IN THE

SUPREME COURT OF FLORIDA

CASE NO. 74,775

JOEL DALE WRIGHT,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR PUTNAM COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

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

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

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

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

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On April 22, 1983, Joel Dale (Jody) Wright was indicted for murder in the first degree, as well as sexual battery, burglary and second degree grand theft (R. 5). He was charged with killing Lima Paige Smith. Ms. Smith had been found stabbed to death in her residence on February 6, 1983, in Palatka, Florida.

Ms. Smith, a seventy-five year old school teacher had lived next door to the Wrights for many years (R. 1583). Jody, the seventh of eight children, was born August 28, 1957 (R. 2968, T.63). He and his family had always gotten along well with Ms. Smith even though Ms. Smith was a bit ecentric (T. 66). Over the years, her house had become piled with debris; this included newspapers, groceries, empty cat and dog food containers, etc. (R. 1534). The debris was between one and three feet deep through the house (R. 2305). The residence also lacked running water (R. 1597). Frequently Ms. Smith would sit in her car as opposed to her house (R. 1611). She would grade papers there. Sometimes she would just sit in the car reading or eating. (Id.) She generally left a back window in her house open so that her cats could come in and out (R. 1612).

On February 6, 1983, at 4:15 p.m. the Putnam County Sheriff's Office received a call from Earl Smith, Ms. Smith's brother. Mr. Smith, who lived across the street from Ms. Smith, had just discovered her body in her bedroom (R. 1628). Sheriff officers entered the residence and found Ms. Smith's body in a crevice ("not over six inches" R. 1600) between the bed and wall of her bedroom (R 1647). Ms. Smith had twelve stab wounds in the left side of her face and neck (R 1739, 1816). Additionally Ms. Smith had a laceration on the back wall of the vagina (R. 1820). From the blood flow it appeared Ms. Smith had been standing at the time of the injuries, and then subsequently fell into the narrow space between the wall and the bed. (Id.) Ms. Smith died as a result of the stab wounds which caused bleeding into her lungs (R 1821). The stab wounds were consistent with a pocket knife - "a sharp-edged weapon about, oh, a half-

an-inch in width and an eight of an inch in thickness, and not particularly long" (R. 1822).[1] Located on top of Ms. Smith's exposed abdomen was a Hershey candy bar (R. 1728). Also found nearby was a used condom, and "a prophylactic box and an open prophylactic pack" (T. 347).[2]

The medical examiner who examined Ms. Smith's body testified that in his opinion Ms. Smith's assailant was standing in front of her when the injuries were inflicted (R. 1834). Thereafter she fell backwards into the narrow crevice between the wall and the bed. The medical examiner concluded that in all likelihood Ms. Smith was stabbed to death by "a person who was right-handed" (R.1834). However, Jody Wright was and is left-handed (R. 2476).

Following the discovery of Ms. Smith's body many potential suspects were questioned and given polygraph examinations. When these individuals passed the polygraph examination, they were dismissed as suspects. This list of people included Jody Wright, Clayton Strickland, and Henry Jackson; who all lived in Ms. Smith's neighborhood and all three of which passed polygraph examinations.

On April 18, 1983, Jody Wright was arrested and charged with the murder of Ms. Smith. The arrest was prompted by a sworn statement by Paige Westberry that her estranged husband had told her that Jody Wright had confessed the murder to him.[3] Paige said that Charles Westberry who was living with another woman, told

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[1]At about 2:00 or 3:00 p.m. on the afternoon that Earl Smith discovered Ms. Smith's body, one of the two neighborhood drunks, Clayton Strickland, sold Earl Smith a pocketknife for $5.00.

[2]Semen was found in the vagina. The presence of condoms, including a used one, would be consistent with two assailants.

[3]Following Paige Westberry's report, the police ran Jody Wright's fingerprints against latent prints of value lifted from Ms. Smith's house. One print matched; this was the only physical evidence linking Jody to the crime. Jody Wright at trial explained that he had entered Ms. Smith's house a month or so before her death. He and a friend had entered through the open window just to look around. In fact the State called Jody's companion and presented the prior entry as Williams rule evidence. This friend testified that they found a "dollar and some change" in the garbage (R. 2392). However at trial law enforcement had still not been able to identify three palm points and one finger

(continued...)

her of Jody Wright's confession on Friday night, April 15, 1983.

> Charles told me of some difficulty that Jody Wright was trying to cause between Charles and some of his friends. Charles said that Jody had a lot of nerve to get him in trouble when Charles said he had enough shit to put him under the jail. I asked Charles what he meant. Charles then said I mean big time stuff I said what. Charles said I'm talking about murder. I told Charles that I did not want to hear any more. Then Charles said that he had to tell me; he wanted to get it of his chest, and that he had been wanting to tell me for a long time. Charles said that Jody was the one that killed Miss Smith. I asked him why Charles said that Jody broke in to her house and while he was there, she woke up. She knew him, he couldn't run so he had to kill her. I asked Charles how did he kill her. Charles said he used a kitchen knife and cut her throat. Charles then said that I wouldn't believe some of the things that he done to her. I asked him what kind of things and Charles said things that are so bad that I don't want to talk about them. I asked Charles how he knew about it. Charles said that Jody had come to his trailer about 7:00 to 7:30 that Sunday morning. Jody knocked on the door. When Charles didn't answer, Jody went around to Charles' bedroom window, knocked on the window and told Charles to get up and open the door. Charles said that he got up and went to the door. When he opened the door, he saw that Jody was covered with blood. Charles thought that Jody had been in an accident. Jody wanted Charles to go outside. It was cold so they got in to Charles' truck. When they got in the truck, Jody started pulling money out of both his pockets. Charles said that there was approximately $243.00 in small bills. Charles asked Jody where he got it and and Jody told him that he had broken in to Ms. Smith's house. Then Charles asked Jody how did you get all the blood on you, how did you get hurt. Jody said she woke up when I was in there. Charles said so you ran and Jody told him no, I had to kill her because she knew who I was.

After Paige Westberry had given her statement, Charles Westberry was arrested on charges of accessory to murder. Mr. Westberry then gave a sworn statement that Jody Wright had claimed to have cut Ms. Smith's throat after she discovered him going through her purse.[4] Mr. Westberry claimed Jody had gotten $290, which he displayed to Mr. Westberry from the purse as well as a jar of change; this up from the $243 that he related to Paige. Mr. Westberry also

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[3](...continued)
print which had been lifted from Ms. Smith's house (R. 2051). The state never compared these prints to the known prints of Clayton Strickland or Henry Jackson (T. 1003). Also of note, no prints of Ms. Smith were found in the house (R. 2058). The condition of the house was such that none of her prints were present.

[4]Again, Ms. Smith's throat was not cut, she was stabbed to death.

claimed that Jody had said there was no rape. According to Mr. Westberry's statement to the police, Jody had just a little bit of blood on him when he arrived at Mr. Westberry's on the morning of February 6, 1983. "[Y] on could see the blood, kind of a blood stain, like he might have tried to wipe it off but he didn't wipe it all off" (R. 278-79). Again, this is at variance with what Mr. Westberry had told Paige.

Mr. Westberry's story must also be compared to what others around him recalled. On February 6, 1983, Charles Westberry was living with Denise Easter and his brother, Allen Westberry and Allen's wife, Beverly, in Allen's trailer home. It was Allen's and Beverly's practice to leave the door to the trailer unlocked at night (R. 1924-25). Ms. Easter recalled that she and Charles had gone out on the night of February 5, 1983, and did not retire to bed until 1:00 or 2:00 a.m. (Id.) Ms. Easter recalled that Charles had gotten up sometime the next morning to get coffee, but returned to bed five minutes later (R. 1925-26). When she got up about 9:00 a.m., Jody Wright was asleep on the couch in the living room (R. 1927). This was not an unusual occurrence. That morning, Jody did not have blood on his clothing (Id.). Later, Ms. Easter, Charles, and Jody went fishing. During the outing, Ms. Easter noticed that Jody had about thirty one dollar-bills on his person.[5] Allen Westberry testified that when he arose at approximately 7:00 a.m., Jody Wright was sitting on the living room couch already having been awaken by Allen's small son, Travis (R. 1944-45). Allen did not notice any blood on Jody (R. 1946). Beverly recalled that when she got up about 6:30 a.m., Jody was still sleeping on the couch (R-195). She did not see anything looking like blood on his person or clothing (R. 1957).

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[5]Testimony from Mr. Wright himself, and other witnesses established that on the evening of February 5, 1983, he had been playing poker and had won approximately thirty dollars (R. 1874).

On February 8, 1983, when Charles Westberry had been originally interviewed by law enforcement personnel, he told them that Jody had arrived at the trailer at approximately 1:00 a.m.; he thus knew he was Jody's alibi. According to Charles' February 8th Statement, Jody had spent the night in the trailer, sleeping on the living room couch (T. 347). Charles' story changed only after Paige went to the police, and he was arrested and charged with murder.

Charles also faced prosecution on other charges. At trial, Jody's attorney attempted to present to the jury the fact that Charles and Jody had been partners in a criminal enterprise. They, along with a third person had stolen scrap metal from Georgia Pacific on a semi-regular basis and sold it. In March 1983, they had discovered by transporting it to Jacksonville and selling it there, considerably more money could be made. In fact, the proceeds from the mid-March sale was nearly $1200. Denise Easter knew of this illegal business, but defense counsel was precluded from questioning her regarding it (R. 1930-37). Defense counsel was also precluded from cross-examining Charles about the illegal nature of this business, although he was permitted to inquire regarding the fact there was a business and $1200 in proceeds from it (R. 2183-95). Charles denied that he had bad blood with Jody over this business and denied ever telling Paige that he was having trouble with Jody (R. 2172).

Defense counsel did not ask about immunity for the criminal enterprise because he did not know that Charles had confessed this criminal enterprise to the prosecuting attorney, James Dunning. Mr. Dunning testified at the Rule 3.850 evidentiary hearing that Charles Westberry told him about this scrap metal business after a contract of immunity regarding the murder charges had been entered into (T. 753). This contract was signed July 19, 1983. Mr. Dunning received the information about the illegal scrap metal business directly from Westberry; the sheriff's office was not involved. Mr. Dunning explained that Westberry received "a limited grant of immunity" regarding the stolen scrap

metal (T. 755-56).

Charles Westberry testified at the evidentiary hearing about his understanding regarding possible charges over the scrap metal business:

> Q Isn't it fair to say that you knew Mr. Dunning wouldn't prosecute you?
>
> A I suppose.
>
> * * *
>
> Q As far as you know could Mr. Dunning have prosecuted you for the scrap metal business at anytime he chose?
>
> A I'm sure he could have.
>
> Q And is that something that has worried you even up until today?
>
> A In a way, yes.

(T. 697-99).

Howard Pearl, Mr. Wright's defense counsel, was never informed of this "limited grant of immunity." He in fact was led to believe that the contract of immunity was the extent of their understanding. Discovery in this case was conducted through the prosecutor, Mr. Dunning. Mr. Pearl and his investigator, Freddie Williams, were not to be provided with any police reports directly. All reports and statements were to be dispersed by Mr. Dunning and signed for by either Mr. Pearl or Mr. Williams (T. 308-42). According to the signed receipts, a copy of the contract of immunity was provided to the defense on July 19, 1983 (T. 321). However, no disclosure regarding the scrap metal business and the "limited grant of immunity" regarding it was provided.

No discovery was provided as to Wanda Brown, Charlene Luce, Kimberly Holt, Henry Jackson, or Clayton Strickland. These individuals' names were not provided to defense counsel as witnesses under Rule 3.220, nor were there statements disclosed. The sworn statements of Ms. Brown, Ms. Luce, and Ms. Holt made Strickland and Jackson prime suspects in the murder.

Strickland and Jackson were roommates and drinking companions. According to former Deputy Taylor Douglas, Jackson and Strickland:

> lived in a very, very old trailer, not very well kept, poorly, poorly kept, as a matter of fact. And I'm sure they lived from day to day on collecting bottles and doing odd jobs. And they used a lot of their money for alcohol. And they drank and argued on a regular basis. And I think that most of the neighbors that knew of them would certainly agree to that.

(T. 959). In 1979, Henry Jackson was convicted of burglarizing Earl Smith's residence (T. 965). Earl Smith was Ms. Smith's brother and lived across the street from her. Jackson had also been previously convicted of a homicide (T. 814). In fact, Mr. Dunning, Jody Wright's prosecutor, had been Jackson's public defender on the homicide charge (T. 720).

Charlene Luce gave the police the following sworn handwritten statement on February 9, 1983:

> Friday afternoon about 3:30 to 4:00 Strickland dress in lime green shirt, tan plaid pants, with plaid sport coat [initialed] sport don't match. Strickland looks about 38-39 years old. I was in the yard picking up sticks. Jackson and Strickland were arguing about clothes and money. Then Strickland called me to the fence ask me to put some meat in my freezer. I said no. I was afraid [sic] that Henry would be mad if his meat was gone. Then, Strickland started talking about he didn't like anyone missing [sic] with his clothes. Told me about shaving and [initialed] taking a cold bath. Also told he was from Texas and had been here about two weeks. Then talked about he wasn't scared of Leroy or Henry they may kill me but I'm not scared of anyone. I walk away. Strickland still fussing about his clothes. Jackson throw blue trunk outside on the ground. Jackson went back into the trailor [sic]. By this time I was near the fence agian [sic]. Jackson came back to the door with a knife in right hand. He was very upset. I yelled at him to clam [sic] down and take a deep breath. Jackson was wearing blue jeans. No shirt. Strickland walk fast to the back of the trailor. [initialed] Knife blade [initialed] was short. Didn't see knife handle. Then Jackson walked closer to the fence talking about he was white man and always will [initialed] be. Had red plaid shirt in hand. Jackson told me that Strickland had his money and he wanted it. I walked away and went inside.
>
> Sunday about 4:30 or 5:00 afternoon I when [sic] outside to get something out of the freezer when Jackson called me to the fence. To tell me that Miss Smith was kill. Then I asked Jackson if he did it. He turn red in the face and turned away. I'm just joking. Strickland was talking didn't understand what was said. Then Jackson told that Miss Smith gave him the best Christmas gift a box of candy. Mr. Smith gave him a carton of cig. He talked about cutting some

tries down for Miss Smith. I could [not] believe that Miss Smith was dead. Why, her? Jackson said that Miss Smith told him that she didn't kept [sic] money at home.

(T. 302-03).

Wanda Brown gave the police the following sworn handwritten statement on February 7, 1983:

On Saturday, February 5, 1983 while in the process of delivering mail I turned right off of Florida Avenue onto Third Avenue and proceeded west towards Highway 19. I first observed Ms. Smith inside of her fenceline motioning with her hand to a white male subject to move on towards on easterly direction on Third Avenue. At this time the male subject shook his arm at Ms. Smith and walked towards the middle of the road in front of my vehicle. I stopped and he walked up to the side of my Jeep. At this time I realized he was intoxicated. He asked me why there was usually a man Mail Carrier but today it was a woman. I then asked what he wanted and he asked if I had his check. I then asked who he was and he replied "Strickland, I live with Henry Jackson (Henry Jackson lives at Rt. 5 Box 184 Oakwood Ave.)" I then told him I had no mail for that box. He then replied "I need my check I need some money. Have you got some money I can have?" I then became scared and drove away. When I last saw him he was walking east on Third Avenue. Ms. Smith was still standing in her yard and watching this take place.

Strickland was wearing plaid slacks and a plaid sports coat that clashed in color and design. His speech was slurred and he was having difficulty standing.

(T. 301).

Kimberly Holt gave the police the following sworn typed statement on February 28, 1983:

Q. The Putnam County Sheriff's Office is conducting an investigation into the stabbing death of Lima Paige Smith. Do you have any information in this investigation that would be helpful?

A. Yes Sir, it may be helpful. I was employed at Miller's Supermarket located at Westgate Shopping Center, from Oct 1982 through Feb 1, 1983. I was a cashier. On Feb 6, 1983 I was working the 3 to 10 PM Shift. A man came through my check-out line with fresh scratch marks on his face. He is in the store alot but I don't know his name. He always pays with food stamps or bottles. The man was in line and when it got his turn to check out, he said "How you doing good look'in." I Kinda ignored him. The [sic] brought two cases of beer, Old Milkawuee [sic], and paid with it with a One Hundred Dollar Bill. He took it out of his wallet and I could see another One Hundred Dollar bill in his wallet. He said "I got money today." Then he asked me if I knew that Mrs Smith was dead? I said pardon me? Then he said "Did you know Ms. Smith was dead?'" I said "That is terrible, I can't believe that anyone would kill a beautiful woman like that."

He asked me what time I got off of work? I told him that I got off at 7 o"clock in the morning when I actually get off at 10PM. I told him that because I was scared of him. Then he left.

Q. What time was this man in the store?

A. At 4:30 PM. I remember because I looked at the clock when he was checking out.

Q. Is the man that you identified in the white male "mug" book, the same individual you stated that had the scratch marks on his face. (The person identified is Henry Jackson).

A. Yes it is.
(T. 304).

Defense counsel did learn of Ms. Holt in July, 1983, due to his own investigate efforts. But by that time, she was uncertain of the day on which she had seen Henry Jackson. Counsel did not know that she had previously been able to state under oath that her conversation with Mr. Jackson was occuring virtually simultaneously with Earl Smith's call to the sheriff's office reporting Ms. Smith's death.

Defense counsel was also not provided with either Mr. Jackson's or Mr. Strickland's statements dated February 10, 1983. According to Mr. Jackson, the scratches on his face were received in a fight on Sunday night.[6] According to Mr. Strickland he had last seen Ms. Smith the "Tuesday or Wednesday" of the previous week.[7] Mr. Jackson and Mr. Strickland both indicated that they had been home on Saturday night. ("We went to bed pretty early" Jackson statement T. 378)("Henry and I had been drinking alot on Saturday and was pretty high. We went to bed around eight o'clock I guess. I didn't get up until Sunday morning and I made some coffee for Henry and I. Henry and I stayed at the trailer all morning" (Strickland statement T. 379). Of course, Jody Wright's jury heard

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[6]Ms. Holt said that these scratches were already on his face at 4:30 pm, Sunday afternoon (T. 304).

[7]Wanda Brown said that Mr. Strickland had a confrontation with Ms. Smith on Saturday, approximately twenty four hours before Ms. Smith's body was found (T. 301).

none of this information regarding Strickland and Jackson.

William Bartley, who testified at Jody Wright's trial, was not asked at that time about his knowledge of the whereabouts of Strickland and Jackson the night of Ms. Smith's death. As a result, the jury did not know that Mr. Bartley saw Strickland and Jackson on Saturday night, February 5, 1983, standing in the empty lot next to Ms. Smith's house, drinking (T. 1007). It should be noted that the medical examiners best guess of time of death was between 5:00 p.m. and 9:00 p.m. on February 5, 1983 (R. 1852).

Having no knowledge of the criminal nature of Charles Westberry's scrap metal business, having no knowledge of Mr. Dunning's grant of limited immunity regarding that business in exchange for Westberry's testimony against Jody Wright, having no knowledge of Ms. Brown's statement linking Strickland to Ms. Smith the day she died; having no knowledge of Ms. Luce's statement regarding Jackson's suspicious behavior regarding Ms. Smith's death, having no knowledge of Ms. Holt's statement of Jackson's suspicious behavior and sudden possession of large amounts of money, having no knowledge of Jackson's prior criminal records, having no knowledge of Mr. Dunning's prior representation of Jackson, having no knowledge of Jackson's and Strickland's association and that they were each others alibi, and having no knowledge that Strickland and Jackson were seen drinking in the vacant lot next to Ms. Smith's house the night she was killed; the jury convicted Jody Wright of the murder.

On September 1, 1983, the jury returned its verdict finding Jody Wright guilty as charged[8] (R. 688). On September 2, 1983, the penalty phase of the

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[8]The jury commenced its deliberations at 11:15 a.m. At 2:30 p.m., the jury asked to be provided with the testimony of Ms. Lasko (an FDLE employee, who had conducted an analysis of hair found on Ms. Smith's body and was unable to match it to Jody Wright) and Dr. Latimer (the medical examiner who concluded the assailant was right handed). The trial court refused to provide the jury with a transcript of this testimony (R. 2899-2908). The jury once again retired and returned its verdict at 3:45 p.m. (R. 2909).

trial was conducted. The jury returned a death recommendation. On September 23, 1983, the trial judge imposed a death sentence.

In the resulting appeal to this Court, constitutional error was found. Near the end of the trial, after the close of evidence, a witness, Kathy Waters, had come forward with new evidence beneficial to Jody Wright. Ms. Waters recalled seeing a person fitting Jody Wright's description walking south on State Road 19 at approximately 12:30 a.m., February 6, 1983 (R. 2613-17). This testimony would have been supportive of Jody's testimony that shortly before 1:00 a.m., he had walked south on State Road 19 on his way to the Westberry trailer where he spent the night. The trial court noted that Ms. Water's testimony "would tend" to corroborate Jody Wright's testimony (R. 2645). However, the trial court refused to permit the jury to hear the evidence saying:

> I think that Counsel had acted with the greatest of professionalism in this case. But if we allow people to come out of the woodwork, as it were, and to testify in support of one side or the other, almost as if that testimony were tailor-made and after that witness had had the opportunity to know and discuss and confer at great length with numerous people concerning the facts in the case and concerning the testimony of people in the case, if the rules governing disclosure, if the of sequestration are to mean anything, then there must be an end to it, and I'm going to deny the motion on that basis.

(R. 2678).

On direct appeal, this Court found that the trial court's ruling violated the sixth amendment. Wright v. State, 473 So. 2d 1277, 1280 (Fla. 1985). However, this Court said the error was harmless. In dissenting from the denial of a petition for a writ of certiorari, Justice Blackman stated:

> Since Wright's fingerprint could have been left during the alleged earlier break-in, this case comes down to Wright's word against Westberry's. Waters' testimony obviously would not have proved Wright innocent, but it would have provided some corroboration for Wright's story. Questions of witness credibility, of course, are within the "special province" of the factfinder, Inwood Laboratories, Inc. v. Ives Laboratories, Inc., 456 U.S. 844, 856, 102 S.Ct. 2182, 2189, 72 L.Ed.2d 606 (1982), and I cannot say "beyond a reasonable doubt" that the corroboration Waters offered could not have altered the jury's assessment of the conflicting stories. More to the point, I do not see how the Supreme Court of Florida could make that statement, particularly given the prosecution's claim of potentially substantial

prejudice and the trial judge's suggestion that Waters' testimony appeared almost "tailor made" for the defense.

Wright v. Florida, 474 U.S. 1094, 1096-97 (1986)(Blackman, J. dissenting).

The denial of the petition for certiorari review occurred on January 21, 1986. This Court on January 21, 1988, granted Mr. Wright until February 22, 1988, to file a Rule 3.850 Motion in circuit court. A timely motion was filed requesting leave to amend. That request was granted. The Amended Motion to Vacate was filed July 19, 1988. An evidentiary hearing on the motion was held on October 3 and 4, 1988. On June 8, 1989, the circuit court denied the Amended Motion to Vacate.

On June 22, 1989, Mr. Wright filed a Motion for Rehearing and Motion to Amend. Mr. Wright sought to amend his Rule 3.850 motion on the basis of Harich v. State, 542 So. 2d 980 (Fla. 1989). On August 21, 1989, the circuit court permitted the claim, but summarily denied. This appeal was perfected.

SUMMARY OF ARGUMENT

I. Mr. Wright did not receive the benefit of an adversarial testing when the State failed to disclose evidence which would have supported the argument that Clayton Strickland and Henry Jackson committed the murder.

II. Mr. Wright did not receive the benefit of an adversarial testing when the State failed to disclose the complete extent of immunity afforded Charles Westberry and all of his prior statements.

III. Mr. Wright received ineffective assistance of counsel when his attorney failed to present known and available exculpatory evidence.

IV. Mr. Wright was denied his right to refuse to testify.

V. Mr. Wright received ineffective assistance of counsel at the penalty phase proceedings when mitigation was not presented.

VI. Juror misconduct deprived Mr. Wright of an impartial jury.

VII. Evidence of Mr. Wright's invocation of his right to silence was improperly introduced as evidence of guilt.

VIII. Mr. Wright was deprived of his right to cross-examine Westberry about his motives for currying favor with the State.

IX. Mr. Wright was deprived of his right to present exculpatory evidence when the trial court refused to permit the introduction of testimony, discovered after the close of evidence, which corroborated Mr. Wright's testimony.

X. Mr. Wright was deprived of a fair trial by the prosecutor's closing remarks which exceeded the bounds of acceptable advocacy.

XI. Mr. Wright was denied an adversarial testing when the jury did not hear that Ms. Smith's house had been regularly burglarized.

XII. Mr. Wright's counsel was ineffective in not moving for a change of venue in light of the extensive pretrial publicity.

XIII. Mr. Wright was deprived of his right to be present during all critical stages when jury questions were propounded and jury misconduct was discussed on the record.

XIV. Mr. Wright received ineffective assistance of counsel when a voluntary intoxication instruction was not requested.

XV. The penalty phase instructions unconstitutionally shifted the burden to Mr. Wright to show the mitigation outweighed the aggravation.

XVI. The sentencing jury was improperly led to believe sentencing responsibility rested solely with the judge.

XVII. The jury received inadequate guidance as to the meaning of heinous, atrocious or cruel.

XVIII. The jury was improperly allowed to double aggravating circumstances, thus tipping the balance in favor of a death recommendation.

XIX. The jury was improperly allowed to consider nonstatutory aggravation.

XX. The jury was erroneously informed that the sentencing recommendation

had to be by a majority vote.

XXI. Mr. Wright was deprived of conflict-free representation when his attorney was at the time of trial a deputy sheriff.

ARGUMENT I

MR. WRIGHT WAS DENIED AN ADVERSARIAL TESTING WHEN EVIDENCE INCRIMINATING STRICKLAND AND JACKSON IN THE MURDER OF MS. SMITH WAS NOT PRESENTED TO THE JURY. AS A RESULT, MR. WRIGHT 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. Wright was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that Clayton Strickland and Henry Jackson either separately or together killed Lima Paige Smith. This evidence was obviously exculpatory as to Mr. Wright because it indicated the murder was committed by someone else. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence incriminating Strickland and Jackson.

A. THE EVIDENCE AGAINST STRICKLAND AND JACKSON

Following Ms. Smith's murder, law enforcement obtained a sworn statement implicating Clayton Strickland and Henry Jackson in the murder. Charlene Luce indicated she saw Strickland and Jackson on the Friday afternoon before Ms. Smith's death. They were arguing about money. Jackson was brandishing a short knife. Ms. Luce further swore:

> Sunday about 4:30 or 5:00 afternoon I when [sic] outside to get something out of the freezer when Jackson called me to the fence. To tell me that Miss Smith was kill. Then I asked Jackson if he did it. He turn red in the face and turned away. I'm just joking. Strickland was talking didn't understand what was said. Then Jackson told that Miss Smith gave him the best Christmas gift a box of candy. Mr. Smith gave him a carton of cig. He talked about cutting some tries down for Miss Smith. I could [not] believe that Miss Smith was dead. Why, her? Jackson said that Miss Smith told him that she didn't kept [sic] money at home.

(T. 302-03).[9]

Wanda Brown stated under oath:

> On Saturday, February 5, 1983 while in the process of delivering mail I turned right off of Florida Avenue onto Third Avenue and proceeded west towards Highway 19. I first observed Ms. Smith inside of her fenceline motioning with her hand to a white male subject to move on towards on easterly direction on Third Avenue. At this time the male subject shook his arm at Ms. Smith and walked towards the middle of the road in front of my vehicle. I stopped and he walked up to the side of my Jeep. At this time I realized he was intoxicated. He asked me why there was usually a man Mail Carrier but today it was a woman. I then asked what he wanted and he asked if I had his check. I then asked who he was and he replied "Strickland, I live with Henry Jackson (Henry Jackson lives at Rt. 5 Box 184 Oakwood Ave.)" I then told him I had no mail for that box. He then replied "I need my check I need some money. Have you got some money I can have?" I then became scared and drove away. When I last saw him he was "walking east on Third Avenue. Ms. Smith was still standing in her yard and watching this take place.

(T. 301).

Kim Holt stated under oath:

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[9]It is interesting to compare Jackson's reference to candy and the fact that candy was left on Ms. Smith's exposed abdomen after the assault and murder.

On Feb 6, 1983 I was working the 3 to 10 PM Shift. A man came through my check-out line with fresh scratch marks on his face. He is in the store alot but I don't know his name. He always pays with food stamps or bottles. The man was in line and when it got his turn to check out, he said "How you doing good look'in." I Kinda ignored him. The [sic] brought two cases of beer, Old Milkawuee [sic], and paid with it with a One Hundred Dollar Bill. He took it out of his wallet and I could see another One Hundred Dollar bill in his wallet. He said "I got money today." Then he asked me if I knew that Mrs Smith was dead? I said pardon me? Then he said "Did you know Ms. Smith was dead?'" I said "That is terrible, I can't believe that anyone would kill a beautiful woman like that." He asked me what time I got off of work? I told him that I got off at 7 o'clock in the morning when I actually get off at 10PM. I told him that because I was scared of him. Then he left.

Q. What time was this man in the store?

A. At 4:30 PM. I remember because I looked at the clock when he was checking out.

Q. Is the man that you identified in the white male "mug" book, the same individual you stated that had the scratch marks on his face. (The person identified is Henry Jackson).

A. Yes it is.

(T. 304).

Strickland and Jackson both denied the murder, as did Mr. Wright. Strickland and Jackson both passed polygraph examinations, as did Mr. Wright. Strickland and Jackson lived together in Ms. Smith's neighborhood, the same neighborhood Mr. Wright lived in. Strickland and Jackson gave each other as alibis. Strickland said: "Henry and I had been drinking alot on Saturday and was pretty high. We went to bed around eight o'clock I guess. I didn't get up until Sunday morning and I made some coffee for Henry and I. Henry and I stayed at the trailer all morning" (T. 379). Jackson said "I stayed at the trailer. Me and Clayton. We went to bed pretty early" (T. 378). However, there was nothing about the homicide which ruled out the possibility of two assailants working together who could then later provide each other with alibis (T. 966). Yet, law enforcement chose not to follow up on Jackson and Strickland:

Q Was hair from Mr. Jackson or Mr. Strickland submitted to the lab?

A No, sir, I don't believe it was.

Q Were the fingerprints of Mr. Jackson and Mr. Strickland compared to fingerprints found in the house?

A I do not think that they were.

(T. 1003).

Solely on the basis of their denials and their performance on polygraph examinations, Jackson and Strickland were "eliminated" by law enforcement as suspects. This despite Jackson's criminal history which included a prior homicide and a burglary of Earl Smith's house, across the street from Ms. Smith's house (T. 965, 1072). Strickland and Jackson were dismissed as suspects in spite of their reputation:

Q Okay. What were they [Strickland and Jackson] like?

A Well, they lived in a very, very old trailer, not very well kept, as a matter of fact. And I'm sure they lived from day to day on collecting bottles and doing odd jobs. And they used a lot of their money for alcohol. And they drank and argued on a regular basis. And I think that most of the neighbors that knew of them would certainly agree to that.

Q They were alcoholics?

A They drank heavy, yes, sir.

Q Were they frequently out of money?

A I would say by the living conditions they didn't have a whole lot of money.

* * *

. . . like I say, Mr. Jackson and Strickland both were known to drink, and their behavior was not, I would say, always rational the way you and I or other people may see it.

(T. 959, 963).

In fact Strickland and Jackson were seen loitering outside Ms. Smith's house the night she was murdered. William Bartley who lived in the neighborhood gave testimony in this regard at the evidentiary hearing which was not presented at trial:

Q Did you know Mr. Jackson and Mr. Strickland?

A Yes, sir, I know them.

Q Henry Jackson?

A Yes, sir.

Q And what's Mr. Strickland's first name?

A I don't know his first name, sir.

Q Did they live in the neighborhood?

A Yes, sir.

Q Whereabouts did they live?

A They stay about three blocks from my house.

Q Was that pretty close to Miss Smith's house?

A About three blocks from Miss Smith, too.

Q Did you observe them in the neighborhood during that time period?

A Yes, sir.

Q What do you recall seeing?

A That night when we were coming from the store they was right side of the vacant lot. They was drinking.

Q You mean by Miss Smith's house?

A Yes, sir.

Q Were they standing or sitting?

A No, they were standing, drinking.

Q Is that an empty lot, you say?

A Yes, sir.

Q Next to Miss Smith's house?

A Yes, sir.

Q Did you frequently see them there?

A Yes, sir.

Q Now, what night was that, did you say?

A That was Saturday night.

Q Okay. Now, that's the night before Miss Smith died?

A Yes, sir.

Q Or was found dead?

A Yes, sir.

(T. 1006-08).

The jury heard none of this evidence against Strickland and Jackson. The adversarial process failed, and as a result Mr. Wright was denied a fair trial.

B. THE PROSECUTOR VIOLATED HIS DUTY TO DISCLOSE EXCULPATORY EVIDENCE WITHIN THE STATE'S POSSESSION.

James Dunning was the assistant state attorney who prosecuted Mr. Wright's case. This is the same Mr. Dunning who had previously defended Henry Jackson when Jackson was prosecuted for a homicide. At the evidentiary hearing Mr. Dunning testified as to the discovery procedure he employed in this case:

> A No, it was not an open file policy. What we would do is file the general response, or answer to demand for discovery, and then as a general rule on cases that weren't complex we'd just tell the Public -- we'd just either tell the Public Defender they can come over and Xerox what we've got, or we'd send it to them.
>
> Now, in this particular case we followed a different policy. I drafted up the receipt. I made sure that everything that the receipt said was there. I had Freddie Williams verify that, and I had him sign for it.
>
> Q Okay.
>
> A And the purpose of that was twofold. One, to keep track myself with the volume of documents that I was delaying with of what documents I had furnished, such as if I ran across one that I had not, I could pick it up on a later receipt and furnish it at that time. Another, with the number of documents there can be times at trial -- I don't know if you have been active in trial practice -- where a Defense Attorney doesn't remember having received a particular document, and he can't find it in his file right then.
>
> And as a matter of fact, during this trial we had such an event happen. As I recall it was in chambers where Mr. Pearl indicated he did not have a particular document that I was referring to in an argument, at which time I pulled out the receipt signed by Freddie Williams and said, he does have it, you do have it because it's signed for by Freddie Williams. And he said, that's fine.

Q It is fair to say the procedure in this case then was unique to this case?

A It was unique to this case. I've used something similar in other cases, not necessarily a receipt.

(T. 730-32).

Captain Miller of the Putnam County Sheriff's Office, testified that all material disclosed to Mr. Wright's defense went through Mr. Dunning:

Q Now, in this case you indicated that there was a chain by which the information got from your office to the Public Defender's Office, and it passed through the State Attorney's Office.

A Yes, sir.

Q Was that the normal policy?

A It was with homicides. Frequently in lesser cases the Public Defender's Office would stop in and pick up the report.

Q Were you under instructions from the State Attorney's Office not to give information directly to the Public Defender's Office?

A I was instructed to furnish all reports to be given to the Public Defender's Office to the State Attorney's Office.

Q Okay. Did you comply with that?

A Yes, sir, I did.

(T. 1073-74).

Howard Pearl, Mr. Wright's attorney, testified that Mr. Dunning required the defense to sign for all material that was disclosed:

This case was handled considerably differently by the Prosecutor, Mr. Dunning, than had been the practice throughout the circuit in other cases, in that ever since I've been with the Public Defender there has been an agreement existing between the Public Defender and the State Attorney in every county of this circuit that we called an open file policy. And with or without the filing of a demand for discovery in most such cases the Public Defender would just borrow the State Attorney's file, copy it, leaving out personal notes, and then return it.

In this case it was not done that way. Mr. Dunning controlled the dissemination or delivery of discovery materials, and required a signature on a list of the specific matters he turned over. And I think Freddie Williams, the Public Defender Investigator, was required to sign for everything that he received from the State.

(T. 784-85).

Freddie Williams, the investigator for the public defender's office, also recalled that discovery was very tightly controlled by Mr. Dunning. All documents and reports provided by the prosecution to the defense were signed for:

> A Well, in our circuit here we have an open file policy. And in this particular case everything that we got came directly through the State Attorney's Office, and I had to sign for it.
>
> Q Okay. Now, in other cases I take it that you could get reports directly from the Sheriff's officers involved?
>
> A I had in the past, yes.
>
> Q Okay. In this case you could not do that?
>
> A Everything I got, I got from -- that I recall getting, I got from the State's Attorney's Office, and I signed for it.
>
> Q Do you recall having any discussion with any of the Sheriff personnel about this arrangement?
>
> A I think I spoke with Captain Miller about why they changed, and he said that's what the State's Attorney's Office wanted.
>
> But, you know, going back five years, I'm not really sure, but I think I spoke to them about it.
>
> Q But it was noted to the Sheriff officers -- I mean everybody was aware that the policy was different in this case?
>
> A Well, I know the only reports I was getting, I was getting from the State's Attorney's Office after I signed for them.

(T. 975-77).

At the evidentiary hearing, all the signed receipts for discovery, along with the State's notices of witnesses who had relevant information, were admitted into evidence as Defendant's Exhibit 11 (T. 308-42). A review of this exhibit shows that the names of Charlene Luce, Wanda Brown, Kim Holt, Clayton Strickland and Henry Jackson were not provided to the defense. Further, the sworn statements of each of these witnesses are not listed in Exhibit 11 as ever having been provided the defense.

Mr. Pearl testified that he was never provided a copy of Charlene Luce's sworn statement:

A You have handed me a photostatic copy of a statement by Charlene C. Luce, L-u-c-e.

All right, sir. I have read it.

Q All right. Now, is that a document you've ever seen before?

A Never.

(T. 339).

Mr. Pearl also testified he was never provided with Wanda Brown's sworn statement:

A You've given me a photostatic copy of a statement by Wanda Brown.

Q Right.

A I have read it.

Q Okay. Have you ever seen that before?

A To the best of my knowledge and belief I have not.

Q Okay. Did you ever have any of the information contained in that report available to you?

A No, I have never spoken to Miss Wanda Brown, and can remember nothing that would have brought her to my attention as a witness during trial preparation.

(T. 796-97).

Mr. Pearl further testified that he was not provided with Kim Holt's sworn statement, although through his own investigative efforts he had learned of her and talked to her:

Q Do you recall if at that point in time you had been provided anything in the nature of a police report such as the one that appears in front of you?

A No, we had not.

Q Okay. In looking at that police report, is that something that you would have expected to have been provided by the State?

A Yes.

Q Would it have been important for you to have when you were talking to Miss Holt?

A Well, of course she said the same things to us that she related in the statement. We discovered it independently. So I can't say that it would have been terribly important to our investigation under those circumstances for this to have been disclosed to us. Certainly, in my opinion, it should have been.

Q Now, let me ask you a couple specifics then with reference to this. Do you recall when you talked to her how certain she was about the date and the time that this had occurred?

A No, she was not certain. Our first information that led us to Miss Holt and to the other witness indicated that Mr. Jackson's appearance at Millers under suspicious circumstances making suspicious claims took place very soon after, or even on the day of the discovery of Miss Lima Paige Smith's body, which would have made that event terribly significant because it would have raised the possibility of another suspect.

However, we later developed that this encounter at Millers had happened a considerable period of time after Miss Lima Paige Smith's death, so that Mr. Jackson's remarks concerning her death could have been a matter by then of public knowledge.

Q In that report are there specific date and times given to Taylor Douglas with reference to when this occurred?

A Let me add here, I have never seen this.

Q Okay. If you could take a minute just to read through it then.

A It says 4:30 p.m. on February 6th of 1983.

Would you please refresh my memory as to the date of death.

Q I believe it's of record that the first report went to the police between 4:30 and 5:00 p.m. on February 6th that there was the body. Mr. Smith discovered it at that point in time.

A Well, to the best of my knowledge and belief I have never seen this statement. It has never been furnished to me.

Q Does that time -- would that have been important for you to know when you were talking to Miss Holt?

A Certainly.

Q And how long after Miss Smith's death were you talking to Miss Holt?

A It probably would have been June or July, in the course of our investigation in preparation for trial.

* * *

Q Was she able to recall, when you were talking to her, with specificity the date and time she reported this, or the date and time this occurred?

A To the best of my recollection she was not. She was not specific about the date.

(T. 793-95).

Ms. Holt's sworn statement, which was introduced as Defendant's Exhibit No. 8, clearly establishes that immediately after her encounter with Henry Jackson she knew the date and time. When Jackson left her check-out line at the grocery story, it was 4:30 p.m., February 6, 1983 (T. 304). This was within fifteen minutes of the call to the sheriff's office reporting the discovery of Ms. Smith's body. Certainly the prosecution's failure to disclose Ms. Holt's sworn statement inhibited the defense's ability to appreciate the significance of Ms. Holt's recall.

Freddie Williams also testified that the defense was not provided with the sworn statements of Charlene Luce, Wanda Brown, and Kim Holt:

Q Did they [the prosecution] provide you with Wanda Brown's statement?

A I -- I -- I didn't see that statement. The first time I saw it was when I was in the State's Attorney's Office last week.

Q Do you recall them providing you with Kim Holt's statement?

A I don't recall that statement provided to me either.

Q And how about Charlene Luce's statement?

A No, I'm sure about that statement either.

(T. 993).

Mr. Dunning testified that the way to know for sure as to whether these sworn statements were disclosed would be by examining the signed receipts:

Q Okay. What I want to ask you about, and for that reason I'll leave it over here with you, it indicates that there was a statement made with reference to a Wanda Brown, or that's what it is, it's a statement from Wanda Brown, which is signed by her.

Do you know whether that document would have been given to Mr. Pearl?

A It should have been, yes.

Q Okay. Do you know one way or the other whether it was?

A The only way I would have of knowing would be to go back to the receipts that would be, I believe, in the State Attorney's file that were signed by Mr. Williams and determine if that was one of the documents furnished.

Now, what could very well be is this voluntary statement was attached to a report such that it would be included in the heading of incident or investigative report on such and such a date, and not listed separately.

Q Okay. In looking at that then there's no doubt in your mind that should be something that Mr. Pearl should have been given?

A I would say that's correct, yes.

Q Okay. And why would you say that?

A Well, I'm required under the Rules of Procedure to do that.

Q Okay. And that is because it contains some exculpatory information?

A No, sir.

* * *

A I can't say its exculpatory. I am required to furnish matters which may be favorable to the Defense, or which the Defense may consider to be favorable to the Defense.

Q Is that such a document?

A It could be.

Q Okay. I'm turning to Appendix Number 6 [Defendant's Exhibit No. 7] in the same --

A If I might add, as to that statement it was my understanding that in addition to that statement that law enforcement did have contact with the person named in there. Also with Henry Jackson. Probably -- I do believe it would have been subsequent to the taking of this statement by Miss Brown. And what that investigation revealed as to that statement, I don't know off the top of my head.

Q Okay. And then flipping to Appendix 6 [Defendant's Exhibit No. 7], if you could just review that and see if you have any recollection of it.

A Okay.

Q Do you have a recollection at all of that?

A I can say that it's a statement made in connection with the homicide investigation of Lima Paige Smith mentioning Mr. Strickland and Mr. Jackson.

Q Okay. I mean, do you recall that that is something that you have seen before?

A Now, that's a little tougher question. I can say that I should have seen it.

Q Okay.

A It should have come to my office in the normal course of affairs.

Q Do you know one way or the other whether it did?

A Not without the benefit of my file.

* * *

Q Okay. Now, in reviewing -- in reviewing that statement, if you had had that statement, and you don't know one way or the other, is that a statement that you would have provided Mr. Pearl?

A Certainly. As I recall, I would have furnished Mr. Pearl with any statement relating to the investigation --

Q Okay.

A -- that I had, because I wouldn't try to pick and choose saying, you know, that I was going to give him some and not give him others.

Q In terms of getting police reports, do you feel there's an obligation on the part of the Prosecutor to get them, to have them provided to you?

A Yes. As a matter of fact -- excuse me, I've got a dry throat. As a matter of fact, we -- one of our investigators, one of his assignments was to keep up with the reports coming in from law enforcement. If they were getting late or not coming in, he would either write them a letter or go down to the Sheriff's Office and pick them up.

Also, as I said before, I was very constantly in contact with Cliff Miller and Taylor Douglas, and they could also furnish me reports. And on a number of occasions I asked them to go ahead and get me some reports because they were slow getting them to me.

Q Is this -- in reviewing the document again, in your mind is it the type of document that under the Rules you would have been required to disclose?

A Certainly.

Q And is that -- well, why is that?

A Again, I'm supposed to give the name and any information, written information, pertaining to anyone who might have any knowledge relating to the facts of the case, or any defense thereto.

(T. 724-28).

There can be no doubt about Mr. Wright's entitlement to relief. Rule 3.220 of the Florida Rules of Criminal Procedure provides in pertinent part:

> (a) Prosecutor's Obligation.
>
> (1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:
>
> (i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.
>
> (ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein means a written statement made by said person and signed or otherwise adopted or approved by him, or a stenographic, mechanical, electrical, or other recording, or a transcript thereof, or which is a substantially verbatim recital of an oral statement made by said person to an officer or agent of the State and recorded contemporaneously with the making of such oral statement . . . .
>
> * * *
>
> (2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control <u>which tends to negate the guilt of the accused as to the offense charged</u>.

Failure to honor Rule 3.220 requires a reversal unless the State can <u>prove</u> that the error is harmless. <u>Roman v. State</u>, 528 So. 2d 1169 (Fla. 1988). Here exculpatory evidence and statements material to the defendant's case were undisclosed. Clearly, the undisclosed statements negate the guilt of Mr. Wright. Taken together, they build a strong case that Strickland and Jackson were in fact the killers. Certainly Rule 3.220(a) was violated. Evidence which

"tend[ed] to negate the guilt of the accused as to the offense charged" was undisclosed. Names of persons known to have information relevant to the offense were not supplied to the defense, and their sworn statements were left undisclosed. This evidence was "within the State's possession or control." It was in the possession of the law enforcement agency investigating the homicide. The nondisclosure cannot be found to be harmless.

The prosecution's suppression of evidence favorable to the accused violated due process. United States v. Bagley, supra. 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. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). 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; Arango v. State, 497 So. 2d 1161 (Fla. 1986). See Dennis v. United States, 384 U.S. 855, 874 (1966)("In our adversary system for determining guilt or innocence, it is rarely justifiable for the prosecution to have exclusive access to a storehouse of relevant facts"). A defendant's right to present favorable evidence is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Counsel cannot be effective when deceived, 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. Wright'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, supra. The Bagley materiality standard is met and 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, supra, 473 U.S. at 680. Such a probability undeniably exists here. Had this evidence been disclosed, there would have been no conviction, and no death sentence.

The undisclosed sworn statements present a strong case against Strickland and Jackson. The only basis for eliminating them as suspects was their passage of a polygraph examination. Just as Mr. Wright's passage of a polygraph examination was inadmissible, so to the results of their polygraph examination would not have been admissible into evidence.

Moreover, had the sworn statements been disclosed, Mr. Pearl would have conducted further inquiry regarding Strickland and Jackson. He would have learned of Jackson's prior burglary charge. Just as Mr. Wright's prior burglary was admissible, so to Jackson's prior burglary would have been admissible. Mr. Pearl also would have conducted further inquiry of witnesses concerning the whereabouts of Strickland and Jackson at the time of the homicide. He would have learned from Mr. Bartley that Strickland and Jackson were seen standing outside Ms. Smith's house drinking during the time period the murder occurred. He would also have been able to establish that both Strickland and Jackson were brandishing pocket knives, consistent with the murder weapon, and threatening Ms. Smith and others the weekend of the murder.

Finally, Mr. Pearl would have also been able to present the fact that Strickland and Jackson gave statements inconsistent with the facts established from other sources. Jackson at one time claimed that his new found wealth immediately after Ms. Smith's death resulted from a social security check (T. 721). However, according to Wanda Brown, on Saturday, the day before in the last delivery of mail, Strickland and Jackson did not receive the social security check they were waiting for (T. 301). Jackson told others that the new found money resulted from some tree trimming (T. 1066). He also claimed his scratched face resulted from this same tree trimming (T. 956). However, Jackson's sworn statement indicated that scratches occurred during a fight at his sister's house on Sunday night (T. 378). But this was inconsistent with Ms. Holt's recall that Jackson had the scratch marks Sunday afternoon (T. 304). Strickland in his sworn statement claimed he last saw Ms. Smith on the Tuesday or Wednesday before her death. However, Wanda Brown saw Strickland gesturing towards Ms. Smith in a threatening manner on Saturday afternoon within twenty four hours of the discovery of Ms. Smith's body (T. 301).

Certainly, this evidence establishes a reasonable likelihood of a different outcome. Had the jury heard this evidence, it would certainly had a reasonably doubt concerning Jody Wright's guilt, and a different outcome would have occurred.[10] A new trial must be ordered.

C. DEFENSE COUNSEL FAILED TO INSURE AN ADVERSARIAL TESTING

In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court explained that the purpose of the right counsel was to assure a fair adversarial testing. The Court noted that, despite counsel's best efforts,

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[10]In evaluating this, consideration must also be given to the other errors and issues presented in this case. On direct appeal constitutional error was found in the limitation upon the defense's ability to present exculpatory evidence. Further, the prosecution did not disclose the extent of its deal with Westberry. See Argument II, infra. Mr. Wright's defense counsel also made unreasonable errors. See Argument III, infra.

there may be circumstances where counsel could not insure a fair adversarial testing, and thus where counsel's performance is rendered ineffective.

Here, even though defense counsel learned of Kim Holt, counsel was not provided with her sworn statement which established the critical time frame that, months later, she was unsure of. Moreover, the prosecution did not provide defense counsel with the other sworn statements which in conjunction with Ms. Holt's made Strickland and Jackson prime suspects. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. Moreover, 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).

Here, too, the prosecution thwarted counsel and insured that Jody Wright was denied the effective assistance of counsel. Without the sworn statements of Kim Holt, Wanda Brown, Charlene Luce, Clayton Strickland and Henry Jackson, counsel was denied the information necessary to a reasonable investigation of available exculpatory evidence. As a result, no adversarial testing occurred. Jody Wright 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. Wright's conviction must be vacated and a new trial ordered.

ARGUMENT II

MR. WRIGHT WAS DENIED AN ADVERSARIAL TESTING WHEN DETAILS OF MR. WESTBERRY'S IMMUNITY FOR THE ILLEGAL SCRAP METAL BUSINESS WAS NOT PRESENTED TO THE JURY. MR. WRIGHT WAS DEPRIVED OF AN ADVERSARIAL TESTING WHEN WESTBERRY'S STATEMENTS TO MR. DUNNING WERE NOT DISCLOSED TO DEFENSE COUNSEL. AS A RESULT, MR. WRIGHT 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. Wright was denied a reliable adversarial testing. The jury never heard the total extent of Charles Westberry's criminal liability and the prosecutor's decision not to prosecute on charges arising from the illegal scrap metal business so long as Charles Westberry assisted in the prosecution of Jody Wright. This evidence was obviously exculpatory as to Mr. Wright 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. Wright's guilt or innocence to hear the extent of Charles Westberry's criminal liability and the prosecutor's agreement not to prosecute in return for testimony against Mr. Wright. Also undisclosed were the written statements of Westberry typed up by Mr. Dunning. Disclosure of these statements were essential for the jury to evaluate Westberry's truthfulness.

A. THE ILLEGAL SCRAP METAL BUSINESS

As Justice Blackmun said in his opinion dissenting from the denial of certiorari review in Mr. Wright's case, "this case comes down to Wright's word against Westberry's." Wright v. Florida, 474 U.S. at 1097. However, the jury did not know that Charles Westberry had been engaged in an illegal business for which he feared prosecution. At the evidentiary hearing in circuit court, Mr. Westberry described this "business":

Q Okay. What kind of business dealings?

A Just selling them scrap.

Q Okay. You sold them scrap.

* * *

Q Can you give me an idea of what years we're talking about?

A What what?

Q Years. What year was this like when you were selling them scrap metal?

A I don't know. '80, maybe '81.

Q It's been quite a while ago?

A Yeah.

Q Now, where did you get the scrap metal?

A From GP.

Q From GP?

A Yeah.

Q I'm not familiar with GP.

THE COURT: Georgia-Pacific.

A Well, it's Georgia-Pacific.

Q How did you get it from them?

A We just went in.

Q Okay. You took it?

A Yeah.

Q Did Georgia-Pacific say it was okay?

A No.

Q So would it be fair to say it as stealing?

A Yeah.

Q Now, in getting the scrap metal who all was involved?

A Well, me and Jody got it -- me and Jody and Harold Rake got it, and that was about it.

Q Okay. Did you make money off of this?

A Yes.

* * *

Q Were you scared of getting in trouble with the law about this?

[Objection overruled]

Q Were you scared of getting into trouble for this?

A Yes.

(T. 642-45).

Mr. Westberry acknowledged that in mid-March 1983 that a check in the amount of twelve hundred dollars was received for the sale of stolen scrap metal:

Q Do you remember how big the check was?

A It was approximately twelve hundred dollars.

Q Now, was that pretty typical as far as the amount of money you were getting paid for the scrap metal?

A No, because we took this to Jacksonville.

Q Okay. Were you getting that much here at Hackney's?

A No.

Q Was there a reason why you would get more in Jacksonville than you would here?

A Yeah.

Q What was that?

A The price. They paid a lot more up there for it.

Q Okay. Did the Hackneys [the buyers in Palatka] know where you were getting the scrap metal?

A I don't believe so.

Q Did you ever tell them?

A No.

Q How often were you taking metal to the Hackneys?

A I don't know. I'd say roughly once a week.

* * *

Q Now, did the Hackneys ever ask you where you were getting the metal?

A Yeah, they asked us.

Q What did you tell them?

A I told them I couldn't tell him.

(T. 648-49).

When the trial court refused to permit inquiry into Westberry's criminal activity, defense counsel proffered the following testimony of Denise Easter, the woman with whom Charles Westberry was living in early 1983:

Q Right. Now, what I want to ask you now is were you aware of any activity that Charles was involved in which -- in which he

obtained scrap metals and resold them to scrap metal dealers?

A Yes, sir.

Q For how long was he engaged in that activity?

A I don't know, he didn't -- there wasn't that many times. I don't really remember the times, the times that I knew about anyway.

Q Do you know anything about his earnings?

A Pardon?

Q Do you know anything about his earnings from that business?

A Not really. I know one time they went out and got a large sum.

Q That was in Jacksonville, wasn't it?

A Yes, sir.

Q Now, weren't he and Jody involved in the business together?

A I wouldn't call it a business, they went out there, Jody went out there with them a couple of times, yes, sir.

* * *

Q Fine, fine, fine. Now, where did Jody and Charles obtain, and in what manner did they obtain the scrap metals that they resold to scrap metal dealers?

A Where did it come from?

Q Yes. Well, I'll just ask it this way so you, you know, head-on. Were those scrap metals stolen by Charles and Jody?

A Yes, sir.

(R. 1930-32).

B. MR. DUNNING HAD KNOWLEDGE OF THE ILLEGAL SCRAP METAL BUSINESS AND ACCORDED CHARLES WESTBERRY IMMUNITY FOR CHARGES ARISING FROM THE BUSINESS IN EXCHANGE FOR TESTIMONY AGAINST JODY WRIGHT IN THE HOMICIDE CASE.

Mr. Dunning testified at the evidentiary hearing that he knew of Charles Westberry's criminal activity in stealing and selling scrap metal. He explained when and how he learned of it as follows:

Q Now, do you recall at some point in time obtaining information with reference to other criminal activities that Mr.

Westberry was involved in?

A Yes, sir.

Q Okay. When did that occur?

A That would have occurred subsequent to this document granting immunity. It would have been during the course of an interview with Charles Westberry at the City Police Department.

Q Okay. How did he happen to be at the City Police Department?

A That's where he was being housed.

Q Okay. You went and interviewed him?

A Excuse me?

Q I'm sorry. I thought you indicated that you went to see him at the City Police Department to talk to him about this information?

A Well, about not only this information. I also showed him an aerial photograph or an area he had previously described to me as being the route that they took the next morning after the murder, where they went. I asked him to show me on the aerial photo where all they went. And I went through other matters concerning, of course, the statement by Joel Dale Wright to him. And then I inquired of him whether or not he had been involved in any prior criminal activity. Any. And he responded with the matter concerning the scrap metal.

Q Okay. Let me stop you for a second. Do you recall who all was present at this interview?

A I sure do.

Q Okay.

A Myself and Charles Westberry.

Q Oh, it was just the two of you?

A Yes, sir.

Q So when you went in to talk to him did you have any information that he was involved in some prior criminal activity?

A I don't recall.

Q Is it possible that you had a cancelled check?

A I don't believe I had a cancelled check at that time, no.

Q Did you at some time get a cancelled check?

A That I don't recall. As I recall, Mr. Pearl had brought a

witness down at the time of trial, and he might have been able to testify and present the cancelled check, the original.

(T. 747-49).

Mr. Dunning then explained what he did with the information obtained from Charles Westberry:

Q What was your personal knowledge?

A I have no personal knowledge of Charles Westberry talking with the Sheriff's Office. My recollection at this point is that I relayed whatever information I had at the time to the Sheriff's Office.

Q Did you ask them to contact Mr. Westberry?

A Did I ask them to contact Mr. Westberry? No, sir.

Q Regarding the scrap metal.

A No, sir, I did not.

Q In fact -- well, the way you say no sir, does that mean that you didn't want them to?

A Well, this was a limited grant of immunity. We weren't out prosecuting a burglary case at this point in time, we were prosecuting a first degree murder. I believe I would have asked them to check out the story that he told me. And if they had needed additional information, I saw Mr. Westberry for a while there about once a day, and I could have obtained that information.

Q Okay. You would have expected them to communicate to you if they needed more information?

A Right.

Q Now, you indicate that you were seeing him about once a day. Now, approximately when in this process would that have occurred?

A It would have been before trial. But how long before trial would be difficult to say.

(T. 755-56)(emphasis added).

C. MR. DUNNING REDUCED TO WRITING MR. WESTBERRY'S STATEMENTS TO HIM DURING THEIR INTERVIEWS

Mr. Dunning testified that he personally interviewed Charles Westberry on almost a daily basis (T. 756). Mr. Dunning wished to iron out inconsistencies

in Mr. Westberry's story. In this regard, Mr. Dunning stated:

Q Now, during this process do you recall providing Mr. Westberry with any written notes?

A Yes, sir. I don't recall exactly what form they took. What they basically would have been, I made up a list of -- I don't think I wrote down questions, because I thought I knew how to ask the questions. I did write down facts that I thought I could prove through various witnesses. And as a matter of fact, I wrote that out for every witness. And then I, on one occasion, gave it to Charles Westberry prior to trial, asked him to review it, go over it, make sure that was on there was what he told me, make sure what was on there was the truth. If there was something on there that he didn't tell me, or was untrue, to let me know before he took the witness stand. And for him to forget about what he -- I put down on that piece of paper, to testify in court under oath as to exactly what he remembered.

But this paper was only to tell me that the information that I was relying on was the same information that he was going to testify to. It was somewhat similar -- when the witness' deposition has been taken it's common practice to let the witness refresh his recollection of his prior answers prior to coming into court and testifying. Not to make him testify to the same thing, but to help him recall that which he testified to.

* * *

Q In his recall, or in talking to you in that week prior to trial did he give any indication that he needed to have his recollection refreshed more?

A No, not at all. I wasn't worried as much about him as making sure that I understood what he was saying and what he was going to be testifying to.

Also, again, I continued to look to make sure his statements were consistent. If at some point in time he -- you know, I asked him a question and he gives me an answer a little bit different I would ask him, okay, now explain that difference to me, what do you mean.

Q Now, these -- these notes that were given to him, were they for him to keep?

A No. He was to deliver them back to me prior to testifying at trial.

* * *

Q Then the answers were Charles Westberry's answers?

A No doubt about it.

Q In that respect they are then statements of Charles Westberry?

A They're statements by Charles Westberry the same of which are contained in the other documents, the investigative reports, the State Attorney investigation. They're the same.

Q But these weren't disclosed to Mr. Pearl?

A I -- no, again those were matters I'm not going to give opposing attorney a list of what I plan on proving through a witness at trial. I don't understand the rules to require me to do that.

(T. 757-59, 763-64).

Mr. Westberry also testified at the evidentiary regarding his conversations with Mr. Dunning. Mr. Dunning provided him with typed written answers to the questions that would be asked at trial:

Q Now, when you met with Mr. Dunning did he talk to you about what your testimony would be?

A He went over it with me.

* * *

Q Okay. Do you recall if you ever indicated to any of the prior investigators for Mr. Wright that he had given you something indicating what your answers should be?

A Yeah.

Q You did indicate that to them?

A Yeah.

Q Okay. Did you also indicate to them that you though you could find those written-out answers and give it to them?

A Yeah.

Q Okay. Were you able to find them?

A No.

Q Where did you look?

A Where I had them at the house.

* * *

Q When was the last time you saw those handwritten answers?

A After I got out of jail.

Q After you got out of jail?

A Yeah.

THE COURT: I didn't hear him say handwritten. I'm sorry.

BY MR. MCCLAIN:

Q Were they handwritten or typed?

A I believe they was typed.

Q They were typed.

Now, in preparing for trial did you -- testify -- did you read over those?

A Yes.

Q Okay. Did Mr. Dunning's questions pretty much line up with those written-out answers at the time you testified?

A I can't recall.

Q Okay. Did you take them into the courtroom with you when you testified?

A I don't believe so.

Q Okay. Where did you leave them?

A Probably at the cell.

(T. 668-71).

D. DEFENSE COUNSEL DID NOT RECEIVE A COPY OF MR. WESTBERRY'S STATEMENTS TO MR. DUNNING NOR DID HE KNOW OF THE "LIMITED GRANT OF IMMUNITY" AS TO THE SCRAP METAL BUSINESS.

Howard Pearl, Mr. Wright's attorney testified at the evidentiary hearing that he did not receive from the State Mr. Westberry's statements to Mr. Dunning nor any information regarding the limited grant of immunity to Mr. Westberry as to the scrap metal business:

Q Now, in the discovery process do you recall if you ever received any information that Mr. Westberry had confessed to Mr. Dunning of illegal activity with reference to a scrap metal business?

A No, I have no recollection of that, and I don't believe that that was disclosed to me. The only disclosure I received with respect to the contract of immunity was that Mr. Westberry would receive immunity or special consideration in connection with his activities in the murder case; that is to say, his false statement, his allegedly false statement which had first been made, and that his subsequent

statement in which he changed his testimony made him liable to prosecution.

And I was aware that he was being dealt with either in terms of leniency or in terms of immunity with respect to that. But I was never informed by the State of any communication passing from Mr. Westberry to the State or back concerning the theft of scrap metals.

We knew. We had evidence. We had gone out and investigated and determined that Mr. Westberry had in fact been involved in the theft and sale of scrap metals. We did this independently of the State. But we were never advised that he was -- that any prosecution or immunity for prosecution were being discussed with him concerning that event.

Q Would the fact that he -- assuming if he had confessed to Mr. Dunning his involvement in this illegal activity, would that be something that you would expect to be disclosed to you?

A Yes, certainly so if he was being offered immunity.

Q And if there was no direct discussion of immunity would that still be something you would want to know to prepare to cross-exam. Mr. Westberry?

A Yes. For example, suppose instead of being offered immunity he was bing threatened with prosecution if he did not testify against Jody Wright. That certainly would be something I would have wanted very badly to know.

(T. 790-92).

Q Do you recall if prior to trial you received any information at all that Mr. Westberry had given statements that were given directly to Mr. Dunning?

A Prior to trial?

Q Uh-huh.

A Well, one of the -- I think one of the statements you gave me, Exhibits 1, 2, or 3 was what we call a SAI, a State Attorney's Investigation, which is an interview conducted by an Assistant State Attorney during his investigation. And I believe that an SAI was made with Mr. Westberry.

Q Do you recall any one-on-one statements between Mr. Westberry and Mr. Dunning?

A I recall none.

Q Okay.

A I know Mr. Dunning told me prior to trial that he had spoken on a number of occasions with Mr. Westberry, telling me that he was reviewing with him the testimony that he was to give.

Q Did Mr. Dunning indicate to you at all that Mr. Dunning was writing written responses for Mr. Westberry?

A No.

(T. 830-31).

E. THE NON-DISCLOSURE VIOLATED DUE PROCESS AND RULE 3.220 OF THE FLORIDA RULES OF CRIMINAL PROCEDURE.

There can be no doubt about Mr. Wright's entitlement to relief. Rule 3.220 of the Florida Rules of Criminal Procedure, set out in Argument I, supra, 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. Wright by impeaching the State's star witness As Justice Blackman noted "the case comes down to Wright's word against Westberry's." Wright v. Florida, 474 U.S. at 1096. 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 interst. 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 suble 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. Wright'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, and no death sentence. The State's case was premised upon Westberry's credibility. The undisclosed evidence would have destroyed that credibility. Without a credible Charles Westberry there would have been no conviction.

At trial, Mr. Dunning knew this and went to extraordinary lengths to protect Westberry's credibility. When Mr. Pearl tried to point out that Westberry had testified before the jury to wholly new facts not contained in any previous disclosed statements, Mr. Dunning ellicted the following on the

redirect examination of Westberry:

Q All right, sir. You indicated that you said nothing or don't recall having said anything about the 7-11 store; is that correct?

A Yes, sir.

Q Did anyone ask you about the 7-11?

A No, sir.

Q Okay. You said you said nothing about Messer's. Did anyone ask you about going to Messer's?

A No, sir.

Q Okay. And you indicated that you said nothing about riding by Miss Smith's house. Was anyone smart enough to ask you that before on April the 18th?

A No, sir.

Q But did someone finally ask you about it?

A Yes, sir.

Q Who?

A You.

(R. 2200-001).

The failure to disclose Westberry's statements to Mr. Dunning was used by the State to its advantage. The failure to disclose the "limited grant of immunity" given Westberry on charges arising from the scrap metal business kept the jury from knowing of Westberry's bias and interest in testifying against Jody Wright. Under Davis v. Alaska, 415 U.S. 308 (1974), defense counsel was entitled to present this to the jury. Because the prosecutor suppressed this information, the court precluded inquiry into the illegal nature of Westberry's scrap metal business (R. 2192). The jury did not know of Westberry's interest in currying favor with the prosecutor. Accordingly, Mr. Wright's conviction must be vacated, and a new trial ordered.

F. DEFENSE COUNSEL FAILED TO INSURE AN ADVERSARIAL TESTING

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.

Here, even though defense counsel learned of of the scrap metal business, he did not know of Westberry's written statements to the prosecutor nor of the "limited grant of immunity" regarding it. The prosecutor did not provide defense counsel with this information. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. 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 Jody Wright was denied the effective assistance of counsel. Without the statements of Westberry to the prosecutor and without knowledge of the immunity afforded Westberry as to the scrap metal business counsel was denied the information necessary to a

reasonable investigation of available impeachment and exculpatory evidence. As a result, no adversarial testing occurred. Jody Wright 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. Wright's conviction must be vacated and a new trial ordered.

ARGUMENT III

MR. WRIGHT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENT.

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

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

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon defense counsel. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliance adversarial testing process." Strickland, 466 U.S. at 688. Here, Mr. Wright was denied a reliable adversarial testing. Howard Pearl, Mr. Wright's attorney, failed his client. Mr. Pearl testified at the evidentiary hearing and acknowledged that he committed serious errors in Mr. Wright's case. As a result of Mr. Pearl's errors important and exculpatory evidence did not reach the jury.

A. EVIDENCE OF OWNERSHIP OF THE VASE

Charles Westberry claimed that Jody Wright had told him that he took a jar of coins from Ms. Smith's house at the time of the murder and buried it in the Wright's backyard. Pretrial, no evidence of such a jar's existence was found. However, during the trial the prosecutor suddenly produced a witness to identify

a vase filled with coins that had been in Jody Wright's possession in mid-February 1983. The witness who produced this vase was Charlotte Martinez. Ms. Martinez's sister was Cynthia Kurkendall. Ms. Martinez came forward during the trial with her sister (T. 771)[11] The prosecuting attorney, James Dunning, has admitted that before the trial he was seeing Cynthia Kurkendall and that subsequently he married her (T. 773).

When Mr. Dunning announced the procurement of this new evidence, Mr. Pearl asked for additional time to investigate. At the evidentiary hearing, Mr. Pearl explained what happened as follows:

> Q Now, in preparing for trial -- actually, I guess it's something that came up during the course of trial. Do you remember a glass vase, a glass decanter:
>
> A Acutely, Mr. McClain.
>
> Q Now, is that something that had come up prior to the trial?
>
> A No, it came up in a very unexpected way during the trial.
>
> Q Prior to the trial do you recall if there were any statements by anybody with reference to a glass jar?
>
> A Yes, Charles --
>
> Q Westberry?
>
> A -- Westberry prior to trial had made statements, and I had taken his deposition, in which he claimed that Jody Wright had said to him that he had not only taken money from Miss Lima Paige Smith's purse, but had also taken a glass jar with coins in it, and that further said that -- or claimed tha Jody Wright told him that he had buried the jar.
>
> That testimony was given at trial by Mr. Westberry. But as yet no glass jar had come into view. Later during the trial a glass jar was produced through a young lady whose name I do not now remember.
>
> Q Would the name Charlotte, Charlene?
>
> A Charlene. Yeah, there were two sisters, and one of them apparently produced the jar to Mr. Dunning, the Prosecutor, outside

---

[11]Apparently Charlotte and Cynthia made an anonymous call to Mr. Dunning and arranged a meeting where Charlotte presented Mr. Dunning with the vase and the testimony (T. 767-73).

the presence of the jury and during a recess. And he showed it to us, and we couldn't make anything of it, that is, at first.

Although Mr. Marion Wright, Jody's father, was present, he didn't recognize it. And of course the suggestion being made by Mr. Dunning was that this was the glass jar that had been taken by Jody at the time of the, of the robbery and murder.

And there was quite a to-do over it, because it caught us quite unawares. And it never -- nothing of that sought had been communicated to us at any time prior to trial, and it was a brand new piece of supposed evidence we would have to deal with if the Judge allowed the State to use it. And it was newly discovered, supposedly. So --

* * *

Q Do you recall how it became newly discovered; do you recall any of those details?

A Only that this young lady, Charlotte or her sister, brought it to the State Attorney saying that it had come from Jody.

The story was that Jody was out riding around several people, including this young lady, and they wanted some beer and they didn't have any money, so Jody had them drive by a stop at his house, and he went inside, and he came back out with a glass jar with coins in it saying this is my piggy bank. And he used that money to buy beer, and apparently left the jar in the car. He had to have done that.

And so later, on virtually in the middle of the trial, this young lady brings the jar from where it had been left in the car, I should suppose, and brings it to Mr. Dunning saying that it had come from Jody under those circumstances.

And, of course, I'm sure that in everyone's mind the inference then arises, you know, could this be the glass jar that Charles Westberry was talking about.

This was especially significant, if true, because it would have been the only article of evidence, or the only piece of testimony that would have been a corroboration of Charles Westberry's claimed confession having been received. There was no other corroboration of any kind.

And so the Court kindly gave us an overnight to try to figure out what to do about that. And we brought down from South Carolina a Mrs. Wiggs, I think her name is, who is Jody's sister, who identified that glass jar as one having been bought by her together with a group of matching glasses and given to Jody's mother, which would have established ownership clearly.

And we went over to Jody's house before Miss Wiggs arrived, and there in Jody's mother's cupboard were six or eight glasses that absolutely and perfectly matched the glass jar.

So we were prepared then to go forward if the State would have produced the jar to say that in fact it had always been in the family, and could not have been the glass jar that had been taken by whoever killed Miss Smith.

But then in the morning when we had made those preparation, and had spent the night bringing Mrs. Wiggs down, the Prosecutor decided that he would drop the matter and not bring it forward. I still had to -- Mrs. Wiggs was there, and of course I had also the slightly less direct, but nevertheless conclusive, proof with the matching glasses that I could prove ownership.

I felt it necessary thereafter -- when this came up I decided that it might be important to have that young lady come on the testify that Jody had gotten his piggy bank and spent the coins in it to buy beer to show that that would make it unlikely that Jody had the more or less three hundred dollars that Charles Westberry claimed Jody said he had taken from Miss Lima Paige Smith when she was killed. In other words, I wanted to show that very shortly after the murder he was broke, and yet there had been no evidence ever that the money had ever come to light, or that Jody had any large sums of money, or so forth. And it seemed from our investigation that we could account for all sums of money that he had subsequent to the murder.

And so I put on that testimony, but then I fear that I made a very bad mistake.

Q Can you explain.

A I failed to prove, and I had the proof in my hand, that that jar was in fact the property of Jody's mother. I failed to do it. It was a lapse, a mistake. I just -- I can't explain it to you. It is as if it passed out of my mind, perhaps due to the pressure of other matters during the trial. But I cannot explain it. It was inferior performance.

Mr. Dunning brilliantly took advantage of that lapse in closing arguments to argue to the jury that that could have been, or must have been the very jar that Charles Westberry had been talking about. And, therefore, I feel very badly about it. I feel very much at fault about it. It was a sorry performance on my part. And in my opinion, if I may state an opinion, may have actually --

[Objection sustained]

Q You indicated you had an opinion -- I'm not certain what the opinion was about -- in reference to -- you know, the Court has stated its position very clearly.

A You want to know what the nature of the opinion I was about to give?

Q I mean, if -- clearly the Judge has just said you can't give it. I mean, I'll drop it.

A Okay. I would be willing to explain the nature -- you know, the subject matter of the opinion without stating the opinion, if you wish.

MR. MCCLAIN: Can I at least obtain that?

THE COURT: Yes, sir.

A I will do whatever I'm told to do.

Q Yes, sir, please explain.

A I was going to give an opinion as to the affect upon the jury and the outcome of the case based upon the matters involving the jar.

Q Okay.

A Which as I understand it now, I may not do.

THE COURT: That is correct.

(T. 815-23).

In fact in his closing argument to the jury, Mr. Dunning did seize upon Mr. Pearl's obvious blunder:

Then we heard from Mrs. Charlotte Martinez about this jar.

The State's the first to admit that the jar can either be attached to the residence of Lima Paige Smith or it can be unattached from the residence of Lima Paige Smith.

You've not had any competent testimony as to who the owner of that jar was or where that jar was originally obtained.

But it was a jar of coins, it was a jar of change, and it was used and in the possession of Joel Dale Wright around the middle of February of this year.

View that in terms of what we heard from Charles Westberry about the Defendant saying not only did I take this folding money but there was a jar coins that I took and hid behind the house.

(R. 2742).

Mr. Pearl's action in this case was, as he acknowledged, deficient performance. He introduced evidence against Mr. Wright which the State had wanted to use. He then failed to introduce the evidence which would have and should have turned the evidence to the defense's advantage. Mr. Pearl's serious

blunder in essence provided corroboration to Westberry's story about a jar of coins, when in fact there was no corroboration. Since in the words of Justice Blackman, "this case comes down to Wright's word against Westberry's," Wright v. Florida, 474 U.S. at 1096, the corroboration of Westberry provided by Charlotte Martinez was quite significant. As Mr. Pearl believed, but for his error there was a reasonable probability of a different outcome.

B. IMPEACHMENT OF CHARLES WESTBERRY AND CORROBORATION OF JODY WRIGHT

The defense in this case was a claim of innocence as to all charges. Jody Wright did not commit this crime nor was he anywhere in the vicinity when the crime was committed. He had come home from a party about 12:30 a.m. to find himself locked out of the house. He was living with his parents whose residence was next to Lima Paige Smith's, the victim. Jody walked to his friend's, Charles Westberry's, to spend the night and arrived there at 1:00 a.m. the morning of February 6, 1983. He went to sleep on the couch and awoke there the next morning when Charles' nephew woke him (R. 2530-2536). This is exactly what Westberry told the police had happened until April 18, 1983 when Westberry for some reason decided to tell his estranged wife, Paige, that Jody had killed Ms. Smith. From that point through trial it was clear that the defense had to show that Westberry was lying and Jody was telling the truth which, in fact, was the case.

Defense counsel, Howard Pearl, had been present during the depositions taken in this case and therefore had the opportunity at that time to question each witness. He was present at the deposition of Marion Wright, when the prosecuting attorney, Jim Dunning, asked Mr. Wright about Jody's first contact with Detective Taylor Douglas. Mr. Wright stated:

> "The only thing I heard Mr. Douglas say to Jody, he asked Jody where he was at.
>
> He told him he was over to Charles Westberry's, and then he started talking about--I don't know what other conversation went on then. But he turned around to Jody and said: I cannot understand why

they don't go ahead and confess and we don't have to go through all this rigamarole. That's what he told Jody."

(R. 392). This piece of information corroborated Jody's statement that Taylor Douglas had said to him, "well somebody ought to just confess to this" (R. 2539). Mr. Pearl knew that Jody Wright had maintained his innocence throughout and had believed the police manipulated the situation against him. Marion Wright's statement at deposition was the perfect opportunity to corroborate Jody's statement and cast a shadow on the integrity of the investigation by contradicting Douglas' denial of such a statement (R. 2584).

Another instance where Mr. Pearl could have supported his client's truthfulness and accurate recollection, was with Gloria Clark, Jody's aunt. Gloria Clark, was deposed in July, 1983, in Mr. Pearl's presence. Ms. Clark stated that she had gone over to visit her sister, Jody's mother, about 4:30 - 5:00 on Sunday, February 6, 1983. Ms. Clark testified she had been visiting with Marion and Betty Wright for about thirty to thirty-five minutes when Jody came home and said there were police cars all around Miss Smith's house: "His father said: Let's go down and find out what's the matter. And my sister said: Yes, go see what's the matter, see if something has happened to Miss Smith" (R. 355). This was critical testimony since the State claimed Jody was lying when he said he met his father inside the Wright residence and told his father about the police cars at Ms. Smith's. Since Mr. Pearl had prior knowledge of what Gloria Clark's testimony had been about this incident and since he saw the way Dunning was focusing his cross examination of Jody, Pearl's failure to call Gloria Clark was deficient performance.

Jody Wright was the last defense witness. On cross-examination Mr. Dunning harangued at Jody about each and every witness asking it they had "lied" in their testimony. Unsophisticated in language and unprepared by his attorney, Jody was unable to fend off this improper attack without benefit of counsel.

Counsel abandoned him, making not a single objection to this barrage.

Counsel also failed properly to impeach Walter Perkins. Defense counsel began impeaching Detective Perkins, apologized while doing it, then withdrew it entirely and apologized in front of the jury when Perkins denied that he "had it in for Jody Wright" (R. 2364-67). Testimony was received during the evidentiary hearing verifying Walter Perkins' threats against Jody. Mr. Pearl's reticence in impeaching Detective Perkins, the quickness with which he abandoned his line of questioning, and his eventual "public apology" served as an endorsement of Detective Perkins. This was not advocacy. Walter Perkins had a motive for lying about Jody's alleged "confession"; he wanted to "put him away". This critical information was withheld from the jury because of counsel's lack of belief in and loyalty to his client. Getting along with the local police was more important to Mr. Pearl that presenting a dark side of Detective Perkins. Because of counsel's unreasonable omissions and commissions, Jody Wright was prejudiced, and, but for counsel's unreasonable actions, there is a reasonable probability that the result in this case would have been different. See Argument XXI, infra.

Obviously, the key testimony in this whole case was that of Charles Westberry. Mr. Westberry's accounts of "what happened" varied considerably each time. Had defense counsel conducted an effective cross examination it is probable the jury would have chosen not to believe Westberry. Certainly, Mr. Pearl was present at the deposition of Westberry and had access to various statements Charles had given. This information together with the statements of Paige Westberry gave the defense more than enough "ammunition" to conduct a competent cross examination. However, Mr. Pearl did not do it.

The first version of Westberry's story was contained in the statement Paige gave Clifford Miller on April 18, 1983. In the afternoon of April 18, 1983, Westberry gave a statement to Taylor Douglas in the State Attorney's office.

State Attorney Dunning was present. Westberry said:

> Well, all I know is that Joe Dale come to the house Sunday morning, right at daylight and told [him] that he - he had broke into Ms. Smith's house and that he, uh, was stealing her pocketbook and she woke up I guess and caught him and he cut her throat and left then with the money. He didn't take the pocketbook but he took the money and then he come to the house and...

(Defendant's Exhibit 2). Westberry could not tell Douglas the name of the trailer park where he was living, nor could he recall which Sunday Jody had come to his trailer. When Douglas asked whether he thought it was close to the time Smith was killed, the best answer Westberry could come up with was that he would "say it was that - that Saturday night sometime, or either early Sunday morning" (Defendant's Exhibit 2).

The story continued:

> [A]after he got there he told me that he broke into Ms. Smith's house and that he was stealing her pocketbook and she woke up - I assume she woke up and caught him, and so, to keep him from going to prison, he cut her throat. That's what he told me. And he got the money out of her pocketbook and I don't know what he did with the pocketbook, I assume he left it; and then he come to the house, and said he wanted me to keep the money for him, you know, until everything cooled down.

(Id.). Westberry alleged that Jody told him he got into Ms. Smith's house through her back window, and that he used a kitchen knife he found in her house to kill her (Id.). He stated further that the two went outside the trailer, then got in Westberry's truck "because it was raining," and there Jody pulled out the money he had "stuck down . . . inside of his pants" and counted "two hundred and ninety" (Id.), not the $243 Westberry told Paige he had pulled "out of both his pockets." Jody now supposedly told Westberry that he had "a jar of change but he hid it somewhere" (Id.). And now Jody was not "covered with blood," as he had been when Westberry talked with Paige; he had "[j]ust a little bit of blood behind - around his ear, 'cause he had a pretty short haircut and you could see the blood, kind of a blood stain like he might have tried to wipe it off but he didn't wipe it all off." Also, Jody had "snuck into his Mom's

house and got him another shirt before he come over," because "he had blood stains on his other shirt."

Westberry gave a second statement to the police that evening. By the time the second interview started, 32 minutes later, Westberry had been able to streamline his recitation:

> Q. How do you know Joel Dale Wright Murder Lima Smith [sic]?
>
> A: Because the following Sunday, the 6th of Feb 83, Joel Da[le] came to my trailer, located at Kelly's Trailer Park, he acted [sic] all-full nerves. Joel Da[le] told me that he had went into Miss Smith's house and stole her pocket book and he was going to leave, and he looked up and saw Smith standing there. Joel Da[le] got a knife and cut her throat. Joel Da[le] got her money and left her house. This was around day light and Joel Da[le] woke me up and told me that he did it and stole her money.

This statement, however, was not so pat about other details of that Sunday. For example, the time of the fishing trip had changed. Now he stated that after he put Jody's money in his truck, he "went back into the trailer and got dressed and got [his] fishing pole," and he and Jody went fishing for about three hours. Now Westberry had told Jody "that he had blood below his ear," and Jody replied that he "got the blood from cutting Miss Smith." Further, Westberry's account now had Jody so nervous when he came into the trailer that they went outside and got into the truck, and Jody then told Westberry about the incident. Westberry also added other details: that he put Jody's money under the carpet in his truck, and that Jody wanted him to keep it because he "did not have a job and he did not want anybody to know that he had a lot of money," that Jody did not keep any of the money, though the two of them spent thirty or forty dollars that day on bait and beer, and that Westberry first learned that Ms. Smith had died from Jody's father when they returned from fishing.

During Westberry's deposition on August 12, defense counsel brought out several facts: after Jody arrived at the trailer, he and Westberry took Westberry's girlfriend's car, went to the "7-11" and got coffee, and then to

Messer's and got cigarettes (R. 440-41). While they were driving, Jody told Westberry that Westberry's brother, "or some guy," dropped off Jody at home after a party, that "he was walking down the road by [Smith's] house, in front of her house, and that he thought he had seen her in the car asleep, so that's when he went around the back and went in through the window" (R. 442). "[H]e found Ms. Smith's pocketbook and took the money out of it and was wiping it off and looked over and he seen Ms. Smith standing there. And then he got a knife and cut her.... [H]e wiped... everything off with a rag, and then he went outside and wiped the window and all off, and he raked up the leaves or something around the window." (R. 442-43). When they got back to the trailer, Jody said nothing more about it when they went inside (R. 443-44). Nonetheless, Westberry explained that no one overheard them because everyone else was in bed (R. 444). Contrary to statement number three wherein Westberry said Jody kept none of the money, he now said that Jody "took a little bit of it," maybe twenty-five dollars, which Wright had in his pocket and which he put in the console of the car after they left Messer's (R. 444).

By the time of trial, Westberry testified that Jody arrived at the trailer right after daylight, came inside and told Charles that he had had to come over because he had killed Ms. Smith. The two went outside so that they would not be overheard. It was drizzling (R. 2132-33). They got into Charles's truck. Geck, not "some guy" or Westberry's brother, had brought Jody home from a party the night before (R. 2134). While the two were in the truck, Jody pulled out the money he had taken from the pocketbook and counted out approximately $290. Jody gave Westberry some of the money to keep for him (R. 2134-38).

Jody then wanted to buy cigarettes, so Westberry borrowed his girlfriend's car. While the two were in the 7-11 store buying coffee, Charles noticed some blood below Jody's ear, which he then wiped off (R. 2142-43). Upon leaving the store, the two drove by Ms. Smith's house, and Jody commented that it did not

look as though she had been found yet. They then went to another store to buy cigarettes (R. 2144). When the two returned to the trailer, Jody lay down on the couch and Westberry went back into the bedroom. When Westberry arose again, Wright was still lying on the couch (R. 2145).

When he took Jody home, they saw police cars at Ms. Smith's house. Mr. Wright was on the porch (R. 2154-55). Later that evening Westberry, his girlfriend, Jody and his girlfriend went to the drive-in; they used Jody's money (R. 2157). By then Westberry had put Jody's money under the carpet in his truck; Jody had put the money he kept in the console of Westberry's girlfriend's car during the fishing expedition (R. 2157).

In his opening statement defense counsel announced that he would impeach Charles Westberry through Paige Westberry (R. 2443). When he called Paige as a witness, however, he asked her only 1) whether she had had a conversation with Charles on April 15, 1983, which related to the case on trial, to which he received an affirmative response; 2) what Charles had said to her about Jody causing some trouble between Charles and some of his friends, to which she replied that Jody had told one friend of Charles's that Charles had stolen some things from him; and 3) whether it was then true that Charles had told her he was having trouble with Jody, to which she replied yes (R. 2472-73).

As far as direct impeachment of Westberry, counsel limited his questions to whether Westberry had told the police right after the incident that Jody spent the night at his trailer (R. 2168), a discrepancy which had already been pointed out on direct examination (R. 2156); and whether, in Westberry's two statements to the police, he said anything about going to the "7-11" store or to Messer's, or about driving by Smith's house (R. 2180-81). Thus counsel failed to put before the jury, through either Paige or Charles Westberry, the extensive development of Westberry's story, as documented above, and the serious discrepancies in the various versions of the story. Mr. Pearl could have and

should have challenged Westberry on each of these discrepancies but ineffectively failed to do so.

Counsel knew that one of the damaging things Westberry would say was that Jody killed Ms. Smith because he didn't want to go "back to prison." What counsel did not do was question Westberry on why Jody would make a statement like that when it was common knowledge that Ms. Smith had hundreds of break-ins in the last few years (R. 236) and that she didn't call the police (R. 215). Counsel was aware of this and had he investigated or even had he just called one witness -- Shirley Bowen, he could have cast another doubt on Westberry's credibility. Counsel also failed to point out that Westberry's description of Jody's "confession" fit the newspaper accounts of the homicide but not the homicide itself. Counsel's failures to use the evidence he had available was ineffective assistance. Had counsel developed these areas through cross-examination, the jury would have been presented with serious questions about Westberry's veracity, and therefore would have been left with a reasonable doubt as to Jody Wright's guilt.

ARGUMENT IV

MR. WRIGHT WAS DENIED HIS FIFTH AND SIXTH AMENDMENT PRIVILEGE WHEN COUNSEL FORCED MR. WRIGHT TO TESTIFY DESPITE MR. WRIGHT'S EMPHATIC DECISION NOT TO.

"Every criminal defendant is privileged to testify in his own defense, or to refuse to do so." Harris v. New York, 401 U.S. 222, 225 (1971). "It is [] recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to [] testify in his or her own behalf." Jones v. Barnes, 463 U.S. 745, 751 (1983).

Jody Wright testified in his own defense. At the evidentiary hearing, Howard Pearl explained how that came about:

> Q I believe in your case in chief Mr. Wright testified in his own behalf; is that correct?
>
> A That is correct.

Q Okay. Can you explain how that came about.

A Well, of course, as in any criminal trial, a tactical decision has to be made as to whether a defendant will testify in his own behalf or not.

* * *

I felt that Jody should testify in his own behalf and deny that he had committed the murder. And so in my opening statement to the jury I represented to the Court that he would testify in his own behalf.

When we finally got to the point where he was to testify -- he was , I believe, the last witness -- he indicated to me reluctance. He said he didn't want to testify. Very emphatically said so.

[Objection overruled]

A I -- but I insisted. And reluctantly Mr. Wright accepted my advice and took the witness stand where --

Q All right, sir. I'm sorry.

A Where he was pretty throughly destroyed.

MR. MCCLAIN: Your Honor, I would proffer at this point in time if I could ask this witness if that were a mistake. I anticipate an objection. I just want to proffer the question.

THE COURT: I won't allow that.

(T. 837-38).

Clearly Mr. Wright was coerced into testifying against his will. This was in violation of his fundamental privilege to decide himself whether to testify. Counsel's performance was deficient in usurping the decision making from Mr. Wright. As a result, Mr. Wright received ineffective assistance of counsel. Mr. Wright's conviction must be set aside, and a new trial ordered.

ARGUMENT V

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

The Supreme Court has held that in a capital case, "accurate sentencing

information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Penry v. Lynaugh, 109 S. Ct. 2934 (1989). The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985). Trial counsel here did not meet these rudimentary constitutional standards.

During his closing argument in the penalty phase, defense counsel announced that he would not take issue with the jury's guilt verdict:

> For example, you have found by your verdict -- and let me add that there will be little discussion at this stage about your verdict, that would be improper. That's done, and it's over. And as an officer of the Court, it would be inappropriate for me to make comments on that verdict. Those are your findings, and now we are now in a different stage. We've shifted gears.

(R. 2987). Next, defense counsel asserted that the crime was heinous, atrocious, and cruel, that he could not argue otherwise. The jury had little deliberation to do on this aggravating circumstance, even though the charge to the jury on this circumstance was constitutionally deficient.

This case was a swearing contest lost by petitioner. At sentencing, defense counsel argued that Mr. Wright was innocent, but introduced no additional evidence that pointed toward innocence. Evidence which is not admissible at a guilt/innocence proceeding may, nevertheless, be admissible at

capital sentencing, and, in fact, state evidentiary rules that limit the introduction of evidence at sentencing that might call for a sentence less than death run afoul of the eighth amendment proscription against cruel and unusual punishment. Before trial, the State had Mr. Wright polygraphed. Mr. Wright agreed to take the test. He has always maintained his innocence. The fact that he agreed to take a polygraph is mitigating in itself, and that fact should have been introduced at sentencing. According to the test, Jody was not lying when he said that he did not kill the victim, and he was not present when it happened. In preparation for clemency, Jody took another polygraph. Again, he passed. Out of three polygraph examinations, not one revealed that Jody was lying when he stated he is innocent of this offense.

Defense counsel offered inconsistent theories at capital sentencing. First, he had Mr. Wright's wife testify that Mr. Wright was a good husband and father (R. 2948). Next, he had Mr. Wright's brother testify that Mr. Wright was not "especially cruel or wicked" (R. 2952). Then he had Mr. Wright's sister testify that he did not exhibit "tendency toward violence, savagery [or] meanness" (R. 2957). This consumed roughly fourteenth pages of transcript.

In closing argument on August 31, 1983, defense counsel asked the jury to question what kind of psychological profile the perpetrator of these crimes would have, ("A madman? A man consumed by hatred and lust?" [R. 2774]), and in the penalty phase he answered the question by presenting the defendant's nine-year-old psychological report. The report indicated that the psychologist saw Mr. Wright on May 7, 1974, for evaluation at the request of the Division of Youth Services, and again on July 26, 1974, when he was sent to her for a court-ordered evaluation. According to Dr. Harry Krop, this report was professionally incompetent and not properly prepared nor valid. This report, offered without any expert explanation for the jury's benefit, was the last thing the jury heard in mitigation. As it was the single psychological report offered by either side

during the entire course of the trial, it provided the jury's only answer to the questions defense counsel had asked during his closing argument two days earlier. The jury had an unexplained psychological profile, which, in their minds -- indeed to any layman -- portrayed the "lustful madman" so recently described by defense counsel. None of this was true, deriving as it did from an inaccurate, incomplete, and incompetent evaluation.

Since mental health issues were involved, reasonably effective counsel should have obtained the services of a mental health expert to assist in the preparation of the defense and evaluating the significance of an nine-year-old report. This was deficient performance. According to counsel, "I'm using it [the report] because it's all I got." He did not have to be so strapped.

During the evidentiary hearing, Mr. Pearl admitted that he had little confidence in the nine year old report he submitted to the jury for sentencing. He also stated that he ordinarily has a mental evaluation performed on any client in a capital case. In this case, he chose not to do so because he was "concerned about relying on Dr. Krop's honesty." Mr. Pearl stated that if he had employed a professional to conduct an evaluation of Joel Dale Wright, it probably would have been Dr. Harry Krop. Mr. Pearl knew Dr. Krop to be a professional with very high standards and a man of integrity and Mr. Pearl knew that if Dr. Krop discovered something damaging about Joel Dale Wright he would put it in his report. Even though Mr. Pearl testified that he knew he would not have had to use the report if he felt it was negative, he insisted that he believed it safer to rely on a nine year old report than to take a chance of finding out something "bad" about Joel.

Dr. Krop testified that he has done an evaluation of Joel Dale Wright at the request of Mr. Wright's present counsel (T. 1017-56). At the evidentiary hearing, Dr. Krop testified to the materials he received including family affidavits, medical records, DOC records, military and school records, etc. and

the interviews and testing employed during the evaluation process. Using all this information, Dr. Krop prepared a written evaluation that was entered into evidence as Defendant's Exhibit 19. After having evaluated some 200 clients who were criminal defendants in capital cases, Dr. Krop has seen only three with an MMPI profile similar to Joel Dale Wright. His MMPI is completely within "normal" ranges. That indicated that there was no evidence of any mood disturbances or psychotic processes. Dr. Krop further explained how the MMPI can be tested for validity and noted that Mr. Wright's was valid. Mr. Wright's responses to the questions were neither exaggerated nor defensive and Dr. Krop explained how unusual that was for an individual in Mr. Wright's situation. Psychological testing was also done in this case because of the nature of the crime. Dr. Krop's opinion was that Mr. Wright's responses in this area showed no sexually deviant behavior nor any sociopathic tendencies.

In discussing his opinion of the nine year old report submitted to the jury at sentencing, Dr. Krop concluded the evaluation had been incompetently performed by Dr. Mary Crummer. Specifically, Dr. Krop noted that Dr. Crummer gave opinion based on an MMPI that was never completed. Dr. Krop was also concerned that the report could easily be misinterpreted by lay persons. Additionally, the report was nine years old, given to a teenager who may have been evidencing fairly normal teenage problems. Certainly nine years later, the report even if it had been completely done at the time, did not address Mr. Wright's then current mental status.

Dr. Krop went on to testify that Mr. Wright's background did not evidence a violent nature at all. To the contrary, Mr. Wright was a much more passive type personality. Mr. Wright has made considerable progress towards rehabilitation since he has continued his education and has never had disciplinary problems while incarcerated. Dr. Krop testified that he would certainly have conducted an evaluation if asked and would have testified accordingly at trial and/or

sentencing.

The testimony of Dr. Krop and the testimony of Mr. Pearl make it clear that Mr. Pearl's use of a nine year old, incompetently prepared report with no professional explanation thereof, in addition to his failure to have an updated competent evaluation and attendant testimony at sentencing was ineffective performance. Counsel has a duty to investigate possible mitigating evidence. Martin v. Maggio, 711 F.2d 1273 (5th Cir. 1983). It is not reasonable to abandon investigation because of the fear that it may turn up harmful evidence. This is particularly true whereas here the evidence uncovered would be in the form of a confidential psychological evaluation. Because of this deficient performance, the jury not only did not hear facts in mitigation but was presented with erroneous information that actually served to aggravate the sentence. Under Strickland v. Washington, supra, a new sentencing hearing must be ordered.

ARGUMENT VI

MR. WRIGHT WAS DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY, IN VIOLATION OF HIS FIFTH, SIXTH, AND FOURTEENTH AMENDMENT RIGHTS, BY IMPROPER JUROR CONDUCT, AND BY THE TRIAL COURT'S FAILURE TO ADEQUATELY INQUIRE INTO AND ENSURE THAT A FAIR AND IMPARTIAL JURY WAS GUARANTEED MR. WRIGHT.

The lower court erroneously denied Mr. Wright's Amended Notice of Intent to Interview Jurors (T. 225). The allegations of juror misconduct were clear and uncontroverted at the hearing on the above motion, yet the court denied the motion (T. 1479) claiming that if and only if "matters extraneous to their [the juror's] deliberations got into their deliberation," (T. 1479) could jurors be interviewed and could the verdict be disturbed. In this, the court was in error.

The allegations here were 1) at least one juror slept throughout much of the trial,[12] 2) the jurors had shifted the burden of proof to the Defendant and found him guilty because the Defense had failed to prove his innocence, and 3) spectators who were friends of one of the jurors had stated that the juror had made up her mind before trial and would need only 5 minute to convict Jody Wright (T. 225-226).

As to the allegation of a juror's premature conclusion of guilt, the court had heard testimony during the trial. On September 1, 1983, counsel and the court were informed that a juror had already made her decision that the defendant was guilty before the trial began, and that the jury would find him guilty in five minutes (R. 2833). A limited inquiry was held by the trial court, in chambers, in Mr. Wright's absence (R. 2831-58). Mr. Kenneth William Schwing testified under oath (in chambers) that he was a prospective juror and when not chosen to try the case, watched the trial (R 2841). Mr. Schwing overheard two women talking about a friend on the jury who: "had already made up her mind that the man was guilty, and it wouldn't take her at least five minutes when they got to the back room to decide the case, that she would find him guilty" (R. 2842). Mr. Schwing did not know who the two women were (R. 2845), but a woman Mr. Schwing identified as a friend of the two women talking, Beaulah Cannon, identified a "red-headed lady," Ava La, and "the lady with glasses," Marlene Tyler who were sitting "perhaps on the second row in the spectators seats earlier" (R. 2847).

Ms. Cannon indicated that the juror known by the two women was Juror Hayes: "I think she said the only person she knew was, you know, Miss Hayes." (R. 2848). The Court found a telephone listing for Ms. Tyler and suggested "that I will call her on the telephone on the speak-a-phone here with Counsel present."

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[12]Testimony at the hearing confirmed that there were actually two sleeping jurors (T. 1454).

(R. 2854). The telephone call was not conducted on the record (R. 2855). The Court "reported" the contents of the telephone call (R. 2855-56). The investigation was then abandoned. This was not in Joel Dale Wright's best interests, or in his presence. See Argument XIII, infra.

At the hearing on the Amended Notice, the lower court refused to take judicial notice of Mr. Schwing's testimony (T. 1439) yet clearly what occured was error. The constitutional protection afforded every criminal defendant is that it is the state's burden to prove guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307 (1979). When jurors have a "premature conclusion of guilt" as Mr. Schwing's testimony made clear, reversal as in United States v. Heller, is required.

> There is evidence in the record to suggest that at least one of the jurors had expressed belief in the defendant's guilt long before formal deliberations began. Before the defense had opened its case, while Heller's accountant, Leonard Safra, was testifying, one of the jurors apparently remarked to the others, "'Oh, they are both guilty.'"

United States v. Heller, 785 1524, 1528 (11th Cir. 1986)

The lower court's failure to conduct an adequate investigation into their allegations allows "no clear picture of the full extent of the taint." Id. at 1528.

> However, from the information we do possess, it is evidence that this pre-judgment may well have affected the legitimacy of the verdict and provides an alternative ground for reversal.

Id. Heller shows that the court's ruling in Mr. Wright's case was in error. At the least, a through inquiry from the jurors should have been granted.

From the testimony at the hearing, it was also clear that the jurors violated the fundamental presumption of innocence guaranteed to Mr. Wright. Mrs. Judith Marks had been a deputy clerk during Mr. Wright's trial and had occasion to speak with juror Sandra Wilkson following the trial.

> A She was talking about the different jurors, what different ones had done, and what different ones had said, and had talked about how difficult the case was. And I asked her how did they come to the

conclusion that he was guilty. . . .

A She said the State did not prove him guilty, but the Defense did had not proved him innocent.

(T. 1451-52).

Thus, when the jurors were awake, they reversed the burden of proof, requiring the defendant to prove his innocence. Clearly the presumption of innocence is one of the most basic notions of our criminal justice system and where it is clear, as here, that a guilty verdict may have been derived at through the jury's burden shifting error, full inquiry must be had and reversal required.

Mr. Wright was further denied a fair and impartial panel because at least two of those jurors slept through most or all of the proceedings.

> I went to Jody Wright's trial on the case one day. While I was in the courtroom, I noticed one of the jurors, an elderly man wearing glasses, appeared to be asleep. He had his eyes closed and his head would slowly nod down, then suddenly jerk up quickly, as if he had just awakened. He would move around in his chair and rub his eyes, trying to stay awake.

(Affidavit of Kathy Waters, Original App. M).

Ms. Marks, who had observed the trial in her official capacity as clerk also had occasion to observe the jurors, and testified at the hearing that a female juror was obviously sleeping during the trial "almost everyday" (T. 1454).

Q Okay. How do you know that the person was asleep?

A She had her eyes closed, and her head would fall forward, and she would wake up.

(T. 1554).

Ms. Wanda Fussell, a spectator at the trial, also testified at the hearing about a man she had observed sleeping:

> [H]e was sitting, I think, on the second row, about two or three over, in the middle. Maybe two over.

Q Okay. All right. Can you describe this individual?

A He had glasses on. He was an elderly man. It seems to me he had a dark green polyester-like knit suit on.

Q Okay.

A But it was real dark, his suit was.

Q Now, on this day then that they were showing pictures to the jury, what specifically did you observe?

A That he was -- I don't know. I was -- he was -- I was sitting -- you know, I was just noticing the jurors really, and I just looked over, and I was sort of watching him from time to time. And he was, you know, like nodding his head. And at one time I looked over there and I -- you know, to me, if it had been -- I just thought he was asleep. And I told my sister, you know, I thought the man was asleep, that somebody ought to get up and wake him up.

(R. 1460-61). The lower court dismissed all this testimony and apparently wanted an affidavit from Mr. Wright. "I think Jody was watching them just as close as anybody, and I don't see any affidavit from him" (R. 1476). The court ignored the sworn evidence and took judicial notice that "I did not notice any such thing" (T. 1476).

The court's refusal to allow juror interview on these limited questions because "[w]e don't have a question here of outside influence of improper conduct" (T. 1478) is clearly in error. Where something as basic as the presumption of innocence and the burden of proof of guilt beyond a reasonable doubt have been violated, a new trial must be ordered. Jackson v. Virginia, supra,

ARGUMENT VII

MR. WRIGHT'S CONVICTION AND SENTENCE OF DEATH ARE INVALID SINCE THE STATE'S USE OF MR. WRIGHT'S COMMENTS ON SILENCE VIOLATED HIS FIFTH AMENDMENT RIGHT TO SILENCE.

Walter Perkins, Deputy Sheriff during Mr. Wright's trial testified that when questioned Jody had said, "If I confess to this, I will die in the electric chair. If I don't talk I stand a chance of living" (R. 2351). Mr. Wright steadfastly denied ever having made such a statement (R. 576-79) but even if he had, it was constitutional error for the court to allow its use in evidence

since it was a comment on silence and therefore a denial of his fifth amendment rights.

This issue was presented to this Court on direct appeal but never discussed, however, since Mr. Wright's direct appeal in 1985, this Court has dealt with a variety of similar questions which show that the Court should revisit this issue in Mr. Wright's case. In Spivey v. State, 529 So. 2d 1088 (Fla. 1988), the defendant's post-arrest silence was at issue. While this Court concluded that Miranda had not been violated under the specific facts involved, it noted:

> It is clear from Doyle, Hale, and Burwick that post-arrest silence has very little, if any, probative value and that assigning a meaning to such silence would be an exercise in pure speculation.

Spivey v. State, supra at 1093; citing Doyle v. Ohio, 426 U.S. 610 (1976); United States v. Hale, 422 U.S. 171 (1975); State v. Burwick, 422 So. 2d 944 (Fla. 1983).

In Garron v. State, 528 So. 2d 353 (Fla. 1988), this Court reversed on a fifth amendment question where the State had inquired of arresting officers whether the defendant appeared to understand his Miranda rights. This was done in an effort to rebut a defense of insanity. This Court stated that the defendant was denied due process by such actions.

In Mr. Wright's case, he did answer some initial questions about his age, his height and weight, etc. but he steadfastly maintained his innocence, he requested phone calls in an attempt to seek legal counsel and finally after three officers kept badgering him and telling him to confess, he invoked his right to silence.

> It is said in Miranda itself that "[t]he mere fact that [the defendant] may have answered some questions. . . does not deprive him of the right to refrain from answering any further inquiries . . ." (cites omitted) Accordingly, even if interrogation is once begun, the defendant may cut it off at any time and for any reason."

Peterson v. State, 405 So. 2d 997 (Fla. 3d DCA 1981).

While it is highly suspect that Mr. Wright ever really made the statement at issue, even if Mr. Wright did say those exact words ("If I confess to this, I'll die in the electric chair. If I don't talk I stand a chance of living."), it was clearly an invocation of his right to silence and could not be used as evidence by the State. Lucas v. State, 335 So. 2d 566 (Fla. 1st DCA 1976); Doyle v. Ohio, supra. In Owens v. Alabama, 849 F.2d 536 (11th Cir. 1988), the Eleventh Circuit declared that the State had violated Mr. Owens Miranda rights by continuing interrogation after even an "equivocal" request for counsel. As such the statements made could not be used. Owens, supra at 541. The record makes it clear that Mr. Wright was requesting "even equivocally" his right to remain silent. Any statement made after that request may not be used in evidence.

This Court had not yet decided Spivey and Garron nor had the benefit of Owens at the time of Mr. Wright's direct appeal. This claim is cognizable and relief warranted. The Court must now correct this error.

ARGUMENT VIII

MR. WRIGHT WAS DENIED HIS FUNDAMENTAL RIGHT TO CONFRONT A WITNESS THROUGH CROSS-EXAMINATION IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

The sixth amendment of the United States Constitution guarantees that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with witnesses against him."

> Cross examination is the principal means by which the believability of a witness and the truth of his testimony are tested. . . . We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross examination. Greene v. McElroy, 360 U.S. 474, 496, 79 S. Ct. 1400, 1413, 3 L.Ed. 2d 1377 (1959).

Davis v. Alaska, 415 U.S. 308, 316, 94 S. Ct. 1105, 1110 (1974)(footnote omitted).

In Mr. Wright's trial, Charles Westberry was called as a witness for the state. On direct examination he testified that Mr. Wright came to his trailer on February 6, 1983, the morning after Ms. Smith was killed, and allegedly told him that he had killed Ms. Smith. Westberry also testified that Mr. Wright went into considerable detail about the incident (R. 2134-39). Westberry's testimony on direct examination was the key to the State's entire case. The only link between Mr. Wright and the death of Ms. Smith was the confession that he purportedly gave to Charles Westberry, and a fingerprint found inside Ms. Smith's home. There was testimony that Mr. Wright's fingerprint could have been left in the house when he was in the house before she died (R. 2545). But the jury was foreclosed from hearing the defense's theory on why Westberry would "make up" a confession and attribute it to Mr. Wright; the defense was not allowed to probe into Westberry's bias and motive to lie.

The jury, as the ultimate fact finder, was entitled to know the possible bias and motive that Westberry held. "[Westberry's] testimony was 'crucial' and . . . there [is] a 'real possibility' that pursuit of the excluded line of impeachment evidence would have '[s]erious damage to the strength of the State's case.' [Davis], at 319, 94 S. Ct., at 1112." Delaware v. Van Arsdale, 475 U.S. 673, 683 (19896).

This claim is cognizable now because new facts have established that Westberry received a "limited grant of immunity" (T. 756), and because of new law. Delaware v. Van Arsdale, supra. Cross-examination should have been allowed in order to reveal Westberry's interest in testifying. Here, Mr. Wright's cross-examination was limited when the evidence used to conduct the cross-examination was not permitted to go to the jury so that it, the trier of fact, could fully consider how plausible Mr. Westberry's story was. Mr. Wright was deprived of his opportunity to effectively challenge Mr. Westberry's account of why he was testifying. The Court's ruling limiting the impeachment of this

witness allowed the introduction of his account of the events without making that account survive "the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984). Mr. Wright's conviction must be vacated and a new trial ordered.

ARGUMENT IX

THE TRIAL COURT'S REFUSAL TO PERMIT THE DEFENSE TO REOPEN ITS CASE TO PRESENT NEWLY-DISCOVERED EVIDENCE AFTER THE CLOSE OF ALL EVIDENCE, BUT PRIOR TO CLOSING ARGUMENTS, VIOLATED MR. WRIGHT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS UNDER THE UNITED STATES CONSTITUTION.

Some of this newly-discovered evidence was proffered to and considered by the trial court (Kathy Waters' testimony), some of it was not and has never been considered by any court (the testimony of passengers in the Waters' vehicle, Russell Gardner and Casey Waters, and the testimony of persons who may later have encountered the persons Waters, Gardner and Waters saw).

At approximately 12:30 a.m., February 6, 1983, Kathy Waters, her daughter Micky, four years old, daughter Casey, twelve years old, passenger Linda Pierce, fifteen years old, and passenger Russell Garner, nineteen years old (R. 2613, 2632) were in Ms. Waters' van after leaving a church function. They went down route 20 and turned south onto State Road 19 where Ms. Waters testified that she saw a pedestrian matching Mr. Wright's description ("lanky-skinny" young, white male wearing dark pants (R. 1615-17) with medium length hair (R. 2634)) walking north on State Road 19 toward Kelly's Trailer Park where Charles Westberry was living (R. 2654-55). Ms. Waters also saw three people in the vicinity of Ms. Smith's home (R. 2617-18, 2624-25). She couldn't see them clearly as they were in the shadow of a large tree there (R. 2618). Ms. Waters told defense counsel about this after both sides rested. The trial court refused to allow the jury to hear this evidence.

On direct appeal this Court held that constitutional error occurred.

> Before it excludes testimony on the ground that the sequestration rule was violated, the trial court must determine that the witness's testimony was affected by other witnesses' testimony to the extent

> that it substantially differed from what it would have been had the witness not heard the testimony. . . .
>
> In the instant case, we find the trial judge erred in failing to exercise his discretion to determine whether exclusion was warranted under the circumstances, and, instead, applied the sequestration rule as a strict rule of law.

Wright v. State, 473 So. 2d 1277, 1280 (1985).

New case law establishes that this Court's conclusion was in error, and thus this claim is cognizible in a Rule 3.850 motion.

> The right to testify is also found in the Compulsory Process Clause of the Sixth Amendment, which grants a defendant the right to call "witnesses in his favor," a right that is guaranteed in the criminal courts of the State by the Fourteenth Amendment.

Rock v. Arkansas, 107 S. Ct. 2704, 2709 (1987).

> Few rights are more fundamental than that of an accused to present witnesses in his own defense. [Citation omitted] Indeed, this right is an essential attribute of the adversary system itself.
>
> * * *
>
> The right of the defendant to present evidence stands on no lesser footing than the other Sixth Amendment rights that we have previously held applicable to the States," Id., at 18.

Taylor v. Illinois, 108 S. Ct. 646, 652 (1988).

In Delaware v. Van Arsdall, 475 U.S. 673, 684 (1986), the Supreme Court discussed how the harmless beyond a reasonable doubt standard was to be applied:

> Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

This Court on direct appeal failed to correctly anticipate this standard. As a result, this issue must be revisited and a new trial ordered.

In applying Van Arsdale, it must be noted that trial counsel failed to proffer the testimony of the passengers in Ms. Waters' vehicle. Russell Garner saw "two or three white males" on 3rd Avenue in the area described by Ms.

Waters (Original App W). Casey Waters saw a white male walking north on Highway 19 and saw three people standing under a street light in front of Miss Smith's house (Original App. X). No trier of fact has ever considered their testimony.

In addition, trial counsel had in his file a police report concerning three such males. As it turns out, they were armed with a knife, and were violent. On that very night:

> It was Sat. night, Feb. 5, 1983, when three boys came in the store together between 2:30 & 3:30 A.M. caring [sic] the containers of bottles. They were between the ages of 14 thru 25. They brought in $4.40 worth of bottles in two containers, one was a wooden GEC case & the other a white plastic bucket. The bottles looked like they had been picked up from the roadside. The one that received the money was named James Edwards. (He left the "a" open like a "u" and printed his name.) The boys were all different heights but were neat and clean. They were wearing navy blue hats and navy blue wind brakers [sic] with no writing on it and blue jeans. All three had brown hair neatly trimmed.
>
> As they were leaving the store the boy on the left of James said to him that still isn't enough "is it" ("referencing to the money in James hand. He then pulled something out of his pocket & a pocket knife. The knife was in his left hand thumb over the knife Saying to James "Well hear [sic] in this. Then the boy left the store and walked toward a dark pick-up truck parked between the gas pumps and phone booth.
>
> It was a large brown pocket knife.

(Original App. Y). Counsel unreasonably failed to present this information in support of the motion to reopen.

When the error is considered along with the new material which was not previously of record, the error cannot be viewed as harmless. Mr. Wright is entitled to a new trial.

ARGUMENT X

THE PROSECUTOR'S CLOSING ARGUMENT IN THE GUILT PHASE DENIED MR. WRIGHT A FAIR TRIAL AS GUARANTEED HIM BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The prosecutor's closing argument was clearly in violation of constitutional guarantees, case law and the canons of ethics. During closing, Mr. Dunning seized upon the error made by Mr. Pearl with regard to the "vase"

(See also Argument III). By this time, Mr. Dunning knew that Mr. Pearl had established that the vase had, in fact, belonged to Jody's mother. Despite that, Dunning told the jury:

> You've not heard any competent testimony as to who the owner of that jar was or where that jar was originally obtained.

(R. 2742). Mr. Dunning then implied that this was the "jar" that Westberry claimed Jody had stolen from Miss Smith's house. Such flagrant and knowing misrepresentation of the facts is clearly in violation of Giglio v. United States, 405 U.S. 150 (1972).

The prosecutor also misled the jury on another matter where defense counsel had erred. Mr. Pearl had presented the testimony of Ruby Ammons who lived on a lot adjacent to Ms. Smith's. The Ammons trailer had been burglarized the night of the murder and Mr. Pearl wanted to show the jury that whoever burglarized and "ransacked" the Ammons trailer probably killed Ms. Smith. Since Jody knew the Ammons' trailer well, he need not have ransacked it looking for anything. He knew where everything was.

Unfortunately, on cross-examination of Ms. Ammons, Dunning had her testify that a flashlight had been taken from her car. Mr. Pearl could have made it clear that the flashlight found in Ms. Smith's house was not the one taken from Ms. Ammons' car since he had a report from Detective Stout to that effect. He failed to do that, however, and on closing Dunning was able to plant the idea that Joel Wright had taken a flashlight from Ms. Ammons' car and used it to navigate in the cluttered, darkened house of Ms. Smith (R. 2747). Clearly defense counsel's performance in these areas was deficient (Argument III) but the prosecutor knew the facts involved in both matters and deliberately presented false or misleading information to the jury. Giglio, supra.

Mr. Dunning also continually vouched for the veracity of the State's witnesses, implying that the jurors, law enforcement and the prosecutor were all

on the same "team" (R. 2805), i.e., "truth" and the defense was on the other team; i.e., "deceit." He clearly used this improper argument to inflame the jurors against Mr. Wright. Rosso v. State, 505 So. 2d 611 (Fla. DCA 1987).

Finally, in rebuttal Dunning argued:

> . . . Did [Jody Wright) ever deny having gone to prison before? No, he didn't, did he? I didn't ask him about it. There are certain rules of procedure we have to follow, and it's not inappropriate for me to talk about what the rule is.
>
> There are reasons at times why questions aren't asked and why they're not answered in relating to the rules of evidence and that which is admissible and that which is not.

(R. 2808).

Contrary to what Mr. Dunning told the jurors, i.e., "it's not inappropriate for me to talk about what that rule is" (id.), it was very improper for him to talk about it in that context. This implication to the jury was that there was other evidence he knew of that went to guilt but because of "the rule" he was not permitted to bring that to the jury's attention. Mr. Dunning's highly improper comments were deliberately misleading and went well beyond argument. This was clearly improper under United States v. Young, 470 U.S. 1 (1985). "While a prosecutor may strike hard blows, he is not at liberty to strike foul ones." Berger v. United States, 295 U.S. 78 (1985). Mr. Dunning's "foul blows" clearly "exceeded all acceptable bounds of advocacy." Rosso, supra at 615.

Since Mr. Wright's direct appeal, this Court has defined the boundaries of proper prosecutorial argument. Bertolotti v. State, 476 So. 2d 130 (Fla. 1985). Mr. Dunning's arguments went far beyond those boundaries and this Court must now correct the error. Moreover, this claim is premised in part on evidence not previously part of the record (the vase and the Ammons police report). Accordingly, it is cognizable in a Rule 3.850 proceeding. A new trial must be ordered.

ARGUMENT XI

MR. WRIGHT WAS DENIED AN ADVERSARIAL TESTING WHEN THE JURY DID NOT HEAR THAT MS. SMITH'S HOUSE HAD BEEN REGULARLY BURGLARIZED.

The State called Clayton Hughes as a witness in Mr. Wright's trial. He worked for Ms. Smith for 10 years doing yard work. On cross-examination, defense counsel asked if Miss Smith hadn't been looking frail before her death, and Mr. Hughes responded that she had been looking frightened (R. 2692). He testified she told him she had had "numerous break-ins in that last two weeks" (R. 2693). The prosecutor objected on the basis of hearsay. The objection was sustained. Id.

The excluded testimony would have been very important to the jury. Of course the allegation here was that Mr. Wright had broken into Ms. Smith's house, stolen money and killed Ms. Smith. It would have been very important for the jury to know that there had been "numerous" break-ins of Ms. Smith's house in the preceding two-week period, none of which were linked to Mr. Wright, and so were arguably committed by one or numerous other individuals. Mr. Wright was convicted solely on the testimony of one man -- Charles Westberry -- the excluded testimony would have supplied a reasonable doubt to this case.

Additional evidence was available and not presented. Ms. Bowen was Ms. Smith's niece. Her deposition was taken by the Assistant State's attorney. In that deposition, she testified that Ms. Smith had commented about people breaking into her house in the past, "[a]nd it got more often toward the end" (R. 215). When asked if Ms. Smith had ever indicated that Mr. Wright was responsible for the break-ins, Ms. Bowen replied:

> A. No. Now she said she knew who it was but she was not going to say because of the family.
>
> Now we took it to mean that she was talking about another family in the neighborhood.
>
> Q. What family?
>
> A. Ammons.

Q. Ammons?

A. They have a grandson that she suspected of breaking in at the time that the furniture was broken up, because she had seen them on the corner and had also seen Jackie Lee Bennett and Paul House.

(R. 222). It is significant that Ruby Ammon's residence was burglarized the same night that Miss Smith was killed.

She also testified that another neighbor had seen three boys coming over Miss Smith's fence on another occasion (R. 224). On cross-examination, Ms. Bowen testified in her deposition that she would feel safe in saying that Miss Smith's house had been broken into over a hundred times in the last few years (R. 236). Ms. Bowen was not called because the court made it clear that it would not allow this important hearsay evidence to be presented.

The United States Supreme Court has not hesitated to overturn evidentiary rulings when they have encroached upon a defendant's fundamental constitutional right to present a defense. See Rock v. Arkansas, 107 S. Ct. 2704 (1987); Crane v. Kentucky, 476 U.S. 683 (1986). This Court should not hesitate to overturn Mr. Wright's conviction now. The evidence at issue here had considerable significance. The fact that Miss Smith's house had been broken into over one hundred (100) times in the last few years before her death would certainly implicate everyone who had burglarized her house, at least to the same extent that the State argued that Mr. Wright's admission to one illegal entry was used against him. Also the fact that everyone knew that Miss Smith had refused to report the burglaries would certainly undermine the State's claim that Mr. Wright "had to kill her because he was afraid she would report him to the police.

To the extent that counsel failed to adequately urge the introduction of this evidence, he provided ineffective assistance of counsel. Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Accordingly Mr. Wright's sentence of death

must be vacated pursuant to the sixth, eighth, and fourteenth amendments.

ARGUMENT XII

MR. WRIGHT WAS DENIED HIS RIGHT TO A TRIAL BY A FAIR AND IMPARTIAL JURY, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BY TRIAL COUNSEL'S FAILURE TO REQUEST A CHANGE OF VENUE AND BY THE TRIAL COURT'S FAILURE ADEQUATELY TO INQUIRE INTO AND ENSURE THAT A FAIR AND IMPARTIAL JURY WAS PROVIDED MR. WRIGHT.

Additional facts adduced at the evidentiary hearing showed that Mr. Pearl had been fully apprised of the overwhelming publicity in this case that began with Mr. Wright's arrest. Darrell Wright, Mr. Wright's brother, testified that the morning after his brother's arrest, he heard a radio news report about it (T. 156) and as soon as he arrived at the Sheriff's Department, found the media set up and broadcasting on the spot (T. 157). Mr. Wright discussed this with his brother's attorney, Howard Pearl, on at least two occasions (T. 158). His concerns about unfair publicity were heightened by all of the press coverage (T. 159; see also Original App. S) and he asked Mr. Pearl to seek a change of venue. Debbie June, one of Mr. Wright's sisters, also testified that she had urged Mr. Pearl to seek a change of venue and was assured by him that would be done (T. 164-165). It is clear from the testimony and the press coverage interviewing Mr. Pearl (Original App. S) that Mr. Pearl was well aware of the adverse publicity this case had received and of the need to at least move the court for a change of venue. Yet that was never done.[13]

Lima Paige Smith was a well loved senior citizen who was brutally murdered. The citizens of Palatka, most of whom had been students or neighbors of hers for years, were outraged and demanded their pound of flesh. They would have

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[13]The inherent prejudice was obvious to all. Over one hundred forty Palatka citizens present at the time of trial provided sworn affidavits attesting to their belief that Jody Wright did not and could not have received a fair trial at that time in Palatka (Original App. U). Indeed, evidence of juror misconduct is before this Court in this brief (See Argument VI).

convicted anyone arrested. Mr. Pearl knew this all too well:

> Anyone tried for that murder and rape would face substantial prejudice here because Miss Smith was so well known by three generations of Palatkans, Pearl said.

Florida Times Union, July 20, 1983 (emphasis added)(Original App. S).

Jody Wright, as any other criminal defendant, was entitled to a fair trial conducted by an impartial jury that based its verdict on evidence and argument presented in court without being influenced by outside sources of information. See Irvin v. Dowd, 366 U.S. 717 (1961). While it is true that a motion for change of venue is addressed to the discretion of the trial court, Davis v. State, 461 So. 2d 67 (Fla. 1984), it is equally true that where a community is "so pervasively exposed to the circumstances of the incident that prejudice, bias, and preconceived opinions are the natural result," the court is obligated to grant the motion. See Manning v. State, 378 So. 2d 274, 276 (Fla. 1979). Accordingly, when, as in this case, the inherently prejudicial nature of the publicity to which the community has been exposed is extreme, the voir dire examination of prospective jurors is deemed incapable of curing the impact of that publicity, and due process requires a change of venue without regard to voir dire. See Oliver v. State, 250 So. 2d 888 (Fla. 1971). This was such a case. Even if the effect of the prejudicial pretrial publicity in Mr. Wright's case could have been ameliorated by the voir dire process, it was not and could not have been by the group voir dire process actually conducted.

In order to protect the sixth, eighth and fourteenth Amendment rights of the accused in a case where, as here, there has been extensive and prejudicial pretrial publicity,

> it may sometimes be necessary to question on voir dire prospective jurors individually or in small groups both to maximize the likelihood that members of the venire will respond honestly to questions concerning bias, and to avoid contaminating unbiased members of the voir dire when other members disclose prior knowledge of prejudicial information.

Nebraska Press Association v. Stuart, 427 U.S. 539, 602 (1976) (Brennan, Marshall, Stevens, JJ., concurring). The trial court's denial of Mr. Wright's request for individual and sequestered voir dire consequently deprived Mr. Wright of his due process rights to be tried by a fair and impartial jury. Cf. Patton v. Yount, 467 U.S. 1025 (1985); Irvin v. Dowd, 366 U.S. 717 (1961).

Counsel's failure to ask for a change of venue was ineffective assistance of counsel. Where, as here, pretrial publicity is "sufficiently prejudicial and inflammatory" and "saturat[es] the community where the trial [is] held," prejudice is presumed. See Rideau v. Louisiana, 373 U.S. 723, 726-27 (1963); Murphy v. Florida, 421 U.S. 794, 798-99 (1975). Although Mr. Wright is therefore not required to demonstrate actual prejudice, he undeniably can demonstrate substantial prejudice in this case: as previously discussed, over half of those venire persons questioned as to their extrajudicial knowledge admitted exposure to prejudicial publicity. Under such circumstances, due process requires the trial court to grant a change of venue, see Rideau, 373 U.S. at 726, or, at a minimum, individual and sequestered voir dire. Mr. Wright's convictions must be vacated.

ARGUMENT XIII

MR. WRIGHT WAS ABSENT FROM THE COURTROOM WHILE THE COURT COMMUNICATED WITH JURORS DURING GUILT/INNOCENCE DELIBERATIONS, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

After the jury retired to deliberate, the court communicated with the jurors in the defendant's absence (R. 2050-54). The court refused the jury's request for testimony, and brought everyone into court to tell them, including the defendant. However, these written communications between court and jury were conducted in Mr. Wright's absence, in violation of his right to be present, and without any waiver, in violation of the sixth, eighth and fourteenth amendments. New case law from this Court makes this claim cognizible now.

Hildwin v. State, 531 So. 2d 124 (Fla. 1988); Rhodes v. State, 547 So. 2d 1201 (Fla. 1989).

A capital criminal defendant is absolutely guaranteed the right to be present at all critical stages of judicial proceedings. This right is guaranteed by the federal constitution. See, e.g., Illinois v. Allen, 397 U.S. 337, 338 (1970); Drope v. Missouri, 420 U.S. 162 (1975); Hall v. Wainwright, 685 F. 2d 1227 (11th Cir. 1982). The purpose of the presence requirement is to effectuate the rights guaranteed by the sixth amendment. Perhaps the most important of those rights implicated by the defendant's presence or absence is the right to counsel. As the United States Supreme Court explained, "[O]ne of the defendant's primary advantages of being present at trial, his ability to communicate with counsel, is greatly reduced when the defendant is in a condition of total physical restraint." Illinois v. Allen, supra at 344. Mr. Wright was also not present when the court inquired into the question of juror misconduct. See Argument VI, supra. He could not participate in or advise counsel regarding those proceedings.

Counsel failed to raise the issue. In this, counsel failed to represent Mr. Wright's interest and thus rendered ineffective assistance. This failure to raise a meritorious issue prejudiced Mr. Wright in exactly the same fashion the defendant was prejudiced in Kimmelman v. Morrison, 477 U.S. 365 (1986).

Because Mr. Wright's involuntary absences violated his fifth, sixth, eighth, and fourteenth amendment rights, he is entitled to the relief he seeks. He is also entitled to relief because counsel was ineffective for failing to litigate this claim.

ARGUMENT XIV

DEFENSE COUNSEL UNREASONABLY FAILED TO REQUEST, AND THE COURT ERRED BY NOT GIVING, A JURY INSTRUCTION REGARDING VOLUNTARY INTOXICATION AND SPECIFIC INTENT, IN VIOLATION OF MR. WRIGHT'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Voluntary intoxication is a defense to specific intent crimes in Florida (like premeditated murder, and the intent required for the underlying felonies in felony murder). The evidence of voluntary intoxication in this case was sufficient to require a specific intent/intoxication instruction, and the failure to provide Mr. Wright with such an instruction (a) relieved the State of its burden to prove intent beyond a reasonable doubt, in violation of the fourteenth amendment, (b) prevented the jury from considering a basis for guilt of a lesser offense than first-degree murder, thereby increasing the risk that Mr. Wright would face death when he should not, in violation of the eighth amendment, see Beck v. Alabama, 477 U.S. 625 (1980), and (c) denied Mr. Wright a fair trial, in violation of the sixth, eighth and fourteenth amendments.

The evidence was sufficient to require a voluntary intoxication instruction. All witnesses agreed that Mr. Wright had been at a party the evening before the offense occurred, and that he was drinking beer and whiskey. According to Mr. Geck, who took Mr. Wright home from the party immediately before the time the State contends the offense was committed, Mr. Wright was then under the influence of alcoholic beverage (R. 1901).

Any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for an instruction on the issue. Gardner, supra; Mellins v. State, 395 so. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981); cf. Bryant v. State, 412 So. 2d 347 (Fla. 1982). The record of Mr. Wright's trial contains significant evidence of voluntary intoxication, more than legally sufficient to support an instruction. The voluntary intoxication issue was a question for the jury to decide. Defense

counsel however, overlooked a defense which the State had handed to him.

In terms of the voluntary intoxication defense, Florida's courts have consistently acknowledged that voluntary intoxication must be pursued by competent counsel if there is evidence of intoxication, even under circumstances in which trial counsel explains in post-conviction proceedings that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985).

The evidence in Mr. Wright's case far surpassed the governing standards, yet his trial counsel inexplicably and unreasonably failed to request an appropriate instruction. Mr. Wright was substantially prejudiced by counsel's unreasonable omissions, as he was deprived of a viable defense which, if pursued, would have in all probability resulted in a conviction on a lesser degree of murder. Beck v. Alabama, 447 U.S. 625 (1980). Here, counsel gravely prejudiced his client. Cf. Beck, supra. Mr. Wright's conviction must be vacated under the sixth, eighth and fourteenth amendments.

ARGUMENT XV

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. WRIGHT 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 if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Wright's capital proceedings. To the contrary, the burden was shifted to Mr. Wright 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. Wright'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. Wright 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. Wright the burden of proving that life was the appropriate sentence. 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. Wright'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. Mr. Wright'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. Wright. For each of the reasons discussed above the Court must vacate Mr. Wright's unconstitutional sentence of death.

ARGUMENT XVI

MR. WRIGHT'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. Wright's eighth amendment rights. Joel Wright 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. Wright'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. Wright'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. 981-82, 983, 990, 1298, 1449). 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. 2943). 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. Wright, but noted that the "formality" of a recommendation was required (R. 2997).

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. Wright'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. Wright's case, and Mr. Wright is entitled to the same relief. The Court must vacate Mr. Wright unconstitutional sentence of death.

ARGUMENT XVII

THE STATUTORY AGGRAVATING CIRCUMSTANCE HEINOUS, ATROCIOUS OR CRUEL WAS APPLIED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel. Mills v. Maryland, 108 S. Ct. 1860 (1988). 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 "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). There, the Supreme Court found error in jury instructions which failed to guide and channell 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).

The jury was not told in Mr. Wright's case what was required to establish this aggravator. The judge failed to apply any narrowing or limiting construction. Mr. Wright's jury was not advised of the limitations on the

"heinous, atrocious or cruel" aggravating factor. As a result, the instructions failed to limit the jury's discretion and violated Maynard v. Cartwright. In addition, the judge employed the same erroneous nonstandard when sentencing Mr. Wright to death.

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. Instructional error is reversible where it may have affected the jury's sentencing verdict. Mr. Wright'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. Wright 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 XVIII

MR. WRIGHT WAS DENIED HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY THE INSTRUCTIONS TO THE PENALTY PHASE JURY THAT INCORRECTLY SET OUT THE LAW AS TO WHAT AGGRAVATING CIRCUMSTANCES COULD BE CONSIDERED.

A trial judge has the responsibility to correctly charge the jury on the applicable law. See generally, Smith v. State, 424 So. 2d 726, 731-32 (Fla. 1982). A judge's duty to correctly charge a jury is no less applicable when it involves a sentencing jury in a capital case. At trial, defense counsel objected to the trial judge's instructions which included the "duplicated" aggravating circumstances of a crime committed for financial gain and a crime committed while in the commission of a burglary (R. 2929). The court also denied a motion for mistrial on the basis of the giving of the two aggravating circumstances over objection (R. 3005). However, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), was a retroactive change in Florida law holding that a penalty phase jury is a sentencer for eighth amendment purposes. As a result, the jury must receive accurate and correct instructions at the penalty phase, and this claim is cognizable now.

In this case the judge provided the jury with four aggravating factors to consider, two of which were repetitive (R. 2998). And the judge never alerted them to this fact. The prosecutor then capitalized on the judge's generous listing by telling the jury that they had four aggravating circumstances to weigh against the mitigating circumstances presented by defense counsel (R. 2974). Thereafter, the jury recommended death. Their verdict was skewed by improper doubling. On appeal from Mr. Wright's sentence of death, this Court further ruled that another of the aggravating circumstances offered to the jury and found by the court, cold, calculated and premeditated, was also not properly found. 473 So. 2d 1277 (Fla. 1985). Had the jury been instructed only on the two proper aggravating circumstances, the result would have been very different, a life sentence was warranted. This Court must vacate Mr. Wright's sentence of

death.

ARGUMENT XIX

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. WRIGHT'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, Mr. Dunning introduced evidence of a juvenile record for Mr. Wright. While Mr. Pearl had objected to the introduction of a certified copy of the information relating to an adult felony charge (R. 2940), he stipulated to introduction of the documents proving a juvenile criminal history (R. 2946). In addition to introduction of records on the previous adult offense, Mr. Dunning presented the following:

> The document is entitled "Commitment to the Division of Youth Services," and reads as follows:
>
> "Be it remembered that on the 1st day of August, 1974, Joel Dale Wright, a child comicided [sic], . . . alleged to be a delinquent child because of the following facts: charge, Possession of a stolen motor vehicle . . .

(R. 2967). Mr. Wright was sixteen years old at the time of this charge (R. 2967). The next document presented by Mr. Dunning, State's Exhibit Number 93, was "In the interest of Joel Dale Wright, a child" (R. 2969) and charged petit larceny on the 4th day of March, 1975 (R. 2969).

Mr. Wright'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. Wright's sentence of death was obtained in violation of the sixth, eighth and fourteenth amendments. It therefore must be vacated.

ARGUMENT XX

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 Joel Wright'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.

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. Wright'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. This error undermined the reliability of the jury's sentencing determination. For each of the reasons discussed above the Court must vacate Mr. Wright's unconstitutional sentence of death.

ARGUMENT XXI

TRIAL COUNSEL'S UNDISCLOSED CONFLICT OF INTEREST IN VIOLATION OF THE LAWS AND CONSTITUTION OF THE STATE OF FLORIDA DENIED PETITIONER THE EFFECTIVE ASSISTANCE OF COUNSEL GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Unbeknownst to Mr. Wright at the time of trial, in addition to serving in the Public Defender's Capital Division, Mr. Pearl was also an active law enforcement officer. In fact, Mr. Pearl's status as a deputy sheriff continued until May 1, 1989, when he resigned that post as a result of this matter finally coming to light in the case of Harich v. State, 542 So. 2d 980 (Fla. 1989). He has in fact been an active law enforcement officer since 1968. These dual positions violate sections 454.18, 27.51 and 27.53 of the laws of the state of Florida, Article II, section 5(a) of the Florida Constitution, and the Florida Code of Professional Responsibility DR 5-101A and DR 5-105, all of which prohibit the divided loyalties and dual responsibilities present here.

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 (1984); Kimmelman v. Morrison, 477 U.S. 365 (1986); Cuyler v. Sullivan, 446 U.S. 335 (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). Rather, "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 circumstances the error cannot be considered harmless." Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 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). Conflicts of interest are especially egregious violations of the sixth amendment where, as here, the conflict is not disclosed to the defendant.

This claim was timely presented in a motion for rehearing. However the circuit court denied Mr. Wright the opportunity for an evidentiary hearing finding the claim meritless. The circuit court's ruling is in direct conflict with Harich v. State, 542 So. 2d 9880 (Fla. 1989), where this Court in virtually

identical circumstances ordered an evidentiary hearing to be held. Under Harich, the circuit court's order must be reversed and evidentiary development of this issue be permitted.

CONCLUSION

Mr. Wright 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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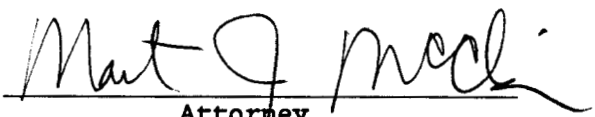
By: 
Attorney

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid to, Margene Roper, Assistant State Attorney, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114 this 13th day of February, 1990.

Matt J Mael.
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