneficiary to Mr. LaRussa for legal assistance. Since Mr. Ober meant this as a

kindness to Mr. LaRussa and to repay his indebtedness, he anticipated Mr. LaRussa would receive substantial benefit. Not only did Mr. Ober recommend Ms. Latham call Mr. LaRussa for legal assistance, he, himself, called Mr. LaRussa and told him to anticipate hearing from Ms. Latham and what the case was about. (T. 135). Mr. Ober along with his co-counsel made substantial decisions about whom to offer plea agreements to and how to prosecute the case against Mr. Byrd. (T. 142). Mr. Ober was part of the prosecutorial team vested with all the prosecutorial discretion allowed under Florida law. (T. 148). The prosecutors decided to make Mr. Byrd the prime target of the prosecution as opposed to either Mr. Sullivan or Mr. Endress. Probation was given to Mr. Sullivan who admitted participation in a planned murder in order to secure his testimony which he had previously indicated would get Mr. Byrd "really good." (T. 144). This deal was worked out after Mr. Ober learned of the insurance policy and after Ms. Latham had filed her claim, but before the interpleader action was initiated in federal court. However, even after the initiation of the interpleader the prosecutors attempted unsuccessfully to work out a deal with a second co-defendant in order to secure his testimony against Mr. Byrd. (T. 121). Mr. Ober actively worked to make sure Mr. LaRussa knew of the facts of the case, heard from the contingent beneficiary, and got employed as counsel. (T. 135). Mr. LaRussa obtained a summary judgment on behalf of the contingent beneficiary. (T. 76). This summary judgment relied on and cited to Mr. Byrd's conviction of murder as supporting its conclusion that there was "no genuine issue as to any material fact remaining." (T. 80, 571). Immediately after Mr. LaRussa received his contingency fee of close to sixteen thousand dollars, he gave Mr. Ober a check for close to sixteen hundred dollars, approximately one tenth of his fee. (T. 77, 136). Mr. Ober received a call, directing him to go to Mr. LaRussa's office where he was handed an envelope with the check inside it. (T. 136). Mr. Ober had absolutely no discussion with Mr. LaRussa

concerning the reason for the "gift", he assumed "that through the years, that, you know, [he] sent [Mr. LaRussa] a lot of things, [Mr. LaRussa] wanted to pay me in a way for it." (T. 150). The failure of Mr. Ober and Mr. LaRussa to ever speak to each other of the sixteen hundred dollar check is evidence that speaks loudly -- it is common for participants to secret deals not to speak of it in order to be better able to deny its existence. Common sense dictates that a recipient of a sixteen hundred dollar check would say something to the "donor" about it, but Mr. Ober testified "I never had any discussion with [Mr. LaRussa] regarding it." The proof is overwhelming that Mr. Ober had a personal, familial and/or financial interest in the outcome of Mr. Byrd's trial. Under the laws of this State, that is an actual impropriety. See section 112.311 of the Florida Statutes; DR 5-101, Code of Professional Responsibility.

In the circuit court, the State asserted "both Florida and federal law require that Petitioner prove prejudice from the alleged impropriety as a requisite for a due process violation." (State's Memorandum at 2). This is simply not true. Due process requires reversal in many instances where prejudice is so inherent it need not be proved. See Chapman v. California, 386 U.S. 18 (1967)(general rule is that state must prove constitutional error harmless beyond a reasonable doubt). "[I]t is beyond dispute that the sixth amendment guarantee of effective assistance of counsel comprises two correlative rights: the right to counsel of reasonable competence . . . and the right to counsel's undivided loyalty." Virgin Islands v. Zepp, 748 F.2d 125, 131 (3d Cir. 1984). "The assistance of counsel means assistance which entitles an accused to the undivided loyalty of his counsel and which prohibits the attorney from representing conflicting interests or undertaking the discharge of inconsistent obligations." People v. Washington, 461 N.E.2d 393, 396 (Ill. Sup. Ct.), cert. denied, 469 U.S. 1022 (1984). Because the right to counsel's undivided loyalty "is among those constitutional rights so basic to a fair trial

. . . [its] infraction can never be treated as harmless error . . . . [W]hen a defendant is deprived of the presence and assistance of his attorney . . . in, at least, the prosecution of a capital offense, reversal is automatic." Holloway v. Arkansas, 435 U.S. 475, 489 (1978)(citations omitted). Defense counsel is guilty of an actual conflict of interest when he "owes duties to a party whose interests are adverse to those of the defendant, . . ." Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979).

Although the general rule is that a criminal defendant who claims ineffective assistance of counsel must show both a lack of professional competence and prejudice, a defendant predicating an ineffectiveness claim on a conflict of interest faces no such requirement. Strickland v. Washington, 466 U.S. 668, 693 (1984); Kimmelman v. Morrison, 477 U.S. 365, 381 n.6 (1986); Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980). He need not show that the lack of effective representation "probably changed the outcome of his trial." Walberg v. Israel, 766 F.2d 1071, 1075 (7th Cir. 1985), cert. denied, 474 U.S. 1013 (1985). Rather, as the Eleventh Circuit has recognized, "it is well established that when counsel is confronted with an actual conflict of interest, prejudice must be presumed, and except under the most extraordinary circum stances the error cannot be considered harmless." Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1982), cert. denied, 456 U.S. 1011 (1982).

Once an actual conflict is demonstrated, there is no need to adduce proof that the "actual conflict of interest adversely affect[ed] counsel's performance or impair[ed] his client's defense." Westbrook v. Zant, 704 F.2d 1487, 1499 (11th Cir. 1983). Instead, prejudice is presumed because

> [a] conflict may affect the actions of an attorney in many ways, but the greatest evil . . . is in what the advocate finds himself compelled to refrain from doing. Holloway v. Arkansas, 435 U.S. at 490. . . . In such circumstances a reviewing court cannot be certain that the conflict did not prejudice the defendant. Accordingly, it is settled that once an actual conflict is shown, prejudice is presumed."

Barham v. United States, 724 F.2d 1529, 1534 (11th Cir. 1984) (Wisdom, J. concurring)(emphasis added), cert. denied, 467 U.S. 1230 (1984).

Some conflicts are so invariably pernicious, so without the possibility of any redeeming virtue that they are "always real, not simply possible, and . . . by [their] nature, [are] so threatening as to justify a presumption that the adequacy of representation was affected." United States v. Cancilla, 725 F.2d at 870. In those kinds of conflicts, courts refrain from searching the record to determine what could or should have been done differently, and instead invoke a rule of per se illegality. See United States v. Cronic, 466 U.S. at 658 (1984)("There are, however, circumstances that are so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified"). The per se standard is invariably applied where an attorney conceals his divided loyalties, in violation of statute or under other circumstances. See, e.g., Solina v. United States, 709 F.2d 160, 167-69 (2d Cir. 1983)(Friendly, J.); Berry v. Gray, 155 F. Supp. 494 (W.D. Ky. 1957); Zurita v. United States, 410 F.2d 477 (7th Cir. 1969). Similarly in Marshall v. Jerrico, Inc., 446 U.S. 238 (1980), the court noted no prejudice was required where due process was violated by tying a judge's salary to the amount of fines he has collected. All that was necessary was to show "possible temptation." 446 U.S. at 243.

In fact this Court in State v. DiGuilio, 491 So. 2d 1129, 1135 (Fla. 1986), explained that its the State's burden to prove error harmless beyond a reasonable doubt unless the error is reversible per se.

> The harmless error test, as set forth in Chapman and progeny, places the burden on the state, as the beneficiary of the error, to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict or, alternatively stated, that there is no reasonable possibility that the error contributed to the conviction. See Chapman, 386 U.S. at 24, 87 S.Ct. at 828. Application of the test requires an examination of the entire record by the appellate court including a close examination of the permissible evidence on which the jury could have legitimately relied, and in addition an even closer examination of the impermissible evidence which might, have possibly

influenced the jury verdict.

> In comparing the per se reversible rule and the harmless error rule, and determining their applicability, it is useful first to recognize that both rules are concerned with the due process right to a fair trial. The problem which we face in applying either rule is to develop a principled analysis which will afford the accused a fair trial while at the same time not make a mockery of criminal prosecutions by elevating form over substance.

The dissenters apparently believe that the rule of harmless error cannot cope with comments on post-arrest silence or failure to testify and that only a per se rule will suffice. This view ignores the far-ranging application of the harmless error rule and does not recognize that certain types of errors are always harmful, i.e., prejudicial. Per se reversible errors are limited to those errors which are "so basic to a fair trial that their infraction can never be treated as harmless error." Chapman, 386 U.S. at 23, 87 S.Ct. at 827-28. In other words, those errors which are always harmful. The test of whether a given type of error can be properly categorized as per se reversible is the harmless error test itself. If application of the test to the type of error involved will always result in a finding that the error is harmful, then it is proper to categorize the error as per se reversible. If application of the test results in a finding that the type of error involved is not always harmful, then it is improper to categorize the error as per se reversible. If an error which is always harmful is improperly categorized as subject to harmless error analysis, the court will nevertheless reach the correct result: reversal of conviction because of harmful error. By contrast, if an error which is not always harmful is improperly categorized as per se reversible, the court will erroneously reverse an indeterminate number of convictions where the error was harmless. See for example, Delaware v. Van Arsdall, --- U.S. ---, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986); United States v. Mechanik, --- U.S. ---, 106 S.Ct. 938, 89 L.Ed.2d 50 (1986); United States v. Lane, --- U.S. ---, 106 S.Ct. 725, 88 L.Ed.2d 814 (1986).

The unique and only function of the rule of per se reversal is to conserve judicial labor by obviating the need to apply harmless error analysis to errors which are always harmful. It is, in short, a rule of judicial convenience. The unique function of the harmless error rule is to conserve judicial labor by holding harmless those errors which, in the context of the case, do not vitiate the right to a fair trial and, thus, do not require a new trial. Correctly applied in their proper spheres, the two rules work hand in glove. Both provide an equal degree of protection for the constitutional right to a fair trial, free of harmful error.

Under the case law the prosecutor's conflict here must be held to be reversible per se because it by its very nature "vitiate[s] the right to a fair trial." It can never be shown to be harmless beyond a reasonable doubt by the

State. There must always be a doubt that the prosecutor used his prosecutorial discretion to benefit himself and his family. There must always be a doubt that counsel's judgment was clouded by his interest in the outcome to Mr. Byrd's detriment. It is quite unusual for the State to give a co-defendant, in a first degree murder case, probation in exchange for admitting his own guilt. Did the State lie to the jury that it did not know in advance that Sullivan in exchange for probation would implicate Mr. Byrd in order to help insure a contingent fee for the prosecutor's brother-in-law? Was Brady violated deliberately? Would the jury have recommended death if it had known of the prosecutor's personal interest in offering probation to Sullivan? Reasonable doubt will always remain. No matter what Mr. Ober says he has reason to lie to himself and others, and that may serve as reasonable doubt as to the harm flowing from having a prosecutor with a personal, familial and/or financial interest at stake.

Here the prosecutor's undisclosed personal, familial, and/or financial interest was so invariably pernicious that a reversal is required because there was "reasonable potential for prejudice." People v. Zimmer, 414 N.E.2d 705, 707 (N.Y. 1980). See Sinclair v. State, 363 A.2d 468, 475 n.8 (Md. 1976)(no need to prove "actual prejudice"); Cantrell v. Commonwealth, supra; State v. Basham, supra; State v. Hatfield, supra; State v. Knight, supra. The State cannot ever prove the error harmlessness beyond a reasonable doubt. This approach is consistent with Barham, supra; Cronic, supra; Baty v Balkcom, supra; Marshall v. Jerrico, Inc., 446 U.S. 238 (1980); Tumey v. Ohio, 273 U.S. 510 (1927).

The State also contended in circuit court that Section 112.311 of the Florida Statutes is only violated where the state employee has a financial interest in the outcome. However, the statute on its face provides "any interest, financial or otherwise." Ignoring for the moment the mysterious "gift", Mr. Ober had a personal interest in the outcome when he knew that his

brother-in-law's ability to collect a contingent fee would be affected by the outcome of the trial.[6] Moreover, this brother-in-law was one to whom Mr. Ober felt very close -- he was indebted to him for helping him through law school and getting him a job.

The State's contention that Mr. Ober did nothing wrong in this case is belied by the statements appearing in the Tampa Tribune on Thursday, March 23, 1989, a copy of which was presented to the circuit court. Assistant State Attorney John Skye stated: "I think the best thing to do is to give someone three of four names and say, 'Go talk to them and see if they can help.' It avoids any kind of improper appearance" (T. 670). Even according to the State Attorney's Office what happened here was wrong.

Because of the prosecutor's undisclosed personal, familial and/or financial interest in the outcome, a reversal is required pursuant to due process under the per se rule of Leonard v. United States, 378 U.S. 544 (1964). See Smith v. Phillips, 455 U.S. 209, 221-24 (1982) (O'Connor, J. concurring). The even stricter scrutiny required in a capital case under the eighth amendment also mandates a reversal. Tuner v. Murray, 476 U.S. 28 (1986). Even if the Court refuses to apply a per se rule, the State cannot prove beyond a reasonable doubt that the conflict had no impact and was harmless.

Whatever else can be said, it is undisputed that his brother-in-law to whom he was greatly indebted, stood to gain an easy sixteen thousand dollars from a criminal conviction of Mr. Byrd. Mr. Ober's personal interest in the outcome of the criminal process offends those traditional notions of fairness and decency

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[6]Disciplinary Rule 2-106 of the Code of Professional Responsibility specifically bars criminal defense attorneys from charging contingent fees for their services. The rule presupposes such a practice would not exist as to prosecuting attorneys. However, the rule as written does reflect the concern that the outcome of criminal cases should not be burdened with possible financial rewards. The criminal courtroom should be a sacred place where justice is done and not a gambling casino where the house stands to profit from the cards it deals.

which constitute due process, and which are embodied in Florida's Code of Ethics for Public Officials and Employees. As a result due process, as case law notes, demands that Mr. Byrd's judgment and sentence must be vacated.

ARGUMENT II

THE DETAILS OF MR. OBER'S PERSONAL, FAMILIAL, AND FINANCIAL INTEREST IN OBTAINING A CONVICTION NOR THE FACT THAT MR. SULLIVAN HAD LONG BEFORE HIS DEAL WITH THE STATE REPRESENTED HE COULD GIVE THE STATE BYRD "REAL GOOD" WERE DISCLOSED. AS A RESULT OF THESE AND OTHER NONDISCLOSURES, MR. BYRD WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

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

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

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, supra.

Here, Mr. Byrd was denied a reliable adversarial testing. The jury never heard the whole story of the State's deal with Ronald Sullivan and the State's decision to grant him probation for his assistance in the prosecution of Mr. Byrd. This evidence was obviously exculpatory as to Mr. Byrd because it "may have been used to impeach [the State's] witness[] by showing bias or interest." Bagley, 473 U.S. at 676. As the Supreme Court has said:

> The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in

testifying falsely that a defendant's life or liberty may depend. Napue v. Illinois, 360 U.S. 264, 269 (1959).

In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury deciding Mr. Byrd's guilt or innocence and sentence to hear the full circumstances of the State's decision to grant Sullivan probation for saying he was hired to kill Debra Byrd and in fact participated in the murder. Disclosure of this information was essential for the jury to evaluate Sullivan's truthfulness and the State's representations of why the deal was worked out.

A criminal trial is supposed to be an adversarial testing. To insure the process works, the prosecutor is obligated to disclose material and exculpatory evidence and the defense attorney is obligated to competently advocate any exculpatory evidence which exists or make a competent decision not to advocate the evidence. The test required for a reversal under the federal constitution is the same whether it is the prosecutor or the defense attorney who failed to carry out his or her duty -- is confidence undermined in the outcome. Here a considerable amount of exculpatory evidence in the State's possession did not get presented to the jury. The adversarial testing did not work in this case. Exactly who is at fault is unclear since the defense attorney lost his files.

At the evidentiary hearing Mr. Lopez, one of the prosecuting attorneys, was shown Defense Exhibit 4. This exhibit established that, contrary to the State's closing argument to the jury, the State knew four months before working a deal with Sullivan that "he [Sullivan] could give us Wade [Byrd] and Endress really good." (T. 89). Recognizing the exculpatory nature of this exhibit Mr. Lopez responded as follows to questioning at the hearing:

> Q. All right. Okay. Is Mr., would it be fair to say that Mr. Sullivan's testimony, then, is not correct in that it does not contain that?
>
> A. In that regard, that's correct.

Q. Do you recall that testimony when it was occurring?

A. On the stand?

Q. Yes.

A. No.

Q. Do you recall ever pointing out to either the Court or to defense counsel, you know, "There is something wrong with what Mr. Sullivan just said"?

A. No. I am sure I probably didn't point that out to defense counsel. But I certainly hoped to God I gave Mr. Sullivan a copy of this, gave Mr. Johnson a copy of that police report, if I had it.

Q. You are relying on the fact Mr. Johnson should have known that what Mr. Sullivan was saying wasn't true?

A. If Mr. Johnson had this police report, he certainly should have known.

Q. Okay. Now, do you recall if at the trial Mr. Sullivan's credibility was a big issue?

A. That is an understatement.

. . . .

Q. My question is, what is reflected in that report, is that at all inconsistent with what you indicated in the closing argument?

A. It is a little bit inconsistent in that, in that context, yes.

(T. 91, 94)(emphasis added).

Clearly, Mr. Lopez did not know whether defense counsel had received full discovery. In fact, there was panic in his voice when he realized the significance of Defense Exhibit 4. Defense counsel testified similarly: "I have no recall of having been provided with this. I may have been. I just don't have a recall." (T. 170). The one thing that is clear is the jury did not know that Sullivan lied when he said he never told the State he would give them Byrd and that the State lied in its closing argument when it claimed it had no idea Sullivan would implicate Mr. Byrd. Somebody should have corrected the perjured testimony presented to the jury and nobody did; thus the adversarial process did

not work.

In Giglio v. United States, 405 U.S. 150, 153-54 (1972), the United States Supreme Court held:

> As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S. Ct. 340, 342, 79 L.Ed. 791 (1935), this Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with "rudimentary demands of justice." This was reaffirmed in Pyle v. Kansas, 317 U.S. 213, 63 S. Ct. 177, 87 L.Ed. 214 (1942). In Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 173, 3 L.Ed.2d 1217 (1959), we said, "[t]he same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id., at 269, 79 S. Ct., at 269, 79 S. Ct. at 1177. Thereafter Brady v. Maryland, 373 U.S., at 87, 83 S. Ct. at 1197, held that suppression of material evidence justifies a new trial "irrespective of the good faith or bad faith of the prosecution." See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function section 3.11(a). When the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility falls within this general rule. Napue, supra, at 269, 79 S. Ct., at 1177. We do not, however, automatically require a new trial whenever "a combing of the prosecutors' files after the trial has disclosed evidence possibly useful to the defense but not likely to have changed the verdict . . . ." United States v. Keogh, 391 F.2d 138, 148 (CA2 1968). A finding of materiality of the evidence is required under Brady, supra, at 87, 83 S. Ct., at 1196, 10 L.Ed.2d 214. A new trial is required if "the false testimony . . . in any reasonable likelihood have affected the judgment of the jury . . . Napue, supra at 271, 79 S. Ct., at 1178.

Here the prosecutor admitted that Mr. Sullivan's testimony was a lie and that he, the prosecutor, did not correct the lie. Since Sullivan's credibility was the big issue in the case, as Mr. Lopez conceded, the adversarial process failed. The jury did not learn that Sullivan had lied in his testimony. The jury heard the prosecutor's vouching for Sullivan's credibility go uncontested. The prosecutor also conceded that Sullivan's credibility was more than a big issue in the case; it was pivotal. Thus there is a reasonable likelihood that the perjury affected the judgment of the jury. Under Giglio, a new trial is required.

There is certainly no dispute regarding the fact that the State did not disclose Mr. Ober's personal, familial and/or financial interest in obtaining

Mr. Byrd's conviction. Certainly that evidence was exculpatory in nature because it constituted impeachment evidence. It impeached the deal giving Sullivan probation. It impeached the State's impartiality. This nondisclosure undermines confidence in the outcome and requires a new trial.

Other undisclosed Brady material included:

1) A psychological screening report done on Mr. Sullivan in 1979 by the Department of Corrections indicating that "Signs of weak coherence to social mores is suggested. He appears to an individual who would take advantage of others when possible. Manipulation should certainly be guarded against."

2) Supplemental police report dated October 16, 1981 made by Detective Reynolds indicating that Wade Byrd's alibi had checked out in that Verna Spurlock, a barmaid, at Rusty O'Reilly's, remembered Mr. Byrd being at that establishment from approximately 9:00 p.m. until 2:30 to 3:00 a.m.; Sherri Haines, another waitress at Rusty O'Reilly's also remembered seeing Mr. Byrd there.

3) A police supplemental report dated October 27, 1981 made by Detective Burke, indicating that Mr. Endress had Italian food with Debra Byrd around 11:30 to 12:00 p.m. on the night before she was found dead.

4) A police report dated November 17, 1981, made by Detective Reynolds showed that Endress had confessed to a Debra Williams and indicated he and Sullivan committed the murder while they were robbing Debra Byrd.

Furthermore, the State failed to disclose the full extent of its deal with Sullivan. The State intervened on Sullivan's behalf to keep his parole from being violated because of his commission of a murder. This was pretty substantial benefit that went undisclosed. Also, details were not disclosed of the agreement between the State and Regina Schimelfining, Ronald Sullivan's girlfriend, who was charged with accessory after the fact to first degree murder. The charges were dropped, but it was not disclosed why.

The State also had testing done on the bullets removed from the scene of homicide in order to determine if they had been shot by a gun equipped with a silencer. The State's testing showed no evidence that a silencer had been used. Though the testing was not conclusive, in the sense that it could establish no silencer was used, it certainly undermined Mr. Sullivan's testimony; as did the failure to find copper fragments that would have been expelled by the copper silencer Mr. Sullivan claimed was used.

There can be no doubt about Mr. Byrd's entitlement to relief. Rule 3.220 of the Florida Rules of Criminal Procedure, clearly defines the prosecutor's obligation of disclosure. Failure to honor Rule 3.220 requires a reversal unless the State can prove that the error is harmless. Roman v. State, 528 So. 2d 1169 (Fla. 1988). Here exculpatory evidence and statements material to the defendant's case were undisclosed. Clearly, the undisclosed statements here negate the guilt of Mr. Byrd by impeaching the State's star witness.

In United States v. Bagley, 473 U.S. 667, 676, the Supreme Court held:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104 (1972). Such evidence is "evidenced favorable to an accused," Brady, 373 U.S., at 87, 83 S.Ct., at 1196, so that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

The prosecution's suppression of evidence favorable to the accused violated due process. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel

requests the specific information. The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information such as the sworn statements here renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, supra; United States v. Bagley, supra. Counsel cannot be effective when deceived. United States v. Cronic, 466 S. Ct. 648 (1984); Stano v. Dugger, 889 F.2d 962 (11th Cir. 1989). The resulting unreliability of a conviction or sentence of death derived from proceedings such as those in Mr. Byrd's case also violates the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margin of error. See Beck v. Alabama, 447 U.S. 625 (1980). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated.

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984); Brady, 373 U.S. at 87. Reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. Such a probability undeniably exists here. Had this evidence been disclosed, there would have been no conviction, no death sentence. The State's case was premised upon Sullivan's credibility. The undisclosed evidence would have destroyed that credibility. Without a credible Ronald Sullivan there would have been no conviction. At trial, the prosecution knew this and went to extraordinary lengths to protect Sullivan's credibility. See Argument IV, infra.

The failure to disclose the impeachment evidence was used by the State to its advantage. The failure to disclose Sullivan's promise to get Byrd "real

good" kept the jury from knowing Sullivan and the State were lying when they claimed that the State gave Sullivan probation without knowing what he would say. Under Davis v. Alaska, 415 U.S. 308 (1974), defense counsel was entitled to present this to the jury. The jury did not know of Mr. Ober's interest in the outcome. Thus the defense could not attack the grant of probation to Sullivan on that basis. The jury did not know of the State's efforts to keep Sullivan's parole from being violated.

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. The Court also noted that, despite counsel's best efforts, there may be circumstances where counsel could not insure a fair adversarial testing, and thus where counsel's performance is rendered ineffective.

The prosecutor did not provide defense counsel with crucial exculpatory information. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. See Argument III, infra. However, the prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury.

> In the present case, the circumstances surrounding Mr. Pearl's representation of Stano--the State's failure to release discovery materials--"prevented [him] from assisting the accused during a critical stage of the proceeding." See Cronic, 466 U.S. at 659 n. 25, 104 S.Ct. at 2047 n. 25. Under those circumstances, as the Court stated in Cronic, "although counsel [was] available to assist the accused ..., the likelihood that any lawyer, even a fully competent one [as Mr. Pearl was here], could provide effective assistance [was] so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial." Id. at 659-60, 104 S.Ct. at 2047.
>
> Under Cronic, therefore, we must presume that Stano was prejudiced by Mr. Pearl's inability to give advice and grant him relief on grounds of ineffective assistance of counsel.

Stano v. Dugger, 889 F.2d 962, 967-68 (11th Cir. 1989).

The prosecution thwarted counsel and insured that Mr. Byrd was denied the effective assistance of counsel. Without the December 17 statements of Sullivan to the police, without knowledge of Mr. Ober's interest in a conviction, and without the other withheld information including the State's intervention with the parole board, counsel was denied the information necessary to a reasonable investigation of available impeachment and exculpatory evidence. Moreover, the prosecution knowingly presented false testimony to the jury and never alerted defense counsel. As a result, no adversarial testing occurred. Milford Wade Byrd was convicted without the effective assistance of counsel. His trial was "a sacrifice of [an] unarmed prisoner [ ] to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied sub nom.; Sielaff v. Williams, 423 U.S. 876 (1975). Accordingly, Mr. Byrd's conviction must be vacated and a new trial ordered.

ARGUMENT III

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

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

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

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

Many of the failures of defense counsel were pled, in Mr. Byrd's Motion to

Vacate and Supplement, either as instances of ineffectiveness, or as Brady or discovery violations by the State. Mr. Johnson, the lead defense attorney at trial, testified at the evidentiary hearing that he had searched for his file on Mr. Byrd but had been unable to locate it (T. 156). Both Mr. Johnson and Mr. Buckine, his co-counsel, testified wholly from memory, and neither could remember, in many respects, whether they had received certain specific discovery material from the State. Likewise, Mr. Ober and Mr. Lopez had difficulty remembering whether they provided specific reports to the defense. In any event, if defense counsel had the material alleged, then clearly they were ineffective for failing to use it.

Counsel's deficiencies were unreasonable and prejudicial: as a result of counsel's omissions, the State's trial and penalty phase case was never properly challenged. Counsel's failures in this regard are sufficient to undermine confidence in the outcome of these proceedings, for the law is also clear that even if an attorney provides effective assistance in some areas, counsel may still be ineffective in his or her performance in other aspects of the proceedings. 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, 477 U.S. 365 (1986). Even a single error by counsel may be sufficient to establish the defendant's entitlement to relief. 893 F.2d 94 (5th Cir. 1990; Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981); 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, supra; Kimmelman v. Morrison, supra. Here, there was much more than one error. Many of the errors on which proof was taken at the Rule 3.850 hearing, even standing alone, are sufficient to warrant relief. Taken together, certainly a reasonable probability of a different outcome is more than established.

Moreover, counsel has a duty to pose proper objections, see Murphy v. Puckett, supra; Nero v. Blackburn, supra; Nelson v. Estelle, supra, and to properly present legal issues for the court's consideration. Id. As will be discussed, without any supporting tactical reason whatsoever, counsel failed to meet those requirements of effective assistance in a number of instances. These errors further establish Mr. Byrd's entitlement to relief. Defense counsel must also 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 Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). As reflected by the original sentencing order, this Court's opinion on direct appeal, and by the penalty phase record itself, there was a failure to present evidence in mitigation at Mr. Byrd's capital sentencing proceeding. Former counsel explained at the Rule 3.850 evidentiary hearing that Mr. Byrd's case was his first capital trial, and that he approached the case just like any other case (T. 161). This is far from enough.

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to properly and fully investigate and prepare available mitigating evidence for the sentencer's consideration, see State v. Michael, 530 So. 2d 929 (Fla. 1988), object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v.

Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these constitutional standards. O'Callaghan v. State, 486 So. 2d 1454 (Fla. 1984). As explained in Tyler v. Kemp:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

755 F.2d at 743 (citations omitted). See Deutscher v. Whitley, 884 F.2d 1152, 1161 (9th Cir. 1989)("A finding that Deutscher was not prejudiced by [counsel's deficient performance] would deny Deutscher the chance to have the jury [] fully consider mitigating evidence in his favor.") Mr. Byrd is entitled to the same relief.

The Rule 3.850 hearing testimony, and counsel's own testimony at the hearing, makes clear that here, as in Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986), counsel's failures to adequately investigate and prepare for "the point when the jury was to decide whether to sentence [Milford Wade Byrd] to death," demonstrate ineffective assistance. In a case such as this, counsel should have prepared well ahead of time. See Harris v. Dugger, 874 F.2d 756, (11th Cir. 1989); Michael, supra; see also, Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). Rather, counsel, who had never before tried a penalty phase, tried to scrape together a penalty phase defense, but spoke only briefly to Mr. Byrd's father, never to his sister, and never asked either of then to attend the trial to testify. The Rule 3.850 hearing evidence -- reflecting the ample mitigation available at the time of Mr. Byrd's trial -- makes it clear that counsel's efforts were woefully inadequate. Cf. Porter, supra; Jones, supra. Where, as here, counsel fails to

prepare and thus fails to develop a compelling case for life, the proceedings' results are rendered unreliable, and relief is proper. Bassett v. State, 541 So. 2d 596, (Fla. 1989). See, e.g., Thomas v. Kemp, supra, (little effort to obtain mitigating evidence); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses at sentencing phase of capital trial); State v. Michael, supra (mental health mitigation ineffectively undeveloped); see also, Tyler v. Kemp, supra. What the post-conviction record before this Court makes undeniable is that significant mitigating evidence which was available and which should have been presented never got to the jury charged with deciding whether Mr. Byrd should live or die. In this case, as in Thomas v. Kemp,

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trials would have been different if mitigating evidence had been presented to the jury. Strickland v. Washington, 466 U.S. at 694. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gregg v. Georgia, 428 U.S. 153 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

796 F.2d at 1325. See also, Deutscher, supra; Michael, supra; Middleton, supra; Porter v. Wainwright, supra.

A. GUILT PHASE

The crux of the State's case was the testimony of Ronald Sullivan, one of Mr. Byrd's co-defendant's. Mr. Lopez, one of the Assistant State Attorneys who prosecuted Mr. Byrd, testified that it would be an understatement to say that Mr. Sullivan's credibility was "a big issue" in the trial. (T. 91). Mr. Sullivan testified that Mr. Byrd hired him to kill Mrs. Byrd, and then actually participated in the murder. Defense counsel unreasonably failed to use key evidence to impeach Sullivan's testimony, to the prejudice of Mr. Byrd.

This impeachment evidence included a supplemental police report that contradicted what Sullivan said on the witness stand. At trial, Sullivan was

asked, on cross-examination:

> "Q The only person that you have spoken to about this case have been the one police officer on October 13 and the statement that you gave at the police department on October 28 prior to April 19th when you gave this statement?
>
> A April 19th.
>
> Q Do you understand the question, Mr. Sullivan?
>
> A Sir, you asked me did I talk to anybody besides that, and I just answered your question yes, I did, on April 19th.
>
> Q But other than April 19th, you have given no statements at all other than the one statement on October 13th and then this statement on October 28th?
>
> A No, sir."

(R. 438)

Defendant's Exhibit 4 at the 3.850 hearing was police report dated December 17, 1981 indicating that Sullivan talked to Detective McAlister on that date. Mr. Johnson testified at the evidentiary hearing that he did not recall whether he was ever given that report, (T. 170) but Mr. Lopez testified, "But I certainly hoped to God I gave Mr. Sullivan a copy of this, gave Mr. Johnson a copy of that police report, if I had it." (T. 91).

Both Lopez and Johnson agreed that the report showed Sullivan lied. But it was never used. They jury was thus left with the impression that Sullivan had much less contact with the police than he actually had. This was also important because that same police report indicated that Sullivan had told Det. McAllister that he could give the State "Endress and Byrd real good." (Def. Exh. 4). The jury, however, was told that the State gave Sullivan probation whether knowing whether his testimony would incriminate Mr. Byrd.

The State's closing argument with regard to Sullivan was that they had made a deal with Sullivan <u>before</u> knowing what he had to say; they offered him a life probation merely for truthful testimony, without knowing what he had to say; without knowing who it would implicate or to what extent. The "deal" was made

on April 19, 1982 (Def. Exh. 6), and the conversation with the police was on December 17, 1981. Defense counsel never brought this out. Instead, he allowed the State to argue:

> "The first time we knew of what happened here is April 19th, when Ronald Sullivan, after being given probation, promised probation for truthful testimony, came and gave us a statement implicating Mr. Byrd in this homicide. If Mr. Sullivan had told Mr. Ober and myself, "I did it, guys, Wade Byrd didn't have anything to do with it," we would have been bound by those plea negotiations. He would have still received probation. My point being, I don't think he has got any motive to come in here and purposely try to put somebody in prison or in the electric chair. He would have been given probation either way.

(R. 1206-7). This was a lie. Counsel's failure to challenge and expose this lie was clearly ineffectiveness.

Finally defense counsel did not inform the jury of the extent of Sullivan's deal with the State. Mr. Johnson testified that Sullivan was given life probation for the murder, but he didn't know how many other charges were dropped as a result of the deal. (T. 190). Also, Johnson never thought it was important to obtain Sullivan's Department of Corrections file to learn how the State was handling Sullivan's parole as a result of the murder charge. (T. 192). Johnson testified that he did believe the State was going to assist Sullivan with the parole revocation (T. 192) which is interesting since both prosecutors adamantly denied this (T. 99; 142) but he never shared that with the jury either.[7]

Because of his failure to obtain DOC records on Sullivan, Mr. Johnson did not have the benefit of a psychological screening report that indicated that Sullivan showed "signs of weak coherence to social mores is suggested. He appears to be an individual who takes, who would take advantage of others when possible. Manipulation should certainly be guarded against." (T. 202).

Defense counsel also failed to properly impeach another State's witness,

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[7]In fact through the intervention of the prosecuting attorneys Mr. Sullivan's parole was not revoked despite his plea to a murder committed while on parole.

Mr. Shad. Mr. Shad was portrayed by the state as a friend of the Byrd's. (R. 1199). In cross-examination, defense counsel asked Shad if he had raped Mr. Byrd's sister, Brenda, but Shad denied it. (R. 329). Defense counsel never talked to Brenda, (T. 178) or he would have known that in fact Shad had raped her, and she was willing to testify to that. (T. 44; 46).

Mr. Johnson also ineffectively failed to utilize a police report that indicated that James Endress, another co-defendant, had told Debra Williams that he and Sullivan had murdered Ms. Byrd in a robbery situation, thus exculpating Mr. Byrd. (T. 181). Again, Mr. Johnson's "reason" for not using this information is patently unbelievable. He testified that he did not want to have to deal with Endress, who had not yet gone to trial, in absentia. "I would prefer to deal with Sullivan than him." (T. 184). Yet Sullivan was the one implicating his client, not Endress. Under Chambers v. Mississippi, 410 U.S. 284 (1973); the criminal defendant's right to defend is paramount to a state's evidentiary rule barring hearsay. Counsel was unaware of this basic rule of law and did not consider it when mapping out defense strategy.

These failings are clearly ineffective assistance of counsel. Sullivan's testimony was the lynchpin of the State's case. Yet counsel inexplicably failed to use key impeachment evidence to attack him, choosing instead to hope that the jury could just recognize that Sullivan was a bad guy. (T. 172). The prejudice to Mr. Byrd is obvious: his capital conviction and sentence of death. Relief is proper. Had this exculpatory evidence been presented to the jury there is a reasonable probability of different outcome.

B. PENALTY PHASE

As noted infra, defense counsel did very little to prepare for the penalty phase of Mr. Byrd's capital trial. As counsel admitted at the evidentiary hearing, his efforts in preparing for the penalty phase were limited to speaking to a few people who were mentioned to him by Mr. Byrd. However, Mr. Johnson

testified that he did not remember if he even spoke to Brenda, Mr. Byrd's sister, even though he had her name. (T. 215-16). He did speak to Mr. Byrd's father (T. 216), but did not ask him to attend the trial, or subpoena him for trial. (T. 216). After the father paid his own way down to the trial, Mr. Johnson did call him to testify at the penalty phase, but only talked to him briefly regarding his testimony. (T. 217). Mr. Johnson testified, "I think that I presented in the father's testimony everything that I thought would be helpful to his son and that I had uncovered that I thought was relevant." (T. 216). Nothing was explained to the father. He testified at the evidentiary hearing that Mr. Johnson told him it was best if he didn't even attend the trial. (T. 24). Percy Byrd did come to the last day of the trial anyway, and was asked by Mr. Johnson if he would take the witness stand, but it was never discussed with him what his testimony would concern. (T. 25). No effort was made to secure Percy Byrd's testimony; it was merely fortuitous that Percy even attended any of the trial after being asked not to. Brenda was never asked to testify. No effort was made to explain to the jury Mr. Byrd's background or his individual characteristics. In fact, Percy Byrd's testimony at the penalty phase consisted of telling the jury that Wade had been convicted twice of passing worthless checks (R. 1303), that he was never a violent person (R. 1305), that he appeared to have been in love with his wife (R. 1306) that he spent the majority of a visiting period, after the verdict was returned, with Jody Clymer, his girlfriend (R. 1309).

There, however, was much more that Percy Byrd could have testified had counsel but asked. Percy Byrd testified, at the 3.850 evidentiary hearing, that he would go fishing with his son when he was younger, (T. 10) and quail and deer hunting at times. (T. 11). When Wade was growing up, he was never given an allowance, but earned his spending money mowing his neighbor's lawns. Wade did real well in school, and "exceptionally good in math." (T. 11). Percy could not

financially afford to send his son to college, so Wade joined the Marine Corps to finish his education. Instead, he was sent into combat in Viet Nam. This was when he was 17 years old. (T. 11-12). Before he went to Viet Nam, Wade attended church regularly. (T. 12). One time he ran away from home and stayed in the church furnace room until he decided to go back home. Shortly after that he went into the Marines. Wade was in combat for 11 or 12 months. He was given the Purple Heart twice for being wounded in action. (T. 15). One time when he was wounded, his platoon left him in a fox hole with only a bayonet. While he was in the fox hole, a number of Viet Cong jumped over the hole, but none fell in. "But when they came back for him, they told him why they did it. That they knew that if they let him have the rifle, that he would shoot the first one that jumped over him. They would turn around and some of the others would kill him. But if someone fell in there on him, he could kill him with a bayonet. There wouldn't be no noise. But nothing happened. And he lay here, and they came back and got him." (T. 16).

Percy explained how Wade was dishonorably discharged from the Marine's. When he returned from Viet Nam, Wade's pay records were messed up and he wasn't getting paid. (T. 36). At that time, Wade had a wife and a baby, and was trying to make car payments. In fear of losing his car, Wade altered the face of some checks. He was convicted and spent time in jail for that. (T. 36-7).

After getting out of the service, Wade's mother died. He had been very close to his mother (T. 17). While she was dying of cancer, he went to visit her in the hospital on breaks from his job. (T. 18). When she died, Wade went and got his sister Brenda from school, and took care of her in order to ease the burden on his father. Percy testified:

"Q Was Wade upset at all when his mother died?"

"A Yes, he was. He was, he was trying to help me, because I had had a long, hard pull. He was trying to help me with my feelings, too. So, and I appreciated that of him."

"Q Was he trying to help Brenda too?"

"A Ma'am?"

"Q Was he trying to help Brenda with her feelings too?"

"A Yes, he did." (T. 19)

Percy and Wade did things together even after Wade was grown up and married. Percy brought a motorcycle so that he could ride with Wade. They would meet somewhere, or Percy would drive down to Florida to ride with Wade.

> "But I bought that motorcycle where him and I could have a better relationship. We could get together and just ride and enjoy just being, he is the only son I had. I wanted just to get closer and closer to him. And this was, he had a motorcycle. I bought one for that purpose, to ride with him, because I was so used to riding in my younger days it wasn't no problem with me. And I bought it for that purpose, was to have a better relationship with him. He had moved a long way from home. I would ride from North Carolina down here."

(T. 26)

"

> A Father-son. That is what it amounted to. Most of the riding he done that I knew anything about, his wife was with him, most of it. Him and I, whenever I would come down here to see him, he would ride Debbie and I would ride Brenda. And we would just, just ride and enjoyed it. It was because we liked motorcycles. We liked speed, and I didn't see anything wrong with that. You don't have to be a bum to do that."

(T. 27-8).

Both Percy and Brenda testified at the evidentiary hearing as to what kind of a brother Wade was to Brenda.[8] Brenda was married at the age of fifteen, and had two children right away (T. 19). When her husband was out of a job, Wade gave them a place to stay in the motel where he was working. When Brenda separated from her husband, she again moved in with Wade and worked in the motel. (T. 20).

As Brenda told it, Wade, who was 12 years older than she, was a good brother to her. She was 13 when their mother died. Wade came and got her out

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[8]Again none of this was presented at the penalty phase of Mr. Byrd's trial.

of junior high school, and told her that their mother had passed away. He took her for a drive, "and then he started to cry. I started to cry. We just drove and talked and he said, 'Well, it's just you, me and dad now. She is gone.' And it was just real emotional." (T. 43).

> "Q. At some point later did there come a time when you needed a place to stay?
>
> A. Yes. My husband and I both and the children didn't have any where to go. He gave us a place to stay.
>
> Q. How old were you at the time?
>
> A. Oh, gosh. Must have been seventeen.
>
> Q. You had how many children?
>
> A. Two children.
>
> Q. How old were you when you got married?
>
> A. Fifteen.
>
> Q. Did you leave home at fifteen?
>
> A. Yes. And he gave us a place to stay, took care of us until we got on our feet. Then, again, when I left my husband, I didn't have anywhere to go. I had two children. I was eighteen years old. And he gave me a place to stay, took care of the children. Then when he got transferred to Florida, he said, "Do you want to go with us? I said, "Yes." So I went with them to Florida and lived with them, stayed in their apartment.
>
> Q. Them? Who do you mean by "them"?
>
> A. Wade and Debbie.
>
> Q. Okay.
>
> A. And I stayed in their apartment, lived with them for about three, four months, I believe it was.
>
> Q. Did he charge you rent?
>
> A. No. I worked at a motel, but that was spending money and stuff."

(T. 43-4). Brenda was never contacted by Wade's defense attorneys. (T. 45). She testified that she would have been willing to talk with them and testify at the penalty phase of Wade's trial if only they had asked (T. 46).

Percy did testify at the penalty phase (R. 1303-1315). But, as he explained at the evidentiary hearing, he felt very ill at ease about that testimony. Percy stated that Mr. Johnson came and talked to him at his home prior to trial, but only spent about a half an hour with him. "He asked, he just asked mainly about his violence, was he violent as a child and hard to handle, you know. But I assured him that he wasn't. But as long as he lived with me, he was an outstanding teenager and young man." (T. 24). Percy was then told it was best if he did not attend the trial.

After Percy did come to the last day of trial anyway, Mr. Johnson put him on the witness stand without explaining to him the importance of his testimony, or what types of things he should be sharing with the jury.

Q. Did he talk to you about what your testimony would consist of?

A. No. He just told me that, that he might want to put me on the stand. That's what he said.

Q. Then he just called you and asked you questions?

A. Right.

Q. Did you feel like you told the jury everything you wanted to during your testimony or did you feel uneasy about your testimony?

A. I didn't, I didn't, I didn't tell the jury what I would have told them if I had to go over it again. They asked me, Mr. Johnson asked me, did I ride a big black motorcycle? I told him I did. And he said, "Does Wade ride a motorcycle?" I said that he did, or he does. I got the feeling after that, and that was about the extent of the questions, and he didn't ask much more questions after that, that I can remember. But what bothered my mind about it, what bothered me about it was that I know how people feel concerning people riding motorcycles. And they just have a bad name, as far as motorcycle riding is concerned, a lot of them, gangs and all.

(T. 25-26)

Given the nature of the crimes alleged by the State, counsel should have fully and properly investigated and prepared for the penalty phase well before Mr. Byrd's trial. See O'Callaghan v. State, supra; Tyler v. Kemp, supra; Jones v. Thigpen, supra. He failed to do so. A compelling case for life imprisonment

could have been presented. It was not. In the language of the Florida Supreme Court in Michael, supra, confidence in the outcome is undermined by counsel's deficient performance. The jury was denied the opportunity to consider the mitigating evidence in Mr. Byrd's favor. As a result the death sentence is unreliable. Deutscher, supra; Blake, supra; Thomas, supra. Mr. Byrd therefore respectfully urges that this Court vacate his unreliable sentence of death.

ARGUMENT IV

MR. BYRD WAS DENIED HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL BY IMPROPER PROSECUTORIAL COMMENTS DURING THE CROSS-EXAMINATION OF A DEFENSE WITNESS AND DURING CLOSING ARGUMENTS IN BOTH THE GUILT AND PENALTY PHASES. TRIAL COUNSEL'S FAILURE TO OBJECT AND COMBAT THE PROSECUTORIAL OVERREACHING WAS INEFFECTIVE ASSISTANCE.[9]

During cross-examination of a defense witness, the prosecutor argued with a witness concerning the content of the out-of-court conversations. At one point the prosecutor asked if the witness was calling the prosecutor a liar (R. 1068). The shouting match concerned the question of whether the prosecutor had told that witness that he would not engage in any plea bargains with that witness. As was made clear in an in-camera hearing that followed the in-court fireworks, in fact the prosecutor had never communicated his intent to cut off negotiations (T. 1123-1129). What is clear here is that the prosecutor should not match his credibility against that of a witness, under any circumstances. In this instance, the prosecutor's statements were even more improper because the prosecutor was in fact wrong; yet he had personally injected himself into the case before the jury by indicating that the defense witness was lying.

As if this extremely outrageous conduct were not enough, in his closing argument, the prosecutor vouched for the credibility of the State's witnesses:

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[9]This claim is ultimately premised upon ineffective assistance of counsel. Trial counsel did not object. Under the circumstances this was deficient performance which prejudiced Mr. Byrd. Gordon v. State, 469 So. 2d 795 (Fla. App. 1985). Yet the circuit court refused to hold an evidentiary hearing on this issue finding it a matter that should have been raised on direct appeal.

MR. SHAD: -- I believe the gentleman is Persian -- a friend of the Byrds, an admitted friend of Debra Byrd and Wade Byrd, no motive to lie or misrepresent anything.

(T. 1199)(emphasis added). This comment is also improper because it is clear that Mr. Shad did have a motive to lie -- he had dated Mr. Byrd's sister and, although he denied it, he was cross-examined on whether the sister came back with a bruise on her neck, on her arm and on her right leg and whether she had accused Mr. Shad of having raped her (T. 329). The prosecutor in essence told the jury that there was nothing to the rape charge Mr. Byrd's sister had lodged against Mr. Shad.

He also tried to buttress his motives for the decisions he made in the case:

. . . [Ronald Sullivan] was given probation -- please understand this -- he was given probation before he told the State Attorney's Office anything.

The first time we knew of what happened here is April 19th, when Ronald Sullivan, after being given probation, promised probation for truthful testimony, came and gave us a statement implicating Mr. Byrd in this homicide. If Mr. Sullivan had told Mr. Ober and myself, "I did it, guys. Wade Byrd didn't have anything to do with it," we would have been bound by those plea negotiations. He would have still received probation. My point being, I don't think he has got any motive to come in here and purposely try to put somebody in prison or in the electric chair. He would have been given probation either way.

(T. 1206-1207). Yet a police report dated four months prior to the deal with Sullivan clearly established if a good enough deal came along he, Sullivan, would get Byrd and Endress real good. In fact at the 38.50 hearing the prosecutor had to admit that his assertions in his closing were not accurate in light of the police report:

Q Do you indicate in the closing argument that you didn't know as the prosecutor what Mr. Sullivan would say as to Mr. Byrd prior to the April 19th plea negotiation?

A I make a statement, I think, somewhere along those lines in here. I allude to April 19 and after he had been given probation, giving us a statement implicating Mr. Byrd. I say that in my summation here.

Q Is that inconsistent at all with the fact that the December

17 report indicates he would get Mr. Byrd or get Wade real good?

[Objection overruled]

Q My question is, what is reflected in that report, is that at all inconsistent with what you indicated in the closing argument?

A It is a little bit inconsistent in that, in that context, yes.

(T. 93-94).

Also in closing, the prosecutor vouched for himself:

> If she did, in fact, say it and your memory serves you, we'll accept it. Don't think, please, that I am trying to put things in your mind at this point in time. If it doesn't agree with what comes from that witness stand, reject what I am saying, <u>but it won't happen because everything that I am telling you is what came from that witness stand</u>
>
> .

(T. 1201)(emphasis added). And he vouched for the police:

> To believe that the police threatened charging Jody Climer if Byrd did not make a statement is to believe that we still exist in Nazi Germany, ladies and gentlemen. To believe that the police lied, he told Mr. Byrd what he had to say, is an insult on your intelligence <u>in my opinion</u>.

(T. 1212-1213)(emphasis added).

The prosecutor, still in closing argument, injected his own personal beliefs into almost every argument he made:

> Ladies and gentlemen, I believe as far as the elements go, we have shown you a prima facie case . . .

(T. 1190).

> . . . [B]ut on this night, the 12th and 13th of October, [Mr. Byrd] stayed there according to him for two or three hours and he was in a position at a well right in front of her where she could see him the whole night. Again, it may seem innocuous to you. <u>I don't believe it is</u>. He was doing that for a reason, ladies and gentlemen, to try and establish an alibi.

(T. 1292)(emphasis added).

> [Wade Byrd] tells them he would not have made the statement if it hadn't been for Jody Climer. <u>I think</u> the reason he made the statement, ladies and gentlemen, is because he had lied to such an extent to this woman and he felt so bad about it when they asked her to come down there, he felt so bad, his conscience was eating him up so bad that he made the statement to clear the slate, and the only

time, in my opinion, that Wade Byrd has ever been truthful in this case was on the 13th day of October when he gave that statement to the police and in Jody Climer's presence, holding her hand, crying. That is the only time in my opinion.

(T. 1205)(emphasis added).

Recently the United States Supreme court ruled that due process and the right to a fair trial may be breached when a prosecutor engages in improper comment. United States v. Young, 470 U.S. 1, 7-8 (1985). The Court noted:

> Nearly a half century ago this court counseled prosecutors "to refrain from improper methods calculated to produce a wrongful conviction . . . " Berger v. United States, 295 U.S. 78, 88 (1935). The court made clear, however, that the adversary system permits the prosecutor to "prosecute with earnestness and vigor." Ibid. In other words, "while he may strike hard blows, he is not at liberty to strike foul ones." Ibid.
>
> The line separating acceptable from improper advocacy is not easily drawn; there is often a gray zone. Prosecutors sometimes breach their duty to refrain from overzealous conduct by commenting on the defendant's guilt and offering unsolicited personal views on the evidence. Accordingly, the legal profession, through its Codes of Professional Responsibility, and the federal courts, have tried to police prosecutorial misconduct. In complementing these efforts, the American Bar Association's Standing Committee on Standards for Criminal Justice has promulgated useful guidelines, one of which states that
>
> '[it] is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.' ABA Standards for Criminal Justice 3-5.8(b)(2nd Ed. 1980)(footnotes omitted).

In Young the Court noted that the prosecutor may breach the constitutional guarantee when he implies he had more information than had been presented to the jury.

> "The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused pose two dangers: such comments convey the impression that evidence not presented to the jury, but known to the prosecutor, supports the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to trust the government's judgment rather than its own view of the evidence. See Berger v. United States, 295 U.S. at 88-89." 470 U.S. at pp. 18-19.

In the penalty phase, an example of the prosecutor's improper closing

argument was his urging the jury that they could not consider sympathy in their deliberations:

> Mr. Byrd has testified, both his father and the defendant, and it's not easy for me to be up here and ask you to do this because we, I think, as human beings are very sympathetic to each other and I think that is a human trait that most of us possess. It's difficult and as a parent you go through what Mr. Percy Byrd is suffering through and that is unfortunate.
>
> You will see on the mitigating circumstances that we have, the real reason for this testimony is sympathy. . . .
>
> * * * *
>
> The testimony of those witnesses changes absolutely nothing because sympathy is not a factor in mitigation. You are to base your decision not on human emotion, not on sympathy.

(T. 1320-1321)(emphasis added).

Finally, in penalty phase closing argument, the prosecutor said:

> What do the facts and the law compel you to do? I must bring up at this time the other people because that is important. The law sets out to punish people equally for their participation in crimes if their conduct is, in fact, equal to other individuals involved in the same crime. What will happen to James Endress, we know not. He is set for trial. He will go through virtually the same thing that Mr. Byrd has been through. A jury will be determined to find out whether he is guilty or innocent. He is looking at the same penalty if he is convicted.
>
> What about Ronald Sullivan? Do you think that Ronald Sullivan was given consideration because he deserved it? He was not. The case against Ronald Sullivan was very weak. He would not have been convicted because up until he told the police in our office what happened, the only evidence against Ronald Sullivan was that statement that he made on October 28th, that he made a silencer. We don't know if a silencer was used in the crime because the murder weapon was never found. He has though subjected himself to life in prison and he will serve -- he is on a violation of parole, now. He will serve time on that violation of parole. He will be out, as Mr. Buckine correctly told you during final arguments, he will be out on probation but as sure as I am standing here, he will violate that probation and he will go to prison for life.

(T. 1331-1332)(emphasis added).

There are several blatant untruths in that argument. The prosecutor knew full well that by the time he made the deal with Sullivan, the case against him

was anything but weak. Sullivan had "confessed" to almost everyone he ran into during that time. Further, the prosecutor knew that he was going to take care of the parole violation so that Mr. Sullivan would spend little or no time in jail. Finally, after Mr. Sullivan did violate his probation, the State recommended that his life sentence be reduced to 10 years.

The knowing use of false testimony is forbidden. "As long ago as Mooney v. Holohan, 294 U.S. 103, 112, 55 S. Ct. 340, 342, 79 L.Ed. 791 (1935), the Supreme Court made clear that deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 92 S. Ct. 763, 31 L.Ed.2d 104 (1972). Likewise, a prosecutor cannot convey false argument to a jury in closing.

In Gordon v. State, 469 So. 2d 795, 796 (Fla. App. 1985), the court said:

> Defendant further claims he was denied a fair trial as a result of prosecutorial misconduct during the trial. It is axiomatic that a prosecutor must refrain from conduct which would deprive an accused of a fair impartial trial. Wilson v. State, 371 So. 2d 126 (Fla. 1st D.C.A. 1978); Meade v. State, 431 So. 2d 1031 (Fla. 4th D.C.A. 1983).

The court there found that the prosecutor there had engaged in highly improper conduct in order to secure a conviction. Further the court ruled it was deficient performance for defense counsel not to object to the prosecutorial misconduct which prejudiced the defendant and required a new trial to be ordered.

Here the prosecutorial error was accompanied by defense counsel inaction. He did not object; he did not refute the prosecutor's lies. Certainly under Gordon, supra, and Kimmelman v. Morrison, 477 U.S. 365 (1986), this was ineffective assistance of counsel. Moreover because counsel did not know of Mr. Ober's personal interest in obtaining a conviction, he was misled. Under United States v. Cronic, 466 U.S. 648 (1984), and Stano v. Dugger, 889 F.2d 962 (11th

Cir. 1989), the circumstances made him ineffective.

Here the prosecutor crossed the line of fair play. Mr. Byrd was denied his rights under the sixth, eighth, and fourteenth amendments to the United States Constitution. Given the fundamental violation of Mr. Byrd's constitutional rights, it simply cannot be said that the proceedings resulting in Mr. Byrd's conviction and sentence of death have comported with fundamental due process, equal protection, and eighth amendment prerequisites. See, Beck v. Alabama, 447 U.S. 625 (1980), Gardner v. Florida, 430 U.S. 349 (1977). An evidentiary hearing and Rule 3.850 relief are warranted.

ARGUMENT V

MR. BYRD WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF EVIDENCE OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. HIS INVOCATION OF HIS RIGHT OF SILENCE WAS IGNORED AND A CONFESSION WAS COERCED FROM HIS LIPS AND USED AGAINST HIM BECAUSE HIS COUNSEL FAILED TO PRESENT THE PROPER FACTS, ALONG WITH CASE LAW AND ARGUMENT, TO THE TRIAL COURT.[10]

On October 28, 1981, Mr. Byrd was arrested at his home and taken to police headquarters. There he was given Miranda warnings, and he signed a written waiver which provided in pertinent part:

> I, Wade Byrd do hereby consent to being interviewed by Det. K.C. Newcomb Det. R.J. Reynolds concerning the offense of homicide. I understand that . . . I have the right to remain silent and not answer any questions asked of me relative to this crime . . . .

(State's Exh. #32).

For two-and-one-half hours, Mr. Byrd maintained his silence while the police tried in vain to prompt a response. The State acknowledged this at trial but argued that Mr. Byrd's long silence and subsequent statements were

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[10]This claim is ultimately premised upon ineffective assistance of counsel. Trial counsel did not object. Under the circumstances this was deficient performance which prejudiced Mr. Byrd. Gordon v. State, 469 So. 2d 795 (Fla. App. 1985). Yet the circuit court refused to hold an evidentiary hearing on this issue finding it a matter that should have been raised on direct appeal.

nonetheless admissible. "This Defendant at no time invoked his right to remain silent. Merely not saying anything is not an indication of a right to remain silent." (R. 699).

The State's position in this case is that an individual must speak in order to exercise his right of silence. Such a position is nonsensical. The State failed to honor Mr. Byrd's right to remain silent and in fact introduced evidence of the silence against him at trial. This violated the Miranda warnings given to Mr. Byrd which indicated that Mr. Byrd retained the right to remain silent.

Trial counsel failed to object to the introduction by the State of Mr. Byrd's prolonged silence. No objection was registered to prosecutorial comment upon Mr. Byrd's silence. Counsel never adequately presented to the trial court the facts surrounding the two-and-one-half hours of silence, and he failed to argue that silence may on its own constitute the invocation of the right of silence. Counsel further failed to argue that Mr. Byrd's prolonged silence was an invocation of the right of silence which required the police to cease the interrogation.

In Miranda v. Arizona, 384 U.S. 436 (1966), the United States Supreme Court declared "Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease." (Emphasis added). 384 U.S. at 473-74. This ruling was reaffirmed in Edwards v. Arizona, 451 U.S. 477, 482 (1981).

Recently this Court explained:

> [A] suspect's equivocal assertion of a Miranda right terminates any further questioning except that which is designed to clarify the suspect's wishes. See Long v. State, 517 So. 2d 664 (Fla. 1987), cert. denied, 108 S. Ct. 1754 (1988), and cases cited therein; and Martin, where although there was no violation of the fifth amendment by continuing questioning after an equivocal invocation of Miranda rights, the court held that the continued questioning was reversible error under Miranda. Given this clear rule of law, and even after

> affording the lower court ruling a presumption of correctness, we cannot uphold the ruling. The responses were, at the least, an equivocal invocation of the Miranda right to terminate questioning, which could only be clarified. It was error for the police to urge appellant to continue his statement. Such error is not, however, per se reversible but before it can be found to be harmless, the Court must be able to declare a belief that it was harmless beyond a reasonable doubt. Chapman v. State, 386 U.S. 18, 24 (1967); Martin v. Wainwright. Applying this standard, we are unable to say in this instance that the error was harmless beyond a reasonable doubt. Even though there was corroborating evidence, Owen's statements were the essence of the case against him. We accordingly reverse Owen's convictions on the basis of the inadmissible statements given after the response, "I'd rather not talk about it."

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

Certainly refusing to talk for two-and-one-half hours indicates a desire to remain silent. See, R. 1202. And even though the exact number of minutes necessary to constitute an invocation of the right of silence may be an open question (cf. Smith v. Illinois, 469 U.S. 91 (1984)), certainly it takes considerably less than one hundred fifty minutes of silence to convey the desire not to talk. Counsel's failure to assert this claim prior to or during trial certainly was ineffective assistance. What case is more basic to American criminal jurisprudence than Miranda; what concept more basic than the right of silence. Certainly the failure to argue this point was as egregious if not more so than the failing in Kimmelman v. Morrison, 477 U.S. 365 (1986), to urge a fourth amendment violation which the United States Supreme Court found required a new trial.

Further, the Miranda violation was exacerbated by the police officer's decision not to re-Mirandize Mr. Byrd following a recess in the interrogation while Mr. Byrd conversed with his girlfriend who had also been transported to headquarters for questioning. Up until Mr. Byrd's conversation with his girlfriend, Mr. Byrd had exercised his right of silence. Under the principles of Miranda and Edwards, Mr. Byrd should have re-initiated the contact and have been re-Mirandized. The failure of the police to honor Mr. Byrd's exercise of

his fifth amendment rights rendered the resulting statements inadmissible. Counsel's failure to argue this on Mr. Byrd's behalf was again ineffective assistance under Kimmelman.

Furthermore, in order to be admissible an accused's statements to law enforcement officers must have been voluntarily given. In Spano v. New York, 360 U.S. 315 (1959), the United States Supreme Court held:

> We conclude that petitioner's will was overborne by official pressure, fatigue and sympathy falsely aroused after considering all the facts in their post-indictment setting. Here a grand jury had already found sufficient cause to require petitioner to face trial on a charge of first-degree murder, and the police had an eyewitness to the shooting. The police were not therefore merely trying to solve a crime, or even to absolve a suspect. [citations] They were rather concerned primarily with securing a statement from defendant on which they could convict him. The undeviating intent of the officers to extract a confession from petitioner is therefore patent. When such an intent is shown, this Court has held that the confession obtained must be examined with the most careful scrutiny, and has reversed a conviction on facts less compelling than these.

360 U.S. at 323-24.

The police in the present case ignored Mr. Byrd's silence and used psychological tactics designed solely to extract a confession. One police officer with tears in his eyes pleaded with him to confess. Finally the officer agreed to let Mr. Byrd talk to his girlfriend, Jody Clymer, if Mr. Byrd would agree afterwards to tell the police officers what they wanted to know. This police officer then went to Ms. Clymer, Mr. Byrd's girlfriend who the police were holding at headquarters and sought her aid in eliciting a confession from Mr. Byrd.

The statements that the police were ultimately able to obtain from Mr. Byrd resulted from his desire to shield Ms. Clymer from harassment and to insure her prompt release. Under the circumstances he believed she was being held under arrest and could continue to be so held until he, Mr. Byrd, cleared her by confessing. Mr. Byrd's subsequent statements were not voluntary. Certainly Mr. Byrd's prolonged silence and refusal to permit taping of his statement evidences

his desire to maintain his silence, but his will was overborne.

In addition, counsel failed to assert the involuntariness of Mr. Byrd's statement over the phone to his father incriminating himself. Mr. Byrd testified this occurred again in the police officers' presence and because of his fear for Ms. Clymer. The police confirmed by their testimony that Mr. Byrd made the phone call while they stood there listening.

The failure of trial counsel to adequately litigate Mr. Byrd's fifth amendment claim was ineffective assistance under Kimmelman v. Morrison, supra. The question of the voluntariness of a confession requires an analysis of all the surrounding circumstances in order to be resolved. Here counsel failed to present the subtle and not so subtle ploys that the police used to overbear Mr. Byrd's will and extract a bogus confession out of him; a confession given in order to protect Mr. Byrd's girlfriend from enduring incarceration. Again counsel's failure in this regard resulted in an involuntary and bogus confession being admitted into evidence. Counsel's performance was grossly inadequate in presenting and arguing the voluntariness issue.

Mr. Byrd's rights under the fifth, sixth, eighth, and fourteenth amendments were violated by the introduction of Mr. Byrd's initial silence and his later statements during the October 28, 1981, interrogation. A full and fair evidentiary hearing was required because the files and records by no means showed that Mr. Byrd was entitled to no relief on his claim. Lemon v. State, 498 So. 2d 923 (Fla. 1986). This Court must reverse the refusal to conduct an evidentiary hearing. Thereafter, relief under Rule 3.850 is warranted.

ARGUMENT VI

MR. BYRD WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. HIS COUNSEL'S FAILURE TO EVEN ASSERT THE SIXTH AMENDMENT VIOLATION WAS

INEFFECTIVE ASSISTANCE.[11]

In the early morning hours of October 28, 1981, Mr. Byrd was arrested on charges of first-degree murder. At 8:31 a.m., a Criminal Report Affidavit was filed with the Clerk of the Circuit Court. A copy of the Affidavit was provided to Mr. Byrd. This Affidavit gave notice of the charge -- first degree murder -- and stated the facts which gave rise to the charge.

As required by Rule 3.130 of the Florida Rules of Criminal Procedure, Mr. Byrd appeared before a judicial officer within twenty-four hours of his arrest and was advised of the charges against him and his sixth amendment right to counsel. Under Rule 3.130(c)(4), in order for a defendant to waive his right to counsel he must execute a written waiver at his first appearance. However, Mr. Byrd expressed his intention of retaining counsel.

Subsequently, On October 30, 1981, law enforcement officers initiated an interrogation of Mr. Byrd. Miranda warnings were given orally at that time. (R. 740). However, no valid waiver of Mr. Byrd's sixth amendment right to counsel could be obtained under the circumstances since the interrogation was initiated by the police.

The sixth amendment guarantees an accused the right to legal representation once adversarial proceedings have been initiated. Massiah v. United States, 377 U.S. 201 (1964); United States v. Gouveia, 467 U.S. 180 (1984). Here, Mr. Byrd's sixth amendment right to counsel attached when he appeared for his first appearance and was advised of the charges against him and of his right to counsel. Once the sixth amendment has attached, statements obtained from an accused without counsel's knowledge and consent are constitutionally admissible

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[11]This claim is ultimately premised upon ineffective assistance of counsel. Trial counsel did not object. Under the circumstances this was deficient performance which prejudiced Mr. Byrd. Kimmelman, supra. Yet the circuit court refused to hold an evidentiary hearing on this issue finding it a matter that should have been raised on direct appeal.

evidence only if there has been a valid waiver of the right to counsel. This waiver requirement was discussed by the United States Supreme Court in Brewer v. Williams, 430 U.S. 387 (1977). There as here judicial proceedings had been initiated and the right to counsel invoked. As to the waiver the Court held that "the State must prove 'an intentional relinquishment or abandonment of a known right or privilege.' Johnson v. Zerbst, 304 U.S. [458] at 464." Further, "courts indulge in every reasonable presumption against waiver." 430 U.S. at 405.

Here the police interrogated Mr. Byrd on October 30, 1981, after the sixth amendment right to counsel had attached and been invoked. This interrogation occurred as a result of police initiation. In Michigan v. Jackson, 475 U.S. 625, 632, 636 (1986), the United States Supreme Court declared:

> [A]fter a formal accusation has been made -- and a person who had previously been just a "suspect" has become an "accused" within the meaning of the Sixth Amendment--the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation.

Thus,

> [I]f police initiate interrogation after a defendant's assertion, at an arraignment or similar proceeding, of his right to counsel, any waiver of the defendant's right to counsel for that police-initiated interrogation is invalid.

(emphasis supplied).[12] Mr. Byrd was apprised of his sixth amendment right to counsel. He expressed his intention to assert that right. Thereafter, law enforcement initiated questioning. Under Jackson, the resulting statements were flatly inadmissible. This was reaffirmed in Patterson v. Illinois, 108 S. Ct. 2389, (1988) when the United States Supreme Court explained that once the Sixth

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[12]Michigan v. Jackson was decided on April 1, 1986. Mr. Byrd's conviction became final on May 27, 1986. Byrd v. Florida, 476 U.S. 1153 (1986). Thus under Teague v. Lane, 109 S. Ct. 1060 (1989), Jackson applies to Mr. Byrd's case.

Amendment right attaches and the accused has expressed a desire for counsel police are "barred" from approaching the accused.

Formal judicial proceedings had taken place before the October 30, 1981, statement was elicited. The State had committed itself to prosecute. The adverse positions of government and defendant had solidified. The sixth amendment guarantees had therefore attached and the State was obligated to recognize Mr. Byrd's right to counsel.

> Once the right to counsel has attached and been asserted, the State must of course honor it. This means more than simply that the State cannot prevent the accused from obtaining the assistance of counsel. The Sixth Amendment also imposes on the State an affirmative obligation to respect and preserve the accused's choice to seek this assistance.

Maine v. Moulton, 106 S. Ct. 477, 479 (1985)(emphasis supplied). The illegalities involved in law enforcement's actions in this case speak for themselves. The State gave no "respect" to Mr. Byrd's sixth amendment rights. Moulton, supra. To the contrary, the State flouted them. "Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he 'is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' [Edwards v. Arizona,] 451 U.S. at 484-485." Arizona v. Roberson, 108 S. Ct. 2093 (1988).

Of course, the law enforcement officers claimed that after they initiated their interrogation, Mr. Byrd orally waived his right to counsel. On this point Jackson is instructive: "[W]ritten waivers are insufficient to justify police-initiated interrogations after a request for counsel," id. at 1410-11, or after the critical stage right to counsel has attached. Id.; see also, Edwards v. Arizona, 451 U.S. 477, 484 (1981). Of course, here there was no written waiver. Under Rule 3.130(c)(4), it would appear that Florida has recognized the need

for extra care in preserving the right to counsel by requiring a written waiver of the sixth amendment right to counsel. However, even if the absence of a written waiver is not controlling on this claim, it is settled that "waiver" cannot be established by the fact that Mr. Byrd, eventually, responded to the questioning. See Brewer v. Williams, 430 U.S. 387 (1977); Edwards, 451 U.S. at 484 n.8; Jackson, 106 S. Ct. at 1410 n.9. The fact that the police initiated the October 30, 1981, interrogation is dispositive. The resulting statement was clearly and unequivocally obtained in violation of the sixth amendment and was not admissible at Mr. Byrd's trial. Mr. Byrd's rights under the sixth, eighth, and fourteenth amendments were violated by the State's introduction of his October 30, 1981, statements to the police.

Furthermore, to the extent that this issue was never argued by Mr. Byrd's trial counsel, Mr. Byrd received ineffective representation under Kimmelman v. Morrison, supra. In 1981, Edwards v. Arizona, 451 U.S. 477 (1981) first established the concept of a bright-line line rule precluding police initiation of questioning once the right to counsel has been invoked. At the time of Mr. Byrd's trial in 1982 counsel should have been aware of this case law and argued its application to Mr. Byrd's situation. Counsel's failure again is virtually identical to the situation in Kimmelman.

Given the appalling and fundamental violation of the Constitution herein described, it simply cannot be said that the proceedings resulting in Mr. Byrd's conviction and sentence of death have comported with fundamental due process, equal protection, and eighth amendment principles. See, Beck v. Alabama, 447 U.S. 625 (1980), Gardner v. Florida, 430 U.S. 349 (1977). A full and fair evidentiary hearing was required because the files and records by no means showed that Mr. Byrd was entitled to no relief. Lemon v. State, 498 So. 2d 923 (Fla. 1986). This Court must reverse the refusal to conduct an evidentiary hearing on this issue. Thereafter, Rule 3.850 relief is warranted.

ARGUMENT VII

MR. BYRD WAS DENIED HIS FOURTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WHEN LAW ENFORCEMENT PERSONNEL AT THE DIRECTION OF AN ASSISTANT STATE ATTORNEY ENTERED MR. BYRD'S HOME WITHOUT A WARRANT TO EFFECTUATE HIS ARREST, AND COUNSEL PROVIDED CONSTITUTIONALLY INADEQUATE ASSISTANCE BY FAILING TO EFFECTIVELY LITIGATE THIS CLAIM.[13]

At approximately 1:00 a.m. on October 28, 1981, law enforcement personnel decided that they had sufficient probable cause to arrest Mr. Byrd. They called an assistant state attorney and waited for over an hour for him to arrive. When he did, he decided a search warrant was unnecessary and accompanied them to Mr. Byrd's residence to watch the arrest. No attempt was made by the police to present the probable cause to a neutral and detached magistrate in order to obtain a warrant because of the prosecutor's decision to forego a warrant.

Arriving at Mr. Byrd's residence at approximately 2:30 a.m., the police knocked on a window in order to awaken Mr. Byrd, while the assistant state attorney watched from the shadows. When Mr. Byrd responded, the police officer displayed his badge and said, "It's Detective Newcomb. You remember me?" (R. 1419) Mr. Byrd had during the preceding two weeks talked several times with Detective Newcomb regarding his wife's death. Mr. Byrd then pulled on a pair of pants and opened his door in response to Detective Newcomb's display of his badge. Once the door was opened the police entered and arrested Mr. Byrd. (R. 1461-63).

Initially when the officer rapped on the window Mr. Byrd was not told of the reason for the officer's visit. Mr. Byrd was never told that pursuant to the fourth, fifth, sixth, and fourteenth amendments he could refuse to provide

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[13]This claim is ultimately premised upon ineffective assistance of counsel. Trial counsel did not object. Under the circumstances this was deficient performance which prejudiced Mr. Byrd. Kimmelman, supra. Yet the circuit court refused to hold an evidentiary hearing on this issue finding it a matter that should have been raised on direct appeal.

the State access to his house and require the State to obtain the appropriate court order.

As to the fourth amendment right implicated by a seizure, the United States Supreme Court has stated:

> But the Fourth and Fourteenth Amendments require that a consent not be coerced, by explicit or implicit means, by implied threat or covert force. For, no matter how subtly the coercion was applied, the resulting "consent" would be no more than a pretext for the unjustified police intrusion against which the Fourth Amendment is directed. In the words of the classic admonition in Boyd v. United States, 116 U.S. 616, 635, 6 S.Ct 524, 535, 29 L.Ed. 746:
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> > "It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the right, as if it consisted more in sound than in substance. It is the duty of courts to be watchful for the constitutional rights of the citizen, and against any stealthy encroachments thereon."

Schneckloth v. Bustamonte, 412 U.S. 218 (1973). Certainly the fourth amendment condemns seizures obtained by trick. Here the police at the direction of the assistant state attorney rapped on the window acting as if there was no choice but for Mr. Byrd to let him into the house.

The fourth amendment also provides extra protection to an individual's home. The police may not consistent with the fourth amendment enter a suspect's home in order to make a warrantless felony arrest. Payton v. New York, 445 U.S. 573 (1980). The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." United States v. United States District Court, 407 U.S. 297, 313 (1972).

The Eleventh Circuit recently addressed the application of Payton to circumstances virtually identical to the ones here:

> The government alternatively contends that the warrantless arrest was valid because Edmondson consented to the officers' entry into the apartment. The government argues that because Edmondson went to the

door to open it after the FBI agent ordered him to do so, stepped back, and placed his hands on his head, his actions amounted to an implied consent to be arrested. We agree with the district court that

> [w]hile defendant's submissive arrest posture may indicate a guilty mind, as the government contends, it also indicates an acquiescence to a show of official authority. There is no direct evidence that defendant actually saw the officers' drawn weapons. However, defendant was aware there were FBI agents at his door and at the bottom of the stairs. The presence of a number of officers tends to suggest an undertaking which is not entirely dependent on the consent and cooperation of the suspect.

We agree with the district court that Edmondson's arrest was illegal and that the physical evidence seized at the time of the arrest was unlawfully seized. A suspect does not consent to being arrested within his residence when his consent to the entry into his residence is prompted by a show of official authority. See United States v. Newbern, 731 F.2d 744, 748 (11th Cir. 1984).

United States v. Edmondson, 791 F.2d 1512, 1515 (11th Cir. 1986).[14]

The facts in Mr. Byrd's case are even more egregious because the police conduct occurred at the direction of the assistant state attorney. Certainly the prosecutor should be held to a higher standard of knowledge of fourth amendment case law. Here he clearly flouted the United States Supreme Court's ruling in Payton. Moreover it was ineffective assistance of counsel for trial counsel not to present the testimony of the assistant state attorney on this point. Certainly his knowledge of Payton would have been a proper area of inquiry. Certainly the state of mind of law enforcement personnel involved in a search has become a proper area of inquiry.

The fruits of a fourth amendment violation may not be used at an accused's trial. Wong Sun v. United States, 371 U.S. 471 (1963). This rule applies even to statements when the statements result from an illegal arrest. Brown v. Illinois, 422 U.S. 590 (1975). Here, the police obtained Mr. Byrd's consent to

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[14]A closely related case is currently pending before the United States Supreme Court. New York v. Harris, 45 Cr.L. 4013, 4017 (1989)(cert. granted April 17, 1989).

enter his residence and place of business. As a direct result of the illegal entry the police also secured a waiver of Mr. Byrd's Miranda rights, statements from Mr. Byrd, and a consent to search the residence and business for evidence. The fruits of this fourth amendment violation were introduced at trial against Mr. Byrd in violation of the fourth, eighth, and fourteenth amendments. All of the evidence in question flowed from the illegal entry of Mr. Byrd's residence.

The failure of defense counsel to adequately litigate this issue and vindicate Mr. Byrd's rights was ineffective assistance of counsel under the sixth amendment. Kimmelman v. Morrison, 477 U.S. 365 (1986). Under the circumstances here, Mr. Byrd was denied fundamental fairness. The prosecutor specifically directed a fourth amendment violation. Given the appalling and fundamental violation of Mr. Byrd's constitutional rights, it simply cannot be said that the proceedings resulting in Mr. Byrd's conviction and sentence of death have comported with fundamental due process, equal protection, and eighth amendment prerequisites. See Beck v. Alabama, 447 U.S. 625 (1980), Gardner v. Florida, 430 U.S. 349 (1977). A full and fair evidentiary hearing was required because the files and records by no means showed that Mr. Byrd was entitled to no relief on his claim. Lemon v. State, 498 So. 2d 923 (Fla. 1986). The circuit court's refusal to hold a hearing on this issue must be reversed. Thereafter because of the violations of the fourth, sixth, eighth, and fourteenth amendments, Mr. Byrd is entitled to 3.850 relief.

ARGUMENT VIII

TRIAL COUNSEL'S FAILURE TO ASSURE MR. BYRD'S PRESENCE DURING CRITICAL STAGES OF HIS CAPITAL PROCEEDINGS, AND THE PREJUDICE RESULTING THEREFROM, VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[15]

15This claim is ultimately premised upon ineffective assistance of counsel. Trial counsel did not object. Under the circumstances this was deficient performance which prejudiced Mr. Byrd. Kimmelman, supra. Yet the circuit court refused to hold an evidentiary hearing on this issue finding it a matter that should have been raised on direct appeal.

A criminal defendant's sixth and fourteenth amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Francis v. State, 413 So. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also, Fla. R. Crim. P. 3.180. "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892). Mr. Byrd was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death on separate, distinct, and "critical" occasions. Mr. Byrd never validly waived his right to be present. However, during his involuntary absences, important matters were attended to, discussed and resolved.

At one point, during an in-camera proceeding, not only was Mr. Byrd expressly excluded but so was his lead counsel, Mr. Johnson. This arose after the prosecutor had attempted to elicit testimony from a defense witness that the witness had offered to testify for the State in numerous cases, including Mr. Byrd's, in exchange for having his 99-year sentence reduced to probation (R. 1064-1068). After several initial questions, the following had occurred in front of the jury:

> Q [BY MR. OBER]: Okay. Did you also tell me last Friday that you would testify for the State of Florida against Wade Byrd?
>
> A [BY MR. GARCIA]: No, I didn't.
>
> Q You didn't say that to me?
>
> A No, sir.
>
> Q And didn't you say that in consideration that you wanted the State to drop the ninety-nine-year sentence and give you probation?
>
> A No, sir.
>
> Q You never said that? You didn't want any consideration for your testimony?

A Against Milford Byrd?

Q Yes, sir.

A No, sir.

Q You didn't say that?

A No, sir.

Q I didn't tell you that I wasn't going to deal with you whatsoever and you could go back and serve your ninety-nine years in prison?

A He is lying, sir.

MR. JOHNSON: I object to this.

Q (By Mr. Ober) I am lying?

A Yes, sir, you are.

MR. JOHNSON: Your Honor, may I have a ruling from the Court?

THE COURT: What grounds?

MR. JOHNSON: He is testifying and it's irrelevant and not covered, beyond the scope of direct examination.

THE COURT: You went into his term of imprisonment and this is to this witness's credibility. I overrule it.

(R. 1067-1068).

At the next opportunity, defense counsel had moved for a mistrial on the basis that the prosecutor was offering testimony that he in fact had told Mr. Garcia that he would make no deals with him. (R. 1087-1088). The defense had offered to call Mr. Donerly, Mr. Garcia's attorney, to testify that in fact Mr. Ober had indicated he might deal with Mr. Garcia. (R. 1089). The Court had agreed to hear testimony after concluding with the witnesses for that day. (R. 1094). In open court but outside the presence of the jury, defense counsel had restated his motion as follows:

MR. BUCKINE: I have made a Motion for Mistrial based on the fact that during the time that the prosecutor was cross-examining Mr. Garcia, he used impeaching facts, or questions insinuating impeaching facts, the proof of which is nonexistent, which it is the Defense's

position that it is impermissible according to the law in the State of Florida, and more specifically I defer to the record, in asking Mr. Garcia that he would not deal with him concerning any matter, when it was the Defense's position we were led to believe that that was not, in fact what had occurred in this out of court conference where Mr. Ober and Mr. Garcia had been present, and those impeaching facts or statements were in fact, made.

We were at that time led to believe that other facts contrary to what Mr. Ober used for his impeaching questions were, in fact, stated and given then, and the persons, as the Defense understood it, to be present were Mr. Donerly, as counsel for Mr. Garcia, Mr. Garcia and Mr. Ober. And I am not aware -- the Defense is not aware of any other persons present and we would want to have the version of what occurred in that transaction given to this Court by Mr. Donerly, who is a Public Defender for this Circuit and who is an Officer of this Court.

That is the bases.

(R. 1108-1109).

After a discussion over whether Mr. Donerly would be violating his attorney/client privilege, or opening himself up to perjury charges by testifying contrary to the prosecutor, it was agreed that Mr. Donerly would testify (R. 1111-1118). The Court then ordered:

All right, gentlemen. In about five minutes I want Mr. Donerly and Mr. Ober in my chambers along with Mr. O'Connor [Mr. Donerly's attorney] and Mr. Buckine. Then I will make a ruling on it tomorrow. That will be in camera. No one else is invited to be there and then we will see whether we decide tomorrow whether to have an open hearing or whether I will just grant the motion or deny the motion. . . .

(R. 1118).

At some point, the in-camera hearing was expanded to allow "Sylvia from the newspaper" and the court reporter to attend. Mr. Johnson, the lead attorney on the case, and Mr. Byrd were specifically excluded. This was a critical phase of trial, and Mr. Byrd never waived his right to be present.

At the hearing, Mr. Donerly testified that the possibility of plea negotiations for the testimony of Mr. Garcia were never firmly cut off. R. 1123-1124). Upon questioning, under oath, Mr. Ober, the prosecutor, admitted that he may have never communicated that to Mr. Donerly or Mr. Garcia. (R. 1128-1129). A ruling was then made that the misrepresentation was not intentional on the

part of the prosecutor, and that Mr. Buckine could prepare a curative jury instruction. (R. 1133). There was then discussion over whether Mr. Buckine should call Mr. Donerly as a witness instead of having a curative instruction. The Court noted, ". . . I guess you will have to sit and discuss that with Mr. Johnson later on and decide which way you want to go. . . ." (R. 1134). This was the same "Mr. Johnson" who, along with Mr. Buckine, was representing Mr. Byrd and who had been excluded from the in-camera proceeding. Of course Mr. Byrd had also been excluded.

No objection was registered by the defense counsel to the exclusion of Mr. Byrd from the proceedings, but at the same time no waiver of his presence was obtained from Mr. Byrd. Certainly his conduct at the time had been appropriate and thus it could not have been used to argue that he was being disruptive to such an extent that he constructively waived his presence.

The next day, Mr. Byrd was also not present at the jury instruction conference:

> THE COURT: We are here on the jury instructions' conference. Present is Mr. Lopez, representing the state; Mr. Johnson and Mr. Buckine, representing the Defendant.

(R. 1137). At that time the defense counsel failed to ask for the curative instruction which had been offered by the judge. Mr. Byrd was also excluded from numerous side bar conferences.

The denial of Mr. Byrd's right to be present violates the sixth, eighth and fourteenth amendments to the United States Constitution. Further Florida law provides that the denial of a defendant's right to be present is fundamental error. Salcedo v. State, 497 So. 2d 1294 (Fla. App. 1986). Since no valid waiver appears of record, fundamental error occurred. Amazon v. State, 487 So. 2d 8 (Fla. 1986); Francis v. State, 413 So. 2d 1175 (Fla. 1982). Moreover under Kimmelman counsel was ineffective in not objecting to the court's exclusion of Mr. Byrd and lead counsel. A full and fair hearing was required because the

files and records by no means show that Mr. Byrd was entitled to no relief. Lemon v. State, 498 So. 2d 923 (Fla. 1986). The circuit court was in error in refusing to conduct such a hearing. Rule 3.850 relief is warranted.

ARGUMENT IX

THE EXCLUSION OF CRITICAL EVIDENCE RENDERED MR. BYRD'S SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE AND VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Byrd's defense was that he had nothing whatsoever to do with the murder of his wife. In support of this defense, Mr. Byrd presented an alibi defense. However, the State was proceeding under alternative theories. The State first argued that Mr. Byrd hired Mr. Endress and Mr. Sullivan to kill the victim, accompanied them when the killing was to take place, and actually participated in the homicide. The State's fallback argument was that he arranged for Mr. Endress and Mr. Sullivan to kill his wife at a specific time when he was able to set up an alibi. The State's case was presented largely through the testimony of Mr. Sullivan which supported the first theory and a confession given by Mr. Byrd which supported the latter theory.

During the trial, defense counsel attempted to introduce various pieces of evidence to cast doubt on the state's case. One such piece of evidence was a transcript of a tape-recorded statement of Mr. Sullivan made at the time of his arrest, October 28, 1981. (R. 471). This statement gave the police probable cause to arrest Mr. Byrd, but was considerably different from his trial testimony. After introducing the transcript, defense counsel learned that the Court had already ruled that it was inadmissible. (R. 471). The transcript was then made a part of the record for appeal purposes. (R. 1092). Apparently the state's objection to the transcript was that it contained hearsay. (R. 472). Thus the defense was precluded from impeaching the state's key witness.

Another piece of evidence the defense sought to introduce concerned Mr. Byrd's own warrantless arrest, and the confession that followed. Defense

counsel had filed to suppress the confession, on the basis that it was the fruit of an illegal arrest (see: R. 1724; 1761; 1776; 1781) and that it was not voluntary (see: 1776; 1778). Each of these motions were heard and then denied (see: R. 1412; 1469; 1509; 1522). At trial, each time defense counsel attempted to introduce evidence concerning the illegality of his arrest, the trial court sustained the prosecution's objection (see: R. 791; 796; 820; 822). Accordingly, the defense was stopped from arguing the illegality of Mr. Byrd's arrest to the jury, and thus could not adequately show them the oppressive circumstances surrounding Mr. Byrd's confession.

Still another piece of evidence that the defense was precluded from presenting to the jury involved two individuals who had been suspects in the killing of Debra Byrd up until Mr. Sullivan's October 28, 1981, statement. That arose as follows:

> Q. Detective Newcomb, to your knowledge, sir, were there any other suspects other than Ronald Sullivan and James Endress arrested and involved linked to this particular homicide?
>
> A. As accessories, yes, as principles, not to my knowledge.
>
> Q. You're not aware, sir, of the facts of two individuals being arrested in the vicinity of this crime allegedly carrying machine guns and a large amount of cash?
>
> MR. LOPEZ: Objection, Your Honor. If I may approach the Bench?
>
> THE COURT: I will sustain the objection.

(R. 837). Because the court sustained the objection before hearing counsel even give a basis for the objection, let alone argument, Mr. Byrd is left to guess at the reason for this objection being sustained. The police reports do bear out the fact that two individuals were arrested in the vicinity of the EconoLodge carrying guns.

The defense was also stopped from introducing evidence that Mr. Byrd had written numerous letters to Jody Clymer and that in each one he steadfastly

maintained that he was not involved with the homicide of his wife. (R. 306).

The defense was stopped from questioning a witness about her purchase of marijuana from Debra Byrd that Debra had allegedly bought from Mr. Sullivan. When defense counsel raised this question, the prosecution objected and the court sustained and asked the jury to disregard the answer. (R. 342).

In short, Mr. Byrd was precluded from presenting a defense because of the court's evidentiary rulings. "The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the state's accusations. The rights to confront and cross-examine witnesses in one's own behalf have long been recognized as essential to due process." Chambers v. Mississippi, 410 U.S. 284 (1973). Mr. Chambers trial was reversed by the United States Supreme Court because "the rulings of the trial deprived [him] of a fair trial." 410 U.S. at 303. That Court recognized that "where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." Id., at 302. See Crane v. Kentucky, 476 U.S. 683 (1986).

In a different context, the United States Supreme Court has held that the constitutional right to cross-examine witnesses outweighs even a state's policy of protecting juvenile offenders. Davis v. Alaska, 415 U.S. 308, 94 S. Ct. 1105, 39 L.Ed.2d 347 (1974) "[W]e conclude that the State's desire that Green fulfill his public duty to testify free from embarrassment and with his reputation unblemished must fall before the right of petitioner to seek out the truth in the process of defending himself." Id., 415 U.S. at 320.

The sixth and fourteenth amendment right to the effective assistance of counsel is violated when the government "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also United States v. Cronic, 466 U.S. 648 (1984); Brown v. Allen, 344 U.S. 443, 486 (1953)(state

interference with criminal defendant's efforts to vindicate federal constitutional rights), cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986). See Geders v. United States, 425 U.S. 80 (1976); Holloway v. Arkansas, 435 U.S. 474 (1979); Herring v. New York, 422 U.S. 853 (1975); Brooks v. Tennessee, 406 U.S. 605 (1972); Ferguson v. Georgia, 365 U.S. 570 (1961); Perry v. Leeke, 109 S. Ct. 594, 599-600 (1989).

Mr. Byrd was denied his sixth amendment rights and deprived him of his right to a fair trial as a result of the court's rulings. His hands were tied. Furthermore, counsel failed to argue that the trial court's rulings were precluding the defendant from presenting evidence in his favor, a basic sixth amendment right. Chambers. Again this failure to object to basic constitutional error was ineffective assistance of counsel under Kimmelman v. Morrison, supra. Thus, his conviction and sentence of death were obtained in violation of the sixth, eighth and fourteenth amendments to the United States Constitution. A full and fair evidentiary hearing was required because the files and records by no means show that Mr. Byrd is entitled to no relief. Lemon v. State, 498 So. 2d 923 (Fla. 1986). Thereafter, Rule 3.850 relief is warranted.

ARGUMENT X

MR. BYRD WAS IMPROPERLY DENIED HIS RIGHT TO CROSS-EXAMINE KEY STATE'S WITNESSES ON MATTERS THAT WOULD HAVE UNDERMINED THEIR CREDIBILITY, AND AS A RESULT HE WAS DENIED HIS RIGHT OF CONFRONTATION IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.[16]

At Mr. Byrd's trial, the trial judge improperly limited counsel's ability to cross-examine Regina Schimelfining as to her deal with the state that pending

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[16]This claim is ultimately premised upon ineffective assistance of counsel. Trial counsel did not object. Under the circumstances this was deficient performance which prejudiced Mr. Byrd. Kimmelman, supra. Yet the circuit court refused to hold an evidentiary hearing on this issue finding it a matter that should have been raised on direct appeal.

charges against her would be dismissed in exchange for her cooperation with the State and her testimony against Mr. Byrd:

> Q. Isn't it true, Ms. Schimelfining, that you were charged in this offense, this First Degree Murder initially?
>
> MR. LOPEZ: Objection, that is a misstatement of what happened here, Your Honor. She was never --
>
> MR. JOHNSON: Judge, I withdraw the question.
>
> MR. LOPEZ: I would please ask the jury to disregard and move to strike the answer if she did give any answer, Your Honor.
>
> THE COURT: Strike it and disregard that last question.

(R. 557). In her deposition, page 49, line 11, Ms. Schimelfining admits that she was arrested in connection with this murder on October 30, 1981. The defense should have been permitted to go into why those charges were dropped.

Counsel was also precluded from cross-examining Ms. Schimelfining regarding whether or not she took a quaalude on the day of the homicide:

> Q. Do you recall, Ms. Schimelfining, whether or not you were under the influence of any narcotic substances on or about October 12, 1981?
>
> A. No, sir.
>
> Q. I want to refer you, Ms. Schimelfining, to page 14 of your deposition given on February 23rd, 1982, and I want to refer you, Ms. Schimelfining, to line 2 and the question is: "Did you take any quaaludes referring to the day in question," and your answer on line 3, "No, sir."
>
> Line 4 I asked --

(R. 552). The prosecutor interjected an objection at that point, and after a bench conference, the defense was not allowed to inquire further. (R. 553). The information would have been helpful to allow the trier of fact to ascertain Ms. Schimelfining's ability to perceive on the night to which her testimony pertained. It should have been left to the trier of fact, the jury, to determine if the effects of the quaalude would have worn off by then.

Defense counsel was also precluded from cross-examining Ronald Sullivan regarding why he pled to second degree murder when he did not believe he had killed the victim.

> Q. (By Mr. Johnson): Mr. Sullivan, as you pulled your hands away from the neck of Deborah Byrd, was she still breathing?
>
> A. Yes, sir, I believe she was.
>
> Q. She was still breathing? If she was still breathing why did you plead guilty to Second Degree Murder?
>
> MR. OBER: I object, Judge.
>
> MR. JOHNSON: I have no further questions, Your Honor.
>
> THE COURT: Sustained.

(R. 473). Mr. Sullivan was the pivotal state witness. He pled guilty to second degree murder, yet he continually minimized his role in the homicide. The defense should have been allowed to attack the credibility of this witness.

The right of confrontation is one of our most sacred and fundamental rights and is contained in the sixth amendment to the United States Constitution. An accused must be permitted reasonable latitude to cross-examine witnesses against him as to matters which call into question the witnesses credibility. Smith v. Illinois, 390 U.S. 129 986 (1968); Davis v. Alaska, 415 U.S. 308 (1974).

The sixth and fourteenth amendment right to the effective assistance of counsel is violated when the government "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also United States v. Cronic, 466 U.S. 648 (1984); Brown v. Allen, 344 U.S. 443, 486 (1953)(state interference with criminal defendant's efforts to vindicate federal constitutional rights), cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986). Thus, a defendant is deprived of the right to the effective assistance of counsel by a court order barring attorney-client consultation during an overnight trial recess, Geders v. United States, 425 U.S. 80 (1976); by court-

ordered representation of multiple defendants, Holloway v. Arkansas, 435 U.S. 474 (1979); by a court's refusal to allow summation at a bench trial, Herring v. New York, 422 U.S. 853 (1975); by a state statute requiring a criminal defendant who wishes to testify on his own behalf to do so prior to the presentation of any and all other defense testimony, Brooks v. Tennessee, 406 U.S. 605 (1972); and by a state statute restricting a criminal defendant's right to testify on his own behalf. Ferguson v. Georgia, 365 U.S. 570 (1961).

The Supreme Court recently explained this rule of law in some detail:

> In passing on such claims of "'actual ineffectiveness,' id., at 686, 104 S.Ct. at 2064, the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Ibid. More specifically, a defendant must show "that counsel's performance was deficient" and that "the deficient performance prejudiced the defense." Id., at 687, 104 S.Ct., at 2064. Prior to our consideration of the standard for measuring the quality of the lawyer's work, however, we had expressly noted that direct governmental interference with the right to counsel is a different matter. Thus, we wrote:
>
> > Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See e.g. Geders v. United States, 425 U.S. 80 [96 S.Ct. 1330, 47 L.Ed.2d 592](1976)(bar on attorney-client consultation during the overnight recess); Herring v. New York, 422 U.S. 853 [95 S.Ct.2550, 45 L.Ed.2d 593](1975)(bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612,613 [92 S.Ct. 1891, 1895, 32 L.Ed.2d 358](1972)(requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593-596 [81 S.Ct. 756, 768-770, 5 L.Ed.2d 783](1961)(bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance,' Cuyler v. Sullivan, 446 U.S. [335] at 344 [100 S.Ct. 1708, at 1716, 64 L.Ed.2d 333 (1980)]. Id., at 345-50 [100 S.Ct., at 1716-1719](actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective)." Id., at 686, 104 S.Ct., at 2063-2064.

Our citation of Geders in this context was intended to make clear that "[a]ctual or constructive denial of the assistance of counsel altogether," Strickland v. Washington, supra, at 692, 104 S.Ct., at 1063-2064, is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective. See Penson v. Ohio, 488 U.S. ___, ___, 109 S.Ct. 346, ___, ___ L.Ed.2d ___ (1988); United States v. Cronic, supra, 466 U.S., at 659, and n.25,

104 S.Ct., at 2047, and n.25.

Perry v. Leeke, 109 S. Ct. 594, 599-600 (1989)(emphasis added).

Mr. Byrd was denied his right to confront witnesses in violation of the sixth, eighth, and fourteenth amendments. Furthermore, counsel failed to argue that the trial court's ruling were infringing upon Mr. Byrd's right of confrontation under the sixth amendment. Again this failure to object to basic constitutional error was ineffective assistance of counsel under Kimmelman v. Morrison, 477 U.S. 365 (1986).

A full and fair evidentiary hearing was required because the files and records by no means showed that Mr. Byrd was entitled to no relief. Lemon v. State, 498 So. 2d 923 (Fla. 1986). Thereafter, Rule 3.850 relief is proper.

ARGUMENT XI

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. BYRD OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> > [S]uch a sentence could be given <u>if the state showed the aggravating circumstances outweighed the mitigating circumstances.</u>

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Byrd's capital proceedings. To the contrary, the burden was shifted to Mr. Byrd on the question of whether he should live or die.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988), and Dixon, for such

instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Byrd's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 2997, 2998).

Such argument and instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the eighth and fourteenth amendments, as the Ninth Circuit Court of Appeals held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). This claim involves a "perversion" of the jury's deliberations concerning the ultimate question of whether Mr. Byrd should live or die. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). No bars apply under such circumstances.

The jury instructions here employed a presumption of death which shifted to Mr. Byrd the burden of proving that life was the appropriate sentence (R. 1302). The prosecutor reiterated that the mitigation had to outweigh the aggravating factors in order for the jury to recommend a life sentence. (R. 1319, 1324). The unconstitutional presumption inhibited the jury's ability to "fully" assess mitigation, in violation of Penry v. Lynaugh, 109 S. Ct. 2935 (1989), a decision which was declared, on its face, to apply retroactively to cases on collateral review. Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock constituted a change in law in this regard. Under Hitchcock and its progeny, an objection, in fact, was not necessary to preserve this issue for review because Hitchcock decided after Mr. Byrd's trial worked a change in law; Florida sentencing juries must be instructed in accord with eighth amendment principles. Hitchcock, supra for the first time held that the eighth amendment applied to the Florida penalty phase

proceedings in front of the jury and did not just apply to the proceedings before the judge. In other words, for eighth amendment purposes, the jury is a sentencer, too. This was a retroactive change in law, and thus, this issue is cognizable now in Rule 3.850 proceedings. Mr. Byrd's sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Byrd. For each of the reasons discussed above the Court must vacate Mr. Byrd's unconstitutional sentence of death.

ARGUMENT XII

MR. BYRD'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 44 Cr. L. 4192 (1988), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Byrd's eighth amendment rights. Mr. Byrd should be entitled to relief under Mann, for there is no discernible difference between the two cases. A contrary result would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

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

either instructions or comments minimize the jury's role relief is warranted. Caldwell involves the most essential eighth amendment requirements to the validity of any death sentence: that a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that a sentence be reliable.

Throughout Mr. Byrd's trial, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase. (R. 30-31, 109, 110, 141, 156, 190, 194). In preliminary instructions to the jury in the penalty phase of the trial, the judge emphatically told the jury that the decision as to punishment was his alone. (R. 1275). During closing argument he repeatedly emphasized that the jury was to deliberate merely upon a recommendation. (R. 1317-1319, 1321, 1329). After closing arguments in the penalty phase of the trial, the judge reminded the jury of the instruction they had already received regarding their lack of responsibility for sentencing Mr. Byrd, but noted that the "formality" of a recommendation was required (R. 1344-45, 1347-48).

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the United States Supreme Court for the first time held that instructions for the sentencing jury in Florida was governed by the eighth amendment. This was a retroactive change in law, see Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object the adequacy of the jury's instructions and the impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The jury's sentencing verdict may be overturned by the

judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Byrd's jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed.

In Caldwell, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere." 472 U.S. 328-29. The same vice is apparent in Mr. Byrd's case, and Mr. Byrd is entitled to the same relief. The Court must vacate Mr. Byrd unconstitutional sentence of death.

ARGUMENT XIII

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

Aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). In Elledge v. State, 346 So. 2d 998 1003 (Fla. 1977), this court acknowledged that standard stating the need to "guard against any unauthorized aggravating factor" that might "tip the scales" in favor of death. The limitation of the sentencer's ability to consider aggravating circumstances specifically and narrowly defined by statute is required by the eighth amendment.

> [O]ur case have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988).

At the instruction conference during the penalty phase, the State advised the trial court that it was going to proceed on three aggravating circumstances. These included (1) the homicide was committed for financial gain, sec. 921.141(50(f); (2) the homicide was especially wicked, evil, atrocious, or cruel, sec. 921.141(5)(h); and (3) the homicide was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, sec. 921.141(5)(i). (R. 1286). No limiting constructions of these aggravating circumstances were given to the jury.

These were the three aggravating circumstances on which the state presented argument to the jury. (R. 1327-30). These were also the three aggravating circumstances on which the jury was orally instructed by the trial court. (R. 1345). The judge did not instruct the jury regarding the elements of the aggravating circumstances.

Moreover, the written jury instructions, which were sent into the jury room with the jurors (R. 1349), contained a completely foreign aggravating circumstance, that the crime was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of laws. (R. 1902). It is impossible to know the effects this had on the jury. The jury was left to its own devices to determine the meaning of this new aggravating circumstance as well as the elements of the other three aggravating circumstances.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel," "cold, calculated and premeditated," and "pecuniary gain" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion. The terms require defining in order for the statutory aggravating factor genuinely to narrow, and its undefined application here violated the eighth and fourteenth amendments. Jurors must be given adequate guidance as to what constitutes an aggravating circumstance. Maynard v. Cartwright, 108 U.S. 1853 (1988). There, the Supreme

Court found error in jury instructions which failed to guide and channel the jury's sentencing discretion. Maynard v. Cartwright also applies to the judge's sentencing where there has been a failure to apply the limiting construction which the eighth amendment requires. Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc).

In Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), the Supreme Court reversed a Florida sentence of death because the jury had been erroneously instructed not to consider nonstatutory mitigation. "In Hitchcock, the Supreme Court reversed [the Eleventh Circuit's] en banc decision in Hitchcock v. Wainwright, 770 F.2d 1514 (1985), and held that, on the record of the case, it appeared clear that the jury had been restricted in its consideration of nonstatutory mitigating circumstances. . . ." Knight v. Dugger, 863 F.2d 705, 708 (11th Cir. 1989). See also Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1987)(en banc); Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988). In Hitchcock, the Supreme Court held the jury was a sentencer for purposes of eighth amendment instructional error review. In fact, this Court, recognizing the significance of this change in law, has held Hitchcock was to be applied retroactively. In reversing death sentences because of Hitchcock error this Court explained:

> It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation.

Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). Hitchcock established that Florida juries must receive correct and accurate penalty phase instructions. Thus this issue is cognizible in Rule 3.850 proceedings. Instructional error is reversible where it may have affected the jury's sentencing verdict. Mr. Byrd's jury was unconstitutionally instructed, Maynard v. Cartwright, supra, and the State cannot prove the error harmless beyond a reasonable doubt. Mitigation was before the jury. Mr. Byrd is entitled to relief under the standards of Maynard

v. Cartwright and the holding in Hitchcock that jury instructions must meet eighth amendment standards.

ARGUMENT XIV

THE JURY WAS MISLED AND INCORRECTLY INFORMED ABOUT ITS FUNCTION AT CAPITAL SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Under Florida's capital sentencing scheme, a jury's recommendation that the death penalty be imposed need not be unanimous, but by a simple majority. If a majority does not vote for death, the jury's recommendation is life; thus, if the jury's vote is split six to six, the jury has recommended life, and the defendant is entitled to that verdict. During the proceedings resulting in Mr. Byrd's sentence of death, the prosecutors' comments and the judge's instructions deprived him of that right by informing the jury the verdict was by a majority vote. (R. 1347-49).

This Court has recognized that such instructions are erroneous, holding that a six-six vote is a life recommendation. Harich v. State, 437 So. 2d 1082 (1983). Rose v. State, 425 So. 2d 521 (Fla. 1982). The prejudice from the incorrect and misleading instruction is patently clear, for the state cannot show that the prosecutor's and judge's misstatements of the law had no effect. Mr. Byrd's sentence of death violated the eighth and fourteenth amendments and must be vacated.

Additionally, Hitchcock, supra for the first time held that the eighth amendment applied to the Florida penalty phase proceedings in front of the jury and did not just apply to the proceedings before the judge. In other words, for eighth amendment purposes, the jury is a sentencer, too. This was a retroactive change in law, and thus, this issue is cognizable now in Rule 3.850 proceedings. This error undermined the reliability of the jury's sentencing determination. For each of the reasons discussed above the Court must vacate Mr. Byrd's unconstitutional sentence of death.

ARGUMENT XV

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

Aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). In Elledge v. State, 346 So. 2d 998 1003 (Fla. 1977), this court acknowledged that standard stating the need to "guard against any unauthorized aggravating factor" that might "tip the scales" in favor of death. The limitation of the sentencer's ability to consider aggravating circumstances specifically and narrowly defined by statute is required by the eighth amendment.

> [O]ur cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.

Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988).

Here, at penalty phase, the prosecutor presented testimony and argument that Mr. Byrd showed "no remorse" for the offense on which he was to be sentenced.

> And I ask you, when are we going to stop being concerned about Wade Byrd, who has left in his trail heartache, death, without any degree of remorse . . .

(R. 1333). Obviously, this "evidence" and argument were used to "aggravate" the offense. The jury heard it and was called on to consider it. The sentencing court relied upon it to sentence Mr. Byrd.

The prosecutor also implied that Mr. Byrd should receive the death penalty because his co-defendant, Mr. Sullivan, who received probation, would no doubt violate his probation and serve twenty-five years minimum on a life sentence.

The prosecutor argued, "A human life is worth twenty-five years? That is the law. It happens all the time. Is that a fair punishment, twenty-five calendar years for this crime?" (R. 1332-3).

Mr. Byrd's jury returned a death recommendation. It is clear that consideration of these nonstatutory aggravating circumstances contributed to that recommendation. The prosecutor's introduction and use of, and the sentencers' reliance on, these wholly improper and unconstitutional nonstatutory aggravating factors starkly violated the eighth amendment.

Hitchcock V. Dugger, 107 S. Ct. 1821 (1987), for the first time held that the eighth amendment applied to the Florida penalty phase proceedings in front of the jury and did not just apply to the proceedings before the judge. In other words, for eighth amendment purposes, the jury is a sentencer, too. This was a retroactive change in law, and thus, this issue is cognizable now. Mr. Byrd's sentence of death was obtained in violation of the sixth, eighth and fourteenth amendments. It therefore must be vacated.

ARGUMENT XVI

MR. BYRD WAS DENIED HIS RIGHTS TO AN INDIVIDUALIZED AND FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF INFORMATION CONCERNING THE VICTIM'S FAMILY BACKGROUND AND OTHER CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Byrd was charged with the murder of Debra Byrd, his wife. In closing argument during the penalty phase, the State argued that Mr. Byrd should receive the death penalty because Debra Byrd had loved ones, but that she was not able to be present to speak to the jury. (R. 1321). This argument was obviously introduced and used for one purpose -- to obtain a capital conviction and sentence of death because of who the victim was. This was patently unfair, and violated Mr. Byrd's rights to a fundamentally fair trial and to a reliable and individualized capital sentencing determination.

Booth v. Maryland, 107 S. Ct. 2529 (1987), requires the exclusion of

evidence of the opinions of the victim's family members as to the appropriate sentence in a capital case. This is because the presentation of this information "can serve no other purpose than to inflame" and divert attention away from relevant inquiries. The Court found the introduction of this information to be improper constitutional error. It violated the well established principle that the discretion to impose the death penalty must be 'suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joint opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983). The Court ruled that the sentencer was required to render an "individualized determination" of what the proper sentence should be in a capital case. This determination should turn on the "character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis in original). See also Eddings v. Oklahoma, 455 U.S. 104, 112 (1982).

In South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal where the sentencer is contaminated by victim impact evidence or argument. Mr. Byrd's trial contained not only victim impact evidence and argument but, in addition, characterizations and opinions of the crimes such as what was condemned in Booth.

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 349 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty [may be] meted out arbitrarily or

capriciously' . . ." Caldwell v. Mississippi, 472 U.S. 320, 344 (1985)(O'Connor, J., concurring). Here, the proceedings violated Booth and Gathers, thus calling into question the reliability of Mr. Byrd's penalty phase. The State's evidence and argument was a deliberate effort to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

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

ARGUMENT XVII

THE EIGHTH AND FOURTEENTH AMENDMENTS WERE VIOLATED BY FAILING TO CONSIDER NON-STATUTORY MITIGATING CIRCUMSTANCES.

In its order setting forth its findings as to aggravating and mitigating circumstances, the sentencing court did not consider whether there were any non-statutory mitigating circumstances present. The sentencing court precluded itself from properly considering such evidence in violation of Lockett v. Ohio, 438 U.S. 586 (1978). Mr. Byrd's co-defendant, Mr. Sullivan, was offered a deal in exchange for his testimony against Mr. Byrd and another co-defendant, Mr. Endress. In return for this testimony, Mr. Sullivan was placed on probation. Mr. Byrd received the death penalty.

The sentencing court failed to consider proportionality as a non-statutory mitigating factor in violation of the eighth, and fourteenth amendments. Lamb v. State, 532 So. 2d 1051 (Fla. 1988); Magwood v. Smith, 791 F. 2d 1438 (11th

Cir. 1986). Rule 3.850 relief is warranted.

CONCLUSION

Mr. Byrd respectfully requests that his conviction and sentence of death be vacated and a new trial ordered for all of the reasons presented to this Court in this brief.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been forwarded by U.S. Mail, first class, postage prepaid to Fariba Komeily, Assistant Attorney General, Suite N-921, 401 N.W. Second Avenue, Miami, Florida 32301, this 20th day of April, 1990.

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