IN THE

SUPREME COURT OF FLORIDA

CASE NO. _____

FRANK LEE SMITH,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTEENTH JUDICIAL CIRCUIT,
IN AND FOR BROWARD COUNTY, FLORIDA

APPLICATION FOR STAY OF EXECUTION AND SUMMARY INITIAL BRIEF OF APPELLANT ON APPEAL OF DENIAL OF MOTION FOR FLA. R. CRIM. P. **3.850** RELIEF, AND DENIAL OF MOTION TO PROCEED IN FORMA PAUPERIS

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PRELIMINARY STATEMENT

This is an emergency appeal from the lower court's denial of Mr. Smith's motion for Rule **3.850** relief. Mr. Smith's execution is presently scheduled for January 16, 1990. All matters involved in the Rule **3.850** action, and all matters presented on Mr. Smith's behalf before the lower court, are raised again in this appeal and incorporated herein by specific reference, whether detailed in the instant brief or not.[1]

Given the pendency of the death warrant which has been signed against Mr. Smith, and the corresponding emergency nature of the instant proceedings, counsel has consolidated into this document Mr. Smith's application for stay of execution as well as his application to proceed in forma pauperis, since without that designation, the Office of the Capital Collateral Representative's continued representation of Mr. Smith is in question.

With regard to the Rule **3.850** appeal, certain matters'should be noted at the outset. Although the Rule **3.850** motion and the files and records in the case did not "conclusively show the [Mr. Smith was] entitled to no relief," Fla. R. Crim. P. **3.850**, the lower court summarily denied the motion. No evidentiary hearing was held, even though serious and legitimate questions regarding

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[1]The exigencies of under-warrant litigation have made it impossible for counsel to prepare the type of appellate brief counsel would normally prepare. Counsel notes at the outset that because of these exigencies, a table of authorities and summary of argument have been impossible to prepare.

the constitutional validity of Mr. Smith's capital conviction and sentence have been raised. This brief is intended to demonstrate that a careful, judicious and studied review of the record is proper and necessary, that an evidentiary hearing is warranted, that a stay of execution is warranted in this case, and that given an adequate opportunity, Mr. Smith can establish his entitlement to relief. In short, the normal appellate process is warranted upon this record.

Mr. Smith's execution should be stayed given the substantial nature of the claims he presents to this Court. The issues raised by Mr. Smith reflect the substantial, meritorious nature of Mr. Smith's challenge to the proceedings which resulted in his conviction and sentence -- the record supports these claims and the instant brief discusses as much of that evidence as counsel is able to discuss under the circumstances.

This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by capital prisoners litigating during the pendency of a death warrant. See Johnson v. State, No. 72,231 (Fla. April 12, 1988); Gore v. Dugger, No. 72,300 (Fla. April 28, 1988); Riley v. Wainwright, No. 69,563 (Fla. November 3, 1986); Groover v. State, No. 68,845 (Fla. June 3, 1986); Copeland v. State, Nos. 69,429 and 69,482 (Fla. October 16, 1986); Jones v. State, No. 67,835 (Fla. November 4, 1985); Bush v. State, Nos. 68,617 and 68,619 (Fla. April 21, 1986); Spaziano v. State, No. 67,929 (Fla. May 22, 1986); Mason v. State, No. 67,101 (Fla. June 12, 1986).

~~See also~~ Roman v. State, 528 So. 2d 1169 (Fla. 1988)(granting stay of execution and a new trial); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and post-conviction relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987). The issues Mr. Smith presents are no less substantial than those involved in any of those cases. A stay is proper.

References to the record on direct appeal to this Court shall be cited as (R.); references to the Rule 3.850 record on appeal shall be cited as (PC-R. ___). All other references shall be self-explanatory or otherwise explained.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT i

TABLE OF CONTENTS iv

PROCEDURAL HISTORY 1

ARGUMENT 3

INTRODUCTION. 3

CLAIM I 12

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

A. COUNSEL'S FAILURE TO INVESTIGATE, PREPARE, AND PRESENT CHALLENGES TO THE STATE'S IDENTIFICATION TESTIMONY . . 15

B. DEFENSE COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE SINGULARLY UNRELIABLE PRE-TRIAL IDENTIFICATIONS AND THE RESULTING IN-COURT IDENTIFICATIONS 23

C. DEFENSE COUNSEL'S FAILURE TO INVESTIGATE OTHER SUSPECTS 27

D. DEFENSE COUNSEL'S FAILURE TO CHALLENGE MR. SMITH'S PURPORTED STATEMENT TO LAW ENFORCEMENT 28

E. DEFENSE COUNSEL'S FAILURE TO OBTAIN THOROUGH AND PROFESSIONAL EXPERT EVALUATIONS OF MR. SMITH'S COMPETENCY TO STAND TRIAL AND HIS FAILURE TO REQUEST A COMPETENCY HEARING 30

F. OTHER FAILURES 32

G. CONCLUSION 34

CLAIMII. 35

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE VIOLATED FRANK LEE SMITH'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

CLAIM III 39

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

CLAIM IV 44

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. SMITH'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

CLAIM V 49

MR. SMITH'S CONVICTION AND DEATH SENTENCE RESULTED FROM IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES WHICH CREATED A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION.

CLAIM VI 54

MR. SMITH WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED HIM AT TRIAL FAILED TO CONDUCT PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, RESULTING IN A TRIAL AT WHICH MR. SMITH WAS INCOMPETENT TO PROCEED, AND IN THE DEPRIVATION OF MR. SMITH'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL GUILT-INNOCENCE AND SENTENCING DETERMINATION.

CLAIM VII 75

MR. SMITH WAS DENIED HIS RIGHTS TO A PRETRIAL COMPETENCY HEARING, AND HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS WHILE NOT LEGALLY COMPETENT.

A. INTRODUCTION 76

B. MR. SMITH WAS ENTITLED TO A COMPETENCY HEARING AT THE TIME OF TRIAL. 77

C. MR. SMITH WAS NOT COMPETENT TO PROCEED TO TRIAL 80

D. MR. SMITH WAS NOT COMPETENT TO WAIVE HIS RIGHT TO REMAIN SILENT OR HIS RIGHT TO COUNSEL 84

E. CONCLUSION 84

CLAIM VIII 85

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

REMAINING CLAIMS 98

CLAIM XXV 98

THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. SMITH S MOTION FOR ORDER OF INSOLVENCY WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

CONCLUSION 99

CERTIFICATE OF SERVICE **100**

PROCEDURAL HISTORY

Mr. Smith was indicted by a grand jury for first-degree murder, sexual battery, and burglary on May 9, 1985, in the Seventeenth Judicial Circuit, Broward County, Florida. After entering not guilty pleas, Mr. Smith was tried by a jury beginning January 21, 1985. The State's case rested entirely on the testimony of three purported identification witnesses, for no physical evidence connected Mr. Smith to the offense. Dorothy McGriff, the victim's mother, identified Mr. Smith by the shape of his shoulders (R. 656), but could not describe the face of the man she had seen at the scene (R. 655). Gerald Davis, called as a court witness because he had given numerous inconsistent statements (R. 741-43), could only say Mr. Smith "looked like" a man Davis had encountered near the scene (R. 793), but could not make a positive identification (R. 795). Chiquita Lowe, the State's key witness, identified Mr. Smith as the man she spoke to outside the victim's home on the night of the offense (R. 680). On January 31, 1985, the jury retired to deliberate its verdict. After five hours of deliberations, the jury sent out a note requesting to hear Chiquita Lowe's testimony (R. 1227). The jury was asked to rely on its recollection, and continued deliberations (R. 1232). One hour later, the jury again requested to have Lowe's testimony read (R. 1232-33). The testimony was read to the jury, and the jury again retired (R. 1234-35). Finally, after eight hours and twenty-five minutes of deliberations, the jury returned a guilty verdict (R. 1252).

At the penalty phase conducted on February 5, 1986, the jury recommended death (R. 1364). On May 2, 1986, the judge sentenced

Mr. Smith to death (R. 1440).

Mr. Smith unsuccessfully appealed his convictions and sentence, Smith v. State, 515 So. 2d 182 (Fla. 1987), and certiorari to the United States Supreme Court was denied on March 21, 1988, Smith v. Florida, 108 S. Ct. 1249 (1988).

The Governor of Florida signed a death warrant in Mr. Smith's case on October 18, 1989, and Mr. Smith's execution is presently scheduled for January 16, 1990. Under the provisions of Rule 3.850, Mr. Smith had until March 21, 1990, to file a Rule 3.850 motion. However, because of the Governor's death warrant, Rule 3.851 required that Mr. Smith's post-conviction pleadings be filed by November 17, 1989. Accordingly, on that date, Mr. Smith filed a Rule 3.850 motion in the circuit court, and also requested leave to amend, an evidentiary hearing, and a stay of execution. Mr. Smith also filed a state habeas corpus petition on that date.

On December 13, 1989, after a brief oral argument, the circuit court summarily denied all relief without conducting an evidentiary hearing (PC-R. 326, 327). On December 15, 1989, Mr. Smith timely filed a motion for rehearing (PC-R. 331-33), and on December 18, 1989, a supplement to the motion for rehearing (PC-R. 334-53), which were denied on December 20, 1989 (PC-R. 354-55). Mr. Smith then filed a motion for reconsideration of rehearing on December 22, 1989 (Amendment to PC-R. 1-7), and a timely notice of appeal on December 26, 1989 (PC-R. 356-57). That appeal and Mr. Smith's previously filed state habeas corpus petition are now before this Court.

The facts pertinent to Mr. Smith's claims for relief are discussed in the body of this brief.

ARGUMENT

INTRODUCTION

The facts involved in this appeal compellingly demonstrate that Mr. Smith is innocent of the offense for which he was convicted and sentenced to death. The circuit court refused to hear these facts, summarily denying Mr. Smith's Rule 3.850 motion without permitting an evidentiary hearing. These facts are summarized in this Introduction, and will be related to Mr. Smith's claims for relief in the discussion of the individual issues presented below.

The State's case against Mr. Smith relied solely upon the identification testimony of three witnesses who had seen a suspicious man near the victim's home at about the time of the offense. No other evidence implicated Mr. Smith -- there were no fingerprints, no blood stains, no serology evidence, no fiber particles. Of the three identification witnesses, one -- Chiquita Lowe -- was clearly the key State witness. Dorothy McGriff, the victim's mother, who had seen a man in the dark reaching into a window of her home, could not describe the man's face (R. 655), and only "identified" Mr. Smith by the shape of his shoulders (R. 656). Gerald Davis, a passerby who encountered a strange man in the street near the victim's home, could not positively identify Mr. Smith (R. 795), and could only say Mr. Smith "looked like" the man Davis had seen (R. 793). Chiquita Lowe was the key, as the jury clearly recognized in twice requesting that her testimony be read during the jury's

deliberations. The jury obviously had significant doubts regarding Mr. Smith's guilt, deliberating for over eight hours.

What was revealed in post-conviction -- and what the circuit court refused to hear -- would have resolved the jury's doubts in Mr. Smith's favor. Chiquita Lowe has now provided a sworn affidavit explaining that when she was testifying at Mr. Smith's trial, she knew that Mr. Smith was not the man she had seen near the victim's house, but that she identified Mr. Smith because of pressure put on her by the police and state attorney. Ms. Lowe's affidavit also explains that the photograph of another suspect in the murder, Eddie Lee Mosley, is the man she saw and that she wrongly identified Mr. Smith:

> 1. My name is Chiquita Lowe and I live in Ft. Lauderdale, Florida. I am presently twenty-four years old.
>
> 2. In 1985, I testified during a murder trial. A little girl was raped and killed near my grandmother's house. I saw the man in the street right before the crime happened.
>
> 3. In 1985, I told the police detectives and the state attorney about how the man asked me for money. I told them that I only saw the man for an instant and that the only things I remembered were the droopy eye, scraggly hair, pot marks on his face, and the ring on his finger.
>
> 4. The police detectives and the attorney told me the man had a scar under his eye. I never saw a scar and they knew that. The state attorney told me that the man on trial had committed several crimes just like the one that happened near my grandmother's house. The state attorney also told me that the man on trial was dangerous, guilty of the crime, and needed to be taken off the streets.
>
> 5. While I was in the courtroom telling about what I saw, I knew that the man on trial was too thin to be the same man I saw on the street. The police detectives and the state attorney put so much pressure on me to testify against the man on trial.
>
> 6. The state attorney told me not to worry about

my testimony because the man would be locked up and electrocuted the following May. He also pointed out the man's entire family to me. I was just feeling so pressured.

7. I have not forgotten about the trial and every few months I picture the man's face in my mind. I also remember how sorry I felt for the little girl.

8. On December 20, 1989, I was shown a photo and asked if this was the man who approached me and asked for fifty cents back in 1985. When I looked at the picture everything came back to me. The photo is attached to this affidavit. The man in the photo is without a doubt the man I saw. I know that he is not the same man who was on trial for the little girl's murder. I am so sorry that the wrong man is in prison and sentenced to death. I had doubts in the courtroom but I was under so much pressure. Also, the state attorney told me about how dangerous the man was and how he needed to be locked up forever.

9. I feel so bad that I did not tell the state attorney about my doubts. I did not know what to do. I felt a lot of pressure to say that the man on trial was the man I saw, even though I had doubts, and the man's hair did look the same.

10. I swear on my mother's grave that the man in the photo is the man I saw on the street the night when the little girl was raped and killed. I identified the wrong man in the courtroom.

(Amendment to PC-R. 4-7).

Eddie Lee Mosley, alias Jessie Smith, was originally a suspect in this case. After Mr. Smith was charged with the murder, the investigation focused upon proving that Mr. Smith was the perpetrator. The identification witnesses were never shown pictures of all of the suspects. Unfortunately, the witnesses were never shown a photograph of Mr. Mosley. Had they been shown a picture of him, they would have instantly recognized him as the man that they saw on the night of the crime, the man they later described, and the man that is portrayed in the composite sketch, as Ms. Lowe has now done. They would have known that Mr. Smith was the wrong man.

Shortly after the offense, the police developed a composite drawing of the man Seen near the victim's home the night of the offense. The composite was developed from descriptions provided by Gerald Davis and Chiquita Lowe. A comparison of that composite sketch with the picture of Eddie Lee Mosley and the picture of Mr. Smith dramatically illustrates the wrongfulness of Mr. Smith's conviction:

(Composite Sketch).

(Photograph of Eddie Lee Mosley, Broward County Sheriff's files)

(This is the photograph shown to Chiquita Lowe and attached to her affidavit).

The resemblance between the photo and the composite is striking and corroborates Ms. Lowe's affidavit statement that Mosley is the person she saw, not Mr. Smith. The shape of the face, the nose and the droopy eye in the composite and Mosley's picture all are identical. Ms. Lowe testified at trial that she was certain about the droopy eye (R. 683-84), but was not sure if it was the right or left eye (R. 696). Mr. Davis testified that one eye was sleepy, like it was dead (R. 751). Mr. Mosley is six feet tall and weighs 198 pounds. Ms. Lowe testified that the man she saw was approximately six feet tall and weighed 190 pounds (R. 671). Mr. Davis testified that the man he saw was 6 feet or 6 feet 1 inch tall (R. 757). The descriptions given and the composite are much closer to Mr. Mosley than they are to Mr. Smith.

But the evidence goes beyond personal appearance. Mr. Mosley has an established record for violent sex crimes, all involving girls and women from the northwest section of Fort Lauderdale, the same area where Shandra Whitehead was killed, and is considered by Fort Lauderdale police as the city's "most dangerous serial killer." Since Mr. Smith's conviction, Mr. Mosley has been arrested, charged, and indicted in two rape/murders. Additionally, he has been tied to six other rape/murders and five forceable sexual batteries between 1973 and 1987 and is a suspect in numerous others.

Police and Department of Corrections records regarding Mr. Mosley indicate strong resemblances between Mr. Mosley's behavior

and that of the person encountered by Davis and Lowe. Both Mr. Davis and Ms. Lowe described the suspect's behavior as strange, delirious, and weird (R. 668-69, 750). Mr. Mosley has an I.Q. of about 51 and has been found to be incompetent to stand trial on two occasions. Mr. Davis described the suspect as rugged looking (R. 750), unkept with kinky, knotted and uncombed hair (R. 751), and said that he appeared to be a "bum" (R. 756). Mr. Mosley was a loner and spent much of his time living on the streets.

Chiquita Lowe testified at trial that about four days after the offense, a man came to her home trying to sell a television set, and that this man was the same person Lowe had seen near the victim's house (R. 677). The suspect that allegedly tried to sell the T.V. to Ms. Lowe's grandmother brought the T.V. to the house in a shopping cart (R. 804). Mr. Mosley's records establish that his usual routine was to steal things and then peddle them from a grocery cart. When Mr. Mosley was arrested in 1987, he was pushing a shopping cart full of stolen plants down the street, and admitted that he was going to sell them. Upon his arrest, he also implicated himself in nine murders.

Davis testified that the person he encountered approached Davis from a field across from the victim's house (R. 745-46), and asked Davis if he had any drugs and if he wanted to have sex (R. 748-49). Mosley's records establish that he had a habit of approaching strangers from a field and asking them for drugs. In 1980, Mosley was convicted of a sexual battery which occurred after he "came out from a vacant field and asked [the victim] where he can sell some reefer." (D.O.C. records). In 1984, Mosley was charged with a sexual battery which occurred in a

vacant field (Ft. Lauderdale Police Department records). During that assault, Mosley told the victim he had "not murdered all those girls" (Id.). In 1982, Mosley was charged with a robbery and battery which occurred after Mosley approached a car and asked the driver if he wanted to buy some drugs (Id.). These records also include mental health evaluations which have determined that Mosley is homosexual.

Davis also testified that the person he encountered "ran as if he was knock-knee'd, wasn't straight" (R. 756). Mosley's records establish that he suffered a serious leg injury as a child, at one time used a cane, and walks with a distinct limp.

This crime involved the sexual assault and murder of an eight-year-old girl. Mosley's records include statements in which he has said he has no problem fulfilling his sexual needs because he watches the girls coming out of school and has no trouble satisfying his sexual needs. At the time of the offense, when Davis refused the suspect's sexual advances, the suspect told Davis, "I guess I have to go back and jack myself off" (R. 749), and then headed for the victim's house (R. 750).

In the context of Mr. Smith's trial, this evidence would have made all the difference in the world. It never reached the jury, however, due to defense counsel's ineffectiveness, the State's withholding of material, exculpatory evidence, and the State's use of false and misleading testimony. This evidence undermines confidence in the outcome of Mr. Smith's capital trial, Strickland v. Washington, 466 U.S. 668 (1984), establishes much more than a reasonable likelihood of a different outcome, United States v. Bagley, 473 U.S. 667 (1985), and certainly

establishes much more than "any reasonable likelihood" that the State's false and misleading evidence "could have" affected the judgment of the jury. Giglio v. United States, 405 U.S. 150, 154 (1972).

That the case against Mr. Smith was weak and thus that the evidence discussed above would have produced a different outcome is demonstrated by the case itself, but also by the prosecutor's actions two years after Mr. Smith's conviction and death sentence. In the Broward County Sheriff's Department file regarding Mr. Smith's case is the following report:

> On Tuesday, February 24, 1987, this writer, as requested by A.S.A. William Dimitrouleas, compared the fingerprint standards of George Gregory Reddick to the latent lifts reference B.S.O. Case #85-4-5789.
>
> All workable latents were previously identified by this writer; however, this writer compared the remaining latents of no value to Reddick's fingerprint standards, and found negative results.

(PC-R. 353; see also PC-R. 70-71). Clearly, if the state attorney was still investigating suspects in Shaundra Whitehead's murder two years after Mr. Smith's conviction, substantial weaknesses existed in the case against Mr. Smith.

As noted above, the State's case against Mr. Smith rested entirely on identification testimony. Although the State presented innumerable lay, law enforcement, and expert witnesses, none of this testimony established anything connecting Mr. Smith to the offense. Law enforcement officers testified regarding, inter alia, their investigation of the scene, taking photographs of the scene, the collection of items from the scene, and the collection of latent fingerprints, but none of this testimony connected Mr. Smith to the offense. Medical doctors testified

regarding the victim's injuries and cause of death, but none of this testimony connected Mr. Smith to the offense. Forensic experts testified regarding fingerprint comparisons and serologic examinations, but none of this evidence connected Mr. Smith to the offense.

The only evidence tending to implicate Mr. Smith was the identification testimony, which has now been established to have been wrong. As Chiquita Lowe has attested, Eddie Lee Mosley more nearly resembles the man she saw than does Frank Lee Smith. Even without Mosley, however, Ms. Lowe has indicated that when she saw Mr. Smith in the courtroom (she had never seen him in person before that time), she knew he was not the man she encountered near the victim's home. Ms. Lowe's affidavit is corroborated by records indicating that Mosley has a history of sexual offenses involving girls and women in the same section of Ft. Lauderdale, that Mosley peddles stolen goods from a grocery cart (as the suspect in this case did), that Mosley has a pattern of approaching strangers from fields and asking for drugs (as Davis testified the suspect in this case did), that Mosley had a serious leg injury and walks with a limp (as Davis testified the suspect in this case did), and that Mosley is homosexual (as the suspect in this case indicated to Davis).

Mr. Smith was wrongfully convicted of capital murder and wrongfully sentenced to death. The circuit court refused to hear the evidence, summarily denying Mr. Smith's Rule 3.850 motion without an evidentiary hearing. The facts, the law, and justice require reversal.

CLAIM I

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

The State's case at Mr. Smith's capital trial was entirely circumstantial. No physical evidence connected Mr. Smith to the offense. As defense counsel and the State agreed, the State's case was wholly based upon the identification of witnesses who had supposedly seen Mr. Smith in the vicinity of the victim's home around the time of the offense. These identifications were conflicting, did not match Mr. Smith's appearance, and were made under circumstances creating a strong likelihood of misidentification.

Despite the obvious shakiness of the State's case, defense counsel did little or nothing to challenge it. For example, the State's forensic testimony regarding fingerprints and serology exams did not directly link Mr. Smith to the offense, yet defense counsel did not consult with experts to establish that this evidence ruled out Mr. Smith as the perpetrator of the offense. The State's case was entirely based on identifications, yet counsel did nothing pretrial to challenge the identifications or to preclude in-court identifications. The State had only one other piece of evidence, a questionable statement purportedly made by Mr. Smith, yet defense counsel failed to investigate the circumstances surrounding law enforcement's obtaining this statement, and failed to investigate evidence demonstrating that Mr. Smith's mental illness and extremely poor eyesight precluded any knowing and voluntary waiver. Finally, and most significantly, defense counsel failed to investigate and develop

evidence which would, at a minimum, have raised a reasonable doubt regarding Mr. Smith's guilt and most likely would have established his innocence: the composite drawing of the suspect created by police artists and witnesses looks exactly like Eddie Mosley, a multiple sex offender suspected in the rapes and murders of as many as **30** girls and women. Counsel could have established his client's innocence, had he properly investigated, prepared, and presented the defense case. As it was, a weak State case went virtually unchallenged, because of counsel's unreasonable omissions and neglect. No tactic or strategy can be ascribed to such attorney conduct. Mr. Smith's sixth and fourteenth amendment rights to the effective assistance of counsel were egregiously violated. An evidentiary hearing, and Rule **3.850** relief are required.

The right to the effective assistance of counsel is "the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing." United States v. Cronic, 466 U.S. **648**, 656 **(1984).** Thus, "counsel's function **. . .** is to make the adversarial testing process work in the particular case." Strickland v. Washington, 466 U.S. **668, 690 (1984).** "[T]hat testing process generally will not function properly unless defense counsel has done some investigation into the prosecution's case and into various strategies." Kimmelman v. Morrison, 477 U.S. **365, 384 (1986).**[2]

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[2]In accordance with these principles, courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which

(footnote continued on following page)

Each of the errors committed by Mr. Smith's counsel is sufficient, standing alone, to warrant Rule 3.850 relief Each undermines confidence in the fundamental fairness of the guilt-

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(footnote continued from previous page)

may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). 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. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Counsel have been found to be prejudicially ineffective for failing to impeach key state witnesses with available evidence; 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; and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963.

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. Washinston v. Watkins, 655 F.2d 1346, 1355, rehearins denied with opinion, 662 F.2d 1116 (5th Cir. 1981), 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. Washinaton, supra; Kimmelman v. Morrison, supra.

innocence determination. The allegations are 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). At such a hearing, Mr. Smith can establish what he has alleged: that the unreasonable errors, omissions, and failings of his trial counsel, singularly and collectively, are more than sufficient to warrant Rule 3.850 relief. Mr. Smith is innocent.

A. COUNSEL'S FAILURE TO INVESTIGATE, PREPARE, AND PRESENT CHALLENGES TO THE STATE'S IDENTIFICATION TESTIMONY

The case against Mr. Smith was far from overwhelming. The jury deliberated for over eight hours and twice asked the court to review testimony of the State's key witness, Chiquita Lowe. The State's case was strictly circumstantial -- there were no prints, no blood stains, no serology evidence, no fiber particles. The State's entire case against Mr. Smith involved one innocuous statement and the identification evidence of three witnesses placing Mr. Smith near the scene of the murder.

The significance of the identification testimony to the State's case cannot be disputed. Nor can the fact that these identifications were the result of highly suggestive procedures. Despite the key significance of these identifications, however, Mr. Smiths' trial counsel failed to conduct an independent investigation of the identification evidence, and failed to attempt to suppress the pretrial identifications and the subsequent and equally suggestive in-court identifications. An independent investigation would have revealed that the witnesses identified the wrong man. At the least, defense counsel should

have moved to suppress these identifications and to prevent the unreliable in-court identifications. The identifications were suppressible.

As defense counsel's opening statement at Mr. Smith's trial indicates, counsel knew that identification testimony was the only evidence the State had which in any way implicated Mr. Smith in the offense (See R. 494-500). Counsel also knew that early on in the investigation of the offense, law enforcement had numerous suspects in the offense (R. **499**). Despite his awareness of these facts, counsel conducted no independent investigation of the identification evidence, and thus failed to discover evidence that the identifications were wrong, that the man the witnesses saw at the scene was not Mr. Smith, and that, in fact, one of law enforcement's early suspects was the more likely perpetrator. This evidence would clearly have established a reasonable doubt regarding Mr. Smith's guilt. Counsel's failure to discover and present it substantially prejudiced Mr. Smith: a defendant whose innocence was provable was convicted of capital murder and sentenced to death.

The State's case relied upon the testimony of Dorothy McGriff, the victim's mother, Gerald Davis, a passerby who was encountered by a suspicious man near the victim's home at about the time of the offense, and Chiquita Lowe, another passerby who was approached by the same man that Mr. Davis encountered near the victim's house. Dorothy McGriff testified that as she returned from work at about **11:30** p.m. the night of the offense, she saw a man standing outside her house with his hands in the window (R. **634-36**). Mrs. McGriff became frightened, yelled at

the man, blew the car horn, and then chased him away (R. 638-39). Mrs. McGriff described the man's build and clothing to the police (R. 650), but could not describe his face (R. 655), because everything was dark from the man's head down to his shoulders (R. 656). A few days later, Mrs. McGriff identified Mr. Smith in a photo line-up "from his shoulders" (R. 656). Before seeing the photo line-up, Mrs. McGriff had been shown a composite sketch prepared from descriptions provided by Davis and Lowe (R. 657). Although Mrs. McGriff was not sure about the sketch, she did not make an identification from the photo line-up until after seeing the composite sketch (Id.). Mrs. McGriff was never shown a live line-up (R. 657-58). At trial, Mrs. McGriff identified Mr. Smith as the man she had seen outside her house on the night of the offense (R. 644-45).

Gerald Davis was called as a court witness at the State's request because he had provided numerous inconsistent statements (R. 741-43). Davis testified that he was walking past the victim's house at about 9:30 or 10:00 p.m. the night of the offense when a strange man approached him from a field across from the victim's house (R. 745-46). The man talked to Davis about doing drugs and having sex (R. 748). After Davis refused the man's advances, the man headed toward the victim's house (R. 750-51). Davis described the man as unkept, with kinky, knotted, uncombed hair, and a "sleepy" eye (R. 751). The man was 6' or 6'1" tall (R. 757), and "ran as if he was knock-knee'd" (R. 756). In a statement to the police, Davis said he thought the man had a scar on his face, but that statement was based on information provided by the police (R. 758), after Mr. Smith's arrest (R.

773). Davis was shown two photo lineups and picked out a photo from the second lineup that "looked like" the man Davis saw (R. 752-55). Before viewing a live line-up, Davis was shown a picture of Mr. Smith (R. 789). At the live line-up, Davis was "bothered" because Mr. Smith did not seem as tall as the man Davis had seen (R. 756), but after the police told him that everyone in the line-up was between 6' and 6'1" tall, Davis was reassured (R. 757). Davis could not say that the man he picked out of the line-up was "exactly the same guy but he looks like the guy" (R. 793), because he did not "remember how the guy looked" (R. 794). Davis felt compelled by the police to pick somebody out of the live line-up (Id.). At trial, Davis identified Mr. Smith as the man who had approached him on the night of the offense (R. 763-64).

Chiquita Lowe testified that on the night of the offense at about 10:30 p.m., she was driving down the street near the victim's house when a man flagged her down and asked for fifty cents (R. 668-69). The man had large pores on his face, a beard, straggly hair, did not look well kept, and was about six feet tall and weighted 190 pounds (R. 671). Lowe helped the police develop a composite sketch of the man (R. 673-74). Four days later, a man came by Lowe's house trying to sell a television set (R. 676). Lowe had no doubt that the man selling the television was the same man who had asked her for fifty cents (R. 677). The next day, Lowe was shown a photo line-up and had no hesitation in picking out the man she saw the night of the offense and at her house (R. 678). The police did not help Lowe select a photograph (R. 681). At trial, Lowe identified Mr. Smith as that man (R.

680). On cross-examination, Lowe did not waver in her identification, and on redirect, she reiterated that Mr. Smith was the man who asked her for fifty cents (R. 707).

In this context, Chiquita Lowe was clearly the key to the State's case. Mrs. McGriff's identification based on "shoulders" and Davis' highly uncertain testimony that Mr. Smith "looked like" the man Davis saw were weak evidence, insufficient for conviction and requiring corroboration. Lowe provided the necessary corroboration with her positive and unwavering testimony. Thus, it was Lowe's testimony which the jury requested to hear again during deliberations before it could reach a verdict.

Despite the uncertain and clearly impeachable identifications by Mrs. McGriff and Davis, and despite the key significance of Lowe's testimony, defense counsel did no independent investigation. Counsel did not investigate the other suspects which law enforcement claimed to have eliminated, did not independently interview the identification witnesses, and did not attempt to show these witnesses photographs of any other suspects. Had defense counsel done so, he could have established that the witnesses had identified the wrong man and that Mr. Smith was innocent. No tactic or strategy can be ascribed to the actions of an attorney who so utterly fails to challenge the State's case. Counsel failed in his most basic duty, the duty to investigate and prepare.

As a result of counsel's failures, his innocent client was convicted and sentenced to death. As we now know, the witnesses identified the wrong man. Had counsel fufilled his duties, he

would have learned that Ms. Lowe knew that Mr. Smith was not the man she had seen near the victim's house, but that she identified him because of the pressure put on her by the State (See Amendment to PC-R. **4-7).**

The testimony of Chiquita Lowe -- the key to Mr. Smith's conviction -- was not true. Counsel could have discovered this by taking the simple step of obtaining photographs of the other suspects and showing them to Ms. Lowe. Mr. Smith's innocence was provable.

The resemblance between the photo identified by Ms. Lowe and the composite is striking and corroborate Ms. Lowe's affidavit statement that Mosley is the person she saw, not Mr. Smith. The shape of the face, the nose and the droopy eye in the composite and Mosley's picture all are identical. Ms. Lowe testified at trial that she was certain about the droopy eye (R. 683-84), but was not sure if it was the right or left eye (R. **696).** Mr. Davis testified that one eye was sleepy, like it was dead (R. **751).** Mr. Mosley is six feet tall and weighs **198** pounds. Ms. Lowe testified that the man she saw was approximately six feet tall and weighed 190 pounds (R. **671).** Mr. Davis testified that the man he saw was **6** feet or **6** feet 1 inch tall (R. **757).** The descriptions given and the composite are much closer to Mr. Mosley than they are to Mr. Smith.

Additionally, had he performed an adequate investigation, counsel could have discovered significant information corroborating Ms. Lowe's identification of Eddie Lee Mosley. This information -- all readily available at the time of Mr. Smith's trial in police and corrections department files --

documents that Mr. Mosley has an established record for violent sex crimes, all involving girls and women from the northwest section of Fort Lauderdale, the same area where Shandra Whitehead was killed, and is considered by Fort Lauderdale police as the city's "most dangerous serial killer." Police and Department of Corrections records regarding Mr. Mosley indicate strong resemblances between Mr. Mosley's behavior and that of the person encountered by Davis and Lowe.

Both Mr. Davis and Ms. Lowe described the suspect's behavior as strange, delirious, and weird (R. 668-69, 750). Mr. Mosley has an I.Q. of about 51 and has been found to be incompetent to stand trial on two occasions. Mr. Davis described the suspect as rugged looking (R. 750), unkept with kinky, knotted and uncombed hair (R. 751), and said that he appeared to be a "bum" (R. 756). Mr. Mosley was a loner and spent much of his time living on the streets.

Chiquita Lowe testified at trial that about four days after the offense, a man came to her home trying to sell a television set, and that this man was the same person Lowe had seen near the victim's house (R. 677). The suspect that allegedly tried to sell the T.V. to Ms. Lowe's grandmother brought the T.V. to the house in a shopping cart (R. 804). Mr. Mosley's records establish that his usual routine was to steal things and then peddle them from a grocery cart.

Davis testified that the person he encountered approached Davis from a field across from the victim's house (R. 745-46), and asked Davis if he had any drugs and if he wanted to have sex (R. 748-49). Mosley's records establish that he had a habit of

approaching strangers from a field and asking them for drugs. In 1980, Mosley was convicted of a sexual battery which occurred after he "came out from a vacant field and asked [the victim] where he can sell some reefer." (D.O.C. records). In 1984, Mosley was charged with a sexual battery which occurred in a vacant field (Ft. Lauderdale Police Department records). During that assault, Mosley told the victim he had "not murdered all those girls" (Id.). In 1982, Mosley was charged with a robbery and battery which occurred after Mosley approached a car and asked the driver if he wanted to buy some drugs (Id.). These records also include mental health evaluations which have determined that Mosley is homosexual.

Davis also testified that the person he encountered "ran as if he was knock-knee'd, wasn't straight" (R. 756). Mosley's records establish that he suffered a serious leg injury as a child, at one time used a cane, and walks with a limp.

This crime involved the sexual assault and murder of an eight-year-old girl. Mosley's records include statements in which he has said he has no problem fulfilling his sexual needs because he watches the girls coming out of school and has no trouble satisfying his sexual needs. At the time of the offense, when Davis refused the suspect's sexual advances, the suspect told Davis, "I guess I have to go back and jack myself off," (R. 749), and then headed for the victim's house (R. 750).

With minimal effort, defense counsel could have destroyed the State's case. Without the identifications, the State simply had no case. Information that the identifications were flatly wrong existed at the time of trial, but went undiscovered because

defense counsel failed his client. Information indicating that Mosley was the more likely suspect was also readily available and would have created substantial reasonable doubt regarding Mr. Smith's guilt. An evidentiary hearing and Rule **3.850** relief are required.

B. DEFENSE COUNSEL'S FAILURE TO MOVE TO SUPPRESS THE SINGULARLY UNRELIABLE PRE-TRIAL IDENTIFICATIONS AND THE RESULTING IN-COURT IDENTIFICATIONS

As stated, identifications were the State's case against Mr. Smith. Without these identifications, the State simply had no evidence linking Mr. Smith to the offense. The identifications, however, were singularly unreliable, both because of the conditions under which the witnesses observed the suspect and because of the highly suggestive identification procedures which were employed. Incredibly, despite the significance of the identifications and despite the readiness with which their reliability could have been challenged, defense counsel filed no motion to suppress the pre-trial or in-court identifications. Such conduct cannot be ascribed any tactic or strategy, for it could only result from ignorance and neglect. The identifications were unreliable, and the failure to challenge them substantially prejudiced Mr. Smith: without the identifications, the State had no case.

Eyewitness identification testimony must be suppressed if it results from an unreliable suggestive identification procedure that violates due process by creating a substantial likelihood of mistaken identification. Neil v. Biggers, **409** U.S. **188 (1972);** Simmons **v.** United States, **390** U.S. **377 (1968).** The reliability of identification testimony, viewed in the totality of the

surrounding circumstances, controls. Manson v. Braithwaite, 432 U.S. 112 (1977). The identification testimony in this case was singularly unreliable.

One of the State's identification witnesses was the victim's mother, Dorothy McGriff. On the night of the murder as Mrs. McGriff returned home from work she saw a man reaching into a window in her home (R. 635). It was dark, and Mrs. McGriff was frightened, not paying attention to the person's appearance, and did not get a good look at his face (R. 654-55). Mrs. McGriff gave a description to the police at the scene of a black male, medium build, blue jeans, suede shoes, short black afro and beard (R. 507). She also described the man as muscular, big, heavy-set like a football player, with a big stomach (R. 653). Mrs. McGriff could not describe the man's face (R. 655), because everything was dark from the man's head down to his shoulders (R. 656).

With only this vague and unreliable description, Mrs. McGriff was shown a photo lineup. The procedures used to conduct the photo lineup were highly suggestive. Before being shown the photo lineup, she was shown a composite sketch of the suspect drawn with the assistance of the State's other two identification witnesses (R. 657), and was told that a man had been arrested based on the sketch and that one of the photos was of him (R. 659). Mrs. McGriff identified Mr. Smith from the photo lineup as the man she saw on the night of the murder. She identified him "from his shoulders" (R. 656). Clearly, this was an improper identification that should have been suppressed. Mrs. McGriff had not had a sufficient opportunity to observe the suspect and

did not know what his face looked like, but was then asked to make an identification from a picture of Mr. Smith's face. Moreover, before being shown the photo line-up, Mrs. McGriff was shown the composite sketch and told that the suspect was in the photo line-up. Despite the complete unreliability of Mrs. McGriff's identification, trial counsel did nothing to challenge these proceedings.

Another of the State's identification witnesses, Chiquita Lowe, saw a man in front of the victim's house on the evening of the murder. She described the man two days later as a black male, with large pores on his face, a beard, straggly hair, oily skin, about five-eleven to six feet tall, and one hundred ninety to ninety five pounds. Ms. Lowe was asked to assist several police artists in drawing a composite. The procedure used was highly unusual in that she and Mr. Davis, another identification witness, each saw different artists and a composite was drawn. Then they switched artists and adjustments were made. Finally, Ms. Lowe and Mr. Davis were then brought together and final adjustments were made to the composite drawing first done with Ms. Lowe's assistance.

Several days later, Ms. Lowe was told by her grandmother that the man was at their house (R. 695). The grandmother "recognized" the man from the composite drawing. Ms. Lowe claims to have seen the back of the man's head and the side of his face (R. 699), although at her deposition she testified that she only saw his back (R. 700). Ms. Lowe then called the police reporting that she had seen the man again. That evening, the police came to her house and showed her a photo lineup. She identified Mr.

Smith as the one that looked most like the suspect (R. 703). She was never shown a live lineup (R. 703). As with McGriff, this procedure was also highly suggestive and should have been challenged pretrial.

The identification procedures used with Mr. Davis were even more troubling. He gave an initial description of the man he saw near the victim's home as a black male, six feet tall, 165-170 pounds, with a little belly, a real tacky beard that looked like he didn't keep it up, and real kinky hair. After assisting with the drawing of the composites and discussing the composite with Ms. Lowe, he was also shown a photo lineup. On the first occasion he could not identify anyone (R. 754). He did make an identification on the second photo lineup, saying Mr. Smith "looks like" the man he saw (R. 784). In fact, he indicated the police were acting in a suggestive manner (R. 786).

Because of this questionable identification, Mr. Davis was shown a live lineup. Before the lineup, Mr. Davis was shown a photograph of Mr. Smith (R. 789). During the lineup the officers asked him, "do any of these guys look like the one in the picture" (R. 790-91)(emphasis added). At the live line-up, Davis was "bothered" because Mr. Smith did not appear to be as tall as the man Davis had seen (R. 757), but was reassured after the police told him all the men in the line-up were six feet or six feet one inch tall (Id.). In fact, at least two of the men in the line-up were 5 feet 9 inches and 5 feet 10 inches tall (R. 791-92). Davis repeatedly told the police at the lineup that Mr. Smith only "looked like" the man Davis had seen (R. 793). However, Davis felt compelled by the police to make a selection

(R. 793). Mr. Davis picked out Mr. Smith. This identification was improper and highly suggestive. Mr. Davis' pretrial identifications should have been suppressed. He should never have been allowed to make an in-court identification. Again, however, defense counsel failed to move to suppress the identifications or challenge their admission. In fact, prior to the in-court identification the prosecutor was seen pointing Mr. Smith out to Mr. Davis.

The procedures used in obtaining the identifications from all three witnesses were highly suggestive and unreliable. Trial counsel's performance was deficient in not moving to suppress the identifications and the resulting prejudice is readily apparent: without these questionable identifications, Mr. Smith could not have been convicted.

C. DEFENSE COUNSEL'S FAILURE TO INVESTIGATE OTHER SUSPECTS

Trial counsel utterly failed to investigate the other suspects in this case. During the cross-examination of Detectives Amabile and Scheff, they acknowledged that there were numerous suspects: James Freeman, Carspelia Williams, Eddie Lee Mosley, Edwin Calvin McGriff, Gator Mouth, and Big John (Johnny Graham)(R. **945-47, 1021-28).** Nevertheless, according to both detectives, through investigation they eliminated all of these individuals as suspects (R. **948, 1055-56).** Counsel failed to do even a cursory investigation of these suspects. An adequate investigation would have revealed that the detectives did not actually eliminate all of these individuals as suspects. They merely ignored some and focused their attention on Mr. Smith.

As a result of trial counsel's failure to investigate, he

was unable to cross-examine the detectives concerning these suspects and how they were actually eliminated as suspects. An adequate investigation would have revealed that they did not actually eliminate all of these suspects through investigation, but simply halted the investigation once they fixed their attention on Mr. Smith. Trial counsel was ineffective for failing to investigate and as a result could not effectively cross-examine the detectives and in fact failed to discover that Mr. Mosley not only was a repeat sex offender, but more closely matched the descriptions of the State's witnesses and the composite drawing (See subsection A, supra). Trial counsel thus failed to discover evidence establishing Mr. Smith's innocence.

D. DEFENSE COUNSEL'S FAILURE TO CHALLENGE MR. SMITH'S PURPORTED STATEMENT TO LAW ENFORCEMENT

Besides the highly questionable identification testimony discussed above, the only other State evidence which was in any way inculpatory was an innocuous statement Mr. Smith purportedly made to law enforcement after his arrest. Despite the weaknesses in the State's case and thus the obvious significance of any evidence -- however innocuous -- implicating Mr. Smith, defense counsel failed to present any challenge to the introduction of this statement. The statement was readily challengeable but went unchallenged because of defense counsel's failure to investigate and prepare readily available evidence that the statement was made without a knowing, voluntary, and intelligent waiver by Mr. Smith, that the statement was obtained in violation of Mr. Smith's right to counsel, and that the statement, in fact, may not have been made at all, or, at the very least, not made when

and to whom the State's testimony indicated.

At trial, Detective Scheff testified that he and Detective Amabile interviewed Mr. Smith shortly after his arrest. Initially, Mr. Smith identified himself as Frank L. Israel, but then he signed a waiver form as Frank L. Smith (R. **978**). Mr. Smith did not have on glasses at the time of the interview (Id). After telling Mr. Smith that Lowe, Davis, and Mrs. McGriff were eyewitnesses and receiving no response (R. **982**), Detective Scheff lied to Mr. Smith, telling him that the victim's brother, who was asleep at the time of the offense, had seen the suspect (R. **983**). According to Detective Scheff, Mr. Smith became upset and spontaneously said there was no way the boy could have seen him because it was too dark (R. **984**).

Detective Scheff's testimony about this statement was thoroughly impeachable with information in defense counsel's possession, but counsel failed to use that information. According to a police report written by a Sergeant Carry, Detectives Scheff and Amabile were the first officers to interview Mr. Smith after his arrest. This interview lasted approximately two and a half hours. Sgt. Carry's report indicates that Detectives Scheff and Amabile were unable to establish any rapport with Mr. Smith or to obtain any statements, so they requested that Sgt. Carry and another officer interview Mr. Smith, which they did at about 6:35 p.m. According to Sgt. Carry's report, it was during his interview with Mr. Smith that Mr. Smith purportedly made the statement. Clearly, this information contradicted Detective Scheff's testimony, casting doubt on whether the statement was made at all and certainly

impeaching Detective Scheff's credibility. Defense counsel had the information, but failed to use it, through no tactic or strategy, but simply through neglect. Defense counsel failed to challenge the State's case.

Mr. Smith's statement was also readily challengeable as being the result of an invalid waiver and as being obtained in violation of Mr. Smith's right to counsel. Mr. Smith has an I.Q. of 83, placing him in the borderline range of intellectual functioning, suffers from paranoid schizophrenia and brain damage, and has such limited vision that he has received job disabilities. Presumably, Mr. Smith "read" the waiver of rights form and signed it, yet he had no glasses on. With 20/400 vision in both eyes and one eye with no lens at all, it is extremely unlikely that Mr. Smith was physically able to read the rights form without his glasses. It is more likely that Mr. Smith simply pretended to "read" so as not to be embarassed about his disability. Additionally, no lawyer was provided to Mr. Smith at the time of his purported statement. Finally, any "waiver" that he may have signed was invalid since Mr. Smith was not competent to understand what he was waiving. See Claim VI, discussing results of psychological evaluation. Defense counsel utterly failed to investigate, prepare, or present these substantial challenges to Mr. Smith's statement, resulting in substantial prejudice to Mr. Smith.

E. DEFENSE COUNSEL'S FAILURE TO OBTAIN THOROUGH AND PROFESSIONAL EXPERT EVALUATIONS OF MR. SMITH'S COMPETENCY TO STAND TRIAL AND HIS FAILURE TO REQUEST A COMPETENCY HEARING

As discussed in Claims VI and VII, infra, serious doubts existed at the time of trial regarding Mr. Smith's competency to

stand trial. Defense counsel had those doubts himself, requesting competency evaluations pretrial and again before Mr. Smith's sentencing. Despite requesting those evaluations, however, defense counsel did little else. He conducted no background investigation and provided the experts with none of the readily available information regarding Mr. Smith's history of mental illness, head injury, and childhood neglect and abuse. Counsel thus failed to ensure that the experts performed thorough and professional evaluations, and failed to protect Mr. Smith's right to adequate mental health expert assistance. See Claims VI and VII, infra; Ake v. Oklahoma, 470 U.S. 68 (1985); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). As a result of counsel's failures, the doubts regarding Mr. Smith's competency were never resolved. A professionally competent mental health evaluation would have revealed that Mr. Smith was not competent to stand trial. See Claims VI and VII, infra, discussing report of Dr. Pat Fleming.

Although the experts indicated that Mr. Smith suffered from mental illness and that his competency was questionable, defense counsel failed to request a competency hearing. At such a hearing, counsel could have examined the experts, elicited the reasons for their doubts, and established that despite the experts' ultimate (questionable) conclusions finding Mr. Smith competent, that in fact Mr. Smith was not competent. As a result of counsel's failures, an incompetent defendant was forced to undergo trial and capital sentencing. Mr. Smith's fifth, sixth, eighth, and fourteenth amendment rights were violated. An evidentiary hearing and Rule 3.850 relief are required.

F. OTHER FAILURES

Defense counsel committed numerous other unreasonable errors, to Mr. Smith's substantial prejudice. For example, post-trial, counsel moved for the appointment of an expert chemist to examine and test the vaginal smears from the victim. The State had found intact spermatozoa from the vaginal smears but were unable to determine the blood type. As trial counsel indicated in the motion:

> That if any independent chemist, with more sophisticated equipment than Mr. Seiden had at his disposal, were allowed to perform his own tests on the items in question he might be able to pick up a blood group substance and if that blood group substance is different from the Defendant's then the jury convicted an innocent man.

(R. 1536). Moreover, counsel argued this possibility to the jury at the sentencing phase as a justification for a life sentence. Trial counsel was ineffective for failing to move for appointment of a chemist and to have the vaginal smears examined prior to trial. The resulting prejudice is clear. Counsel's failure to investigate this critical aspect of the case in a timely manner resulted in the loss of potentially exculpatory evidence.

All of the State's identification witnesses who testified that Mr. Smith was the man near the scene of the murder indicated that the man was not wearing slasses. The significance of this was never brought before the jury. Mr. Smith has very poor eyesight. His vision is 20/400 in both eyes. Trial counsel was ineffective for failing to call an expert witness on this point.

Walter Hathaway, O.D., an optometrist retained by undersigned counsel, has opined that Mr. Smith would have extreme difficulty navigating at night without his eyeglasses and had

serious doubts that Mr. Smith could have even gotten into the victim's house:

> I have reviewed the information packet you sent to me on this case. Mr. Smith is extremely nearsighted. It would be virtually impossible for him to escape from the crime scene without glasses. In fact it would be difficult for him to find the door either to enter or exit the crime scene. I can give you a pair of glasses which will make you as nearsighted as Mr. Smith. This might be helpful in illustrating why it would be impossible for him to do what he is accused of doing.

(PC-R. 352). This testimony would have been extremely powerful in light of the questionable identifications by the State's witnesses. There can be no sound tactical reason for failing to develop and present this evidence.

As indicated in Mr. Smith's direct appeal, trial counsel failed to object to several instances in which the prosecutor overstepped the bounds of fair advocacy. He failed to object to the prosecutor's closing argument when he commented upon Mr. Smith's courtroom actions that the prosecutor himself coerced and, more importantly, on Mr. Smith's failure to testify (R. 1167). He also failed to object to portions of the prosecutor's closing arguments when he called Mr. Smith a "weirdo" (R. 1157) and emphasized Mrs. McGriff's emotional outburst on the stand (R. 1174). Trial counsel also failed to object to the use of the impeachment testimony of Mr. Davis by the prosecution as substantive evidence. The cumulative effect of these omissions prejudiced Mr. Smith, as this Court on direct appeal refused to address the prosecutor's misconduct and ruled the issue was procedurally barred. Smith v. State, 515 So. 2d 182, 183 (Fla. 1987). No tactical or strategic explanation can be found for counsel's failures, which could only have been the result of

ignorance and neglect.

G. CONCLUSION

It would be difficult to construct from whole cloth a scenario in which a capital defendant received more ineffective representation than Mr. Smith received. There was ample readily available evidence of Mr. Smith's innocence. Because trial counsel failed to adequately investigate, prepare, and present that evidence, Mr. Smith's jury never heard it.

The circuit court summarily denied relief, making no findings whatsoever and refusing to conduct an evidentiary hearing. At a minimum, Mr. Smith's allegations require an evidentiary hearing, for the files and records in this case by no means "conclusively show that [Mr. Smith] is entitled to no relief." Lemon v. State, 498 So.2d 923 (Fla. 1986) (emphasis added), citing, inter alia, Fla. R. Crim. P. 3.850. Obviously, the question of whether a capital defendant was denied the effective assistance of counsel is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. See O'Callaghan v. State, 461 So.2d 1354, 1355 (Fla. 1984); Squires v. State, 513 So.2d 138 (Fla. 1987); Groover v. State, 489 So.2d 15 (Fla. 1986). Mr. Smith simply seeks one opportunity to establish what he has alleged, and to prove his entitlement to Rule 3.850 relief.

Evidence existed to prove Mr. Smith's innocence. Evidence existed to disprove the State's case. This evidence was substantial, but it never got to court because counsel failed his client. Even with counsel's deficiencies, the weaknesses in the State's case left the jury with concerns -- they deliberated for

hours. Had counsel provided even a semblance of effective representation, Mr. Smith would not have been convicted. Counsel's neglect was grossly prejudicial. An evidentiary hearing and Rule **3.850** relief was and are required.

CLAIM II

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL AND EXCULPATORY EVIDENCE VIOLATED FRANK LEE SMITH'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State's withholding of material exculpatory information violates due process of law under the fourteenth amendment. If there is a reasonable probability that disclosure of the withheld information would have affected the conviction or sentence, relief is required. United States v. Bagley, **105** S. Ct. **3375** (1985). In this case, there is much more than a reasonable probability that the State's misconduct affected the verdict, for that misconduct directly resulted in the admission of false evidence -- the testimony of Chiquita Lowe -- which was the key to Mr. Smith's conviction. The State's misconduct also permitted the jury to believe that other suspects in the offense had been eliminated through police investigation when, in fact, no such elimination by investigation had occurred, a fact which the State failed to disclose.

As discussed above, the State's case against Mr. Smith rested entirely on very questionable identification testimony. The key witness was Chiquita Lowe, who positively identified Mr. Smith as a man she had encountered near the scene of the offense. Because the other identification testimony was highly suspect, see Claim I, supra, Lowe's testimony was essential to Mr. Smith's conviction. However, the State failed to disclose at trial the

lengths to which it went to obtain Ms. Lowe's testimony and the pressures put upon her to testify as she did. As Ms. Lowe has recently explained, she was pressured into identifying Mr. Smith by the State and was given false information about Mr. Smith in order to encourage her to make that identification, even though she knew when she saw Mr. Smith in court that he was not the man she had encountered near the victim's home:

> 4. The police detectives and the attorney told me the man had a scar under his eye. I never saw a scar and they knew that. The state attorney told me that the man on trial had committed several crimes just like the one that happened near my grandmother's house. The state attorney also told me that the man on trial was dangerous, guilty of the crime, and needed to be taken off the streets.
>
> 5. While I was in the courtroom telling about what I saw, I knew that the man on trial was too thin to be the same man I saw on the street. The police detectives and the state attorney put so much pressure on me to testify against the man on trial.
>
> 6. The state attorney told me not to worry about my testimony because the man would be locked up and electrocuted the following May. He also pointed out the man's entire family to me. I was just feeling so pressured.

(Amendment to PC-R. 5-6).

Clearly, information that Ms. Lowe was pressured by the State, that she was told Mr. Smith had committed similar crimes (he had not) and was guilty of this one, and that she was told not to worry about her testimony because Mr. Smith would soon be executed was exculpatory information which would have impeached the reliability of Lowe's trial testimony and which therefore should have been disclosed. Its nondisclosure allowed Ms. Lowe's trial testimony to stand virtually unimpeached. There can be no doubt that there is a reasonable probability that disclosure of the withheld information would have affected the outcome.

Bagley, supra.

The State's withholding did not stop there, however. The State also withheld its own serious doubts about Mr. Smith's guilt. In **1987**, two years after Mr. Smith's conviction, the state attorney was still investigating the case:

> On Tuesday, February **24, 1987,** this writer, as requested by A.S.A. William Dimitrouleas, compared the fingerprint standards of George Gregory Reddick to latent lifts reference B.S.O. Case **#85-4-5789.**
>
> All workable latents were previously identified by this writer; however, this writer compared the remaining latents of no value to Reddick's fingerprint standards, and found negative results.

(Broward County Sheriff's Department report)(PC-R. **353).** Nothing could be much more exculpatory and material **--** and therefore disclosable **--** than the prosecutor's own doubts regarding a defendant's guilt.

The State also failed to disclose that it had not, as law enforcement officers testified, eliminated the other suspects in the case but had simply abandoned the investigation of those suspects. There were numerous serious suspects who the police simply said "were eliminated as suspects" without providing any reasons for their elimination. One such suspect, Eddie Mosley, was, in fact, linked to over **30** sex crimes involving females from the ages of **7-70.** The police eventually **"narrowed"** down the list of Mosley's victims to ten, but never revealed this information to the defense. The most striking thing to note in all of this is the amazing likeness of Mosley to the composite photo developed by the State (See Introduction, supra). Frank Lee Smith had never been involved in any sex crimes and maintained his innocence of this charge. The entire case for the State

consisted of very shaky identifications by three unsure witnesses. Eddie Mosley fits the description given far better than Frank Lee Smith. The State never disclosed how they eliminated Mr. Mosley as a suspect.[3]

The prosecution's deliberate suppression of material, exculpatory evidence violates due process. Bradv v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, supra. Thus, the prosecutor must reveal to the defense any and all information that is helpful to the defense, regardless of whether defense counsel requests the specific information. See Bagley, supra. It is of no constitutional significance whether the prosecutor or law enforcement is responsible for the nondisclosure. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984).

The circuit court summarily denied relief, making no findings whatsoever and refusing to conduct an evidentiary hearing. At a minimum, Mr. Smith's allegations require an evidentiary hearing, for the files and records in this case by no means "conclusively show that [Mr. Smith] is entitled to no relief." Lemon v. State, 498 So. 2d 923 (Fla. 1986)(emphasis added), citing, inter alia, Fla. R. Crim. P. 3.850. Clearly, the question of whether the State withheld material exculpatory

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[3]Counsel also notes the absence of any handwritten notes from either the State Attorney file or the Sheriff's Department file. The conspicuous absence of such notes requires counsel to conclude that full disclosure under Chapter 119, Fla. Stat., has not been given. Therefore, it has been impossible for counsel to fully plead this claim, or to know whether further grounds for relief exist. Counsel respectfully urges that the Court stay Mr. Smith's execution and order full disclosure by the State.

evidence from the defense is a claim requiring an evidentiary hearing for its proper resolution. See Squires v. State, 513 So. 2d 138 (Fla. 1987). Rule 3.850 relief was and is required.

CLAIM III

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

This case involves much more than a simple violation of Brady v. Maryland, 373 U.S. 83 (1967). As long as fifty years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violated a criminal defendant's right to due process of law. Moonev v. Holohan, 294 U.S. 103 (1935). The fourteenth amendment's Due Process Clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berser v. United States, 295 U.S. 78, 88 (1935). "A prosecutor must refrain from improper methods calculated to produce a wrongful conviction." United States v. Rodriquez, 765 F.2d 1546, 59 (1985)(citing Berger, id.).[4]

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[4]The prosecution not only has the constitutional duty to fully disclose any deals it may make with its witnesses, United States v. Bagley, 105 S. Ct. 3375 (1985); Giglio v. United States, 405 U.S. 150 (1972), but also has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Moonev v. Holohan, supra, and to

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Not only did the State withhold evidence here, but it intentionally presented evidence to create a false impression. The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Agurs, supra, 427 U.S. 97, 103-04 and n.8 (1976). The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 150 U.S. at 153. Consequently, unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

Accordingly, in cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." United States v. Bagley, 105 S. Ct. 3375, 3382

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correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). Where, as here, the State uses false or misleading evidence, and suppresses material exculpatory and impeachment evidence, due process is violated whether the material evidence relates to a substantive issue, Alcorta, supra, the credibility of a State's witness, Napue, supra; Giglio v. United States, 405 U.S. at 154, or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated by the prosecution. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

(1985), quoting United States v. Agurs, 427 U.S. at 102. In sum, the most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's witness. The defendant is entitled to a new trial if there is anv reasonable likelihood, Bagley, supra, that the falsity could have affected the verdict. Bagley. The facts set forth in the Rule 3.850 motion demonstrate that these principles were flouted during the proceedings resulting in Mr. Smith's capital conviction and sentence of death. Thus, if there is "any reasonable likelihood" that uncorrected false and/or misleading testimony could have affected the verdicts at guilt-innocence or sentencing, Mr. Smith is entitled to relief. Obviously, here, there is much more than just a "likelihood" -- as the facts presented establish.

The defense's theory was one of mistaken identity -- that an awful crime occurred, but that Mr. Smith was not involved. Of course, the key aspect of the defense case was to establish that the identification testimony was mistaken. Another critical aspect of the defense case was to also try to show that Mr. Smith was not the only suspect.

Trial counsel attempted to establish that Mr. Smith was not the only suspect with Mrs. Shirley McGriff (R. 612). During the cross-examination of Detectives Scheff and Amabile, trial counsel did in fact establish that there were at least seven other suspects. Mr. Smith was robbed of the effectiveness of this evidence, however, when the detectives testified that they had eliminated all of *these* suspects through their investigation.

That was a lie, the detectives knew it the prosecutor knew it and the jury was misled.

In fact, the records of the Broward County Sheriff's Department indicate that the other suspects were not eliminated by investigation at all. Of particular importance is the fact that the Sheriff's Department had no information to eliminate Eddie Mosley as a suspect. Had the State not abandoned its investigation of the other suspects and focused entirely upon Mr. Smith, they would have discovered information in their possession which further implicated Mr. Mosley as the more likely suspect. The State had information in its possession which that Mosley has a history of sexual offenses involving girls and women in the same section of Ft. Lauderdale, that Mosley peddles stolen goods from a grocery cart (as the suspect in this case did), that Mosley has a pattern of approaching strangers from fields and asking for drugs (as Davis testified the suspect in this case did), that Mosley had a serious leg injury and walks with a limp (as Davis testified the suspect in this case did), and that Mosley is homosexual **(as** the suspect in this case indicated to Davis). The State never discovered this important information because they never conducted an investigation to eliminate Mr. Mosley as a suspect. The detectives' testimony to the contrary was false and materially misled the jury on a crucial issue.

This misrepresentation cannot be considered harmless in the context of this case. The jury deliberated for over eight hours and obviously struggled with the identification testimony. The existence of other possible suspects would have a direct impact on the jury's weighing of the credibility of the identification

testimony. It would support the defense theory and undermine the State's case. The State's use of this false testimony is a classic example of "a corruption of the truthseeking function of the trial process." United States v. Agurs, supra at 103-04.

This is not an isolated instance of prosecutorial overreaching and government misconduct. The same detectives were also involved in the use of the highly suspect identification procedures employed in this case. They gave Mrs. McGriff the composite sketch before showing her the photo lineup. They gave Mr. Davis the photo of Mr. Smith before conducting the live lineup.

The State Attorneys were also involved in other instances of overreaching. They effectively forced Mr. Gallagher, Mr. Smith's first defense attorney, to withdraw when they indicated that they were going to call Mr. Salantrie, another Assistant Public Defender, as a State witness. Mr. Salantrie represented Mr. Smith at the lineup. Mr. Gallagher withdrew, but the State never called Mr. Salantrie as a witness. Such heavy handed tactics indicate that the State had lost sight of the duty to ensure "justice shall be done." Burser v. United States, supra at 88.

Moreover, the prosecutor's coaching of the witnesses, particularly Mr. Davis, is equally improper. The prosecutor was seen pointing out Mr. Smith to his witness Mr. Davis prior to Davis' testimony. The net result was the presentation of additional misleading and false testimony to the jury.

The circuit court summarily denied relief, refusing to hold an evidentiary hearing. Given the opportunity, Mr. Smith can establish the State's presentation of false testimony at an

evidentiary hearing. At such time Mr. Smith will establish that his rights were violated and that he is entitled to relief under Giglio, supra, and Agurs, supra. An evidentiary hearing and Rule 3.850 relief are proper.

CLAIM IV

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. SMITH'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The factual basis for the ineffective assistance of counsel claim, the Brady claim, and the Giglio claim must not be viewed in isolation. The evidence that was never presented because of trial counsel's deficient performance, the suppressed evidence, and the false evidence become even more significant in light of the newly discovered evidence that has been found. With this newly discovered evidence, the theory defense counsel attempted to assert at trial that Mr. Smith was the wrong man is now more clearly focused. The nature of this evidence when viewed in conjunction with trial counsel's deficient performance and the Brady and Giglio violations certainly dictates a new trial. The newly discovered evidence, standing alone, warrants a new proceeding where a true adversarial testing can occur, a trial where the jury has an opportunity to hear both sides of the case. Richardson v. State, 14 F.L.W. 318 (Fla., June 29, 1989).

Eddie Lee Mosley, alias Jessie Smith, was originally a suspect in this case. After Mr. Smith was charged with the murder, the investigation focused upon proving that Mr. Smith was the perpetrator. The identification witnesses were never shown pictures of the other suspects. Unfortunately, the witnesses were never shown a photograph of Mr. Mosley. Had they been shown

a picture of him, they would have instantly recognized him as the man that they saw on the night of the crime, the man they later described, and the man that is portrayed in the composite sketch. They would have known that Mr. Smith was the wrong man, as Chiquita Lowe has recently attested:

> **8.** On December **20, 1989,** I was shown a photo and asked if this was the man who approached me and asked for fifty cents back in **1985.** When I looked at the picture everything came back to me. The photo is attached to this affidavit. The man in the photo is without a doubt the man I saw. I know that he is not the same man who was on trial for the little girl's murder. I am so sorry that the wrong man is in prison and sentenced to death. I had doubts in the courtroom but I was under so much pressure. Also, the state attorney told me about how dangerous the man was and how he needed to be locked up forever.
>
> 9. I feel so bad that I did not tell the state attorney about my doubts. I did not know what to do. I felt a lot of pressure to say that the man on trial was the man I saw, even though I had doubts, and the man's hair did look the same.
>
> 10. I swear on my mother's grave that the man in the photo is the man I saw on the street the night when the little girl was raped and killed. I identified the wrong man in the courtroom.

(Amendment to PC-R. **5-6).**

But the evidence goes beyond personal appearance. Since Mr. Smith's conviction, Mr. Mosley has been arrested, charged and indicted in two rape/murders. Additionally, he has been tied to six other rape/murders and five forceable sexual batteries between **1973** and **1987** and is a suspect in numerous others. All involved girls and women from the northwest section of Fort Lauderdale, the same area where Shandra Whitehead was killed. Mr. Mosley has an established record for violent sex crimes, and is considered by Fort Lauderdale police as the city's "most dangerous serial killer."

Moreover, police and corrections records regarding Mr. Mosley indicate strong resemblances between Mosley's patterns of behavior and those of the person encountered by Davis and Lowe. Both Mr. Davis and Ms. Lowe described the suspect's behavior as strange, delirious, and weird (R. **668-69, 750**). Mr. Mosley has an I.Q. of about **51** and has been found to be incompetent to stand trial on two occasions. Mr. Davis described the suspect as rugged looking (R. 750), unkept with kinky, knotted and uncombed hair (R. 751), and said that he appeared to be a **"bum"** (R. **756**). Mr. Mosley was a loner and spent much of his time living on the streets.

Chiquita Lowe testified at trial that about four days after the offense, a man came to her home trying to sell a television set, and that this man was the same person Lowe had seen near the victim's house (R. **677**). The suspect that allegedly tried to sell the T.V. to Ms. Lowe's grandmother brought the T.V. to the house in a shopping cart (R. **804**). Mr. Mosley's records establish that his usual routine was to steal things and then peddle them from a grocery cart. When Mr. Mosley was arrested in **1987**, he was pushing a shopping cart full of stolen plants down the street, and admitted that he was going to sell them. Upon his arrest, he also implicated himself in nine murders.

Davis testified that the person he encountered approached Davis from a field across from the victim's house (R. **745-46**), and asked Davis if he had any drugs and if he wanted to have sex (R. **748-49**). Mosley's records establish that he had a habit of approaching strangers from a field and asking them for drugs. In **1980**, Mosley was convicted of a sexual battery which occurred

after he "came out from a vacant field and asked [the victim] where he can sell some reefer." (D.O.C. records). In 1984, Mosley was charged with a sexual battery which occurred in a vacant field (Ft. Lauderdale Police Department records). During that assault, Mosley told the victim he had "not murdered all those girls" (Id.). In 1982, Mosley was charged with a robbery and battery which occurred after Mosley approached a car and asked the driver if he wanted to buy some drugs (Id.). These records also include mental health evaluations which have determined that Mosley is homosexual.

Davis also testified that the person he encountered "ran as if he was knock-knee'd, wasn't straight" (R. 756). Mosley's records establish that he suffered a serious leg injury as a child, at one time used a cane, and walks with a distinctive limp.

This crime involved the sexual assault and murder of an eight-year-old girl. Mosley's records include statements in which he has said he has no problem fulfilling his sexual needs because he watches the girls coming out of school and has no trouble finding someone to satisfy his sexual needs. At the time of the offense, when Davis refused the suspect's sexual advances, the suspect told Davis, "I guess I have to go back and jack myself off," (R. 749), and then headed for the victim's house (R. 750).

All of this information has only recently been uncovered by counsel for Mr. Smith. The resemblance to the composite drawing, the description, the history of sex crimes, the strange behavior, the M.O. of murders and the use of the shopping cart are more than

mere coincidence. This newly discovered evidence supports what Mr. Smith has contended all along -- that someone else committed the murder. This evidence, if available at the time of trial, would most certainly have affected the outcome.

Mr. Smith's request for relief based upon newly discovered evidence is properly before this Court. Richardson v. State, 14 F.L.W. 318 (Fla, June 29, 1989). Mr. Smith is entitled to an evidentiary hearing. He has provided information which must be taken "at face value" and thus is "sufficient to require an evidentiary hearing." ~~Lishtbourne v. Dugger~~, ___ So. 2d ___, 14 F.L.W. 376 (Fla. July, 20, 1989). Mr. Smith can establish that newly discovered evidence exists which was "unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." Indeed, here, some of the evidence did not exist until long after trial.

Mr. Smith urges this Court to recognize the importance this evidence would have had on the outcome of the trial. This evidence unquestionably undermines confidence in the reliability of Mr. Smith's conviction, a conviction which resulted in a sentence of death. The eighth amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences.[6]

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[6]The evidence presented in Mr. Smith's Rule 3.850 motion and herein demonstrates that the result of Mr. Smith's trial is unreliable. Richardson and Rule 3.850 provide to this Court the authority to "produce just results." The Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that

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The eighth amendment mandates that this Court not dismiss this newly discovered evidence. Mr. Smith submits that it more than sufficiently questions the reliability of his conviction and death sentence. When the newly discovered evidence is viewed in conjunction with the evidence never presented because of trial counsel's deficient performance, the evidence withheld in violation of Brady, and the false evidence presented, there can be no question that Mr. Smith's conviction cannot withstand the requirements of the eighth amendment and fourteenth amendment due process. An evidentiary hearing and, thereafter, Rule 3.850 relief are proper.

CLAIM V

MR. SMITH'S CONVICTION AND DEATH SENTENCE RESULTED FROM IMPERMISSIBLY SUGGESTIVE PRETRIAL IDENTIFICATION PROCEDURES WHICH CREATED A SUBSTANTIAL LIKELIHOOD OF MISIDENTIFICATION.

The case against Mr. Smith was far from overwhelming. The jury deliberated for over eight hours and twice asked the court to review testimony of one of the State's key witnesses. The

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death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gregg v. Georgia, 428 U.S. 153, 187 (1976); Reid v. Covert, 354 U.S. 1, 45-56 (1957) (Frankfurter, J., concurring); id. at 77 (Harlan, J., concurring). This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including those phases specifically concerned with guilt, Beck v. Alabama, 447 U.S. 625, 637-38 (1980). Amadeo v. Zant, 108 S. Ct. 1771 (1988). Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Gregg v. Georgia, 428 U.S. 153, 187 (1976), including full and fair post-conviction proceedings. See, e.g., Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980); Evans v. Bennet, 440 U.S. 1301, 1303 (1979)(Rehnquist, Circuit Justice).

State's case was strictly circumstantial -- there were no prints no blood stains, no serology evidence, no fiber particles. The State's entire case against Mr. Smith involved one innocuous statement and the identification evidence of three witnesses placing Mr. Smith near the scene of the murder.

The significance of the identification testimony to the State's case cannot be disputed -- it was the State's entire case. Nor can the fact that these identifications were the result of highly suggestive procedures be disputed -- the conditions under which the witnesses observed the suspect created a likelihood of mistaken identification and then the suggestive identification procedures employed made that likelihood a reality.

Eyewitness identification testimony must be suppressed if it results from an unreliable suggestive identification procedure that violates due process by creating a substantial likelihood of mistaken identification. Neil v. Biggers, 409 U.S. 188 (1972); Simmons v. United States, 390 U.S. 377 (1968). The reliability of identification testimony, viewed in the totality of the surrounding circumstances, controls. Manson v. Braithwaite, 432 U.S. 112 (1977). The identification testimony in this case was singularly unreliable.[7]

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[7]Unreliability leading to a danger of mistaken identification must be evaluated under the totality of the circumstances surrounding the challenged identification procedure. Stovall v. Denno, 388 U.S. 293 (1967). The "totality of the circumstances," including specific factors identified in Manson and Neil as indicia of reliability, must be weighed against "the corrupting effect of the suggestive identification itself." Manson at 114. It is thus a matter of degree -- the

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One of the State's identification witnesses was the victim's mother, Dorothy McGriff. On the night of the murder, as Mrs. McGriff returned home from work, she saw a man reaching into a window in her home (R. **635).** It was dark, and Mrs. McGriff was frightened, was not paying attention to the person's appearance, and did not get a good look at his face (R. **654-55).** Mrs. McGriff could not describe the person's face (R. **655),** because everything was dark from the man's head down to his shoulders (R. **656).** Mrs. McGriff gave a description to the police at the scene of a black male, medium build, blue jeans, suede shoes, short black afro and beard (R. **507).** She also described him as muscular, big, heavy-set like a football player, with a big stomach (R. **653).** Clearly, Mrs. McGriff did not see the suspect's face and could not recognize his face (R. **657-58 .**

With only this vague and unreliable description, Mrs. McGriff was shown a photo lineup. The procedures used to conduct the photo lineup were highly suggestive. Before being shown the photo lineup, she was shown a composite sketch of the suspect drawn with the assistance of the State's other two identification witnesses (R. **657),** and was told that a man had been arrested based on the sketch and that one of the photos was of him (R.

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more unnecessarily suggestive the identification procedure, the more likely the chance of irreparably mistaken identification which would require exclusion of the fatally unreliable testimony. Although "[r]eliability of properly admitted eyewitness identification, like credibility of other parts of the prosecution's case, is a matter for the jury, . . . in some cases procedures leading to eyewitness identification may be so defective as to make identification constitutionally inadmissible as a matter of law." Foster v. California, **394** U.S. **440, 442 n.2 (1969).** This is such a case.

659). Mrs. McGriff identified Mr. Smith from the photo lineup as the man she saw on the night of the murder. She identified him "from his shoulders" (R. 658). Clearly, this was an improper identification.

Another of the State's identification witnesses, Ms. Chiquita Lowe, saw a man in front of the victim's house on the evening of the murder. She described the man two days later as a black male, with pores on his face, a beard, straggly hair, oily skin, about five-eleven to six feet tall, and one hundred ninety to ninety five pounds. Ms. Lowe was asked to assist several police artists in drawing a composite. The procedure used was highly unusual in that she and Mr. Davis, another identification witness, each saw different artists and a composite was drawn. Then they switched artists and adjustments were made. Finally, Ms. Lowe and Mr. Davis were then brought together and final adjustments were made to the composite drawing first done with Ms. Lowe's assistance.

Several days later, Ms. Lowe was told by her grandmother that the man was at their house (R. 695). The grandmother "recognized" the man from the composite drawing. Ms. Lowe claims to have seen the back of the man's head and the side of his face (R. 699), although at her deposition she saw his back (R. *700).* Ms. Lowe then called the police reporting that she had seen the man again. That evening, the police came to her house and showed her a photo lineup. She identified Mr. Smith as the one that looked most like the suspect (R. *703).* She was never shown a live lineup (R. *703).* As with McGriff this procedure was also highly suggestive. Further, as is now known, the State pressured

Ms. Lowe into making an identification (Amendment to PC-R. 4-5), enhancing the suggestibility of an already highly suggestive procedure.

The identification procedures used with Mr. Davis were even more troubling. He gave an initial description of the man he saw near the victim's home as a black male, six feet tall, 165-170 pounds, with a little belly, a real tacky beard that looked like he didn't keep it up, and real kinky hair. After assisting with the drawing of the composites and discussing the composite with Ms. Lowe, he was also shown a photo lineup. On the first occasion he could not identify anyone (R. 754). He did make an identification on the second photo lineup, saying Mr. Smith "looks like" the man he saw (R. 784). In fact, he indicated the police were acting in a suggestive manner (R. 786).

Because of this questionable identification, Mr. Davis was shown a live lineup. Before the lineup, Mr. Davis was shown a photograph of Mr. Smith (R. 789). During the lineup the officers asked him "do any of these guys look like the one in the picture" (R. 790-91). At the lineup, Davis was "bothered" because Mr. Smith did not seem as tall as the man Davis had seen, but Davis was reassured when the police told him all the men in the lineup were 6' or 6'1" tall (R. 757). Davis repeatedly told the police that Mr. Smith only "looked like" the man Davis had seen, but felt compelled by the police to make a selection from the lineup (R. 793). Mr. Davis picked out Mr. Smith. This identification was improper and highly suggestive. Mr. Davis' pretrial identifications should have been suppressed. He should never have been allowed to make an in-court identification. In fact,

prior to the in-court identification the prosecutor was seen pointing Mr. Smith out to Mr. Davis.

The procedures used in obtaining the identifications from all three witnesses were highly suggestive and unreliable. The unreliability of the resulting identifications has now been powerfully demonstrated: the witnesses identified the wrong man (Affidavit of Chiquita Lowe)(Amendment to PC-R. 4-7). Without the questionable identifications, Mr. Smith could not have been convicted. The circumstances leading up to and surrounding the identifications of Mr. Smith created an irreparable likelihood of misidentification. An evidentiary hearing is required, and relief is proper.

CLAIM VI

MR. SMITH WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERTS WHO EVALUATED HIM AT TRIAL FAILED TO CONDUCT PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS, AND BECAUSE DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE, RESULTING IN A TRIAL AT WHICH MR. SMITH WAS INCOMPETENT TO PROCEED, AND IN THE DEPRIVATION OF MR. SMITH'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL GUILT-INNOCENCE AND SENTENCING DETERMINATION.

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, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States V. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

When 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).

The experts appointed in this case, Drs. Zager, Krieger and Cohn, either because of court imposed restrictions, their own failures or counsel's failure to provide necessary information, failed to provide the professionally adequate expert mental health assistance to which Mr. Smith was entitled. Dr. Krieger was originally appointed as a confidential expert for the defense (Circuit Court file). When concerns regarding Mr. Smith's competency continued, the court appointed Dr. Jess Cohn and Dr. Arnold Zager. Prior to sentencing, the court asked for an assessment of Mr. Smith's sanity to be sentenced. Drs. Cohn, Zager and Cahn did those evaluations.

None of the experts were provided with any background materials regarding Mr. Smith. In fact, Dr. Cohn noted in his August 7, 1985, report (Dr. Cohn report):

> DIAGNOSIS
>
> Deferred, because of the paucity of data that otherwise could be contributory to the establishment of a clinical diagnosis.

Dr. Krieger testified at the penalty phase that he "didn't have enough information to make a statement of what [Mr. Smith's] mental state was at the time of the offense" (R. 1307). No

adequate testing was performed. In fact, none of the reports indicate that *any* testing was performed.

Each of the experts had obvious questions about Mr. Smith's competency. Dr. Krieger reported:

> When asked if he has any contact with his family he replied that he "communicates" with them, but implying that it was neither by telephone or letter.
>
> * * *
>
> His speech was strident, pressured, and intense. At times the content was illogical. There was evidence of both grandiose and persecutory delusions. Behavior suggestive of active hallucinations was not observed but would be consistent with the rest of his clinical presentation.

(Dr. Krieger report)(emphasis added). In conclusion, Dr. Krieger stated:

> Conclusions: The defendant is not floridly psychotic, but manifests some breakdown in thinking and delusional patterns which suggest the presence of a major mental illness with paranoid features. I have no information to the contrary, but it seems unlikely that he has never been treated for psychiatric problems in the past.

With all of these questions, Dr. Krieger did not seek any further information, did no testing, did not consult with Mr. Smith's attorney, and found Mr. Smith "marginally competent" (Dr. Krieger report)(emphasis added).

The other experts also reported mixed findings:

> He appeared to demonstrate some paranoid ideation but did not disclose overt paranoid delusions.
>
> * * *
>
> He appears to at least demonstrate an underlying paranoid personality disorder characterized by suspiciousness, evasiveness and argumentativeness. Nevertheless, the subject does not appear to be actively psychotic but will be a challense to his attorney to properly represent him because of his particular personality disorder. Nevertheless, the

> subject should be considered competent to go forward with the legal process.

(Report of Dr. Zager)(emphasis added).

Dr. Cohn performed no testing either, but acknowledged:

> admittedly, information obtained for this evaluation was obtained only from the Defendant.

(Dr. Cohn report). He deferred diagnosis for lack of information, but proceeded to declare Mr. Smith competent to proceed to trial (Id.).

These evaluations were, in fact, grossly inadequate -- and admittedly so. At sentencing, Dr. Krieger acknowledged that the brief evaluations were done in order to "save the tax payers money" (R. **1305**). He had spent a total of **1** hour and **15** minutes with Mr. Smith and that was for two meetings (R. **1304**). Dr. Krieger reported the need for "further evaluation" (R. **1305**), but no "further evaluation" was ever done. No adequate testing was performed. A cursory interview and pro forma presentation of opinions based solely on what little was gleaned from such an interview is all the mental health **"assistance"** that Mr. Smith received. This is by no means enough, Mason v. State, **489** So. 2d at **735-37**, and falls far short of what the law and the profession mandate. See State v. Sireci, **536** So. 2d **231** (Fla. **1988**).

Well-established standards for psychiatric and psychological evaluations were extant at the time the experts saw Mr. Smith, but were not even approximated by these experts. The experts simply failed to diagnose and evaluate Mr. Smith in *any* reasonably professional competent way whatsoever. As Dr. Krieger stated, that may have been because of the court's desire to save money and therefore provide minimal reimbursement for expert

services.

Florida law also provides, and thus provided Mr. Smith, with a state law right to professionally adequate mental health assistance. See, e.g., Mason, supra; cf. Fla. R. Crim. P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal Due Process Clause. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 427 U.S. 215, 223-27 (1976). In this case, both the state law interest and the federal right were arbitrarily denied.[8]

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[8] In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court recognized that the due process clause entitles an indigent defendant not just to a mental health evaluation, but also to a professionally valid evaluation. Because the psychiatrists who evaluated Mr. Mason pre-trial did not know about his "extensive history of mental retardation, drug abuse and psychotic behavior," id. at 736, or his "history indicative of organic brain damage," id. at 737, and because this court recognized that the evaluations of Mr. Mason's mental status would be "flawed" if the physicians had "neglect[ed] a history" such as this, id. at 736-37, this Court remanded Mr. Mason's case for an evidentiary hearing. Id. at 735.

In State v. Sireci, 502 So. 2d 1221 (1987), this Court recognized that the due process clause entitled an indigent defendant to a professionally competent and appropriate psychological evaluation. At trial, Sireci had been examined by two psychiatrists. During collateral proceedings, Sireci was examined by a third psychiatrist who, unlike the previous mental health examiners, took into account Sireci's past medical history. Highly critical of the procedures used by the original two psychiatrists, the third psychiatrist "reached a vastly different conclusion." Id. at 1222. The post-conviction psychiatric evaluation found that Mr. Sireci suffered from a form of organic brain damage. This Court affirmed the trial court's order setting an evidentiary hearing on Sireci's claim, reasoning that "a new sentencing hearing is mandated in cases which entail psychiatric examinations so grossly insufficient that they ignore clear indications of either mental retardation or organic brain

(footnote continued on following page)

Although the mental health experts could have had access to information regarding Mr. Smith's background had they sought it, they did not seek nor were they provided with the relevant information regarding early head injury and serious neglect and trauma from which Mr. Smith suffered. If they had only done minimal investigation, they would have learned:

(footnote continued from previous page)

damage." Id. (emphasis added).

On remand, the state trial court vacated Mr. Sireci's sentence of death and ordered resentencing. This Court affirmed, accepting the trial court's finding:

> [T]here is substantial evidence that the Defendant's organic brain disorder existed at the time the defendant murdered Henry Poteet. That circumstances existed at the time of the defendant's pre-trial examination by the Court appointed psychiatrists which required, under reasonable medical standards at the time, additional testing to determine the existence of organic brain damage.
>
> The failure of the Court appointed psychiatrist to discover these circumstances and to order additional testing based on the circumstances known deprived the defendant of due process by denying him the opportunity through an appropriate psychiatrist examination to develop factors in mitigation of the imposition of the death penalty.

State v. Sireci, 536 So. 2d 231, 233 (Fla. 1988).

On the basis of generally-agreed upon principles, the standard of care for a proper mental health evaluation reflects the need for a careful assessment of medical and organic factors contributing to or causing psychiatric or psychological dysfunction. Kaplan and Sadock at 543. As explained in Mr. Smith's Rule 3.850 Motion to Vacate Judgment and Sentence, the method of assessment must include the following steps: An accurate medical and social history must be obtained (Motion at 48-49). Historical data must be obtained not only from the patient, but from sources independent of the patient (Id. at 49-51). A thorough physical examination (including neurological examination) must be conducted (Id. at 51). Appropriate diagnostic studies must be undertaken in light of the history and physical examination (Id. at 51-52). The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the patient's mental illness (Id. at 52-53).

> The subject was born in Valdosta, Georgia on 7-20-47, the second of three children in his family. His early childhood was a turmoil of confusion. It was marked by the death of his father by police bullets when he was one year old; the criminality of his parents, the careless attitude of his mother toward his care, the poverty and the unhealthy psychological atmosphere that prevailed in the home. At the age of seven, authorities removed him from his mother's home because he was not receiving the proper care and placed him in a foster home where he remained until the age of ten. At that time, he began living with his grandmother in Fort Lauderdale, Florida where he lived until the age of seventeen. He has had no stable masculine figure at any time in his life, and therefore has developed no father image. He has not lived with his mother on any regular basis since he was seven years old. He says that his discipline during his childhood was applied by his grandmother and that there was quite a bit of it, but it was not enough. He describes the living conditions of his home as poor. The home has been fairly stable geographically as he lived in Valdosta, Georgia until the age of five, at which time he moved to Fort Lauderdale, Florida and remained in that immediate vicinity until the present.
>
> The subject's health appears to be good and he related only two periods of hospitalization in his life. The first of these occurred when he was three years old when he suffered a head injury as a result of a blow on the head with a coke bottle. At the age of sixteen, he again suffered a head injury with a blackjack. When he was fifteen years old, his leg was broken in football. He has 20/400 vision in both his eyes and because of that, has been graded medically #3 Light Duty.

(D.O.C. report).

In fact, a thorough review of background information and collateral data is <u>most critical</u> in forensic cases and, especially in cases involving mentally ill clients. As is obvious, the client's mental illness will invariably preclude any ability to accurately relay facts. Mr. Smith's mental illness was and is patently obvious. His self-history is unreliable in that he chooses to characterize himself either in grandiose fashion or conversely in a self depreciating way, completely overlooking a realistic view of himself or his history. His

behavior and his background demonstrated substantial and longstanding mental health problems. His problems were patently obvious even to law enforcement officials, who obviously lacked the special training that is considered to be the province of the mental health expert. Mr. Smith's problems were readily recognized by his attorney, who renewed his request for mental health assistance even through sentencing (R. 1538, 1539). The mental health professionals, however, did not seek out or use critical and available background information. They failed to undertake the procedures necessary to an adequate evaluation. They simply failed to look or to notice the obvious, that Mr. Smith is a mentally ill individual who was mentally incompetent to waive his right to remain silent or to stand trial. His evaluation was not professionally adequate.

It is especially important that the mental health professional consider the patient's history of head injury as well as alcohol and/or drug abuse. Here, such factors as brain damage were ignored. Had adequate information been obtained, Mr. Smith's long history of delusional thinking, hallucinations and overall mental illness would have been revealed. The experts failed to obtain or assess this information.

The experts here failed to meet the professionally recognized standard of care. Either because of court imposed financial restrictions, their own inadequacies, or defense counsel's failure to provide the necessary background information, none of the experts obtained background materials, performed any testing or consulted with Mr. Smith's attorney.

The professional inadequacies in Mr. Smith's pretrial

evaluations are clear on the record. The experts admitted that they had no background information and thus could not reach definitive conclusions. A review of available information would have demonstrated that Mr. Smith, as a result of his mental illness, was not competent to stand trial, was not competent to waive his right to remain silent or his right to counsel, and that a plethora of mitigating circumstances were more than readily available.

Had the experts adequately evaluated and considered the readily available information concerning Mr. Smith, they would have found that his background demonstrated not only serious mental illness but the strong possibility of organic mental impairments. Had they considered any of the available information, they would have discovered that Mr. Smith was severely abused and neglected as a child to the point of having been removed from his mother's house at age 7. Had the expert conducted adequate testing, Mr. Smith's mental impairments would again have been made obvious. The necessary testing, however, was <u>never</u> provided.

Frank Lee Smith simply did <u>not</u> receive the professional mental health assistance to which he was entitled. Organic brain damage was not considered. His overt mental illness was disregarded.

Overall, the evaluations conducted were totally inadequate to discover the mental health problems in existence. Either because of the pressures from the court or because of their own failures, none of the experts performed even a minimally acceptable professional evaluation. Nor did defense counsel

provide the experts with knowledge he had and in so doing his performance was deficient. These deficiencies were clearly prejudicial to Mr. Smith since both statutory and nonstatutory mitigation was lost. In fact, defense counsel did not even tal to the mental health experts about statutory or nonstatutory mitigation, as reflected by his penalty phase examination of Drs. Krieger and Zager. During those examinations, defense counsel never mentioned the word "mitigation" and did not ask about statutory or nonstatutory mitigating factors. Obviously, as Dr. Krieger testified, defense counsel had not provided the background information necessary for the experts to evaluate Mr. Smith's mental status at the time of the offense. Although Mr. Smith's ability to conform his conduct to the requirements of law was substantially impaired, no evidence concerning this circumstance got to the sentencing judge and jury. Although Mr. Smith was suffering from an extreme emotional disturbance, the jury and judge never heard about it. Mr. Smith was mentally ill. His family history reflected that he was raised in a family with little or no affection, but rather with serious physical abuse.

In sum, had Mr. Smith been provided with a professionally adequate evaluation, significant competency, insanity, diminished capacity, and mental health mitigation issues would have been presented for the consideration of the judge and jury. Sadly, the issues were ignored. The experts failed. As a result, Mr. Smith's capital trial and sentencing proceedings were rendered fundamentally unreliable and unfair. Of course, the professional inadequacies involved in the experts' evaluations had the devastating effect of ultimately depriving Mr. Smith of the

effective representation of counsel. Important and dispositive guilt-innocence and penalty phase defenses were ignored. The resulting conviction and sentence are unreliable. There was a significant question of guilt-innocence in this case and Mr. Smith's attorney even stated that the entire case was a question of identification. Yet, counsel failed to have a mental health expert assist even in that area. If he had, he would have discovered that this particular crime was completely out of character for Mr. Smith. He had never been convicted of any sex crime, and the deviant nature of this one simply does not fit within the psychological makeup of Frank Lee Smith. Clearly that evidence alone would not be conclusive but when added to the equation to counterbalance the State's very shaky case, it clearly would have had an effect, especially when one considers the jury deliberated for 8 1/2 hours without such evidence.

As discussed in the introductory section to this claim, the duty to protect the client's right to professionally adequate mental health assistance does not rest solely with the mental health professional. Counsel must discharge significant responsibilities as well. See Blake, supra; Fessel, supra; O'Callaghan, supra. Here, counsel failed in that duty. He neither obtained nor provided the expert with the history of family abuse, hospitalization, or any other mental health history. No request was made that the expert consider mitigation. Dr. Zager and Dr. Krieger were called at the penalty phase and testified to Mr. Smith's mental illness but counsel had not provided them with the background material so important in determining whether mitigation was present. Background records

indicated a disordered and illogical thought process many years before this offense occurred (UCI psychological screening, **1976),** and other available information would have given the experts a more accurate picture of Frank Lee Smith (See Claim VIII, p. 104-**115).**

Had counsel and the experts performed competently, substantial mental health evidence relevant to both guilt-innocence and penalty would have been developed. Dr. Pat Fleming, an eminently qualified clinical psychologist, has now reviewed extensive background materials and conducted the necessary psychological testing. Her report, in stark contrast to those produced at the time of trial, reveals the gross failures of counsel and the pretrial experts:

> REASON FOR EVALUATION
>
> Frank Smith was evaluated at the request of the Capital Collateral Representative (CCR) regarding the psychological and mental status of Mr. Smith who has been sentenced to death by electrocution. Given the time constraints, I am providing a summacy of my findings.
>
> EVALUATION PROCEDURES
>
> Frank Smith was evaluated for a total of eight hours at Florida State Prison, Stark, Florida on **89-12-07.** Additional testing was completed **89-12-07** for approximately two hours. The evaluation procedure included a clinical interview which covered family and interpersonal relationships, school and work experiences. Behavioral observations and quality of thought processes were noted.
>
> Formal tests administered include: Wechsler Adult Intelligence Scale-Revised, (Wais-R), Spelling and Reading of Wide Range Achievement Test - Revised, Logical Memory, Verbal Paired Associates, Halsted-Reitan Neuropsychological Test Battery including Category Test, Tactual Performance Test, Seashore Rhythm Test, Speech-sounds Perception Test, Finger Oscillation Test; Trail Making Test, Part A and B, Strength of Grip, Miles ABC Test of Ocular Dominance, Reitan-Klove Tactile Form Recognition Test, Reitan-

Klove Sensory Perceptual Exam, Tactile Finger Recognition, Finger-tip Writing, Reitan-Klove Lateral Dominance Exam, Minnesota Multiphasic Personality Inventory (MMPI), and Bender - Gestalt.

In addition to the formal tests and the clinical interview, and extensive review of records was completed with included, among other documents:

Florida Supreme Court Opinion, No. **68-834**
Florida State Prison Inmate File
Penalty Phase Testimony of Frank Lee Smith, and other manuscripts
Presentence Investigation
Testimony of Dr. Seth Krieger
File of Dr. Seth Krieger
Testimony of Dr. Arnold S. Zager
File of Dr. Burton Cahn
File of Dr. Jess V. Cohn
Florida State Prison Medical File
School Records
Parole/Probation Records

BEHAVIORAL OBSERVATIONS

Mr. Smith is a **5'9", 160** pound negro. He was neatly dressed. He wears very think glasses and examined some written information at a close distance. Hearing was adequate and he did not require repetitions of questions except when distracted. He did not exhibit unusual symptoms of tension such as trembling, twitching, or ticks. He was restless, particularly when closely questioned regarding delusional conversation. Eye contact was poor. He frequently would look away during the conversation as if he were talking to another person. Speech was periodically accelerated although not difficult to understand. Articulation was good with no apparent problems. Volume was adequate for social conversation. Quality of speech was odd with loose associations, disorganization, rambling and confusion, with frequent switching in subjects so that conversation was illogical and incoherent at times.

Mr. Smith entered the testing room with a guarded attitude initially. The purpose of the evaluation was presented, which included that the information was not confidential. This information elicited a stream of conversation about the Shield of Solomon and forces that protected him. Throughout the interview, conversation was rambling, disjointed, with the notion of being controlled by outside forces.

He switched topics quickly. When questioned regarding information that indicated delusional thinking, he would become defensive. He noted that

psychiatrists played with your mind. As the interview progressed he became less agitated but his difficulty in concentration and inability to stay on one subject continued. He put forth good effort during the formal testing and wanted to be seen as "normal." He tended to minimize problems, both his own and family of origin. His explanations of events were consistently focused on outside forces with a strong religious component.

The evaluation results are felt to be an adequate representation of his functioning. Mr. Smith put forth effort to succeed.

BACKGROUND INFORMATION

Family History

Mr. Smith's account of his early history was difficult to follow. He knew that his father was shot when he was "two or three" but then gave a detailed description of his battle with a cougar to bring his father home. He was able to communicate with and conquer the cougar through the help of an outside force. He remembers and can describe clearly being in his mother's womb and knows that she came from another planet. He also recognizes that she was raped and murdered when he was in prison. Records indicate that Frank's father died as a result of a bullet wound when Frank was one year old. Frank clearly states that his mother was a "wonderful woman" who was anointed to be his hand maiden. The records indicate that he did not have the "necessary love or care" and his mother had a criminal record, drank heavily and cohabited with known criminals.

At the age of seven Frank was placed in a Foster Home and never lived with his mother on a regular basis after that time. He was returned to live with his maternal grandmother at age ten who lived in Fort Lauderdale, Florida. Records indicate that Frank was initially removed from the mother's home due to the improper care. Frank does not recollect physical abuse from his mother or grandmother.

Mr. Smith reports one older brother who is now in a Ft. Lauderdale prison and an older sister. He reports he does not know the whereabouts of two older brothers and that one older sister was killed. He became confused in his description of his siblings. Records indicate that he has one older brother and a half sister.

Records indicate that both parents lived in the criminal world, in poverty, and neglect, turmoil, confusion, an "unhealthy psychological atmosphere."

At age thirteen years Frank was assigned to Okeechobee Florida School on a Manslaughter charge as a result of a fight with another student. He remained there for ten months and was committed again to the Florida School for Boys at Okeechobee for charges of breaking and entering. He was released on 10-13-64.

Education History

Frank reportedly entered school late (eight years) for undetermined reasons. School records were difficult to read due to poor copying but other reports indicate that he earned average grades but was frequently absent from school. In his second commitment to Okeechobee he earned A, B, and C grades and was enrolled in the ninth grade. He did not continue his education upon release.

Marital History

Mr. Smith has never married but states that he has had a number of relationships with women. Records indicate a common law relationship with Donna Brown. The couple had one daughter. Mr. Smith notes that he has had 14 children, all of whom are living. He also reports a child born as a result of relationship while he has been on death row at Florida State Prison.

Mr. Smith reports a heterosexual orientation.

Occupational History

Mr. Smith has limited vocational skills. He notes that he worked at different jobs during the five years prior to arrest on the last charges. He has had a variety of simple, repetitive jobs for short periods including dishwasher, car washer, and lawn work.

Medical History

Frank apparently did not have significant health problems during his youth or adult life. He had two significant head injuries. One injury occurred at age three when he was hit in the left temporal lobe with a coke bottle resulting in a severe open wound, and another in his teens when he was hit at the base of the skull with a black jack. He also sustained a leg injury during his teens while playing football.

Visual functioning is poor. Frank wear thick glasses and one reference noted vision of 20/200. Hearing is adequate. Sleep is disturbed. He noted that he frequently doers not sleep at night and does not have an established sleep pattern. Headaches occur approximately once a week.

Mr. Smith was a heavy alcohol user. Both alcohol and drug use were limited due to finances and long periods of incarceration.

EVALUATION RESULTS

Intellectual Functioning

During the intellectual evaluation Mr. Smith had a tendency to drift and would relate unrelated incidents. He frequently would preface remarks with "I hear that it is.... "

As measured by the Wechsler Adult Intelligence Scale - Revised (WAIS-R) the Full Scale IQ of 83, Verbal IQ of **81** and Performance IQ of **86** places Mr. Smith in the Borderline range of intellectual functioning. (Diagnostic and Statistical Manual of Mental Disorders Classification). He had particular difficulty on those subtests while require attention and concentration (Digit Span ss 5, Arithmetic SS 7, Digit Symbol ss 5). Digit Symbol is the subtest most sensitive to brain damage and was the lowest of the eleven subtests in the WAIS-R battery. He had difficulty answering questions that required abstract thinking and organization of ideas. He gave concrete answers, for example, "How are a boat and automobile alike?" he responded that you ride on the back. He lacked awareness of proper responses to everyday situations: "Why are child labor laws needed?", response was birth control...abortion. When questioned why people who were born deaf are usually unable to speak, Mr. Smith stated it was because of the syllabus...when questioned further, he pointed to his neck.

Mr. Smith's performance on an expanded version of the Halstead-Reitan Neuropsychological Battery yields an overall picture of cerebral dysfunction. Mr. Smith earned an Impairment Index of 5.7. An index rating above **4.0** is consistent with the ratings of patients with known brain damage. He was impaired on tests of psychomotor problem solving ability (Tactual Performance Test) and sustained attention and concentration (Seashore Rhythm Test). He was in the severely impaired range on logical short term memory. He was in the impaired range of tests of logical analysis and new concept formation (Category Test) and perseverative thinking (Wisconsin Card Sorting Test). He did not learn new verbal information with efficiency. He showed mild constructional dyspraxia. The Bender-Gestalt showed disorganization with run-on figures.

Visual fields were full to gross confrontation and

I found no evidence of finger dysgnosia, graphesthesia dysterognosis, or tendencies to suppress tactile, visual, or auditory stimulation to either side of his body. He performed within normal limits with both hands on tests of pure motor speed, (Finger Tapping Test), grip strength (Hand Dynamometer). He earned a good score on a test that requires fine discrimination of verbal auditory stimuli (Speech-Sounds Perception Test). Screening for Aphasia did not indicate significant problems. These tests measure only basic sensory-perception functioning. Mr. Smith's diminished/impaired cognitive functioning and difficulties with abstractions are reflective in the other tests noted above, which were developed for that purpose.

Implications of Halstead-Reitan Results

These test results suggest generalized cerebral dysfunction. Given Mr. Smith's history of severe head injury at three years and the subsequent head injury at fifteen years, it is likely that his deficits are a result of these injuries. It is known that children reared in an environment of neglect and or abuse are more likely to suffer head injuries. Mr. Smith's early environment has been documented to have been chaotic with criminality and limited supervision or direction.

Academic Functioning

As measured by the WRAT-R, reading level is beginning tenth grade and spelling beginning 8th grade.

Minnesota Multiphasic Personality Inventory (MMPI)

These test results are typical of clinical patients who are confused, distractable, and show memory problems. The test protocol indicates an unusual number of psychological symptoms indicating a high degree of distress and possible personality deterioration. Evidence of delusions and thought disorder are indicated.

The response content indicates that Mr. Smith may feel estranged, alienated and blame others. His responses indicate impulsivity, and suspiciousness. Difficulty in interpersonal relationships is indicated. The MMPI profile shows an exaggerated or grandiose idea of his own capabilities and personal worth.

The MMPI Megargee system of classifying male criminal offenders has been found to be useful typology for incarcerated individuals. The procedure allows for the classification of about two-thirds of the offender population with over 90 percent accuracy. Mr. Smith's MMPI profile is not classifiable according to the

Megargee criminal offender rules. This indicates that his profile does not match the profiles that typically characterize convicted felons. Mr. Smith's test results and behavior support this finding.

The interview and test results support significant psychological problems. At the present time Mr. Smith has difficulty staying in contact with reality. He reports "interference" or intrusive thoughts. He cites instances of "forces" allowing him to communicate with animals and outside forces that he cannot talk about. He has the sensation of alien thoughts being put into his mind by some external agency. He evidences paranoid ideation. He knows that a "fate known as god is in conspiracy against me on the basis of religious thing." He states that the lawyers know who the real adversary is but he cannot talk about it. There are other adversaries that no one knows but he. He becomes very secretive when talking about these adversaries and then refuses to discuss it further.

Seth Krieger, PH.D. evaluated Mr. Smith July 11, 1985. He noted evidence of both grandiose and persecutory delusions. Dr. Krieger noted "although the defendant is not floridly psychotic he manifests some breakdown in thinking and delusional patterns which suggest the presence of a major mental illness with paranoid features."

On a report of August 9, 1985, Dr. Zager noted that "He appears to at least demonstrate an underlying paranoid personality disorder characterized by suspiciousness, evasiveness, and argumentativeness."

Mr. Smith stated that he is unable to think too much about religion since he cannot think clearly. He struggles to maintain his thinking but clearly cannot maintain boundaries. He slips into the psychotic thought processes.

Presently Mr. Smith does not appear to be overwhelmed with anxiety regarding his sentence. He has become increasingly occupied with his religious themes, and thoughts become fragmented with loose associations. His continuing paranoia increases his fatigue and disrupts his sleep.

Mr. Smith has a flattened affect and a distant way of relating. He has consistently demonstrated aa inability to judge appropriate behavior. He maintains that he has fathered fourteen children as evidence of his ability to have close relationships and be acceptable. He does not see any discrepancies nor inconsistencies in statements that he has a son that he fathered while on death row.

Mr. Smith's thought processes are complicated by two factors: his inability to draw appropriate conclusions, organize his thoughts, and remember facts. These deficits are typical of patients with known brain damage. On top of these deficits are the paranoia and schizophrenic thinking that further disrupt his thoughts. He lacks the ability to be in control of his thoughts due to the paranoia and schizophrenic thought processes that increasingly control his responses. It is probable that he spends an increasing amount of time in delusional thoughts.

Mr. Smith's paranoia, well developed delusions, blunted affect, vague and tangential speech, odd beliefs, long history of ineffective interpersonal relationships, his failure to learn from experience, and his impulsivity are verified by his history, test results, and clinical observations. Mr. Smith consistently acknowledges the previous offenses and just as consistently denies the present charges. He is adamant that he would not harm a "baby", that he has no interest sexually in children, that he has never had any charges related to any sexual crimes. His delusions have not been of a sexual nature.

Implications of Findings

Mr. Smith's paranoid schizophrenic pattern was identified in 1985. This defendant's paranoia caus d him to view his lawyer as an adversary. He would have had extreme difficulty cooperating with his attorney, as is indicated on the record during his trial and sentencing, because of paranoia and schizophrenic functioning. Equal or more significant is the combination of the dysfunctional thought processes and inability to organize facts from the brain damage and schizophrenia.

Given his diminished capacity due to brain damage and his mental illness, including his paranoid schizophrenic thought process and accompanying delusional behavior, at the time of trial, Mr. Smith would have been unable to competently understand and rationally assist his attorney. I would opine, within a reasonable degree of medical certainty that Mr. Smith was not competent to assist in his own defense or to rationally understand the proceedings transpiring before him.

Mitigating Circumstances

Mr. Smith's early years were marked by poverty, neglect, and abandonment. Both parents were involved in criminality and both were killed. He did not have adequate *care* and certainly no adequate parenting.

He had two documented injuries that could have resulted in the brain damage...a serious head injury at age three and age 15. The behaviors and cognitive dysfunctions that are typical of organic mental disorders that Frank demonstrates include:

1. Disorientation to time and place
2. Memory impairment
3. Thinking disturbances
4. Disturbance in mood
5. Emotional ability
6. Impairment in impulse control

These symptoms were never evaluated nor tested previously. If the evaluating psychiatrists and psychologists had available the history of head injuries and results of the neuropsychological testing, their conclusions would likely have been modified.

Mr. Smith meets the diagnostic criteria for a schizophrenic disorder as outlined in DSM III and DSM III-R. He demonstrates psychotic features and deterioration that are persistent and which are documented in his records as being present for at least 10 years, as evidenced by:

1. Delusions
2. Incoherence, loosening of associations, illogical thinking, and poverty of content associated with blunt, flat, and inappropriate affect
3. Emotional withdrawal and isolation

Additionally, Mr. Smith is schizophrenic and this disorder is longstanding in nature. He meets the DSM-III and DSM-IIIR diagnostic criteria for this diagnosis. He meets the durational requirement and has exhibited

1. Social isolation or withdrawal
2. Marked impairment in role functioning as wage-earner
3. Marked impairment in personal hygiene and grooming
4. Flat or inappropriate affect

5. Odd or bizarre ideation or magical thinking

6. Unusual perceptual experiences

7. Digressive, vague, overelaborate or circumstantial speech

Based upon my evaluation of Mr. Smith, I would think that at the time of the offense Mr. Smith was under the influence of extreme mental disturbance and that his capacity to conform his conduct to the requirements of the law was substantially impaired.

(PC-R. 335-44). Dr. Fleming's professionally thorough evaluation demonstrates that counsel's and the experts' failures at the time of trial deprived Mr. Smith of substantial guilt-innocence and penalty phase evidence.

Mr. Smith was denied his fifth, sixth, eighth, and fourteenth amendment rights. The evaluations conducted in this case at the time of the trial were not professionally adequate. Counsel failed to assure that they would be, and the experts failed in their tasks. Consequently, Mr. Smith was tried and sentenced to death in violation of his due process and equal protection rights. Ake v. Oklahoma, supra. The professional inadequacies of the three mental health professionals whom he saw before trial resulted in the abrogation of Mr. Smith's right to not undergo a criminal prosecution when he was mentally incompetent to proceed. See Pate V. Robinson, 383 U.S. 375 (1965). The guilt-innocence phase was rendered fundamentally unreliable: available and provable mental health issues were ignored. At sentencing, a professionally adequate evaluation would have made a significant difference: substantial statutory and nonstatutory mitigation would have been established; aggravating factors would have been undermined. Again, when compared to the total absence of mitigation at sentencing, the

substantial prejudice suffered by Mr. Smith is more than plain.

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. Smith is "conclusively" entitled to "no relief" on this and its related claims. See Lemon v. State, 498 So. 2d 923 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984). An evidentiary hearing and, thereafter, Rule 3.850 relief were and are more than proper.

CLAIM VII

MR. SMITH WAS DENIED HIS RIGHTS TO A PRETRIAL COMPETENCY HEARING, AND HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS WHILE NOT LEGALLY COMPETENT.

The United States Constitution guarantees a defendant's right not to stand trial or sentencing while he is incompetent. Pate v. Robinson, 383 U.S. 375 (1966). This guarantee in turn requires trial courts to conduct competency hearings whenever there are reasonable grounds to suggest incompetency. Hill v. State, 473 So. 2d 1253, 1256-57 (Fla. 1985). A trial court's failure to hold a hearing deprives the defendant of a fair trial and entitles him to post-conviction relief. Hill, 473 So. 2d at 1259; Bundy v. Dusser, 816 F.2d 564 (11th Cir. 1987). Mr. Smith's trial court violated his constitutional rights by failing to hold a competency hearing; his attorney provided ineffective assistance by failing to investigate his mental health, to obtain adequate mental health evaluations, and to request a competency hearing.

Mr. Smith's trial attorney had a duty to investigate his mental health. Futch v. Dugger, 874 F.2d 1483, 1487 (11th Cir.

1989). There is 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). However, Mr. Smith's counsel failed to adequately investigate his mental health, failed to provide the experts with relevant and necessary background data, failed to properly present this information to the court, and failed to request an evidentiary hearing on competency. The failures of the court, the pretrial evaluators, and Mr. Smith's attorneys were interrelated. Everyone charged with the duty to protect Mr. Smith's rights instead simply ignored his mental illness.

A. INTRODUCTION

Mr. Smith's history is one of very questionable mental health. His traumatic childhood had taught him violence, neglect and deprivation which fed his mental and emotional instability. His father had been shot and killed by a police officer when Frank Lee was just a toddler. His mother, an alcoholic, was periodically living with different men of questionable character, and the abuse and neglect of her children was finally stopped when Frank and his siblings were removed from her home and placed in foster care. Frank was seven at that time, and then at age ten he went to live with an aging grandmother who was no disciplinarian. Frank's only role models were his older brother, Ruban, who was frequently in trouble, and other "street kids." His upbringing was consistently reported as deprived and "poor".

Mr. Smith also suffered serious head injury as a child and has clearly shown patterns of thought disorder that have consistently worsened over the years. Mr. Smith was finally

diagnosed in 1985 as suffering from a schizophrenic paranoid disorder.

The evidence of Mr. Smith's severe mental and emotional problems, and of his history of mental illness (evidence which the trial court should have but never did consider) is simply overwhelming. He should not have been forced to proceed to trial. A full and fair hearing should be held on the issue. The "experts" who saw Mr. Smith prior to trial failed to consider any of this evidence. They interviewed Mr. Smith, but invested little or no effort into seeking out the necessary collateral data or conducting the necessary testing. Defense counsel failed to seek out this information and provide it to the experts or the trial court.

B. MR. SMITH WAS ENTITLED TO A COMPETENCY HEARING AT THE TIME OF TRIAL

Defense counsel recognized that Mr. Smith was not competent to proceed and requested mental health assistance. The defense attorney's motion stated that he had

> reasonable grounds to believe the Defendant is incompetent to stand trial or that the Defendant may have been insane at the time of sentencing.

(Circuit Court file, June 11, 1985).

Dr. Seth Krieger had been appointed pretrial as a confidential defense expert to determine mental health questions relating to competency and sanity at time of the offense (Circuit Court file, June 12, 1985). On July 11, 1985, Dr. Krieger submitted his report to the defense attorney, concluding that Mr. Smith ''manifests some breakdown in thinking and delusional patterns which suggests the presence of a major mental illness

with paranoid features"; he "appears to be marginally competent" (Report of Dr. Krieger). Dr. Krieger continued:

> It is difficult to judge whether his paranoid stance will prevent him from relating effectively or impair his ability to assist in the planning of a defense. Likewise, it is possible that his illness might result in some inappropriate behavior in court, difficulty with the challenge of prosecution witnesses, or possibly impair his ability to testify in his own behalf. He is, without question, motivated to help himself in the legal process. His capacity to cope with the stresses of incarceration while awaiting trial are barely acceptable.

(Dr. Krieger's report).

Dr. Krieger indicated that Mr. Smith was "agitated", "suspicious", "illogical", "hostile", "tense", and "labile", with "persecutory" and "grandiose" delusions and "possible" hallucinations (id.) and yet found him "marginally competent." Admittedly, Dr. Krieger did not have enough information to determine sanity at the time of the crime (Id.).

Faced with this "waffling" report, defense counsel requested two more mental health experts to determine competency (Circuit Court file, July 23, 1985). The court appointed Dr. Arnold Zager and Dr. Jess Cohn (Circuit Court file, July 24, 1985).

Dr. Zager, too, expressed reservations about an "underlying paranoid personality disorder" (Dr. Zager's report) and was concerned that Mr. Smith would be "a significant challenge to appropriately relate to his attorney and to assist his attorney in planning his defense" (id.), yet found him "competent" (Id.).

Dr. Cohn deferred his diagnosis "because of the paucity of data that otherwise could be contributory to the establishment of a clinical diagnosis" (Dr. Cohn's report) and admitted that the information he did obtain to form his opinion came solely from

Mr. Smith (Id). He found Mr. Smith competent.

Counsel was thus faced with a client he knew to be incompetent and with expert reports which failed to resolve the competency question. Despite these waffling reports and counsel's own concerns about his client's mental status, he ineffectively failed to pursue the matter through the process of a hearing. The court simply declared Mr. Smith competent to proceed.

A criminal defendant has an absolute constitutional due process right to a competency hearing in the trial court during the initial trial level proceedings. "The significance of the Robinson decision is that it places the burden on the trial court, on its own motion, to make an inquiry into and hold a hearing on the competency of the defendant when there is evidence that raises questions as to the competence." Hill, 473 So. 2d at 1257. Such evidence existed in this case. When the trial court should have conducted a competency hearing, but did not, due process is violated, and the ground cannot be made up:

> The questions remains whether petitioner's due process rights would be adequately protected by remaining the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a nunc pro tunc determination under the most favorable circumstances, see Pate v. Robinson, 383 U.S., at 386-87; Dusky v. United State, 362 U.S., at 403, we cannot conclude that such a procedure would be adequate here.

Drope, 420 U.S. at 183.

On the "right to a hearing ab initio" issue, it matters not whether the defendant was in fact incompetent, and that need not be decided. The violation is the failure to conduct a hearing when one should have been conducted: "the failure to do so

deprive[s a defendant] of the right to a fair trial." Hill, supra, at 1257-58. Moreover, when, as here, it can be shown that a substantial and reasonable probability exists that the defendant was incompetent at the time of trial, (see PC-R. 335-44, Report of Dr. Fleming), post-conviction relief is warranted. Bundy, supra; Hill, supra; Bishop, supra. It simply violates due process to put an incompetent individual on trial. For whatever reason competency is not adequately resolved pretrial or at trial, if a bona fide question of competency is raised later, habeas corpus relief is warranted. See, e.g., Price v. Wainwright, supra; Pate v. Robinson, supra.

Under Florida law, a trial court is required to hold a competency hearing when there are reasonable grounds to doubt a defendant's competency. Hill. Reasonable grounds existed here, and the trial court's failure to conduct a competency hearing deprived Mr. Smith of the protections, i.e., the "liberty interest," afforded under Florida law. See Vitek v. Jones, 445 U.S. 48, 488-89 (1980); Hicks v. Oklahoma, 447 U.S. 343 (1980). A competency hearing was required.

C. MR. SMITH WAS NOT COMPETENT TO PROCEED TO TRIAL

The trial court failed to conduct a competency hearing even though, as noted, a question of competence clearly existed. But there really was more than just a question, and throughout the proceedings, the defense attorney attempted to make the court aware of his difficulties and his belief that his client simply was not competent:

> [PROSECUTOR]: One other thing, Judge, just maybe housekeeping, before I got on the case I understand that there were motions to have this defendant

prescreened and evaluated psychologically, psychiatrically and my understanding is that there is no question as to his competency. Now that has been determined that any issue as to his competency to stand trial or at the time of the offense is not being raised.

THE COURT: Insanity; my understanding is competency is not an issue in this case, at the time of the alleged offense, now and at all the times in between; is that a full, fair, accurate statement of the Court?

[DEFENSE ATTORNEY}: Judge, the Court ruled that way and the psychiatrists basically determined that after examining Mr. Smith.

THE COURT: It's no longer an issue now at this time to be raised before the jury.

[DEFENSE ATTORNEY]: I have my own personal doubts as to Mr. Smith but it's not going to be raised as a defense if that is what you are asking.

(R. 154). Then during voir dire:

[DEFENSE ATTORNEY]: Without going into what Mr. Smith was saying, <u>there is times durins the trial he's acting very irrational.</u> I want the Court to be apprised of it because if he keeps on I may have to have the Court inquire as to whether he's competent at this period in time.

<u>He's saying things to me I don't understand what he's saying to me</u>, to be honest with you. I wanted to put that on the record.

MR. DIMITROULEAS: I have no objection with Mr. Washor taking as much time as he needs to talk to Mr. Smith. If he's not satisfied after that consultation, to bring it up to the Court and the Court can make an inquiry.

MR. WASHOR: That is what I will do.

MR. DIMITROULEAS: He's been determined competent in other hearings. If we have to address that issue again, fine, but that is clearly going to put a hold on any speedy trial. Hopefully we can avoid that.

MR. WASHOR: Exactly. I would rather go through the complete trial but I don't know how he's going to act.

THE COURT: All right. Everything seems to be okay. Is that correct?

MR. WASHOR: I have to keep on calming him down. He just has off the wall comments and things that don't make sense.

(R. 364-66)(emphasis added).[9]

When the guilt phase instruction conference began, Mr. Smith was apparently not paying any attention to what was occurring:

[DEFENSE COUNSEL]: Judge, if I can say something. Frank, do you want to read this over with me or continue to read your Bible?

(R. 1085).

Finally, prior to sentencing:

[DEFENSE COUNSEL]: The first one I have, Judge, is a Motion to Continue Sentencing.

After being with the Defendant last week and speaking to him, basically his present demeanor and conduct creates doubt as to his mental condition as to whether he can actually be sentenced today, and I would like to be evaluated before you pronounce sentence on him by at least three psychiatrist.

(R. 1375). The court continued sentencing and appointed three experts to evaluate Mr. Smith to determine "if Frank Lee Smith is insane." (Drs. reports and file notes). Dr. Arnold Zager, again performing no testing and doing a cursory examination at best, found Mr. Smith to be suffering from a paranoid personality disorder but competent to proceed (Dr. Zager's report).

Dr. Jess Cohn stated that Mr. Smith's "capacity to reason was not acceptable" (Dr. Cohn report). Dr. Cohn's earlier evaluation had reserved any diagnosis because of a lack of

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[9] A competency question can arise at any time during the course of the trial. See Drope V. Missouri, 420 U.S. 162, 181 (1985)("Even when a defendant is competent at the commencement of his trial, a trial court must always be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial").

necessary materials, and admitted that information had been obtained solely from Mr. Smith. Yet the later report had no more information, no testing, still relied solely on Mr. Smith's report, and declared a mixed personality disorder as the diagnosis. Dr. Cohn stated Mr. Smith was competent to proceed at sentencing.

The third expert employed at this stage was Dr. Barton Cahn. Dr. Cahn relied on self report and viewed the very limited area of sanity for sentencing. Dr. Cahn's practice when presented with a very narrow legal question such as "sanity for sentencing" is to limit his evaluation accordingly. He was never consulted by the defense attorney regarding Mr. Smith's bizarre behaviors during trial and therefore did not address them (Dr. Cahn affidavit).

Since by this time, Drs. Zager and Krieger had testified that Mr. Smith suffered from a severe thought disorder, probably a schizophrenic disorder with paranoid features **(R. 1304),** the court was clearly on notice that Mr. Smith was most likely not competent. Defense counsel continually raised the question to the court, but no hearing was conducted. At sentencing, the judge simply announced that this would be the hearing to determine if Mr. Smith was insane for sentencing (R. **1392-1393).** Defense counsel had no witnesses, presented no challenges to the cursory and inadequate evaluations, and simply objected to the particular doctors chosen (R. **1393).** Even then defense counsel reiterated his personal concern and doubt as to Mr. Smith's competency **(R. 1393),** but that concern went unheeded by the court, and sentencing proceeded.

Mr. Smith was never competent to proceed to trial or to sentencing. The professionally thorough evaluation which should have been conducted at the time of trial has now been conducted by Dr. Pat Fleming, a clinical psychologist. Dr. Fleming's report, reproduced in Claim VI, supra, and incorporated herein, demonstrates that Mr. Smith was not competent for trial or capital sentencing. He was thus denied his fifth, sixth, eighth, and fourteenth amendment rights.

D. MR. SMITH WAS NOT COMPETENT TO WAIVE HIS RIGHT TO REMAIN SILENT OR HIS RIGHT TO COUNSEL

Because of his mental illness, Mr. Smith was not competent to waive his fifth, sixth and fourteenth amendment rights. He could not waive that which he did not understand and his illness precluded him from knowingly, intelligently and voluntarily making any waiver of counsel or of his right against self-incrimination (—— Report of Dr. Fleming, PC-R. **335-44).**

E. CONCLUSION

The trial court failed to conduct a competency hearing when one was clearly required. Counsel was ineffective in failing to investigate and properly litigate these claims. Kimmelman v. Morrison, **106** S. Ct. **2574 (1986).** As a consequence, Mr. Smith was forced to undergo capital trial and sentencing although he was not competent to do so. A hearing is required for the files and records in this case by no means "conclusively show that [Mr. Smith] is entitled to no relief." Lemon, supra (emphasis added). An evidentiary hearing and, thereafter, Rule **3.850** relief are warranted.

CLAIM VIII

MR. SMITH WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING 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). Moreover, counsel has a duty to ensure that his or her client receives appropriate mental health assistance, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's level of mental functioning is at issue, Mauldin, supra, and when the client cannot fend for himself. See United State v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).10

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[10]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. See Bassett v. State, 541 So. 2d k596 (Fla. 1989); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So. 2d 1154, 1155-56 (Fla. 1984); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491, 493-94 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, 104 S. Ct. 3575, adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 104 S. Ct. 3575 (1984), adhered to on remand, 739 F.2d 531 (1984); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these rudimentary constitutional standards. Mr. Smith, like the petitioners in Bassett, Michael, Harris, and Middleton, is entitled to the same relief, for here counsel failed to present substantial available mitigation -- an omission based upon no "tactic" but on the failure to adequately investigate and prepare for the penalty phase. Prejudice is also apparent, as the discussion below relates, and as Mr. Smith's death sentence attests.

Mr. Smith's counsel failed his capital client. The wealth of significant evidence which was available and which should have been presented was inadequately presented, and mostly was not presented at all. No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. Harris; Middleton. Mr. Smith's capital conviction and sentence of death are the resulting prejudice. In this case, as in Thomas v. Kemp,

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trials would have been different if mitigating evidence had been presented to the jury. Strickland v. Washinston, 466 U.S. at 694. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particularized characteristics of the individual. Gress v. Georsia, 428 U.S. 153 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

796 F.2d at 1325.

Proper investigation and preparation would have resulted in evidence establishing a compelling case for life on behalf of Mr. Smith. A wealth of mitigating information was available to trial counsel in this case. Mr. Smith, however, was sentenced to death by a jury that knew almost nothing about him. This was far from an individualized capital sentencing proceeding.

Mr. Smith was sentenced to die by a jury who never knew the true extent of the appalling conditions he grew up under and that he suffered a lifetime of abuse, rejection, abandonment and incarceration. His mother was an alcoholic who willingly participated in the underworld activities of Ft. Lauderdale's wild, and often corrupt, street life. This life style prohibited Ruby Lee Smith, the sole adult in the single parent headed

household, from maintaining any semblance of parental nurturing. Consequently, Mr. Smith suffered extensive emotional abuse beginning at the time of his infancy.

Ruby Lee Smith gave birth to her son Frank Lee Smith, the second of three children, while living on a subsistance family farm in Valdosta, Georgia, on July 20, 1947. Frank's chances in life were immediately impaired due to his mother's gross emotional neglect and involvement in suspicious activities outside of the household. Additionally, Frank never had the opportunity to know, love, cherish or develop a father-son relationship due to his father's death while he was still an infant. Ruby Lee never remarried and Frank was forced to live his life without any knowledge of, or guidance from, a respectable and loving father figure.

Ruby Lee married as a teenager and was never offered a chance to benefit from a formal education. She immediately gave birth to her first child and was thrust into parenthood while still a child herself. When faced with the demanding life of raising children, Ruby Lee's perceptions of what a parent should be were greatly distorted. Ruby Lee had a myriad of personal problems including alcoholism and emotional instability. She herself was a victim of the poverty stricken single headed household. Her husband was shot and died a violent death, leaving her totally uneducated and without legitimate means of adequately supporting her children. This further distorted her pathetic understanding of the responsibilities of adulthood and parenting, leaving her a desperate woman.

While still an infant, Frank's family moved to Florida in an

attempt to fight the mass poverty and social inequality which every black family in the south faced. However, the employment opportunities available to Frank's mother failed to provide his family the ticket leading them out of poverty. Ruby Lee was devastated by the death of her husband and sunk into a state of depression that tugged on her emotional state for the remainder of her short life. This enormous amount of grief, coupled with the extreme poverty in which Frank's father left the family, totally whipped Ruby Lee. She quickly grew weary of the dismal life and the daily struggles involved in stretching her few available pennies. Subsequently, her alcohol consumption accelerated at an alarming rate while her financial woes continued to mount.

In an attempt to escape the poverty and escalating misery of her life, Ruby Lee began to further neglect her children by leaving them alone for long periods of time while pursuing a decadent existence in the streets. The suffering and neglect of the children extended to the point that all acceptable role models became absent from the home. Frank was forced to make adult decisions while still a child and the pressure took its toll. He regressed to the point that he was unable to handle the challenge presented by the local school district. Frank's school records reflect an amazingly high truancy rate and a substandard performance when present. The absence of a stable and reliable role model left Frank helpless and lagging far behind in social skills. As a result, his dependability, ability to work with others, and personal appearance were far below the average when compared to that of his peers.

Without the presence of any positive or constructive adult supervision Frank began to emulate the older boys in the street. His mother continued to ignore his abnormal development and the emotional neglect was stacking up against Frank. The situation deteriorated to such a low level that a juvenile judge stepped in and placed Frank, along with his sister and brother, in a foster home. This placement was an attempt to remove Frank from the evil nature of the streets, which had become his only guiding force and provider of an understanding of right and wrong.

Even though he was subjected to extensive emotional neglect, Frank continued to love his mother dearly. While in the foster home, he continued to long for his mother and vowed to reunite himself with her. After a three year stay in foster care Frank was returned to his family when his grandmother (Louella Irving) was granted custody rights. Frank was overjoyed at the idea of being able to spend time, once again, near his mother. It was like Frank was determined to, one day, win his mother's attention, affection, and love. Louella had already raised nearly all of her thirteen children and was beginning to feel the effects of old age. This severely hampered her ability to properly supervise her youngest children, Frank and his siblings, and many cousins -- all of which were under the care of Louella.

Louella was already facing a day to day struggle with keeping those in her household properly fed and clothed. The addition of Frank and his siblings extended the household's struggle with poverty and Louella was faced with insufficient means to satisfy unrealistic ends. Consequently, Frank was returned to an environment unprepared to provide him with the

guidance, attention, social skills, and the understanding of right and wrong that had been absent since his birth. The decision of the court to remove Frank from his foster mother left him, unintentional as it may have been, prey to further abuse and emotional torment.

The economically downtrodden areas of any urban setting is a difficult place for a child to mature. Especially when, like Frank, the child is without extensive guidance, affection, nurturing, day to day instruction, and a stable family unit. Since Frank's life was without these essential ingredients, he was naively lured into the streets of Ft. Lauderdale.

The agonizing pain, stemming from his mother's emotional neglect, which Frank wrestled with everyday stripped him of the necessary tools to rise above the twisted and cruel "laws" of the street and forced him to adopt the instincts of a survivor. Thus, when faced with the brutal life in the streets, Frank handled the horrors with a distorted understanding of how to properly defuse the daily violence surrounding him. Frank had clearly become a victim and was helplessly sucked into a nasty vacuum of violence, harassment, and savagery. The absence of any and all emotional stability, guidance, understanding, and parental nurturing denied Frank a sound foundation upon which he could build a life above the bizarre and disturbing web of survival in the streets.

Frank became such an element of the street that he lost all ability to clearly reason and make sound judgments. When confronted with a hostile situation, Frank's reactions were based strictly on instinct and protecting himself was the dominate

variable. Consequently, a disagreement and ultimately an exchange of blows resulted in thirteen year old Frank being slapped with a manslaughter conviction and a sentence at Okeechobee Boys Center. It has been established that the practices carried out by the personnel of Okeechobee were inappropriate and detrimental to the young inmates sentenced to the institution during the 1960's. Hence, an opportunity to remove Frank from the violence of the streets once again backfired, again leaving him without sound adult guidance and nurturing.

After this initial encounter with the court system at the age of thirteen, Frank's chaotic, unsupervised, and uncharted childhood caught him unaware and left him forever a victim. Okeechobee was unaware that Frank lived his life without a true father, guidance from a stable adult, an accurate understanding of right and wrong, or examples of healthy relationships between stable people. He was released with no where to go except back to the streets. The indoctrination Frank went through on the streets totally captured his thinking process, never to set him free. There he was, a boy without guidance, a stint in a harsh juvenile prison, and still without sound adult supervision or a method to escape the extensive poverty and misfortune that totally engulfed his life. Frank had absolutely no way to escape the doom he was destined to experience.

He then became tangled up with the most corrupt segment of society and his reasoning abilities decayed even further. The power of the streets had totally overtaken Frank's thought process. This dilemma was created due to the fact that Frank was

never provided the necessary instruction to allow him to function properly in society. Inevitably, Frank was naively drawn further into the madness of the streets, and deceived by older, dominating, and perverse members of the criminal kind, only to find himself face to face with a long term prison sentence.

In addition to his horrendous childhood and Okeechobee experiences, Frank was sentenced, at the young age of eighteen to Florida State Prison. Correctional institutions, such as Florida State Prison, place all inmates in the same position - adapt and master the code or face an existence in hell, an existence so brutal and horrid, that not even the most vivid imagination in the "free world" could accurately portray. Consequently, the socially immature and naive boy that Frank was when incarcerated at the state prison left him no choice but to succumb to the forces of the code. Frank matured under the heavy hand of this code to forever become a product of the "system."

While serving his sentence, Frank was devastated by the news of his mother's death. She was brutally raped and murdered. This news bashed Frank's mind and took away the possibility of the one hope and dream that fueled his lifelong struggle to rise above the overwhelming hardships dominating his life -- a loving and stable relationship with his mother, free of all the pain and anguish of his fated life of poverty, torment, and emotional neglect.

Upon his release from prison, Frank continued to struggle with his attempts to establish stability. All of his fruitful attempts fell short due to either his past record or extremely poor eyesight. This left Frank to wander around in a seriously

confused and troubled state. He honorably continued his effort to raise himself above his past and conquer the many evil forces ripping at his efforts. The loss of his mother continued to linger and weigh heavy on his now bent and twisted mind. Unfortunately, the combination of the grief he felt toward his mother and the forces, beyond Frank's control, took a wrenching grip and totally destroyed him -- never to set him free.

Not only did trial counsel fail to present the wealth of available mitigating evidence but his lack of preparation of the witnesses he did present was more damaging than good. The family members who testified on Mr. Smith's behalf all acknowledge that trial counsel did not prepare them for their testimony, and only spoke to them about it at the courtroom on the day of the sentencing proceeding.

The results of this lack of preparation are readily apparent upon a review of the record. Their testimony is superficial and at times outright misleading. Mrs. Andrews testified that Mr. Smith did not have a rough childhood (R. **1322**). Mrs. Irving testified that Mr. Smith would not hurt anyone (R. **1324**) and in **so** doing opened the door for the admission of Mr. Smith's juvenile conviction for manslaughter in 1960. Responsibility for this fatal error rests with trial counsel who obviously had not prepared his witnesses for such a glaring trouble spot.

Had counsel properly investigated and prepared, he could have obtained the testimony of someone like Frank Lee Smith's brother, Ruben Smith, who grew up under the same conditions, faced many of the same difficulties encountered by Frank, and observed the effects of their childhood on Frank. Counsel could

have presented Ruben Smith's compelling account regarding Frank's life and character:

> My name is Ruben Smith and Frank Lee Smith is my brother. I am about three years older than Frank. As young boys we lived in Valdosta, Georgia and then our family moved to Ft. Lauderdale. We have lived in south Florida ever since.
>
> My parents were good church going people, just like the rest of the family, while we lived in Georgia. My father was killed while I was young and that was very hard on everyone. He was a hard working man and was liked by my aunts, grandmother, and everyone. Of course, his passing was especially hard on my mother. As a matter of fact, it caused her so much pain that she vowed never to remarry. She loved my father and was left to raise three children without a husband.
>
> While we were in Georgia Frank suffered a serious head injury. He was about three years old and in my mother's arms while we stopped at a bar to pick up my Aunt Lela. While we were there a fight broke out. People were yelling, arguing and real mad about something. In that type of situation it is hard not to become involved and that is what happened. Someone threw a coke bottle and it hit Frank right in the head. A big sliver of his head popped off and you could look straight in and see Frank's brain.
>
> When Frank was about sixteen he was hit in the head with a blackjack. Him and I were just walking down the street and some guy walked up and whacked Frank right in the head. It was one hell of a blow. I heard a loud thud and then a lot of blood was coming off of Frank's head. I know one thing, I could not of taken a blow like the one Frank took from that blackjack.
>
> On another occasion, Frank and I were playing around and getting kind of rough with one another. I took a hand sized rock and threw it across the yard and hit Frank right in the head. As I think back, it seems like Frank was always getting hit in the head with one thing or another. I am sure all of the knocks to the head has effected Frank's eyesight. After being hit by the coke bottle in Georgia Frank's eyes started going bad and they have always gotten worse.
>
> As a boy Frank was always the quiet type. He never really complained about anything and kept his inner feeling to himself. While I would be hanging out with some of my neighborhood friends, Frank would be off by himself - thinking and just being the loner that

he is. At the same time Frank was a popular guy and had no trouble making friends, but he always had to have a lot of time for himself so he could review his inner thoughts - thinking about the future and his philosophy of life. Frank and I have always been close and he would tell me about the things that he would spend hours thinking about.

After we moved to Florida things changed. My mother was under a lot of pressure. After all, she had to be both a mother and father for her children. She did her best but it is a tremendous responsibility for anyone. We were poor and she had to work all of the time so she could make ends meet. As soon as I was old enough I took an after-school job to help her out. Additionally, She started to realize just how much she missed my father and sometimes she would sit and cry. It was at this point that my mother started drinking. She would drink just about everyday and most of the time get drunk.

My sister Virginia, who is about four years younger than me, had a nervous breakdown when she was about eleven or twelve and had to be put into the hospital. I am not quite sure what caused her so much pain but it was definitely a nervous condition.

When Frank, Virginia, and I were young we were taken to Dania, Florida and placed in a foster home. We lived in the home of Roshelle Green. She was a wonderful woman and always treated us children good. We lived there about three years and then moved in with my grandmother who lived back in our old neighborhood.

Through all of this our family remained tight knit. My mother always kept her children's interests at heart. She continued to be concerned about our future and would always tell us, "be careful out there." My mother needed a lot of special attention because of my father's death. Frank and I always tried to help my mother by letting her know that we would always love her.

The neighborhood where we grew up was pretty tough. We had to be careful and be smart. Frank and I always tried to take care of one another and learn from what was happening around us. It was to our advantage to not only learn from books but take in life and try to become a better person. I guess you could say that we had to learn the art of life, and Frank was forced to learn it at an early age. Frank had to stop depending on our family, go out on his own, be independent, and become a man.

Of course the streets can be evil and overwhelm a person. Frank and I had to be strong and stay on top

of what was going on. In the neighborhood and in the streets it was easy to find any kind of drug. I'm not real sure what all Frank was involved with but let me put it this way, anything and everything was available to him.

You know, Frank has always been a kind and considerate person who looked out for others. I remember when Frank got real upset with a girl we knew because she was abusing her child. That was one of the things that Frank hated, an adult taking advantage of and mistreating a child. He also frowned upon the mistreatment of women. Some of guys in the neighborhood started talking about "making trains" or having group sex with the local girls. This really upset Frank and myself. Frank was always the first to object to such behavior and he'd quite hanging out with the ones who came up with or approved of the idea. The bottom line is that Frank has a big heart and he always did the best he could to be fair with others.

When Frank was about thirteen years old he found himself in a tight situation and ended up with a manslaughter charge. The guy who ended up dying was named John Wesley Span. I was dating John's sister (Joyce) at the time of the incident and I knew John well. John had a well deserved reputation of running with a gang and using weapons to rip people off. Frank was the opposite of John, he was quiet and to himself. Frank never, ever initiated a fight or conflict and would only react to the way others treated him. However, when put under a lot of pressure Frank would lose his ability to think clearly and/or make rational decisions. That is why Frank got into trouble. John was aggressive and a known threat. Once him and his boys started harassing Frank: Frank lost it and simply tried to defend himself.

Like I said earlier, the streets can be a tough place to get by and it is easy for a person to be taken advantage of. That is what happened to Frank in 1966 when he was put in prison for being involved in the Herbert DeWitt killing. Frank started running with the wrong gang and he lost his head. Aggressive behavior is not part of Frank's personality. He only acts out against others when under pressure and pushed. **I also** know for a fact that Frank was smoking pot and drinking wine on the night of the DeWitt incident.

I can't understand why Frank's attorney had him plead guilty to the crime without trying to explain the entire situation. No one got to hear about the type of person Frank really is and how he can be pushed into a situation and react without thinking clearly. Frank has always been a shy person and a loner but once pushed hard enough, he loses control.

> After Frank got out of prison in **1981** he was a little slow getting back on his feet. Frank was isolated for a long time and a lot of things change over fifteen years. However, Frank did not want to go back to prison and was careful not to make another mistake. More importantly, there is absolutely no way that Frank would hurt a little girl and do the things that they say he did. That is totally ridiculous, Frank has always been so good with children and has special respect for woman and children. It is just a matter of really taking the time to understand who Frank is.
>
> At the time of Frank's arrest I was never contacted by his attorney. I was in the Ft. Lauderdale area and my family members could have lead him to me. Had I been contacted, I would have told him anything he wanted to know about Frank.

(PC-R. **345-51**).

In addition to failing to investigate Mr. Smith's background, trial counsel did nothing to explain Mr. Smith's prior convictions. Mitigating information should have been presented concerning both offenses. Counsel's failure to investigate and prepare for this prejudiced Mr. Smith's sentencing case, as Ruben Smith's account establishes. Facts could have been presented which established that as to the first degree murder conviction, Frank was one of the younger of the six individuals involved and was not involved in the planning of the offense. In fact, the three older men were the ones to develop the plan and supply the weapons. As to the manslaughter conviction, counsel failed to develop the evidence establishing that Mr. Smith acted in self-defense (See PC-R. **349**). Trial counsel made no attempt to lessen the impact of these prior convictions.

Mr. Smith was deprived of his right to effective assistance of counsel at the penalty phase of his trial. Mr. Smith is

entitled to a full and fair evidentiary hearing, for the files and records in this case by no means "conclusively show that [Mr. Smith] is entitled to no relief." Lemon v. State, 498 So. 2d 923 (Fla. 1986)(emphasis added), citing, inter alia, Fla. R. Crim. P. 3.850. Obviously, the question of whether a capital defendant received ineffective assistance of counsel at the penalty phase is a claim requiring an evidentiary hearing for its proper resolution. See O'Callaghan v. State, 461 So. 2d 1354, 1355, (Fla. 1984): Groover v. State, 489 So. 2d 15 (Fla. 1986). An evidentiary hearing and Rule 3.850 relief was and are proper.

REMAINING CLAIMS

Claims IX, X, XI, XII, XIII, XIV, XV, XVI, XVII, XVIII, XIX, XX, XXI, XXII, XXIII, and XXIV of Mr. Smith's Rule 3.850 motion (pp. 71-163, specifically incorporated herein) will not be repeated in this brief. Rather, Mr. Smith will rely upon the presentation in the Rule 3.850 motion.

The lower court erred in summarily denying these claims, for they reflect fundamental error which rendered Mr. Smith's capital conviction and death sentence fundamentally unfair and unreliable. As reflected by the allegations presented in the Rule 3.850 motion and by the entire record in this case, these claims present substantial and meritorious issues. Rule 3.850 relief is proper.

CLAIM XXV

THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. SMITH'S MOTION FOR ORDER OF INSOLVENCY WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

A criminal defendant has a right to counsel, a right guaranteed by the sixth and fourteenth amendments of the United

States Constitution and by Article I, Section 16 of the Florida Constitution. For this right to be meaningful, courts and legislatures have long provided that indigent criminal defendants must be provided counsel with little or no cost to themselves.

Mr. Smith was declared indigent at the time of his trial and direct appeal, and counsel was accordingly appointed to represent him. Mr. Smith has remained incarcerated since the time of his arrest in this case and his financial situation is unchanged.

The lower court's denial of Mr. Smith's Motion for Order of Insolvency was clearly erroneous and obviously intended to deprive Mr. Smith of his statutory right to pursue collateral appeals of his convictions and sentences. This Court should now grant relief and order Mr. Smith be found insolvent so that the representation of the Capital Collateral Representative may continue. See Glock v. Dugger, 537 So. 2d 99, 102-03 (Fla. 1989).

CONCLUSION

Counsel have not in this brief repeated the contents of the Rule 3.850 motion. It is intended that this brief be read in conjunction with that pleading, which is fully incorporated herein, as the Court has had the benefit of the motion. No claim presented in the motion which is not specifically discussed herein is waived or abandoned. On the basis of the presentation in the 3.850 motion, and the above discussion, we urge that the Court stay Mr. Smith's execution, grant him leave to proceed in forma pauperis, and grant Mr. Smith the relief to which he has

established his entitlement and/or remand this case for proper evidentiary resolution.

Respectfully submitted,

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By: _____
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by first class, U.S. Mail, postage prepaid to Robert Krauss, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, 3rd day of January, 1990.

_____
Attorney