IN THE SUPREME COURT OF FLORIDA
CASE NO. 75,698

BRYAN FREDRICK JENNINGS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE EIGHTEENTH JUDICIAL CIRCUIT COURT, IN AND FOR BREVARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

JEROME H. NICKERSON
Assistant CCR
Florida Bar No. 0829609

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

MARTIN J. McCLAIN
Special Assistant CCR
Florida Bar No. 0754773
28E Broadway Village Drive
Columbia, Missouri 65201
(314) 442-3727

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Jennings' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied relief, despite the State's admission that a discovery violation occurred and despite trial counsel's affidavit detailing both, the prejudice flowing from the discovery violation, and his own deficient performance. Even though Mr. Jennings submitted the affidavit of his trial attorney detailing the discovery violation, the resulting prejudice to Mr. Jennings, and counsel's own deficient performance, no evidentiary hearing was held.

Citations in this brief shall be as follows: The record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The record on appeal from the Rule 3.850 proceedings shall be referred to as "T. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Jennings 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. Jennings through counsel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Jennings was charged by indictment on May 16, 1979, in Brevard County, Florida with three counts of first degree murder[1], kidnapping, three counts of sexual battery, burglary, and aggravated battery. Trial commenced on February 4, 1980, and concluded on February 11, 1980. Mr. Jennings was found guilty as charged. The jury recommended death and the judge sentenced Mr. Jennings to death. On direct appeal, this Court vacated the judgment and sentence and ordered a new trial. Jennings v. State, 413 So. 2d 24, 27 (Fla. 1982).

On June 11, 1982, Mr. Jennings was reindicted in Brevard County and again charged with three counts of first degree murder, kidnapping, three counts of sexual battery, burglary, and aggravated battery. Trial began on July 13, 1982, and concluded on July 16, 1982. Mr. Jennings was convicted and again sentenced to death. This Court affirmed both the conviction and sentence. Jennings v. State, 453 So. 2d 1110 (Fla. 1984). On petition for writ of certiorari, the United States Supreme Court vacated the judgment and remanded the case. Jennings v. Florida, 470 U.S. 1002 (1985). In turn, this Court remanded the case to the trial court ordering a new trial be conducted. Jennings v. State, 473 So. 2d 204 (Fla. 1985).[2]

Pursuant to a change of venue, trial commenced in Bay County, Florida, on March 24, 1986, and concluded on March 27, 1986. The jury returned a verdict finding Mr. Jennings guilty of the three counts of first degree murder[3], kidnapping, one count of sexual battery, and burglary of a dwelling. The

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[1]Even though there was one homicide, the grand jury indicted Mr. Jennings on three counts of first degree murder.

[2]This reversal was premised upon a violation of Edwards v. Arizona, 451 U.S. 477 (1981).

[3]Again there was only one homicide even though the jury returned a conviction on three counts.

penalty phase was conducted on April 7 and 8, 1986.[4] The jury recommended a sentence of death. On April 25, 1986, the court imposed a sentence of death. Mr. Jennings took a direct appeal from the judgment of conviction and imposition of the death sentence. Mr. Jennings argued that improper victim impact evidence was admitted over objection and argued to the judge and jury. This Court affirmed both the verdicts of guilt and sentence of death. Jennings v. State, 512 So. 2d 169 (Fla. 1987), reh'g denied.

On August 29, 1989, the Governor signed a warrant for Mr. Jennings' execution. This death warrant scheduled the execution of Mr. Jennings for the week beginning Thursday, October 26, 1989, and ending noon, Thursday, November 2, 1989. Mr. Jennings' execution was scheduled by Florida State Prison Superintendent Tom Barton for 7:00 a.m., Friday, October 27, 1989. This is fifty-nine days after the date the warrant was signed.

On October 23, 1989, Mr. Jennings filed his 3.850 motion in circuit court. The 3.850 motion included a Brady claim which was premised upon an undisclosed tape recording of a material witness describing Mr. Jennings' intoxication on the night of the homicide. According to the undisclosed tape recording Mr. Jennings was "loaded." He was too drunk to drive and "he seemed to have a childish mind" (T. 312). The witness reported having to drive Mr. Jennings home because he busted his zipper. Defense counsel provided an affidavit in support of the 3.850 motion detailing the discovery violation and how he would have used the undisclosed tape recording:

> The statement contains critical eyewitness evidence concerning the degree of Mr. Jennings' intoxication, and the existence of a broken zipper on his pants. At no time did the State divulge that Ms. Slocum had made a statement to the State concerning material evidence pertaining to Mr. Jennings' case. At no time did the State divulge

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[4]The State called Dr. Wilder to rebut the mental health mitigation presented by the defense. Dr. Wilder's testimony, which was subsequently relied upon by the trial court to find no mental health mitigation was premised upon a review of the statements ruled inadmissible under Edwards v. Arizona, 451 U.S. 477 (1981).

that Ms. Slocum was a material witness, and further, at no time was I provided with the original tape, a copy thereof, or a transcript by the State.

Ms. Slocum's statement provided critical material evidence that Mr. Jennings was severely intoxicated shortly before the time of the offense was committed. The statement also contained evidence that would have been useful in rebutting the State's evidence that a sexual battery had occurred. This information would have been key material evidence I would have use to impeach state witnesses, and photographic evidence on the sexual battery charge.

If I would have had Ms. Slocum's statement I definitely would have presented her testimony to the jury in the guilt phase as part of the voluntary intoxication defense. This testimony would have become a key part of Mr. Jennings' defense. I would have also presented Ms. Slocum's statement to the mental health experts to aid their evaluation in determining Mr. Jennings' mental state at the time of the offense. I do not believe that the mental health experts were able to make an accurate and adequate evaluation on the issue of voluntary intoxication without the benefit of Ms. Slocum's material statement. Ms. Slocum's statement to law enforcement officers or her live testimony should have been presented to the guilt phase jury. There should have been an adversarial testing before a jury on the facts presented in Ms. Slocum's material statements.

If I had known of Ms. Slocum's statement I would have presented here testimony or the statement itself in the penalty phase to establish that Mr. Jennings ability to conform his conduct to the law was substantially impaired, or, at the very least, that he was severely intoxicated, which is itself a non-statutory mitigating circumstance. I would have presented her testimony or the statement itself in the penalty phase to rebut the State's evidence that the crime was committed in a cold, calculated, and premeditated manner. Further, the descriptive testimony of Ms. Slocum regarding Mr. Jennings' intoxication would have been relevant and material to establish that he was immature, and to argue that his age should have been found as a mitigating circumstance. Case law interpretation of this statutory mitigation circumstance places emphasis on the maturity of the Defendant, and Ms. Slocum's testimony clearly shows an immature individual, raucous and socially inept, who overindulged in consumption of beer, and acted like an adolescent. I would have presented the statement to the mental health experts in order for them to have an accurate picture of Mr. Jennings' mental status at the time of the offense. The concepts of the statement is exactly the type of evidence that would have given the mental health experts a true picture of Mr. Jennings' severe intoxication.

(T. 317-18). Defense counsel also detailed how he had failed to contact and call several witnesses who had important exculpatory information regarding Mr. Jennings' intoxication. Counsel explained that his failures in this regard where without "strategic or tactical reason" (T. 320).

The State filed its Response on October 25, 1989. On October 26, 1989, the court permitted oral argument. At that time, the State conceded a discovery violation had occurred, but argued it was harmless. After argument, the circuit court denied relief.[5] No evidentiary hearing was permitted.[6] Mr. Jennings' timely motion for rehearing was denied January 24, 1990. A timely notice of appeal was filed February 21, 1990.

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[5]The circuit court was presented with draft orders. Mr. Jennings presented one denying relief for the reasons set forth on the record. The State presented a draft which contradicted the reasons set forth on the record and which dismissed the motion for a violation of 3.851. Over Mr. Jennings' objection the circuit court signed the State's proposed order prepared well in advance of the court's ruling and inconsistent with the oral reasoning.

[6]Following the denial of Rule 3.850 relief on October 26, 1990 but before a motion for rehearing or notice of appeal were due in circuit court, this Court stayed Mr. Jennings' execution in order to consider his petition for writ of habeas corpus.

SUMMARY OF ARGUMENTS

1. Victim impact evidence and argument was presented to Mr. Jennings' judge and jury during his capital trial in violation of the eighth amendment. Trial counsel objected, but the judge overruled the objections because "a victim in a crime [need not] remain some plastic individual without any flesh being presented as to the personality of the victim" (R. 1717). This issue was briefed to this Court on direct appeal before the decision was rendered in Booth v. Maryland, 482 U.S. 496 (1987). This Court erroneously affirmed Mr. Jennings' sentence of death. Under Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), this Court must revisit this issue. Under Jones v. State, 15 F.L.W. 469 (Fla. 1990), a new sentencing must be ordered.

2. The trial court erred in summarily denying Mr. Jennings' 3.850 motion without benefit of an evidentiary hearing and without ordering compliance with Chapter 119. Mr. Jennings presented trial counsel's affidavit detailing a Brady violation and acknowledging deficient performance in failing to contact key defense witnesses. These errors made a difference in the mental health evaluations, the testimony adduced in the guilt phase, and the evidence presented in the the penalty phase. Under this Court's case law, an evidentiary hearing was required on the 3.850 motion, because the files and records do not conclusively refute trial counsel's affidavit.

3. Exculpatory evidence was not disclosed by the State to trial counsel. The evidence would have been used by defense counsel to establish Mr. Jennings' intoxication, to explain his injured penis, and to impeach state witnesses. Without the evidence, the trial court concluded that Mr. Jennings had failed to demonstrate that he was intoxicated and in any way impaired on the night of the offense. The undisclosed evidence, thus, would have demonstrated that Mr. Jennings was intoxicated and his judgment impaired. Confidence in the trial court's conclusions and the outcome of the trial must be undermined. Certainly,

the file and records do not conclusively establish that Mr. Jennings is entitled to no relief. Accordingly an evidentiary hearing must be ordered.

4. The trial court erred in not ordering the State Attorney and the Sheriff's Office to comply with Chapter 119 of the Public Record Act. This matter must be remanded for compliance with Chapter 119, and thereafter, Mr. Jennings be given leave to amend.

5. Trial counsel's performance at the guilt phase was deficient as he acknowledged in his affidavit submitted in support of the 3.850 motion. As a result of counsel's deficient performance evidence of Mr. Jennings' intoxication which negated his ability to form specific intent was not presented to the jury. Confidence is undermined in the outcome. The files and records do not conclusively establish that Mr. Jennings is entitled to no relief; an evidentiary hearing must be ordered.

6. Mr. Jennings' mental health evaluations were rendered inadequate by the prosecution's suppression of evidence and by trial counsel's deficient performance. As a result, Mr. Jennings was in effect denied the assistance of a mental health expert.

7. Trial counsel's performance at the penalty phase was deficient as he acknowledged in his affidavit. He failed to investigate and present evidence of Mr. Jennings' intoxication. This failure was cited by the trial court as supporting the imposition of a death sentence. Under the circumstances confidence is undermined in the outcome. Certainly the files and records do not conclusively establish that Mr. Jennings is entitled to no relief, an evidentiary hearing must be ordered.

8. The State used evidence obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981), against Mr. Jennings by presenting it to the State's mental health experts who relied upon the statements to conclude aggravation was present and mitigation was not. Counsel's failure to litigate this issue was

deficient performance which prejudiced Mr. Jennings.

9. The case was improperly submitted to the jury on three counts of murder even though there was but one victim. At the penalty phase, the State argued that the fact that the jury had convicted on three counts of murder justified a death sentence (R. 1659-60). This was error.

10. Mr. Jennings' right to present a defense and to confront witnesses against him were denied when the court limited the cross-examination of the State's key witness, Clarence Muszynski, and when Mr. Jennings was foreclosed from introducing evidence establishing that either Mr. Muszynski was insane, a perjurer, or both.

11. Mr. Jennings was deprived of his rights under the fifth, sixth, eighth and fourteenth amendments when jurors were advised of his previous convictions for the very crimes at issue.

12. The trial court erred in denying the motion to suppress and allowing into evidence items that were seized during a warrantless arrest. Counsel was ineffective in failing to adequately litigate this issue.

13. The sentencing court erred by failing to independently weigh aggravating and mitigating circumstances and in relying on previous findings of fact which relied on evidence obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981). Counsel was ineffective in failing to challenge this.

14. The jury instructions regarding heinous, atrocious or cruel were inadequate under Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

15. The jury instructions regarding cold, calculated and premeditated were inadequate under Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

16. The death sentence rests upon an unconstitutional automatic aggravating circumstance in violation of Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

17. The introduction of nonstatutory aggravating factors so perverted the

sentencing phase that it resulted in the arbitrary and capricious imposition of death.

18. The sentencer refused to consider mitigation as a matter of law in violation of Eddings v. Oklahoma, 455 U.S. 104 (1982).

19. The jury was erroneously instructed that under Florida law Mr. Jennings bore the burden of proving a life sentence was warranted.

20. The jury's sense of responsibility was improperly diminished under Caldwell v. Mississippi, 472 U.S. 320 (1985).

21. The jury was improperly instructed not to consider sympathy for Mr. Jennings in determining what sentence to recommend.

22. The aggravating circumstance cold, calculated and premeditated was applied in Mr. Jennings' case in violation of ex post facto.

23. The prosecution of Mr. Jennings by the State Attorney's Office when the State Attorney had previously been a senior public defender in the office that represented Mr. Jennings during one of his previous trial constituted a conflict of interest in violation of the fifth, sixth, eighth and fourteenth amendments.

ARGUMENT I

MR. JENNINGS' JUDGE AND JURY CONSIDERED AND RELIED ON THE VICTIM'S PERSONAL CHARACTERISTICS, THE IMPACT OF THE OFFENSE ON THE VICTIM'S PARENTS, AND THE PROSECUTOR'S AND FAMILY MEMBERS' CHARACTERIZATIONS OF THE OFFENSE AND THE VICTIM'S PERSONALITY OVER DEFENSE COUNSEL'S TIMELY AND REPEATED OBJECTION IN VIOLATION OF MR. JENNINGS' EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, BOOTH V MARYLAND, SOUTH CAROLINA V. GATHERS, JACKSON V. DUGGER, AND JONES V. STATE.

At Mr. Jennings' trial, his counsel objected to the testimony of the victim's family and friends who described her, her personality, her personal characteristics and her family. The trial court rejected the objections because it did not agree that "a victim in a crime must remain some plastic individual without any flesh being presented as to the personality of the victim" (R. 1717). The circuit court's position has been repudiated by the United States Supreme Court and by this Court. See Booth v. Maryland, 482 U.S. 496 (1987); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) and Jones v. State, ___ So. 2d ___, 15 F.L.W. 469 (Fla. 1990). This issue was preserved at trial and raised on direct appeal. It is cognizable at this juncture.

This Court recently held:

> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

Jones v. State, ___ So. 2d ___, No. 72,461 (Fla., Sept. 13, 1990).

Crimes against children are unparalleled in their capacity to evoke the human emotion of sympathy for the victim's parents while simultaneously engendering the emotional and unprincipled responses of rage, hatred, and revenge against the accused. The temptation to provoke an unbridled and unprincipled emotional response from Mr. Jennings' judge and jury proved irresistible to the State. The State called the victim's mother, Patricia Kunash. The prosecutor used the testimony of Mrs. Kunash to underscore her

loss and to present demonstrative evidence of victim impact. Directly after Mrs. Kunash's testimony, the State called Robert Kunash, the victim's father, again to play on the jury's sympathy and passion. Defense counsel for Mr. Jennings anticipated the State's intention to elicit, and thereby contaminate Mr. Jennings' jury with, victim impact evidence and sought to insulate them from "contamination" as the following demonstrates:

> [THE PROSECUTOR]: Did you go to any other location to try to find Becky?
>
> [MR. KUNASH]: Yeah, I ran down to the school.
>
> Q. Was there a particular reason why you thought she might have gone to school?
>
> MR. REYES [DEFENSE COUNSEL]: Judge, I am going to object. That's speculation.
>
> MR. HOWARD [DEFENSE COUNSEL]: May we approach, Your Honor.
>
> (Thereupon, the following proceedings were held out of the hearing of the jury as follows:)
>
> MR. REYES: Judge, the objection is two grounds. It is not relevant as to why she was going to the school, it is prejudicial in this circumstance, and also --
>
> THE COURT: I can't hear you, come forward.
>
> MR. REYES: Judge, the primary objection is, it is prejudicial under the circumstances, and also it is speculation on the part of the father.
>
> THE COURT: Well, I think if he has been asked to explain why he went to the school, I think that would be relevant as to why he thought the girl might be there. I think it could be highly relevant. Overrule the objection.
>
> (Thereupon, the following proceedings were held in the hearing of the jury as follows:)
>
> [THE PROSECUTOR]: Sir, could you explain to us why you though she might be at the school?
>
> A. Becky was supposed to be the narrator of the first grade school play, because she learned how to read faster than anybody else, and she was really excited about it. I thought maybe there was some chance that, you know, she went there just, you know, because she told me all about the play and read me the whole story of it, and --
>
> Q. When you went there, did you in fact find her?

A. No, sir, I didn't.

(R. 341-2)(emphasis added). Through this testimony introduced over objection the State was allowed to demonstrate the father's loss, establish that the victim had learned to read faster than her classmates, that she was killed before she had the opportunity to do a first grade school play, that she was a child who experienced emotions, that she was precocious, that she loved school and probably had a great future ahead of her which was cut sort by her death; and that her father was desperate to find her when she was discovered missing.

Having introduced the wholly irrelevant and highly prejudicial testimony from the victim's father regarding the victim's personal characteristics and participation in her school's May Day pageant the State then called the school's principal to bolster the identical victim impact evidence already elicited from the victim's father. Once again defense counsel objected, but to no avail:

Q. And in what capacity were you employed by the School Board at that time?

A. I was the Principal of Audubon Elementary School.

* * *

Q. And in the course of your work at that school, did you come to know a child by the name of Rebecca Kunash?

A Yes, I did.

Q. I now show you what's previously been marked as State's Exhibit S for identification purposes, and ask you to take a look at this particular item. Do you recognize the person that you know as Rebecca Kunash in this photograph?

A. Yes, I do.

* * *

Q. Is this a clear and accurate representation of -- or do you just recognize it as being her, at this time?

A. I recognize one part of her, her face there, I recognize Rebecca.

Q. How is it that you came to know Rebecca?

A. She was a first grade student as Audubon Elementary School.

* * *

A. This was the morning of the same day.

Q. Was there any particular activity going on in the school that day?

MR. HOWARD: Objection, Your Honor. May we approach, please?

(Thereupon, the following proceedings were had out of the hearing of the jury as follows:)

MR. HOWARD: Judge, we are going to object on the ground that this line of questioning is irrelevant and immaterial to the issue at hand, which is identification. I anticipate after talking to the witness before the testimony, that her testimony is going to be concerning the school play and May Day. That's all fine and good, but the sole purpose would be to gain sympathy from the jury for the dead girl, and I know that we are going to have plenty of sympathy anyway, but I don't think that's a proper way to get it. She has identified the child it the photograph, the additional testimony is not going to aid in showing that she even knew the child or could identify her any better. She has already testified that she looked for the child high and low, she and the janitor both, and they did not find her.

MR. HOLMES: Your Honor, there has already been testimony that's been made in reference to that, her testimony would be that it was a major day at that school, in terms of the May Day and in terms of programs, and that she knew Rebecca Kunash and that she was a participant in those programs.

THE COURT: I think it is admissible to show or to explain why the parents thought that she might have gone to school prior to calling the sheriff, or looking around the home, and for that reason I'm going to permit it. Objection overruled.

MR. HOWARD: We would renew it on the additional ground that it is cumulative, Your Honor, Mr. Kunash already testified to that.

THE COURT: All right. Objection is overruled.

(R. 487-91)(emphasis added). The court thereafter permitted the school principal to repeat the father's testimony regarding the victim and the concern over her disappearance. Thus through this testimony the State was allowed to reiterate the victim impact information already presented through the testimony of the victim's parents.

The State's presentation of victim impact evidence before Mr. Jennings' jury and judge occurred throughout the course of the proceedings. It was then used in the penalty phase to "emotional[ly] distract []" the jury in clear violation of this Court's holding in Jones v. State, supra. During the State's closing penalty phase argument the prosecutor sought a collective emotional response from Mr. Jennings' jury drawing upon the victim impact evidence and testimony. The prosecutor argued that the impact that crimes against children have on their parents justified death sentence. Once again, defense counsel objected:

> [THE PROSECUTOR]: [E]ach one of those crimes are there to protect the things in society that we hold the most dear. What is more important than the security of a person's home, where parents can raise their children and have a safe place for them to sleep at night? What do we hold more dear? But yet in this case, that right, the right of the Kunashes to have this protection, the right of the child to be left alone in her home was violated by the act of the defendant.
>
> . . .
>
> MR. HOWARD [DEFENSE COUNSEL]: Your Honor, I must raise an objection. I think Mr. Holmes is coming perilously close to the Golden Rule argument, in that statement.
>
> THE COURT: I think it's proper argument. Overrule the objection.
>
> MR. HOWARD: Very well, Your Honor.
>
> MR. HOLMES: And this is a right that society recognizes and protects. And did the defendant violate that right? Absolutely. And not only that, who did he violate that right with? A six year old child. And who is society, who does society try to protect more than a child?

(R. 1658-9)(emphasis added).

The sentencing court was contaminated with additional and graphic victim impact evidence in the presentence report:

> Robert Kunash, father of the victim, states he thinks Jennings should receive the death penalty. He advises the incident literally tore his family apart. He states his wife still cries every night and does not want to go near a bridge. He and his wife were at the point of divorce but have been going to counseling and things have improved

somewhat.

(Presentence Investigation at 10)(emphasis added). In addition, the presentence investigator offered his own characterization of the offense for the court's consideration:

> There is little the Court nor any other agency can do to redress or recompense what has been done to the victim and her parents in this case but it is within the purview of the Court to insure that such an act will never be perpetrated by this defendant again.

(Id. at p. 11)(emphasis added).

Having properly preserved the issue at trial, counsel during the hearing on Mr. Jennings' motion for a new trial succinctly synthesized for the court the very basis upon which the United States Supreme Court, a year later, in Booth v. Maryland, 482 U.S. 496 (1987), would preclude the use of victim impact evidence in capital trials. As defense counsel stated:

> MR. HOWARD: We felt that 3C, permitting the testimony concerning the participation of class play, was irrelevant to the issues in this case, that is, whether Mr. Jennings committed the crimes or not. It was unduly prejudicial in the sense that it impermissibly intended to elicit sympathy for the victim in the case, Rebecca Kunash, unlike civil cases where sometimes where day-in-the-life testimony is admissible. It is obviously not admissible in a criminal case except in the context of res gestae. There is no res gestae in connection between her being in the school play and her disappearance. The Court's ruling, as I recall, was it was relevant on the grounds that explained Mr. Kunash's actions in going to the school and to try to find her. But, again, we felt that in and of itself was irrelevant. She has disappeared. The disappearance was uncontested by the State. We did not contest identity in the case. The State proved it up. We did not stipulate to it. But had a stipulation been asked for it, we probably would have offered one.
>
> THE COURT: Do you have any case authority on that point, Mr. Howard?
>
> MR. HOWARD: No, I don't. There has not been any case directly on point where this particular type of evidence has been admitted as I recall. Our argument is based on the general rule of evidence. That irrelevant [sic] evidence is admissible unless it is so prejudicial as to have the prejudicial effect outweigh the relevancy.
>
> THE COURT: Well, it is your position that a victim in a crime must remain some plastic individual without any flesh being presented as to the personality of the victim?
>
> MR. HOWARD: In some case, the personality of the victim becomes

very important. As the Court is aware of self defense cases, things of this nature, the personality or the character of the victim is a material point in both the prosecution and the defense. There was no such defense raised here. The personality of the victim in this particular case, although I would not phrase it quite as the Court did, was irrelevant. Whether she was a nice little girl, a bad little girl, whether she was going out to just skip school would have made no difference in the consideration by the jury of the evidence.

THE COURT: All right. The Court still feels that the fact the the child was expected to be in the school play was relevant to the father's rushing to the school to look for her prior to calling the police. I still will stay with that ruling.

(R. 1716-18)(emphasis added).

On direct appeal, the circuit court's ruling on this very issue was challenged. This Court was asked to reverse Mr. Jennings' judgment and sentence because the circuit court erred when it held that "a victim in a crime [did not have to] remain some plastic individual without any flesh being presented as to the personality of the victim." Point III of the initial brief was:

In contravention of Appellant's Constitutional Rights to Due Process of Law to a Fair Trial the Trial Court Erred in Overruling Two Timely and Specific Objections and Allowing Prejudicial and Irrelevant Testimony Concerning the Victim.

(Initial Brief at 28). Mr. Jennings cited Welty v. State, 402 So. 2d 1159 (Fla. 1981), in support if his argument. (Initial Brief at 31).

Mr. Jennings also argued as Point V on appeal that the introduction of photographs of the victim shifted the focus of the penalty phase from Mr. Jennings to the victim and inflamed the jury. In Point X, Mr. Jennings challenged the prosecutor's penalty phase closing argument:

The prosecutor then argued that the age of the victim, in and of itself, was an aggravating circumstance. "And who in society, who does society try to protect more than a child?" (R. 1659). This constitutes clearly impermissible argument of non-statutory aggravating factors. The prosecutor was allowed to make this improper argument with impunity once Appellant's objection was overruled.

(Initial Brief at 56).

In Booth, the United States Supreme Court held that "the introduction of

[victim impact] at the sentencing phase of a capital murder trial violates the Eighth Amendment." Id. at 2536. The victim impact statement in Booth contained descriptions of the personal characteristics of the victim, the emotional impact of crimes on the family and opinions and characterizations of the crimes and the defendant "creat[ing] a constitutionally unacceptable risk that the [sentencer] may [have] impose[d] the death penalty in a arbitrary and capricious manner." Id. at 2533 (emphasis added). Similarly, in South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal were the sentencer is contaminated by victim impact evidence or argument.

Here, the jury and judge relied on the victim impact evidence and argument in recommending a sentence of death. The trial court believed victims of crime need not remain "some plastic individual without any flesh being presented as to the personality of the victim." The court's own sentencing order expressly makes reference to the presentence investigation:

> The Court, having heard all the evidence in this case and having had the benefit of the updated presentence investigation and report conducted by the Florida Department of Corrections, Parole, and Probation Service, a complete copy having been provided to the Defendant and having had the benefit of an advisory sentence of death to be imposed upon the Defendant, the Court now makes its findings as to each of the aggravating and mitigating circumstances set forth in Florida Statutes and which were guidelines for the jury in its consideration of its advisory sentence.

(R. 1826)(emphasis added). Thus, Mr. Jennings' case presents not only the constitutionally unacceptable risk that the sentencer may have relied on victim impact evidence in violation of Booth, Gathers, and Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), but actual reliance on victim impact evidence by the trial court. Scull v. State, 533 So. 2d 1137 (Fla. 1988). Zerquera v. State, 549 So. 2d 189 (Fla. 1989).

There is more than a mere risk such evidence was actually considered in their recommendation of death. As trial counsel has stated in his affidavit which was filed with Mr. Jennings' Rule 3.850 motion:

> 7. During the trial the state presented testimony that the victim was the narrator of her school play, that she was excited about this prospect, that she loved school, that she learned to read faster than anyone in her class, and other similar evidence from both family members, and her school principal. I objected strenuously to the admission of this highly inflammatory and prejudicial testimony. I stated my reasons for objecting, made a motion for a new trial, based in part on this inflammatory and prejudicial testimony. I believe that this testimony had no probative value, was irrelevant, and was not material to any of the elements at issue in this case. When my objections were overruled and the jury heard the inflammatory victim impact statements it was clear from their collective reactions that the testimony had an adverse effect. The jury was visibly inflamed by this irrelevant victim impact testimony, and, as this material was being presented, would turn and glare at Mr. Jennings. The adverse effect was heightened due to the fact that this testimony was presented early in the State's case, and I feel that, thereafter, the jurors were irreversibly biased against Mr. Jennings. This material was exactly the same type of information the United States Supreme Court found repugnant to the Eighth Amendment.

(T. 319-20).

Sentencing procedures in capital cases must ensure "heightened reliability in the determination that death is the appropriate punishment." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). See also Gardner v. Florida, 430 U.S. 349 (1977). The central purpose of these requirements is to prevent the "unacceptable risk that 'the death penalty [may be] meted out arbitrarily or capriciously' . . ." Caldwell v. Mississippi, 472 U.S. 320, 344 (1985)(O'Connor, J., concurring). Here, the proceedings violated Booth and Gathers, thus calling into question the reliability of Mr. Jennings' sentence of death. The State's evidence and argument was a deliberate effort to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989). The evidence in question had little if any probative value. Certainly "the danger of unfair prejudice" substantially outweighed whatever probative value existed. Under section 90.403 of the evidence code, Mr.

Jennings' objection should have been sustained. In fact, this case is indistinguishable from Jones v. State, 15 F.L.W. at 471:

> Sixth, Jones contends that the trial court allowed family members to identify the victims in violation of Booth v. Maryland, 482 U.S. 496 (1987), and Welty v. State, 402 So.2d 1159 (Fla. 1981), and for that reason he seeks a new sentencing recommendation. In Booth, the United States Supreme Court held invalid, as violative of the eighth amendment, a Maryland statute which required consideration of victim impact statements by the capital sentencing jury. Booth recognized that the presentation of an emotionally charged opinion expressing grief and anger is inconsistent with the requirement for individualized sentencing and reasoned decision making. Booth, 482 U.S. at 504. The personal characteristics of the victim and emotional trauma suffered by the victim's family and wholly unrelated to the defendant's blameworthiness and thus create an impermissible risk of an arbitrary capital-sentencing decision. Id. at 502-03.
>
> These same concerns were addressed by this Court on the issue of guilt well before Booth in Welty. Welty reasserted the well-established rule that "a member of the deceased victim's family may not testify for the purpose of identifying the victim where nonrelated, credible witnesses are available to make such identification." Welty, 402 So.2d at 1162; see also Lewis v. State, 377 So.2d 640 (Fla. 1979); Rowe v. State, 120 Fla. 649, 163 So. 22 (1935); Ashmore v. State, 214 So.2d 67 (Fla. 1st DCA 1968); Hathaway v. State, 100 So.2d 662 (Fla. 3d DCA 1958). Although the testimony here is somewhat different from that which occurred in Booth, we conclude that the guilt phase identification of the victims by Brock's sister and brother and Perry's sister, in violation of Welty, created an equal risk of an arbitrary capital-sentencing decision.
>
> A verdict is an intellectual task to be performed on the basis of the applicable law and facts. It is difficult to remain unmoved by the understandable emotions of the victim's family and friends, even when the testimony is limited to identifying the victim. Thus, the law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented.

In Jackson v. Dugger, 547 So. 2d 1197, (Fla. 1989), this Court held that the principles of Booth are to be given full effect in Florida capital sentencing proceedings. As in Jackson, defense counsel for Mr. Jennings vigorously objected during the State's repeated introduction of victim impact evidence (R. 341; 491; 1658). As in Jackson, this claim was raised on direct appeal pre- Booth and Gathers. See Jennings v. State, 512 So. 2d 169, 172 (Fla. 1987). Jackson dictates that relief post-Booth and Gathers is now warranted in Mr. Jennings' case. Compare Jackson v. State, 498 So. 2d 406, 411 (Fla. 1986) with Jackson v. Dugger, supra.

Sentences of death must be premised upon "a reasoned moral response" as opposed to an "unguided emotional" one. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989). The error, here, undermined the reliability of the judge's and the jury's sentencing determination and prevented the assessment of the full panoply of mitigation presented by Mr. Jennings. For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death.

ARGUMENT II

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

Over the defense's vehement and strenuous objections Judge Harris signed verbatim the one-sided and inaccurate order prepared by the State denying an evidentiary hearing and Rule 3.850 relief. This order was substantially different from the reasons given orally by Judge Harris. This order held that Mr. Jennings had failed to comply with Rule 3.851, and thus the entire 3.850 motion was procedurally barred as untimely. This ruling was in error. Rule 3.851 only applies if the warrant sets the defendant's execution "at least sixty days from the date of signing." The warrant in Mr. Jennings' case did not set the execution "at least sixty days from the date of signing."[7] Rule 3.851 did not apply as this Court implicitly held in Parker v. Dugger, 550 So. 2d 459 (1989) where the identical issue was present.[8]

As to oral pronouncement denying relief on the 3.850, the lower court summarily denied Mr. Jennings' claims without conducting any type of hearing,

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[7]The warrant did not itself set an execution date. The prison, after consulting with the Governor, set the execution for the fifty ninth day following the signing of the warrant. This does not comply with the prerequisites necessary to make Rule 3.851 applicable.

[8]The third warrant signed on August 29, 1989, which set an execution for the week of October 26, 1989, was for Angel Diaz. As in Mr. Jennings' case and Mr. Parker's case, the execution was set less than sixty days from the date the warrant was signed. Mr. Diaz' Rule 3.850 motion was filed on October 24, 1989. In that case an evidentiary hearing was scheduled for the summer of 1990, and has yet to be conducted.

without adequately discussing whether (and why) the motion failed to state valid claims for Rule 3.850 relief (it does), without any adequate explanation as to whether (and why) the files and records conclusively showed that Mr. Jennings is entitled to no relief (they do not), and without attaching the purported portions of the record which conclusively show that Mr. Jennings is entitled to no relief (the record supports Mr. Jennings' claims). The lower court erred in its disposition, a disposition which in all reality involved no more than Judge Harris' signing of the one-sided order drafted by the State.[9]

The rulings regarding the Rule 3.850 motion which resulted from this process were improper in several respects. The very process which resulted in the order was itself improper, as was the order: it was a verbatim adoption of the State's wish-list of findings. Mr. Jennings, through counsel, stated his vehement objection to this proposed order and urged that the court not adopt such a grossly improper and grossly inaccurate document which failed to comport to his oral rulings (T. 88-89).

Despite counsel's objections the court without any independent thought or review signed the State's already prepared order word-for-word, factual and legal errors included. The Order, even upon a cursory review, was plainly nothing more than a one-sided document presenting a condensed version of the State's response. Post-conviction proceedings are governed by principles of due process, Holland v. State, 503 So. 2d 1250 (Fla. 1987), and due process requires that findings be independently made by the court. Here, however, the findings

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[9]This is not a case in which the judge dictated findings and then asked a party to put them into typewritten form. Rather, the judge simply signed verbatim what the State brought to him. Mr. Jennings had presented Judge Harris with a draft order denying relief for the reasons set forth on the record. Judge Harris refused to sign that order. The judge did draft his own order denying rehearing in which he personally attacked Mr. Jennings' counsel and counsel's "cavalier" attitude towards Mr. Jennings. The personal nature of the attack demonstrates Judge Harris' bias and establish cause for his disqualification from the case.

were made by the State. What happened before the 3.850 trial court on this case is simply not due process.

Courts should hear evidence presented by both parties and make independent rulings. In this case, the lower court permitted one party, the State of Florida, to blatantly form opinions for the court. Here, the "findings" were no more than an abdication to the State.[10]

Just as fundamentally erroneous was the lower court's adoption of the State's order's findings of fact, while never allowing Mr. Jennings the opportunity for an evidentiary hearing on issues of fact which were contested by the parties. Mr. Jennings was and is entitled to an evidentiary hearing on his Rule 3.850 motion, Lemon v. State, 498 So. 2d 923 (Fla. 1986), and was and is also entitled in these proceedings to that which due process allows -- a full and fair hearing by the court on his claims. Cf. Holland v. State, 503 So. 2d

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

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

E.E.O.C. v. Federal Reserve Board of Richmond, 698 F.2d 633, 640-41 (4th Cir. 1983), quoting Golf City, Inc. v. Sporting Goods, Inc., 555 F.2d 426, 435 (5th Cir. 1977). What the lower court did here is odious under any view of how a criminal justice system should properly function, especially in a case in which a man's life is at stake. Any order "written by the prevailing party to a bitter dispute," will not comport with fair adjudication. Amstar Corp. v. Domino's Pizza, Inc., 615 F.2d 252, 258 (5th Cir. 1980). See also Shaw v. Martin, 733 F.2d 304, 309 n.7 (4th Cir. 1984). Such a disposition is unfair, unjust, and improper. Such a disposition in a capital case violates fundamental fairness and due process, as well as the eighth amendment. This Court has cautioned against even the appearance of impropriety in the entry of findings of fact when a circuit court is required to make such findings. See Van Royal v. State, 497 So. 2d 625 (Fla. 1986); Patterson v. State, 513 So. 2d 1257 (Fla. 1987). The disposition of this case before the lower court cannot be squared with what fundamental fairness requires.

1250 (Fla. 1987). Mr. Jennings' due process rights to a full and fair hearing were not only abrogated by the lower court's adoption of the State's factually and legally erroneous order, the court's summary denial without affording proper evidentiary resolution violated Mr. Jennings' fundamental rights.[11]

In support of his 3.850 motion, Mr. Jennings submitted an affidavit from trial counsel in which trial counsel identified Brady error and admitted deficient performance which prejudiced Mr. Jennings. Also in support of the 3.850 motion, Mr. Jennings presented affidavits from the very witnesses that trial counsel admitted he overlooked. Mr. Jennings further presented a transcript of the tape which the State never disclosed. This tape was of a witness' statement who had observed Mr. Jennings on the night of the homicide, his level of intoxication, and his busted zipper which explained his damaged penis (photographs of which were introduced at trial as evidence of a violent rape). Finally Mr. Jennings included reports of mental health experts who considered the material which had been unavailable at trial, and these experts explained its significance.

The need for an evidentiary hearing in Mr. Jennings' case is identical to the need for an evidentiary hearing in Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990), and Mills v. Dugger, 559 So. 2d 578 (Fla. 1990). In light of trial counsel's affidavit and the other supporting material an evidentiary hearing was

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

and is required. Gorham v. State, 521 So. 2d 1067 (Fla. 1988).[12]

The files and records in the case by no means conclusively show that he will necessarily lose. The circuit court did not address the affidavit from Mr. Jennings' trial counsel, Vincent Howard, detailing how Mr. Jennings was prejudiced by the Brady violation, and detailing his own deficient performance which also prejudiced Mr. Jennings. Mr. Jennings' claims and supporting proffers and appendices were more than sufficient to require evidentiary resolution. Nothing "conclusively" rebutted them, and nothing was attached to the order which showed that they were "conclusively" rebutted. Lemon, supra. Indeed, in a case such as this, where facts are in dispute, the refusal to allow an evidentiary hearing makes no sense at all. Blackledge v. Allison, 431 U.S. 63 (1977).

Facts not "of record" are at issue in this case; such facts cannot be resolved now by this Court, as there is no record to review.[13] The lower court should have allowed an evidentiary hearing.

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[12]It is quite puzzling that in a case in which the need for an evidentiary hearing is so plain the State would have a court make findings of fact without affording the defendant evidentiary resolution. Mr. Jennings' verified Rule 3.850 motion alleged (allegations supported by specific factual proffers), the extensive non-record facts in support of claims which have traditionally been raised in Rule 3.850 proceedings and tested through evidentiary hearings.

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

Finally, as this Court's recent opinions in State v. Kokal, 562 So. 2d 324 (Fla. 1990), and Provenzano v. State, 561 So. 2d 541 (Fla. 1990), make crystal clear, the lower court's verbatim acceptance of the State's position that Mr. Jennings was entitled to absolutely nothing under Fla. Stat. sec. 119 was absolutely wrong.[14] In Kokal and Provenzano, this Court quite unequivocally held that the State's parsimonious view of section 119, adopted by Judge Harris here, does not comport to the statute. This case should therefore be remanded in order to afford Mr. Jennings the access to documents pursuant to section 119 to which he has always been entitled, but which the lower court denied. This is particularly important in this case, for even with the State's refusal to comply with section 119, Mr. Jennings has pled quite a substantial claim under Brady, Giglio and their progeny. What the State's undisclosed files may further reflect is indeed important.

Mr. Jennings was (and is) entitled to an evidentiary hearing and disclosure

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[14]Judge Harris rejected Mr. Jennings' claim premised upon Chapter 119 by saying:

> This court finds that the Chapter 119 claim should be rejected for two reasons. First, the litigation is not concluded. What is the nature of this litigation? This action stems from an indictment for first degree murder in which the state sought the death penalty. The litigation will not conclude until the propriety of this conviction and penalty is finally determined. This case is a perfect example that a final ruling on an appeal to the Florida Supreme Court does not settle the matter.
>
> Second, and more importantly, Chapter 119 is not a rule of criminal discovery either contemplated by the Florida Criminal Rules of Procedure or required by the Florida or United States Constitution. Chapter 119 permits citizens access to public records; it does not expand the criminal rules of discovery. Jennings, as a citizen, is entitled to appropriate records under Chapter 119; Jennings, as a criminal defendant, has no additional rights under the act. As a citizen, if Jennings is unhappy with the State's disclosure, he can urge prosecution of the offending public officer or perhaps file a civil suit for performance. Nowhere does the statute or the Florida Criminal Rules of Procedure authorize the court to impose sanctions in a criminal case to enforce the provisions of Chapter 119.

(T. 476).

under section 119, and the trial court's summary denial of his Rule 3.850 motion was erroneous. This Court must reverse that denial and remand this case for a full and fair evidentiary hearing and 119 disclosure.

ARGUMENT III

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

The State had in its possession material and exculpatory evidence that was never turned over to the defense. This evidence should have been revealed to defense counsel and presented to the jury. The failure to allow the jury to consider this evidence precluded an adversarial testing and prevented the jury from rendering an accurate determination of Mr. Jennings' guilt and the appropriateness of a death recommendation.

The State possessed an undisclosed tape of an interview with Judy Slocum concerning Mr. Jennings' condition on the night of the offense:

> Sheriff's Department: This is June 6, 1979. Statement being taken from Judy Slocum. It concerns Brevard County Sheriff's Department Case No. 17880. The statement beginning 1640 hours. Judy, would you state your name, please?
>
> Slocum: Judy Slocum.
>
> * * *
>
> Sheriff's Department: Judy, I call your attention to May 11, 1979 and ask you if on that evening, early that morning, if you were at the John Barleycorn Bar on Merrit?
>
> Slocum: Yes I was until about 2:30.
>
> Sheriff's Department: And while you were there did you have an occasion to see Bryan Jennings?
>
> Slocum: Yes, I did.
>
> Sheriff's Department: When you first saw Bryan how was he dressed?
>
> Slocum: He had on a pair of shorts and a pullover shirt with a ribbon on it.
>
> Sheriff's Department: Did you take him anywhere that night?

Slocum: Yes I did. I took him home to change clothes because he had busted the zipper in his shorts and then I took him back to Barleycorn.

Sheriff's Department: How did you take him home?

Slocum: In his car. In his mother's car.

Sheriff's Department: Do you know what kind of car that is?

Slocum: Actually, no, I know it's a yellow car.

Sheriff's Department: And you drove him home in his car?

Slocum: Right.

Sheriff's Department: Waited in the car while he went in and changed?

Slocum: Yes.

Sheriff's Department: And that took about how long?

Slocum: Approximately ten minutes, no more than ten.

Sheriff's Department: And this was at what time?

Slocum: Uh, one, one fifteen.

Sheriff's Department: And what is the last time that you saw Bryan Jennings?

Slocum: At 2:30 when I left to go home.

Sheriff's Department: And he was still at the John Barleycorn at that time?

Slocum: He sure was.

Sheriff's Department: And, what was his physical condition?

Slocum: He was much loaded.

Sheriff's Department: Was he drunk?

Slocum: Yeah. That's why he asked me to drive him home to change clothes.

Sheriff's Department: Because he knew he had too much to drink.

Slocum: Right.

* * *

Sheriff's Department: Okay. Tell me, if you can your opinion of

Bryan Jennings. You've already told me that he was pretty loaded. What was his mental state that night?

Slocum: He seemed to have a childish mind and the way he talked and some of his actions.

Sheriff's Department: Can you describe them for me?

Slocum: He was, he had a really short temper and you know, he just ...

Sheriff's Department: Did he seem to get mad over nothing?

Slocum: Yes.

Sheriff's Department: Did he exhibit any signs of being violent when he would lose his temper?

Slocum: Not really violent.

Sheriff's Department: Well, tell me what he would do?

Slocum: Well for example there were a couple of guys who were shooting pool and the game wasn't even over and he just slammed his stick down on the table and just walked to the other side of the bar and there was no obvious reason why he did it.

Sheriff's Department: About what time did this happen?

Slocum: I have no idea.

Sheriff's Department: Was that before or after you took him home?

Slocum: This was before.

Sheriff's Department: Before?

Slocum: Um, hmm.

Sheriff's Department: After you took him home and brought him back, well let me back up and start that over again. When you first saw him, I think you said he was wearing a pair of cutoff blue jeans and a pullover shirt?

Slocum: Uh, huh.

Sheriff's Department: And when you took him home what did he change into?

Slocum: A pair of long legged jeans and the same shirt.

Sheriff's Department: The same, he didn't change his shirt?

Slocum: No.

(T. 310-14).

The State did not provide Judy Slocum's name to defense counsel as a material witness, nor did it disclose the contents of her statement. Trial counsel, Vincent Howard, reviewed a transcript of the tape and declared:

> 3. Before Mr. Jennings' trial, I demanded discovery under Rule 3.022(a), Fla. R. Crim. P. and Brady v. Maryland, 373 U.S. 83, 10 L.Ed.2d 215, 83 S. Ct. 1194 (1963). I had a subpoena duces tecum issued to the Sheriff of Brevard County in order to have a meeting with the prosecutor and review all the physical evidence the state had in its possession or control. This meeting occurred. Mr. Jennings' collateral counsel has informed me that a cassette tape recording was made by the Brevard County Sheriff's Department of one Judy Slocum. I have reviewed a transcript of the contents of the statement. The statement contains critical eye witness evidence concerning the degree of Mr. Jennings' intoxication, and the existence of a broken zipper on his pants. At no time did the State divulge that Ms. Slocum had made a statement to the State concerning material evidence pertaining to Mr. Jennings' case. At no time did the State divulge that Ms. Slocum was a material witness, and further, at no time was I provided with the original tape, a copy thereof, or a transcript by the State.
>
> 4. Ms. Slocum's statement provided critical material evidence that Mr. Jennings was severely intoxicated shortly before the time of the offense was committed. The statement also contained evidence that would have been useful in rebutting the State's evidence that a sexual battery had occurred. This information would have been key material evidence I would have used to impeach state witnesses, and photographic evidence on the sexual battery charge.
>
> 5. If I would have had Ms. Slocum's statement I definitely would have presented her testimony to the jury in the guilt phase as part of the voluntary intoxication defense. This testimony would have become a part of Mr. Jennings' defense. I would have also presented Ms. Slocum's statement to the mental health experts to aid their evaluation in determining Mr. Jennings' mental health state at the time of the offense. I do not believe that the mental health experts were able to make an accurate and adequate evaluation on the issue of voluntary intoxication without the benefit of Ms. Slocum's material statement. Ms. Slocum's statement to law enforcement officers or her live testimony should have been presented to the guilt phase jury. There should have been an adversarial testing before a jury on the facts presented in Ms. Slocum's material statement.
>
> 6. If I had known of Ms. Slocum's statement I would have presented her testimony or the statement itself in the penalty phase to establish that Mr. Jennings ability to conform his conduct to the law was substantially impaired, or, at the very least, that he was severely intoxicated, which is itself a non-statutory mitigating circumstance. I would have presented her testimony or the statement itself in the penalty phase to rebut the State's evidence that the crime was committed in a cold, calculated, and premeditated manner. Further, the descriptive testimony of Ms. Slocum regarding Mr.

> Jennings' intoxication would have been relevant and material to establish that he was immature, and to argue that his age should have been found as a mitigating circumstance. Case law interpretation of this statutory mitigating circumstance places emphasis on the maturity of the Defendant, and Ms. Slocum's testimony clearly shows an immature individual, raucous and socially inept, who overindulged in consumption of beer, and acted like an adolescent. I would have presented the statement to the mental health experts in order for them to have an accurate picture of Mr. Jennings' mental status at the time of the offense. The contents of the statement is exactly the type of evidence that would have given the mental health experts a true picture of Mr. Jennings; severe intoxication. Due to the fact that there was never an adversarial testing regarding the Ms. Slocum's statement before the jury, there was not full and fair trial by the jury, with regard to either guilt or sentence.

(T. 316-19).

It is clear that the State's failure to fully disclose the information discussed above was a substantial violation of Mr. Jennings' right to discovery. Rule 3.220, Fla. R. Cr. P., 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) <u>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</u>.
>
> * * *
>
> (ii) The statement of any person whose name is furnished in compliance with [paragraph i]. The term "statement" as used herein means a written or . . . electrical, or other recording. . . .

Failure to honor Rule 3.220 requires a reversal unless the State can <u>prove</u> that the error is harmless. <u>Roman v. State</u>, 528 So. 2d 1169 (Fla. 1986). Here it is undisputed that evidence and statements material to the defendant's case were undisclosed. In fact, the State conceded during oral argument in the circuit court that a violation of Rule 3.220 occurred. Certainly the non-disclosure cannot be found to be harmless; confidence is undermined in the outcome. This case is identical to <u>Roman</u>. Not only would the jury have

received the benefit of Ms. Slocum's statement, but also the jury would have heard mental health testimony regarding the implications of this evidence on Mr. Jennings' state of mind at the time. The state's nondisclosure in all probability affected the result, and confidence in the outcome and fairness of Mr. Jennings' trial is undermined.[15] Under Roman, a new trial is necessary.

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, 473 U.S. 667 (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. Here, the State has conceded that the Slocum tape was not disclosed.

The government's hiding of exculpatory, impeachment, or otherwise useful evidence deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment. Brady v. Maryland, 373 U.S. 83 (1963). Of course, counsel cannot be effective when deceived, so hiding exculpatory or impeaching information violates the sixth amendment right to effective assistance of counsel as well. United States v. Cronic, 104 S. Ct. 2039 (1984). See Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989). The unreliability of fact determinations resulting from such State misconduct also violates the eighth amendment requirement that no unreliable death sentence be imposed.[16]

The Eleventh Circuit has noted:

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[15]In fact, at trial the judge found Mr. Jennings' drinking "was not a factor contributing to this ofense [sic]." R. 3463. This finding was due to the non- disclosure of compelling evidence regarding Mr. Jennings' extreme intoxication.

[16]Again, the trial court, without the benefit of the suppressed evidence, found Mr. Jennings' drinking "was not a factor contributing to this ofense [sic]." R. 3463.

> A Brady violation occurs where: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. See United States v. Burroughs, 830 F.2d 1574, 1577-78 (11th Cir. 1987), cert. denied, 485 U.S. 969, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988). Suppressed evidence is material when "there is a reasonable probability that . . . the result of the proceeding would have been different" had the evidence been available to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40 (1987)(quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)) (plurality opinion of Blackmun, J.).

Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(in banc).

There can be little doubt that material evidence was withheld in Mr. Jennings' case. The State conceded in the circuit court that evidence was withheld. Trial counsel submitted an affidavit explaining how he would have used the evidence of the drinking and busted zipper during the guilt and penalty phases, as well as how he would have presented it to the mental health professionals for consideration. The only question is whether the evidence was material. Material evidence is evidence of a favorable character for the defense which may have affected the outcome of the guilt-innocence and/or capital sentencing trial. Smith 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.

The withheld evidence's materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973). Here, as trial counsel has stated, the withheld evidence was critical to the theory of defense -- intoxication. This was the very issue upon which the trial court found the defense failed to present sufficient evidence. Certainly the undisclosed evidence was material. The

evidence, as trial counsel has noted, also provided the defense with the explanation of how Mr. Jennings injured his penis. This case presents an even more egregious violation of the discovery requirement than was presented in Roman, supra. Under Roman, reversal is required.[17]

Claims predicated on Brady v. Maryland are precisely the type of issues which must be heard pursuant to Rule 3.850. Gorham v. State, 521 so. 2d 1067 (Fla. 1988). See Demps v. State, 416 So. 2d 808, 809-10 (Fla. 1982) (directing a Rule 3.850 hearing on Brady claim); Arango v. State, 437 So. 2d 1099, 1104-05 (Fla. 1983) ("[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."). As in Gorham, Mr. Jennings' Rule 3.850 pleadings made a prima facie showing sufficient to allow him to present the proof supporting his claim at a hearing.[18]

Also not disclosed by the State at the time of Mr. Jennings' trial was the following letter from a State's witness to the State Attorney requesting a

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[17]The question is not whether the tape would have convinced the jury of Mr. Jennings' innocence; it is whether there is "a reasonable probability" of a different outcome. United States v. Bagley, 473 U.S. 667, 682 (1985). "[A] 'reasonable probability' [is] 'a probability sufficient to undermine confidence in the outcome." Bagley, 473 U.S. at 682, quoting Strickland v. Washington, 466 U.S. 668, 694 (1984). "The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors [ ] cannot be shown by a preponderance of the evidence to have determined the outcome." Strickland, 466 U.S. at 694. "[W]e believe that a defendant need not show that [the suppressed evidence] more likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. "The Constitution merely requires 'a probability sufficient to undermine confidence in the outcome.'" Chambers v. Armontrout, 907 F.2d 825, 833 n. 4 (8th Cir. 1990)(in banc) quoting Strickland, 466 U.S. at 694. "The alleged misconduct reflected in the suppressed evidence would have been enthusiastically exploited by defense counsel, would have fit the defense strategy like a glove, and would have provided forceful impeachment of the major evidence against [Mr. Jennings.] We conclude that the materiality prong has been satisfied." Stano v. Dugger, 901 F.2d 898, 903 (11th Cir. 1990)(in banc).

[18]This is particular so where the trial court concluded that Mr. Jennings had not established that he was intoxicated on the night of the offense and had failed to prove that intoxication in any way contributed to the sequence of events.

price for his cooperation and testimony against Mr. Jennings, the price being the appointment of counsel:

> Dear Mr. Wolfinger:
>
> I was interviewed and left a calling card by Wayne D. Porter, Investigator for your Office in reference to a murder case of a six year old child which had been sexually abused.
>
> In order for me to be able to communicate with your office for any possible assistance you may require of me I would appreciate if you would have an attorney appointed for me so that I will not infringe on any of my Fifth Amendment rights, being a layman, and that all discussions would be handled through said attorney representing me.
>
> Hoping this arrangements suits your purposes, I remain,
>
> Sincerely yours,
>
> /s/
>
> Clarence Muszinski

(T. 322).

Certainly this letter was a material written statement by a State's witness. The letter suggests that Mr. Muszinski, an inmate at Avon Park, wanted an attorney in order to reap benefit from his testimony against Mr. Jennings. This certainly reflects upon Mr. Muszinski's motives and bias. See Davis v. Alaska, 415 U.S. 308 (1974). Certainly counsel could have and would have used to letter to impeach Mr. Muszinski, whose testimony was that Mr. Jennings had confessed to crime to him. Mr. Muszinski's testimony was in fact the State's theory of what occurred and why Mr. Jennings should die. Impeachment of Mr. Muszinski was crucial and therfore material. The failure to disclose this letter was error under Roman and Brady. Its nondisclosure further undermines confidence in the outcome. An evidentiary hearing is required. The trial court's summary denial must be reversed.

ARGUMENT IV

THE STATE'S CONTINUED WITHHOLDING OF EVIDENCE VIOLATED THE CONSTITUTIONAL RIGHTS OF BRYAN JENNINGS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AS WELL AS HIS RIGHTS UNDER CHAPTER 119 OF THE FLORIDA STATUTES.

Once a case is final, Chapter 119 of the Florida Statutes governs. Upon request, the State was required to disclose for inspection and/or copying its full file. Following this Court's decision on direct appeal, Mr. Jennings' conviction became final. Thereafter Mr. Jennings made a Chapter 119 request. However, the State refused to provide full access to the State's files. The State's refusal to provide full access to their files on Mr. Jennings violated Chapter 119. It is impossible for undersigned counsel to know what prejudice exists. However, at this point, as set out in Argument III, supra, it is clear that discovery and Brady violations have occurred. Access under Chapter 119 is necessary to fully determine what other violations may have occurred. It is also necessary in conjunction with Argument XXIII infra.

Pursuant to Chapter 119 of the Florida Statutes, undersigned counsel sought access to the files maintained by both the Sheriff's Office and the State Attorney. However, both offices limited counsel's access. On September 13, 1989 the Sheriff's Office sent the following response:

> As per the instruction on the letter from Mr. Martin J. McClain dated September 1, 1989, the Brevard County Sheriff's Office, Records Unit, did provide to you, copies of the following:
>
> * * *
>
> All information on Bryan Fredrick Jennings, W/M, DOB: 12/09/58, except for the agents personal handwritten notes which were removed from the file per instructions by Inspector J. D. Wilmer, Homicide.

(T. 324).

On September 14, 1989, State Attorney's Office responded to counsel's request for access to that office's files as follows:

> Terry Farley arrived here and reviewed and copied our files regarding the murder prosecutions of Bryan F. Jennings. There were certain materials which we did not permit your investigator to copy pursuant to the exemption in 119.07(3)(o), Florida Statutes.

* * *

> The parties to the litigation that existed at the time such documents were prepared were and are the State of Florida and Bryan F. Jennings. In light of the recent signing of a Death Warrant for the execution of Bryan F. Jennings the State of Florida does reasonably anticipate that the litigation has not concluded because other avenues for attacking his conviction still remain available to Mr. Jennings such as motions for post conviction relief or writs of habeas corpus. In that event, you will be using the work product of myself and other attorneys representing the State of Florida to prepare an attack on the convictions in this case. Furthermore, should you be successful, those records could then also be utilized by Mr. Jennings' trial attorney to prepare for trial. Such a result cannot be permitted by this office unless the law clearly mandates it.
>
> Should you require anything further please contact me or Wayne Holmes of this office. Please advise me if you have any case law which you feel impacts upon our position regarding this matter.

(T. 326, 329-30). Ms. Farley was not only denied the ability to copy the file, she was also denied access to review those materials excessed from the file (T. 333).

The circuit court refused to order the State to comply with section 119 because the litigation was pending and the conviction therefore not final. ("The litigation will not conclude until the propriety of this conviction and penalty is finally determined" (T. 476). The circuit court also concluded that a Rule 3.850 was not the proper forum for challenging the State's compliance with section 119.

This Court's rulings in State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), are directly at odds with the circuit court's holding here. The circuit court must be reversed and the matter remanded for compliance with the procedure set forth in Kokal.

ARGUMENT V

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

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.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Chambers v. Armontrout, 907 F.2d 825, (8th Cir. 1990)(in banc); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).[19]

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981),

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[19]Counsel have been found to be prejudicially ineffective for failing to impeach key State witnesses with available evidence, Nixon v. Newsome, 888 F.2d 112 (11th cir. 1989); for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976), or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963; and for failing to interview witnesses who may have provided evidence in support of a partial defense, Chambers v. Armontrout, 907 F.2d at 828-30.

cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington, supra; Kimmelman v. Morrison, supra.

The errors committed by Mr. Jennings' counsel warranted Rule 3.850 relief. Each undermined confidence in the fundamental fairness of the guilt-innocence determination. The allegations were more than sufficient to warrant a Rule 3.850 evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987); see also Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983).

Trial counsel stated in an affidavit:

> 8. I did not contact Annis Music to determine the extent of the information she possessed concerning Mr. Jennings' level of intoxication at the time of the offense for use in the guilt and penalty phase of the trial. I had no strategic or tactical reason for not determining what she knew, and had a note in my file to contact her for this purpose.
>
> 9. I had no tactical or strategic reason for not contacting Mr. Charles Patrick Clausen to determine the extent of his knowledge of facts pertinent guilt and penalty phase issues, but believed he was stationed in the United States armed forces outside of the United States, and would be unavailable for trial.

(T. 320). Thus counsel failed to adequately investigate and prepare. Evidence to support the intoxication defense was available but not discovered. Expert testimony to explain the effects of alcohol on the ability to form specific intent was not presented. In order to ensure a reliable adversarial testing, defense counsel was obligated to bring to bear such skill and expertise as necessary to marshall the wealth of available evidence of intoxication.

Moreover Mr. Jennings was prejudiced when counsel failed to adequately investigate. When counsel did not talk to Annis Music, he failed to learn that Annis Music talked to Mr. Jennings on the phone at 2:30 a.m. the morning of the homicide, and later saw him when he returned home. Annis Music was able to graphically describe Mr. Jennings' inebriated condition (T. 336-39). Counsel for no tactical or strategic reason failed to learn of what Annis Music knew, and thus did not call her to testify regarding these matters. Counsel also failed to contact Charles Clausen and learn of his knowledge of Mr. Jennings' intoxication the night of the homicide (T. 341-43). Again, counsel had no tactical or strategic reason for this failure. Mr. Clausen was available and would have testified regarding Mr. Jennings' extreme intoxication. Counsel failed to discover and present the testimony of Judy Slocum because the State hid her identity and statement. See Argument III, supra. Counsel failed to present the testimony of Floyd Canada regarding Mr. Jennings' intoxication. See Chambers, supra. Counsel failed to present an available mental health defense through the calling of mental health experts to explain the effects of alcohol and cocaine on the ability to form specific intent. See Gurganus v. State, 451 So. 2d 817 (Fla. 1984). Because of counsel's failing in this regard, the trial court concluded that Mr. Jennings failed to demonstrate that intoxication impaired his judgment or was involved in the offense (R. 3463). Had counsel investigated and presented the evidence of intoxication surely the factfinder would have known that Mr. Jennings was impaired by his intoxication.

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

> 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 States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Sielaff 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). See Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989).

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 State's failure to disclose exculpatory evidence. In addition, counsel failed to develop other evidence of intoxication, present it to a mental health expert, and elicit available testimony regarding the effects of alcohol on the ability to form specific

intent. Exculpatory evidence was not presented to the trier of fact at the guilt phase of the proceedings. Under Gurganus, supra, the evidence was admissible and should have been heard by the jury. There was no adversarial testing. Counsel's performance was rendered ineffective and deficient, to some extent against counsel's own wishes, to some extent because he failed to adequately investigate without a tactical or strategic reason. Where there is no adversarial testing, prejudice is presumed. However, the prejudice here is apparent and certainly undermines confidence in the outcome. Evidence of intoxication which the trial court specifically found lacking was not presented to the jury. But for the failure to present this exculpatory evidence, there is a reasonable probability of a different outcome. The evidence negated specific intent. Accordingly, an evidentiary hearing is required. Thereafter, Rule 3.850 relief must be granted and a new trial ordered.

ARGUMENT VI

MR. JENNINGS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WERE NOT PROVIDED WITH THE NECESSARY BACKGROUND INFORMATION, NECESSARY FOR AN ADEQUATE EVALUATION.

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985); State v. Sireci, 536 So. 2d 231 (Fla. 1988). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not

denied a professional and professionally conducted mental health evaluation. See Fessel, supra; Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). Similarly, the State must disclose exculpatory information which is important for the mental health expert to consider in order to assure an adversarial testing results.

The experts appointed in this case were unable to provide the constitutionally adequate expert mental health assistance to which Mr. Jennings was entitled. The evaluations were inadequate because the experts were not provided the information necessary to evaluate Mr. Jennings for guilt-innocence defense or for mitigating circumstances. Cf. United States v. Cronic, 466 U.S. 648 (1984); Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989). The relevant and crucial background facts regarding Mr. Jennings' alcohol intake on the night of the offense were not provided to these experts. This deprived Mr. Jennings of the benefit of professionally adequate mental health assistance.

The fourteenth amendment mandates that an indigent criminal defendant be provided with an expert who is not only professionally fit to undertake his or her task, but who undertakes that task in a professional manner, and receives the necessary information to complete the task. Ake v. Oklahoma, supra; Sireci, supra. The expert shall be confidential and assist the defense in preparing the case for trial. Accordingly, an appointed psychiatrist must render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provided as being acceptable under similar conditions and circumstances." Fla. Stat. Sec. 768.45(1) (1983). In his or her diagnosis, an expert is required to exercise a professionally recognized "level of care, skill, and treatment." The expert is required to adhere to procedures that experts in the field deem necessary to render an accurate diagnosis. Olschefsky v. Fischer, 123 So. 2d 751 (Fla. 3d DCA 1960). Here the appointed experts could not conduct constitutionally adequate evaluations because they did not receive

materials necessary for a thorough evaluation of Mr. Jennings' mental state or the mitigating circumstances in his history and background. The experts could not adequately assist defense counsel in planning for trial without this information.

Florida law made Bryan Jennings' mental condition relevant to criminal responsibility and sentencing in several significant ways: (a) specific intent to commit the crimes charged; (b) diminished capacity; (c) statutory mitigating factors contained in Fla. State Secs. 921.141(6)(b), (e), and (f); (d) aggravating factors (Fla. Stat. sec. 921.141 [5]); and, (e) myriad nonstatutory mitigating circumstances relevant at sentencing. Mr. Jennings was entitled to professionally competent mental health assistance on these issues. However, he did not receive the assistance to which he was entitled because the experts did not receive the necessary information.

On the basis of the generally-agreed upon principles discussed above, the proper method of assessment must include an accurate medical and social history. Because "[i]t is often only from the details in the history" that organic disease or major mental illness may be accurately differentiated from personality disorder, R. Strub and F. Black, Organic Brain Syndromes, 42 (1981), the history has often been called "the single most valuable element to help the clinician reach an accurate diagnosis." Kaplan and Sadock at 837. See also MacDonald at 98, 103, 110 (emphasizing the singular importance of a "painstaking clinical history"). "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan and Sadock at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." Id. Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough

> forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). Accord Kaplan and Sadock at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H. Davidson, Forensic Psychiatry 38-39 (2d ed. 1965); MacDonald at 98.

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).

These established constitutional standards were not met in Mr. Jennings' case. The constitutional inadequacies in Mr. Jennings' evaluation are clear. A review of available information would have demonstrated Mr. Jennings' severe intoxication, impacting upon the mental health issues in his case. Had Mr. Jennings been provided with a constitutionally adequate evaluation, evidence of Mr. Jennings' inability to form specific intent and the presence of significant mental health mitigation would have been presented for the consideration of the judge and jury. Without the disclosure of this important evidence regarding Mr. Jennings' intoxication to the mental health experts, Mr. Jennings' capital trial

and sentencing proceedings were rendered fundamentally unreliable and unfair. In fact, the trial court concluded intoxication "was not a factor contributing to this ofense [sic]." R. 3463. Specifically, the mental health experts did not have the benefit of Judy Slocum's statement, Annis Music's affidavit, Charles Clausen's affidavit, or Floyd Canada's testimony. To the extent that the constitutional inadequacies involved in the mental health evaluation arose because of counsel, he rendered ineffective assistance. To the extent they arose because of State suppression, Rule 3.220 and the fourteenth amendment were violated. Important and dispositive guilt and penalty phase defenses were left undeveloped.

Had the experts received this critical information they would have been able to provide a constitutionally adequate evaluation, and assist counsel in presenting this critical information (detailed in this motion) to the jury. Such a professionally competent evaluation has recently been conducted. As a result, we now know that in light of the background information, Mr. Jennings was not able to form specific intent, he suffered from extreme emotional disturbances, and his ability to conform his conduct to the requirements of law was substantially impaired.

Dr. Henry Dee, a clinical psychologist, reviewed extensive background material regarding Mr. Jennings, conducted psychological testing, and performed a professionally competent evaluation. Dr. Dee reported:

> I have received the testimony, statements and affidavits of individuals who witnessed Mr. Jennings' level of alcohol intake, and level of intoxication before and after the offense. I have also considered Mr. Jennings' own report that he consumed a large quantity of alcohol and ingested LSD. This information in conjunction with Mr. Jennings' history of alcohol and drug abuse and psychological testing results indicating problems with addiction are critical factors to be considered in evaluating Mr. Jennings' mental state at the time of the criminal episode. This information would also be critical in determining if Mr. Jennings' ability to specifically intend the consequences of his acts or conform his conduct to the requirements of the law was substantially impaired.
>
> Mr. Jennings' attorneys have informed me that the statements of Ms.

Judy Slocum, Mr. Charles Patrick Clausen and Ms. Annis Music were not provided to the psychiatrists and psychologist who testified at trial.

These statements provide valuable insight into Mr. Jennings' mental state at the time of the offense. The fact that these statements reflect Mr. Jennings' level of intoxication directly before and directly after the offense would be the type of information that is key in rendering an accurate opinion as to Mr. Jennings' mental state at the time of the offense.

The amount of alcohol Mr. Jennings consumed rendered severe intoxication. The statements of witnesses to Mr. Jennings' level of intoxication bear this out. It is my opinion within a reasonable psychological certainty that Mr. Jennings' ability to form specific intent was substantially impaired by extreme alcoholic intoxication, as was any ability for "heightened premeditation." It is also clear that Mr. Jennings' ability to conform his conduct to the law was substantially impaired.

The information given to the trial level mental health experts did reflect that alcohol consumption played a role in Mr. Jennings' behavior. It is unfortunate that those mental health experts were not provided with the additional eyewitnesses accounts of Mr. Jennings' severe intoxication.

(T. 166-67).

Similarly, Dr. Peter Macaluso, an addictionologist, reviewed extensive background information and concluded:

The statements of Judy Slocum, Annis Music Clausen, and Charles Patrick Clausen portray a person whose intoxication precludes the higher cognitive functioning necessary for impulse control. Without this control, an individual does not have the capacity to fully think through and plan the consequences of conduct. Absent impulse control there is no specific intent, an element of the crime of premeditated murder and kidnapping. The absence of impulse control also negates the presence of the aggravating circumstance of cold, calculated and premeditated. Finally, the absence of impulse control is a substantial impairment of the capacity to conform conduct to the requirements of the law. In addition, intoxication, as shown here, is in and of itself a mitigating circumstance.

Please note that these opinions are based upon a reasonable degree of medical probability. Had I been the court-appointed pre-trial mental health expert in this case, I certainly would have explained to counsel the critical need for corroboration of Mr. Jennings' intoxication on the night of the offense. The statements of Slocum and the Clausens are critical sources of information that should have been used not only to assist Mr. Jennings' mental health expert, but to negate the testimony of the state experts whose conclusions were premised upon the lack of evidence of intoxication. In fact, the testimony of the state's experts, Dr. Podnos and Dr. Wilder, contained the caveat that substantial impairment may have occurred if in fact there was sufficient alcohol intake. The statements of Slocum and the

> Clausens establish the intoxication and the substantial level of impairment suffered by Mr. Jennings on the night of the offense.

(T. 167-68).

Mr. Jennings was denied his fifth, sixth, eighth, and fourteenth amendment rights. The evaluation conducted in this case was not constitutionally adequate. Counsel failed to assure that it would be; the State insured it would not be. Consequently, Mr. Jennings was tried and sentenced to death in violation of his due process and equal protection rights. Ake v. Oklahoma, supra. In the guilt phase, the jury was not adequately apprised of the significance of the evidence of intoxication as it relates to the capacity to form specific intent. At sentencing, a constitutionally adequate evaluation would have made a significant difference: substantial statutory and nonstatutory mitigation would have been established; aggravating factors would have been undermined. The trial court's sentencing findings clearly reveal that the evaluations conducted by the experts were inadequate; the trial court primarily relied upon the absence of corroboration of intoxication (R. 3462-63).

Confidence is undermined in the outcome. The constitutional inadequacies directly "precluded the development of true facts," and "serve[d] to pervert the jury's deliberations concerning the ultimate question[s] whether in fact [Bryan Jennings] should live or die." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). A full and fair evidentiary hearing is now proper, see, e.g., Mason v. State, 489 So. 2d at 735-37, for the files and records by no means show that Mr. Jennings is "conclusively" entitled to "no relief" on this and its related claims. See Mills v. Dugger, 559 So. 2d 578 (Fla. 1990); Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990). At minimum an evidentiary hearing must be conducted. Thereafter, Rule 3.850 relief will be more than proper.

ARGUMENT VII

BRYAN JENNINGS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Defense counsel must 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 Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th cir. 1985); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these rudimentary constitutional standards.

In O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), this Court examined allegations that trial counsel ineffectively failed to investigate, develop, and present mitigating evidence. 461 So. 2d at 1355. The Court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and

remanded the case for an evidentiary hearing. The allegations presented herein are similarly sufficient to warrant Rule 3.850 relief and also require an evidentiary hearing. See Mills v. Dugger, 559 So. 2d 578 (Fla. 1990); Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990). Mr. Jennings' court-appointed counsel failed in his duty to investigate and prepare available mitigation. There was a wealth of significant and mitigating evidence which was available and which should have been presented. However counsel failed to adequately investigate. Counsel operated through neglect. Counsel has admitted he had no tactical motive for his failures into this regard. Here, Mr. Jennings' sentence of death is the prejudice resulting from counsel's unreasonable omissions. See Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

Annis Music Clausen was not contacted by defense counsel. Counsel has in an affidavit conceded that this was deficient performance. Annie Clausen would have provided significant information. Her affidavit which accompanied the 3.850 motion provided:

> My name is Annis Clausen and I live at 1430 Lester Court, Merritt Island, Florida.
>
> Bryan Jennings is my cousin and I have known him since we were children. Bryan, his mother and, sister have all lived with us at my mother's house at various times when Bryan was growing up and, later, when Bryan came home on leave from the Marine Corps.
>
> Ever since Bryan was age 15, I believed he had a problem with drugs. I remember several occasions when Bryan's mother found bags of marijuana in Bryan's room. Being naive about drugs she would show me what she found and ask me what it was. Once I told her she would then flush it down the toilet.
>
> I continued to see signs that Bryan had a drug and alcohol problem up until the time that he was arrested in 1979. I remember a call that I received out of the blue from Bryan late one night after he had joined the Marines. Bryan told me he was in Alabama and had got a hold of a pickup truck and had gone AWOL. Bryan's speech was slurred and he was clearly drunk. He said that he just wanted to let me know that he was AWOL in case the Marines said that he was missing.
>
> Bryan's alcohol and drug problems were also apparent when he came to stay with us in April 1979. Bryan's mother would let him use her car and when he returned it there would be empty beer bottles and

cans in it. I did not realize the full extent of Bryan's alcohol and drug addiction however until the day of his arrest.

I was working late at the newspaper on the evening of May 11th getting the next days edition ready for press. I had planed to meet my fiance at the time, Pat Clausen, at the John Barleycorn Bar out on Merritt Island. At twelve midnight I called the bar and spoke with Pat and told him that I was running late and was not sure what time I would get off. At 2:30 a.m., I received a call from Bryan who was also at the John Barleycorn. Bryan's speech was extremely loud and slurred and there was no mistaking that Bryan was thoroughly intoxicated. Bryan said that he had been drinking for most of the evening, and that he was very drunk and unable to drive home from the bar. Bryan said that he was going to sleep in the back seat of the car at the Barleycorn parking lot and asked me to pick him up on my way home home from work.

I got off work at 4:00 a.m. and drove by the Barleycorn to pick Bryan up. Although the car was there Bryan was nowhere to be found. I returned home and right as I was getting ready to go to sleep Bryan pulled up in his mother's car.

I was in the living room with my mother when Bryan came in through the front door. Bryan was staggering and could not keep his balance, his pupils were fully dilated and he had a wild look about him. From his appearance it was clear to me that Bryan was under the influence of more then just alcohol. Both my mother and I were asking Bryan where he had been and if he was all right but, Bryan never answered; he was having a difficult time just trying to make it back to his bedroom. As Bryan went down the hallway he was unable to walk a straight line stumbling every few feet and hitting one side of the wall and then the other.

Within a few minutes Bryan came staggering back out of his bedroom with no shirt on and went out the front door. I could hear the engine racing and then heard the tires screeching as he went down the street. Bryan could barely walk and was far too intoxicated to be driving. That was the last time I saw Bryan before he was arrested.

None of Bryan's attorneys ever tried to contact me about Bryan's drunken phone call from the Barleycorn or his physical appearance on the morning of May 11th 1982.

If Bryan's attorneys contacted me I would have gladly told them what I knew about Bryan's drug use and his appearance on May 11th 1979, and would have testified at his trial if they asked me to.

(T. 336-39).

Charles Clausen was also not contacted by defense counsel. Again counsel in his affidavit conceded that this was performance. Mr. Clausen would have provided significant information. His affidavit, which accompanied the 3.850

motion, provided:

My name is Charles Patrick Clausen and I live in Satellite Beach, Brevard County, Florida.

I knew Bryan Jennings in 1979, through his cousin, Annis Music.

I was with Bryan on the evening of May 10th and the early morning hours of May 11th 1979, at the John Barleycorn Bar on Merritt Island.

I don't recall what time I first saw Bryan at the Barleycorn but remember that we were there drinking for at least five or six hours. As the night wore on Bryan became increasingly intoxicated. I know Bryan got pretty drunk, but I don't know if he took any drugs that night. He could have easily taken drugs because the Barleycorn had a reputation for being a a good place to buy drugs.

The Barleycorn served both hard liquor and beer and Bryan was drinking both. I recall playing pool with him and at other times seeing him at the bar throughout the course of the evening. Towards the latter part of the evening I distinctly recall that Bryan was at the bar and appeared to be nodding off.

At about 2:30 a.m. I, along with my friend Rusty, decided that it was time to call it a night. I knew it was 2:30 a.m. as I had called my fiance at work to see when she would be getting off. Bryan was thoroughly intoxicated at this point and while we were all feeling no pain, Bryan was definitely drunker then anyone else at the bar. As we were getting into our cars Bryan kept insisting that Rusty and I go drinking with him and another guy at the beach. Bryan was adamant about going to the beach even though he was in no condition to drive or do anything but go home. Bryan was staggering, his eyes were glassy and, he could not keep his head up straight. In a loud voice he just kept talking about how drunk he was and insisting that Rusty and I should go down to the beach. I told Bryan that he was already too drunk and offered him a ride home but he refused.

That was the last time that I saw Bryan. When I heard what he had been arrested for I just could not believe it given his state of intoxication when I left him at the Barleycorn.

Shortly after Bryan's arrest I entered the Air Force and was stationed at Panama City. I thought that the information that I had was important and when none of Bryan's attorneys contacted me I called the Titusville Courthouse and was told that my testimony did not matter as other witnesses were saying the same thing.

If any of Bryan's attorney's had contacted me I would have told him how intoxicated Bryan was at the Barleycorn when I left him. In addition, I would have been willing to testify about these matters if asked.

(T. 341-43).

In his affidavit, defense counsel has stated:

> 8. I did not contact Annis Music to determine the extent of the information she possessed concerning Mr. Jennings level of intoxication at the time of the offense for use in the guilt and penalty phase of the trial. I had no strategic or tactical reason for not determining what she knew, and had a note in my file to contact her for this purpose.
>
> 9. I had no tactical or strategic reason for not contacting Mr. Charles Patrick Clausen to determine the extent of his knowledge of facts pertinent guilt and penalty phase issues, but believed he was stationed in the United States armed forces outside of the United States, and would be unavailable for trial.

(T. 320).

Bryan Jennings' military records, which were not presented to the judge or jury in this case, show that only a mere three months prior to the offense, he was referred by the alcohol rehabilitation program to the medical department at the Marine base in Okinawa. Due to Mr. Jennings' severe problem with alcohol addiction, the physician prescribed Antabuse for him. (T. 362-63). Antabuse, also known as disulfiram, is a drug used "as an aid in the management of selected alcoholic patients who want to remain in a state of enforced sobriety so that supportive and psychotherapeutic treatment may be applied to best advantage." (Physicians' Desk Reference, 1988 edition, p. 637). The regimen of medication given to Mr. Jennings to assist him in his battle to overcome his addiction problem is clearly outlined in his military records and independently corroborates his history of alcohol dependency. It is also significant to note that Mr. Jennings' participation in alcohol counseling and the subsequent Antabuse therapy program was voluntary. This evidence of Mr. Jennings' alcoholism is in and of itself a non-statutory mitigating circumstance. Had defense counsel investigated and presented these military records to the judge and jury, it would have made a difference.

Mr. Jennings' psychological and psychiatric records from the Brevard County Mental Health Center and Wuesthoff Memorial Hospital in Rockledge, Florida, (R.

3487), were never presented to the jury for their consideration. These records contain numerous references to Mr. Jennings' early drug and alcohol use and describe in great detail the

> psychosocial factors in Mr. Jennings' life history that are often found in the development of Chemical Dependency, i.e., troubled relationships in early childhood and the inability to relate to other people and express feelings.

(Report of Peter M. Macaluso, M.D., T. 178). Again, such independent corroboration of Mr. Jennings' severe addiction problem was critical. Defense counsel's failure to present this evidence renders Mr. Jennings' death sentence unreliable.

None of this evidence was developed and presented to the jury. However, 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, 481 U.S. 393 (1987), Mr. Jennings 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. Jennings' death sentence is unreliable.

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 just 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). In Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989), the Ninth Circuit agreed:

> Although we do not presume prejudice in a case such as this, we must be especially cautious in protecting a defendant's right to effective counsel at a capital sentencing hearing. The Constitution prohibits imposition of the death penalty without adequate consideration of factors which might evoke mercy. California v. Brown, 479 U.S. 538, 554, 107 S.Ct. 837, 846, 93 L.ED. 2d 934 (1987). "Consideration of such evidence is a 'constitutionally indispensable part of the process of inflicting the penalty of death'" Id. (quoting Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed. 944 (1976) (plurality). The Supreme Court has consistently held that "the sentencer may not refuse to consider or be precluded from considering 'any relevant mitigating evidence.'" Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)(quoting Eddings v. Oklahoma, 455 U.S. 104, 114, 102 S.Ct. 869, 877, 71 L.Ed.2d 1 (1982). See also, Hitchcock v. Dugger, 481 U.S. 393, 398-99, 107 S.Ct. 1821, 2824-25, 95 L.Ed.2d 347 (1987). Deutscher's state appointed lawyer failed to present any mitigation evidence at all. A finding that Deutscher was not prejudiced by this failure would deny Deutscher the chance to ever have a jury, Nevada's death penalty arbiter, fully consider mitigating evidence in his favor. Instead, secondhand bits and pieces of mitigation evidence would be analyzed and rebutted based only on speculation about what might have happened if dozens of important variables had been different. Allowing the death penalty to be imposed in that context would fall far short of the constitutional mark. We therefore reverse and remand for resentencing so that a jury can properly weigh mitigating and aggravating circumstances before deciding Deutscher's fate.

884 F.2d at 1161.

Here, had trial counsel conducted a reasonable investigation and imparted the results of that investigation to his mental health professionals in advance a very powerful penalty phase case could have been built. It closing argument counsel would have then be able to portray Mr. Jennings as a redeemable human

being whose life had value, but also as a person who was entitled to mercy because he was a product of an extremely dysfunctional background, and was extremely intoxicated on the night of the offense.

In considering whether a resentencing is necessary because of defense counsel's deficient performance, consideration must be given to the United States Supreme Court recent holding:

> In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson, 428 U.S., at 305, the [sentencer] must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.
>
> . . . Our reasoning in Lockett and Eddings thus 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; Eddings, 455 U.S., at 119 (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.

Penry v. Lynaugh, 109 S. Ct. 2934, 2951-52 (1989)(emphasis added). The prejudice to Mr. Jennings resulting from counsel's deficient performance is also clear. Confidence is undermined in the outcome, and the results of the penalty phase are unreliable. An evidentiary hearing must be conducted; Mills, supra; Heiney, supra. Thereafter, Rule 3.850 relief must be granted and a new sentencing ordered.

ARGUMENT VIII

THE STATE'S MENTAL HEALTH EXPERTS RELIED ON A STATEMENT MADE BY MR. JENNINGS WHICH WAS UNCONSTITUTIONALLY OBTAINED BY THE STATE IN VIOLATION OF EDWARDS V. ARIZONA, ESTELLE V. SMITH, POWELL V. TEXAS, AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

In 1982, Mr. Jennings was convicted of first degree murder and sentenced to death. This Court vacated the conviction and sentence because the State extracted a statement from Mr. Jennings in violation of his fifth and sixth amendment rights. Jennings v. State, 473 So. 2d 204 (Fla. 1985); Edwards v. Arizona, 451 U.S. 477 (1981). During the 1982 trial, the State had called Dr.

Wilder and Dr. Podnos to rebut evidence that Mr. Jennings committed the offense while under the influence of extreme emotional disturbance, that his capacity to conform his conduct to the law was substantially impaired, and that he was unable to form premeditation. These State mental health witnesses based their opinions on the information contained in the statement that as a matter of law had been extracted from Mr. Jennings in violation of his fifth and sixth amendment rights. During the 1986 trial, the State again called the same mental health experts to rebut Mr. Jennings' evidence of mental health mitigation and to prove aggravation. The testimony of the state mental health experts in the trial at issue in this pleading was based on Mr. Jennings' suppressed statement (R. 1514, 1554). The use of an unconstitutionally extracted statement to negate mitigation and prove aggravation violated Mr. Jennings' fifth and sixth amendment rights. See, Estelle v. Smith, 451 U.S. 454 (1981); Powell v. Texas, 109 S. Ct. 3146 (1989); Edwards v. Arizona, 451 U.S. 477 (1981).

Counsel should have objected to the State's experts' reliance upon statements obtained from Mr. Jennings in violation of Edwards. "[C]ounsel's lack of awareness of [applicable] law and his failure to object at sentencing constitute ineffectiveness under Strickland." Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Counsel "abrogated his duty of representation by failing to object." Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989). "[P]rofessionally competent counsel [ ] would have been sufficiently prepared to object" to the mental health experts' consideration and reliance upon evidence obtained in violation of Edwards. Nixon v. Newsome, 888 F.2d 112, 116 (11th Cir. 1989).

As a result of counsel's deficient performance, confidence is undermined in the outcome. The trial judge relied upon the State's mental health experts to reject mental health mitigation. If counsel had objected to the State experts' testimony, he "would have had a reasonable chance of success." Harrison, supra, 880 F.2d at 1283. The resulting death sentence is unreliable. The files and

records do not establish that Mr. Jennings is entitled to no relief. At a minimum an evidentiary hearing must be ordered. Mills v. Dugger, 559 So. 2d 578 (Fla. 1990). Additionally, the experts' reliance on the suppressed statement was fundamental error. This constitutional violation requires that a new trial and sentencing be ordered.

ARGUMENT IX

MR. JENNINGS' JURY WAS IMPROPERLY INSTRUCTED RESULTING IN FUNDAMENTALLY UNFAIR CONVICTIONS AND SENTENCES IN VIOLATION OF THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Notwithstanding the fact that there was one death, Mr. Jennings' jury was instructed and returned verdicts of guilt on no less than three counts of murder. (R. 3393) (premeditated murder); (R. 3394) (felony murder kidnapping); (R. 3395) (felony murder sexual battery). Under Florida law, Mr. Jennings could only be convicted and sentenced on one count of murder. Muszynski v. State, 392 So.2d 63, 64 (Fla. 5th D.C.A. 1981).

As it is now impossible to determine on which count of murder the jury actually convicted Mr. Jennings, all three murder convictions and their respective sentences must now be vacated and the case remanded for a new trial with a properly instructed jury. It is impossible to determine how the jury understood these instructions; the jury might have believed that the elements of one charge could satisfy the elements of a different charge. Stromberg v. California, 283 U.S. 359 (1931). Muszynski, supra, holds that this error is fundamental and cognizable in 3.850 proceedings. The trial contravened the most basic principles of double jeopardy and 3.850 relief is now proper.

Moreover, at the penalty phase of the proceedings the prosecutor argued to the jury that, since it had convicted on three counts of murder, "[t]his is all you really had to have or have to have in this particular case to justify the death penalty" (R. 1660). Even the trial judge in his findings in support of the death penalty relied upon the fact that the jury had convicted on three

counts of murder (R. 3460). Consideration of the three counts of murder in imposing death violated the principles enunciated in Zant v. Stephens, 462 U.S. 862 (1983). The sentencer's discretion was not properly channeled. The sentencer received unbounded discretion to determine Mr. Jennings was death eligible and should be sentenced to death. Counsel's failure to object was deficient performance which prejudiced Mr. Jennings. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989). The files and records do not conclusively establish that Mr. Jennings is entitled to no relief. At a minimum, an evidentiary hearing is warranted. Mills v. Dugger, 559 So. 2d 578 (Fla. 1990).

ARGUMENT X

MR. JENNINGS' RIGHTS TO PRESENT A DEFENSE AND TO CONFRONT THE WITNESSES AGAINST HIM WERE DENIED WHEN THE COURT LIMITED THE CROSS-EXAMINATION OF THE STATE'S KEY WITNESS, CLARENCE MUSZYNSKI, AND WHEN MR. JENNINGS WAS FORECLOSED FROM INTRODUCING EVIDENCE ESTABLISHING THAT EITHER MR. MUSZYNSKI WAS INSANE, A PERJURER, OR BOTH.

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. Jennings was denied his rights to present a defense and to confront and cross-examine the witnesses against him when trial counsel was precluded from introducing the prior sworn statement of Clarence Muszynski.

Perhaps the most damaging evidence presented by the State was the testimony of Muszynski, a four-time convicted felon, and former cellmate of Mr. Jennings (R. 623-684). Muszynski testified in great detail concerning a statement purportedly made to him by Mr. Jennings while they were both in the Brevard County Jail. This testimony included a physical demonstration of the manner in which Mr. Jennings picked up the victim by her legs and swung her over his head in order to bang her head into the pavement several times (R. 634-39). This testimony was specifically relied upon by the sentencing court as credible

evidence establishing the exact manner in which the homicide occurred.[20] In light of his damaging testimony, the credibility of Clarence Muszynski was pivotal. Trial counsel cross-examined the witness about two motions for post-conviction relief that Muszynski had filed in 1981 and 1982 (R. 657-67). Muszynski admitted that he had alleged complete and total insanity at the time of each offense and each trial. Muszynski admitted that this insanity claim was made under oath and was signed before a notary public. Muszynski denied knowing that he was swearing to the truth of the contents of the motion by his signature. He also alleged in one motion that he was confined in a Houston mental ward less than one month prior to his 1979 trial. He claimed that he hallucinated and was treated with Thorazine while hospitalized. On the stand at Mr. Jennings' trial, Muszynski stated that the allegations in the motions were completely false (R. 657-67). Appellant sought to introduce the post-conviction motions into evidence, but the trial court refused to allow such a procedure during the State's case-in-chief (R. 678). At the close of the defense case-in-chief, defense counsel once again proffered the written motions for introduction into evidence. The State objected, contending that the motions contained much irrelevant material and were not proper impeachment. After hearing brief argument, the trial court refused to allow the evidence to be introduced (R. 1122-28). At the hearing on the motion for new trial, defense counsel contended that the trial court's refusal to allow the evidence to be introduced violated Mr. Jennings' constitutional rights.

Obviously, it was critical to the defense to fully explore this witness' credibility and to effectively impeach his testimony before the jury. However, effective cross-examination and impeachment was never permitted. The Court

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[20]Of course in analyzing Mr. Muszynski's credibility, the trier of fact was unaware of his letter to the prosecuting attorney seek a price for his testimony. The factfinders ignorance in this regard was precipatated by the prosecutor's nondisclosure. See Argument III, supra.

ruled that the impeachment were irrelevant, and in fact not even proper impeachment. Since Mr. Jennings' trial, new case law has developed which establishes the error here and justifies under Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), presentation of this issue in a Rule 3.850 motion. See Olden v. Kentucky, 109 S. Ct. 480 (1989).

There can be no doubt that the trial court's decision violated the sixth amendment right of confrontation, which requires that a defendant be allowed to impeach the credibility of prosecution witnesses by showing the witness' possible bias or showing that there may be other reasons to doubt the State's reliance upon the witness's testimony. Here the defense sought to let the jury actually see the evidence that Mr. Muszynski had made a prior inconsistent statement under oath. The jury would be able to actually see whether Mr. Muszynski's claim that he did not know it was under oath was, in fact, credible. Here, Mr. Jennings' cross-examination was limited when the evidence used to conduct the cross-examination was not permitted to go to the jury so that it, the trier of fact, could fully consider how plausible Mr. Muszynski's story was. State rules of procedure do not override a defendant's right to elicit evidence in his defense. Olden v. Kentucky, supra.

Mr. Jennings was deprived of his opportunity to effectively challenge Mr. Muszynski's account of why he was testifying. Moreover, the State's suppression of Mr. Muszynski's letter to the State Attorney seeking to barter his testimony against Mr. Jennings for favorable treatment certainly underscores the need for the trier of fact to be able to evaluate Mr. Muszynski's credibility.

The constitutional error here contributed to Mr. Jennings' conviction. The error can by no means be deemed harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18 (1967). The Court's ruling limiting the impeachment of this witness allowed the introduction of his account of the events without making that account survive "the crucible of meaningful adversarial testing."

United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984). Similarly, the State's suppression of evidence denied an adversarial testing.

The exclusion of this evidence resulted in the arbitrary conviction and imposition of a death sentence in violation of Mr. Jennings' eighth amendment rights. New case law establishes Mr. Jennings' entitlement to relief. New evidence warrants reconsideration as well. Rule 3.850 relief is appropriate.

ARGUMENT XI

MR. JENNINGS WAS DEPRIVED OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WHEN JURORS WERE ADVISED OF MR. JENNINGS' PREVIOUS CONVICTIONS FOR THE VERY CRIMES AT ISSUE.

Mr. Jennings' jury was informed of his prior trials and convictions. One of the jurors, Ms. Chamberlain, explained:

> MS. CHAMBERLAIN: I heard -- actually I already gathered it from information we saw, but I heard that this case had been tried before, which we knew basically from the Lorraine Sylvain letter, it mentioned the previous trial, but I thought I should mention it.
>
> THE COURT: What concerning that previous trial, if anything, did you --
>
> MS. CHAMBERLAIN: The only thing someone said to me, that the case had been tried before, and I told them not to say anything more. So that's all I heard.

(R. 1324). Thus, the jury was informed through a letter introduced by the State over defense objection that Mr. Jennings had been tried and convicted before. This was fundamental prejudicial error, violating due process.

During its deliberations, the jury's written question to the court demonstrated that the jury knew that Mr. Jennings' convictions had been reversed twice, and two retrials ordered (R. 1704). The jury's knowledge of a void conviction, which had been obtained unconstitutionally, violated all notions of due process and fundamental fairness. The fourteen amendment guarantees that Florida cannot deprive an individual of life, liberty or property without due process. This guarantee must focus upon the concept of fundamental fairness. Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984);

Engle v. Issac, 456 U.S. 107, 131 (1982); Smith v. Phillip, 455 U.S. 209, 219 (1982). In Rochin v. California, 342 U.S. 165, 169 (1952). There, this Court observed:

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

(Citation and footnote omitted).

In United States v. Biswell, 700 F.2d 1310, 1319 (10th Cir. 1983), the Tenth Circuit Court of Appeals considered whether the admission of evidence of other "alleged earlier wrongs" violated due process:

> On careful consideration of the record here we are convinced that the evidence of other crimes and misconduct as interjected was not justified under Rule 404(b). In any event we must hold that any probative value it had was also substantially outweighed by the danger of unfair prejudice so that its admission was an abuse of discretion under Rule 403. Moreover, "[i]mproper admission of evidence of a prior crime or conviction, even in the face of other evidence amply supporting the verdict, constitutes plain error impinging upon the fundamental fairness of the trial itself." United States v. Parker, 604 F.2d 1327, 1329 (10th Cir. 1978); see also United States v. Gilliland, 586 F.2d 1384, 1391 (10th Cir. 1978).

Here, the prosecution introduced Mr. Jennings' prior convictions. This was fundamentally unfair at both the guilt and penalty phases. See Merritt v. State, 523 So. 2d 573 (Fla. 1988); Teffeteller v. State, 495 So. 2d 744 (Fla. 1986). It constituted fundamental error. Thus, Rule 3.850 relief is warranted. The jury was able to consider Mr. Jennings' prior conviction at both the guilt and penalty phases of his trial. In such circumstances, instructions to disregard are insufficient to cure the error. The admission over objection of Mr. Jennings' letter to Lorraine Sylvain was improper. The failure to grant a

mistrial was error. A new trial must be ordered.

ARGUMENT XII

IN CONTRAVENTION OF MR. JENNINGS' CONSTITUTIONAL RIGHTS UNDER THE FOURTH, FIFTH, AND FOURTEENTH AMENDMENTS, THE TRIAL COURT ERRED IN DENYING THE MOTION TO SUPPRESS AND ALLOWING INTO EVIDENCE ITEMS THAT WERE SEIZED AS A RESULT OF A WARRANTLESS ARREST. COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY LITIGATE THIS ISSUE.

Mr. Jennings filed a motion to suppress certain evidence, including his shoes seized from his home and fingerprint cards made at the time of his arrest (R. 3238-42). Mr. Jennings contended, inter alia, that the evidence was obtained as a direct result of his illegal, warrantless arrest for an alleged Orange County traffic offense. A hearing on the motion to suppress was held prior to trial (R. 1896-1996). The trial court rendered an order denying the motion to suppress and found the following:

> (1) Testimony revealed that Jennings was arrested on an Orange County warrant for failure to appear on a driving without a license charge.
>
> (2) At the time of the arrest, the arresting officers did not have a copy of the warrant in hand, but instead relied on a computer check printout.
>
> (3) The issue . . . appears to be . . . whether or not, in fact, there was an outstanding warrant authorizing the arrest . . . .
>
> (4) The burden of proving that the outstanding warrant existed is on the State.
>
> (5) . . . [T]he State introduced the testimony of the officer who requested the computer check . . . verifying that a "hit" had come back prior to the arrest and then introduced a certified copy of the Orange County docket sheet reflecting the outstanding warrant during the appropriate period of time. An actual copy of the warrant was not found.

(R. 3289-90). The trial court found that the docket sheet reflected the existence of an outstanding warrant and was sufficient proof to justify the arrest of Mr. Jennings. However, it is clear that the alleged warrant was used as a pretext.

The testimony at the suppression hearing indicated that numerous law enforcement personnel were searching and canvassing the area surrounding the

Kunash home shortly after the victim's disappearance was discovered. Mr. Jennings and a friend, Raymond Facompre, were seen in the general vicinity that morning pushing a motorcycle. Agent Porter of the Brevard County Sheriff's Department directed Deputy Cain to conduct a routine field interrogation of these two individuals. During subsequent discussion among law enforcement, Mr. Jennings' name was mentioned as one of the individuals who had been seen in the general vicinity that morning during the search for the girl. One officer recognized Mr. Jennings' name as an individual who had had a prior brush with the law. Mr. Jennings' name was then run through the NCIC computer which resulted in a "hit" based upon an alleged failure to appear on a no valid driver's license charge in Orange County. Based upon this computer information, an officer was dispatched to Mr. Jennings' home to arrest him on the Orange County case. Mr. Jennings was eventually arrested for the Orange County offense at Raymond Facompre's home. Deputy Bolick, the arresting officer, admitted that he had never seen a warrant or a teletype. The Orange County capias was reportedly returned unexecuted on February 13, 1980, eight months after Mr. Jennings' arrest. No warrant was ever found in spite of diligent efforts by the State (R. 1899-1900). The State never could produce a warrant for Mr. Jennings' arrest. A copy of the teletype was never produced by the State (R. 897-996).

There can be no question that this must be treated as a warrantless arrest case. No warrant has been produced. Without a warrant, there is no way to determine what probable cause existed in support of the warrant. Under Franks v. Delaware, 438 U.S. 154 (1978), Mr. Jennings would have the right to attack the probable cause supporting the warrant. But where no warrant is produced, there is no opportunity to be fully and fairly heard as to the adequacy of the probable cause supporting the warrant. In Whiteley v. Warden, 401 U.S. 560, 564 (1971), it was held:

> The decisions of this Court concerning Fourth Amendment probable-cause requirements before a warrant for either arrest or search can issue require that the judicial officer issuing such a warrant be supplied with sufficient information to support an independent judgment that probable cause exists for the warrant.

Here, Mr. Jennings was arrested on the basis of a warrant no one has ever seen. There is no way to determine if the warrant supported by probable cause within its four corners. Counsel failed to argue this. This was ineffective assistance under Kimmelman v. Morrison, 477 U.S. 365 (1986). As a result of the warrantless arrest, photographs of Mr. Jennings were obtained and admitted into evidence in violation of the fourth amendment. Mr. Jennings was prejudiced. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). This issue has not previously been fully or fairly presented or considered. It must be now, as evidentiary hearing held, and Rule 3.850 relief granted.

ARGUMENT XIII

THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. JENNINGS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. COUNSEL WAS INEFFECTIVE IN NOT OBJECTION TO THE SENTENCING'S COURT ACTION.

Mr. Jennings' sentence of death was illegally imposed because the Court failed to perform its statutorily mandated function of independently weighing aggravating and mitigating circumstances before imposing Mr. Jennings' death sentence. Florida's death penalty statute clearly outlines the bifurcated penalty and sentencing proceedings that must be followed in a murder case where the death penalty is sought. Fla. Stat. 921.141. Part of the guidelines enacted by the legislature requires the Court to conduct an independent assessment of the propriety of the jury's recommendation if the penalty jury advises the Court to impose a death sentence. The statute provides:

> (3) FINDINGS IN SUPPORT OF SENTENCE OF DEATH.--Notwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death, but if the court imposes a sentence of death, it shall set for in writing its findings upon which the sentence is based as to the facts:

(a) The sufficient aggravating circumstances exist as enumerated in subsection (5), and
(b) That there are insufficient mitigating circumstances to outweigh the aggravating circumstances.

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

(Fla. Stat. 921.141(3)(emphasis added).

The Court, when sentencing Mr. Jennings to death, failed to recognize its independent role in the sentencing process. Rather than independently weighing aggravating and mitigating circumstances, the trial court merely adopted verbatim the sentencing order entered by Judge Johnson four years earlier in 1982. Compare Finding of Fact in Support of Sentence of Death (R. 3016-3021) with Findings of Fact in Support of Sentence of Death (R. 3459-3464). In fact, the court indicated it would simply rely on previous factfindings from trials where Mr. Jennings' confession was improperly considered (R. 1815).[21]

The fundamental precept of this Court's and the United States Supreme Court's modern capital punishment jurisprudence is that the sentencer must afford the capital defendant an individualized capital sentencing determination.

> Explaining the trial judge's serious responsibility, we emphasized, in State v. Dixon, 283 So. 2d 1, 8 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S.Ct. 1950, 40 L.Ed 2d 295 (1974):
> [T]he trial judge actually determines the sentence to be imposed -- guided by, but not bound by, the findings of the jury. To a layman, no capital crime might appear to be less than heinous, but a trial judge with experience in the facts of criminality possesses the requisite knowledge to balance the facts of the case against the standard criminal activity which can only be developed by involvement with the trials of numerous defendants. Thus the inflamed emotions of jurors can no longer sentence a man to die. . . .
>
> The fourth step required by Fla. Stat. sec. 921.141, F.S.A., is that the trial judge justifies his sentence of death in writing, to provide

[21]These previous factfindings had considered and relied upon evidence admitted in violation of Edwards v. Arizona, 451 U.S. 477 (1981). See Argument VIII, supra.

> the opportunity for meaningful review by this Court. Discrimination or capriciousness cannot stand where reason is required, and this is an important element added for the protection of the convicted defendant.

Patterson v. State, 513 So. 2d 1257 (Fla. 1987)(emphasis added).

In this case the trial court merely parroted the findings made in 1982, despite the fact that no less than three additional witnesses testified on Mr. Jennings' behalf in mitigation during the 1986 trial who did not testify in 1982. Likewise, additional documentation was introduced during the penalty phase including Mr. Jennings' records from Florida State Prison which documented that Mr. Jennings was a model prisoner. The latter, a classic source of nonstatutory mitigation upon which a sentence of less than death could rest. Skipper v. South Carolina, 476 U.S. 1 (1986). The record here reflects that no independent weighing of aggravating and mitigating circumstances whatsoever was afforded by the sentencing judge.

This Court has addressed the ramifications of a trial judge's failure to engage in a meaningful weighing of aggravating and mitigating circumstances before imposing death. Nibert v. State, 508 So. 2d 1 (Fla. 1987); Muehleman v. State, 503 So. 2d 310 (Fla. 1987); Van Royal v. State, 497 So. 2d 625 (Fla. 1986). In Van Royal, the Court set aside the death sentence because the record did not support a finding that the imposition of that sentence was based on a reasoned judgment. Chief Justice Ehrlich's concurring opinion explained:

> The statutory mandate is clear. This Court speaking through Mr. Justice Adkins in the seminal case of State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S.Ct 1950, 40 L.Ed2d 295 (1974), said with respect to the weighing process:
>
> It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.
>
> 283 So. 2d at 10. (emphasis supplied).

> How can this Court know that the trial court's imposition of the death sentence was based on a "reasoned judgment" after weighing the aggravating and mitigating circumstances when the trial judge waited almost six months after sentencing defendant to death before filing his written findings as to aggravating and mitigating circumstances in support of the death penalty? The answer to the rhetorical question is obvious and in the negative.

497 So. 2d at 629-30.

Most disturbing is the fact that even the State's mental health experts, in addition to the defense mental health experts, found noticeable improvement in Mr. Jennings' emotional and mental health since their original evaluations. Even Dr. Lloyd Wilder, the very expert relied on in Judge Harris' sentence of death found that Mr. Jennings' condition had improved (R. 1572), while Dr. McMahon found Mr. Jennings' thinking more normative, he had matured, and appeared mentally and emotionally "more together." (R. 1454). Such "evidence concerning [] [Mr. Jennings'] emotional history . . . bears directly on the fundamental justice of imposing capital punishment." Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989) quoting Skipper, supra, 13-14 (opinion concurring in judgment).

Finally, by adopting without modification the Findings of Fact in Support of Sentence of Death from 1982, the trial court in the instant case by necessity incorporated facts derived from the illegal confession obtained from Mr. Jennings, suppressed by the United States Supreme Court in Jennings v. Florida, 470 U.S. 1002 (1985), the very basis upon which the Florida Supreme Court ordered a new trial. Jennings v. Florida, 473 So. 2d 204 (Fla. 1985). This violated Edwards v. Arizona, 451 U.S. 477 (1981).

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' death sentence. Counsel was ineffective in failing to explain to the sentencing judge his obligation not to blindly follow a death recommendation. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Mr. Jennings' sentence of death was imposed in violation of the

sixth, eighth and fourteenth amendments. He respectfully urges that the error be corrected now. Rule 3.850 relief must be afforded. The independent weighing set forth in Fla. Stat. sec. 921.141 is jurisdicational to the imposition of a death sentence. The failure to conduct an independent weighing is the failure to properly exercise sentencing discretion under Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and Penry v. Lynaugh, 109 S. Ct. 2934 (1989).

ARGUMENT XIV

THE JURY INSTRUCTIONS REGARDING THE STATUTORY AGGRAVATING CIRCUMSTANCE HEINOUS, ATROCIOUS OR CRUEL VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe any murder to be heinous, atrocious or cruel. Mills v. Maryland, 108 S. Ct. 1860 (1988). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988).

Recently, the Supreme Court explained its holding in Maynard:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey.

Walton v. Arizona, 110 S. Ct. 3047, 3056-57 (1990).

In Walton, the Arizona capital scheme did not provide for a jury in the penalty phase of a capital trial. Thus, the Court's conclusion that no error occurred in Walton is not controlling here. That is because in Florida a jury in the penalty phase returns a verdict recommending a sentence. The jury's verdict is binding as to the presence and weight of aggravating circumstances as well as the sentence recommended unless no reasonable person could have reached the jury's conclusion. Hallman v. State, 560 So.2d 223 (Fla. 1990). See Ferry

v. State, 507 So.2d 1373 (Fla. 1987) ("The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.") The Florida standard for an override is exactly the same standard that the United States Supreme Court adopted for federal review of a capital sentencing decision. In Lewis v. Jeffers, 110 S. Ct. 3092, 3102-03 (1990), the Supreme Court stated:

> Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in Jackson v. Virginia, 443 U.S. 307 (1979). We held in Jackson that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine whether the conviction was obtained in violation of In re Winship, 397 U.S. 358 (1970), by asking "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S., at 319 (citation omitted); see also id, at 324 ("We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. Sections 2254 -- if the settled procedural prerequisites for such a claim have otherwise been satisfied -- the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt") (footnote omitted). The Court reasoned:
>
> "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic fact to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." 443 U.S., at 319 (footnote omitted).
>
> These considerations apply with equal force to federal habeas review of a state court's finding of aggravating circumstances.

The significance of this is that certainly a federal court conducting the review mandated by Lewis v. Jeffers cannot be regarded as the sentencer. In Florida, therefore, the courts, which review the jury's recommendation in order to determine whether it has a "reasonable basis" and whether a "rational factfinder" could have reached the jury recommendation, are not replacing the

jury as sentencers for eighth amendment purposes. In Florida a capital jury and judge both act as sentencers in the penalty phase. Because the jury's factual determinations are binding so long as a reasonable basis exists, it must be regarded as a sentencer. In fact, that was the holding in Hitchcock v. Dugger, 481 U.S. 393 (1987); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc), cert. denied 109 S.Ct. 1353 (1989); Hall v. State, 541 So.2d 1125 (Fla. 1989).

Here, the jury was not told what was required to establish this aggravator at issue here. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Cochran v. State, 547 So. 2d 528 (Fla. 1989); Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Mr. Jennings' jury was not advised of the limitations on the "heinous, atrocious or cruel" aggravating factor (R. 1216). However, Mr. Jennings' trial counsel timely filed a proposed jury instruction which would have provided the jury with the requisite guidance:

> In considering whether the crime committed by the defendant was especially heinous, atrocious or cruel, you are instructed that heinous means extremely wicked or shockingly evil; that atrocious means outrageously wicked and vile, and that cruel means designed to inflict a high degree of pain with utter indifference to, or even, enjoyment of, the suffering of others. What is intended to be included are those capital crimes where the actual commission of the capital felony was accompanied by such additional acts as to set the crime apart from the norm of capital felonies - the consciousless or pitiless crime which is unnecessarily torturous to the victim.

(R. 3443).

Trial counsel also argued to the trial court that in order for the jury to understand the "heinous, cruel and atrocious" aggravator the interpretation given in Dixon v. State, 283 So. 2d 1, 9 (1973), was necessary. (R. 1648). The trial court noted that "heinous" might be confusing to the jurors, but ultimately denied Mr. Jennings' proposed instruction (R. 1651). Mr. Jennings' appellate counsel raised the trial court's denial of this proposed instruction on direct appeal. Without the benefit of Maynard v. Cartwright, 108 S. Ct. 1883

(1988), which was decided after Mr. Jennings' appeal, this Court rejected this claim without comment. Jennings v. State, 512 So. 2d 169, 176 (1987).[22]

Where an aggravating factor is struck in Florida, a new sentencing must be ordered unless the error was harmless beyond a reasonable doubt. White v. State, ____ So.2d ____. 15 F.L.W. 391 (Fla. July 17, 1990). Error before a sentencing jury must be reversed where the record contained evidence upon which the jury could reasonably have based a life recommendation. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1988) ("It is of no significance that the trial judge stated that he would have imposed the death penalty in any event. The proper standard is whether a jury recommending life imprisonment would have a reasonable basis for the recommendation.") Mitigation was before the jury which could have served as a reasonable basis for a life recommendation. Mr. Jennings is entitled to relief under the standards of Maynard v. Cartwright.

ARGUMENT XV

THE JURY INSTRUCTIONS REGARDING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS VIOLATED OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The Florida Supreme Court rendered its decision in Rogers v. State, 511 So. 2d 526 (Fla. 1987), on July 9, 1987. That decision established an overbroad application of the cold, calculated and premeditated aggravating circumstance occurred here.[23] Moreover, the decision in Maynard v. Cartwright, 108 S. Ct 1853 (1988), applies to overbroad applications of aggravating circumstances and holds them to be violative of the eighth amendment. As the record in its totality reflects, the sentencing jury never applied the limiting construction of the cold, calculated aggravating circumstance as required by Rogers and

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[22]Of course, since Maynard, this Court had revised the standard instruction, much in the fashion suggested by Mr. Jennings' trial counsel.

[23]The Rogers decision applies to Mr. Jennings because his conviction was not final until after Rogers was decided.

Maynard v. Cartwright. Because Mr. Jennings was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the proper definitions; Mr. Jennings' sentence violates the eighth and fourteenth amendments. The record in this case fails to disclose a shred of evidence which could support a finding of "careful plan" or "prearranged design." In fact, the record establishes precisely the opposite. The judge did not require any "heightened" premeditation and certainly he did not properly construe the statutory language and understand the obvious legislative intent as explained in Rogers, supra.

Trial counsel proposed a jury instruction that would have channeled the jury's discretion:

> The alleged aggravating circumstances, that the capital felony is a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification, was not intended by the legislature to apply to all cases of premeditated murder. Rather, this circumstance exists where facts show, beyond a reasonable doubt, that there was a particularly lengthy, methodical or involved series of events, or a substantial period of reflection and thought by the perpetrator.

(R. 3446). The trial court denied this instruction. This issue was raised on direct appeal, but before Cartwright. This Court erroneously affirmed.

The result here should be the same as in Cartwright:

> Claims of vagueness directed at aggravating circumstances defined in capital punishment statutes are analyzed under the Eighth Amendment and characteristically assert that the challenged provision fails adequately to inform juries what they must find to impose the death penalty and as a result leaves them and appellate courts with the kind of open-ended discretion which was held invalid in Furman v. Georgia, 408 U.S. 238 (1972).

108 S. Ct. at 1859 (emphasis added).

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Jennings' jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the

particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Jennings' jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwright.

Under the analysis of Witt v. State, 387 So. 2d 922 (Fla.1980), cert. denied 449 U.S. 1067 (1980), Cartwright 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. See Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989). Since mitigation was contained in the record and presented to the jury, the error can not be harmless beyond a reasonable doubt. Rule 3.850 relief is warranted.

ARGUMENT XVI

MR. JENNINGS' DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF MAYNARD V. CARTWRIGHT, LOWENFIELD V. PHELPS, HITCHCOCK V. DUGGER, AND THE EIGHTH AMENDMENT.

In Florida, the "usual form" of indictment for first degree murder under sec. 783.04, Fla. Stat. (1987), is to "charge[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). Mr. Jennings was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04 (R. 1918). An indictment such as this charges felony murder: section 782.04 is the felony murder statute in Florida. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). In this case, Mr. Jennings was convicted on the basis of felony murder. The State argued for a conviction based on the felonies charged, and argued that the victim was killed in the course of a felony. The death penalty in this case was predicated upon an unreliable automatic finding of a statutory

aggravating circumstance -- the felony murder finding that formed the basis for conviction. The jury was instructed that it was entitled automatically to return a death sentence upon its finding of guilt of first degree (felony) murder because the underlying felony justified a death sentence. The state argued to the jury that the jury should find Mr. Jennings guilty of felony murder and that the aggravation was automatic (R. 1190).

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. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied 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. Dugger, 107 S. Ct. 1821 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the eighth amendment. Moreover, Hitchcock and its progeny according to this Court was a change in Florida law which excuses procedural default of penalty phase jury instructional error. Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988).

Trial counsel rendered ineffective assistance of counsel in that he did not

object to the state's argument before the jury that the findings of these automatic aggravating circumstances requires the imposition of death. Trial counsel was also ineffective in not requesting that the jury be adequately instructed that if only the automatic aggravating factor was found that an advisory opinion of life was required. Surely the jury should have been informed that the automatic aggravating circumstance alone would render a death sentence violative of the eighth amendment. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Zant v. Stephens, 462 U.S. 862, 876 (1983); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984). A new sentencing is required.

ARGUMENT XVII

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

This Court, in Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977) stated:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. State, 373 So. 2d 882 (Fla. 1979). See also Riley v. State, 366 So. 2d 19 (Fla. 1979), and Robinson v. State, 520 So. 2d 1 (Fla. 1988). The limitation of the sentencer's ability to consider aggravating circumstances specifically and narrowly defined by statute is required by the eighth amendment.

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

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

As part of the penalty proceedings, the State informed the jury that they should consider all the evidence presented during the guilt phase as part of the evidence at the penalty phase. The problem with the consideration of guilt phase evidence is that it included nonstatutory aggravation. The court specifically instructed the jury to consider guilt phase evidence during the penalty phase (R. 1698). As a result of the instruction to consider guilt phase evidence when assessing the proper penalty, the jury and the court considered the improper and nonstatutory aggravating factors.

Moreover, the prosecutors argued nonstatutory aggravation:

> MR. HOLMES (prosecutor): . . .These are aggravating circumstances. Because each one of those crimes are there to protect the things in society that we hold the most dear. What is more important than the security of a person's home, where parents can raise their children and have a safe place for them to sleep at night? What do we hold more dear? But yet in this case, that right, the right of the Kunashes to have this protection, the right of the child to be left alone in her home was violated by the act of the defendant.

(R. 1657). Clearly the age of the victim does not constitute a statutory aggravating factor promulgated by the legislature. Burglary is not a sufficient aggravating factor to warrant death. Certainly interference with the parent-child relationship is not an aggravating circumstance. See Booth v. Maryland, supra. Intrusion into a home versus intrusion into a public place, or a place of work, is not an aggravating circumstance. See Tison v. Arizona, 107 S. Ct. 1676 (1987); Rembert v. State, 445 So. 2d 337 (Fla. 1984). Dr. Wilder also testified that Mr. Jennings had no remorse. (R. 1572). This was another non-statutory aggravating factor.

The State relied heavily upon nonstatutory aggravating circumstances to justify the imposition of a death sentence. Mr. Jennings' jury returned a death recommendation. It is clear that consideration of these nonstatutory aggravating circumstances resulted in that recommendation. This violated Mr.

Jennings' constitutional guarantee under the eighth and fourteenth amendments. This error cannot be harmless in light of the substantial and unrefuted mitigation presented to the jury.

The prosecutor's introduction and use of, and the sentencers' reliance on, these wholly improper and unconstitutional non-statutory aggravating factors violated the eighth amendment. See Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977). In addition, defense counsel failed to object to the introduction and consideration of non-statutory aggravators. This is clearly ineffective representation as defined under Kimmelman v. Morrison, 477 U.S. 365 (1986). However, Hitchcock was a change in law which recognized the jury as a sentencer whose sentencing discretion must comport with eighth amendment jurisprudence. Hitchcock established that error before the penalty phase jury was reversible. Mr. Jennings' sentence of death was obtained in violation of the sixth, eighth and fourteenth amendments. It therefore must be vacated.

ARGUMENT XVIII

THE SENTENCING COURT'S REFUSAL TO FIND THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD VIOLATED THE EIGHTH AMENDMENT AND DEMONSTRATES THAT THE JURY'S CONSIDERATION WAS SIMILARLY CONSTRAINED.

On review of a death sentence the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). See Eddings v. Oklahoma, 455 U.S. 104 (1982); Mills v. Maryland, 108 S. Ct. 1860 (1988). Where that finding is clearly erroneous the defendant is entitled to new resentencing. Id. at 1450. The sentencing judge in Mr. Jennings' case found no mitigating circumstances should be considered error as a matter of law. The judge refused to consider mitigation and the jury was precluded from full considering substantial and unrebutted statutory and nonstatutory mitigation regarding Mr. Jennings' drug and alcohol intoxication and his mental and emotional disturbance at the time of the offense

in addition to the improvement in Mr. Jennings' psychiatric condition at the time of his third trial in 1986. This violated Eddings and Mills.

Mr. Russell Schneider testified during the penalty phase that Mr. Jennings had consumed at least a gallon and a half of beer only hours prior to the instant offense and Mr. Jennings was still drinking at a bar where the witness left him at 2:30 a.m. (R. 1618). Catherine Music testified that Mr. Jennings clearly appeared intoxicated at 5:00 a.m. (less than an hour after the offense according to the state's theory at trial) that, Mr. Jennings had difficulty walking, stumbling against the walls leading to his bedroom, and reported to Mr. Jennings' mother that Mr. Jennings was too intoxicated to be driving (R. 1613-15). In addition, Commander Jerome Hudepohl of the Brevard County Sheriff's Homicide Division, who searched the car utilized by Mr. Jennings on May 11, 1979, testified to the presence of multiple empty beer cans. In addition, there were numerous other witnesses who could have substantiated Mr. Jennings' extreme intoxication on the night of the offense who were not called due to trial counsel's ineffectiveness or were deliberately suppressed by the state. Moreover the State did not challenge the mitigating evidence that Mr. Jennings was intoxicated.

Without question evidence of intoxication at the time of the offense under Florida law is a relevant nonstatutory mitigating circumstance which must be considered by the sentencer. Hargrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Foster v. Dugger, 518 So. 2d 901, 902 n.2 (Fla. 1987); Waterhouse v. Dugger, 522 So. 2d 341, 344 (Fla. 1988). In Mr. Jennings' case the proffered evidence of involuntary intoxication was ignored by the court as a matter of law. This violated Eddings supra at 876. Here the refusal was not based on the courts restrictive interpretation of admissible non-statutory mitigation present in Eddings, but rather the court's erroneous application of a sanity threshold requirement on Mr. Jennings proffered evidence of intoxication before the court

would even consider Mr. Jennings' intoxication as a statutory mitigating factor pursuant to Fla. Stat. 921.141(6)(f). As this Court recently explained, this was error as a matter of law. Campbell v. State, ___ So. 2d ___, 15 F.L.W. 343 (Fla. 1990). The error here is identical to what occurred in Eddings. The actual impediment to consideration is irrelevant if the net result is the preclusion from the sentencer's consideration of the proffered mitigation. Mills v. Maryland, 108 S. Ct. 1860 (1988); McKoy v. North Carolina, 110 S. Ct. 1227 (1990). Unmistakably the court in Mr. Jennings' case was precluded by its misunderstanding of applicable law which is evidenced by its sentencing order:

> 6. Sec. 921.141(6)(f), Fla. Stat.: The Court finds that the capacity of the Defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law WAS NOT substantially impaired. Although the Defendant had been drinking, the Court finds that at the time in question Defendant knew right from wrong, knew the nature, quality and consequences of his acts, was in control of his acts and appreciated the criminality of his acts. The Court finds that this statutory Mitigating circumstances is not present.

(R. 3462).

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. Jennings 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 shows that reasonable jurors may have similarly misunderstood the law. Counsel had requested clarifying jury instructions.

In addition, the state mental health experts found the longstanding

existence of Mr. Jennings' personality disorder. The essential difference between the testimony of Drs. Wilder and Pondos and that of Drs. Gutman and McMahon was whether or not Mr. Jennings' personality disorder in conjunction with the consumption of alcohol rose to the level that would "substantially" impair his ability to conform his conduct to the requirements of law or constituted "extreme" emotional disturbance. Compare, e.g., (R. 1448) with (R. 1551). Likewise, mental health experts for the state, including Dr. Wilder upon whom the court primarily relied, found improvement in Mr. Jennings' psychiatric condition (R. 1572), while Dr. McMahon characterized the improvement as surprising and significant (R. 1454). There is no question but that improvement during incarceration is mitigating and a basis for a sentence of less than death. Skipper v. South Carolina, 476 U.S. 1 (1986).

The court not only refused to consider statutory mitigation of Mr. Jennings' intoxication but substantial and uncontroverted nonstatutory mitigation as well. Each of the mental health experts testified that Mr. Jennings was immature in comparison with other 20 year olds. (R. 1365) (Testimony of Dr. Gutman "immature approach to life); (R. 1425) (Testimony of Dr. McMahon "extremely immature young man and impulsive"); (R. 1518) (Testimony of Dr. Pondas "emotionally immature") (R. 1593) (Testimony of Dr. Wilder "less mature than other 20 year olds would be"). Notwithstanding this complete consensus of expert opinion the trial court in sentencing Mr. Jennings to death completely ignored this testimony. See R. 3462-63.

The mental health experts were also in agreement that Mr. Jennings' psychiatric condition had improved since their original evaluations in 1979. Dr. McMahon testified that her reevaluation in 1986 indicated surprising improvement:

> Any changes were toward positive, in that he looks a little bit less angry, he looks a little bit more -- in his thinking is a little bit more in accord with society, his thinking in general. . . . In the Rorschach, however, one of the things that did come through is that

> Bryan responded in a way that is now, one, somewhat more mature, much less anger, I did not see the coiled-spring type of young man that I did see in '79. And I saw a young man who now is modulating, now is tempering his emotions, and they are not the impulsive kind that are just out there, that they were in 1979.
>
> I guess I am surprised because that is at a deeper level, and if I would have predicted, I would have predicted that on the more superficial level. He might have responded in a way that said, yes, I am not as angry, yes, I am not doing all these kinds of things. But what he has done is, he is saying, well, yeah, I am a little less angry, but what we are seeing at a deeper level, that is one that the individual can't simply tell you about, that's why we use things like Rorschach, because it gets at a level where most of us cannot just tell somebody else or even ourselves what is going on. At that level, he looks healthier. He looks more well modulated, more together, more integrated, more mature. That is a -- while it is still a guarded Rorschach which is something I don't like to see, somebody with his IQ, somebody with his intelligence ought to be responding with the Rorschach with thirty, thirty-five responses. The last time he gave, I think, twelve. This time he gave ten. He tends to give one response per card.

(R. 1453-6).

So too, Dr. Wilder detected improvement in Mr. Jennings' condition from his original evaluation in 1979: "Well, he looked a little more mature. He looked a little more mellow, and he talked a little more mellow fashion." (R. 1573). The testimony of Drs. Wilder and McMahon regarding Mr. Jennings' improved mental and emotional condition was classic nonstatutory mitigating evidence, "evidence concerning a defendant's emotional history . . . bear[s] directly on the fundamental justice of imposing capital punishment." Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989) quoting Skipper v. South Carolina, 476 U.S. 1, 13-14 (1986).

In this overall context, a reasonable juror plainly could have believed that all of the evidence bearing upon Mr. Jennings' 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. Hargrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Messer v. Florida, 834 F.2d 890, 894-5 (11th Cir. 1987); Cf. Mills v. Maryland, 108 S. Ct. 1860, 1866

(1988). The reasonableness of this interpretation of the instructions is supported by the trial courts findings in support of Mr. Jennings' sentence of death. As demonstrated by his findings, the trial judge considered the evidence of Mr. Jennings 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. Jennings' 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 Jennings' case which reasonable jurors would have interpreted in a "all or nothing" fashion thereby foreclosed further consideration of the effects of Mr. Jennings' personality disorder as nonstatutory mitigation.

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. Jennings favor in deciding whether he should live or die. In his order, the judge rejected mitigation as a matter of law because it "did not contribute to the Defendant's actions on May 11, 1979." (R. 3463). Under Eddings, supra; Mills, supra and Magwood, supra, the sentencing court erred in refusing to accept and find the statutory and nonstatutory mitigating circumstances which were established. This issue was not previously adequately litigated. This was deficient performance which prejudiced Mr. Jennings. A proper balancing cannot occur if the "ultimate" sentencer fails to consider obvious mitigating circumstances. The mitigation should now be recognized and this Court should grant relief. Under Harrison v. Jones, supra, 3.850 relief is warranted.

ARGUMENT XIX

THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. JENNINGS OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Jennings' capital proceedings. To the contrary, the burden was shifted to Mr. Jennings on the question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Jennings' jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 1900, 1195, 1201, 1215, 1217). Moreover, the judge's sentencing order reflects that he only considered mitigation to the extent that it outweighed aggravation (R. 1251); as does his order denying 3.850 relief.

The prosecutor argued that the mitigation had to outweigh the aggravating factors in order for the jury to recommend a life sentence (R. 1195, 1201).

Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock constituted a change in law in this regard. Under Hitchcock and its progeny, an objection, in fact, was not necessary Mr. Jennings' sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation presented by Mr. Jennings. For each of the

reasons discussed above the Court must vacate Mr. Jennings' unconstitutional sentence of death.

ARGUMENT XX

MR. JENNINGS' SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE.

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

Throughout Mr. Jennings' trial, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase (R. 234-5, 1228, 1698-99). In preliminary instructions to the jury in the penalty phase of the trial, the judge emphatically told the jury that the decision as to punishment was his alone. After closing arguments in the penalty phase of the trial, the judge reminded the jury of the instruction they had already received regarding their lack of responsibility for sentencing Mr. Jennings, but noted that the "formality" of a recommendation was required.

In Hitchcock v. Dugger, 481 U.S. 393 (1987), the Supreme Court for the first time held that instructions for the sentencing jury in Florida was governed by the eighth amendment. This was a retroactive change in law, see

Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object the adequacy of the jury's instructions and the impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Jennings' jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed.[24]

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

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[24]This claim is made pursuant to Caldwell v. Mississippi, 472 U.S. 320 (1985), and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (in banc), cert. denied 109 S.Ct. 1353 (1989). See Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1987), reversed on other grounds, Dugger v. Adams, 109 S.Ct. 1211 (1989). Mr. Jennings' conviction became final in 1986. Jennings v. State, 512 So. 2d 169 (Fla. 1987), cert. denied, 108 S. Ct. ___ (1988). Since Caldwell was decided over two years before Mr. Jennings' conviction became final, Caldwell is the applicable law.

As Sawyer v. Smith, ____ U.S. ____, 47 Cr.L. 2192 (1990), recently explained, Caldwell stands for the proposition that "the Eighth Amendment prohibits the imposition of a death sentence by a sentencer that has been led to the false belief that the responsibility for determining the appropriateness of the defendant's capital sentence rests elsewhere." 47 Cr.L. at 2193. The Eleventh Circuit has already held that Caldwell applies in Florida to a capital jury that has its sense of responsibility improperly minimized. Mann, 844 F.2d at 1458.

ARGUMENT XXI

DURING THE COURSE OF MR. JENNINGS' TRIAL THE COURT IMPROPERLY ASSERTED THAT SYMPATHY AND MERCY TOWARDS MR. JENNINGS WERE IMPROPER CONSIDERATIONS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Bryan Jennings' trial was repeatedly admonished and instructed by the trial court, that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Jennings' ultimate fate. During voir dire, the court made it plain that considerations of mercy and sympathy were to have no part in the proceedings:

> THE COURT: On the other hand, if the evidence convinces you beyond and to the exclusion of a reasonable doubt that the Defendant is guilty, will you set aside any sympathy you may feel for the Defendant and return a verdict of guilty?
>
> PROSPECTIVE JURORS: (All answer in the affirmative.)

(R. 20)(emphasis added).

* * *

> THE COURT: However, if the evidence does convince you as to the guilt of the defendant, will you set aside any feelings of sympathy that you may have and return a verdict of guilty?
>
> PROSPECTIVE JURORS: (All answer in the affirmative.)

(R. 172)(emphasis added).

Prior to the jury's guilt-innocence deliberations the court once again re-emphasized that sympathy and mercy were to play no part in Mr. Jennings' trial by expressly instructing them that such considerations were precluded by law and would result in a miscarriage of justice. Significantly, the following instructions were the only ones provided by the court with respect to the role that mercy or sympathy could play in deliberations:

> This case must not be decided for or against anyone because you feel sorry for anyone, or are angry at anyone.
>
> * * *
>
> Feelings of prejudice, bias or sympathy are not legally reasonable doubts and they should not be discussed by any of you in any way.

(R. 1287-88)(emphasis added). The jury was never informed that a different standard, one allowing for consideration of mercy or sympathy, was applicable at the penalty phase.

In Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985), the court found that statements, which may mislead the jury into believing personal feelings of mercy must be cast aside, violate the federal constitution. An admonition to disregard the consideration of sympathy improperly suggests to the sentencer "that it must ignore the mitigating evidence about the [petitioner's] background and character." California v. Brown, 479 U.S. 538, 107 S. Ct. 837, 842 (1987)(O'Connor, J., concurring). The sympathy arising from the mitigation, after all, is an aspect of the defendant's character that must be considered.

The United States Supreme Court recently held in a case declared to be retroactive on its face that a capital sentencer jury must make a "reasoned moral response to the defendant's background, character, and crime." Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). It is improper to create "the risk of an unguided emotional response." 109 S. Ct. at 2951. A capital defendant should not be executed where the process runs the "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. There can be no question that Penry must be applied retroactively. There is also no question that California v. Brown, and Wilson v. Kemp, apply to Mr. Jennings' sentence of death. Saffle v. Parks, 110 S. Ct. 1257 (1990).

In Mr. Jennings' case, the sentencer was expressly told that Florida law precluded considerations of sympathy and mercy. The resulting recommendation is therefore unreliable and inappropriate in Mr. Jennings' case. This error undermined the reliability of the jury's sentencing verdict. Penry, supra. Given the court's admonition, reasonable jurors could have believed that the

court's original instructions during guilt-innocence (R. 921; 922) remained in full force and effect during penalty phase deliberations, cf. Booth v. Maryland, 482 U.S. 496 (1987); Penry v. Lynaugh, 109 S. ct. 2934 (1989).

The error here undermined the reliability of the sentencing determination and prevented the jury from assessing mitigation. The court's instructions impeded a "reasoned moral response" which by definition includes sympathy. Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989). For each of the reasons discussed above the Court should vacate Mr. Jennings' unconstitutional sentence of death. This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Jennings' death sentence. The retroactive opinion in Penry requires that this issue to be addressed and fully assessed at this juncture. The eighth amendment cannot tolerate the imposition of a sentence of death where there exists a "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Penry, 109 S. Ct. at 2952. Accordingly, Rule 3.850 relief is warranted.

ARGUMENT XXII

THE AGGRAVATING CIRCUMSTANCE THAT THE OFFENSE WAS COLD, CALCULATED AND PREMEDITATED WAS IMPROPERLY APPLIED RETROACTIVELY IN VIOLATION OF ARTICLE I, SECTION 10 OF THE UNITED STATES CONSTITUTION, THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The offense in this case occurred on May 11, 1979. At the time of the offense, the Florida capital sentencing statute did not contain, as a statutory aggravating circumstance, that the offense was committed in a cold, calculated and premeditated manner. This aggravator did not exist at the time of the offense. That circumstance was added by the Florida Legislature on July 1, 1979, by Chapter 79-353, Laws of Florida. The Court has now applied an ex post facto aggravating circumstance to this offense. Mr. Jennings contends initially that this is a retroactive application, in violation of Article I, Section 10 of the United States Constitution, in violation of the fifth, sixth, eighth, and

fourteenth amendments, in violation of due process and equal protection of law, and in violation of the corresponding provisions of the Florida Constitution.

In Miller v. Florida, 107 S. Ct. 2446 (1987), the Supreme Court set out the test (in Florida, coincidentally) for determining whether a statute is ex post facto. In so doing, the Court for the first time harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282 (1977), and Weaver v. Graham, 450 U.S. 24:

> As was stated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it." Id., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." Id., at 293.

Miller, supra 107 S. Ct. at 2451. Under the resulting new analysis, it is now clear that sec. 921.141(5)(j) operated as an ex post facto law in Mr. Jennings' case, and that the application of this aggravator in this case was accordingly flatly improper.

In addressing the issue of retrospectivity, a court must examine the challenged provision to determine whether it operates to the disadvantage of a defendant, as the Miller decision clearly requires. See Miller v. Florida, 107 S. Ct. at 2452. In Miller, the Supreme Court examined both the purpose for the enactment of the challenged provision and the change that the challenged provision brought to the prior statute to determine whether the new provision operated to the disadvantage of Mr. Miller. In applying that analysis to the challenged provision at issue here, it is clear that the new provision is "more onerous than the prior law" (Dobbert v. Florida, supra) because it works a substantial disadvantage to the capital defendant.

The change which the new law brought to the sentencing statute operates to the disadvantage of the capital defendant. In Mr. Jennings' case, the jury and

trial judge applied the new aggravating factor and weighed it in making the determination that death was the appropriate sentence. Under the law in effect at the time of the offense in this case, the jury and trial judge would not have been empowered to increase the probability of a death sentence in this manner because consideration of aggravating factors is strictly limited to those enumerated in the statute at the time of the offense. See, e.g., Fla. Stat. sec. 921.141(5). Under Miller, this Court's application of this aggravator is plain constitutional error. Under Jackson v. Dugger, 547 So. 2d 1197, (Fla. 1989), Miller was a significant change in law because it was overturned this Court's prior rulings.

Similar to the Miller defendant, Mr. Jennings was subjected to the probability of a more enhanced sentence because of the new law. Mr. Jennings presented substantial mitigation at the penalty phase. The jury and trial court relied on this additional aggravating factor in finding that the statutory aggravating factors outweighed the mitigation. In this instance the more severe sentence was death instead of life. Mr. Jennings was therefore "substantially disadvantaged" by a retrospective law. As explained previously, Florida law limits the consideration of aggravating factors to those enumerated in the capital sentencing statute. This limitation affects the "quantum of punishment" that a capital defendant can receive because a jury and judge must balance aggravating circumstances against mitigating circumstances before arriving at a verdict of life or death. The right to limitation was altered when the jury and trial court, by operation of the new law, applied an additional statutory aggravating factor.

Miller v. Florida, supra, is a fundamental change in Florida law. Mr. Jennings jury was inaccurately instructed. The trial court based his sentence on an unconstitutional jury advisory sentence and the trial court sentenced Mr. Jennings to die based on an ex post facto law. Relief is warranted.

ARGUMENT XXIII

THE PROSECUTION OF MR. JENNINGS BY THE OFFICE OF THE STATE ATTORNEY FOR THE EIGHTEENTH JUDICIAL CIRCUIT VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE STATE ATTORNEY PARTICIPATED IN THE PROSECUTION OF MR. JENNINGS DESPITE THE FACT THAT HE HAD BEEN A SENIOR PUBLIC DEFENDER WITH THE OFFICE THAT REPRESENTED MR. JENNINGS.

Mr. Wolfinger was a senior public defender for the eighteenth judicial circuit during Mr. Jennings 1982 capital trial. Mr. Wolfinger later became the State Attorney for the Eighteenth Judicial Circuit. Mr. Wolfinger participated in the prosecution of Mr. Jennings in the 1986, capital trial. (See App. 3). It is apparent that an "actual" conflict of interest has always existed in this case. Baty v. Balkcom, 662 F.2d 391 (5th Cir.), cert. denied, 456 U.S. 1011 (1981); see also Cuyler v. Sullivan, 446 U.S. 335 (1980); Holloway v. Arkansas, 435 U.S. 475 (1978); Wood v. Georgia, 450 U.S. 261 (1981); United States v. McKeon, 738 F.2d 26 (2d Cir. 1984). Mr. Jennings has therefore been denied his fifth, sixth, eighth, and fourteenth amendment rights. In addition, under the heightened reliability requirements applicable to capital cases, this conviction and sentence cannot stand, for they have resulted from a conflict which is fundamentally at odds with the eighth and fourteenth amendments. See Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977); Gregg v. Georgia, 428 U.S. 153 (1976).

Under any ethical standard a lawyer may not represent interests adverse to those of a former client. Mr. Jennings was entitled to the protection of such rules. See, e.g., United States v. Kitchin, 592 F.2d 9000 (5th Cir. 1979); see also, Code of Professional Responsibility, Canon 4. To establish a "conflict" claim, all that need be shown is that the matters involved in the previous representation are substantially related to those in the action in which the attorney represents an adverse interest. See United States v. Kitchin, 592 F.2d at 904; see also In re Yarn Processing Patent Validity Litigation, 530 F.2d 83 (5th Cir. 1976); American Can Co. v. Citrus Feed Co., 436 F.2d 1125 (5th Cir.

1971); United States v. Trafficante, 328 F.2d 117 (5th Cir. 1964). Mr. Jennings undeniably can make such a showing.

Under State v. Fitzpatrick, 464 So. 2d 1185 (Fla. 1985), when such a "conflict of interest" involves a government prosecutor's office, the individual prosecutor who had the prior relationship must be screened from any direct or indirect participation in the former client's prosecution. See Fitzpatrick, 464 So. 2d at 1187 (expressly approving ABA Formal Op. 342). However, the entire State Attorney's Office is precluded from proceeding in the prosecution if the disqualified attorney has either: 1) "provided prejudicial information relating to the pending criminal charge," or 2) "personally assisted, in any capacity, in the prosecution of the charge." Fitzpatrick, 464 So. 2d at 1188 (emphasis supplied).

Mr. Wolfinger, undeniably did "personally assist," in an active "capacity," in the prosecution of the instant murder case. See the undisclosed letter directed to him which is set forth in Argument III, supra. The State Attorney Office's involvement in Bryan Jennings' prosecution thus violated Fitzpatrick. The conflict rendered this capital prosecution fundamentally unfair and unreliable. Fitzpatrick holds that assistance in the prosecution "in any capacity" by the disqualified attorney disqualifies the State Attorney's Office. No "screening" of Mr. Wolfinger from participation in this prosecution, Fitzpatrick, supra was even attempted here. In fact, it would be impossible for Mr. Wolfinger, the elected state attorney whom the Florida Constitution requires to take all responsibility for the actions of his office to not participate in the prosecution. There is evidence that conclusively demonstrated that Norman Wolfinger "personally assisted" in the prosecution, and thus, the State Attorney's Office had a substantial conflict which operated

to Mr. Jennings' disadvantage.[25] See Fitzpatrick, supra; United States v. Kitchin, supra; cf. Holloway v. Arkansas, 435 U.S. 475 (1978); Cuyler v. Sullivan, 446 U.S. 335 (1980).

This Court should vacate the judgments and sentences due to this conflict. At a minimum this court should order a full and fair evidentiary hearing in order for Mr. Jennings fully develop the merits of this constitutional claim.

CONCLUSION

On the basis of the argument presented to this Court above, as well as on the basis of his Rule 3.850 motion, Mr. Jennings respectfully submits that he is entitled to a remand for compliance with Chapter 119 and an evidentiary hearing and 3.850 relief, and respectfully urges that this Honorable Court set aside his unconstitutional convictions and sentences of death.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

JEROME H. NICKERSON
Assistant CCR
Florida Bar No. 0829609

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

MARTIN J. McCLAIN
Special Assistant CCR
Florida Bar No. 0754773
28E Broadway Village Drive
Columbia, Missouri 65201
(314) 442-3727

COUNSEL FOR APPELLANT

[25]Further the prosecution has refused to comply with Chapter 119. Compliance with that Chapter would certainly reveal more evidence of Mr. Wolfinger's improper involvement in Mr. Jennings' prosecution. See Argument IV supra.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Kellie Nielan, Assistant Attorney General, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 9 day of November, 1990.

Attorney