IN THE

SUPREME COURT OF FLORIDA

CASE NO. **75,039**

LLOYD DUEST,

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

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PRELIMINARY STATEMENT

This is an emergency appeal from the lower court's denial of Mr. Duest's motion for Rule **3.850** relief. Mr. Duest's execution, scheduled for January 16, 1990, has been temporarily stayed by this Court. All matters involved in the Rule **3.850** action, and all matters presented on Mr. Duest'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. Duest, and the corresponding emergency nature of the instant proceedings, counsel has consolidated into this document Mr. Duest's application for stay of execution.

Mr. Duest's execution should be stayed given the substantial nature of the claims he presents to this Court. The issues raised by Mr. Duest reflect the substantial, meritorious nature of Mr. Duest'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

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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.

presented by capital prisoners litigating during the pendency of a death warrant. See Tompkins v. Dusaer, No. 74,098 (Fla. June 2, 1989); Marek v.Dugger, No. 73,175 (Fla. Nov. 8, 1988); Johnson v. State, No. 72,231 (Fla. April 12, 1988); Gore v. Duqqer, No. 72,300 (Fla. April 28, 1988); Rilev 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. Dusser, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and post-conviction relief); Kennedv v. Wainwright, 483 So. 2d 426 (Fla. 1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987). The issues Mr. Duest 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 (T. ___). All other references shall be self-explanatory or otherwise explained.

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On May 21, 1982, Mr. Duest was charged by indictment with the first degree murder of John Pope. Mr. Duest was tried before a jury in March, 1983. The jury returned a guilty verdict on March 18, 1983. The next day the penalty phase proceeding was conducted. The jury returned a death recommendation by a seven to five vote. At the sentencing on April 24, 1983, Mr. Duest was sentenced to death.

The central issue at trial was whether Lloyd Duest was "Danny", the person in whose company Mr. Pope had last been seen alive. The State called witnesses who had met and partied with "Danny" during the holiday weekend in 1982 when Mr. Pope was killed. The State's witnesses acknowledged their considerable use of alcohol and illegal drugs during the brief time period that they saw and were familiar with "Danny". The witnesses identified Mr. Duest as being "Danny" although there were differences in his physical appearance: Lloyd Duest wore glasses; "Danny" did not. "Danny's" hair was longer.

Mr. Pope was last seen alive at about 3:00 p.m. on Monday, February 15, 1982, which was Presidents' Day. He was in Lefty's, a gay bar in Fort Lauderdale. He was seen leaving in the company of "Danny". Mr. Pope was also seen in a gold Camaro with "Danny" at about 3:00 p.m. at the apartment where "Danny" had left his belongings. At 4:30 p.m., "Danny" was seen driving the gold Camaro alone. At 8:00 p.m., Mr. Pope was found dead by his roommate.

In his defense, Mr. Duest called numerous witnesses who testified that Mr. Duest was in Massachusetts during Presidents'

Day weekend of 1982. Nancy Duest, Lloyd Duest's mother, testified she saw Lloyd in Watertown, Massachusetts on February 13th. She again saw Lloyd on March 12, 1982. She further stated that she and her husband took Lloyd to the bus station in Boston on April 5, 1982, which was when Lloyd left Massachusetts bound for Florida (R. 1192-95).

Richard Duest, Lloyd's father, testified he saw Lloyd on February 15th, while he was cleaning his van in Watertown, Massachusetts. Lloyd delivered to him auto parts and a receipt for purchases made at Suburban Auto Parts (R. 1231-36).

Stephen Fralick, owner of Suburban Auto Parts, testified he knew Lloyd Duest. On February 15th, Lloyd purchased a fan belt from Mr. Fralick. Mr. Fralick recalled the transaction and produced his copy of the original receipt which was then admitted into evidence (R. 1947-55).

Debra Duest, Lloyd's sister, testified she saw Lloyd on February 15th in Watertown, Massachusetts. She was having a dinner party at her house. Present were her fiance, sister, brother-in-law, and sister-in-law. Lloyd dropped by briefly, but did not have dinner with them (R. 1018-20). Paul Duest, Lloyd's brother, testified about seeing Lloyd at Debra's dinner party on February 15, 1982 (R. 1073-76). Eddie Lavache, Debra's fiance, testified he recalled seeing Lloyd at Debra's dinner party on February 15, 1982 (R. 1915-18). Nancy Kerrigan, Lloyd's other sister, testified she was present at Debra's house when Lloyd stopped by on February 15, 1982 (R. 1992-98).

Matthew and Diane Turner, friends of Lloyd, both testified

that they saw Lloyd in Watertown on February 14, 1982, Valentine's Day (R. 1863-66, 1887-90). Frank Duest, Lloyd's uncle, testified he saw Lloyd on February 15, 1982, in Watertown (R. 1095-1102). Mark Duest, Lloyd's cousin and Frank's son, testified he was present with Frank when they saw Lloyd on February 15, 1982, in Watertown, Massachusetts (R. 1116-19).

Deputy Feltgen, who had interrogated Mr. Duest when he was arrested April 18, 1982, testified for the State that Mr. Duest told him that he arrived in Fort Lauderdale approximately a week before via a Trailways bus (R. 877). Deputy Feltgen further testified that law enforcement attempted to verify whether Mr. Duest had in fact arrived a week or so before via a Trailways bus, but evidence supporting Mr. Duest's claim could not be located (R. 887-88, 895).

In his closing argument, the prosecutor argued that Mrs. Duest had deliberately or otherwise confused dates, and that she and her husband had taken Lloyd to the Trailways bus station on February 13th and not April 5th. According to the prosecutor, Lloyd travelled to Florida in early February, not on April 5th, and killed Mr. Pope on February 15th (R. 1403-05).

Unbeknownst to the jury that convicted Lloyd Duest was the State's possession of a Trailways bus ticket issued April 5, 1982, showing travel from Boston, Massachusetts, to Fort Lauderdale, Florida. This bus ticket was contained in a manila envelope in the Lloyd Duest file maintained by the Broward County Sheriff's Office. The manila envelope contained Lloyd Duest's personal effects. The bus ticket's existence was not disclosed to Mr. Duest's attorneys until November, 1989, after the circuit

court ordered the State to honor 119 requests made by Mr. Duest's collateral counsel.

Following the jury's verdict of guilty, penalty phase proceedings were held. At that time the State introduced two judgments and sentences from Massachusetts. The first one, State's Exhibit No. 1, indicated Mr. Duest had pled guilty to the charge of robbery. The offense occurred March 4, 1970, when Mr. Duest "did rob and steal from the person of James Moore money of the property of First National Stores, Incorporated" (R. 1574). The second one, State's Exhibit No. 2, indicated Mr. Duest was convicted of "armed assault to murder" (R. 1574). This offense occurred, according to the indictment, when Mr. Duest, "armed with a dangerous weapon, did assault Herbert McSheehy and Les Iacopucci . . . with intent to murder them" (R. 1575).

The State successfully moved to have the trial court take judicial notice of Mr. Duest's date of birth. The jury was then told Mr. Duest was born October 27, 1951 (R. 1575).

The defense called Lloyd's father, mother, sister and wife to testify regarding Lloyd's good character and background. As the State and the trial court conceded on January 4, 1990, at the Rule 3.850 evidentiary hearing, a wealth of nonstatutory mitigation was presented to the jury.

After the jury retired to deliberate on its sentencing recommendation, the jury sent word to the trial judge that it wished to inspect State's Exhibits Numbers 1 and 2 which had been previously read to the jury, but not furnished to it. The judge then once again read the two judgments and sentences to the jury

(R. 1631-32). The judge noted that for the armed assault with intent to murder Mr. Duest was sentenced to Walpole (R. 1633). This had not been disclosed previously.

When the judge had finished, the jury again retired to deliberate further. Subsequently, a death recommendation was returned by a seven to five vote (R. 1633-34).

A presentence investigation was ordered. Upon its completion, sentencing occurred, and a sentence of death imposed. The judgment and sentence was affirmed by this Court on January 10, 1985. Duest v. State, 462 So. 2d 446 (Fla. 1985). The mandate issued on February 19, 1985.

On February 19, 1987, Mr. Duest, through the Office of the Capital Collateral Representative, filed a Rule 3.850 motion. On April 16, 1987, without objection, counsel amended the Rule 3.850 motion. On June 18, 1987, the State asked for additional time to file a response. On June 23, 1987, the circuit court gave the State an additional forty-five days to respond. On August 12, 1987, the State filed a response to the Rule 3.850 motion. Simultaneously, the State filed Motion to Determine Counsel.

This latter motion challenged CCR's representation of Mr. Duest as being against Mr. Duest's wishes. On February 11, 1988, the circuit court directed Mark Olive to consult with Mr. Duest and report to the court as to Mr. Duest's wishes. On May 21, 1988, CCR filed notice that Mr. Olive no longer worked for CCR and inquired of the court of how to proceed. Afterwards the court did not respond in any fashion, nor did the State call its motion up for determination. With CCR's representation of Mr. Duest at issue in the Motion to Determine Counsel, and after

inquiring of the court as to how CCR should proceed, CCR felt unable to act as counsel.

On October 18, 1989, the Governor signed a warrant for Mr. Duest's execution. Under Rule 3.851, Mr. Duest had thirty days from that date to file any available claims for post-conviction relief. Undersigned counsel was assigned to inquire of the court whether determination of CCR's representation of Mr. Duest could be reached so that Rule 3.851 could be complied with. A status hearing was held on November 8, 1989, and undersigned counsel was directed to represent Mr. Duest. Also at that hearing, the State was directed to honor Mr. Duest's 119 request and permit access to files and records regarding Mr. Duest in the State's possession. Due to conflicting demands on his time, counsel was given until December 8, 1989, to complete inspection of the State's files and records.

Undersigned counsel filed the Second Amendment to Motion to Vacate Judgment and Sentence on November 17, 1989. Subsequently, on November 27, 1989, Mr. Duest moved to disqualify the judge. On December 8, 1989, a status hearing was held. At that time, Judge Cocalis denied the motion to disqualify. She also indicated she did not have the court record and would have to take under advisement the question of whether an evidentiary hearing was necessary. Argument as to non-evidentiary issues was set for January 4, 1990, when the evidentiary hearing, if necessary, was tentatively set.

On December 19, 1989, having completed a 119 inspection of the State's files and records, Mr. Duest filed a Supplement to

Motion to Vacate Judgment and Sentence. In this supplement, Mr. Duest alleged discovery violations which occurred at trial. This included Mr. Duest's claim arising from the nondisclosure of his bus ticket.

On January 4, 1990, the judge finally ruled that a limited evidentiary hearing would be conducted. Evidence would be received as to penalty phase ineffective assistance of counsel including inadequate preparation of a mental health expert. The allegations as to these matters were set forth in Claims VIII and X of the motion to vacate. The judge also ruled evidence would be received as to the nondisclosure of the bus ticket, one aspect of the discovery violation claim, set forth as Claim N of the supplement to the motion to vacate. Evidence was also received establishing that Mr. Duest's Massachusetts conviction for armed assault with intent to murder had been vacated and subsequently nolle prossed. All other claims were denied summarily. At the conclusion of the hearing, the judge denied all relief and signed an Order drafted by the State.

On January 9, 1990, a timely motion for rehearing was filed. It was subsequently denied on January 10, 1990. This appeal then followed.

ARGUMENT I

THE CIRCUIT COURT JUDGE WAS IN ERROR IN REFUSING TO DISQUALIFY HERSELF FROM PRESIDING OVER THE 3.850 PROCEEDING.

The Florida Rules of Criminal Procedure provide for the disqualification of a judge as follows:

VII. DISQUALIFICATION AND SUBSTITUTION OF JUDGE

RULE 3.230. DISQUALIFICATION OF JUDGE

(a) The State or the defendant may move to disqualify the judge assigned to try the cause on the grounds: that the judge is prejudiced against the movant or in favor of the adverse party; that the defendant is related to the said judge by consanguinity or affinity within the third degree; or that said judge is related to an attorney or counselor of record for the defendant or the state by consanguinity or affinity with the third degree; or that said judge is a material witness for or against one of the parties to said cause.

(b) Every motion to disqualify shall be in writing and be accompanied by two or more affidavits setting forth facts relied upon to show the grounds for disqualification, and a certificate of counsel of record that the motion is made in good faith.

(c) A motion to disqualify a judge shall be filed no less than 10 days before the time the case is called for trial unless good cause is shown for failure to so file within such time.

(d) The judge presiding shall examine the motion and supporting affidavits to disqualify him for prejudice to determine their legal sufficiency only, but shall not pass on the truth of the facts allesed nor adjudicate the question of disqualification. If the motion and affidavits are legally sufficient, the presiding judge shall enter an order disqualifying himself and proceed no further therein. Another judge shall be designated in a manner prescribed by applicable laws or rules for the substitution of judges for the trial of causes where the judge presiding is disqualified.

(emphasis added).

This Court has repeatedly held that where a motion demonstrates a preliminary basis for relief, a judge "shall not pass on the truth of the facts alleged nor adjudicate the question of disqualification." Bundy v. Rudd, 366 So. 2d 440 (Fla. 1978). The Code of Judicial Conduct emphasizes the importance of an independent and impartial judiciary in maintaining the integrity of the judiciary:

Canon 1

A JUDGE SHOULD UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Canon 2

A JUDGE SHOULD AVOID IMPROPRIETY AND THE APPEARANCE OF IMPRO-PRIETY IN ALL HIS ACTIVITIES

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary

* * *

C. Disqualification.

(1) A judge should disqualify himself in a proceedins in which his impartiality might reasonable be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concernins the proceeding;

(emphasis added).

The purpose of the Code of Judicial Conduct and the Disqualification Rule is to prevent "an intolerable adversary atmosphere" between the trial judge and the litigant. Department of Revenue v. Golder, 322 So. 2d 1, 7 (Fla. 1975), as cited in Bundy v. Rudd, supra. The rule applies in a Rule 3.850 proceeding. Suarez v. Dugger, 527 So. 2d 190 (Fla. 1988).

Prior to the 3.850 hearing, counsel for Mr. Duest filed with the circuit court his motion to disqualify Judge Cocalis. The

motion was premised upon a letter written in 1986 by Judge Cocalis to Carolyn Tibbetts regarding Mr. Duest's clemency proceedings. In the letter, Judge Cocalis stated: "Mr. Duest is still lying to the Court and still trying to thwart whatever judicial processes that remain." At the December 8, 1989, hearing, the circuit court noted that the letter was written because it was solicited by the Clemency Board. The reason the letter was written is irrelevant as to whether it requires the court to recuse itself from further participation in the case. The question is whether the letter demonstrates the standard for disqualification has been met.

Under Suarez v. Dugger, 527 So. 2d 190, 192 (Fla. 1988), the question is whether "these statements are sufficient to warrant fear on [Mr. Duest's] part he would not receive a fair hearing by the assigned judge." In Suarez, the judge had made a statement to the newspapers "demonstrating a special interest in the speedy execution of the death sentence." 527 So. 2d at 191. Here, Judge Cocalis' statement was in a letter to Carolyn Tibbetts as opposed to a statement to the press. However, the substance of the statement was otherwise very similar. In fact, Judge Cocalis' statement reflected a much more personalized belief that Mr. Duest was playing games with the system by asking for clemency. In her opinion, he was trying to "thwart whatever judicial processes that remain." That certainly reflects a prejudgment of Mr. Duest and any action he might undertake to avoid execution. It is certainly "sufficient to warrant fear on [Mr. Duest's] part that he would not receive a fair hearing by

the assigned judge." Suarez, 527 So. 2d at 192. See Stevens v. State, ___ So. 2d ___, 14 F.L.W. 513, 515 (Fla. Oct. 5, 1989). See also MacKenzie V. Breakstone, ____ So. 2d ____, 14 F.L.W. 2223, 2224 (Fla. 3d DCA 1989)("No judge under any circumstances is warranted in sitting in the trial of a cause whose neutrality is shadowed or even questioned," quoting Livingston v. State, 441 So. 2d 1083, 1085 (Fla. 1983), quoting Dickerson v. Parks, 140 So. 459, 462 (Fla. 1932)). Here, Judge Cocalis' neutrality is much more than "shadowed".

Under the law, the circuit court erred in denying Mr. Duest's motion to disqualify the judge. The motion should have been granted and a new judge assigned to the case. Mr. Duest was as a result denied a full and fair forum for presenting his claims for post-conviction relief.

Since this Court's decision in Bundy V. Rudd, the law in this state has been clear. Where a facially sufficient motion to disqualify has been presented, the judge may not refute the charges of partiality. His or her only choice is to grant the motion. Canady V. Johnson, 481 So. 2d 983 (Fla. 4th DCA 1986). When a judge attempts to refute the allegations contained in the motion to disqualify, "he [has] exceeded the proper scope of his inquiry and on that basis established sufficient grounds for his disqualification." Lake v. Edwards, 501 So. 2d 759, 760 (Fla. 5th DCA 1987). A judge's attempt to respond to the allegations contained in the motion and establish his or her own impartiality is itself cause for disqualification. A.T.S. Melbourne. Inc. V. Jackson, 473 So. 2d 280 (Fla. 5th DCA 1985). Such action by the judge causes the judge to assume "the posture of an adversary"

and requires disqualification. ~~Gieseke v. Moriarty~~, 471 So. 2d 80, 81 (Fla. 4th DCA 1985). Further, it matters not when in the proceedings the motion to disqualify is presented. As long as there is something further for the judge to do in the proceedings a motion to disqualify may be presented, and if sufficient "the judge 'shall proceed no further.'" ~~Lake v. Edwards~~, ~~supra~~, 501 So. 2d at 760, quoting Florida Rule of Civil Procedure 1.432(d)(emphasis in original). It should be noted that Florida Rule of Criminal Procedure 3.230(d) contains virtually identical language.

This Court has explained at length the purpose behind the rule permitting disqualification of a judge:

> The Code of Judicial Conduct sets forth basic principles of how judges should conduct themselves in carrying out their judicial duties. Can 3-C(1) states that "[a] judge should disqualify himself in a proceeding in which his impartiality might be reasonably questioned . . . ." This is totally consistent with the case law of this Court, which holds that a party seeking to disqualify a judge need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.
>
> When a party believes he cannot obtain a fair and impartial trial before the assigned trial judge, he must present the issue of disqualification to the court in accordance with the process designed to resolve this sensitive issue. The requirements set forth in section 38.10, Florida Statutes (1981), Florida Rule of Criminal Procedure 3.230, and Florida Rule of Civil Procedure 1.432 were established to ensure public confidence in the integrity of the judicial system as

> well as to prevent the disqualification process from being abused for the purposes of judge-shopping delay, or some other reason not related to providing for the fairness and impartiality of the proceeding. The same basic requirements are contained in each of these three processes. First, there must be a verified statement of the specific facts which indicate a bias or prejudice requiring disqualification. Second, the application must be timely made. Third, the judge with respect to whom the motion is made may only determine whether the motion is legally sufficient and is not allowed to pass on the truth of the allegations. Section **38.10** and Florida Rule of Criminal Procedure **3.230** also require two affidavits stating that the party making the motion for disqualification will not be able to receive a fair trial before the judge with respect to whom the motion is made, as well as a certificate of good faith signed by counsel for the party making the motion.
>
> * * * *
>
> What is important is the party's reasonable belief concerning his or her ability to obtain a fair trial. A determination must be made as to whether the facts alleged would place a reasonably prudent person in fear of not receiving a fair and impartial trial.

Livingston v. State, **441** So. 2d **1083, 1086-87** (Fla. **1983)** (emphasis added).

Here, Judge Cocalis did not address whether the motion set forth such facts as would "place a reasonably prudent person in fear of not receiving a fair and impartial [hearing]." Instead, Judge Cocalis justified herself and her conduct, explaining that the letter was solicited.' This is precisely what case law establishes that the judge may not do in response to a motion to disqualify. In such circumstances, the judge's efforts to explain her prior conduct in order to refute the charge of prejudice became cause itself for disqualification. Judge

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'Apparently due to the exigencies of the case, the December **8, 1989,** hearing at which Judge Cocalis addressed this motion has yet to be transcribed and made a part of the record.

Cocalis assumed "the posture of an adversary." ~~Gieseke~~, 471 So. 2d at 81. Certainly, the matters set forth in the motion would have placed anyone in Mr. Duest's position in fear of not receiving a fair and impartial hearing on his 3.850 motion. The judge's letter could reasonably be understood as prejudgment of Mr. Duest's efforts to get relief from his judgment and sentence. As a result, once the motion for disqualification was filed, it was incumbent upon Judge Cocalis to disqualify herself.

In Livinaston, supra, the issue arose in this Court on appeal from a conviction of first degree murder and the imposition of the death sentence. There, this Court concluded that the failure of the judge to disqualify himself was error. Consequently, this Court ruled that the resulting conviction and sentence of death had to be reversed and the matter remanded for a new trial presided over by a different judge. A fair hearing before a fair tribunal is a basic requirement of due process. In re Murchison, 349 U.S. 133 (1955). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing.

In this case, it was reversible error for the judge to refuse to recuse herself. At this point, the order denying Rule 3.850 relief must be vacated and the case remanded for new proceedings before another duly assigned judge. Moreover, the patent unconstitutionality attendant to a capital proceeding involving a biased judge also raises significant questions about the validity of Mr. Duest's capital conviction and sentence of death. The lack of impartiality herein at issue has infected the

process. The conviction, sentence and post-conviction resolution in this action are invalid under the fifth, sixth, eighth and fourteenth amendments. Relief is proper.

ARGUMENT II

THE STATE'S NONDISCLOSURE OF EXCULPATORY EVIDENCE VIOLATED RULE 3.220 OF THE RULES OF CRIMINAL PROCEDURE AND UNDER ROMAN V. STATE, A NEW TRIAL IS REQUIRED.

Rule 3.220 of the Florida Rules of Criminal Procedure provides in pertinent part:

> (a) Prosecutor's Obligation.
>
> (1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:
>
> (i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.
>
> * * *
>
> (ii) The statement of any person whose name is furnished in compliance with [paragraph i]. The term "statement" as used herein means a written [adopted or adopted] statement . . . or . . . a substantially verbatim recital of an oral statement [made to a state agent or officer] . . . The court shall prohibit the State from introducing in evidence the material not disclosed, so as to secure and maintain fairness in the just determination of the cause.
>
> * * *
>
> (vi) Any tangible papers or objects which were obtained from or belonged to the accused.
>
> * * *
>
> (2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control

which tends to negate the guilt of the accused as to the offense charged.

Failure to honor Rule 3.220 requires a reversal unless the State can prove that the error is harmless beyond a reasonable doubt. This is the express standard of review under Rule 3.850 when Rule 3.850 proceedings establish a discovery violation which was unknown at trial. Roman v. State, 528 So. 2d 1129 (Fla. 1986). In Roman, this Court noted that the case arose pursuant to a Rule 3.850 motion:

> Ernest Lee Roman, under sentence of death and execution warrant, appeals the trial court's denial of post-conviction relief under Florida Rule of Criminal Procedure 3.850 and stay of execution. We have jurisdiction. Art. V, sec. 3(b)(1), Fla. Const. Having granted a stay of execution on March 31, 1988, we hereby vacate the conviction and sentence of death and remand for a new trial.

528 So. 2d at 1169.

There, the State failed to provide the defense with a prior inconsistent statement of a State's witness. This was specifically in violation of Rule 3.220. The State at the Rule 3.850 hearing did not contest that defense counsel was not provided the prior statement. The State conceded defense counsel did not receive the statement which Rule 3.220 required to be disclosed. Accordingly, this Court found Rule 3.220 violated. The witness' prior statement was in the State's possession and not provided to defense counsel.

The only issue for the Court was then whether a reversal was required. As to that question, this Court held:

> The state concedes that its failure to disclose these statements was a discovery violation, but argues that the nondisclosure was harmless. The state claims that the defense impeached Reese's credibility with a prior inconsistent statement, and that further

> impeachment with the undisclosed statement would not have changed the trial's result. Although the defense impeached Reese, the state successfully rehabilitated the witness on redirect examination. Further, Reese's undisclosed statements were important not only for impeachment purposes, but for content as well. Given this trial's circumstantial nature, we cannot say beyond a reasonable doubt that the state's failure to disclose Reese's prior statement did not contribute to the conviction. State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986).

528 So. 2d at 1171.

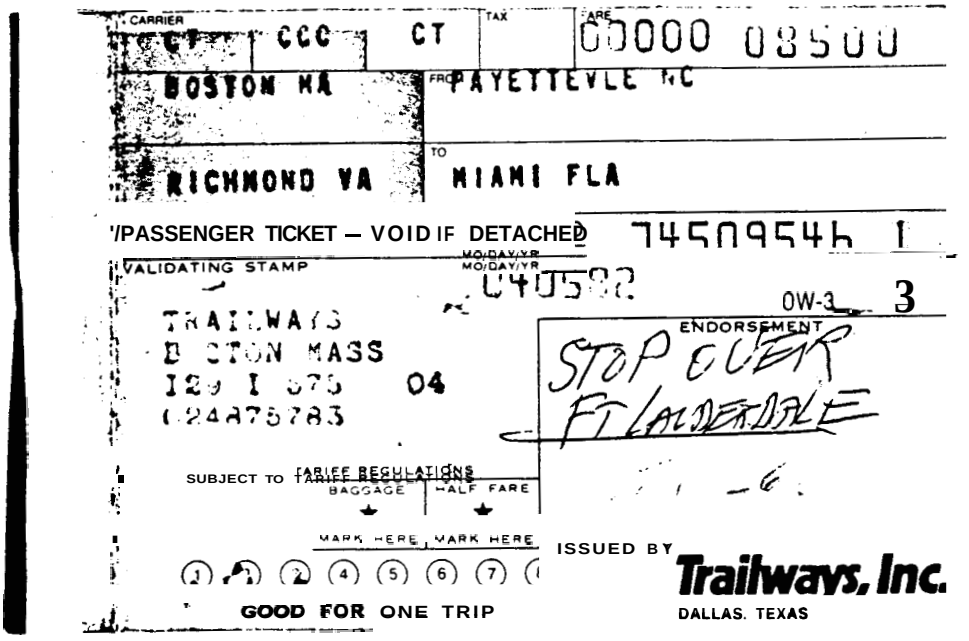
Under Roman, where a violation of Rule 3.220 is established in a Rule 3.850 proceeding, reversal is required unless the error is shown to be harmless beyond a reasonable doubt. Recently, in a case like Mr. Duest's involving a discovery claim in a Rule 3.850 capital proceeding, the State conceded that Roman required reversal of Rule 3.220 errors unless harmlessness beyond a reasonable doubt was established. At a circuit court hearing in a case now pending before this Court, Roberts v. State, No. 74,920, the Assistant Attorney General stated:

> MR. BARREIRA: Your Honor, the Roman case is important because what does it tell us?
>
> It tells us if there is a violation of Florida discovery, the Florida Supreme Court comes down extremely hard, harder than the United States Supreme Court does, and they put a burden on the state of promissory [sic] beyond a reasonable doubt.
>
> * * *
>
> He says that we don't follow Bagley. Well, if you look up Bagley, you are going to see the Florida Supreme Court in pure Brady claims applied the Bagley standard okay.
>
> To discover violations of the Florida rules, it cracks down and applies a different standard, okay.

(Transcript of October 25, 1989, status hearing at pp. 449-51).

Rule 3.220(a)(1)(vi) specifically requires the State to "disclose to defense counsel" "[a]ny tangible papers or objects

which were obtained from or belonged to the accused" and which are "within the State's possession or control." At the evidentiary hearing in the circuit court held January **4-5,** Mr. Duest introduced as Defendant's Exhibit **8** the following:


CARRIER CCC CT TAX 65000 08500
BOSTON MA FR FAYETTEVLE NC
RICHMOND VA TO MIAMI FLA
/PASSENGER TICKET — VOID IF DETACHED 74509546 1
VALIDATING STAMP MO/DAY/YR 040582 OW-3 3
TRAILWAYS BOSTON MASS 04
ENDORSEMENT STOP OVER FT LAUDERDALE
SUBJECT TO TARIFF REGULATIONS BAGGAGE HALF FARE
MARK HERE MARK HERE ISSUED BY Trailways, Inc.
GOOD FOR ONE TRIP DALLAS, TEXAS

This bus ticket was in the State's possession, as the State stipulated at the hearing (T. **198).** It was in a manila envelope which contained Mr. Duest's personal effects (T. **195-96).** Deputy Feltgen, the lead investigator on the case, recalled that there had been a bus ticket, but he could not recall exactly when it was obtained from Mr. Duest (T. **201).** Evan Baron, Mr. Duest's trial counsel testified he was never provided with the bus ticket (T. **162-64).** He also stated that if it had been disclosed, he definitely would have presented it to the jury. The bus ticket supported the testimony of Mr. Duest's alibi witnesses. Richard Garfield, the prosecutor in Mr. Duest's case, acknowledged that the bus ticket was never provided by him to defense counsel. Mr. Garfield also testified that the bus ticket should have been disclosed (T. **214-17).**

Here, as in Roman, there can be no question but that a violation of Rule 3.220 occurred. Thus, the question under Roman is whether this Court can "say beyond a reasonable doubt that the State's failure to disclose [the bus ticket] did not contribute to the conviction." 528 So. 2d at 171.

In this case, Mr. Duest presented an alibi defense. He called eleven (11) witnesses to testify that he was in Massachusetts in February and March of 1982, and that he left Boston, Massachusetts, on April 5, 1982, via a Trailways bus bound for Florida. The State responded at trial to this evidence by calling Deputy Feltgen. He testified that law enforcement personnel attempted to verify Mr. Duest's arrival via a Trailways bus in early April of 1982, but could uncover no physical evidence to support Mr. Duest's claim (R. 887-88, 895).[3] Mr. Garfield in his closing argument focused upon the absence of physical evidence to support Mr. Duest's claim that he left Boston for Florida on April 5, 1982. Mr. Garfield suggested that Mr. Duest's mother had taken Mr. Duest to the bus station in early February and not on April 5 (R. 1403, 1405).

The bus ticket, dated April 5, 1982, would have done several things for the defense. First, it verified Mrs. Duest's testimony that she took Lloyd to the Trailways bus station in

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[3] This testimony was misleading on another score. It implied that the bus company had been contacted and after a search made, no evidence confirming Mr. Duest's claim was found. However, in fact, a deputy had simply gone to the bus station but was unable to determine which bus locker was Mr. Duest's. The deputy was thus unable to either confirm or deny Mr. Duest's statement (Deposition of Rene Robes at 17).

Boston on April 5, 1982, so he could catch a bus to Florida. By corroborating this portion of Mrs. Duest's testimony, it added credibility to her claim that she recalled seeing Lloyd in Massachusetts on February 13. Mrs. Duest's credibility was pivotal; without the bus ticket to corroborate her tesimony, the State convinced the jury she was lying.

The bus ticket in the same fashion would have bolstered the testimony of Lloyd's father who had also testified regarding Lloyd's April 5 departure. Lloyd's father had also testified he saw Lloyd in Massachusetts on February 15, the day Mr. Pope was killed in Florida.

The bus ticket, which unimpeachably establishes Lloyd Duest's departure from Boston on April 5, 1982, would have greatly enhanced the credibility of Mr. Duest's parents. It also is evidence that Mr. Duest was in Massachusetts. Though it does not conclusively prove that Mr. Duest was there on February 15, it does establish he was there in early April, which is exactly what he told Deputy Feltgen. The bus ticket was important for both its content and its corroboration of the alibi witnesses.

In this case, just as in Roman, this violation of Rule 3.220 cannot be found harmless beyond a reasonable doubt. The bus ticket may very well have, in fact probably would have, verified the alibi defense so as to raise a reasonable doubt in the jury's mind as to Mr. Duest's guilt. As a result, an acquittal would have resulted. Accordingly, Rule 3.850 relief must be granted and a new trial ordered.

ARGUMENT III

MR. DUEST'S SENTENCE OF DEATH RESULTED FROM THE ERRONEOUS ADMISSION OF A VOID AND UNCONSTITUTIONAL PRIOR CONVICTION. THE DEATH SENTENCE THUS RESTED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude." In Johnson v. Mississippi, 108 S. Ct. 1981 (1988), this principle was applied to a capital case where a conviction used to establish an aggravating circumstance was reversed after a death sentence had been imposed. There, the defendant was convicted of murder in 1982. At the penalty phase proceedings, a 1963 conviction from the State of New York was used to establish the aggravating circumstance -- previously convicted of prior crime of violence. Following appellate affirmance of the death sentence in 1985, the New York conviction was overturned by the New York Court of Appeals in 1987. The defendant then filed to vacate the death sentence. When the case reached the United States Supreme Court, the death sentence was overturned. The Court explained:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case. See Gardner v. Florida, 430 U.S. 349, 363-364, 97 S. Ct. 1197, 1207-1208, 51 L.Ed.2d 393 (1977) (quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S. Ct. 2978, 2991-92, 49 L.Ed.29 944 (1976)) (White, J., concurring in judgment). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such

decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 884-885, 887, n.24, 103 S. Ct. 2733, 2747, 2748, no.24, 77 L.Ed.2d 235 (1983). The question in this case is whether allowing petitioner's death sentence to stand although based in part on a vacated conviction violates this principle.

In its opinion the Mississippi Supreme Court drew no distinction between petitioner's 1963 conviction for assault and the underlying conduct that gave rise to that conviction. In Mississippi's sentencing hearing following petitioner's conviction for murder, however, the prosecutor did not introduce any evidence concerning the alleged assault itself; the only evidence relating to the assault consisted of a document establishing that petitioner had been convicted of that offense in 1963. Since that conviction has been reversed, unless and until petitioner should be retried, he must be presumed innocent of that charge. Indeed, even without such a presumption, the reversal of the conviction deprives the prosecutor's sole piece of documentary evidence of any relevance to Mississippi's sentencing decision.

Contrary to the opinion expressed by the Mississippi Supreme Court, the fact that petitioner served time in prison pursuant to an invalid conviction does not make the conviction itself relevant to the sentencing decision. The possible relevance of the conduct which gave rise to the assault charge is of no significance here because the jury was not presented with any evidence describing that conduct-the document submitted to the jury proved only the facts of conviction and confinement, nothing more. That petitioner was imprisoned is not proof that he was guilty of the offense; indeed it would be perverse to treat the imposition of punishment pursuant to an invalid conviction as an aggravating circumstance.

It is apparent that the New York conviction provided no legitimate support for the death sentence imposed on petitioner. It is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly urged the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances "one against the other." 13 Record 2270; App. 17; see 13 Record 2282-2287; App. 26-30. Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be "decisive" in the "choice between a life sentence and a death sentence." Gardner v. Florida, 430 U.S., at 359, 97 S.Ct., at 1205 (plurality

opinion).

108 S. Ct. at 1986-87.

The Court in Johnson concluded:

> . . . the error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.
>
> Accordingly, the judgment is reversed, and the case is remanded to the Mississippi Supreme Court for further proceedings not inconsistent with this opinion.

108 S. Ct. at 1989 (footnote omitted).

Here, at Mr. Duest's penalty phase proceeding before the jury, two prior convictions were introduced to establish the aggravating circumstance of previously convicted of a crime of violence. One of the convictions was for robbery; the other was for armed assault with the intent to murder two police officers. Both convictions arose from the State of Massachusetts and were entered in 1971. Mr. Duest's jury, just as the jury in Johnson v. Mississippi, was instructed as to the existence of the aggravating circumstance -- previously convicted of a prior crime of violence -- and was instructed to weigh the aggravating circumstances found against the mitigating circumstances.

At Mr. Duest's evidentiary hearing on his Rule 3.850 motion, it was established that one of two judgments and sentences introduced at the penalty phase to establish a prior conviction of crime violence had since been vacated and nolle prossed (Defendant's Exhs. 1 and 2). This vacated conviction was for the armed assault with the intent to murder of two police officers in Massachusetts. However, the circuit court refused to vacate Mr.

Duest's sentence of death because one conviction remained to support the aggravating circumstance (T. **680).**[4]

There can be no dispute that here the judge and jury relied on Mr. Duest's prior Massachusetts convictions to establish the "prior crime of violence" aggravating circumstance upon which his death sentence was based. The sentencing court found that aggravating circumstance, saying:

> (B) That at the time of the crime for which the defendant is to be sentenced, he had been previously convicted of another capital offense, or of a felony involving the use or threat of violence to some person;
>
> (1) This aggravating circumstance does apply in this case as the Defendant has been convicted of Armed Robbery and Armed Assault with the Intent to Commit Murder.

(R. **1833).**

The State's evidence in this regard consisted solely of copies of two convictions: one for Armed Robbery and one for Armed Assault with the Intent to Murder. As to the latter charge the judge told the jury:

> THE COURT: State's Exhibit No. 2 is a certified copy from the Commonwealth of Massachusetts. Superior Court, Department of the Trial Court. This is a conviction for armed assault to murder. The defendant

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[4] **Though** not the basis of the circuit court's ruling, the State has in its Response to the habeas corpus petition asserted that this claim is procedurally barred under Eutzy v. State, 541 SO. 2d 1143 (Fla. **1989),** and Bundv v. State, **538** So. 2d 445 (Fla. **1989).** However, in both Eutzy and Bundv, the Johnson v. Mississippi claim was barred because the prior conviction was simply under attack. In neither case had the prior conviction actually been vacated. Here, as in Burr, the collateral crime has been wiped clean. It is the removal of the prior conviction which constitutes new evidence previously unavailable that authorizes the presentation of this claim under Rule **3.850.** As a result there is no procedural bar. See Sonser v. State, 544 So. 2d 1010 (Fla. **1989).**

pled guilty on January 13, 1971, and was sentenced to a term not exceeding ten years, nor less than five years.

I will read this Indictment to you, also. It says, "Commonwealth of Massachusetts. The Superior Court. At the City of Cambridge, within and for the County of Middlesex, on the first Monday of April, in the year of our Lord one thousand nine hundred and seventy, the jurors for the Commonwealth of Massachusetts on their oath present that Lloyd Paul Duest on the 4th day of March in the year of Our Lord one thousand nine hundred and seventy, at Reading, in the County of Middlesex, aforesaid being armed with a dangerous weapon, did assault Herbert McSheehy and Leo Iacopucci," or something like that, I-A-C-O-P-U-C-C-I, "with intent to murder them against the peace of said Commonwealth and contrary to the Statute in such case and provided--"

(R. 1574-75). This indictment in fact indicates that Mr. Duest attempted to murder two people.

After the jury returned to deliberate regarding its sentencing recommendation, proceedings were reconvened in open court when the jury requested an opportunity to view the prior convictions:

(Thereupon, the following proceedings were resumed within the presence of the jury:)

THE COURT: Ladies and gentlemen, I understand [sic] you wanted to see the criminal records. They were not published to you originally so I will read them to you again. The first one I read to you, armed robbery, Commonwealth versus Lloyd Paul Duest. I will read you the Indictment.

(R. 1631). The Court thereupon read each indictment, notice of guilty plea and sentence, to the jury. Again the jury heard the indictment and guilty plea indicating Mr. Duest had tried to murder two people.

As brought out at the evidentiary hearing on the Rule 3.850 motion, Mr. Duest's conviction of armed assault with intent to murder was vacated on June 27, 1988. Commonwealth V. Duest, 26 Mass. App. Ct. 137 (1988). The appellate court noted:

> The Commonwealth acknowledges that it cannot meet its burden of establishing the circumstances of the plea to the indictment charging armed assault with intent to murder. Note **1,** supra. There is no proof that the defendant harbored a specific intent to murder or kill when shots from a pistol were fired out of the window of the getaway vehicle at the police cruiser chasing that vehicle. The only evidence on that point is to the effect that the shots were fired at the pursuing police officers in the cruiser. The record, therefore, is fatally deficient on the essential mental element of armed assault with intent to murder, as that element has been clarified by Commonwealth v. Henson, **394** Mass. **584 (1985).** The Henson decision has retroactive application. See Commonwealth V. Ennis, **398** Mass. **170, 175 (1986).** We find the Commonwealth's concession justified and we accept it.

26 Mass. App. Ct. at **138-39** n.2. See Defendant's Exh. **2.**

On October 20, **1988,** the charge was nolle prossed:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS.
SUPERIOR COURT DEPARTMENT

NO. 87764

COMMONWEALTH
V.

LLOYD PAUL DUEST

NOLLE PROSEQUI

Now comes the Commonwealth and files a nolle prosequi on this indictment of armed assault with the intent to murder. The offenses occurred on March **4, 1970,** in the town of Reading, Massachusetts. The defendant pled guilty to indictment No. **87762** (armed robbery), indictment No. **87763** (unlawfully carrying a firearm) and indictment No. **87764** (armed assault with intent to murder) and he was sentenced by Justice Hale on January **18, 1971** in Middlesex Superior Court. On September **24, 1987,** the defendant filed a motion to withdraw his plea of guilty and for a new trial. Justice Hale, after a hearing, denied the defendant's motion on December **10, 1987.** On June **27, 1988,** the Appeals Court vacated the guilty plea on the indictment for armed assault with intent to murder. The Appeals Court affirmed Judge Hale's denial of the defendant's

motion to withdraw his guilty pleas on the other indictments.

The Commonwealth is unable to proceed to trial on this indictment, as witnesses, including police officers, are no longer available. Therefore, due to the present state of the evidence, this nolle prosequi is filed in the interest of justice.

Respectfully Submitted
For the Commonwealth,

SCOTT HARSHBARGER
DISTRICT ATTORNEY

by: _____
Elizabeth Kelley
Assistant District Attorney
Middlesex Superior Courthouse
40 Thorndike Street
Cambridge, MA 02141
(617) 494-4673

Dated: October 20, 1988

(Defendant's Exh. 1).

Mr. Duest's jury, after being instructed to weigh the aggravating circumstances against the mitigating and determine if the mitigating outweighed the aggravating, returned a seven to five death recommendation. Only one of the seven jurors needed to have changed sides because of the prior armed assault with intent to murder which the jury specifically asked to have read a second time. It is the "possibility" that the reversed prior conviction may have resulted in a death sentence that warranted reversal in Johnson. It is the same possibility that requires a reversal of Mr. Duest's sentence of death. Yet, the circuit court refused to vacate Mr. Duest's sentence of death. This was error.

The circuit court's ruling was erroneous under Johnson v. Mississippi, 108 S. Ct. 1981 (1988); Castro v. State, 547 So. 2d

111 (Fla. 1989); and Burr v. State, 550 So. 2d 444 (Fla. 1989). In Johnson, the Supreme Court reversed because "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." 108 S. Ct. at 1989. Moreover, Mississippi, like Florida, is a weighing state. It is the weight of the aggravating circumstance that is important, not merely its existence. The Supreme Court specifically found that the introduction of materially inaccurate evidence "extended beyond the mere invalidation of an aggravating circumstance." 108 S. Ct. at 1989. The issue is not whether an aggravating circumstance need be struck; it is instead whether the death sentence is unreliable because it results from inaccurate information.

Evan Baron, Mr. Duest's trial counsel, testified at the evidentiary hearing that the introduction of the judgment and sentence showing that Mr. Duest was previously convicted of trying to kill two police officers was particularly devastating to the defense (T. 160, 187-89). Moreover, the State and the trial judge agreed Mr. Baron had introduced substantial nonstatutory mitigation in Mr. Duest's behalf (T. 118-22). In striking the balance between the aggravation and the mitigation, the evidence that Mr. Duest tried to murder two police officers was pivotal, particularly where the death recommendation was by a vote of seven to five.

The evidence introduced at the evidentiary hearing also showed that the reason the judgment and sentence was vacated was because there was no evidence of "an intent to murder," an

element of the crime of assault with intent to murder. Yet, at Mr. Duest's penalty phase, the jury was told Mr. Duest assaulted two (2) police officers with the intent to murder them. Certainly, the evidence considered by the jury was, in the words of Johnson v. Mississippi, **"materially inaccurate."** 108 S. Ct. at **1989.**

The error in the circuit court's conclusion denying relief is most clearly established in the opinion in ~~Castro v. State~~, **547** So. 2d 111 (Fla. **1989).** There, this Court found ~~Williams~~ Rule error in the guilt phase of a capital trial. Evidence was improperly admitted that Mr. Castro "had tied [a witness] up and threatened to stab him several days prior to killing [the **victim]." 547 So.** 2d at 114. This Court concluded the error was harmless as to the guilt phase, but not as to the penalty phase. The Court held the introduction of irrelevant bad acts evidence, which is decidedly what occurred in Mr. Duest's case, is presumed to be reversible error unless the State establishes harmlessness beyond a reasonable doubt. In Castro, the Court concluded:

> In sum, the Williams rule error improperly tended to negate the case for mitigation presented by Castro and thus may have influenced the jury in its penalty-phase deliberations. For this reason, we cannot say beyond any reasonable doubt that had the jury not heard McKnight's irrelevant, prejudicial testimony, it might not have determined that a life sentence was appropriate under the circumstances.

547 So. 2d at 116.

The same is true here. Mr. Duest offered in mitigation family testimony that he was a good and caring person who had suffered from a heroin addiction (T. **119,** 121). Evidence that he had tried to kill two police officers in all likelihood shifted

the balance struck by the jury. After retiring to deliberate and before returning a verdict, the jury even asked to be able to inspect the judgment and sentence. Instead, the Court reread the judgment and sentence to the jury. Only then, after hearing for a second time that Mr. Duest had tried to kill two police officers, was a death recommendation by a seven to five vote returned. Certainly, it cannot be said beyond a reasonable doubt that, absent the inaccurate evidence, one of the seven jurors who recommended death would not have found the mitigation warranted life.

In Burr v. State, 550 So. 2d 444 (Fla. 1989), this Court was presented with a claim pursuant to Johnson v. Mississippi in an appeal from the denial of Rule 3.850 relief. There, evidence of three (3) collateral crimes had been introduced against Burr. Subsequent to his conviction and sentence of death, Burr was acquitted of one of the collateral crimes, and the State nolle prossed another. This Court reversed Burr's death sentence pursuant to Johnson v. Mississippi:

> We reject the notion that the one instance of collateral conduct for which Burr was acquitted was merely cumulative of the other two instances presented trial. We have no way to determine the weight given each witness' testimony. As the reviewing court it is not our function to weigh the credibility of each witness, but rather, it is that of the trial judge. Nor can we determine whether the one improperly admitted instance of collateral conduct was determinative of the outcome.

550 So. 2d at 446.

It is clear under Burr and Castro that where improper collateral crimes evidence is admitted, it is the State's burden to prove harmlessness beyond a reasonable doubt. It also clear

that in a capital sentencing determination in Florida, there is no magic formula. It is for the jury, in the first instance, to weigh aggravation versus mitigation. Here the jury by a seven-to-five vote found the aggravation, which included a prior armed assault with the intent to murder two (2) individuals, outweighed the substantial mitigation presented. In such circumstances, as this Court ruled in both Castro and Burr, the error cannot be found to be harmless beyond a reasonable doubt. Accordingly, Mr. Duest's sentence of death must be vacated.

ARGUMENT IV

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

In rejecting this claim,[5] the circuit court ruled that no objection had been registered during Mr. Duest's 1982 capital trial to the introduction of victim impact evidence. The court further held that Booth v. Maryland, 107 S. Ct. 2529 (1987), was not a change in Florida law and therefore that this claim was procedurally barred. The circuit court erred.

In the guilt-innocence phase of the trial, the prosecutor introduced, and the court admitted over strenuous defense objection, a photograph of the victim's dresser, on which were displayed photographs of the victim's family. The State argued

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[5]This claim was pled in the original Rule 3.850 motion as part of Claims V and IX. Following the decision in Booth v. Maryland, this claim was repled as Claim G of the Second Amendment to Motion to Vacate.

that the purpose of the photograph was to depict the victim with his family in order to counter the fact that the defendant's family would be testifying:

> MR. BARON [DEFENSE COUNSEL]: I don't know what the probative value of this is. I would object. I don't -- I would object because it depicts a dresser.
>
> THE COURT: What does it have to do with this case?
>
> MR. GARFIELD [PROSECUTOR]: I don't know. I offer all the photographs in. What is wrong with showing that he is a human being, Judge, with children? He is going to call the whole defendant's family down. How could that be prejudice? All the other photographs show the room.
>
> MR. BARON: Another photograph shows this dresser from a side angle. It doesn't show -- The photographs haven't been introduced. What is the necessity?
>
> THE COURT: I don't have any problem. What is the probative value?
>
> MR. GARFIELD: Just part of the room, Judge.
>
> THE COURT: We have another one that shows part of the room. Which is the other one?
>
> MR. GARFIELD: What is the question? Is it so important, Judge, that the jury can't see?
>
> THE COURT: It doesn't make any difference to me. Why do you need to put extra things in?
>
> MR. GARFIELD: See the one you have got?
>
> THE COURT: Switching them around. You want this on it?
>
> MR. GARFIELD: It shows -- Look, Judge. You have here State's Exhibit 10 that shows --
>
> THE COURT: Do you know who these people are?
>
> MR. GARFIELD: No.
>
> MR. BARON: Judge, I know he has a daughter and a son and if I am not mistaken Mr. Shifflett's picture.
>
> MR. GARFIELD: It looks like Mr. Shifflett's. I have no idea. It shows how the room is laid out and

taking this room into account where the clothes are from.

THE COURT: This is an old 1890's thing. Look at the thing.

MR. GARFIELD: Obviously it is time for Mr. Baron to make an objection. I don't think it is prejudicial.

THE COURT: It is not prejudicial. Probably a relative.

MR. GARFIELD: At best it is cumulative, shows how the room is laid out. I might not have to put this in.

THE COURT: I will allow it in. For the record, I, we are going to take out --

MR. GARFIELD: Take out this one, G.

THE COURT: I is 11?

THE CLERK: Yes.

(Thereupon, State's Exhibits Nos. 4 through 11 were offered and received in evidence.)

(R. 459-61)(emphasis added). The prosecutor's motive could not have been more clearly stated, and could not have more clearly violated Booth. The only purpose of introducing the photo in question, as the prosecutor himself argued, was to present a photograph depicting the victim's family to the jury, to advise the jury that the victim had a family too. Of course, the photograph also alerted the jury to the fact that victim's family was sitting in the courtroom throughout the trial (R. 1064-65).

Moreover, the State had begun developing the theme of sympathy for the victim in voir dire:

MR. DOEBERLING: I am thinking, two weeks is going to kill me, but yet this guy is very important.

MR. GARFIELD: What about the person who is dead?

MR. DOEBERLING: I know. Sure, he is -- I spend most of my career as a respiratory therapist, having these guys come through ER and so forth, trying to help

them out.

(R. 122)(emphasis added).

It became only too obvious to the jury as to the identity of the persons pictured in exhibit 11. The victim's family was very much in evidence. At one ponit, the prosecutor pointed out to the court that one witness kept looking at the victim's family during his testimony and because of their presence, was hesitant to mention the victim's homosexuality:

> MR. GARFIELD: He also said the same thing to me outside. I think what is happening, is when he is saying that he is looking at the relatives and the relatives are very adamant about that. Mr. Grillo had indicated that they don't like this homosexual thing being brousht out. You notice he is saying Marlin Beach and Lefty's?
>
> THE COURT: I know.

(R. 497)(emphasis added). At another point, defense counsel informed the court that the victim's family and friends had been commenting on the proceedings within the jury's hearing:

> THE COURT: Okay. Ladies and gentlemen, I am going to let you go for lunch. You come back at 1:30 and then we can start again.
>
> (Thereupon, the following proceedings were had out of the presence of the jury:)
>
> MR. BARON: Judge, my client has told me, and I haven't seen anything, I am going by what he told me. It is something I need to bring up to the Court. That three people in Mr. Pope's family and Mr. Harris [a friend of the victim's] were sitting right near the jury and have been making comments, that if not to the jury, at least easily within earshot of the jury. I would ask if nothing else that they not sit there anymore.
>
> THE COURT: I have not noticed anything because I cautioned Mr. Harris before.
>
> MR. GARFIELD: I didn't notice because my back -- I will tell them to move over to the next aisle which they were in.

THE COURT: Okay.

MR. GARFIELD: I think the reason was to see the witness better. You can't see from the left side as well as from the right side.

MR. BARON: If they want to sit a few rows back, I don't care.

THE COURT: Okay. Anything else?

MR. BARON: No.

THE COURT: I didn't say anything for the record but my clerk watched and she didn't see anything, either. I watched. Okay.

(R. 1064-64)(emphasis added). Thus, not only were the victim's family the subject of the prosecutor's motion and their photographs shown to the jury, but they also created at least two disturbances in the courtroom requiring that they be admonished and then moved.

The State's presentation of victim impact evidence before Mr. Duest's jury and judge continued throughout the course of the proceedings. During the state's closing penalty phase argument the prosecutor sought a collective emotional response from Mr. Duest's jury drawing upon the victim impact evidence and testimony adduced during guilt-innocence proceedings. He specifically referred to the evidence, the objected to photograph as establishing that the victim had a family too:

> The defendant in this case has taken the position that he did not do this. Therefore, he has no remorse in this case. The victim was what I would call, and what he has been called by the witnesses, a young 64. You remember the picture that was in evidence of him. of Mr. Pope. That was a live and well picture. so it is not a gory photograph. I just want you to recall State's Exhibit 16. There he is. Look at the age of the people that he is with. Pretty young for his age. Enjoying his life. Perhaps he was gay. I watched you people too long to believe that that makes any

difference to you. He had just as much of a right to be the way he was as anybody else has to be the way they are. ~~Of course, he had a family, too~~. I am not going to dwell on that but you have heard from the family of Mr. Duest. ~~Let's not forget that the person who is dead has a family, also. They loved him and he~~ loved them. So much for that circumstance. I submit to you that that does apply in this case. Number eight, wicked, evil, atrocious, or cruel.

(R. 1596-97)(emphasis added). The prosecutor's message is clear -- Mr. Duest should die because the victim was a young 64 and enjoying his life. Mr. Duest should die because the victim had friends and family who loved him. The prosecutor continued to evoke the jury's sympathy for the victim:

> No remorse. All that time. All that time. So I would submit to you that this was a premeditated killing, that it was done in the cold and calculated and premeditated manner without any pretense of moral or legal justification. Okay. That is all for the aggravating. You want to be as fair to the State and you want to be as fair to Mr. Duest and to the family of Mr. Duest and to the family of Mr. Pope as you possibly can be.
>
> Not a single one of you started this trial, sitting there as prospective jurors, thinking you were going to be unfair. So it is too late now to become unfair.

(R. 1605-06)(emphasis added). The gist of the prosecutor's argument was that it would be **"unfair"** not to consider the victim's family and that it was "too late to become unfair." Again, this argument was predicated upon the admission into evidence of a photograph of the victim's family. The court had overruled the objection to the evidence finding nothing prejudicial about the fact the victim had a family.

The sentencing court itself was further contaminated with additional and graphic victim impact evidence provided in the presentence investigation:

Daughter of the victim, Lillian P. Ferren, stated, **"It**

is very difficult to summarize my feelings about my Dad's tragic murder without wondering why such a good man had to die in such a horrible manner, or for that manner, anyone else. My Dad was a good father to my brother and I. He was a kind and gentle man who always put his family first. He was retired from a company he had worked for for twenty-five years and had moved to Fort Lauderdale just five short months before he was murdered. I could write pages on the pain and grief this murder has caused our family. About the loss we feel on a daily basis. About all the big and little things he did that made him such a special Dad and made his tragic death such a terrible loss, but that is not the purpose of this letter. My Dad was brutally murdered and one of the worst ways imaginable to me. He lay bleeding to death after being literally ripped apart by an escaped convict who was awaiting trial for another crime. Do I feel Lloyd Duest deserves to be able to return to society in twenty-five years to prey on more innocent victims? The jury did not want to give Duest the opportunity and neither do I. The repeated escapes and subsequent crimes indicates to me that this man has no intention of either rehabilitating himself of allowing the penal system to rehabilitate him. With all of this in mind, I must agree with the jury's recommendation of the death sentence for Lloyd Duest for the atrocities he has committed against my father and others and if given the opportunity, I feel he will do it again."

Victim's son, David D. Pope, stated, "I would like first to address the prospect of the minimum sentence of life in prison with the provision for Parole in twenty-five years; I find the idea of Parole unacceptable, not just in this case but in any case which involves someone accused of Murder In The First Degree. I do not believe anyone should be placed back in society after being convicted of this type of crime. Quite frankly, I believe it would be difficult to keep the defendant in prison for even twenty-five. In my opinion his prior record indicates not only a consistent history of criminal convictions, but also a consistent history of prison escapes. Because of this trend, I am concerned that the defendant might escape again and in the process or aftermath take someone's life. On a more personal basis I believe the fact that this man did take my father's life in an intentional as well as cruel manner justifies the maximum sentence. I do not accept the reasoning presented by others that someone has to commit multiple murders before Capital Punishment is warranted. For these reasons I reaffirm the recommendation of the majority of the jury to impose the maximum sentence."

(R. 1811-12)(emphasis added). In addition, the presentence

investigator offered her own characterization of the offense for the court's consideration:

> In view of the fact that The Aggravating Circumstances that do apply sufficiently outweigh The Mitigating Circumstances, it can be said that Lloyd Duest presents a threat to society. It is the opinion of this officer that he acted knowingly, with and in a premeditated design and that he did so knowing his actions created a great likelihood of death for John Pope, Jr. This offense was a brutal Homicide in which victim was stabbed eight times and then left to die.
>
> Lloyd Duest is of a criminal nature with a total lack of regard for the law or the rights of others, including their right to live. His entire adult life has been one criminal act after another. It is felt that life imprisonment is not sufficient punishment. Chances for rehabilitation are minimal, due to the fact that attempts have been made in the past and have failed.
>
> Lloyd Duest has a history of Escape from confinement at least four times in Massachusetts and Florida, and should he escape again, the results could be disastrous. This officer feels that Lloyd Duest has the capacity as well as the propensity to murder again.
>
> Having considered the subject's prior criminal record, his absolute lack of remorse and the seriousness of the offense, The Aggravating and Mitigating Factors, and the advise of the jury, this officer respectfully recommends that Lloyd Duest be sentenced to death.

(R. 1817).

In Booth v. Maryland, the United States Supreme Court held that "the introduction of [victim impact evidence] at the sentencing phase of a capital murder trial violates the Eighth Amendment." Id. at **2536**. The victim impact evidence in Booth was contained in a presentence investigation which was provided to the jury. It consisted of descriptions of the personal characteristics of the victim, the emotional impact of the crimes on the family and opinions and characterizations of the crimes and the defendant, "creat[ing] a constitutionally unacceptable

risk that the [sentencer] may [have] impose[d] the death penalty in a arbitrary and capricious manner." Id. at 2533 (emphasis added). Similarly, in South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the Court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the prosecutor fashioned a victim impact argument during his penalty phase closing. Booth and Gathers mandate reversal where the sentencer is contaminated by victim impact evidence or argument.

Mr. Duest's trial contained not only victim impact evidence and argument but, in addition, characterizations and opinions of the crimes condemned in Booth. Both the jury and judge relied on the victim impact evidence and argument in recommending a sentence of death. The court not only condoned but considered the victim impact evidence presented. Mr. Duest's case presents the constitutionally unacceptable risk that the sentencer may have relied on victim impact evidence in violation of Booth, Gathers.

The prosecutor even augmented his appeal to the court that Mr. Duest should die because of the suffering of the victim's family and friends with a specific argument at the time of sentencing:

> I will be brief also, as far as the proper sentence. Aside from legal consideration, that jury was not allowed to consider the tears that would have, without a doubt, flowed from the family of the victim and some of the victim's friends. Some of the family and friends of the deceased did not want to testify. In the interest of a clean presentation, I did not allow them to testify. I'm not sure that would have been proper, but it's amazing how we can have a defendant standing here today worried about how many

> convictions you're going to count when, as far as I'm concerned, it's almost trivial in regard and in comparison to the human misery this man has basically spent his life inflicting upon people.

(R. 1685-86) (emphasis added).

The Booth and Gathers courts found the consideration of evidence and argument involving matters such as those relied on by the judge and jury here to be constitutionally impermissible, as such matters violated the well-established principle that the discretion to impose the death penalty must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gress v. Georgia, 428 U.S. 153, 189 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.); see also California v. Ramos, 463 U.S. 992, 999 (1983). The Booth court ruled that the sentencer was required to provide, and the defendant had the right to receive, an "individualized determination" based upon the "character of the individual and the circumstances of the crime." Booth v. Maryland, supra; see also Eddings v. Oklahoma, 455 U.S. 104, 112 (1982). The state's evidence and argument was a deliberate effort to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

In Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989), the court held that the principles of Booth are to be given full effect in Florida capital sentencing proceedings. In Jackson this Court held that Booth and Gathers were a change in Florida law, cognizible in Rule 3.850 proceedings. Here, as in Jackson, defense counsel for Mr. Duest vigorously objected during the State's introduction of victim impact evidence (R. 459-461).

Jackson dictates that relief post-Booth and Gathers is now warranted in Mr. Duest's case.

The State argued before the circuit court that Mr. Duest's Booth claim was not cognizible under Parker v. Duaser, 550 So. 2d 459 (Fla. 1989), because no objection had been made at trial. In Parker, this Court held "the procedural bar applies when there is no objection at trial." 550 So. 2d at 460. As a result, this Court found Mr. Parker's claim not cognizible "[b]ecause no objection was made at the time the state made the comments at issue." Id. The circuit court in denying Mr. Duest relief specifically relied on Parker and found that Mr. Duest had not objected to the introduction of victim impact evidence. However, the circuit court in this regard was clearly erroneous. Defense counsel specifically objected to the introduction of evidence regarding the victim's family. The prosecutor argued for its admission saying it was necessary to counter evidence that Mr. Duest had a family. The trial court agreed with the prosecutor. Thereafter the prosecutor argued for a death sentence on the basis of the evidence objected to by defense counsel. Under these circumstances Parker does not apply; Jackson v. Dusser does, and a resentencing is required. See Zersuera v. State, 549 So. 2d 189, 193 (Fla. 1989).

Here, as in Booth, the victim impact information "serve[d] no other purpose than to inflame the jury [and judge] and divert it from deciding the case on the relevant evidence concerning the crime and the defendant." Id. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358

(1977)(opinion of Stevens, J.), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, supra at 2536. The decision to impose death must be a "reasoned moral response." Penry, 109 S. Ct. at 2952. The sentencer must be properly guided and must be presented with the evidence which would justify a sentence of less than death. Accordingly, Mr. Duest's sentence of death was obtained in violation of the eighth amendment and must be vacated.

ARGUMENT V

MR. DUEST WAS DENIED HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY WHEN THE STATE INTRODUCED EVIDENCE OF FLIGHT, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This claim was presented in Mr. Duest's original Rule 3.850 motion. It was rewritten in light of substantial new case law in his second amended motion. This claim is premised upon a change in law, Merritt v. State, 523 So. 2d 573 (Fla. 1988), upon circumstantial ineffective assistance of trial counsel, United States v. Cronic, 466 U.S. 648 (1984), and upon ineffective assistance of appellate counsel, Evitts v. Lucey, 469 U.S. 387 (1985).

During Mr. Duest's trial, the State's repeated references to Mr. Duest's alias -- Robert Brigida -- and his flight from police officers on April 18, 1982, violated due process and the Florida Evidence Code. This evidence was not relevant; it was not probative; it did not tend to prove or disprove a material fact; it was materially inaccurate and misleading. At least to a person who knows that Mr. Duest was wanted for escape in

Massachusetts and some thirty other charges, the evidence of the use of an alias and of flight does not tend to prove guilty knowledge of murder because the conduct is just as likely the result of being wanted for escaping from Massachusetts while awaiting trial for robbery, six (6) counts of cocaine possession, and thirty one (31) counts of larceny by check. **See** Presentence Investigation, R. **1809**. Use of aliases and evidence of flight are only admissible when the alias and the flight are relevant to the consciousness of guilt. Merritt v. State, 523 So. 2d 573 (Fla. **1988).**

The State in response to this claim has argued that Mr. Duest's flight was prompted by either consciousness of guilt of the homicide or fear of the two misdemeanor warrants for Robert Brigida. The State's argument ignores the fact that the flight occurred immediately after Mr. Duest was fingerprinted. The State ignores this and the fact that Mr. Duest had over thirty charges pending against him in Massachusetts as well as a prior record. His flight reflected consciousness of those facts.

When the defense sought to suppress this evidence before the trial the following occurred:

> [PROSECUTOR]: Then this defendant, after Feltgen had walked out of the room, this defendant ran. I think it is more presumable that he ran when he found out he was a suspect in a homicide as opposed to a misdemeanor, some misdemeanor warrant.
>
> THE COURT: Either that or he was afraid they were going to find out he had a capias from Massachusetts.
>
> MR. BARON: That is the real reason. That is something that is not going to be brought out. I don't see the relevance of him leaving two months after a murder when he is not even arrested for murder, where he has voluntarily at that point, according to all of

the police reports, came in voluntarily and was talking to the detectives.

At that point in time it was not only the arrest that took place but it was on a warrant for the real Robert Brigida.

Of course, my concern is a jury hearing that this man is charged with an escape or he had escaped that evening and what prejudicial impact it will have on the case.

MR. GARFIELD: I don't think I have to bring out any formal charges. All I want to bring out was after Feltgen talked to him he ran out of the interrogation room and was found hiding in somebody's closet which is what happened.

(R. 37-38). Despite the judge's recognition that the flight may have resulted because of the Massachusetts capias, she ruled the evidence was admissible. "I think that is a factor that the jury has to consider" (R. **39).** In its Habeas Corpus Response, the State contended that no objection was made to this flight evidence. The State's position is wrong. An objection was made. The objection was overruled, and the evidence was declared admissible. This was error.

In Merritt, this Court stated:

John Edward Merritt was convicted of first-degree murder and armed burglary. The trial judge imposed death over the jury's recommended life sentence. We have jurisdiction. Art. V, section **3**(b)(1), Fla. Const.

Darrell Davis was murdered and his home burglarized in **1982.** In **1985** the state received information leading to Merritt who was serving time on an unrelated conviction in Virginia. In April **1985** the state executed a search warrant for Merritt's body hair and fingerprints. Nine months later, (December **1985)** he escaped while being transported to Florida for prosecution of charges unrelated to the Davis incident. In March **1986** Merritt was indicted for Davis's first degree murder and armed burglary.

Merritt argues that the trial court erroneously admitted evidence of the **1985** escape. We agree.

Flight evidence is admissible as relevant to the defendant's consciousness of guilt where there is sufficient evidence that the defendant fled to avoid prosecution of the charged offense. See Straight v. State, 397 So.2d 903, 908 (Fla.), cert. denied, 454 U.S. 1022, 102 S.Ct. 556, 70 L.Ed.2d 418 (1981); State v. Young, 217 So.2d 567 (Fla.1968), cert. denied, 396 U.S. 853, 90 S.Ct. 112, 24 L.Ed.2d 101 (1969); Daniels v. State, 108 So.2d 755 (Fla.1959); Blackwell v. State, 79 Fla. 709, 86 So. 224 (1920). However, flight alone is no more consistent with guilt than innocence. See Whitfield v. State, 452 So.2d 548 (Fla.1984).

Merritt argues that the state failed to establish that he fled to avoid prosecution for the Davis murder as opposed to the other unrelated charges. We addressed a similar argument in Bundy v. State, 471 So.2d 9 (Fla.1985), cert. denied, ___ U.S. ___, 107 S.Ct. 295, 93 L.Ed.2d 269 (1986). Bundy murdered two Tallahassee Chi Omega sorority sisters in January 1978. During Bundy's trial for the Leach murder, the state introduced evidence that he fled twice in the six days following Leach's disappearance. Bundy argued on appeal that the evidence was inadmissible because the state failed to prove that he fled to avoid prosecution for the Leach murder as opposed to the Tallahassee crimes. We found, however, that the jury could reasonably infer Bundy's consciousness of guilt from his flights because they occurred only days after Leach's much publicized disappearance.

Unlike Bundy, there is insufficient evidence in the instant case that Merritt fled to avoid prosecution for the Davis murder and burglary. Merritt escaped three years after the Davis murder. Although he was made aware of the murder investigation when the state executed its search warrant in April 1985, he did not attempt to escape until December 1985 during his return to Florida to stand trial on unrelated charges, including armed kidnapping, aggravated assault, and armed burglary. Merritt was not indicted for the Davis murder until March 1986. A jury could not reasonably infer from these facts that Merritt escaped to avoid prosecution for the Davis murder. Such an inference would be the sheerest of speculation.

Merritt was between a rock and a hard place once the court erroneously admitted the evidence. To rebut the state's improper implication that he escaped to evade prosecution for the Davis murder, defense counsel introduced testimony that he escaped while being returned to Florida on unrelated charges. The court compounded the error by instructing the jury that an attempt to avoid prosecution through flight is a circumstance which may be considered in determining

> guilt. We cannot say beyond a reasonable doubt that these errors did not affect the jury's verdict. See DiGuilio v. State, 491 So.2d 1129 (Fla.1986).

523 So. 2d at 573-74.

The facts here are virtually identical with those in Merritt. Here, as in Merritt, there is no evidence indicating that flight was in order to avoid prosecution for the murder. At the time he was arrested, Mr. Duest was already using an alias which is very consistent with trying to avoid prosecution in Massachusetts. The flight occurred more than two months after the homicide, unlike "days after" as was the case in Bundy. Mr. Duest was stopped on the street and taken to the police station without making any effort to run, even after the police had informed Mr. Duest he was "a possible suspect in a homicide" (R. 844). Mr. Duest voluntarily went with the police. He was not placed under arrest. He was not handcuffed. Id. Mr. Duest was told Massachusetts authorities had been contacted and that "he was, in fact, under arrest for the warrants in Massachusetts, at which time he replied, 'I was afraid you were going to find out about those'" (R. 882). Mr. Duest fled only after he was fingerprinted (Feltgen depo at 18). Certainly the fingerprinting caused Mr. Duest to know that his true identity would soon be discovered. Under the circumstances, it is the "sheerest of speculation" to conclude his flight was premised upon his guilt of the murder and not upon some thirty (30) charges pending against him in Massachusetts.

Despite the defense's strenuous objection, the following testimony was elicited from the arresting police officer:

> Q Did you eventually leave the room and leave

him still there?

A Yes, I did. I then left the room.

Q Did there come a time when you returned to the room and Mr. Duest or, as you know him, Brigida, was not there?

A That is correct.

Q You didn't give him permission to be not there?

A No, I didn't.

Q Since he was under arrest. Well, what did the room look like when you came back in?

A The wooden chair that I had secured him to, the arm of the chair was broken off from the chair itself. The door was open, and Robert Brigida was gone.

Q Did there come a time later on when you actually found Lloyd Duest, also known as Robert Brigida?

A Yes, I did.

Q And how much time went by before you eventually found him? You can skip all the details.

A It was approximately four to five hours later, approximately six o'clock a.m. the following morning.

(R. 883).

The prosecutor argued in closing that Mr. Duest was guilty of the murder: "that is why he ran out of there" (R. 1448). "All the man had to do was say I am not Bobby Brigida and then he would be clear." Id. The prosecutor also asked other witnesses if they had hid in a closet (R. 514). The prosecutor's statement was a blatant lie. He knew that Mr. Duest could not have just said he was not Robert Brigida and walked away. The prosecutor knew that to accomplish that Mr. Duest would have to prove his true identity which would have led to thirty (30) outstanding

charges in Massachusetts. The prosecutor knew the jury did not know this and knew that defense counsel could not and would not explain his way out of this corner by introducing evidence of such an extensive criminal record. The prosecutor's argument violated Giglio v. United States, 405 U.S. 150 (1972), and its progeny. When the State presents false and misleading evidence or argument, the defendant is entitled to relief if there is "any reasonable likelihood" that the testimony or argument "could have" affected the verdict. United States v. Bagley, 105 S. Ct. 3375, 3382 (1985). The evidence of flight violated due process, the Florida Evidence Code, and Merritt. The resulting conviction is unreliable. The error is not harmless beyond a reasonable doubt. There is a "reasonable likelihood" it "could have" affected the verdict.

This case represents a classic example of where an objected to trial court ruling renders counsel unable to insure an adversarial testing. The sixth and fourteenth amendment right to the effective assistance of counsel is violated when the government "interferes . . . with the ability of counsel to make independent decisions about how to conduct the defense." Strickland v. Washinston, 466 U.S. 668, 686 (1984); see also United States v. Cronic, 466 U.S. 648 (1984); Brown v. Allen, 344 U.S. 443, 486 (1953)(state interference with criminal defendant's

efforts to vindicate federal constitutional rights), cited in Murray v. Carrier, 106 S. Ct. 2639, 2646 (1986).[6]

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

> In passing on such claims of "'actual ineffectiveness,' id., at 686, 104 S.Ct. at 2064, the "benchmark . . . must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." Ibid. More specifically, a defendant must show "that counsel's performance was deficient" and that "the deficient performance prejudiced the defense." Id., at 687, 104 S.Ct., at 2064. Prior to our consideration of the standard for measurins the quality of the lawyer's work, however, we had expressly noted that direct sovernmental interference with the right to counsel is a different matter. Thus, we wrote:
>
> > Government violates the right to effective assistance when it interferes in certain ways with the ability of counsel to make independent decisions about how to conduct the defense. See e.g. Geders v. United States, 425 U.S. 80 [96 S.Ct. 1330, 47 L.Ed.2d 592](1976)(bar on attorney-client consultation during the overnight recess): Herrins v. New York, 422 U.S. 853 [95 S.Ct.2550, 45 L.Ed.2d 593](1975)(bar on summation at bench trial); Brooks v. Tennessee, 406 U.S. 605, 612,613 [92 S.Ct. 1891, 1895, 32 L.Ed.2d 358](1972) (requirement that defendant be first defense witness); Fersuson V. Georgia, 365 U.S. 570, 593-596 [81 S.Ct. 756, 768-770, 5 L.Ed.2d 783](1961)(bar on direct examination of

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[6]Thus, a defendant is deprived of the right to the effective assistance of counsel by a court order barring attorney-client consultation during an overnight trial recess, Geders v. United States, 425 U.S. 80 (1976); by court-ordered representation of multiple defendants, Hollowav v. Arkansas, 435 U.S. 474 (1979); by a court's refusal to allow summation at a bench trial, Herring v. New York, 422 U.S. 853 (1975); by a state statute requiring a criminal defendant who wishes to testify on his own behalf to do so prior to the presentation of any and all other defense testimony, Brooks V. Tennessee, 406 U.S. 605 (1972); and by a state statute restricting a criminal defendant's right to testify on his own behalf. Fersuson V. Georgia, 365 U.S. 570 (1961). See Stano V. Dugger, 889 F.2d 962 (11th Cir. 1989).

> defendant). Counsel, however, can also deprive a defendant of the right to effective assistance, simply by failing to render 'adequate legal assistance,' Cuyler v. Sullivan, 446 U.S. [335] at 344 [100 S.Ct. 1708, at 1716, 64 L.Ed.2d 333 (1980)]. Id., at 345-50 [100 S.Ct., at 1716-1719] (actual conflict of interest adversely affecting lawyer's performance renders assistance ineffective)." Id., at 686, 104 S.Ct., at 2063-2064.
>
> Our citation of Geders in this context was intended to make clear that "[a]ctual or constructive denial of the assistance of counsel altogether," Strickland v. Washington, supra, at 692, 104 S.Ct., at 1063-2064, is not subject to the kind of prejudice analysis that is appropriate in determining whether the quality of a lawyer's performance itself has been constitutionally ineffective. See Pension v. Ohio, 488 U.S. ___, ___, 109 S.Ct. 346, ___, ___ L.Ed.2d (1988); United States v. Cronic, supra, 466 U.S., at 659, and n.25. 104 S.Ct., at 2047, and n.25.

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

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

> Thus, the adversarial process protected by the Sixth Amendment requires that the accused have "counsel acting in the role of an advocate." Anders v. California, 386 U.S. 738, 743, 87 S.Ct. 1396, 1399, 18 L.Ed.2d 493 (1967). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. When a true adversarial criminal trial has been conducted--even if defense counsel may have made demonstrable errors--the kind of testing envisioned by the Sixth Amendment has occurred. But if the process loses its character as a confrontation between adversaries, the constitutional suarantee is violated. As Judge Wyzanski has written: "While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators." United State ex. re. Williams v. Twomey, 510 F.2d 634, 640 (CA7), cert. denied sub nom. Sielaff v. Williams, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109 (1975).

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

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

> Most obvious, of course, is the complete denial of counsel. The presumption that counsel's assistance is essential required us to conclude that a trial is unfair if the accused is denied counsel at a critical state of his trial. Similarly, if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing, then there has been a denial of Sixth Amendment rights that makes the adversary process itself presumptively unreliable. No specific showing of prejudice was required in Davis v. Alaska, **415** U.S. **308, 94** S.Ct **1105, 39** L.Ed.2d **347 (1974),** because the petitioner had been "denied the right of effective cross-examination" which "'would be constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.'" Id., at **318, 94** S.Ct., at **1111** (citing Smith v. Illinois, **390** U.S. **129, 131, 88** S.Ct. **748, 749, 19** L.Ed L.Ed.2d **956 (1968),** and Brookhart v. Janis, **384** U.S. 1, **3, 86** S.Ct. **1245, 1246, 16** L.Ed.2d **314 (1966).**
>
> Circumstances of that magnitude may be present on some occasions when although counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial.

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

Here, defense counsel was constrained by the trial court's ruling. As noted in Merritt, counsel was put between a rock and a hard place. There was no adversarial testing. Counsel's performance was rendered ineffective and deficient, against counsel's own wishes. Where there is no adversarial testing, prejudice is presumed. A new trial is required.

ARGUMENT VI

THE STATE INTRODUCED IRRELEVANT PREJUDICIAL, AND INFLAMMATORY EVIDENCE OF "OTHER CRIMES" AND BAD CHARACTER, VIOLATING DUE PROCESS UNDERMINING THE RELIABILITY OF THE JURY'S DETERMINATION.

Florida's Evidence provides:

> **(1)** Character Evidence Generally. Evidence of a person's character or a trait of his character is inadmissible to prove that he acted in conformity with it on a particular occasion, except:
>
> (a) Character of accused. Evidence of a pertinent trait of his character offered by an accused, or by the prosecution to rebut the trait.
>
> . . . .
>
> (2) Other Crimes, Wrongs, or Acts.
>
> **(a)** Similar fact evidence of other crimes, wrongs, or acts is admissible when relevant to prove a material fact in issue, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident, but it is inadmissible when the evidence is relevant solely to prove bad character or propensity.
>
> (b) **1.** When the state in a criminal action intends to offer evidence of other criminal offenses under paragraph (a), no fewer than 10 days before trial, the state shall furnish to the accused a written statement of the acts or offenses it intends to offer, describing them with the particularity required of an indictment or information. No notice is required for evidence of offenses used for impeachment or on rebuttal.
>
> 2. When the evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Sec. **90.404,** Florida Evidence Code. This is a statement of the rule of Williams v. State, 110 So. 2d **654** (Fla. **1959).** Before **a** defendant's extraneous criminal acts may be introduced, the

following should occur:

a. There must be a demonstrated connection between the defendant and the collateral occurrences;

b. The probative value of the evidence must be weighed against its prejudicial effect. Section 90.403.

If the evidence is deemed admissible after this analysis, the jury should be given a cautionary instruction at the time the evidence is introduced and in final jury instructions, if requested.

In Castro v. State, 547 So. 2d 111, 115 (Fla. 1989), this Court held that the introduction of evidence of collateral misconduct is subject to special scrutiny in a capital case:

> Because we find error, we must consider whether the state has met its burden of showing that the error here can be deemed harmless beyond a reasonable doubt. State v. DiGuilio, 491 So.2d 1129, 1135 (Fla.1986). As we have noted above, the improper admission of this irrelevant collateral crimes evidence is presumptively harmful. Peek, 488 So.2d at 56; Straight, 397 So.2d at 908. Moreover, we recognize that it is not enough to show that the evidence against a defendant was overwhelming. Error is harmless only "if it can be said beyond a reasonable doubt that the verdict could not have been affected by the error." Ciccarelli v. State, 531 So.2d 129, 132 (Fla. 1988)(emphasis supplied).

At Mr. Duest's trial, defense counsel moved to exclude certain collateral bad acts. At the bench conference, the following occurred:

> MR. BARON: Judge, the fourth matter is that there was testimony that at the apartment Demizio and Wioncek and all the other people were living at for that weekend that the night of February 14th or the morning house, actually, of February 15th, there was a rather wild scene going on.
>
> THE COURT: I gathered that in the opening statement. With a 15-year-old girl.

MR. GARFIELD: I didn't say that much, Judge.

THE COURT: I gathered, Mr. Garfield.

MR. BARON: One of the things that was testified to by Mr. Demizio and as was as all the other witnesses, which I'm going to be moving - I guess I can move now as to any of the witnesses that actually observed it - was that the person named Danny supposedly took a razor blade to a girl named LaDonna. LaDonna's not a witness. She's not been listed as a witness. I don't know if anyone knows where she is.

But, anyway, a razor blade, and cut this girl LaDonna's shirt off of her back for whatever reason. And certainly I don't really see any relevance to show anything at that point in time he was acting badly. It has nothing to do with the relevance of a particular murder case that might have happened.

THE COURT: Except that this man was toush.

MR. GARFIELD: I don't even care about that. I was going to say that. But I think that's a relatively secondary argument to the real reason that's admissible.

Other people saw that, too, and there, remembering this isn't a self-defense case or something where the central issue is other than identification.

THE COURT: It's an "I wasn't here" case.

MR. GARFIELD: Heck, yeah. He want to come in here next week with all his witnesses to say, "I remember the pot roast that Lloyd ate and we have such a good memory because it was Valentine's day and birthdays." But he wants to deprive the State's witnesses of being able to show their good memory.

I don't want to make a value judgment or moral judgment, but basically the testimony would be simply that the way he elected to help her disrobe was to take a razor blade and cut down.

He saved her buttons. He didn't rip the buttons. So what? Other people observed that. That's one way they remember the guy, besides his scars, besides whatever the other testimony is going to be. And that I strongly feel.

MR. BARON: Judge, I don't see any way that goes to identify, that they remember him because he took a razor.

They remember the incident.

MR. GARFIELD: I'd remember somebody who took a razor blade to a girl that was laying next to me.

Judge, I just think that's relevant. There's no way it's not relevant. It's not prejudicial at all.

In light of a guy charged with stabbing somebody a dozen times, he's not going to get a fair trial if they think that he took off a girl's blouse that way?

That's ridiculous.

I don't know if you have any other motions in limine. There's something else you should raise, incidentally.

That's it? How about drugs? He's going to say everybody used drugs, including Duest. I don't care.

THE COURT: Obviously, he doesn't care about it.

MR. BARON: Judge, it goes to the person's ability to remember or perceive what they saw.

MR. GARFIELD: That's fine with me.

Mr. Baron is saying it's okay for a witness to say that Mr. Duest popped five quaaludes or whatever else he did? That's no problem?

MR. BARON: I'm not objecting to it.

MR. GARFIELD: As to the razor blade --

THE COURT: As to the razor blade incident, I'll let that in.

(R. 633-36)(emphasis added).

The State presented evidence that the assailant escaped from custody, was guilty of statutory rape (the girl involved in the razor blade incident was a minor), participated in orgies and with regard to a different victim at a different place, he

> [S]macked her, threw her into the wall; threw her head into the wall; threw her on the bathroom floor. He took a razor blade and cut the back of her shirt right off.

(R. **658, 635, 648, 675, 934, 944).**

The State used this "evidence" improperly in closing. For example:

> They remember it. It is something that stands out in a normal person's mind because it isn't everybody that goes around up to women or men - it doesn't make any difference - with some sharp device and shssh. That is something that someone would remember.
>
> It is also interesting, and I believe interesting that there was testimony from Mr. Demezio, that this incident involving why a man would do that to a girl, related to the fact that everybody else around there was having sex. If it wasn't said to you explicit, you people aren't deaf, dumb and blind. You knew what kind of party that was. Everybody is paired off. It is like a flesh pile. But who is left out? Who is left out? Lloyd Duest is left out. Danny is left out. He doesn't like it. He tries to get it on with Donna and she resists. . . .

(R. 1407).

In light of Castro, it is the State's burden to prove the error harmless beyond a reasonable doubt. In Mr. Duest's case, the State cannot meet this burden. Both a new trial and a new sentencing are required.

ARGUMENT VII

> MR. DUEST WAS DENIED HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND DUE PROCESS OF LAW, BY TRIAL COUNSEL'S CONFLICT OF INTEREST IN RENDERING LEGAL ADVICE TO MR. DUEST'S ALIBI WITNESSES AND BY THE STATE'S THREATENING OF ALIBI WITNESSES, CAUSING THEM TO WITHHOLD EXCULPATORY TESTIMONY RATHER THAN SUBJECT THEMSELVES TO WHAT COUNSEL MISTAKENLY REPRESENTED TO BE CRIMINAL LIABILITY UNDER MASSACHUSETTS LAW, BY COUNSEL'S INEFFECTIVENESS VIS-A-VIS THE ALIBI WITNESSES, AND BY COUNSEL'S CONFLICT OF INTEREST REGARDING OCTAVIUS PROIA.

Mr. Duest's "theory" at trial was alibi: eleven witnesses testified he was in Watertown, Massachusetts, at the time the murder occurred in Ft. Lauderdale, Florida. Of these witnesses, five were immediate family members (mother, father, brother, two

sisters), two were uncles, one was his future brother-in-law, two were friends, and one was a local Watertown merchant who testified he sold Mr. Duest a fan belt on the date of the crime, February **15, 1982.** (Mr. Duest's wife testified at the sentencing phase only). On the date of the murder, Mr. Duest was allegedly on escape from the Billerica House of Corrections in Boston, Massachusetts. At the time of his arrest for the murder on April 18, **1982,** he would have been on escape for nineteen **(19)** months. This was known to the State, defense counsel, and the court, and its purported legal significance was stressed to all alibi witnesses pretrial. If Mr. Duest was on escape and **"harbored"** by family members or friends at a time and place rendering it impossible for Mr. Duest to have committed the crime, then candid testimony from these alibi witnesses was crucial for an effective defense.

All of the alibi witnesses testified to seeing Mr. Duest in Massachusetts at various times during the weekend of February 13-15, **1982,** but it was agreed that there would be no testimony about Mr. Duest being on escape at the times mentioned (R. 34). These alibi witnesses -- after **"advice"** (threats) -- became reluctant and, in fact, unwilling to testify as to Mr. Duest's whereabouts at any time other than the weekend of the murder. The witnesses, in particular, Mr. Duest's immediate family, were similarly unable or unwilling to testify that they knew where he resided, what he did for a living, or anything else one would reasonably expect close family members to know. what testimony they did present concerned cryptic, very short **(5-20** minute)

encounters with Mr. Duest during the weekend in question. These curious interludes were characterized in the State's closing argument as "cameo appearances" ala Alfred Hitchcock, where a

> [B]ig name actor in the script . . . makes about a two, or three, or five minute appearance in the movie and you never see him again . . . Alfred Hitchcock is famous for that . . . . He really does not fit into the scene. But you just stick him in there for a minute and he is gone.
>
> That is what I basically contend you have been hearing evidence about.

(R. 1396-97).

As a result of the sketchy, gap-ridden, and, as presented, ultimately implausible **"alibi"** testimony of Mr. Duest's family and others, "the jury went back there and had a lot of unanswered questions which, Mr. Duest and I [defense counsel] talking it over, knew they would" **(R. 1681).** As stressed by the State with incredulity:

> Most of the witnesses say they had not even seen Lloyd Duest in at least a year [before the weekend of the offense].

(R. 1403). Defense counsel's statement as to the jury's "unanswered questions" was based, at least in part, on a letter from a juror in the case to Judge Cocalis in which the juror, according to counsel,

> [B]asically complained that they [the jury] were not fed everything, that they only knew part of the story, but they were only told what they were supposed to be told . . .
>
> I think it's obvious from that particular juror that he was in a majority, that he voted along with the other six in recommending the death sentence. . . .
>
> I think part of the trouble with the trial, Your Honor, was that Mr. Duest was in a situation and the defense was in a situation where he was kind of damned if he did and damned if he didn't. They couldn't know

all the facts because if they did, obviously, it would be something that would be quite prejudicial, that he was wanted for escape in Massachusetts, why the family didn't see him on a regular basis, why he wasn't living at home, things of that nature, so I think the jury went back there and had a lot of unanswered questions.
. . .

(R 1678-79).

The reason for the mysterious and suspect reticence of Mr. Duest's critical exculpatory witnesses to be expansive in their awareness of Mr. Duest's whereabouts is manifest: they were repeatedly threatened and warned -- first by an assistant state attorney and then by Mr. Duest's own attorney -- that statements indicating a knowledge of Mr. Duest's whereabouts during the time he was on escape potentially exposed the witnesses to criminal prosecution for harboring a fugitive.

The depositions of Mr. Duest's family taken November **12, 1982,** in Watertown, illustrate the intimidation to which these critical witnesses were subjected. Each of Mr. Duest's immediate family members was specifically warned by the State attorney and by Mr. Duest's attorney of alleged risks assumed in testifying to Lloyd's whereabouts. For example, the prosecutor warned the witnesses of the danger **"if** you tell me that you knew his whereabouts. **. . ."** (Deposition of Richard Duest, p. **10).** Lloyd's wife was told by defense counsel:

MR. BARON: I am going to advise you and as Mr. Grillo told you before several questions might possibly incriminate you, specifically what we are referring to might be a crime in the State of Massachusetts, to know where a fugitive is and not report it to the police. Your husband was a fugitive at that time. You have a right to decline to answer the question and invoke your Fifth Amendment right and at this time I am advising you that you should do that, but again, I am --

THE WITNESS: Okay.

(Deposition of Doreen Duest, p. 9). Following this warning, Doreen Duest, rather than answer questions about her knowledge of Lloyd's whereabouts surrounding the date of the murder, invoked her fifth amendment right at least 36 times during the deposition.

Lloyd's mother was warned:

> MR. BARON: Ma'am, I will advise you now that you do not have to answer that. You can, at this time, exercise your right to remain silent because of the fact that it may be a crime in the State of Massachusetts to know someone is an escaped prisoner and yet not to report it to the police, so anything you may say now could possibly be used against you at a future time.
>
> We don't know for sure, I am just advising you that in your best interest, it might be, at this time, to say that you do not want to answer and exercise your Fifth Amendment privilege.

(Deposition of Nancy Duest, pp. 15-16).

Lloyd's father was told:

> MR. BARON: I am going to advise you at this time that you do not necessarily have to answer that question. You have a right to remain silent under the constitution and state that you wish to remain silent on the grounds that it could incriminate you in future prosecution.

(Deposition of Richard Duest, pp. 8-9).

Later, the prosecution added:

> Q The reason your son's attorney was telling you about your rights to remain silent is that conceivably if you tell me that you knew his whereabouts or you had any kind of contact with him during the time that he was an escapee, conceivably you would be violating a Massachusetts law, in that you didn't turn him in and he is telling you that -- We did not know the law in Massachusetts, but I believe there is a law to that effect in most states, that you cannot aid a fugitive, which is what your son would have been and if you do so, it could be a misdemeanor or a felony and he is telling you if you admit to having contact with him or seeing him or things like that and you didn't turn him

in, you might be exposing yourself to possible prosecution. It is unlikely, but we have no control over what the Commonwealth of Massachusetts would do.

(Id. p. 10).

Lloyd's older sister, Nancy, was warned by both attorneys:

MR. BARON: I am going to advise you that you do not have to answer questions relating to your knowledge of whether or not your brother had escaped or where he was or anything of that nature, because it might be a criminal offense in the State of Massachusetts to harbor a fugitive.

MR. GRILLO: If at any time you met with him and you knew that he had escaped and did not report it, if that goes on the record, that at some time in the future might be used against you. That is a possibility. I am just trying to protect your interest. On the other hand, if you feel that you did not do anything wrong feel free to answer the questions.

THE WITNESS: I do not wish to answer the questions.

(Deposition of Nancy Kerrigan, pp. 10-11).

Lloyd's younger sister, Debbie, was similarly advised, as was her husband, Eddie, Lloyd's brother-in-law:

MR. BARON: The only reason I am advising you -- I do not know the law in Massachusetts, but it may be that if you knew that someone had escaped and you saw him and you didn't report it, it would be that you could be charged with a crime in the State of Massachusetts.

(Deposition of Eddie Lavache, p. 12).

As will be discussed below, counsel for Mr. Duest and the State were right about one thing: they indeed did **not** know the law in Massachusetts. Contrary to counsel's inhibiting words of alarm, the immediate family member witnesses described above were not subject to prosecution in Massachusetts owing to an exception in that state's harboring statute for immediate family members. Mass. Gen. Laws Ann. Ch. 274 sec. 4. See, e.g., Commonwealth v.

Wood, 19 N.E.2d 320, 323 (Mass. 1939)("The statute defining the crime of being an accessory after the fact excepts from its provisions a person who is a husband or wife, or, by consanguinity, affinity or adoption, the parent or grandparent, child or grandchild, brother or sister of the offender . . . ." G.L.(Ter.Ed.) ch. 274, sec. 4.); Commonwealth v. Barnes, 340 N.E.2d 863, 866 (Mass. 1976)("Under G.L. ch. 274, sec. 4, . . . once there was evidence in the case that the defendant was the principal's wife, she could not be convicted as an accessory after the fact unless the Commonwealth proved beyond a reasonable doubt that she was not the 'wife . . . of the offender.'").

Regardless of the State's and defense counsel's colossal error as to Massachusetts law (an error that profoundly impaired Mr. Duest's defense), defense counsel egregiously violated his duty to Mr. Duest in pointing out to crucial exculpatory witnesses, who were not his clients, that the information desperately needed by his client was "not in your interest" to divulge. In placing the interest of Mr. Duest's key witnesses above that of Mr. Duest, defense counsel breached his duty to his client. This conflict of interest left Mr. Duest in the lurch, deprived of independent, effective representation, in violation of the sixth and fourteenth amendments to the United States Constitution.

Mr. Baron also had a conflict of interest regarding Octavius Proia, a witness the State threatened to call, but in fact did not call to the witness stand. Unfortunately, defense counsel never knew what Mr. Proia would say because counsel was unable to

interview Mr. Proia due to a conflict of interest. Both Mr. Duest and Mr. Proia were represented by the same Public Defender's office. This created a conflict of interest which was admitted and recognized by both parties and the court (R. 1261-63; 1290-94; 1296-98).

Had defense counsel not had a conflict of interest, he certainly would have interviewed Mr. Proia. Had he done so, he would have discovered that Proia would have testified that Mr. Duest made a statement describing the offense as the result of an argument:

> He said that uh that he was picked up this man in a gay bar and he uh went to uh his apartment and uh he had uh an argument with the man, that he said he stabbed the man and uh that he left the apartment but he wasn't dead yet, he said that he had witnesses up in Massachusetts who would lie for him and say that he was in Massachusetts at the time of the hearing I mean the time of questioning and that he said that the person the person was going to lie for him at an auto parts store and they have receipts saying that he bought parts on that day.

(State's Exhibit No. 1). The State introduced this statement at the evidentiary hearing. Of course, Mr. Duest's counsel did not obtain this statement until 119 access was provided in November of 1989. Because of the conflict, the defense never learned of the exculpatory evidence contained in Mr. Proia's statement.

The sixth amendment guarantees the right to conflict free counsel. Alvarez v. United States, 580 F.2d 1251 (5th cir. 1978). This right is violated when a conflict impairs an attorney's ability to vigorously defend his client. Stephens v. United States, 595 F.2d 1066 (5th Cir. 1979). The United States Supreme Court has forbidden attorneys to have such conflicting loyalties: "Joint representation of conflicting interests is

suspect because of what it tends to prevent the attorney from doing." Hollowav v. Arkansas, 435 U.S. 475, 490 (1978). In this regard, ineffectiveness is presumed where counsel "actively represented conflicting interests." United States v. Cronic, 104 S. Ct. 2039, 2048 n.28 (1984); Cuvler v. Sullivan, 446 U.S. 335, 356 (1980). The dangers inherent in the representation of conflicting interests in a criminal trial are so extensive that in such cases a showing of prejudice is not required. Strickland v. Washinston, 104 s. Ct. 2052, 2067 (1984); Cuvler, 446 U.S. at 345.

When an attorney-client relationship exists, it is presumed that confidential information has been communicated. See United States v. Shepard, 675 F.2d 965, 980 (8th Cir. 1982); United States v. Provenzano, 620 F.2d 985, 1005 (3rd Cir. 1982). This reveals the untenable nature of the instant conflict, as Mr. Baron was forced to choose between violating one client's confidence, or foregoing a vigorous defense of Mr. Duest. See United States v. Armato Sarmiento, 524 F. 2d 591 (2d Cir. 1975). "In order to show an actual conflict, [Duest] must demonstrate that [Baron] chose between possible alternative courses of action" to Mr. Duest's detriment. Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986).

In such situations, no additional demonstration of prejudice is necessary. Prejudice is so potent that a defendant need not show, as he or she must in codefendant conflict situations, that counsel "actively represented conflicting interests," and that the conflict "adversely affected his lawyer's performance."

Cuyler, 445 U.S. at 350. As is apparent from Mr. Duest's case:

> the situation is too fraught with the danger of prejudice, prejudice which the cold record might not indicate, that the mere existence of the conflict is sufficient to constitute a violation of [defendant's] rights whether or not it in fact influences the attorney or the outcome of the case.

Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974).

Thus, the first question is whether Mr. Baron was actually constrained by representing conflicting interests. If so, the second question is whether another defense strategy could have been employed by another lawyer that would have benefitted Mr. Duest's defense. Here, it has clearly been established that Mr. Baron's office represented both Mr. Duest and Mr. Proia and their respective interests were antagonistic. Mr. Baron also offered legal advice to Mr. Duest's family members. Mr. Baron did not interview Mr. Proia because the conflict prevented him from doing so. Counsel warned Mr. Duest's family of possible criminal charges. Mr. Baron did not vigorously defend Mr. Duest as a result. Another counsel without the conflict certainly would have interviewed Mr. Proia and presented the information at the penalty phase. Certainly, Mr. Proia's representation that Mr. Duest made a statement to him was so unbelievable that the State elected not to use the unreliable testimony. However, given the sentencers' rejection of Mr. Duest's innocence claim, it was essential to present the available mitigating evidence that the killing occurred in the heat of argument. Under the circumstances, there was an actual conflict of interest. The circuit court erred in denying a hearing on this claim. An evidentiary hearing and Rule 3.850 relief are proper.

ARGUMENT VIII

THE STATE INTRODUCED STATEMENTS TAKEN IN VIOLATION OF MR. DUEST'S FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, AND COUNSEL UNREASONABLY FAILED TO SUPPRESS THE STATEMENTS. MR. DUEST RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL.

Two statements alleged to have been made by Mr. Duest to law enforcement officers were introduced by the state during the officers' testimony. Both statements were taken in violation of Mr. Duest's fourth, fifth, sixth, eighth and fourteenth amendment rights; both were used to incriminate Mr. Duest; and both were introduced at trial without objection from defense counsel. Counsel unreasonably made no effort to suppress either statement.

The first statement attributed to Mr. Duest and used against him at trial was allegedly made to Broward Sheriff's Deputy John Feltgen in an interrogation room in the Broward County Courthouse. Deputy Feltgen testified that he "advised the defendant of his Miranda rights," he also testified that Mr. Duest "refused to give any type of statement." With regard to Mr. Duest's alleged **"statement,"** Feltgen testified:

> A: If the defendant is willing to give a taped statement, a tape is used.
>
> Q: You didn't ask him, though, did you?
>
> A: Yes, I did.
>
> Q: And he said no?
>
> A: He refused to give **any type of statement**.

(R. 893)(emphasis added). Thus, any statements elicited after Mr. Duest's refusal were inadmissable and should have been suppressed. Miranda v. Arizona, 384 U.S. 436 (1966). Counsel was ineffective in not moving to suppress the highly prejudicial

statement.

The second reported statement used against Mr. Duest was introduced through the testimony of Broward Sheriff's office Detective Rene Robes. Detective Robes testified that he conducted a live lineup identification procedure involving Mr. Duest on April 30, **1982,** twelve days after Mr. Duest's arrest.

> Q: Did you advise him that there would be certain individuals who in fact would be viewing him?
>
> A: Yes. There were witnesses that would be viewing the lineup.
>
> Q: And during that conversation that you just referred to did he say anything back to you in response to you advising him of the procedure?
>
> A: Well, we spoke and I advised him of the procedure. One of the statements to me was that he never committed a murder before.

(R. **987)** (emphasis added).

Robes' police report depicts a significantly different account of Mr. Duest's alleged **"statement":**

> Suspect then called the Public Defender's office and while doing so made a statement as follows in this officer's presence: "I've never committed a murder before." After suspect finished his conversation, he advised this officer that he would not pick out the persons [to join him in the line-up] that his lawyer or this officer could pick out those persons.

(Robes report, p. **7).** That Robes listened to Mr. Duest's conversation with his attorney was in itself, a flagrant invasion of Mr. Duest's right to communicate confidentially with his attorney. That Robes was permitted to testify as to the alleged content of the client-attorney communication is shocking. That Robes misled the judge and jury with regard to the nature and content of the conversation is untenable. Mr. Duest's sixth, eighth, and fourteenth amendment rights were violated.

Mr. Duest's alleged statement "I never committed a murder before" was effectively introduced as if it were a confession to the murder. Counsel was ineffective for failing to suppress the statement, and for failing even to move for its suppression or to object to its introduction. Both of the statements allegedly made by Mr. Duest were inadmissible and counsel's failure to suppress or object deprived Mr. Duest of his fifth, sixth, eighth, and fourteenth amendment rights.

During the State's case evidence was presented that Mr. Duest "refused to make a statement" (R. 893). Such "evidence," however, was comment upon Mr. Duest's exercise of his constitutional right to silence. The introduction of Mr. Duest's silence as evidence was fundamentally unfair and a violation of due process. Dovle v. Ohio, 426 U.S. 610 (1976). Despite the fact that Mr. Duest had been advised of his right to silence, the State used that invocation of silence to urge that Mr. Duest be convicted and sentenced to death.

The presentation and use of evidence of post-Miranda silence is forbidden by the United States Constitution. Dovle v. Ohio, 426 U.S. 610 (1976). Doyle reversed a criminal conviction where the prosecution attempted to impeach a defendant's exculpatory trial testimony by eliciting testimony that the defendant remained silent following Miranda warnings. The Court reasoned that the promise of a right to remain silent carries with it the implicit promise that silence will not be penalized. Doyle, 426 U.S. 610, 619, quoting United States v. Hale, 422 U.S. 171, 182-83 (1975)(White, J., concurring). Thus, use of a defendant's

post-Miranda silence is fundamentally unfair, in violation of the due process clause of the fourteenth amendment. Doyle, 426 U.S. 610, 619.

Similarly, post-Miranda silence may not be used to rebut an insanity defense. Wainwright v. Greenfield, 106 S. Ct. 634 (1986). Using post-Miranda silence as affirmative proof is indistinguishable from using such silence for impeachment:

> The point of the Doyle holding is that it is fundamentally unfair to promise an arrested person that his silence will not be used against him and thereafter to breach that promise by using the silence to impeach his trial testimony. It is equally unfair to breach that promise by using silence to overcome a defendant's plea of insanity. In both situations, the state gives warnings to protect constitutional rights and implicitly promises that any exercise of those rights will not be penalized. In both situations, the State then seeks to make use of the defendant's exercise of those rights in obtaining his conviction. The implicit promise, the breach, and the consequent penalty are identical in both situations.

Greenfield, 106 S. Ct. 634, 639. The Court concluded that just like Doyle, "Greenfield received 'the sort of implicit promise to forego use of evidence that would unfairly "trick" [him] if the evidence were later offered against him at trial.'" Id. at 640, quoting South Dakota v. Neville, 459 U.S. 533, 566 (1983).

The considerations highlighted in Doyle and Greenfield are especially important at a capital sentencing phase. The Constitution requires heightened reliability at a penalty proceeding where a defendant's life is at stake. Gardner v. Florida, 430 U.S. 349 (1977). Therefore, just as a defendant's exercise of constitutional rights may not be used to obtain his conviction, even more so may the exercise of those rights not be used to take his life. See, e.g., Estelle v. Smith, 451 U.S.

454, 462-63 (1981)("Just as the Fifth Amendment prevents a criminal defendant from being made 'the deluded instrument' of his own conviction, . . . it protects him as well from being made the 'deluded instrument' of his own execution. . . . We can discern no basis to distinguish between the guilt and penalty phase . . . so far as the protection of the Fifth Amendment is concerned."). The invocation of the right to silence following Miranda warnings may not be used in any fashion against an accused. Here, that principle was violated. The state clearly was directing the jury's attention to pretrial and sentencing silence. This was fundamental error.

Trial counsel was ineffective for not discovering, moving in limine to preclude, and objecting at trial to this evidence. Kimmelman V. Morrison, 477 U.S. 365 (1986). Counsel's performance was deficient and Mr. Duest was prejudiced as a result. The circuit court erred in denying an evidentiary hearing on this claim. Mr. Duest's sentence of death was obtained in violation of the fifth, sixth, eighth and fourteenth amendments. Mr. Duest's post-arrest silence was used to convict him and sentence him to death. An evidentiary hearing and thereafter Rule 3.850 relief are warranted.

ARGUMENT IX

THE WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE AND THE INTRODUCTION OF FALSE AND MISLEADING EVIDENCE VIOLATED MR. DUEST'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The State had in its possession material exculpatory evidence that was not turned over to the defense. This evidence should have been revealed to defense counsel and presented to the

jury. The failure to allow the jury to consider this evidence prevented them from rendering an accurate determination of Mr. Duest's guilt and the appropriateness of a sentence of death. To the extent that the evidence did not reach the jury, there was a failure of the adversarial process, and a violation of due process.

The files of the State Attorney and Sheriff's Office, recently released to undersigned counsel, contain extensive exculpatory and impeachment evidence that should have been revealed to the defense at the time of trial and presented to the jury. This evidence should have been presented to the jury to allow them to fairly weigh whether Mr. Duest was guilty of capital murder and worthy of a death sentence. This evidence also establishes that the State knowingly presented false and misleading evidence to the jury. Collateral counsel was unable to review the State's file prior to the order of the circuit court on November 8, 1989, directing the State to permit access. The facts contained therein were previously unknown to Mr. Duest and were not discoverable until state provided collateral counsel was afforded adequate time to review the file.

From the moment of his arrest, Lloyd Duest maintained that he had just come to Florida via a Trailways bus on April 5, 1982, which would have been almost two months after the offense. He further maintained that at the time of his arrest, that he had a bus ticket in his possession which proved that he was being truthful. Throughout pretrial discovery when the defense attempted to ascertain the existence of such a ticket, the State denied any knowledge of any personal property seized from Mr.

Duest (Deposition of Rene Robes at p. 18, July 15, 1982; Deposition of Thomas Carney, July 15, 1982). As to this aspect of this claim the circuit court held a limited evidentiary hearing. **See** Argument 11, susra. The remainder of this claim was denied without a hearing.

At trial the State rebutted the defense alibi by presenting testimony that officers had in fact investigated whether Mr. Duest had traveled to Florida on April 5, 1982 and leaving the judge and jury with the clear impression that the investigation had proved fruitless. Again, this was contrary to the facts known to the State. The facts were that the investigators were unable to determine which bus locker Mr. Duest had put his belongings in and were therefore unable to confirm or deny his statement (Deposition of Rene Robes at p. 17 July 15, 1982). The State thus knowingly presented false and misleading evidence to the jury in violation of due process.

There were other instances where the State withheld evidence critical to Mr. Duest. During the trial, a State Attorney's investigator took a statement from a jail inmate, named Octavius Priao, who alleged that Mr. Duest had made statements to him regarding the offense. Mr. Priao's first account of the statement made by Mr. Duest was:

> Proia:
>
> He said that uh that he was picked us this man in a gay bar and he uh went to uh his asartment and uh he had uh an arsument with the man, that he said he stabbed the man and uh that he left the apartment but he wasn't dead yet, he said that he had witnesses up in Massachusetts who would lie for him and say that he was in Massachusetts at the time of the hearing I mean the time of questioning and that he said that the person

> the person was going to lie for him at an auto parts store and they have receipts saying that he bought parts on that day.

(Proia Statement of March 16, 1983, State's Exh. 1). There is no indication that this statement was ever provided to the defense attorney who had a conflict of interest as to this witness. **See** Argument VII, supra. It was obviously critical for the penalty phase. Once Mr. Duest had been convicted, it was incumbent upon him to establish mitigation. This statement would have been mitigating in that it was evidence that, if in fact Mr. Duest committed the murder, that it occurred in the heat of an argument and on the spur of the moment as opposed to the preplanning scenario put forward by the State.

The Broward County Sheriff's Department took a statement from Neil O'Donnel, the bartender at the bar where the victim allegedly left with another man. Mr. O'Donnel told the Detective that he only heard the name **"Danny"** from an anonymous witness. This statement was never provided to defense counsel. At the trial the State presented testimony from Mr. O'Donnel indicating that he had heard the unknown man use the name Danny. This permitted the State to present inadmissible hearsay as fact without affording the defendant the opportunity to cross-examine the witness who actually made the statement.

Another witness at the bar told the detectives that the guy who had been at the bar had bushy hair, had been there the last three nights and the victim seemed to know him. In fact, Danny had only been in town for two nights and is described as having a military haircut. Another fact misrepresented by the State was that the eyewitnesses reported that Danny had a tattoo on the

opposite arm from Lloyd Duest. When coupled with the facts that Danny had been in Viet Nam and did not wear glasses, while Lloyd Duest had never been in Viet Nam and did wear glasses (the testimony revealed that Mr. Duest was in fact wearing glasses at the time of his arrest; R. 838), these factors became critical pieces of evidence in the evaluation of the circumstantial evidence. The alleged identification of Lloyd Duest as **"Danny"** was the central issue in the case. This evidence was critical in enabling the judge and jury to evaluate that evidence both as to guilt/innocence and at the penalty phase. The failure to disclose this evidence was a violation of due process.

At trial, the State emphasized Mr. Duest's escape as evidence of his guilt yet they never provided the defense or the judge and jury with evidence that Mr. Duest went with the police voluntarily even though he was not under arrest and only attempted to escape when the police arrested him on Massachusetts' warrants and then fingerprinted him. Since he was wanted in Massachusetts, this was a logical explanation for his escape attempt that had nothing to do with the Florida charges. Had he been concerned about Florida charges, he would not have gone with the police voluntarily in the first place.

The detectives interviewed Michael DiMizio regarding **"Danny".** Mr. DiMizio advised them that Danny had the Camaro between 2:00 and 2:30PM although it could have been later. This was exculpatory evidence for Mr. Duest in that even if the jury did believe that Mr. Duest was **"Danny",** that he had a Camaro before the victim left the bar instead of after. This statement

was contrary to Mr. Dimizio's trial testimony.

The detectives took a statement from Tammy Dugan. In this statement she said that she couldn't definitely blame Danny for cutting a girl's shirt off and that she did not see anything on his jogging suit. Again, this contradicted testimony offered by the State at trial, and was thus exculpatory. The failure to provide it to the defense was error.

Robert Harris was a friend of the victim. He stated to detectives that the victim was in excellent physical shape and worked out at a gym. He also told the detectives that the victim cared for his roommate David but that David did not care as much for the victim. This was important exculpatory evidence for Mr. Duest in that: (1) the roommate was a suspect in the investigation; (2) the roommate gave contradictory statements to detectives and at trial as to a two hour time differential for when he arrived home; (3) the roommate had put clothing in the dryer shortly before the police arrived; and (4) a detective stated that the victim's blood was "fresh" four hours after the time when the State alleged he had been killed. The State also tried to prove that the victim possessed valuable jewelry when Robert Harris had told the detectives that the victim had trouble making ends meet financially and was selling his house due to financial problems. Finally, the State argued at trial that Danny had gone by the apartment to get a knife when in fact they knew that Joanne Wioncek stated that Danny said he had come back to get money out of the closet. All of this was exculpatory evidence not turned over to the defense.

Related to these issues was the first detective on the

scene's report that the blood was "fresh" four hours after the murder had supposedly been committed. This was exculpatory evidence that was suppressed by the State at trial. Another related issue was DiMizio's report that Danny said he took $15,000 worth of jewelry. Again this was impossible according to the suppressed statement of Robert Harris that the victim was in financial trouble and with the roommate's trial testimony that neither her or the victim did had any jewelry of particular value.

At trial, the prosecution featured the fact that a pack of Marlboro cigarettes was found at the scene and presented witnesses to testify that Mr. Duest smoked Marlboro cigarettes. What the State did not reveal to the defense or the jury was that the package of cigarettes was not found until two days after the offense. Again this would have been important evidence for the jury to consider in weighing the value of the circumstantial evidence. The State also failed to disclose police reports inconsistent with the trial testimony regarding Mr. Duest's alleged statement that he had never committed murder before.

The prosecution's suppression of evidence favorable to the accused violated due process. Bradv v. Maryland, 373 U.S. 83 (1967); Aaurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 105 S. Ct. 3375 (1985). The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, supra. It is

of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d at 1542.

There can be little doubt that material evidence was withheld in Mr. Duest's case -- evidence which would have made a difference at trial and sentencing. Material evidence is evidence of a favorable character for the defense which would affect the outcome of the guilt-innocence and/or capital sentencing trial. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence). Napue v. Illinois, 360 U.S. 264 (1959), Giglio, and Bagley make it clear that exculpatory evidence as well as evidence which can be used to impeach are governed by the same constitutional standard of reversal. Moreover, the materiality of the evidence at issue must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., United States v. Agurs, supra, 427 U.S. at 112; Chaney v. Brown, supra, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-37 (D.S.C.

1982), aff'd, 709 f.2d 887 (4th Cir. 1983)(withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982).

The withheld evidence's materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Hevd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973). In this case the first two are obvious. The third factor is also present -- had Mr. Duest been able to undermine even the state witnesses' testimony, his defense would have been so much more credible. Information was withheld that would have supported the credibility of the defense witnesses.

Mr. Duest's motion to vacate judgment and sentence pled the substantial facts supporting this claim. The claim was based upon nonrecord [hidden] evidence of prosecutorial misconduct and knowing use of false or misleading evidence which which was kept from the jury at the time of Mr. Duest's trial. That the State concealed the truth and kept it from the record, in fact, is an essential component of the claim which Mr. Duest pled. Because the State kept the truth from the "record" at trial there was no

"record" from which the claim could have been brought on direct appeal. The true facts revealing the State's misconduct have only now come to light.

Such claims cannot be raised anywhere but post-conviction, as the Florida Supreme Court has acknowledged. See Aranao v. State, 437 So. 2d 1099, 1102 (Fla. 1983)("A Bradv violation is normally predicated on the defendant's not knowing of the withheld evidence."); see also Smith v. State, 400 So. 2d 956, 963 (Fla. 1981). Rule 3.850, Fla. R. Crim. P., provided the forum and the mechanism. The circuit court erred in denying this claim without benefit of a full evidentiary hearing. Even on the basis of the limited hearing, Mr. Duest is entitled to relief under Bagley, supra. This Court should stay this execution and grant an evidentiary hearing -- the files and records do not demonstrate that Mr. Duest is entitled to no relief.

ARGUMENT X

DEFENSE COUNSEL UNREASONABLY AND PREJUDICIALLY MISINFORMED THE JURY REGARDING BURDEN OF PROOF WITH REGARD TO ALIBI, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State must prove beyond a reasonable doubt that the accused committed the offense. However, throughout jury selection, defense counsel informed the jury that Mr. Duest had to create a reasonable doubt that he was the culprit, rather than that the State had to remove all doubt.

For example, counsel stated, "We just have to raise a reasonable doubt as to whether he was there or not" (R. 366). "You understand that the law is that all we need to do is raise a reasonable doubt as to his whereabouts" (R. 377).

> Do you understand that it is not necessary for the defendant to prove that he was somewhere else beyond a reasonable doubt but all that is necessary is to raise a reasonable doubt as to whether or not he was present at the crime? Ma'am, do you understand that?
>
> MISS BISHOP: Certainly do.
>
> MR. BARON: Could you follow the law in that regard?
>
> MISS BISHOP: Certainly could.
>
> MR. BARON: Sir, how about you?
>
> MR. ROSENBAUM: Yes.

(R. 312-13). See also R. 231, 291, 296, 137, 139, 187-88. The potential jurors heard all the questions of all juuros. Mr. Rosenbaum actually served.

Counsel "educated" and committed the jury to requiring Mr. Duest to demonstrate a reasonable doubt rather than requiring the State to dispel all reasonable doubt. This was ineffective assistance of counsel. It was unreasonable and deficient performance. This burden-shifting was the resulting prejudice which violated the sixth, eighth and fourteenth amendments.

ARGUMENT XI

MR. DUEST WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.[7]

In Strickland v. Washinston, 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

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[7]This claim has been written hastily. It is not a complete discussion in light of the time and page constraints. Moreover, counsel has had only one day to review the transcript of the evidentiary hearing and prepare this brief.

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).[8]

Mr. Duest's counsel failed his capital client. The wealth of significant evidence which was available and which should have been presented was inadequately presented. 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.

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[8]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. Duest, 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. Duest's death sentence attests.

Harris; Middleton. Mr. Duest'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. Georgia, 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. Duest. A wealth of mitigating information was available to trial counsel in this case. Mr. Duest, however, was sentenced to death by a jury that had not the benefit of the fruits of a thorough investigation. This was far from an individualized capital sentencing proceeding.

Mr. Duest was sentenced to die by a jury who never knew the extent of the abusive background in which he was raised. He suffered a lifetime of abuse, rejection, and incarceration. Yet his counsel failed to adequately investigate and develop the available mitigation. Counsel did not obtain school records (T. 142). Other than family members, he did not contact any individuals who knew Mr. Duest regarding mitigation (T. 143). He failed to obtain hospital and medical records (T. 143). He did not talk to Mr. Duest's physician, Dr. Rummerman (T. 145). He failed to obtain Mr. Duest's Massachusetts' prison record (T. 143). He failed to contact Massachusetts' probation office (T.

144). He did not obtain the court file regarding Mr. Duest's conviction for robbery and armed assault with intent to murder (T. 144). He did not learn of the circumstances of these offenses and that Mr. Duest was in fact an accessory charged as a principle (T. 145). He did not investigate or develop the fact that Mr. Duest at age 18 was sent to the maximum security prison at Walpole, nor did he consider the impact such a placement had upon Mr. Duest. He failed to adequately question Mr. Duest's family and learn of the abuse of Mr. Duest as a child (T. 146). Counsel also neglected to obtain records establishing Mr. Duest's methadone treatment (T. 149). Furthermore, he failed to provide a mental health expert with any background documentation (T. 153). Finally, counsel failed to look at Mr. Duest's jail record in Broward County (T. 154).

Counsel's preparation and investigation was inadequate. Choices made on less than complete investigation are not reasonable. Without a complete investigation, counsel can not make professionally competent choices.

Moreover, at the evidentiary hearing the fruits of a reasonable investigation were presented. The documents from Mr. Duest's background were presented (Def. Exh. 5). Family affidavits detailing Mr. Duest's abusive background were introduced as well as an affidavit from a lifelong friend who knew of the extent of Mr. Duest's drug history (Def. Exh. 3). Finally, the testimony of a psychologist who had the benefit of an adequate investigation was also presented (T. 46-106). As a result, substantial prejudice from counsel's deficient performance was shown. The circuit court's contrary conclusion

was in error. Mr. Duest's sentence of death must be vacated and new sentencing ordered.

ARGUMENT XII

MR. DUEST WAS DEPRIVED OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BY COUNSEL'S FAILURE TO OBJECT TO OR TO ATTEMPT TO RESTRAIN THE PROSECUTOR FROM INJECTING HIS OWN OPINIONS AND EXPERIENCE, FROM REFERRING TO MATTERS NOT IN EVIDENCE, FROM MISSTATING EVIDENCE AND TESTIMONY, AND FROM ARGUING THE APPLICABILITY OF NON-STATUTORY AGGRAVATING FACTORS TO SUPPORT THE DEATH SENTENCE.

This issue was raised as Claim V of Mr. Duest's Rule **3.850** motion. Mr. Duest relies upon the argument presented in the Rule **3.850** motion, which demonstrates that relief is proper.

ARGUMENT XIII

THE TRIAL COURT'S RELIANCE UPON A PSI, AND UPON EX PARTE COMMUNICATIONS WITH THE PREPARER OF THE REPORT, AND THE MANNER IN WHICH THE SENTENCING COURT CONDUCTED THE SENTENCING HEARING, VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND COUNSEL UNREASONABLY FAILED TO ADEQUATELY ADDRESS THESE SHORTCOMINGS, IN VIOLATION OF THE SIXTH AMENDMENT.

This issue was presented as Claim IX of Mr. Duest's Rule **3.850** motion. Mr. Duest relies upon the argument presented therein, which demonstrates that relief is proper.

ARGUMENT XIV

MR. DUEST'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AGGRAVATING CIRCUMSTANCE, AND THE AGGRAVATOR WAS IMPROPERLY ARGUED AND IMPOSED, IN VIOLATION OF MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Duest acknowledges that this issue was raised on direct appeal, but submits that new case law -- Hitchcock v. Dugger, 107 S. Ct. **1821 (1987);** Maynard V. Cartwriaht, **108 S.** Ct. **1853 (1988)** -- makes its presentation herein proper and demonstrates Mr.

Duest's entitlement to relief. The issue was presented as Claim C of Mr. Duest's second amended Rule **3.850** motion. Mr. Duest relies upon the argument presented therein, which demonstrates that relief is proper.

ARGUMENT XV

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. DUEST'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Duest acknowledges that this issue was raised on direct appeal, but submits that new case law -- Hitchcock, supra; Cartwright, supra -- makes its presentation herein proper and demonstrates Mr. Duest's entitlement to relief. The issue was presented as Claim D of Mr. Duest's second amended Rule **3.850** motion. Mr. Duest relies upon the argument presented therein, which demonstrates that relief is proper.

ARGUMENT XVI

MR. DUEST'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. DUEST TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE SENTENCING JUDGE HERSELF EMPLOYED THIS IMPROPER STANDARD IN SENTENCING MR. DUEST TO DEATH.

This issue was presented as Claim F of Mr. Duest's second amended Rule **3.850** motion. It had originally been presented as part of Claims V and XII of Mr. Duest's Rule **3.850** motion. It was restated in light of significant new case law. Mr. Duest relies upon the arguments presented in Claim F, Claim V and Claim XII, which demonstrate that relief is proper.

ARGUMENT XVII

THE TRIAL COURT'S WRONG INSTRUCTION TO THE JURY AS TO THE NUMBER OF VOTES REQUIRED TO RETURN A RECOMMENDATION OF LIFE, AND TRIAL COUNSEL'S UNREASONABLE FAILURE TO CORRECT (AND IN FACT AGREEMENT WITH) THAT FUNDAMENTAL ERROR, ROBBED THE CAPITAL SENTENCING PROCEEDING OF ANY INDICIA OF RELIABILITY, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This issue was presented as Claim XII of Mr. Duest's Rule **3.850** motion. Mr. Duest relies upon the argument presented therein, which demonstrates that relief is proper.

ARGUMENT XVIII

THE PROSECUTOR AND TRIAL JUDGE UNDER FLORIDA BIFURCATED TRIAL PROCEDURE MISINFORMED THE JURY AND IMPERMISSIBLY DIMINISHED THE JURORS' UNDERSTANDING OF THE IMPORTANCE OF THEIR ROLE AND RESPONSIBLITY IN THE SENTENCING PHASE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This issue was presented as Claim VII of Mr. Duest's Rule **3.850** motion. Mr. Duest relies upon the argument presented therein, and as restated in light of new case law in Claim I of the second amended motion, which demonstrates that relief is proper.

ARGUMENT XIX

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

This issue was presented as Claim E of Mr. Duest's second amended Rule **3.850** motion. Mr. Duest relies upon the argument presented therein, which demonstrates that relief is proper, noting in addition that at the Rule **3.850** hearing, the State conceded that the trial court's sentencing order was **"ambiguous"** as to whether nonstatutory mitigation was considered (T. 119) and that there was "plenty" of nonstatutory mitigation present in the

record (T. 121). The State conceded under Lamb v. State, 532 So. 2d 1051 (Fla. 1988), the court's findings in support of the death sentence needed to be corrected to reflect consideration of the fact "plenty" of nonstatutory mitigation was presented.

ARGUMENT XX

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

This issue was presented as Claim J of Mr. Duest's second amended Rule 3.850 motion and as Claim V of Mr. Duest's Rule 3.850 motion. Mr. Duest relies upon the arguments presented therein, which demonstrate that relief is proper.

ARGUMENT XXI

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

This issue was presented as Claim H of Mr. Duest's second amended Rule 3.850 motion. Mr. Duest relies upon the argument presented therein, which demonstrates that relief is proper.

ARGUMENT XXII

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

This issue was presented as Claim K of Mr. Duest's second amended Rule 3.850 motion. Mr. Duest relies on the argument presented therein, which demonstrates that relief is proper.

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. Duest's execution and grant Mr. Duest the relief to which he has established his entitlement and/or remand this case for proper evidentiary resolution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by Federal Express to Celia Terenzio, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Suite 204, West Palm Beach, Florida 33401, this 12th day of January, 1990.

Attorney