IN THE

SUPREME COURT OF FLORIDA

CASE NO. 75,055

ASKARI ABDULLAH MUHAMMAD,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF
THE EIGHTH JUDICIAL CIRCUIT, IN
AND FOR BRADFORD COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Muhammad's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied relief, despite the showing that Mr. Muhammad requested the assistance of counsel and despite trial counsel's affidavit detailing that the court ordered him not to provide the requested assistance. Even though Mr. Muhammad submitted reports by mental health experts deocumenting his long standing schizophrenia and the affidavit of his trial attorney detailing the resulting prejudice to Mr. Muhammad, no evidentiary hearing was held.

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

REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

Mr. Muhammad was charged with murder in the first degree, by indictment issued on October 24, 1980, in Bradford County, Florida. On May 24, 1982, a trial commenced before a jury; however, a mistrial was subsequently declared (hereinafter "Muhammad I"). A second trial before a jury commenced on October 19, 1982, the defendant proceeding pro se; and the jury returned a verdict of guilty on October 26, 1982 (Muhammad II). On November 4, 1982, the penalty phase of Mr. Muhammad's trial was conducted without a jury. Mr. Muhammad did not present any additional evidence in mitigation and on January 20, 1983, the court imposed a sentence of death. This Court affirmed both the conviction and sentence. Muhammad v. State, 494 So. 2d 969 (Fla. 1986).

On February 23, 1989, Mr. Muhammad filed his motion to vacate judgment and sentence with special request for leave to amend and on April 24, 1989, Mr. Muhammad filed his consolidated motion for evidentiary hearing, supplement to, and in support of, motion for Rule 3.850 relief, and proffer in support of motion for evidentiary hearing and motion to vacate together with his appendix (PC 201-1159). Mr. Muhammad's pleadings established that a seriously mentally ill, brain damaged, incompetent defendant was not only allowed to represent himself at his trial, but was misled by the court to believe he would have the assistance of counsel when in fact stand-by counsel was ordered not to consult with him. It is unconstitutional to take undue advantage of any person in a criminal proceeding. It is especially repugnant when the defendant is addled by mental illness.

By the time Mr. Muhammad appeared before Judge Chance he had previously been found incompetent to stand trial by Judge Trawbridge and incompetent to represent himself by Judge McCrary, Judge Green and Judge Carlisle. Initially the court appointed Joseph Forbes and Susan Cary to represent Mr. Muhammad and also appointed Dr. Jamal Amin to examine Mr. Muhammad in preparation for his

defense (R. 4, 34-35). Within two months, attorney Forbes was allowed to withdraw from the case. A month later, attorney Cary was also permitted to withdraw and the court appointed Stephen Bernstein to represent Mr. Muhammad. On January 14, 1981, Mr. Muhammad, in proper person, filed motions to dismiss counsel, to represent himself, for the assistance of counsel, and to appoint an investigator (R. 59-60, 179-82). The previous day, attorney Bernstein had filed a motion to withdraw (R. 173). Judge Green denied all of these motions citing Mr. Muhammad's mental incompetence and appointed Mr. Bernstein as "attorney ad litem" (R. 62-65). Subsequently, due to actions of the State, Judge Green recused himself and Judge Carlisle replaced him (R. 66, 172).

Mr. Muhammad proceeded to trial on May 24, 1982, with Mr. Bernstein as counsel but the court declared a mistrial on May 25, 1982 (R. 375). The next day Judge Carlisle recused himself, and Judge Chance was assigned to the case (R. 373, 386).

Despite Judge Green's findings and a lengthy record of mental illness, Judge Carlisle found Mr. Muhammad competent to stand trial after a pro forma hearing at the Florida State Prison where no testimony was presented and where there was no court reporter to record the proceedings. However, even though he found Mr. Muhammad competent to stand trial, Judge Carlisle refused to find him competent to represent himself after conducting a lengthy Faretta hearing. This finding was in fact the law of this case. Judge Chance thereafter completely disregarded the factfindings and rulings of the two previous judges including Judge Green's observation of obvious symptoms of paranoia and noting a proclivity to chase mental "rabbit trails." He permitted Mr. Muhammad to represent himself despite a lengthy prior history of mental illness, rambling monologues, a lack of understanding of law in general, and capital law in particular, and even though Mr. Muhammad himself requested the assistance of counsel and a competency examination (SR June 7, 1982, at 78-79, 85).

In his Faretta inquiry, Judge Chance never asked why Mr. Muhammad wanted to represent himself. Had he done so, it would have been discovered that Mr. Muhammad had a phobia against men, and was too mentally ill to participate in the exposure and presentation of his mental deficiencies. Further, in the Faretta hearing conducted by Judge Chance, in response to the court's inquiry as to whether he was competent to conduct his own defense, Mr. Muhammad expressed concern about his own ability to understand the legal process and requested a mental evaluation for competency. Instead of finding that Mr. Muhammad was unable to represent himself, or ordering the requested evaluation, the court misled Mr. Muhammad by assuring him he would receive the assistance of stand-by counsel, Mr. Bernstein; that the court would grant "five out of six motions" filed by Mr. Muhammad; and that he would have access to a law library. In fact, the court later ordered stand-by counsel Richard Replogle not to confer with or assist Mr. Muhammad. Instead of granting "five out of six motions," the court denied virtually all defense motions even reversing defense motions already granted by Judge Green and Judge Carlisle including a motion requesting the assistance of an investigator.

As the trial proceeded with Mr. Muhammad attempting to represent himself, it became an obvious farce and a mockery. The prosecutor suppressed evidence on the grounds that a proper demand for discovery had not been made when in fact numerous demands had been made (R. 418, 427). The prosecutor assured the court that there were no statements by witnesses that had not been turned over to Mr. Muhammad when subsequent investigation by collateral counsel has revealed that the statements had not been provided and in fact never were. These witness statements which have now been obtained by collateral counsel are found to contain substantial exculpatory evidence. Mr. Muhammad did not know how to use the subpoena process, harangued jurors at length because they were against the death penalty, presented no defense to the crime, did not move for judgment of

acquittal, waived a sentencing jury and did not understand the presentation of mitigating evidence at the penalty phase. The court not only did not take any action to stop the trial due to obvious due process violations but did nothing to correct obvious errors. The court compounded the State's misconduct and Mr. Muhammad's incompetence by permitting incorrect statements of law to the jury; subpoenaeing prospective jurors late at night for appearance in court the next morning; not conducting a Richardson hearing on the failure of the State to provide discovery; refusing to order transcripts of prior proceedings (including hearings where Mr. Muhammad had not been present); failing to serve process on witnesses subpoenaed by Mr. Muhammad; conducting ex parte proceedings outside the presence of Mr. Muhammad and stand-by counsel; permitting Mr. Muhammad to dismiss the sentencing jury without sufficient reason or inquiry; permitting 100 uniformed corrections officers to pack the small courtroom; and failing to provide Mr. Muhammad with a copy of the presentence investigation and failure to inform him that he could rebut the presentence investigation and present mitigating evidence.

Due to violations of constitutional protections, protections much more rigorously applied in capital cases because of the eighth amendment's concerns for heightened scrutiny, the court and the State effectively precluded the factfinders from hearing the true, tragic facts regarding why the incident at issue occurred and what it was all about. The events of the homicide began when Mr. Muhammad, who was incarcerated, was denied a visit because he requested a clipper for shaving. The factfinders never knew that the "visitor" that Mr. Muhammad wanted so desperately to see was his mother who had not visited him in four years. The factfinders never heard that Mr. Muhammad refused to shave with a razor because of a painful skin condition; and when the correctional officer denied the visit, he violated prison policy that a prisoner who does not shave should be given a disciplinary report, but still allowed to visit. The

factfinders never knew that when Mr. Muhammad decided to undergo the painful condition of an ingrown beard just to see his mother, that he learned that she had been told he refused to see her. The factfinders never knew that his mother was in poor health making it nearly impossible to travel; that Mr. Muhammad's mental illness involved an obsessive desire to be with his mother; and that the actions of the prison in refusing this untreated, mentally ill person a visit with his mother resulted in a psychotic episode on the part of an inmate who was obviously schizophrenic (PC 930, 1060, 1624-25).

The factfinders never learned that Mr. Muhammad had suffered a horrible childhood of extreme and constant physical and mental abuse including starvation; being tied naked to the bed for up to five hours and whipped till he bled; being forced to sleep under the bed; witnessing the rape of his ten year old sister by his father and having to testify against his father; being sent to a boy's school at the age of nine (9) because there was no suitable placement for him; and finally, incarceration in an adult prison at the age of 15. The court never learned of the extent and degree of Mr. Muhammad's serious mental illness and brain damage.

On August 31, 1989, the trial court entered an order summarily denying relief on the consolidated motion to vacate judgment and sentence (PC 1378-84). On September 14, 1989, Mr. Muhammad filed his motion for rehearing and on October 12, 1989, the trial court entered an order denying the motion for rehearing (PC 1619). At no time was Mr. Muhammad ever granted the opportunity to present argument on his claims nor did the State ever respond to the motion to vacate or the motion for rehearing. On November 8, 1989, Mr. Muhammad timely filed his Notice of Appeal.

SUMMARY OF ARGUMENTS

I. The trial court erred in summarily denying Mr. Muhammad's motion to vacate without requiring a State response, permitting argument or conducting an

evidentiary hearing. Mr. Muhammad's motion to vacate pleadings revealed substantial evidentiary claims including the State's suppression of critical witness statements, ineffective assistance of counsel for failure to obtain and present an adequate mental health evaluation contrary to Heiney v. Dugger and Mills v. Dugger. These claims were not conclusively refuted by the record. Further, the court erred in failing to attach or identify the portions of the record which allegedly refute Mr. Muhammad's claims. Hoffman v. State.

II. After numerous attempts by appellate counsel, the Attorney General's office and this Court, the record of the trial proceedings is still incomplete making it impossible to achieve a meaningful review on direct appeal contrary to Gardner v. Florida.

III. Collateral counsel has discovered new facts which reveal that Mr. Muhammad was suffering from the major mental illness of schizophrenia and brain damage which made it impossible for him to make a knowing and voluntary waiver of his right to counsel. These facts are established by affidavits of all three trial counsel, a competent mental health evaluation, and by documents suppressed by the State. Further, stand-by counsel has revealed that he was ordered not to consult with Mr. Muhammad despite Mr. Muhammad's repeated pleas for the assistance of counsel.

IV. Mr. Muhammad never received a competent mental health evaluation because the expert appointed to examine him admitted that he did not do a complete evaluation and did no testing; and the expert did not have access to critical materials suppressed by the State. Further, defense counsel ineffectively failed to obtain the voluminous background materials which establish a long history of abuse, mental illness and delusions.

V. The court erred in denying the right to present an insanity defense. Collateral counsel has discovered facts to establish that Mr. Muhammad's refusal to see the court appointed experts was due to his suspiciousness, paranoia, and

fear of men, and not a reasoned, tactical decision.

VI. Collateral counsel has established through the affidavits of trial counsel and a competent mental health evaluation that Mr. Muhammad's delusions and paranoia due to his severe mental illness made it impossible for him to communicate with counsel as to aid counsel in presenting an insanity defense.

VII. Due to the misconduct of the State in packing the courtroom with 100 uniformed correctional officers and the failure of the Court to make an adequate inquiry into the voluntariness and intelligence of the waiver, Mr. Muhammad was deprived of his right to the sentencing recommendation of a properly informed and impartial jury.

VIII. Due to a pattern of misconduct by the State and erroneous rulings of the Court, Mr. Muhammad was denied the right to consult with stand-by counsel, deprived of critical statements by witnesses, denied access to a law library, denied the services of an investigator, denied process of defense witnesses, and was never provided with the presentence investigation.

IX. The State suppressed exculpatory, eyewitness accounts of the offense despite repeated requests for discovery. Further, they misrepresented to the court that the statements had been provided when they had not. Collateral counsel has obtained these statements and discovered that they contain substantial exculpatory evidence that contradicts facts which were presented by the State and accepted by this Court to Mr. Muhammad's detriment.

X. Mr. Muhammad's case received massive publicity including articles and film accounts that the Attorney General attended the victim's funeral. In addition to the massive publicity, virtually every member of the venire was an employee of the Department of Corrections or related to or friends of an employer. Under these unique circumstances, it was error not to grant individual voir dire or a change of venue.

XI. Mr. Muhammad's grand jury was biased contrary to the fifth, sixth,

eighth and fourteenth amendments. Within 48 hours a grand jury composed almost entirely of prison employees and relatives demanded that the State Attorney expedite Mr. Muhammad's case. The prosecution did so and an indictment was returned four days after the offense.

XII. The trial court erred by failing to consider Mr. Muhammad's mental deficiencies as nonstatutory mitigating circumstances. The trial court also erred in considering nonstatutory aggravating factors which were contained in a presentence investigation not provided to Mr. Muhammad.

XIII. The trial court unconstitutionally shifted the burden of proof with regard to the appropriateness of a sentence of life imprisonment to Mr. Muhammad, in violation of his fourteenth amendment rights to due process and equal protection of law, and his rights under the fifth, sixth, eighth and fourteenth amendments to the United States Constitution.

XIV. Mr. Muhammad's rights under the eighth and fourteenth amendments were denied by improper consideration of the victim's character and victim impact information.

XV. The "heinous, atrocious and cruel" aggravating circumstance was applied to Petitioner's case without articulation or application of a meaningful narrowing principle, in violation of Maynard v. Cartwright and the eighth and fourteenth amendments.

ARGUMENT I

THE TRIAL COURT'S SUMMARY DENIAL OF MR. MUHAMMAD'S MOTION TO VACATE WAS ERRONEOUS AS A MATTER OF FACT AND LAW AND THE COURT FURTHER ERRED IN FAILING TO ADEQUATELY IDENTIFY AND TO ATTACH TO ITS ORDER THE PORTIONS OF THE RECORD CONCLUSIVELY REFUTING EACH CLAIM.

Despite numerous meritorious issues of grave constitutional dimensions, Mr. Muhammad's Rule 3.850 claims were summarily denied. Despite lengthy documentation of his claims by voluminous records; seventeen statements of witnesses; ten affidavits of family members; affidavits from trial attorneys

Cary, Bernstein and Replogle; and a comprehensive mental evaluation, the State was never required to file any type of response to the motion and the circuit court summarily dismissed the motion (PC 1378).

Further, the order denying the defendant's consolidated motion recites summary denials without citation to the specific portion or portions of the record relied upon by the trial court in making its disposition of each of the claims. At the end of the order, the trial court incorporated by reference the entire record. The court did not, in any part of its order, specifically identify what portion or portions of the enumerated records conclusively refute which of each of the eighteen separate claims asserted by the defendant. The records identified by the trial court are lengthy, containing multitudinous facts, claims, issues and citations of authority.

This Court, in its recent opinion in Hoffman v. State, 15 F.L.W. 649 (Fla. Dec. 13, 1990), noted that the trial court failed to attach to its order summarily denying relief the portion or portions of the record conclusively showing that relief was not required. In response to the argument that the entire record was attached to the order in the Court file and fulfilled Rule 3.850's requirement, this Court concluded that "such construction of the rule would render its language meaningless." As the Court noted,

> The record is attached to every case before this Court. Some greater degree of specificity is required. Specifically, unless the trial court's order states a rationale based on the record, the court is required to attach those specific parts of the record that directly refute each claim raised.

Hoffman, 15 F.L.W. at 649 (first emphasis in original; second emphasis added).

The trial court's order here fails, under the Hoffman rationale, to satisfy the requirements of Rule 3.850 and precludes adequate review on appeal. The lower court summarily denied Mr. Muhammad's claims without conducting any type of hearing, without hearing argument, without a State response, without adequately discussing whether (and why) the motion failed to state valid claims

for Rule 3.850 relief (it does), without any adequate explanation as to whether (and why) the files and records conclusively showed that Mr. Muhammad is entitled to no relief (they do not), and without attaching the purported portions of the record which conclusively show that Mr. Muhammad is entitled to no relief (the record supports Mr. Muhammad's claims). The lower court erred in its disposition.

The rulings regarding the Rule 3.850 pleadings which resulted from this process were improper in several respects. The very process which resulted in the order was itself improper. Post-conviction proceedings are governed by principles of due process, Holland v. State, 503 So. 2d 1250 (Fla. 1987), and due process requires that the court at least grant the opportunity to present argument as well as conduct an evidentiary hearing. What happened before the 3.850 trial court on this case was simply not due process.

Courts should hear evidence presented by both parties and make informed rulings. Mr. Muhammad was and is entitled to an evidentiary hearing on his Rule 3.850 pleadings, Lemon v. State, 498 So. 2d 923 (Fla. 1986), and was and is also entitled in these proceedings to that which due process allows -- a full and fair hearing by the court on his claims. Cf. Holland v. State, 503 So. 2d 1250 (Fla. 1987). Mr. Muhammad's due process rights to a full and fair hearing were abrogated by the lower court's summary denial without affording argument or proper evidentiary resolution.[1]

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[1]Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Muhammad's motion alleged facts which, if proven, would entitle him to relief. These facts were never controverted by the State. The files and records in his case do not "conclusively show that he is entitled to no relief," and the trial court's summary denial of his motion was therefore erroneous.

In support of his 3.850 pleadings, Mr. Muhammad submitted three affidavits from trial counsel in which trial counsel identified mental health deficiencies which they believed made it impossible to waive counsel or proceed to trial. Most remarkably, stand-by counsel states that he was ordered not to consult with Mr. Muhammad. Also in support of the 3.850 pleadings, Mr. Muhammad presented voluminous affidavits, records and mental health evaluations.

The need for an evidentiary hearing in Mr. Muhammad's case is identical to the need for an evidentiary hearing in Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990), and Mills v. Dugger, 559 So. 2d 578 (Fla. 1990). In light of trial counsels' affidavits and the other supporting material, an evidentiary hearing was and is required. Gorham v. State, 521 So. 2d 1067 (Fla. 1988).

The files and records in the case by no means conclusively show that he will lose. In fact the files and records corroborate the Rule 3.850 claims. The circuit court did not address the affidavits from Mr. Muhammad's trial counsels or the mental health evaluation. Mr. Muhammad's claims, proffers and appendices were more than sufficient to require evidentiary resolution. Nothing "conclusively" rebutted them, and nothing was attached to the order which showed that they were "conclusively" rebutted. Lemon. Indeed, in a case such as this, where facts are in dispute, the refusal to allow an evidentiary hearing makes no sense at all. Blackledge v. Allison, 431 U.S. 63 (1977).

Facts not "of record" are at issue in this case; such facts cannot be resolved now by this Court, as there is no record to review.[2] The lower court

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[2]Obviously, the question of whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. See Bassett v. State, 541 So. 2d 596 (Fla. 1989). Mr. Muhammad's claim that he was denied a professionally adequate mental health evaluation due to failures on the part of counsel and the court-appointed mental health professionals is also a traditionally recognized Rule 3.850 evidentiary claim. See Mason; Sireci; cf. Groover v. State, 489 So. 2d 15 (Fla. 1986). Facts that have now come to light, which were unknown before, reflect that the prior dispositions of this issue were erroneous, and demonstrate the need for an (continued...)

should have allowed an evidentiary hearing. Mr. Muhammad was (and is) entitled to an evidentiary hearing and the trial court's summary denial of his Rule 3.850 pleadings was erroneous. This Court must reverse that denial and remand this case for a full and fair evidentiary hearing.

ARGUMENT II

MR. MUHAMMAD'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS AND CRITICAL RECORDS WERE NOT INCLUDED IN THE RECORD ON DIRECT APPEAL, PRECLUDING RELIABLE APPELLATE REVIEW.

Mr. Muhammad's record on direct appeal in this case was confused.[3] Appellate counsel for Mr. Muhammad, including collateral counsel, have been vexed by the difficulties in obtaining accurate transcripts of the proceedings. The present state of Mr. Muhammad's transcript and record on appeal here, as it was in 1983 on direct appeal, creates serious and substantial questions as to

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[2](...continued)
evidentiary hearing. See, e.g., Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Harich v. State, 542 So. 2d 980 (Fla. 1989). Moreover, obviously, Mr. Muhammad's claim that the State presented false evidence can only be resolved through an evidentiary hearing. See Lightbourne; Gorham. Since no hearing was allowed, however, Mr. Muhammad was never properly heard on these claims below.

[3]Since the Clerk of Bradford County first attempted to transmit the record on appeal to the Clerk of the Florida Supreme Court, there have been numerous problems, including:

a. The erroneous transmission of Mr. Muhammad's Notice of Appeal from the Clerk of Bradford County to the Clerk of the First District Court of Appeal rather than the Supreme Court of Florida (PC 639).

b. Memo from Clerk of the Supreme Court to the Office of the Clerk for Bradford County indicating failure to comply with Florida R. App. P. 9.200(d)(1) and returning for sequential numeration of the transcript, Volume I-III of the record and, Volume I of the Supplemental Record (PC 648).

c. Memo from the Supreme Court to the Clerk of Bradford County indicating failure to number three volumes of transcript consecutively and returning for sequential numeration (PC 648).

d. Memo from the Supreme Court to the Clerk of Bradford County noting materials improperly sent directly from the Office of Judge Wayne Carlisle, indicating they must first be transmitted to the Clerk of Bradford County and then transmitted to the Florida Supreme Court (PC 650).

how counsel can provide the constitutionally and statutorily mandated assistance to which Mr. Muhammad is entitled. McMann v. Richardson, 397 U.S. 759, 771 n. 14 (1970); Evitts v. Lucey, 469 U.S. 387 (1985); Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). A transcript of the record is a constitutional requirement to an appeal. Entsminger v. Iowa, 386 U.S. 748 (1962).

The appellate attorney for Mr. Muhammad and the Assistant Attorney General were similarly stymied in assembling the transcript and record on direct appeal which did exist, let alone "reconstruct" events from two year old proceedings. Appellate counsel, on two occasions prior to filing the direct appeal brief, sought to reconstruct events via motions pursuant to Fla. R. App. P. 9.200 (b)(3), requesting the Supreme Court to relinquish jurisdiction. As Mr. Davis noted in his second motion to reconstruct the record, missing transcripts and records on appeal ("ROA") were becoming all too routine in prison murder cases from Union and Bradford Counties. Mr. Muhammad's case is an example of the prejudice of these failings.

Assistant Attorney General Fox had little success in his efforts to assemble the transcript and ROA, and requested Assistant State Attorney Elwell to locate missing materials (PC 655). Failing this, he was forced to request copies from the defense (PC 657). This Court was affected by the chaotic state of the transcript and ROA as well. The multiple errors committed by the Bradford County Clerk and ex parte contacts by judges of that court with the Clerk of the Supreme Court ultimately required the intervention of Chief Justice Alderman with Chief Judge Tench to see that a "full record" of the trial court proceedings was forwarded to the Supreme Court (PC 659). This, in turn, prompted Chief Judge Tench to dictate a memo to Mr. Muhammad's file noting the "complexities" of the case with the cryptic hope "I think there would be no repercussions with this case" (PC 661). "Repercussions," however, were immediately encountered not only by appellate counsel, noted above, but also,

and more significantly, by this Court. This Court's opinion is unprecedented from the standpoint that this Court was unable to discern legally crucial events in Mr. Muhammad's trial, e.g., why the first trial ended in a mistrial or why Judge Green recused himself. Muhammad, 494 So. 2d at 970, 972.

Why this Court was unable to discern the circumstances giving rise to these critical events in Mr. Muhammad's trials has only recently come to light. Collateral counsel has learned that the court reporter in Muhammad I never prepared a transcription of that trial despite requests by the defendant for a transcript. In addition, collateral counsel has determined the reason this Court was unable to discern the basis of Judge Green's recusal was due to the unreasonable refusal of the Bradford County Clerk to transmit Judge Green's appendix to his order of recusal as ordered by this Court (PC 659)(Transmittal of "complete record"). Almost five years later, collateral counsel finally obtained the release of the sealed appendix pursuant to a court order (PC 664). That appendix reveals a vituperative character assassination of then defense counsel by the Department of Corrections. This unfounded defamation reached its mark, ultimately resulting in counsel's withdrawal and Judge Green's recusal. This is misconduct properly chargeable to the State. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). Notwithstanding an order from the highest Court of this state for a complete record, the sealed appendix was not in this Court's record on direct appeal.

The Bradford County Clerk's misfeasance in carrying out the mandatory duties imposed by Fla. R. App. P. 9.200(a)(1), also resulted in Mr. Muhammad being stripped of a constitutionally meritorious grand jury challenge on his direct appeal. See Argument XI. The grand jury misconduct stems from the domination of the grand jury by Department of Corrections' employees, as well as a circuit court judge's wife. The grand jury demanded Mr. Muhammad's case, and then indicted him. With only 48 hours left in its term, the grand jury

"specially requested" that Assistant State Attorney Elwell expedite Mr. Muhammad's case for indictment. Due to this uncharacteristic haste, defense counsel filed appropriate pretrial motions to abate and discover these highly suspect proceedings. The motions were filed, renewed, and denied, preserving the issues for review on direct appeal. But, the clerk failed to transmit these materials to this Court until less than 24 hours before appellate counsel was to file his brief.

Nowhere in Mr. Muhammad's brief does Mr. Davis, an attorney well versed in the law, raise the issue of grand jury abuse. The most probable explanation for his failure to raise the issue is that the transcript was not part of the ROA when Mr. Muhammad's brief was being prepared and filed. Otherwise, it constitutes ineffectiveness of appellate counsel. This omission alone violated Mr. Muhammad's rights to equal protection and due process, see Griffin v. Illinois, 351 U.S. 212 (1956), and its predecessors.

Further, there was never compliance with this Court's order to transmit the presentence investigation (PSI)(PC 1091). A thorough search of this Court's record on direct appeal fails to reveal the PSI report. Appellate counsel came to similar conclusions, and desperately pleaded with the Court to relinquish jurisdiction to supplement the ROA with the PSI. The motion was denied. The record before the Court does not reflect that Mr. Muhammad was ever provided with the PSI report or that he ever understood that he had the right to rebut the inaccuracies in the PSI.

Even Askari Muhammad, unversed in the law, perceived that irregularities were taking place with respect to the making of the record. He filed numerous motions to transcribe pretrial hearings and the previous trial which resulted in a mistrial; all of which were denied. He also strenuously objected to the deficits in the record, correctly foreseeing that these record inadequacies would inure to his prejudice (SR October 11, 1982, at 6-11). The failure to

contemporaneously transcribe the "competency hearing" conducted at Florida State Prison, rendered a fair and adequate review of the competency and waiver issues in this case virtually impossible. The constitutional due process right to receive transcripts for use at the appellate level was acknowledged by the Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956). The existence of an accurate trial transcript is crucial for adequate appellate review. Id. at 219. The sixth amendment also mandates a complete transcript. Hardy v. United States, 375 U.S. 277, 288 (1964)(appellate counsel must be equipped with "the most basic and fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy.").

Adequate appellate review is impossible when the trial record is incomplete. The United States Supreme Court in Entsminger v. Iowa, 386 U.S. 748 (1967), held that appellants are entitled to a complete and accurate record. See also Evitts v. Lucey, 469 U.S. 387 (1985)(effective appellate review begins with giving an appellant an advocate and the tools necessary to do an effective job). Finally, Gardner v. Florida held that:

> Since the State must administer its capital sentencing procedures with an even hand, see Proffitt v. Florida, 428 U.S. at 250-58, 96 S.Ct. at 2966-67, it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed.
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> . . .
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> In this particular case, the only explanation for the lack of disclosure is the failure of defense counsel to request access to the full report. That failure cannot justify the submission of a less complete record to the reviewing court than the record on which the trial judge based his decision to sentence petitioner to death.

Gardner v. Florida, 430 U.S. 349, 361 (1977)(emphasis added).

The record on appeal must disclose considerations which motivated the imposition of the death sentence. "Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the

defects which resulted in . . . unconstitutionality in Furman v. Georgia, 408 U.S. [238,] at 313-314 [1972]." Gardner v. Florida, 430 U.S. at 361. Mr. Muhammad claims just such a defect here. The question is whether Mr. Muhammad should suffer the ultimate sentence of death when he did not have the benefit of the constitutionally guaranteed review of a bona fide record of the trial proceedings. Art. V sec. 3(b)(1), Fla. Const.; Delap v. State, 350 So. 2d 462, 463 (Fla. 1977).

This Court's appellate review involves at least two functions:

> First, we determine if the jury and judge acted with procedural rectitude in applying section 921.141 and our case law. This type of review is illustrated in Elledge v. State, 346 So.2d 998 (Fla. 1977), where we remanded for resentencing because the procedure was flawed -- in that case a nonstatutory aggravating circumstance was considered.
>
> The second aspect of our review process is to ensure relative proportionality among death sentences which have been approved statewide. After we have concluded that the judge and the jury have acted with procedural regularity, we compare the case under review with all past cases to determine whether or not the punishment is too great. In those cases where we find death to be comparatively inappropriate, we have reduced the sentence to life imprisonment.

Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981). This Court has emphasized that "[t]o satisfactorily perform our responsibility we must be able to discern from the record that the trial judge fulfilled that responsibility" of acting with procedural rectitude. Lucas v. State, 417 So. 2d 250 (Fla. 1982) (emphasis added). The record in this case was incomplete due to the omission of critical records, which prevented this Court from conducting a meaningful review on direct appeal. Gardner v. Florida.

Due to an incomplete record on appeal, Mr. Muhammad was denied due process, effective assistance of counsel on appeal, a reliable and trustworthy appellate review of his conviction and sentence of death by the highest court in the state, all in violation of the fifth, sixth, eighth and fourteenth amendments.

Mr. Muhammad is entitled an evidentiary hearing to establish the error and the resulting prejudice. The trial court erred in summarily denying his claims, and this Court should reverse and remand for an evidentiary hearing.

ARGUMENT III

MR. MUHAMMAD WAS DENIED THE ASSISTANCE OF COUNSEL CONTRARY TO FARETTA AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This Court initially considered the sufficiency of the Faretta waiver of counsel on direct appeal. The request for reconsideration is based upon facts which have been discovered by post-conviction counsel but were unknown to this Court at the time of the direct appeal. Under Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989), this claim as supplemented by the newly discovered facts is cognizable in Mr. Muhammad's 3.850 pleadings.

Collateral counsel has discovered that approximately one year before the offense, Mr. Muhammad was diagnosed as suffering from paranoid schizophrenia and the mental health expert expressed concern that due to the fact he was not receiving treatment or medication, he might constitute a danger potential:

> SUMMARY AND CONCLUSIONS:
>
> This is clearly a man with a major psychiatric problem in need of appropriate medication and treatment responses. I diagnos (sic) him as paranoid schizophrenia and only wonder why the medication and treatment previously given to him for this condition has not been continued during this incarceration. The presence of a major thought disorder is clear, concomitant with the need for appropriate psychiatric responses (including psychotropic medication), yet what is not clear is the extent to which these treatment responses called for (at least the medication componant) would be available through the facilities' medical department, and should be tried before conclusions about his danger potential and prison adjustment potential are forthcoming. It may well be that appropriate medication (even without other treatment) will be enough to greatly reduce the present unpredictability, disorientation, and general disorder of thought that he currently exhibits.

(Report of Dr. Brad Fisher, PC 1060)(emphasis added).

Dr. Fisher's observations suggest that Mr. Muhammad's inability to submit himself to the subsequent court ordered evaluations was due to his mental

illness and not to a reasoned decision:

> BEHAVIORAL OBSERVATIONS:
>
> Thomas Knight was high strung, suspicious, and somewhat disoriented at times during our interview. He demonstrated many symptoms and characteristics consistent with a diagnosis of paranoid schizophrenic (e.g. ideas of reference, reports of previous hallucinations, a sense of being persecuted, and frequent flight of ideas and manic speech patterns). He was highly suspicious of this interviewer and I was given the definite sense that any remark he possibly interpreted as threatening would have led to his refusing to participate further in the interview. When some rapport was established he exhibited a rush of frequently incoherent statements that suggested a serious thought disorder. However, he was not overtly threatening or dangerous towards me at any point in the interview.

(PC 1060)(emphasis added).

An independent evaluation obtained by collateral counsel establishes that Mr. Muhammad's major mental illness is further complicated by an organic brain disorder:

> On the Booklet Categories Test, Mr. Muhammad falls into a range that is indicative of brain damage (82 errors). Given his Performance I.Q., one would expect only half of the errors made by Mr. Muhammad. The Categories test is a test that requires problem solving ability, abstract reasoning, mental flexibility, and judgement. It has been described as the "single test most sensitive to damage in any area of the brain". He received a score clearly placing him in the brain damaged range.

(Report of Dr. Joyce Carbonell, PC 927-38).

Collateral counsel has discovered that approximately ten years before the offense, a mental health expert at the state hospital in MacClenny, Florida, warned of Mr. Muhammad's murderous potential due to his delusions about his mother:

> "This patient has unresolved oedipal sexual conflicts and presently shows some signs of identity problems. Deep underlying paranoid fantasies seem to represent a fear that this father will kill him because of the patient's love for his mother, and in a psychotic state this male could kill a man in delusional defense from the murderous onslaught of the father represented by the male".

(PC 922).

Trial counsel, Susan Cary, who communicated with Mr. Muhammad within a few

hours after the offense, would testify to his obsessions about his mother:

> Since I was representing Mr. Muhammad on another case he was permitted to call me on night of the offense at Florida State Prison in Bradford County. He did not ask me any questions regarding his rights or his case. His only concern was to ask me to contact his mother to explain why he was unable to visit with her. Under the circumstances of an ongoing interrogation, his concern for his mother seemed excessive and inappropriate.
>
> . . .
>
> As a result of my contact with Mr. Muhammad I have gained some insight into his perception of the offense. Mr. Muhammad has what may only be described as an unusual or bizarre relationship with his mother, Anna Knight. She is mentally and emotionally disturbed. She raised her son in abject poverty and brutalized him throughout his childhood. She doesn't drive, doesn't work, and rarely visits her son. The journey to the prison is a seven hour trip. For an emotionally unstable and impoverished woman, the simple task of visiting her son at the prison takes on monumental proportions. Their aborted visit on the date of the offense had enormous significance for Mr. Muhammad, who was fortunate if he received a visit each year from his mother and who was well aware of the great difficulties faced by her in just making the simple arrangements for the visit.

(PC 1623, 1625).

Based upon the previously undisclosed background materials it is clear that Mr. Muhammad was insane at the time of the offense:

> Mental State at the Time of the Offense: In order to be considered insane in the State of Florida one must have a mental disease or defect and because of this condition not know what one is doing or the consequences or although knowing what one is doing, not knowing it was wrong. That Mr. Muhammad had a mental disease or defect was well established. He had a hospitalization, a history of medication with antipsychotics and numerous evaluations indicating all the signs and symptoms of mental illness. He was most likely diagnosed as paranoid schizophrenic or as having a schizophreniform disorder. Because of this he was unduly suspicious, overly sensitive and was, as with most schizophrenics, extremely sensitive to experiences of rejection. On the day of the murder he had not been allowed to see his mother. Because he believed, however incorrectly, that he did not need a clipper pass, the officer's refusal to let Mr. Muhammad see his mother was inexplicable to Mr. Muhammad. Given the close relationship he believed he had with his mother, the fact that he had not seen her for years and earlier warnings that were in his record about what would happen if he were prevented from seeing his mother, such behavior seems an inevitable result of his mental disorder and delusions. He did not in fact, kill a person who had prevented him from seeing his mother, but killed another officer who was simply there. As Kaplan and Sadock have said, the schizophrenic homicide comes as a "horrifying surprise...The homicidal schizophrenic patient may appear to be relaxed, even apathetic; and then within a

day or two, he kills somebody". They continue on saying "A careful analysis of these unpredictable suicides and homicides leads to the conclusion that the most significant factor in most of them is a traumatic experience of rejection. The schizophrenic's pathological sensitivity makes him extraordinarily vulnerable to all common life stresses." The importance of the visit to his mother and his inability to see beyond that is apparent when he is given a call to his lawyer. His first statement is to request that the lawyer call his mother to explain that he had not been allowed to meet with her when she came to visit.

(Report of Dr. Joyce Carbonell, PC 930)(emphasis added).

Trial counsel, Stephen Bernstein, will testify that Mr. Muhammad was unable to make rational decisions to waive counsel and legal defenses:

> Originally Mr. Muhammad allowed me to prevail in the presentation of mental health issues. As time went on, his obsessive opposition to the use of these issues continued to increase until at some time after Dr. Amin's evaluation for competency he ultimately decided to represent himself. Based on my communications with him, I believe he was acting on the basis of his irrational mental condition and was not understandingly and knowingly waiving his right to counsel or voluntarily exercising his own informed free will.

(PC 561).

Trial counsel, Susan Cary, describes Mr. Muhammad's mental state and his deterioration as the time of trial approached:

> Throughout my representation of Mr. Muhammad, I have observed that Mr. Muhammad's thinking process were distorted and confused. During my interviews with him he has never been able to understand common nuances of languages such as humor and satire. The mental health experts whom I consulted informed me that this is called concrete thinking and is typical for persons suffering from schizophrenia.
>
> In addition to his usual difficulties with communication, at the time of the Bradford County offenses and subsequent to the offenses, I noticed a significant deterioration of his ability to communciate and understand. Not only did he exhibit the previous effects of mental illness which had always interfered with my communication with him, he was not able to aid me in the defense of this case. Specifically, he would insist on starting from an illogical assumption and proceed to build a progression of ideas that did not coincide with the reality of his situation. He was very rigid in his thinking and seemed unable to comprehend what his other attorney and I were trying to communicate to him. His discussions of the offense and the available defenses were confused and illogical.
>
> I interviewed Mr. Muhammad one time after the court had found he could proceed as his own counsel. At that time Mr. Muhammad was more confused and disoriented that I had ever seen him. I was unable even

to complete the interview due to his state of mental distress. He was unable to discuss his case at all. I have never seen him so distressed. Although I had worked to build communication with him, he was too out of touch to have any meaningful communicaton. I finally gave up and left.

I had worked over a long period of time to gain Mr. Muhammad's trust so that I could communicate with him. I am also aware that he did not relate well to me. I feel sure that if he was so mentally incomplete that he could not communicate with me, he would not be able to communicate with Mr. Bernstein. In fact, I understand that he refused to see Mr. Bernstein for the last three months before his first trial. It is my opinion based on my interactions with Mr. Muhammad as well as his background that he was too incompetent to cooperate with his attorney or make a knowing and voluntary waiver of counsel or represent himself at trial.

(PC 1624-25).

Stand-by counsel, Frederick Replogle would testify that contrary to customary practice he was ordered not to consult with Mr. Muhammad during the preparation and presentation of the trial:

I was an Assistant Public Defender for the Eighth Judicial CIrcuit in and for Bradford County in 1982. On July 23, 1982 I was appointd as stand-by counsel for Askari Abdullah Muhammad a/k/a Thomas Knight.

Mr. Muhammad represented himself at his trial which commenced on October 19, 1982. I did not consult with Mr. Muhammad prior to the trial or aid him in his defense in any way. I did not consult with Mr. Muhammad during the trial and remained in the back of the courtroom as an observer. In fact, I never even spoke with Mr. Muhammad.

I have been asked to act as stand-by counsel in the past for defendants who are representing themselves. Generally, I have counselled with them during breaks in the trial in regard to various issues as they come up during the proceeding. In Mr. Muhammad's case I did not do this because I had been ordered by Judge Chance not to consult with Mr. Muhammad. I had never heard of any other judge ever issuing such an order. It was clear to me that Mr. Muhammad needed my assistance. My hands, however, were tied.

Since the judge ordered me not to consult with Mr. Muhammad, I did no preparation or investigation of the case. I was totally unaware of Mr. Muhammad's background and had no more than a general idea of the facts of the offense.

Assistant State Attorney Tom Elwell was very forceful and aggressive in his handling of the case and fully exploited his advantage against Mr. Muhammad as a pro se defendant.

(PC 913-14).

Due to his mental illness, Mr. Muhammad was too incompetent to knowingly and voluntarily waive a jury recommendation at sentencing and too mentally ill to present the overwhelming mitigation which has been documented by post-conviction counsel:

> Ability to waive a penalty phase jury: Given his mental illness and the particular symptoms that accompany it, Mr. Muhammad could not knowingly, intelligently and voluntarily waive a penalty phase jury. The grandiosity accompanying paranoid schizophrenia would have prevented Mr. Muhammad from putting on the available mitigating circumstances. His childhood, for example was marked by inadequate basic care, brutal beatings from both parents, the witnessing of the rape of his sister and a life devoid of any normal love or affection. Yet, Mr. Muhammad presented none of this; in fact at other times when asked about his parents, he did not mention any problems but has said they are "beautiful people." His strong feelings about his mother prevent him from saying anything that would effect her. He is blind to his own mental illness. Because a paranoid schizophrenic may function at an adequate social level at times, people may have failed to notice the grandiosity and delusional beliefs that were present. His own suspiciousness and distrust prevented him from allowing others to help or advise him. Just as he refused to allow his lawyer to prevent his only viable defense, he refused to present his only viable mitigtion.

(PC 932).

The purpose of the post-conviction process is to bring to light critical facts which were not in the record on direct appeal and therefore unavailable to appellate counsel or this Court. The importance of facts discovered in the post-conviction process can never be more critical than in a case such as this where a mentally ill person conducts his own defense. Although the bare record may conceal the facts regarding mental illness and competency, those facts can now be presented.

Askari Abdullah Muhammad has a history of head injury, severe child abuse, malnutrition, and major mental illness. A prior judicial finding of incompetency to stand trial was entered in St. Lucie County on December 28, 1970, and Mr. Muhammad was involuntarily committed to Northeast Florida State Hospital due to psychosis and schizophrenia. Mr. Muhammad experienced

hallucinations while incarcerated. He has a well-documented history of severe drug and alcohol abuse.

From the outset, Mr. Muhammad's mental competency was at issue. Initially, the court appointed Joseph Forbes and Susan Cary to represent Mr. Muhammad. They soon requested that a mental health expert be appointed to aid the defense and Dr. Jamal Amin was appointed (R. 4, 34-35). Each of these attorneys subsequently withdrew as counsel and Stephen Bernstein was appointed.

During an appearance before Judge Green, Mr. Muhammad requested that he be permitted to conduct his defense pro se while also insisting that he be provided with the assistance of counsel (R. 63). Judge Green conducted a Faretta hearing and denied the motion citing to a defense motion describing Mr. Muhammad "as having '. . . a severely disabling mental illness' . . . 'a major psychiatric illness' and has been committed to the state hospital as 'incompetent.'" The court further observed that Mr. Muhammad "exhibits symptoms consistent with extreme paranoia." Judge Green proceeded to appoint Mr. Bernstein as "Attorney Ad Litem as well as attorney of record for the Defendant in this case and in such other matters, if any, as Stephen N. Bernstein, in his sole professional judgment shall deem indicated." (R. 63, 1651-56). It is significant that Judge Green specifically conducted a Faretta hearing and entered an order because "I only intend to step down after this hearing is completed and the issue of your counsel is finally resolved for I fear that for me to abdicate responsibility and not deal with that issue, would be unfair to any successor in your case." (R. 1654). Little did he know there would be two more judges and each would conduct yet another Faretta hearing before Mr. Muhammad went to trial.

After the recusal of Judge Green, Judge Carlisle conducted another Faretta hearing, and determined that Mr. Muhammad was competent to stand trial, but not competent to waive counsel (R. 10-25). Mr. Muhammad's case proceeded to trial but a mistrial was declared. Due to critical publicity over the way the jury

venire procedures were handled in Muhammad I, Judge Carlisle became the second judge to recuse himself.

The case was then assigned to Judge Chance. On June 7, 1982, a hearing was held before Judge Chance who proceeded to conduct a third Faretta hearing (R. 564-600). During this hearing Mr. Muhammad reiterated his wish to have the assistance of counsel:

> THE COURT: All that being what it is, would you still wish to represent yourself?
>
> MR. MUHAMMAD: At that time, your Honor, I believe that I would take whatever rights the Court would allow me and I would proceed as the defendant in this cause.
>
> THE COURT: Without counsel?
>
> MR. MUHAMMAD: Without counsel, your Honor, or representation of counsel, Your Honor, not the assistance of counsel.
>
> THE COURT: In the event that the Court grants your motion to represent yourself, it is probable that I will ask Mr. Bernstein to remain as a legal advisor or in the terms of his role in your preparation of your case, that if you had any questions with regard to the legal procedure, the proceedings in the case and so forth, that Mr. Bernstein will be available to you to answer those questions. I would not request Mr. Bernstein to perform an active participation in your preparation of your defense in that either one or the other of you is going to be the lawyer. . . .

(R. 581-82)(emphasis added). Reversing Judge Green's and Judge Carlisle's earlier judgments that Mr. Muhammad was not competent to represent himself, Judge Chance accepted Mr. Muhammad's waiver of counsel and granted his request to proceed as his own counsel (R. 389).

Subsequently, Mr. Muhammad filed another pro se motion for the assistance of counsel (R. 396-97). During the hearing before Judge Chance on July 19, 1982, Mr. Muhammad again requested the assistance of counsel (R. 1673-76). It is obvious from his address to the court that Mr. Muhammad believed he had a right to and was seeking the assistance of counsel for the preparation of his case. At no time did he ever make a "clear and unequivocal" waiver of that right. Mr. Bernstein subsequently filed a motion to withdraw as counsel and the

Public Defender was appointed as stand-by counsel (R. 1714-17). At the time of the Faretta inquiry, Mr. Muhammad asked for legal assistance in his case and was assured that Mr. Bernstein would be available to assist him in the preparation of his case (R. 581-82). However, collateral counsel has discovered that after Mr. Bernstein withdrew Judge Chance ordered the new stand-by counsel, Mr. Replogle, not to consult with his client (PC 913-14). Again this Court did not know that on direct appeal.

A. MR. MUHAMMAD'S "WAIVER" OF HIS RIGHT TO COUNSEL WAS EQUIVOCAL AND INCOMPLETE UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS AND WAS NOT VOLUNTARILY, KNOWINGLY AND INTELLIGENTLY MADE

1. The Waiver of Counsel Was Equivocal

A common thread exists throughout the record of all proceedings which addressed Mr. Muhammad's demands to proceed pro se. He consistently indicated his understanding that he had a right to have the assistance of appointed counsel to aid him in the preparation of his case even proceeding pro se:

> I request that this Court allow me the assistance of counsel. . . And, because I believe I have this right, and because I choose to exercise this right, I therefore move this Court to appoint counsel for that purpose of assisting the defendant in preparing and presenting his defense, whatever defense that may be, to this Court. Thank you, Your Honor.
>
> * * *
>
> Your Honor, I'm saying that the defendant has represented to the Court his inability to obtain the assistance of counsel due to its [sic] impecunious nature. Your honor, I am saying that I believe the defendant has a right to be provided with assistance of counsel by the State of Florida through its court. I believe it is the duty of this Court as a representative of the State of Florida in this instance to provide the defendant with the assistance of counsel.

(R. 1673-76). It is obvious from his lengthy address to the court that despite the court's attempts to explain the legal issues to him, Mr. Muhammad firmly believed he could both represent himself and have the assistance of counsel. It is little wonder that this schizophrenic, brain damaged man was confused when the court assured him of the assistance of counsel; yet, as Mr. Replogle's

affidavit attests, off the record ordered him not to assist Mr. Muhammad.

The constitutional right of a defendant in a criminal proceeding to the assistance of counsel is beyond cavil. Gideon v. Wainwright, 372 U.S. 335 (1963). It has also been established that a criminal defendant may waive the right to counsel and has the constitutional right to represent himself. Faretta v. California, 422 U.S. 806 (1975). However, in order to represent himself, the defendant must "knowingly and intelligently" relinquish the right to counsel:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct. at 242.

Faretta, 422 U.S. at 835. See also Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938); Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986).

The trial court should consider the following factors in determining whether a criminal defendant is aware of the dangers of proceeding pro se:

> (1) the background, experience and conduct of the defendant including his age, educational background, and his physical and mental health; (2) the extent to which the defendant had contact with lawyers prior to trial; (3) the defendant's knowledge of the nature of the charges, and the possible defenses, and the possible penalty; (4) the defendant's understanding of the rules of procedure, evidence and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether standby counsel was appointed, and the extent to which he aided the defendant; (7) whether the waiver of counsel was the result of mistreatment or coercion; or (8) whether the defendant was trying to manipulate the events of the trial.

United States v. Fant, 890 F.2d 408, 409-10 (11th Cir. 1989)(per curiam). "The ultimate test is not the trial court's express advice, but rather the defendant's understanding." Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986).

"While the right to counsel is in force until waived, the right of self-representation does not attach until asserted. In order for a defendant to represent himself, he must 'knowingly and intelligently' forego counsel, and the

request must be 'clear and unequivocal.'" Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982)(emphasis in original).[4] Because the demand must be clear and unequivocal, the waiver must be equally clear and unequivocal.

However, this Court has stated that "there is not and neither should there be any requirement for the appointment of 'assisting counsel' to aid the pro se conduct of a defendant's criminal case." Hammond v. State, 264 So. 2d 463, 465 (Fla. 1972). See also State v. Tait, 387 So. 2d 338, 339 (Fla. 1980). The record is very clear that Mr. Muhammad was never able to grasp the concept that he had to chose between assistance of counsel and self-representation. Nor did he ever make that choice. Given Mr. Muhammad's simultaneous request for the assistance of counsel and the right to represent himself, the trial court should have found (a) there was no unequivocal waiver; (b) there was no knowing and voluntary waiver; and (c) the defendant was mentally incapable of drawing a distinction between these two rights. Moreover, the non-record materials clearly establish Mr. Muhammad's mental illness and incompetency to waive counsel.

Where there is a conflict between the right to have the assistance of counsel and the right of self-representation, the right to the assistance of counsel is preeminent:

> In addition to the constitutional right to counsel in a criminal trial, the Supreme Court has confirmed the right to self-representation accorded a defendant in a state criminal trial under the Sixth and Fourteenth Amendments. Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525 (1975). The right to counsel, however, is preeminent over the right to self-representation because the former attaches automatically and must be waived affirmatively to be lost, while the latter does "not attach unless and until it [i]s asserted." Dorman v. Wainwright, 798 F.2d 1358, 1366 (11th Cir. 1986) (emphasis in original), cert. denied, 480 U.S. 951, 107 S. Ct. 1616 (1987); Brown v. Wainwright, 665 F.2d 607, 610 (Former 5th Cir. 1982) (en

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[4]See also Faretta, 422 U.S. at 835; United States v. Brown, 591 F.2d 307 (5th Cir.), cert. denied, 442 U.S. 913 (1979); United States v. Jones, 580 F.2d 785 (5th Cir. 1978); Chapman v. United States, 553 F.2d 886, 893 (5th Cir. 1977); Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984); Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986).

banc); see Strozier v. Newsome, 871 F.2d 995, 997 (11th Cir. 1989). Stano v. Dugger, No. 88,375 (11th Cir. Jan. 2, 1991), slip op. at 41.

As the record shows, Mr. Muhammad's demand and waiver were neither unequivocal nor knowingly and intelligently made; but rather his demand for self-representation was always conditional upon a simultaneous demand for the assistance of counsel. Certainly the nonrecord evidence of Mr. Muhammad's schizophrenia explains this inconsistency. It is more than obvious that Mr. Muhammad was never able to grasp the concept that he must make a choice. Further, the court led him to believe that he could have both.

The facts that have been revealed and documented in Mr. Muhammad's post-conviction pleadings go to the heart of the waiver issue. He is entitled to an evidentiary hearing to enable him to develop these facts in an adversary proceeding for the benefit of the trial court and this Court. It is a denial of due process, the right to the representation of counsel and the right to subpoena witnesses and present evidence to deny this mentally confused, pro se defendant the right to develop the substantial factual issues raised in his pleadings at a full and fair evidentiary hearing.

2. The Court Failed to Ensure the Defendant's Knowledge of the Full Ramifications of the Waiver of Counsel

The record of the waiver proceeding before Judge Chance is devoid of any admonition by the Court to Mr. Muhammad that, by waiving counsel and proceeding pro se, he was not, under Florida law, also entitled to assisting counsel, which Mr. Muhammad asserted in conjunction with his demand for self-representation. Not only did the Court not advise Mr. Muhammad of this, but then affirmatively represented to him that he would have the continuing assistance of counsel to aid him (PC 582). A waiver was thus obtained conditioned upon the Court's representation, and the accused's reliance, that the assistance he demanded would be provided. Mr. Muhammad did not know, nor did this Court know on

direct appeal that the circuit court ordered Mr. Replogle not to assist Mr. Muhammad in any fashion. A waiver of counsel requires that the accused know, and the court ensures that he knows, the full ramifications of such a waiver. See Faretta, 422 U.S. at 836; Johnson v. Zerbst; Fitzpatrick v. Wainwright, 800 F.2d at 1065-67; United States v. Fant, 890 F.2d at 409-10.

The trial court failed to inquire into the eight Faretta factors set out by the Eleventh Circuit Court of Appeals in United States v. Fant. Had these factors been explored the Court could have discovered that Mr. Muhammad had suffered all his life from the major mental illness of schizophrenzia; that he had only limited contact with his trial counsel and no contact at all for the previous three months; that his understanding of the defense of insanity was irrational; that he did not understand the procedures for the presentation of mitigating evidence; that stand-by counsel did not consult with or aid Mr. Muhammad; the waiver was due to paranoid delusions about men and his inability to discuss his mental state and childhood; and, finally, there was no deliberate attempt to manipulate the events of the trial to his own advantage. Post-conviction investigation has now exposed all of these facts. These new facts require evidentiary hearing development.

Mr. Muhammad's demand for self-representation was never clear and unequivocal, or knowing and intelligent; to the contrary, it was equivocal and inherently inconsistent with existing Florida law because of his demand for the assistance of counsel to aid him while proceeding pro se.

Moreover, there could be no effective waiver of counsel unless the court first determined that Mr. Muhammad knew that, upon relinquishing his sixth amendment right to counsel, he would not have reasonable access to a law library due to his incarceration. At the Faretta hearing, Mr. Muhammad asserted his right to access to the law library, an issue which the trial court deferred for later consideration (PC 577-78, 586-87). Mr. Muhammad believed he would have

such access when he demanded self-representation (PC 586). His subsequent motion for access to the law library was later denied (R. 414, 1714). He was also led to believe "four out of five" defense motions would be granted (SR June 7, 1982, at 97). This was not true. He believed he could have the services of an investigator. This was denied.

In a Faretta hearing, the trial judge has an affirmative duty to protect the essential rights of a defendant. As the Court explained in Holloway v. Arkansas, "'[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.'" 435 U.S. 475, 484 (1978). Judges Green and Carlisle exercised their duty to protect this mentally ill defendant. A trial judge is justified in refusing to grant the right of self-representation to a defendant with a prior history of mental illness. Johnston v. State, 497 So. 2d 863 (Fla. 1986). Judge Chance, on the contrary, misled Mr. Muhammad by leading him to believe that he would have access to a library and the assistance of stand-by counsel. These offers were later withdrawn, as the materials in support of the 3.850 pleadings establish.

The trial court committed fundamental constitutional error. Mr. Muhammad's demand for self-representation was an equivocal, involuntary, uninformed and mentally deficient waiver of his right to counsel which had attached under the sixth and fourteenth amendments. Such error is presumed to be prejudicial per se, and not subject to a harmless error analysis. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); United States v. Cronic, 446 U.S. 648 (1984). Mr. Muhammad's subsequent trial, conviction and sentence of death violated his rights to counsel and due process as guaranteed by the sixth and fourteenth amendments. Only by conducting a full and fair evidentiary hearing can these issues be elucidated for the Court.

B. THE COURT ERRED IN FAILING TO CONDUCT AN ADEQUATE FARETTA HEARING TO DETERMINE THE MENTAL COMPETENCE OF MR. MUHAMMAD TO WAIVE HIS RIGHT TO COUNSEL AND TO CONDUCT HIS OWN DEFENSE PRO SE, CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

Mr. Muhammad had been previously and repeatedly found to be incompetent to waive counsel and to conduct a pro se defense. Also, Mr. Muhammad had previously been found incompetent to stand trial and committed to a state hospital in 1971. Judges Green and Carlisle had both conducted Faretta hearings and both had determined that Mr. Muhammad required the protection of counsel. Judge Green found that Mr. Muhammad had symptoms of paranoia, created distracting mental "rabbit trails" in his motions, and took the extraordinary action of appointing Mr. Muhammad's counsel as his "Attorney Ad Litem" apparently due to a deep concern regarding Mr. Muhammad's mental incompetency.

The court had ample evidence of the indicia of mental illness to require a full inquiry into the issue of incompetence to waive the right to counsel. Mr. Muhammad acknowledged to Judge Chance that his mental competency was then in question and requested examinations and a determination of his mental competency before Judge Chance accepted his waiver of counsel (R. 573). There was substantial evidence and previous judicial findings of mental incompetency in the record; a full hearing was required on this issue. United States v. Fano, 890 F.2d 408, 409-10 (11th Cir. 1989); Johnston. Yet the court failed to pursue this. Now in the 3.850 pleadings, the available evidence not presented to the court or considered by the circuit court or this Court on appeal demonstrates that Faretta was not satisfied.

Furthermore, during the Faretta hearing Mr. Muhammad stated to the Court:

> I understand that, Your Honor. I believe that I was not willing to be examined by the psychiatrists that were appointed by the Court, I believe that I am entitled to be examined by those psychiatrists. However, I was not willing to be forcefully examined by those psychiatrists. I am willing to allow a psychiatrist appointed by the Court to determine whether I am competent under the law to proceed to trial. . . .

(R. 573)(emphasis added). The competency evaluation requested by Mr. Muhammad has now been conducted by collateral counsel. We know that Mr. Muhammad suffered from major mental deficiencies which rendered him incompetent. The 3.850 pleadings demonstrate the prejudice which flowed from the court's failure to pursue Mr. Muhammad's competency. Had this Court had this non-record evidence on direct appeal, reversal would have resulted.

C. A HIGHER STANDARD OF COMPETENCY APPLIES TO A WAIVER OF COUNSEL

The Court correctly recognized that if Mr. Muhammad was incompetent to stand trial, he was incompetent to waive counsel (PC 573). The converse, however, is not true. A defendant competent to stand trial, may, nonetheless, be incompetent to waive counsel and to represent himself. Compare ABA Standard 7-4.1 with ABA Standard 7-5.3(d)(iii)[5]; see Westbrook v. Arizona, 384 U.S. 150 (1966); Pate v. Robinson, 383 U.S. 375 (1966). The Court failed to make an adequate Faretta inquiry, the need for which was clearly indicated by the record then before the Court thus depriving Mr. Muhammad of his constitutional right to a fair trial.

The test for competency to stand trial is "whether . . . [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960)(emphasis supplied); Hill v. State, 473 So. 2d 1253 (Fla. 1985).[6] However, the mental competency required to waive counsel and for self-representation is greater and of a different kind than that required to stand

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[5]Standing Committee on Association Standards for Criminal Justice, Proposed Mental Health Standards (1984).

[6]Mr. Muhammad did not meet even this lower standard in that his mental illness made it impossible for him to communicate with counsel and make rational decisions regarding his defense.

trial. See ABA Standard 7-5.3(d)(iii)[7]; Fitzpatrick v. Wainwright, 800 F.2d at 1066. The court failed to adequately determine Mr. Muhammad's competency in this context and counsel respectfully requests that this Court reconsider this

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[7] Standard 7-5.3. Competence to Waive Counsel and to Proceed Without Assistance of Counsel

(a) A defendant who is mentally incompetent to waive counsel or to defend himself or herself at trial without the assistance of counsel should not be permitted to stand trial without the assistance of counsel.

(b) The test for determining the competence to waive counsel and to represent oneself at trial should be whether the defendant has the present ability to knowingly, voluntarily and intelligently waive the constitutional right to counsel, to appreciate the consequences of the decision to proceed without representation by counsel, to comprehend the nature of the charge and proceedings, the range of applicable punishments, and any additional matters essential to a general understanding of the case.

(c) If, after explaining the availability of a lawyer and making sufficient inquiry of a defendant professing a desire to waive counsel and represent himself or herself, the trial judge has a good faith doubt of the mental competence of the defendant to waive counsel or to represent himself or herself the judge should order a pretrial mental evaluation of the defendant according to the procedures set forth in Part IV of this Chapter.

(d) After obtaining the report of the evaluators, the court should hold a hearing on the issues raised according to the procedures set forth in Part IV of this Chapter.

(i) If, after hearing, the court determines that the defendant is competent to waive counsel and to represent himself or herself, the court should proceed with the cause. The court in any such case should consider the appointment of standby counsel in accordance with Standard 6-3.7 to assist the defendant or, if it should prove necessary, to assume representation of the defendant.

(ii) If, after hearing, the court should determine that the defendant is incompetent to waive counsel and is incompetent to stand trial or to plead, the court should proceed to issues of treatment and habilitation in accordance with Part IV of this Chapter.

(iii) <u>If, after hearing, the court should determine that the defendant is competent to stand trial but is incompetent to waive counsel and to proceed without assistance of counsel, the court should appoint counsel to represent the defendant and should proceed to trial of the case</u>.

Standing Committee on Association Standards for Criminal Justice, Proposed Criminal Justice Mental Health Standards (1984)(emphasis added).

issue in light of the subsequent finding in Johnston v. State that a defendant can be competent to stand trial yet incompetent to represent himself.

The summary denial of his Rule 3.850 claims was erroneous. Mr. Muhammad was entitled to an evidentiary hearing on his claims, and this Court should reverse and remand for an evidentiary hearing.[8]

D. MR. MUHAMMAD'S WAIVER OF HIS RIGHT TO COUNSEL WAS NOT VOLUNTARY, KNOWING AND INTELLIGENT, CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, DUE TO HIS LACK OF MENTAL COMPETENCE TO WAIVE COUNSEL AND TO CONDUCT HIS PRO SE DEFENSE

Mr. Muhammad has now established that he was not legally competent to waive his right to counsel. This is clear from the evidence not of record during the direct appeal, but which is included in the 3.850 pleadings. After a comprehensive evaluation, Dr. Joyce Carbonell has found:

> Because of his paranoia he would be suspicious, grandiose, and unable to trust. His concerns about men are part of this problem. His thought process is and was tangential as has been noted numerous times in his record. His mental illness impeded him from aiding in his defense in any rational way. His requests to represent himself which were eventually granted by the third judge who sat on his case were simply another sign of his inability to overcome his suspiciousness of men and a function of the grandiosity that is common in paranoid schizophrenia.
>
> Waiver of Counsel and Self-Representation. It seems fairly obvious that one who is unable to aid a lawyer in preparing a defense could be ill equipped to handle his own trial. Mr. Muhammad had little experience with the adult criminal justice system. He had been though only one capital case, in which he tried to dismiss his lawyers and gave disjointed statements such as the one quoted earlier. He was at that time also concerned about being represented by a man, rather than a woman.

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[8]A nunc pro tunc hearing to determine competency to waive counsel, as well as to stand trial, is not constitutional. Drope v. Missouri, 420 U.S. 162 (1975); Dusky v. United States, 362 U.S. 402 (1960); Pate v. Robinson, 383 U.S. 375 (1966); Hill v. State, 473 So. 2d 1253 (1985). The appropriate remedy in such a case is to vacate the conviction and sentence and remand for re-prosecution after it has been determined that Mr. Muhammad is competent to stand trial. Hill, 473 So. 2d at 1260. However, whether a determination of competency was adequate, or whether the assistance of a mental health expert was adequate, requires an evidentiary hearing in the trial court to determine.

(R. 930). The trial counsel attest to the fact that Mr. Muhammad waived his right to counsel due to his mentally ill delusions rather than making a reasoned, knowing decision. Finally, the most poignant evidence of Mr. Muhammad's deluded state is his letter to Sid White, the Clerk of this Court:

> Dear Mr. White:
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> I am in receipt of your letter dated March 22, 1983.
>
> I request that the Court appoint a <u>woman</u> attorney to handle my appeal. I do not want a man attorney to handle my appeal. I had problems with men attorneys in the trial court and <u>I had to represent myself before the trial court</u>. I am not willing to allow a man attorney to handle my appeal.
>
> Thank you.
>
> /s/
> Askari ABdullah Muhammad

(R. 472)(emphasis in the original). Mr. Muhammad was mentally ill, as evidenced by the conclusions of numerous experts who had previously conducted competency evaluations and his trial counsel. The record contains an abundance of documentation relating to Mr. Muhammad's mental deficiencies. The court failed to meet its heavy burden to protect this mentally ill defendant. The court was misled by a psychiatric report which can now be shown to be a woefully incompetent mental evaluation and conclusion. The court conducted a third inquiry without regard to <u>two</u> prior "law of the case" judgments. There was more than sufficient evidence in the record to trigger an adequate competency determination of Mr. Muhammad's mental state with regard to his ability to waive the right to counsel and to construct and pursue defenses on his own behalf.

During Judge Chance's inquiry, Mr. Muhammad himself expressed doubts about his own mental competence to proceed and agreed to be examined by a mental health expert to determine his competency although he had previously refused to be examined; however, no further inquiry was made. Had the court conducted further inquiry it would have discovered that Mr. Muhammad did not want to

repesent himself but was being compelled by a phobia against men and a compulsive need to mask his mental illness.

Mr. Muhammad was permitted to proceed to trial without counsel, waiving what he could not competently comprehend: his constitutional right to be represented by an effective attorney who would have asserted an insanity defense in his behalf at the guilt/innocence phase and presented substantial mitigating mental health evidence to a sentencing jury at the penalty phase.

Due to the lack of an adequate inquiry, the constitutional invalidity of Mr. Muhammad's waiver, and the court's reliance upon an incompetent evaluation, Mr. Muhammad's fifth, sixth, eighth and fourteenth amendment rights were abridged. We must be cognizant, as the trial court should have been, of the need for a heightened assurance of reliability in this capital case. Woodson v. North Carolina, 428 U.S. 280, 350 (1976); Gardner v. Florida, 430 U.S. 349 (1977).

The material set out elsewhere in this brief, which was not of record in the direct appeal, establishes the waiver of counsel was not knowing, voluntary, or intelligent. An evidentiary hearing must now be ordered. The court erred in summarily denying relief, and this Court should reverse and remand for an evidentiary hearing.

E. THE COURT INTERFERED WITH THE ASSISTANCE OF APPOINTED STAND-BY COUNSEL CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS

The Supreme Court in Faretta acknowledged that "a State may - even over the objection by the accused - appoint 'stand-by counsel' to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that the termination of the defendant's self-representation is necessary." Faretta, 422 U.S. at 834 n.46, citing United States v. Dougherty, 473 F.2d 1113, 1124-26 (D.C. Cir. 1972).

At Mr. Muhammad's request, Judge Chance appointed stand-by counsel to assist the pro se defendant, and assured him of the assistance of such counsel in the preparation of his defense. Once the trial court accepted the waiver of counsel conditioned on the availability of the assistance of stand-by counsel; it was a denial of the fundmental right to counsel to later withdraw the assistance of the stand-by counsel. This was a "bait and switch" bargain made with Mr. Muhammad which has only been exposed in the collateral investigation (PC 913). A fundamental right exists under the sixth and fourteenth amendments to the assistance of counsel while conducting a pro se defense after a request for assistance and the appointment of counsel by the court. The right to the assistance of counsel was subsequently denied when the trial court, outside of the record, ordered stand-by counsel not to consult with his client. Geders v. United States, 425 U.S. 80 (1976). Such error is prejudicial per se. Id. at 92; Perry v. Leeke, 109 S. Ct. 594, 599 (1989)("[a] showing of prejudice is not an essential component of a violation of the rule announced in Geders."); see also Crutchfield v. Wainwright, 803 F.2d 1103, 1108 (11th Cir. 1986)(en banc) ("any deprivation of assistance of counsel constitutes reversible error."). Even if no fundamental right of a pro se accused to the assistance of stand-by counsel was inherent within the sixth amendment, once the court appointed stand-by counsel to assist at the request of the pro se defendant, a constitutionally protected right was created. Consistent with due process and the sixth amendment, the court could not then interfere with the exercise of that right by the defendant. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983).

Here, as shown by the affidavit of Frederick Replogle, the trial court ordered him not to consult with his pro se client. An order of this kind, made to counsel by the court outside of the record, without the knowledge of the pro se defendant, without notice, and without an opportunity to be heard,

particularly considering the defendant's pro se counsel status, failed to accord the most minimal requirements of eighth amendment due process, see Fuentes v. Shevin, 407 U.S. 67 (1972), and, in a matter respecting counsel, those of the sixth and fourteenth amendments. Geders.

This case is not the typical pro se case in which the defendant complains of the participation of counsel against his wishes; rather, this case is the reverse. Mr. Muhammad requested and was led to believe by the court that he was going to have the assistance of counsel he demanded (R. 87-88).

> "The very premises of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." It is that "very premise" that underlies and gives meaning to the Sixth Amendment. It "is meant to assure fairness in the adversary criminal process." Unless the accused receives the effective assistance of counsel, "a serious risk of injustice infects the trial itself."

United States v. Cronic, 466 U.S. at 655-56 (citations and footnotes omitted).

When a pro se defendant demands and has been granted the assistance of appointed stand-by counsel, not only is stand-by counsel not constitutionally unobjectionable, but the aid and assistance by stand-by counsel, to be used as the defendant sees fit, has then become unequivocally protected by the sixth and fourteenth amendments. Cf. McKaskle v. Wiggins, 465 U.S. 168 (1984); Faretta v. California, 422 U.S. 806 (1975); Gideon v. Wainwright, 372 U.S. 335 (1963); Betts v. Brady, 316 U.S. 455 (1942); Powell v. Alabama, 287 U.S. 45 (1932); Geders v. United States, 425 U.S. 80 (1976).

The right to the assistance of counsel in an advisory role to be used as the accused sees fit, has deep historic roots:

> In sum, there is no evidence that the colonists and the Framers ever doubted the right of self-representation, or imagined that this right might be considered inferior to the right of assistance of counsel. To the contrary, the colonists and the Framers, as well as their English ancestors, always conceived of the right to counsel as an 'assistance' for the accused, to be used at his option, in defending himself.

Faretta, 422 U.S. at 832 (emphasis added). The court denied Mr. Muhammad his fundamental right to use his assisting counsel as he saw fit.

The order which stripped Mr. Muhammad of his fundamental constitutional right to counsel was not of record, was unknown to the pro se defendant until after his conviction and sentence of death were affirmed by this Court, and thus was not known or considered by this Court upon direct appeal. This, and the fundamental constitutional nature of the Geders claim removes any question of procedural bar as a proper ground for denial by the trial court of Mr. Muhammad's Rule 3.850 claim for relief. See Crutchfield v. Wainwright, 803 F.2d 1103 (11th Cir. 1986)(en banc).

The trial court erred in summarily denying relief. Mr. Muhammad was entitled to an evidentiary hearing and relief on this fundamental constitutional claim. This Court should reverse and remand for an evidentiary hearing on all aspects of this claim.

ARGUMENT IV

MR. MUHAMMAD WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE MENTAL HEALTH EXPERT RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION, AND BECAUSE THE STATE FAILED TO DISCLOSE CRUCIAL INFORMATION, DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE DEPRIVING HIM OF A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION.

Counsel moved for funds to retain expert psychiatric assistance to determine Mr. Muhammad's sanity at the time of the alleged offense and competency to stand trial. The trial court appointed Jamal Amin, a psychiatrist (R. 13). Dr. Amin conducted a preliminary interview with Mr. Muhammad in October 1980, "like a friend" who was trying to find out what happened but "without specifically trying to tease out any mental illness" (PC 459).

Six months later, on the basis of this interview, Dr. Amin prepared a report (R. 369-70). On June 7, 1982, relying on this report, Judge Chance found

Mr. Muhammad competent to stand trial and to waive counsel. Dr. Amin's report was neither submitted nor mentioned by either party at the guilt/innocence or penalty phases of the trial and no insanity or mental health defenses or mitigation were presented.

A. THE PSYCHIATRIC EVALUATION WAS PROFESSIONALLY INADEQUATE

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). This right is a right to a confidential mental health expert who is part of the defense team and assists in preparation and planning of a defense. Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990). When mental health is at issue, counsel has the duty to conduct a proper investigation into the client's mental health background and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See United States v. Fessel, 531 F.2d 1278 (5th Cir. 1979); Mason v. State, 489 So. 2d 734 (Fla. 1986); O'Callaghan, 461 So. 2d at 1355.

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

The expert appointed in this case, Dr. Amin, failed to provide the professionally adequate expert mental health assistance to which Mr. Muhammad was entitled. His evaluation was, in fact, grossly inadequate. None of the relevant and crucial statutory criteria regarding competence to stand trial were addressed. See Fla. R. Crim. P. 3.211. No adequate testing was performed, nor was an adequate history obtained. A cursory interview and pro forma presentation of opinions based solely on what little was gleaned from the interview is all the mental health "assistance" that Mr. Muhammad received. This is by no means enough, Mason v. State, 489 So. 2d at 735-37, and falls far

short of what the law and the profession mandate. The expert simply failed to diagnose and evaluate Mr. Muhammad in a professionally competent manner.

Florida guaranteed Mr. Muhammad professionally adequate mental health assistance. See, e.g., Mason; cf. Fla. R. Crim. P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, this state law interest is protected against deprivation by the federal Due Process Clause. Cf. Hicks v. Oklahoma, 447 U.S. at 347; Vitek v. Jones, 445 U.S. at 488; Hewitt v. Helms, 459 U.S. at 466-67; Meachum v. Fano, 427 U.S. 215, 223-27 (1976). Florida law made Askari Muhammad's mental condition relevant to criminal responsibility and sentencing.[9] In this case, both the state law interest and federal rights were denied.

In the context of diagnosis, exercise of the proper "level of care, skill and treatment" requires adherence to the procedures that are deemed necessary to render an accurate diagnosis. "[N]ot only must the medical practitioner employ the proper skill and prudence when diagnosing the ailment of a patient but he or she must also employ methods that are recognized as necessary and customary by similar health care providers as being acceptable under similar conditions and circumstances." 36 Fla. Jur. 2d, Medical Malpractice, (9, at 147 (1962). See also Olschefsky v. Fischer, 123 So. 2d 751 (Fla. 3d DCA 1960). In the context of a forensic mental health evaluation in a criminal case, the inquiry focuses upon the acceptable methods of diagnosis of a person presenting symptoms such as those exhibited by the defendant and consideration of the defendant's mental

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[9](a) competency at trial and sentencing; (b) specific intent to commit first degree murder; (c) legal insanity; (d) competency to waive counsel; (e) statutory mental health related aggravating factors and mitigating factors contained in Fla. Statutes 921.141(6)(b), (e), and (f); and, (f) myriad nonstatutory mitigating circumstances relevant at sentencing.

health history.[10] Here a complete evaluation was not conducted and does not support an opinion as to competency to stand trial or sanity at the time of the offense.

On the basis of the generally-agreed upon principles discussed above, the proper method of assessment must include the following:

a. An accurate medical and social history must be obtained.[11]

Although Dr. Amin had access to some of Mr. Muhammad's background, he did not have critical background information because the State and defense counsel failed to provide, further available information about Mr. Muhammad: e.g., Mr. Muhammad had been abused by his mother as well as his father; he had abnormal results in skull series testing; he had suffered from serious head injuries; he had been suicidal; and he suffers from organic brain damage.

b. Historical data must be obtained not only from the patient, but from sources independent of the patient.

It is well recognized that the patient is often an unreliable data source for his own medical and social history. Kaplan and Sadock at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past event or is selective in what is able to be remembered, is a constant hazard of

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[10]See R. Slovenko, Psychiatry and the Law 400 (1973). See also S. Arieti, American Handbook of Psychiatry 1161 (2d ed. 1974); J. MacDonald, Psychiatry and The Criminal 102-03 (1958). Accord H. Kaplan and B. Sadock, Comprehensive Textbook of Psychiatry 548, 964, 1866-68 (4th ed. 1985); R. Hoffman, Diagnostic Errors in The Evaluation of Behavioral Disorders, 248 J. Am. Med. Ass'n 964 (1982).

[11]Because "[i]t is often only from the details in the history" that organic disease or major mental illness may be accurately differentiated from personality disorder, R. Strub and F. Black, Organic Brain Syndromes, 42 (1981), the history has often been called "the single most valuable element to help the clinician reach an accurate diagnosis." Kaplan and Sadock at 837. See also MacDonald at 98, 103, 110 (emphasizing the singular importance of a "painstaking clinical history"). Such a history must also include a review of background facts demonstrating the presence or possible presence of mental illness. Pertinent records (e.g., school records, prior incarceration records, etc.) are critical and central to such an assessment and review.

which the psychiatrist must be aware." Id.[12]

A thorough review of background information and collateral data is critical in forensic cases and, especially in cases involving mentally ill clients. The client's mental illness will invariably preclude the ability to accurately relay facts. Mr. Muhammad's self-history was patently unreliable as was his self-opinion of his sanity. Cf. Mason. For example, Mr. Muhammad characterized the nightmare conditions in his family as a close family relationship. His behavior and his background demonstrated substantial and longstanding mental illness. This would have been made more than obvious by his history of psychiatric hospitalization.

As this Court has explained:

> Commentators have pointed out the problems involved in basing psychiatric evaluations exclusively, or almost exclusively, on clinical interviews with the subject involved. . .
>
> In light of the patient's inability to convey accurate information about his history, and a general tendency to mask rather than reveal symptoms, an interview should be complemented by a review of independent data. See Bonnie, R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va.L.Rev. 427, 508-10 (1980).

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[12]Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

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

Mason v. State, 489 So. 2d at 737 (emphasis supplied). Here, no adequate history was supplied by the State or defense counsel.

c. Information regarding the patient's past and present physical condition should be reviewed.

Professional standards require that the evaluating psychologist or psychiatrist review information concerning the patient's past and present physical condition: "[The psychiatrist] should be expected to obtain [a] detailed medical history . . ." Kaplan and Sadock at 544. Any past or present somatic complaints should be considered as should any evidence of odd or unusual behavior. In this regard, it is especially important that the mental health professional consider the patient's history of head injury as well as alcohol or drug abuse. Here, such factors as brain damage were not considered. Had adequate information been given to Dr. Amin, Mr. Muhammad's history of head injury and brain damage would have been revealed. Again, Dr. Amin failed to assess the requisite information because defense counsel failed to discover, and the State refused to disclose relevant and material information.

d. Appropriate diagnostic studies must be undertaken in light of the history and physical examination.

The psychiatric profession recognizes that psychological testing is indispensable to an adequate evaluation. Previous testing and the results thereof must be reviewed. Proper testing of the patient's mental state at the time of the evaluation as well as at all periods of time relevant to the evaluation should be conducted. Thereafter, the results of proper testing must be considered and reviewed alongside information concerning the patient's mental health background and history. In short, psychological testing was critical to an adequate evaluation. See Kaplan and Sadock, pp. 547-48. Dr. Amin failed to conduct complete testing, while at the same time he himself noted the need for additional testing (PC 459).

e. A competent mental examination must assess the presence or absence of organic impairment or major mental illness.

"[C]ognitive loss is generally and correctly conceded to be the hallmark of organic disease," Kaplan and Sadock, p. 835, and cognitive loss goes hand in hand with major mental illness. Such loss can be characterized as "(1) impairment of orientations; (2) impairment of memory; (3) impairment of all intellectual functions, such as comprehension, calculation, knowledge, and learning; and (4) impairment of judgment." Id. at 835.

Accordingly, "[c]ognitive impairment[s]" should be considered in the context of the patient's overall clinical presentation -- past history, present illness, lengthy psychiatric interview, testing, and detailed observations of behavior. Id. at 836. It is only in such a context that a reasonable decision can be made concerning whether any cognitive impairment exists and, if so, regarding what the causes of such an impairment may be. However, the State with a wealth of past history and of relevant prior diagnosis did not disclose this crucial information.

Had it been disclosed, we now know what would have been found. Mr. Muhammad has now had a professionally adequate evaluation conducted by Dr. Joyce Lynn Carbonell, a clinical psychologist and professor, who has stated regarding Dr. Amin's evaluation:

> The question remains of course, as to why the one mental health professional who saw [Mr. Muhammad] prior to trial failed to recognize any of the problems that were so blatant. Dr. Amin's deposition provides some answers. He initially evaluated Mr. Muhammad in 1979 and saw him several times. Dr. Amin stated that Mr. Muhammad had delusions, was grandiose and very concerned about impressing the examiner with his intelligence. He states that Mr. Muhammad was suffering from a "schizophrenic-like illness". He noted that Mr. Muhammad was concrete and could explain proverbs to him. In fact, his 1979 report indicates that Mr. Muhammad talks to himself, has a family history positive for mental illness, grew up in a poverty ridden environment and used drugs from an early age. He described Mr. Muhammad as follows:
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> > "Dull facial expression. Poor eye contact with his gaze constantly shifting around the interview room in a suspicious manner. His speech was productive, but his

> associations were intermittently loose and he would stop for a few seconds only to begin again with an apparently different subject. Also the connections between his thoughts were difficult if not impossible to follow."
>
> He noted that Mr. Muhammad was suffering from a schizophreniform illness and had an underlying paranoid personality pattern. Yet, when he returned to see Mr. Muhammad in 1980, he states a number of contradictory things. He notes that he believes Mr. Muhammad had a complete psychotic break, "a complete break with reality" as a result of being refused a visit with his mother. He also notes that he does not think that Mr. Muhammad was legally insane because Mr. Muhammad told him that he was not insane, and that he had to rely on this opinion because his own evaluation was incomplete. In fact, Dr. Amin notes that he went to see Mr. Muhammad "'like a friend' who was trying to find out what happened without specifically trying to tease out any mental illness".
>
> * * *
>
> Those who had close contact with Mr. Muhammad at the time of his trial, for example his attorney, clearly felt differently. Dr. Amin, however, apparently conducted no inquiry into the criteria for evaluation of competency to stand trial. He noted clearly the symptoms of increased paranoia and suggested a 'complete break with reality' and yet for inexplicable reasons took the word of a man with such symptoms to make his finding of sanity.

(PC 932-934). Clearly the State's failure to disclose the relevant and crucial background information and defense counsel's failure to advise the doctor of his concerns deprived Mr. Muhammad of a professional, adequate evaluation.

Despite Dr. Amin's observation that Mr. Muhammad was "inappropriately concerned about any labels implying insanity," Dr. Amin concluded that Mr. Muhammad was competent to stand trial in a case where the only issue was his sanity. Had Dr. Amin conducted a professionally adequate examination he would have found that Mr. Muhammad could neither aid in his defense nor understand the nature and consequences of the criminal proceedings.[13]

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[13]Dr. Amin's assessment of Mr. Muhammad's competency to stand trial gives no indication whatsoever that he properly assessed or applied the criteria set forth in Fla. R. Crim. P. 3.211. In fact, in his final conclusion he refers to knowing "the difference between right and wrong." This is a sanity issue, not a competency issue. Dr. Amin's protocol does not comply with established professional standards. He took no notes during the interviews and relied only on memory when writing a report over six months later. Regarding the interview when he was ostensibly conducting a competency evaluation in a very serious capital case, Dr.

(continued...)

Had Mr. Muhammad been provided with the professionally adequate evaluation to which he was entitled, significant competency, insanity, diminished capacity, and statutory and nonstatutory mental health mitigation evidence could have been presented for the consideration of the judge and jury. A professionally competent evaluation would have established that Mr. Muhammad, as a result of his mental illness, was not competent to stand trial, was not competent to validly waive counsel and was not legally sane at the time of the alleged offense.

We now know, as Judge Chance and Dr. Amin did not (but should have), that given proper background information, adequate testing (which Dr. Amin himself recognized to be a necessity), and a professionally adequate evaluation, Mr. Muhammad suffered and suffers from extreme emotional disturbances including brain damage and schizophrenia, and his ability to conform his conduct to the requirements of law was substantially impaired. It is now clear that Mr. Muhammad was not competent to stand trial, that he could not relate to his attorney or aid in his defense, was so impaired that he could not competently waive counsel and represent himself, and he was legally insane at the time of the offense. The professionally inadequate evaluation, upon which the court relied, had the prejudicial effect of depriving Mr. Muhammad of the representation of counsel, his only defense at the guilt-innocence phase of the

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[13](...continued)
Amin stated in his deposition that he went to see him to ". . . ascertain whether or not I wanted to be involved." Contrary to the finding of competency, he stated that Mr. Muhammad must be "completely crazy" and "was not able to control his emotions because of a long-standing mental problem." He described his interview as "an incomplete evaluation." "I was more or less like a friend who was trying to find out what happened without specifically trying to tease out any mental illness." Dr. Amin, however, did observe that between 1979 and the offense in 1982, Mr. Muhammad's "paranoia had intensified" and that his illness had worsened. Moreover, Dr. Amin did not inform Mr. Muhammad that he was examining him as a court-appointed expert in order to determine his competency to stand trial. This is a violation not only of Mr. Muhammad's constitutional right, but of recognized standards of professionalism for mental health experts.

trial, and substantial statutory and nonstatutory mitigation. The resulting conviction and sentence were, consequently, unreliable. An adversarial testing did not occur because the State did not disclose evidence it possessed of Mr. Muhammad's mental illness.

B. MR. MUHAMMAD WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL

The duty to protect the client's right to professionally adequate mental health assistance does not rest solely with the mental health professional. Counsel has a concomittant duty to ensure adequate mental heath evaluations. See Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Fessel; O'Callaghan. Here, counsel failed to obtain and provide the mental health expert with an adequate history and records, including the history of head injury and the records indicating an abnormal skull series study. Counsel made no request that the mental health expert consider mitigation.

Morever, counsel also has the duty to adequately investigate, prepare and present evidence of his client's mental compentence during a Faretta inquiry when the defendant's mental competence is at issue. During the waiver hearing before Judge Chance, Mr. Muhammad's counsel stood mute and failed to present any evidence or argument to the court concerning his client's mental incompetency to waive counsel, or, minimally, to even direct the court's attention to the records before the court which evidenced a lack of competency or to the deposition of Dr. Amin which would have supported a challenge to the adequacy of Dr. Amin's report, upon which the court relied (PC 565-608). Although present, defense counsel stood idly by during consideration of every substantive Faretta waiver issue before the court. The record clearly shows, however, counsel was then well aware of the existance of a substantial issue of his client's mental competency to waive counsel and was aware of the available evidence which would have supported a finding of incompetence (PC 559-62). He was also cognizant of the inadequacy of Dr. Amin's report based upon Dr. Amin's deposition.

Counsel had the duty to "bring to bear such skill and knowledge as will render the [hearing] a reliable . . . testing process." Strickland v. Washington, 466 U.S. 668, 688 (1984). Notwithstanding his client's pro se demand for self-representation, defense counsel must nonetheless ensure that the trial court satisfies its protecting duty and properly discharges the "serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused." Westbrook v. Arizona, 384 U.S. 150 (1966).

In short, counsel failed to take the most elementary steps necessary to assure that his client received the expert mental health assistance to which he was entitled and then withdrew the guiding hand of counsel by failing to litigate the competency issue to ensure that the court discharged its protective duty to Mr. Muhammad. While Mr. Muhammad still had counsel to protect him, his attorney failed to do so, and rendered ineffective assistance to his client, resulting in the failure to provide the trial court with sufficient reliable information with which to properly discharge its protective duty to the accused. The failure to raise basic fundamental objections which preclude prosecution constitutes ineffective assistance of counsel. Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Mr. Muhammad was thereby denied his fifth, sixth, eighth, and fourteenth amendment rights.

A full evidentiary hearing was proper, see, e.g., Mason v. State, 489 So. 2d at 735-37, for the records do not show that Mr. Muhammad is conclusively entitled to no relief on this and its related claims. See O'Callaghan v. State, 461 So. 2d at 1355. Indeed this is a classic issue requiring the presentation of evidence in a full and fair evidentiary proceeding. The lower court erred, and this Court should reverse and remand for a evidentiary hearing.

C. THE PSYCHIATRIC EVALUATION WAS IMPROPERLY OBTAINED AND USED

Mr. Muhammad's conviction and sentence of death resulted from the trial court's use of a confidential, privileged psychiatric report to establish competency to stand trial, competency to proceed pro se, to prove aggravating circumstances and to rebut mitigating circumstances, in violation of the fifth, sixth, eighth, and fourteenth amendments.

> 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.

Estelle v. Smith, 451 U.S. 454, 462-63 (1981)(citations omitted).

The facts are that: 1) Mr. Muhammad exercised his State-created right to a confidential pretrial psychiatric examination by Dr. Amin on the issue of insanity; 2) he spoke to Dr. Amin, the psychiatrist retained by defense counsel; 3) Dr. Amin was subsequently appointed by the court to evaluate competency to stand trial; 4) Dr. Amin again examined Mr. Muhammad without revealing to him that their discussions were no longer confidential; 5) Mr. Muhammad subsequently exercised his right not to present an insanity defense and not to introduce any evidence derived from the pretrial psychiatric evaluations; and 6) the trial court nevertheless used the purportedly confidentially obtained information in this report as its basis for finding Mr. Muhammad competent to stand trial, competent to surrender his right to counsel, competent to exercise the right to self-representation, competent to waive a jury recommendation at the penalty phase, and undeserving of mitigation. This violated Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990), and Ake v. Oklahoma.

The affidavit of the State's prosecuting attorney, Tom Elwell, states in part, "The Court found the Defendant competent to stand trial based on the defense expert report." The court had granted the defense motion for the appointment of a mental health expert to aid in the preparation of the defense. Then, suddenly and without warning, Dr. Amin's report was submitted to the court

as an independent evaluation, not as a confidential and privileged report prepared for the defense. Not only was the defense report used to determine competency, the report was cited by Judge Chance in determining Mr. Muhammad's right to waive counsel (SR 72, PC 572). This privileged report was submitted to the court without a valid and informed waiver. "[O]nce an expert is appointed, all matters related to that expert are confidential." State v. Hamilton, 448 So. 2d 1007, 1008 (Fla. 1984); Parkin v. State, 238 So. 2d 817, 820-21 (Fla. 1970); Jones v. State, 289 So. 2d 725, 727-28 (Fla. 1974); McMunn v. State, 264 So. 2d 868, 869-70 (Fla. 1st DCA 1972); Pouncy v. State, 353 So. 2d 640, 641-42 (Fla. 3d DCA 1977). Until counsel was discharged, he had a duty to challenge this basic violation of Mr. Muhammad's rights. Counsel's failure resulted from ignorance or neglect. Such a failure constitutes ineffective assistance as it did in Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), and McInerney v. Puckett, 919 F.2d 350 (5th Cir. 1990). An evidentiary hearing is required on this issue.

The procedures employed here, leading to Mr. Muhammad's conviction and death sentence, simply cannot be squared with the Due Process Clause, his privilege against self-incrimination, his right to counsel, the eighth amendment, or Florida state law, and relief was proper. The summary denial of the claim should be reversed and remanded for an evidentiary hearing.

ARGUMENT V

MR. MUHAMMAD WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN THE COURT ORDERED DEFENSE COUNSEL NOT TO PRESENT AN INSANITY DEFENSE AND THE COURT'S RULING DEPRIVED MR. MUHAMMAD OF HIS RIGHT TO DEFEND.

Mr. Muhammad was denied his sixth amendment right to compulsory process, the right to put on a defense and effective assistance of counsel by erroneous pretrial rulings which rendered defense counsel ineffective as a matter of law. United States v. Cronic, 466 U.S. 648 (1984). Mr. Muhammad's only defense to the alleged murder of officer Burke was insanity; since there were eyewitnesses

to the offense, the essential facts were not in dispute. Mr. Muhammad's counsel was well aware of Mr. Muhammad's history of bizarre behavior, the findings of incompetency by two circuit courts, and Judge Green's finding of incompetency to waive counsel to proceed pro se. See Affidavit of Stephen Bernstein (PC 559-62). See also Deposition of Susan Cary (PC 822-50); Affidavit of Susan Cary (PC 1623-28). See also Knight v. Dugger, 863 F.2d 750 (11th Cir. 1988).

Before the waiver hearing, Mr. Muhammad had refused to submit to examination by two experts appointed by the court to evaluate Mr. Muhammad's mental competence. The trial court ruled:

> THE COURT: My ruling is that the Defendant's total uncooperation with the Court-appointed psychiatrists precludes the defense offering any evidence through any witness going to the issue of sanity.

(R. 70-80). Mr. Muhammad's refusal to submit to examination by the court-appointed experts was resulted solely from his incompetent mental state "concern[ing] . . . any labels implying insanity;" with the masking of illness common with the mentally ill, Mason; and with his paranoia. As Dr. Fisher observed a year earlier:

> BEHAVIORAL OBSERVATIONS:
>
> Thomas Knight was high strung, suspicious, and somewhat disoriented at times during our interview. He demonstrated many symptoms and characteristics consistent with a diagnosis of paranoid schizophrenic (e.g. ideas od reference, reports of previous hallucinations, a sense of being persecuted, and frequent flight of ideas and manic speech patterns). He was highly suspicious of this interviewer and I was given the definite sense that any remark he possibly interpreted as threatening would have led to his refusing to participate further in the interview. When some rapport was established he exhibited a rush of frequently incoherent statements that suggested a serious, thought disorder. However, he was not overtly threatening or dangerous towards me at any point in the interview.

(PC 1060)(emphasis added).

Despite evidence in the record of a prior hospitalization for incompetence to stand trial, the court failed to adequately determine whether Mr. Muhammad's refusal to submit to examination was the product of an incompetent mental state.

In United States v. Cronic, the Supreme Court held:

> Circumstances of [sufficient] 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.

466 U.S. at 659-60. Such "circumstances" are present in Mr. Muhammad's case. The court's ruling, precluding all evidence regarding Mr. Muhammad's tortured history of mental illness from childhood up to the instant trial, was an objective factor external to the defense which rendered defense counsel per se ineffective under Cronic. Harding v. Davis, 878 F.2d 1341 (11th Cir. 1989). Compare Cronic, with Strickland v. Washington, 466 U.S. 668 (1984). Cf. Murray v. Carrier, 477 U.S. 478, 497 (1986).

Mr. Muhammad's counsel stood ready to discharge his duties in the form of the "only" defense possible: Mr. Muhammad's insanity at the time of the offense. The historical evidence of Mr. Muhammad's prior mental disease confirmed his paranoid schizophrenia and brain damage; this was not merely "cumulative mitigation," but was powerful guilt/innocence (and penalty) phase testimonial and documentary evidence. The mitigating evidence in Mr. Muhmmad's case has been reviewed by the Eleventh Circuit Court of Appeals in another proceeding and found to be substantial enough to justify reversal of the death sentence:

> The hearing evidence shows that Thomas Knight grew up in an impoverished home. He was the eldest son, one of fifteen children of Anna and S.T. Knight. Thomas and the other children were frequently beaten by their alcoholic and violent father. The father was sent to prison when Thomas was nine for attempting to rape or raping one of Thomas' sisters. Thomas was shortly thereafter sent to a boys' school at the age of nine because of a lack supervision at home and because he had been getting into juvenile trouble repeatedly. Thomas was sent to Raiford when he was fourteen. He was a patient at a mental hospital when he was eighteen. The record evidences the extremely disadvantaged early years of Petitioner. The other conditions and circumstances of the unhappy family life of Petitioner were the subject of testimony from Petitioner's sisters, mother, aunt, schoolteacher, probation officer, boys' school headmaster, and an old family friend.

. . .

> While we are not prepared to definitively state what might constitute harmless error in the Lockett context, it is clear that harmless error cannot be made out simply because multiple aggravating circumstances exist in a given case. Since the State offers no other arguments to support its contention that the violation of Lockett in this case is harmless, relief must be granted.

Knight v. Dugger, 863 F.2d 705, 710, 749 (1988). In the instant case, however, despite the overwhelming evidence of mental illness, the court precluded all evidence of Mr. Muhammad's insanity. In so doing, the court rendered defense counsel per se ineffective under Cronic.

Mr. Muhammad is entitled to relief on the denial of his sixth amendment right to counsel alone; a Cronic ineffectiveness claim requires no less. In light of Mr. Muhammad's extensive history of mental disease, with his "only" defense of insanity precluded, prejudice is manifest. Not only did the trial court's preclusion of defense counsel from employing the defense of insanity constitute Cronic ineffectiveness,[14] it is subject to a separate and independent sixth amendment error in that it simultaneously denied Mr. Muhammad his right to compulsory process as well as the right to put on a defense:

> Finally, use of the preclusion sanction may give rise to other significant legal issues that can be resolved only through collateral attack on the conviction.

Fendler v. Goldsmith, 728 F.2d 1181, 1187 (9th Cir. 1983).

Pretrial sanctions for discovery violations, when applied to criminal defendants, run afoul of substantial constitutional protections. Two additional constitutional challenges are also present as a result of the sanction. First, Mr. Muhammad's refusal to be interviewed was in fact a consequence of his mental disease, as defense counsel suggested to the court (R. 38), so that sanctioning him for non-cooperation constitutes cruel and unusual punishment. Second, the

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[14]Counsel was of course required to disregard the wishes of a mentally ill client where in counsel's best judgment the mental illness constituted a defense or mitigation. See Foster v. Dugger, 823 F.2d 402 (11th Cir. 1987).

fifth amendment issue of whether Mr. Muhammad could be sanctioned for what amounts to a invocation of his right against self-incrimination. Estelle v. Smith; McMunn v. State. Ten years prior to Mr. Muhammad's trial, the Supreme Court in Brooks v. Tennessee, 406 U.S. 605 (1972), served notice

> that state rules of criminal procedure must yield when they conflict with a criminal defendant's right to present a defense or, operate as onerous and coercive levers that interfere with "counsel's guiding hand", i.e., the right not to testify. The concept was in fact an ancient one recognized first by the states themselves. See, e.g., Bell v. State, 66 Miss. 192; 5 So. 389 (1889).

Unmistakably, the court was imposing a sanction (R. 32-33); the State had requested it (R. 1619), defense counsel objected to it (R. 1636), and the court clearly intended his ruling to operate as such (R. 8-10). New evidence reveals that the refusal to be evaluated was due to a mental illness and not to a reasonable strategy by Mr. Muhammad. The court failed to see the constitutional implications of the sanctions being visited upon Mr. Muhammad. Sanctions far less onerous then those imposed on Mr. Muhammad have been struck down by the federal Circuit Courts of Appeals. Braswell v. Wainwright, 463 F.2d 1148 (5th Cir. 1972); United States v. Davis, 639 F.2d 239 (5th Cir. 1981); Fendler v. Goldsmith, 728 F.2d 1181 (9th Cir. 1983).

Mr. Muhammad was entitled to relief. Mr. Muhammad's trial did not comport with the standard of reliability which the federal constitution requires. An evidentiary hearing and Rule 3.850 relief were proper, because new evidence not of record on appeal supports this claim. Moreover, ineffective assistance of counsel claims are cognizable in 3.850 proceedings. The trial court erred in summarily denying relief, and that decision should be reversed, with the case remanded for an evidentiary hearing.

ARGUMENT VI

MR. MUHAMMAD'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.

Mr. Muhammad's case presents a classic case of a mentally ill person who is unable to cooperate or even communicate with counsel. Trial counsel Stephen Bernstein describes his frustration with his inability to communicate with Mr. Muhammad:

> My concerns regarding Mr. Muhammad's sanity and competency to stand trial and/or to waive counsel were based on the defendant's persistent irrational, illogical, unrealistic, and bizarre concepts regarding the reasons for the attack on the correctional officer. Specifically, Mr. Muhammad believed that he acted in self defense. He was out of contact with reality. Indeed, his competency was sorely lacking.
>
> Another basis for my concern was his insistence that mental health issue not be raised in his defense. This was particularly disturbing in that mental health issues were his only defense to the charges against him and a compelling source of mitigating evidence. Mr. Muhammad and I spent many hours discussing the use of potential mental health issues in his defense. I repeatedly stressed to him the importance of these issues in that they were the only defense available to him. That was it; there wasn't anything else. He repeatedly stated that he did not want to raise any mental health defenses but could not give any rational reasons to explain his position. Indeed, his persistent irrationality and mental illness became even more evidence during his adamant refusals to even discuss mental health issues. It was my opinion that he did not want to use mental health defenses precisely because of his fear that others would recognize his mental illness.

(PC 559-60). Trial counsel Susan Cary describes her efforts to gain the trust of this mentally ill man and his inability to cooperate with counsel:

> In addition to his usual difficulties with communication, at the time of the Bradford County offenses and subsequent to the offenses, I noticed a significant deterioration of his ability to communciate and understand. Not only did he exhibit the previous effects of mental illness which had always interfered with my communication with him, he was not able to adi me in the defense of this case. Specifically, he would insist on starting from an illogical assumption and proceed to build a progression of ideas that did not coincide with the reality of his situation. He was very rigid in his thinking and seemed unable to comprehend what his other attorney and I were trying to communicate to him. His discussions of the offense and the available defenses were confused and illogical.
>
> I interviewed Mr. Muhammad one time after the court had found he

> could proceed as his own counsel. At that time Mr. Muhammad was more confused and disoriented that I had ever seen him. I was unable even to complete the interview due to his state of mental distress. He was unable to discuss his case at all. I have never seen him so distressed. Although I had worked to build communication with him, he was too out of touch to have any meaningful communicaton. I finally gave up and left.
>
> I had worked over a long period of time to gain Mr. Muhammad's trust so that I could communicate with him. I am also aware that he did not relate well to me. I feel sure that if he was so mentally incomplete that he could not communicate with me, he would not be able to communicate with Mr. Bernstein. In fact, I understand that he refused to see Mr. Bernstein for the last three months before his first trial. It is my opinion based on my interactions with Mr. Muhammad as well as his background that he was too incompetent to cooperate with his attorney or make a knowing and voluntary waiver of counsel or represent himself at trial.

(PC 1624-25). Dr. Joyce Carbonell explained in her report submitted in the 3.850 pleadings that the psychosis surrounding his mother and his incredibly abusive childhood made it impossible for him to cooperate with his counsel in the presentation of his case (PC 916-34).

A wealth of evidence was available then which would have revealed his lack of competency to stand trial. However, it was not presented, not considered or reviewed, despite of record indicia of incompetency. See Hill v. State, 473 So. 2d 1253 (Fla. 1985). New evidence exists now which shows that Mr. Muhammad was not competent to stand trial.

Mr. Muhammad's fifth, sixth, eighth, and fourteenth amendment rights were abrogated because he was not legally competent to stand trial. Those rights were also abrogated because he was denied an adequate hearing on the issue of his competency although more than sufficient evidence existed in the record to raise serious questions of incompetency. An evidentiary hearing was warranted. The trial court erred in summarily denying relief, and that decision should be reversed and the case remanded for a hearing on this claim.

ARGUMENT VII

THE DEATH SENTENCE IS NOT RELIABLE AND MUST BE VACATED BECAUSE MR. MUHAMMAD WAS NOT COMPETENT TO WAIVE HIS SENTENCING JURY, BECAUSE THE TRIAL COURT FAILED TO CONDUCT PENALTY PROCEEDINGS BEFORE AN ADVISORY JURY, AND BECAUSE THE RESULTING SENTENCE OF DEATH WAS CONTRARY TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

After Mr. Muhammad's conviction, the court ordered the jury to reconvene for the penalty phase. The trial court remarked upon the importance of convening a jury to consider the proper penalty:

> I am concerned about giving both the State and the defendant adequate time to prepare for that proceeding. At the same time, I intend to use the same jury for that proceeding. As a result, I do not wish too much time to pass between the time of this case and the sentencing procedure. So, it was my feeling that approximately a little over a week would be adequate time for both parties to prepare for that proceeding.

(R. 1504).

When the jury reconvened for the penalty phase of the trial, Mr. Muhammad moved the court to permit him to waive the jury proceedings (R. 1517). Mr. Muhammad explained to the court his reasons for waiving a penalty recommendation by the jury:

> . . . . It is based, in part, with the jury being absent from these proceedings the several days that we have been away, in conjunction with the representation of the Department of Corrections in this courtroom, I feel that for this jury to be influenced as I am influenced by this overwhelming presence of the Department of Corrections, I feel that it is to my best interest to exercise this right, Your Honor.

(R. 1522).

Mr. Muhammad's reasons for waiver of the sentencing jury were not rational. First, he cited the "length of time" since the jury had recessed. Only eight (8) days passed between the two phases of the trial. The court had specifically balanced the interests of time for adequate preparation and prompt consideration of sentence in scheduling the time for the penalty phase. This was <u>not</u> a rational ground for waiver.

Second, Mr. Muhammad's further reason for waiver was that the jury would be

influenced, "as I am influenced," by the presence of an overwhelmingly large number of uniformed Department of Corrections officers in the courtroom. Waiving a penalty phase jury on such grounds was not a rational decision. In fact the presence of these spectators was objectionable. Woods v. Dugger, No. 89,3420 (11th Cir. Feb. 5, 1991); Norris v. Risley, 918 F.2d 828 (9th Cir. 1990). However, a rational counsel would have relied upon the objection instead of dismissing the jury.

The nature and extent of Mr. Muhammad's mental illness and legal incompetency has been previously detailed. His mental incompetency precluded him from making a mentally rational, voluntary, knowing and intelligent waiver of such a critical part of his sentencing determination. The court's failure to conduct an adequate Faretta inquiry into Mr. Muhammad's competency to stand trial and waive counsel irrevocably tainted the trial and the penalty phase; the resultant proceedings cannot withstand constitutional scrutiny. The decision to waive the right to a sentencing recommendation by a jury also requires a higher degree of competency than that required to stand trial. As with the right to counsel, a jury waiver must be knowing, intelligent, intentional and voluntary, and whether such a waiver is so depends upon the totality of the circumstances which supports that conclusion. Johnson v. Zerbst, 304 U.S. at 464-65; Fitzpatrick v. Wainwright, 800 F.2d at 1065; United States v. Ellison, 798 F.2d 1102, 1108 (7th Cir. 1986), cert. denied, 107 S. Ct. 893 (1987); State v. McCombs, 81 N.J. 373, 378 (1979); State v. Johnson, 68 N.J. 349, 353-54 (1975). As the United States Supreme Court has stated in the context of a waiver of the right against self-incrimination: First, the relinquishment of the right must have been voluntary in the sense it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Colorado v.

Spring, 479 U.S. 564 (1987) (quoting Moran v. Burbine, 475 U.S. 412 (1986); see also Smith v. Zant, 855 F.2d 712 (11th Cir. 1988). Mr. Muhammad's case presents a classic case of coercion due to the packing of the courtroom with uniformed guards.

The waiver colloquy with the defendant was remarkably brief and almost pro forma. It certainly was not adequate to determine whether Mr. Muhammad was mentally competent to waive the sentencing jury, or whether that waiver was the product of a knowing, intelligent, voluntary and rational decision on his part. See Pridgen v. State, 531 So. 2d 951, 954-55 (Fla. 1988)(the court erred in failing to stay the sentencing portion of trial to have Pridgen reexamined by experts and hold a new hearing on competency to stand trial). The need to determine competency is equally compelling with respect to competency to waive the jury's recommendation. At no time was Mr. Muhammad advised of the important role of the jury in Florida's sentencing scheme. Far from being an intelligent and voluntary waiver, it is obvious that this schizophrenic, brain damaged man felt intimidated, coerced and overwhelmed by the "packing" of the courtroom with uniformed prison officers. Such a massive showing of "support" would be intimidating for experienced counsel. It was simply overwhelming for this mentally ill, paranoid man who was trying to present his case. See Woods v. Dugger.

It is contrary to public policy to permit sentencing proceedings in a capital case in which the defendant "waives" the opportunity to present statutory and nonstatutory evidence concerning his mental competency.[15] This Court has recognized that society has a duty to see that capital proceedings do not become a vehicle by which a person can commit suicide. Hamblen v. State, 527 So. 2d 800, 802 (Fla. 1988). This is especially true in a case in which the

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[15]This is particularly so where the record demonstrates his mental predisposition to avoid any "labels implying insanity."

evidence outside the record establishes that the defendant is mentally incompetent and the evidene of mitigation is overwhelming.

This case is distinguishable from Hamblen. Hamblen's waiver in the sentencing phase was based upon a finding that "he was clearly competent" to represent himself and the conclusion that "all competent defendants have the right to control their own destinies". 527 So. 2d at 804 (emphasis added). In this case, the waiver was prompted by the coercive atmosphere of 100 uniformed guards. Also, the question of Mr. Muhammad's competency to represent himself, and thus control his own destiny, is at issue for the reasons discussed elsewhere in this brief relating to his mental condition. "A defendant cannot be executed unless his guilt and the propriety of his sentence have been established according to law." Hamblen, 527 So. 2d at 804. Unlike Hamblen, the court here did not carefully analyze the nonstatutory mitigating evidence in the record and the administration of death by default in this case should not be upheld. Cf. Gardner v. Florida, 430 U.S. at 357-58. Substantial and abiding questions of Mr. Muhammad's mental competency cast a pall over the constitutionality of the entire proceedings. When considered with the coercive circumstances of the penalty proceedings, it is clear that the death sentence proceeding was arbitrary and capricious.

Under Florida's statutory scheme, a sentencer can only impose the death penalty if the aggravating factors outweigh the mitigating factors. If the sentencer never hears the available mitigation evidence because of the pro se defendant's mental state (which compelled him to "waive" his opportunity to do so), there is no basis for properly discharging its statutory and moral duty. This is particularly true of a mentally ill person, unable to even acknowledge the horror of his childhood, and decompensating under stress due to the ominous and overwhelming presence of 100 uniformed officers in the courtroom, who may be precisely the person with the most compelling mitigation. See, e.g., State v.

Koedatich, ___ A.2d ___ (N.J. 1988), citing State v. Hightower, 518 A.2d 482 (N.J. Super. 1986).

Mr. Muhammad's penalty phase became death by default. There was no jury, no counsel, and no further presentation of statutory and nonstatutory mitigation. It appears from Mr. Muhammad's arguments at sentencing that he was completely unaware of relevant statutory and nonstatutory mitigating factors. This was already apparent during voir dire when Mr. Muhammad indicated that he believed that if he was convicted of first degree murder the jurors must vote for the death penalty. He even engaged in lengthy disputes with jurors who disagreed with this misperception of the law. The court did nothing to correct his misperceptions of the law or to advise him. The court had even ordered stand-by counsel not to assist him. This was not known when this Court reviewed the record on direct appeal.

We now know that compelling evidence could have been presented in mitigation. Since this evidence was never introduced, the trial court was unable to make a reasoned decision consistent with the statutory and constitutional requirements for the imposition of a death sentence. The California Supreme Court expressed it well when it said:

> Although we are unpersuaded by defendant's legal reasoning, we find persuasive policy reasons exist for not allowing a defendant in a capital case to execute even a knowing and voluntary waiver of his right to present mitigating evidence during the penalty phase. The policy reasons are based substantially on the State's "interest in a reliable penalty determination."

People v. Deere, 710 P.2d 925, 931, (1985).

It is contrary to the constitutional requirements of reliability in death penalty cases to reduce any sentencing to a pro forma proceeding. This is true for all capital defendants, and particularly true in this case where the accused is incompetent to waive counsel; incompetent to waive the sentencing jury; where no attempt was made to present the substantial available mitigation; where no

adequate inquiry was conducted into whether the jury waiver was voluntary, knowing, intelligent, and rational; and where the expressed reason for the jury waiver was the overwhelming coercive circumstances of a courtroom packed with 100 uniformed prison officers. The new evidence not of record on appeal establishes the basis for this claim. It is cognizable now. Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989). An evidentiary hearing was necessary on this issue and relief is proper. See Lemon v. State, 498 So. 2d 923 (Fla. 1986). The trial court erred in its summary denial, and that decision should be reversed by this Court and the case remanded for hearing.

ARGUMENT VIII

MR. MUHAMMAD WAS DENIED HIS RIGHTS AS A PRO SE DEFENDANT AT THE GUILT/INNOCENCE AND SENTENCING PHASES OF TRIAL IN VIOLATION OF MR. MUHAMMAD'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The pervasive pattern of coercion, misconduct and complete disregard for due process pervaded the entire prosecution. In the process, Mr. Muhammad's individual constitutional rights were repeatedly violated and he was prevented from functioning as an effective pro se defendant. New evidence which was non-record at the time of direct appeal requires evidentiary development.

A. COURT APPOINTED COUNSEL WAS NOT PERMITTED TO CONSULT WITH MR. MUHAMMAD AND SLANDEROUS ACCUSATIONS WERE MADE AGAINST COUNSEL

Immediately after the offense, Judge Green appointed Joseph Hughes and Susan Cary as counsel for Mr. Muhammad. However, the prison authorities refused to allow counsel to consult with Mr. Muhammad until forced to do so by order of the court. It is also apparent that the prison authorities made slanderous allegations against counsel which were unfounded and which resulted in Judge Green's recusal:

> I can't try your case because I am incensed over the frustration of your right to counsel this far; I can't try your case because I am incensed with what has been allegations made by persons in positions of authority concerning your relationship between you and Miss Cary. I can't be fair to the State of Florida in your case because of that.
>
> It is strange, your case is a notorious case because of the

person you are alleged to hvae killed and, yet, I am equally incensed by the conduct of the Department of Corrections about your case thus far, but that is neither here nor there; my being incensed to know doesn't change the fact that you have to go on trial in the near future for your life a second time, and you are going to need someone, I think, that has the ability because of where he lives and where he is and his ability to get the law books, and his knowledge, to defend you and help you in defending yourself.

(SR January 12, 1981, at 1654-55).

B. MR. MUHAMMAD WAS INDICTED BY A BIASED GRAND JURY

Within 48 hours a grand jury composed almost entirely of prison employees and relatives demanded that the State Attorney expedite Mr. Muhammad's case. The prosecution did so and an indictment was returned four days after the offense. See Argument XI.

C. DURING THE PENDENCY OF THE TRIAL TWO JUDGES WERE RECUSED DUE TO ACTIONS OF THE STATE

Judge Green was the initial trial judge. He made it more than clear that he recused himself due to his off-the-record efforts to force the State and the prison to accord Mr. Muhammad his basic constitutional rights. See Argument IX. Judge Carlisle was also forced to recuse himself after the State complained about his handling of voir dire forcing a mistrial of Mr. Muhammad's first trial. It seems quite fortuitous that the third judge, upon motion of the State, proceeded to set aside many of the previous rulings favorable to the defense including Mr. Muhammad's competency to waive counsel.

D. MR. MUHAMMAD WAS ASSURED ACCESS TO A LAW LIBRARY AT THE TIME OF WAIVER WHICH WAS SUBSEQUENTLY DENIED

On June 15, 1982, four months before Mr. Muhammad's trial, Judge Chance granted Mr. Muhammad's motion to proceed pro se and conduct his own defense at trial after assuring him he would have access to a law library (R. 389). Mr. Muhammad, now acting in the capacity of counsel, immediately filed motions to effectuate his sixth amendment right to conduct his own defense. On July 15, 1982, Mr. Muhammad filed a "Motion to Use Law Library" (R. 392), requesting

implementation of his right as guaranteed by the court as a condition of his self-representation and pursuant to the Florida and federal Constitutions to "meaningful access to this Court" by allowing him to conduct research at the library located at Florida State Prison, where he was incarcerated. His motion was denied (R. 414, 1714).

The administration of Florida State Prison ("FSP") denied Mr. Muhammad in personam access to the FSP law library. Instead, the State required him to submit requests to the librarian, who would then "attempt" to locate the legal authority requested (R. 1686-97). Such a procedure is useless for direct access to the law library is necessary in the first instance to identify relevant legal authority in order to be able to then request it. Also, requiring that legal research be conducted by the opponent is a substantial breach of confidentiality, violating Mr. Muhammad's sixth and fourteenth amendment rights. Mr. Muhammad did not enjoy a meaningful right of access to the prison law library. Yet, access to the sources of the law is fundamental to the exercise of the right of self-representation, especially where the possible sentence is death.

In Bounds v. Smith, 430 U.S. 817, 828 (1977), the Supreme Court held that the constitutional right of access to the courts requires that the states aid inmates in filing meaningful legal papers by providing access to adequate law libraries or assistance from persons with legal training. Although Mr. Muhammad had requested both access and legal assistance, he received neither. Failure to provide prisoners with legal authority or assistance by which they may address important constitutional rights has consistently been found to violate access to the courts. Ex Parte Hull, 312 U.S. 546 (1941).[16] Mr. Muhammad was entitled to

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[16]More recently such denials have been found to run afoul of equal protection, Burns v. Ohio, 360 U.S. 252 (1959); Smith v. Bennett, 365 U.S. 708 (1961); Douglas v. California, 372 U.S. 252 (1963)(equal protection and due process violation); Johnson v. Avery, 393 U.S. 483 (1969)(right of access grounded in due process and (continued...)

no less.

Although the State contended that requests for materials to the Department of Corrections was sufficient; case law makes clear that any restrictions on access, whether it be nondiscriminatory or not, violates due process. Cf. Douglas v. California, 372 U.S. 252 (1963). See also Access to the Courts, 26 Kansas L.R. 636 (1978)(The due process right of access does not depend on the largess of the state for its viability, since it is constitutionally secured by the fourteenth amendment). Bounds requires constitutionally adequate access to a law library, which was denied here.

E. THE PRO SE DEFENDANT WAS DEPRIVED OF HAVING THE SERVICES OF AN INVESTIGATOR TO AID COUNSEL IN PREPARATION OF A DEFENSE

Mr. Muhammad was also denied access to an investigator. As has been made clear in Bounds, and in other cases, an attorney has an obligation and a duty to investigate all possible defenses. An investigator is an essential tool for a lawyer to fulfill his duty to investigate and is especially so for a pro se defendant who, by reason of his incarceration, is precluded from effectively undertaking such activities himself. In fact, trial counsel for Mr. Muhammad had already sought the services of an investigator (R. 273). An investigator is especially essential in a capital murder where the State is seeking the death penalty. Mr. Muhammad filed a written motion requesting an investigator which was denied (R. 396-97, 404-05). The denial of this right deprived Mr. Muhammad of his right to defend, and deprived him of his rights under the Equal Protection Clause of the fourteenth amendment. Cronic. See also Ake v. Oklahoma. It is clear from Ake and related cases that an investigator, like a mental health expert, is a necessary and basic tool for counsel within the

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[16](...continued)
is fundamental to our constitutional scheme); Wolff v. McDonnell, 418 U.S. 539 (1974)(right of meaningful access applies to prisoners bringing civil rights claims).

meaning of the Court's language in Ake, and denial thereof renders counsel ineffective under Cronic.

F. THE COURT ERRED IN STRIKING THE INSANITY DEFENSE

Despite the overwhelming evidence of prior hospitalization and major mental illness, the court struck the insanity defense which was the only viable defense available to Mr. Muhammad. See Argument IV, Section D.

G. THE COURT ERRED IN DENYING THE PRO SE MOTION TO TRANSCRIBE PRETRIAL HEARINGS

Many pretrial hearings were conducted in this case -- many of which were outside the presence of Mr. Muhammad. It was impossible for him to know what arguments had been presented or what previous court rulings had been made on the record. Thus he was unable to respond to the arguments of the State that previous rulings in favor of the defense should be set aside. He was further unable to rebut the State's erroneous claims that discovery had been provided. Even Askari Muhammad, unversed in the law, perceived that irregularities were taking place with respect to the making of the record. He filed numerous motions to transcribe pretrial hearings and the previous trial which resulted in a mistrial; all of which were denied (SR October 11, 1982, at 6-9). He also strenuously objected to the deficits in the record, correctly foreseeing that these record inadequacies would inure to his prejudice (SR October 11, 1982, at 6-11). See Argument II.

H. THE COURT ERRED IN NOT REQUIRING THE STATE TO PROVIDE DISCOVERY OR CONDUCTING A RICHARDSON HEARING

Mr. Muhammad made numerous discovery requests which were never complied with by the State. No Richardson hearing was conducted. Post-conviction counsel has subsequently obtained the statements of eyewitnesses requested by, but not provided to, Mr. Muhammad through public records requests. These records contain substantial evidence of an exculpatory nature. See Argument IX.

I. STAND-BY COUNSEL WAS ORDERED NOT TO CONSULT WITH MR. MUHAMMAD DESPITE HIS REPEATED REQUESTS FOR ASSISTANCE OF COUNSEL

Despite literally pages and pages of transcript, letters, and motions in which Mr. Muhammad requested the assistance of counsel, the Court ordered Mr. Replogle not to consult with Mr. Muhammad. See Argument III, Section E.

J. MR. MUHAMMAD WAS DENIED MEANINGFUL ACCESS TO THE COURT AND ITS PROCESSES TO COMPEL THE ATTENDANCE OF WITNESSES

Mr. Muhammad requested that the court issue a witness subpoena to Officer S. Wade, an employee of the Florida State Prison (R. 1286). Officer Wade could have testified that Mr. Muhammad had a painful skin condition and had been told that he would be permitted "clipper privileges" without the necessity of renewing his "clipper pass." The shaving incident was relevant to the events which followed. Officer Wade's testimony was crucial to the defense to rebut the testimony of Officers Edwards and Padgett: his testimony would have supplied an explanation of Mr. Muhammad's actions in which, due to the denial of clipper privileges and the consequential denial of the visit with his mother, mentally ill Askari Muhammad went berserk and stabbed Officer Burke to death -- a man he had never met or spoken with.

Officer Wade, an employee of the Florida State Prison, a witness under the control of the State, should have been produced to testify for the defense. A subpoena was issued, but never served. Officer Wade was never produced as a defense witness. Mr. Wade's subpoena in the circuit court files shows that the subpoena was not served because: a) Officer Wade was not on shift at the Florida State Prison when service was attempted, and b) Officer Wade lives in Gainesville, Florida. Neither of these reasons are a sufficient basis for failing to produce Officer Wade at the defendant's trial, and failing to protect Mr. Muhammad's constitutional rights to compulsory process. There is simply no reasonable explanation for the failure to serve Officer Wade once he reported for work at the Florida State Prison or to serve him in Gainesville, a nearby

town.

The violation of Mr. Muhammad's compulsory process rights was further exacerbated by the court's failure to subpoena or produce for trial Officers Jarvis and Phipps. A witness subpoena was never issued to Jarvis although the defendant sought to present his testimony at trial (R. 1366). Jarvis, like Officer Wade, was an employee of the Florida State Prison (R. 1362). Officer Phipps was present at the time of the homicide and investigated the killing. Officer Phipps would have explained the events surrounding the death of Officer Burke. No subpoena was issued or served on Officer Phipps, whose testimony was central to the pro se defense. If the testimony of these witnesses had been presented, Mr. Muhammad could have portrayed the events leading to Officer Burke's death and shown that he lacked the mental culpability to be convicted of first degree murder and sentenced to death.

The State made various representations regarding their efforts to secure the attendance of defense witnesses. Before the defense presented its case, the prosecutor stated that the witnesses were available at the prison and could be present to testify within twenty minutes (R. 1367). The prosecutor asked the Court if the witnesses should be called and was told to call the witnesses Mr. Muhammad had requested (R. 1368). The State then informed Mr. Muhammad that these prison officials could not be located and that Officer Phipps may not be in the State of Florida (R. 1426). The State did not show their efforts to determine whether Phipps was within the jurisdiction and no subpoena was issued to compel his appearance.

The compulsory process clause is elemental in assuring a fair trial. Chambers v. Mississippi, 410 U.S. 284, 302 (1973). The Supreme Court explained that the gravamen of the compulsory process clause is:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury so that it may decide where the

> truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

Washington v. Texas, 388 U.S. 14, 19 (1967)(emphasis added). The Court reversed the conviction, holding:

> We hold that the petitioner in this case was denied his right to have compulsory process for obtaining witnesses in his favor because the State arbitrarily denied him the right to put on the stand a witness who was physically and mentally capable of testifying to the events that he had personally observed, and whose testimony would have been relevant and material to the defense.

Id. at 23 (emphasis added).

The right of the accused to the attendance of witnesses is illusory when the court merely issues a subpoena, but the State does not assure that the witness is served with the subpoena. The State is obligated to secure his presence as a defense witness, particularly where the witness is under the control of the state. Cf. Jacobson v. Henderson, 756 F.2d 12, 16 (2d Cir. 1985).

The violation of Mr. Muhammad's right to compel the attendance of Officers Wade, Jarvis and Phipps emasculated his right to a fair trial.[17] Consequently, this conviction and death sentence are fundamentally unreliable. See Woodson v. North Carolina, 428 U.S. 280 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586 (1978); Skipper v. South Carolina, 476 U.S. 1 (1986).

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[17]This was precisely the dilemma which Judge Green anticipated, as he stated in his order finding Mr. Muhammad incompetent to waive counsel:

> In the instant case this Defendant is not so able either due to the particular factual circumstances of the case (death row incarceration/in-prison occurrence) OR alleged mental defects (incompetence, mental illness, insanity) or both.

(R. 64)(emphasis added).

K. MR. MUHAMMAD WAS NOT PRESENT AT CRITICAL STAGES OF THE PROCEEDINGS

The proceedings resulting in Mr. Muhammad's conviction and death sentence failed to comport with constitutional guarantees and the procedure and protections of the Florida Rules of Criminal Procedure because crucial stages of the proceedings were conducted in his absence.[18] This Court has interpreted Fla. R. Crim. P. 3.18(a) to require the presence of the defendant unless he has waived his presence by voluntarily absenting himself from the proceedings. The waiver of presence will not be found unless the defendant is questioned about his understanding of the right to be present and the record affirmatively demonstrates a knowing waiver of the right to be present. See Francis v. State, 413 So. 2d 1175 (Fla. 1982).

The record in Mr. Muhammad's case makes it clear that he was absent during critical stages of the trial proceedings. During the penalty phase of the trial the Court directed that the defendant be removed from the courtroom before pronouncing his penalty findings and ordering a PSI (R. 1572-63). The record clearly shows that Mr. Muhammad was not then present. The Court also engaged in numerous ex parte sidebars with the State from which Mr. Muhammad was excluded. One incident took place when Mr. Muhammad stated that he wanted to waive the jury recommendation as to sentencing and the Court took a recess to discuss the

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[18]The Florida Rule of Criminal Procedure 3.18(a) provides, in pertinent part:

In all prosecutions for crime the defendant shall be present:

. . . .

(4) At the beginning of the trial during the examination, challenging, impanelling, and swearing of the jury;
(5) At all proceedings before the court when the jury is present;
(6) When evidence is addressed to the court out of the presence of the jury for the purpose of laying the foundation for the introduction of evidence before the jury;

. . . .

(8) At the rendition of the verdict;
(9) At the pronouncement of judgment and the imposition of sentence.

matter with the State without the pro se defendant attending.

Mr. Muhammad's ability to defend was also foreclosed by the trial court's reluctance to permit contact between the court and Mr. Muhammad. For "security" reasons Mr. Muhammad could not cross an imaginary line parallel to the forward edge of counsel's table (R. 509). Thus he was precluded from participating in side bars attended by counsel for the State. Sidebars were, therefore, ex parte communications with the Court.

Further, a significant ex parte communication occurred after imposition of the death sentence, when the Assistant State Attorneys approached the bench in an off record conference with the court:

> THE COURT: For the record, the State Attorney's Office indicates that although there are no statutory mitigating circumstances, the court also can consider other outside mitigating circumstances. The Court finds no other outside mitigating circumstances.
>
> MR. HERBERT: Thank you, Your Honor.
>
> THE COURT: This Court has prepared in written form a nine page order that will be furnished to the State and the defendant that outlines in specificity the Court's finding of facts.

(R. 1586-87)(emphasis added). Collateral counsel has secured a video tape of this ex parte communication which would be introduced into evidence at an evidentiary hearing. The video tape would show what the record does not. The video tape constitutes newly discovered evidence which cannot be properly assessed without an evidentiary hearing. This tape constitutes critical evidence which establishes Mr. Muhammad was not present at a critical penalty phase proceeding.

A criminal defendant's sixth and fourteenth amendment right to be present at all critical stages of the proceedings is a settled question. See, e.g., Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); Francis v. State, 413 So. 2d 1175 (Fla. 1982). "One

of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial." Illinois v. Allen, 397 U.S. at 338, citing Lewis v. United States, 146 U.S. 370 (1892). This Court has unequivocally held that the voir dire process and the concomitant exercise of jury challenges is a "critical stage" at which this guarantee is operative. See Francis. The proceedings at the penalty phase of a capital trial determine the life and liberty of the defendant. These proceedings are equally as critical as is the jury selection process. The direct result of trial court's removal of Mr. Muhammad from the courtroom during the penalty phase was the denial of Mr. Muhammad's fundamental rights as the defendant.

The analysis in Francis applies with even greater force to Mr. Muhammad's case since the defendant was not represented by independent counsel, but proceeding pro se. Mr. Muhammad was never questioned with regard to his understanding of his right to be present; no inquiry was made as to whether he wished to waive that right; Mr. Muhammad provided no waiver whatsoever of his right to be present; Mr. Muhammad never acquiesced in a waiver of his presence or even knew that proceedings took place in his absence until long after trial.

Because Mr. Muhammad was then acting as his own counsel, not only was Mr. Muhammad deprived of his personal sixth and fourteenth amendment rights to be present at all critical stages of his trial, but also of his right to act as his own counsel. See Faretta v. California, 422 U.S. 806 (1975); United States v. Cronic, 466 U.S. 648 (1984); McKaskle v. Wiggins, 465 U.S. 168 (1984); Dorman v. Wainwright, 798 F.2d 1358 (11th Cir. 1986).

The prejudice to Mr. Muhammad is evident. See Proffitt v. Wainwright, 685 F.2d 1227, 1260 (11th Cir. 1982), modified, 706 F.2d 311 (11th Cir. 1983); Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964). During Mr. Muhammad's absence the trial court made critical findings summarizing the arguments presented at the penalty proceeding. Mr. Muhammad was given no opportunity to

address or rebut the statements by or to the trial court. He was not even aware that the proceedings had occurred in his absence. Further, Mr. Muhammad was unaware that a PSI had been ordered, and therefore was denied the opportunity to prepare information to be submitted in rebuttal. This was especially important in light of the fact he was never provided with a copy of the PSI.

During Mr. Muhammad's absence, the trial court found that there was no evidence to mitigate a death sentence. If pro se counsel had been present, he could have directed the court's attention to the findings of Judge Green and Judge Carlisle that he was suffering from a mental impairment that affected his ability to waive the right to counsel. This evidence was present in the record and formed a basis for mitigation at the penalty phase. If counsel had been present he could have further rebutted the trial court's assertion that there were no mitigating factors by directing the court's attention to the written proffer of evidence on insanity (R. 316-67). Evidence of insanity was ruled inadmissible during the guilt/innocence phase of the trial, but, this evidence should have been considered by the court, as the factfinder, as evidence of mitigation in the penalty phase. The court's statement that there was no evidence to support mitigation was incorrect. However, Mr. Muhammad was not present when the court announced this finding and was, therefore, unable to confront, rebut or even object to this either personally or as pro se counsel.

The removal of the pro se defendant from the courtroom during this vital stage of the proceedings is inexplicable. In this regard, Mr. Muhammad's case is in all pertinent respects no different than Proffitt v. Wainwright, where the defendant was involuntarily absent from a hearing held after the jury had rendered its advisory sentence at which a doctor presented testimony concerning psychiatric reports that had been presented to the Court. 685 F.2d at 1256-58. The State argued that Proffitt's absence was harmless. The Eleventh Circuit Court of Appeals, however, applied the well-established standard attendant to

such situations and refused to "engage in speculation as to the possibility that [Proffitt's] presence would have made a difference." Proffitt, 685 F.2d at 1260, citing Davis v. Alaska, 415 U.S. 308, 317 (1974). Rather, the court explained that because Proffitt could have provided information which could have been used to impeach the doctor, the defendant's absence could not be deemed harmless even though the defendant had not shown that the information would have changed the doctor's opinion. Proffitt, 685 F.2d at 1260-61.

Similarly, Mr. Muhammad could have provided information regarding mitigation. He also could have attempted to rebut aggravation, to explain, to present his views as to sentence. But, Mr. Muhammad could not do so because he was not in the courtroom. Mr. Muhammad had invoked his constitutional right to self-representation under Faretta v. California. Any decisions regarding the litigation of his capital case therefore could not be made without his presence as counsel. As counsel, the right was personal to Mr. Muhammad, and could not be waived absent his consent or acquiescence. Yet, this is what took place when the court made factual findings at the penalty phase while Mr. Muhammad was involuntarily removed from the courtroom. Moreover, decisions to excuse two jurors and the manner for conducting voir dire of potential jurors were also made in Mr. Muhammad's absence (R. 506, 508, SR. 34), decisions requiring the presence of the defendant and which could not be made without the presence of pro se counsel (R. 34, 506, 508). Cf. Francis.

Such procedures, flowing not from his own acts, but from the actions of the court, denied Mr. Muhammad his right to defend. The opportunity to provide effective self-representation, and to even act as counsel, was precluded by the actions of the court, and a presumption of prejudice is appropriate. Cronic, 466 U.S. at 660; Gideon, Faretta. Mr. Muhammad's absences infringed on the integrity that should be ascribed to criminal proceedings. Mr. Muhammad was not

only deprived of his personal and fundamental right to be present at all stages of the proceedings against him, but also of his rights as his own counsel.

L. THE COURT ERRED IN FAILING TO PROVIDE MR. MUHAMMAD WITH A COPY OF THE PRESENTENCE INVESTIGATION REPORT AND AN OPPORTUNITY TO REBUT THE CONTENTS THEREIN

The use of the PSI report and its absence from the record on direct appeal is also discussed in Argument II, and is incorporated herein by reference. By its own admission, the court considered "at great length" a presentence investigation report, and only that document at sentencing. Two months prior to sentencing, the court had concluded that Mr. Muhammad had not presented mitigation during the penalty phase and that no mitigation existed in the record (R. 1572-73, 1585). The court ordered a presentence investigation report outside the presence of Mr. Muhammad. Mr. Muhammad was never supplied with a copy of the PSI. Mr. Muhammad had no opportunity to prepare rebuttal to the prejudicial information and nonstatutory aggravating circumstances presented in the report. This was not of record on direct appeal and is thus cognizable now.

It is reversible error if the record reflects that a defendant was precluded from seeing, reviewing and responding to a PSI report. Gardner v. Florida, 430 U.S. 349 (1977); Barclay v. State, 362 So. 2d 657 (Fla. 1978). Such preclusion also denied his right to defend.

M. CONCLUSION

Mr. Muhammad's original waiver of counsel was conditioned on his access to the library and the consultation with stand-by counsel; both of these were denied as the 3.850 pleadings alleged and can be proven at an evidentiary hearing. He was not provided a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights or defenses during his trial by virtue of his inability to conduct legal research, by the trial court's denial of his motion for access to the law library, and by the failure to effectuate subpoena service of defense witnesses. Mr. Muhammad was prejudiced

in presenting defenses and challenging the State's case on substantive, procedural and evidentiary grounds. The prejudice was not of record on direct appeal. It can be established at an evidentiary hearing through the presentation of the proof identified in the 3.850 pleadings and supporting documentation. This new evidence is cognizable now in 3.850 proceedings. Evidentiary resolution is essential. The error is fundamental and cannot be found harmless, as it goes to the very heart of the principles of fairness and reliability of both the guilt/innocence and penalty phases.

A pro se defendant cannot be deprived of his right to defend. United States v. Cronic, 466 U.S. 648 (1984). When defense counsel, pro se or otherwise, is prevented from defending, the sixth and fourteenth amendment rights of the defendant are violated. Unlike ineffective assistance of counsel claims under Strickland, Cronic error is prejudicial per se.

In addition to the violation of rights personal to Mr. Muhammad as the accused, each claim is also subject to analysis as a Cronic denial of the right to defend due to the pro se status of the defendant. An evidentiary hearing is proper and the summary denial of Rule 3.850 relief was erroneous.

ARGUMENT IX

THE STATE'S MISCONDUCT THROUGHOUT THE GUILT AND PENALTY PHASES DENIED MR. MUHAMMAD HIS RIGHTS TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

"[A] prosecutor's concern in a criminal prosecution is not that it shall win a case, but that justice shall be done." Rosso v. State, 505 So. 2d 611, 614 (Fla. 3rd DCA 1987). In Mr. Muhammad's case, the State was concerned with winning the case at all costs.

A. THE VIOLATION OF MR. MUHAMMAD'S RIGHTS UNDER BRADY AND FLORIDA'S DISCOVERY RULES

Prior to trial, Mr. Muhammad and his attorneys made numerous requests for discovery pursuant to Fla. R. Crim. P. 3.220.[19] On October 11, 1982, Mr. Muhammad complained that he had not been provided with statements by eyewitnesses who were employees at FSP (SR 27). The State responded with an outright lie:

> THE COURT: What about statements made by employees?
>
> MR. ELWELL: There are none, Your Honor. There are no statements relative to the defendant made by employees.

(SR 27). In fact, there were eyewitness accounts by employees in the possession of the State which have now been obtained by collateral counsel.

Mr. Muhammad's first complaint about the lack of response to discovery came when he asserted the State was obliged to provide him with a list of witnesses that the State intended to call at trial. He was informed that the State is not required to inform the defense as to which witnesses they will call (R. 1273-75). Mr. Muhammad next objected that photographs taken of the victim were not provided in discovery (R. 1360). The court's only response was to say that he should have deposed the medical examiner (R. 1361). When Mr. Muhammad presented his defense witnesses, he called the institutional investigator who investigated the offense. Mr. Ball testified that during the investigation he obtained taped and written statements from prison employees (R. 1393). Photographs were also taken at the prison and given to the State (R. 1395). Again Mr. Muhammad requested to see the photographs provided to the State by the prison. The court denied the request. Mr. Muhammad argued that he had filed a written demand for discovery on September 3, 1982 (R. 418-19), but the State never responded (R. 1398). The State responded that they provided discovery to Mr. Bernstein (R.

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[19]January 8, 1981 (R. 61); January 14, 1981 (R. 49-51); September 3, 1982 (R. 418-19).

1400). The court denied the request (R. 1401). Despite discovery requests, the photographs taken by the medical examiner, the photographs taken at the prison, and the statements of prison inmates and employees were never provided to Mr. Muhammad. The court, moreover, did not conduct a Richardson hearing despite a showing of discovery violations. Richardson v. State, 246 So. 2d 771 (Fla. 1971).

Mr. Muhammad called another prison investigator as a witness. When Mr. Muhammad asked Mr. Crawford whether inmates were interviewed, the court refused to permit the question (R. 1410-11) although Mr. Muhammad pointed out that he had requested the statements in his demand for discovery (R. 1428-30). Prior to the trial, Mr. Muhammad had complained about not receiving discovery and in particular statements made by employees. The State made an unequivocal representation to the court that there were no statements by employees (SR Oct. 13, 1982). The State's representation to the court that there were no statements by employees was not true. The State was in possession of numerous statements by state employees. Furthermore, these statements contained a great deal of exculpatory information regarding Mr. Muhammad's mental state during the time period surrounding the offense.

At trial the State presented a false factual scenario that Mr. Muhammad refused to shave because of his religion. In fact this Court adopted this misstatement in the opinion on direct appeal: "His refusal to shave was apparently based on his perception of religious principle, and the murder may be viewed as his taking a stand on this principle." 494 So. 2d at 976. At an evidentiary hearing, Mr. Muhammad can show that in fact the reports suppressed by the State expose the truth that Mr. Muhammad told the correctional officer that he was unable to shave due to a skin condition. The suppressed transcripts of interviews also contain a statement from an inmate employee who warned the officers that their cruel and arbitrary treatment of Mr. Muhammad might result

in a violent outburst: "I told him I said, 'Man you fucking around like that, you gonna cause somebody to get hurt.'" Finally, the suppressed statements describe Mr. Muhammad immediately after the incident as "not knowing what happened," having a "blank expression," and "his eyes appeared to be stretched to an unusual size." The relevancy of these statements to the circumstances and motivation of the offense are more than obvious. They are also very relevant to Mr. Muhammad's mental state at the time of the offense. The jury, the trial judge and this Court were all misled as to the true circumstances and Mr. Muhammad's motivation. Finally the State failed to disclose prison records detailing Mr. Muhammad's mental health history. These records established a longstanding mental illness which had been previously treated with thorazine. These records were exculpatory and material.

As a result of the State's failure to comply with discovery, see Fla. R. Crim. P. 3.220, Mr. Muhammad was unable to use the withheld evidence in his defense. Mr. Muhammad was further denied his right to effectively cross-examine witnesses against him based on the photographs and statements. The trial court, without any appropriate hearing and deliberation, much less the mandated Richardson inquiry, simply overruled defense objections to the discovery violation and to the admission of the evidence. After the trial, the court then entered a nunc pro tunc order granting Mr. Muhammad's motion for discovery (R. 443).

The purpose of discovery rules is to help the accused prepare his case. Ivester v. State, 398 So. 2d 926 (Fla. 1st DCA 1981). Richardson v. State, 246 So. 2d at 775. If no Richardson inquiry is held after a discovery violation has been brought to the court's attention, relief is mandated. See Smith v. State, 500 So. 2d 125 (Fla. 1986). The failure to hold a Richardson hearing when required is per se reversible error. Richardson v. State; Zeigler v. State, 402 So. 2d 365 (Fla. 1981). Harmless error analysis does not apply, because:

> [t]he very purpose of a Richardson hearing ... is to determine if a violation is, in fact, harmless. One cannot determine whether the State's transgressions of the discovery rules has prejudiced the defendant (or has been harmless) without giving the defendant the opportunity to speak on the question.

Smith, 500 So. 2d at 126. The failure to hold a Richardson hearing itself controls, not the nature and extent of the discovery violation. No Richardson hearing occurred in Mr. Muhammad's case. Moreover, this claim is cognizable now because we now have evidence of what was withheld. This was not previously of record. This claim is properly presented pursuant to Rule 3.850 and requires an evidentiary hearing.

The suppression of exculpatory evidence was a violation of the constitutional principles articulated in Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. In Florida, claims arising under Brady v. Maryland or discovery violations are to be brought in Rule 3.850 proceedings. Roman v. State, 528 So. 2d 1169 (Fla. 1988). The trial court erred in summarily denying this claim, and that decision should be reversed and remanded for a hearing.

B. OTHER PROSECUTORIAL MISCONDUCT THROUGHOUT THE GUILT AND PENALTY PHASES OF TRIAL

Mr. Elwell's opening statement hammered home the picture of Richard James Burke, "law-abiding family man;" a correctional officer tragically murdered by a "cancer of society" (R. 984). This blatant appeal for sympathy and attempt to elicit an emotional response was clearly beyond the bounds of proper opening statement or closing argument. "While a prosecutor may strike hard blows, he is not at liberty to strike foul ones." Rosso.

In closing argument, Mr. Elwell said:

> If you are moved by emotion -- and thank God that people are -- a 48 year old correction officer just starting a new job for three months, a family man, losing his life is emotion enough.

(R. 1440).

This Court has defined the purpose of closing argument and clearly delineated what may not be done in Rosso, 505 So. 2d at 614:

> The proper exercise of closing argument is to review the evidence . . . it must not be used to inflame the mind and passion of the jurors so that their verdict reflects an emotional response.

The State not only violated Booth (see Argument XIV), but deliberately misrepresented to the court that there were no statements by prison employees and thereby violated basic discovery requests as recognized under Brady and the Florida Rules of Criminal Procedure. The State committed misconduct by failing to obtain the appearance of defense witnesses requested by Mr. Muhammad (See Argument VIII). The prosecutor breached his duty to seek substantial justice when he made a special effort to expedite his presentment to the grand jury in order to obtain a jury whose members were composed primarily of Department of Corrections personnel (See Argument XI). The prosecutor committed misconduct when he infringed upon the factfinder's function by insisting that the court assert it had considered nonstatutory as well as statutory mitigating circumstances after the court failed to consider nonstatutory mitigation, and was apparently unaware until that moment that it should do so (See Argument VIII).

The proceedings culminating in the conviction and imposition of a death sentence upon Mr. Muhammad were fundamentally unfair because critical stages of his trial were conducted before three different judges, two of whom recused themselves in the midst of the proceedings due to pressure exerted by the State. The record shows Judge Green's recusal was due to a calculated attempt by state prison officials to prejudice him against Mr. Muhammad and his counsel with unfounded allegations:

> You have the right to counsel and competent counsel. Mr. Knight, as far as it has been possible for this Court to do so, I have tried to accord you that right. There have been continuing interferences with the rights of your lawyers and the ability of your lawyers to communicate with you at the Florida State Prison. Those frustrations have been dealt with by this Court, directly and indirectly, to be

sure that you are able to talk to your lawyer.

As they say in the vernacular, there is no point whipping a dead horse, but I think perhaps the horse of interference against you, as far as seeing your lawyer, is finally dead. I don't think you have no more problem talking to your lawyer.

On the other hand, because, and I want to tell you this so that you won't read about it later, because of what has gone down this far in your case, because of what was told to me to be the situation concerning Miss Cary, because of my ex parte communications with Miss Cary about your case to the end of trying to assure that you receive and you do receive ultimate justice and substantial due process, I intend to step down from hearing your case further either way, but I intend to step down only after this hearing is completed and the issue of your counsel is finally resolved for I fear that, for me to abdicate responsibility and not to deal with that issue, would be unfair to my successor in your case.

I can't try your case because I am incensed over the frustration of your right to counsel this far; I can't try your case because I am incensed with what has been allegations made by persons in positions of authority concerning your relationship between you and Miss Cary. I can't be fair to the State of Florida in your case because of that.

It is strange, your case is a notorious case because of the person you are alleged to have killed and, yet, I am equally incensed by the conduct of the Department of Corrections about your case thus far, but that it neither here nor there; my being incensed to know doesn't change the fact that you have to go on trial in the near future for your life a second time, and you are going to need someone, I think, that has the ability because of where he lives and where he is and his ability to get the law books, and his knowledge, to defend you and help you in defending yourself.

(R. 1653-55). These improper allegations set into motion a chain of events ultimately culminating in Mr. Muhammad's election to represent himself. This is misconduct properly charged to the State. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984), citing Schneider v. Estelle, 552 F.2d 593, 595 (5th Cir. 1977); Smith v. Florida, 410 F.2d 1349, 1351 (5th Cir. 1969). Judge Green's

recusal was prejudicial to Mr. Muhammad.[20]

After Judge Green's recusal, Judge Carlisle was appointed to preside over the cause. Judge Carlisle determined Mr. Muhammad was competent to stand trial, but incompetent to waive counsel. Judge Carlisle entered an order of recusal on May 27, 1982, following a mistrial. See Muhammad v. State, 494 So. 2d 969, 972 (Fla. 1986). He did not state the basis for his recusal or the mistrial, nor do any reasons appear in the record. Collateral counsel has obtained newspaper accounts, however, which report that a mistrial was declared in Muhammad I when an article concerning Mr. Muhammad's 1974 conviction was found in the jury room. One can only speculate how such an article came to be in the jury room in the Bradford County Courthouse. A mistrial was fortuitous for the State: Judge Carlisle had denied Mr. Muhammad's motion to proceed pro se, and it was also to the State's advantage to obtain a new venire that would not be inclined to vent its frustrations against the State. The recusal of two judges, one of whom at least was recused directly as a result of acts of the State, prejudiced Mr. Muhammad. His trial thereafter became replete with conflicting orders from the bench.[21] An evidentiary hearing is required.

C. THE STATE'S ORCHESTRATION OF THE PRESENCE OF UNIFORMED DOC PERSONNEL

The State's influence on the impartiality of the proceedings is now evident in other ways. Bradford County is a small county, and the Department of

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[20]Having determined that Mr. Muhammad was not competent to waive counsel and proceed pro se, Judge Green also clearly stated sua sponte that Mr. Muhammad's competence to stand trial was then at issue (R. 64). Before Judge Green could resolve Muhammad's competency to stand trial, the State compelled his recusal, thus avoiding a determination by Judge Green adverse to the State on this issue. The record suggests that Judge Green was deeply troubled over this issue based on the evidence then before him. Under Rule 3.212, such a determination would have prevented prosecution until Mr. Muhammad's competency to stand trial was restored.

[21]a) Judge Green's order finding Mr. Muhammad incompetent to waive counsel was reversed by Judge Chance; b) Judge Carlisle's finding that Mr. Muhammad did not comprehend the right to proceed pro se under Faretta v. California was reversed by Judge Chance; and c) Judge Carlisle's and Judge Green's orders for the individual and sequestered voir dire were reversed by Judge Chance.

Corrections is the major employer. Virtually every prospective juror questioned in this case either had friends or relatives who had worked at the prisons,[22] or they had worked there themselves.[23] It is a "company town." There had been six homicides involving inmates within Florida State Prison that year, and no less than the Attorney General for the State of Florida attended the memorial services for officer Burke. Community feelings were especially tense, as evidenced by television coverage of the prison disturbances (PC videotapes). Publicity was overwhelming. And there was Judge Green's sealed appendix.

On November 4, 1982, Mr. Muhammad entered the Bradford County courtroom prepared to proceed before the jury with the penalty phase of his trial. As he entered the courtroom, he was overwhelmed by the enormity of the scene that unfolded before him. The courtroom, with seating for 80, had been packed with more than one hundred (100) uniformed correctional officers (PC 1154-58). Mr. Muhammad clearly indicated on the record that he was intimidated and overwhelmed by their presence, as he assumed the jury would be (R. 1522, 1524). Additionally, uniformed officers sat directly behind counsel table. The court took no action to assure orderly procedures complying with due process in the courtroom. One reporter's account termed the scene "ominous" and noted this was the second time during the trial that DOC officers had showed up en masse (PC 1154-58).

Mr. Muhammad, acting as his own counsel, requested that the State do something about it. The State did not. Defense counsel asked that the court do

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[22]See, e.g., R. 517, 519, 525, 526, 527, 542, 545, 551, 555, 577, 578, 583, 584, 589, 611, 618, 620, 666, 673, 720, 722, 723, 724, 731, 772, 777, 789, 790, 792, 801, 803, 828, 855, 865, 900, 910, 931, 932, 948, 949, 952, 956, 968.

[23]See, e.g., R. 534, 636, 709, 710, 711, 716, 718, 731, 732, 772, 773, 780, 804, 805, 813, 827, 873, 926, 927, 946.

something about it -- remove them. The court refused.[24] Mr. Muhammad insisted that the overwhelming presence of the Department of Corrections employees in the courtroom was affecting him and chilling his right to an impartial jury penalty recommendation (R. 1524). As a result of these coercive circumstances, the jury was "waived" (R. 1526).

The officers who packed the courtroom, attending court in uniform in contravention of their own regulations,[25] were acting intentionally and consciously to intimidate and influence the factfinders and to debilitate the defense. By failing to control these tactics, the court violated Mr. Muhammad's sixth, eighth and fourteenth amendment rights. Woods v. Dugger; Sheppard v. Maxwell, 384 U.S. 333 (1966); see also State v. Gens, 107 S.C. 448, 93 S.E. 139 (1917); State v. Franklin, 327 S.E.2d 449 (W.Va. 1985); United States v. Rios Ruiz, 579 F.2d 670 (1st Cir. 1978). The strategy was so effective that this mentally ill defendant was so overwhelmed that after his objections were disregarded, he actually gave up his right to a sentencing jury.

Department of Corrections Rules also prohibited correctional officers from carrying guns. However, during Mr. Muhammad's trial, uniformed correctional officers, armed with rifles or shotguns, "secured the perimeters" of the small courthouse. As would be proven at an evidentiary hearing, numerous correctional officers with guns were observed in the courthouse during trial. An evidentiary hearing is essential to this claim.

Moreover, as would also be proven at an evidentiary hearing, the jurors -- arriving in the morning, leaving in the evening, being escorted through the

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[24]Under Norris v. Risley, 918 F.2d 828 (9th Cir. 1990), such an obvious presence violates the presumption of innocence and the right of confrontation. The court's refusal to act was error which can properly be presented in collateral proceedings where evidence of the "ominous" presence can be established and presented.

[25]Department of Corrections Rule 33-4.07.

grounds at lunch time -- were exposed to this highly charged and unduly prejudicial atmosphere. The jurors had to walk directly through the uniformed, armed officers when entering the courtroom. The record in this case is rife with futile attempts by Mr. Muhammad to keep the jurors insulated from the overbearing presence of the uniformed officers. Those attempts, however, illustrate and emphasize the unacceptable risk of the jurors' having been affected by their presence. As could be shown at an evidentiary hearing, because of the unique size and layout of the courthouse, harm had occurred. The presence of the armed and uniformed state officers was a deliberate and successful attempt to intimidate the defendant and to improperly influence the course of the trial.

This Court has addressed the influence of uniformed correctional employees on the defendant's right to an impartial jury in Woods v. State, 490 So. 2d 24 (Fla. 1986). There, Justice Shaw, dissenting, eloquently pointed out the unique problems of homicide trials in neighboring Union County where the victim was also a corrections officer, as in Mr. Muhammad's case:

> I would reverse the conviction on the basis that the presence of approximately forty-five corrections officers in uniform, approximately half the public in attendance during closing argument to the jury, effectively denied appellant a fair trial. The state concedes that this court has already recognized that Union County is a small county and that many of the citizens of that county either work for the Department of Corrections or are related to such workers. Lusk v. State, 446 So.2d 1038 (Fla.), cert. denied, ___ U.S. ___, 105 S.Ct. 229, 83 L.Ed.2d 158 (1984), and Morgan v. State, 415 So.2d 6 (Fla.), cert. denied, 456 U.S. 1055, 103 S.Ct. 473, 74 L.Ed.2d 62 (1982).
>
> Appellant does not argue that the presence of uniformed corrections officers amounts to per se reversible error. His argument is that under the unique circumstances of this case, the presence of such a large number of uniformed officers at the most emotionally charged stage of the trial amounted to an abuse of judicial discretion. I agree.
>
> An accused is entitled to a trial before an impartial jury unaffected by outside forces and influences. The presence of forty-five uniformed corrections officer is, in my mind, no less prejudicial than the presence of forty-five friends of a murder victim appearing en masse at the trial of the accused assailant, bearing

> signs expressing their concerns regarding the outcome of the trial. Exhibitions of this nature have no place in a court of law because of the great possibility of jury intimidation or coercion. Having denied appellant's motion for a change of venue, the trial court assumed the heavy burden of ensuring that the fairness of the trial was not compromised by the venue and the deep public interest in the trial. I am persuaded that the trial judge abused his discretion in not requiring the removal of the uniformed corrections officers, and that in the interest of justice a new trial should be granted.

490 So. 2d at 28 (Shaw, J., dissenting)(emphasis added). See also Woods v. Florida, 107 S. Ct. 446, 447 (1986)(Blackmun, J., and Brennan, J., dissenting from denial of petition for writ of certiorari). The Eleventh Circuit has now reversed the Woods case for a new trial on precisely the same issue. Woods v. Dugger.

Although the overwhelming presence of DOC correctional officers in uniform is intimidating and prejudicial in any case, it was particularly so where a mentally ill defendant, who knew he was about to be sentenced to death, was attempting to conduct his own defense. Even seasoned trial counsel would be overwhelmed and intimidated under such ominous circumstances. Mr. Muhammad panicked, and asked to dismiss the jury because of the prejudicial influence. He indicated to the court that this was due to the effect of the mob strategy. Thus the prejudice of the judge's failure to protect Mr. Muhammad's rights was the sacrifice of his right to a jury. Due process is violated where a defendant is presented with Hobson's choice of which right to sacrifice.

The Supreme Court provided the analytical framework in Sheppard v. Maxwell, 384 U.S. 333 (1966), where Sheppard's conviction for murder was reversed because the trial court had not fulfilled its duty to protect Sheppard from the inherently prejudicial publicity which saturated the community, and did not control the disruptive influences in the courtroom. In Cox v. Louisiana, 379 U.S. 559 (1965), the Supreme Court explained that a trial court can restrict conduct which has free speech components in order to afford a litigant a fair trial. In that case, the Court upheld the facial constitutionality of a state

statute prohibiting picketing in or near courthouses. In justifying the statute as applied, the court said:

> It is, of course, true that most judges will be influenced only by what they see and hear in court. However, judges are human; and the legislature has the right to recognize the danger that some judges, jurors, and other court officials, will be consciously or unconsciously influenced by demonstrations in or near their courtrooms both prior to and at the time of the trial. A State may also properly protect the judicial process from being misjudged in the minds of the public. Suppose demonstrators paraded and picketed for weeks with signs asking that indictments be dismissed, and that a judge, completely uninfluenced by these demonstrations, dismissed the indictments. A State may protect against the possibility of a conclusion by the public under these circumstances that the judge's action was in part a product of intimidation and did not flow only from the fair and orderly working of the judicial process. See S. Rep. No. 732, 81st Cong, 1st Sess, 4.

379 U.S. at 565. See also Estes v. Texas, 351 U.S. 532 (1965)(the public's right to access to a criminal trial does not overcome the accused's right to be fairly tried). Estes is especially instructive in a case such as this.

This claim should also be analyzed in light of Holbrook v. Flynn, 475 U.S. 560 (1986). As the Supreme Court in Holbrook observed:

> The Court of Appeals was correct to find that Justice Giannini's assessment of jurors' states of mind cannot be dispositive here. If "a procedure employed by the State involves such a probability that prejudice will result that it is deemed inherently lacking in due process," Estes v. Texas, 381 U.S. 532, 542-543 (1965), little stock need be placed in jurors' claims to the contrary. See Sheppard v. Maxwell, 384 U.S. 333, 351-352 (1966); Irvin v. Dowd, 366 U.S. 717, 728 (1961). Even though a practice may be inherently prejudicial, jurors will not necessarily be fully conscious of the effect it will have on their attitude toward the accused. This will be especially true when jurors are questioned at the very beginning of proceedings; at that point, they can only speculate on how they will feel after being exposed to a practice daily over the course of a long trial. Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated but rather whether "an unacceptable risk is presented of impermissible factors coming into play," Estelle v. Williams, 425 U.S. 501, 525 (1976).

475 U.S. at 571.

Although the Court in Holbrook found that the presence of four uniformed state troopers in the courtroom was not so inherently prejudicial as to deny the

petitioner a fair trial, the Court also observed:

> We do not minimize the threat that a room full of uniformed armed policemen might pose to defendant's chances of receiving a fair trial.

Holbrook, 475 U.S. at 572. Here, the courtroom was overflowing with uniformed state officers. Moreover, this pro se defendant was so imtimidated by the overwhelming show of force by uniformed state officers that he told the court he was overwhelmed by this and that he was dismissing the jury due to their presence and undue influence on the proceedings (R. 1522, 1524).

At an evidentiary hearing, Mr. Muhammad would show that in a community almost completely dominated by the Department of Corrections and inflamed by overwhelming publicity regarding officer Burke's death, the undue influence of a uniformed mob deprived Mr. Muhammad of his right to a fair and impartial trial. The effect was totally devastating to a mentally ill man trying to conduct his own defense.

Prejudicial misconduct at Mr. Muhammad's trial was rampant and was not controlled by the court. Mr. Muhammad was deprived of the basic elements of due process, an impartial tribunal, an opportunity to be heard, an impartial factfinder, a reasoned defense, and a sentencing jury contrary to the fifth, sixth, eighth, and fourteenth amendments. The results of this proceeding are not reliable. Summary denial of this claim was erroneous, and this Court should reverse and remand for an evidentiary hearing in order to present non-record evidence regarding these matters.

ARGUMENT X

> THE TRIAL COURT'S FAILURE TO GRANT MR. MUHAMMAD'S MOTIONS FOR CHANGE OF VENUE AND FOR INDIVIDUAL, SEQUESTERED VOIR DIRE DEPRIVED HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A defendant in a criminal case is entitled to a fair trial by an impartial jury which will render its verdict based on the evidence and argument presented in Court without being influenced by outside sources of information. See Irvin

v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Groppi v. Wisconsin, 400 U.S. 505 (1971); Taylor v. Kentucky, 436 U.S. 478 (1978); Isaacs v. Kemp, 778 F.2d 1482 (11th Cir. 1986); Coleman v. Kemp, 778 F.2d 1478 (11th Cir. 1986).

Mr. Muhammad was deprived of his right to an impartial jury when the trial judge denied his motions for change of venue and for individual voir dire, despite the existence of overwhelmingly extensive pretrial publicity and despite the extent of the venire's prejudicial exposure to the facts of the alleged offense. The substantial prejudice to Mr. Muhammad resulting from the community's exposure to the case can be shown at an evidentiary hearing which would document the extent of the publicity and its effect on the trial. These issues were preserved by specific, timely motions and objections presented to the trial court by Mr. Muhammad's counsel and by Mr. Muhammad acting as his own counsel. Mr. Mr. Muhammad urges that the Court grant an evidentiary hearing and correct the substantial errors which form the basis of this claim. This issue was not raised on appeal because the record was incomplete. The failure to raise this issue was the prejudice resulting from a violation of Entsminger v. Iowa, 386 U.S. 748 (1967).

Virtually every member of the venire had been exposed to pretrial publicity. However, the record of the mistrial proceedings was never prepared and never put before the Court on direct appeal. As a consequence, defense counsel's motions, juror responses, and other matters reflected in the mistrial record which demonstrate the extreme level of prejudicial pretrial publicity were not made part of the record on appeal before this Court.

The pervasive pretrial publicity relating to the offense and arrest combined with the small, close-knit nature of the community, resulted in an atmosphere in which it was virtually impossible to obtain a jury untainted by prejudicial extra-judicial information or influences. See Manning v. State, 378

So. 2d 274 (Fla. 1979). That Mr. Muhammad had already been tried for the offense in proceedings that ended in a mistrial just three months previously made the impossibility of securing an impartial and untainted jury upon re-trial even more obvious. A mistrial was declared because a news article about the case was actually found inside the jury room. The renewal of media publicity prompted by the second trial removed any possibility that the passage of time between the offense and the instant trial created "a sufficient change in the nature or amount of the publicity to conclude that 'the feelings of revulsion that create prejudice have passed.'" Coleman v. Kemp, 778 F.2d at 1541, citing Patton v. Yount, 467 U.S. 1025 (1984).

Where, as here, pretrial publicity is "sufficiently prejudicial and inflammatory" and "saturat[es] the community where the trial [is] held," prejudice is presumed. See Woods v. Dugger; Rideau, 373 U.S. at 726-27; Murphy v. Florida, 421 U.S. 794, 798-99 (1975). Although Mr. Muhammad is therefore not required to demonstrate actual prejudice, Rideau; Murphy, he undeniably can demonstrate substantial prejudice in this case (See, e.g., R. 950, 952, 954, 968). Cf. Coleman v. Zant, 708 F.2d 541, 544 (11th Cir. 1983). Under such circumstances, due process requires the trial court to grant a change of venue, see Rideau, 373 U.S. at 726, or, at a minimum, individual and sequestered voir dire. Here, the trial court did neither. The errors were timely preserved before the lower court. However, the incomplete record prevented the issue from being raised on direct appeal. The proceedings resulting in Mr. Muhammad's conviction and death sentence violated the fifth, sixth, eighth, and fourteenth amendments, and Mr. Muhammad was entitled to the relief he sought. The summary denial of his claims was erroneous, and this Court should reverse and remand for an evidentiary hearing. Thereafter, Mr. Muhammad should be able to present the underlying issue to this Court as if on direct appeal.

ARGUMENT XI

MR. MUHAMMAD WAS INDICTED BY A BIASED GRAND JURY, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The offense with which Mr. Muhammad was charged was the homicide of a correctional officer at Florida State Prison, Bradford County, Florida. Two days later the grand jury requested that the case be expedited. Four days after the offense occurred, the Bradford County grand jury returned an indictment charging Mr. Muhammad with first degree murder (R. 1605). As defense counsel noted in a later hearing, the State had a "special interest . . . in the forwarding of this cause. . . ." Subsequently it is determined that the grand jury consisted largely of DOC employees, relatives, and a wife of a circuit judge. Before Mr. Muhammad's arraignment, initial defense counsel filed several motions challenging the composition and proceedings of the grand jury, including a Motion to Produce the Records Pertaining to the Composition and Appointment of Foreman of the Bradford County Grand Jury (R. 24), a Motion to Voir Dire Grand Jurors (R. 26), and a Motion to Compel the Production of Testimony Before the Grand Jury (R. 29). At arraignment, the trial court noted that the motions had been timely filed (R. 1613), and ordered that they be set for hearing (R. 1603). That hearing was not held, and the motions were denied July 7, 1981, nunc pro tunc as of June 2, 1981. Subsequent defense counsel filed a Motion to Abate the indictment on March 27, 1981 (R. 226). The grounds for that motion are detailed at R. 226-28. No hearing was apparently held on this motion either, and it too was denied July 7, 1981, nunc pro tunc as of June 2, 1981. Because the record was not complete, this issue was not raised on appeal. An evidentiary hearing is required to establish the circumstances of misconduct by the grand jury and the State.

Fundamental fairness requires that an indictment be issued by a legally constituted and unbiased grand jury. Costello v. United States, 350 U.S. 359

(1956). A grand jury composed of Department of Corrections employees and relatives of corrections employees can hardly be considered an unbiased judge of charges regarding the homicide of a corrections officer. Presentation of Mr. Muhammad's case to the grand jury described above violated his fifth and fourteenth amendment rights.

If a prosecutor improperly influences the grand jury, an indictment may be dismissed. See, e.g., United States v. DeRosa, 783 F.2d 1401 (9th Cir. 1986); In re Kiefaber, 774 F.2d 969 (9th Cir. 1985); Silverthorne v. United States, 400 F.2d 627 (9th Cir. 1968). Here, the State, at the request of the grand jury, rushed Mr. Muhammad's case before a biased grand jury motivated by its "special interest . . . in the forwarding of this cause."

As a result of the State's actions and the trial court's denial of Mr. Muhammad's motions challenging the grand jury and the indictment, Mr. Muhammad was denied his fifth, sixth, eighth and fourteenth amendment rights. An evidentiary hearing and Rule 3.850 relief are proper in order to complete the record and allow this issue to be presented to this Court as on direct appeal.

ARGUMENT XII

THE TRIAL COURT ERRED BY FAILING TO CONSIDER MR MUHAMMAD'S MENTAL DEFICIENCIES AS NONSTATUTORY MITIGATING CIRCUMSTANCES AND ERRED IN CONSIDERING NONSTATUTORY AGGRAVATING FACTORS, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A. THE FAILURE TO CONSIDER NONSTATUTORY MITIGATION

In its sentencing order dated January 20, 1983, the court wrote:

> As directed by Florida statute 921.141, the Court has weighed and applied the total evidence received to the legislatively mandated criteria of aggravating and mitigating circumstances.

(R. 455)(emphasis added).

The court made no reference to the judicially mandated requirement that the court consider all aspects of the defendant's character. Lockett v. Ohio, 438 U.S. 586 (1978). The court, having tracked the statutory aggravating

circumstances, Fla. Stat. sec. 921.141(5)(a) to (i) (as in effect in 1982) (R. 455-59), then undertook to track the statutory mitigating circumstances, Fla. Stat. sec. 921.141(6)(a) to (g) (R. 459-461). Absent is any consideration of nonstatutory mitigating circumstances (R. 461). The court's lack of awareness that nonstatutory mitigation is to be considered, and the court's failure to actually consider the wealth of nonstatutory mitigation available throughout the proceedings (motions and hearings concerning insanity, competence, the appointment of experts and reports to be discussed below), is illuminated by the court's statements during sentencing, which occurred the same date the judgement and sentence order was filed:

> The defendant having not offerred [sic] any evidence with regard to mitigation, the court ordered a pre-sentence investigation and reviewed that at great length. The court finds that there are no statutory mitigating circumstances.

(R. 1585)(emphasis added). The court then sentenced Mr. Muhammad to death (R. 1585), advised him of his right to automatic review by the Supreme Court of Florida, and made the statement, "we need the defendant fingerprinted" (R. 1586). Sentencing was then complete.

After sentencing was completed, the State then requested an ex parte bench conference without Mr. Muhammad or the court reporter present. Only the court and the prosecutors took part in the conference (R. 1586). Collateral counsel has now documented this conference as recorded in a videotape of the proceeding. Upon conclusion of the unrecorded conference, the Court made the following statement, which itself demonstrates the judge had not actually considered nonstatutory mitigation and that it was unaware it could and should consider such mitigation:

> For the record, the state attorney's office indicates that although there are statutory mitigating circumstances, the court also can consider other outside mitigating circumstances. The court finds no other outside mitigating circumstances.

(R. 1586)(emphasis added). The court then also noted it had already prepared

its nine page order of judgment and sentence (R. 1586). This after-the-fact statement is not an adequate showing that the court, upon due deliberation, actually weighed and considered nonstatutory mitigating circumstances. The record in its totality is complete with nonstatutory mitigation which the court did not consider. See, e.g., R. 669-672. This violated Parker v. Dugger, 111 S. Ct. ___ (Jan. 22, 1991).

Two months earlier, Mr. Muhammad requested the court to grant him life (R. 1572). He did not request death, and he did not waive his right to have the court consider nonstatutory mitigation. At the close of penalty phase, the Court had Mr. Muhammad removed from the courtroom and proceeded to tell the State in Mr. Muhammad's absence that he:

> [F]ound that the defendant has elected not to present any evidence of testimony with regard to any mitigating circumstances. I have searched my mind and the record to find, during the course of the proceeding that I cannot find that there are any mitigating circumstances.
>
> I have listened to the defendant's argument through today and find that he has failed to mention, during his argument, any mitigating circumstances in this matter.
>
> On the other hand, I believe that the Court's responsibility in a matter like this is a grave one and a responsibility that cannot be hastily entered into.
>
> As a result, I have requested a presentence investigation to be independently prepared for the Court to review to determine where there exists any basis for any mitigating circumstances in this case.
>
> At the conclusion of the presentence investigation and the filing to this Court, I will schedule a sentencing proceeding.

(R. 1573)(emphasis added). The court was not searching for nonstatutory mitigating circumstances when it referred to "searching" the record for mitigation. To the contrary, the record contained, inter alia, a Motion for Appointment of Psychiatric Expert to Aid Defense filed by defense counsel on October 20, 1980, in which it was stated that: (1) a clinical psychologist and a psychiatrist reported that Mr. Muhammad suffers major psychiatric illness; (2)

that Mr. Muhammad was previously committed to Northeast Florida State Hospital as mentally incompetent; (3) that an insanity defense was raised at Mr. Muhammad's trial in 1975; (4) and that of the four experts who examined him, one found that Mr. Muhammad was legally insane at the time of the crime while the other three found that he suffered from mental illness but did not meet the M'Naughton test for insanity (R. 13-14). A Statement of Particulars of Defense of Insanity filed May 6, 1981, related that Mr. Muhammad had been diagnosed as suffering from a mental disease known as "schizophreniform," a form of paranoid schizophrenia (R. 253-54). Judge Chance, the third judge on the case, was supplied with a report by Dr. Amin in relation to Mr. Muhammad's competence to stand trial (R. 369). His report to Judge Chance contained the following:

> This was approximately the fifth interview with Mr. Askari since December of 1979. In past interviews, I have indicated that Mr. Askari has been suffering for many years from a schizophreniform illness. For many years Mr. Askari has been a latent schizophrenic, complete with hospitalizations, who could and did decompensate under extreme environmental stress and/or the toxic effect of drugs.

(R. 369)(emphasis added).

On January 21, 1981, Judge Green specifically noted:

> "The Court is faced with an obviously intelligent man who exhibits symptoms consistent with extreme paranoia."

(R. 63)(emphasis added).

On May 27, 1981, the State took the deposition of Dr. Amin, the doctor upon whom Judge Chance relied in holding Mr. Muhammad competent to waive his rights to counsel. This deposition was filed on May 10, 1982, two days before the doctor was ordered by Judge Chance to determine Mr. Muhammad's competence. The deposition is replete with nonstatutory mitigation. Thus, the court had access to multiple sources evidencing severe mental illness which should have been considered in mitigation.

In his sentencing order the trial judge looked only for statutory mitigating circumstances. Any consideration the trial court may have given Mr.

Muhammad's obvious and extensive mental deficiencies were restricted to a determination of whether the deficiencies rose to the level of statutory mitigating circumstances. The court found that this level of proof was not obtained, and so rejected all mental deficiency mitigating evidence. Where the record contained unrebutted evidence of a lengthy history of severe mental illness, it is error to fail to consider such nonstatutory mitigation.

In regard to Hitchcock/Lockett violations, the Supreme Court's pronouncements in Hitchcock v. Dugger, 481 U.S. 393 (1987), fundamentally changed the analysis applied by the Eleventh Circuit, the Federal District Courts, and this Court to eighth amendment issues of this sort.[26] Similarly Parker v. Dugger overrules this Court's historical refusal to review a lower court's ruling as to mitigation.

In Lockett v. Ohio, 438 U.S. 586 (1978), the Court held that "the sentencer [must] not be precluded from considering, as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Id. at 604 (emphasis in original). The Supreme Court has reaffirmed Lockett. See, e.g., Skipper. In Hitchcock v. Dugger, the Supreme Court stated that "the exclusion of [nonstatutory] mitigating evidence . . . renders the death sentence invalid." 481 U.S. at 400 (emphasis added). A defendant is entitled to relief

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[26]See Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987); Stone v. Dugger, 837 F.2d 1477 (11th Cir. 1988); Hargrave v. Dugger, 832 F.2d 1528 (11th Cir. 1988); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1988); Messer v. Florida, 834 F.2d 890 (11th Cir. 1988); Ruffin v. Dugger, 848 F.2d 1512 (11th Cir. 1988); Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988); Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1988); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987). See also Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Valle v. State, 502 So. 2d 1255 (Fla. 1987).

if Hitchcock error occurs either before a Florida sentencing jury or a sentencing judge. Messer v. Florida, 834 F.2d at 892.[27]

B. THE ERRONEOUS CONSIDERATION OF NONSTATUTORY AGGRAVATING CIRCUMSTANCES FOUND IN A PSI WHICH WAS NEVER SHOWN TO THE DEFENSE[28]

The introduction of nonstatutory aggravating factors during the sentencing phase of Mr. Muhammad's trial resulted in an unlawful imposition of the death penalty in violation of the eighth and fourteenth amendments of the United States Constitution. Aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979). This Court, in Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) stated:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

(Emphasis added). See also Proffitt v. Florida, 428 U.S. 242, 258 (1976); Miller v. State; Riley v. State, 366 So. 2d 19 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988).

The State improperly argued that Mr. Muhammad showed no remorse by arguing that Mr. Muhammad had shown an indifference to human life:

> What about his conduct and his attitude at the time that this was going on? There is nothing to reflect that he was remorseful, crying, overreactive, underreactive. He was, according to those that know him the best and according to the questions that he asked, pretty much the

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[27]See also Hitchcock v. Dugger; Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio; Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985)(en banc). This principle applies both to the Florida sentencing jury and the sentencing judge. Riley v. Wainwright; see also Magill v. Dugger.

[28]This was a violation of Gardner v. Florida, 430 U.S. 349 (1977), and is cognizable in 3.850 proceedings.

> same as he always is. Probably the reason why it was just another time to kill another person. That's three now.
>
> His remorse, I guess, can be characterized in the statement that he later made that was heard clearly by medical technician, MacCauley, "Good, I hope the mother fucker is dead."

This Court has specifically barred the use of lack of remorse as evidence of an aggravating circumstance in Robinson v. State, 520 So. 2d 1, 6 (Fla. 1988). See also Trawick v. State, 473 So. 2d 1235 (Fla. 1982); Jackson v. Wainwright, 421 So. 2d 1385, 1388 (Fla. 1982); Quince v. State, 414 So. 2d 185 (Fla. 1982).

The State improperly argued an additional nonstatutory aggravating circumstance when the prosecutor urged that a death sentence should be imposed to promote deterrence (R. 1555). See Teffeteller v. State, 439 So. 2d 840 (Fla. 1983); Tucker v. Kemp, 762 F.2d 1480, 1508 (11th Cir. 1985)(en banc); Hance v. Zant, 696 F.2d 940 (11th Cir. 1983). The State improperly argued the nonstatutory aggravating circumstance that the sentence imposed on Mr. Muhammad would be subject to review by a higher authority and that the state and federal appellate process would permit a higher tribunal to determine whether Mr. Muhammad lives or dies (R. 1554-55).

Additional nonstatutory aggravating circumstances were contained in the presentence investigation report, which the trial court considered before imposing sentence (R. 1573). The PSI report was not in the record on direct appeal but the trial court used the PSI in forming the basis for discharging the mandatory weighing process of aggravating and mitigating factors. The defendant has now filed what his counsel believes to be the PSI report (PC 1093-99)

considered by the trial court.[29] When a PSI is submitted to the trial judge and considered by him, both a defendant and his counsel are entitled to review, and rebut or deny the information contained therein. Gardner v. Florida, 430 U.S. 349 (1977). Mr. Muhammad, acting as his own counsel, had no opportunity to explain, rebut or deny the information contained in the report. This error violates the standards set out in Gardner. This claim is cognizible now in Rule 3.850 proceedings.

The PSI report, which was a significant basis for the trial court's death sentence, is replete with references to nonstatutory aggravation of future dangerousness. The presentation and consideration of future dangerousness is an unconstitutional consideration of nonstatutory aggravation. Skipper v. South Carolina.

The Supreme Court outlined the constitutional ramifications of this violation:

> The relevance of evidence of probable future conduct in prison as a factor in aggravation or mitigation of an offense is underscored in this particular case by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison. Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of Lockett and Eddings that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430 U.S. 349, 362, 97 S. Ct. 1197, 1207, 51 L.Ed.2d 393 (1977).

Skipper, 476 U.S. at 6 n.1. Skipper held that resentencing was proper when the petitioner was not given the opportunity to rebut the state's evidence of future dangerousness:

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[29]Counsel has no way of knowing, however, without a hearing before the trial court, whether this is the PSI report considered by the trial court or whether any other documents were attached to the PSI report. At an evidentiary hearing Mr. Muhammad would move to supplement the record to include the PSI that formed a part of the trial court's conclusions, and request evidentiary resolution of the question of whether the full PSI report has yet been disclosed.

> The prosecutor himself, in closing argument, made much of the dangers petitioner would pose if sentenced to prison, and went so far as to assert that petitioner could be expected to rape other inmates.
>
> * * *
>
> The resulting death sentence cannot stand, although the State is of course not precluded from again seeking to impose the death sentence, provided that it does so through a new sentencing hearing at which petitioner is permitted to present any and all relevant mitigating evidence that is available. Eddings, 455 U.S. at 117, 102 S. Ct. at 878.

Skipper, 476 U.S. at 9.

The presentence investigation report also included other nonstatutory aggravation: lack of remorse (p.6, section VII, p. 5 section IV); community sentiments that death was appropriate (p. 6, section VII); uncharged crimes (p. 6, section VII; p. 4, section II (D); p. 3, section II (B); p. 3, section II (D)); and unexplained reports about defendant's adjustment to prison life (p. 3, section II (c)). The use of such nonstatutory aggravation by the sentencer to sentence Mr. Muhammad to death violated the standards of Booth v. Maryland, 107 S. Ct. 2529 (1987).

The introduction of evidence of lack of remorse, argument based upon that evidence, and reliance by the sentencer on such evidence was clear Eighth Amendment error. Mr. Muhammad's sentence of death should be vacated on the basis of Robinson v State, 520 So. 2d 1 (Fla. 1988). The prosecutor's introduction and use of, and the sentencers' reliance on, wholly improper and unconstitutional nonstatutory aggravating factors violated the eighth and fourteenth amendments, see Elledge v. State, 346 So. 2d at 1002-03; Barclay v. Florida, 463 U.S. 939, 955 (1983), and should not be allowed to stand.

The imposition of the death sentence violated the constitutional mandates of Hitchcock v. Dugger, Gardner v. Florida, Lockett v. Ohio, and Skipper v. South Carolina. The sentencer in Mr. Muhammad's case committed fundamental constitutional error. These claims were before the lower court on their merits,

see Armstrong v. Dugger; Messer v. Florida; Stone v. Dugger, and, especially considering the absence of the PSI report in the record on direct appeal, the merits of each claim called for relief in the lower court.

The trial court erred in summarily denying relief, and the judgment should be reversed and the case remanded by this Court for an evidentiary hearing on each claim.

ARGUMENT XIII

THE TRIAL COURT UNCONSTITUTIONALLY SHIFTED THE BURDEN OF PROOF WITH REGARD TO THE APPROPRIATENESS OF A SENTENCE OF LIFE IMPRISONMENT TO MR. MUHAMMAD, IN VIOLATION OF HIS FOURTEENTH AMENDMENT RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This Court held that "the state must establish the existence of one or more aggravating circumstances before the death penalty can be imposed," and that a sentence of death can be imposed only "if the state shows [that] the aggravating circumstances outweigh the mitigating circumstances." Arango v. State, 411 So. 2d 172, 174 (Fla. 1982); accord, State v. Dixon, 283 So. 2d 1 (Fla. 1973). This Court has stated that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with Dixon.

In its sentencing order, after enumerating the statutory aggravating circumstances and finding that three applied to Mr. Muhammad's case, the trial court then unequivocally shifted the burden to Mr. Muhammad to prove that life was the appropriate sentence:

> Having found that three aggravating circumstances exist, it becomes necessary to determine if sufficient mitigating circumstances exist to outweigh the aggravating circumstances.

(R. 459)(emphasis added). After weighing the statutory mitigating circumstances, the court imposed death (R. 462).

A capital sentencing judge must require:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Muhammad's capital proceedings. To the contrary, the burden was shifted to Mr. Muhammad on the question of whether he should live or die. In requiring Mr. Muhammad to show that mitigating circumstances outweighed the aggravating, the court injected misleading and irrelevant factors into the sentencing determination, thus violated Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

Under Hitchcock, Florida courts must folow eighth amendment principles. Hitchcock constituted a change in law in this regard. Under Hitchcock and its progeny, an objection, in fact, was not necessary. Mr. Muhammad's sentencing of death is neither "reliable" nor "individualized." This error undermined the reliability of the sentencing determination and prevented the judge from assessing the full panoply of mitigation presented by Mr. Muhammad. For each of the reasons discussed above the Court must vacate Mr. Muhammad's unconstitutional sentence of death.

ARGUMENT XIV

MR. MUHAMMAD'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY IMPROPER CONSIDERATION OF THE VICTIM'S CHARACTER AND VICTIM IMPACT INFORMATION.

Throughout this trial, the ultimate sentencer was subjected to sympathetic information about the victim's character, his home life, and his "tragedy". More often than not, the prosecutor dispensed with subtlety and used blatant, improper comments that never should have gone to the capital sentencer. The

State made no secret of the fact that it intended to make the victim's character a part of its prosecution of Askari Muhammad. Collateral counsel as discovered that as early as March 17, 1982, the prosecutor wrote to then Inspector Turner, actively soliciting victim impact information.

> I need the following matters:
>
> . . . 2) I need you to secure as much background information as you can about Officer Burke and his family life such salient facts as number of children he had, how long he was married, and other notable things about his church affiliations, his civic responsibilities or anything I can understand about him so I can project him although victimize as something in someone understandable before the jury. It is very important . . .

(emphasis added).

Victim impact information was presented to the jury and the sentencing judge through evidence and argument (R. 982, 984, 986, 988, 989, 991, 996, 1440, 1444-48, 1477-78). It was also presented in an undisclosed, ex parte PSI.

In Booth v. Maryland, 482 U.S. 496 (1987), the Court requires the exclusion of evidence of the opinions of the victim's family members as to the appropriate sentence in a capital case. It violated the well established principle that the discretion to impose the death penalty must be 'suitably directed and limited so as to minimize the risks of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976)(joing opinion of Stewart, Powell, and Stevens, JJ.); California v. Ramos, 463 U.S. 992, 999 (1983). The sentencing determination should turn on the "character of the individual and the circumstances of the crime." Zant v. Stephens, 462 U.S. 862, 879 (1983)(emphasis in original). See also Eddings v. Oklahoma, 455 U.S. at 112; Emnund v. Florida, 458 U.S. 782 (1982). In South Carolina v. Gathers, 109 S. Ct. 2207 (1989), the court vacated the death sentence there based on admissible evidence introduced during the guilt-innocence phase of the trial from which the prosecutor fashioned a victim impact statement during closing penalty phase argument. Booth and Gathers mandate reversal where the sentencer is

contaminated by victim impact evidence or argument. This is precisely what occurred in Mr. Muhammad's trial. Here, the proceedings violated Booth and Gathers, thus calling into question the reliability of Mr. Muhammad's penalty phase. The State's evidence and argument was a deliberate effort to invoke "an unguided emotional response" in violation of the eighth amendment. Penry v. Lynaugh, 109 S. Ct. 2934, 2952 (1989).

The lower court denied this claim stating:

> It is evident on the fact of the defendant's motion that what he objects to are remarks made on the prosecutor in various arguments to the court, not to a sentencing jury.

(PC 1381).

However, a Booth claim is applicable to the court as sentencer as well as the jury. Booth is new law as this court has stated in Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989) and the error is cognizable at this time. Moreover, much of the error occurred in an ex parte PSI to which no objection could be registered. The lower court erred in denying relief.

ARGUMENT XV

THE "HEINOUS, ATROCIOUS AND CRUEL" AGGRAVATING CIRCUMSTANCE WAS APPLIED TO PETITIONER'S CASE WITHOUT ARTICULATION OR APPLICATION OF A MEANINGFUL NARROWING PRINCIPLE, IN VIOLATION OF MAYNARD V. CARTWRIGHT AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Muhammad was sentenced to death based on a finding that the murder was "heinous, atrocious and cruel." Such an aggravating circumstance is impermissible under the eighth and fourteenth amendments unless the sentencer is provided with and the courts articulate and apply a "narrowing principle" which goes beyond merely reciting the specific facts that may support the finding of such an aggravating circumstance in the particular case. Maynard v. Cartwright, 108 S. Ct. 1853 (1988). No court in this case articulated and applied a "narrowing principle" to the "heinous, atrocious and cruel" aggravating circumstance. In Maynard v. Cartwright, 108 S. Ct. at 1859, the Supreme Court

held that the narrowing construction could not be fulfilled by a mere recitation of the evidence which supported the finding of that aggravating circumstance. This is, however, what occurred here. Furthermore, the factual circumstances of a quick stabbing, unanticipated by the victim do not support a finding of a heinous, atrocious and cruel aggravating factor.

Relief was therefore appropriate. The trial court erred in summarily denying relief, and this Court should reverse and grant a hearing.

CONCLUSION

For each of the foregoing reasons, the summary denial of each of Mr. Muhammad's Rule 3.850 claims was erroneous, and this Court should reverse and remand the case for an evidentiary hearing on the claims.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Fariba Komeily, Assistant Attorney General, Ruth Bryan Owen Rhode Building, Dade County Regional Service Center, 401 N.W. Second Avenue, Suite 921N, Miami, Florida 33128, this 6th day of February, 1991.

Attorney