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

REPLY BRIEF OF APPELLANT

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STATEMENT OF THE CASE

In the State's recital of the facts, there are numerous misrepresentations. Counsel will not attempt to correct each error but will call the Court's attention to the most important ones.[1]

According to the Answer Brief, "Mr. Dunning testified that all documents in his files had been provided to Howard Pearl or his investigator, Freddie Williams. (T. 724, 726, 728, 730, 732, 743, 737)" (State's Answer Brief, page 4). This statement is not accurate. Mr. Dunning's testimony was that the questioned documents should have been turned over to Mr. Pearl. He did not recall turning over any of the specific statements shown to him by Mr. Wright's counsel except one. Only with reference to Earl Smith's statement concerning Clayton Strickland pawning a pocket knife the day Lima Paige Smith's body was discovered, was he sure the statement had been disclosed. (T. 729). This one statement was Appendix No. 7 to the Amended Motion to Vacate, and it was admitted as Defense Exhibit No. 15. As to the statements by Ms. Luce, Ms. Brown, and Ms. Holt, Mr. Dunning did not recall disclosing those statements to Mr. Wright's trial counsel. Mr. Dunning testified that the only way to know for sure what items were disclosed and which were not was to recheck the State Attorney's file and look at the receipts. (T. 724). Mr. Dunning explained the special policy for Mr. Wright's case:

> 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 was there. I had Freddie Williams [the public defender's investigator] verify that, and I had him sign for it.

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[1]An example of the numerous but relatively unimportant factual errors occurs at page 4 of the Answer Brief. The State refers to the testimony of "[a]nother of Wright's brothers" who testified that Miss Smith's "house had been burglarized several times but not on a regular basis." (T. 706). The testimony referred to is given by Earl Smith, the victim's brother and not one of Mr. Wright's brothers. A quick reading of the testimony establishes that Mr. Smith had been aware of several break-ins at his sister's house and that he was very concerned about the situation. (T. 707-708).

(T. 730). Defense Exhibit No. 11 is the document referred to by Mr. Dunning. (T. 308-42). This exhibit includes the discovery packet provided to Mr. Pearl pretrial, and the itemized receipts signed by Mr. Williams. Reference to those receipts will verify for this Court that none of the documents in question, the statements from Luce, Brown, Holt, Jackson or Strickland, were ever provided to the defense. Mr. Wright concedes that Mr. Smith's statement was disclosed; but, it is not the basis of Mr. Wright's Brady claim.

As to the "limited grant of immunity" Mr. Dunning gave Charles Westberry, the State inexplicably denies its existence. (Answer Brief at 4, 17). Yet, Mr. Dunning testified that there was a "limited grant of immunity." (T. 756). Mr. Dunning explained that he did not have the Sheriff's Office pursue the theft of scrap metal, the crime to which Mr. Westberry confessed, because:

> 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.

(T. 756). Thus according to the prosecuting attorney Mr. Westberry received an undisclosed "limited grant of immunity" for his involvement in the theft of scrap metal.

The State also misreports Mr. Pearl's testimony regarding the Kim Holt statement. The State represents "[Pearl] may have had the Holt statement." Answer Brief at 4. However, Mr. Pearl testified that, though he did know of Kim Holt (T. 792-793), he had not seen her statement.

> Q: Do you recall if at that point in time [at the time of Mr. Pearl's interview with Ms. Holt] 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.

(T. 793). Mr. Pearl testified that by the time he and Mr. Williams interviewed Ms. Holt in June or July following the February murder, she was uncertain as to the date she observed Jackson. (T. 794-795). Her statement to the police, that

had been tape recorded and then typed, had been put in written form and signed by her under oath on February 28, 1983. (T. 796, 304). In that statement, taken very soon after the February 6, 1983, discovery of Ms. Smith's body, Ms. Holt had been certain as to the date she had observed Jackson. (T. 794). It was only months later when Mr. Pearl contacted her that she was uncertain of the date she observed Jackson. Mr. Pearl was unequivocal as to the fact that he had never seen this typed statement and thus could not have used it to refresh Ms. Holt's recall:

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

(T. 794)(emphasis added).

> It has never been furnished to me.

Later, Mr. Pearl testified:

> Q: Now, did you have any one of these three reports [the statements of Luce, Brown and Holt], to your recollection?
>
> A: I did not.
>
> Q: And are you certain of that?
>
> A: It is possible, but I say it is highly unlikely, that I saw at some time during the investigation Miss Holt's statement . . .
>
> At that time I might have been given a copy of Miss Holt's statement, but I doubt it. I do not think so. I do not think that anything was produced to me thereafter.
>
> As to the statements of Wanda Brown and Charlene Luce, absolutely not. I have never seen or received copies of those statements, and until this moment was unaware of their existence.

(T. 807-808). Later still, Mr. Pearl testified that in fact he did not ever learn that Ms. Holt had given a statement that her encounter with Mr. Jackson occurred at 4:30 p.m. on February 6, 1983, virtually simultaneous with the discovery of the body:

> Q: At that point in time did you know for certain, or did you have evidence, such as the statement, which indicated that Miss Holt had her encounter with Mr. Jackson on Sunday afternoon?

A: No. I was given to believe, and I came to believe that it was later than that. In other words, later enough that Mr. Strickland [Jackson], if that's who it was, could have learned of the death of Miss Smith from independent sources, or gossip, or having just been on the street. Whereas, if I had known, or been advised, or seen these statements, and had learned that he was speaking in this fashion in the mid-afternoon hours of Sunday, February the 6th, it would have raised great suspicion in my mind concerning it.

(T. 902). According to Defense Exhibit No. 11, which Mr. Dunning testified would reveal what statements were disclosed to Mr. Wright's defense team, Ms. Holt's statement was not disclosed. Thus is absolutely no evidence indicating that Ms. Holt's statement was disclosed.

Contrary to the State's assertion that Mr. Pearl found the undisclosed statements "mildly interesting." (Answer Brief at 5). Mr. Pearl testified that when taken together the undisclosed statements would "give[] you a truckload of leads to follow" (T. 1807) and when used with reports he did have, would have caused him to present Jackson and Strickland as possible alternative suspects. (T. 810-811, 917, 928).

While Mr. Pearl and Mr. Williams investigated any leads they discovered, they were never given the reports to fully investigate. They were told by the police that Jackson and Strickland had been eliminated as suspects. (T. 807). Mr. Pearl testified that he specifically requested that the State provide him with all reports and let him make the decisions as to what was important. (T. 809).

The State asserts Freddie Williams "felt there was nothing held back." (Answer Brief at 6). Again the State's claim is not true as the record establishes. Mr. Williams, Mr. Pearl's investigator, testified he had spoken to Kim Holt but "I don't ever recall seeing this statement." (T. 980). With regard to Charlene Luce's statement, he stated "I don't recall ever seeing this statement." (T. 981). He further testified that he had never seen Wanda

Brown's statement. (T. 981). The prosecuting attorney asked on cross examination:

> Q: Mr. Williams, isn't it true that there was no restriction as to documents coming from the Sheriff's Office to you other than them going through Mr. Dunning? In other words, Mr. Dunning was making a catalog or writing down what documents were flowing to you but there was nothing held back that you know of?
>
> A: Nothing that I know -- well that's not true.
>
> Q: Okay.
>
> A: This Kim Holt, we didn't have any knowledge of that.

(T. 987). Mr. Williams was clear that the first time he had seen the statements of Brown, Luce and Holt was "when I was in the State Attorney's office last week." (T. 994). He had never been provided those statements pretrial.[2] That hardly constitutes a "free flow of information." (Answer Brief at 6). More importantly Mr. Williams' testimony was that the statements constituting Mr. Wright's Brady claim were not disclosed.

The State asserts that Mr. Pearl decided "not [to] present testimony about the ownership of the glass vase [] because the State Attorney had decided not to delve into the matter." (Answer Brief at 5). This is not true. Mr. Pearl testified in great detail about the vase and what occurred. (T. 815-820). He testified that even though the State did not use this evidence, he had reason to present the testimony (T. 819) and he had the witnesses present (T. 819) and he simply "failed to do it. It was a lapse, a mistake. I just can't explain it to you." (T. 820). Mr. Pearl testified it was deficient performance; he said there was no tactical reason for his failure to present evidence of the vase's ownership.

The state's very limited selection of Dr. Harry Krop's responses to hypotheticals posed by the state is a blatant mischaracterization of Dr. Krop's

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[2]A review of the discovery packet at T. 308-342 will support this fact.

testimony. Dr. Krop testified that Mr. Wright's mental health profile was very unusual for a death row inmate. It was "normal." "I've probably gotten a normal profile in terms of validity and clinical scales from three or four individuals that I've evaluated on death row." (T. 1029).

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.

The State claims "Freddie Williams was aware of the statements of Luce and Brown." (Answer Brief at 12). For this, the State cites "T. 979-80, 1131-32." The later cites are xeroxed copies of pages 979-980 of the transcript which were attached to the judge's order denying relief. At page 979, Freddie Williams was shown copies of the statements of Charlene Luce, Kim Holt, and Wanda Brown. At that time Mr. Wright's counsel and Mr. Williams had the following exchange:

> Now, I believe to speed things up I had somebody provide you with copies of those out in the hallway.
>
> A: Yes. I think both sides provided me with copies of them.
>
> Wanda Brown. I never saw that statement before, except one day I was discussing this case in the State Attorney's Office and they showed it to me then.

(T. 979-80). The circuit court relied upon this very passage in denying relief. However, Mr. Williams later in his testimony explained that, when he saw Ms. Brown's statement in the State Attorney's Office, it was a week before the evidentiary hearing:

> Q: Did they 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 Attorney's Office last week.

(T. 994). Contrary to the State's assertion and the circuit court's order, Mr. Williams testified he did not receive the statements in question until five years after the trial, while the State was questioning him in advance of the

evidentiary hearing.

The State says "There was no evidence which was not provided except possibly the statement from Holt, who Mr. Williams discovered anyway." (T. 987, 1135). Again the second cite is to a xeroxed copy of the earlier cite. At page 987, Mr. Williams testified that he did not receive a copy of Ms. Holt's statement. On that particular page, he did not discuss the statements from Ms. Luce or Ms. Brown. However, Mr. Williams testified the first time he saw Ms. Brown's statement was in September of 1988. (T. 994). He also testified that he was "sure" that he had not seen Ms. Luce's statement either at the time of trial. (T. 994).

All the evidence at the evidentiary hearing was that the statements of Luce, Brown, and Holt were undisclosed. According to Mr. Pearl, the statements were not disclosed. (T. 795, 797, 799, 807). According to Mr. Dunning he did not recall disclosing the statements:

> 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.

(T. 724). These receipts were introduced into evidence as part of Defense Exhibit No. 11. They do not reflect the disclosure of the statements of Ms. Brown, Ms. Holt, or Ms. Luce. (T. 308-342).

The State argues any error was harmless because the Sheriff's Office had "eliminated Jackson and Strickland as suspects only after interviews and investigation." (Answer Brief at 13). However, William Bartley, a State's witness at Mr. Wright's trial, was never asked by the police about his knowledge of Jackson and Strickland and their whereabouts at the time of the murder. William Bartley was not asked about this by defense counsel because counsel did not have the statements of Ms. Luce, Ms. Brown, and Ms. Holt. If he had been asked, William Bartley would have established that Strickland and Jackson lied

for each other. At the time the pathologist estimated was time of death, Strickland and Jackson were standing outside the victim's home drinking. (T. 1006-08). This was the very same day Strickland had been asking the victim for money and threatening her. (T. 301). This was the very same Strickland and Jackson that even the police described in the following fashion:

> like I say, Strickland and Jackson 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. 963). This is the same Jackson with a conviction for burglarizing Mr. Smith's home which was directly across the street from where Ms. Smith lived. This is the same Jackson with a prior homicide conviction.

Moreover, the State ignores in its brief that there were no records of any sort to support the Sheriff's Office claim that a witness was able to corroborate Mr. Jackson's claim that the money Ms. Holt saw him carrying was obtained from tree trimming. According to the State, Mr. Jackson claimed that the scratches on Mr. Jackson's face were also as a result of the same tree trimming. (T. 956, 1067). However, Mr. Jackson's own sworn statement contradicts this. In his sworn statement, Jackson claimed that the scratches were as a result of a fight on Sunday night. (T. 378). Obviously Jackson gave inconsistent accounts of his injuries suffered on the day of Ms. Smith's homicide.

Ultimately Deputy Douglas who was in charge of the investigation also dismissed Strickland as a suspect. He explained:

> A: I don't think there was any evidence pointing to him as a suspect. We were taking leads as they came to us, and we also offered him the polygraph, which he voluntarily took. And he ran clean on the polygraph.

(T. 958).

Beyond the inadmissible polygraph, the State has no evidence exonerating Jackson or Strickland. Mr. Wright, on the other hand, has presented the three

sworn statements that Mr. Dunning said were exculpatory because they implicated Strickland and Jackson, and most importantly Mr. Wright has presented Mr. Bartley. According to Mr. Bartley, Strickland and Jackson were at the scene of the crime at the time the crime was committed. Obviously the non-disclosure was not harmless. The non-disclosure undermines confidence in the outcome and thus requires a new trial.

The State has argued "Disclosure requirements for the prosecution principally concern those matters not accessible to the defense in the course of reasonably diligent preparation." (Answer Brief at 15). However that is not the issue here. Mr. Dunning testified at the evidentiary hearing the three sworn statements should have been disclosed. (T. 728).[3]

The State also urged in its brief "Generally, police reports are not discoverable." (Answer Brief at 16). But, police reports are not at issue here. These were sworn statements by witnesses possessing information relevant to the offense charged. Rule 3.220 of the Fla. R. of Crim. Pro. required disclosure of these sworn statements. And again, Mr. Dunning conceded at the evidentiary hearing that these statements should have been disclosed. (T. 728).

The non-disclosure undermines confidence in the outcome of the trial.

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[3]The State tries to allege that Mr. Pearl should have on his own unearthed the incriminating evidence against Jackson and Strickland which the Sheriff's Office had collected. However, Mr. Pearl was misled by the police and told Jackson and Strickland were deadends. The State also misstates the record in this regard. At page 14 of its brief, it claims "In fact, defense counsel, conducted a deposition on July 23, 1983, in which their [Strickland's and Jackson's] possible involvement was discussed (R. 227)." Jackson's name actually came up on page 228 of the record and Strickland's name on page 229. The questioning at the time was being done by Mr. Dunning. In context, the witness, Shirley Bowen, was being asked what the local gossip was as to who may have killed Ms. Smith. Ms. Bowen identified the following list of nine suspects, according to local gossip: her own husband, Ms. Bowen's father, Jody Wright, Henry Jackson, Clayton Strickland, "[t]he man who stabbed the woman in the neck eleven times and raped her and left her to die on the side of the road, that was in the newspaper ... he picked her up in Ocala or something, the woman, and it was so close that where he might have done it," Jackie Bennett, Jody Wright's father, and Paul House.

United States v. Bagley, 473 U.S. 667 (1985). There is no admissible evidence to exonerate Strickland and Jackson of the murder. This is because they in fact committed the crime. Had Mr. Pearl received the undisclosed sworn statements, he would have pursued the "truckload of leads" contained therein. Mr. Pearl would have then been in the position to reveal the true killers to the jury, and Mr. Wright would have been acquitted.

ARGUMENT II

MR. WRIGHT WAS DENIED AN ADVERSARIAL TESTING WHEN DETAILS OF MR. WESTBERRY'S IMMUNITY FOR THE ILLEGAL SCRAP METAL BUSINESS WERE 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.

In its brief, the State asserts that Mr. Wright "says there was some 'limited grant of immunity of which he was not aware.' The record shows there was no immunity, limited or otherwise." (Answer Brief at 17). Perhaps the State should reread the testimony of Mr. Dunning, the prosecuting attorney. At the evidentiary hearing, Mr. Dunning revealed that Charles Westberry confessed to him that Westberry had been trading in stolen scrap metal. (T. 747-49). Westberry made this confession after Mr. Dunning had given him a contract of immunity for any role he played in the Smith homicide. Mr. Dunning was then asked if he had the Sheriff's Office pursue an investigation into the stolen scrap metal. Mr. Dunning answered:

> 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.

(T. 756). According to the prosecutor's own testimony Mr. Westberry received "a limited grant of immunity." The theft of scrap metal was not investigated and evidence to support criminal charges was not gathered because of "a limited grant of immunity." This was an undisclosed "limited grant of immunity." What is inexplicable is the failure of the State and the circuit court to address Mr. Dunning's testimony that Westberry received "a limited grant of immunity," and

that this "limited grant of immunity" was undisclosed.

This non-disclosure undermines confidence in the outcome and requires a new trial since the case ultimately was a matter of Mr. Wright's word against Mr. Westberry's word.[4] The jury never knew that Westberry faced criminal prosecution for the theft of scrap metal and had reason to curry favor with the prosecution.[5] Confidence in the outcome is undermined, and a new trial is required.[6]

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 AMENDMENTS.

The State on page 21 of the Answer Brief argues: "Hindsight opinion has little meaning or value under Strickland." Accordingly the State urges this Court to ignore Howard Pearl's testimony that "I made a very bad mistake . . . It was a lapse, a mistake. I just -- I can't explain it to you . . . It was inferior performance." (T. 819-20). The State, in the same brief just a few pages later, relies upon Mr. Pearl's testimony.

> Counsel testified at the evidentiary hearing that he did not ask to have an expert appointed because he was afraid of what could be discovered and the state would have access to whatever he discovered.

(Answer Brief at 33). Either Mr. Pearl's testimony has value or it does not. The State wishes to ignore Mr. Pearl's confession of deficient performance at the guilt phase as hindsight, but yet rely on his recall of his reasoning in

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[4]Further Mr. Pearl was precluded from presenting evidence to the jury that Westberry's scrap metal business was a criminal enterprise. See Argument VIII, infra.

[5]In fact at the evidentiary hearing Westberry indicated he was still fearful of being charged. (T. 653). Prior to his taking the stand, the Assistant State Attorney handling the proceeds chided Mr. Westberry in the hallway saying "remember what I told you." (T. 694).

[6]The State did not address the other aspects of Mr. Wright's Argument II regarding undisclosed statements of Mr. Westberry to Mr. Dunning. Accordingly Mr. Wright relies on his initial brief on that aspect of this claim.

deciding not to obtain a confidential mental health expert.

The State, after ignoring Mr. Pearl's own confession of deficient performance, argues:

> It is a travesty of justice that Mr. Pearl has to face accusations of ineffectiveness which are gleaned from a voluminous record in an attempt to raise a doubt as to his abilities . . . Mr. Pearl testified that of three hundred capital cases, he has tried about seventy-five cases and only has six defendants on death row.

(Answer Brief at 35-36). Yet, it is Mr. Pearl himself who has confessed that in Mr. Wright's case he gave deficient performance. As this Court is aware, this is the only time Mr. Pearl has accused himself of suffering such a lapse as occurred here and which rendered his performance deficient. Certainly Mr. Pearl's testimony on this point is uncontested and entitled to considerable weight. He had no strategic or tactical reason not to present the available evidence regarding the ownership of the vase.[7] That evidence was crucial because it went to a point of contention in the credibility battle between Mr. Wright and Charles Westberry. Mr. Pearl's lapse was seized upon by Mr. Dunning to argue that the vase corroborated Westberry's story.[8]

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[7]Again the vase was significant because Westberry claimed Mr. Wright had told him he had stolen a glass jar full of coins from Ms. Smith's house at the time of the murder. After the "anonymous tipster" brought forward a vase during the trial and claimed it was taken from Mr. Wright shortly after the homicide, Mr. Pearl presented the vase to the jury. He then, due to "a very bad mistake," forgot to present the witnesses who were present that could have explained to the jury that the vase belonged to Mr. Wright's mother. Because of Mr. Pearl's "very bad mistake," no evidence of the vase's ownership reached the jury. Mr. Dunning then suggested in his closing that this vase was the jar that Mr. Westberry had testified Mr. Wright had stolen from Ms. Smith's house. This suggestion was made even though both Mr. Pearl and Mr. Dunning knew the vase could not possibly have been the jar Westberry discussed.

[8]The State contests whether Mr. Dunning was, before the trial, "seeing" the anonymous tipster who brought the vase forward during the trial. Of course it conveniently leaves out a record cite for its contention. See Answer Brief at 21 n2. However in fact Mr. Dunning testified he had first seen this anonymous tipster at a pretrial hearing in Mr. Wright's case. He then related:

> I saw her on several occasions after that at bars and so forth, had conversation with her, knew her. Did not know she had any contact -- well, I knew Charlotte somewhat, but that was the gist of it until

(continued...)

The State argues Mr. Pearl's deficient performance was harmless because "The most logical assumption the jury would make is that if the vase were important and the state has the burden of proof, the vase would have been introduced into evidence by the state, not the defense." (Answer Brief at 24). This statement reflects the State naivete and inexperience. Parties to litigation frequently rely on evidence introduced by the party opponent as proving their case. The jury is in no way instructed that a party, or particularly the State, must rely only on the evidence it has introduced to meet its burden of proof.

Further, the State argues "Mr. Pearl dissipated any possible effect the prosecutor's comment may have had since his closing argument followed the comment (R. 2782-83)." Mr. Pearl's only response was to focus on Mr. Westberry's use of the wood "jar" and the testimony that Mr. Wright was keeping money in a "vase." (R. 2782). Moreover according to Mr. Pearl at the evidentiary hearing, he was convinced that this "very bad mistake" resulted in Mr. Wright's conviction. As a result confidence is undermined in the outcome. State v. Michael, 530 So. 2d 929 (Fla. 1988). A new trial must be ordered.[9]

ARGUMENT IV

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

The State contends "Th[is] issue regarding Wright being forced to testify was never presented to the trial court and was raised for the first time in this

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[8](...continued)
after the trial of the case.

(T. 773). Thus according to Mr. Dunning's testimony he was seeing this "platinum blonde girl" (T. 773) "at bars and so forth" prior to Mr. Wright's trial. Subsequent to the trial, he married her.

[9]Other aspects of Mr. Pearl's deficient performance were discussed in Mr. Wright's initial brief. Mr. Wright relies on that discussion as refuting all other aspects of the State's brief regarding this claim.

appeal." (Answer Brief at 28-29). The State is once again in error. In the Defendant's Post-Hearing Memorandum filed in October of 1988, Mr. Wright set forth, as the third part of his ineffective assistance of counsel claim:

> C. DEFENSE COUNSEL WAS INEFFECTIVE IN FORCING MR. WRIGHT TO TESTIFY AT THE GUILT PHASE OF TRIAL
>
> Mr. Pearl in his opening statement in the guilt phase promised the jury that Mr. Wright would testify. As a result, when the time came for a decision as to whether Mr. Wright would testify, Mr. Pearl felt trapped and forced Mr. Wright to testify even though he did not want to. Mr. Pearl admitted this was a mistake and that Mr. Wright's testimony proved damaging because of Mr. Dunning's cross-examination.
>
> Counsel's conduct in forcing Mr. Wright to testify against his will was deficient performance which prejudiced Mr. Wright. The decision to testify is the client's alone. Of course counsel is expected to advise the client; however, he cannot override the client's decision. Mr. Pearl acknowledged his error in this regard and the resulting prejudice. A new trial should be ordered.

(T. 423). Clearly then the issue was litigated below without objection, evidence was received, and the issue is now properly before this Court.

As to the merits of this claim, the State argues Mr. Pearl "made a tactical decision that Wright should testify." (Answer Brief at 29). However that is not the issue. According to the United States Supreme Court a criminal defendant's decision to testify is one of five that is his and his alone.

> It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify on his or her own behalf, or take an appeal see Wainwright v. Sykes, 433 U.S. 72, 93, n. 1, 97 S.Ct. 2497, 2509 n. 1, 53 L.Ed.2d 594 (1977) (BURGER, C.J., concurring); ABA Standards for Criminal Justice 4-5.2, 21-2.2 (2d ed. 1980). In addition, we have held that, with some limitations, a defendant may elect to act as his or her own advocate, Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975).

Jones v. Barnes, 463 U.S. 745, 751 (1983). See also Faretta v. California, 422 U.S. 806, 834 N 45 (1975).[10] Thus the question is whether Mr. Wright's

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[10]Under Jones and Faretta, defense counsel has a duty to honor a criminal defendant's decision not to testify. That duty is absolute. Counsel's failure to honor his client's decision on such a fundamental issue is ineffective assistance of counsel because it is a breach of that duty.

testimony was the produce of his own free will. Just as the decision to waive counsel requires proof of a voluntary, knowing and intelligent decision, see Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989), the decision to testify or not to testify must be voluntary, knowing and intelligent. According to Mr. Pearl, Mr. Wright's decision not to testify was not honored, and Mr. Pearl coerced Mr. Wright into testifying. Therefore, a new trial is required.

ARGUMENT V

MR. WRIGHT RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

Mr. Wright was sentenced to death without the jury receiving the benefit of the substantial evidence calling for a sentence of less than death. The jury did not hear this evidence because counsel failed to adequately investigate, develop and present this evidence. Counsel did not obtain the assistance of a confidential mental health expert to review the family background information and other available data because counsel believed in the adage, "ignorance is bliss". The decision to forego investigation is adequate performance only if it is reasonable. Strickland v. Washington, 466 U.S. 668 (1984). It is not a reasonable tactic to chose ignorance.

The State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to properly and fully investigate and prepare available mitigating evidence for the sentencer's consideration, see State v. Michael, 530 So. 2d 929 (Fla. 1988), object to inadmissible evidence or improper jury instructions, and make and adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); Thomas v. Kemp, 769 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these constitutional standards. O'Callaghan v. State, 486 So. 2d 1454 (Fla. 1984). As explained in Tyler v. Kemp:

In Lockett v. Ohio, the Court held that a defendant has the right to

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

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

In Skipper v. South Carolina, 476 U.S. 1 (1986), the Supreme Court held that it was eighth amendment error for a trial judge to exclude evidence offered in mitigation regarding a circumstance of the offense or the character and background of the defendant. If counsel here had offered the results of a mental health evaluation as evidence of mitigation, it would have been reversible error for the judge to exclude such evidence. The reason the error would be reversible is that the resulting death sentence would be considered unreliable. What Mr. Wright contends is that under Strickland v. Washington, 466 U.S. 668 (1984), consideration must be given to the fact that, when counsel for no reasonable strategic reason fails to develop and present evidence in mitigation, the net result is the same as if the trial judge had ruled the evidence inadmissible. The prejudice suffered by the defendant in such circumstances is an unreliable death sentence.

Here, the jury was deprived of mitigating evidence in the form of Dr. Krop's testimony. Instead Mr. Pearl unreasonably presented an old, outdated, unreliable, and inadequate mental health evaluation. Mr. Pearl never checked with a mental health expert to determine whether the evaluation had been conducted in a professionally adequate manner. Mr. Pearl failed to present a mental health expert with the family affidavits and school records which would

have resulted in the finding of mitigation. Under Deutscher and Blake, a resentencing is required.

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 RIGHT, 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 State's brief seems to miss the point. At issue in Argument VI is whether Judge Perry's decision to deny interviews of the jurors and Rule 3.850 relief is in error. This decision by Judge Perry was orally announced on September 16, 1988, and it was premised upon the affidavits and testimony presented at that time. Accordingly, it was not of record at the time of the direct appeal in 1985. Therefore, Mr. Wright could not have challenged Judge Perry's decision in 1985. Since the matter was not of record, it was not cognizable on direct appeal. Mr. Wright has now presented his claim in a Rule 3.850 proceeding and it was ruled upon by Judge Perry on the merits. Accordingly, the merits are properly before the Court at this juncture.

As to the merits, the affidavits and testimony presented below establish juror misconduct which must be investigated. The jurors should be interviewed on the record. This court must reverse Judge Perry's decision to sweep the matter under the rug.

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.

Contrary to the State's argument, this Court's decisions in Garron v. State, 528 So. 2d 353 (Fla. 1988) and Spivey v. State, 529 So. 2d 1088 (Fla. 1988) establish that a change in law has occurred which justifies revisiting this issue which was raised on direct appeal. Moreover the decision in Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990) establishes that Mr. Wright is entitled

to relief on this issue. It is in no one's interest to delay the grant of relief.

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.

Even though this issue was raised on direct appeal, it is now cognizable because of new evidence. What is now known which was not known at the time of the direct appeal is that Mr. Westberry received "a limited grant of immunity." (T. 756). Though the State tries to ignore this, those are the words of the prosecuting attorney. The preclusion of cross-examination of Mr. Westberry about his criminal enterprise prevented the jury from hearing of his fear of criminal prosecution and his immunity. The trial judge specifically precluded cross-examination of Mr. Westberry regarding the fact his scrap metal business was a criminal enterprise for which he faced criminal prosecution. These were matters Mr. Wright was entitled to present to the jury. Davis v. Alaska, 415 U.S. 308 (1974). Rule 3.850 relief is warranted.

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.

The State opposes this issue saying "Even if the cases did constitute a change in law, the United States Supreme Court has recently issued two opinions which precludes raising a change in law in collateral proceedings." (Answer Brief at 49). The decisions the State refers to are premised upon Teague v. Lane, 109 S. Ct. 1060 (1989). However what the State fails to note is that Teague involves statutory construction of 28 U.S.C. section 2254. At issue in Teague and the cases following it is the scope of federal habeas review mandated by statute.

This proceeding is not pursuant to 28 U.S.C. section 2254. It is pursuant to Rule 3.850. This Court has already declared fundamental changes in law cognizable in Rule 3.850 proceedings. Jackson v. Dugger, 547 So. 2d 1197 (Fla. 2989). Accordingly Teague is irrelevant.

The State further claims that ineffective assistance of counsel can not be premised upon a failure to object. The State is error. In Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990), ineffective assistance of counsel was found where counsel failed to make a double jeopardy objection. Here, counsel failed to object to Mr. Wright's absence from critical stages of the judicial proceedings. This was deficient performance which prejudiced Mr. Wright. A new trial is required.

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.

In its brief, the State argues "In fact, requesting the instruction never occurred to counsel." (Answer Brief at 51). That is precisely the point. Counsel's performance was deficient. The voluntary intoxication instruction should have been requested. A new trial is required.

CONCLUSION

For reasons stated herein and those reasons stated in Mr. Wright's initial brief, Mr. Wright respectfully requests that this Court vacate his unconstitutional capital conviction and sentence of death.

Respectfully submitted,

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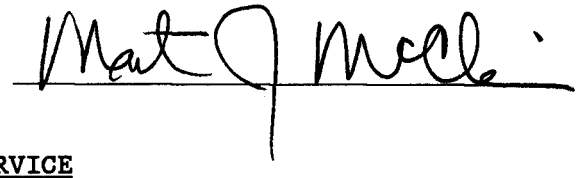
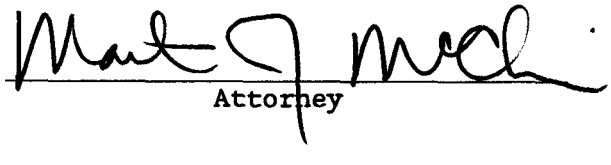
By: 

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 Barbara Davis, Assistant Attorney General, Office of the Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, FL 32114 this 4th day of June, 1990.



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