IN THE SUPREME COURT OF FLORIDA

CASE NO. 74,902

GREGORY SCOTT ENGLE,

Petitioner/Appellant,

v.

STATE OF FLORIDA; RICHARD L. DUGGER,

Respondents/Appellees.

ON APPEAL FROM THE FOURTH JUDICIAL
CIRCUIT COURT, IN AND FOR DUVAL
COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

BILLY H. NOLAS
Chief Assistant CCR
Florida Bar No. 806821

THOMAS H. DUNN
Staff Attorney

OFFICE OF THE CAPITAL COLLATER L
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

Mr. Engle's case is before the Court on the appeal of the circuit court's denial of relief pursuant to Fla. R. Crim. P. 3.850 and on a petition for habeas corpus relief. Oral argument was conducted under the exigencies of a death warrant. At the time, Mr. Engle filed a Record Appendix with this Honorable Court which included a number of highly pertinent documents from the Rule 3.850 record on appeal in this case.[1] The Court thereafter directed that Mr. Engle file a formal brief on appeal; Mr. Engle hereby does so. Given the importance and substantiality of the claims involved in this appeal, Mr. Engle also separately files herewith a motion for oral argument, and requests that should the Court deem additional argument to be an aid to the Court, that the Court schedule a date for argument.

In this brief the Record Appendix shall be cited as "R. App. ___." The original trial record on appeal shall be cited as "T. ___" and the resentencing record on appeal shall be cited as "R. ___." The transcript of the argument before Judge Olliff (who took over the case after Judge Santora recused himself) on the 3.850 motion shall be cited as "H. ___." All other citations shall be self-explanatory or otherwise explained.

---

[1] Mr. Engle also filed an extensive application for stay of execution. He also filed a petition for habeas corpus relief which is currently pending consideration.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

> It is true everything they say. I have prejudice against Engle. I sat there and listened to the evidence for a week, and I being a normal average human being, I developed, as any judge would, the opinion that he deserved to die for what he did to that woman. If I had it to do all over again, I'd sentence him to die again and I don't think it's a fair shake for me to sit in judgment on these matters feeling about this cruel murder as I do.

(Judge Santora's comments at the hearing on Mr. Engle's motion to recuse, R. App. 256-57).

After the hearing was concluded, Judge Santora further explained that he was troubled by Mr. Engle's earlier motion to disqualify him from the resentencing in 1984, but noted that he felt he had a duty to hear the case and did not want to pass the responsibility on to another judge. Judge Santora openly discussed how this case affected him. He indicated he could have saved the State a lot of money in 1979. He explained:

> If I had had a .45 in 1979, I would have taken care of it at that time. That's how mad I was at that time.

The judge explained that after hearing everything that came out at the trial in 1979, he believed Mr. Engle deserved to die. Judge Santora stated that he still had those strong feelings concerning the case. His feelings were based on what he heard at the 1979 trial.

(R. App. 430)(Affidavit of Thomas Dunn).

The judge then considered the motion to disqualify filed by Mr. Engle. Consideration of this motion was quite lengthy. The judge asked many questions and Mr. Nolas and Mr. Menser argued and responded to many points. Mr. Engle's motion rested on allegations of among other things, statements in the record reflecting the judge's prejudice against Mr. Engle and a letter written by the judge in 1988 in which the judge stated that, "There is absolutely no way this animal should be granted executive clemency."

After continued argument by both counsel and discussion between the judge and both counsel, the judge granted the motion to disqualify and admitted that he was prejudiced against Mr. Engle. The judge further admitted, after the on-the-record proceedings concluded, that during Mr. Engle's 1979 trial he developed the opinion that Mr. Engle deserved to die. The judge stated that if he had to do it all over again, he would sentence Mr. Engle to die again, for what he (Mr. Engle) did to this woman.

Reflecting further on his feelings about the case, the judge said "If I had had a .45 in 1979, I would have taken care of it at that time. That's how mad I was at that time."

Some of these statements by the judge were on the record and transcribed by the court reporter. However, at some point the judge

told the court reporter to "shut that thing off" and although he continued talking, he made some of these comments after the court reporter had stopped transcribing the proceedings. The judge's feelings were obviously in earnest, and he noted that his feelings that Mr. Engle should be executed came about during the 1979 trial.

(R. App. 433-34)(Affidavit of Josephine Holland).

After the cost motion, Judge Santora suggested that the motion to disqualify him be discussed next. After a lengthy discussion, the judge agreed that he should disqualify himself, that he was prejudiced against Mr. Engle. Judge Santora stated that he had developed an opinion during the 1979 trial that Mr. Engle was guilty and deserved to die. He also said that if he had it to do over, he would again sentence him to die.

After discussing his feelings about Mr. Engle, Judge Santora concluded that if he had had a .45 in 1979, he would have taken care of it right then. That's how mad he was at the defendant.

After disqualifying himself, Judge Santora told the court reporter to turn that thing off (the stenographic machine). Some of his comments were made after this point.

(R. App. 435-36)(Affidavit of Gary Hendrix).

The jury in this case voted that Mr. Engle should be sentenced to life. However, Judge Santora formed his opinion that Mr. Engle should die, no matter what, at the 1979 guilt-innocence trial. Judge Santora has now acknowledged this fact, a fact not stated by him earlier. No true consideration was afforded to the mitigating evidence presented by Mr. Engle at the 1979 sentencing and then the 1984 resentencing. This too is now clear. Judge Santora's recent candid statements also make it clear that he should have disqualified himself from presiding over the resentencing in 1984, as Mr. Engle had requested. During these 3.850 proceedings the Judge forthrightly disclosed his feelings: that he was going to sentence Mr. Engle to death no matter what, that he has always been "prejudiced" against Mr. Engle and remained so today, that the recusal motion "troubled" him but that he stayed on the case then in order not to pass it on to another judge. These facts have also come to light because of the Judge's candid and commendable admissions during the litigation of the Rule 3.850 motion. Finally, Judge Santora's recent statements make it clear that he

never applied (or even considered) the Tedder standard, never truly considered mitigation in this case because of his set feeling -- formed during the guilt-innocence trial -- that Mr. Engle had to be sentenced to death for what Mr. Engle "did",[2] and never evaluated whether he should have abided by the jury's verdict of life.

Mr. Engle was entitled to a fair sentencing decision from a circuit court judge who was not set on sentencing him to death. He was also entitled to a sentencing judge who would have considered and applied the Tedder standard:

> [i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ.

Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). It is the trial judge's duty to apply that standard fairly and impartially after assessing the mitigation fully and the aggravation properly, and after considering the jury's verdict. Here, the circuit judge who sentenced Mr. Engle to death never did that. But it is the sentencing judge, not this Court on appeal, that sentences under Florida law, and Mr. Engle was entitled to a proper sentencing decision from the trial court judge:

> This Court's role after a death sentence has been imposed is "review," a process qualitatively different from sentence "imposition." It consists of two discrete functions. First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in Elledge v. State, 346 So.2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed--in that case a nonstatutory aggravating circumstance was considered. See also Brown v. State, 381 So.2d 690 (Fla. 1980); Kampff v. State, 371 So.2d 1007 (Fla. 1979).
>
> * * *

---

[2] As shall also be discussed herein, the Judge's persistent belief that Mr. Engle "did" the actual killing was based on the improper consideration of statements by codefendant Stevens which Mr. Engle had never had an opportunity to rebut. That is why this Court initially vacated the death sentence and directed resentencing. Judge Santora, however, in his recent comments has made it clear that he has never been able to shake himself of a reliance on those statements -- not in 1984 and not today, and that he should have recused himself in 1984.

> Neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances.

Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981)(footnote omitted).

Mr. Engle should never have been sentenced to die, At guilt-innocence, the jury in Mr. Engle's case deliberated for almost six hours. The jurors asked four substantive questions, requested easel and chalk, and asked for permission to retire for the evening so they could resume deliberations with a fresh start the next morning (T. 981-982). The questions asked were:

> No.1 - Testimony of Nathan - We would like to see his testimony in which he said to the effect: "I know he (or they) killed her."
>
> N0.2 - In order to prove first degree murder, must we be convinced that the defendant killed the victim?
>
> No.3 - We do not now need Nathan's testimony. We do need the judge's definition previously requested.
>
> No.4 - Do we have to be convinced defendant personally killed the victim to render a verdict of murder in the first degree?

These questions indicate that the jury seriously questioned the extent of Mr. Engle's involvement in the homicide. Although the jury eventually convicted Mr. Engle of the capital murder, after twenty-five (25) minutes of deliberations they recommended that he receive a life sentence. Their questions during deliberations and the life verdict indicate that they did not believe Mr. Engle was actively involved in the killing of the victim. The Judge, however, who presided over both trials, could not shake his reliance on codefendant Stevens' statements -- statements that Mr. Engle has never had a chance to rebut.

Indeed, there were many reasonable bases for the jury's verdict of life. Despite the reasonable factual bases for the jury's life recommendation and the legal restraints on Judge Santora to not ignore that recommendation, he sentenced Mr. Engle to death -- twice: 1) once based upon improper evidence from the co-defendant's statements and 2) then again based upon that same evidence and his unwaivering belief that Mr. Engle should die regardless of the

evidence or the law. These facts have only now come to light, because of the honest acknowledgments made by Judge Santora during the litigation of this Rule 3.850 motion. Judge Santora gave the jury recommendation absolutely no credence in this case -- either when he originally overrode or at the resentencing. As his recent statements indicate, Judge Santora made up his mind at the original trial that Mr. Engle deserved death, because of the statements of codefendant Stevens,[3] and because of that belief sentenced Mr. Engle to death at the original override sentencing and at the resentencing. The trial court never conscientiously applied the reasonable basis standard. See Cochran v. State, 547 So. 2d 928 (Fla. 1989); Tedder, supra. The court's most recent comments reflect as much.

On direct appeal, this Court vacated the death sentence because the judge in sentencing Mr. Engle to death relied on statements from . codefendant Stevens. Ennle v. State, 438 So. 2d 803, 814 (Fla. 1983). The case was remanded for a resentencing hearing before the judge without a new jury, because of the original jury verdict of life. At the resentencing, Mr. Engle, through counsel, made a motion to disqualify Judge Santora from presiding. Mr. Engle argued that it would be difficult or impossible for Judge Santora to ignore the statements of the co-defendant as instructed by this Court. Judge Santora denied the motion. It should have been granted: today, Judge Santora has acknowledged that the motion "troubled" him, but that he denied it because he did not then want to pass the responsibility to another judge.

At the resentencing, Mr. Engle presented additional evidence in mitigation, consisting of the testimony of his mother, Florence Engle, his sister, Peggy Jo Pugh, and (upon the State's stipulation) a written psychological evaluation by Dr. Vallely. Also before the court from the original sentencing proceeding in

---

[3]Statements which this Court ruled the sentencing judge should never have considered. Ennle v. State, 438 So. 2d 803, 814 (Fla. 1983).

1979 were the pre-sentence investigation report and psychological evaluations by Drs. Ernest Miller and Lauren Yates. Moreover, the court received a memorandum of law (followed by four supplemental memoranda) in support of the reasonable bases for the jury's life recommendation. Despite this additional evidence and the court's duty to ignore the improper evidence from the co-defendant's statements, Judge Santora resentenced Mr. Engle to death.

The recent statements made by Judge Santora establish that the reimposition of death was clearly erroneous. Judge Santora's original override and later imposition of death were based precisely on the evidence which this Court instructed the trial court not to consider. What is also now clear is that the Tedder standard was never applied in this case -- Judge Santora has told us that he made up his mind to impose death at the original trial, and that decision is what dictated the result of his later actions.

Judge Santora's prejudgment that Mr. Engle deserved to die prevented him from making a proper sentencing determination in Mr. Engle's case. As Judge Santora has acknowledged, he formed the prejudgment before sentencing, while hearing the evidence at trial. This prejudgment prevented him from giving the jury's recommendation the "great weight" it is entitled to under the Tedder standard. At resentencing, it prevented him from properly recusing himself. This unwaivering prejudice was based upon the very evidence this Court instructed the Judge to ignore on remand. Moreover, it prevented the judge from fully, fairly, and properly considering the additional mitigation that Mr. Engle presented at the resentencing. Judge Santora's prejudgment prevented him from acting "with procedural rectitude in applying section 921.141 and [this Court's] case law." Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981).

Just as this Court vacated Mr. Engle's original sentence of death, it must vacate Judge Santora's reimposition of death. Although the question of the propriety of the override issue was presented to this Court on appeal from the

resentencing, the claim is now properly before this Court because newly disclosed facts (Judge Santora's recent comments) which were unavailable earlier establish the impropriety of the override. See Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Harich v. State, 542 So. 2d 980 (Fla. 1989). Judge Santora has now stated the reasons employed in his decision to impose death, reasons which he did not state on the record earlier. As in Harvard v. State, 486 So. 2d 537 (Fla. 1986), and Sonner v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(in bane), the original judge's statements during the post-conviction process concerning the reasons behind his imposition of the death penalty shed new light on the constitutional error, and require that the claim be re-assessed.

The impropriety of Judge Santora's override of the jury's recommendation of life has been established. The judge has admitted his prejudgment that death was required in Mr. Engle's case, a prejudgment formed at the original guilt-innocence trial, and a prejudgment which prevented him from assessing the jury's verdict under the Tedder standard and the additional mitigating evidence presented at the resentencing. Under this Court's precedents, Mr. Engle is plainly entitled to a new, proper sentencing hearing before a judge who is not biased against him.[4]

This Court has made it clear that its "role after a death sentence has been imposed is 'review,' a process qualitatively different from sentence 'imposition.'" Brown, 392 So. 2d at 1331.[5] The rationale of this case law

---

[4]Judge Santora has recused himself from this 3.850 action and from any further proceedings in this case.

[5]There is no question that this Court does not sentence and does not act as a resentencer when reviewing death sentences. See Quince v. State, 414 So. 2d 185, 187 (Fla. 1982)("Neither of our sentence review functions . . . involves weighing or reevaluating the evidence adduced to establish aggravating or mitigating circumstances"); Lucas v. State, 417 So. 2d 250, 251 (Fla. 1982) (This Court's role after a death sentence has been imposed is 'review', a process qualitatively different from sentence 'imposition'"); Bates v. State, 465 So. 2d 490, 493 (Fla. 1985)("As a reviewing court, we do not reweigh the evidence"); Atkins v. State, 497 So. 2d 1200, 1203 (Fla. 1986)("It is not this (continued...)

certainly applies to Mr. Engle's case. The need for a proper sentencing is now clearer than it was on direct appeal. Mr. Engle has never been afforded the right which is fundamental to an appropriate sentence under Florida law: the right to a sentencing proceeding at which the judge fully considers and evaluates the mitigation, aggravation, and jury verdict of life and then determines what would be the appropriate sentence. On direct appeal, this Court reversed the sentence because the trial court relied in part on the co-defendant's statement. We now know that Judge Santora not only relied again on that evidence when resentencing Mr. Engle, but sentenced Mr. Engle to death based on his prejudgment that death was required, a prejudgment made at the original trial which guided the judge's actions thereafter.

We also note at the outset that this issue should not be reviewed in isolation. Judge Santora's sentencing decision was not only based upon his prejudice and without regard to the Tedder standard, his sentencing decision was also tainted by false evidence (see Claim III, infra), an incomplete and inadequate defense presentation concerning who Mr. Engle was in light of the substantial available mitigating evidence in this case (See Claims V and VI, infra), and Judge Santora's inability to properly consider the mitigating evidence that he did hear (See Claims II, IX, and XI). Mr. Engle presents herein substantial and compelling claims that his conviction and sentence were not constitutionally obtained. Some of the issues involved in this 3.850 action require an evidentiary hearing. Some warrant relief at this juncture. It is against this backdrop that this appeal should be considered.

---

[5](...continued)
court's function to engage in a general de novo re-weighing of the circumstances. Rather, we are to examine the record to ensure that findings relied upon and supported by the evidence").

PROCEDURAL HISTORY

This Court has before it the appeal of the circuit court's summary denial of Mr. Engle's motion for post-conviction relief, brought pursuant to Fla. R. Crim. P. 3.850, and Mr. Engle's petition for a writ of habeas corpus, which is presently pending before the Court. Gregory Scott Engle was tried in the Fourth Judicial Circuit before Circuit Court Judge John E. Santora, Jr., who also presided over the trial of Mr. Engle's co-defendant Rufus Stevens. Mr. Engle was convicted and judgment was entered on June 2, 1979. After lengthy guilt-innocence deliberations, the jury deliberated for approximately twenty minutes at sentencing and then rendered a sentence of life imprisonment. The trial judge overrode the jury's verdict and on August 17, 1979, sentenced Mr. Engle to death. On appeal this Court affirmed the conviction but vacated the sentence and remanded the case for a new sentencing at which statements by the co-defendant would not be considered. Engle v. State, 438 So. 2d 803 (Fla. 1983). That resentencing hearing was held without a jury on October 14, 1984, and in an order filed March 28, 1986, the trial court again sentenced Mr. Engle to death. On appeal this Court affirmed. Engle v. State, 510 So. 2d 881 (Fla. 1987).

On September 28, 1989, Mr. Engle filed a Rule 3.850 motion in the circuit court and a petition for habeas corpus in this Court. Mr. Engle also filed a Motion to Disqualify the original trial court judge from presiding over the 3.850 motion. At a hearing on that motion on October 10, 1989, Judge Santora acknowledged his prejudice against Mr. Engle and disqualified himself. Circuit Judge Olliff heard argument on the 3.850 motion on October 15, 1989, and in an order dated October 18, 1989, denied all relief. Mr. Engle appealed from the denial of that motion and applied to this Court for a stay of his then-scheduled execution. This Court granted a stay of execution. This appeal follows.

CLAIM I

THE TRIAL COURT'S SUMMARY DENIAL OF MR. ENGLE'S MOTION TO VACATE WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

After Judge Santora recused himself, Judge Olliff took over the case. Over the defense's vehement and strenuous objections (written, R. App. 278-285, and oral) Judge Olliff signed verbatim the one-sided and inaccurate order prepared by the State denying an evidentiary hearing and Rule 3.850 relief.

Accepting the State's position wholesale, the lower court summarily denied Mr. Engle's claims without conducting any type of hearing, without adequately discussing whether (and why) the motion failed to state valid claims for Rule 3.850 relief (it does), without any adequate explanation as to whether (and why) the files and records conclusively showed that Mr. Engle is entitled to no relief (they do not), and without attaching the purported portions of the record which conclusively show that Mr. Engle is entitled to no relief (the record supports Mr. Engle's claims). The lower court erred in its disposition, a disposition which in all reality involved no more than Judge Olliff's signing of the one-sided order drafted by the State.'

The rulings regarding the Rule 3.850 motion which resulted from this process were improper in several respects, as will be more fully explained below. Further, the very process which resulted in the order is itself improper, as is the order: it is verbatim adoption of the State's wish-list of findings. After receiving the proposed order and before the court made any rulings, Mr. Engle, through counsel, filed a vehement and strenuous written objection to this proposed order and urged that the court not adopt such a grossly improper and grossly inaccurate document (R. App. 278-285). Counsel urged that the court prepare an order of its own. This objection was argued

---

'This is not a case in which the judge dictated findings and then asked a party to put them into typewritten form. Rather, the judge simply signed verbatim what the State brought to him.

again at the hearing before Judge Olliff on October 15, 1989.

Despite counsel's objections and despite the court's indication on the record that a proposed order was "something to go by," the court without any independent thought or review signed the State's already prepared order word-for-word, factual and legal errors included. The court did this notwithstanding the fact that it had indicated on the record that "I'm one of those who does take a great deal of pride in [the] authorship" of orders (H. 57). Indeed, the lower court did not even correct erroneous aspects of the order that were corrected orally at the October 15, 1989, hearing. The Order, even upon a cursory review, is plainly nothing more than a one-sided document presenting a condensed version of the State's response. Post-conviction proceedings are governed by principles of due process, Holland v. State, 503 So. 2d 1250 (Fla. 1987), and due process requires that findings be independently made by the court. Here, however, the findings were made by the State. What happened before the 3.850 trial court on this case is simply not due process.'

'Examples of the inaccuracies are plentiful. In the findings on Claim I, the challenge to the constitutionality of Fla. R. Crim. P. 3.851, the order indicates that:

> The Court also finds that this identical claim was denied in Tompkins v. Dugger, 14 F.L.W. 455 (Fla. 1989), a case in which current counsel for Mr. Engle was attorney of record but which counsel did not recite to this Court, as ethically required. Rule 4-3.3(3), Rules Regulating the Florida Bar.

To the contrary, although he was not counsel in Tompkins, Mr. Engle's current counsel (Billy H. Nolas) on the record indicated that:

> With regard to claim one we would simply rest on the written submission. I agree with Mr. Menser that the Florida Supreme Court has in the past rejected this claim. We stand by it, we think it's important, we think it's something that [is] relevant and that the Court should consider.

This specific portion of the order illustrates the recklessness involved in the court's wholesale adoption of the State's position -- no effort was made to correct even this patently inaccurate recitation included in the State's writing.

(continued...)

Courts should hear evidence presented by both parties and make independent rulings. In this case, the lower court permitted one party, the State of Florida, to blatantly form opinions for the court. Here, the "findings" were no more than an abdication to the State.[8]

---

[7](...continued)
The court's findings on Claim II plainly show how the findings are not even factually accurate. The order states that Mr. Engle took no steps to compel production of records requested pursuant to section 119, Fla. Stat. In fact, at the hearing counsel vigorously argued that the court should grant Mr. Engle's then already filed and pending motion to compel disclosure of the records at issue under Fla. Stat. section 119.01, et seq. (1989). The court's order is simply incorrect.
Other examples include the order's statement that as to Claim III, the defendant's petition fails to allege or show any motive on the part of the State to submit false evidence, when the claim clearly indicates that the motive was to obtain a conviction and a death sentence; the court's finding that trial counsel made a strategic decision not to cross-examine Dr. Floro, despite the fact that the record shows he did cross-examine the doctor on that issue, but was totally ineffective because he had not adequately investigated the case, and because evidence had been improperly withheld from the defense; the court's finding that the disqualification issue and the override issue are procedurally barred, despite newly disclosed facts; the fact that "files and records" purportedly showing that the defendant is entitled to no relief do not exist, etc., and thus were never attached. Appellant can provide a list covering numerous pages, but the point has been made.

[8]When, as here, a court is "required" to make findings of fact, "the findings must be based on something more than a one-sided presentation of the evidence . . . [and] require the exercise by an impartial tribunal of its function of weighing and appraising evidence offered, not by one party to the controversy, but by both." Simms v. Greene, 161 F.2d 87, 89 (3rd Cir. 1947) (emphasis added). A death-sentenced inmate deserves at least as much.

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

E.E.O.C. v. Federal Reserve Board of Richmond, 698 F.2d 633, 640-41 (4th Cir. 1983), quoting Golf City, Inc. v. Sporting Goods. Inc., 555 F.2d 426, 435 (5th Cir. 1977). What the lower court did here is odious under any view of how a criminal justice system should properly function, especially in a case in which a man's life is at stake. Any order "written by the prevailing party to a bitter dispute," will not comport with fair adjudication. Amstar Corp. v. Domino's Pizza. Inc., 615 F.2d 252, 258 (5th Cir. 1980). See also Shaw v. Martin, 733 F.2d 304, 309 n.7 (4th Cir. 1984). Such a disposition is unfair, unjust, and improper. Such a disposition in a capital case violates fundamental fairness and due process, as well as the eighth amendment. This Court has cautioned against even the appearance of impropriety in the entry of findings of (continued...)

Just as fundamentally erroneous was the lower court's adoption of the State's order's findings of fact, while never allowing Mr. Engle the opportunity for an evidentiary hearing on issues of fact which were contested by the parties. Mr. Engle was and is entitled to an evidentiary hearing on his Rule 3.850 motion, Lemon v. State, 498 So. 2d 923 (Fla. 1986), and was and is also entitled in these proceedings to that which due process allows -- a full and fair hearing by the court on his claims. Cf. Holland v. State, 503 So. 2d 1250 (Fla. 1987). Hr. Engle's due process rights to a full and fair hearing were not only abrogated by the lower court's adoption of the State's factually and legally erroneous order, the court's summary denial without making independent findings and without affording proper evidentiary resolution violated Mr. Engle's fundamental rights.[9]

It is quite puzzling that in a case in which the need for an evidentiary hearing is so plain the State would have a court make findings of fact without affording the defendant evidentiary resolution. It is doubly puzzling that the State would take that position in this case when codefendant Stevens was afforded an evidentiary hearing under Rule 3.850 and was then granted relief on the basis of the evidence adduced at the hearing. Stevens v. State, 552 So. 2d

---

[8](..,continued)
fact when a circuit court is required to make such findings. See Van Roval v. State, 497 So. 2d 625 (Fla. 1986); Patterson v. State, 513 So. 2d 1257 (Fla. 1987). The disposition of this case before the lower court cannot be squared with what fundamental fairness requires.

[9]Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Engle's motion alleged facts which, if proven, would entitle him to relief. The files and records in his case do not "conclusively show that he is entitled to no relief," and the trial court's summary denial of his motion was therefore erroneous.

1082 (Fla. 1989).

Mr. Engle's verified Rule 3.850 motion (R. App. 1) alleged (allegations supported by specific factual proffers (R. App. 285, et seq.)), the extensive non-record facts in support of claims which have traditionally been raised in Rule 3.850 proceedings and tested through evidentiary hearings. Mr. Engle is entitled to an evidentiary hearing: the files and records in the case by no means conclusively show that he will necessarily lose. Even if that was what the lower court judge believed, in such instances the judge must attach "a copy of that portion of the files and records which conclusively show that the prisoner is entitled to no relief . . ." Fla. R. Crim. P. 3.850; Lemon. supra. Otherwise, an evidentiary hearing should be held. The lower court attached only a portion of the record which contained trial counsel's opening statement. That portion is far from dispositive of the ineffective assistance of counsel claims presented, and has nothing to do with the various other evidentiary claims involved in this case such as the mental health issues, the impropriety of Judge Santora's override (now demonstrated by facts not "of record"), Brady violations, State presentation of false and misleading evidence, etc. Mr. Engle's claims and supporting proffers and appendices were more than sufficient to require evidentiary resolution. Nothing "conclusively" rebutted them, and nothing was attached to the order which showed that they were "conclusively" rebutted. Lemon, supra. Indeed, in a case such as this, where facts are in dispute, the refusal to allow an evidentiary hearing makes no sense at all. Blackledge v. Allison, 431 U.S. 63 (1977).

The circuit court erred in denying an evidentiary hearing. The court accepted the State's invitation to apply erroneous standards to the questions of competency, ineffective assistance of counsel, Brady and discovery violations, the override, and other important issues. Facts not "of record" are at issue in this case; such facts cannot be resolved now by this Court, as there is no

record to review."[10] The lower court should have allowed an evidentiary hearing.

Finally, as this Court's recent opinions in State v. Kokal, No. 74,439 (Fla. April 19, 1990), and Provenzano v. State, No. 74,101 (Fla. April 26, 1990), make crystal clear, the lower court's verbatim acceptance of the State's position that Mr. Engle was entitled to absolutely nothing under Fla. Stat. sec. 119 (not one piece of paper from the state attorney's or law enforcement files in this case was provided to the defense under section 119) was absolutely wrong. In Kokal and Provenzano, this Court quite unequivocally held that the State's parsimonious view of section 119, adopted by Judge Olliff here, does not comport to the statute. This case should therefore be remanded in order to afford Mr. Engle the access to documents pursuant to section 119 to which he has always been entitled, but which the lower court denied. This is particularly important in this case, for even with the State's refusal to comply with section 119, Mr. Engle has pled quite a substantial claim under Bradv, Giglio and their progeny. What the State's undisclosed files may reflect is indeed important.

Hr. Engle was (and is) entitled to an evidentiary hearing and disclosure under section 119, and the trial court's summary denial of his Rule 3.850 motion

---

[10]Obviously, the question of whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. See Bassett v. State, 541 So. 2d 596 (Fla. 1989). Mr. Engle's claim that he was denied a professionally adequate mental health evaluation and competency determination due to failures on the part of counsel and the court-appointed mental health professionals is also a traditionally-recognized Rule 3.850 evidentiary claim. See Mason; Sireci, supra; cf. Groover v. State, 489 So. 2d 15 (Fla. 1986). Indeed, the claim here is borne out by even the proffered accounts of the original mental health experts. Mr. Engle's claim that the judge's override of the jury's life recommendation was unconstitutional is based upon newly disclosed facts. Facts that have now come to light, which were unknown before, reflect that the prior dispositions of this issue were erroneous, and demonstrate the need for an evidentiary hearing. See, e.g., Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Harich v. State, 542 So. 2d 980 (Fla. 1989). Moreover, obviously, Mr. Engle's claim that the State presented false evidence can only be resolved through an evidentiary hearing. See Lightbourne, supra; Gorham, supra. Since no hearing was allowed, however, Mr. Engle was never properly heard on these claims below.

was erroneous. Mr. Engle prays that this Court reverse that denial and remand this case for a full and fair evidentiary hearing.

CLAIM II

THE JURY OVERRIDE IN MR. ENGLE'S CASE RESULTED IN *AN* ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED SENTENCE OF DEATH, IN VIOLATION OF *THE* EIGHTH AND FOURTEENTH AMENDMENTS, AS HAS NOW BEEN MADE APPARENT BY *THE* STATEMENTS OF *THE* ORIGINAL SENTENCING JUDGE DURING THE LITIGATION OF THE RULE 3.850 MOTION.

Even without the benefit of the facts which have now come to light demonstrating the impropriety of the manner by which and of the reasons why Judge Santora overrode the jury's recommendation of life and imposed death, two Justices of the United States Supreme Court found the override in this case sufficiently improper to write that "trying a penalty phase or appealing a 'life override' under Florida's capital sentencing scheme is akin to Russian Roulette." Engle v. Florida, 108 S. Ct. 1094, 1098 (1988)(Marshall and Brennan, JJ.). The facts which have now come to light show that the override here was flatly improper, that the Tedder v. State, 322 So. 2d 908 (Fla. 1975), standard was never applied at all by the sentencing and resentencing judge, that the judge should have recused himself in 1984, and, at a minimum, that an evidentiary hearing is warranted.

The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific reliable procedural parameters, and so long as it does not lead to inconsistent, unreliable, freakish, and/or arbitrary capital sentencing results and procedures. Spaziano v. Florida, 468 U.S. 447, 465 (1984). The eighth amendment requires "significant safeguard[s]," id., to be built into the override process. The trial court judge shoulders the responsibility of fairly and fully applying those standards when sentencing a capital defendant.

The override in this case was constitutionally wrong. It was permeated with and resulted from Booth error; it was made without the benefit of extensive

statutory and nonstatutory mitigation evidence that counsel at sentencing and resentencing unreasonably failed to present; it was based in large part on the "false" evidence presented by the State; it was done without the benefit of a proper mental health assessment of the defendant. Most importantly, however, this override was based upon the trial, sentencing, and resentencing judge's inability to disregard the improper evidence from the co-defendant's statements and his unwaivering personal belief that Mr. Engle should be put to death regardless of the evidence or the law. The evidence which has come to light during these post-conviction proceedings showing the true unreliability and wrongfulness of this death sentence requires that the claim now be heard. See Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Harich v. State, 542 So. 2d 980 (Fla. 1989). These facts were not available earlier.

In this case "the application of the jury override procedure has resulted in arbitrary or discriminatory application of the death penalty . . . in general . . . [and] in this particular case." Spaziano, supra. To allow the override to stand in this case would indeed be to validate a procedure providing no meaningful basis upon which to distinguish between those persons who receive life (when a judge does not override, or when an override is reversed) and those who receive death. To allow this override to stand given what has now come to light is to reject what is at the core of the Tedder standard. This override violates the eighth and fourteenth amendments, and violates this Court's well established standards. Mr. Engle was entitled to the proper weighing and consideration under Tedder of mitigation, aggravation, and the jury's life verdict from the trial-level sentencing judge. He was never afforded these rights, as Judge Santora's recent comments make manifest.

A. THE STANDARDS ATTENDANT TO FLORIDA'S JURY OVERRIDE PROCEDURE

The nature of Florida's capital sentencing process ascribes a role to the sentencing jury that is central and "fundamental", Riley v. Wainwright, 517 So.

2d 656, 657-58 (Fla. 1988); Mann, 844 F.2d 1446, 1452-54 (11th Cir. 1988)(in banc), representing the judgment of the community. Id. A Florida sentencing jury's recommendation of life is entitled to "great weight," and can only be overturned by a sentencing judge if that judge fully considers the jury's verdict, and the evidence in support thereof, and then applies the law properly[11] to determine whether "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975) (emphasis supplied). See also Mann, 844 F.2d at 1450-51 (and cases cited therein); Cochran v. State, 547 So. 2d 928 (Fla. 1989); Freeman v. State, 547 So. 2d 125 (Fla. 1989).

The jury's recommendation of life can only be disturbed if the sentencing judge fairly and fully adheres to and employs the Tedder standard. Where, as in this case, evidence exists showing that the sentencing judge disregarded the Tedder standard (and the jury's role) and imposed death because he believed death to be appropriate, the eighth and fourteenth amendments are violated. The error is compounded when the judge overrides on the basis of matters not properly before the jurors or court. Such, however, was the case here.

If a jury recommendation of life is supported by any reasonable basis in the record -- such as mitigating factors, albeit nonstatutory -- that jury recommendation cannot be overridden. See Mann. supra, 844 F.2d at 1450-54 (and cases cited therein); see also Ferry v. State, 507 So. 2d 1373, 1376-77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986); Tedder, supra, 322 So. 2d at 910. Cf. Hall v. State, 541 So. 2d 1125 (Fla. 1989). As this Court noted in Hall, "it is of no significance that the trial judge stated that he would have imposed the death penalty in any event," 541 So. 2d at 1128, because the trial judge must give

---

[11]In this case, for example, such an application requires that no reliance be placed on the codefendant's statements.

proper deference to the jury's verdict. This is "the nature of the sentencing process," Mann, 844 F.2d at *1455* n.lO, under Florida law. This standard is a "significant safeguard" provided to Florida capital defendants. Spaziano, *468* U.S. at *465.* This safeguard was not afforded to Mr. Engle by the trial judge.

B. THE OVERRIDE IN MR. ENGLE'S CASE RESULTED IN *AN* ARBITRARILY, CAPRICIOUSLY, AND UNRELIABLY IMPOSED DEATH SENTENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Engle's jury recommended that he be sentenced to life. There were many reasonable bases for the jury's life sentence. The jurors recommended life because (as the State put it) they "had no evidence that Mr. Engle participated in the actual homicide." The court, however, relied on "evidence" from codefendant Stevens' trial to rebut that reasonable finding.[12] But the jury had heard uncontradicted testimony from the State's key witness, Nathan Hamilton, that it was Stevens who brought up the subject of a robbery; it was Stevens who (accompanied only by Hamilton) went into the Majik Market for a cup of coffee while Mrs. Tolin was working there; it was Stevens who then decided that that would be the best place to rob; it was Stevens who (when Hamilton objected that Mrs. Tolin could identify them) said they would abduct her from the store to get her away from a telephone (T. *427-28, 459-60, 463-64).* All of this was formulated by Stevens before Mr. Engle ever came into the picture.

The medical examiner testified that he could not tell whether Mrs. Tolin's injuries were caused by one person or more than one person (T. *381).* When Hamilton was questioned by the police, however, he told them that Rufus Stevens

---

[12]Stevens' statements to law enforcement were the only evidence that implicated Mr. Engle as the killer. Mr. Engle, obviously, had no opportunity to cross-examine and confront Stevens' version of the events. Because Judge Santora relied on those statements, the originally imposed death sentence in this case was reversed. It was only after the resentencing that Judge Santora acknowledged that his actions were nevertheless always guided by those statements and his unwavering view that Mr. Engle deserved to die, no matter what the mitigation may have shown and without regard to the jury's unanimous verdict of life.

did the killing (T. 635, see R. 54) or might have done the killing (T. 457). The jury heard Nathan Hamilton testify that he and Rufus Stevens were relatives by marriage and close friends (T. 398-99, 425), and that Hamilton had been taught not to turn in a relative for no reason (T. 470). The jury learned that, after the crime, Rufus Stevens had told Nathan Hamilton that they had to get rid of the knife "because that's what it was done with" (T. 44). Stevens dispatched Hamilton to get the knife (T. 411, 416, 421, 440-42). Hamilton testified that if he had gotten the knife he would have given it to Stevens (T. 441).

The jury heard that Nathan Hamilton, who had known Mr. Engle for seven or eight years, and who had been good friends with Rufus Stevens for six (T. 405, 425), considered Stevens to be tougher, and to be the dominant one of the two (T. 456). While the jury did not hear the testimony presented in the resentencing hearing of Mr. Engle's mother and sister, that testimony was consistent with Nathan Hamilton's observations, and indicated that Mr. Engle has been, by nature, a "follower" all of his life (R. 24-25, 30). Mr. Engle's personality trait of being a follower is also consistent with the previously discussed testimony (which the jury did hear) of Hamilton, that the robbery and the abduction of Mrs. Tolin were planned by Rufus Stevens at least an hour and a half before they ever stopped to pick up Mr. Engle. According to Hamilton, when Mr. Engle got into the car with them, "Rufus Stevens asked him if he wanted to make some money and Scott said sure, what do I have to do. Rufus Stevens said rob a Majik Market. Scott said sure" (T. 403). Hamilton heard no more conversation after that (T. 403). The evidence shows, therefore, that at the time he agreed to accompany Stevens in robbing the Majik Market, Mr. Engle did not know that abducting the clerk was part of Stevens' already formulated plan.

The jury also heard Hamilton's testimony that several days after the crime,

> I asked him [Engle] why they did it. He said that they got her out of the store, away from a telephone, got her out into the country, Rufus Stevens went crazy and started saying she's going to identify us, she's going to identify us.

(T. 421)(emphasis added).

The jury deliberated for nearly six hours before returning a guilty verdict. Twice during the deliberations the jury submitted questions to the effect of "Do we have to be convinced that the defendant personally killed the victim to render a [verdict] of murder in the first degree?" (T. 976, see T. 972). The trial court provided felony murder instructions. In the original penalty phase, no additional evidence was presented by either side; rather, the cause was submitted based upon the arguments of counsel and the instructions of the court. The jury was instructed that it was to base its penalty verdict "upon the evidence which you have heard while trying the guilt or innocence of the defendant, and evidence which has been presented in the proceedings" (T. 1023). After 25 minutes of deliberation, the jury recommended a life verdict. At the resentencing, mental health mitigation was also presented on Mr. Engle's behalf, in addition to the testimony of Mr. Engle's mother and sister.

Although there was much more than a reasonable basis for the jury's recommendation, the trial judge, who also presided over codefendant Stevens' trial, ignored the law and imposed death because he, unlike the jury, considered the self-serving statements from Stevens. This Court reversed, finding that the trial court improperly considered Stevens' statements, in violation of the sixth amendment right of confrontation. Ennle v. State, 438 So. 2d 803 (Fla. 1983).

What is now evident is that Judge Santora's original override and later imposition of death were both based precisely on the evidence which this Court instructed the trial court not to consider. What is also now clear is that the Tedder standard was never applied in this case -- Judge Santora has stated that he made up his mind to impose death at the orininal trial, and that decision is what dictated the result of all his later actions. The discussion presented below shall attempt to place the facts which have now come to light in the

contexts of the errors which they demonstrate.

1. The Trial Court Erred in Not Granting Mr. Engle's Motion to Disqualify at the Resentencing[13]

At the resentencing on October 4, 1984, Mr. Engle's counsel made a motion to disqualify Judge Santora from presiding at the resentencing. Counsel argued that it would be difficult or impossible for Judge Santora to ignore the statements by codefendant Stevens, as instructed by this Court (R. 11).

Judge Santora denied the motion. He denied it in spite of confusion, at the opening of the resentencing hearing, concerning what evidence he should not consider (R. 5). The court's denial of the motion to disqualify was contrary to Florida's statutes and case law addressing disqualification and violated Mr. Engle's federal and state constitutional rights.[14]

What is now clear, in light of what Judge Santora has recently acknowledged, is that Judge Santora should have recused himself from the resentencing. He has always been prejudiced against Mr. Engle, as he acknowledged in these proceedings. He should have recused himself in 1984 to ensure a decision untainted by the very prejudice which he has acknowledged during these proceedings. Judge Santora has now acknowledged as much.

In Mr. Engle's case, the court's slanted perception of the facts directly conflicted with the competent evidence in this record and with the jury's life recommendation. The record reflects evidence indicating that Mr. Engle's participation was limited, that he was dominated by Stevens, and that Stevens did the actual killing (R. 418, 432-34, and 456-59). Judge Santora, however,

---

[13]This section of Claim II also fully incorporates Claim X of Mr. Engle's Rule 3.850 motion.

[14]Four rules address the disqualification of a judge in Florida: the Code of Judicial Conduct Canon 3-C, section 38.10, Fla. Stat. (1981); Florida Rule of Criminal Procedure 3.230, which was adopted verbatim from a former statute, section 911.01, Florida Statutes (1967); and Florida Rule of Civil Procedure 1.432. These rules should have been adhered to then, but were not (See Rule 3.850 motion, Claim X; R. App. 87-103).

could not put Mr. Stevens' statements out of his mind.

Mr. Engle at the original sentencing argued that the court should not consider the codefendant's statements that implicated Mr. Engle, or if it did then it should also consider Stevens' conflicting statement admitting that Stevens did the killing. The Court allowed the first statement but not the second to be admitted into evidence (T. 1050-63, 1077-79). This was the evidence (from Stevens' statements) heard at the original trial upon which Judge Santora "developed . . , the opinion that **he** [Mr. Engle] deserved to die for what **he** did to that woman" (R. App. 496-97)(Judge Santora). Other than that Stevens statement, there was **no** evidence that Mr. Engle "did" anything to kill the victim -- the other evidence, obviously relied upon by the jury, was that Stevens was the ringleader who actually killed the victim. The record would eventually show that Judge Santora relied on even further evidence from Stevens' trial (T. 1077-79). In its original judgment the court demonstrated its inability to separate the two defendants:

> I find that both of you are equally guilty of murder under the facts of this case and the laws of the State of Florida.

(T. 1090). The court originally sentenced Mr. Engle and Stevens on the same day.

The court opened the resentencing hearing on October 4, 1984, with a discussion of this Court's instructions; the judge expressed some confusion regarding which findings were improper and what evidence he was not to consider. The prosecution read in open court those parts of the prior sentencing order which the prosecution acknowledged to be based on Stevens' statements:

> [The Court's] knowledge of the fact that she was confronted by Gregory Engle and Rufus Stevens with a large pocket knife in the minute [sic] market must have come from the Stevens' trial. . . .
>
> The portions of that, Your Honor, that were not included in the Engle trial were the portions relating to her being placed in the front seat of the automobile between two strange men begging she be released, stating she could not identify them without her glasses and forcing her into the back seat where she was too terrified to offer resistance, and the fact that she begged for her life, those particular facts did not come out in the Engle trial.

> In addition, Your Honor, reading on the same paragraph after the rape you told Stevens to take her out and get rid of her at which time he led her away from the car and strangled her with a piece of rope. Those facts did not come out in the trial of Gregory Engle. . . .
>
> Continuing, you then stabbed her in the back with your knife at which time Stevens introduced his hand into the victim's vagina up to the knuckles causing a four inch laceration on the inner wall. . . . those particular facts did not come out in the Engle's trial.

(R. 4-10). Although the court asked the prosecutor to provide him with a written statement of those improper findings (R. 69), the urosecution restated the imurouer findings in its resentencina brief presented later to the court.

At this point in the resentencing, Mr. Engle's counsel asked the court to consider the motion to disqualify. Defense counsel argued that it would be difficult or impossible for Judge Santora to ignore the statements by co-defendant Stevens, or to ignore other evidence from Stevens' trial (R. 11). The court denied the motion. As noted, Judge Santora's recent statements acknowledge that he should have recused himself. Of particular importance in this regard is the fact that at the original sentencing the court seemed unaware of the fact that Mr. Stevens had made several different statements about what happened that night. All were in varying degrees obviously self-serving and the existence of several different statements illustrates the basis for this Court's significant concern about the use of unreliable, self-serving statements of co-defendants that cannot be challenged through cross-examination, The error was compounded by Judge Santora's focusing entirely on the one statement most damaging to Mr. Engle; the statement did guide his actions.[15] The statement in

---

[15]This Court's recent opinion in the Stevens case further demonstrates that Judge Santora should have recused himself. Stevens v. State, 552 So. 2d 1082 (Fla. 1989). Counsel for Stevens sought to have Judge Santora recuse himself from considering Stevens' Rule 3.850 motion. Judge Santora denied that motion. Because relief was granted in part, this Court found it unnecessary to address Stevens' motion for recusal. Nonetheless, this Court observed:

> Because Stevens raised numerous allegations during the rule 3.850 motion of bias on the part of the trial judge, we order that another

(continued...)

which Stevens admitted that he was the killer was ignored.

2. The Resentencing

At resentencing, Mr. Engle presented additional evidence in mitigation, consisting of the testimony of his mother, Florence Engle; his sister, Peggy Jo Pugh; and (upon the State's stipulation) a written psychological evaluation by Dr. James Vallely (R. 16-32, 75-78). Also before the court from the original sentencing proceeding in 1979 were the pre-sentence investigation report, and psychological evaluations by Drs. Ernest Miller and Lauren Yates (R. 42-59).

Mr. Engle submitted memoranda in support of the jury's life recommendation, and argued that (especially with the absence of the "evidence" derived from Rufus Stevens' statements) the jury's verdict should be followed (R. 66-74, 180-191). Included in the memorandum was a brief biographical sketch of each juror, and a summary of his or her responses when asked under oath whether he or she could recommend the death penalty if warranted (R. 69-72). The jurors had said that they would. Defense counsel emphasized the questions submitted by the jury during their lengthy guilt-phase deliberations reflecting their concerns that Mr. Engle did not personally kill the victim (R. 73). Defense counsel also focused on the testimony of the key State witness at trial, Nathan Hamilton (R. 73-74), and the defense's closing argument in the penalty phase (R. 73).

The State also filed a memorandum of law, in which it argued for re-imposition of the death penalty (R. 81-103). It was the State's position that there were four aggravating circumstances (R. 83-103). The State's argument that there were four aggravating factors, although accepted by the court, was

---

[15](...continued)
trial judge be appointed to conduct the sentencing proceeding to avoid any appearance of impropriety.

(Id. at 1088). The reasons for recusal were much more significant in Mr. Engle's case. Santora's recent comments demonstrate that he should have granted the recusal motion in 1984.

contrary to the State's own argument before the jury. The State never argued before the jury that it could find the aggravating factors of murder committed to avoid arrest and for pecuniary gain. The Court's reliance on these two aggravating facts was improper, see Bullinaton v. Missouri, 451 U.S. 430 (1981), as this Court noted in its opinion in the Stevens case. This fundamental error should be corrected now. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965).

On March 28, 1986, the trial court again sentenced Mr. Engle to death (R. 204, 206-208, 74-78). The court found the four aggravating circumstances the State argued, including the two waived before the jury: (1) in the course of a robbery, kidnapping, and sexual battery; (2) to avoid arrest; (3) pecuniary gain; and (4) heinous, atrocious, or cruel (R. 206-08). The sentencing order does not discuss any mitigating circumstances, but only conclusorily states, "The Court finds that there are no mitigating circumstances" (R. 208). There is absolutely no reference in the sentencing order to the jury's life recommendation. This fact is significant, in the context of the facts discussed below, for as we now know the Tedder standard was never applied by the court at the original sentencing or at resentencing. Judge Santora has now made this clear. No findings were made addressing the jury's verdict, although the record here did demonstrate mitigating matters that a trial judge could have relied upon to follow the jury's life sentence verdict.

Thus, in his original sentencing order, Judge Santora did not even mention the jury's life recommendation, much less accord it the weight to which it was entitled. See, e.g. Tedder v. State, supra, 322 So. 2d at 910; Thompson v. State, 456 So. 2d 444, 447 (Fla. 1984)(a jury recommendation under Florida's trifurcated death penalty statute is entitled to great weight); Hallman v. State, No. 70,761 (Fla. April 12, 1990), slip op. at 7 (trial court's inquiry should be whether there is any reasonable explanation for the jury's life recommendation). Nor did the court articulate any reason whatsoever for

rejecting the the jury's life verdict."[16] The court did, however, include in this sentencing order a narrative account of the supposed circumstances of the crime, as gleaned from Rufus Stevens' statements (R. 114, 116-17). As the State conceded (or, more accurately, insisted) in the original appeal, this was the trial court's justification for overriding the jury's life recommendation: he had "evidence", which the jurors did not, from which to conclude that Mr. Engle was a co-participant with Stevens in the actual homicide (See Brief of Appellee, Case No. 57,708, p. 29, 30, 32). But the "evidence" came from codefendant Stevens' statements, which never should have been considered. The sentencing judge's continued consideration of this "evidence" violated the confrontation clause and justifies relief now. Today, Judge Santora informs us that he made up his mind at the original trial that Mr. Engle should be executed (after hearing Stevens' statement and before any sentencing took place), that if could have he would have shot Mr. Engle with a .45 at that time, that these considerations infected his thinking throughout, and that the allegations about his bias against Mr. Engle asserted in the motion to disqualify filed by current counsel are the "truth". Judge Santora never applied, and as we now know, never even considered the Tedder standard.

In his second sentencing order, the trial court again failed to mention the jury's life verdict (R. 206-08). The order states, "This court finds that the evidence presented at trial conclusively establishes that Gregory Engle was an active participant in all phases of this crime and at least contemplated that lethal force be used . . ." (R. 206)(emphasis supplied). There is no discussion

---

[16] See Burch v. State, 343 So. 2d 831, 834 (Fla. 1977)(for override to be sustained on appeal, the reasons for the trial court's rejection of jury's life recommendation must be compelling ones); Thompson v. State, 328 So. 2d 1, 5 (Fla. 1976)(trial court must express concise and particular reasons for overruling jury life recommendation and imposing death sentence); Smith v. State, 403 So. 2d 933, 935 (Fla. 1981)(trial court failed to articulate any reason for rejecting jury's life recommendation).

of whether the jury (which heard the same evidence) could reasonably have found otherwise. With regard to mitigating circumstances, the order contains only the conclusory statement that T<u>his Court finds</u> there exists no mitigating circumstances" (R. 208)(emphasis added).[17] Again, there is no discussion as to whether the jury, from the evidence it heard at trial, could reasonably have found otherwise. Nor is there any discussion of the evidence in mitigation presented at the resentencing hearing of October 4, 1984. In the original sentencing proceeding, the trial court was relying on inadmissible and unreliable additional evidence, some not before the jury, and all founded on Stevens' statements. In the second sentencing proceeding, with regard to the crucial question of Mr. Engle's degree of participation in the crime as compared with that of Stevens, the trial court was presented with essentially the same aggravating evidence as the jury, but heard more mitigation.

Based on all of the above, and a great deal more discussed below, it is clear that in sentencing Mr. Engle to death the judge never considered whether "reasonable people could differ as to the propriety of the death penalty in this case," <u>Brookines v. State</u>, 495 So. 2d 135, 143 (Fla. 1986), but acted merely on his personal beliefs. There were numerous valid and eminently reasonable statutory and nonstatutory mitigating factors in this case, and two of the four aggravating factors were waived by the State before the jury. The jury quite

---

[17]The United States Supreme Court's recent opinion in <u>Clemons v. Mississippi</u>, No. 88-6878 (March 28, 1990), speaks directly to the impropriety of such a disposition:

> [B]ecause the [lower court's] opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. We must, therefore, vacate the judgment below. . .

<u>Clemons</u>, <u>supra</u>, slip op. at 12. The same holds true in Mr. Engle's case, as the circuit's court's original and resentencing orders were also "virtually silent" as to the mitigation involved in this case.

reasonably could have and did reject these aggravating factors. Whatever balance the trial judge may have struck, the jury's balancing and resulting life recommendation were reasonable under Florida law. The trial judge refused to provide Mr. Engle with the right which the law clearly afforded him: the right to have a trial judge decide his sentence in light of proper evidence, appropriate aggravation and mitigation in the record, and the Tedder standard.

In fact, the trial judge failed to even explain why the jury had no rational basis for its recommendation, as Tedder requires. A jury life recommendation magnifies the sentencing judge's duty to actually consider statutory and nonstatutory mitigating factors, because the usual presumption in Florida that death is the proper sentence upon proof of one or more aggravating factors does not apply (and indeed is reversed) when there is a life recommendation. Williams v. State, 386 So. 2d 538, 543 (Fla. 1980).

The judge's override here was thus not predicated on any lack of reasonable basis for the jury's verdict. Ferry, 507 So. 2d at 1376-77 (emphasis added). See Hallman v. State, susra. The jury had reasonable bases for its verdict of life. The judge's override, however, and his reimposition of death were based on standards that have nothing to do with Tedder or Florida sentencing law.

Even on the basis of the record which then did not include the facts which have now come to light, two Justices of the United States Supreme Court wrote:

> I would grant the petition for certiorari to consider petitioner's contention that the Florida Supreme Court is applying the review standard of Tedder v. State, 322 So. 2d 908, 910 (1975)(per curiam), in a manner that has denigrated the role of legitimate mitigating circumstances in Florida's sentencing scheme and that has led to the arbitrary infliction of the death penalty. Petitioner's sentencing jury recommended life imprisonment, but the trial judge overrode the jury's recommendation and imposed the death sentence. Under Florida's unusual system of capital sentencing, the trial judge is given the power to overturn a sentencing jury's rejection of the death penalty. In upholding Florida's sentencing system against various constitutional challenges, this Court repeatedly has relied on the Florida rule, announced in Tedder, that "in order to sustain a sentence of death following a jury's recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ," ibid. See Ssaziano v.

Florida, 468 U.S. 447, 465-66, 104 S. Ct. 3154, 3164-66, 82 L.Ed.2d 340 (1984); Barclay v. Florida, 463 U.S. 939, 955-56, 958, 103 KS. Ct. 3418, 3427-3428, 3429, 77 L.Ed.2d 913 (1976)(opinion of Stewart, Powell, and Stevens, JJ.). The trial iudee in this case failed even to consider the reasonableness of the iury's recommendation and refused to recoenize petitioner's lesser role in the crime as a valid mitigating circumstance. The Florida Supreme Court nonetheless affirmed the override of the jury's recommendation, arguing that it would be "unreasonable . . . to conclude that [petitioner] played no part in the brutal slaying." 510 So. 2d 881 (1987)(per curiam). This reasoning evinces a cramped view of mitigating circumstances regarding evidence of petitioner's lesser role that it is contrary to the constitutional principles recognized in Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978), and Eddinns v. Oklahoma, 455 U.S. 104, 102 S. Ct. 869, 71 L.Ed.2d 1 (1982). In addition, a review of this and other cases convinces me that the Florida Supreme Court has embraced conflicting views of whether such mitigating evidence may justify the jury's recommendation of life imprisonment. The court's inconsistent application of the Tedder standard in felony-murder cases has led to arbitrary imposition of the death penalty.

Enele v. Florida, 108 S. Ct. 1094, 1095 (1988)(Marshall and Brennan, JJ.) (emphasis added).

Even the original disposition in Enele cannot be reconciled with this Court's decisions in Barclav v. State, 470 So. 2d 691 (Fla. 1985), and Hawkins v. State, 436 So. 2d 44 (1983). As Justices Marshall and Brennan explained:

> Defendants Barclay, Hawkins, and Engle all were present during violent murders. Each presented evidence in mitigation indicating that they were followers, not leaders, and that they did not do the actual killings. All three were sentenced to die by the trial judge after their juries determined that death was an inappropriate sentence. Barclay and Hawkins are now serving life sentences. If the Florida Supreme Court's decision in this case is allowed to stand, Engle will die in the electric chair. The Florida Supreme Court has not explained how these cases can be reconciled. As petitioner explains, these holdings create confusion as to whether it is wise, or even competent, for defense counsel to emphasize at trial the defendant's lesser role in a capital crime. The opinions in Barclay, Hawkins, and Ennle appear collectively to "stand for the proposition that trying a penalty phase or appealing a 'life override' under Florida's capital sentencing scheme is akin to Russian Roulette." Pet. for Cert. 26. I believe the Florida Supreme Court has failed to apply the Tedder review standard in a consistent manner in these cases, leading to the arbitrary imposition of the death penalty. I also believe that in the present case the Florida Supreme Court based its decision on a view of mitigation that is contrary to the constitutional principles of Lockett and Eddinns.

Ennle v. Florida, 108 S. Ct. at 1098.

The imposition of the death penalty becomes arbitrary and freakish. There is no discernible difference between those who get death and those who do not, other than whether a sentencing judge for his own personal reasons overrides a life recommendation. This is precisely what occurred here, As applied to Mr. Engle, the death penalty violates the eighth amendment. Judge Santora's recent comments make it plain that a proper resentencing before a different judge is warranted. Those statements were not available on the earlier appeals. Those statements, and the discussion presented above, also demonstrate that this case indeed involves "error that prejudicially denie[d] fundamental [eighth amendment] rights," Kennedv v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986), and that relief at this juncture is therefore warranted.

3. Newly Disclosed Facts Establish that Judge Santora's Override Was Constitutionallv Improper

Although the question of the propriety of the override was presented to this Court on appeal, the claim is now properly before this Court because newly disclosed facts which were unavailable earlier establish the impropriety of the override in this case. See Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Harich v. State, 542 So. 2d 980 (Fla. 1989). Judge Santora has now stated the reasons he employed in his decision to impose death -- those reasons were not stated earlier. Here, as in Harvard v. State, 486 So. 2d 537 (Fla. 1986), and Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(in banc), the original judge's statements during the post-conviction process concerning the reasons behind his imposition of the death penalty shed new light on the constitutional error, and require that the claim be re-assessed post-conviction. See also Lightbourne, supra. What is now obvious is that Judge Santora, first in 1979 and then in 1984, consistently relied on the opinion that he had formed while hearing the evidence (including the improper Stevens' statement evidence) at the 1979 guilt-innocence trial. He decided then, at the trial (not the sentencing

or resentencing) that death was the only proper sentence. No assessment of the jury's verdict under the Tedder standard was ever made. The same judge has now admitted his on-going prejudice and bias -- since the trial -- against Mr. Engle. This prejudgment and bias was especially inappropriate here because it contradicted the jury verdict of life and the apparent factual conclusions of the jury. But, as his recent comments make clear, Judge Santora did not give any deference to the jury's verdict. As defense counsel argued in the original sentencing and at resentencing, the jury apparently found that Mr. Engle was an accessory but that he did not do the killing (T. 1014; R. 44-45). The witnesses (Hamilton originally; Mr. Engle's mother and sister at resentencing) testified that Mr. Engle had always been a follower, and was a follower during this offense. It was Stevens' plan, after all, and Stevens has always been more dominant and more violent than Mr. Engle. The jury deliberated 6 hours on guilt and posed to the court during deliberations questions concerning its verdict given the lack of evidence that Mr. Engle personally killed the victim. After finally returning a verdict of guilty the jury then deliberated less than a half hour before recommending a life sentence. Id. Twelve impartial people who had not heard the evidence in the Stevens trial believed that Mr. Engle did not do the killing and should not receive a death sentence.

Judge Santora's extreme prejudice and unshakeable belief that Mr. Engle did the killing (based on the improper and unreliable evidence elicited at the original trial) and that Mr. Engle had to be put to death were first vividly demonstrated in an extrajudicial letter dated April 22. 1988 from him to the Florida Parole and Probation Commission. This letter reads:

> The above named [Gregory Scott Engle] was convicted in 1979 of murder. He robbed, kidnapped, raped, and mutilated the vagina of a young mother of *two* children before stabbing and choking her to death.
>
> There is absolutely no way that this animal should be granted executive clemency.

(R. App. 191)(emphasis added). Judge Santora, however, other than the improper Stevens statements, had no evidence that Mr. Engle did any of this. This letter, not existing at the time of the resentencing, shed new light on the real basis of Judge Santora's second sentence. It indicated that Judge Santora was extremely biased against Mr. Engle in the original proceedings and in the resentencing; this bias endured well beyond these proceedings.

Even more compelling new evidence has come to light which conclusively establishes that Judge Santora has been irreversibly prejudiced against Mr. Engle since the 1979 trial, acted throughout on his belief that Mr. Engle should be executed, and never assessed the reasonableness of the jury's verdict in light of the Tedder standard. On October 10, 1989, a hearing was held before Judge Santora to resolve several preliminary motions, and to hear arguments on the merits of Mr. Engle's 3.850 motion, the need for an evidentiary hearing and the application for a stay of execution. One of the motions that Judge Santora heard was Mr. Engle's motion to disqualify the judge.

The arguments on this motion were extensive. Judge Santora asked numerous questions of counsel for Mr. Engle and for the State. Judge Santora then granted the motion to recuse himself and admitted that he was in fact prejudiced against Mr. Engle from the time of the original trial. Judge Santora stated:

> I think that I have to disqualify myself, and I hate to do it because all it's doing is costing taxpayers more money and more work for another judge. But in view of what the Supreme Court said in the Stevens' case and what I have said about Engle, I find that the motion is legally sufficient.
>
> It is true everything they say. I have prejudice against Engle. I sat there and listened to the evidence for a week. and I being a normal average human being. I developed, as any judge would, the opinion that he deserved to die for what he did to that woman. If I had it to do all over again. I'd sentence him to die again and I don't think it's a fair shake for me to sit in judgment on these matters feeling about this cruel murder as I do.
>
> So your motion is granted. Another judge will be appointed to whom you have to defer all these other matters.

(R. App. 496-97)(emphasis added). Tedder was never applied here. The judge has acted throughout on his own beliefs.

Judge Santora made further comments concerning his prejudice against Mr. Engle. Mr. Dunn, co-counsel for Mr. Engle, related Judge Santora's additional comments in an affidavit provided to the court below:

> After the hearing was concluded, Judge Santora further explained that he was troubled by Mr. Engle's earlier motion to disqualify him from the resentencing in 1984, but noted that he felt he had a duty to hear the case and did not want to pass the responsibility on to another judge. Judge Santora openly discussed how this case affected him. He indicated he could have saved the State a lot of money in 1979. He explained:
>
> > If I had had a .45 in 1979, I would have taken care of it at that time. That's how mad I was at that time.
>
> The judge explained that after hearing everything that came out at the trial in 1979, he believed Mr. Engle deserved to die. Judge Santora stated that he still had those strong feelings concerning the case. His feelings were based on what he heard at the 1979 trial.

(R. App. 430)(Affidavit of Thomas Dunn). Ms. Holland, then an attorney with the CCR office and co-counsel on this case, was also present at the hearing:

> The judge then considered the motion to disqualify filed by Mr. Engle. Consideration of this motion was quite lengthy. The judge asked many questions and Mr. Nolas and Mr. Menser argued and responded to many points. Mr. Engle's motion rested on allegations of among other things, statements in the record reflecting the judge's prejudice against Mr. Engle and a letter written by the judge in 1988 in which the judge stated that, "There is absolutely no way this animal should be granted executive clemency."
>
> After continued argument by both counsel and discussion between the judge and both counsel, the judge granted the motion to disqualify and admitted that he was prejudiced against Mr. Engle. The judge further admitted, after the on-the-record proceedings concluded, that during Mr. Engle's 1979 trial he developed the opinion that Mr. Engle deserved to die. The judge stated that if he had to do it all over again, he would sentence Mr. Engle to die again, for what he (Mr. Engle) did to this woman.
>
> Reflecting further on his feelings about the case, the judge said "If I had had a .45 in 1979, I would have taken care of it at that time. That's how mad I was at that time."
>
> Some of these statements by the judge were on the record and transcribed by the court reporter. However, at some point the judge told the court reporter to "shut that thing off" and although he continued talking, he made some of these comments after the court

> reporter had stopped transcribing the proceedings. The judge's feelings were obviously in earnest, and he noted that his feelings that Mr. Engle should be executed came about during the 1979 trial.

(R. App. 433-34)(Affidavit of Josephine Holland). Mr. Hendrix, a CCR investigator who was also present at the hearing, related:

> After the cost motion, Judge Santora suggested that the motion to disqualify him be discussed next. After a lengthy discussion, the judge agreed that he should disqualify himself, that he was prejudiced against Mr. Engle. Judge Santora stated that he had developed an opinion during the 1979 trial that Mr. Engle was guilty and deserved to die. He also said that if he had it to do over, he would again sentence him to die,
>
> After discussing his feelings about Mr. Engle, Judge Santora concluded that if he had had a .45 in 1979, he would have taken care of it right then. That's how made he was at the defendant.
>
> After disqualifying himself, Judge Santora told the court reporter to turn that thing off (the stenographic machine). Some of his comments were made after this point.

(R. App. 435-36)(Affidavit of Gary Hendrix).

These comments and admissions by Judge Santora himself establish that he developed his feelings about Mr. Engle's case on the basis of the evidence that came out at trial in 1979, including the improper Stevens statements. At the trial, he formed the opinion that Mr. Engle should die. No proper assessment of aggravation and mitigation was made (mitigation was not even argued until sentencing and later resentencing), no deference was given to the jury's verdict, and the Tedder standard was never applied by the sentencing judge. If he had it to do again, Judge Santora would again impose death based solely on what he heard at the 1979 trial. This is far removed from a proper application of the Tedder standard. Judge Santora has maintained since trial a personal belief that Mr. Engle should be executed. This is what he based his override on, twice. Judge Santora's statements establish that in 1979 and 1984 he was irreversibly prejudiced against Mr. Engle: that he had made up his mind that Mr. Engle should die at trial and that nothing could change that opinion. The mitigation, **see** Clemons, supra, and the jury's verdict, **see** Tedder v. State,

supra, were never fully and fairly considered (indeed were not considered at all) by the judge who sentenced Mr. Engle to death.

C. THIS CLAIM MUST BE HEARD

The newly disclosed facts now establish that Judge Santora's override of the jury's life sentence was predicated upon his inability to put the statements of Mr. Stevens out of his mind, and not upon any deference to the jury recommendation. The trial judge sentenced Mr. Engle based solely upon his firmly established and unwaivering opinion that Mr. Engle should die.

The judge explained that at the 1979 trial he formulated the belief that Mr. Engle deserved to die. That belief has been what has guided the judge throughout: Judge Santora stated that he still had those strong feelings concerning the case. As Judge Santora candidly admitted: "It is true everything they say. I have prejudice against Engle." There can be little doubt that the focus of Judge Santora's resentencing was not the reasonableness of the jury's recommendation. Rather, it was his intensely developed opinion based on the evidence he heard in 1979, evidence which included the self-serving and unreliable statements of Mr. Stevens. Those statements were the only evidence which would allow Judge Santora to determine what Mr. Engle should die "for what he did to that woman." The basis for the judge's override of the jury's recommendation was his irreversible prejudice against Mr. Engle. Although Judge Santora's honest admissions are commendable, the views espoused have no place in a capital sentencing proceeding. The sentencing judge never assessed the reasonableness of the jury's recommendation in this case. This violates Tedder.

Recently, the United States Supreme Court held:

> [F]ull consideration of evidence that mitigates against the death penalty is essential . . . to . . . a "reasoned moral response to the defendant's background, character, and crime" . . . Our reasoning in Lockett and Eddinns thus compels a remand for resentencinn so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty" . . . When the

> choice is between life and death, that risk is unacceptable and incompatible with the commands of the Einhth and Fourteenth Amendments.

Penry v. Lynaugh, 109 S. Ct. 2934, 2951-52 (1989)(citations omitted)(emphasis added). The Court reaffirmed that continuing and close scrutiny must be given to death sentences to make sure that such a sentence is not imposed in error. In light of the new facts, Mr. Engle's case must be reexamined by an unbiased sentencing judge to assure that it comports with the eighth amendment.

The circuit court (Olliff, J.) summarily denied this claim, holding that it was raised on appeal. The court obviously did not consider the newly disclosed facts. Nothing in the order prepared by the State discusses this new evidence. Those facts surely warrant reconsideration of the claim. See Liahtbourne v. State, 549 So. 2d 1364 (Fla. 1989); Harich v. State, 542 So. 2d 980 (Fla. 1989); Harvard v. State, 486 So. 2d 537 (Fla. 1986).

The significance of these new facts is apparent even from the State's response to Mr. Engle's Petition for Writ of Habeas Corpus. In its response, the State strenuously argued that:

> It is very important that this issue be correctly defined. The issue of recusal in this action is limited to the issue as it existed prior to Engle's last appeal. The factual basis for this claim does not and cannot include Engle's recent motion or Judge Santora's recent recusal.

(emphasis in original). The State thus strenuously urges that this Court avoid the newly disclosed facts at all costs. This Court's own precedents, however, require that this Court not ignore the new evidence. Harvard; Lightbourne.

This claim involves facts that have only now come to light and which were not "of record" at the time of the appeal. The impropriety of this override is now manifest. Fundamental fairness and the dictates of the eighth amendment require that his claim be heard, for Mr. Engle's death sentence is plainly unconstitutional and unreliable. Mr. Engle is entitled to a new, proper

sentencing hearing before a judge who is not biased.''

CLAIM III

MR. ENGLE'S CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE RENDERED FUNDAMENTALLY UNFAIR AND UNRELIABLE, AND VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, DUE TO THE PROSECUTION'S DELIBERATE AND KNOWING PRESENTATION AND USE OF FALSE EVIDENCE AND ARGUMENTS, AND ITS INTENTIONAL DECEPTION OF THE JURY, THE COURT, AND DEFENSE COUNSEL.[19]

The prosecutors misrepresented the facts at Mr. Engle's trial, and did so intentionally. They knowingly presented false "evidence", and then used that false "evidence" as the centerpiece of impassioned arguments for a capital conviction and sentence of death. The Court, the jury, and defense counsel were more than misled -- they were lied to. False, misleading, inaccurate, and deceptive evidence and argument was presented and paraded before the jury, left uncorrected, and then blatantly used by the State in its arguments at guilt-innocence and sentencing. Mr. Engle's capital conviction and sentence of death resulted from this abrogation of rudimentary due process. Giglio v. United States, 405 U.S. 150 (1972). The process by which Mr. Engle was convicted and sentenced was a paradigm of the "corruption of the truth-seeking function of the trial process." United States v. Agurs, 427 U.S. 97, 103-04 and n.8 (1976).

---

[18]At a minimum, an evidentiary hearing is required, Lemon v. State, 498 So. 2d 923 (Fla. 1986), for the files and records not only fail to rebut the claim, the files and records now before the Court support it.

[19]Although the State has flatly refused to turn over any records regarding Mr. Engle's case contained in the state attorney's or sheriff's files, Mr. Engle presents this issue on the basis of information obtained from other sources -- the medical examiner's files, the records of the Department of Corrections, and codefendant Stevens' trial record. The State has nevertheless flatly refused to abide by the clear mandate of Florida's Public Records Act, see Fla. Stat. section 119.01, et seq. (1989), and the lower court refused to grant Mr. Engle's properly presented motion for disclosure under the Act. Given what this claim involves, the State's continuing withholding of information indeed raises serious questions. In light of State v. Kokal and Provenzano v. State, it cannot be disputed that the State and Judge Olliff were in error in refusing to allow Mr. Engle that to which the Act entitles him. This Honorable Court should order disclosure, in light of the clear mandate of Provenzano and Kokal, and particularly in light of the facts pled below and discussed in the text which immediately follows.

The prosecution wanted to show that a sexual battery and the damage done to the victim's vagina occurred while the victim was alive. The State needed to establish this to obtain a conviction for felony murder in the course of a sexual battery and thus to use it in support of its arguments for conviction, for the especially heinous, atrocious, and cruel aggravating factor, for the aggravating factor that murder occurred during a sexual battery, and for death.

Other than a tear in the victim's vagina, there was absolutely no other evidence to establish that the victim was sexually assaulted. According to Dr. Floro, the medical examiner, there was no trauma to the outer vaginal area (T. 369). He also testified that no semen was discovered (T. 381). This was corroborated by Mr. Platt, a serologist with the Florida Department of Law Enforcement (T. 748). Mr. Platt did indicate that he had found semen stains on the back seat of Mr. Sevens' car but could in no way link those stains to anyone and provided no testimony as to how long the stains could have been there (Id.).

The wound to the victim's vagina was thus the only evidence of a sexual assault. To obtain a conviction for felony murder, the State had to prove that the sexual assault and resulting injury occurred while the victim was alive. See McCall v. State, 503 So. 2d 1306 (Fla. 5th DCA 1987). In fact, the State in its closing argument conceded that much, arguing:

> [I]f the defendant assisted in any way in sexual battery, either by forcible intercourse or by forcing an instrument in her vaginal area and, in the course of that, at any time for any reason she died, he's guilty of first degree murder, even if he never intended her to die and he stood there and watched another man do it.

(T. 898).

Additionally, at sentencing, the most significant fact the prosecution argued, and on which the Court relied in determining the aggravating factor of "heinous, atrocious, and cruel," was the four-inch laceration in the victim's vagina. This was central to the State's arguments for death. The State in its penalty phase argument to the Court and jury emphasized this purported "fact":

> Then, they weren't satisfied with raping her in the back seat, they weren't satisfied with taking her out and putting a knife in the middle of her back three times and trying to put another rusty knife in her that wouldn't go in, they weren't satisfied with that, they weren't satisfied with putting a telephone cord around her neck or whatever it was around her neck, they weren't satisfied with that, they took a blunt instrument the size of a man's hand and put it in her vagina and tore her to pieces. It's ugly, ladies and gentlemen, it's ugly and I don't like to stand down here on Saturday morning and talk about it any more than you like to sit here and hear it but it happened in Duval County, Florida, on March 13, 1979, in this county that happened and he did it.

(T. 994-95). Judge Santora, in both his sentencing orders, repeatedly made mention of this purported injury to the victim. In discussing the aggravating factor of especially heinous, atrocious, or cruel the Court focused on the sexual battery and the resulting injury:

> Testimony established that a large object had been inserted into the victim's vagina causing a severe laceration. After being assaulted, she was brutally murdered. . . .
>
> The evidence established beyond any doubt that Kathy Tolin's murderers by their acts, cruelly inflicted unbelievable terror, wickedness, and cruelty all of which were designed to inflict a high degree of pain with utter indifference to the suffering of Kathy Tolin.

(T. 202-04). According to the court's original sentencing order this "mutilation" occurred "as she was dying." This "evidence" was also a cornerstone of the State's arguments for conviction and the State's theory at the guilt-innocence trial. This "evidence" was what the State relied on, at the original trial and sentencing, and at resentencing.

But this "evidence" was false. In fact, <u>the victim was alreadv dead when this purported injury occurred</u>. Thus, the "injury" could not be used to convict, or to properly find the aggravating factor of heinous, atrocious, or cruel, or to find anything else warranting a death sentence.

At Mr. Engle's trial, Dr. Floro, the medical examiner, testified:

> Q Dr. Floro, were you able to determine in your observation and analysis of the vaginal damage if Mrs. Tolin was alive or dead when that damage was committed?
>
> A <u>She was alive</u>, sir.

Q How can you make a determination

A Okay. Inside the vagina. I have recovered about five spoonfuls of blood and Mrs. Tolin at that time was not in her period, so it could not be from regular menstruation; it came, the blood came from the laceration. Again, if she were dead, there should be no blood in that vaeinal cavity.

(T. 370). According to Dr. Floro, the amount of blood in the vagina, "five spoonfuls of blood," led him to conclude that the victim was alive at the time of the injury. This conclusion was critical to the State's argument for conviction, for the heinous, atrocious, or cruel aggravating factor, and for death.

But the State must have known that this was a lie: the medical examiner's records and the State's presentation at codefendant Stevens' trial make this evident. Dr. Floro certainly knew it was false. His own autopsy report unquestionably notes that only a fraction of that amount of blood was found in the victim's vagina:

The uterus, the fallopian tubes and the ovaries are unremarkable. Approximately 4 cc. of blood admixed with mucus is present in the vagina.

(R. App. 340). There is a considerable difference between "5 tablespoons" and "4 cc.'s of blood." Dr. Floro, in fact, testified that "there are 15 cc's per tablespoon" (T. 375) (emphasis added). Thus his testimony of 5 tablespoons, or 75 cc's, is drastically different from his autopsy report of 4 cc's. Such a divergence cannot result from a misstatement or poor memory. Dr. Floro and the prosecution knew the significance of that information and knew that the amount of blood was dispositive to this crucial issue.

At co-defendant Stevens' trial, Dr. Floro's testimony concerning his findings on this very issue varied significantly from what he testified to at Mr. Engle's trial. Dr. Floro there testified that he found only 2 tablespoons of blood in the victim's vagina. Mr. Stevens' counsel then pressed Dr. Floro on the certainty of his statement:

Q Doctor, if that blood -- that blood could have been there

two ways if I understand what you've been saying. That blood could be there due to active bleeding of a live person or it could be there if what you said a while ago and if it happened the way I said it by a body that may have been dead and the activity of dragging, pulling that blood through the veins toward the bottom or the gravity forcing it out, now, one of the two ways; am I correct?

A The blood that I recovered there was the result of an active bleeding.

Q How can you tell the difference between blood that's from active bleeding and from non-active bleeding 36 hours later after the cause of a person is dead?

A I'm referring to the amount; the passive bleeding, you wouldn't record that much blood, it must have been an active bleeding.

Q Doctor, you're talking about passive bleeding from a comatose or still body, are you not?

A A dead body, okay? A dead body would still bleed passively, we call it passively due to the Dull of gravity and it will let an amount to two tablespoons full.

(R. App. 381-82)(emphasis added). Dr. Floro then admitted that two tablespoons of blood could have resulted from passive bleeding, and that he could not conclude that the victim was alive at the time of the injury. No such admission was made at Mr. Engle's trial.

Of course, two tablespoons or approximately 30 cc's of blood is significantly different than "4 cc's of blood admixed with mucus." If Dr. Floro opined that 30 cc's of blood could have resulted from passive bleeding, as he did at co-defendant Stevens' trial, then it is beyond any doubt that less than 4 cc's, as he noted in his autopsy report, could have, and would have, resulted from passive and not active bleeding, and that the victim was most likely already dead. By Dr. Floro's own admissions at the Stevens trial and in his autopsy report, the victim would have been dead when any injury occurred, if any injury was inflicted at all.

At Mr. Engle's trial, however, Dr. Floro and the State boldly paraded the "active bleeding" ("5 tablespoon") theory. There is, of course, a considerable difference between "active" and "passive" bleeding: the victim is not alive

when the latter occurs. There is a considerable difference between "4 cc's admixed with mucus" (what Dr. Floro said in his report) and "5 tablespoons" or 75 cc's of blood (what he said at Mr. Engle's trial).[20] If the former is true, the victim had already died; if the latter is true, she was alive. If two tablespoons (30 cc's) can result from "passive" bleeding, as Dr. Floro said at the Stevens trial, certainly 4 cc's would result from "passive" bleeding.

Based upon the true facts set forth in the autopsy report, that Dr. Floro found only 4 cc's of blood and mucus, he would have to conclude there was no "active" bleeding. Dr. Floro would have to conclude that the victim was dead at the time of the injury.

This information clearly establishes that the prosecution knew it was presenting inaccurate "facts" to Mr. Engle's jury. The lower court erred in refusing to conduct an evidentiary hearing on this claim, for Mr. Engle pled more than sufficient facts to warrant full and fair evidentiary resolution. See Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Squires v. State, 513 So. 2d 138 (Fla. 1987). Mr. Engle pled that the State deliberately presented this false evidence because the State knew that it was essential to establishing the heinous, atrocious, and cruel aggravating factor, and thus to a death sentence. Judge Olliff's refusal to conduct an evidentiary hearing was fundamentally at odds with this Court's rules governing the disposition of Rule 3.850 actions. Gorham; Squires. Judge Olliff compounded the harm by signing, verbatim, the State's proposed order denying Rule 3.850 relief, and thus by accepting the State's invitation to render findings of fact without any evidentiary support.

It is noteworthy that although he signed the State's Order, Judge Olliff never found, and the State could not ask that the court find that Mr. Engle was not prejudiced as a result of this error. This is significant because of the

---

[20]As noted, Dr. Floro himself testified that there are "15 cc's" per "tablespoon".

strict burden imposed on the State by United States v. Baaley, 473 U.S. 667 (1985). Under Bagley (incorporating the analysis of Azurs), to establish prejudice from prosecutorial presentation of false evidence, a defendant need only show that the error may have affected the outcome at either milt-innocence or sentencing. Since the State's use of false or misleading evidence corrupts the trial proceedings, Bagley; Agurs, the burden on the petitioner is much, much lower, and the burden on the State much higher, than that involved in the situation where only the withholding of evidence is alleged. Here, Mr. Engle alleged that the prosecution presented false and misleading evidence, and presented specific facts to support the claim. The lower court erred in accepting the State's order verbatim without hearing the facts at a hearing.

Indeed, Mr. Engle's allegations that the State lied to and misled the jury and court are even more substantial than those found sufficient to warrant an evidentiary hearing and post-conviction relief in Troedel v. Wainwrizht, 667 F. Supp. 1456 (S.D. Fla. 1987), affirmed sub nom., Troedelv. Dugger, 828 F.2d 870 (11th Cir. 1987). In Troedel, a claim was presented that the State misled the jury and court because the State's gunpowder residue expert testified differently at Troedel's codefendant's trial. The federal district court conducted an evidentiary hearing -- which the lower court here denied Mr. Engle -- and at the hearing it was established that the State could not but have known about the discrepancy, but took advantage of it. Mr. Engle's allegations are even more substantial; the discrepancies between Dr. Floro's report and testimony at the Engle and Stevens trials are even more substantial, and more harmful, than the discrepancy at issue in Troedel. Mr. Engle, however, has not been allowed an evidentiary hearing.

The lower court erred. There can be no doubt that the falsities herein at issue had a substantial effect on the conviction and sentence. Under no construction could it be said that this testimony did not affect this case. A

presentation of the true facts would have precluded a conviction of felony murder during the course of a sexual battery and the use of the purported injuries to the victim as aggravating evidence. Here, Mr. Engle has more than shown that the errors "may have" affected the result. Bagley; Agurs. Only with this false testimony could the court have found the aggravating factors that "the victim had been the subject of a violent sexual battery," that the murder took place during the course of a sexual battery, that it was heinous, atrocious or cruel, and thus overridden the jury and imposed death.

Indeed, in an admission quite similar to the one testified to by the prosecutor in Troedel, after the trial, the prosecutor in Mr. Engle's case wrote to Dr. Floro, stating:

> On behalf of Hank Coxe, the citizens of Jacksonville and myself, I wish to personally thank you for the time and co-operation you contributed to the successful prosecutions of Gregory Scott Engle and Rufus Eugene Stevens. This case has reconfirmed our position that the effectiveness of the criminal justice system depends on the willingness of everyone involved to make the sacrifices you have made.

At the bottom of the letter is a hand-written note complimenting Dr. Floro and indicating that his "testimony was devastating" (R. App. 334). It certainly was. But it was devastatingly untrue.

Before the Rule 3.850 trial court, the State responded to this claim by acknowledging that there are "discrepancies in the quantities of blood noted by Dr. Floro in his testimony in the Stevens' [sic] trial, his written report and his testimony in this case." Nevertheless, no effort to provide an explanation for these blatantly obvious discrepancies was made. The State then opposed an evidentiary hearing.[21] The State's description of these discrepancies as inconsistencies is quite an understatement. In fact, Dr. Floro's testimony at Mr. Engle's trial differs so drastically from his later testimony at the

---

[21] Cf. Agan v. Dugger, 835 F.2d 1337 (11th Cir. 1987)(Noting the court's disappointment at the Florida Attorney General's opposition to evidentiary hearings in cases in which the need for an evidentiary hearing is clear).

codefendant's trial and his earlier findings set forth in the autopsy report, that one can only conclude that it was false evidence, even on the basis of the record now before the Court. Given the State's failure to in any way contest the facts pled by Mr. Engle, the granting of relief by this Court now would not be inappropriate. At a minimum, an evidentiary hearing is certainly proper.[22]

---

[22]Claims of prosecutorial misconduct are classic post-conviction issues requiring an evidentiary hearing for their proper resolution. Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Gorham; Squires. Nevertheless, the circuit court summarily dismissed this claim, signing the State's order which stated that the inconsistencies alleged "do not prove or even give rise to a reasonable probability" of subornation of perjury by the State. The facts presented show more than mere inconsistencies, the significance of which the State, and therefore the circuit court failed to understand, Judge Olliff in fact noted at the argument conducted on October 15, 1989:

> All right. I have of course read Dr. Floro's testimony, the direct and limited cross examination -- well, read all the evidence. But I read that with particular inferences because that was an issue brought up by -- in the 3.850 motion by defense counsel. And although there is a difference as to the amount of blood that the doctor found at the time of the autopsy, it's -- there is a difference, but not a great amount of blood in any event. There is -- I don't find that doctor perjured himself, I don't find from the testimony that the State is spurn [sic] to perjury, doctor lying, it's inconsistent -- inconsistent but only in the amount.

(H. 41-42)(emphasis added). It is simply inconceivable to believe that less than 4 cc's (autopsy report)(passive bleeding), 30 cc's (Mr. Stevens' trial) (likely passive bleeding), and 75 cc's (Mr. Engle's trial)(active bleeding), were differences that were not "great". These differences are obviously "great" and are certainly more than "mere" inconsistencies. These differences were central to the State's arguments for Mr. Engle's conviction and death sentence. Without Dr. Floro's "75 cc" testimony, the State had no proof of sexual battery (and thus no proof on its felony murder and aggravation theories) to present at Mr. Engle's trial.

Further evidence that the circuit court failed to understand this claim is shown by the very words used by the court when it signed the State-prepared order denying relief:

> The Defendant's petition also fails to allege or show any motive, by the State or Dr. Floro, to suborn or commit perjury.

First, a defendant need not plead a "motive" -- the fact that the State used false or misleading evidence is itself enough to warrant relief, whatever the "motive", as the United States Supreme Court held as long as five decades ago. Mooney v. Holohan, 294 U.S. 103 (1935); see also Agurs, supra; Bagley, supra; Napue v. Illinois, 360 U.S. 264 (1959); Giglio V. United States, 405 U.S. 150 (1972); Bradv V. Maryland, 373 U.S. 83 (1963). Second, "motive" was pled and is obvious: the State's desire for a conviction and a death sentence, further

(continued...)

Without an evidentiary hearing, and apparently without even a rudimentary understanding of the claim, the circuit court made findings of fact:

> I don't find that doctor perjured himself, I don't find from the testimony that the State is spurn to perjury, doctor lying it's inconsistent -- inconsistent but only in the amount.

(H. 41-42). The discrepancies pled are blatant and unexplainable from the record. They relate to a material aspect of Mr. Engle's conviction and death sentence. The allegations must be taken as pled at this juncture, Blackledge v. Allison, 431 U.S. 63 (1977), for Mr. Engle has pled more than sufficient facts to warrant evidentiary resolution, Gorham; Squires; Troedel, and nothing in the "files and records" shows "conclusively" that Mr. Engle is entitled to "no relief." Lemon v. State, 498 So. 2d 923 (Fla. 1986). An evidentiary hearing was and is warranted.

CLAIM IV

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE AND THE CIRCUIT COURT'S REFUSAL TO ORDER ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. ENGLE IN THE POSSESSION OF THE STATE'S ATTORNEY AND THE SHERIFF OF JACKSONVILLE VIOLATED THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND VIOLATED FLORIDA LAW.

Mr. Engle made appropriate requests for disclosure of state attorney and law enforcement files pursuant to Fla. Stat. section 119. The State Attorney and Sheriff flatly refused to comply with the clear mandate of the Act and expressly took the position that they would disclose nothing. A proper motion was filed with the circuit court, requesting that the court direct disclosure. The State opposed the motion. Judge Olliff adopted wholesale the State's proposed order denying disclosure of anything. In Mr. Engle's case, the Act has not been complied with. As this Court's recent opinions in State v. Kokal, No.

---

[22](...continued)
demonstrated in the State's "thank you" to Dr. Floro ("[Y]ou did a great job -- Your testimony was devastating" (R. App. 334)). The sexual battery and resulting injury, a factor Judge Santora described as "mutilation" justifying the finding of "heinous, atrocious, and cruel," was obviously critical at trial and sentencing.

74,439 (Fla. April 19, 1990), and Provenzano v. State, No. 74,101 (Fla. April 26, 1990), make crystal clear, the lower court's ruling was erroneous. This case should be remanded to the circuit court with instructions that an order issue directing the State to comply with the Public Records Act. This is particularly necessary in this case given the facts involved in the preceding claim. As in Provenzano, slip op. at 17-18, a remand with instructions that the circuit court direct disclosure is required, while

> [t]he two-year time limitation of Florida Rule of Criminal Procedure 3.850 shall be extended for sixty days from the date of such disclosure solely for the purpose of providing [Mr. Engle] with the opportunity to file a new motion for postconviction relief predicated upon any claims under Brady v. Maryland, 373 U.S. 83 (1963), arising from the disclosure of such files. In this manner, [Mr. Engle] will be placed in the same position as he would have been if such files had been disclosed when there were first requested.

The same result is warranted here.

CLAIM V

GREGORY SCOTT ENGLE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Engle was denied the effective assistance of counsel at the guilt-innocence and penalty phases of his capital proceedings. Counsels' failure to fulfill the overarching duty to investigate and prepare directly resulted in Mr. Engle's conviction and resulting death sentence, and directly resulted in the imposition of an improper sentence of death on resentencing. The difference between the Mr. Engle presented at trial and the Mr. Engle whose background and mental health problems would have come to light had counsel properly prepared is startling. The omissions and errors of counsel are glaring and refute any principled basis upon which the characterization of tactic or strategy can rest. Of course, without an evidentiary hearing, no such finding can be made, and the lower court erred in accepting the State's bizarre invitation to reject this claim because of what counsel said in his opening statement at the original trial -- something that does not speak to the lack of investigation concerning

sentencing and that has nothing to do with the lack of presentation at the resentencing. In any event, the claim was that trial counsel did not investigate; thus nothing counsel said in opening can be deemed the result of a reasonably investieated strategy; in fact, Mr. Engle's submission was that there was no strategy at all, but a presentation without reasonable preparation.

The specific omissions and errors of counsel are set forth below with their attendant legal analyses. Each individually warrants a full and fair evidentiary hearing and ultimately the relief of a new trial and/or sentencing proceeding. All of the claims listed below are classic examples of ineffective assistance of counsel which were not, and could not have been, raised on direct appeal. An evidentiary hearing was and is required. Mr. Engle's counsel were ready to conduct one. The lower court erred in failing to allow one.

In Strickland v. Washineton, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland v. Washineton requires a defendant to plead: 1) unreasonable attorney performance, and 2) prejudice. Mr. Engle pled each. He pled the lack of proper investigation. Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979). Here, beyond the failure to investigate and prepare mitigation, the errors of counsel in the sentencing and resentencing proceedings (and later, of counsel on appeal) are strikingly similar to those upon which this Court granted relief in Mr. Engle's codefendant's case. See Stevens v. State, supra. Here also counsel failed to properly challenge the State's case in aggravation, including those aggravators waived before the jury. See Bullinnton v. Missouri, 451 U.S. 430 (1981). Indeed, the State waived two aggravators before the jury which it later urged the judge to find and which

Judge Santora did find at the resentencing. Neither trial-level nor appellate counsel litigated this important issue, and the same prejudice accrued to Mr. Engle as that which was found to result from the ineffectiveness of counsel in the case of codefendant Stevens. See Stevens v. State, supra.

Moreover, counsel has a duty to ensure that his or her client receives appropriate mental assistance, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's level of mental functioning is at issue. Mauldin, supra; United State v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

Importantly in Mr. Engle's case -- contrary to the findings given by the State to and accepted by the circuit court -- every expert involved at the time of the original and resentencing proceedings has agreed that had necessary information been provided to them, and had the relevant questions been posed by counsel (e.g., as to the statutory mental health mitigating factors), compelling mitigation would have been adduced.

The lower court erred in accepting the State's invitation to render findings of fact without allowing a hearing. At the requisite hearing, Mr. Engle would have established what his motion alleged: that the unreasonable errors, omissions, and failings of former counsel, singularly and collectively, are more than sufficient to warrant Rule 3.850 relief. Moreover, as discussed in the accompanying petition for writ of habeas corpus and herein, the omissions of appellate counsel are also sufficient to warrant habeas corpus relief.

A. FAILURE TO MOVE FOR SUPPRESSION OF STATEMENTS[23]

Trial counsel failed to move to suppress Mr. Engle's statements on fourth amendment grounds. Mr. Engle was arrested without a warrant and on the basis of information which did not amount to probable cause. The latter makes his case

[23]This section of Claim V also incorporates Claim XIV of Mr. Engle's Rule 3.850 motion.

different from the allegation raised by codefendant Stevens. See Stevens, supra. In the Stevens case there was probable cause, but no warrant.

The lack of probable cause in the case of Mr. Engle was established at Detective Parmenter's deposition, where the insufficiency of the evidence provided by Hamilton became apparent. Brown v. Illinois, *422* U.S. 590 (1975), and Dunaway v. New York, *442* U.S. 200 (1979), had certainly established the unconstitutionality of investigatory arrests such as the arrest in this case. There is no possible argument that the defense would acquiesce in the admission of the statements for some strategic reason. The issue was simply missed.

Mr. Engle on the night of March 20, 1979, after his arrest, provided the police with various statements which indicated that he was with Mr. Stevens throughout the night of the incident. James Lester Parmenter, the detective principally involved in investigating this matter, testified concerning Hamilton's tip at a deposition on May 8, 1979 (p. *25):*

> I had no idea at the time I received it that it was correct. It was something that had to be checked out.

He also admitted that he had no other evidence against Mr. Engle other than what Hamilton had told him (p. *26).*

Parmenter made the fact that there was no probable cause even clearer in an August 17, 1979 Jacksonville Journal article (p. 8, col. 2) in which he stated that "the Hamilton statement left police 'a million miles from making a case'" against Mr. Stevens and Mr. Engle. Parmenter also told the reporter that the "police would have had to turn the two loose had Stevens not confessed in a lengthy interrogation following his arrest."

Parmenter's skepticism about Hamilton's accusations was certainly warranted by the fact that Hamilton refused to give the police any information until after it occurred to him that he might obtain the $5,000 reward which had been offered by the convenience store's management (Parmenter deposition, pp. *5-6).* Thus the

record establishes that there was no probable cause for Mr. Engle's arrest.

Parmenter arrested Mr. Engle at gunpoint and without a warrant at about 3:00 a.m. on March 20, 1979, while Mr. Engle was asleep in bed in his home (T. 551). Miranda warnings were given to Mr. Engle at the time of his arrest and again at about 6:30 a.m. shortly after he arrived at police headquarters. Mr. Engle was thereafter continuously interrogated until about 11:00 a.m. (T. 561). During that interrogation Mr. Engle admitted being with Mr. Stevens on the night of the offenses, but denied that he committed the crimes (T. 561). Parmenter testified to those admissions at the trial.

The United States Supreme Court held in Payton v. New York, 445 U.S. 573, 576, 589-90 (1980), that the fourth amendment requires that, in the absence of exigent circumstances, a warrant must be obtained before a suspect is arrested in his home. The Court in United States v. Johnson, 457 U.S. 537, 562 (1982), held Payton retroactive to all cases where the conviction was not yet final on the date Payton was decided. Mr. Engle's appeal to this Court was not decided until September 14, 1982. Thus, Payton is clearly applicable to this matter.

Mr. Engle was arrested in his home without a warrant. There was no probable cause. There were no exigent circumstances. See Michigan v. Tyler, 436 U.S. 499, 509 (1978). The time it would have taken the police to obtain a warrant would not have jeopardized anyone's safety. There was no "hot pursuit." There was no reason for the police to believe that Mr. Engle, who did not flee in the week following the crime, would flee in the hour or two it would take to obtain a warrant. The statements Mr. Engle made to the police were a direct fruit of this unconstitutional arrest without a warrant. The statements should have been suppressed.

Detective Parmenter's testimony and statements to the press make it crystal clear that the police did not have probable cause to arrest Mr. Engle until after they obtained his incriminating statements. Those statements were a

direct fruit of the arrest without probable cause and as such were plainly subject to suppression on fourth amendment grounds. Taylor v. Alabama, 457 U.S. 687 (1982); Dunaway v. New York, 442 U.S. 200 (1979); Brown v. Illinois, 422 U.S. 590 (1975).

The Supreme Court stated in Taylor v. Alabama, 437 U.S. at 690:

> A confession obtained through custodial interrogation after an illegal arrest should be excluded unless intervening events break the causal connection between the illegal arrest and the confession ....

Mr. Engle's arrest was illegal both because of the absence of a warrant and also because of the absence of probable cause.[24]

However, the circuit court in its order denying relief accepted the State's presentation that:

> As noted in the recent companion decision in Stevens v. State, ___ So.2d (Fla. October 5, 1989), no viable Fourth Amendment claim for a warrantless in-house arrest existed in 1979. Therefore, counsel could not have foreseen this issue. Payton v. New York, 445 U.S. 573 (1980), did not reject Florida's position until after this trial.

---

[24]To determine whether the link between the illegal arrest and the subsequent statement is close enough, the Court in Brown v. Illinois, 422 U.S. at 603-04, set forth the following factors, which were reaffirmed in Taylor v. Alabama, 457 U.S. at 690:

> [t]he temporal proximity of the arrest and the confession, the presence of intervening circumstances, . . . and, particularly, the purpose and flagrancy of the official misconduct.

In Taylor, sufficient temporal proximity was found where the confession was made six hours after the illegal arrest. Here statements were taken from Mr. Engle shortly after his arrest and the taking of statements was concluded within less than five hours of his arrest. Similarly, there was no intervening event which breaks the connection in this case. Mr. Engle was subjected to continuous interrogation from the time he arrived at police headquarters. The giving of Miranda warnings, even if done three times, does not break the connection. Taylor at 691. Here, as in Taylor:

> . . . the police effectuated an investigatory arrest without probable cause, based on an uncorroborated informant's tip, and involuntarily transported petitioner to the station for interrogation in the hope that something would turn up.

Id. at 693. As to the absence of a warrant, the Supreme Court gave notice in Coolidge v. New Hampshire, 403 U.S. 443, 474-75 (1971), that warrantless seizures inside a person's home -- in the absence of exigent circumstances -- are "per se unreasonable."

In so holding, the court failed to understand the basis for this claim: that Mr. Engle was arrested without probable cause. Unlike Stevens, Mr. Engle does not rely solely upon Pavton v. New York. Finally, unlike Stevens, Mr. Engle's case was remanded for a resentencing in 1984. This claim should also have been asserted at that time. Counsel unreasonably failed to do so. An evidentiary hearing is warranted.

B. FAILURE TO OBJECT TO INADMISSIBLE STATEMENTS OF CO-DEFENDANT[25]

Trial counsel failed to object to the introduction into evidence of the statements of Mr. Stevens which implicated Mr. Engle. Witnesses at Mr. Engle's trial testified to numerous inadmissible hearsay statements made by Mr. Stevens to others. All of these statements were admitted in violation of Mr. Engle's sixth and fourteenth amendment rights, and contrary to the trial court's original ruling to sever the trial in accordance with Bruton v. United States, 391U.S. 123 (1968).

The most damaging statement was elicited from Mr. Hamilton. On direct examination, he testified that Mr. Stevens had told him:

> We got to get rid of Scott's [Mr. Engle's] knife because that's what it was done with.

(T. 440). This was the only information that directly tied Mr. Engle's knife to the stabbing of the victim. Mr. Engle had no way to attack that critical statement. He was denied the opportunity to confront that "self serving," Engle, supra, statement of Mr. Stevens.

---

[25]This section of Claim V also incorporates Claim XV of Mr. Engle's Rule 3.850 motion. In dismissing this claim the lower court ignored the fundamental error presented and ignored this Court's own recognition of the devastating damage to Mr. Engle's case resulting from his co-defendant's statements. See Engle v. State, 438 So. 2d 803 (Fla. 1983).

All of the admitted statements by Mr. Stevens shifted blame to Mr. Engle. They are the very type of statements condemned in Bruton.[26] If not for the unconstitutionally-admitted Bruton evidence, the overall record would have had virtually no evidence that Mr. Engle was involved in the actual killing.

In Bruton v. United States, the Supreme Court held that the right of cross-examination is violated by the admission into evidence of a non-testifying co-defendant's statements implicating the defendant in the commission of the crime. As this Court stated in Hall v. State, 381 So. 2d 683, 687 (Fla. 1979):

> The crux of a Bruton violation is the introduction of statements which incriminate an accused without affording him an opportunity to cross-examine the declarant.

It is indisputable that the statements made by Stevens to the various witnesses both incriminated Mr. Engle and were admitted without Mr. Engle having an opportunity to cross-examine Stevens. This unconstitutionally-admitted evidence did not simply involve a few small items of proof introduced during three days of testimony. Rather, the prosecutor used the unconstitutionally-admitted statements to argue Mr. Engle's involvement in the actual killing. In these circumstances, fundamental constitutional error occurred. This Court attempted to protect Mr. Engle's rights by its first remand for a new sentencing. Defense counsel, however, idly sat by while the statements were admitted at trial, notwithstanding the fact that these very statements were the reason for the severance, This was unreasonable and prejudicial performance.

No conceivable strategy justified the lack of objection to Hamilton's

---

[26]According to Mrs. Wemmer, Mr. Stevens told Mr. Engle that Nathan Hamilton might be turning them in for the murder of the store clerk (T. 481-83, 487). Mr. Day testified that Stevens further indicated that the police were over at Hamilton's house, that Hamilton was going to run his mouth, and "we got to get out of here and run" (T. 499, 502, 507). Mr. Day related that Mr. Stevens had indicated that he wanted to take off and run and that he had told his wife to pick up his check, that he was going to take off (T. 508). The State called Mr. Custer to further emphasize and highlight these improper statements. Mr. Custer also testified that Mr. Stevens had told Mr. Engle that Mr. Hamilton was "going to pin it on him," and that they had to get out of town (T. 517).

testimony as to what codefendant Rufus Stevens had said. This evidence alone in the entire trial directly implicated Mr. Engle as a participant in the killing. Nor would any conceivable strategy justify the acquiescence in the admission of Stevens' statements. An evidentiary hearing was required.

C. FAILURE TO INVESTIGATE AND TO REQUEST A "RICHARDSON" HEARING

During the State's case, a kitchen knife was identified by Detective Parmenter. The record reveals that the trial counsel was "surprised" by the knife. The prosecutor indicated that Stevens had admitted that that was the knife he had attempted to stab the victim with. The following colloquy ensued:

> MR. AUSTIN: If you want to bring it out, Harry, be warned.
>
> MR. SHORSTEIN: I didn't know about the knife.
>
> MR. COXE: Judge, so you understand and everybody understands what happened, Stevens had offerred to plead guilty to first degree murder and testify against Engle and our condition was he pass a couple of polygraph tests about what happened. In the course of the polygraph preparation, Mr. Stevens substantiated his account of what he originally confessed to as how, to how the girl was stabbed and everything else and brought up this particular knife and mentioned and told Officer Parmenter that he could go out and find it underneath his trailer in the grass.
>
> Okay. And I just want to make sure you are aware of that before you walk into something.
>
> MR. SHORSTEIN: Well, I don't represent Rufus Stevens and I don't know that he has any basis, no standing at all.

(T. *623).*

At that time, trial counsel, obviously surprised by the knife, should have requested a hearing. Richardson v. State, *246* So. 2d 771 (Fla. 1971). Instead, trial counsel proceeded blindly without all of the facts and without time to contemplate the problem. By proceeding blindly, he only aggravated the lack of preparation.

Trial counsel's lack of preparation prevented him from adequately dealing with this critical piece of evidence. This was highlighted during his closing when trial counsel, apparently again forgetting about the second knife, argued:

> . . . Rufus started out, "Let's rob the Best Western," and then, "Let's rob this particular Majik Market, take that girl out of the Majik Market," but the important point because sometimes when somebody makes a story up, there are truthful parts in it, if you're going to fabricate a story, it's not going to be totally false and, again, this can only relate from your own personal experience.
>
> But the important point that I think he made was he said he didn't do it, naturally, he told you he didn't do anything like that, even though he said the reason was he thought that the woman at the Majik Market could identify him. But whatever reason he had, he did say that all he had to do was say yes, and the crime was ready to occur, which indicates that Rufus had the present ability to commit the crime that he intended to commit.
>
> He didn't say Nathan, do you have a knife we can use to rob this place, they're talking about the Best Western, so apparently even if you might conclude that he could have because the testimony is that Rufus is strong and Nathan appears to be pretty strong, that they could have robbed the woman at the convenience store without a weapon.
>
> I don't think it's fair to assume that but, if you do, I don't think you can carry the assumption further that they could rob the Best Western without a weapon.

Of course, the State argued that Rufus Stevens did have a knife, the one found under his trailer.

Counsel's trouble with the surprise knife resurfaced during his closing:

> Then, Parmenter finds the broken knife that came from under Rufus Stevens' house and, very candidly, on this point I can't tell you the significance of the knives, that broken knife. I'm not going to argue or debate the point, I think it's somewhat absurd because I don't know what it proves one way or another when they tell me that that broken knife cannot penetrate a female's body. You can take it with you and you see because it scratched me pretty well when it was just handed to me and you tell me if you insert that with the pointed edge or even with the blunt edge, use your own common sense, everyday experience, to determine whether you think that would penetrate.
>
> But the point that makes it pretty much impossible is there's no indication, assuming that knife that they found whether at Rufus Stevens' house or wherever, that it had a point at the time of the murder.

There is no doubt that trial counsel was unprepared to deal with this critical piece of evidence, and that the lack of preparation compromised his client's case. There can be no tactical or strategic reason for counsel's failure to investigate and anticipate the State's use of this second knife.

There is even less of a reason for the failure to litigate the Richardson issue. An evidentiary hearing is appropriate.

D. FAILURE TO ADEQUATELY CROSS-EXAMINE THE MEDICAL EXAMINER

Trial counsel was ineffective in his cross-examination of Dr. Floro. The most significant fact that the prosecution argued to obtain a conviction of felony murder and to establish the aggravating factor of "heinous, atrocious, and cruel" was the laceration in the victim's vagina. Dr. Floro testified that the victim was alive at the time of the injury based upon the purported amount of blood in the vagina.

According to Dr. Floro, that amount of blood, 5 tablespoons, led him to conclude the victim was alive at the time of the injury. Trial counsel did not press Dr. Floro on that issue. This devastating opinion went unchallenged. Although counsel's failure in this regard is likely explained by the State's misconduct, at this juncture the claim has been alternatively pled. An evidentiary hearing is required to determine where the error lies. See, e.g., Squires v. State, 513 So. 2d 138 (Fla. 1987).

The circuit court in its order denying relief on this issue made a finding of fact without the benefit of an evidentiary hearing, a finding which the record belies. The court found that:

> Counsel, as an announced matter of trial strategy, limited his cross of Dr. Floro to minimize the inflammatory evidence the doctor had to offer.

In fact. the record indicates that there was no such "announced matter of trial strategy" and that trial counsel did cross-examine Dr. Floro on several issues regarding his findings concerning the injury to the victim's vagina. Trial counsel specifically questioned Dr. Floro about the injury to the victim's vagina and the amount of bleeding from that injury (R. 374). Additionally, trial counsel cross-examined Dr. Floro about the stab wounds and specifically whether the victim was alive at the time of the stabbing (R. 384). All of this

conflicts with the circuit court's findings that trial counsel sought to minimize the inflammatory evidence the doctor had to offer, a finding made without a hearing and a finding which is in contradiction of the facts pled by Mr. Engle. Counsel had the right theory, but either failed to properly investigate the true facts or, more likely, had to deal with the State's misconduct which resulted in the presentation of false and misleading facts. An evidentiary hearing is required.

E. FAILURE TO OBJECT TO JURY INSTRUCTION[27]

Trial counsel failed to object to the jury instruction which in effect directed a finding of premeditation as a matter of law (T. 959). The unconstitutionality of presumptions such as the premeditation charge in this case had been recognized by the courts at least since United States v. Morrisette, 342 U.S. 246, 274-75 (1952), which was reaffirmed in United States v. United States Gypsum Co., 438 U.S. 422, 435, 446 (1978). See also Mullaney v. Wilbur, 421 U.S. 684 (1975). Counsel's failure to object could only have been based on ignorance of the law, and no tactical decision can be ascribed to attorney conduct founded on ignorance.

Since there was no dispute that a homicide occurred, the court's charge on the premeditation element certainly was sufficient to effectively direct a verdict of guilty of murder in the first degree, This was surely prejudicial.

F. FAILURE TO RAISE VOLUNTARY INTOXICATION DEFENSE

Counsel failed to present an available mental health defense through the calling of mental health experts, to explain the effects of alcohol and cocaine on the ability to form specific intent. See Gurganus v. State, 451 So. 2d 817 (Fla. 1984). See also section G, infra. The evidence was readily available, but uninvestigated by counsel.

[27]This section of Claim V also incorporates Claim XVI of Mr. Engle's Rule 3.850 motion.

G. FAILURE TO RAISE COMPETENCY TO STAND TRIAL

Counsel failed to raise the question of Mr. Engle's lack of competency to stand trial. There was no tactical or strategic reason for this, as discussed in the Rule 3.850 motion.

H. FAILURE TO SEQUESTER JURY DURING DELIBERATIONS

Trial counsel was ineffective in not insisting that the jury be sequestered during deliberations. The jury had already indicated their need for further discussion and had requested further instructions. There could be no sound tactical reason for allowing the jury to leave unsequestered, particularly in light of the deliberations in this case. See Johnson v. Wainwright, 498 So. 2d 938 (Fla. 1987).

I. DEFENSE COUNSEL'S FAILURE TO PROVE AVAILABLE MITIGATION AND TO ADEQUATELY *ARGUE* AGAINST THE AGGRAVATING FACTORS AT THE ORIGINAL SENTENCING AND AT THE RESENTENCING

Proper evaluation of aggravating and mitigating factors is essential to ensure that the capital sentencing process is an individualized and reliable determination and that it results in a sentence that is not arbitrary or capricious. The purpose of a capital sentencing scheme is to "narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 877 (1983), and to provide for a fundamentally fair and reliable result. All possible mitigating factors, at the very least all possible statutory mitigators, must be thoroughly researched and investigated by defense counsel to ensure that the death penalty is properly applied.

Mr. Engle was denied effective assistance of counsel because of his attorneys' failures at either sentencing proceeding to properly present mitigating factors that the court should have found. In particular, counsel could have presented compelling evidence of co-defendant domination, intoxication, a history of debilitating drug and alcohol abuse, Mr. Engle's substantially diminished emotional/mental age, diminished capacity, emotional

disturbance, brain damage, history of mental illness, psychiatric and psychological impairments, and Mr. Engle's lack of significant history of prior criminal activity. At each proceeding, counsel could have established a wealth of mitigation, but did not.

The sentencing court based its finding that Mr. Engle did have a significant history of criminal history in part on a psychiatric evaluation that should not have been considered in the first instance, but counsel failed to object. Cf. Estelle v. Smith, *451* U.S. *454 (1981).* In addition, the court considered a previous arson conviction as evidence of significant prior criminal history. However, evidence was available, but never presented, to show that Mr. Engle did not set the fire. Counsel never investigated this. Mr. Engle's cousin, Mark Engle, described:

> In *1974* Scotty and I, along with some other kids, were arrested for burning some stuff in a building. The sprinkler system came on and no real damage was done. As usual, Scotty was hanging around with younger kids. All of us were treated as juveniles but because Scott was older he was treated as an adult. At that time he was living at my house because his brother, sister and mother were in a two bedroom house that was too small for all of them. Scotty did not set the fire. One of the other kids started the fire. Scotty did not put them up to it either. He was just there when it happened.

(Affidavit of Mark Engle).

In addition, one of the officers who investigated the arson acknowledged that Mr. Engle did not set that fire:

> The arson charge is an example of how easy it is for others to mislead Scott. The investigation of the arson charge revealed that Scott did not start the fire and was just going along with what the others wanted him to do. Although Scott was 21 and the others were 16, *17* and *18* years old, Scott was the weak link. Scott was the first to blow the whistle when we talked to the boys. Although he was older, he seemed less sophisticated than the others.

(Affidavit of Douglas Nichols, Middletown, Ohio, police detective). This evidence also was quite relevant to Mr. Engle's passive personality, and to the fact that the co-defendant was unquestionably the dominant figure in this offense. Defense counsel could have easily inquired of family members about

this arson charge, Officer Nichols would have been glad to give a statement, if counsel had just attempted to contact him (Affidavit of Douglas Nichols).

Indeed, a review of the presentence investigation prepared for Mr. Engle's capital sentencing would also have revealed this important information. The PSI itself states that the Ohio records indicate that Mr. Engle did not set the fire (R. 56). No one used such evidence at the sentencing or at resentencing.

Similarly, critically important mental health mitigating evidence was <u>not</u> investigated, developed, or presented. As the discussion presented in subsequent portions of this brief demonstrates, such evidence was readily available. Counsel, however, never posed the appropriate questions of the experts that they themselves had retained, and never provided the experts with <u>any</u> background information concerning Mr. Engle. Today, these very experts can provide compelling evidence of counsels' deficiencies and of the favorably mitigating conclusions they would have reached had they been provided with relevant information about the client by counsel.

Trial counsel did argue to the jury at the original sentencing that Mr. Engle's age of 25 years old was still relatively young (T. 1017). Defense counsel at both sentencings, however, could easily have presented evidence and argument that Mr. Engle had a greatly diminished mental/emotional capacity. Many friends and family members recognized Mr. Engle's stark emotional/ psychological immaturity. Scott Engle is, and always has been, seriously developmentally impaired. His cousin Mark explains:

> His mother, Eileen, treated him like a child. Really Scotty has been childish all of his life. Whenever Scotty felt threatened by someone, he would withdraw into himself. Fear made him physically sick. He would cry and be visibly frightened. Scotty was a really weak person - he was a wimp.

(Affidavit of Mark Engle). Mr. Engle's mother realized that her son was always immature for his age:

> Throughout his life, Scott has been immature. His friends were younger than him. Some of them by as much as seven or eight years

younger. When Scott completed the first grade his teacher came to me and asked me to hold him back a year because he was so immature and had problems with learning. I did so hoping that would help him out.

(Affidavit of Florence Eileen Engle).

Others who knew Mr. Engle also noticed this immaturity. *An* attorney who represented Mr. Engle in connection with a driver's license restoration explained that:

> [He s]eemed very quiet. Although he was 25 ye rs old at the time, he acted much younger....He acted like a teenager. I was surprised to learn that he was in his mid 20s.

(Affidavit of Douglas W. Casper). Officer Nichols, the law enforcement officer who had previously arrested Mr. Engle, also noticed this characteristic:

> Scott seemed immature and his friends were three and four years younger than he. Although he associated with younger kids, he was not the ringleader of their activities. Instead he just wanted to go along with them and could be talked into anything.

With just a few phone calls either defense counsel could have obtained such evidence, provided it to the mental health experts, and presented it to the jury and court. Mental health mitigation, however, was never properly developed in this case -- the experts were provided with inadequate information, and expert mental health evidence was never effectively developed or presented at the original sentencing or at resentencing.

Later counsel also failed to argue these and other mitigating factors to the court at resentencing. Both original and resentencing counsel could have easily obtained proof of these mitigating factors by questioning the psychiatrists and psychologists who evaluated Mr. Engle, by contacting family members and friends and by investigation of Mr. Engle's record, history, and background. There could be no possible tactical or other reason for counsel's failure to pursue and argue such issues. This failure clearly prejudiced Mr. Engle's case, because a finding of statutory and nonstatutory mitigating factors would have ensured a life sentence rather than the death penalty in this

override case. Cf. Tedder. The prejudice is more than obvious. The court specifically observed that many young men are mature at age 25. Counsel presented nothing, although a great deal was available, to show that Mr. Engle had the maturity of a boy, at best.

Counsels' failures to investigate were quite prejudicial. Much of the information obtained by the mental health experts and presented in the presentence report came from Mr. Engle himself, a person suffering from brain damage and other serious mental health problems. These issues are discussed in subsequent portions of this brief. That discussion, and the one above, demonstrate that counsel failed to develop available mental health evidence which would have established statutory and nonstatutory mitigation, rebutted aggravation, and rebutted the damaging and clearly unreliable contents of the PSI. Furthermore, trial counsel failed to object to the State's reliance upon two aggravating factors which the State waived before the jury. See Bullington v. Missouri, 451 U.S. *430* (1981); see also Stevens, supra. There could be no reasonable tactic for this.

Counsel must reasonably and carefully assess the statutory aggravating circumstances and all statutory and nonstatutory mitigating circumstances. The court found no mitigation in Mr. Engle's case, but defense counsel's proper presentation of available mitigating factors would have mandated that the jury's life recommendation be followed. Defense counsel's unreasonable failure denied Mr. Engle effective assistance of counsel.

The facts presented in this 3.850 proceeding were more than sufficient to justify an evidentiary hearing. Based upon the information pled and in light of this Court's decision in the codefendant's case, Stevens v. Florida, the denial of an evidentiary hearing is quite puzzling indeed. The mitigating evidence that Mr. Engle is now prepared to present goes well beyond that which Mr. Stevens presented in his Rule 3.850 proceeding. The failure to present this

information was the result of counsels' failure to conduct adequate investigation and not the result of an informed strategic decision. As in Stevens, counsels' failure to present this information effectively deprived the trial court of a basis requiring that the jury's recommendation be followed. Mr. Engle is entitled to a full and fair evidentiary hearing. Mr. Stevens was allowed that opportunity, and was granted relief as a result thereof; Mr. Engle is entitled to no less.

J. FAILURE TO REQUEST A CONFIDENTIAL MENTAL HEALTH EXPERT

Counsel were also ineffective for not requesting a confidential psychiatric evaluation. Perri v. State, 441 So. 2d 606 (Fla. 1983). Concerning this claim, the lower court's order stated:

> The Court fails to see how any honest physician would have rendered a "different" evaluation by rendering a confidential report.

The lack of a confidential report is only one aspect of this claim. The mental health experts retained to evaluate Mr. Engle further failed to conduct professionally appropriate evaluations, and were hindered in doing so because important information was not provided to them, in large part because of trial counsels' ineffectiveness. Thus, the reports were inaccurate and incomplete, containing and based on evidence largely from the self-report of a mentally ill patient, as those same experts have now acknowledged.

More importantly, the point of the claim is that the evaluations should have been confidential, and that none of the information should have been disclosed and thus used against Mr. Engle without a knowing choice by counsel and the defendant. See Proffitt v. Wainwrieht, 685 F.2d 1227 (11th Cir. 1982), modified on rehearing, 706 F.2d 311 (11th Cir. 1983); Gardner v. Florida, 430 U.S. 349 (1977); Estelle v. Smith, 451U.S. 454 (1981).

Trial counsel knew that the reports, based solely on the little the experts then knew about the patient, were damaging. The reports were only discussed

when the sentencing court brought them up (T. 1041). At that time counsel asked the court what parts of the psychiatric reports were admissible, since Mr. Engle had not been advised of his rights when examined, Counsel knew that the reports were damaging yet was ignorant to the fact that he 1) could have sought a confidential report, 2) should have objected to the court's use of the reports since Mr. Engle had never been informed that they could have been used against him, and 3) should have done a background investigation to ensure that the mental health experts had accurate and complete information to make a proper evaluation. Counsels' ineffectiveness prevented the mental health experts from making an honest and accurate evaluation of Mr. Engle. That error was compounded by the failure to seek a confidential evaluation which would have at least protected Mr. Engle from counsels' ineffective representation and the resulting highly prejudicial and inaccurate reports. Counsel operated through ignorance of the law, and thus operated ineffectively.

K. CONCLUSION

An evidentiary hearing is required.[28]

CLAIM VI

MR. ENGLE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS RETAINED TO EVALUATE HIM AT THE TIME OF THE ORIGINAL AND RESENTENCING PROCEEDINGS FAILED TO CONDUCT PROFESSIONALLY APPROPRIATE EVALUATIONS, WERE HINDERED IN DOING SO BECAUSE IMPORTANT INFORMATION WAS NOT PROVIDED TO THEM, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE.

Mr. Engle is a person addled by brain damage. He is easily led by others and has no ability to exercise mature judgment or thought. He is paranoid, an

[28]With regard to any subsidiary aspects of the ineffective assistance of counsel claims not discussed at length herein, Mr. Engle respectfully relies on his lower court presentations, which are included in the record appendix previously provided to the Court. Mr. Engle also notes that he has alleged counsels' lack of effectiveness in failing to litigate various constitutional errors presented in this Rule 3.850 action.

schizophrenic, and his disorders distorted his perception of reality and the processes of the criminal justice system. His childhood was a nightmare of constant beatings, torture, neglect, and abuse. He was sexually molested by an older man when he was only eleven years old. His severe substance abuse and constant intoxication further subverted his ability to make reasoned judgments or engage in normal thought processes. The sentencing court never heard most of this evidence, and never learned about the real Gregory Scott Engle, and how pathetic his life truly was.

Mr. Engle's attorneys and the mental health experts previously involved in this case had a duty to conduct a proper background investigation and perform appropriate testing to bring these facts before the court and the jury. Mr. Engle did not receive the professionally adequate mental health assistance that due process and eighth amendment require.[29] As a result, substantial issues involving both the guilt-innocence and the penalty phases were never raised, or if raised, never developed in a way that would permit a trier of fact to assess the true mental status and background of Gregory Scott Engle.

---

[29]A criminal defendant is entitled to expert psychiatric/psychological assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When as here mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel, supra; Mason v. State, 489 So. 2d 734 (Fla. 1986); State v. Sireci, 536 So. 2d 231 (Fla. 1988); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The mental health expert also must protect the client's rights, and violates those rights when he or she fails to provide professionally adequate assistance. Sireci, supra; Mason v. State, supra. The expert also has the responsibility to properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

The minimal issues that were raised were never given the weight and consideration by the court which they deserved and which is required to meet constitutional standards. In fact, the inaccurate and incomplete evaluations done by the prior mental health experts involved in this case not only resulted in the sentencer's failure to hear substantial mitigating evidence, they in fact portrayed an inaccurate picture of Mr. Engle which was highly prejudicial in the eyes of the court.

The experts who evaluated Scott Engle failed to provide the professionally adequate expert mental health assistance to which Mr. Engle was entitled. Their evaluations were inadequate in many critical respects. Their evaluations were inadequate because insufficient information was provided to them by the original attorney and then by resentencing counsel. No one made any attempt to conduct the background investigation essential to a reliable mental health evaluation. Such background investigation would have revealed a history of brain damage, and thus led to an appropriate evaluation. The failure of self-report is painfully obvious in Mr. Engle's case. Reports produced by two mental health experts only one day apart give substantially different information about Mr. Engle because they relied on the self-report of a mentally ill and brain-damaged man. Such a process is by no means enough. Mason v. State, 489 So. 2d at 735-37.

Well-established standards for psychiatric and psychological evaluations were extant at the time the experts saw Mr. Engle. The experts simply failed to properly diagnose Mr. Engle, a failure grounded in large part on counsels' (trial and resentencing) failures to give the experts the facts.

Here, Dr. Miller noted that Mr. Engle had many symptoms of a major psychiatric disorder such as "loose associations," "pressured speech," and a "bland manner." Loosening of associations is considered to be "one of the most valuable diagnostic criteria" in schizophrenia and particularly paranoid schizophrenia. H. Kaplan & B. Sadock, Comprehensive Textbook of Psychiatry, p.

205 (4th ed. 1985). Yet, no mention is made of the possibility of such a disorder. In fact, Dr. Yates' testing would have supported such a diagnosis, but that testing was inadequately interpreted. In light of Scott Engle's history, such a diagnosis would have been especially compelling.

Drs. Yates, Vallely and Miller had no background information about Mr. Engle. The original and resentencing attorneys gave them none. They had no military records, records showing Mr. Engle's severe drug addiction. They had no information regarding his lifelong role as a follower. They did not receive or seek information regarding the personality of codefendant Rufus Stevens. Although Dr. Miller reported that Mr. Engle ingested whiskey, beer, and marijuana on the morning of the crime, the experts were not asked to consider and failed to recognize the significance of this behavior on Mr. Engle's mental state at the time of the offense. Drug and alcohol intake, however, have much greater effects on individuals who suffer from brain damage -- such as Mr. Engle. Dr. Yates reported that Mr. Engle uses drugs and alcohol to the extent of "maximal intoxication" when such substances were available to him, but failed to recognize the significance of such behavior. Counsel gave the experts nothing in this regard, and <u>never</u> asked the experts how these factors may have affected Mr. Engle's level of functioning under recognized categories of mitigation -- was there an extreme disturbance, a substantially impaired capacity to conform conduct to law, brain damage, a diminished mental state? These questions were never asked of these experts, and counsel's errors here are the same as those found sufficient to warrant relief in <u>State v. Michael</u>, 530 So. 2d 929, 930 (Fla. 1988)(counsel failed to render effective assistance in failing to request from the experts opinions on the statutory mental health mitigating factors).

Mr. Engle's case presents a classic example of the pitfalls of self-report. He told Dr. Miller that he drank very little alcohol when independent witnesses

confirm that he had a severe drinking problem up to and including the day of the murder. He told Drs. Miller and Yates that he had committed 54 arsons when in fact his mother explains (and told a probation officer in Ohio, who was easily accessible) that she had to take him to a psychiatrist because of his fantastic delusions involving arson. Dr. Yates also never learned that Mr. Engle had been sexually abused: Mr. Engle was in fact sexually molested by an older man at age 11 and suffered extreme physical and emotional torture at the hands of his drunken and mentally ill father. These facts were available; counsel should have provided them to the experts.

In fact, a thorough review of background information and collateral data is most critical in forensic cases and, especially in cases involving mentally ill clients. As is obvious, the client's mental illness will invariably preclude any ability to accurately relay facts. Gregory Engle is mentally ill. He can report only what his mental illness allows him to see. Like all mentally ill patients, his self-history is unreliable and incomplete. Dr. Yates and Dr. Miller, for example, reported different behaviors in reports written only two days apart. His behavior and his background demonstrated substantial and longstanding mental health problems. His problems were patently obvious even to law enforcement officials, who obviously lacked the special training that is considered to be the province of the mental health expert. Mr. Engle's problems were readily recognized by his Ohio attorney, and by the attorneys involved in this case. The mental health experts, however, did not seek out or use critical and available background information, and were not provided with it by counsel. The procedures necessary to an adequate evaluation were not undertaken here.

Here, no history was requested or obtained. Dr. Yates makes no mention of head injuries; in fact, physical health is never mentioned at all in Dr. Yates' report. Dr. Miller mentioned a history of head injuries and blackouts, yet failed to recognize the significance of such incidents. No one asked these

experts to consider whether Mr. Engle is significantly brain damaged. He is.

Adequate testing was not conducted in this case, and the testing that was conducted was not adequately interpreted. In fact, recent psychological testing reveals Mr. Engle's deficiencies, deficiencies which were shown by the prior testing but then inadequately interpreted, and the original experts themselves agree that their original assessments were professionally inappropriate and flawed. The results of the original experts' testing and the more recent testing are strongly indicative of schizophrenia (Green, The MMPI an Interpretive Manual, Grune and Stratton, 1980, p. 133, 136-37). In clients with similar profiles, a "diagnosis of schizophrenia is very common." Additionally, the previous testing available on Mr. Engle (prior to 1979) would have revealed similar patterns of mental illness. Inadequate interpretation and the failure to examine relevant past materials resulted in inappropriate conclusions.

With regard to established standards, the mental health professionals involved originally and at resentencing failed to meet the professionally recognized standard of care. They were called on to evaluate a defendant suffering from the lifelong effects of brain damage, substance abuse, and mental illness, yet they rendered opinions without adequate background or investigation. They failed to discover that Mr. Engle had a lifelong dependent personality: his history reveals that he was a weak person who always followed the lead of his acquaintances, even when they were much younger. Proper investigation would have revealed the severity and length of alcohol and drug abuse and the state of intoxication at the time of the offense.

The professional inadequacies in Mr. Engle's former evaluations are clear. A review of available information would have demonstrated that Mr. Engle, as a result of his mental illness, was not competent to stand trial, and that a plethora of mitigating circumstances were more than readily available.

Adequate and competent evaluations would have also revealed Mr. Engle's

organic mental impairments. Dr. Miller noted that Mr. Engle was frequently beaten by an alcoholic father with psychiatric problems, yet failed to recognize the significance of these events. Medical records reveal that Mr. Engle has long suffered from severe headaches. Yet, in spite of the history of numerous head injuries at an early age and subsequent headaches, organic brain damage was never adequately assessed. Had the experts provided adequate testing, Mr. Engle's mental impairments would again have been made obvious. The necessary testing, however, was never provided. Dr. Miller, in fact, noted that Mr. Engle had suffered head injuries, but failed to undertake any testing for brain damage. Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987). Dr. Yates performed no testing at all for brain damage and failed to inquire in order to obtain basic information about this issue in his interview. Dr. Vallely's evaluation suffered from similar flaws. None of the experts were provided with the relevant, available facts about Mr. Engle and the offense by either original or resentencing counsel.

Although Mr. Engle's drug abuse problems were long-standing, the possibility of brain damage was not investigated. Mr. Engle also has a history of head injury and blackouts. All of the indicators were present in the military records and the Ohio correctional records. None of these records were reviewed by the experts.

Substantial mitigation was lost because of the experts' flawed evaluations. Statutory and nonstatutory mitigation was present in this case and could have been presented to the judge. Scott Engle was mentally ill and brain-damaged. He is developmentally impaired. He was chronically and severely abused; he was never shown love or affection. He was repeatedly beaten with fists and knocked across the room. The only attention he was shown was punishment. He was not provided for materially. One winter the family had no heat or hot water and almost froze to death (See Aff. of Peggy Jo Pugh, R. App. 406).

Overall, the experts in their evaluations failed to acquire any of the readily available information necessary for a proper assessment. Thus, although Mr. Engle clearly suffered from extreme emotional disturbances, mitigation under this statutory factor was lost. Mr. Engle's ability to conform his conduct to the requirements of law was substantially impaired. An adequate evaluation would have revealed that Mr. Engle was brain-damaged and suffered from a psychotic disorder, most likely schizophrenia. Although Mr. Engle's mental maturity was that of a boy, no evidence regarding this circumstance got to the judge. Finally, and most critically, a compelling case of domination by Stevens was never presented because of these flaws.

Family members were available to describe Mr. Engle's meek, childish demeanor. They all describe how he would run away if it looked like a fight might develop. His younger sister and cousin had to defend him. He was so easily intimated that when he was twenty, a twelve-year-old threatened him and Mr. Engle ran in fear. He was and is developmentally impaired: always childish, always dominated by others. Fear made him physically sick. He would cry and be visibly frightened (Aff. of Mark Engle, R. App. 393).

Not only family members were aware of Mr. Engle's timidity. A local police official observed that Scott was very immature and that his friends were always younger than he was. The officer observed that Mr. Engle was never a ringleader and could be talked into anything. An attorney from Ohio also observed Mr. Engle's self-effacing demeanor. He describes him as bewildered and overwhelmed. He acted much younger than his age and was a passive follower. Although Scott was 25 years old, he acted like a child, and functioned at a child's level. He was nondemanding and was not assertive (Aff. of Douglas Casper, R. App. 389; Douglas Nichols, R. App. 391).

In contrast to the very meek temperament of Scott Engle, Rufus Stevens was a violent, aggressive person. He was five years older than Mr. Engle,

physically assertive, and domineering. Everyone was afraid of Rufus Stevens, including Mr. Engle. Had the experts collected any background information, they would have found that Mr. Engle was substantially dominated by Rufus Stevens. But counsel never provided the experts with the available facts which shed light on these issues.

Mr. Engle was and is mentally ill. He was and is brain damaged. In addition to the statutory mitigating factors, substantial and compelling nonstatutory mitigation was present in this case. Mr. Engle's family history reflected that he was raised in a family with constant violence, no affection and serious physical abuse. In short, nonstatutory mitigation was available as was mental health evidence which would have rebutted and rendered unavailable the aggravating factors, e.g., "heinous, atrocious, and cruel." Mr. Engle was far removed from the "cool character" described by the judge.

Had Mr. Engle received a professionally adequate evaluation, significant competency, intoxication, and mental health mitigation issues would have been presented for the consideration of the court. The mitigation alone is more than enough to establish a reasonable basis for life. Sadly, these critical issues were ignored. The experts failed. As a result, Mr. Engle's capital trial and sentencing proceedings were rendered fundamentally unreliable and unfair. Important and dispositive guilt-innocence and penalty phase defenses were ignored. The resulting conviction and death sentence are unreliable.

Two eminently qualified mental health experts were asked to evaluate Mr. Engle's background and mental health status at the time of trial and sentencing by post-conviction counsel. Their findings confirm that an evidentiary hearing is required. But the need for a hearing does not stop there: the original experts themselves have acknowledged that their prior evaluations were flawed and that a great deal of mental health evidence relevant to competency, intoxication, and statutory and nonstatutory mitigation was never provided to

them by counsel originally.

Dr. Joyce Carbonell is a psychologist and neuropsychologist, is a tenured professor at Florida State University, is the director of the F.S.U. Psychology Clinic, trains police officers, evaluates the work of mental health professionals for the Florida Department of Professional Regulation, trains other experts and graduate students on the use of psychological and neuropsychological testing and assessment instruments, holds a supervising position at the Georgia State Hospital, and is a licensed psychologist in the states of Florida and Georgia. She is highly credentialled and highly qualified. Her vita is included at R. App. 524-533.

Dr. Carbonell conducted an evaluation of Gregory Scott Engle on September 28, 1989. She reviewed extensive materials on Mr. Engle including school records, military records, probation records, prison records, testimony, the trial and resentencing records, previous evaluations, affidavits, presentence investigations, and other records.

Dr. Carbonell's evaluation involved extensive neuropsychological and psychological testing. She should have been allowed to present her findings regarding Mr. Engle at an evidentiary hearing. Dr. Carbonell would have explained, and the experts retained by defense counsel at the time of the original trial and the resentencing would have confirmed, that the testing results clearly demonstrate that Mr. Engle suffers from significant brain damage. This brain damage is static in nature and may be particularly focused in the frontal lobes. The Stroop Color and Word Test that Dr. Carbonell provided shows a striking disparity between different portions of the test, a pattern of findings clearly associated with frontal lobe damage. On the Halstead Reitain Test Battery Mr. Engle scored with an impairment index of .9, indicating severe brain damage. His score on the Categories test, when compared to his intellectual functioning, also indicates serious cognitive deficits. His

score on Trails B indicates that he falls below the 25 percentile when compared to others in his age group. This test is one of the more sensitive indicators of general brain damage and has implications for a person's daily functioning. On a test of memory Mr. Engle scores only at the 24 percentile on a test of verbal memory and in general performs significantly more poorly on tests of verbal memory than on tests of visual memory. This too is indicative of significant neurological deficits.

Dr. Carbonell can also explain that individuals with personality test results similar to Mr. Engle's are typically described as having chronically schizoid adjustments. Such profiles are also found in drug and alcohol abusers. In addition, Mr. Engle scores extremely high on a subtest relating to substance abuse. Other indicators are also supportive of a history of drug and alcohol abuse. People similar to Mr. Engle will have trouble concentrating, will have bizarre thought processes, and will have feelings of unreality.

Background materials show consistently that Mr. Engle had a seriously disturbed childhood with an abusive, alcoholic and drug abusing father. He began using drugs at an early age. Mr. Engle was slow in school, and was socially isolated and an object of other children's ridicule. He dropped out of high school, but later finished his high school education while incarcerated.

He also has a history of significant head injury. He was hit on the head by a brick, an injury causing substantial damage, and was involved in numerous car accidents. In addition he had high fevers as a child. His fingers are deformed as a result of his chronic chewing of his own hands; such self-injurious behavior is seen only in very disturbed people. His prison records, available in 1984, are generally clear of disciplinary infractions. Indeed, he gets along by staying alone.

Dr. Carbonell would also have presented evidence relating to the fact that Mr. Engle suffered from an extreme emotional disturbance at the time of the

offense. He suffers from organic brain damage, serious mental illness that is schizoid in nature, and was likely in an altered state of consciousness at the time of the crime. These problems are longstanding in nature and existed before, during, and after the offense. They continue to exist to this day.

The capacity of Mr. Engle to conform his conduct to the requirements of law was substantially impaired. Brain damage alone produces impairments in emotional control, impulse control, trouble concentrating and difficulty in sequencing events. Combined with other emotional problems, Hr. Engle's ability to conform his conduct to the requirements of law is even more substantially impaired. Drugs and/or alcohol would only heighten the problem. People with brain damage are in fact more susceptible to the effects of drugs and alcohol. Dr. Carbonell would also have explained that given Mr. Engle's history, background, testing, and the records, it is quite likely that Mr. Engle acted under the influence of Rufus Stevens at the time of the offense.

Today, after having reviewed background information which Mr. Engle's former counsel never provided, and after having been asked to address statutory and nonstatutory mitigators -- something that the former attorneys never did, cf. Michael, 530 So. 2d at 930 -- the doctors who examined Mr. Engle at the time of the sentencing and resentencing have informed present counsel that they would have also made such findings. Originally, however, the defense attorneys provided the experts with virtually no information about the client. The facts were not difficult to obtain. Anyone who knew Mr. Engle could have informed the experts, counsel, and the court that Mr. Engle was always a follower. In fact he was not a ringleader, but a follower, even when his associates were younger. Law enforcement officers also would have confirmed this. Mr. Engle has always been a follower; Mr. Stevens has always been dominating; the roles stayed the same at the time of the offense.

Dr. Carbonell would also have explained why, given Mr. Engle's various,

serious mental health problems, there are important doubts about his ability to form a specific plan of action or intent, and that questions about Mr. Engle's competency at the original proceedings exist which were not answered. Dr. Carbonell also would have explained why the previous evaluations were inadequate as they did not evaluate any of the available background materials and relied solely on self-report. In addition, no reasonable testing was done, particularly for brain damage, in spite of the fact that a history of head injury is noted in Dr. Miller's report.

Dr. Robert Fox, Jr., M.D., is a Board Certified expert in forensic neuropsychiatry. He is a neurologist and has been affiliated with the faculty of the Yale Medical School. His vita is included at R. App. 514-23.[30]

Dr. Fox would have testified at the evidentiary hearing which this case requires regarding the significance of Mr. Engle's childhood and background, his mental disability, the requirements for a professionally adequate mental health evaluation, competency, intoxication, and mitigation. Dr. Fox would have explained that Mr. Engle was born into a family with a household head (the father) who was a mentally ill and disabled war veteran. Mr. Engle's father was an extremely violent and abusive man who was both a chronic alcoholic and a drug user. He received psychiatric treatment at the Veteran's Administration hospital in Hamilton, Ohio, including insulin shock treatment, but his problems were never controlled. Indeed, affidavits proffered below detail the significant degree of physical and emotional abuse that the father subjected all members of the family, particularly Scott Engle. In the face of this abuse,

[30]Dr. Fox conducted an evaluation of Mr. Engle on September 8, 1989, and reviewed extensive background materials regarding Mr. Engle including school records, military records, probation records from Ohio, Ohio Department of Corrections records, family affidavits, affidavits from members of the community, statements by Scott Engle, statements by Rufus Stevens, Florida State Prison inmate and medical records, medical records for Gary Engle, medical records for Arnold Engle, medical examiner records, prior evaluations, testimony, trial and resentencing transcripts, and the presentence investigation report.

Scott's mother was unable to protect either herself or her five children.

Dr. Fox would have described what the records and testing reflect: that Mr. Engle is developmentally impaired -- as a child he was always a slow learner. He was poorly developed at birth and had to be placed in an incubator. There are indications that he suffered neo-natal brain damage. He displayed a failure to thrive and had a retarded development. His school performance was always poor. He consistently had difficulty learning to read and to perform in school. During childhood he suffered a number of head injuries, including being knocked unconscious at the age of nine, when he was hit in the head with a brick and was beaten senseless by his father on numerous occasions.

Scott began a pattern of substance abuse as a young teenager, first, stealing his father's psychiatric medications, and later, using all forms of illicit drugs at school or in the neighborhood. Dr. Fox would have described the longstanding effects of the drugs and alcohol that Mr. Engle consumed in large quantities, through the years. LSD, a mind altering drug, was used often. Mr. Engle's pattern of substance abuse is confirmed in affidavits of members of his family and in his medical records from his military service. Mr. Engle left school in the 9th or 10th grade and joined the army at that time. He served slightly less than two years in military service. He received a general discharge because of his inability to control his drug and alcohol abuse.

At the time of the offense, Mr. Engle had consumed drugs and alcohol. This is consistent with his history, his addiction, and statements by other witnesses. Given Mr. Engle's brain damage, Dr. Fox would have described the fact that the drugs and alcohol would have had an even more potent effect.

On mental status examination, Mr. Engle displayed a grossly inappropriate affect. Due to his mental illness, Mr. Engle has been constantly detached from the world around him. His thought processes reveal concrete thinking and significant grandiosity. He also has inappropriate affect, which was shown at

the time of his arrest and during his incarceration. His flatness of affect is associated with his organic syndrome. No one properly analyzed this when Mr. Engle was tried and sentenced to death. No relevant background information was sought by or provided to the previous examiners, and proper testing was not undertaken.

Dr. Fox would have explained that, in order to render professionally adequate mental health assistance, an expert must conduct a thorough background investigation as well as adequate testing. The experts who evaluated Mr. Engle originally did not perform a professionally adequate background investigation and/or undertake adequate testing. Dr. Fox would have also explained, that based on his psychiatric evaluation of Mr. Engle and the review of prior medical, legal, and other documentation, and testing, it is clear that Mr. Engle suffers from organic brain damage. Causative factors for this diagnosis are a combination of neonatal birth trauma and head injuries experienced during childhood. Additional contribution may come from a chronic pattern of alcohol and substance abuse. These mental deficits have been life-long, and were characterized in childhood by slow learning as reflected in Mr. Engle's inability to perform in school or develop positive relationships in childhood. As an adult, Mr. Engle's impairments have been characterized by patterns of markedly impaired social judgment and paranoia. Neuropsychological testing reveals the presence of frontal lobe dysfunction which is compatible with this syndrome. Gregory Scott Engle also has a long and detailed history of abuse of alcohol, marijuana, hallucinogens, stimulants, and depressants.

Based on his psychiatric evaluation of Scott Engle and review of the historical facts, Dr. Fox would have discussed the reasons why on March 13, 1979, Mr. Engle's mental status was significantly impaired by the presence of the above noted psychiatric impairments. Because of Mr. Engle's psychological makeup and his history, Dr. Fox would have explained why to a reasonable degree

of medical certainty Mr. Engle was substantially under the influence of Rufus Stevens at that time.

Dr. Fox also would have discussed why, given these deficits, there are important questions about Mr. Engle's competency which were not answered originally. Mr. Engle's diminished capacity is still present due to his organic brain disorders. His capacity to fully comprehend the courtroom proceedings, to assist in his own defense, or to appreciate the seriousness of his situation and the consequences of his own actions, were highly questionable, but were not adequately assessed.[31]

The experts who evaluated Mr. Engle originally (at trial and resentencing) would also have been called at the evidentiary hearing which this case requires, as Mr. Engle noted before the 3.850 trial court. The original experts would have confirmed what Dr. Carbonell and Dr. Fox found -- that significant mental health questions, particularly concerning mitigation, were never answered in this case because of defense counsels' failures to provide the experts with information or to ask that the areas be assessed. The original experts would

---

[31]As pled below, a summary of the statutory mitigating circumstances which Dr. Fox would have discussed had an evidentiary hearing been held include:

a. The capital felony was committed while Mr. Engle was under the influence of extreme mental and emotional disturbance. This disturbance was due to his suffering from a serious psychiatric syndrome, an organic disorder, and other contributing factors.

b. The capacity of the defendant to conform his conduct to the requirements of the law was substantially impaired. Mr. Engle's organic disorder created problems in forethought and impulse control. Drug and alcohol intake only served to exacerbate the problem.

c. In addition to the statutory mitigating circumstances, there existed nonstatutory mental health mitigation, including Mr. Engle's severe child abuse, poverty, abuse by other children, paranoia, substance abuse and the many disabilities resulting from mental illnesses such as the inability to succeed in school, military service, or a vocation.

d. Dr. Fox would have also discussed why Mr. Engle acted under the substantial domination of Rufus Stevens. Mr. Engle's organic mental disorder, substance abuse, mental illness, developmental impairments, and background, demonstrate a life-long pattern of compliance and domination by others. He was encouraged to participate in the robbery by Stevens, and he lacked the ability to shape or deter the subsequent events. In addition, Stevens is older, more streetwise, more aggressive and more in control than Mr. Engle could ever be.

also have testified that if they had been asked, if information had been provided to them, and/or if proper testing had been conducted, findings which would have been quite favorable to the defense (for example, opinions that the statutory mental health mitigators existed in this case) would have been provided. In short, the original experts agree that important information which would have been highly relevant to their evaluations was never provided, that appropriate questions were never asked by counsel, and that positive findings would have been available had counsel acted properly.

James Vallely, Ph. D., for example, evaluated Mr. Engle in 1984. Dr. Vallely would testify that, at the request of current counsel, he carefully reviewed his report of neuropsychological functioning conducted on Mr. Engle in October of 1984. There was a great deal of background information that was not provided to him, and has now been provided. Even his original evaluation showed that Mr. Engle had significant cognitive deficits indicating organic brain impairment effecting Frontal Lobe abilities, but no follow-up was undertaken, although it should have been. In this regard, Mr. Engle's neuropsychological deficits would lead to his having impaired impulse control and poor social judgment. His ability to develop plans, organize his thinking, learn from past experience, and anticipate consequences to his actions are inadequate. Such individuals are unable to formulate effective problem solving strategies and would tend to deal with most situations in a highly emotional, impulsive manner.

These findings strongly indicate that Mr. Engle would be incapacitated in his ability to function, especially when faced with even moderate stress or emotionality. This is consistent with his long history of behavioral acting out. Limitations in judgment and behavioral inhibition would be significantly exacerbated by ingestion of drugs or alcohol, even in relatively small amounts. Mr. Engle's history of substance abuse, particularly on the day and night in question, support the conclusion that neuropsychological deficits interacted

with substance abuse to cause diminished capacity. Indeed, Dr. Vallely today confirms that statutory mitigation was amply available in this case.

Mr. Engle's documented mental disorders are symptoms frequently seen in individuals with neuropsychogical deficits such as his. In this regard, Dr. Vallely could explain that such individuals have very poorly developed interpersonal skills, are highly immature, and are impaired in their ability to form meaningful relations. Mr. Engle would likely be a follower of others and very solicitous of their attention and approval. Since he lacks skills to lead, Mr. Engle would certainly tend to be easily influenced and easily dominated by others in most of his relations.

Dr. Vallely can also explain, significantly, that had he been asked about the issue of substantial domination relative to the results of his testing, he would have affirmed that Mr. Engle was susceptible to being dominated by almost anyone and was in fact under the influence of Stevens. In addition, if Mr. Engle's previous attorneys had inquired on this issue, Dr. Vallely could have offered substantial clinical guidance shedding light on the client's vulnerabilities in this regard. No such guidance, however, was sought from any of the previous examiners, and no relevant information concerning Mr. Engle was provided to them.

Dr. Lauren Yates would testify that had he been asked originally, he would have explained that Scott Engle suffered from the cumulative effects of serious mental deficits and severe substance abuse which impaired his ability to appreciate the criminality of his behavior. Dr. Yates would also testify that Mr. Engle was a passive personality prone to domination by others such as Rufus Stevens. Mr. Engle's developmental deficiencies, immaturity, lack of insight, and inability to make normal social and logical judgments constituted mitigating evidence of immaturity and lack of responsibility for his behaviors in the instant offense.

In addition, Dr. Yates would testify to a wealth of statutory and nonstatutory mitigation including severe child abuse and constant torture involving canes, bricks and scalding coffee. Dr. Yates would testify to evidence of learning disability and suicidal ideation. Dr. Yates was originally given no relevant background information, and counsel failed to develop mitigation that Dr. Yates could have explained.

Dr. Ernest Miller can also testify to mitigating circumstances concerning Mr. Engle, and would have testified to such had he been asked originally. Significant questions were not asked of him at the time of the original proceedings, and relevant background information was never provided to him. Dr. Miller can also discuss Mr. Engle's history of head injuries, brain damage, childhood abuse, severe substance abuse and evidence of his fear of his co-defendant, Rufus Stevens, and that such mitigating information would have been provided originally had he been asked. Because of those factors, mental disabilities exist impairing Mr. Engle's maturity and his exercise of sound judgment. All of these factors relate to both statutory and nonstatutory mitigation.

The duty to protect the client's right to professionally adequate mental health assistance does not rest solely with the mental health professional. Counsel must discharge significant responsibilities. Here, both original and later counsel failed in that duty. They neither obtained nor provided the experts with the history of severe physical and emotional abuse, domination by others, sexual abuse, head injury, and prior psychiatric treatment which was amply available in this case. No proper inquiries into mitigation were made of the experts. Mitigating mental health evidence was in fact never properly developed at all. In short, counsel failed to take the steps necessary to assure that their client would receive the expert mental health assistance to which he was entitled.

Mr. Engle was denied his fifth, sixth, eighth, and fourteenth amendment rights. Counsel failed to assure that the evaluations would be properly conducted and the experts failed in their task. Consequently, Mr. Engle was tried and sentenced to death in violation of his due process and equal protection rights. See Ake v. Oklahoma; Blake v. Kemp. The professional inadequacies of the mental health professionals originally resulted in the abrogation of Mr. Engle's right to a competency hearing. See Pate v. Robinson, 383 U.S. 375 (1965). The guilt-innocence phase was rendered fundamentally unreliable: an available and provable intoxication defense was ignored. Such a defense would have made a difference. At sentencing and resentencing, a professionally adequate evaluation would have made a significant difference: substantial statutory and nonstatutory mitigation would have been established; aggravating factors would have been undermined; the jury's life verdict would have been unassailable.

Had counsel and the mental health experts adequately assessed the client, had the experts been asked proper questions about mitigation, or had counsel or the experts obtained the necessary background information, significant statutory and nonstatutory mitigation evidence would have been discovered (See e.g., R. App. 389-425). Background material was never provided to Drs. Miller, Yates and Vallely. There is no doubt that this information should have been given to them and would have been very relevant to their evaluations. The original experts themselves today confirm this.[32]

---

[32]Other witnesses are also available to testify that Rufus Stevens was a violent, domineering individual who frightened and coerced those around him, especially Mr. Engle. They would also testify that Scott Engle was easily intimidated by Stevens and it was inconceivable that Stevens would take orders from the obviously intimidated, younger, physically slim and weaker Scott Engle. They would also testify to Mr. Engle's compulsive and excessive use of drugs and alcohol at the time approximate to the offense.

The inadequate mental health evaluations, and ineffective assistance of counsel, deprived Mr. Engle of his most essential rights. Important and significant information was never heard by the tribunal charged with deciding whether Mr. Engle was guilty of first-degree murder, and whether he should live or die.

The circuit court summarily denied this claim by signing the State's order which said that:

> Psychiatric experts can be found to advocate any position any party chooses to take. That is why their opinions are not binding upon the court, especially when their conclusions regarding competence do not correspond to the record or the facts. The disaereement between Engle's "experts" who examined him a decade after trial and those who saw him at the relevant time does not compel relief.

(emphasis added). The ruling on this claim again indicates that the court (signing the State's order) did not know what this claim involved. Mr. Engle alleged that the prior evaluations were inaccurate and incomplete in large part because counsel at sentencing and resentencing failed to do a background investigation of Mr. Engle's life history. Mr. Engle did not present "disagreements" but alleged that Drs. Miller, Yates and Vallely in fact agree with the experts who evaluated Mr. Engle during post-conviction proceedings, after reviewing the relevant and necessary information that counsel should have provided them with originally. The summary dismissal was thus not even based upon an accurate understanding of the claim pled. A full and fair evidentiary hearing is necessary. See, e.g., Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986); Groover v. State, 489 So. 2d 15 (Fla. 1986); Hill v. State, 473 So. 2d 1253 (Fla. 1985); State v. Sireci, 502 So. 2d 1221 (Fla. 1987). The files and records by no means show that Mr. Engle is "conclusively" entitled to "no relief" on this and its related claims. See Lemon v. State, 498 So. 2d 923 (Fla. 1986)(emphasis added); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984).

CLAIM VII

MR. ENGLE'S FIFTH, SIXTH, EIGHTH *AND* FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT AFFORDED A HEARING ON THE QUESTION OF HIS COMPETENCY.

"A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against . . ." Fla. R. Crim. P. 3.210. It is simply unfair to try someone who cannot meaningfully participate in proceedings that will subject him to a loss of liberty or, as here, life. This fundamental unfairness is prohibited by the fifth, sixth, eighth and fourteenth amendments to the United States Constitution, and by parallel Florida constitutional provisions.[33]

Gregory Scott Engle was likely not competent to undergo the criminal judicial proceedings which resulted in his conviction, sentence of death, and reimposed sentence. Evidence was available then which would have shed light on his lack of competency. Evidence exists now which shows that there are substantial doubts as to whether he was competent. Counsel (original and resentencing) failed to pursue the issue. The experts were never asked to fully evaluate it, and never did. Substantial doubts, however, exist. A hearing

---

[33]The constitutional test for incompetency is articulated in Dusky v. United States, 362 U.S. 402 (1960), and is well known to, and oft quoted by, this Court:

> [T]he "test must be whether he has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him."

Id. See also Drope v. Mississippi, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); Bishop v. United States, 350 U.S. 961 (1956). Florida decisions regularly analyze and apply this test, and decisions from this Court reflect an especially vigilant concern for protecting the rights of incompetents. See Jones v. State, 478 So. 2d 346 (Fla. 1985); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Gibson v. State, 474 So. 2d 1183 (Fla. 1985); Christopher v. State, 416 So. 2d 450 (Fla. 1982); Lane v. State, 388 So. 2d 1022 (Fla. 1980). See also ABA Mental Health Standards, Part IV, Competence to Stand Trial, 7-4.1. If an incompetency issue, which has not been adequately resolved, is properly raised, an evidentiary hearing is mandatory. Hill: Mason.

should have been held originally, and the lower court erred in failing to allow one in these 3.850 proceedings. Although there existed sufficient evidence to raise the question of competency at the time of the aforementioned proceedings, counsel unreasonably failed to request a competency hearing.

Mr. Engle has never been well. He has suffered from a major mental illness virtually all his life. He suffered and suffers from organic brain damage. He is psychotic: since childhood he has been severely impaired. He was and is delusional. He was and is mentally and emotionally ill. His history reveals his mental illness.

At the time of his trial, sentencing, and resentencing, he was plagued by his longstanding mental disorders. He was plagued by delusions, hallucinations, paranoia, diminished intellectual and emotional functioning, developmental impairments and organic brain damage. He specifically told Dr. Miller that he had "strange notions." Within a matter of days, he told one expert that he used alcohol to maximal intoxication when available and yet told another expert that he drinks very little. This mentally ill, brain-damaged man was unable to give consistent, reliable statements regarding even simple matters. He was unable to consult with his counsel regarding the mitigating facts of his childhood or strategic decisions regarding guilt-innocence and penalty. He was unable to express himself. He was unable to describe his severe paranoia and immaturity. He had no insight into his past or the circumstances of the offense. Because of his disorders he could not deal with counsel, aid in his defense, or understand what the proceedings transpiring before him were truly about. The questions concerning competency should have been addressed during the eearlier proceedings. Because of failures on the part of counsel and the experts, they were not.[34]

---

[34]"Mr. Engle has brain damage. He is clearly deficient in abstract reasoning, problem solving and concept formation. He has difficulties with

(continued...)

Had Mr. Engle been adequately and professionally evaluated prior to trial on the question of competency, had trial counsel effectively represented his client by fully investigating his client's mental health background and effectively presenting the competency issue, or asked for opinions from the experts thereon, the court would not have allowed Mr. Engle to proceed to trial. Had counsel requested a competency examination and submitted the wealth of available evidence demonstrating his client's lack of competency to the court and to the mental health experts who saw Mr. Engle, or had those experts tested and evaluated this issue, an incompetent defendant would not have been forced to trial. There should have been a hearing on this question at some point in this case.

Mr. Engle was nevertheless forced to proceed to trial, and was required to make critical life and death decisions although he lacked the mental capacity to rationally make such choices. Mr. Engle's lack of competency **was** and **is** provable. He could not aid in his defense. He could not deal with counsel. He could not rationally understand the nature and consequences of the judicial proceedings he was undergoing. He could not testify rationally. He could not make intelligent choices. Even the experts who saw him originally would confirm that substantial doubts exist in this case about this defendant's competency.

The lower court erred in summarily denying this claim. An evidentiary

---

[34](...continued)
tasks requiring concentration and attention. This is also consistent with brain damage. There is a history of head injury and convulsions. Such brain damage impairs impulse control and has serious implications for aspects of daily functioning. Clearly a person with such brain damage will have difficulty with abstract reasoning and the planning required for complex legal proceedings. His deficits are further complicated by his mental disability. He additionally has a family history of mental illness. He has been treated with psychotropic medications and diagnosed with various mental disabilities. In fact, he was treated for drug abuse and mental illness while in the military, while on parole, and while in the prison system in Ohio and Florida. Since childhood he has exhibited bizarre and unusual behavior. As an adult he has had delusions of ESP, flying, and levitation. He was so paranoid that he slept curled up in the fetal position behind the couch.

hearing is warranted.

CLAIM VIII

THE STATE VIOLATED MR. ENGLE'S RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WHEN THE PROSECUTOR URGED THAT HE BE FOUND GUILTY *AND* THAT HE BE SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT EVIDENCE, IN VIOLATION OF BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Engle presented a meritorious and compelling claim of eighth amendment err r pursuant to Booth v. Maryland, 107 S. Ct. 2529 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989). The prosecutor and the trial judge focused on the victim as a petite, working mother and this theme pervaded the guilt phase, the original penalty phase and the resentencing of Mr. Engle. At various points the prosecutor referred to the victim's personal characteristics and the rights of the victim relative to Mr. Engle's rights. The jury apparently rejected the prosecutor's appeal to their emotions, by recommending a life sentence. However, the trial judge, instead of attempting to correct the State's error, himself fell prey to these improper urgings. Comments by the trial judge in open court, as well as the findings of fact in both judgments, reveal the judge's adoption of the prosecutor's improper arguments.

The circuit court's finding that this claim is procedurally barred failed to address the fact that in Mr. Engle's case, the court relied upon victim impact evidence in its findings. The claim of procedural bar overlooks this Court's well-established precedents. In State v. Whitfield, 487 So. 2d 1045 (Fla. 1986), this Court ruled that a "contemporaneous objection" is not required where the sentence on its face is illegal. Sentencing errors apparent on the face of the record are cognizable, and taken as preserved. State v. Rhoden, 448 So. 2d 1013 (Fla. 1984); Walker v. State, 462 So. 2d 452 (Fla. 1985); State v. Snow, 462 So. 2d 455 (Fla. 1985). No contemporaneous objection is necessary if the claim involves factual matters that are apparent or determinable from the face of the record on appeal, e.g., from the face of the sentencing order.

Dailey v. State, 488 So. 2d 532 (Fla. 1986); Forehand v. State, 537 So. 2d 103 (Fla. 1989). Here, the trial court in imposing death based its sentence on victim impact, on the suffering of the victim's family. The trial court in its findings stated that:

> On March 12, 1979, Elinor Kathy Tolin, a 24-year-old mother of two children, attempting to supplement her husband's Navy income, went to work at the Majik Market where she was scheduled to work from 11:00 p.m. to 7:00 a.m. the next day.

(T. 1083). Thus, the error is apparent on the face of the sentencing order. The trial court expressly relied on what the eighth amendment forbids, the suffering of the victim and the victim's family, and this reliance was consistent.

Finally, the lower court failed to address the fact that the trial court based its sentencing decision on improper factors of victim impact information and that counsel could not have objected -- how does one "contemporaneously object" to a sentencing order?[35]

Booth and Gathers require reversal if "contamination" occurs -- if the improper evidence gets to the sentencer. Here, the sentencing and resentencing judge explicitly relied on victim impact and the suffering of the victim's family in imposing death. The error is clear. Mr. Engle was denied "an individualized sentencing." In Mr. Engle's case, the risk condemned in Booth occurred -- his capital sentence was imposed in "violat[ion of the] principle that a sentence of death must be related to the moral culpability of the defendant." South Carolina v. Gathers, 109 S. Ct. at 2210. The judge relied on victim impact to conclude death was appropriate. See also Enmund v. Florida, 458 U.S. 782, 801 (1982)("[f]or purposes of imposing the death penalty . . . [the defendant's] punishment must be tailored to his personal responsibility and

---

[35]Appellate counsel should have urged the claim, and as noted in the habeas corpus petition, rendered ineffective assistance in failing to do so.

moral guilt"). Under both Booth and Gathers, Mr. Engle's sentence of death cannot stand.

CLAIM IX

THE DEATH SENTENCE IMPOSED UPON MR. ENGLE VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE SENTENCING JUDGE LIMITED HIS CONSIDERATION OF MITIGATING FACTORS TO THOSE EXPRESSLY LISTED IN THE STATUTE, *AND* THUS BECAUSE CONSIDERATION OF NONSTATUTORY MITIGATING EVIDENCE WAS CONSTRAINED.

Mr. Engle's death sentence is invalid because the sentencer did not fully or carefully consider any mitigating factors not enumerated in Florida's death penalty statute. A capital sentencer may not fail to provide independent and serious consideration to the nonstatutory mitigating circumstances presented by a capital defendant in making the sentencing determination. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987).

The trial judge here cursorily reviewed statutory mitigation and did not fully and seriously consider nonstatutory mitigation at the original sentencing (T. 1089). At resentencing, the Court addressed each aggravator in great detail (R. 75-76). However, the Court made no review of mitigation. After its findings of aggravation the Court merely stated, "The Court finds there exists [sic] no mitigating circumstances" (R. 77).

It is clear from the record that the Court did not fully and fairly consider either statutory or nonstatutory mitigation. Instead the Court sentenced Mr. Engle to death on the basis of a visceral reaction to the crime itself, regardless of Mr. Engle's personal culpability.

Mr. Engle has presented a meritorious and compelling claim of eighth amendment error pursuant to Hitchcock v. Dumzer, 107 S. Ct. 1821 (1987), and Hallv. State, 541 So. 2d 1125 (Fla. 1989). As the lower court had erred in Hall, the lower court erred here. With regard to the procedural default ruling in Hall this Court held:

> [A]s we have stated on several occasions, Hitchcock is a significant change in law, permitting defendants to raise a claim under that case in postconviction proceedings. Cooper v. Dunaer, 526 So.2d 900 (Fla. 1988); Thompson v. Dunner, 515 So.2d 173 (Fla. 1987), cert. denied, 108 S.Ct. 1224 (1988); McCrae v. State, 510 So.2d 874 (Fla. 1987); Downs v. Dugger, 514 So.2d 1069 (Fla. 1987).

Hall, 541 So. 2d at 1126. The same applies here.

The lower court erred in accepting the State's novel and unprecedented arguments regarding Rule 3.850's two-year provision.[36] Mr. Engle's Rule 3.850 motion presented a compelling and classic violation of Hitchcock v. Dunaer. Hitchcock demonstrates that the construction of the Florida statute used by the trial court during Mr. Engle's sentencing and resentencing was fundamentally wrong, see Knight v. Dueeer, 863 F.2d 705 (11th Cir. 1989), and that Mr. Engle's death sentence thus violated the eighth amendment.

CLAIM X

MR. ENGLE'S DEATH SENTENCE MUST BE VACATED BECAUSE THE COURT FAILED TO PROVIDE A FACTUAL BASIS IN SUPPORT OF THE PENALTY.

Florida law requires that a trial judge make specific written findings of fact to support any imposition of a death sentence. Fla. Stat. section

---

[36]This Court in Adams v. State established a Hitchcock filing deadline of August 1, 1989, for movants whose judgment and sentence become final two years prior to August 1. 1989. This filing deadline was obviously intended to apply to litigants who had previously litigated a motion for post-conviction relief. This deadline applied to litigants who unlike Mr. Engle were asserting a Hitchcock claim as a "fundamental constitutional right . . . not established within [the two year filing deadline of Rule 3.8501 and [has] held to apply retroactively." Rule 3.850. The application of the August 1, 1989, filing deadline to shorten the initial two-year filing deadline provided in Rule 3.850 is a fundamental miscarriage of the law. This Court could not have intended that the filing date set for Hitchcock claims in Adams v. State, 543 So. 2d 1244 (Fla. 1989), shorten drastically the two-year period allowed for initial Florida capital litigants under Rule 3.850 or the 30-day period established under Rule 3.851.

Mr. Engle has done what Rule 3.850 and the meaning of Adams require. He filed a Rule 3.850 motion alleging a claim within "two years after the judgment and sentence became final." Rule 3.850. He raised his Hitchcock claim in his initial Rule 3.850 motion, well before the two-year period expired. The August 1, 1989, filing deadline is simply inapplicable to initial litigants such as Mr. Engle. To apply it against such litigants is to create a procedural "trap for the unwary," Lefkowitz v. Newsome, 420 U.S. 283 (1975), something that fundamental fairness simply does not allow.

921.141(3). The Legislature has mandated that the imposition of the death penalty cannot be based on a mere recitation of the aggravating or mitigating factors present, but must be supported by a written finding of the specific facts giving rise to the aggravating and mitigating circumstances. The legislature has provided as part of the capital sentencing scheme:

> In each case in which the court imposes the death sentence, the determination of the court shall be supported by specific written findings of fact based upon the circumstances in subsections (5) and (6) and upon the records of the trial and the sentencing proceedings. If the court does not make the findings requiring the death sentence, the court shall impose sentence of life imprisonment in accordance with s. 775.082.

Fla. Stat. sec. 921.141(3); **see** Van Rovalv. State, 497 So. 2d 625 (Fla. 1986).

The findings in support of Mr. Engle's second death sentence fail to comport with the statutory mandate set out in section 921.141(3). The trial court based the death sentence on a discussion of aggravating factors that revolved around the offensive nature of the crime. This discussion fails to state specific facts showing that Mr. Engle actually killed the victim or contemplated that she be killed (R. 75-77). With regard to mitigation, the court simply stated that it found no mitigation (R. 77). The Court's complete refusal to discuss mitigation precludes any possibility that the court made a "well-reasoned application" of the sentencing statute. Mr. Engle's death sentence is unlawful, **see** Rule 3.850, and it must be vacated and a life sentence should be imposed in accordance with section 921.141(3).

CLAIM XI

THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD VIOLATED THE EIGHTH AMENDMENT.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 1242 (1976). On review of a death sentence the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous the defendant is entitled to new resentencing. Id. at 1450.

The sentencing judge in Mr. Engle's case found no mitigating circumstances (R. 202). Finding four aggravating circumstances the court imposed death (R. 1204). The court's conclusion that no mitigating circumstances were present, however, is belied by the record, and by the jury's recommended life sentence, The 3.850 court's dismissal of this claim ignores the fundamental constitutional requirements that capital sentencing be reliable and noncapricious.

Statutory and nonstatutory mitigating circumstances were reflected in the trial and resentencing record. The record reflected evidence sufficient to preclude the override under proper standards. The State did not contest the record mitigating evidence; however, the court not only refused to find this mitigation but failed to even consider it (R. 204). Judge Santora's recent comments demonstrate why this was so.[37]

---

[37]For example, the Court also failed to find the statutory mitigating circumstance that Mr. Engle's capacity to conform his conduct to the requirements of the law was substantially impaired even though Dr. Vallely specifically found this mitigating circumstance and it was unrebutted by the State (R. 78).

Despite the presence of clearly mitigating circumstances, the court concluded that no mitigating circumstances were present. This Court has

(continued...)

Under Eddings v. Oklahoma, 455 U.S. 104 (1982), and Magwood, supra, the sentencing court erred in refusing to accept and find the statutory and nonstatutory mitigating circumstances which were established. A proper balancing cannot occur if the "ultimate" sentencer fails to consider obvious mitigating circumstances. The mitigation should now be recognized and this Court should grant relief.

CLAIM XII

INTRODUCTION OF INFLAMMATORY CRIME SCENE PHOTOGRAPHS WAS FUNDAMENTAL ERROR AND VIOLATED MR. ENGLE'S RIGHT TO A FAIR TRIAL.

The State introduced several photographs at Mr. Engle's trial that depicted the victim as she was found in the woods. These photos were inflammatory and served no valid purpose. To the contrary, the introduction of these photographs prevented Mr. Engle from receiving a fair trial.[38]

Photographs should be excluded when they are so shocking that the risk of

---

[37](...continued)
recognized that factors such as poverty, emotional deprivation, lack of parental care, cultural deprivation, and a previous history of good character are mitigating. See, e.g., Perry v. State, 522 So. 2d 817 (Fla. 1988).

[38]In particular, the State introduced as Exhibit 9 an enlarged colored photograph taken when Detective Parmenter discovered the body (T. 336). Defense counsel objected to the introduction of this photograph, arguing that it was inflammatory and would not assist the jury in deliberation, especially since there was no question of the manner of death (T. 336). The court admitted the photograph over defense's objection (Id.). The medical examiner admitted that he normally used smaller black and white photographs to explain his testimony (T. 362). The medical examiner also admitted that this photo was not taken by any member of his staff (T. 363). Other photographs such as Exhibit 11 showing injuries to the face and neck area were admitted without objection and could have been used to illustrate the medical examiner's testimony (e.g., T. 355).
The State fanned the fire of prejudice created by this photograph when it showed the photograph to the jury again in its closing argument:

> I submit to you that the large photograph showing Kay Tolin dead, face-down in the woods off Fouraker Road is part one and the man sitting 15 feet away from you is part two and that's all there is to it.

(T. 873). Again in its sentencing argument the State showed the photograph to the jury, stating, "That's Kay Tolin afterwards" (T. 990). The State at resentencing repeated this improper attack by again showing the judge photographs of the body (R. 59 and 65).

prejudice outweighs its relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla. 1975). Such was the case here.[39] The photograph presented in this case was not merely repetitive and cumulative; it was also unnecessarily grotesque and inflammatory. The State's use of this photograph distorted the actual evidence against Mr. Engle. There was no valid reason to enter this particular photograph at any stage of proceedings. The subject matter of the photograph was depicted in other less grotesque photographs. The defense stipulated to the identity of the victim at the medical examiner's office (T. 348). The photograph under these circumstances created impermissible and incurable prejudice.

This admission of this photograph was fundamental constitutional error that deprived Mr. Engle of a fair trial. The lower court erred in dismissing this claim, and this Court should now correct this error.

CLAIM XV

MR. ENGLE'S SENTENCING JUDGE IMPROPERLY FOUND THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE IN VIOLATION OF RHODES V. STATE, MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

This Court has explained concerning the "heinous, atrocious or cruel" aggravating circumstance:

> [T]he prosecutor argued that the fact that th victim's body was transported by dump truck from the hotel where she was killed to the dump where she was found supported the aggravating factor that the murder was heinous, atrocious, and cruel. We have stated that a defendant's actions after the death of the victim cannot be used to support this aggravating circumstance. Jackson v. State, 451 So. 2d 458 (Fla. 1984); Herzog v. State, 439 So. 2d 1372 (Fla. 1983). This statement was improper because it misled the jury.

---

[39] Photographs should also be excluded when they are repetitious or "duplicitous." Alford, supra (admission of photographs was proper when there were no duplications); Adams v. State, 412 So. 2d 850 (Fla. 1982)(exclusion of two additional photographs was properly based on the trial court's exercise of reasonable judgment to prohibit the introduction of "duplicitous photographs"); see also Mazzarra v. State, 437 So. 2d 716, 718-19 (Fla. 1st DCA 1983)(gruesome photographs admissible when they are not repetitious). Such was also the case here.

Rhodes v. State, 547 So. 2d 1201, 1205-06 (Fla. 1989)(emphasis added). In Cochran v. State, 547 So. 2d 928, (Fla. 1989), the Court stated:

> Our cases make clear that where, as here, death results from a single gunshot and there are no additional acts of torture or harm, this aggravating circumstance does not apply.

Cochran at 931. In Hamilton v. State, 547 So. 2d 630 (Fla. 1989), the Court stated:

> Although the trial court provided a detailed description of what may have occurred on the night of the shootings, we believe that the record is less than conclusive in this regard. Neither the state nor the trial court has offered any explanation of the events of that night beyond speculation. Nonetheless, the court found that the crimes were heinous, atrocious, or cruel and that they were committed in a cold, calculated manner with a heightened sense of premeditation. There is no basis in the record for either of these findings. Aggravating factors must be proven beyond a reasonable doubt. The degree of speculation present in this case precludes any resolution of that doubt.

Hamilton at 633-34.

The judge did not consider these limitations on the "heinous, atrocious or cruel" aggravating factor. Apparently, this Court also failed to do so when it affirmed the findings on this aggravating factor. Indeed, the unconstitutional constructions rejected by this Court are precisely what Mr. Engle's judge employed in his own sentencing determination. As a result, the judge failed to limit his discretion and violated Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In addition, the judge specifically referred to and relied upon his sympathy for the victims when he pronounced the sentence in open court. The eighth amendment error in this case is absolutely indistinguishable from the eighth amendment error upon which a unanimous United States Supreme Court granted relief in Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Under Maynard the only remaining question is whether the error can be found harmless beyond a reasonable doubt. In this case, the life recommendation based upon valid mitigation precludes a finding of harmless error. The fundamental error asserted in this claim merits this Court's reconsideration at this time.

CLAIM XVI

MR. ENGLE'S DEATH SENTENCE VIOLATES THE EIGHTH AMENDMENT BECAUSE THE TRIAL COURT SHIFTED THE BURDEN TO MR. ENGLE TO PROVE THAT DEATH WAS INAPPROPRIATE CONTRARY TO MULLANEY V. WILBUR, 421U.S. 684 (1975), LOCKETT V. OHIO, 438 U.S. 586 (1978), *AND* MILLS V. MARYLAND, 108 S. CT. 1860, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A presumption that death is the appropriate sentence violates the principles of Mullanev v. Wilbur, 421 U.S. 684 (1975). See Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). The sentencing determination by Mr. Engle's trial judge similarly violated the eighth and fourteenth amendments, Mullanev v. Wilbur, 421U.S. 684 (1975), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988). The burden of proof was shifted to Mr. Engle on the central sentencing issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Engle's due process and eighth amendment rights. See Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). This improper burden shifting also limited the full and fair consideration of mitigating evidence, and a full and fair assessment of the validity of the jury's verdict of life in light of Tedder.

The gravamen of Mr. Engle's claim is that the judge presumed that death was appropriate once aggravating circumstances were established, unless Mr. Engle proved that the mitigating circumstances outweighed the aggravating circumstances. The Court assumed in its sentencing decision that Mr. Engle had the ultimate burden to prove that life was appropriate.

The effects feared in Adamson and Mills are precisely the effects resulting from the burden-shifting standard used in Mr. Engle's case. By requiring that mitigating circumstances must outweigh aggravating circumstances before a life sentence could be imposed, the judge in effect did not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. Cf. Mills; Lockett; Hitchcock.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Engle's death sentence. Mr. Engle submits that the lower court erred in denying this claim. For each of the reasons discussed above the Court should vacate Mr. Engle's unconstitutional sentence of death.

CONCLUSION

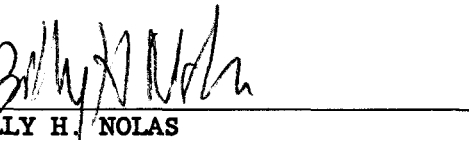
The discussion presented above demonstrates that the constitutional validity of this capital conviction is suspect at best. That discussion also demonstrates that the manner by which the jury's verdict of life was overridden cannot be squared with Florida's capital sentencing statute, this Court's case law concerning that statute, or the eighth amendment. The facts which show this (for example, Judge Santora's recent disclosures) were not available earlier. Some facts are still withheld from Mr. Engle, as the State has refused to in any way comply with the Public Records Act.

Based on what has now come to light about this death sentence, this Court should vacate that sentence and direct that a proper resentencing proceeding be conducted. Based on the facts pled, an evidentiary hearing is required on a number of the issues involved in this case. The lower court erred in its signing of the State's order summarily denying Rule 3.850 relief.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Mark Menser, Assistant Attorney General, Department of Legal Affairs, Magnolia Park Courtyard, 111-29 North Magnolia Drive, Tallahassee, Florida 32301, this 30th day of April, 1990.

Respectfully submitted,

By: 

BILLY H. NOLAS
Counsel for Appellant