IN THE SUPREME COURT OF FLORIDA

CASE NO. 75,598

HARRY PHILLIPS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Phillips' motion to vacate judgment and sentence filed pursuant to Fla. R. Crim. P. 3.850. A rubstantial amended motion and memorandum were filed below and accepted by the trial court as pleadings supplanting the original 3.850 motion. A motion for summary judgment was also filed by Mr. Phillips (consolidated with his answer to the State's motion to limit the 3.850 hearing). This pleading is not contained in the current record on appeal, apparently because of an error by the circuit court clerk. By stipulation of the parties it is baing separately filed on this appeal and is included in the motion to supplement the record.

The Appendix to the 3.850 motion (introduced among the exhibits at the hearing) is cited as "App. ___" with the appropriate page number following thereafter. Certain volumee of the appendix were also inadvertently omitted by the circuit court clerk from the record on appeal; the appendix, as originally filed in the trial court, is being filed on this appeal by stipulation of the parties with the motion to supplement the record. Citatione to "E.H.[1] ___" refer to the evidentiary hearing conducted by the trial court on January 19-22, 1988. Citations to "E.H.[2] ___" refer to the evidentiary hearing conducted by the trial court on September 15, 1988. Appellant's citations are to the transcript page numbers when testimonial evidence is being referred to. "PC-R. ___" shall refer to the post-conviction record on appeal. The appendices to the 3.850 motion, introduced at the hearing, are cited herein as "App. ___." The original trial and sentencing record an appeal is cited as "R. ___" with the appropriate page referred to listed thereafter. All other citations are self-explanatory or otherwise explained.

REOUEST FOR ORAL ARGUMENT

Mr. Phillips was sentenced to death. This Court haa consietently allowed oral argument to be conducted in capital cases. A full opportunity to air the issues in this case through oral argument would be an aid to the Court and the parties. Given the seriousness of the claims involved and the stakes at issue, Mr. Phillips respectfully requests that the Court schedule oral argument in this cause.

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STATEMENT OF THE CASE

The Circuit Court of the Eleventh Judicial Circuit, in and for Dade County, Florida, entered the judgment of conviction and sentence at issue. Mr. Phillips was indicted for first-degree murder on January 4, 1983 (R. 1) and entered a plea of not guilty to the charge. He waa tried before a jury.

The central evidence produced against Mr. Phillips by the State was that of informants. These informants all teetified that Mr. Phillips admitted, either directly or indirectly, his guilt to them. This testimony waa false, but critical evidence relating to it was not disclosed to the defense. Other than the informants there waa no other evidence of Mr. Phillips' guilt -- no eyewitneesee, no murder weapon, no physical evidence and no forensic evidence. At trial the prosecution did nothing to correct the false testimony of these informanta. As a result the jury was repeatedly misled into believing that Mr. Phillips confeared to each of these informants (which he did not) and that no deals were made between the government and the informants in exchange for their testimony. Deals were made and the government kept its promise in each case, which resulted in substantial reductions in sentences for these experienced criminals, but the defense was not informed of these facts.

William Smith, also known as William Scott, had been a longtime paid informant for the government. He repeatedly denied any connection with the State at trial (R. 582-83, 591). In fact, however, he was working €or the Metro Dade Police Department at the time that Mr. Phillips allegedly incriminated himself to Smith. Then, three (3) days after Mr. Phillips allegedly made the statements to Smith, the latter was prematurely released from jail and assault charges pending against him were dropped. Smith then, on behalf of the police, attempted to buy information from Mr. Phillips' family and otherwise "investigated" the case on behalf of the State. At the evidentiary hearing Smith admitted his ties to the police as well as the detailed work that he had done on this case, evidence undisclosed to the defense at trial and admissions he would not make at trial (E.H. [2] 43-44, 72-80). Not only did the State intentionally conceal evidence relating to his

testimony at trial., but it made efforts to conceal Smith's whereabouts at the evidentiary hearing. The Assistant State Attorney told the trial court that he could not locate Mr. Smith for the hearing (E.H. [1] 334-35, 343) when in fact Smith had been in the building on the very day of the hearing (E.H. [1] 1230).

William Farley, another informant, testified at trial in exchange for money and early release from jail, but the facts relating to him were also not disclosed. Farley was initially visited by Metro Dade detectives the day after being placed in a cell with Mr. Phillips. Then, when he returned to his cell, Mr. Phillips allegedly confessed to the crime (R. 809-13). The next day Farley was moved to another institution and gave a statement to the police (R. 814). It is now known that the statement was rehearsed prior to being taped (E.H. [1] 937-73). Farley, like Smith, testified at trial that there were no deals (R. 806, 813, 815). The jury waa simply told that the prosecutor would write a letter for him (R. 845). What is now known is (1) that Farley's testimony was fabricated, (2) that Mr. Phillips never confessed, (3) that the prosecutor and the police directly assisted Farley in securing a one thousand dollar ($1,000.00) reward and (4) that the prosecutor affirmatively coached Farley in his false testimony (E.H. [1] 937-73, 985-95, 996-1004, 1018-24). These and other facts relating to Smith were not disclosed to the defense.

The third informant, Larry Hunter, likewise testified at trial that Mr. Phillips confessed to him (R. 649-50) and that he had not received a deal in exchange for his testimony (R. 653). Less than two weeks after Mr. Phillips' trial, however, Hunter pled guilty to armed sexual battery, possession of cocaine and grand theft auto (see App. 23). In exchange he was sentenced to five (5) years probation on each count (all charge8 to run concurrent) and nine months incarceration on the grand theft. The State nolle prossed one count of cocaine possession and child abuse (App. 23, pp. 4-5). These facts were not disclosed. It also is now known that the State tampered with its own police reports, which resulted in the defense receiving a stilted view of the investigation and the facts relating to Hunter and his involvement with the

State. The trial prosecutor conceded the same at the evidentiary hearing, statina that this wag his normal procedure (E.H. [1] 1097-98). And Hunter's affidavit, admitted at the evidentiary hearing, plainly stated that he testified faleely at trial, recanted that testimony, and provided critical facts undisclosed to the defense at trial.

The last informant, Malcolm Watson, was serving a life sentence for armed robbery at the time of trial. He testified that Mr. Phillips showed him a .38 pistol (R. 699) and admitted involvement in the crime (R. 692). Again, no deals were allegedly made in exchange for this testimony (R. 696). However, four (4) months after Mr. Phillips wae eentenced to death the prosecutor executed a stipulation wherein Watson's life sentence was vacated (see App. 31). There was no legal basis for vaeatina the conviction. And so, Watson, a repeat offender, became a free man on May 17, 1984. The facts relating to this assistance to Watson were not disclosed to the defense.

Mr. Phillips was convicted solely on the strength of these informanta, each of whom presented false and misleading testimony. The prosecutor never corrected their inaccurate accounts. There was no direct evidence linking Mr. Phillips to the crime. He was, however, tried, convicted, and sentenced to death, solely on the strength of "evidence" obtained through the State misconduct infolving its informants. The verdict was rendered on December 15, 1983.

Mr. Phillips was and is addled by intellectual impairments. He is almost mentally retarded. He is psychologically inpaired. His functioning is that of a child. His court-appointed trial attorney's performance, however, was not effective and critical evidence relating to Mr. Phillips was not heard at trial and sentencing because of counsel's failures. The trial court found trial counsel's performance at sentencing to be deficient (a finding agreed-to by the State in its poet-hearing memorandum), but, applying the same analysis found improper by this Court in Hall v. State (an analysis which overlooks the critical role of the jury) declined to grant relief.

Ronald Guralnick represented Mr. Phillips at trial. He met with Mr. Phillips for one (1) hour on the day he was appointed to represent his client. Trial counsel's own records reflect that this was the only meeting between him and his mentally impaired client prior to trial. As a result he failed to determine whether Mr. Phillips was competent to stand trial. Instead, although he felt Mr. Phillips was an "idiot" (E.H. 524) he brushed his client aside. At the evidentiary hearing Mr. Guarlnick stated that Mr. Phillips was no help in hia defense and that every time he opened hie mouth he would put his foot into it.

At the guilt/innocence phase this attorney failed to move to suppress the inculpatory statements allegedly made by Mr. Phillips to the informanta working €or the State -- even though these informants intentionally elicited statements subsequent to Mr. Phillips invoking hie right to counsel. Additionally, trial counsel failed to move for a change of venue, deepite the extensive pre-trial publicity in this case. Then, during trial, Mr. Guarlnick failed to object to Mr. Phillips' absence during critical stages of the trial. Finally, due to his own failure to thoroughly investigate, trial counsel failed to conduct necessary cross-examination of the State's witnesses.

Nothing that can be called a defense was presented on Mr. Phillips' behalf at the penalty phase. Trial counsel admitted at the evidentiary hearing that he had done no penalty phase investigation whatsoever (See E.H. 576-79). No mental health experts were asked to examine Mr. Phillips. Family members were not contacted prior to trial, although they were available. No school records were obtained. No records from the Department of Corrections (which reflected Mr. Phillips' impairments) were obtained, deepite the fact that trial counsel's client had spent most of his adult life incarcerated. The jury which decided Mr. Phillips' fate thus never learned about Mr. Phillips' severe mental impairments, the impoverished and abusive condition in which he grew up, the racial discrimination suffered by him or the child abuse inflicted upon him by his alcoholic father.

The Circuit Court has held that Mr. Guarlnick's performance was deficient, but in a holding mirroring the error of the trial court in Hall v. State, that Mr. Phillip suffered no prejudice because the trial judge would have imposed death. Thia holding belies the fact that extensive mitigation existed at the time of trial and wae presented at the evidentiary hearing. It further fails to consider that on December 16, 1983 the jury voted by only a 7 - 5 margin to impose death. Any evidence of mitigation would likely have resulted in a life recommendation and the mental health and other available mitigation counsel failed to develop would have established a reasonable basis for that recommendation. But counsel presented none because he did nat investigate. Indeed, at the evidentiary hearing, counsel's testimony reflected a grose ignorance of capital sentencing law.

On February 1, 1984 the trial court imposed the death sentence upon Mr. (R. 3). Thia Court affirmed on appeal. Phillips v. State, 476 So. 2d 194 (Fla. 1985). Mr. Phillips filed pleadings pursuant to Fla. R. Crim. P. 3.850 and a habeas corpus petition in this Court in November of 1987. This Court denied habeas corpus relief. See Phillips v. Dugger, No. 71,404 (November 19, 1987).

The trial court conducted an evidentiary hearing on January 19-22, 1988. On May 17, 1988, the trial court ordered that the evidentiary hearing be reopened, pursuant to a motion filed by Mr. Phillips. The motion was filed on March 28, 1988, due to the discovery of additional misconduct on the part of the Office of the State Attorney in failing to disclose the whereabouts of a key witness. The evidentiary hearing was reopened and on September 15, 1988, additional testimony was taken.

Thereafter, the Circuit Court, on February 13, 1989, issued its Order denying relief. Rehearing was denied on November 8, 1989. Mr. Phillips filed a timely Notice of Appeal. Thia appeal follows.

SUMMARY OF ARGUMENT

1. Mr. Phillips was denied effective assistance of counsel during the penalty phase and wae substantially prejudiced by counsel's deficiencies. The trial court found defense counsel's performance to be deficient. Defense counsel conducted no penalty phase investigation. No mental health experts were obtained to examine Mr. Phillips and no family members were interviewed prior to trial. Substantial mitigation existed but was never provided to the jury which sentenced Mr. Phillips to death by a vote of 7 to 5. Mr. Phillips is almost mentally retarded. His mental functioning is on the level of a child. He waa abuaed as a child by an alcoholic father and then waa the victim of discrimination and impovershiment. These facts were proven at the evidentiary hearing, prejudice is apparent, and relief is proper.

2. The State intentionally withheld critical impeachment evidence regarding its four key informants, each of whom denied at trial that any deals had been consummated with the State. It has now been proven, however, that extensive deals were made. Furthermore, Mr. Phillips did not confess to these informants as they alleged at trial. The prosecution not only withheld critical impeachment material, it alao affirmatively assisted the informants in testifying falsely, and did not correct their false and misleading testimony. The prosecutor likewise altered evidence so that critical impeachment material would not be discovered by the court, the defense or the jury. Relief is proper.

3. Each of the jailhouse informants were acting as agents of the State when they intentionally attempted to secure, and allegedly succeeded in securing, confessions from Mr. Phillips. Mr. Phillips was represented by counsel at the time each of these alleged confessions waa made. Accordingly, relief is appropriate under United States v. Henry.

4. Mr. Phillips was not legally competent to stand trial and defense counsel was ineffective for failing to have him examined by mental health experts prior to trial. Testimony at the evidentiary hearing established that Mr. Phillips, who is almost retarded, was likely incompetent. No hearing was

held on the competency question at the time of trial, as Pate v. Robinson requires, because of counsel's deficiencies. Relief is appropriate.

5. Mr. Phillips' trial counsel was ineffective during the guilt/innocence phase of his trial inasmuch as he failed to investigate the jailhouee informants, failed to move for a change of venue, failed to obtain or coneult with experts and failed to properly cross-examine witnesses.

6. Mr. Phillips' sentencing jury was repeatedly misled by instructions and arguments which unconstitutionally and inaccurately diluted their sense of responsibility for sentencing in violation of the eighth and fourteenth amendments. Counsel was ineffective for failing to litigate thie issue.

7. Mr. Phillips' due process and equal protection rights, and his righte under the eighth and fourteenth amendments were violated by jury instructions at sentencing which improperly shifted the burden of proof. Counsel was ineffective for failing to litigate this issue.

8. The jury was erroneously instructed at the penalty phase that a majority vote waa required for a verdict of life imprisonment. Mr. Phillips' eighth and fourteenth amendment rights were thus violated while counsel ineffectively failed to litigate thie issue.

ARGUMENT I

MR. PHILLIPS WAS DEPRIVED OF AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION, BECAUSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE AT THE PENALTY PHASE OF THESE CAPITAL PROCEEDINGS

A. Introductioq

Trial counsel presented nothing that can be characterized as a defense during the penalty phase of Mr. Phillips' trial. A8 a result the jury knew nothing about Mr. Phillips when it voted by the slimmest margin, 7-5, to sentence him to die. But a wealth of substantial statutory and nonstatutory mitigating evidence was readily available. Counsel only had to look. He did not, and the trial court expressly found that counsel's performance was deficient, a finding with which the State agreed in its post-hearing memorandum below. Trial counsel met with his client outside of court only one

a

time, according to his own records, for one hour. Failing to investigate and prepare, counsel wae left with nothing when the court directed that the sentencing hearing be held earlier than anticipated. Then, strangely, he argued that the jurors should consider as mitigating evidence the fact that Mr. Phillips had only two previous convictions (an argument which was thoroughly diecredited by the State). At the evidentiary hearing trial counsel conceded he knew of no cases in which a defendant with an adult criminal record had been found not to have a significant prior criminal history:

> Q. -- is there a single case where the mitigating circumstance that the defendant had no significant prior criminal history has been found when the defendant has committed two violent felonies in the past and where the defendant has been incarcerated for most of his adult life?
>
> A. No.
>
> Q. No such case that you know of?
>
> A. That I know.
> That doesn't mean there aren't any.

(PC-R. 9262, H. 539). Trial counsel's reliance upon this mitigating factor notwithstanding hie client's criminal record was strange, and demonstrated the inadequacy of his preparation. Because he had not prepared, arguments which the State discredited were presented in the place of the significant and compelling mitigation which this case involvee. Accordingly, the trial court found no mitigating circumstances when it sentenced Mr. Phillips to death, given the paucity of evidence submitted.

It is evident from reviewing trial counsel's file that he held no regard for his client. He referred to him as an "idiot" at the hearing (See E.H. 523 ["I thought he was an idiot"]) and believed he was not intelligent. But counsel sought no mental health evaluation. This case does not involve tactical decisions, but ignorance of the law and lack of investigation. The trial court found that counsel's performance was deficient. The deficiencies are apparent even from a cursory review of counsel's testimony.

Because of Mr. Phillips' low intelligence, counsel did not allow him to testify -- "He couldn't testify he's an idiot" (E.H. 528); "[a]ny time the

defendant opened his mouth, he'd insert his foot" (E.H. 530). In fact, trial counsel, in reviewing Mr. Phillips Rule 3.850 motion, underlined the section on page 46 of the motion where it stated that Mr. Phillips could not assist in his own defense (E.H. 528-529). Then, at the evidentiary hearing, he testified, "[h]is aid caused him to lose." (E.H. 529).

Thus it is apparent that trial counsel had (or at least should have had) concerns about Mr. Phillips' level of intelligence and his resulting inability to follow counsel's advice and to assist in his own defense. Indeed, Mr. Phillips' Department of Correctione records contained many records reflecting his diminished psychological functioning, his impairments, and his intellectual and emotional deficiencies. The family, ignored by defense counsel, also could have spoken to Mr. Phillips' deficiencies. In spite of all this and of his own views, counsel did not have his client evaluated by mental health experts, nor did he speak with family members prior to trial, nor did he secure critical background materials regarding Mr. Phillips. Even a minimal amount of investigation by counsel would have documented a history of severe limitations on intellectual functioning, poverty and child abuse. Counsel, however, did not prepare, as the trial court found.

B. <u>The Law</u>

A defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to guilt/innocence or sentencing. <u>Ake v. Oklahoma</u>, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of his state of mind." <u>Blake v. Kemp</u>, 758 F. 2d 523, 529 (11th Cir. 1985). Counsel must assume the responsibility €or obtaining the assistance of experts. In a capital case, counsel cannot simply ignore mental health evidence, especially when records substantiating his client's intellectual and emotional deficiencies are as accessible as they were in Mr. Phillips' case, especially when his client is almost mentally retarded, especially when his client's level of functioning is that of a child's, and especially when his client is more than likely not competent to stand trial. Harry Phillips' problems are obvious to almost anyone. But it is not

surprising that counsel ignored them -- between his appointment to the case and trial he never adequately visited with hia client. It is not surprising that, bacauae of his lack of preparation, the attorney had virtually nothing to preaent at sentencing. Although significant evidence in mitigation was available, this lawyer's entire penalty phaee defense consisted of a couple of questions to Harry's mother (who had come to court to see her eon and was called unprepared), and strange argumenta to the jury, based on an even stranger request to charge: couneel aaked the court to inetruet on and then argued only two mitigating circumstancee: 1) age (Harry Phillips wae 38 years old at the time); 2) lack of significant prior criminal record (Harry Phillips had, at the time, two felony convictions and had epent much of his adult life in prison).

There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Feesel, 531 F. 2d 1278, 1279 (5th Cir. 1979). Counsel has a duty to seek mental health assistance where, as here, facts exiet (and here, even DOC records demonstrate the existence of such facts, although counsel never obtained any records concerning his client) which show that there may exist mental health issues. Blake; Proffitt v. United States, 582 F. 2d 854, 859 (4th Cir. 1979). Counsel has the duty to conduct a competent independent investigation, Goodwin v. Balkcom, 684 F. 2d 794, 805 (11th Cir. 1982), in order to discover any mental health problems of his or her client and to underetand the legal impact of such problems on competency, sanity, waivers, specific intent, and mitigating circumstancee.

Harry Phillips waa and is intellectually impaired and almost retarded. He was unable to fend for himself. He could not aid in his defense. He wae intellectually no more than an ignorant child. But defense counsel ignored the obvious. Family, friends, school personnel, and prison personnel, all knew Mr. Phillips had problems. Defense counsel only had to conduct the investigation necessary to present the case to the jury.

Florida law, at the time of Mr. Phillips' trial, allowed for psychiatric/psychological examination upon motion of counsel. See Rule 3.210, 3.211, Florida Rules of Criminal Procedure. With the slightest investigation, defense counsel would have discovered the plethora of evidence establishing Mr. Phillips' long-term deficiencier. The DOC records mentioned above, for example, included entry after entry describing Mr. Phillips' psychological problems. Family would have provided a history that strongly spoke to Mr. Phillips' deficiencies. School and prison records would have confirmed them, and a mental health examination would have spoken to them. with that information, a reasonably effective attorney would have conducted investigation into mental health issues and arranged €or evaluation, diagnosis and assistance. Counsel's ineffectiveness denied Harry Phillips his constitutional right to competent psychiatric/psychological assistance.

At a capital sentencing proceeding, counsel must "assure that the adversarial testing process works to procure a iust rerult under the standards governing decisions." Strickland v. Washinston, 466 U.S. 668 (1984)(emphasis supplied). When confronted "with both the intricacies of the law and the advocacy of the public prosecutor," United States v. Ash, 413 U.S. 300, 303 (1970), a defendant is entitled to counsel who will "bring to bear such skill and knowledge as will render the trial a reliable testing process." Strickland, 466 U.S. at 690. The constitutional right to the effective assistance of counsel is violated when counsel's performance as a whole, United States v. Cronic, 466 U.S. 648, 664 (1984), or through individual errors, Strickland, 466 U.S. at 686, falls below an objective standard of reaaonableness. And where, as here, as a result of counsel's lack of preparation mental health and other mitigating evidence whose omission undermines confidence in the result of the jury verdict is ignored, the defendant establishes a reasonable probability of a different result at sentencing. See State v. Lara, 16 F.L.W. 306, 207 (Fla. May 9, 1991); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); Strickland v. Washinaton.

Here the jury voted 7-5 for death without any mitigating evidence. The mitigation presented at the evidentiary hearing would have established a reasonable basis for a recommendation of life. There can be no serious dispute that the mitigation counsel ignored (without a tactic) was reasonably likely to have altered one juror's vote. The trial court, however, in denying relief overlooked the role of the jury and thus erred in the same manner in which the trial court had erred in Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)(It makes no difference that the trial court believed it would have imposed death in any event, for the proper question is whether the evidence presents a basis upon which a reasonable juror could rely to vote €or life). Confidence in the result, Michael; Stevens v. State, 442 So. 2d 1082 (Fla. 1990), is undermined because of counsel's inadequacies in this case and relief is therefore appropriate. Michael.; Stevens; Lara; Strickland v. Washinuton.

The Florida and federal courts have therefore expressly and repeatedly held that trial counsel in capital sentencing proceedings ha6 a duty to investigate and prepare available mitigating evidence for the sentencer'e Consideration. See, e.q., O'Callaghan v. State, 461 So. 2d 1154, 1155-56 (1984); Tvler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); Kinq v. Strickland, 748 F.2d 1462, 1463-64 (11th Cir. 1984); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 3986); Jones v. Thiqpen, 788 F.2d 1101, 1103 (5th Cir. 1986); Lara; Michael. Trial counsel here did not meet this rudimentary constitutional requirement. Mr. Phillips, like the petitioners in Tvler, Thomas, Kina, Lara, Blake, Goodwin, Michael, and Jones, is entitled to relief, €or counsel here also failed to investigate and present substantial, available mitigation -- an omission based upon no "tactic", but on the failure to adequately investigate and prepare for the penalty phase. Here, a jury which voted for death by the slimmest of margins (7-5), was given absolutely no reason, no mitigation, upon which it could vote for life. Prejudice is apparent.

C. The Facts

As the State conceded below, counsel's performance with regard to the sentencing phase of Mr. Phillips' capital trial was constitutionally deficient, as he conducted no investigation with regard to the sentencing phase (See State's Final Response to Defendant's Rule 3.850 Pleadings and Evidentiary Hearing, 3/29/88, pp. 50-51). The State contended, however, that Mr. Phillips did not establish prejudice (Id.). As the following discussion of the compelling mitigating evidence introduced at the hearing before the trial court demonstrates, Mr. Phillipe amply demonetrated prejudice. The trial court, however, denied relief by applying the same atandard of review -- one which ignores the role of the jury -- found to be erroneous by this Court in Hall v. State, 541 So.2d at 1128, and Preston v. State, 564 So.2d 120 (Fla. 1990). All of the evidence introduced at the 3.850 hearing would have been admissible at the penalty phase, and all of it could have been developed and presented by trial couneel had he done any investigation. In assessing the prejudice emanating from trial counsel's admittedly deficient performance here, it is important to note again that the jury which recommended that Mr. Phillips receive a sentence of death did so by the narrowest possible majority -- 7 to 5 -- despite having heard absolutelv nothinq in mitigation. Thus, swaying the decision of a single juror would have changed the outcome of the eantencing proceeding. Under euch circumstances, anything couneel could have done could have swayed the balance. As discussed below, there was much that could have been done with regard to mitigating evidence, but Mr. Phillips' attorney did nothing.

Mr. Phillips' family members, friends, and co-workers all testified at the 3.850 hearing, relating, inter alia, the abject poverty faced by their family when Harry Phillips was growing up; the physical and emotional abuse inflicted by the father; the father'a early abandonment of the family; a gunshot wound to the head suffered by Harry as a young teenager; and Harry's life-long mental and emotional deficiencies (See, e.q., E.H. [1] 26-47 [Teetimony of Julius Phillips]; E.H. [1] 48-82 [Testimony of Ida Phillips

Stanley]; E.H. [1] 83-129 [Testimony of Laura Phillips]; E.H. [1] 131-37 [Testimony of Reverend Yenkins]; E.H. [1] 142-48 (Testimony of Mary Williams]; E.H. [1] 154-59 [Testimony of Samuel Forde]; E.H. [1] 161-67 [Testimony of Robert Cummings]; E.H. [1] 905-16 [Testimony of Georgia Ayres]). (See also Apps. 35, 36, 37, 38, 39, 40 [Affidavits of Laura Phillipe, Ida Phillips Hanley, Julius Monroe Phillipe, Samuel Forde, Robert Cummings, Ocilla Curry]).

All of this evidence would have been wholly admissible at the sentencing phase, and all of it is classically recognized mitigating evidence. All of it could have been developed and presented at sentencing had counsel conducted any penalty phase inveetigation. Counsel asked these witnesses nothing with regard to mitigating evidence: he did not even take this first investigative step. As a result of counsel's admitted omissions in this regard, Mr. Phillips' sentencing jury heard nothing in mitigation.

Trial counsel's unreasonable omissions did not end with the failure to investigate and present the testimony discussed above: there was even more compelling mitigating evidence which never made its way to the jury because counsel simply failed to look. Wad trial counsel conducted any investigation, and employed the assistance of a mental health expert, substantial mental health-related mitigating evidence could have been developed. Counsel thought his client was an "idiot," who acted inappropriately in court and was incapable of following instructions (see, e.q., E.H. [1] 616-17)(trial counsel's testimony), yet counsel did not seek the assistance of a mental health expert in preparing for sentencing. The type of background investigation (and the resultant evidence) discussed herein is not only crucial €or its independent mitigating value, but is also indispensable to an adequate, competent, and complete psychological evaluation. The background personal history information presented during the post-conviction proceedings in court was aleo presented to competent mental health experts, and was utilized by the experts in performing their avaluationa of Mr. Phillips. The results of thoee evaluations reveal a plethora of non-statutory and statutory

mitigating evidence which should have been presented to Mr. Phillips' jury.

For example:

> Mr. Phillips is a 42-year-old man functioning in the borderline range of intellectual functioning. While he seems to have an adequate fund of general information, he seems unable to apply this information. He is easily led and tends to be socially isolated. His academic achievement in areas such as reading comprehension and mathematics are below what one would expect even given his low intellectual functioning. While he doe0 not score in the brain-damaged range on a test designed for that purpose, hie reproduction of figures is rather poor and brain damage cannot be ruled out. It is important to note that testa for brain damage are not designed to eeparate out brain damage from retardation, thus making the reliable assessment of brain damage in cases such as this a questionable task. But, closed head injuries can cause brain damage and "produce deficits that implicate both hemispheree" in which "memory skills are frequently impaired" (Berg, Franzen and Wedding, 1987). Mr. Phillips did indeed experience the kinds of incidents that cause closed head injury (beatings by his father) and also other injury such as that experienced when he was shot.
>
> Mr. Phillips is pleasant and cooperative and attempta to disguise his low level of intellectual function with a veneer of social skills. In spite of thie he appears obviously intellectually deficient and socially isolated. He has few interests and states that mostly he watches T.V. While he claims that he enjoys being out in the "yard", he has a history of refusing to go out. Like many people of limited intellectual functioning he is passive, has less than adequate memory, and will generally try to please the examiner by answering in the way he believes is appropriate. While technically a score of 75 would not qualify as mental retardation, it is important to note that both IQ score and level of adaptive functioning contribute to classification. The cutoff scores €or retardation are in fact arbitrary. Earlier definitions of retardation (Heber, 1961) ured a score of 85 as the demarcation. The 1983 American Association on Mental Deficiency manual on classification and terminology notes that while an IQ of 70 is the cutoff for mental retardation, the "upper limit is intended a5 a guideline, it could be extended upward through IQ of 75 or more depending on the reliability of intelligence tests used."
>
> Mr. Phillips' low level of intellectual functioning is compounded by his emotional problems. He may be euffering from a "Pervasive Developmental Disorder Not Otherwise Specified." (PPDNOS)(DSMIII-R). This is a disorder characterized by a "qualitative impairment in the development of reciprocal social interaction . . ." and is not infrequently associated with mental retardation. Some people with thie diagnosis have a restricted repertoire of activities and interests. This is a disorder present from early childhood, but often not noticed until the child is school age and is observed with other children. Parents not infrequently date the onset from a time of illness or emotional trauma, but signs of the disorder may well have been preeent before the event. Mr. Phillips' family describes him as a child who never joined in playing with other children, a child who was on the sidelines, and one who at a time of trauma sank deeper into himself. While Mr. Phillips appears also to have the characteristics of a schizoid pereonality (for example, he has no

close friends or confidants other than first-degree family and almoet always chooses solitary activities) it appears that his symptoms appeared before adulthood, perhaps making a diagnosis of PPDNOS more appropriate.

(Def. Ex. N; App. 34 [Report of Dr. Carbonell]).

At the evidentiary hearing, Dr. Carbonell testified with regard to the compelling etatutory and non-statutory mental health related mitigating evidence, and the background mitigating facts, which could and should have been preeented to Mr. Phillips' sentencing jury. But counsel never had hie client evaluated.

In terms of mitigating evidence, did you evaluate Mr. Phillips in terms of mitigation in this case?

A. Yes, I did.

Q. Did you find, by the time of Mr. Phillips' 1983 trial, any evidence that could have been admitted in terms of mitigation?

A. Yes.

Q. Did you in fact try to assess such evidence in Mr. Phillips' case?

A. Yea.

That was part of what I was asked to do.

Q. Did you assess such evidence in terms of what a mental health professional, applying recognized standards in the community, would have assessed had they been asked to see Mr. Phillips in 19831

A. Yea.

Q. Could you tell us whether there were any mitigating circumstances that were available in this case?

A. His intellectual problems would clearly fall under mitigating circumstances.

He has a history of low level I.Q. functioning.

He has a history *of* difficulty in achievement.

He has a history of emotional and mental health problems. He's always been a loner. He's been isolated, he's been withdrawn.

There is a combination of factors, including not only an impoverished upbringing in a physical sense, but in a sense that he had no supervision and had no opportunity to receive much in the way of nurturance. He received very little guidance.

In spite of this, he wae described by people as a good boy, he went to school, he tried to behave. He was there.

His record for the last few yeare of high school I think indicates only about eight daye absent in two years.

He went. He tried. He was there.

Mr. Ford's recollection -- that was the teacher -- was also that he didn't, you know -- he wasn't absent.

He was at times able to hold employment, and he was thought of ae a good worker when he worked for the Sanitation Department, for example, which would make sense.

He's passive. He wants to go along. It's something he can do and is getting rewarded for.

Those kind of instances are going to be few and far between.

School is not a rewarding experience for people like Mr. Phillips.

He worked, he provided in spite of his deficits. He provided the money to his family, help take care of his sister'e children.

He was an abused child. He was a seriously impoverished child.

I recognize in that area at that time most everybody living there was impoverished. It's not like he was isolated in that sense.

But, given his other deficits, he was unable to do the kind of things his brother and sister did, which is get out of it.

He wae there, there wae no one around to help.

He was limited by intellectual functioning, his basic social background, and his mental and emotional problems.

And, in spite of that there is some evidence that in fact he did try to do the right thing.

Q. What about hie emotional problems?

Describe those for us.

A. He's schizoid. He's sincerely schizoid; meets the diagnostic criteria for a schizoid.

Q. People that are schizoid, what kind of people --

A. They're isolated, they're loners. They don't relate well to other people. They don't have close relationships outside their family.

It's not schizophrenia. This isn't delusions.

But, if you put schizophrenia on a continuum and watered it down, you end up at the other -- schizophrenia, autism, ambivalence, and I've lost my fourth. I'll come back to it; okay.

And, he has what essentially used to be called autism.

That's withdrawing into himself, doesn't deal with anyone else. He haa that sort of ambivalence.

Some things are okay by him. We doesn't have the flamboyant symptoms. He's not schizophrenic.

But, schizoid has that sort of alienation that you see that makes you unable to cope.

Q. What about in terms of his upbringing, in terma of his childhood?

Is there any mitigation there or anything important for a jury to know about?

A. It might have been important for the jury to know in fact that he waa certainly abused as a child, that he was in a situation of serious deprivation, that he wae abandoned by the father at an early age, that his other role model left, that he possibly had a head injury that could have in fact further have damaged his level of functioning, that he had little or no supervision in the home, and that once again, in spite of that, he did in some situations try and behave.

Q. Waa his family wealthy?

A. No. His family was very poor.

. . . .

Q. The resulting effects of that poverty, is that something a jury should have known about?

A. Yes.

That would have been important because Mr. Phillips' deficits were such that that poverty was a serious compounding factor.

Q. What about in terms of statutory mitigation?

One of the statutory factors is at the time of the offense the defendant suffered from extreme emotional disturbance.

Are you aware of that factor?

A. Yes.

Q. Assuming Mr. Phillips' guilt and assuming that everything the State proved was hundred percent true beyond a reasonable doubt, beyond any doubt, would that mitigating circumstance have been applicable in Mr. Phillips' case?

A. Yeah.

It would have fit with that pattern of going along and acquiescing, even when he particularly thought he was being treated unfairly, and then suddenly taking some kind of action that is some kind -- that passive-aggressive that was a result of

a

his anger, his inability to plan, and in *the* end would get him in more trouble, but at that moment was a solution for him.

That sort of fit perfectly with his pattern that was Been over the years.

Q. Has Mr. Phillips suffered from an extremem emotional disturbance throughout his life?

A. I would say that given the combination of problems that he has, you could call that an extreme emotional disturbance.

Q. There's another mitigating circumstance. I'll just use the phrase very loosely.

Ha0 to do with conformation, conforming of ones conduct with those requirements.

Would such a mitigating --

A. Mr. Phillips has a history of being unable to conform.

I mean, he spent years in a correctional eetting and never seems to grasp in terms of what was required of him, in terms of conformity.

And, he would go through the pattern of sort of conforming, being passive, and then going off on something.

Q. Mr. Phillips have any level of underetanding --

A. In other words, he never seemed to benefit from the experience that if he would do this, he would get punished.

He wouldn't seem to benefit from it. He would come out and do it again.

It was nothing being learned.

Q. Did Mr. Phillips have any --

Is there a deficit in Mr. Phillips' ability to understand the requirement of law?

A. He has an I.Q. of 73, he hasn't very good achievement level.

He's going to have difficulty understanding.

Q. So, that factor would apply?

A. Yeah.

Q. What about in terms of aggravation?

1'11 be very brief.

Two of the aggravating factors presented in this case, or preeent in this case, were that the offense was heinous, atrocious and cruel and/or that the offense was cold, calculated, premeditated, without any pretense of moral or legal justification,

Is there any relevance to --

Is there relevance of mental health testimony with regard to those two aggravating factors?

A. With regard to cold, calculated, which I presume means planned, thought out, done in some rational and cold manner, that's not how Mr. Phillips operates.

Q. Has he ever operated that way?

A. I've seen no evidence.

Q. Could he have?

A. It would be hard to imagine that he suddenly developed that capacity on that day.

Q. What about the level of premeditation?

That's what is required for first degree murder.

Could Mr. Phillips form such a level of premeditation.

A. He doesn't.

There is no evidence that he forms premeditation in his general behavior.

He has that pattern of going along and then getting very frustrated and having some kind of an outburst.

Q. What about the mental state required to commit an act that's heinous, atrocious and cruel; as I understand it, the desire to inflict pain, to torture, rational choice to inflict this type of thing on another person.

Could Mr. Phillips form that mental state?

A. Mr. Phillips' mental state seems to be that he gets angry and he does something, regardless of whether or not that'a useful to him, helpful to him.

It's never done anything for him. He's never done any of these in any way that has helped him.

Q. So, it's more reaction --

A. It is a reaction.

(E.H.[1] 438-47). Mr. Phillips' jury returned a recommendation of death by the slimmest possible majority (7-5), without having heard the first iota of mitigating testimony. under such circumstances, there can be little doubt that mental health testimony, like the background mitigation counsel failed to develop and present, would have had an effect on the jury's verdict.

Another qualified mental health expert who evaluated and tested Mr. Phillips, Dr. Jethro Toomer, and who also reviewed background materials and collateral data in conjunction with his evaluation, expreaeed similar views with regard to the existence of mitigating circumetances:

> Q. Could you tell us, as a mental health professional and applying recognized standards in the profession which were available in 1983, what could such a person have told the court and jury about mitigation in Mr. Phillips' case?
>
> A. I'm of the opinion that a qualified mental health professional could have pointed out a number of mitigating circumstances.
>
> Q. You're aware that in a capital sentencing proceeding by 1983 in Florida that any evidence --
>
> A. Yes.
>
> Q. -- that the defense chooses to introduce in mitigation was admissible?
>
> A. Yes.
>
> Q. What type of such evidence existed or what type of such mitigating evidence existed in Mr. Phillips' case?
>
> A. I would think a qualified mental health professional would have considered Mr. Phillips' background, the environment, and tremendous difficult surrounding --
>
> Q. Let's just stop you there.
>
> A. Okay.
>
> Q. His background then and the difficulty of growing up?
>
> A. Exactly.
>
> Q. What's that all about?
>
> A. I think it has to do with the abuse that we have alluded to earlier, the desertion by his father, the emotional trauma, the emotional difficulties that were identified early on, prior to his teenage years, the tremendous difficulties he encountered in the educational process due in part to the emotional difficulties.
>
> I think a professional, a mental health professional, would have focused on the head injury and the residual effects of that in terms of its effect on intellectual development as well aa emotional development.
>
> I think those are the kind of factors that one would have been able to glean from an examination of records, history, and the like.
>
> Q. What type of information sort of preaents itself from Mr. Phillips' background, say the family being migrant workers, and that type of thing?

Was there, in your opinion, information which a jury should have heard abaut --

A. I think --

Q. -- which a mental health professional then could have provided to a jury?

A. I think the information regarding specifically the impoverished environment and its effect on an individual; prolonged and severe abuse and it's effects on an individual; desertion by parent and its effect on emotional development; the injury that I alluded to earlier; once again its effect, it's impact on emotional as well as intellectual development.

I think all of there are factors that come into play, and the other factors.

I think that probably it is a big part of this, that even though these difficulties, these problems, presented themselves around age ten or eleven, nothing was ever done, nothing was ever done -- not by the school system, not by any other agency or whatever to intervene or to try to focus on or to provide any kind of assistance with what waa going on.

You have a child who is in school every day, who teachers say cannot -- who teachers say put forth the effort but still cannot function effectively.

Nothing was ever done.

Q. Was it normal for things to be done back then?

A. That may have been a factor in the process, the fact that people either did not know or people -- or the resources were not available.

But, the bottom line was that nothing was done.

Q. What about racism?

Does that have any significance?

A. I think that is a factor in that, given the particular environment.

Given the deficiencies in terms of resources, in terms of how schools are funded, and so forth and so on, I'm sure that wae a factor at some point.

Q. What other type of evidence which mitigates presented itself in this came, given Mr. Phillips' environment --

Even after he grew up, what other type of information was important or is important?

A. I think that looking at the history the background that was laid --

If you looked at Mr. Edwards -- Mr. Phillips in terms of how he grew up, and how he developed, and what kind of behavior that he engaged in as he grew up, I think that you could see, for

example, such things as an individual who had a conscience; who, for example, cared about hie family; who when working, attempted to -- attempted to provide for hia family, and who attempted to be nurturing in some particular way, who had the ability to care and to provide or demonetrate some sense of caring to those around him.

Q. You're aware that Mr. Phillip's sister has indicated that he would take care of her children?

A. That's correct.

Q. By the way, any high level of intellectual functioning necessary to take care of kid a half hour or an hour a day?

A. Not necessarily, no.

Q. Anything elae?

I know you've testified at length about his intellectual functioning, hie emotional functioning.

You don't have to repeat all of that.

I assume all of that goes into the equation?

A. Exactly.

Q. And, all of that, in your opinion, is the type of information that a jury should have had?

A. Exactly.

Q. Anything else you'd like to add about that?

A. I believe I have covered most of the kind of mitigating factors that I think should have been brought forth.

Q. General factors?

A. General factora.

Q. What about with regard to specific statutory factors?

Is there anything that could have been said about such factors?

A. I think if you look at the specific factors, I think that you talk -- you can talk about duress, individual being under duress: emotional disturbance.

I think those are factora.

Q. You said emotional disturbance.

You recognize one of the of atatutory factors is extreme emotional disturbance at the time of the offense?

A. Exactly.

Q. Assuming that the jury was correct and Mr. Phillips was in fact guilty, and assuming at this point we have to deal with that --

A. Yes.

Q. -- how would that factor be relevant, pertinent, to a capital sentence?

Why does that factor exist in this case, in your opinion?

A. We have described --

Because what we have here is the individual that we have described, the emotional state that characterizes Mr. Phillips is at the basis of his behavior.

It is a factor, it is a foundation in terms of his behavior and how he functions and how he operatee.

Q. What is that emotional state?

A. Well, the emotional state is the one that come8 about, that exists, as a result of the deprivation, as a reault of the kind of trauma that he hae been exposed to, the abuse, etc.

That leads to this particular state characterized by a loss of self-esteem, and we're talking about a severe lost of self-esteem, not the rudimentary or general kind that most people talk about.

We are talking about a loss of self-esteem that results in inappropriate behavior, in behavior that is maybe deatruetive.

That is what we're talking about.

That is emotional durees, and that is what we have operating here.

That need, that need in terms of the loss of self-esteem, the loss of self-concept, the self hate and need that arises as a result of that, influence behavior, influences how the individual behaves, how he views the world and kind of acts that he engages in.

Q. In your opinion, was Mr. Phillips extremely emotionally disturbed at the time of the offense?

A. I believe so.

Q. At trial?

A. I believe so, yes.

Q. And, today?

A. Yes.

Q. Would a mental health professional, applying common standards recognized in the profession, have found that then?

A. I believe so, yes.

Q. What about with regard to the statutory mitigating factor relating to the defendant's capacity to conform his conduct to the requirement of law or to understand the criminality of hie conduct?

Is that something that would have applied in Mr. Phillips' case?

A. I'm of the opinion that he was not, becauee what we're talking about here --

When we start talking about appreciating the criminality and the like, what we're talking about here is something that requires a certain measure of intellectual ability, requires an individual to be able to project consequences, to be able to look at behavior and follow it to its logical extensions in terms of projecting the consequences that will occur as a result.

I don't believe he was able to.

Q. Does he possess that level of intellectual functioning -

A. I don't believe so, no.

Q. -- that level of emotional well-being, so to speak?

A. I don't believe so, no.

Q. In terms of aggravating factors, were you able to consider those?

A. I looked at some of the aggravating factors.

I think we have to mention, once again, the intellectual functioning in terme of the individual and of the deficits that manifested themselves.

Q. Consider, €or example, the aggravating factor that says that the offense committed was heinous, atrocious and cruel, or the one that refers to a defendant's act ae cold, calculated, premeditated, without pretense, I believe, of moral or legal justification.

A. Uh-huh.

Q. A person who meets those factors, what type of level of intellectual and emotional functioning do you have there?

A. Well, you've got to be able --

In terms of doing that, of functioning in that way, you have to be able to reason abstractly, once again.

In other words, to look at long range consequences, and so forth.

And, if you can't do that, that does not apply.

Q. Your understanding --

Is it your understanding that's a higher level of premeditation?

A. Yea.

Q. Does Mr. Phillips have that level --

A. Not in my opinion, no.

Q. -- of intellectual or emotional functioning?

A. No.

(E.H.[1] 240-250). Again, there can be little doubt but that such testimony would have had an effect on Mr. Phillips seven-to-five sentencing jury.

Although the State did present the testimony of two mental health experts at the 3.850 hearing, both of those experts testified that they evaluated €or the sole purpose of determining Mr. Phillips' competency to stand trial (See E.H. [1] 679, 821). Neither expressed any opinions on mitigating circumstances, nor provided any testimony in rebuttal of Dre. Toomer and Carbonell'e opinions that substantial statutory and non-statutory mitigating circumstances existed in Mr. Phillips' case.'

Despite the recognized importance of mental health related mitigating evidence, and despite the fact the counsel thought his client was an "idiot" who could not follow instructions (see E.H. [1] 523-24, 528, 553), trial counsel did nothing with respect to investigating and developing the subetantial and compelling mental health related mitigating factors discussed herein. Of course, as Mr. Phillips established in these proceedings, had counsel conducted any reasonable penalty phase investigation, a wealth of statutory and non-statutory mitigating circumstances could have been provided to Mr. Phillips' sentencing jury and judge. Counsel did nothing, however, and the jury which sentenced Mr. Phillips to death by one vote heard nothing in mitigation.

'The State's experts (Dr. Haber and Dr. Miller) were specifically asked at the hearing whether they had any opinions as to .mitigating circumstances, and thus whether they were willing to contradict the account of Drs. Toomer and Carbonell in that regard, and they each testified that they did not. With regard to the penalty phase mitigation established by the accounts of Dre. Toomer and Carbonell, the State thus offered absolutely no testimony in rebuttal.

A8 diacusaed, and as the State conceded, Mr. Phillips demonstrated deficient attorney performance pursuant to Strickland v. Washinaton. Prejudice is also apparent -- Mr. Phillips' jury returned a recommendation of death by the slimmest of majorities. Anything counsel could have done with reepect to the preaentation of mitigation could have awayed the balance in favor of life, but counsel did nothing. There is thus here more than a "reasonable" probability, that the wealth of atatutory and non-statutory mitigating evidence which Mr. Phillips proved at the 3.850 hearing would have affected the outcome of the eentencing proceeding before the jury. See Strickland, 466 U.S. at 694; Lara; Michael; Stevens. Mr. Phillips' death sentence is the prejudice resulting from counsel's unreasonable conduct. In Mr. Phillips' case, as in Thomas v. Kemp,

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

796 F.2d at 1325. Rule 3.850 relief is the only fair and just result.

ARGUMENT II

THE STATE'S DELIBERATE USE OF FALSE AND MISLEADING TESTIMONY, AND THE INTENTIONAL WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE, VIOLATED MR. PHILLIPS' RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. Introduction

Mr. Phillips' conviction and aentence of death were obtained through prosecutorial misconduct. The prosecution not only withheld material, exculpatory evidence regarding its witnesses and the facts and circumstance8 underlying their testimony, but also stood silently by while those witnesses repeatedly testified falsely under oath, both in depositions and at trial. This mieconduct violated Mr. Phillips' fundamental fifth, sixth, eighth, and fourteenth amendment rights, and rendered his trial and capital eentencing proceedings fundamentally unfair and unreliable. The facts and evidence

presented in these Rule 3.850 proceedings establish Mr. Phillips' entitlement to the relief he seeks.

The prosecutorial misconduct which is the gravamen of this claim is related to the testimony of the State's informanta. As previously noted, and as discussed below, the proeecution withheld material, exculpatory evidence regarding these witnesses, their backgrounds, and the circumstances underlying their testimony. Moreover, the prosecution knowingly allowed these witneaees to testify falsely under oath. The material, exculpatory evidence which was withheld, and the false and misleading testimony which was presented to the court and jury, is discussed below as it relates to the teetimony of the individual informant witnesses.

Harry Phillips was indicted, convicted, and sentenced to death entirely on the strength of the testimony of jailhouse informanta. There was no other evidence of his guilt: there were no eyewitnessee, no murder weapon was found, and abeolutely no physical or forensic evidence connecting Mr. Phillips to the scene existed. It was on the basis of the informant teetimony that the case against Mr. Phillips was based. Without the jailhouse informants, there was no case.

All of the informants, according to their trial testimony, had directly or indirectly contacted authorities on their own after Mr. Phillips supposedly made spontaneous, unsolicited incriminatory admissions to them. None of the informante admitted at trial that they had been made promises by the government, beyond the offer of a letter to the parole board, or a word to a sentencing judge, regarding their assistance in the case, and none admitted to having been in any way instructed by the police or prosecution prior to their meetings with Mr. Phillips.

As portrayed by the State, the informants were all fortuitously present when Mr. Phillips made incriminating admissions, and were then prompted by their consciences to contact the authorities and ultimately testify. We now know, though defense counsel, the jury, and the court were not allowed to know, that this was simply not the truth.

Promises were made, and were later fulfilled by the government. The statements which the informants elicited from Mr. Phillips were taken at the behest of the government, under circumstances created and controlled by the State. Defense counsel and Mr. Phillips' jurors were not aware of the careful maneuvering and complex dealing which led to this teatimony. There was also a great deal more that they were not allowed to learn. The government suppressed critical facts: it turned over neither what it knew, nor what it rhould have known, about its informants, their testimony, or the agreements and understandings that had been reached. The government misled the jury, and then not only failed to correct the accounts -- it used them.

B. <u>The Evidence That Was Withheld from the Court, The Defense, and the Jury</u>

Most of the testimony provided by the government's informants wae simply false, and the State knew or should have known it was false. Quite Simply, Mr. Phillips' conviction and death sentence resulted from governmental misconduct. None of the errors discussed herein can be deemed "harmless". The withheld evidence, and the false and misleading testimony provided to the jury, is presented below as it relates to the testimony of the individual informants:

1. <u>William Smith/Scott</u>

William Smith, also known as William Scott, a former paid informant for the federal government and participant in the federal witness protection program, according to his trial testimony, "just happened" to be in a cell with Mr. Phillips in the Dade County Jail when Mr. Phillips made incriminatory statements, Informant Smith/Scott, according to his trial testimony, then reported the atatements to detectives because he wanted the matter "cheeked out" (R. 591). Smith/Scott testified that no one gave him anything in connection with his involvement in the ease, and that he was not a "police agent" when he heard Mr. Phillips make the statements (R. 582-83, 591). Although the assault charges €or which ha had been incarcerated at the time were subsequently dissolved, the State had nothing to do with that; rather, he

explained, it waa the victim himself who voluntarily dropped the charges (R. 583).

Defense counsel attempted to explore Smith/Scott's relationship with the police and motivation for testifying at a pretrial deposition: there, Smith/Scott repeatedly asrured counsel that he was not a "police agent," that prior to the instant caee he had never acted as an "informer" for anv other aaencv besides the federal aovernment; and that no one had given him anything or done anything for him in connection with this case (Deposition of William Smith/Scott, App. 1). The trial prosecutor was at that deposition.

Unbeknownet to trial counsel, a preliminary hearing on Smith/Scott's pending state parole revocation had been held on September 2, 1982, the day before his alleged conversation with Mr. Phillips. A parole warrant had been issued in 1980, alleging parole violations based on Smith/Scott's arrest for stabbing his wife, failure to pay supervision costs, and failure to appear in court on the assault charges stemming from the stabbing incident (App. 2).

Smith/Scott was not picked up on this warrant until August of 1982, when he was arrested in connection with yet another assault. At the September 2nd preliminary hearing, Detectivee Hough and sapp of the Metro-Dade Police Department appeared and testified on behalf of Smith/Scott, requesting that he be released on his own recognizance (App. 3). Detective Hough attempted to explain the earlier assault charges, testifying that those charges may have been prompted by the victim's anger at her husband because of his work as a Metro-Dade informant in a case involving the arreet and conviction of one of her relatives on narcotics charges (Id.). Detective Sapp appeared and advocated for Smith/Scott's releaee, promieing that he would provide employment and take custody of Smith/Scott immediately, if the Examiners would release him that day (Id.). Smith/Scott, testifying on his own behalf, told the Parole Examiners that he was currently workina for the police (Id.). The detectives assisted with the Phillipe case.

At the conclusion of the September 2nd hearing, probable cause wae found on all the asserted parole violations except thoee involving the assault.

Because the victim did not appear at the hearing, no finding of probable cause was made ae to that violation. Nevertheless, the Examiners recommended, "based on the assaultive behavior noted in the warrant and the fact that the subject hae pending charges for assaultive type behavior in the Dade County Circuit Court," that Smith/Scott's bond and/or ROR request be denied and that he be returned to prison (Id.). Nothing regarding what transpired at the parole revocation hearing, the testimony elicited, the identities of those who attended, nor even the Parole Examiners' findings and recommendation wae turned over to the defense or presented to the Court and the jury.[2]

The day after the Parole Commission's hearing (September 2) Smith/Scott auppoaedly elicited the incriminating statements from Mr. Phillips. He turned the information over to the detectives -- as even he admitted at trial. Neither judge, jury, nor defense counsel were told that immediatelv after Smith/Scott obtained statements from Mr. Phillips (September 3rd), Metro-Dads detective8 were frantically trying to obtain his release from jail (App. 3). On September 7, 1982, Detective Smith personally contacted a Parole Commissioner and requested the immediate release of his informant (See App. 3); he described Smith/Scott's long-standing and mutually-beneficial relationship with the Metro-Dade Police Department; he told the Commissioner that the informant was trusted and that he had been used many times in the past; he spoke of the informant's continuing importance to the Phillips case; and he described the Department's desire to use Smith/Scott to obtain even more evidence against Mr. Phillips (see Apps. 3,5,6,7). None of this was disclosed at trial. Smith/Scott was released on his own recognizance from the parole violation warrant that afternoon, pending further revocation

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[2]That is not the only evidence which showed Smith/Scott's long-term informant status. Department of Corrections records were rife with entries discussing Smith/Scott's status as an informant for etate and county law enforcement agencies (see Apps. 4,5). Indeed, Scott himself once related in sworn testimony that he had in the past made a "deal" with the State whereby certain charges then pending against him would be dropped, and probation imposed on the remaining, in exchanqe for his cooperation and assistance in a murder investigation being conducted by Detective Houah of the then Metro Dade Police Department (App. 6). This evidence also was withheld from the jury, the court, and defense counsel.

proceedings (Apps. 7,8). Those further proceedings were never held, and Smith/Scott was continued on ROR status until hi8 parole wae discharged on March 7, 1984 (App. 8).[3]

There was another obstacle to Smith/Scott's immediate release from jail, but it too waa overcome. As recognized by the Parole Examiners, Smith/Scott still had additional assault charges pending against him. Although Smith/Scott testified at trial and at his deposition that the police had nothing to do with those chargee being dropped (see R. 583; App. 1, p. 19), evidence withheld from the defense indicates that the State had indeed lent a helping hand. A police report prepared by Detective Smith on October 2, 1982, indicates that Detective sapp, who had aleo testified on Smith/Scott's behalf at the parole revocation hearing, was instrumental. in ensuring that those charges were dropped:

> On Tuesday, 7 September 82, at approximately 11:00 A.M., contact was made with DETECTIVE M. SAPP who works in the General Investigation Unit of Metro-Dade's Station #2. DETECTIVE SAPP advised that he was the lead investigator in the aggravated battery case where WILLIAM SCOTT was arrested on 21 August 82. He stated that the victim in that case did not want to pursue the matter by pressing charges against MR. SCOTT. Further, he advised that MR. SCOTT was to be arraigned on said charges at 1:00 P.M., 7 September 1982. He stated that the victim in the aggravated battery case was requested by him to respond to the court room at that time if he did not wish to pureue the matter so that the case could be diaposed of at that time. It was learned at approximately 2:30 p.m. that afternoon that the victim in the aggravated battery case did in fact respond to court and did verify his unwillingness to pursue criminal charges against MR. SCOTT by signing a nolle prose form witnessed by DETECTIVE SAPP. The charge of aggravated battery against MR. SCOTT was subsequently dropped.

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[3]Detective Smith sat with the Assistant State Attorney throughout Mr. Phillips' trial. He, like the trial prosecutor, sat in silence as Smith/Scott lied. Their star informant testified [falsely] that he was not an "informer", that he was not an "agent", and that the government was providing him no benefit. Neither Detective Smith nor the trial prosecutor corrected this informant's false account, although it was Detective Smith who had personally obtained Smith/Scott's release from the jail. Although Detective Smith had frantically attempted, and eventually succeeded in obtaining Smith/Scott's release becasue of the Phillips case, neither he nor the prosecutor said anything about it. And even though Detective Smith himself had described in glowing terms the work Smith/Scott had done for Metro Dade, their long-standing relationship, the need to use him further in the Phillips case, etc., Detective Smith and the trial prosecutor never even gave a hint that this informant-witness was lying under oath.

(Report of Detective Gregg Smith, October 2, 1982, App. 9). Although selected portions of that report were provided defenae counsel pretrial, the portion cited above wae not. (It is noteworthy that this would not be the first or last discoverable document that was "doctored" or selectively suppressed in this case.) Again, the government hid its involvement. Again, defense counsel, court, and jury were deliberately misled.

Not only did the detectives make sure that informant Smith/Scott was released from jail three days after his meeting with Mr. Phillips, they did so for a specific reason: to enable him to continue to act as an agent of the State in gathering evidence and assisting in building the government's case.

> At approximately 3:15 P.M., 7 September 82, it was learned that WILLIAM SCOTT was released from custody....
>
> At approximately 4:30 P.M., 7 September 82, a team conference was held at which time the facts and circumstancee regarding the case were discussed up until that point. It was agreed at that time to recontact MR. WILLIAM SCOTT to ascertain if he would voluntarily respond to the residences of LAURA PHILLIPS, HARRY PHILLIPS' mother, and IDA STANLEY, in an attempt to illicit (sic) information regarding this investigation. At approximately 7:30 P.M., 7 September 82, a meeting was held in the MDPD Homicide Office in which WILLIAM SCOTT, DETECTIVE M. SAPP, SERGEANT HEBDING, DETECTIVE L. BELINE and this investigator were in attendance. At that time MR. SCOTT advised that he would in fact respond to said residences in an attempt to secure information regarding the investigation.
>
> At 8:15 P.M., 7 September 82, MR. WILLIAM SCOTT responded to the residence of IDA STANLEY, located at 12530 N.W. 20 Avenue, transported by DETECTIVE M. SAPP. At the same time, this investigator accompanied by DETECTIVES M. RICHTER, L. BELINE & SERGEANT C. HEBDING responded to Metro-Dade Sub-Station #1 to await the return of MR. SCOTT which had been previously arranged.
>
> At approximately 9:00 P.M., 7 September 82, MR. SCOTT and DETECTIVE SAPP arrived at Station #1 pursuant to MR. SCOTT contacting IDA STANLEY. MR. SCOTT advised that approximately 8:15 P.M. he did in fact speak to MRS. STANLEY in her residence. He advised that during the course of his conversation with MRS. STANLEY, nothing was mentioned with regards to the homicide. He did note that MRS. STANLEY made no excuses for her brother and further did not advise him that the police were attempting to frame her brother. He stated that he left the residence at approximately 8:45 P.M. Further, he advised that during the course of the conversation, he did not confront her with any reference to the murder.
>
> Subsequent to the meeting at Station #1, MR. SCOTT was transported home by DETECTIVE SAPP, and this investigator returned to the MDPD Homicide Office.

(App. 9)(emphasis supplied). Again, on the following day,

At 7:00 P.M., 8 September 82, this investigator responded to the residence of MR. WILLIAM SCOTT, picked him up and subsequently transported him to the MDPD homicide office, A subsequent meeting was held with DETECTIVE M. SAPP at which time he and MR. SCOTT reeponded to the residence of IDA STANLEY, the sister of HARRY PHILLIPS....

(App. 9). Yet again, the next day,

On 9 September 82 at approximately 3:00 P.M., thie investigator once again picked up MR. WILLIAM SCOTT.... DETECTIVE SAPP accompanied by MR. SCOTT once again responded to the residence of IDA STANLEY....

Pursuant to learning that MRS. STANLEY was not at home, this investigator responded to NW 20th Avenue at approximately NW 126 Street and initiated a surveillance of MRS. STANLEY. At 7:15 P.M. the subject's 1981 Ford Fairmont... was observed pulling up to the residence.... At that time radio contact was made with DETECTIVE SAPP, at which time he returned to the area with MR. SCOTT. At 7:30 P.M., 9 September 82, MR. SCOTT approached the front of the residence at which time he was met by IDA STANLEY and MRS. PHILLIPS. At that time MR. SCOTT aave to MRS. PHILLIPS $20 in U.S. currency so as to give to HARRY. (NOTE: Said currency had been previously given to MR. SCOTT for that purpose.). . .

(App. 9) (Emphasis supplied).

These statements were excerpted from the reports provided to the defense. At trial, the government failed to disclose that Smith/Scott's testimony [not an "informer"; not a "police agent"] was a blatant lie. Four days after he supposedly secured Mr. Phillips' atatements and provided them to the police, Smith/Scott wae still employed by the detectives, investigated for them, contacted Mr. Phillips' family for them, and attempted to "buy" information €or them from the family. The government, however, did nothing when he intentionally denied being a "police agent" at trial.

Defenee counsel became aware of Smith/Scott's subsequent encounters with Mr. Phillipa' family at deposition, when a hint at what the true facts were managed to slip out. Counsel was then again lied to, and again the true nature of Smith/Scott's actions was suppressed. During the deposition, Smith/Scott intimated that he had more information regarding Mr. Phillipa which he had chosen not to disclose (App. 1, pp. 23-24). He had obtained this information during a visit to Mr. Phillips' sister's house, where he had gone, according to his testimony, to fulfill a promise he made to Mr. Phillips' while they were in jail. The promise was to drop off money at the sister's

house which she would later give to Mr. Phillips (Id., pp. 24-25). This sworn testimony was yet another lie (See police reports, supra). The trial prosecutor was again present at this deposition, as he was at the others. Yet he did nothing to correct what the State's own files showed to be perjury. Not only were the detective's reports not turned over, not only was informant Smith/Scott allowed to lie under oath and to mislead counsel, but this time the prosecutor himself directly assieted in the perjury: the government's failure to correct Smith/Scott's lies, and its exploitation of his perjured testimony (see infra) are striking in this case. The prosecutor carefully moved the informant to another subject, passing the whole thing off as a "joke" on Smith/Scott's part (Id.). Defense couneel tried again, but was again assured that Smith/Scott went to Mr. Phillips' sister's house to fulfill hie promise to Mr. Phillips (Id., p. 33).

Smith/Scott was an informant for the very authorities who sat by and let him lie. He worked for those very authorities. He was coddled, cared for, and provided with benefits by those same authorities. He obtained statements from Mr. Phillips in his capacity as their agent (and in violation of the Sixth Amendment, see infra). However, nwne of this information was provided to the defense, and none of the documents in the State's own files which referred to these matters were turned over. The government's dealings with Smith/Scott are questionable. The abrogation of the Sixth Amendment which resulted from their use of this informant is constitutionally intolerable. The government's efforts to conceal its dealings with Smith/Scott, to suppress evidence, and to mislead defense couneel can not be condoned.

William Smith/Scott and What was Learned at the Hearing

Smith/Scott testified both in his pre-trial deposition and at trial that he was not an informant or agent for the Metro-Dade Police when he first talked to Mr. Phillips, and that he had never acted in that capacity prior to that time (See R. 582-83, 591; see also Dse. Ex. I; App. 1 [Deposition of William Smith/Scott]). The State's own records and documents presented with Mr. Phillips' Rule 3.850 motion, and admitted into evidence at the hearing,

demonstrate that Scott/Smith was and had been an informant for Metro Dade, and that he therefore lied under oath in his deposition and at trial (See. e.q., Dfae. Ex. I; Apps. 1-9). Moreover, those records also demonstrated that the State was well aware of his statua as an informer (See, e.q., Dee. Ex. I, Apps. 3, 4, 6, 9), yet neither provided that information to the defense prior to trial nor corrected Smith/Scott's perjurioue testimony.

Detective Gregg Smith, the lead detective in the Phillips case, who worked closely with the Assistant State Attorney and in fact eat next to him at counsel table throughout the trial, was well aware of Scott/Smith's status as a police informant. Detective Smith had in fact appeared before the parole board on September 7, 1982, and informed them of Smith/Scott's long and successful history as a Metro-Dade informant (See Dee. Ex. I; App. 6). Detective Smith had before that time employed Smith/Scott to gather information and evidence in this case, as is demonstrated by Detective Smith's own report (See Dfse. Ex. I; App. 9).

Detective Smith testified at the evidentiary hearing as follows:

> Q. Do you remember yourself, Detective Hough, Detective Sapp getting together and sending Scott over to Mr. Phillips' family's house?
>
> A. No, sir.
>
> Q. That never happened?
>
> A. It did happen, but Hough was not involved.
>
> Q. Hough was not involved?
>
> A. No.
>
> Q. You and Sapp did that?
>
> A. Correct.
>
> Q. Do you remember giving him twenty dollars ae a way to sort of get a foot in the door?
>
> A. Certainly.
>
> Q. And to elicit information?
>
> A. Yes, sir.
>
> Q. If Scott's trial testimony denied that activity, would you characterize that as inaccurate?

A. I would have to eay he was mistaken, true.

Q. If he denied it, would you agree with me that he lied?

A. I can't say that he lied.

He may have forgotten.

I don't know what's in hie mind. He's obviously mistaken because that did occurr.

Q. You sent him over to the family?

A. Yea, eir.

Q. With $207

A. Yes, sir.

Q. What did you tell him to do with the $20?

A. Mr. Scott indicated to me he might be able to find out where the gun was.

. . .

We did give him $20, and we did ask him to go there and find out where the gun was that was used.

Q. When he was undertaking that activity, would it be fair €or me to eay that he waa working as an agent of yours?

A. At that time, definitelv.

Q. As an informant of yours?

A. As an agent, yes.

. . .

Q. Assuming that he was an agent, €or the sake of argument, and that wn the stand at trial that he knew what the word was, and on the stand at trial he said I waa never an agent €or Metro-Dade, only €or the federal government; I never worked as an informant €or Metro-Dade, only €or the federal government --

A. If he understood what those words were, yee.

Q. Is that the kind of statement which you would have asked Mr. Waksman to correct if he made that on the stand?

A. I don't recall.

Q. You never did ask Mr. Waksman to correct that statement?

A. I don't recall.

(E.H.[1] 1293-1297) (emphasis added). Detective Smith's testimony is consietent with his police report: Smith/Scott, despite his sworn testimony

to the contrary, was and had been an informant for the Metro-Dade police, and had acted in that capacity in this case. Since none of this information was turned over to defense counsel effective crose-examination and impeachment was prevented. The trial record itself demonatrates that neither Detective Smith nor the Assistant State Attorney made any effort to correct this witness's inaccurate testimony.

Smith/Scott's testimony at the evidentiary hearing confirmed what the records appended to Mr. Phillips' 3.850 Motion showed: that contrary to hi8 sworn deposition and trial testimony, he was and had long-been a paid informant for the Metro-Dade Police Department:

> A. I started working with Detective Hough in '72 when I got out. I got on probation in '72.
>
> Q. With Detective Hough?
>
> A. Right.
>
> Q. When you say you worked with him, what kind of things would you do?
>
> A. Well, I was a C.I. for him at the time.
>
> Q. Seeing eye?
>
> A. A C.I., confidential informant.
>
> Q. You would provide him with information as a confidential informant?
>
> A. Yes, sir.
>
> . . .
>
> Q. You just indicated that you were a C.I. for Detective Hough?
>
> A. Right.
>
> Q. You worked with him?
>
> A. Right.
>
> Q. You were an informant for him?
>
> A. Right.
>
> Yes, sir.
>
> . . .
>
> [Q.] By the way, did you have a number, an informant number, with Detective Hough?

A. Well, I had one for D.E.A.

Q. Okay.

A. And, I got a number from the county maybe few years back.

I don't know.

Q. You had a number €or the county?

A. I worked for the county.

Q. Would that be for Metro-Dade?

A. Right.

And, I had one €or D.E.A.

Q. You had a number for Metro-Dade and one for D.E.A.?

A. Yes.(E.H.[2] 29-32).

Q. Did you ever work as an informant with Metro-Dade before 1980?

A. Yea.

. . .

Q. Were you a C.I. with Metro-Dade before 1980?

A. Well, yeah, I had to be.

Yeah.

Q. Would that be with Detective Hough?

A. With Detective Hough, yes.

. . .

Q. Were you paid --

I assume you were paid for information or for assistance?

A. Well, that's what I would say.

Q. Who waa it that paid yau?

A. Larry Hahn (phonetic) of D.E.A.

Q. Up until today have you ever received any money from any state detective?

A. Yee, sir.

Q. Before 1985 --

Before 1984, did you receive any money from any state detective?

A. Before '84?

Q. Yeah.

Mr. Scott, let me ask you this:

You said you were working with Detective Hough, you were an informant for the state before 19807

A. Yeah, €or Hough.

Q. What was given to you for being an informant?

A. Ha gives me money.

Q. So, Detective Hough now we're talking about?

A, Right.

Only when I tried to help out on a case, or something like that; not just to be given money to be given.

Q. You worked for it, so to speak?

He wasn't just giving it to you?

A. Right.

Q. That happened before 19801

A. Yeah.

Q. With Detective Hough?

A. With Hough, yeah.

Q. How much money were *you* given?

A. Well, most of the time, you know, if I start on a case or something like that, he gave me a hundred dollars.

I start a case, he give me a hundred dollars; something like that.

Q. So, he'd give you a hundred dollars when you started a case?

Correct?

A. NO.

Probably if I provide him with the proper information, you know.

I go out and take anything he have me take care of, he have pay €or me it, you know.

Q. How much were you paid?

A. How much were I paid?

Q. Yeah.

Did that depend on the case or --

I just want to get an idea.

How did that work?

A. well, air, I never even paid any attention.

Q. On the average case, how much would you gat?

A. That the state, right?

Q. Uh-huh, state.

The state before 1980 now.

A. Well, sir, I go in, sometimes --

Maybe twice a month, you know, give me hundred, hundred fifty dollare, you know.

Q. So, you got about hundred fifty dollars twice a month from the state before 19807

A. Well, it depend on what type of case I'm on really, you know.

Q. Could we say the average --

What would the average be?

Say three hundred dollare, hundred fifty dollare twice a month?

A. No.

Well, you could say that. You could say that.

Q. When did you start as an informant?

A. 1972.

(E.H.[2] 37-43). Moreover, as Scott/Smith now testifies (and as is confirmed by Detective Smith and the State's own records), he was working as a paid police agent on <u>this case</u>:

Q. Do you remember any law enforcement officer, any detective ever giving you any money to take to Mr. Phillips' family?

A. Yeah.

I carried $20.

Q. And, who gave you that7

A. Detective sapp.

Q. And, why was that money given to you?

A. Well, basically he wanted me to see I can get information concerning the weapon.

Q. You went over to Mr. Phillips' family?

Right?

A. Yes, I did.

. . .

Q. Why did you go there?

A. Basically, he was trying to find the weapon, you know.

Q. Who is he?

A. Detective Sapp.

. . .

Q. Who handed you the money?

A. Sapp.

Q. What did he tell you to do with it?

A. He asked me --

You know, he said: Well, go there and tell his eister that you just got out, that you wanted to give Harry some money for the commissary.

Q. What were you supposed to do when you went and talked to the family?

What was the purpose of all of that?

You were going over there to just say hello?

A. Well, I guess to pick up the information that they needed, right.

Q. You were trying to get information out of them?

Fair?

A. Wall, I didn't do too much questioning.

I just --

I asked a few questions, you know.

Q. You asked a few questions.

But, the idea was to get information out of them, wasn't it?

Q. Yeah.

A. I told her I had just gotten out and that I bought this $20 by her to give for the commissary.

. . .

Q. You were trying to find out where the gun was?

A. Well, you know, that was the motive.

You know, that was the motive.

Q. You wanted to find out where the gun was?

Right?

A. Right.

Q. And, you wanted to find out what they knew about the case?

Right?

A. Well, right.

Q. You wanted to find out what Harry had told them about the case?

Right. I'm not asking you now --

A. I guees.

Q. Hold on a minute here.

I'm not asking you how you asked the questions.

I'm asking you what you wanted to find out.

You wanted to find out where the gun was, what Harry told them about the case, what they knew about the case, that kind of stuff?

Right?

A. Right.

Q. Who told you to go find out that information?

I don't think you cared about something like that on your own.

A. Well, they was listening to what I was saying.

I had a body bug and it's on record, man, you know.

(E.H.[2] 72-80).

In fact, Smith/Scott is to this day a paid informant in the employ of the Metro-Dade Police Department:

Q. And, are you an informant today?

A. Well, I work occasionally.

Q. Yes or no?

Are you an informant today?

A. Well, yes.

Q. Were you an informant €or the state in November of 1987?

A. November of '87?

Q. Yeah.

A. November of '87 --

Yeah.

Q. Okay.

So, from 1982 until today you've been an informant €or Metro-Dade?

You just said that?

A. Right.

But, I don't just work for this Metro-Dade.

Q. I'm just asking you about Metro-Dade.

Now, from 1970 until today you've been an informant €or Metro-Dade?

A. I've been helping out.

Q. Have you been an informant for Metro-Dade from 1982 until today?

Yes or no and then you can explain it.

A. Well, yes, I am.

(E.H.[2] 43-44).

The record is clear with regard to Smith/Scott's sworn pre-trial and trial testimony denying hie past status as a paid agent €or the Metro-Dade Police Department (See R. 582-83, 591; Dfse. Ex. I, App. 1 [Deposition of William Scott/Smith]). The record developed in these post-conviction proceedings is equally clear that Smith/Scott wae a paid informant before, at, and after his encounter with Harry Phillips, and that he lied under oath with regard to that status, as he now freely admits:

Q. If somebody were to tell me that William Scott has never been an informant for the state, they'd be lying, wouldn't they?

A. They had to be lying, oh, if they say I wasn't an informant.

Q. If somebody were to tell me that William Scott has been an informant €or the federal government but never an informant €or the state, they'd be lying, wouldn't they, from what you know?

A. Well, I've been an informant on both sidee.

Q. You've been an informant €or both sides?

A. Right.

(E.H.[2] 43-44). The record also clearly demonstrates that the prosecution knew Smith/Scott was lying, yet stood silently by.

The State's misconduct with regard to Smith/Scott did not end with Mr. Phillips' trial: the concealment continued throughout and infected the post-conviction proceedings. Mr. Phillips attempted to procure Mr. Scott's attendance and testimony at the initial hearing held before the trial court, but the State then said it did not have knowledge of Smith/Scott's whereabouts.'

Subsequent evente proved that the State's representations regarding its lack of knowledge of Smith/Scott's whereabwuts were misleading, at a minimum. Several weeks after the January, 1988, hearing Assistant State Attorney Waksman wrote a letter to the Governor's Assistant General Counsel, Andrea Hillyer, alleging that the CCR office had acted somehow improperly with regard to ite initial interview of Smith/Scott (See Defendant's Motion to Reopen Evidentiary Hearing, App. 4). Attached to that letter was an "affidavit"[5]

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[4]Smith/Scott was spoken to in the Dade County Jail in October of 1987, as part of the investigation and preparation of Mr. Phillips' Rule 3.850 Motion. By the time of the January, 1988, evidentiary hearing, however, Smith/Scott was nowhere to be found. At that hearing, counsel asked Assistant State Attorney Waksman whether he, any other proeecutors in his office, or any detectives were aware of Smith/Scott's whereabouts: Mr. Waksman represented that he had no idea where Smith/Scott was, and that he in fact had not seen or heard from him in four years (See E.H.[1] 334-35; see also id. at 343). Counsel learned during that hearing that Smith/Scott had been seen in the building, and put his ex-wife, Janice Scott, on the stand to testify to that effect (E.H.[1] 1230). Assistant State Attorney Waksman, however, continued to deny any knowledge of his whereabouts (See E.H.[1] 1241, 1244).

[5] The term "affidavit" is Mr. Waksman's -- the document at issue was neither sworn to, subscribed to, made under oath, nor notarized. The term "affidavit" is thus inapplicable to the document signed by Smith/Scott, and the document will therefore henceforth be referred to herein as an "unsworn statement."

from Scott/Smith (see id., App. 5) and a police report from Detective Gregg Smith (Id., App. 6). These documents demonstrate that the State's avowed lack of knowledge of Smith/Scott's whereabouts was patently inaccurate.[6] Counsel for Mr. Phillips moved to re-open the hearing. The trial court granted the mot ion.

The teetimony of Smith/Scott at the September 15, 1988, re-opened hearing further demonstrated that the State's disavowal of knowledge regarding his whereabouts was false. Smith/Scott testified that Detective Gregg smith had talked to him about the January, 1988, hearing shortly before the hearing was to occur, and told him that he may be called on to testify at that hearing (E.H.[2] 114-17). Maraover, Smith/Scott also testified (as his ex-wife had previously testified, see E.H.[1] 1230) that he was in the Metro Juetice

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[6] Smith/Scott's unsworn statement, dated "11/12/87" (Id., App. 5) was co-signed by Detective Greg Smith. obviously, Detective Smith had seen him since the time of trial. Detective smith readily explained his involvement with Smith/Scott in his November 10, 1987, police report (Id., App. 6). The involvement was in fact so significant that Smith/Scott war provided with a "body bug" by Detective Smith.

Detective Smith's report also explained that after talking to Smith/Scott,

> "this investigator contacted Chief Assistant State Attorney Abe Laeaer and related to him the aforementioned information. He agreed that if Mr. Scott consented, a body bug would be in order. Mr. Laeser then prepared a letter . . . documenting the stance taken by the State . . . "

(Id., App. 6).

There is further evidence that belies the state's avowed lack of knowledge. The identification line appearing at the bottom of Smith/Scott's unsworn statement clearly reads, "DW:tk:11/10/87" (Id., App. 5). Only one "DW" was associated with Mr. Phillips' post-conviction action: David Waksman. The exact same identification line appears on Mr. Waksman's letter to Andrea Hillyer. The identification line is significant:

> Responsibility or Identification Line.
> The typed notation that shows who dictated a letter, and who typed it . . .
>
> . . . If the dictator's name is typed on the letter, there is no need for his initials to appear in the responsibility marks.

(Legal Secretary's Encyclopedic Dictionary, 2d Ed., p. 378). David Waksman'e name appears nowhere in the unsworn statement; one would therefore expect to find his initials in the "responsibility marks" if he in fact dictated it, as with the letter.

Building while that hearing was going on, on the fourth floor, attending his own criminal trial which, presumably, was being proeecuted by Mr. Waksman's office (See E.H.[1] 115-116). And Smith/Scott's testimony, quoted earlier in this brief, confirmed that he had testified falsely at trial.

2. William Farley

William Farley was an inmate at the Lake Butler Correctional Institute in 1982, and €or a brief period of time shared a cell with Harry Phillips. On November 4, 1982, one day after Farley was moved into the same cell with Mr. Phillips (R. 877), Detective Gregg Smith and a companion traveled to Lake Butler €or the express purpose of interviewing Farley. According to Farley's trial testimony, at their initial meeting Detective Smith asked him if his cellmate, Harry Phillips, had "been mentioning anything pertaining to a murder ease" (R. 809). Farley "told them at that time no," and was returned to his cell. When he got back to his cell, Farley testified, Mr. Phillips fortuitously volunteered a detailed account of his involvement in the offense (R. 809-13). Farley relayed this information to a prison guard, who in turn relayed it to Detective Smith (R. 813).

The following day, Farley was transferred to the Polk County correctional Institution where he again met with Detective Smith, and gave a tape-recorded statement describing his conversations with Mr. Phillips (R. 814). According to Farley'a trial testimony, the taping started immediately, and he thus had no opportunity to discuss his statement with Detective Smith before it was recorded (R. 822).

Farley's description of the taping session was a patent lie. Detective Smith, who took the statement from Farley, and who sat next to the trial prosecutor during the proceedings, heard the State's informant lie -- neither the detective nor the prosecutor corrected it. After he met with Farley, Detective Smith memorialized the meeting in a report. The Detective's report explained that he and Farley talked for one and a half hours before the tape was turned on and a formal atatement taken (Report of Detective Gregg Smith, November 24, 1982, App. 10). The section of this report referring to the

taping of Farley'e etatement was excerpted from the discovery materials and not supplied to the defense. The trial testimony made it look like the statement was an unrehearsed, spontaneous, i.e., true, account. The reality was that the witness wae prepared. But the defense was left with no means to impeach the witness' account -- evidence to which the defense was entitled was again suppreesed and the State allowed the witness to testify falsely.

The circumstances under which Farley ended up in a cell with Mr. Phillips (and ultimately obtaining etatemente) are themselves questionable. Farley had been in the cell only one day when Detective Smith first travelled to Lake Butler (R. 877), and when he was initially interviewed on October 4, Farley did not even know Mr. Phillips' name nor had he yet epoken to him; Detective Smith had to show him a picture of Mr. Phillips (Deposition of Detective Smith, App. 11, p. 22). After Detective Smith told him who his cellmate was, and that his cellmate (Harry Phillips) was the prime suspect in a murder which had recently occurred in Miami (Statement of William Farley, App. 12), Farley was returned to the cell.

We also now know that Farley had been moved from prison to prison eleven times in the six months surrounding his encounter with Mr. Phillips. He had been placed in isolation for his own safety at most of those prisone (see App. 13)[Department of Corrections records regarding William Farley]. Farley had been incarcerated at Polk County Correctional Institute until September 23, 1982, when he was moved to Lake Butler, where Mr. Phillips had been housed for two weeks. Only two weeks later, immediately after eliciting statements from Mr. Phillips, Farley was transferred back to Polk County, on October 7, 1982 (Id.). Farley's movements, reflected in the government's files -- particularly the two week "jaunt" from Polk County to Lake Butler and back to Polk County -- fill in important pieces.

Farley testified at trial that no one made him any promises in connection with the statements he obtained from Mr. Phillips or his subsequent testimony (R. 806, 813, 815), and he expected no benefit (R. 817). Farley's motivation for testifying he said, was simply that, "for once in his life, [he] wanted to

do somethina to try to serve society and help humanity" (R. 851) (emphasis added). Detective Smith also explained that no promises had been made (R. 878, 880). The trial prosecutor did tell Farley that he would write a letter on his behalf to the Parole Board, in a conversation which occurred a year after Farley's taped atatement (R. 845). The prosecutor told defenee counsel prior to trial, with regard to Farley, that

> when he told Detective smith that he would be willing to testify no promises were made at the time and I brought him to Dade County and I interviewed him. After the interview I told him once again, that I would feel obliged to send a letter to the parole board that he renders assistance. He said, it was not necessary, that he was aettina out in less than a year. I told him that I would send one anyway. That is the sum and substance of his promises that I rendered him.

(Deposition of David Waksman, App 14, p. 13)(emphasis supplied).

We now know that Farley's "serve humanity" testimony was blatant perjury. Promiaea had been made, and Farley did indeed expect to benefit by his testimony. when those promises were not fulfilled quickly enough, Farley expressed hia anger in a letter to the prosecutor:

> Dave,
>
> I need to be deceived no more than I need to put my hand on my conscious. Approximately one month and a half ago, you told me that you had effectuated the release of those three other inmates who testified at Phillips' trial. Detective Smith advised me the other day that they're still incarcerated. You have given me reason to imagine that you've lied to me about everything, including the letter which you claimed that you sent to the parole commissioners. I want to make it absolutely clear to you that I realize that it's your duty and obligation to put people in jail, not to endeavor to get them out. But I would appreciate it if you'd fulfill the promises that you mads to me and my fiancee and my father. I know that I'm just a mediocre and insignificant "nigger" to you, that you are indifferent to my imprisonment or existence. But didn't I help you win Phillips' case and more prestige? Can't you at lease [sic] fulfill your promise if €or no other reason than that? It would be in the beet interest for the both of us if you did, because if the parole commissioners does not confirm the release date that the parole examiner (Mr. McFadden) recommended for me by the end of this month, and if I don't have the reward money by that time; I will do everything I can to aabotage the case and get Phillips an acquittal. Detective Smith said that it would be dirty, but it would also be dirty if you didn't fulfill your promises.
>
> Authentically,
>
> William Farley

(Letter to Assistant State Attorney David Waksman from William Farley, February 14, 1984, App. 15).

Farley's threat to the prosecutor got results -- he waa paroled on March 20, 1984, six days after the letter was sent out, and releaeed on March 21 (App. 16). The State moved quickly to fulfill its promise to Farley -- two weeke after his letter, an initial Order of Parole was entered (App. 17). Memos flew (see App. 18) and two weeke later parole was granted (see App. 16). The State did nothing to let the jury, the Court, or the defense know that it had made promises.

At the time of the trial, Farley's presumptive parole date was November 24, 1984 (R. 805, 815). He made it very clear at trial that he was not testifying to get an early parole (R. 817). His February 12 letter to the trial prosecutor (App. 15) demonetrates that he lied while on the stand. But no evidence reflecting the government's dealmaking was provided to the defense.

Farley not only gave false testimony pertaining to his future incarceration and the deals he had made with the government in that regard, he also lied about his prior record. Farley told the jury that he had one prior conviction and one parole violation (R. 817). This too was a lie: Farley had been convicted a total of three times (see App. 19: armed robbery [1974]; burglary [1976]; escape [1981]) and had had hie probation revoked. Although the State was keenly aware of his incarceration status and possible release dates, Farley failed to mention his substantial record while on the witness stand and the misleading [and false] testimony of its witness was left uncorrected by the government.

Farley's Testimonv At the 3.850 Hearing

Farley was the eecond informant who acknowledged that he lied at Mr. Phillips' capital trial during these 3.850 proceedings.[7] Mr. Farley's testimony at the hearing demonstrated that Mr. Phillips is entitled to relief:

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[7]Letters from Farley to the trial prosecutor demanding that the latter fulfill his end of the bargain were appended to Mr. Phillips' 3.850 motion and were also introduced at the hearing (See Def. Ex. I, Apps. 15, 17, 18).

A. First of all, I never knew the reason why I was moved one Cell on the wing specifically to Harry's cell.

But, one day I was just moved for no reason and placed in the cell with Harry.

And, then I think the next day or so I was called out by Detective Smith, and asked had Barry, you know, told me anything about what he was suapacted of or charged with.

And, at that time I told him no.

Q. Okay. I'm sorry.

Let me just stop you.

Was that the first thing that Detective Smith did when the two of you met each other, ask you whether Harry had told you anything?

A. Yes.

Q. During that interview that you had with Detective Smith, did he, did Detective Smith, tell you anything about Harry?

A. He told me that Harry was suspected of murder, homicide.

. . . .

Q. We are where you spoke with Detective Smith for the very first time now: okay.

You already told us that Detective Smith told you that Harry was a prime suspect in a murder in Miami?

A. Right.

Q. Do you remember, when you gave that aame statement back at the time of the trial, you said Detective Smith showed you pictures?

Do you remember that?

A. Yea.

But, I think, if I remember correctly, he showed me the pictures at -- I think either the Poe (sic) Correctional Institution or the Dade Correctional Institution.

Q. Did Detective Smith know that you were locked up with Harry?

A. Obviously he had to know.

Q. Sure.

A. Yeah.

Q. That's what the two of you were talking about?

A. Yea, I guess he knew.

Q. Okay.

Now, again when you were speaking to Detective Smith that first time --

When that finished, Detective Smith sent you back into the cell?

Right?

A. Right.

. . . .

Q. Did he say to you, indicate to you in some way or another, that he wanted to know about Barry, to know what you knew about Harry?

A. Yea.

Q. Detective Smith --

Would it be fair for me to say that Detective Smith asked you to listen and to -- if you have any information, to let him know what you knew about Harry?

A. Yes.

Q. He asked you to keep your ears open --

A. Yea.

Q. -- to see what you can find out?

A. Yes.

Q. Yes?

A. Yes.

Q. And, to let him know what you found out?

A. Yea.

. . . .

Q. Before you went back in, when he was telling you about keeping your ears open, about listening -- remember the stuff we just talked about -- how did he say that?

Do you remember?

A. Well, he said it looked like I was tired of being incarcerated or whatever.

When I think about that, you know, it was an indication of something, of me maybe getting the assistance from him to be released from prison if I obtained, you know, testimony or statements or whatever from Phillips.

Q. He said you looked like you were tired of being incarcerated?

A. Yes.

Q. Did he --

Thinking back to everything you remember now from the trial and from when you spoke to Detective smith, did he say something like --

Did he indicate to you in some way that he could help you so that you wouldn't be incarcerated anymore?

A. Not overtly, but I would say --

Q. He didn't say, in other words, I'm going to get you out tomorrow?

A. Right.

Q. But, he did say you Looked like you were tired of being incarcerated.

How did he say --

What did he mean by that?

A. Well, he said I think something to the effect that I was tired of being in prison and that was --

I knew --

I grasped from that that he was saying if I gave -- obtained that information from Phillips, that maybe perhaps he could assist me, like I said, in some way of getting out.

Q. You knew that from the way he said it?

A. Yes.

Q. You knew that Erom what he said?

A. Yes.

Q. Did you believe him?

Did you think that this detective from Dade County could help you get out of prieon at some point?

A. Yes.

. . . .

Q. Were you thinking abut what Detective Smith told you when you went back in the cell?

A. Yes.

I thought maybe that Detective smith had implied to me that Phillips was guilty, and that if I could pick information from him concerning that, that he would assist me eomehow.

Q. I'm sorry; go ahead.

a

A. And, like I say, not long after I contacted the jail administrators to contact Detective Smith.

Q. Before we get to them --

We're going to talk about the whole thing because I want you to tell us what you know.

You went back into the cell, and you were thinking about what Detective Smith told you?

You just said that?

A. Right.

Q. You went in and you saw Harry back in the cell?

A. Yee.

Q. Did you know at that point, right there when you guys were in there together --

Did you know other guys who had been locked up that had gotten favors?

Did you hear stories like that?

A. Uh-huh; yes.

Q. You heard about people who -- I'll just use this word -- who had snitched on people?

A. Yes.

Q. And, had gotten released?

Right?

A. Yes.

. . . .

Q. You went back in and spoke to Harry?

A. Yes.

Q. What --

Let me just put it this way, and You can explain it.

Did you try to get information from him?

A. Yes.

Q. Go ahead.

A. I did have another conversation with Harry after I was placed --

Q. What did you do, what did you say?

Tell us in your own words.

A. I told Harry at that time that detective had called me out and asked me questions about --

Q. I'm sorry?

A. -- about him.

Q. You had?

You asked him questions about that?

A. Yeah.

I told Harry that detectives had, you know, questioned me about him.

And, he told me again on that same date that he hasn't did anything, that he was being detained for something that he knew nothing about.

And, then again he showed me the photograph, I think a news article of crime that was committed, and things like that.

. . . .

Q. Did you ask Harry questions about hie case?

A. No.

Q. But, you talked to him about his case?

A. Yes.

Q. Did you talk about Harry'e case?

A. Well --

Q. You just said he showed you the newspaper and stuff?

A. Yes.

And, really Harry never talked in detail about that except that he said that he knew nothing about it, that he waa just a suspect in it.

. . . .

Q. What did Harry tell you about the case when the two of you were talking together after you got back into the cell and you were talking to him?

A. Well, he just said that the guy, you know, it wae his probation officer, and that he revoked his parole once and sent him back to prison, but he didn't, you know -- he waen't the one that murdered him.

Q. He told you he was innocent?

A. Yes.

Q. Did he tell you anything about bullets?

A. No.

. . . .

Q. Tell us about the picture that Harry showed you.

What was that all about?

A. Well, it was just a news article.

Above the article were a picture of this Lady and her child leaving a funeral.

And, because, I guess, what Detective Smith had implied to me and beeauae a lot of things at that time, I felt €or this child.

I imagined to myself that Harry was perhaps guilty.

But, since then --

Q. Wait, wait. Let me --

We'll get to that in a minute. We're trying to go one step at a time.

You said because of what Detective Smith said to you?

A. Right.

Q. What did you mean by that?

A. Well, the indication that maybe --

You know, there were indication that maybe I could get: out of prison.

Q. Did Detective Smith put that thought in your head?

A. I guess subconsciously the thought of getting Out of prison was always --

Q. You wanted to get out?

A. Right.

Q. And, the two --

You already said you talked to each other?

A. Yes.

Q. And, you talked to Harry about his case?

A. Yes.

Q. Now, when you did that --

Do you remember you told us earlier when you talked to Detective Smith he told you to keep your ears open, see what you could find out, and then to let him know?

Is that fair?

A. Yea.

Q. And, when you went back in and you talked to Harry, is that what you were doing?

A. Yes.

Q. What Detective Smith told you?

A. Yea.

. . . .

Q. After you found this stuff out, what did you do?

A. I had prieon officials to contact Detective Smith.

. . . .

Q. What did you tell the prieon official?

A. That I wanted to speak with the detective that had called me out to interview me.

Q. And, then did there come a time when you did speak to Detective Smith again?

A. Yes.

Q. Did he call you out for that interview?

A. Yes.

That was --

I had been --

I was sent to the Poe (sic) Correctional Institution.

Q. You were back at Poe (sic)?

A. Yes.

. . . .

A. Well, when he called me out he --

First of all, he told me that --

He asked me how many times did Harry say the victim was shot, and I told him I think at that time once or twice.

Then, he said no, the victim was shot numerous times.

Q. Smith said that?

A. Yes.

Q. Go ahead; I'm sorry.

A. But, he never informed me exactly how many times that were.

And, then I think he instructed me there were a reward involved, that he could assist me to get out of jail if I testified.

Q. Let's take that one at a time. Let's --

Did you tell Detective Smith the things that you had found out from Harry at that second interview?

A. Yes.

Q. Remember at that second interview Detective smith had a tape with him?

A. Yes.

Q. When you first were brought out and you first talked with him --

A. Uh-huh.

Q. -- was the tape on?

A. No.

. . . .

Q. Did he turn the tape on right away or did you guys then talk a little more before he turned it on?

A. He turned it on after we had talked a while.

Q. You talk some more?

A. (Nodding in the affirmative.)

. . . .

Q. Before Detective Smith turned the tape on, is that when he told you that he could assist you with parole with your case?

A. Yes.

Q. Did he show you hie badge at that second interview?

A. Yea.

Q. You knew he was a detective?

A. Yea.

Q. From Miami?

A. Yes.

Q. This I don't mean to sound insulting in any way.

But this wasn't the first time that you had been incarcerated?

Right?

A. No.

Q. You'd been locked up before?

A. Yes.

Q. Did you want him to assist you?

A. In a way, no, to be truthful.

Q. Did you expect that he would assist you?

A. Yes, I figured that he probably would.

Q. Did you believe that he would assist you?

A. Yes.

Q. Do you remember --

Do you remember how he said he could assist you with parole, what could he do for you there?

A. Well, he said that he would write a letter and have the State Attorney in the case to try to contact Parole and Probation officials in Tallahassee.

Q. That they would write a letter to try and get you parole?

A. Yes, that they would contact --

Q. Did he say to you that they could get you parole?

A. Yes.

Q. And, that they would do that?

Right?

A. Yes.

Q. If you helped them out?

A. Yes.

Q. Now, let me just ask about one more question on this.

You weren't assuming this etuff?

He told you this stuff?

Right?

A. Yes.

Q. Did he say anything about money?

A. Yes.

He said that there were.

The family of the victim had a reward out, or something like that, and that whoever testified would be rewarded or compensated.

Q. Whoever testified would be rewarded and compensated?

A. Yes.

Q. And, when he said that he didn't -- he meant in Harry's case?

A. Right.

Q. Whoever testified in Harry's case would be rewarded and compensated?

A. Yes.

Q. Did he ever mention one thoueand dollars?

A. Yes.

. . . .

Q. What did he say about that, about that thousand dollars?

A. He said that if I testified and if Harry was found guilty, that I would be given a thousand dollars.

Q. If you testified and if Harry was found guilty, you would be given a thousand dollars?

Is that what he said?

A. Yes.

Q. That's your understanding of what he said?

A. Yes.

Q. Did you believe that?

A. Yea.

. . . .

This is now the second time you guys are talking: okay?

A. Uh-huh.

Q. What else did he say?

A. After he concluded the interrogation or interview of me --

Q. Let me stop you.

Did he turn the tape on at some point?

A. Yea.

I would say after he instructed me specifically to etate certain things, I would say he turned it on.

Q. He instructed you specifically to state certain things.

A. Yes.

Q. Can you tell us with [sic] those things were?

A. Well, to state, I guess, most importantly that the victim was shot numerous times because before he ever turned the recorder on he stressed that.

Q. Before --

I'm sorry. I didn't hear.

Before he turned it on, what happened?

A. He stressed that I state the victim wae shot numerous times.

Q. He told you that it was important to put that on the tape?

A. Yes, to state that.

Q. Did he tell you why?

A. No.

Q. Did you wonder why?

A. At that time I sort of knew that if the victim was shot maybe seven, eight times that it was -- it would be important, I guess, for what you would call a material witness to state that in order €or prosecutor or state attorney to prove -- to prove that a person did something.

Q. Did you think that that would help the detective, the State, the case?

Did that part ever cross your heard?

A. Yea. (E.H [1] 937-73).

Q. . . . [d id there come a time when you met Mr. Waksman?

Did you meet Mr. Waksman after that?

A. Yes.

Q. When you met him, was Detective Smith there when you met him the first time?

A. Yes.

. . . .

Q. When the three of you first met, did Detective Smith introduce you to Mr. Wakaman?

A. Yes.

Q. What did Detective Smith say to you then at that meeting?

A. He said that Mr. Waksman were the prosecutor in the case, and that afterwards he would also do what he can to get me out of prison.

Q. That he would do what he can to get you out of prison?

A. Yes.

. . . .

Q. Now, during these times when you met, what did you tell Mr. Wakaman?

A. Well, up until --

On the occasions that I met with Mr. Waksman alone, like on the day that the trial commenced, he instructed me that - You know, the same way that Detective Smith had.

He indicated that it was material and important that I indicate that the victim had been shot several times.

And, on that day he informed me that there were a thousand dollars reward.

And, that after the trial, if Harry wae convicted, he would try to assist me in getting out of trouble.

Q. That reward money --

Did you understand that to be reward for your testimony?

A. Yea.

Q. Did they tell you that that was reward for your testimony?

A. Well --

Q. I mean, Detective Smith.

You already said he told you that?

A. Right.

Q. Mr. Waksman say that to you?

A. Yes.

Q. Did Mr. Waksman tell you thinge you should say on the stand at the trial?

A. No more than to state that the victim was shot numeroua times, and that was --

Q. He told you that was important, that the victim was shot numeroua times?

A. Yes, sir.

. . .

Q. Did he ever show you any questions of what he was going to ask you in court that were written down?

A. Yes.

Q. He ehowed you questions that were already written down?

A. You know, specific thinge that I guess he felt the etate attorney or Harry's lawyer might try to cross-examine or whatever.

But, it was certain things that he informed me to state.

Q. Did he write down the notes that he gave you?

Did he have things that you should remember that you were going to testify at the trial?

A. Yes.

Q. Was it so that you wouldn't forget things?

A. Yes.

Q. And, was the fact that you ahould say that the victim had been shot a lot of times, was that on the note?

A. Yea.

. . .

Q. Now, you said that you went down to Dade and Detective Smith mentioned a thousand dollars again?

A. Uh-huh.

Q. Mr. Waksman mentioned a thousand dollars?

You said that, too?

A. Uh-huh.

Q. Did he mention that one time?

A. Who, Mr. Waksman?

Q. Yeah.

A. I think twice.

Q. Twice?

A. Yes.

Q. Was it mentioned at the same meeting?

In other words, did he mention one at one meeting and one at another meeting?

A. The second time I saw him in hie office I think he mentioned that, and then on the day of the trial.

Q. So, he mentioned it once in the jail cell back at the --

A. Yes.

Q. -- Dade County Jail?

A. Yes.

Q. And, once in his office?

A. Yea.

Q. And, you said that he said that that wae reward for testimony?

A. Yes.

. . .

Q. And, Detective Smith mentioned helping you get parole, get you parole.

Do you remember that?

A. Yea.

Q. After you came down here to Dade County, did Detective Smith mention that again?

A. Yea.

Q. Said the aame thing?

A. Yes.

Q. Did he say that he could get you parole when you were down in Dade County?

A. He said that it would be sometime after the trial.

Q. That after the trial you would get parole?

A. Yes, sir.

Q. And, that he could get help you get that?

A. Yea.

Q. Did Mr. Waksman mention parole?

A, Yes.

Q. Did Mr. Waksman also say that after trial he would get you parole?

A. Yes.

Q. When Detective smith and Mr. Waksman said that when you were down here in Dade County, did you believe that?

A. Yes.

Q. When they talked about the money when you were down here in Dade County, did you believe it?

A. Yes.

(E.H.[1] 985-95). Thus, Farley confirmed what Mr. Phillips' Rule 3.850 motion pled. He was offered, in exchange for hie testimony, early release and financial remuneration. Of course, none of this was revealed to the defense prior to trial, and no one made any efforts to correct Farley's false trial testimony.

Farley also confirmed and authenticated those documents offered by Mr. Phillips in aupport of this claim in these Rule 3.850 proceedings -- i.e., Farley's lettere to Mr. Waksman demanding that Mr. Waksman uphold his end of the bargain (See Dse. Ex. I, Apps. 15, 17, 18):

Q. William, let me show you what hae been marked Exhibit A-24, and ask you if you recognize this document.

First let me ask you is that your handwriting?

A. Yea.

Q. Do you recognize that document?

A. Yes.

Q. Can you tell us the date on that document?

A. February 1st.

Q. And the year?

A. '84.

Q. Is that in fact a letter that you wrote to Mr. Waksman?

A. Yes.

. . .

Q. . . . [D]id that letter reflect what you believed at the time you wrote it?

A. Yes.

Q. Now, you're under oath now, okay.

When you wrote that letter, was everything in there true?

Everything you said in there, was it true?

A. Yes.

. . .

Q. Are you telling us today under oath that everything you said in that letter is true?

A. Yes.

Q. You stand by it?

A. Yes.

Q. You stood by it then --

A. Yes.

Q. - when you wrote it?

A. Yes.

Q. And, you're standing by it now?

A. Yes.

Q. The things you said in that letter, did you know those things when you testified at Harry's trial?

Let me rephrase that.

The stuff that you talk about in that letter, that had already happened at the time of Harry's trial, did you know thoee things when you testified?

A. I believe I knew it somewhat.

I believe that people knew that what I was going to testify to wasn't the truth.

Q. Okay.

Let me show you what has been marked as Exhibit A-26, and ask if you recognize that document?

First, is that your handwriting?

. . .

A. Yes.

Q. And, do you recognize what that is?

A. Yea.

Q. Can you give us the date on that letter?

A. February 12.

Q. What year?

A. '84.

. . .

Is everything you said in there true?

A. Yea.

Q. Like the other letter?

A. Yes.

Q. Now, you're telling us today under oath that everything you said in that letter is true?

A. Yes.

. . .

Q. And, when you testified at Harry's trial --

The things that had already happened that you talked about in that letter, by the time of Harry's trial were those things in your head?

Did you know about them?

A. Yes.

Q. Okay.

'Cause it already happened.

And, you etand by that today?

A. Yes.

Q. You stood by that when you wrote it?

A. Yes.

Q. You stood by thie stuff at the time of trial?

A. Yes.

Q. Both these letters, did you stand by what you said in there even before the trial?

A. Yes.

Q. And, when you testified at trial --

A. Yea.

Q. -- you stood by it, you knew it?

Right?

A. Yes.

(E.H.[1] 96-1004). These lettera, written long before the commencement of the instant proceedings, confirm Farley'a evidentiary hearing testimony, and confirm Mr. Phillips' allegations. As Mr. Phillips alleged in hie Motion, Farley lied at trial, lied about matters as fundamental as the substance of the atatements he allegedly obtained from Mr. Phillips, and did so under the State'e promiae of reward:

> [Q.] Remember testifying at trial that the only reason you were teatifying and the only reason you were saying the things you said about Barry is that -- and I'll quote what you said:
>
> "For once in my life I wanted to do something to try to serve society and help humanity."
>
> Do you remember saying that?
>
> A. Yes.
>
> Q. when you said that, was that true?
>
> A. Yes.
>
> But, now when I reflect on that, I realized that I waa trying to help humanity in the wrong way be exaggerating, and it wasn't entirely my fault.
>
> Q. Well, explain.
>
> What do you mean it wasn't entirely your fault?
>
> What were you doing?
>
> A. well, at that time or point in my life I was confused about a lot of --
>
> Q. Let me take it one step at a time.
>
> Part of the reason you testified was what you expected to get in terms of parole?
>
> A. Right.
>
> Q. Part of the reason you testified was money?
>
> Right?
>
> A. Right.
>
> Q. Was the other part --

MR. NEIMAND: What wae the other part.

BY MR. NOLAS:

Q. What was the other part?

A. Because of things, because I was sad, the grief-stricken child and things, and from my exaggeratione and the way I looked at things at that time, I really thought that Harry was guilty of a crime which I knew that he never verbally told me that he committed a crime.

Q. He never told you that flat out?

A. He never told me that.

Q. So, part of the thinking was parole, part was money.

And, part of it was you thought this guy is guilty anway, I might as well get the parole and money, testify against him, and go on my way?

A. Yes.

Q. Is that fair?

A. Yes.

* * *

Q. William, you remember testifying at trial that the victim, Mr. Svenson, was carrying something; that Harry told you that he was carrying something when he was shot, right, that night?

A. Yes.

But, I think that it was Mr. Waksman that gave me the idea.

Q. Let me ask you this:

Did Harry ever tell you that?

A. NO.

Q. Did Detective Smith tell you to say that?

A. I think also Detective Smith and Mr. Waksman.

Q. Just Detective Smith now. We'll get to Mr. Waksman in a moment.

Just Detective Smith.

Did he tell you to say that?

A. Yes.

Q. Before he told you to say that, had you told him that Mr. Phillips had said anything like that?

A. No.

. . .

Q. You said Mr. Waksman also told you to say that?

A. No directly, indirectly.

From what he told me I knew maybe it was possible someone was concealed across the street.

Q. Did Mr. Waksman --

How did Mr. Waksman tell you to say that at trial?

A. Harry never told me that.

Q. How did Mr. Waksman tell you to say that?

A. He said --

Q. Directly, indirectly, sideways; however he said that.

A. He said that someone, I think, was concealed, I think maybe across the street behind some structure or something.

so --

And, that wasn't, like I said, directly.

It was indirectly the way he told it to me.

Q. Do you remember what his words were?

A. Not exactly.

Q. But, he said something about that?

A. Yes.

Q. Something that tipped you off that that's important, that that's something you should say on the stand?

A. Yea.

Q. Although it wasn't true?

A. Yes.

Q. When you testified on the stand about the number of shots that were fired, you said Harry said to me this number of shots were fired.

Do you remember that?

A. Uh-huh.

Q. That wasn't true, was it?

A. NO.

Q. Harry never said that to you?

A. He never said that to me.

Q. That was put in your head by Detective smith and Mr. Waksman?

A. Yes.

Q. When you testified on the stand about Mr. Svenson carrying something, that Harry told you he wae carrying something, and all the other testimony you said about that kind of thing, that wasn't true?

A. No, it wasn't.

Q. Harry never said that to you?

A. No.

Q. Detective Smith and Mr. Wakaman put that in your head?

A. Yes.

Q. That's your testimony?

A. Yes.

Q. When you testified at trial that you were just testifying to serve humanity and that was the only reason, that wasn't true?

Right?

There were --

You said there were three reasons?

A. Well, at that time when I said that I thought that it waa true.

Q. But, you were also testifying 'cause you wanted parole?

A. Right.

Q. 'Cause you'd been promised parole?

A. Yes.

Q. You expected parole?

A. Right.

Q. Same thing with the money?

A. Yes.

Q. You wanted it, it was promised to you, you expected it?

A. Yes.

Q. You remember you testified at trial that yau were not testifying -- no way you would testify because you expected parole?

You remember you said that in front of the jury?

A. Yea.

Q. That wasn't true?

Right?

A. No, it wasn't.

Q. You did expect parole?

A. Yes.

(E.H.[1] 1018-24). Thua, this foundational part of the State's case was fundamentally false.

In assessing the credibility of Mr. Farley's evidentiary hearing testimony, it is important to remember that, unlike his previous testimony, he had absolutely nothing to gain by now taking the stand, as he did, and testifying truthfully. To the contrary, he had everything to loae -- his evidentiary hearing testimony now exposes him to criminal prosecution for his perjured trial testimony. In assessing Farley's credibility, it is alao important to remember that his letters to Mr. Waksman, written long before the instant proceedings had even commenced, are in fact substantially similar to his evidentiary hearing testimony.

Even independently of Farley's evidentiary hearing testimony, Mr. Phillips wroved that critical parts of his trial testimony were patently false. and were known to be so by the State. For example, Farley testified at trial that he had only one prior felony conviction (R. 817). This, of course, was a lie: as the records demonstrate, Farley had three prior felony convictions at the time of trial (See Dse. Ex, I, App. 19). Moreover, the State had these records at the time of trial, as the state admitted below (see E.H.[1] 111), and knew the true extent of Mr. Farley's criminal record, yet did nothing to correct his false trial testimony. The State's deliberate inaction in this regard was a violation of Mr. Phillips' righte to a fundamentally fair trial.

Farley also testified at trial that when he initially gave his incriminating tape-recorded statement to Detective Smith, the tape waa turned on immediately, and he thus had no opportunity to discuss that statement with Detective Smith before it was recorded (R. 821). The State admitted at the 3.850 hearing that that testimony was a lie -- both Detective Smith and Detective Hebding testified at the hearing that they spoke with Farley for one and a half hours before the tape recorder was actually turned on, and that if Farley said it was turned on immediately he would be lying (See E.H.[1] 1323; 1264). No one corrected or attempted to correct Farley's lie at trial, however, although Detective Smith sat next to the prosecutor throughout the trial.

3. Larry Hunter

Larry Hunter was also supposedly fortuitously present when Mr. Phillips again incriminated himself, according to Hunter's trial testimony. He too said no promisee *were* made and no benefit was expected or received. In fact, when the trial proeecutor offered to go before the sentencing judge if Hunter was convicted on pending charges, Hunter refused; he did not need or want the State's help (R. 653).

According to Hunter's trial testimony, Mr. Phillips provided a detailed account of the offense, and Hunter's recitation of those specific details at trial was as precise as a police report (See R. 649-50). Hunter related the layout of the scene, relative locations of various landmarks, directions of travel, etc. (Id). Hunter also testified that Mr. Phillips had attempted to enlist his support for hie (Phillips') alibi, and over a period of time provided the details of the alibi to Mr. Hunter in a series of notes (R. 650-52). Hunter ultimately turned these notes over to either Detective Smith (651, 655) or his own lawyer, Mr. Samek (R. 665), depending on which version of his testimony is believed. Hunter testified that he wrote the date of receipt on two of the notes, one on April 29, 1983, and the other on May 31, 1983 (R. 652). All of these encounters with Mr. Phillips purportedly occurred in April or May of 1983 (R. 663).

According to Hunter's trial testimony, he did not want to get involved, but his cellmate called Detective Smith without hie knowledge (R. 651, 662, 666, 669). Only after the call from the cellmate did Hunter actually become "involved," when Detective Smith came to the jail to interview him (R. 651). Detective Smith at trial thought that he first talked to Hunter and etarted receiving the notes from him in April or May (R. 914). The Assistant State Attorney was not sure how Hunter became involved in the case:

> Q How did it come about that he volunteered his services to testify against Harry Phillips?
>
> A I don't know. I think the police found him. He called the police and told the police what was going on and they told me. I think he called the police and volunteered. You can ask him more specifically, I don't recall.

(Deposition of David Waksman, App. 14, p. 6). Later, he was sure that this was how **all** of the witnesses became involved in the case:

> A The police saw everybody first. I didn't investiuate this case. They brought the witnesses to me. They brouaht me the names of the witnesses.

Id., p. 9 (emphasis supplied).

Neither informant Hunter's nor proeecutor Waksman's version was the truth, according to Detective Smith's report, made shortly after he himself first became aware of Hunter. According to Detective Smith, it was Mr. Waksman whom Hunter first contacted (see Report of Detective Smith, June 16, 1983, App. 20). The full report made by Detective Smith at that time related that he first talked to Hunter after he was directed to do so by Mr. Waksman (Id.). According to the report, Mr. Waksman told Detective Smith on May 17, 1982, that he (Waksman) had been contacted by "an individual identified as LARRY HUNTER who is an inmate at the Dade County Jail," who had related information implicating Mr. Phillips in the instant offense (Id.). It was not until after this communication from Mr. Waksman that Detective Smith first talked to Hunter (Id.). Nowhere in Detective Smith's report is it reflected that Larry Hunter called him.

The State and Hunter took great pains to conceal how and when Hunter became involved in the case, and whom he had first contacted: although

defense counsel was provided part of the police report which discloses that Mr. Waksman had the first contact with Hunter, discussed above, the entry reflecting Hunter's call to Waksman and the latter's subsequent communication to Detective Smith was carefully excised from the page of that report actually furnished to the defense. The "revision" of this report was so carefully done as to be almost undetectable, aa demonstrated by a comparison of Appendix 20, the unexpurgated copy of the original report [obtained from Metro-Dade Police Department files], with Appendix 21, the "doctored" copy of the report furnished defense counsel by the State.

Mr. Waksman testified below that: his view was that the section of Detective Smith's report discussed herein was "undiscoverable," and that he thus caused it to be excised from the material that was actually turned over to the defense pursuant to discovery (E.H. [1] 1097-98). Mr. Waksman also testified that this sort of "cutting and pasting" is a usual practice (Id. at 1098). An examination of the police reports actually provided to the defense demonstrates that while the random cutting, pasting, and xeroxing of excerpt6 from police reports may well be a common prctice in Mr. Waksman's office, the type of meticulous, undetectable, deliberately deceptive "cutting and pasting" which occurred with reference to *the* particular reports was not. The information excised was what Brady requires disclosure of.

The information regarding Hunter's negotiations with Mr. Waksman was discoverable, as it would have revealed the sordid circumstances underlying the State's dealings with Larry Hunter, and would have provided crucial impeachment evidence. It was thus material and exculpatory under Brady. Moreover, it would have revealed the fact that Mr. Waksman's deposition account was untrue. As it was, defense counsel was "stuck" with the information provided by Mr. Waksman at his deposition (See E.H. [1] 591).

On a different note, the fee request filed by Hunter's own attorney, Yeffrey Samek, in connection with his representation of Hunter, also reflecte that Hunter and his attorney were somehow involved in the case against Harry Phillips as early as 4/18/83. An entry for services consisting of "reports

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re: trial, continuances, and defendant's testimony in Harvey [sic] Phillips trial," totalling six hours and spanning the dates "4/18, 22, 29/83" and "5/9, 16, 29/83, 6/27/83, 8/8/83, 10/18, 20, 24/83" (see App. 21) indicates that Hunter was already contemplating testifying against Mr. Phillips before he provided the State with any of the notes he had received from him. A6 the first note was apparently received from Mr. Phillips on April 29, 1983 (see R. 652, 914), Hunter and/or his attorney were negotiating with the state before the notes were received by Hunter.

Occurrences since Mr. Phillips' trial shed light on the motivee for carefully concealing the trail which lead to Larry Hunter's testimony. A "deal" had been made with Hunter, and a substantial one at that.

The prosecutor informed defense counsel prior to trial that

> [i]f he [Hunter] goes to trial and is convicted or if he chooses to plead guilty, I would feel obligated to either go myself to his judge and I told his attorney to subpoena me and I would feel obliged to tell his judge at time of sentencing that he rendered assistance in a major case to me.

(Deposition of David Waksman, App. 14, p. 5). Hunter confirmed this vereion in his trial testimony, but stated that he had told both Mr. Waksman and Detective Smith, who had extended an identical courtesy, that he didn't need their help, as he was innocent of the charges and would be in any event acquitted (R. 653).

What Mr. Waksman actually did in connection with Hunter's pending charges wae as different from what he told defense counsel as night is from day. On December 29, 1983, less than two weeks after Mr. Phillips' trial, Hunter appeared in court and entered pleas of guilty to charges of sexual battery (a charge which involved the rape of a teenage boy at knifepoint), possession of cocaine, and grand theft auto (see App. 23). At that proceeding, Assistant State Attorney Targ announced the following to the court:

> MS. TARG: Pureuant to plea negotiations between the Assistant State Attorney David Waxman (sic) and Mr. Samek it is my understanding the defendant will plead as follows and the State will also take the following actions as to case 82-000650 which is armed sexual battery. The defendant will plead guilty and be placed on five years probation with a special condition of ten months in the Dade County Jail.

> As to case No. 83-1398 which is possession of cocaine the defendant will plead guilty and be placed an five years probation which will run concurrent to the probation in 82-000650. Aa to Case No. 83-1398, based upon the pleas and discussions with the attorney who recently handled this case the State will be nolle pros. as to case 82-30120 which is one count of cocaine and one count of child abuse.
>
> The State will nolle pros. the child abuse uwon the evaluation of the facts and circumstances.
>
> The defendant will be pleading guilty to one count of grand theft. He will be placed on five years probation a special condition nine months in Dade County Jail. The nine monthe are to run consecutively with the ten montha in the armed sexual battery.
>
> The probation will run concurrent and the defendant is to be given credit for time served on all charges.

(App. 23, pp. 4-5). This "deal" had been "entered into in view of the defendant's invaluable help to David Waksman in a serious murder trial" (Id., p. 5.) With regard to the sexual battery charge, Hunter's lawyer's understanding was that the plea was no contest and that hie client would be "immediately released" (Id., p. 6.) This was Assistant State Attorney Targ's understanding also, as "Mr. Waksman and [her]self both epoke to the victim . . . [and] they were in agreement . . . in view of the circumstances" (Id.) The plea was accepted, and Hunter was free that day.

The magnitude of the deal actually made between informant Hunter and prosecutor Wakaman, and the severity of the prejudice to Mr. Phillips resulting from the State's deliberate obfuscation of the truth regarding that deal, is now apparent. Had defense counsel known of such dealing, the value of Hunter's teatimony would have been gutted. But no one told the defense. And there is more.

Hunter was not a dependable, or even very stable, witness. Unbeknownst to trial counsel, but known to the State, Hunter has a long and documented history of mental disturbances. In 1972 he was twice acquitted of felonies due to his insanity (see App. 24). He has been diagnosed as schizophrenic, and has been on numerous occasions committed to State hospitals (see App. 24). A 1970 psychiatric report relates that Mr. Hunter had been eating his own fecee because he was convinced that someone was poisoning his food (App. 24).

Defense counsel knew none of this, either, and the State again went to great lengths to hide it.

All of the concerns implicated by the evidence deliberately hidden by the State were realized here. And compelling evidence was introduced at the 3.850 hearing, from Hunter himself, demonstrating that Hunter'e teotimony was false:

> 1. My name is Larry Eugene Hunter. I am presently incarcerated at Apalachee Correctional Institution, Sneads, Florida.
>
> 2. I was a witness against Harry Franklin Phillips in his murder trial in Miami, Florida,
>
> 3. At Phillip' trial in 1982, I testified that Phillips made a full confeeaion to me about the murder of a probation officer in Miami. I said that Phillips entered the east end of the doctors building, shot a man by the gate then left the same way. I also said that Harry wanted me to help make up an alibi. I said that he had given me some notes so that 1 would remember what to say when I called his attorney.
>
> 4. Phillips never made a confession to me. He never spoke to me about the murder. The only knowledge that I have about the events I testified to was provided to me by Detective Smith and Mr. Waksman. I testified because they wanted me to, and I told them what they wanted to hear.
>
> 5. Before Phillips' trial, I spoke with Detective Smith, three times in the Dade County Jail and across the way at the Homicide Office one time. I also spoke with the State Attorney, David Waksman.
>
> 6. Detective Smith would give me information about the case. I did not have to ask. He told me that Phillips entered from the east, that the body was found at the gate, and other things. He made clear to me that if I testified against Phillips I would get a deal. The deal was that I would get 5 years probation on my charges. He told me that if I helped him, he would help me. He told me Waksman would also help me. I also knew about the reward money. He gave me the date that the murder happened, and other information like what I talked about earlier, and made it clear that I ehould remember these things so that I could help them at the trial.
>
> 7. Mr. Waksman wasn't as clear about my deal as Detective Smith. He was real careful when he talked. But we both knew that we were talking about a deal. For example, Mr. Wakrman made it clear that I should help them, and he threatened me. I knew he meant a deal, and so did he. If I cooperated he would help me, and I would get probation, but if I didn't I would get life. Mr. Waksman also made clear to me what I needed to know for the trial. After talking to Mr. Waksman, I knew that if I cooperated and did what he eaid, I'd get probation, Mr. Waksman told me that I should say that no deals had been made.
>
> 8. The cops had asked me to make deals with them in the past. Then Detective Smith came to the jail to see me and told me that he knew that I had a note from Phillips about an alibi. I

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had the note. In fact, I had asked Phillips for it. I lied to Phillips and told him I was in the Winn Dixie and would testify that I saw him there. I asked him to write me a note with hie attorney's phone number on it, the day and time that he was in the store, what he waa wearing and things like that. I thought that I could use it later, because I had heard about other guys who the cops had come to the jail to talk to about making deals. These guya made deals on the Phillips case. I had heard that the cope had been asking a lot of people about what they knew or what they heard about the case, and that some guya were talking like they were going to walk after they talked to the police about Phillips. I knew this was true because Detective Smith and the cope were going to the jail, and trying to make deals with everybody all the time. They were trying to get people to get Phillips to confess. They did this with me too.

9. Detective Smith took the first note. The other notes that I asked Phillips to give me I gave to my attorney Mr. Samek, who gave them to Mr. Waksman. Detective Smith and Mr. Waksman told me to try and get more notes, so I kept asking Phillips for more. I'd tell Phillips that I lost the ones he had given me before, or that I was having a hard time remembering all the details, and he'd sent me another note.

10. I tried to get out of the whole thing several times. At one point, I refused to go to a deposition that Phillips' lawyers had set up. I told Phillips' lawyer, a black guy, that I didn't know what I was doing there. Detective Smith and Mr. Waksman kept telling me that if I didn't help them and then testify, they could put a lot more charges on me. They told me I could end up doing life in prison, and I sure didn't want to do that, Detective Smith also talked about probation.

11. My attorney, Mr. Samek, Detective Smith, and Mr. Waksman all called my mother telling her that she should get me to take the plea and testify against Phillips. Between them and my mother, I just felt like I didn't really have any choice. Detective Smith told me I should take the plea and testify for them, and they would help me. But, if I didn't testify,, Detective Smith and Mr. Waksman made it clear that I would get life. They offered me the deal and I had to take it.

12. I was taken to Detective Smith's or Mr. Waksman's offices to talk about Harry Phillips a number of time (sic). Each time they would tell me the facts over and over to make sure I said the right things and didn't mess up the story. Most of what I knew about this case I learned from Mr. Waksman and Detective Smith. I learned the rest from other inmates who were also talking to Smith and Waksman.

13. After Phillips was convicted, Detective Smith and Mr. Waksman went to court with me. I changed my plea to guilty and the judge eentenced me to 5 years probation. At the time I had been charged with car theft, sexual battery and possession of cocaine. This happened right after Phillips was found guilty in December 1983. Shortly after that, I got $200.00 from Detective Smith.

(Affidavit of Larry Hunter, App. 19).

Although Hunter executed the above sworn and notarized affidavit revealing the State misconduct underlying his false testimony, he refused to testify at the evidentiary hearing, asserting his fifth amendment privilege against self-incrimination (See E.H.[1] 1056-63; 1245-51). The trial court admitted his affidavit, finding that the fifth amendment privilege did apply to Hunter, as he would be admitting "some sort" of criminal conduct (Id. at 1062). The affidavit is thus substantive evidence in this record, and demonstrates the inaccuracy of Hunter's trial account.

In assessing the credibility of Hunter's sworn affidavit, it is important to note that the records independently support the contents of that affidavit, and confirm Mr. Phillips' allegations. Hunter did indeed ultimately receive five years probation on his then-pending, serious, multiple felony charges (See Dse. *Ex.* I, App. 23), and did in fact ultimately receive reward money. Moreaver, the records of Hunter's own attorney demonstrate that Hunter had been negotiating with the State with regard to Harry Phillips before he had received any of the notes which he testified at trial he had received from Harry Phillips (See id., App. 21; cf. R. 652, 914; see also Amended Emergency Motion to Vacate Judgment and Sentence, etc., pp. 26-27; Motion €or Summary Judgment [appended to Joint Motion to Supplement the Record].)

Mr. Phillips thus proved what he pled in his Rule 3.850 Motion: i.e., that the state withheld material, exculpatory evidence, knowingly presented false testimony, and failed to correct it.

4. Malcolm Watson

Malcolm Watson was also called by the prosecutor to testify regarding etatements allegedly made to him by Harry Phillips. According to Watson, their first encounter was in the fall of 1980, when Mr. Phillips came into a dry cleaning store owned by Watson. At that time, Watson testified, Mr. Phillips produced a gun and asked Watson to loan him $50, taking the gun as collateral (R. 689). At trial Wateon described the gun as "look[ing] like a big silver policeman [sic] revolver," which Mr. Phillips had told him was a

".38 caliber or .38" (R. 699). Watson, however, who waa at the time rerving a life sentence for armed robbery, was "not that much into guns," (id.), so presumably his description was open to argument. At his deposition, Watson described "a big old silver gun," but initially could not say what kind, because he just didn't "know guns" (Deposition of Malcolm Watson, App. 20. p. 10). When pressed, however, he took a stab: ".38-- a big silver 38. I'm not too sure on guns--.38 or .37 or .32 or whatever," (Id., p. 11). He did not mention, as he did at trial, that Mr. Phillips informed him of the caliber of the gun.

Watson declined the gun, and he and Mr. Phillips engaged in conversation (R. 689). Mr. Phillips allegedly related the troubles he was having with hi8 parole officer, who was trying to violate him, but he did not mention "at that particular time whether it was male or female." (Id.). Mr. Watson ssemed to think that the sex of the parole officer was significant, but appeared to have some problem8 assigning a sex or remembering just what the significance of sex was in relation to his testimony. Mr. Waksman tried to help, but to little avail:

> Q. Did he indicate if he liked anybody or was seeing anybody at the time?
>
> * * *
>
> A. There was some young lady at the Parole Office, I assume.
>
> Q. Don't assume.
>
> What did he say?
>
> A. That some parole officer was trying to violate him on some technical violation and-- pertaining to some female lady that works there at the Parole Office.
>
> Q. He didn't tell you who that lady was?
>
> A. As far as I know, she is--
>
> Q. You don't know?
>
> A. No, Sir.
>
> Q. But, it was something to do with a female at the Parole Office that some other parole officer wanted to violate him for?
>
> A. Yes.

(R. 691-92). At his deposition, Watson had also seemed to briefly remember, although he had not been asked, that the sex of the Parole Officer was Bomehow important -- in response to defense counsel's question regarding the type of gun Mr. Phillips had, Mr. Watson replied:

> .38-- a big silver 38. I'm not too sure on guns--.38 or .37 or .32 or whatever, you know. He went to sell the gun and I didn't purchaee the gun but it was about $50 that he needed-- $50 and I told Harry to get him a job. He kept saying that I sounded like a parole officer when he wae talking-- he wasn't talking like the parole officer was a guy, like it was a lady and trying to put him back for eome technical violation.

(App. 26, p. 11).

Mr. Watson was sure that Mr. Phillips had told him that the parole matter he was concerned about was a "technical violation" (R. 689). Watson testified that he was sure that it was Mr. Phillips who used the term "technical violation," as he (Watson) had never been on probation or parole and preeumably would thus not be familiar with the term (R. 689). In fact, Mr. Watson had twice been sentenced to terms of probation -- seven years in 1974 and five years in 1976 (see App. 27). Mr. Waksman did nothing to correct this patent falsehood, just as he had done nothing to disclose this and other critical impeachment evidence to the defense prior to trial.

The next time Watson saw Mr. Phillips was in September of 1982, when both were incarcerated in the Dade County Jail. On this occasion, as he admitted at trial, Watson went up to Mr. Phillips and asked "you finally did it?" (R.692). Mr. Phillips allegedly replied "yeah, yeah, but they got to prove it." (R. 692). In his deposition, Watson had stated that he had already heard about the murder through the news media and "over the streets," before he first questioned Mr. Phillips about his involvement (Deposition of Malcolm Watson, p. 11). In his initial Statement, Watson said that when Mr. Phillips initially denied any knowledge of the murder, he (Watson) pressed the point -- "I said 'No, Harry. All right. This is me you're talking to'" (Statement of Malcolm Watson, App. 22) -- until Mr. Phillips replied "yeah yeah." Moreover, according to his statement, when he later again asked Mr. Phillips if he had committed the murder, Mr. Phillips again denied it (Id.). Nevertheless,

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according to his trial testimony, Watson at no time "pumped" Mr. Phillips for information: to the contrary, Mr. Phillips "volunteered" (R. 694).

At the time he questioned Mr. Phillips in the Dade County Jail, Watson was serving a life sentence €or robbery (see App. 28). Although he had been received by the Department of Corrections to begin serving his life term on March 16, 1982, by September he was somehow back in the county jail. According to Watson's testimony, after he asked Mr. Phillips about his involvement in the murder and the specific details of the offense, he called the police to tell them what he had learned (R. 695). The police did not contact him, he contacted them, and he did so because he is, "among other things," a "good citizen" who doesn't like murder (R. 711).

On direct, Watson testified that he had never been offered anything in exchange for his testimony (R. 696). In any event, according to Watson, he had at that time been already convicted and sentenced to life (R. 687, 696, 700). When he wae reminded on cross that he had earlier testified at hie deposition that he "was offered a polygraph in connection with his own case" (App. 26, p. 5), Watson acknowledged his earlier testimony, but stated that the offer was not in exchange €or his testimony (R. 704). Watson had asked Detective Smith to give him a polygraph, and to speak on his behalf if he passed it, but he was going to testify regardless (R. 703). According to Watson, Detective Smith knew he was innocent, had known for some time, and was going to give him a polygraph exam anyway (Id.). Detective Smith had originally stated in his deposition, taken on November 14, 1983, that Watson had asked for no help "at all," and that ha (Smith) had promieed nothing, not even to tell someone of Watson's cooperation (Deposition of Detective Greg Smith, App. 29, p. 47). By trial, however, Detective Smith had recalled that aeveral months after their initial encounter, Watson had approached him about taking the polygraph (R. 913). Mr. Waksman, in his deposition, atated that although he had made no promises, he did tell Watson "we'll see if we can get you a polygraph test. If you pass the polygraph, I will tell the judge what's

on it." (App. 14). He also told Watson that he "would feel obliged to tell the judge, if the judge would contemplate mitigation." (Id.).[8]

Watson was no etranger to the information-for-consideration game. The State Attorney's Office had dealt with him before, and had recommended sentencing deals based on hie cooperation as an informant in other cases (see Appe. 30, 31). Defense counsel was not aware of this history, however, because the State withheld it. Indeed, defense counsel attempted pretrial to determine whether Watson had in the past acted as an informant, but Wateon simply lied (see App. 26, pp. 6, 14, 21). Again, the etate stood silently by.

Whether or not Watson was ever administered the promised polygraph, hie life sentence was vacated on May 17, 1984, five months after Mr. Phillips's trial (see Apps. 31, 32). Ths record of the proceedings which lead to the vacation of Mr. Watson's life sentence is conspicuously bare: a two-page Rule 3.850 motion filed on March 7, 1984 (App. 31), which states that the grounds €or the motion will be presented at a hearing; a one page stipulation executed by David Waksman and filed on May 11, 1984, agreeing and jointly requesting that Mr. Watson's motion be granted and hie conviction for armed robbery be reversed; a one-page, six-line order vacating Watson's conviction and life sentence; and an order granting him a five year term of probation (Id.). Nowhere does there appear a record of any hearing, or of any of the "new evidence" referred to in Mr. Waksman'e stipulation. Thus, according to court documents, Mr. Watson simply walked away from a life sentence with no legal justification other than a court order.

Malcolm Watson was a career criminal, a multiple repeat offender who the authorities thought should spend the remainder of his life in jail. The report of his first hearing examiner's recommendation, held on January 24,

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[8]At the time of trial, Watson had not yet been administered a polygraph test. According to his testimony, he could have taken one, but didn't want to "pressure himself and try to do too much at one time." (R. 705). Besides, he knew that Smith was a man of his word, because he has known other people that Smith has helped (Id.). Moreover, he wanted to wait on the outcome of his appeal before taking the teat (R. 708). Mr. Wakaman said in his deposition that the polygraph had not yet been administered because he (Wakaman) had been too buey, and that he would "see to it" when he had more time (App. 14).

1983, recommended September 30, 2006 as his presumptive parole release date (PPRD), and recommended that he be made to do the maximum time allowable on his eentence (App. 32). Later parole examiners found fault with this initial calculation, and on March 31, 1983, his PPRD was recalculated correctly, and appropriately revised -- his new PPRD was May 4, 2175 (Id.). Another interview was conducted in October of 1983, after Watson's encounter with Mr. Phillips, and his PPRD was again changed, to September 26, 1996, a reduction of 179 years (Id.). One month after Watson's sentence wae vacated and he was freed to a term of probation, the Parole Commission met again on hie case, and decided that his PPRD should remain at September 26, 1996 (Id.). Apparently not even the Parole Commission was prepared to believe that Malcolm Wateon could go free from his life sentence without even serving the mandatory three year minimum.

It is apparent that there was indeed a deal made, and a good one. The absence of a record on Watson's post-conviction proceedings begs such a conclusion. Watson's life sentence was simply stipulated away. The record now demonstrates that a promise was made and consummated, yet the defense was repeatedly told that no such deals exiated.

C. The Law

The government here violated the imperatives which the Constitution requires the State to follow during adversarial judicial proceedings. The facts ehow much more than a violation of Bradv v. Maryland, 373 U.S. 83 (1963). But even if only a Brady violation were made out, Mr. Phillips would be entitled to relief: the withheld Bradv evidence involved the government's informant/witnesses, and testimony of the informants' was all that connected Harry Phillips to the offense.

None of the true facts concerning the State's informanta were provided to the defense. Nwne of the many, many falsehoods the informants told under oath at depositions and at trial were ever corrected. None of the powerful evidence in the State's own files which could have been used to impeach the credibility of theae key witnesses was ever disclosed: to the contrary, the

State doctored the police reporte it did provide to defense counsel, and simply hid other records altogether.

The informants worked €or the government. They were the government's auents, and it was in that agency capacity that they allegedly elicited statements from Mr. Phillips. Harry Phillips was incarcerated and the State wae committed to the prosecution. The Sixth Amendment applied -- but it was completelv ianored by the State and by the informants. Most of the time that etatemente were elicited, Mr. Phillips had counsel. The government, however, sent its jailhouse informante into Harry's cell; dim-witted and trusting, they made him talk; they provided the statements to the government; and then all involved covered the whole thing up. Not one pertinent agency relationship waa disclosed. Had it been, there would have been no case. See United States v. Henry, 447 U.S. 264 (1980).

Bradv was also violated because the key element upon which defense counsel could have based a motion to suppress -- the aqency relationship -- was never disclosed. Thus, although Harry Phillips' statements should not have been admitted, and although the government abrogated his right to counsel, the government kept it quiet. Then, at depositions and at trial the informants and the prosecutor misled counsel, and testified inaccurately about their agency status, and about a great deal more.[9]

The State did not correct the falsehoods which came from the mouth of its key witnesses. This is a case of flagrant governmental misconduct. And this Court has already shown in no unclear terms why the misconduct arising from what the government did with its informants, what it then hid about them,

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[9] Even if there was no Henry issue in this case (for example, if Harry Phillips had said nothing incriminating to the informants as some informants admitted during the 3.850 proceedings) the agency relationship was important evidence which should have been disclosed. And the State used the informants to try to obtain incriminating statements from Mr. Phillips' family. Given the type of men that these informants were, and given their absolute dieregard for anything but their own gain (a flaw that each informant had and that the government exploited -- to its own advantage), serious doubts exist as to whether Harry Phillips ever did "confess" to them at all. Some informants [e.g., Hunter] so admitted in theee proceedings. The facts presented in these proceedings leave little room to doubt the fact that Mr. Phillips' constitutional rights were violated by the State and its informants.

and what it let them lie about cannot be deemed "harmless" under any etandard. On direct appeal in this case, the Court wrote:

> In the evening of August 31, 1982, witnesses heard several rounds of gunfire in the vicinity of the Parole and Probation building in Miami. An inveetigation revealed the body of Bjorn Thomaa Svenson, a parole supervisor, in the parole building parking lot. Svenson was the victim of multiple gunshot wounde. There apparently were no eyewitnesses to the homicide.
>
> As parole supervisor, the victim had responsibility over several probation officers in charge of appellant's parole. The record indicatee that for approximately two years prior to the murder, the victim and appellant had repeated encounters regarding appellant's unauthorized contact with a probation officer. On each occasion, the victim advised appellant to etay away from his employees and the parole building unless making an authorized visit. After one incident, based on testimony of the victim and two of hie probation officere, appellant's parole was revoked and he was returned to prison for approximately twenty monthe.
>
> On August 24, 1982, several rounds of gunfire were shot through the front window of a home occupied by the two probation officers who had teetified against appellant. Neither was injured in the incident, €or which appellant was subsequently charged.
>
> <u>Following the victim's murder, appellant was incarcerated for parole violations. Testimony of several inmates indicated that appellant told them he had killed a parole officer. Appellant was thereafter indicted for first-degree murder</u>.

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<u>Phillips v. State</u>, 476 so. 2d 194, 194-95 (Fla. 1985) (emphasis supplied). The Court's summary makes the point: since the informants' testimony [paragraph 4] was unconstitutionally tainted, their tainted testimony [paragraph 4] must be taken out of the equation under any type of harmless error analysis. Removing the informants from the trial evidence equation is the same as removing paragraph 4 from the Court's summary of the trial evidence. The state is left with <u>no case</u>.

Accordingly, although a different harmlessness standard is applied to the varieties of governmental misconduct in this case, it all demonstrates that relief is appropriate. The constitutional analysis pursuant to which the government's misconduct should be analyzed is presented below with one exception -- the Sixth Amendment issue is diecussed in subsequent portions of this brief.

1. Napue/Giglio

The process by which Mr. Phillips was convicted and sentenced to death was a paradigm of the "corruption of the truth-seeking function of the trial process." United States v. Aaurs, 427 U.S. 97, 103-04 and n.8 (1976).

This case involves more than a simple violation of Brady v. Marvland, 373 U.S. 83 (1963). As long as fifty yeara ago, the United Statee Supreme Court eetabliehed the principle that a prosecutor'e knowing use of false evidence violates a criminal defendant's right to due process of law. Moonev v. Holohan, 294 U.S. 103 (1935). The fourteenth amendment's Due Process Clauee, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

A prosecutor not only has the constitutional duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Moonev v. Holohan, but also to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of false evidence violates due process whether it relates to a substantive issue, Alcorta, the credibility of a State's witness, Nawue; Giglio v. United States, 405 U.S. 150, 154 (1972), or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due proceso when evidence is manipulated. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

In short, the State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the truth-seeking function of the trial process." United States v. Aaurs, 427 U.S. at 103-04 and n.8. The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 150 U.S. at 153. Consequently, unlike cases where the denial of due proceee stems solely from the suppression of evidence favorable to the

defense, in cases involving the use of false testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Aqurs, 427 U.S. at 104.

Accordingly, in cases involving knowing use of false evidence the defendant'e conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Baalev, 105 S. Ct. 3375, 3382 (1985), quoting United States v. Aqurs, 427 U.S. at 102. The most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's witness. The defendant is entitled to a new trial if there is any reasonable likelihood, Baqley, that the falsity affected the verdict. There is more than a "reasonable likelihood" here. The informants' uncorrected false and misleading testimony affected the verdicts at guilt-innocence and esntencing.

In this regard, the Eleventh Circuit Court of Appeals' opinion in Brown v. Wainwriaht, 785 F.2d 1457 (1986), is very much on point -- so much so, in fact, that we can employ its legal analysis and use the facts of Mr. Phillips' case:

> The government has a duty to disclose evidence of any understanding or agreement as to prosecution of a key government witness. Haber v. Wainwriaht, 756 F.2d 1520 (11th Cir. 1985); Williams v. Brown, 609 F.2d 216, 221 (5th Cir. 1980); U.S. v. Tashman, 478 F.2d 129, 131 (5th Cir. 1973). The qovernment, in this case, did not disclose. The government ha0 a duty not to present or use false testimony. Gialio [v. U.S., 405 U.S. 150 (1972)]; Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984). It did use false testimonv [testified to by the informante]. If false testimony surfacee during a trial and the government has knowledge of it, as occurred here, the government har a duty to step forward and disclose. Smith v. Kemp, 715 F.2d 1459, 1463 (11th Cir.), cert. denied, 464 U.S. 1003, 104 S. Ct. 510, 78 L.Ed.2d 699 (1983) ("The state must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony."). It did not step forward and disclose when [the informants] testified falsely. The government has a duty not to exploit false testimony by prosecutorial argument affirmatively urging to the jury the truth of what it knows to be false. See U.S. v. Sanfilippo, 564 F.2d 176, 179 (5th Cir. 1977) (defendant's conviction reversed because "The Government not only permitted false testimony of one of its witnesses to go to the jury, but argued it as a relevant matter €or the jury to consider"). Here

> the government [argued €or Harry Phillips' capital conviction and death sentence on the basis of the informants' testimony].

785 F.2d at 1464 (footnotes omitted). It should also be noted that "[i]t is of no consequence that the facts pointed to may support only knowledge of the police because such knowledge will be imputed to state Drosecutors." Williams v. Griswald, 743 F. 2d 1533, 1542 (11th Cir. 1987)(citation omitted)(Empahsis added). Moreover, "[i]t is of no consequence that the falsehood [bears] upon the witness's credibility rather than directly upon [the] defendant's guilt." Brown, 785 F.2d at 1465, quoting Williams v. Griswald and Napue v. Illinois.

In Mr. Phillips' case the informants' false testimony obviously involved their credibility -- credibility which should have bean suspect from the outeet, but which was bolstered by the State's failure to correct the lies that they neither expected nor wanted any benefit for their testimony. The Rule 3.850 record demonstrates a great deal more. There is much more than a "reasonable likelihood" that the informants' false and misleading evidence affected the jury's judgment at guilt-innocence and sentencing in this case.

2. Bradv/Baglev

The prosecution's suppression of evidence favorable to the accused violates due procese. Bradv v. Marvland, 373 U.S. 83 (1967); Aaurs v. United States, 427 U.S. 97 (1976); United States v. Baqley, 105 S. Ct. 3375 (1985). Thus the proeecutor muet reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requeete the specific information. United States v. Baqley. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d at 1542.

The State's action of withholding evidence in this case violated the fifth, sixth, eighth and fourteenth amendments. An explanation of how each amendment's guarantees were denied Mr. Phillips is appropriate. The cornerctone is the fourteenth amendment: the government's hiding of exculpatory, impeachment, or otherwise useful evidence deprives the accused of a fair trial and violates the due process clause of the fourteenth amendment.

Brady v. Maryland, 373 U.S. 83 (1963). When the withheld evidence goes to the credibility and impeachability of a State's witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated. Chambers v. Mississippi, 93 S. Ct. 1038, 1045 (1973). Of course, counsel cannot be effective when deceived, so hiding exculpatory or impeaching information violates the sixth amendment right to effective assistance of counsel as well. United States v. Cronic, 104 S. Ct. 2039 (1984). In this case such errors are even more obvious for the withholding of substantial Henry-type evidence may well have been the reason why counsel never filed the necessary motion to suppress. The unreliability of fact determinations resulting from such gwvernmental misconduct also violates the eighth amendment requirement that capital proceedings should be reliable.

These rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were violated in Mr. Phillips' case. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 94 S. Ct. 1105, 1110 (1974). As is obvious, there is "particular need for full cross-examination of the State's star witness," McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982), and here the etar-witnesses were the informante. The agency relationship between the government and its informants was suppressed. The informants testified falsely about their statue. Their testimony was not corrected. The pattern of State misconduct and evidence suppression in Mr. Phillips' ease warrants relief.

> By requiring the prosecutor to assist the defense in making its case, the *Brady* rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor'srole transcends that of an adversary: he "is the representative not of an ordinary partyto a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). See Brady v. Maryland, 373 U.S., at 87-88.

United States v. Bagley, 105 S. Ct. at 3380 n.6.

Material evidence was clearly withheld in Mr. Phillips' case -- evidence which would have made a difference at trial and sentencing. Material evidence

is evidence of a favorable character for the defense which would affect the outcome of the guilt-innocence and/or capital sentencing trial. Smith (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment). Napue, Giglio, and Bagley make it clear that exculpatory evidence as well as evidence which can be used to impeach are governed by the same constitutional standard of reversal. Moreover, the materiality of the evidence at issue must be determined on the basis of the cumulative effect of all the euppreeaed evidence and the evidence introduced at trial; in its analyeis, that is, the reviewing court may not ieolate the various suppressed items from each other or from the evidence that helps the accused introduced at trial. E.g., United States v. Agurs, 427 U.S. at 112; Chaney v. Brown, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-37 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983) (withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982).

The withheld evidence's materiality may derive from any number of charaeteriatice of the suppressed evidence, ranging from (1) its relevance to an important issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witnees, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith; Miller v. Pate, 386 U.S. 1, 6-7 (1967). See also Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973). In this case the first two are obvious. The third factor is also present -- had Mr. Phillips been able

to undermine even one government informant's testimony, the alibi defense preeented at trial would have been much more credible.

Evidence which even tends to impeach a critical state witness is clearly material under Bradv. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Brown v. Wainwright. This is so because "[T]he jury's estimate of the truthfulness and reliability of a given witness may wall be determinative . . . and it is upon such subtle factors as the possible interest of a [witness on which the] defendant's life . . . may depend." Napue v. Illinois, 360 U.S. 264, 269 (1959). The jurors at Mr. Phillips' trial were never allowed to hear the important information regarding the government's informants -- the information was critical to any adequate guilt-innocence or penalty determination. However, the government and its informants kept it from defense counsel, and never allowed it to get to the jury or the Court.

D. Conclusion

Mr. Phillips has alleged and proved that separate and distinct types of governmental misconduct occurred in his case, each with its own distinct standard of review. Mr. Phillips has alleged and proved both that the state withheld material, exculpatory evidence, see Bradv, and that the state knowingly presented false testimony. See Giglio. Each ha5 been conclusively proven in this case and relief is therefore appropriate.

ARGUMENT III

THE STATE'S UNCONSTITUTIONAL USE OF JAILHOUSE INFORMANTS TO OBTAIN STATEMENTS IN VIOLATION OF MR. PHILLIPS' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

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This claim could not have been brought on direct appeal. The true facts which demonstrated that the only evidence connecting Mr. Phillips to the offense -- the statements he "made" to jailhouse informante -- were, in fact, the product of the State's deliberate efforts to extract confessions. The Rule 3.850 record demonstrates that the State dispatched informant after informant on statement-gathering missions. Law enforcement placed the informants in close proximity to Mr. Phillips -- when they got the statements

they were after, they would be transferred out. They then knowingly lied on the stand to secure Mr. Phillips* conviction.

For the sake of brevity the detailed involvement of the State with each informant will not be repeated herein. Rather, Mr. Phillips respectfully refers the Court to Argument II for a complete recitation of the facts.

At the time of trial significant evidence was not provided to the defense which showed the truth: that the witnesses at issue were not just cellmates who happened to be at the right place at the right time. Rather, the cellmates were government informanta, agents of the State, who were working for the State at the time that they elicited the statements. The whole operation was carefully crafted: Harry Phillips would be moved, the informante would move in, contact would be made, alleged statements would be elicited, the informants would be moved out and would disappear. The informanta lied about their status at their depositions and at trial -- the State kept its orchestration of its agents' statement-gathering missions hidden. Defense counsel was lied to and misled. The Sixth Amendment does not protect a defendant from just cellmates. But no one told the jury, the Court, or defense counsel that theae people were not just cellmates, but highly valued aaents. When he tried to ask he was lied to or steered away from the truth.

The government prized its informants so highly that Metro-Dade detectives pleaded with parole authorities that their agents be released. The parole authorities knew better -- these valued informanta were very, very dangerous people, but they were allowed to "walk" because of the important services they rendered to the State. The informants were enlisted to surreptitiously obtain incriminating evidence even from Mr. Phillips' family.

The very same governmental misconduct, concealment of evidence and presentation of lies which requires that Claim 11 be entertained on the merits alao mandates that this claim be now heard and properly determined. This claim simply could not have been presented earlier -- the government hid the true facte. We now know that these "cellmates" were State agents. But the

government covered all this up at the time of Harry Phillips' trial. This presents yet another reason why this Court should hear the merits of Mr. Phillips' claim -- a refusal to allow consideration will in effect allow the State to profit twice from its own misconduct.

Mr. Phillips had a lawyer -- John Middleton -- during much of the time that the State sent in its agents. The detectives never bothered to call Mr. Middleton and inform him what they were up to with his client. After Mr. Phillips was charged with murder, and after he had a lawyer in this case, the State was still trying to obtain statements through the use of informante -- again, no one informed counsel. But the "right to counsel" iesue in this case does not require any elaborate chronological analysis:

> . . , the right to the assistance of counsel is shaped by the need for the assistance of counsel, . . . the right [therefore] attaches at earlier, "critical" stages in the criminal justice proceae "where the results might well settle the accused's fate and reduce the trial itself to a mere formality."

Maine v. Moulton, 106 S.Ct. 477, 484 (1985), citing, inter alia, United States v. Wade, 388 U.S. 218, 224 (1967), and United States v. Gouveia, 467 U.S. 180, 189 (1984). In addition, once adversarial criminal proceedings have begun, i.e., once the State has committed itself to the prosecution, the Sixth Amendment provides the accused with the protection of the right to counsel. Mwulton, 106 S.Ct. at 484, citing, Gouveia, 467 U.S. at 189. Mr. Phillipe waa incarcerated, and the State had committed itself to prosecution. The Sixth Amendment's protections had attached.

There can be no doubt in this ease that the government, at minimum, "must have known" that its informants would take the steps necessary to secure statements €or the government. United States v. Henrv, 447 U.S. 264, 271 (1980). Here, as in Henrv,

> "[b]y intentionally creating a situation likely to induce [Harry Phillips] to make incriminating etatements without the assistance of counsel, the Government violated [Harry Phillips'] Sixth Amendment right to counsel."

447 U.S. at 274. The United States Supreme Court has recognized that "[d]irect proof of the State's knowledge [that it is circumventing the Sixth Amendment] will seldom be available to the accused." Moulton, 106 S.Ct. at

487 & n.12. That is why the standard only requires a showing of what the government "must have known." Id. at 487 n.12, citing, United States v. Henry.

Here, even on the basis of the documentation presented with the amended 3.850 motion, it is clear that the government "must have known," Henry, that it was "circumventing [Mr. Phillips'] right to have counsel present in . . . confrontation[s] . . . [with] state agent[s]." Moulton, 106 S.Ct. at 487.

The government here created the opportunity to obtain statements from Mr. Phillips, and it then used its assortment of jailhouee informants to knowingly exploit that opportunity. Moulton. In the process, the State trampled the Sixth Amendment.

Because the government's own misconduct precluded the claim from being brought earlier, relief is now appropriate.

ARGUMENT IV

MR. PHILLIPS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS XIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE HE STOOD A CRIMINAL TRIAL ALTHOUGH HE WAS DENIED A COMPETENCY HEARING AT TRIAL AND STOOD TRIAL ALTHOUGH LIKELY NOT COMPETENT, AND COUNSEL RENDERED INEFFECTIVE ASSISTANCE BY ALLOWING AN INCOMPETENT CLIENT TO STAND TRIAL

A. Backaround

Mr. Phillips was not competent to undergo the judicial proceedings resulting in his capital conviction and sentence of death. However, no one conducted the requisite evaluation. Counsel, ineffectively, failed to ask €or one. See Argument I, supra. Defense counsel failed to recognize obvious aigne and symptoms of Mr. Phillips' mental deficiencies and emotional disturbance. counsel even failed to obtain his client'e previous incarceration records (App. 33) -- records raising serious doubts about hie client's level of functioning, and about his client's competency. Counsel did not recognize the obvious, and failed to aid his borderline retarded client. Mr. Phillips' subaverage intellectual functioning and adaptive deficits were and are eaey to document. The fact that Harry Phillips has always been intellectually deficient is obvious to almoet anyone. But counsel spent only

one hour with his client prior to trial, and although he believed his client was "an idiot", did not ask for an evaluation.

Mr. Phillips' family would have explained a history of deprivation, beatings, serious head injury and subsequent personality change, and an inability to perform in school, all of which speak to Mr. Phillips' inability to adjust or adapt at a minimal level to an everyday environment, much less function competently in a trial setting. Counsel failed to look.

Mr. Phillipa was forced to proceed to trial and required to make critical life and death decisions although he lacked the mental capacity to make such choices. Importantly, had he been provided with the expert mental health assistance he so desperately needed, Harry Phillips could have been helped to achieve a sufficient level. of competency.

Counsel himself testified at the hearing that Mr. Phillips was "an idiot" (E.H.[1] 523-524) yet counsel did not have his client evaluated. Mr. Phillips' low level of functioning alone was sufficient to subatantially impair him. But Harry waa hampered not only by those factors but by head injuries with untold effects on cognitive and personality functioning. It is a statement to his intellectual deficiencies that Harry Phillips functions at such a low level that he cannot be adequately tested for brain damage. Mr. Phillips simply should not have proceeded to trial before receiving proper evaluation and treatment. Hie behavior is indicative of a schizoid personality disorder, a disorder characterized by factors which are obvious in hie background: e.g., a reetricted range of emotional experience and expression (DSM-IIIR, p. 340). He is quiet. He keeps to himself, oftentime depreesed. He shies away from others. He has no friends. All this fits -- Harry is almost retarded. He simply does not know how to deal with life. None of this was professionally assessed, considered, or analyzed prior to trial.

Harry Phillips was properly tested by two highly qualified mental health professionale using appropriate methods during the 3.850 proceedinge. First, Dr. Carbonell evaluated Mr. Phillips, and concluded that he was likely not

competent to stand trial (App. 34, p. 11). Her report, introduced at the hearing, is substantial, and summarizes important background facts. For the rake of brevity, however, only Dr. Carbonall's conclusions are reproduced below. The entire report is contained in App. 34 and Dfse. Ex. N. AB Dr. carbonell summarized:

> *Summary and Conclusions*
>
> Mr. Phillips is a 42-year-old man functioning in the borderline range of intellectual functioning. While he seems to have an adequate fund of general information, he seems unable to apply this information. He is easily led and tends to be socially isolated. His academic achievement in areas such as reading comprehension and mathematics are below what one would expect even given his low intellectual functioning. While he does not score in the brain-damaged range on a test designed for that purpose, his reproduction of figures is rather poor and brain damage cannot be ruled out. It is important to note that tests for brain damage are not designed to separate out brain damage from retardation, thus making the reliable assessment of brain damage in cases such as this a questionable task. But, cloeed head injuries can cause brain damage and "produce deficits that implicate both hemispheres" in which "memory skills are frequently impaired" (Berg, Franzen and Wedding, 1987). Mr. Phillips did indeed experience the kinds of incidents that cause closed head injury (beatings by his father) and also other injury such as that experienced when he was shot.
>
> Mr. Phillips is pleasant and cooperative and attempts to disguise his low level of intellectual function with a veneer of social skills. In spite of this he appears obviously intellectually deficient and socially isolated. He has few interests and states that mostly he watches T.V. While he claims that he enjoys being out in the "yard", he ha0 a history of refusing to go out. Like many people of limited intellectual functioning he is passive, has less than adequate memory, and will generally try to please the examiner by answering in the way he believes is appropriate. While technically a score of 75 would not qualify as mental retardation, it is important to note that both IQ score and level of adaptive functioning contribute to classification. The cutoff scores for retardation are in fact arbitrary. Earlier definitions of retardation (Heber, 1961) used a score of 85 as the demarcation. The 1983 American Association on Mental Deficiency manual on classification and terminology notes that while an IQ of 70 is the cutoff for mental retardation, the "upper limit is intended as a guideline, it could be extended upward through IQ of 75 or more depending on the reliability of intelligence tests used."
>
> Mr. Phillips' low level of intellectual functioning is compounded by his emotional problema. He may be suffering from a "Pervasive Developmental Disorder Not Otherwise Specified." (PPDNOS)(DSMIII-R). This is a disorder characterized by a "qualitative impairment in the development of reciprocal social interaction . . ." and is not infrequently aesociated with mental retardation. Some people with this diagnosis have a restricted repertoire of activities and interests. This is a disorder present from early childhood, but often not noticed until the

child is school age and is obeerved with other children. Parente not infrequently date the onset from a time of illness or emotional trauma, but signs of the disorder may well have been preaent before the event. Mr. Phillipe' family describes him as a child who never joined in playing with other children, a child who was on the sidelines, and one who at a time of trauma sank deeper into himself. While Mr. Phillips appears also to have the characteristice of a schizoid personality (for example, he has no close friends or confidante other than first-degree family and almost always chooses solitary activities) it appears that his symptome appeared before adulthood, perhaps making a diagnosis of PPDNOS more appropriate. While the exact diagnosis may be questionable, the existence of an emotional disturbance is not. This diagnosis and/or symptom pattern is supported by his limited responeee to the Rorschach which are indicative of withdrawal and social isolation, and his pattern of responding on the MMPI.

The question remains as to how these factors would have related to his 1983 case. You raised the question of competence to stand trial, a frequent issue for defendante with below normal IQ's. Retardation or borderline intellectual functioning will effect a person's receptive and expressive language, their vocabulary and their ability to comprehend complex topics, all of which are essential parts of aiding in one's own defense. Although Mr. Phillips may acquiesce and state that he understands, this in no way indicates that he does underrtand. Mr. Phillips will try quite hard not to appear deficient, and like many retarded people may overrate his own skills. The subtleties and abstractions involved in understanding and "appreciating" the charges and the range and nature of possible penalties are lost on Mr. Phillips. His capacity to relate to his lawyer and disclose relevant facts was limited by hie intellect and his willingness to please. For example, because of Mr. Phillips' deficite he was unable to appropriately proteet hie lawyer's lack of contact. I am aware that the case against Mr. Phillips involved the testimony of cellmates who related that he made incriminating etatements. Given Mr. Phillips' level of functioning, such statements are suspect. "The retarded are particularly vulnerable to an atmosphere of threats and coercion, as well as to one of friendliness designed to induce confidence and cooperation . . . . It is unlikely that a retarded person will see the implications or consequences of hie etatements in the way a person of normal intelligence will." (President's Panel on Mental Retardation, 1963). Although this statement refers only to "retarded" defendante, it is applicable to Mr. Phillips as well, given hie borderline intellectual functioning.

Although Mr. Phillips may have wanted to help himself, he Could not turn this motivation into reasonable actions to help himself in the legal process any more than he could realistically challenge prosecution witnesses. Hie inability to maintain a coherent description of the events surrounding the alleged crime would rule out hie capacity to testify. Quite eimply, Mr. Phillips was not competent to stand trial.

This is not to say that he could never be competent or that functioning at this level automatically precludes competency. With epecial efforts made, such defendante may attain competency.

Special education and habilitation may make it possible for the defendant to stand trial.

Had Mr. Phillips been evaluated by a mental health profeeeional his deficits would have been clear; but given his limited contact with his lawyer(s), not only was no attempt made to prepare him, but no one noticed that he needed special preparation . . . .

The sections of the report reproduced above also demonstrate why professional mental health assistance was such a dire need in Mr. Phillips' case.

Harry Phillips was incarcerated €or much *of* his adult life. It would be expected therefore that defense counsel review those files (See App. 33 [DOC Records]). He never did (E.H.[1] 576-579). Important information which was directly relevant to competency issues and capital sentencing, and which would have demonstrated that an expert evaluation was needed, was therefore again lost.

The DOC files, however, should have been put before the trial court and provided to an expert by defense counsel. They corroborate Mr. Phillips' deficiencies and disturbances. Examples are reproduced below (all emphasis is supplied):

a. 1968:

ANALYSIS AND PROGNOSIS: Harry Franklin Phillips, a 23-year-old colored male, has eerved since Yanuary, 1963, on a 15-year Sentence for ASSAULT WITC MURDER IN THE FIRST DEGREE. This is his first felony conviction and, in fact, his first arrest. He apparentlv committed this crime due to his vouth at the time of the crime and possiblv a contributina factor miaht be his rather low IO. He is adiustina satisfactorilv in the prison settina and has not received a disciplinarv report now for approximatelv six or seven months.

b. 1964:

Mental condition at present is questionable. Was dull normal intelligence.

c. 1964:

Phillips was reared in urban Miami. He had inadeauate supervision in his formative vears. He associated with bad companions, who were probably no worse than himself. He has dull normal intelliuence and an aaaressive-assertive personalitv.

d. 1970:

Record improved since January, 1969. Subiect not to bright, only [unint.] when sent to prison, he has actuallv done well €or aae and intelliaence - if ever €or outside believe he is ready now. Ouiet tvpe, aood attitude durina interview. contact mother and

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see if ahe will be of assistance in developing employment plan - not much work history due to age; works in furniture refinishing shop. Your developing suitable plan will be appreciated.

e. 1974:

Test results indicate somewhat limited learning ability and educational progrese.

In a preceeding section of this brief (Claim I), Mr. Phillips has also presented significant facta pertinent to his mental health. Such facts -- e.g., the views of family members, teachers, co-workers, etc. -- were also pertinent to hia mental condition at the time of trial. But they were not considered, since counsel failed to investigate them. And counsel's performance was found to be deficient by the trial court. The hearing evidence is discussed intra, in section C.

B. The Law

"In order to demonstrate prejudice from counsel's failure to investigate his competency, petitioner has to show that there exists 'at least a reasonable probability that a psychological evaluation would have revealed that he was incompetent to stand trial'." Futch v. Duaaer, 874 F. 2d 1482, 1487 (11th Cir. 1989) (citations omitted). Mr. Phillips surely made that showing during these 3.850 proceedings

The specific facts demonstrating that Mr. Phillips was likely not legally competent during the course of the 1982-83 proceedings resulting in his conviction and sentence of death were presented in detail at the hearing. Competency issues are classic Rule 3.850 claims. Hill v. State, 473 F.2d 1253 (Fla. 1985); Mason v. State, 489 So.2d 734 (Fla. 1986); Lemon v. State, 498 So. 2d 923 (Fla. 1986). The state and federal legal analysis attendant to this claim establishes his entitlement to relief.

Harry Phillips was seen by no mental health expert prior to trial. Had an adequate pretrial evaluation been conducted in this case, Mr. Phillips' lack of competency would likely have been noted. See Futch. A hearing would have been held at the time of this initial proceedings. Mr. Phillips, however, because of counsel's deficiencies was denied that right, a right guaranteed by Pate v. Robinson and its progeny. Here, eminently qualified

mental health professionals concluded that Mr. Phillips waa likely not competent when he was evaluated during the 3.850 proceedings. Mr. Phillips' background also demonstrates the type of documented history of mental deficiencies cited in Hill v. State, 473 So.2d 1253 (Fla. 1985) (granting post-conviction relief), and Mason v. State, 489 So.2d 734 (Fla. 1986) (remanding for evidentiary hearing on competency issue). Because Mf. Phillips spent much of his adult life in prison, that documentation is included in one set of records: hie Department of Corrections files. Defense counsel never bothered to look at those files (E.H.[1] 576-579).

As noted, competency to stand trial is properly raised in a motion under Rule 3.850. Hill v. State, 473 So. 2d 1253 (Fla. 1985); see also Mason and Lemon. In Hill, this Court reviewed the extensive body of state and federal case law which recognizes that trial incompetency may be raised whenever evidence which raises a legitimate doubt regarding the defendant's competency surfaces. See Bishop v. United States, 350 U.S. 961 (1956) (post-conviction relief in federal district court when no Competency issue raised at trial); Pate v. Robinson, 383 U.S. 375 (1966) (issue of competency raised during trial, and relief granted during post-conviction); Drope v. Missouri, 420 U.S. 162 (1975) (post-conviction ruling that trial court should have conducted a competency determination and that trial court's failure warranted relief).

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

> The question remains whether petitioner's due process righte would be adequately protected by remanding the case now for a psychiatric examination aimed at establishing whether petitioner was in fact competent to stand trial in 1969. Given the inherent difficulties of such a nunc *pro tunc* determination under the most favorable circumstances, see Pate v. Robinson, 383 U.S., at 386-

> 87; Dusky v. United States, 362 U.S., at 403, we cannot conclude that such a procedure would be adequate here.

Drope, 420 U.S. at 183.

On the "right to a hearing ab initio" iesue, it matters not whether the defendant wae in fact incompetent, and that need not be decided. The violation is the failure to conduct a hearing when one ehould have been conducted: "the failure to do so deprive[s a defendant] of the right to a fair trial." Hill, 473 So.2d at 1257-58. Counsel is prejudicially ineffective when he fails to investigate competency and there is a reasonable probability that one "psychological evaluation" would have revealed a potential lack of competency. Futch, 847 F.2d at 1487.

The second Competency issue is whether in fact there is a reaeonable probability that the defendant was incompetent at the time of trial. Hill; Bishop. Regardlees of whether the trial record put the trial court on notice of a possibility of incompetency, if the defendant shows during post-conviction proceedings that there is substantial evidence that he was incompetent at the time of trial, a new trial is required. It simply violates due process to put an incompetent individual on trial.

This Court has held that retroactive determinations of incompetency are impractical, a8 they fail to adequately protect a defendant's due process rights. "Such a hearing should be conducted contemporaneously with the trial." Hill, 473 So. 2d at 1259. Thus, whether the procedural failure is found on direct appeal, Gibson v. State, 474 So. 2d 1183 (Fla. 1985), or in poet-conviction, Hill, the remedy is to "vacate the conviction and sentence and remand with directions that the State may proceed to re-prosecute the defendant after it has been determined that he is competent to stand trial." Hill, 473 So. 2d at 1260.

This is true because competency is flatly nonwaivable: "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." Pate, 383 U.S. at 384. Regardlees of why competency is not

adequately resolved pretrial or trial, if a bona fide question of competency is raised later, the judgment and sentence should be vacated. Hill.

In Pate v. Robinson, 383 U.S. 375 (1966) and Drope v. Missouri, 420 U.S. 162 (1978), judgments of guilt were reversed because trial judgee failed to order a Competency evaluation and conduct an appropriate competency hearing when confronted with information which raised doubt about the defendant's competence. "The Court need not be convinced that the defendant is incompetent to stand trial before an evaluation is ordered -- that is the purpose of the evaluation." The ABA Mental Health Standards 7-4.1, Competence to Stand Trial (hereafter "Mental Health," p. 192). The quantum of information necessary to raise a doubt of competency is difficult to measure:

> There are, of course, no final or immutable signs which invariably indicate the need for further inquiry to determine fitness to proceed: the question is often a difficult one in which a wide range of manifestations and subtle nuances are implicated.

Drope, 420 U.S. at 162. Under *any* standard, a doubt about competency exists in this ease, and no one can conclude confidently that Mr. Phillips was competent in a manner that does not violate due process. Mason, 486 So. 2d at 737. No competency hearing was held pre-trial or at trial, no evaluation was performed, although the evidence existed.

C. The Hearing Evidence

The Rule 3.850 evidentiary hearing record, in its entirety, reflecting, inter alia, Mr. Phillips' record, the accounts of those who knew him, the results of psychological testing (critically necessary to a proper review of competency issues), the testimony of Dr. Toomer and Dr. Carbonell on this issue (See Argument I, supra) quoting the testimony of Dr. Toomer and Dr. Carbanell), and even defense counsel's views of Mr. Phillips (many written in the margin of a copy of the Rule 3.850 motion which had been provided to trial defense counsel), is clear that there is much, much more than a aubetantial doubt regarding Mr. Phillips' competency at the time of trial. This alone entitles Mr. Phillips to relief, see Hill v. State, 473 So. 2d 1253 (Fla. 1985); Mason v. State, 489 So. 2d 734 (Fla. 1985); Aaan v. Duaaer, 835 F.2d

1357 (11th Cir. 1987), as does counsel's ineffective failure to present the iseue at the time of Mr. Phillips' trial. Futch.

The only "evidence" the State could mueter to rebut a conclusive record in this regard waa the testimony of Drs. Miller and Haber, who were originally appointed at the request of the State. What was revealed on cross-examination was that if these doctors had provided at the time of trial the type of evaluation they conducted in 1987, those evaluations would not be deemed professionally adequate under the standards established by this Court. See Mason, 489 So. 2d 735-37; State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987).

Dr. Miller (who was not quite sure of his employment statue at the University of Miami and was not quite sure if he was even "tenured"), and Dr. Haber, 1) conducted their "evaluation" comtemporaneously -- this alone is a substantial flaw rendering the evaluations professionally invalid; 2) conducted absolutely no testing, although psychological testing is absolutely required in a case such as this;[10] 3) provided no analysis whatsoever regarding the applicability of the criteria set forth under Rule 3.211; 4) absolutely refused during cross-examination to acknowledge that the independent facts regarding this record and Mr. Phillips' history showed that he was not competent at the time of trial; 5) reviewed and conridered absolutely no independent history regarding Mr. Phillips (although both acknowledged that they could have asked for it); 6) admittedly had never conducted a nunc pro tunc competency evaluation; 7) and, significantly, evaluated Mr. Phillips' "present" competency in 1987, not his competency at the time of trial. (By 1987, Mr. Phillips, who is significantly impaired, had spend numerous hours with CCR attorneys and investigators, and with mental health experts, time which his trial attorney never afforded him, and the proceedings were explained to him over-and-over, in painstaking detail). The

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[10] Dr. Miller and Dr. Haber are, in fact, psychologists and therefore should be extensively trained in the adminietration of psychological testing. As any competent psychologist would testify (as Drs. Toomer and Carbonell did testify), a "psychological" evaluation conducted without appropriate testing is inadequate.

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State's experts considered none of this, and their evaluatione were far from professionally adequate.

This record is simply overwhelming on the key question now at issue: do substantial doubts exist about Mr. Phillips' competency at the time of trial? The overwhelming proof presented by Mr. Phillips at the hearing speaks for itself, as does the clear, unimpeached testimony of Dr. Carbonell and Dr. Toomsr. Relief is appropriate.

ARGUMENT V

MR. PHILLIPS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, AND WAS PREJUDICED BY COUNSEL'S IGNORANCE OF THE LAW, IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS

Trial counsel's unreasonably inadequate investigation and preparation reeulted in numerous specific errors and omission8 which operated to Mr. Phillips' substantial prejudice. As this Court noted on direct appeal, trial counsel failed to litigate and preserve issues or object to substantial errors at trial and sentencing. These failings directly resulted from his ignorance of the law and lack of preparation.

As the State's entire case against Mr. Phillips was based on the testimony of jailhouse informante, counsel's first and foremost duty was to challenge the admission of that testimony. Investigation should have been conducted into the statemente elicited from Mr. Phillips by various informants. Trial counsel was or should have pursued facts upon which such a challenge could have been based, yet failed to prepare and did not file pre-trial motions to supprese.

a. William Farley had a history as an informant, and the circumstances of his encounter with Mr. Phillips should have been a red flag to counsel. Farley was moved to Mr. Phillips' cell, met with police, returned to the cell where he obtained incriminating atatemente from Mr. Phillips, then traneferred to another prison, all in the space of <u>three days</u>.

b. William Smith (a.k.a. William Scott) was a career informant, and had been paid handsomely €or his services by the Federal Government as recently as two months prior to hie encounter with Mr. Phillips. Smith allegedly elicited

statements from Phillips, initiated their conversation and employed the subtle peychologieal interrogative techniques of the professional informer. Three davs after his encounter with Mr. Phillips, Smith was out on the atreet actually working €or the detectives investigating the instant offense. Yet, counrel unreasonably failed to recognize the patent fifth and sixth amendment violations extant in the entire episode.

c. Malcolm Watson had a documented history as a paid informant for the Metro-Dade Police Department, and allegedly elicited statements in a manner which should have alerted counsel to the constitutional violation8 involved.

d. Larry Hunter was also a career informant, and engaged in a lengthy process of eliciting "incriminating" information from Mr. Phillips. Hunter used his attorney as a go-between with the police, all the while continuing to "play" Mr. Phillips for more information which with to negotiate.

All of theee witnesses were acting as agents at the direction of the etate, and the statementa elicited by them from Mr. Phillips were obtained and used in violation of the fifth, eixth, and fourteenth amendments. Reasonable counsel would have moved to suppress their testimony prior to trial. There is no question that key material facts on this issue were withheld by the State (see supra); Mr. Phillips alternatively submits herein that defense counsel's failure to file a motion to supress constituted ineffective assietance.

Furthermore, trial counsel unreasonably failed to move for a change of venue or to conduct an appropriate voir dire, despite the extensive pre-trial publicity extant in the community. This was a highly publicized crime, and the local media made much of the collateral events leading up to the crime. Newspapers carried exteneive (and often inaccurate) coverage of Mr. Phillips prior criminal history, and exploited then recent and unfounded allegations that he had been previously involved in harassment of parole officers. The jury could not but have been affected by this publicity, but counsel made no attempt to ascertain the existence and extent of such an effect and take appropriate remedial action. His failure to do so waa unreasonable, and deprived Mr. Phillips of the effective assistance of counsel.

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Trial counsel failed to object to Mr. Phillips' absence during critical stages of the proceedings (Amended Motion to Vacate, Claim IX), and conducted proceedings although Mr. Phillips was involuntarily absent.

Trial counsel's lack of adequate investigation and preparation manifeeted itself on numerous occaaiona in his cross-examination of state witnesses. For example, William Smith lied many times about his previour association with Mr. Phillips, stating on several occasions that he had known Mr. Phillips at Glades Correctional Institute, in Belle Glade, Florida, in the mid-seventies. Mr. Phillips was never incarcerated at Glades, and this fact was easily ascertainable by trial counsel (e.g. by talking to his client, reviewing records, etc.). Trial counsel Unreasonably failed to discover this outright lie and to impeach Smith. Similarly, trial counsel's ignorance of basic historical facts allowed state's witness Vivian Chabrier to supply detaile of her conversations with Mr. Phillips which she had deliberately withheld at her deposition. Trial counsel on two separate occasions elicited from state witnesses references to collateral crimes which he had attempted to have excluded pre-trial.

Trial counsel unreasonably failed to obtain the assistance of or to consult with experts. There is and was at the time of trial a substantial question as to Mr. Phillips' competency to etand trial. See Argument IV, supra. Counsel made no attempt to have an expert appointed to determine competency, although he was undeniably entitled to such appointment.

Likewise, consultation with an expert in firearms could have demonstrated that the testimony of the state's expert and the attendant demonstrative evidence was misleading and inaccurate. The bullets in evidence could just as well have come from a nine shot revolver, and the state's elaborate and irrelevant display of the mechanics of gun-loading was therefore misleading. An expert would have so testified, but counsel did not pursue the issue.

Trial counsel's unreasonable failure to research and familiarize himself with general criminal law and the law of evidence resulted in numerous

subatantial errors. Damaging inadmissible heareay evidence was repeatedly presented by the state without objection. Laypersons were allowed to give unqualified and inaccurate expert opinions without objection. Counsel failed to object to manifestly improper closing arguments by the state, rife with expressions of personal opinion, prosecutorial expertise, and other improprieties. Substantial constitutional errors were not objected to.

Shockingly, counsel gave no thought to what the adequate preparation of a case euch as Mr. Phillips' would require, He spent only one hour with his client prior to trial -- he saw his client for this period of time on the very day that he was appointed to the case, and never again visited the jail. The trial and eentencing proceedings show counsel's woeful lack of preparedness. He failed to investigate. Be failed to prepare. His testimony at the hearing demonstrated a patent ignorance of the applicable principles of law.

Under Strickland v. Washinaton, 466 U.S. 668 (1984) a defendant presenting an ineffective assistance of counsel claim must show: 1) deficient attorney performance, and 2) prejudice. Mr. Phillips has.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails tw investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th cir. 1979). See also Beavers v. Balkcorn, 636 F.2d 114, 116 (5th Cir. 1981); Gaines v. Homer, 575 F.2d 1147, 1148-50 (5th Cir. 1978). Cf. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). Likewise, courts have recognized that an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Carawav v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See, *e.g.*, Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980).

Counsel's performance at the guilt-innocence phase of Mr. Phillips' trial was deficient under the sixth amendment in a number of respects, and relief is appropriate.

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ARGUMENT VI

COMMENTS BY THE COURT AND PROSECUTOR THROUGHOUT THE COURSE OF THE PROCEEDINGS RESULTED IN MR. PHILLIPS' SENTENCE OF DEATH, DIMINISHED THE JURORS' SENSE OF RESPONSIBILITY FOR THE CAPITAL SENTENCING TASK THAT THEY WERE TO PERFORM, AND HAD AN EFFECT ON THE JURY IN VIOLATION OF CALDWELL V. MISSISSIPPI AND THE EIGHTH AND FOURTEENTH AMENDMENTS AND TRIAL AND APPELLATE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO ASSERT THE CLAIM

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

Throughout Mr. Phillips' trial, the court and prosecutor frequently made statements about the difference between the juror's responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase (R. 71, 36-37, 42, 55, 1200, 1199, 1202, 1239, 1248, 184, 216, 311, 339, 486, 716, 772, 779, 780, 784, 2166, 2186, 2212-13, 2267, 2270). In preliminary instructions to the jury in the penalty phase, the judge emphatically told the jury that the decision as to punishment was his alone (R. 1227). After closing arguments in the penalty phase, the judge reminded the jury of the instructions they had already received regarding their lack of responsibility for sentencing Mr. Phillips (R. 1255). After the jury retired to deliberate whether Mr. Phillips ahould live or die, the jury sent two notes to the Court asking about Mr. Phillips' conviction record and to be reinstructed on mitigating circumstances (R. 1268). Therefore, it is obvious that proper instructions, together with evidence of mitigation, would have resulted in a life sentence.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dugger, 481 U.S. 393 (1987), the United States Supreme Court for the first time held that instructions for the sentencing jury in Florida was governed by the eighth amendment. This was a retroactive change in the law, Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987), which excuses counsel's failure to object to the adequacy of the jury's instructions and impropriety of prosecutor's comments. Thus, the intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a miestatement of the law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Phillips' jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed. To the extent that counsel failed to know the law and litigate this issue, his performance was deficient under Strickland and Mr. Phillips was prejudiced. The Court must therefore vacate Mr. Phillips' unconstitutional sentence of death.

ARGUMENT VII

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING REINFORCED BY THE PROSECUTOR'S SIMILAR BURDEN-SHIFTING COMMENTS ON SUMMATION, DEPRIVED MR. PHILLIPS OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION, AND HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND TRIAL COUNSEL INEFFECTIVELY FAILED TO LITIGATE THE CLAIM

In Aranao v. State, 411 So.2d 172, 174 (Fla. 1982), this Court held that:

> [S]uch a sentence [of death] could only be given if the state showed the aaaravatina circumstances outweiqhed the mitiqatinq circumstances.

State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. den., 4126 U.S. 943 (1974) established that the state carried the burden of proof at the penalty phase, and that the state had to carry that burden "beyond a reasonable doubt."

Mr. Phillips' sentencing proceeding did not follow this due process and eighth amendment requirement. Rather, his sentencing jury wae specifically inetructed by the court, and specifically told the prosecutor on summation (e.g., R. 1245), that Mr. Phillips bore the burden of proof on the issue of whether he should live or die.

The court specifically instructed the jury that a sentence of death was warranted if the mitigating circumstancee did not outweigh the aggravating circumstances found (R. 1263). These instructions, and the State's summation, presented this unconstitutional [mis]information to the jury, a jury which then returned a verdict of death by the slimmest of margins: 7-5. Such burden shifting was constitutional error. See Mullaney v. Wilbur, 421 U.S. 684 (1975); Sandstrom v. Montana, 442 U.S. 510 (1979). Moreover, this construction inhibited the jury's ability to consider mitigation, for only the mitigation which outweighed the aggravation could be given effect under the inetructions. See Mills v. Maryland, 108 S. Ct. 1860 (1988). It also undermined the requirment of reliability in capital sentencing proceedings.

Trial counsel failed to litigate these important queatione and to raise timely objections. There was no tactic or strategy. He was ignorant of capital sentencing law (as his testimony at the hearing showed), and his performance was ineffective.

ARGUMENT VIII

THE INCONSISTENT JURY INSTRUCTIONS THAT A VERDICT OF LIFE IMPRISONMENT MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE CONSTITUTIONALLY UNACCEPTABLE RISK THAT DEATH MAY HAVE BEEN IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. PHILLIPS' SENTENCE OF DEATH THUS VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS, AND TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THIS REGARD

Mr. Phillips' jurors were misinformed as to the required vote €or a recommendation of life imprisonment. Although at some point they received correct instruction8 that a majority of their number was required to recommend a sentence of death, they were also provided inconsistent and mieleading instructions that a majority was required for a life recommendation (R. 1268). The erroneous instructions were an illegal restriction on the jury's function

under the law. See Rose v. State, 425 So.2d 521 (Fla. 1982); Harich v. State, 437 So.2d 1082 (Fla. 1983). The ineoneistency and inaccuracy resulting from the instructions involved the type of misinformation condemned by the eighth amendment for they "create[d] a misleading picture of the jury's role." Caldwell v. Mississippi, 105 S. Ct. 2633, 2646 (1985). The instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the most fundamental requirements of the eighth amendment. And this jury voted 7-5, demonstrating that the error more than likely was prejudiced.

Mr. Phillips' jury was erroneously instructed. Mr. Phillips thus may well have been sentenced to die only because his jury was misinformed and misled. Such a procedure violates the eighth and fourteenth Amendments, €or it creates the substantial risk that a death sentence was imposed in spite of factors calling for a leas severe punishment. Lockett v. Ohio, 438 U.S. at 605. Inconsistently telling the jury that it had to reach a majority life verdict, and that it did not have to reach a majority life verdict, "interject[ed] irrelevant considerations into the factfinding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instruction may have encouraged the jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict was required. The instructions thus "introduce[d] a level of uncertainty and unreliability into the [sentencing] process that cannot be tolerated in a capital case." Id. at 643.

This danger was enhanced by the time of the inconsistent instructions. At the end of the penalty phase, the jury was correctly and incorrectly instructed aa to their vote. The incorrect instruction was the very last thing they heard before they retired to deliberate:

> You will now retire to consider your recommendation. When eeven or more are in agreement as to what sentence should be recommended to the Court, that form of recommendation should be signed by your foreman and returned to the Court.

(R. 1261). Then, they returned from their deliberations and poaed questions to the court as to the inetructions and evidence they could consider. The court re-instructed, and again the <u>very last</u> thing which the jury was told before they were returned to the jury room was that a <u>majority</u> was necessary for a verdict of life:

> In these proceedings it is not necessary that the advisory sentence of the jury be unanimous. Your decision may be made by a majority of the jury.

(R. 1268).

In <u>Harich</u>, this Court condemned that part of the then standard penalty phase instruction which incorrectly indicated that a majority of the jury was required to recommend life. The death sentence in <u>Harich</u> was upheld only because, as his jury had returned a nine to three recommendation of death, there was no indication that they had had difficulty achieving a majority consensus. It is apparent from the record that Mr. Phillips' jury, unlike Mr. Harich's, did have substantial difficulty reaching a verdict, and did so only by the narroweet of margina -- 7-5. Following the completion of the sentencing phase instructions, the jury deliberated for some time, then sent two questions to the judge. The trial court answered the questions and sent them back into the jury room by providing <u>only</u> the improper instruction. The jury questions show that the jury was seriously considering the recommendation of a life sentence, and was struggling during the deliberations. Thus, the error actually mattered in Mr. Phillips' case, and mattered in a way that could have been determinative of the sentence ultimately imposed. The jury was within one vote of a life recommendation. The erroneous instruction was simply not a minor or technical error. It went to the heart of the death sentencing process: <u>but for</u> the erroneous instruction, the jury's verdict in all probability would have been €or <u>life</u> imprisonment. Thus, unlike <u>Harich</u>, the erroneous instruction here was <u>determinative of the outcome</u>. The error went to the very core of the accuracy of the jury's findings.

In this case, the instruction <u>was</u> prejudicial, and denied Mr. Phillips the protections afforded under the <u>Tedder</u> standard. The jury "represent[s]

the judgment of the community as to whether the death sentence is appropriate." McCampbell v. State, 421 So.2d 1072, 1075 (Fla. 1982). There thua may be "no denigration of the jury's role" in capital Sentencing. Richardson v. State, 437 So.2d 1091, 1095 (Fla. 1983).

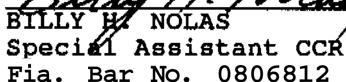
Inaccurate and misleading instructions regarding the jury's role and function in capital sentencing proceedings violate the eighth amendment. The constitutionally mandated "heightened need for reliability in the determination that death is the appropriate punishment in a specific case," id. at 2645, quoting Woodson v. North Carolina, 428 U.S. at 305 (1976), was irrevocably frustrated when his jury was misinstructed.

Mr. Phillips' sentencing jury was unconstitutionally misinformed. Hie resultant sentence of death is fundamentally unreliable, and violates the Eighth and Fourteenth Amendments. Trial counsel's failure to litigate this issue, an issue that mattered in this case, and to raise timely objections, eepecially when the jury came back in, constituted prejudicially deficient assistance. The Court should grant relief.

CONCLUSION

Appellant, based on the foregoing, respectfully urges that the Court vacate his unconstitutional capital conviction and death sentence and grant all other relief which the Court deems just and equitable.

Respectfully submitted,



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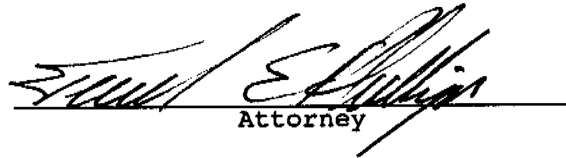
CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Ralph Barreira, Assistant Attorney General, Department of Legal Affaire, 401 N.W. Second Avenue, Suite 921N, Miami, Florida 33128, this 5 day of August 1991.



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