

IN THE

SUPREME COURT OF FLORIDA

CASE NO. 74,920

---

RICKEY BERNARD ROBERTS,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

---

ON APPEAL FROM THE CIRCUIT COURT  
OF THE ELEVENTH JUDICIAL CIRCUIT,  
IN AND FOR DADE COUNTY, FLORIDA

---

INITIAL BRIEF OF APPELLANT

---

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Roberts' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Roberts' claims, and this appeal followed.

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

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

"T" -- Record on Rule 3.850 motion.

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

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On June 21, 1984, Mr. Roberts was charged by indictment with the first degree murder of George Napoles, sexual battery of Michelle Rimondi, and two counts of robbery and kidnapping of Michelle Rimondi. Mr. Roberts entered a plea of not guilty to the charges and was tried before a jury in December of 1985. After deliberating for twenty three (23) hours, the jury returned a verdict of guilty of first degree murder, sexual battery, and kidnapping.

The central issue at the trial was the credibility of Michelle Rimondi. She claimed that it was Rickey Roberts who killed Mr. Napoles and raped her, Ms. Rimondi at approximately 3:00 a.m. on June 4, 1984. Mr. Roberts testified in his own behalf and denied the charges, although admitting he had picked up a hitchhiking-Ms. Rimondi on the night on the murder. Mr. Roberts' defense was that Ms. Rimondi, a prostitute, and one or both of her male protectors killed Mr. Napoles, Ms. Rimondi's client, and then framed Mr. Roberts for the murder. However, the defense was precluded from presenting any evidence of Ms. Rimondi's sexual history because the trial court ruled that the Rape Shield Law prohibited its introduction. Even without this key information going towards Ms. Rimondi's motives to lie about her involvement in the murder and her relationship with the victim, the jury deliberated for twenty three (23) hours before convicting.

In the penalty phase of the trial, the court instructed the jury on several aggravating circumstances, but failed to include the appropriate qualifiers applicable to the various aggravating factors. The jury was also instructed regarding the statutory mental health mitigating factors. However, the jury was told that if the mental health mitigation did not rise to the statutory threshold level, only "other aspects" of Mr. Roberts character or background could be considered in mitigation. The trial was prior to the decision in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), holding that a Florida sentencing jury must receive accurate and correct penalty phase instructions. After being erroneously instructed

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and having deliberated, the jury, by a vote of seven to five (7-5), recommended that Mr. Roberts be sentenced to death for the first-degree murder conviction.

Prior to the sentencing hearing, the trial judge prepared his written findings as to the aggravating and mitigating circumstances surrounding the murder. At the conclusion of the sentencing, this order was entered. The aggravating circumstances found were as follows: (1) Mr. Roberts has previously been convicted of a violent felony; (2) Mr. Roberts was under sentence of imprisonment; (3) the murder was committed while Mr. Roberts was engaged in the crime of sexual battery; and (4) it was especially heinous, atrocious and cruel (R. 581-84). The court stated that it "has been unable to find anything about this offense or association with this defendant's to warrant mitigation" (R. 586). The court sentenced Defendant to death (R. 587).

On appeal this Court affirmed Mr. Roberts' conviction and sentence of death. Roberts v. State, 510 So. 2d 885 (Fla. 1987). On August 29, 1989, the Governor of Florida signed a death warrant setting Mr. Roberts' execution for Tuesday, October 31, 1989. On September 28, 1989, Mr. Roberts timely filed his Rule 3.850 motion. On October 19, 1989, Mr. Roberts supplemented his motion to vacate. A status hearing was conducted on October 25, 1989. At that hearing the court ruled that Mr. Roberts' supplementation was proper, but concluded that the motion to vacate should be summarily denied. A notice of appeal was promptly filed. Thereafter, this Court stayed Mr. Roberts' execution.

#### SUMMARY OF ARGUMENT

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I. Olden v. Kentucky, 109 S. Ct. 480 (1989), effectively overruled this Court's decision in Mr. Roberts' direct appeal. Under Olden, Mr. Roberts was denied his sixth amendment right to cross-examine the State's witness, Ms. Rimondi, as to her prostitution, which was material as to her motives to lie. Ms. Roberts' defense was that either Ms. Rimondi or her male protectors committed the murder and framed Mr. Roberts. Since the jury deliberated for twenty-three hours without knowing of

Ms. Rimondi's prostitution, the limitation upon the cross-examination cannot be found to be harmless beyond a reasonable doubt, and a reversal is required.

11. Rock v. Arkansas, 107 S. Ct. 2407 (1987); Taylor v. Illinois, 108 S. Ct. 646 (1988); and Olden v. Kentucky, 109 S. Ct. 480 (1989), effectively overruled this Court's decision on direct appeal upholding the trial court's limitation on Mr. Roberts' ability to testify in his own behalf. Under these new decisions, Mr. Roberts was denied his constitutional right to testify in his own behalf and present relevant and material evidence. The exclusion of Mr. Roberts' testimony, that Ms. Rimondi told him that she was a prostitute, cannot be held to be harmless beyond a reasonable doubt since Ms. Rimondi's prostitution gave rise to a motive for her or her male protectors to have killed Mr. Napoles, her client.

111. The State violated Rule 3.220 of the Florida Rules of Criminal Procedure and Brady v. Maryland, 373 U.S. 83 (1967), by withholding statements and evidence which were exculpatory. Under Roman v. State, 528 So. 2d 1129 (Fla. 1986), a reversal is required because the error was not harmless beyond a reasonable doubt.

IV. Pennsylvania v. Ritchie is new case law which establishes that an in camera proceeding must be held in order to ascertain what exculpatory evidence Ms. Rimondi provided her rape counselor, an employee of the state attorney's office.

V. Mr. Roberts was deprived of effective assistance of counsel at the penalty phase of his capital trial by virtue of counsel's failure to investigate, develop and present mitigating evidence of Mr. Roberts' background and history. Mr. Roberts was prejudiced because the sentencing jury which recommended death by a vote of seven to five did not know of the substantial mitigation in Mr. Roberts' background and how the background corroborated the opinions of the mental health experts.

VI. Mr. Roberts was deprived of the effective assistance of counsel at the guilt-innocence phase of his capital trial. Counsel neglected for no tactical reasons to develop and present impeachment evidence. Further, counsel was rendered ineffective by several of the trial court's rulings.



VII. Mr. Roberts was denied his right of confrontation when the court limited cross-examination into pending charges against the State's witnesses. Mr. Roberts was denied the effective assistance of appellate counsel when counsel failed to raise this issue on appeal, and as a result, deprived Mr. Roberts of the reversal to which he was entitled to by virtue of the constitutional error.

VIII. Mr. Roberts was denied his right to trial by a jury that presumed him innocent when the State repeatedly referred to him by an alias. Mr. Roberts received ineffective assistance of appellate counsel when this issue was not raised on direct appeal.

IX. New case law establishes that this Court erred on direct appeal and that Mr. Roberts' sentence of death is unreliable because the sentencers did not know to consider mental health mitigation not rising to the statutory threshold as nonstatutory mitigation within the meaning of "any other aspect of the defendant's character."

X. Mr. Roberts' sentencing jury was not adequately instructed regarding the meaning of heinous, atrocious, or cruel. This violated the eighth amendment under Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), new case law which is cognizable in collateral proceedings.

XI. Mr. Roberts' sentencing jury was incorrectly instructed that in order to recommend a life sentence, the jury had to find that the mitigating circumstances outweighed the aggravating circumstances. This claim is cognizable because of a change in law. Mills v. Maryland, 108 S. Ct. 1860 (1988), and Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

XII. The jury in Mr. Roberts' case was improperly led to believe that they could not consider sympathy for Mr. Roberts in determining the sentence. This was in violation of the eighth amendment and the principles set forth in Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

XIII. Under Maynard v. Cartwright, supra, and Hitchcock v. Dugger, supra,

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changes in the law, Mr. Roberts' jury was not adequately instructed regarding the aggravating circumstance of "in the course of a felony."

XIV. Mr. Roberts' jury was not adequately instructed regarding the weight of the "under sentence of imprisonment" in violation of the eighth amendment requirements set forth in Maynard v. Cartwright, supra, and Hitchcock v. Dugger, supra, which are changes in the law.

XV. The sentencing proceeding here, was tainted by the impermissible use of victim impact evidence in violation of Booth v. Maryland, 107 S. Ct. 2529 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989), new case law.

XVI. The jury was misled concerning its role in the sentencing of Mr. Roberts in violation of the eighth amendment new precedent established by Hitchcock v. Dugger, supra, and Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

XVII. Nonstatutory aggravating circumstances were presented to Mr. Roberts' jury and proper instructions were not given to disregard this argument as required by Maynard v. Cartwright, supra, and Hitchcock v. Dugger, supra.

XVIII. Mr. Roberts was denied a fair trial and sentencing as a result of the prosecutor's improper arguments which contained vindictive and personal attacks on Mr. Roberts.

XIX. The trial court erred when it improperly limited Mr. Roberts' mental health expert's testimony in violation of Perry v. Lynaugh, supra, new case law.

XX. Mr. Roberts was denied the effective assistance of counsel when his attorney withdrew because he was a material witness to an inconsistent statement by a State's witness. The attorney was in fact not subsequently called as a witness,

XXI. Mr. Roberts was deprived of his right to a jury not picked on a racial basis.

XXII. By virtue of Rule 3.851 of the Florida Rules of Criminal Procedure, Mr. Roberts was deprived of his right to a full and fair opportunity to present his claim.

XXIII. Mr. Roberts' sentence of death rests upon an unconstitutionally obtained prior conviction.

#### ARGUMENT I

OLDEN V. KENTUCKY IS NEW CASE LAW WHICH ESTABLISHES THAT MR. ROBERTS WAS DEPRIVED OF HIS RIGHT TO CONFRONT WITNESSES AGAINST HIM WHEN THE TRIAL COURT PROHIBITED CROSS-EXAMINATION OF THE STATE'S WITNESS, MICHELLE RIMONDI, REGARDING HER WORK AS A PROSTITUTE AND HOW THAT LED TO THE VICTIM'S DEATH.

Michelle Rimondi was a prostitute at the time George Napoles was killed. She testified for the State and claimed that while she and Mr. Napoles were parked on Key Biscayne Boulevard at about 3:00 a.m., Mr. Roberts killed Mr. Napoles and raped Ms. Rimondi. The defense argued that Ms. Rimondi and either one or both of her male friends, Manny Cebey and Joe Ward, killed Mr. Napoles. The defense was not allowed to cross-examine Mr. Rimondi or her male friends, Mr. Cebey or Mr. Ward, regarding her employment as a prostitute or the protection they provided her and her business. The defense was not able to present what it obviously believed was the motive for the killing, a "trick" gone awry.

The State's Response to the Petition for Writ of Habeas Corpus which the State presented to the circuit court at the October 25, 1989, hearing for consideration (T. 359). concedes much of this:

In his opening statement and closing argument, defense counsel theorized that either the rape victim's boyfriend, Manuel Cebey, or Joe Gary Ward, at whose house the rape victim and Jamie Campbell were staying that weekend, had murdered the victim because they were jealous of his being with the rape victim that evening, and that the rape victim blamed the defendant to protect either one or both of them.

Response at 13-14. However, counsel argued jealousy was the motive only because he was precluded from developing the real motive for the murder, Ms. Rimondi's prostitution. Defense counsel, as the State concedes, presented evidence that "Ward was a violent man who sometimes carried a firearm (T. 1595-1600)." Response at 30. "Michelle Rimondi, also testified that Ward had a bad temper and was a violent person (T. 2269)." Response at 30. However, the defense was unable to provide the

jury with the information necessary to complete the picture; Ms. Rimondi was a prostitute who Mr. Cebey and Mr. Ward protected, that was why she associated with these violent men.

The jury did not know of Ms. Rimondi's prostitution in evaluating her testimony as to why she was in a strange man's car at 3:00 a.m. on Key Biscayne Boulevard. Ms. Rimondi did not know Mr. Napoles. She had just met him. They were "partying" together. Obviously, cross-examination should have been allowed to develop that Mr. Napoles was a "john." Defense counsel should have been able to confront Ms. Rimondi with her prostitution and whether Mr. Napoles got out of line and was killed by either herself, Mr. Ward or Mr. Cebey. In evaluating her story, the jury needed to know the very relevant fact that Ms. Rimondi was a prostitute who was a turning a "trick" when the homicide occurred.

The defendant's rights to present a defense and to confront and cross-examine the witnesses against him are fundamental safeguards "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 403, 404 (1965). Mr. Roberts was denied his rights to present a defense, to confront and cross-examine the witnesses against him, when trial counsel was precluded from questioning Michelle Rimondi about her history of prostitution. Prior to trial, the State's motion in limine to preclude testimony about Michelle Rimondi's sexual history, was granted by the trial court (R. 661). Obviously, it was critical to the defense to fully explore Ms. Rimondi's credibility and to effectively impeach her testimony before the jury. However, effective cross-examination was never permitted since the trial court ruled that the Rape Shield Law prohibited inquiry into Michelle Rimondi's sexual history. The court found that evidence of specific acts and Michelle Rimondi's sexual history were not admissible since consent was not at issue.' This Court on appeal affirmed,

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'However, the court ignored the provision in the Rape Shield Law which allows the admission of this kind of evidence in order to explain the presence of sperm in a sexual assault victim Fla. Stat. sec. 794.022(2), which was an issue.

finding no violation of Mr. Roberts' confrontation rights because of the "highly prejudicial aspect" of Ms. Rimondi's sexual history.

Since Mr. Roberts' trial, new case law has developed which establishes the error here and justifies presentation of this issue in a Rule 3.850 motion or petition for habeas corpus relief. This Court has held that where new precedent from the United States Supreme Court establishes that error occurred in a criminal prosecution, the defendant may present a claim premised upon the new precedent in a state collateral proceeding. Jackson v. Dunner, 547 So. 2d 1197 (Fla. 1989). State courts will entertain and decide such claims if the new precedent constitutes a change in law. This Court has held that a decision from the United States Supreme Court is a change in law if it effectively overrules this Court's prior precedent. In Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), this Court recognized that Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), explicitly overturned this Court's prior precedent and thus constituted a change in law cognizable in collateral proceedings. In Jackson v. Dugger, 547 So. 2d 1198-99, this Court recognized that Booth v. Maryland, 107 S. Ct. 2529 (1987), effectively overturned the prior decision on direct appeal in Ms. Jackson's case. See Jackson v. State, 498 So. 2d 406 (Fla. 1986). Here in Mr. Roberts' case, the question is whether Olden v. Kentucky, 109 S. Ct. 480 (1989), effectively overrules this Court's decision affirming on direct appeal.<sup>2</sup>

In Olden v. Kentucky, 109 S. Ct. at 483, the Supreme Court was presented with case where the Kentucky courts, pursuant to a Rape Shield Law, had refused to allow cross-examination of an alleged rape victim regarding her sexual history. In

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<sup>2</sup>Of course the rationale for recognizing United States Supreme Court's decisions, which effectively overrule decisions of this Court, as cognizable in collateral proceedings, is that the State courts have an obligation under the constitution to correct obvious constitutional error. There is no reason to force the defendant into federal court in order to obtain the relief to which he is entitled. In fact the delay involved in federal litigation will only prejudice both parties at the inevitable retrial.

reversing the Supreme Court stated:

In Davis v. Alaska, we observed that, subject to "the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation . . . , the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness." *Id.*, at 316, 94 S.Ct., at 1110. We emphasized that "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." *Id.*, at 316-317, 94 S.Ct. at 1110, citing Greene v. McElroy, 360 U.S. 474, 496, 79 S.Ct. 1400, 1413, 3 L.Ed.2d 1377 (1959). Recently, in Delaware v. Van Arsdall, 475 U.S. 673, 106 S.Ct. 1431, 89 L.Ed.2d 674 (1986), we reaffirmed Davis, and held that "a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby 'to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" 475 U.S., at 680, 106 S.Ct., at 1436, quoting Davis, supra, 415 U.S., at 318, 94 S.Ct., at 1111.

In the instant case, petitioner has consistently asserted that he and Matthews engaged in consensual sexual acts and that Matthews--out of fear of jeopardizing her relationship with Russell--lied when she told Russell she had been raped and has continued to lie since. It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witnesses'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." Delaware v. Van Arsdall, supra, 475 U.S., at 680, 106 S.Ct., at 1436.

The Kentucky Court of Appeals justified the limitation of the cross-examination on the basis of the prejudice to the alleged victim, Matthews. "[T]he court held that petitioner's right to effective cross-examination was outweighed by the danger that revealing Matthews' interracial relationship would prejudice the jury against her." Olden, 109 S. Ct. at 483. However, the Supreme Court noted that Matthews, the alleged victim, gave testimony that "was central, indeed crucial, to the prosecution's case," *Id.* at 484. Her testimony was directly contradicted by the defendant's testimony. As a result, evidence going towards her motives to lie and testify against the defendant could not be excluded on the basis of "[s]peculation as to the effect of jurors' . . . biases." *Id.* at 483.

Here as in Olden, the State's case was premised upon the testimony of the alleged sexual assault victim. The defense, here as in Olden, claimed the victim was lying. Here as in Olden, the defense sought to impeach the alleged victim by

introducing evidence of her sexual history in order to establish why she would be lying when fingering the defendant as the assailant. Here, as in Olden, the defense also wanted to cross-examine the witness about the matter in order to corroborate portions of the defendant's **own** testimony. Here as in Olden, the evidence was excluded because of potential prejudice to the alleged victim. On direct appeal, the Court found the excluded evidence "highly prejudicial." Roberts v. State, 510 So. 2d 885, 892 (Fla. 1987).

There can be no doubt under Olden that this Court's decision in Mr. Roberts' direct appeal violated the sixth amendment right of confrontation, which requires that a defendant be allowed to impeach the credibility of the prosecution's witnesses by showing the witnesses' possible biases or by showing that there may be other reasons to doubt the State's reliance upon the witnesses' testimony. In Olden, Kentucky's rape shield law precluded cross-examination regarding the victim's sexual history. The United States Supreme Court's summary reversal of Olden's conviction was premised upon the Court's conclusion that the Kentucky court had "failed to accord proper weight to petitioner's Sixth Amendment right 'to be confronted with the witnesses against him.'" 109 S. Ct. at 482-83. The court found error saying:

It is plain to us that "[a] reasonable jury might have received a significantly different impression of [the witness'] credibility had [defense counsel] been permitted to pursue his proposed line of cross-examination." Delaware v. Van Arsdall, *supra*, 475 U.S., at 680, 106 S.Ct., at 1436.

109 S. Ct. at 483. Certainly here a jury deadlocked for twenty three (23) hours as to whether to believe Ms. Rimondi or Mr. Roberts, may have reached a different result had it know that Mr. Roberts' claim that a hitchhiking-Ms. Rimondi told him she was a prostitute and that there was basis in fact for such a claim; she, in fact, was a prostitute. Further, a different impression of Ms. Rimondi's motives would certainly have resulted had the jury **known** she was **a** prostitute and that Mr. Cebey and Mr. Ward were violent male friends who provided her protection. Certainly

the obvious inference that Mr. Napoles was a "**trick**" is important in understanding the possible scenarios which may have created reasonable doubt as to Mr. Roberts' guilt.

The prejudice to Mr. Roberts resulting from this limitation of cross-examination and confrontation rights is manifest when the testimony of Ms. Rimondi is analyzed in the context of the testimony that may have been elicited during cross-examination. Michelle Rimondi had accused the defendant of first degree murder, sexual battery and kidnapping. She was the only eye-witness. By precluding the defense from exploring her reputation, her sexual history, and her motives to lie which arose from her prostitution, her account of the crime was left unchallenged. Her reasons for lying were left unrevealed. Cross-examination of this witness would have disclosed that Michelle Rimondi's motives were very much in doubt. She was a prostitute who had special male companions looking after her. The defense was that one or both of these male companions with Ms. Rimondi's assistance killed Napoles, and then decided to pin it on the Mr. Roberts. Ms. Rimondi's activity as a prostitute, and in picking up Napoles in the first place were important facts for the jury to know. Ms. Rimondi's activities as a prostitute also shed new light on Mr. Roberts' testimony that she was hitchhiking at 3:00 a.m. on Key Biscayne Boulevard when he gave her a lift. If she was looking for someone to frame, what better way to locate the patsy.

If the defense had been permitted to examine this witness about her reputation, the defense could have fully contradicted the allegation of a sexual battery. The State's evidence, a finding of sperm, would have been easily explained had the defense been able to inquire and present evidence about Michelle Rimondi's source of employment, prostitution. Consent may not have been an issue because petitioner denied sexual relations with Ms. Rimondi, but certainly the source of the sperm was an issue. The jury was deprived of the evidence necessary to properly evaluate her testimony. Counsel should have been able to ask if the presence of sperm was not



explainable by her work as prostitute.

Here, Mr. Roberts' cross-examination of Michelle Rimondi was limited as in Olden. The limitation of cross-examination was similarly based on the misinterpretation and misapplication of a rule of evidence - the Rape Shield Law. Olden declared rape shield laws could not limit the defendant's sixth amendment rights. This Court's interpretation of this evidentiary rule prevented the defense from challenging Michelle Rimondi's account of the offense. Counsel could not attack Ms. Rimondi's motives for lying about the rape, covering up her **own** criminal activity, or what had occurred between her and the victim which led to his death.

The application of the Rape Shield Law to limit the cross-examination of Michelle Rimondi prevented Mr. Roberts from the opportunity of presenting a complete defense. State rules of procedure cannot override a defendant's right to elicit evidence in his defense. Olden specifically and emphatically **so** holds. Just as Booth effectively overturned this Court's decision in Jackson v. State, 498 **So.** 2d 406 (Fla. 1986), Olden effectively overturned Roberts v. State, 510 **So.** 2d 885 (Fla. 1987). Mr. Roberts was deprived of his opportunity to effectively challenge Michelle Rimondi's account of the offense.

The constitutional error, here, contributed to Mr. Roberts' conviction. The error can by no means be deemed harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673 (1986); Chapman v. California, 386 U.S. 18 (1967). The Court's ruling limiting the cross-examination of this witness allowed the introduction of her unchallenged account of the events to survive "the crucible of meaningful adversarial testing." United States v. Cronin, 466 U.S. 648 (1984), 104 **S. Ct.** 2039 (1984).

This violation of the confrontation clause allowed the jury to assess her testimony without the knowledge that cross-examination would have revealed. The jury should have been granted the opportunity to weigh Michelle Rimondi's testimony after full disclosure of the facts and circumstances. As the United States Court

has held:

We have elected to employ an adversary system of criminal justice in which the parties contest **all** issues before a court of law. The need to develop all relevant facts in the adversary system is both fundamental and comprehensive. The ends of criminal justice would be defeated if judgments were to be founded on a partial or speculative presentation of the facts. The very integrity of the judicial system and public confidence in the system depend on full disclosure of all the facts, within the framework of the rules of evidence.

United States v. Nixon, 418 U.S. 683, 709 (1974).

The limitation here prevented the jury from reaching a reliable verdict. This error cannot be found to be harmless beyond a reasonable doubt when consideration is given to how difficult the deliberations were for the jury. It took twenty-three (23) long hours for the jury to return a guilty verdict. The evidence that Ms. Rimondi was a prostitute and the permissible inferences flowing from that fact would have resulted in a different outcome. The error certainly was not harmless beyond a reasonable doubt.

The limitation of cross-examination also affected Mr. Roberts right to rebut the aggravating factors during the penalty phase. The State asked the jury to impose death because the homicide had occurred during the course of a sexual battery. The court also found in its sentencing findings that this aggravating factor was applicable. Sexual history was clearly relevant to rebut this aggravating factor; it was essential to challenge Ms. Rimondi's motives for charging rape as opposed to admitting criminal activity on her **own** part. The preclusion of this evidence resulted in the arbitrary imposition of a death sentence in violation of Mr. Roberts' eighth amendment rights. This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Roberts. For each of the reasons discussed above the Court should vacate Mr. Roberts' unconstitutional conviction and sentence of death.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Roberts' death sentence and renders it unreliable. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. This Court on direct appeal reached an erroneous conclusion, just as the Kentucky Court of Appeals did in Olden. The circuit court in denying Rule 3.850 relief on this claim, presented as Claim IV of the motion to vacate, accepted the State's argument that Olden did not effectively overrule this Court's decision on direct appeal. ((T]he Court feels there is no relief for the defendant," T.52) In the State's Response to Claim I of the habeas corpus petition (which Response was presented to the circuit court and considered by it), the State argued Olden "in no way changed any established confrontation clause principles and does not require a reconsideration by this Court." Response at 17. However, the Supreme Court's decision has established the error, just as Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989), established the error in this Court's prior analysis in Jackson v. State, 498 So. 2d 406 (Fla. 1986). See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). Under the principle of Jackson, this Court must revisit this issue decided on direct appeal and reverse. Pursuant to Claim IV of the motion to vacate, Mr. Roberts' conviction and sentence of death must be vacated and a new trial ordered.

## ARGUMENT II

MR. ROBERTS WAS DENIED THE RIGHT TO PRESENT A DEFENSE WHEN THE COURT APPLIED THE RAPE SHIELD LAW TO LIMIT MR. ROBERTS' RIGHT TO TESTIFY IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS UNDER TAYLOR V. ILLINOIS, 108 S. CT. 646 (1988); ROCK V. ARKANSAS, 107 S. CT. 2407 (1987); AND OLDEN V. KENTUCKY, 109 S. CT. 480 (1989), ALL OF WHICH ARE DECISIONS SUBSEQUENT TO THE SUBMISSION OF THIS CASE ON DIRECT APPEAL AND ESTABLISH A CHANGE IN LAW IN THAT THIS COURT ERRONEOUSLY RESOLVED THIS ISSUE.

Mr. Roberts was tried and convicted for the murder of George Napoles and the sexual battery and kidnapping of Michelle Rimondi. The State's case was based on Michelle Rimondi's account of the offense. Mr. Roberts steadfastly denied guilt for the offense. He maintained that Ms. Rimondi identified him in order to protect herself and the men who provided her protection in the prostitution business. Throughout the trial, Mr. Roberts sought to develop a defense by discrediting Michelle Rimondi's account, and establishing that she either participated in the murder with one or two male friends or at least knew they committed the murder. However, the State convinced the trial court that evidence regarding Ms. Rimondi's occupation as a prostitute was precluded by the Rape Shield Law. Thus, the jury never learned of Ms. Rimondi's occupation, nor was defense counsel ever able to explain to the jury that Mr. Napoles was a client who was killed when a "trick" went awry.

Michelle Rimondi gave various statements about the offense, all of which were conflicting about crucial events. The defense tried to impeach her credibility by introducing evidence about her prior sexual conduct. This evidence was relevant to dispel Michelle Rimondi's account of a sexual battery, to discredit her account of the offense, and to establish her motive for lying, i.e., fear of prosecution for prostitution, accessory to murder, or even murder. But the jury did not learn of the basis of the relationship between Ms. Rimondi and Mr. Napoles, and thus had no reason to understand why Ms. Rimondi or her male friends might kill Mr. Napoles.

Ms. Rimondi presented a dubious account of a sexual battery. According to the State's witness, Joe Riley, Ms. Rimondi failed to reveal the sexual battery when she first told him about the offense. Michelle Rimondi was unsure about where the assault had occurred. She told different people that she was assaulted in the car and then told others that the assault occurred on the ground. Even more specious is her story, not told until a year and half after the offense, of a second assault after leaving the crime scene. Roberts was not even indicted for the second sexual assault. These various accounts given by Ms. Rimondi show that her credibility was more than in dispute -- it was pivotal, as were her motives. Yet the jury was kept in the dark about Ms. Rimondi's occupation, solely because of the Rape Shield Law and concern that the evidence would prejudice Ms. Rimondi.

Rickey Roberts took the stand to testify on his **own** behalf. Roberts denied the sexual assault and the homicide. Roberts testified that he offered Michelle Rimondi a ride when she was hitchhiking. Although Ms. Rimondi testified about her conversation with the defendant, Mr. Roberts was precluded from revealing part of his account of the conversation, and his resulting knowledge that Ms. Rimondi was a prostitute. Over defense counsel's vehement objections, the trial court granted the State's motion in limine to keep all evidence of Michelle Rimondi's occupation from the jury and to limit Mr. Roberts' **own** testimony. Based on the Rape Shield Law, the trial court limited the defendant's right to testify on his **own** behalf and to present evidence to support his claim of innocence. However, there can be no doubt that had there been no sexual assault alleged, just the murder of Mr. Napoles, the defense would have been able to explore Ms. Rimondi's occupation as a prostitute, her reasons for being on Key Biscayne Boulevard at 3:00 a.m. with a man she had just met and in his car, her close relationship with Manny Cebey, and her close relationship with Joe Ward, a man she described as having a bad temper and being very violent (R. 2269).

Recently, in Olden v. Kentucky, 109 S. Ct. 480 (1989), the Supreme Court

addressed the constitutionality of a ruling limiting the admission of impeachment evidence by the application of a Rape Shield Law. Traditionally, the Rape Shield Law limits prejudicial evidence about a witness. The confrontation clause assures the defendant the right to impeach a witness about bias or motivation to lie. This evidence is critical for the jury to adequately assess the reliability of a witness. The limitation upon defense counsel's ability to cross-examine Ms. Rimondi was addressed in Argument I, *supra*. However, here the Rape Shield Law was also applied to limit Mr. Roberts' ability to present evidence and testify in his own behalf.

In this case, Rickey Roberts consistently asserted that he never had sexual relations with Michelle Rimondi and that either Ms. Rimondi and/or a third person committed the homicide. Rickey Roberts asserted that Michelle Rimondi had implicated him in order to protect herself or the guilty party. It was his position that Ms. Rimondi lied when she told police and the State Attorney various accounts of the offense and continued to lie at trial. The trial was, in fact, her word against his. However, he was limited in his ability to produce evidence that would corroborate his version if it revealed Ms. Rimondi's activities as a prostitute.

The Rape Shield law was misapplied to limit the defense's ability to present evidence and Mr. Roberts' testimony. In this case, the Rape Shield Law was applied to limit testimony prejudicial to the witness but necessary to the theory of defense. It was used to limit Mr. Roberts' own testimony.

Since Mr. Roberts' briefing of this issue on direct appeal, the United States Supreme Court has decided new case law which effectively overrules this Court's decision on direct appeal. Recently the United States Supreme Court has held:

Just as a State may not apply an arbitrary rule of competence to exclude a material defense witness from taking the stand, it also may not apply a rule of evidence that permits a witness to take the stand, but arbitrarily excludes material portions of his testimony. In Chambers v. Mississippi, 410 U.S. 284, 93 S.Ct. 1038, 35 L.Ed.2d 297 (1973), the Court invalidated a State's hearsay rule on the ground that it abridged the defendant's right to "present witnesses in his own defense." *Id.*, at 302, 93 S.Ct., at 1049. Chambers was tried for a murder to which another person repeatedly had confessed in the presence of acquaintances. The State's hearsay rule, coupled with a "voucher" rule that did not allow

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the defendant to cross-examine the confessed murderer directly, prevented Chambers from introducing testimony concerning these confessions, which were critical to his defense. This Court reversed the judgment of conviction, holding that when a state rule of evidence conflicts with the right to present witnesses, the rule may "not be applied mechanistically to defeat the ends of **justice**," but must meet the fundamental standards of due process. Ibid. In the Court's view, the State in Chambers did not demonstrate that the hearsay testimony in that case, which bore "assurances of trustworthiness" including corroboration by other evidence, would be unreliable, and thus the defendant should have been able to introduce the exculpatory testimony. Ibid.

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Of course, the right to present relevant testimony is not without limitation. The right "**may**, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process." Id., at 295, 93 S.Ct., at 1046. But restrictions of a defendant's right to testify may not be arbitrary or disproportionate to the purposes they are designed to serve. In applying its evidentiary rules a State must evaluate whether the interests served by a rule justify the limitation imposed on the defendant's constitutional right to testify.

Rock v. Arkansas, 107 S. Ct. 2704, 2711 (1987) (emphasis added).

Here there was no evaluation of whether the interest to be served by the Rape Shield Law justified the limitation of Mr. Roberts' right to testify. In Rock, the Supreme Court specifically considered the adverse effect on the defendant's ability to defend herself, and concluded that a per se rule excluding a defendant's posthypnosis testimony was unconstitutional. Here Mr. Roberts' contended that he was being framed by Ms. Rimondi. Yet by virtue of the trial court's ruling that the Rape Shield Law per se prohibited all evidence of sexual history, Mr. Roberts was limited in explaining Mr. Rimondi's possible reasons for lying. Mr. Roberts could not tell the jury that Ms. Rimondi had told him she was a prostitute. In this case, the fact that Ms. Rimondi was a prostitute would have corroborated Mr. Roberts' testimony and bolstered his credibility. How would he know she was a prostitute, unless she told him? Moreover, Ms. Rimondi's activities as a prostitute would account for her being with Mr. Napoles, a man she did not **know**, at 3:00 a.m. Further, Ms. Rimondi's occupation could account for her relationships with Manny Cebey and Joe Ward, a "real violent guy" (R. 2269). Finally Ms. Rimondi's involvement in criminal activity, prostitution, was evidence upon which many

arguments could be premised as to what occurred between Ms. Rimondi and Mr. Naples that led to his death.

Ms. Rimondi's credibility was central and critical to the State's case. Her story varied and was inconsistent. Her account was corroborated only by the derivative accounts presented through the testimony of her friends. It was essential that Mr. Roberts be given the opportunity to rebut her account by testifying to his conversations with this witness. The application of the Rape Shield Law to exclude this evidence prevented the jury from having the essential tools to assess her credibility. If Mr. Roberts had not been charged with a sexual assault but only first degree murder, there can be no question but that Ms. Rimondi's occupation as a prostitute would have been admissible. By virtue of the rape allegation, the State was able to exclude this evidence which was very relevant to the motivations of Ms. Rimondi, both at the time of the homicide and in pointing the finger at Mr. Roberts.

Rock indicated consideration must be given to the purpose of the rule limiting a defendant's ability to testify. Certainly the purpose of the Rape Shield Law does not apply in a murder case where the issue is not whether the victim's history shows an inclination to consent to sexual activity. Under the Rape Shield Law in sexual assault cases, it has been determined that: consent on one occasion is not relevant to consent on another occasion. The policy behind such a rule is not served by application of the rule in this case, where the issue is whether Ms. Rimondi was trying to frame Mr. Roberts for a murder either she or friends of hers committed. Under Rock, the purpose for the **rule** was not advanced by its application here. More importantly, the defendant's right to defend against the murder charged certainly outweighed the State's purpose in adopting the Rape Shield Law in the first place.

The trial court's ruling violated the defendant's right to testify in his own behalf, that right guaranteed by the fifth and sixth amendments. The State "may not apply a rule of evidence that permits a [defendant] to take the stand, but



arbitrarily excludes material portions of his testimony." Rock v. Arkansas, 107 S. Ct. at 2711 (1987). The court's ruling, prohibiting Mr. Roberts from testifying about his conversations with Ms. Rimondi, abridged his right to testify in his behalf. He **was** arbitrarily denied the opportunity to rebut Ms. Rimondi's account of her conversations with Rickey Roberts. The limitation imposed by the court unfairly restricted Mr. Roberts' right to testify in his defense:

The opportunity to testify is also a necessary corollary to the Fifth Amendment's guarantee against compelled testimony. In Harris v. New York, 401 U.S. 222, 230, 91 S.Ct. 643, 648, 28 L.Ed.2d 1 (1971), the Court stated: "Every criminal defendant is privileged to testify in his **own** defense, or to refuse to do **so**." Id., at 225, 91 S.Ct., at 645. Three of the dissenting Justices in that case agreed that the Fifth Amendment encompasses this right: "[The Fifth Amendment's privilege against self-incrimination] is fulfilled only when an accused is guaranteed the right 'to remain silent unless he chooses to speak in the unfettered exercise of his **own** will.' ... The choice of whether to testify in one's **own** defense ... is an exercise of the constitutional privilege." Id., at 230, 91 S.Ct., at 648, quoting Malloy v. Hogan, 378 U.S. 1, 8, 84 S.Ct. 1489, 1493, 9 L.Ed.2d 653 (1964). (Emphasis removed.)<sup>10</sup>

Rock v. Arkansas, 107 S. Ct. at 2710. Footnote 10 provided:

On numerous occasions the Court has proceeded on the premise that the right to testify on one's **own** behalf in defense to a criminal charge is a fundamental constitutional right. See, *e.g.*, Nix v. Whiteside, 475 U.S. 157, ---, 106 S.Ct. 988, 993, 89 L.Ed.2d 123 (1986); id., at ---, n.5, 106 S.Ct., at 995, n. 5 (BLACKMUN, J., opinion concurring in the judgment); Jones v. Barnes, 463 U.S. 745, 751, 103 S.Ct. 3308, 3312, 77 L.Ed.2d 987 (1983) (defendant has the "ultimate authority to make certain fundamental decisions regarding the case, as to whether to ... testify in his or her **own** behalf"); Brooks v. Tennessee, 406 U.S. 605, 612, 92 S.Ct. 1891, 1895, 32 L.Ed.2d 358 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right").

Neither the trial court nor this Court on direct appeal conducted the balancing test required by Rock. Moreover, under that test the purpose of the Rape Shield Law is not advanced in this case and did not outweigh Mr. Roberts' need to present a full and complete defense.

The trial court's ruling also violated the recent decision in Taylor v. Illinois, 108 S. Ct. 646, 653 (1988):

The defendant's right to compulsory process is itself designed to vindicate the principle that the "end of criminal justice would be

defeated if judgments were to be founded on a partial or speculative presentation of the facts," United States v. Nixon, 418 U.S., at 709, 94 S.Ct., at 3108.

Mr. Roberts was denied the right to present and develop evidence crucial to the jury's assessment of Michelle Rimondi's involvement in the murder of Mr. Napoles and her motivation in testifying that Mr. Roberts committed the murder. The application of the Rape Shield Law unconstitutionally limited Rickey Roberts' right to testify on his behalf. Mr. Roberts' capital conviction and death sentence were unconstitutionally obtained. Olden, *supra*; Taylor, *supra*, and Rock, *supra*, establish that the trial court's ruling and the affirmance on appeal were in error

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Roberts' death sentence and renders it unreliable. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, *see* Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. This Court on direct appeal reached an erroneous conclusion, just as the Kentucky Court of Appeals did in Olden and the Arkansas Supreme Court did in Rock. The circuit court in denying Rule 3.850 relief on this claim, presented as Claim V of the motion to vacate, accepted the State's argument that Olden did not effectively overrule this Court's decision on direct appeal. ((T)he Court feels there is no relief for the defendant" (T.52). In the State's Response to Claim II of the habeas corpus petition (which Response was presented to the circuit court and considered by it), the State argued neither Olden nor Rock constituted a "basis to re-examine" this Court's resolution of this issue on direct appeal. Response at 18. However, the Supreme Court's decision has established the error, just as Booth v. Maryland, 482 U.S. 496 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989), established the error in this Court's prior analysis in Jackson v. State, 498 So. 2d 406 (Fla. 1986). *See* Jackson v. Dunner, 547 So. 2d 1197 (Fla. 1989). Under the principle of Jackson, this Court must

revisit this issue decided on direct appeal and reverse. Pursuant to Claim V of the motion to vacate, Mr. Roberts' conviction and sentence of death must be vacated and a new trial ordered.

### ARGUMENT III

THE STATE'S DELIBERATE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED MR. ROBERTS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State's case against Mr. Roberts consisted largely of the testimony of the purported eyewitness to the offense -- Michelle Rimondi. The State had in its possession information that repudiates Ms. Rimondi's credibility and her account of the offense; information that was never revealed to defense counsel and was never presented to the jury. The failure to present this information to the factfinder prevented the jury from having the basic tools for assessing this witness's credibility. This claim was plead as Claim XIV of the supplemental motion to vacate judgment and sentence.

The withheld information was central to an assessment of Ms. Rimondi's motivation for testifying favorably for the State and the State's influence over its star witness. The State kept Ms. Rimondi, a **known** runaway, available to testify by promising her money. Ms. Rimondi was given cash payments as an inducement to testify for the State. The monetary relationship between Ms. Rimondi and **Sam** Rabin, the original assistant state attorney prosecuting this action, commenced long before the case against Mr. Roberts went to trial. The trial began in December **1985**, but as early as July of **1984**, Michelle Rimondi was contacting the assistant state attorney to request money ("**8-14-84, 1:50, Sam** call Michelle, **271-9853, Money.**" "**Sam, 8-14, 4:00, Michelle Rimondi, 271-9853, Re: Money.**" "**Mitchell [sic] Rimondi -- Holiday Inn, 324-0800, I'll tell her to be here @ 10:00 a.m. I have to give her money.**" Proffer **21**). When the trial against Mr. Roberts commenced, the State went to the expense of lodging Ms. Rimondi in a hotel room. The payments were made to ensure that she testified at trial. The state attorney kept written notes as a

a  
reminder that he "must give her money" (Proffer 21).

The monumental efforts by the State to favorably portray its star witness at Mr. Roberts' trial were never revealed to the defense. The state attorney spared no expense in its attempts to make Ms. Rimondi a more credible witness. The State tried to influence every aspect of Ms. Rimondi's life including her deportment, schooling and career. The State tried to transform Ms. Rimondi's image from a runaway to an innocent schoolgirl. Ms. Rimondi was effectively placed on probation for fifteen (15) months preceding trial and urged to maintain biweekly contacts with the state attorney's office:

August 28, 1984

Mr. Kenneth Rimondi  
P.O. Box 116  
St. Cloud, Florida 32769

Dear Mr. Rimondi:

It was a pleasure speaking to you today regarding our mutual concern, Michelle. After you and I had an opportunity to speak, I again reiterated my demands upon Michelle that she attend school regularly, live with the Welshs, seek to obtain a job, maintain contact with the undersigned Assistant State Attorney twice weekly and contact you once a week.

Michelle has agreed to abide by these conditions and I trust that she will live up to her commitment. In the event the situation changes or Michelle fails to maintain regular contact with you or I, then I shall be in contact with you to take further action.

I want to apologize for not contacting you earlier regarding your role as Michelle's parent in the prosecution of Rickey Bernard Roberts (case number 84-13010), however this was an oversight on my part. I will keep you informed of all developments in the case, which is presently set for trial on November 12, 1984. If you would like to attend the trial, I will make arrangements to have you flown down at the expense of the State of Florida.

If I can be of any further assistance to you regarding the foregoing correspondence or any other matters related to Michelle, please do not hesitate to contact me at (305) 547-5252.

Sincerely,

JANET RENO  
State Attorney

/s/

By: **SAMUEL J. RABIN, JR.**  
Deputy Chief Assistant  
State Attorney

(Proffer 23).

The State went to extraordinary lengths to protect the image of its star witness and to keep her from further criminal involvement. When she was arrested for grand theft, Ms. Rimondi asked the state attorney in Mr. Roberts' case, Mr. Glick, to intercede for a favorable disposition ("When M.R. taken into custody, ask to talk to Glick." Proffer 19). The State claimed in a deposition that the prosecutor in the grand theft case did not learn that Ms. Rimondi was an alleged rape victim until after the decision as to disposition had been made (R. 639). Cf. Proffer 19. Yet, in fact, prior to the decisionmaking, the prosecutor in Mr. Roberts' case, Assistant State Attorney Glick, was contacted by the prosecutor in the grand theft case concerning Ms. Rimondi's arrest (Proffer 19). In spite of a substantial criminal history, Ms. Rimondi received pretrial intervention and the case was later nolle prossed. The ongoing relationship between the State and Ms. Rimondi was never revealed to the defense or to the jury. These inducements by the State affected Ms. Rimondi's testimony and demonstrated her motivation to curry her testimony to gain favor with the State. Clearly, her immediate efforts to get Mr. Glick to intervene speaks loudly as to her motivation. This was discoverable evidence under Roman v. State, 528 So. 2d 1169 (Fla. 1988). The nondisclosure cannot be found to be harmless beyond a reasonable doubt.

The State went to enormous lengths to hide evidence that would paint an unfavorable picture of its star witness. Ms. Rimondi admitted limited drug use at trial but the State had statements revealing that Ms. Rimondi frequently used drugs ("Leonara Michelle McGuldy 6/13/56: . . . 3) Saw Mich. use drugs/quaaludes/smoke marijuana with J.C. [Jamie Campbell] Owen S. McG; 4) wit. did coke in Feb 1985; 5) sex for money -- Michelle tells wit's -- actual conv. -- Bill would call." Proffer

11). Ms. Rimondi also attended Narcotics Anonymous meetings and was "provide[d]" as a "girl" at parties (Proffer 18).

The State also withheld information that could impeach Ms. Rimondi's account of the offense. Ms. Rimondi testified that she was sexually assaulted at 2:30 a.m. When she reported the crime to Dr. Rao, the physician treating her for the sexual assault, Ms. Rimondi contradicted her trial testimony stating that she was raped at 4 a.m. (Proffer 24). Dr. Rao reported that Ms. Rimondi was not upset enough and was too "cool and collected" to have just witnessed a murder and been the victim of a sexual battery ("Dr. Rao -- didn't believe v's story -- can't believe anyone who witnessed homicide -- not as upset as would've thought -- very cool and collected," Proffer 14). Dr. Rao also indicated that Ms. Rimondi had said "last coitus 6-3-84 10A, Manny not sure." (Proffer 14). Again this evidence was not disclosed.

The State presented medical evidence to substantiate Ms. Rimondi's account of a sexual battery. According to the evidence presented at trial, a positive result on the rape treatment kit was only possible if Ms. Rimondi engaged in sexual relations twelve (12) to twenty-four (24) hours before the test was administered. The State never revealed the fact that a positive test result was also possible if Ms. Rimondi had engaged in sexual relations as long as one hundred and twenty hours before the test was administered (Proffer 15). In fact, the State believed that the test results were consistent with sexual relations the night before the offense (Proffer 6). This evidence was critical to rebut Ms. Rimondi's account of a sexual battery because Ms. Rimondi admitted to consensual sexual relations within this time period. Defense counsel was unaware of the evidence contradicting the account of a sexual battery, the evidence of Ms. Rimondi's consensual sexual activity was never presented to the jury.

The defense also could not present, because it did not know, that Ms. Rimondi was unsure of the time of her last coitus and who it had been with. She apparently believed it was at 10:00 a.m. on June 3rd with Manny, but she was "not sure"

(Proffer 14).

The defense's theory of the case was that one of Ms. Rimondi's friends -- Joe Ward -- may have committed the offense. The defense tried to develop this theory during the cross-examination of Ward. The State withheld information that shows that the State had serious concerns about Ward's propensity for violence. When placed under arrest for a drug offense, Ward became violent and hostile. He was "high" on drugs and attacked the arresting officer. The testimony of a police detective was compelling evidence of Ward's reputation which is admissible under section 90.610 of the Evidence Code. ("Ward is an asshole." Proffer 13).

Jamie Campbell testified on behalf of the State that she miraculously slept through the entire incident. The defense was unable to attack her reputation for truth telling because the State withheld evidence that Campbell used drugs, was a liar and a thief ("Jamie -- Bad -- smoke dope -- stole from witness, Gen. Ref. -- Drugs/Liar/Thief." Proffer 12).

The State withheld information that would have substantially affected the outcome of the penalty proceedings. The mental health experts called by Mr. Roberts testified that he suffered from a mental deficit that was especially pronounced if he was under the influence of drugs or alcohol. The State had taken statements that revealed that Mr. Roberts was looking for marijuana prior to the offense (Proffer 1). He was using cocaine two (2) or three (3) hours prior to the offense (Proffer 2); Kevin Brown, who was not called to testify, told the State that Mr. Roberts was seen with cocaine three (3) hours prior to the offense (Proffer 4, 17). In a statement taken from Gary Mendus, a witness who was not called at trial, it was revealed that immediately prior to the offense Roberts was strung out on coke ("Was obvious that defendant coked at pool and he displayed the coke." Proffer 8).

Witnesses who testified for the State at trial also knew about Roberts' drug use prior to the offense but again this information was not revealed to the defense. An interview with Thomas McMurray reveals that Roberts was looking for marijuana

("he wanted joint"), "beer and blow" (Proffer 7). Rhonda Haines knew of Roberts' drug use prior to the offense. In a statement given to police she said that Roberts drank five (5) cans of beer at the festival before the offense and "snorted a couple of bumps" of cocaine ("He had about five cans, six." Proffer 5). Haines also reports that Roberts and the victim were using cocaine ("Q. How frequently have you done cocaine with Rick? A. About everyday, every other day." Proffer 20). Michelle Rimondi also knew of Roberts' drug use on the night of the offense. Police statements from Ms. Rimondi revealed that she claimed Roberts offered her coke (Proffer 10 at p. 3). Roberts told her he liked to use coke (Proffer 17). The State side-stepped this entire area of inquiry keeping this vital information about drug use from the defense. Notes in the state attorney's file state "Don't get into drugs" (Proffer 6).

The defense was unable to establish at the penalty phase Mr. Roberts' drug use on the night of the offense. The factual basis for the mitigating circumstances testified to by the experts was available, but these facts were not revealed to the defense. It was the absence of this evidence at the sentencing which we used to justify a death sentence. (The court's findings in support of death provided: "[N]o evidence of . . . drug or alcoholic [sic] abuse or intoxication in this case." R. 587). If these facts had been provided to the experts, the experts would have conclusively testified to Mr. Roberts' mental impairment at the time of the offense. This testimony would have proved the existence of two statutory mitigating circumstances: the defendant was under the influence of extreme emotional disturbance; and, unable to conform his conduct to the requirements of the law.

The trial court rejected both these mitigating factors because Mr. Roberts was unable to establish the factual predicate of drug and alcohol use on the night of the offense (R. 586-87). The withheld evidence of substance abuse the night of the offense clearly influenced the outcome of the sentencing proceedings. The findings of fact by the sentencing court stated that these mitigating factors were not



established because Mr. Roberts had not presented evidence of substance abuse. There can be no doubt that the failure to reveal this information contributed to Mr. Roberts' death sentence. Accordingly, a new trial and sentencing proceeding before a jury are warranted. Roman v. State, 528 So. 2d 1169, 1171 (Fla. 1988).

It is clear from the testimony and the records that the State's failure to fully disclose the information discussed above was a substantial violation of Mr. Roberts' right to discovery. Rule 3.220 of the Florida Rules of Criminal Procedure provides in pertinent part:

(a) Prosecutor's Obligation.

(1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:

(i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

\* \* \*

(ii) The statement of any person whose name is furnished in compliance with [paragraph i]. The term "statement" as used herein means a written [adopted or adopted] statement . . . or . . . a substantially verbatim recital of an oral statement [made to a state agent or officer] . . . The court shall prohibit the State from introducing in evidence the material not disclosed, **so** as to secure and maintain fairness in the just determination of the cause.

\* \* \*

(2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to negate the **guilt** of the accused as to the offense charged.

Failure to honor Rule 3.220 requires a reversal unless the State can prove that the error is harmless beyond a reasonable doubt. This is the express standard of review under Rule 3.850 when Rule 3.850 proceedings establish a discovery violation which was unknown at trial. Roman v. State, 528 So. 2d 1129 (Fla. 1986). Here it is undisputed that evidence and statements material to the defendant's case were undisclosed. Impeachment evidence, as well as substantive evidence, was

undisclosed. This evidence undermined the credibility of the State's witness, supported the defense's theory that Ms. Rimondi and her male protectors committed the offense, and established Mr. Roberts' drug usage on the night of the offense. Certainly the nondisclosure cannot be found to be harmless beyond a reasonable doubt, Mr. Roberts is entitled to both a new trial and a new sentencing.

The prosecution's suppression of evidence favorable to the accused **also** violated due process. Brady v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 105 S.Ct. 3375 (1985). The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, *supra*. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d at 1542.

The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information such as that contained in its files renders a criminal defendant's trial fundamentally unfair. Brady v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 105 S. Ct. 3375 (1985); Arango v. State, 497 So. 2d 1161 (Fla. 1986). A defendant's right to confront and cross-examine witnesses against him is violated by such state action, See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Counsel cannot be effective when deceived; consequently, Mr. Roberts' sixth amendment right to effective assistance of counsel was also violated. Cf. United States v. Cronin, 466 S. Ct. 648 (1984). The resulting unreliability of a guilt or sentencing determination derived from proceedings such as those in Mr. Roberts' case also violates the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margin of error. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v.

Florida, 430 U.S. 349 (1977). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated.

Counsel for Mr. Roberts made repeated requests for exculpatory, material information pretrial. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence). The evidence here, met that test, but it was not turned over. The Bagley materiality standard is met and reversal required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [both phases of the capital] proceeding would have been different." Bagley, supra, 105 S. Ct. at 3833. Such a probability undeniably exists here.

An even more serious due process violation occurs when the State deliberately presents false and/or misleading testimony. See Bagley, supra; Mooney v. Holohan, 294 U.S. 103 (1935); Alcorta v. Texas, 355 U.S. 28 (1957); Napue v. Illinois, 360 U.S. 264 (1959); Miller v. Pate, 386 U.S. 1 (1967); Giglio v. United States, supra, 405 U.S. 150 (1972); United States v. Agurs, 427 U.S. 91 (1976). When such is the case, the defendant is entitled to relief if there is "any reasonable likelihood" that the testimony "could have" affected the judgment of the jury. United States v. Bagley, 105 S. Ct. at 3382, quoting Agurs, 427 U.S. at 103 (emphasis supplied).

Mr. Roberts' motion to vacate judgment and sentence pled substantial facts supporting this claim. See Fla.R. Crim. P. 3.850. The claim is based upon nonrecord [hidden] evidence of prosecutorial misconduct and knowing use of false or misleading evidence which was kept from the jury at the time of Mr. Roberts' trial. That the State concealed the truth and kept it from the record. The true facts

revealing the State's misconduct have only now come to light. Such claims cannot be raised anywhere but post-conviction, as this Court has acknowledged. See Arango v. State, 437 So. 2d 1099, 1102 (Fla. 1983) ("A Brady violation is normally predicated on defendant's not knowing of the withheld evidence."); see also Smith v. State, 400 So. 2d 956, 963 (Fla. 1981). Rule 3.850, Fla. R. Crim. P., provides the forum and mechanism. The court below should have granted an evidentiary hearing .. the files and records do not demonstrate that Mr. Roberts is entitled to no relief. The lower court erred by not conducting an evidentiary hearing to fairly determine this claim. Roman, supra; Demps v. State, 416 So. 2d 808, 809-10 (Fla. 1982) (ordering Rule 3.850 evidentiary hearing on Brady claim); Smith v. State, supra, 400 So. 2d at 962-64 (same); Aranao v. State, supra, 437 So. 2d at 1104-05 (same), subsequent history in 467 So. 2d 692 (Fla. 1985) (granting Rule 3.850 post-conviction relief), vacated and remanded, 474 U.S. 806 (1985) (directing reconsideration in light of United States v. Barley), 497 So. 2d 1161 (Fla. 1986) (granting Rule 3.850 post-conviction relief under Barley). Claims predicated on Brady v. Maryland are precisely the type of issues which must be heard pursuant to Rule 3.850. See Demps, supra, 416 So. 2d at 809-10 (directing a Rule 3.850 hearing on Brady claim); Smith, supra, 400 So. 2d at 963 ("Since the trial court believed that [a Brady claim] was inappropriate to a Rule 3.850 proceeding, it did not pass on the merits of the question . . . and accordingly we remand this singular issue to the trial court to make this determination."); Arango, supra, 437 So. 2d at 1104-05 ("[P]etitioner has made a prima facie case which requires a hearing. We remand to the trial court for the purpose of conducting a hearing on the claimed Brady violation."); cf. Cash v. State, 207 So. 2d 18 (Fla. 3d DCA 1968); Smith v. State, 191 So. 2d 618 (Fla. 4th DCA 1966); Wade v. State, 193 So. 2d 459 (Fla. 4th DCA 1967). As in Demus, Mr. Roberts' claim is that "the State affirmatively manipulated testimony, a violation more egregious than the mere passive nondisclosure disapproved in Brady v. Maryland," 416 So. 2d at 809.

There can be no question but that the testimony of Michelle Rimondi was critical to Rickey Roberts' conviction and death sentence. It is equally beyond question that her substantial deficiencies raised substantial doubts regarding her credibility and the validity of her account of the offense. Had this evidence been disclosed, her testimony would have been severely discredited.

The preclusion on impeachment of Ms. Rimondi's testimony could not but have affected the jury's decision at the guilt and penalty phases. As it was, Mr. Roberts' jury deliberated for twenty-three (23) hours and recommended death by the slimmest majority possible, 7-5. The errors discussed herein simply cannot be deemed "harmless." Mr. Roberts therefore urges that circuit court erred in concluding that files and records conclusively established "no discovery violation" occurred here (T. 108). Mr. Roberts has pled and presented unrefuted documentation of a discovery violation. Moreover, when the jury deliberated twenty-three (23) hours, the discovery violation cannot be found to be harmless beyond a reasonable doubt. Accordingly, under Roman, Mr. Roberts' conviction and sentence of death must be reversed.

#### ARGUMENT IV

PENNSYLVANIA V. RITCHIE IS NEW CASE LAW WHICH ESTABLISHES THAT MR. ROBERTS' RIGHTS UNDER THE CONFRONTATION CLAUSE OF THE SIXTH AMENDMENT WERE DENIED WHEN THE RAPE TREATMENT COUNSELOR, WHO HAD TREATED MICHELLE RIMONDI AND WAS AN EMPLOYEE OF THE STATE ATTORNEY'S OFFICE, INVOKED PRIVILEGE AND REFUSED TO DISCLOSE WHETHER IN HER CONVERSATIONS WITH MS. RIMONDI SHE HAD LEARNED ANY EXCULPATORY INFORMATION.

The defendant's right to present favorable evidence overrides the State's interest of protecting the confidentiality of either work product or information revealed to a rape treatment counselor. Disclosure **is** required when the material presented to a State agent who is a rape treatment counselor is exculpatory because of its impeachment value. Michelle Rimondi, the alleged eyewitness to the homicide, was treated for an alleged sexual battery immediately after the alleged offense (R. 620-621). She was counseled on a weekly basis up to the time of trial by an

employee of state attorney's office (R. 621). After numerous versions of the alleged rape had been given by Ms. Rimondi to various people, the defense attorney sought to depose the rape counselor, Denise Moon, to learn which, if any, of the various versions of the incident Ms. Rimondi had told the counselor. Shortly after the treatment had begun, however, Ms. Moon became an employee of the State Attorney's office (R. 621). At her deposition, the counselor refused to disclose any information revealed by Ms. Rimondi. The defense's motion to reopen the deposition was denied by the trial court (R. 630, 633) which held that the counselor's position as an employee of the state attorney's office rendered any communications with her privileged as work product. Despite Ms. Moon's invocation of a rape counselor privilege, the trial court premised its ruling upon work product of the state attorney's office. To the extent that Ms. Rimondi had given numerous inconsistent statements regarding the offense, her statements to an employee of the state attorney could not be consistent with Ms. Rimondi's statements, and were thus, discoverable under Rule 3.220 of the Florida Rules of Criminal Procedure.

At trial, the primary witness against Mr. Roberts was Michelle Rimondi. In an attempt to rebut her testimony, the defense counsel cross-examined her at length, about the inconsistencies in her testimony and the various accounts given previously. Her credibility was seriously in doubt. The court's ruling denying the defendant access to the information revealed to the rape treatment counselor, denied Mr. Roberts information necessary to prepare a defense and effectively cross-examine Michelle Rimondi. Without access to the material revealed to the counselor, Mr. Roberts was denied the opportunity to obtain inconsistent statements or information revealing motive.

The State has a duty to disclose to the defense all material exculpatory information. Brady v. Maryland, 373 U.S. 83 (1963). Rule 3.220 of the Florida Rules of Criminal Procedure. The prosecution's suppression of evidence favorable to the accused violated due process. Anurs v. United States, 427 U.S. 97 (1976);

United States v. Bagley, 105 S. Ct. 3375 (1985). The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, *supra*. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d at 1542. Similarly, Rule 3.220 of the Florida Rules of Criminal Procedure requires disclosure of exculpatory or impeachment evidence. Roman v. State, 528 So. 2d 1169 (Fla. 1988).

Pretrial, defense counsel explained that access to the counselor, Denise Moon, was essential in order to allow adequate preparation of a defense:

[w]hen you can show as I have in a factual way that Ms. Rimondi has given a large number of inconsistent statements to different people about how the rape happened. To one officer, saying it happened in a deadman's car and to someone else, the rape happened on the ground outside the car and to another office, it happened--it happened inside the car--I'm talking for seven months--first seven months of this case about their only being one rape. And seven months later coming up with a second story of a second rape.

There is a large number of inconsistencies that come out of Michelle Rimondi's own mouth, apart from her being arrested for grand theft and a run away and being--her own statements have made this important and I think what she what she would have told Denise Moon, certainly after July of '84 about the facts of the crime--and Denise Moon's capacity at the State Attorney's office; an employee, this becomes critical impeachment for me; an important Sixth Amendment material.

(R. 623-624). The Court ruled that the information revealed to the rape treatment counselor was confidential work product. This issue was not raised on appeal, but case law developed after submission of the case, which establishes not only the trial court's error, but also the remedy. Prior to the new decision, Florida law provided no remedy for nondisclosure where the defense did not know what was not disclosed. Thus prior to the new United States Supreme Court precedent, there was no basis for presenting the issue on appeal.

However, in Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987), the Supreme Court analyzed the issue of whether the privilege protecting the confidentiality of child abuse records overrode the defendant's right of access to information necessary to formulate and prepare a defense. The Court ruled that the privilege of confidentiality is not unqualified. The defense has the right to information that "may be relevant to [the defendant's] claim of innocence." Ritchie, 107 S. Ct. at 1002.

In order to protect that right, there must be an in camera inspection of confidential material in order to ascertain whether the confidential material contains exculpatory information. Here, the defense needed access to the information revealed to the rape treatment counselor in order to effectively cross-examine Michelle Rimondi about prior inconsistent statements or her possible bias or motivation to lie. The Court in Ritchie recognized that the State's obligation to turn over material favorable to the accused required disclosure of the privileged material:

It is well-settled that the Government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt or punishment. United States v. Agurs, 427 U.S. 97, 96 S. Ct. 2392, 49 L. Ed. 2d 342 (1976); Brady v. Maryland, supra, 373 U.S., at 87, 83 S.Ct., at 1196. Although courts have used different terminologies to define "materiality," a majority of this Court has agreed, "[e]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome," United States v. Bagley, supra, 473 U.S., at 682, 105 S.Ct., at 3384 (opinion of BLACKMUN, J.); see id., at 685, 105 S.Ct., at 3385 (opinion of WHITE, J..).

At this stage, of course, it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file. The Commonwealth, however, argues that no materiality inquiry is required, because a statute renders the contents of the file privileged. Requiring disclosure here, it is argued, would override the Commonwealth's compelling interest in confidentiality on the mere speculation that the file "might" have been useful to the defense.

Although we recognize that the public interest in protecting this type of sensitive information is strong, we do not agree that this



interest necessarily prevents disclosure in all circumstances.

\* \* \*

Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial.

107 S. Ct. 1001-02. Under Ritchie, it is clear that the trial court erred in not conducting an in camera proceeding and ascertaining whether an employee of the state attorney's office possessed exculpatory evidence.

Ritchie was recently discussed by the Tenth Circuit Court of Appeals in Hopkinson v. Shillinaer, 866 F.2d 1185 (10th Cir. 1989). There the court ordered the federal district court to conduct an in camera inspection of grand jury transcripts on the basis of Ritchie:

In Ritchie, a defendant charged with child abuse sought discovery of the file of Pennsylvania Children and Youth Services (CYS) investigations against him, "because the file might contain the names of favorable witnesses, as well as other, unspecified exculpatory evidence," 107 S.Ct. at 995. The Supreme Court upheld the decision of the Pennsylvania Supreme Court ordering an in camera review of the CYS file to determine whether the file contained exculpatory evidence. See also Miller v. Dugger, 820 F.2d 1135 (11th Cir. 1987) (per curiam) (reinstating the decision in Miller v. Wainwright, vacated by the Supreme Court for further consideration in light of Ritchie).

The instant case falls within the ambit of the Miller and Ritchie rulings. A grand jury continued to investigate a murder for which Hopkinson has been convicted, and for which he has been sentenced twice to die. Exculpatory evidence could have been presented to the post-trial grand jury. Hopkinson's unique position surely constitutes a "preliminary showing of particularized need," Bary v. United States, 292 F.2d 53, 56 (10th Cir. 1961), and an in camera inspection of the materials by the district court is therefore warranted. Such an inspection will protect the state's interest in keeping the grand jury transcripts secret if no particularized need for disclosure is established. Of Ritchie, 107 S.Ct. at 1004 ("An in camera review by the trial court will serve Ritchie's interest without destroying the Commonwealth's need to protect the confidentiality of those involved in child-abuse investigations.").

Hopkinson, 866 F.2d at 1185.

In the Miller decision, the Eleventh Circuit Court of Appeals found that Ritchie required an in camera inspection of Florida grand jury transcripts because the state courts had failed to conduct such an inspection:

Since neither the state or federal court has reviewed this evidence, the case must be remanded to the district court to consider the claim involving the grand jury testimony under the correct standard. Miller, 798 F.2d 430.

The Supreme Court's reasoning and decision in Ritchie is an endorsement of the procedures this Court recommended and the holding we reached in Miller. Both courts, based on facts presented, determined that due process required some court to review the confidential material to determine if the appropriate file "contains information that may have changed the outcome of his trial had it been disclosed." Ritchie, \_\_\_ U.S. \_\_\_, 107 S. Ct. at 1004, 94L.Ed.2d at 60. Indeed, the Miller sworn testimony, which contains different versions of the facts, shows recantations of testimony, and other questionable circumstances, presents a compelling need for in camera inspection.

Miller v. Dugger, 820 F.2d 1135, 1137 (11th Cir. 1987).

Denise Moon was ordered not to disclose the contents of Ms. Rimondi's statements to her after she went to work for the State Attorney's Office because the trial court found the statements to be work product. In her deposition she acknowledged talking to the prosecuting attorney regarding Ms. Rimondi. Because of the tie between the counselor and the prosecutor, the fifth, sixth, eighth and fourteenth amendments require disclosure. However, "work product" must be disclosed if it consists of exculpatory evidence. Discovery must be allowed. At the very least an in camera inspection is required.

A hearing is necessary on this issue. Collateral counsel must be given an opportunity to discover the statements made by Ms. Rimondi to Ms. Moon, and then to present any claims which arise from that discovery. After reviewing the information including notes taken by the counselor, the Court must decide whether the privileged material contains information favorable to the defense. The failure to disclose to the defendant the material revealed to the counselor, including the notes taken by the counselor, prevented Mr. Roberts from presenting to the jury information bearing on his claim of innocence. The jury was denied the factual basis for assessing the credibility of the State's key witness. His capital conviction and sentence of death were obtained in violation of the fifth, sixth, eighth and fourteenth amendments. A hearing and then Rule 3.850 relief on the basis of Claim VII of the

motion to vacate, is required under new case authority.

#### ARGUMENT V

RICKEY ROBERTS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, AND WAS DENIED A PROFESSIONALLY ADEQUATE MENTAL HEALTH EXAMINATION BECAUSE OF COUNSEL'S DEFICENCIES, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This argument is premised upon Claims XI and XII of the motion to vacate judgment and sentence. The circuit court summarily denied without the benefit of an evidentiary hearing because of its belief that as a matter of law, there was "no prejudice" (T. 93).

However, Mr. Roberts was denied the effective assistance of counsel at the sentencing phase of his capital trial, Counsel's failure to fulfill the overarching duty to investigate and prepare directly resulted in Mr. Roberts' death sentence. He failed to adequately investigate and prepare for the penalty phase of the capital proceedings. Counsel failed to discover and use the wealth of mitigation available in Mr. Roberts' background -- mitigating evidence which establishes reason for sympathizing with Mr. Roberts -- mitigating evidence without which no individualized consideration could occur. Had counsel adequately prepared and discharged his sixth amendment duties, overwhelming mitigating evidence which would have precluded a sentence of death in this case would have been uncovered.

As it was, Mr. Roberts' sentencing jury recommended death by the slimmest possible majority -- 7 to 5. One single vote would have swung the balance. Any of the available material and relevant evidence discussed herein which counsel could have presented would have made a difference. Although ample mitigating evidence was easily accessible, trial counsel failed to present critical mitigating evidence in the penalty phase of Mr. Roberts' trial. Counsel's failure in this regard was not based on "tactics"; it was based on the failure to adequately investigate and prepare. The evidence was not hard to find, it cried out for presentation.

Evidence regarding Mr. Roberts' character and background, his early life marked by abandonment, abuse, and emotional deprivation, his resultant bizarre behavior patterns, and his serious problem with drug dependency were all ignored. Proper investigation and preparation would have resulted in evidence establishing an overwhelming case for life on behalf of Mr. Roberts: it would have delivered the one necessary vote for a jury recommendation for life. Mr. Roberts was sentenced to death by a judge and jury who knew little about him. The difference between the Rickey Roberts presented at trial and the Rickey Roberts whose background and mental health problems would have come to light, had counsel properly prepared is startling. Counsel also failed to provide the mental health experts who testified at the penalty phase with this critical family history, evidence of Mr. Roberts' drug dependency problem, and evidence of his drug and alcohol use on the day of the offense.

The circuit court did not address adequate performance. The Court assumed an adequate showing of deficient performance had been made. However, the lower court did find as a matter of law that there was "no prejudice" from any deficient performance (T. 437). The court erred in summarily denying this claim on that basis.

In Strickland v. Washington, 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. Washington requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Mr. Roberts pled each. At issue here is whether Mr. Roberts can not show prejudice as a matter of law. "The Court's going to rule that there is no prejudice. The Court finds there is no prejudice by Mr. Lange's representation." (T. 437).

Since the circuit court seemed to accept Mr. Roberts' claim that there was deficient performance, there is little point in arguing deficient performance here,

Deficient performance was pled, alleged, and accepted as having been established. This case is very similar to Tompkins v. Dugger, \_\_\_ So. 2d \_\_\_, 14 F.L.W.455 (Fla. 1989), where deficient performance was found, but this Court concluded no prejudice resulted.

Defense counsel must also discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing **decision.**" Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Ferry v. Lynaugh, 109 S. Ct. 2934 (1989); Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976). The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Steuhens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985). Trial counsel here did not meet these rudimentary constitutional standards. As explained in Tyler v. Kemp, supra:

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

Id. at 743 (citations omitted). Accepting, as the circuit court did, that trial counsel failed to adequately investigate, develop and present evidence of Mr. Roberts' background, the question for this Court is whether the wealth of information not presented undermines confidence in the outcome.

Counsel conducted absolutely no investigation of Mr. Roberts's background or family history. The only information of this nature that was presented to the jury and judge came from one of Mr. Roberts's mental health experts, Dr. Jethro Toomer. The background information that Dr. Toomer presented was **so** superficial that it was absolutely useless. This limited information could in no way aid Mr. Roberts' jury in making an individualized determination that is required by the eighth amendment. Mr. Roberts' jury knew nothing about his early life history especially during his formative years.

Mr. Roberts was sentenced to die by a judge and jury who never knew that he grew up under appalling conditions and suffered a lifetime of abuse, rejection, and abandonment. His mother, Josie Mae, was a prostitute and gambler who suffered such emotional and psychological deficits of her own that she was completely incapable of providing even the minimal amount of parental involvement in Rickey's life from the very start. Josie Mae Robinson gave birth to her son Rickey Roberts, without the assistance of a physician, on January 1, 1958, while living with her parents in Savannah, Georgia. Rickey was born out of wedlock to his 18 year old mother. His father, Thomas Overstreet, was a married man who had the reputation of being an assaultive alcoholic who frequented the company of young street women such as Rickey's mother. After Rickey's birth, Mr. Overstreet refused to acknowledge Josie Mae or Rickey yet would become violently jealous when seeing Josie Mae on the street with other men. On these occasions, Mr. Overstreet would brutally beat Josie Mae and demand that she return to her home.

Mrs. Gertrude McKinney, Josie Mae's older sister recently explained in a sworn affidavit:

Josie Mae continued to have real bad problems with my father after I left home and she soon started leading a wild and fast life. She got herself mixed up with a racketeering man and he was a real crooked mess. His name was Thomas Overstreet but everyone knew him as "Bo Didley." He got Josie Mae pregnant with Rickey when she was eighteen years old and still living at home. Thomas Overstreet was already married and liked to fool around with all kinds of women - he was a very mean and wild man. He drank all of the time and would beat up Josie Mae whenever he felt like it. **As** soon as Rickey came along Thomas didn't want anything to do with Josie Mae and left her to fend for herself. Even after they split up he would beat Josie Mae whenever he saw her around town and order her to go home.

(T. 288-289).

Rickey's chances in life were immediately impaired due to his mother's lifestyle and refusal to parent her only natural son. Thus Rickey was thrown into the world without a father or a stable family structure. Consequently, Rickey was literally born without a family and no one ever gave him the love and support he needed to have a fair chance at a normal life.

Josie Mae was the youngest of five children born to a man who used strong arm and violent tactics to enforce the strictest of guidelines. George Roberts, Sr. raised both of his daughters in a fashion that grossly stunted their ability to properly mature, use sound judgment, and understand the responsibilities of parenthood.

George was a quick-tempered man who put a tremendous amount of pressure on his wife and daughters to be perfect. He was **known** as a passionately jealous man who would jump on and beat his wife whenever she had contact with anyone outside of the household. Josie Mae and Gertrude found themselves in a similar position and were forced to struggle with their father's unrealistic and harsh expectations. George demanded that his daughters isolate themselves in his house and remain ignorant to the notion of healthy interaction in the outside world.

Mrs. McKinney explains life with her father:

Me and Josie Mae and our three brothers grew up in Savannah, Georgia. Our father was a strict and quick-tempered man and our mother was afraid of him because he was very jealous all the time. If anyone outside our house even spoke to our mother, our father would jump on her bad. **So** mostly our mother was real quiet and stayed home all the time.

My father ruled his house with an iron fist. He wanted his daughters to be perfect and he tried to make us stay home all the time like he did my mother. When my father got mad, he would get violent and it was always very risky to disobey him or make him angry. He and my sister, Josie Mae, never seemed to get along at all - they had real bad problems with one another. If Josie Mae came home even just a few minutes late, my father would lock her out of the house and she would have to sleep on the porch or stay out all night. Either way, Josie Mae would be in for a bad beating the next day.

(T. 287-8).

While enforcing such stringent rules with his daughters, it was common knowledge that George was simultaneously participating in numerous extra-marital affairs. This hypocrisy baffled Josie Mae and Gertrude and lead to intense feelings of hostility. Furthermore, Josie Mae actually caught her father with another woman thus thrusting her relationship with him toward a complete breakdown.

Mrs. McKinney explained:

For as long as I can remember, my father went around with other women. We all knew what was going on and it didn't seem fair that he would be so jealous of our mother for no reason when he was the one cheating and fooling around. One time, Josie Mae caught my father with another woman and then things got even worse between them.

(T. 288).

Josie Mae's father, however, was unable to see that he had laid the foundation of a destructive relationship with his family and continued his abusive behavior. When Josie Mae was a teenager, George would lock her out of the house all night and in the morning when she was permitted to return, he would savagely beat her. In the midst of sheer desperation, Josie Mae's internal hostility exploded, and she began to purposely defy her father. In fact, at one point, Josie Mae fantasized about poisoning her father's food so to rid herself of his brutal ways forever. The differences between them escalated, thus causing the cycle to persist. Ultimately, Josie Mae continued to be the victim of violent beatings. The struggle came to a head when Josie Mae, after fooling around with a married man, became pregnant with Rickey. At that point, her father took an iron cord and beat Josie Mae until she



was badly bleeding. Josie Mae's sister, Gertrude, suffered through an equally vicious beating when she was fifteen years old, **also** a result of her pregnancy outside of wedlock.

Mrs. McKinney describes her beatings:

**When I** was only fifteen years old, **I** got pregnant and **my** father went crazy on me. He beat **me** real bad with a stick several times when **I** was carrying the baby. **It** was a very bad time for me because the whole time **I** was pregnant **I** wasn't treated right. Years later, shortly before he died, **my** father asked me to forgive **him** for how he hurt me **so** bad.

(T. 288).

To escape her father's continued violence, Josie Mae left Rickey behind for the allure of quick cash available from selling herself on the streets of Savannah. Josie Mae joined forces with a well-known hustler who put her to work along with the other young women in his employ. Josie Mae's now elderly father and his wife were then left to raise Rickey along with Gertrude's two children, Leon and Less:

After the baby was born, **I** left **my** parents' house **as** soon as **I** could. **My** mother agreed to take care of my son and **I** moved out. A short time later **I** had another son, and **my** mother took **him** in too. Leon and Less lived with **my** parents until after **my** mother's death years later and then **I** took them to live with me.

\* \* \*

Soon after Rickey was **born**, Josie Mae left him behind with our parents and moved out.

(T. 288-9).

**As** a result of the ever-present conflict with her father, Josie Mae evolved into a hardened survivor and developed a **knack** for success in the streets. By all accounts, Josie Mae, like her father, was easily angered and when need be, could act like she wanted to tear you apart and instill fear in any aggressor. Perhaps **as** a way to avenge her father's meanness, Josie Mae would resurface and return to her parents house to flash her money, fancy clothes, stylish car and to generally wreak havoc.

Mrs. McKinney describes the kind of woman her sister became after leaving Rickey with her parents:

She took up with a hustler-man named Harold Reeves and started running around, drinking and partying all the time. It got to the point where Josie Mae was living fast and free. She always had a lot of money to flash around and wore very fancy clothes. In some ways, Josie Mae was a lot like my father because she was real quick-tempered and would act like she wanted to tear you apart if you made her mad. Josie Mae was living such a fast life that it got to be **so** that nobody could mess with her.

**(T. 289).**

Josie Mae's occasional homecomings caused unprecedented uproars -- the effects of which would linger far after her departure. Her behavior was outrageous, inappropriate and unpredictable. She would also sometimes bring friends of questionable character with her on these visits, to the delight of the three naive youngsters in the Roberts' home. Often she would force Rickey, Leon and Less to perform unnecessary household tasks for hours on end. Although her parents found this to be insulting, Josie Mae was uncontrollable. Whereas Less and Leon resented the senseless household cleaning chores Josie Mae would dream up, Rickey would do anything as long as it won him his mother's attention.

Less McGullars, Rickey's cousin, was raised by his grandparents with Rickey. He describes Rickey's mother:

Once in a while, Aunt Josie Mae would come and visit, and she always had a lot of money. She also had a bad nervous problem and was very quick-tempered. Whenever she visited, she would dream up all kind of chores for Rickey and Leon and I to do around the house, even if it was unnecessary. This would upset my grandparents a lot because it was insulting to them for her to make us wash and scrub a house that was already clean. Whenever I saw that Aunt Josie Mae was around I would take off **so** I wouldn't get mixed up in whatever she was up to, but Rickey loved his mother **so** much that he didn't care how mean she was to him and he always put up with whatever she made him do.

**(T. 294-5).**

As a child, Rickey Roberts became completely obsessed with winning the love, attention and devotion of his mother. When Josie Mae would visit, Rickey would hang onto his mother and follow her around endlessly and when she would leave, Rickey was

devastated. Throughout his childhood, Rickey constantly talked about how one day his mother was going to come for him and take him to live with her permanently, Tragically, Josie Mae's lifestyle relegated Rickey to little more than an irritating burden with the sole exception of using Rickey as a tool of extortion. She would convince her many male companions that each were the true father of her son and demand support monies from them. Otherwise, Josie Mae had little use for Rickey and ignored his endless cry for love and attention.

As Rickey's desperate attempts to get his mother's attention persisted, Josie Mae would respond by chastizing and humilitating him. Instead of offering Rickey hugs, kisses, security and other symbols of authentic parental love, Josie Mae only paid attention to Rickey when she would scream at him to leave her alone.

Meanwhile, it was becoming clear to those who truly knew Rickey that he was a boy who had been hurt deeply by his mother's abandonment. He loved his mother dearly, despite her rejection, and would dream of the day when she would care for him. Every time Josie Mae visited, Rickey would hang on her, cry frantically, and beg her not to leave him behind. Josie Mae would always promise never to leave again but after Rickey would fall asleep, she would sneak off to escape his hysterical reaction at discovering his mother's absence, leaving him further pained and scarred by her false promises.

Less McCullars explains:

Each time Aunt Josie Mae would come for a visit, Rickey would hang onto her and follow her around and beg her to take him with her when she left. No matter how late it got, Rickey would struggle to stay awake so that he could make sure that Aunt Josie Mae didn't leave without him. When she left, Aunt Josie Mae would sneak out of the house in the middle of the night so that Rickey wouldn't know she was leaving. The next day Rickey would be crushed. This happened time after time and it was just pitiful to see how much it hurt Rickey.

(T. 295-6). Leon Roberts, another of Rickey's cousins, had similar memories:

Every time Josie Mae came around Rickey would beg to be with her. She would tell him that he could go with her when she left. However, she would leave and Rickey would be left behind. Josie Mae was torturing Rickey because the more he saw her the greater his desire was to live with her. Then she would break her promises and they would simply crush

Rickey. Even though she kept hurting him, Rickey never quit talking about how wonderful his life would be when he finally got the chance to live with his mother.

(T. 305-06).

This led to Rickey living his life in a dream world. He developed a complex and obsessive fantasy life that consisted of a time in which his mother would appear and answer his every cry for her love and guidance. Rickey frequently walked around trancelike, thinking and talking of nothing but his mother. This made Rickey the victim of teasing from his neighborhood peers and he was picked on mercilessly. Less described Rickey's obsession with his mother:

When we were growing up, Rickey constantly talked about his mother. He about drove me and my brother Leon crazy the way he would go on and on about how Aunt Josie Mae was going to come and get him soon and take him to live with her. It would be like Rickey was in a trance and couldn't think or talk about anything else. This went on for years and years - the only thing Rickey ever really wanted was to be with his mother.

(T. 294).

In reality, Rickey felt unwanted and unloved. The void left by Josie Mae's absence coupled with her father's manner of raising children only intensified Rickey's unhappiness. George and his wife were unable to replace the emptiness in Rickey's life. They simply went through the motions and provided the basic necessities -- food, water, and shelter. Rickey's grandparents never provided counseling, assistance with school work, advice for everyday problems, affection, nurturing, or parental love. This deprivation resulted in, among other things, Rickey's struggle with his school work, and extensive ridicule from his classmates due to the lengthy amount of time it took Rickey to learn how to read.

Rickey was sent to a South Carolina-based family farm every summer to participate in the back-breaking labor involved in producing cotton, tobacco, and various other crops. His grandfather looked forward to the summer months so he could rid himself of Rickey. Thus, the summer's did nothing but increase the already overwhelming amount of pressure Rickey was carrying around. At summer's

end, again no relief was in sight for Rickey. He had to return to his grandfather's house. It was becoming clear that Rickey was being expected to conquer emotional and physical burdens that only an adult could have hoped to overcome.

The grandfather's violent and quick tempered nature ill-equipped him to handle growing and often active boys and he often administered extreme discipline. Whenever the grandfather became enraged, he forced Rickey to chop down a tree branch and he would brutally beat Rickey with it until his skin was torn and bleeding. If he deemed the branch too skimpy he would send Rickey back up the tree to find a branch with the strength to provide a truly fierce beating. By all reports, the grandfather was not only rough but also abusive to Rickey. The beatings became so cruel and unnecessary that Leon eventually ran away and never came back. Rickey, who was much younger than Leon, had nowhere to go to escape the daily abuse and cruelty of his mother's father. Leon explained the beatings Rickey received:

To punish Rickey our grandfather would send him up a tree in the yard to cut down a branch and then viciously beat him with it. If the branch broke he would send Rickey back up to get a stronger one. This happened all the time and not once did grandfather sit Rickey down and counsel him or attempt to understand his inner feelings. This approach clearly affected Rickey's development as an adult.

(T. 307). Leon saw how the physical abuse affected Rickey's development:

Our grandparents did not know how to provide Rickey with solutions and replace what he lost when his mother kept ignoring and emotionally abusing him. Rickey was never able to get help for his problems or troubles. He would have to try and figure out everything on his own. Our grandparents never did anything for us beyond giving us a place to live, food and clothing. Rickey did not have anyone to sit down with him and talk about how to solve his problems or give him guidance about right and wrong. Our grandfather would punish Rickey without teaching him how to do things right. For example, Rickey was always being violently beaten for not doing his school work correctly. Grandfather would check over Rickey's work and if there were mistakes, he would brutally beat him. Because of this, Rickey was getting beat but no one was helping him learn how to do his school work correctly. Rickey then fell behind in his schoolwork and it took him a long time to learn how to read. This was very embarrassing for him and all the other students would make fun of him. This only added to the overwhelming frustration and confusion Rickey was struggling with everyday. Our grandfather was like that with everything and Rickey ended up wandering around not knowing how to figure things out for himself or how to solve his problems.

(T. 306-07).

Additionally, Rickey was deprived of interacting with potential playmates. Rickey's grandfather never allowed him to have friends over to play. When the grandfather would permit him to visit his cousin Alphonso, Rickey was amazed at how different a healthy family environment could be. Even the simplest interactions that any normal family takes for granted were totally foreign to Rickey. Because Rickey was never provided the opportunity to talk, learn, laugh, and be friends with anyone like Alphonso was with his father, Rickey's own emotional deficits became apparent. Life without parental love and affection was taking its toll on Rickey.

Rickey's cousins began to notice his increasingly strange behavior. It is reported that Rickey was "prone to having spells" -- he would pace around as if something was on his mind and act "out of it."

Mrs. McKinney described Rickey's strange behavior:

When Rickey was growing up, he often acted like there was something wrong with his head. One minute he would be doing fine and then all of a sudden something would snap and he would change very quickly. It was kind of like he was having a spell. When this happened to Rickey he would pace around like he had something on his mind and act strange. Then Rickey would lose control of his thoughts and not make any sense. Nobody knew what to do for Rickey when this would happen.

(T. 290-1). Ms. Mamie Douglas, Rickey's cousin, also noticed his strange behavior:

The whole time we were growing up, Rickey always seemed strange. He didn't look or act like a normal kid. One minute he'd be fine and then his mind would just snap and he would act really weird. He would get really quiet and pace around and say crazy things that didn't make any sense. When Rickey would get this way we would mostly ignore him and he would be over it the next day. Sometimes my mother would try to talk to Rickey when he would get this way but it never seemed to help.

(T. 301).

As his grandfather's abuse became increasingly intolerable, Rickey made a desperate attempt to escape and find his mother. When he was only nine years old, Rickey took an axe and chopped through his grandfather's bedroom door and took \$200.00 and fled to the bus station. Upon seeing such a young boy with so much cash, the station attendant called Rickey's grandfather to come and get him.

Instead of realizing that Rickey's escapade was a pathetic display of his own misery and need to find his mother, his grandfather turned him into the police and had Rickey sent to a detention center. Leon recalls this incident:

After years and years of wrestling with the burning pain and broken promises Rickey began to feel very desperate and tried to find his mother on his own. When he was only about eight years old Rickey took an ax and broke into my grandfather's room and stole some money and tried to catch a bus. The situation with his mother confused him so much and made him so sad and desperate that he went as far as to take the money and try to run away and find her. Even after this incident, no one tried to understand Rickey or talk with him about what he was feeling, why he tried to run away, or why he was so unhappy. It was obvious that Rickey needed counseling but my grandfather was an enforcer and continued to ignore Rickey's cry for help. Instead he did all he knew how to do and that was beat Rickey and then put him in a detention home.

(T. 307).

Shortly thereafter, when Rickey's grandmother died, the household exploded into a state of total chaos. Rickey would suddenly appear at his cousin's house hungry and longing for companionship. Because of his wife's death, Rickey's grandfather could not cope with the day to day domestic functions as he grieved the loss of his lifelong partner. Various family members realized that Rickey's grandfather could no longer provide for him, but Rickey had nowhere to go. After much pressure from her siblings, Josie Mae reluctantly agreed to take Rickey to live with her.

Alphonso Roberts, a cousin of Rickey's described what happened when their grandmother died:

After our grandmother died, grandfather's mind went the other way. He was not able to take care of Rickey and I remember Rickey coming over to our house looking for something to eat. Grandfather would get mad at Rickey when he would tell him he was hungry. Grandfather was sad that his wife died and he just did not know how to take care of children. He did not how to cook and take care of the day to day responsibilities and he just forgot about Rickey's needs. This hurt Rickey very bad because he knew that no one wanted him and his mother was far away.

When Rickey finally found himself reunited with his mother, he also gained a step-father and four step-brothers and they lived in Oak Grove, a rural area in northeast Louisiana. After a few years, Josie Mae married her new companion, J.T. Robinson and accepted his four boys as her own. Prior to Rickey's arrival, the

Robinsons had settled into a comfortable family unit and Rickey was viewed as an intruder. Josie Mae made no effort to hide her lack of enthusiasm for Rickey's arrival and offered him no support in his efforts to adapt to his new environment. Rickey was eager to become a member of his mother's family and make the most of the opportunity to live with her, yet she proceeded to treat him as unfairly as she had while Rickey was living with his grandparents. Instead of assisting Rickey's adjustment and accepting him as her own flesh and blood, Josie Mae continued to scold, chastize, and emotionally batter Rickey without justification. Rickey was also confronted with the stinging realization that his mother, after years of abandoning him, had willingly accepted the role as the mother of J.T.'s children. Rickey attempted to get his mother to pay attention to him and this created tension between Rickey and the Robinson boys. Josie Mae refused to side with Rickey and she demanded that he leave.

Rickey became frightened and confused. He had waited so very long for the opportunity to be with his mother and now she was once again rejecting him. Rickey had anticipated that all the loneliness and immense pain he endured while living with his grandparents would vanish and be replaced with his mother's love and comfort. Since the time he was a baby, Rickey placed everything he had into this moment, and suddenly all of the dreams he carried with him for 14 long years were crushed. But before he could realize what was taking place, his entire life came crashing down around him.

The final blow came when Rickey's mother not only pointed a shotgun at him, but actually fired it in his direction as her final notice that she would never accept him. Soon Rickey found himself standing on the highway all alone, emotionally devastated and without a home, or a mother, to call his own.

Mrs. McKinney explains this painful experience:

When Rickey lived with Josie Mae things just never worked out. She would be real hard on Rickey and disciplined him all of the time. Many times she would be too rough when she punished him. Rickey finally left Josie Mae when she ran him off with a shotgun and told him to go away and



never come back. Then Rickey wandered around for awhile with nowhere to go until he came to Maryland and I took him in to live with me.

(T. 291).

Rickey attempted to digest the realization that his desire to be his mother's son was nothing short of a fantasy. Rickey traveled around aimlessly, dropping in on various relatives but unable to settle down and get on with his life. Rickey's family reports that he has never been the same person after his mother so violently rejected him. Leon described Rickey's state of mind while he stayed with him and his wife, Shirley, in New York:

In about 1982 Rickey came and visited me while I was living in New York. During his stay it was clear that Rickey was overwhelmed with a feeling of being inadequate. After being rejected his whole life he was left with a "nothing works out" outlook on life. I was working at the airport and Rickey was just kind of hanging out. Rickey was depressed and started talking to me about drugs but I wasn't interested. After a short stay in New York he suddenly took off again. With all the pain and misfortune in his life Rickey was never provided the necessary know-how to overcome his troubles and permanently settle down.

(T. 308-9). Shirley explained:

When Rickey came to stay with Leon and me in New York, you could tell that he wanted to build a life for himself but he really didn't know how. For example, Rickey didn't have any warm clothes to wear even though it was wintertime. Even the simplest things were confusing for Rickey - he didn't know how to adapt to things going on around him.

(T. 310-11).

Mamie recalls Rickey living with her family in Maryland:

When Rickey came to live with my family in Maryland, he still acted like he had some bad mental problems. Rickey had a hard time making friends because of his strange behavior. He tried as hard as he could to make a life for himself, but he didn't know how, so Rickey spent most of his time lonely, sad and confused.

(T. 302).

Rickey's bizarre behavior escalated and he lost any ability to think clearly beyond his immediate circumstances. His decision making became spontaneous and reactive. While struggling with the realization that he had absolutely nowhere to go or no place to call home, Rickey slipped even further downward and fell prey to

the drug world. As a teenager Rickey became a heavy user of cocaine and other hard drugs and this did nothing but further cripple him. Rickey's emotional and psychological deficits, combined with drug abuse, seriously incapacitated him. After his arrest at the age of 17, Rickey underwent a series of mental health evaluations. Psychiatric records from the Clifton T. Perkins State Hospital in Maryland report that:

[Rickey] admitted for the past two years he has been abusing downers and acid type drugs... [H]e used drugs in order to get away, 'from problems and facing the hassle of life.' The patient feels that nobody cares about him including his mother... [and he] feels no identity with the exception that he belongs to the street... Patient acknowledged occasional suicidal ideas in the past and indicated that he feels unwanted...

The patient admits to a drug history which began when he was approximately 10 years of age... [he] does feel himself constantly depressed and he feels he needs to use marijuana on a daily basis to combat the depression.

One of the hospital's social workers, after conducting interviews with Rickey's family members observed that

Mr. Roberts never found a permanent home... and moved from relative to relative until the present time... [H]e never viewed himself as a wanted member of the family unit... All the time the patient was living with assorted relatives he kept hoping that his mother would ask him to return, or at least offer some indication she was concerned about his welfare, but his mother did nothing to indicate she cared what became of her son.

The hospital records described Rickey's mother:

[She is described as] a tense, mean individual, who took out her frustrations on her son. While the patient lived with his mother, he was frequently beaten and during his last home visit she threatened him with a shotgun when he returned home late one night.

Additionally, the hospital social service summary noted that

The patient is very bitter towards his mother for her lack of caring, but still persists in hoping she will change...

When [his] grandmother died... [Rickey's mother] had to be persuaded to take the patient. The grandfather informed the patient that nobody wanted him...

The patient is viewed by his aunt as an immature youth who still grieves and feels bitter due to his mother's rejection. It appears that the patient feels himself more in need of a loving mother than a girlfriend.

Psychological testing conducted at the hospital revealed Rickey to be in the borderline category of adult intellectual functioning. I.Q. test results "suggest that there are emotional factors preventing an increased intellectual achievement." The psychologist reports that

Weaknesses are noted in judgment and this appears to be reflected in failure to recognize conventional modes of thought, misinterpretation of the implications of social situations and incorrect evaluation of the appropriateness and consequences of his behavior.

...[T]he patient verbalized a general lack of self assurance. His affect was dysphoric... He is attempting to deal with feelings of self recrimination and self contempt. There is a general underestimation of himself on all levels, physical, mental and moral. Feelings of dejection and disaffection are not too well contained.

... This individual appears to be experiencing an inordinate amount of anxiety in his interactions with other human beings... [and] appears to be suffering from an impaired sense of reality.

As numerous records and reports from various hospitals and institutions reveal, Rickey's dysfunctional family situation was a major contributing factor to the serious problems he faced in his later life. Because Mr. Roberts' sentencing jury recommended death by the slimmest possible margin, the plethora of mitigating evidence that was unavailable for their consideration surely would have tipped the scales in favor of a life recommendation and provided a sound basis for the judge to find that many valid mitigating circumstances existed in this case. Had defense counsel properly and adequately investigated and presented this evidence to the judge and jury at the penalty phase of Mr. Robert's trial, it would have made a difference. Confidence is undermined in the outcome.

None of this evidence got developed and presented to the jury. If counsel had developed the mitigation and tried to present it, but was not allowed to do so because the trial court ruled it inadmissible, under Penry v. Lynaugh, 109 S. Ct. 2934 (1989), Skipper v. South Carolina, 476 U.S. 1 (1986), and Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Mr. Roberts would be entitled to a new sentencing proceeding because his death sentence would be unreliable. The same conclusion must follow

here since the evidence did not reach the jury because of counsels' deficiencies -- Mr. Roberts' death sentence is still unreliable. See State v. Michael, 530 So. 2d 929, 930 (Fla. 1988) ("The inability to gauge the effect of this omission undermined the court's confidence in the outcome of the penalty proceeding.").

In Strickland v. Washington, the Supreme Court noted:

[T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce iust results.

466 U.S. at 696 (emphasis added).

In Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), the Eleventh Circuit noted the interplay between Lockett and its progeny and the prejudice prong of Strickland v. Washington:

Certainly [petitioner] would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the state's showing of aggravating circumstances. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978). Here, [counsel's] failure to seek out and prepare any witnesses to testify as to mitigating Circumstances just as effectively deprived him of such an opportunity. This was not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure--albeit prompted by a good faith expectation of a favorable verdict--to prepare for perhaps the most critical stage of the proceedings. We thus believe that the probability that Blake would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome.

758 F.2d at 535 (emphasis added).

Had trial counsel conducted a reasonable investigation and provided this available information to the mental health professionals who evaluated Mr. Roberts, they would have been able to present a very powerful penalty phase case and closing argument that not only would have portrayed Mr. Roberts as a redeemable human being whose life had value, but also would have been able to show that Mr. Roberts was entitled to mercy -- he was a product of an extremely physically and mentally

abusive background, in addition to his mental health problems. Cf. Penry, 109 S. Ct. at 2947 ("defendants who commit criminal acts attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse"). Counsel's failure to conduct a reasonable investigation not only deprived him of the effective assistance of counsel, but Mr. Roberts was also denied a competent mental health evaluation as a result.

A defendant is entitled to an independent competent mental health expert evaluation when the state makes his or her mental state relevant to "his criminal culpability and to the punishment he might suffer." Ake v. Oklahoma, 105 S. Ct. 1087, 1095 (1985). What is required is an "adequate psychiatric evaluation of his state of mind." Blake v. Kemu, 758 F.2d 523, 529 (11th Cir. 1985). As important as this right is to a defendant facing the ultimate punishment, the right alone -- as with any right -- is useless without "the guiding hand of counsel" to enforce and implement it. See Powell v. Alabama, 287 U.S. 45, 69 (1932).

There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). Mental health and mental state issues permeate the law. Their significance is amplified in capital cases where the jury is to give a "reasoned moral response" to the defendant's "background, character, and crime." Penry, 109 S. Ct. at 2952.

The experts appointed in this case failed to provide the constitutionally adequate expert mental health assistance to which Mr. Roberts was entitled. The evaluations were inadequate because the experts were not provided the information necessary to evaluate Mr. Roberts for mitigating circumstances. The relevant and crucial background facts regarding Rickey Roberts' mental, emotional, and psychological background were never presented to the experts, for their review, or consideration. Information regarding Mr. Roberts' drug and alcohol usage on the day of the offense was not provided to these experts. This was not enough under Mason

v. State, 489 So. 2d at 735-37, and falls far short of what the law and the profession mandate. See State v. Sireci, 502 So. 2d 1221 (Fla. 1987).

Well-established standards for psychiatric and psychological evaluations were extant at the time of the evaluations of Mr. Roberts but were not met here. As a result, the experts failed to diagnose and evaluate Mr. Roberts in a constitutionally adequate way because of counsel's failure to adequately investigate and develop mitigation.

A recent psychological examination of Mr. Roberts by Dr. Henry L. Dee confirms the findings of Mr. Roberts' original mental health experts, Dr. Toomer, Dr. Stillman and Dr. Crown. According to Dr. Dee, his evaluation of Mr. Roberts has indicated:

Mr. Roberts' performance on the Wechsler Adult Intelligence Scale fell into the average range, at the 28th percentile (Full Scale IQ-91). He showed adequate effort and concentration on the tests and I believe this to be broadly representative of his present level of functioning.

His performance on tests of general verbal facility and verbal reasoning fell into the average range, at the 25th percentile. His general fund of information was average, falling at the 37th percentile. His general arithmetic reasoning skills were low, falling at the 16th percentile. His ability to form and to use abstract concepts was high, falling at the 91st percentile. Immediate verbal memory was very low, falling at the 2nd percentile.

His performance on tests of nonverbal cognitive adequacy fell into the average range, at the 35th percentile. His ability to acquire and to use new information under time pressure was low, falling at the 5th percentile. His ability to detect the important, as opposed to the unimportant aspects of a learning situation was high, falling at the 84th percentile. Visuoconstructive ability on the mosaics test was average, falling at the 37th percentile.

\* \* \* \*

He showed intact auditory verbal language comprehension (indeed, performing at quite a high level on this test), normal verbal associative fluency, but somewhat impaired immediate verbal repetition and visual naming. The difficulty with immediate verbal repetition echoes the problem with immediate memory seen on the digit span subtest of the Wechsler, where his performance was grossly defective, but is certainly well below expectation and below what one would expect from his performance on his test of auditory verbal language comprehension. The same can be said for his capacity to name a variety of common visual objects; it simply out of keeping with his intelligence.

Similarly, his performance on the Benton Visual Retention Test, one of the most broadly used screening tests for cerebral insult or disease was grossly defective.

\* \* \* \*

His memory function is grossly impaired. Since the mean and standard deviation of this test is that same as that of the Wechsler test, the Memory Quotient should be the same as the Intelligence Quotient, and he shows impairment in all tested areas of verbal memory, nonverbal memory, and over all memory function, the latter falling at roughly the 4th percentile. Verbal memory was significantly more impaired than nonverbal memory, which was consistent with his performance on the Multilingual Aphasia Examination and the Wechsler.

\* \* \* \*

The results of these tests indicate the presence of cerebral damage, insult, or disease. From the pattern of the results on the memory tests, it would appear that there is more relative involvement of left hemisphere function than right, although there is evidence of apparent right hemisphere involvement as well.

The importance of this background information cannot be stressed enough.

Because organic brain damage and major mental illness can be readily but mistakenly diagnosed as personality disorder, the psychiatric profession has recognized that before a diagnosis of personality disorder can be made, the evaluating psychiatrist must first rule out those bases for the symptoms presented. See, e.g., Kaplan and Sadock at 964. See also MacDonald at 98, 102-03. Accordingly,

Psychiatrists have a clear responsibility to search out organic causes of psychic dysfunction either through their own examinations and workups or by referral to competent specialists.

S. Halleck, Law in the Practice of Psychiatry 66 (1980).

Simply put, the clearly recognized standard in the field mandates that "only in the absence of organic, psychotic, neurotic or intellectual impairment should the patient be . . . categorized [as antisocial]." Kaplan and Sadock at 1866; see also id. at 543. Dr. Toomer and Dr. Stillman's evaluations failed to adequately consider evidence of Mr. Roberts' background and upbringing in formulating their opinion because counsel failed to provide the information.

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. Mr. Roberts' behavior and his background demonstrated substantial and long-standing mental health problems. As the Florida Supreme Court has explained:

Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved. . .

In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. See Bonnie, R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427, 508-10 (1980).

Mason v. State, 489 So. 2d 734, 737 (Fla. 1986) (emphasis supplied). Here, no adequate history was provided. The evaluations failed under the standards required by the constitution as recognized by the profession and by the Florida Supreme Court. Again, the circuit court did not dispute deficient performance in this regard, but found no prejudice on the basis of either Claim XI or XII of the motion to vacate.

If a proper investigation had been done, counsel and his mental health experts could have presented their evaluations and conclusions in the context of Mr. Roberts' life history. As it was presented to the jury, the mental health experts' \* opinions, though valid, were presented in isolation without the benefit of first-hand accounts of Mr. Roberts' life from family members. This information would have supported the findings of Drs. Toomer, Stillman and Crown, and would have been an excellent means of presenting their expert opinions in an understandable manner for the jury.

Information about a serious health problem that Mr. Roberts suffered from as a baby would have supported a finding of brain damage. Mrs. McKinney, Mr. Roberts'



aunt, explained:

When Rickey was just a baby he got real sick and had to spend several weeks in the hospital. They put him in an oxygen tent and he had needles and tubes stuck all over his little body. My mother would go to the hospital and spend every night with Rickey and try to help him get better. The doctors told us that if he was not such a strong baby that he would have died.

(T. 290). The long term nature of this brain damage could have been confirmed by the observations of Mr. Roberts' family. Mr. Less McCullars recalls:

For as far back as I can remember, Rickey acted like he was really out of it. Not only did Rickey go into these trances and talk about his mother all the time, but his mind would wander so that you couldn't be sure he knew what was going on. Even when he was still really young, Rickey would suddenly go walking clear across town for no reason even though he didn't know where he was going or where he was. Then he would end up with a bad beating from our grandfather. When Rickey started acting strange, he would sometimes take chances and be fearless in a way that Leon and I would never dream of even though we were older. One time when the three of us were walking to school, Rickey was talking about being with his mother and then he suddenly said he had to go back to the house because he forgot something and ran off. Later we learned that he took an axe and broke down our grandfather's door to get some money and then went to the bus station to go off and try to find Aunt Josie Mae.

(T. 296-7).

Counsel's failure to provide his mental health experts with sufficient facts concerning Mr. Roberts' use of drugs and alcohol before the offense, prejudiced Mr. Roberts. The significance of this omission was that the court rejected the experts' opinions:

The Court rejects these opinions and points out that the defendant gave no information to these witnesses as to:

- (a) Whether he was using drugs during or before the commission of this crime;
- (b) Whether he was using alcohol during or before the crime was committed;
- (c) His mental state prior to, during, or after the event.

There is no testimony in this record, from any witness, that the defendant was exhibiting any of the behavioral characteristics at the time of the murder, which would support or corroborate the bald assertions of the existence of extreme emotional or mental disturbance.

\* \* \*

The facts of the crimes committed show that the defendant's behavior was planned and premeditated and showed no evidence of mental illness or drug or alcoholic abuse or intoxication in this case.

(R. 584).

If the court was troubled by this, one can surmise that the jury also had problems with the lack of a factual basis for the mental health experts' opinions. This **is** likely, especially in light of the State's arguments on this issue:

Once again, he talks about the Defendant's behavior which would be triggered by drugs or alcohol. Once again there is no evidence of drugs or alcohol being used.

(R. 3464). What makes this argument troubling is that the State knew that drugs and alcohol were being used. See Argument III, supra. There was a significant amount of evidence concerning Mr. Roberts' use of drugs and alcohol on the evening of the offense. None of this was presented by counsel. There can be no tactical reason for investigating, developing and presenting the experts to provide their opinions as to mitigating evidence and not providing them or the jury with the facts necessary to support those opinions. Moreover, the circuit court did not question deficient performance, but simply denied this claim (Claim XI of the motion to vacate) on the basis of "no prejudice" (T. 437).

Notes from the State Attorney's file of an interview with Mr. James Horan indicated that on the night in question Mr. Roberts "didn't seem like he had it all together." Counsel should have discovered this information and presented it. Mr. Greg Mendus would have said that Mr. Roberts was "coked out" and was in possession of cocaine shortly before the offense. Both Kevin Brown and Sean Brown could have testified to Mr. Roberts' possession of cocaine on that night. Notes for the State Attorney's file not only establishes that Mr. Roberts was using drugs that night, but one notation concerning the interview of Messrs. Horan and Kevin and Sean Brown -- "Don't get into drugs" -- indicates that the State knew this information was helpful to the defense. Again the defense failed to discover and present this evidence. The resulting prejudice is obvious. Confidence is undermined in the

outcome.

This is only a sampling of the evidence available on this point that counsel could have and should have presented. The failure to do so deprived counsel of his effective assistance of counsel and his right to competent mental health evaluations. Mr. Roberts' sentence of death is unreliable. A new sentencing should be ordered. At the very least, Mr. Roberts is entitled to an evidentiary hearing.

#### ARGUMENT VI

RICKEY ROBERTS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This argument is premised upon Claim IX of the motion to vacate. The circuit court summarily denied, without the benefit of an evidentiary hearing, because of its belief that as a matter of law there was "no prejudice" (T. 437). Mr. Roberts was denied the effective assistance of counsel at the guilt-innocence phase of his trial. In his motion to vacate judgment and sentence, Mr. Roberts properly pled deficient performance and prejudice as required by Strickland v. Washinnton, 466 U.S. 668 (1984). Because of the page limitation of this brief, Mr. Robert relies upon the motion, with the following additional comments.

The jury in Mr. Roberts' case deliberated for twenty-three hours before convicting Mr. Roberts. Based upon the length of the jury deliberations, it is unlikely in such a case that any deficient performance could ever be without prejudice. In the final analysis, the jury's deliberations necessarily focused upon the testimony of Mr. Roberts and Ms. Michele Rimondi. Counsel needed to impeach the witness the State built its case upon -- Michelle Rimondi. A wealth of impeaching evidence was available but was never used. Counsel failed to effectively use the available impeachment evidence to cross-examine Ms. Rimondi.

Additionally, counsel failed to adequately cross-examine the State's witnesses about their exposure to criminal charges unless they cooperated with the State. Of particular importance were the inconsistent statements made to associates of Mr.

Scott, Mr. Robert's prior counsel. Although Mr. Scott and the court felt that some of these inconsistent statements they obtained were significant enough to warrant a withdrawal (see Claim X of the motion to vacate), none of these statements were ever used. In fact, no reference to them were ever found in counsel's file. In a case such as this one, where impeachment is critical, this was an unreasonable omission.

Finally, this case represents a classic example of ineffective assistance of counsel, not only because of counsel's deficient performance, but also because of circumstances beyond the control of counsel which prevented counsel from ensuring a fair adversarial testing. The sixth and fourteenth amendment right to the effective assistance of counsel is violated when the government "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washington, 466 U.S. 668, 686 (1984); see also United States v. Cronin, 466 U.S. 648 (1984); Brown v. Allen, 344 U.S. 443, 486 (1953) (state interference with criminal defendant's efforts to vindicate federal constitutional rights), cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986). Thus, a defendant is deprived of the right to the effective assistance of counsel by a court order barring attorney-client consultation during an overnight trial recess, Geders v. United States, 425 U.S. 80 (1976); by court-ordered representation of multiple defendants, Holloway v. Arkansas, 435 U.S. 474 (1979); by a court's refusal to allow summation at a bench trial, Herring v. New York, 422 U.S. 853 (1975); by a state statute requiring a criminal defendant who wishes to testify on his own behalf to do so prior to the presentation of any and all other defense testimony, Brooks v. Tennessee, 406 U.S. 605 (1972); and by a state statute restricting a criminal defendant's right to testify on his own behalf. Ferguson v. Georgia, 365 U.S. 570 (1961).

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

In passing on such claims of "actual ineffectiveness," id., at 686, 104 S.Ct. at 2064, the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Ibid. More

specifically, a defendant must show "that counsel's performance was deficient" and that "the deficient performance prejudiced the defense." *Id.*, at 687, 104 S.Ct., at 2064. Prior to our consideration of the standard for measuring the quality of the lawyer's work, however, we had expressly noted that direct governmental interference with the right to counsel is a different matter. Thus, we wrote:

Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See e.g. Geders v. United States, 425 U.S. 80 [96 S.Ct. 1330, 47 L.Ed.2d 592](1976)(bar on attorney-client consultation during the overnight recess); Herring v. New York, 422 U.S. 853 [95 S.Ct.2550, 45 L.Ed.2d 593](1975)(bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612,613 [92 S.Ct. 1891, 1895, 32 L.Ed.2d 358](1972) (requirement that defendant be first defense witness); Ferguson v. Georgia, 365 U.S. 570, 593- 596 [81 S.Ct. 756, 768-770, 5 L.Ed.2d 783](1961)(bar on direct examination of defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance,' Cuyler v. Sullivan, 446 U.S. [335] at 344 [100 S.Ct. 1708, at 1716, 64 L.Ed.2d 333 (1980)]. *Id.*, at 345-50 [100 S.Ct., at 1716-1719] (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective)." *Id.*, at 686, 104 S.Ct., at 2063-2064.

Our citation of Geders in this context was intended to make clear that "[a]ctual or constructive denial of the assistance of counsel altogether," Strickland v. Washington, *supra*, at 692, 104 S.Ct., at 1063-2064, is not subject to the kind of Drejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective. See Penson v. Ohio, 488 U.S. \_\_\_, \_\_\_, 109 S.Ct. 346, \_\_\_, \_\_\_ L.Ed.2d \_\_\_ (1988); United States v. Cronic, *supra*, 466 U.S., at 659, and n.25, 104 S.Ct., at 2047, and n.25.

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

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

Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a

near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." United State ex. re. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Slalaff v. Williams, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

466 U.S. at 656-57 (footnotes omitted)(emphasis added).

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

Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential required us to conclude that a trial is unfair if the accused is denied counsel at a critical state of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, 415 U.S. 308, 94 S.Ct 1105, 39 L.Ed.2d 347 (1974), because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at 318, 94 S.Ct., at 1111 (citing Smith v. Illinois, 390 U.S. 129, 131, 88 S.Ct. 748, 749, 19 L.Ed L.Ed.2d 956 (1968), and Brookhart v. Janis, 384 U.S. 1, 3, 86 S.Ct. 1245, 1246, 16 L.Ed.2d 314 (1966).

Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

446 U.S. at 659-60 (footnotes omitted)(emphasis added).

Here defense counsel was constrained by the trial court's refusal to let him present pertinent relevant testimony and cross-examination. Exculpatory evidence was not presented to the trier of fact because of the court's limitations. There was no adversarial testing. Counsel's performance was rendered ineffective and deficient, against counsel's own wishes. Where there is no adversarial testing prejudice is presumed. Accordingly, relief must be granted, and a new trial must be ordered. At a minimum, this case should be remanded for a full and fair evidentiary hearing.

ARGUMENT VII

MR. ROBERTS WAS DENIED HIS RIGHTS UNDER *THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS* WHEN THE COURT LIMITED CROSS EXAMINATION INTO CRIMES COMMITTED BY THE STATE'S WITNESSES.

To establish the credibility of the witnesses presented by the State, the defense is permitted to elicit on cross examination testimony revealing their credibility or motivation to lie. Evidence that the State's witnesses have criminal charges pending before or during trial reveals a motivation by the witness to lie or curry favor with the State by enhancing their testimony against a defendant. As Claim VIII of the motion to vacate, Mr. Roberts asserted his conviction could not stand because of unconstitutional restrictions on his ability to present evidence of pending charges against State's witnesses.

As the State concedes in its Response to the habeas corpus petition (which was submitted to the circuit court at the hearing on the motion to vacate), many of the State's witnesses who testified against Mr. Roberts had been arrested for offenses and had charges pending before and during the trial. These charges were either pending at the time of trial or were disposed of immediately prior trial. Mr. Roberts was entitled to cross-examine these witnesses as to their belief that the testimony against Mr. Roberts would lead or had led to a favorable disposition of these pending charges. The Court refused to permit cross examination about these pending charges and ruled that evidence of arrests not yet resulting in convictions was inadmissible. However, this was fundamental constitutional error. The threat of pending prosecution must be allowed to be inquired into by defense counsel. Davis v. Alaska, 415 U.S. 308 (1974).

Throughout the trial, Mr. Roberts maintained his innocence for this offense. The defense sought to elicit, through cross examination of the State's witnesses, evidence that someone else had committed the offense. During his opening, defense counsel argued that two of the State's witnesses, Manny Cebey and Joe Ward, were the culpable parties. The defense maintained that the account given by the alleged eye

witness, Michelle Rimondi, was fabricated to protect Mr. Cebey and Mr. Ward. Obviously, it was vital to the defense to attack the credibility of these witnesses. The Court's decision to prevent the defense from inquiring about pending charges against these witnesses prevented the jury from obtaining the factual basis to accurately assess the credibility of these witnesses.

Three weeks before trial, Michelle Rimondi was arrested for the crime of grand theft (R. 664). Over the defense objection, the court granted the State's motion in limine to restrict testimony of this pending charge (R. 665). Defense counsel argued that because Ms. Rimondi confessed to having committed the crime, he should be permitted to impeach Ms. Rimondi with the pending charge:

The case law .. and again, but I think I can tell you what I would propose, and I was going to file my **own** motion.

That is as to Michelle, I be allowed to inquire about her confessed -- because given a written confession about dishonesty and grand theft and burglary. Even though with the Defendant, you can't **ask** unless he opens the door other than have you been convicted of a crime, blah, blah, blah. But that is the Defendant's protection.

I will suggest in this case where we have the critical witness involved, that I be allowed to inquire about her confession or arrest and her subsequent confession or arrest and her subsequent confession to Detective Juan Coop because it is a crime of dishonesty.

It is not aggravated battery.

Burglary and grand theft are crimes of dishonesty and it goes to her credibility when she takes the stand and swears under oath when recently, within the last month or two, she has confessed to committing a crime of dishonesty.

(R. 664-665).

The defense was denied the opportunity to reveal to the jury the factual basis for assessing Rimondi's credibility. The Court erred when it ruled that defense counsel could not cross-examine Ms. Rimondi regarding the matter. In Davis v. Alaska, 415 U.S. 308 (1974), the Supreme Court addressed the issue of whether the juvenile offense was admissible as impeachment. The Court discussed the importance of the defendant's sixth amendment right to cross examine witnesses:

Cross-examination is the principal means by which the believability of a



witness and the truth of his testimony are tested. Subject always to the broad discretion of a trial judge to preclude repetitive and unduly harassing interrogation, the cross-examiner has traditionally been allowed to impeach, i.e., discredit, the witness. One way of discrediting the witness is to introduce a prior criminal conviction of that witness. By **so** doing the cross-examiner intends to afford the jury a basis to infer that the witness' character is such that he would be less likely than the average trustworthy citizen to be truthful in his testimony. The introduction of evidence of a prior crime is thus a general attack on the credibility of the witness. **A** more particular attack on the witness' credibility is effected by means of cross-examination directed toward revealing possible biases, prejudices, or ulterior motives of the witness as they may relate directly to issues or personalities in the case at hand. The partiality of a witness is subject to exploration at trial, and is "always relevant as discrediting the witness and affecting the weight of his testimony." **3A J. Wigmore, Evidence §ec. 940, p. 775 (Chadborn rev. 1970).** We have recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination. Greene v. McElroy, **360 U.S. 474, 496, 79 S. Ct. 11400, 1413, 3 L.Ed.2d 1377 (1959).**

Davis, **415 U.S. at 316-17.**

The Davis court ruled that a juvenile offense was relevant to prove bias of a witness:

The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of **so** vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected Green from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the petitioner to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records. The judgment affirming petitioner's convictions of burglary and grand larceny is reversed and the case is remanded for further proceedings not inconsistent with this opinion.

Davis, **415 U.S. at 320.**

Rimondi's juvenile offense for theft involved a crime of ,dishonesty. Under section **90.609** of the evidence code, evidence relating to a witness's honesty and truthfulness is admissible. Yet the trial court ruled that because the crime, to which she had confessed, was still pending in a technical sense, Ms. Rimondi would be prejudiced by impeachment concerning it, But more importantly, the trial court failed to consider that to the extent that the evidence code conflicted with Davis, the decision in Davis controlled. Here, Ms. Rimondi's credibility could not be

adequately assessed without the evidence of her arrest. Her motive for saying whatever the prosecutor wanted in order to avoid prosecution herself was a relevant area of inquiry and one which, under Davis, had to be allowed. Ms. Rimondi's story was constantly changing. The pendency of the charges gave the State a hammer to force Ms. Rimondi to adhere to a story to the State's liking.<sup>3</sup>

The defense was also precluded from cross examining two other State witnesses about arrests and the factual basis of their convictions. According to the testimony of Ian Riley, Joe Ward was a violent person (R. 1596, 1597). He used cocaine and carried a weapon. The defense's theory of the case was that Ward committed the offense (R. 1597). Before the State presented Ward's testimony, the State moved to limit cross examination about arrests and the underlying facts of his convictions. The defense argued that the jury needed to hear specific evidence of Ward's criminal history to support the defense's theory that Ward and not Rickey Roberts had committed the offense:

You know you can go into it with him in terms of propensity for violence, crimes, drug related crimes, you know, his criminal history.

He's been identified as one of two likely murderers by me. I think the jury has a right to know it. If they are going to call him, if they are going to call him to the stand, they are choosing to call him and its absolutely my right, as your Honor ruled with Ian Riley, to ask Riley about Ward, specifically Ward's criminal history, I can now ask Ward the specifics of that same history.

(R. 2013). The defense sought to discredit Ward by eliciting an adjudication of crime:

He has a court case number 72-5703, dealing in stolen property. Certified copy that he was convicted and adjudicated and placed on five years probation.

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<sup>3</sup>Of course, the most telling evidence in this regard was not disclosed and not considered by the trial court when it made its ruling. When Ms. Rimondi was arrested on the grand theft charges, she immediately asked that the authorities get in touch with Mr. Glick, the prosecutor attorney involved in Mr. Roberts' case. See Argument 111, supra.

(R. 2048). The defense argued this evidence was necessary -- not only to show Ward's reputation for truth telling but to prove the defense's theory of the case:

It gets to the broader issue of your Honor prohibiting me from fully developing before the jury, one of two people that I have identified as the real killer in this case.

Whether the State chooses to accept it or not, that's still the theory of the defense, that he did not -- Rickey Roberts did not do it, that it could either be two killers, one of two killers, Cebey or Ward.

(R. 2050). The Court granted the State's motion to exclude this conviction finding that it was inadmissible because Ward was placed on probation and not technically convicted for the offense (R. 2051). However, this evidence was not being offered for the traditional impeachment, but for the purposes set forth in section 90.404(2) of the Evidence Code. "Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue." The fact in issue was whether Mr. Ward committed the murder.

Ward had additional criminal charges that were not revealed to the jury. He was charged with a crime of violence which was not prosecuted because Ward offered the victim full restitution. Defense counsel explained the nature of the charges:

MR. LANGE: Just for the purposes of appeal so there is no misunderstanding what you are saying, in terms of introducing these cases 80, 81, 82 leaving the scene of an accident, personal injury, ag assault, possession of a firearm while engaged in a criminal offense.

(R. 2050). The defense also tried to impeach Ward with another crime of violence that was ultimately nolle prossed by the State as part of a plea agreement. This charge arose from a confrontation between Ward and three Miami police officers. Defense counsel explained for the record the nature of this offense:

MR. LANGE: This is where -- there was an outstanding case for carrying a concealed firearm, which caused -- there was a arrest warrant out for him.

That's when the officers go to get the house and are battered by him and resisting.

(R. 2054). Ward had also been charged with an additional crime of violence that was not prosecuted:

**MR. LANGE:** June 30, 1978. ag battery and again it indicates the case was dropped by the State but I think I should be allowed to inquire as the ag battery bears on his violent nature.

(R. 2055).

The defense also sought to show that Manny Cebey was the perpetrator. In order to rebut the defense's theory of the case, Manny Cebey appeared as a witness for the State during their case in chief. This witness had been charged with crimes that related to his reputation for truth telling. Over objection, these offenses were never revealed to the jury. The jury was denied the essential tools for assessing Mr. Cebey's credibility.

The Court's ruling limited the defense's ability to challenge the credibility of Messrs. Ward and Cebey and Ms. Rimondi. It was essential to the defense to confront the accounts of these witnesses in order to establish the defense that they acted in concert to falsely implicate Rickey Roberts in the homicide. The refusal to allow this evidence deprived the jury of the facts necessary for assessing the witnesses' credibility. Mr. Roberts' capital conviction and death sentence were obtained in violation of the fifth, sixth, eighth and fourteenth amendments. Davis v. Alaska, supra, and Olden v. Kentucky, 109 S. Ct. 480 (1988), establish that the trial court erred in not permitting the cross-examination in this case. Certainly where the jury deliberated twenty three hours the error cannot be found to be harmless beyond a reasonable doubt. Delaware v. Van Arsdall, 475 U.S. 673 (1986).

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Roberts' death sentence and renders it unreliable. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985). and it should now correct this error. Accordingly, Rule 3.850 relief must be accorded now.

ARGUMENT VIII

MR. ROBERTS WAS DENIED HIS RIGHT TO TRIAL BY A JURY THAT PRESUMED HE WAS INNOCENT WHEN THE STATE REPEATEDLY REFERRED TO HIM BY AN ALIAS IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

During Mr. Roberts' trial, the State repeatedly referred to him by his alias, Less McCullars. This improperly relieved the State of the burden of proving guilt beyond a reasonable doubt. The jury was implicitly told that Mr. Roberts used an alias because he had something about his background that he wanted to hide. This suggested that Mr. Roberts was not a law abiding citizen and should not be presumed innocent for this offense. Use of aliases is only admissible when the alias is relevant to the consciousness of guilt. Merritt v. State, 523 So. 2d 573 (Fla. 1988). Use of an alias alone "is no more consistent with guilt than innocence." Merritt, supra, 523 So. 2d at 524. To be harmless, Merritt error must be harmless beyond a reasonable doubt.

The indictment for this offense names Mr. Roberts and specifies that he is also known as Less McCullars. Defense counsel filed a motion to have the alias stricken and to preclude the State from referring to the alias during trial (R. 79). Initially, this motion was denied (R. 80) and then later granted. Despite the ruling foreclosing the State from referring to Mr. Roberts' alias, the State repeatedly used the alias during trial. Whenever a witness was questioned about Mr. Roberts, the State asked the witness if he knew Mr. Roberts or Less McCullars. The record reads as though the state attorney thought the defendant had two names. Over the course of the three week trial, the State repeatedly referred to the defendant as Less McCullars or Rickey Roberts (R. 1639, 1641, 1659, 1939, 1937, 1995, 1996, 2395, 2396, 2804, 2963, 3089, 3088, 3099, 3100, 3107). Again and again the State apparently "slipped" and for a moment "forgot" whether the defendant's name was Rickey Roberts or Less McCullars. When Juror Salas asked about the alias (R. 1668), it was clear that the jurors were confused by the repeated use of both names. These repeated references to the defendant's alias were highly improper, and a flagrant

violation of the Court's ruling.

This improper reference to the alias inferred that Mr. Roberts was not presumed innocent for this offense and effectively relieved the State of the burden of proving guilt beyond a reasonable doubt. This was a clear violation of Mr. Roberts' due process rights under the fifth, eighth, and fourteenth amendments.

This error obviously had significant bearing on the guilt determination since the jury deliberated for twenty-three hours before returning a verdict of guilt. Given the length of deliberations, the jury certainly had misgivings about Mr. Roberts' guilt. It cannot be said that the improper reference to Mr. Roberts' alias did not contribute to the jurors conclusion of guilt. Indeed, it decreased the State's burden of proof by improperly suggesting that Mr. Roberts had a predisposition to commit this offense. Had this improper evidence been excluded at trial as had been ordered by the court, the jury would most likely have resolved its doubts about Mr. Roberts guilt in his favor. This State's use of Mr. Roberts' alias resulted in an unjust conviction. Mr. Roberts' conviction was unconstitutionally obtained and must be vacated. Rule 3.850 relief is required.

Merritt v. State, supra, establishes the error here is not harmless beyond a reasonable doubt. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Roberts' death sentence and renders it unreliable. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error. Accordingly, under Meritt this Court must grant Rule 3.850 relief.

ARGUMENT IX

MR. ROBERTS' DEATH SENTENCE WAS IMPOSED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE HIS JURY WAS PREVENTED FROM GIVING APPROPRIATE CONSIDERATION TO, AND HIS TRIAL JUDGE REFUSED TO CONSIDER **ALL** EVIDENCE PROFFERED IN MITIGATION OF PUNISHMENT, CONTRARY TO HITCHCOCK V. DUGGER, MILLS V. MARYLAND, AND PENRY V. LYNAUGH, NEW CASES WHICH EFFECTIVELY OVERRULES PRIOR INCONSISTENT DECISIONS FROM THIS COURT.

Changes in Florida law, caused by decisions of the United States Supreme Court which effectively overrule prior decisions of this Court, are cognizable in collateral proceedings. In Claim XXII of his motion to vacate, Mr. Roberts presents a claim that Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and Penry v. Lynaugh, 109 S. Ct. 2934 (1989), effectively overruled prior precedent of this Court and establish error in Mr. Roberts' sentence of death. At the time of Mr. Roberts' trial it was axiomatic that the eighth amendment required a capital sentencer, "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Eddinns v. Oklahoma, 455 U.S. 104, 110 (1982) quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978). No less clear was the fundamental tenant that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigation." Eddinns, supra at 114. Yet this Court held that it is the trial court alone that decides what constitutes mitigation. Roberts, 510 So. 2d at 894. However, after Mr. Roberts' penalty phase proceedings, the United States Supreme Court held that a Florida jury was a sentencer within the meaning of the eighth amendment and that as a result the jury must be properly instructed in accord with Lockett and Eddings. Recently in Mills v. Maryland, 108 S. Ct. 1860 (1988), the Supreme Court in surveying the prime directive of Lockett and its progeny stressed the ability of the sentencer to consider all evidence of mitigation unimpeded.

{I}t is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio, supra; Hitchcock v. Dugger, \_\_\_ U.S. 107 S. Ct. 1821, 95 L.Ed. 2d (1987); by the sentencing court, Eddinns v. Oklahoma, supra; or by evidentiary ruling, Skinner v. South Carolina, [476 U.S. 1 (1986)] . . .

[w]hatever the cause, the conclusion would necessarily be the same: Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing."

Mills at 1866 quoting Eddings v. Oklahoma, 455 U.S. at 117 (O'Connor, J., concurring).

In Mr. Roberts' case, the judge refused to properly consider Eddings, supra; Hitchcock, supra; Mills, supra; Penry, supra, and his jury was precluded from fully considering substantial and un rebutted nonstatutory mitigation regarding Mr. Roberts' mental and emotional disturbance at the time of the offense. Expert testimony was introduced establishing that Mr. Roberts suffered brain damage. Evidence not rising to the level of statutory mitigation is nonetheless mitigation and must be considered by the sentencer under Eddings. A sentencer may not conclude that mitigation is not mitigation. The sentencer can only determine the weight to be given to the mitigation. Here not only was there evidence of brain damage, but also expert testimony regarding Mr. Roberts' documented history of drug abuse. According to this Court's precedent, such evidence is mitigating, yet the trial court specifically said it was not mitigating. Under Eddings, the sentencer is entitled to determine weight, but not to reject the mitigating quality of evidence altogether. Such a rejection is an error of law. In Mr. Roberts' case the evidence of brain damage and drug abuse was rejected by the court as a matter of law. The court erroneously applied a sanity threshold requirement on Mr. Roberts evidence before the court would even consider Mr. Roberts' mental impairments as a statutory mitigating factor pursuant to Fla. Stat. sec. 921.141(6)(f). As Mills instructs, the actual impediment to consideration is irrelevant if the net result is the preclusion from the sentencer's consideration of all mitigation. Unmistakably the court in Mr. Roberts' case was so precluded, as evidenced by its sentencing order where the court rejected the statutory mitigating circumstance of extreme or emotional disturbance because the defendant could "appreciate the criminality of his



conduct or conform his conduct to the requirements of the law" (R. 564).

By imposing a sanity standard on the evidence of mental or emotional impairment the court effectively transformed evidence of Mr. Roberts' brain damage into an all or nothing proposition. By finding the evidence insufficient to rise to the level of McNaughton insanity, a defense Mr. Roberts never raised during trial, the court thereby erroneously refused to consider any such evidence not only as a statutory mitigating factor but, as nonstatutory mitigation as well. The sentencing court found mental health mitigation was not "any other aspect" of the defendant's character,

This Court in Perri v. State, 441 So. 2d 606 (Fla. 1983), noted the proper standard to be applied with respect to this statutory mitigating factor:

The trial court denied defendant's request for a psychiatric evaluation prior to the sentence proceeding. The trial court found the defense of insanity had not been raised and there was no indication or evidence that the defendant was incompetent. The court also found that the prior psychiatric evaluation had determined that the defendant was competent.

Section 921.141(6)(b), Florida Statutes (1981), states that a felony committed while defendant was under the influence of extreme mental or emotional disturbance is a mitigating factor.

Section 921.141(6)(f) states that if the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired, a mitigating factor arises.

We explained these mitigating factors in State v. Dixon, 283 So.2d 1, 10 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed.2d 295 (1974). as follows:

Extreme mental or emotional disturbance is a second mitigating consideration, pursuant to Fla.Stat. Section 921.141(7)(b), F.S.A., which is easily interpreted as less than insanity but more than the emotions of an average man, however inflamed.

\* \* \*

Mental disturbance which interferes with but does not obviate the defendant's knowledge of right and wrong may also be considered as a mitigating circumstance. Fla.Stat. Section 921.141(7)(f), F.S.A. Like subsection (b), this circumstance is provided to protect that person who, while legally answerable for his actions, may be deserving of some mitigation of sentence because of his mental state.

\* \* \*

Perri did not testify during the guilt proceeding and did not testify during the sentence proceeding. His only testimony was given to the judge for the purpose of stating that he had been in mental institutions. This should be enough to trigger an investigation as to whether the mental condition of the defendant was less than insanity but more than the emotions of an average man, whether he suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong. A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Id. at 608-9. See also Amazon v. State, 487 So. 2d 8, 13 (Fla. 1986) (inconclusive evidence that defendant had taken drugs the night of the offense and stronger evidence that the defendant had a history of drug abuse constitutes sufficient evidence that defendant could have acted under extreme mental or emotional distress).

Clearly, the trial court's erroneous saddling of the defense with a threshold sanity requirement pursuant to subsection (6)(f) gave rise to the courts refusal to consider as a matter of law the proffered evidence on mitigation. Eddings makes plain that the trial court may not "refuse to consider as a matter of law, any relevant mitigating evidence." Id. at 877. By imposing the erroneous statutory sanity standard the trial court effectively precluded its consideration of this evidence by depriving Mr. Roberts of the individualized sentencing to which he is entitled. The court committed fundamental eighth amendment error and resentencing relief is now warranted. Moreover, the court's confusion obviously demonstrates that reasonable jurors may have similarly misunderstood the law.

Mr. Roberts' jury would have also believed that it was precluded from considering the mitigating evidence of his longstanding mental impairment. A reasonable juror could have found that Mr. Roberts' disabilities did not establish statutory mitigation by applying the same erroneous insanity test applied by the sentencing court. Mr. Roberts' jury was instructed, in accord with Florida's death penalty statute that mental or emotional disabilities could be considered as

mitigating circumstances if the evidence demonstrated that:

The crime for which the defendant is to be sentenced was committed while he was under the influence of extreme mental or emotional disturbance.

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

Any other aspect of defendant's character or record and any other circumstance of the offense.

(R. 567-69).

A reasonable juror could have found the brain damage and history of drug abuse were not so severe that they met the statutory criteria, as the judge did. Nevertheless, a reasonable juror could still have found on the basis of the undisputed evidence that Mr. Roberts did suffer from brain damage, that he had suffered from this disorder most of his life and that in conjunction with his history of drug abuse, it plainly adversely affected his thinking and behavior at the time of the crime. As previously noted the Florida Supreme Court has recognized that a history of drug and alcohol addiction is a nonstatutory mitigating factor. Amazon, supra. Likewise that court has recognized that brain damage is appropriate nonstatutory mitigation. State v. Sireci, 536 So. 2d 231 (Fla. 1988). In this overall context, a reasonable juror plainly could have believed that all of the evidence bearing upon Mr. Roberts' mental and emotional condition of the time of the crime was to be considered only in relation to the two statutory mitigating circumstances which addressed this concern. Under Mills v. Maryland, supra, this was error.

At the time of Mr. Roberts' trial, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), had yet to be decided. In Hitchcock, the United States Supreme Court held that a Florida capital sentencing jury must be correctly instructed on the mitigation to be considered. Hitchcock is new case law which justifies presentation of erroneous jury instruction issues in collateral proceedings. This claim is thus cognizable

now even though there was no objection to the defective instructions. See Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hally v. State, 541 So. 2d 1125 (Fla. 1989); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 73 (Fla. 1987); Delap v. Dugger, 513 So. 2d 659 (Fla. 1987).

As demonstrated by his findings, the trial judge considered the evidence of Mr. Roberts' mental and emotional disabilities only in relation to the two statutory mitigating circumstances which addressed this subject. Certainly a reasonable juror could likewise assume that consideration of Mr. Roberts' mental and emotional state were exclusively limited to the two enumerated statutory mental mitigating factors and nowhere else. In this respect, the preclusive instructions in Mr. Roberts' case, which reasonable jurors could have interpreted in an "all or nothing" fashion thereby foreclosing further consideration of the effects of Mr. Roberts' brain damage as nonstatutory mitigation, operated in much the same fashion as the special circumstances in Penry v. Lynaugh, 109 S. Ct. 2934 (1989). In Penry the Court found that the use of the qualifier "deliberately" in Texas' functional equivalent of a mitigating factor without further definition was insufficient to allow the jury to give effect to Johnny Penry's mitigating evidence of mental retardation.<sup>4</sup> In Penry the Court found that a rational juror could have concluded that Penry's mental retardation did not preclude Mr. Penry from acting deliberately, yet also conclude that Mr. Penry's mental retardation made him less culpable than a normal adult. In striking the sentence of death the Court noted:

In this case, in the absence of instructions informing the jury that it could consider and give effect to the mitigating evidence of Penry's mental retardation and abused background by declining to impose the death penalty, we conclude that the jury was not provided with a vehicle for expressing its "reasoned moral response" to that evidence in rendering its sentencing decision. Our reasoning in Lockett and Eddings thus

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<sup>4</sup>The issues involved in several cases currently pending before the United States Supreme Court will have import for the issue presented here. See Blvstone v. Pennsylvania, 109 S. Ct. 1567 (1989); Boyde v. California, 109 S. Ct. 2447 (1989); Saffle v. Parks, 109 S. Ct. 1930 (1989).

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compels a remand for resentencing 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." Lockett, 438 U.S., at 605, 93 S.Ct., at 879 (concurring opinion). When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments." Lockett, 438 U.S., at 605, 98 S.Ct., at 2965.

Here, reasonable jurors at Mr. Roberts' trial, having found that his personality disorder was neither "extreme" or "substantial" may still well have concluded that Mr. Roberts' mental and emotional immaturity reduced his moral culpability, but were left with no vehicle with which to give effect to that conclusion. Brain damage did not fit into "any other aspect." The trial court's findings thus establish not only that he failed to comply with Lockett in his own sentencing deliberations by refusing to consider Mr. Roberts' brain damage, but also that a reasonable juror, despite knowing that she might consider nonstatutory mitigating circumstances could believe that the evidence of mental health and emotional disability was properly considered only in relation to statutory mitigating circumstances. Ultimately the court's refusal to consider and the jury's reasonable mistake in failing to consider meant that neither fully considered the only evidence in Mr. Roberts' favor in deciding whether he should live or die.

In Perry, the Supreme Court held:

Underlying Lockett and Eddinns is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (concurring opinion). Moreover, Eddinns makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987). Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein{g}" and has made a reliable determination that death is the appropriate sentence. Woodson, 428 U.S., at 304, 305.

109 S. Ct. at 2947.

Perry is new case law which along with Hitchcock and Mills establish that this Court erroneously affirmed Mr. Roberts' sentence of death. The jury here, as well as the judge, did not have a vehicle for evaluating and giving meaning to the mitigation. The jury was not allowed and the judge refused to comply with the dictates of Perry. The resulting death sentence is unreliable. These fundamental violations of eighth amendment jurisprudence demonstrate that Rule 3.850 relief and/or habeas corpus relief are now appropriate. Mr. Roberts' sentence of death must be vacated.

#### ARGUMENT X

MAYNARD V. CARTWRIGHT AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE "HEINOUS, ATROCIOUS, AND CRUEL" AGGRAVATING CIRCUMSTANCE TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the aggravating and mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dunner, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Mills v. Maryland, 108 S. Ct. 1860 (1988); Perry v. Lynaunh, 109 S. Ct. 2934 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Duaeer, 548 So. 2d 184 (Fla. 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim XV of the motion to vacate is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed regarding the meaning of heinous, atrocious, or cruel. This violated the eighth amendment principles embodied in Maynard v. Cartwright, supra. For these reasons, and those more fully explained in Claim XV of the motion to vacate Mr.

Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

#### ARGUMENT XI

PENRY V. LYNAUGH, MILLS V. MARYLAND, AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE MANNER IN WHICH AGGRAVATING CIRCUMSTANCES ARE TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the aggravating and mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Further, the jury must not be denied a vehicle for giving effect to the mitigation. Mills v. Maryland, 108 S. Ct. 1860 (1988); Penry v. Lynaugh, 109 S. Ct. 2934 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim XVI of the motion to vacate is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was incorrectly instructed that in order to recommend a life sentence, the jury had to find that the mitigation outweighed the aggravation. This violated the eighth amendment principles embodied in Penry, supra, and Mills, supra. See Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005; Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988) (in banc). For these reasons, and those more fully explained in Claim XVI of the motion to vacate, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

## ARGUMENT XII

PENRY V. LYNAUGH AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE JURY'S ABILITY TO RECOMMEND MERCY BECAUSE OF SYMPATHY EVOKED BY THE EVIDENCE IN MITIGATION.

A capital sentencing jury must be properly instructed as to mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). The jury must be allowed to fully consider and give effect to mitigation presented by the defense. Mills v. Maryland, 108 S. Ct. 1860 (1988). On the basis of the mitigation, the jury must be free to exercise mercy because of the sympathies evoked on behalf of the defendant. Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized in Florida. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim XVII of the motion to vacate is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury could reasonably have understood that feelings of sympathy evoked by the mitigating evidence could not be considered. This violated the eighth amendment principles embodied in Mills, supra. See Parks v. Brown, 860 F.2d 1545 (10th Cir. 1988)(in banc), cert. granted sub nom., Saffle v. Parks, 109 S. Ct. 1930 (1989). For these reasons, and those more fully explained in Claim XVII of the motion to vacate, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.



ARGUMENT XIII

MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND LOWENFIELD V. PHELPS EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE "IN THE COURSE OF A FELONY" AGGRAVATING CIRCUMSTANCE TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the aggravating and mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Mills v. Maryland, 108 S. Ct. 1860 (1988); Penry v. Lynaugh, 109 S. Ct. 2934 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim XVIII of the motion to vacate is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed regarding the "in the course of a felony" aggravating circumstance. This violated the eighth amendment principles embodied in Maynard v. Cartwright, supra, and Lowenfield v. Phelps, 108 S. Ct. 546 (1988).

According to this Court the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984) (no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"). Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987) ("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty."). However, here, the jury was instructed on this aggravating circumstance and told

that it was sufficient for a recommendation of death unless the mitigating circumstances outweigh the aggravating circumstance. There is no way at this juncture to know whether the jury relied solely on this aggravating circumstance in returning its death recommendation. In Maynard v. Cartwright, 108 S. Ct. at 1858, the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Danner, 107 S. Ct. 1821 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the eighth amendment. Under Mills v. Maryland, 108 S. Ct. 1860, 1870 (1988), "[t]he possibility that a single juror" read the instructions in an unconstitutional fashion requires a resentencing.

For these reasons, and those more fully explained in Claim XVIII of the motion to vacate, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

#### ARGUMENT XIV

MAYNARD V. CARTWRIGHT AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THE "UNDER SENTENCE OF IMPRISONMENT" AGGRAVATING CIRCUMSTANCE TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the aggravating and mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Danner, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Mills v. Maryland, 108 S. Ct. 1860 (1988); Penry v. Lynaugh, 109 S. Ct. 2934 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr.

Roberts' trial, Claim XIX of the motion to vacate is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed regarding the weight of the "under sentence of imprisonment" aggravating circumstance. This circumstance is less weighty where the defendant "did not break out of prison." Sonner v. State, 544 So. 2d 1010 (Fla. 1989). The jury was not instructed as to this fact. This violated the eighth amendment principles embodied in Maynard v. Cartwright, *supra*. For these reasons, and those more fully explained in Claim XIX of the motion to vacate, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

#### ARGUMENT XV

MR. ROBERTS' RIGHTS TO RELIABLE CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE VIOLATED WHEN THE STATE URGED THAT HE BE CONVICTED AND SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT AND OTHER IMPERMISSIBLE FACTORS, **IN** VIOLATION OF BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Roberts presented a meritorious claim of eighth amendment error pursuant to Booth v. Maryland, 107 S. Ct. 2529 (1987), and South Carolina v. Gathers, 109 S. Ct. 2207 (1989). The circuit court erroneously ruled that this claim is procedurally barred.

This Court recently acknowledged that Booth v. Maryland, was an unanticipated retroactive change in law:

Under this Court's decision in Witt v. State, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067 (1980), Booth represents a fundamental change in the constitutional law of capital sentencing that, in the interests of fairness, requires the decision to be given retroactive application.

Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). In that same opinion, this Court held that Rule 3.850 is an appropriate forum for the presentation of claims predicated upon Booth v. Maryland. Mr. Roberts' death sentence was based on impermissible victim impact information.

Although no objection was presented to the trial court, Mr. Roberts is entitled to relief. Mr. Roberts respectfully submits that a change in law is a change in

law, and whether or not Booth and Gathers should be retroactively applied to a given case simply cannot constitutionally turn on whether, pre-Booth, a defense attorney presented an objection when he or she had no eighth amendment basis for doing so. It is respectfully submitted that this Court's perspective in Parker (J.B.) v. Dugger, So. 2d , 14 F.L.W. 557 (Fla. Oct. 25, 1989) (defense counsel had a duty to object before Booth), does not pass constitutional muster. As this Court has done in the Hitchcock context, relief on the basis of a retroactive change in law cannot turn on whether an attorney objected before the decision changing the law was issued. See Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987) (no pre-Hitchcock objection; relief granted on the basis of Hitchcock because Hitchcock was found to be a retroactive change in law); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988) (same); Hall v. State, 541 So. 2d 1125 (Fla. 1989) (same); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988) (same); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987) (same). Interestingly, the Attorney General's office took this same position in Jackson v. Dugger. See Respondent's petition for rehearing. To impose on defense counsel the duty to object when counsel had no basis for objecting is to rely on a procedural bar which does not comport with due process and equal protection, for such a bar can by no means be deemed to rest on a fair, adequate, and independent state law ground. See Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986); Johnson v. Mississippi, 108 S. Ct. 1981 (1988); Ake v. Oklahoma, 470 U.S. 68 (1985); Harris v. Reed, 109 S. Ct. 1038 (1989); Hathorn v. Lovorn, 457 U.S. 255 (1982); NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). If Booth is indeed a retroactive change in law, as this Court held in Jackson, then no procedural bar can properly and constitutionally be invoked under the standards set forth in Witt v. State, 387 So. 2d 922 (Fla. 1980).

For these reasons, and those more fully explained in Claim XX of the motion to vacate, this claim should be entertained on its merits. Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

## ARGUMENT XVI

CALDWELL V. MISSISSIPPI AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS REGARDING THEIR ROLE IN THE SENTENCING PROCESS.

A capital sentencing jury must be properly instructed as to their role in the sentencing process. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Caldwell v. Mississippi, 105 S. Ct. 2633 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(in banc), cert. denied, 109 S. Ct. 1353 (1989). At the time of Mr. Roberts' sentencing, this Court had failed to recognize that a capital jury must be correctly instructed. In fact, on the basis of Hitchcock, this Court has reversed instructional error where no objection to the inadequate instruction was asserted at trial. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hally v. State, 541 So. 2d 1125 (Fla. 1989). This is because until Hitchcock, the importance of penalty phase jury instructions was not recognized. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim III of the motion to vacate is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed regarding the significance of their sentencing verdict. Throughout Mr. Roberts' trial, the prosecutor's and judge's comments about the jury's role in the sentencing process allowed the jury to attach less significance to their sentencing verdict, and therefore enhanced the risk of an unreliable death sentence. This violated the eighth amendment principles embodied in Caldwell v. Mississippi, supra, and Mann v. Dugger, supra. For these reasons, and those more fully explained in Claim III of the motion to vacate, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

## ARGUMENT XVII

MAYNARD V. CARTWRIGHT AND HITCHCOCK V. DUGGER EFFECTIVELY OVERTURNED PRIOR PRECEDENT FROM THIS COURT THAT A CAPITAL SENTENCING JURY NEED NOT RECEIVE ACCURATE PENALTY PHASE INSTRUCTIONS LIMITING THE AGGRAVATING CIRCUMSTANCES TO BE WEIGHED AGAINST THE MITIGATING CIRCUMSTANCES.

A capital sentencing jury must be properly instructed as to both the

aggravating and mitigating circumstances which it is to consider in recommending life or death. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988); Mills v. Maryland, 108 S. Ct. 1860 (1988); Penry v. Lynaugh, 109 S. Ct. 2934 (1989). At the time of Mr. Roberts' sentencing, the prosecutor urged a sentence of death on the basis of nonstatutory aggravating circumstances. However, in Maynard v. Cartwright, the Supreme Court said that eighth amendment error occurs where a jury is not adequately informed of the channeling and limiting principles applicable to its sentencing discretion. 108 S. Ct. at 1858. Because of the new case law not in existence at the time of Mr. Roberts' trial, Claim XXIII of the motion to vacate is now cognizable.

As set forth in this claim, Mr. Roberts' sentencing jury was not adequately instructed that it could not consider the nonstatutory aggravating circumstances paraded before them by the prosecutor and urged as a basis for a death recommendation. This violated the eighth amendment principles embodied in Maynard v. Cartwright, supra. For these reasons, and those more fully explained in Claim XXIII of the motion to vacate, Mr. Roberts' sentence of death is unreliable. A new sentencing proceeding is required.

#### ARGUMENT XVIII

THE PROSECUTOR'S CLOSING ARGUMENT IN THE GUILT **AND** PENALTY PHASES DENIED MR. ROBERTS A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The prosecutor distorted Mr. Roberts' trial and sentencing with improper closing arguments. He destroyed any chance of a fair trial by comparing Mr. Roberts to Ted Bundy (R. 3109), by calling Mr. Roberts a "bullshitter" (R. 3090), and by repeatedly calling Mr. Roberts, and even his counsel at one point, a liar (R. 2946, 2967, 2986, 2987, 2989). The State's arguments at both the guilt and penalty phases are filled with these vindictive and personal attacks on Mr. Roberts, designed to inflame the jury.

The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones,'" Rosso v. State, 505 So. 2d 611, 614 (Fla. 3rd DCA 1987) (quoting Berner v. United States).

These comments by the prosecutor went beyond the bounds of proper argument and clearly prejudiced Mr. Roberts' right to a fair trial as guaranteed by the sixth, eighth and fourteenth amendments. See United States v. Young, 470 U.S. 1 (1985). Trial counsel rendered ineffective assistance by failing to object. Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979). For these reasons, and those more fully explained in Claim XIII of the motion to vacate, Mr. Roberts' conviction and sentence should be set aside.

#### ARGUMENT XIX

THE PENALTY PHASE OF MR. ROBERTS' TRIAL WAS FUNDAMENTALLY FLAWED WHEN THE TRIAL COURT LIMITED THE TESTIMONY OF THE DEFENSE'S MENTAL HEALTH EXPERT IN VIOLATION OF HITCHCOCK V. DUGGER AND PENRY V. LYNAUGH.

During the penalty phase of a capital trial, the defense has the opportunity to present evidence relevant to the character of the offender and the nature of the offense. The trier of fact weighs the evidence to determine whether death or a sentence other than death is appropriate. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), constituted a change in law by recognizing that the jury in Florida was a sentencer for eighth amendment purposes.

During the penalty phase of Mr. Roberts' trial, the defense presented the testimony of three mental health experts. These expert witnesses testified that Mr. Roberts suffered from an organic brain syndrome. The evidence of organic brain syndrome was offered to prove the mitigating factors of extreme emotional disturbance and the defendant's inability to conform his conduct to the requirements of the law. The defense presented the testimony of Dr. Stillman. He based his opinion of Mr. Roberts' mental health upon the contents of a letter he received from

former defense counsel. The State's objection to the contents of this letter was sustained (R. 3377). The court improperly excluded testimony about the factual basis underlying the expert's opinion. The court ruled that the testimony was inadmissible because the State asserted the defendant's attorney-client privilege (R. 3377). This ruling was improper. The exclusionary rules of evidence applicable during the penalty phase of a capital trial are substantially more relaxed than those applied during guilt-innocence. For example, it is generally recognized that hearsay testimony is admissible during the penalty phase. The broader scope of evidence admissible at penalty allows the introduction of all evidence relevant to a sentencing decision. Tompkins v. State, 502 So. 2d 415, 420 (Fla. 1986).

The trial court erred by preventing the defense's expert from testifying to the factual basis of his opinion. This testimony was admissible and relevant to the jury's penalty decision. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). This claim, Claim XX of the motion to vacate, involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Roberts' death sentence and renders it unreliable. This Court has not hesitated in the past to exercise its inherent jurisdiction to remedy errors which undermine confidence in the fairness and correctness of capital proceedings, see Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985), and it should now correct this error.

#### ARGUMENT XX

MR. ROBERTS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY WITHDREW BECAUSE OF A PURPORTED CONFLICT OF INTEREST, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Thomas E. Scott was appointed by the court as trial counsel for Mr. Roberts. After a considerable amount of work and investigation had been conducted on Mr. Roberts' case, Mr. Scott moved the trial court to allow him to withdraw as counsel.

Mr. Scott indicated that withdrawal was necessary because a conflict of interest had developed. The conflict was that a witness, Rhonda Haines, had changed



her story and was not providing incriminating statements against Mr. Roberts. As a result of this change in Ms. Haines' story, Mr. Scott indicated:

It is now apparent that in light of the meeting at these offices, the intended impeachment of this witness by members associated with this firm and its paralegals, and indeed even the undersigned counsel, KIMBRELL, HAMANN, JENNINGS, WOMACK, CARLSON & KNISKERN, P.A. must withdraw as counsel of record because they have become material witnesses and will necessarily be called to impeach the credibility of Ms. Haines.

(R. 106). Although collateral counsel cannot fault trial counsel's "ethical" concerns, it is apparent that Mr. Scott's withdrawal was not necessary and in fact was prejudicial to Mr. Roberts' case.

The facts as set forth by Mr. Scott do not support his decision to withdraw. Counsel's actions clearly indicate the abandonment of his duty of loyalty to his client. See Osborn v. Shillinner, 861 F.2d 612 (10th Cir. 1988).

Mr. Scott's withdrawal at that critical stage of the proceedings was prejudicial to Mr. Roberts' sixth, eighth and fourteenth amendment rights. Mr. Scott abandoned his client. Relief is warranted.

#### ARGUMENT **XXI**

THE PROSECUTOR PEREMPTORILY EXCUSED BLACK PROSPECTIVE JURORS SOLELY BASED UPON THEIR RACE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This issue was raised at trial but not on direct appeal. After the trial proceedings and before the judgment on direct appeal became final, the United States Supreme Court decided Batson v. Kentucky, 476 U.S. 79 (1986). in which new rules and prohibitions against discriminatory exercise of peremptory challenges were announced. Batson is applicable to litigation pending on direct state or federal review or not yet final when Batson was decided. Griffith v. Kentucky, 107 S.Ct. 708 (1987). Batson is applicable to collateral review of convictions that were not final when Batson was decided. Teague v. Lane, 109 S. Ct. 1060, 1067 (1989). The trial court did not apply Batson, but applied pre-Batson analysis to deny Mr. Roberts' claim. In Griffith, Batson had been decided after a petition for writ of certiorari was filed, and the Supreme Court determined that Batson was to be

applied. Under Satson, relief is mandated here. For these reasons and those more fully set out in Claim II of the motion to vacate, Mr. Roberts' conviction and sentence of death must be set aside.

#### ARGUMENT XXII

THE APPLICATION OF RULE 3.851 TO MR. ROBERTS' CASE VIOLATED HIS RIGHT TO DUE PROCESS AND EQUAL PROTECTION OF LAW AND DENIED HIM HIS RIGHTS TO REASONABLE ACCESS TO THE COURTS.

Under Rule 3.851, Mr. Roberts' motion to vacate judgment and sentence had to be filed by September 28, 1989. However, under the two-year time limitation provision of Rule 3.850, Mr. Roberts had until March 7, 1990, to file for post-conviction relief; two years from the denial of his petition for a writ of certiorari. Roberts v. Florida, 108 S. Ct. 1124 (March 7, 1988). The signing of Mr. Roberts' death warrant has therefore accelerated the time within which he must file for post-conviction relief by over **six (6)** months.

The **loss** of **six** months in which to adequately investigate Mr. Roberts' case, and the unrelenting workload Mr. Roberts' counsel have been functioning under, has deprived Mr. Roberts of the effective assistance of counsel. Mr. Roberts has been prejudiced by the arbitrary signing of a death warrant in his case. This is not due process. Accordingly, Mr. Roberts urges this Court to remand this case for a full and fair evidentiary hearing and allow him leave to amend his pleading.

#### ARGUMENT XXIII

MR. ROBERTS' SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS, AND COUNSEL WAS INEFFECTIVE FOR FAILING TO LITIGATE THIS CLAIM.

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial court relief even in part upon "misinformation of constitutional magnitude," such as prior uncounseled convictions that were unconstitutionally imposed. In Zant v. Stephens, 462 U.S. 879 (1983), the Supreme Court made clear

that the rule of Tucker applies with equal force in a capital case. Id. at 887-88 and n.23. Accordingly, Stephens and Tucker require that a death sentence be set aside if the sentencing court relied on a prior unconstitutional conviction as an aggravating circumstance supporting the imposition of a death sentence. Accord Douglas v. Wainwright, 714 F.2d 1532, 1551 n.30 (11th Cir. 1983). As articulated in Zant v. Stephens, this rule is absolute and does not depend upon the presence or absence of other aggravating or mitigating factors for its application. Reconsideration of the sentence is required. See Tucker, 404 U.S. at 448-449; Lipscomb v. Clark, 468 F.2d 1321, 1323 (5th Cir. 1972).

There can be no dispute that the judge and jury relied on Mr. Roberts' prior Maryland conviction to establish an aggravating circumstance upon which his death sentence was based. The sentencing court found that aggravating circumstance sufficient to outweigh the mitigation and justified the sentence of death (See R. 58).

The underlying conviction upon which Mr. Roberts' sentence of death was obtained in violation of Mr. Roberts' rights under the sixth, eighth, and fourteenth amendments. His death sentence, founded upon that unconstitutionally obtained prior conviction, thus also violates his constitutional rights. Johnson v. Mississippi, 108 S. Ct. 1981 (1988). For these reasons and those set out in Claim XXI of the motion to vacate, Mr. Roberts' sentence of death must be vacated.

The presentation of the unconstitutionally obtained prior conviction deprived Mr. Roberts of a fair and reliable capital sentencing determination. Rule 3.850 relief is warranted.

#### CONCLUSION

No claim or aspect of a claim which, given the time constraints, has not been fully briefed herein is waived or abandoned. Mr. Roberts' lower court submission are all incorporated hereby, and presented for this Honorable Court's review.