IN THE

SUPREME COURT OF FLORIDA

CASE NO. _____

ROBERT ANTHONY PRESTON,

Appellant,

versus

STATE OF FLORIDA,

Appellee.

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

SUMMARY INITIAL BRIEF OF APPELLANT

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INTRODUCTION

> THE COURT: [The jury] heard misinformation. There's no question about that.
>
> MR. NOLAS: Has it been shown that it was misinformation? It has.
>
> THE COURT: It has been.

(Transcript of March 26, **1990,** hearing, p. **50).**

> THE COURT: I don't know whether it's harmless or not.

(Id. at 56).

> The law says that if someone has committed an aggravating felony in the past, that's an indication that this person is going to do it again. The barrier that we all have about trying to injure people has been broken. He will repeat and do this again.
>
> Another jury in this County has heard the Defendant. Another jury in this County has passed judgment on the Defendant, and the Defendant stands convicted of throwing a deadly missile at an occupied vehicle, and he was adjudicated guilty, and he was sentenced to six years in the Department of Offender Rehabilitation, and his conviction has been affirmed, and the judgment is now final, and it is an aggravating circumstance.

(Prosecutor's closing argument at original jury sentencing, R. **1993).**

> Would the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which [evidence on the impermissible aggravating factor] shall not be considered.

Elledge v. State, **346 SO.** 2d **998, 1003** (Fla. **1977)**(emphasis added).

> We cannot tell how this improper evidence and argument may have affected the jury. We therefore vacate Dougan's sentence and remand for another complete sentencing hearing before a new jury.

Dougan v. State, 470 So. 2d 697, 701 (Fla. 1985)(emphasis added).

Robert Preston's jury, a jury that heard significant mitigating evidence, voted 7-5 for death. The vote itself is telling, as is the record -- a record reflecting the substantial difficulty which the jury had in reaching a verdict. Following the completion of the sentencing phase instructions, the jury deliberated for some time, then sent two questions to the judge. First the jury asked: "Is it possible for a judge or parole board to give Mr. Preston credit for any years he has served in jail toward his 25 years for murder?" (R. 2032). Second, the jury asked: "There are five counts of which three are capital. Will they be served consecutively, 75 years, or concurrent, not more than 25 years?" (R. 2032). The jury's questions confirm what the jury vote showed -- that the jury was seriously considering the recommendation of a life sentence and was struggling during the deliberations.

But Mr. Preston's jury also heard the State present an argument for death which stressed that death was required because Mr. Preston had been convicted of a previous violent act, which stressed that that conviction was an important aggravating factor, which used that conviction to argue that Mr. Preston had a propensity for violence, which relied on that conviction to rebut the nonstatutory mitigating factor of no significant history of prior criminal activity, and which employed that conviction to undermine the compelling nonstatutory mitigating case for life

presented by Mr. Preston at the penalty phase. We now know that in Mr. Preston's case, as in Johnson v. Mississippi, 108 S. Ct. 1981 (1988), "the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Id. at 1989. The prior conviction, and the prosecution's arguments thereon, should never have gone to the jury for, as discussed in Claim I of this brief, that conviction was invalid. Here, there is no question that this 7-5 jury was provided with "misinformation of constitutional magnitude," United States v. Tucker, 404 U.S. 443, 447 (1972); Johnson, supra, as the Rule 3.850 trial judge acknowledged at the March 26 hearing below.

By the time that the lower court drafted its order, however, the role of the jury completely dropped out of the trial court's analysis. In this, the lower court erred, as this Court's longstanding precedents plainly show: Riley v. Wainwright, 517 So. 2d 656, 657-59 (Fla. 1987)("[A] new jury is required when the original jury recommendation is invalid); Menendez v. State, 419 So. 2d 312, 314 (Fla. 1982)(new jury sentencing appropriate where error at original sentencing trial concerned the instructions and evidence provided to the jury); Mikenas v. State, 407 So. 2d 892, 893 (Fla. 1981)(new jury sentencing appropriate where improper evidence provided to jury); Elledae v. State, 346 So. 2d at 1003 (same); Dougan v. State, 470 So. 2d at 701 (same): Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983)(same, in a case involving improper argument presented to the jury by the State); Maggard v. State, 399 So. 2d 973, 977-78 (Fla. 1981)(same, in a case involving no mitigating factors). These precedents, grounded on

this Court's construction of Fla. Stat. section 921.141 that jury resentencing is required where improper evidence is introduced to the jury which may have affected its sentencing deliberations, should have controlled the lower court's disposition of this claim. And here the jury heard misinformation of a constitutional magnitude, in a case in which there was mitigation and in which the death vote was 7-5. All of the evidence used by the State to argue the prior violent felony aggravator and to argue propensity has been shown to be invalid. Cf. Duest V. Duaaer, 15 F.L.W. 41, 43 (Fla. 1990)("[T]here is still a basis for the aggravating circumstance of prior conviction of a violent felony."). The lower court's order, an order which completely overlooks the jury's critical role and this Court's precedents discussing that role, is plainly erroneous. Mr. Preston's case is thus in the same posture as Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989), a case in which this Court made it plain that "it is of no significance that the trial judge stated that he would have imposed the death penalty in any event," because the real issue involves the effect of the error on the jury.

These issues are discussed in Claim I of this brief. At the outset, however, immediately below, we detail some of the precedents which should have governed the lower court's analysis, precedents which the trial court completely ignored, and precedents which mandated resentencing before a new jury because the unreliability of the original jury verdict is a given fact in this case -- a fact noted by the circuit court at the March 26, 1990 hearing but then ignored in the court's order. Resentencing before a jury is required in this case, unless this Honorable

Court is prepared to overturn its body of precedent concerning the role of the jury in a Florida capital sentencing proceeding and section 921.141 itself.

The standard of review for claims of error before a Florida capital sentencing jury have been long-settled by this Court:

> This Court has long held that a Florida capital sentencing jury's recommendation is an integral part of the death sentencing process. Lamadaline v. State, 303 So.2d 17, 20 (Fla. 1974)(jury recommendation can be "critical factor" in determining whether or not death penalty should be imposed). Under Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), a jury's recommendation of life must be given "great weight" by the sentencing judge. A recommendation of life may be overturned only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Id.[1]
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> * * *
>
> In Lucas v. State, 490 So.2d 943 (Fla. 1986), we held that there should be a complete new sentencing proceeding before a newly empaneled jury where the trial took place before this Court's decision in Sonser v. State, 365 So.2d 696 (Fla. 1978), cert. denied, 441 U.S. 956, 99 S.Ct. 2185, 60 L.Ed.2d 1060 (1979), which held that mitigating factors are not restricted to those listed in the statute. Our decision in Lucas was based upon a review of the record, which indicated that the trial judge

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'Here, Judge Davis, never ruled that he would have overridden a jury verdict of life. Nor could he have, as his comments at the March 26 hearing show. No such finding has been made by the trial court here, and thus that is not an issue before this Court. Just as significantly, the mitigation presented at sentencing certainly would have provided a reasonable basis for a recommendation of life which this jury all but made originally (See Claim I, infra). And, originally, the jury heard impassioned arguments for death which were grounded on "misinformation of constitutional magnitude." Tucker; Johnson.

> instructed the jury only on the statutory mitigating circumstances. In reaching our conclusion, we noted that resentencing without the benefit of a new jury recommendation is not always error but that a new jury is required when the original jury recommendation is invalid. See Menendez v. State, 419 So.2d 312, 314 (Fla. 1982)(new jury recommedation not required where no error at original sentencing trial with regard to evidence and instructions to jury); Mikenas v. State, 407 So.2d 892, 893 (Fla. 1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982) (trial judge did not err in resentencing without further jury deliberations where evidence itself was not improper but only the manner in which it was considered by the court). . . .
>
> * * *
>
> If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure.

Riley v. Wainwright, 517 So. 2d 656, 657-59 (Fla. 1987, emphasis added).

The Eleventh Circuit Court of Appeals has also acknowledged the pivotal role of the Florida sentencing jury:

> Second, it is argued that any errors committed during the sentencing phase were rendered harmless when the trial court (under remand from the Florida Supreme Court) resentenced Magill to death after a new hearing in 1981. Although the court in the 1981 hearing considered the nonstatutory evidence and, in fact, found one nonstatutory mitigating circumstance, the resentencing did not render harmless the Lockett error of the original sentencing proceeding.
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> * * *
>
> [T]o hold that resentencing by the court cleanses the taint of the original proceeding would ignore the importance of the advisory jury to the Florida sentencing scheme.
>
> * * *

> We cannot hold that the subsequent resentencing by the court purged the taint of the original proceedings without infusing an unacceptable level of arbitrariness into the administration of the death penalty in Florida. The error can be cured only by a sentencing proceeding before a new advisory jury.
>
> This result is not inconsistent with Spaziano v. Florida, 468 U.S. 447, 104 S.Ct. 3154, 82 L.Ed.2d 340 (1984), where the Court held that Florida's death penalty statute was constitutional even though the trial judge was permitted, in some instances, to override the jury's recommended sentence. Althoush Spaziano indicates that a state may allocate the sentencins power as it wishes between the judge and jury, it does not stand for the proposition that the state may arbitrarily alter this allocation as it applies to particular defendants. Under Florida law, a capital defendant is entitled to have a sentencins proceedins before a jury. A capital defendant is no less entitled to that advisory jury sentence merely because his original sentencins proceedins was infected by constitutional error. . . . Indeed, when the Florida Supreme Court in Magill remanded for resentencing without a jury, it did not believe that the penalty phase was tainted by consitutional error. The court merely remanded so that the trial court could amend its findings of fact in support of the death penalty. In contrast, when the Florida Supreme Court believes the sentencing proceeding is marred by serious error, it has remanded for resentencing by a new advisory jury. . . . In order to avoid the arbitrary application of the death penalty in Florida, we hold that Magill cannot be resentenced to death unless a new advisory jury is empaneled to consider his penalty.

Magill v. Dugger, 824 F.2d 879, 894-95 (11th Cir. 1987)(footnote and citations omitted)(emphasis supplied). Applying this Court's standards, the Eleventh Circuit has also held:

> . . . In analyzing the role of the jury, however, we cannot operate in a vacuum. Rather, we must look to how the Supreme Court of Florida, the final interpreter of the

death penalty statute, has characterized that role.

* * *

A review of the case law shows that the Supreme Court of Florida has interpreted Section 921.141 as evincing a legislative intent that the sentencing jury play a significant role in the Florida capital sentencing scheme.

Mann v. Dugger, 844 F.2d 1446, 1450-51 (11th Cir. 1988)(in banc). After discussing the important impact under this Court's standards of a sentencing jury's verdict, the Eleventh Circuit's analysis of this Court's case law continued:

In analyzing the role of the sentencing jury, the Supreme Court of Florida has apparently been influenced by a normative judgment that a jury recommendation of death carries great force in the mind of the trial judge. This judgment is most clearly reflected in cases where an error has occurred before the jury, but the trial judge indicates that his own sentencing decision is unaffected by the error. As a general matter, reviewing courts presume that trial judges exposed to error are capable of putting aside the error in reaching a given decision. The Supreme Court of Florida, however, has on occasion declined to apply this presumption in challenges to death sentences. For example, in Messer v. State, 330 So.2d 137 (1976), the trial court erroneously prevented the defendant from putting before the sentencing jury certain psychiatric reports as mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. The supreme court vacated the sentence, even though the sentencing judge had stated that he had himself considered the reports before entering sentence. The supreme court took a similar approach in Riley V. Wainwright, 517 So.2d 565 (Fla.1987). There, the defendant presented at his sentencing hearing certain nonstatutory mitigating evidence. The trial court instructed the jury that it could consider statutory mitigating evidence, but said nothing about the jury's obligation under Lockett v. Ohio, 438 U.S. 586, 98 S.Ct.

2954, 57 L.Ed.2d 973 (1978), to consider nonstatutory mitigating evidence. The jury recommended death and the trial judge imposed the death penalty. In imposing the death sentence, the trial judge expressly stated that he had considered all evidence and testimony presented. On petition for writ of habeas corpus, the supreme court ordered the defendant resentenced. The court held that the jury had been precluded from considering nonstatutory mitigating evidence, and that the trial judge's consideration of that evidence had been "insufficient to cure the original infirm recommendation." **Id.** at 859 n. 1.

In light of the disposition of these cases, it would seem that the Supreme Court of Florida has recognized that a jury recommendation of death has a **sui** generis impact on the trial judge, an impact so powerful as to nullify the general presumption that a trial judge is capable of putting aside error. We do not find it surprising that the supreme court would make this kind of normative judgment. A jury recommendation of death is, after all, the final stage in an elaborate process whereby the community expresses its judgment regarding the appropriateness of a death sentence.

844 F.2d at 1453-54 (footnote omitted).

The [Florida] supreme court's understanding of the jury's sentencing role is illustrated by the way it treats sentencing error. In cases where the trial court follows a jury recommendation of death, the supreme court will vacate the sentence and order resentencina before a new jury[7] if it concludes that the proceedings before the original jury were tainted by error. Thus, the supreme court has vacated death sentences where the jury was presented with improper evidence, **see** Douaan v. State, 470 So.2d 697, 701 (Fla.1985), cert. denied, 475 U.S. 1098, 106 S.Ct. 1499, 89 L.Ed.2d 900 (1986), or was subject to improper argument by the prosecutor, **see** Teffeteller v. State, 439 So.2d 840, 845 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984). The supreme court has also vacated death sentences where the trial court gave the jury erroneous instructions on mitigating

> circumstances or improperly limited the defendant in his presentation of evidence of mitigating circumstances. See Thompson v. Duaaer, 515 So.2d 173, 175 (Fla.1987); Downs v. Duaaer, 514 So.2d 1069, 1072 (Fla.1987); Riley v. Wainwright, 517 So.2d 656, 659-60 (Fla.1987); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987); Floyd v. State, 497 So.2d 1211, 1215-16 (Fla.1986); Lucas v. State, 490 So.2d 943, 946 (Fla.1986): Simmons v. State, 419 So.2d 316, 320 (Fla.1982); Miller v. State, 332 So.2d 65, 68 (Fla.1976). In these cases, the supreme court frequently focuses on how the error may have affected the jury's recommendation.

Id. at 1452 (emphasis supplied).2

> In light of the case law, we conclude that the Florida jury plays an important role in the Florida capital sentencing scheme. The case law reflects an interpretation of the death penalty statute that requires the trial court to give significant weight to the jury's recommendation, whether it be a recommendation of life imprisonment or a recommendation of death. The case law also reflects, we think, an insightful normative judgment that a jury recommendation of death has an inherently powerful impact on the trial judge.

Id. at 1454. In footnote 10 the Court also provided:

'Footnote 7 provided:

> The Supreme Court of Florida has permitted resentencing without a jury where the error in the original proceeding related to the trial court's findings and did not affect the jury's recommendation. See, e.g., Menendez v. State, 419 So.2d 312, 314 (Fla.1982); Mikenas v. State, 407 So.2d 892, 893 (Fla.1981), cert. denied, 456 U.S. 1011, 102 S.Ct. 2307, 73 L.Ed.2d 1308 (1982); Magill v. State, 386 So.2d 1188, 1191 (Fla. 1980), cert. denied, 450 U.S. 927, 101 S.Ct. 1384, 67 L.Ed.2d 359 (1981): Fleming v. State, 374 So.2d 954, 959 (Fla. 1979). . .

Id. at 1452, n.7.

> Florida could, if it so desired, administer a capital sentencing scheme in which the jury played no role. See Spaziano v. Florida, 468 U.S. 447, 465, 104 S.Ct. 3154, 3165, 82 L.Ed.2d 340 (19840("[T]here is no constitutional imperative that a jury have the responsibility of deciding whether the death sentence should be imposed. . . ."). The fact of the matter is. however, that under the existing scheme in Florida the jury does share in capital sentencing responsibility. Because the jury's recommendation is a critical factor in the ultimate sentencing decision. the jury's function. like the function of any capital sentencer, must be evaluated pursuant to eighth amendment standards. This court, in various contexts in federal habeas cases, has treated the Florida jury as if it were a sentencer for constitutional purposes. For example, in Jackson V. Dugger, 837 F.2d 1469 (11th Cir. 1988), we held that the eighth amendment is violated when a Florida sentencing jury is instructed that, once it finds the victim's murder to have been committed under aggravating circumstances, death is presumed to be the appropriate sentence.

Id. at 1454-55 n.10 (emphasis added). This Court's precedents uniformly confirm this analysis -- where invalid evidence is presented to a sentencing jury in Florida and that jury recommends death, resentencing before a jury is required, particularly where the defendant has presented some mitigation:

> The trial court, therefore, erred in allowing the state to present and argue to the jury the second indictment. We cannot tell how this improper evidence and argument may have affected the jury. We therefore vacate Dougan's sentence and remand for another complete sentencing hearing before a new jury. Elledge V. State, 346 So.2d 998 (Fla. 1977). See Teffeteller v. State, 439 So.2d 840 (Fla. 1983), cert. denied, ___ U.S. ___, 104 S.Ct. 1430, 79 L.Ed.2d 754 (1984); Maggard v. State, 399 So.2d 973 (Fla.), cert. denied, 454 U.S. 1059, 102 S.Ct. 610, 70 L.Ed. 2d 598 (1981).

Dougan V. State, 470 So. 2d 697, 701 (Fla. 1985)(emphasis added).

Indeed, even in cases presenting much less egregrious violations of the eighth amendment than Mr. Preston's, where improper arsument alone is presented to the jury (Mr. Preston's case involved improper evidence, argument, and instructions that the jury consider that evidence in aggravation), this Court has consistently reversed:

> "We think that in a case of this kind the only safe rule appears to be that unless the court can determine from the record that the conduct or improper remarks of the prosecutor did not prejudice the accused the ... [sentence] must be **reveresed."** Pate v. State, 112 So.2d 380, 385-86 (Fla. 1959). We cannot determine that the needless and inflammatory comments by the prosecutor did not substantially contribute to the jury's advisory recommendation of death during the sentencing phase. We hold that it was reversible error for the trial court to deny appellant's motion for a mistrial or for a cautionary instruction.
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> * * *
>
> The remarks of the prosecutor were patently and obviously made for the express purpose of influencing the jury to recommend the death penalty. The intended message to the jury was clear: unless the jury recommeded the death penalty, the defendant, in due course, will be released from prison and will kill again . . . . There is no place in our system of jurisprudence for this argument. . . . We thus reverse the sentence of death for first-degree murder and remand back to the trial court to hold a new sentencing trial before a jury.

Teffeteller v. State, 439 So. 2d 840, 845 (Fla. 1983)(footnote omitted)(emphasis added). Interestingly, Teffeteller, like Mr. Preston's case, involved a propensity argument. In Mr. Preston's case, however, the argument was based on **"misinformation"** of a constitutional magnitude. Johnson v. Mississippi. See also

Maasard v. State, 399 So. 2d 973, 977-78 (Fla. 1981)(reversing for resentencing before a jury, in a case involving no mitigating factors, because the State introduced evidence of prior non-violent convictions to the original jury although the defendant waived the statutory mitigating factor of no significant history of prior criminal activity). The reasoning of these cases certainly applies to Mr. Preston's case. As this Court noted in Elledse v. State, 346 So. 2d 998, 1003 (Fla. 1977)(emphasis added), "[W]ould the result of the weighing process by both the jury and the judge have been different had the impermissible aggravating factor not been present? We cannot know. Since we cannot know and since a man's life is at stake, we are compelled to return this case to the trial court for a new sentencing trial at which [evidence of an improper factor on which evidence was presented and which was argued to the sentencing jury] shall not be considered."

These are the principles that should have governed the circuit court's disposition of this claim. These standards, focussing on the jury's critical role, were ignored by the lower court in its order denying relief. The error involving the "misinformation" of "a constitutional magnitude," presented to Mr. Preston's jury at sentencing, Johnson, supra, actually mattered in this case, and mattered in a way that very likely was determinative of the sentence ultimately imposed. The misinformation, after all, was used by the State to argue propensity. Even with the misinformation the jury was within one vote of a life recommendation. This is by no means a minor or technical error. It went to the heart of the death sentencing

process: but for the misinformation, the jury's verdict could well have been for life imprisonment, and Judge Davis never held that he would have overridden a jury verdict of life (**See** n.1, supra). The error was by no means harmless beyond a reasonable doubt. The lower court, however, completely ignored the jury's role. It is against this backdrop that Mr. Preston's Johnson v. Mississippi claim should be considered.

PERTINENT PROCEDURAL HISTORY

On March 30, 1989, a third death warrant was signed against Mr. Preston. Before that warrant was signed, Mr. Preston had filed a Rule 3.850 motion challenging the constitutionality of a previous conviction presented to the jury by the prosecution and relied upon by this Court to establish aggravation and rebut mitigation. An evidentiary hearing was conducted before Judge Mize, and Judge Mize thereafter granted Rule 3.850 relief (App. 1).[3] The State took an appeal from Judge Mize's ruling (App. 5), oral argument was conducted (App. 6), the District Court of Appeals affirmed (App. 7), the State moved for rehearing (App. 8), rehearing was denied (App. 9), and the District Court of Appeals issued its mandate on March 8, 1990 (App. 10).

Mr. Preston filed a Petition for Writ of Habeas Corpus in this Court on April 19, 1989, presenting the claim predicated upon Johnson v. Mississippi. This Court granted a stay of execution on April 19, 1989, and remanded the claim to the

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[3] **"App."** refers to the Appendix to Mr. Preston's Rule 3.850 motion. Mr. Preston has also filed an appendix with this Court in support of the application for stay of execution filed yesterday, April 3, 1990.

Circuit Court by denying habeas corpus relief "without prejudice to raise the same argument by 3.850 motion in the trial court." Preston v. Dugger, 545 So. 2d 1368 (Fla. 1989) (App. 2).

As discussed in undersigned counsel's correspondence to the Circuit Court before the issuance of a death warrant (App. 11), the filing of the Rule 3.850 motion was delayed because of the State's appeal of Judge Mize's order granting Mr. Preston Rule 3.850 relief and vacating his conviction for throwing a "deadly missile" at an occupied car (App. 1). The vacation of that conviction is the basis for one of the principle claims raised in this 3.850 proceeding. The Fifth District Court of Appeals affirmed Judge Mize's ruling on January 17, 1990 (App. 7). On January 31, 1990, the State filed a motion for rehearing (App. 8). The Fifth District Court of Appeals denied the motion for rehearing on February 19, 1990 (App. 9). The mandate was issued on March 8, 1990 (App. 10).

Ironically, also on March 8, 1990, the Governor signed a death warrant. Mr. Preston's execution is scheduled for 7:00 a.m. on Saturday, April 7, 1990, pursuant to a temporary stay of execution entered by this Court.

On March 26, 1990, the Circuit Court heard arguments from counsel on the Rule 3.850 motion. The Circuit Court entered an order denying relief late in the afternoon of March 30, 1990. Mr. Preston filed timely notices of appeal. That appeal is now before this Court.

CLAIM I

ROBERT PRESTON'S JURY AND JUDGE WERE PROVIDED WITH AND RELIED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN SENTENCING HIM TO DEATH, IN VIOLATION OF JOHNSON V. MISSISSIPPI, 108 S. CT. 1981 (1988), AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The jury in Mr. Preston's case sentenced him to death by the narrowest margin, voting 7 to 5 for death. One vote would have resulted in a jury recommendation of life. Under no construction can it be said with certainty and beyond a reasonable doubt that a jury verdict of life in this case would have been subject to a valid override: the mitigation in the record would have provided a "reasonable basis" for a recommendation of life, whatever the trial judge's own view may have been. See Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). It is in this context that this Court must judge the effect of the error on the jury's deliberations at the penalty phase: the deliberations that were tainted by "misinformation of a constitutional magnitude" as the trial court acknowledged below (S. 50).[4]

[4] Although the lower court made a number of findings on the record at the March 26, 1990, hearing which made it clear that the error before the jury could by no means be found "harmless beyond a reasonable doubt," the lower court's ultimate order denying Rule 3.850 relief said virtually nothing about the error before the jury. But it is misinformation before the jury that Johnson and every precedent from this Court applying Johnson speak to. See Burr v. State, 550 So. 2d 444 (Fla. 1989); Duest v. Dugger, 15 F.L.W. 41 (Fla. Jan. 18, 1990); cf. Castro v. State, 547 So. 2d 111 (Fla. 1989). Moreover, the lower court's opinion represents the only case, anywhere, in which eighth amendment error under Johnson v. Mississippi is ruled harmless notwithstanding the fact that all of the evidence presented to the jury in support of a "prior conviction" aggravator has been established to be "materially inaccurate." Cf. Burr, supra. In

(footnote continued on following page)

As the court below found, there was error of constitutional magnitude in the sentencing of Mr. Preston. Both the judge and the jury were presented with "misinformation of a constitutional magnitude," as the lower court acknowledged: they were presented with a felony conviction involving violence which was later found to be unconstitutional (S. 50). See Johnson V. Mississippi, 108 S. Ct. 1981 (1988). The constitutionally invalid prior conviction was the sole basis for supporting the aggravating circumstance of "a prior violent felony conviction." As the Court below noted:

> I relied upon it. I wouldn't have cited it if I didn't rely upon it. That was an aggravating factor. The Court considered it . . . . If I didn't consider it, I shouldn't have put it in there.

(S. 43). The circuit court also found that the jury was presented with this same "misinformation" of constitutional magnitude:

> It [the jury] heard misinformation. There's no question about that.

(S. 50). The circuit court thus found constitutional error, but employed an unprecedented analysis to rule it harmless. Indeed, before the lower court and now before this Court, the State has yet to refer to a case in which all of the evidence supporting

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(footnote continued from previous page)

every case decided by this Court (or any other court addressing this issue) the error has only been found harmless beyond a reasonable doubt when there were other prior convictions to support that same aggravating factor. See Burr, supra; Daugherty v. State, 533 So. 2d 287 (Fla. 1988); Bundy V. State, 538 So. 2d 445 (Fla. 1989). The lower court's ruling is unique, both in terms of its harmless error analysis and in its overlooking the jury's critical role.

the "prior violent felony" aggravator presented to a sentencing jury is shown to be based on "misinformation" and in which the jury's verdict is nevertheless deemed reliable and the error harmless. There is no such case. The lower court never found reliability in the jury verdict. To the contrary, its findings at the March 26 hearing show that the verdict of the jury, based on "misinformation" is not reliable. And Mr. Preston's jury voted for death by the slimmest margin possible, 7-5.

Although the circuit court had no problem finding constitutional error, the court was troubled about what to do with the case as a result of that error (S. 52-54). In fact, the court revealed just how troubled it was by the case when counsel for Mr. Preston argued that this Court would not have allowed Mr. Preston to raise this issue in a Rule 3.850 motion before the trial court if it was procedurally barred. The circuit court responded: "I wish they [this Court] has said that [that the claim was procedurally barred]" (S. 57).

The circuit court was troubled because the State was arguing for a harmless error finding, but could not point to one case in which the sole basis for the aggravating factor of "a prior violent felony conviction" presented to a jury was later found to be unconstitutional and a resentencing before a new jury was not held. The State still cannot point to such a case. The court was also troubled because of the jury's 7 to 5 recommendation. The court recognized the crux of the problem, the jury, on the record,

> But if it is error, then what am I going to do at that point, resentence without the benefit of the jury? They are the ones that

made a recommendation. But if I find that it is error, then I'm saying the jury shouldn't have considered that issue.

(S. 57). As the court found, there was error and the jury did consider unreliable evidence. But then the court ignored the jury's role in its order.

Given the facts of this case, this Court cannot find that the error was harmless beyond a reasonable doubt. Despite the circuit court's finding to the contrary, the court acknowledged at the hearing that it could not make such a finding:

I don't know whether it's harmless or not.

(S. 56)(emphasis added). The lower court later discussed its view that this Court sent the issue back to him to "let him guess at it" (S. 58)(emphasis added). Unfortunately, that is what the circuit court did. The Court did not use the appropriate analysis involved in a Johnson claim, as is apparent from the court's order. Not once is the jury's role mentioned. As this Court has recognized in a similar context, the proper analysis is on what the jury would have done, not on the judge's view. State v. Hall, 541 So. 2d 1125, 1128 (Fla. 1989)("[I]t is of no significance that the trial judge stated that he would have imposed the death penalty in any event," because the proper focus is on the jury's role). This analysis is doubly important when the jury is asked to consider misinformation of a constitutional magnitude. See Johnson v. Mississippi, supra. Indeed, the posture of Mr. Preston's case at this juncture is no different than that of Hall.

In Johnson v. Mississippi, 108 S. Ct. 1981 (1988), a

unanimous United States Supreme Court struck down a sentence of death imposed by the Mississippi state courts because that sentence was predicated, in part, on a felony conviction which was found to be unconstitutional in subsequent proceedings.[5] The Supreme Court ruled as it did in Johnson, and as it recently reiterated in Clemons v. Mississippi, No. 88-6878 (March 28, 1990), slip op. at 14-15 n.5 (distinguishing Johnson because there "the jury was permitted to consider inadmissible evidence in determining the defendant's sentence," whereas in Clemons there was an improper instruction on an aggravating factor but the evidence was still properly before the jury), because a sentence of death resulting from a jury's consideration of misinformation of constitutional magnitude -- reliance on an invalid prior conviction to find an aggravating factor -- could

[5] Johnson is strikingly similar to Mr. Preston's case. There, the sentence of death was founded on three aggravating factors, one of which was subsequently shown to be invalid (the prior felony conviction; that the offense was committed to avoid arrest or effect an escape from custody: that the offense was heinous, atrocious and cruel, see Johnson, 108 S. Ct. at 1984 n.1) and there is no indication in the Supreme Court's opinion that any mitigation was presented or found in Johnson. Here, Mr. Preston's sentence is founded on three similar aggravating factors (the prior conviction; heinous, atrocious or cruel; that the offense occurred during the course of another felony) and, although the sentencing court did not find statutory and did not discuss nonstatutory mitigating factors in its order, substantial statutory and nonstatutory mitigating circumstances were before the sentencing jurors. (These factors are discussed below.) Mr. Preston's jury voted for death by the slimmest of possible margins, 7-5. Additionally here, unlike Johnson, the sentencing jury was urged to use the unconstitutional prior conviction as evidence of the defendant's "propensity" for violence and to rebut mitigation -- Mr. Preston's lack of significant history of prior criminal activity. As discussed herein and in the body of this petition, Johnson's rationale squarely fits Mr. Preston's case -- there can be no serious dispute about Mr. Preston's entitlement to relief under Johnson.

not be tolerated under the eighth amendment. As the Supreme Court stated:

> [T]he error here extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible. Here the jury was allowed to consider evidence that has been revealed to be materially inaccurate.

Johnson, 108 S. Ct. at 1989 (emphasis added).[6] In Mr. Preston's case it is also true that the error goes beyond the "mere invalidation" of an aggravating circumstance involving otherwise admissible evidence. Here, as in Johnson, "materially inaccurate" information was presented, argued to, and relied upon by the jury and judge when sentencing Robert Preston to death. See also Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(sentence of death constitutionally unreliable when misleading or inaccurate information is presented to jury; under such circumstances a petitioner presents a valid claim of a

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[6]The Court's footnote at the end of the above quote explained:

> In Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983), we held that on the facts of that case the invalidation of an aggravating circumstance did not, under Georgia's capital sentencing scheme, require vacation of the death sentence. In reaching this holding, we specifically relied on the fact that the evidence adduced in support of the invalid aggravating circumstance was nonetheless properly admissible at the sentencing hearing. Id., at 887, 103 S.Ct., at 2748.

Johnson, 108 S. Ct. at 1989 n.9 (emphasis added). Note 5 of Clemons reaffirmed this qualitatively different standard of harmlessness review. Mr. Preston provided a copy of Clemons to the trial court, along with a cover letter discussing that recent opinion. A copy of the letter is attached to the application for stay of execution filed by Mr. Preston yesterday in this Court.

fundamental miscarriage of justice and therefore no procedural bar can be applied).[7] Mr. Preston's entitlement to relief under Johnson cannot be seriously disputed.

Indeed, in Johnson, the Court had no hesitation in granting the relief sought notwithstanding the state Attorney General's argument and Mississippi Supreme Court's ruling that their state post-conviction procedures "would become capricious" if during collateral proceedings the state courts "were to vacate a death sentence predicated on a prior felony conviction when such a conviction is [subsequently] set aside." 108 S. Ct. at 1987. Relying on its own settled precedents in this area of the law (precedents also relied upon in the past by this Court, see infra), the United States Supreme Court flatly rejected that contention, writing:

> A rule that resularlv gives a defendant the benefit of such Dost-conviction relief is not even arsuablv arbitrary or capricious. Cf. United States v. Tucker, 404 U.S. 443, 92 S. Ct. 589, 30 L.Ed.2d 592 (1972); Townsend v. Burke, 334 U.S. 736, 68 S. Ct. 1252, 92 L.Ed. 1690 (1948). To the contrary, especially in the context of capital sentencing, it reduces the risk that such a sentence will be imposed arbitrarily.

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[7] As discussed below, the unconstitutional prior conviction in this case was used not only to establish the aggravating factor of a prior felony conviction, but also was used before the jury to rebut the statutory mitigating circumstance that Mr. Preston did not have a significant history of prior criminal activity, to argue against the weight of the nonstatutory mitigation presented at sentencing, and as "propensity" evidence.

Johnson, 108 S. Ct. at 1987 (emphasis added).[8]

The Court, following this reasoning, ruled that the use of a prior conviction which is subsequently shown to be unconstitutional as aggravation in a capital sentencing proceeding rendered the resulting sentence of death arbitrary and capricious, and therefore that it violated the bedrock eighth amendment principles referred to above.

Mr. Preston's entitlement to relief under Johnson is obvious. There, as here, the prior conviction was found to be

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[8] Supporting this conclusion, the Court explained in introducing its opinion:

> The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special "'need for reliability in the determination that death is the appropriate punishment'" in any capital case. See Gardner v. Florida, 430 U.S. 349, 363-364, 97 S.Ct. 1197, 1207-1208, 51 L.Ed.2d 393 (1977)(quoting Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976)) (WHITE, J., concurring in judgment). Although we have acknowledged that "there can be 'no perfect procedure for deciding in which cases governmental authority should be used to impose death,'" we have also made it clear that such decisions cannot be predicated on mere "caprice" or on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 884-885, 887, n.24, 103 S.Ct. 2733, 2747, 2748, n.24, 77 L.Ed.2d 235 (1983).

108 S. Ct. at 1986 (emphasis added).

unconstitutional in subsequent proceedings.[9] There, as here, "[i]t is apparent that the [prior] conviction provided no

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[9]The prior conviction in Johnson was vacated because of an improperly obtained confession and because the petitioner had not been informed of his right to appeal. Here, Mr. Preston's prior conviction was found to be unconstitutional and thus vacated pursuant to Fla. R. Crim. P. 3.850 because Mr. Preston received ineffective assistance of counsel during those proceedings: proceedings in which confidence in the outcome was undermined because of trial counsel's ineffectiveness. **See** infra (discussing order granting relief); see also App. 1 (order granting motion to vacate). Mr. Preston's entitlement to relief is as plain here as was the petitioner's entitlement to relief in Johnson. In fact, the unanimous Supreme Court's grant of relief in Johnson is consistent with this Court's and the United States Supreme Court's own prior precedents. Where, as here, criminal punishment is enhanced through the use of a prior conviction obtained in violation of the right to counsel, the Constitution is fundamentally violated. **See**, e.g., Baldasar v. Illinois, 446 U.S. 222 (1980); United States v. Tucker, 404 U.S. 443 (1972); Burset v. Texas, 389 U.S. 109 (1967). Such enhancement of punishment is "inherently **prejudicial,**" Bursett, supra, 389 U.S. at 115, as it results in a sentence based upon **"misinformation** of constitutional magnitude." Tucker, supra, 404 U.S. at 447.

This well established constitutional rule applies with even greater force in the capital sentencing context, where **"[t]he** fundamental respect for humanity underlying the eighth amendment's prohibition against cruel and unusual punishment gives rise to a special 'need for reliability in the determination that death is the appropriate **punishment.'"** Johnson v. Mississippi, 108 S. Ct. 1981, 1986 (1988), quoting Gardner v. Florida, 430 U.S. 349, 363-64 (1977) and Woodson v. North Carolina, 428 U.S. 280, 305 (1976). The capital sentencing decision thus cannot be predicated on "factors that are constitutionally impermissible or totally irrelevant to the sentencing process." Zant v. Stephens, 462 U.S. 862, 884-85 (1983). An unconstitutionally obtained prior conviction is precisely such a factor, and a death sentence premised on such a conviction violates the eighth amendment. **See** Johnson, supra.

Florida courts have long recognized and applied the rule of Tucker, and have consistently vacated sentences enhanced under **"recividist"** statutes where the predicate prior convictions were obtained in violation of the right to counsel, or are otherwise shown to be invalid, and/or have remanded to the trial court for evidentiary hearings on the question of whether the predicate priors were in fact obtained in violation of the right to counsel or other constitutional guarantees. **See**, e.g., Lee v. State, 217 So. 2d 861, 864 (Fla. 4th DCA 1969); Jackson v. State, 252 So. 2d 241, 242 (Fla. 4th DCA 1971); Howard v. State, 280 So. 2d 705

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legitimate support for the death sentence imposed on petitioner" because of its unconstitutionality. Johnson, 108 S. Ct. at 1986-87. There, as here,

> [i]t is equally apparent that the use of that conviction in the sentencing hearing was prejudicial. The prosecutor repeatedly ursed the jury to give it weight in connection with its assigned task of balancing aggravating and mitigating circumstances "one against the other." . . . Even without that express argument, there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be "decisive" in the "choice between a life sentence and a death sentence." Gardner v. Florida, 430 U.S., at 359, 97 S.Ct., at 1205 (plurality opinion).

Johnson, 108 S. Ct. at 1987 (emphasis added). Here, the prosecutor urged the jury to consider the prior conviction as

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(Fla. 4th DCA 1973); Wolfe v. State, 323 So. 2d 680 (Fla. 2d DCA 1975); Hicks v. State, 336 So. 2d 1244 (Fla. 4th DCA 1975); Glenn v. State, 338 So. 2d 263 (Fla. 2d DCA 1976); Haves v. State, 468 So. 2d 471 (Fla. 4th DCA 1985); Pilla v. State, 477 So. 2d 1088 (Fla. 4th DCA 1985); Chaffin v. State, 480 So. 2d 700 (Fla. 4th DCA 1985); Crigler v. State, 487 So. 2d 420 (Fla. 2d DCA 1986); Evrard v. State, 502 So. 2d 3 (Fla. 4th DCA 1986); Lowe v. State, 516 So. 2d 114 (Fla. 2d DCA 1987).

The cases cited above apply with full force to Mr. Preston's case -- Florida's death penalty statute is functionally a "recividist" statute, in the sense that it provides for the enhancement of punishment from life imprisonment to death on the basis of prior criminal convictions. See Fla. Stat. 921.141(5)(b)(establishing as an aggravating circumstance the fact that "the defendant was previously conviction of another capital felony or of a felony involving the use or threat of violence to another person.") Moreover, here, the prior conviction which was subsequently used to aggravate, or enhance, Mr. Preston's sentence was also used to rebut mitigating circumstances. Mr. Preston was thus in precisely the same posture as the defendants in those cases cited above -- his sentence was enhanced on the basis of a prior conviction which was obtained in violation of the right to counsel. Like those defendants, Mr. Preston is entitled to relief from his unconstitutionally imposed sentence.

aggravation, as rebutting mitigation, and as a critical factor upon which to sentence Mr. Preston to death. The sentencing court then relied on the prior conviction as an aggravating factor and used it to rebut mitigation. Johnson fits this case like a glove, for the record here reflects the same reliance on unconstitutional misinformation in support of a capital petitioner's death sentence.

The State made Mr. Preston's "deadly missile" conviction the feature of its sentencing case: in fact, evidence relating to that conviction was the only evidence presented by the State at the penalty phase (See R. 1930-31). In its penalty phase closing argument, the State argued not only that the prior conviction established an aggravating circumstance, but also that it demonstrated Mr. Preston's propensity for violence and his future dangerousness:

> The law says that if someone has committed an aggravating felony in the past, that's an indication that this person is going to do it again. The barrier that we all have about trying to injure people has been broken. He will repeat and do this again.
>
> Another jury in this County has heard the Defendant. Another jury in this County has passed judgment on the Defendant, and the Defendant stands convicted of throwing a deadly missile at an occupied vehicle, and he was adjudicated guilty, and he was sentenced to six years in the Department of Offender Rehabilitation, and his conviction has been affirmed, and the judgment is now final, and it is an aggravating circumstance.

(R. 1993). Moreover, the State later argued that this conviction rebutted a finding in mitigation that Mr. Preston had no significant prior criminal history.

Not only did the State make the "deadly missile" conviction the centerpiece of its penalty phase presentation, but the sentencing court then informed the jurors that they must find an aggravating circumstance based on this conviction, instructing them that one of the available aggravating circumstances was that "the Defendant has been previously convicted of . . . another felony involving the use of violence to another person," and that "the crime of throwing a deadly missile into an occupied vehicle is a felony involving the use of violence to another person" (R. 2026)(emphasis added). Given such instructions, the jury had little choice but to find and consider this aggravating circumstance. As the lower court found on the record, this 7-5 jury was provided with "misinformation" of constitutional magnitude.

The prior conviction was central to Mr. Preston's sentence of death. As we now know, that conviction was unconstitutionally obtained, and Mr. Preston's sentence of death -- a death sentence which, as in Johnson, was based in part on that conviction -- is constitutionally invalid: as in Johnson, "[h]ere the jury was allowed to consider evidence that has been revealed to be materially inaccurate." Johnson, 108 S. Ct. at 1989 (emphasis added).

Mr. Preston's prior conviction was vacated by the Honorable C. Vernon Mize, Jr., Circuit Court Judge, Eighteenth Judicial Circuit, Seminole County, after an evidentiary hearing. In its Order Granting Defendant's Motion for Post-Conviction Relief the circuit court specifically found that Mr. Preston was denied effective assistance of counsel during the proceedings resulting

in his prior conviction, that Mr. Preston's conviction was therefore unconstitutional, and that Mr. Preston's Motion to Vacate (**see** Fla. R. Crim. P. 3.850) should therefore be granted. The Circuit Court made a number of specific findings of fact in support of its order granting relief, findings which were based on more than **"competent** substantial evidence" in the record. **See** State v. Michael, 530 So. 2d 929, 930 (Fla. 1988)(circuit court's grant of Rule 3.850 relief will not be disturbed when the circuit court's findings and conclusion are based on "competent substantial evidence."). See also State v. Preston (5th DCA Orders affirming Judge Mize's grant of relief and denying the State's motion for rehearing) (Apps. 7 and 9). As Judge Mize explained in his order granting relief:

> [T]he Defendant challenges the pretrial preparation of his attorney. Briefly, the facts of this incident [are] as follows. Mark Accamondo alleged that the Defendant threw a bottle at his car and broke the windshield after the two exchanged words and Preston had thrown a beer at Accamondo. Preston testified that Mark Accamondo tried to run him down with his car after the two exchanged words and Preston threw beer at Accamondo. Preston testified that he threw the beer bottle in self defense. Frank Richards was interviewed by the investigator for the Public Defender's Office. Mr. Richards told the investigator he heard squealing tires, saw Preston run away from Accamondo's car, and throw the bottle underhanded at the car.
>
> Preston's attorney, Gauldin, never interviewed Mr. Richards or deposed him. Attorney Gauldin testified at the Post Conviction Relief hearing that he requested his secretary to subpoena Mr. Richards. It is not known when this request was made. It is an attorney's responsibility to know if he is ready to go to trial when he announces he is ready. A praecipe for a subpoena to have

> Mr. Richards testify was not filed until the day of the trial. Apparently, Richards was out of town the day of the trial. Attorney Gauldin did not ask for a continuance on the record until Richards could be available. Florida courts have ruled that failure to interview witnesses or to have them subpoenaed is ineffective assistance of counsel. Warren v. State, 504 So.2d **1371** (Fla. 1st DCA **1987)**; Martin v. State, **363** So.2d 403 (Fla. 4th DCA **1978).**
>
> Frank Richards was the one witness to this event that was not a participant. This court finds that the attorney's failure to interview this witness, subpoena him, and ask for a continuance when the witness was unavailable the day of the trial, was prejudicial to the Defendant. This court believes that but for the errors of the attorney there is a reasonable probability the outcome of this trial would have been different.

(App. 2, pp. 3-4; see also Apps. **7** and **9** (District Court of Appeals' Orders affirming the grant of relief)).

There is fundamental eighth amendment error in Mr. Preston's sentence of death, as Judge Mize's order demonstrates. In Johnson v. Mississippi, supra, the Supreme Court held that the error **was** prejudicial because the jury was allowed to consider an aggravating factor which was founded on **"materially** inaccurate" information. Misinformation of constitutional magnitude was presented to and relied on by the sentencing jury and judge in Mr. Preston's case as well, as the lower court acknowledged (S. *50).*

This Court has previously held that when a felony involving the use of violence is used as the basis for an aggravating factor and is subsequently reversed and vacated, "the vacated conviction cannot be used as an aggravating factor," and resentencing is therefore required. Oats v. State, 446 So. 2d

90, 95 (Fla. 1985). As in Oats, the aggravating factor of "a prior violent felony" is invalid in Mr. Preston's case, and Mr. Preston's sentence of death must be vacated.

Mr. Preston's sentence of death is thus constitutionally invalid. The need for a resentencing before a new jury is also demonstrated by this Court's decision in Castro v. State, 547 So. 2d 111 (Fla. 1989). There, this Court found Williams Rule error in the guilt phase of a capital trial. Evidence was improperly admitted that Castro "had tied [a witness] up and threatened to stab him several days prior to killing [the victim]." 547 So. 2d at 114. This Court concluded the error was harmless as to the guilt phase, but not as to the penalty phase. This Court held the introduction of improper evidence before a sentencing jury concerning the defendant's criminal history, which is precisely what occurred in Mr. Preston's case, is presumed to be reversible error:

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

Castro, 547 So. 2d at 116 (emphasis added).

In Burr v. State, 550 So. 2d 444 (Fla. 1989), this Court was presented with a claim pursuant to Johnson v. Mississippi in an appeal from the denial of a motion for Rule 3.850 relief. There, evidence of three (3) collateral crimes had been introduced against Burr. Subsequent to his conviction and sentence of

death, the defendant was acquitted of one of the collateral crimes, and the State nolle prossed another. This Court reversed the death sentence pursuant to Johnson v. Mississippi:

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

Burr, 550 So. 2d at 446.

It is clear under Burr and Castro that where improper collateral crimes evidence is admitted, reversal of a death sentence based thereon is required. It is for the jury, in the first instance, to weigh aggravation versus mitigation. Here the jury's deliberations at the penalty phase were tainted by the same "misinformation" as that upon which relief was granted in Johnson. Unlike Johnson, Castro and Burr, Mr. Preston's jury was instructed that they must find the aggravating circumstance of "a prior violent felony conviction" based upon Preston's "deadly missile" conviction. And Mr. Preston's jury voted 7-5 for death -- one vote would have changed the result before this jury, in a case in which significant mitigation was heard.[10] In such

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[10]The State disputed the weight to be given this mitigation before the circuit court and now before this Court, but the fact remains that it is all contained in the original sentencing record. This is not the place where the parties are to argue "weight". The simple truth of the matter is that the mitigation

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circumstances, as this Court ruled in both Castro and Burr, the error cannot be found to be harmless beyond a reasonable doubt.

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was presented to the jury, as was the unconstitutional "prior conviction" aggravator, and the jury voted **7-5** for death. There is no way that it can be said beyond a reasonable doubt that this same mitigation, without the unconstitutional aggravator based on **"misinformation",** would not have altered one vote **--** particularly where, as here, the State used it to argue **"propensity"** for violence. This **7-5** jury death vote is **not** reliable **--** confidence in the outcome of these proceedings has been undermined.

Significant mitigation was before the jury in this case. The jury heard lengthy testimony from numerous witnesses regarding Mr. Preston's long-term, habitual use of dangerous narcotics, particularly PCP, as well as testimony regarding his ingestion of drugs and the effects of these substances on him on the night of the offense.

Donna Maxwell testified that she had smoked a significant amount of marijuana (four joints) with Mr. Preston on the night of the offense (R. 771), that she heard Mr. Preston ask his brother to assist him in injecting PCP (R. 805), and that Mr. Preston appeared to be under the influence of PCP when he returned to the house early that morning (R. **805).** Ms. Maxwell also testified that she was aware of Mr. Preston's habitual use of that drug, and that she had seen him ingest it on numerous occasions (R. **807, 812).**

Scott Preston similarly testified that he smoked marijuana with Robert Preston on the night of the offense (R. 1391), that Robert had that night asked him to "hold him off," i.e., assist him in injecting PCP (R. **1399),** and that Robert looked and acted as if he was under the influence of PCP when he returned to the house early that morning (R. **1417, 1435).** Scott Preston also testified that Robert had used heavy drugs even as a boy, since **1971** (for ten years prior to the time of trial), and that he had frequently seen drugs and drug paraphernalia in Robert's bedroom (R. **1412).**

Mr. Preston himself also testified with regard to his addiction and use of dangerous drugs dating from the age of eleven or twelve and escalating until the time of his arrest to the point where he was injecting PCP as often as four times a day (R. **1452-64, 1525).** His usage of PCP became so constant that he experienced frequent blackouts, and at the time of his testimony his memory of the entire two years proceeding his arrest was still vague and incomplete as a result of the large quantities of PCP he had been ingesting on a daily basis (R. **1464-66).** Mr. Preston also testified that on the night of the offense, he had smoked a quantity of marijuana, drank a bottle of wine, and injected PCP (R. **1470-73).**

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Indeed, this case is one involving significant mitigation (See n.10, supra). The mitigation in the record could have been

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Dr. Rufous Vaughn, M.D., a board certified forensic psychiatrist with extensive experience in drug abuse and related disorders, testified with regard to the general effects of PCP on the user, both immediate and long-term, and with regard to its specific effects on Mr. Preston. Dr. Vaughn testified that in his opinion, at the time of the offense Mr. Preston was suffering from acute Organic Brain Syndrome, caused by his abuse of PCP, and as a result did not know what he was doing, could not differentiate between right and wrong, was unable to comprehend the consequences of his actions, and was incapable of forming specific intent (R. **1580-86).** Similarly, Dr. Gerald Mussenden, a clinical psychologist, testified with regard to the effects of PCP on Mr. Preston and his resulting diminished mental capacity (R. **1959, 1972).**

The compelling mental health-related mitigating evidence discussed above was far from the only mitigation available to the sentencing jury. There was also testimony regarding Mr. Preston's unstable home environment, his father's early abandonment of the family and the subsequent lack of any male role model during Mr. Preston's formative years, and his mother's frequent and extended absences from the home **(See** R. **1363, 1386, 1390, 1417, 1947).** Moreover, several individuals testified with regard to Mr. Preston's potential for rehabilitation (R. **1956, 1981).** **See** Skipper V. South Carolina, **106** S. Ct. **1669 (1986).**

Mr. Preston's trial attorney argued all of the mitigating evidence discussed above to the sentencing jury; the jury also heard argument that Mr. Preston's age **(19)** constituted a mitigating circumstance, as did his lack of a significant prior criminal history. The circuit court found that Mr. Preston was **19** years old at the time of the offense. Mr. Preston's jury voted for death by the narrowest of possible margins **--** 7-5.

Additionally, the court had before it the presentence investigation report on Mr. Preston. The PSI indicated that Mr. Preston received his GED while incarcerated in the Seminole County Jail while awaiting trial. Cf. Skipper, supra. The report also emphasized that Mr. Preston was "never a real problem while growing **up,"** that his mother as a single parent **"was** constantly working", and that **"she** could not control her children's coming and goings and they were more or less left on their own when they began their teenage **years."** In light of this information, the PSI concluded as follows:

> Mr. Preston is an individual who comes from a broken home who has a great deal of potential. However, his life has been

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relied upon by the jury, without the misinformation, to render a verdict of life; Judae Davis has never said that he would have overridden such a verdict; but the jury's consideration of the mitigation in the record was skewed by the invalid prior conviction, one used by the State to argue propensity -- a matter which was at the core of the State's presentation at sentencing. Even with the misinformation vehemently urged before them, Mr. Preston's jury voted for death by the narrowest of possible margins, seven to five (7-5). This 7 to 5 vote for death came after the jury conducted serious deliberations concerning the appropriate sentence. During these deliberations the jury sent two questions to the judge. First the jury asked: "Is it possible for a judge or parole board to give Mr. Preston credit for any years he has served in jail towards his 25 years for murder?" (R. 2032). Second, the jury asked: "There are five counts of which three are capital. Will they be served consecutively, 75 years, or concurrent, not more than 25 years?" (R. 2032). The Court answered the two questions in writing (R. 2032-35). The jury's questions show that the jury was seriously considering the recommendation of a life sentence and was

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> influenced by drugs and poor choice of associates.

The jury could have very well come to the same conclusion: that Mr. Preston had a great deal of potential but needed the guidance he never received, and thus became a drug addict. The addiction affected his behavior. The effect of the unreliable aggravating factor which the jury was directed to find could not be harmless beyond a reasonable doubt, under any recognized harmlessness standard attendant to such issues.

struggling during the deliberations. Under these circumstances, there can be little doubt that here, as in Johnson, the use of materially inaccurate information was prejudicial. 108 S. Ct. at 1986-87. There is simply no way that the Respondent can show, beyond a reasonable doubt, that the misinformation had no effect on Mr. Preston's jurors. As this Court explained in Hall v. State, 541 So. 2d 1125 (Fla. 1989), the determinative factor in the harmless error inquiry is the effect the error had on the jury: in this regard, the Hall Court explained that "[t]he proper standard is whether a jury recommending life imprisonment would have a reasonable basis for that recommendation." Id. Given the substantial mitigation before the jury, the difficulty with which and the narrow majority by which the jury recommended death, and the fact that this improper aggravating factor was also employed by the State to rebut statutory mitigation before the jury, it cannot be confidently concluded that the jury would not have recommended life absent this impermissible conviction or that such a recommendation would not be reasonably based. As noted in the PSI:

> Mr. Preston is an individual who comes from a broke home [and] who has a great deal of potential. However, his life has been influenced by drugs and poor choice of associates.

The jury knew this, and almost rendered a life verdict. The unconstitutional prior conviction could not but have affected this jury's ultimate 7-5 verdict. See Burr, supra.

The circuit court in its order denying relief cited Duest v. Dusser, 15 F.L.W. 41 (Fla. Jan. 18, 1990), a case provided to the court by Mr. Preston, as support for its finding of harmless

error in a case in which the jury heard misinformation of a constitutional magnitude. But Duest supports Mr. Preston's entitlement to relief: another more serious violent felony conviction remained undisturbed in that case, and thus the error was harmless. As this court noted: "[T]here is still a basis for the aggravating circumstance of prior conviction of a violent felony." Id. at 43, citing Bundy v. State, 538 So. 2d 445 (Fla. 1989), and Daushterty v. State, 533 So. 2d 287 (Fla. 1988). Mr. Preston's case is like Burr, and unlike Duest. As this Court explained in Duest, the key is the effect of the harm before the jury, and the errror before a jury which hears nothing but "misinformation" concerning a prior conviction aggravating factor, which also hears mitigation, and which then votes 7-5 for death, cannot be deemed harmless beyond a reasonable doubt.[11]

Just as this Court has remanded for resentencing where the sentencer was prohibited from hearing and considering valid mitigating evidence, it has likewise not hesitated to remand where the sentencer considered improper aggravating evidence, even in cases where no mitigation is present. See, e.g., Maggard v. State, supra (discussed in the Introduction to this brief);

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[11] Neither do the State's arguments below that the error is harmless because Mr. Preston's counsel asked him about the "deadly missile" case while he was testifying hold up. Counsel knew that the State was going to use the prior conviction. Counsel did what reasonable attorneys do -- he brought it up on direct examination to give his client a chance to explain it in order to minimize the harm. But the fact remains that the State was going to use and did use it -- as impeachment at trial; as aggravation and "propensity" evidence at sentencing. Additionally, as this Court held in Castro and Burr, even though the error may be harmless as to guilt-innocence, such a finding is not appropriate in the penalty phase.

Schafer v. State, 537 So. 2d 988 (Fla. 1989)(remanded for resentencing where one aggravating circumstance improper and no mitigating circumstances identified); Nibert v. State, 508 So. 2d 1 (Fla. 1987)(same); cf. Rembert v. State, 445 So. 2d 387 (Fla. 1984)(directing imposition of life sentence where one aggravating circumstance improper and no mitigating circumstance found). Under this Court's and the United States Supreme Court's standards, see Johnson v. Mississippi, supra; Clemons, supra, Mr. Preston's sentence of death stands in violation of the eighth amendment.[12]

As Mr. Preston noted below, a word about Clemons v. Mississippi should also be noted. The Clemons opinion has two components. First there is a discussion of the Mississippi Supreme Court's "weighing" of aggravating and mitigating circumstances. See Clemons, slip op. at 1-10. It is clear that that discussion is irrelevant to Mr. Preston's case as a Rule 3.850 trial court does not have authority under Florida law to weigh aggravating and mitigating circumstances and decide whether a death sentence is proper, i.e., to resentence the defendant in a Rule 3.850 proceeding. This Court has applied this analysis and reversed for proper resentencing proceedings under Fla. Stat. sec 921.141 even in cases in which the Rule 3.850 trial judge finds that he would have imposed a death sentence in any event,

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[12]As noted, the jury was urged to and the sentencing court did rely on the unconstitutional prior conviction to find aggravation, to argue propensity, and to rebut the mitigating factor of no significant history of prior criminal activity. Without the conviction, however, Mr. Preston's prior "record" consisted of only a misdemeanor case of resisting arrest without violence.

irrespective of the error. The Florida Supreme Court, unlike the Mississippi Supreme Court, reverses for resentencing before a jury in such cases precisely because of the importance of the jury's recommendation in the Florida capital sentencing scheme. See Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989)("it is of no significance that the trial judge stated that he would have imposed the death penalty in any event."); see also Riley V. Wainwrisht, 517 So. 2d 656, 659 (Fla. 1987)("If the jury's recommendation, upon which the judge must rely, results from an unconstitutional procedure, then the entire sentencing process necessarily is tainted by that procedure."). Indeed, as this Court itself has made clear, under Florida's capital sentencing scheme, resentencing before a jury is not required where the evidence presented to the jury was not improper, but resentencing before a jury is required where the jury is allowed originally to consider invalid evidence. See Menendez v. State, 419 So. 2d 312, 314 (Fla. 1982); Mikenas V. State, 407 So. 2d 892, 893 (Fla. 1981); Riley V. Wainwright, supra.

Neither does this Court "reweigh" aggravating and mitigating factors and impose sentence under Florida law, because Florida law, unlike Mississippi law, ascribes that role strictly to the jury and judge in a sentencing proceedings under Fla. Stat. sec. 921.141. The capital sentencing statute itself, section 921.141, establishes this, as does the Florida Supreme Court's own longstanding decisional authority. See Brown V. Wainwriaht, 392 So. 2d 1327, 1331 (Fla. 1981). In Brown, this Court indicated that review of death sentences involves "two discrete functions." "First, we must conclude that the judge and jury acted with

procedural regularity. . . . Second, we compare the case under review with all past capital cases to determine whether or not the punishment is too great." This Court emphasized that "neither of our sentence review functions, it will be noted, involves weighing or reevaluating the evidence adduced to establish aggravating and mitigating circumstances." Here, **"misinformation"** was heard by a jury which voted 7-5 for death. Its verdict is therefore **not** reliable. Sentencing in Florida can only take place in accord with Fla. Stat. sec. 921.141. Since the original jury verdict is not reliable, a proper sentencing is required because of the error concerning the invalid evidence which the jury was urged to consider. **See** Menendez, supra; Mikenas, supra; Riley, supra. See also Magill v. Dugger; Mann v. Dugger, 844 F.2d at 1452 n.7 (citing and relying upon Menendez and Mikenas). This is the standard of harmless error review under Florida law, a standard which the State and the lower court have completely overlooked. As the Eleventh Circuit explained in rejecting contentions presented by the Florida Attorney General which are similar to those presented here:

> [I]t is argued that any errors committed during the sentencing phase were rendered harmless when the trial court (upon remand from the Florida Supreme Court) resentenced Magill to death after a new hearing in 1981. Although the court in the 1981 hearing considered the nonstatutory evidence and, in fact, found one nonstatutory mitigating circumstance, the resentencing did not render harmless the Lockett error of the original sentencing proceeding.
>
> * * *
>
> More importantly, to hold that resentencing by the court cleanses the taint of the

> original proceeding would ignore the importance of the advisory jury to the Florida sentencing scheme. The essence of Magill's Lockett claim is that but for the limitation on nonstatutory mitigating circumstances the jury probably would hhave advised the court to sentence Magill to life imprisonment. . . .
>
> * * *
>
> We cannot hold that the subsequent resentencina by the court purged the taint of the orisinal proceedinas without infusing an unacceptable level of arbitrariness into the administration of the death penalty in Florida. The error can be cured only by a sentencins proceedins before a new advisory iurv.
>
> This result is not inconsistent with Spaziano v. Florida, 468 U.S. 447, 104 S. Ct. 3154, 82 L.Ed.2d 340 (1984), where the Court held that Florida's death penalty statute was constitutional even though the trial judge was permitted, in some instances, to override the jury's rocommended sentence. Although Spaziano indicates that a state may allocate the sentencing power as it wishes between the judge and jury, it does not stand for the proposition that the state may arbitrarily alter this allocation as it applies to particular defendants. Under Florida law, a capital defendant is entitled to have a sentencinq proceedins before a jury. A capital defendant is no less entitled to thhat advisory jury sentence merely because his original sentencins proceedins was infected by constitutional error.

Magill V. Dugger, 824 F.2d 879, 894 (11th Cir. 1987)(emphasis supplied)(footnote omitted). See also Mann v. Dugger, 844 F.2d at 1453 ("[I]f the jury's recommendation is tainted, then the trial court's sentencing decision, which took into account that recommendation, is also tainted.").

The second part of the Clemons opinion, although still dealing with the Mississippi Supreme Court's review and Mississippi capital sentencing law, does contain a discussion

that may be relevant to Mr. Preston's claim that a resentencing is required because of the original sentencers' (jury and judge) reliance on an invalidated prior conviction which was the sole support for an aggravating factor, an aggravating factor that was significant to the State's arguments for a death sentence in this case. At sentencing, the State argued:

> The law says that is someone has committed an aggravating felony in the past, that's an indication that this person is going to do it again. The barrier that we all have about trying to injure people has been broken. He will repeat and do this again.
>
> Another jury in this County has heard the Defendant. Another jury in this County has passed judgment on the Defendant, and the Defendant stands convicted of throwing a deadly missile at an occupied vehicle, and he was adjudicated guilty, and he was sentenced to six years in the Department of Offender Rehabilitation, and his conviction has been affirmed, and the judgment is now final, and it is an aggravating circumstance.

(R. 1993) (emphasis added).

The State used the "deadly **missile"** conviction to support aggravation, argue propensity, and to rebut mitigation. This resulted in the presentation before the jury of misinformation of a constitutional magnitude concerning an aggravating circumstance. See Johnson v. Mississippi, **486** U.S. **578, 108 S.** Ct. **1981 (1988);** Burr v. State, 550 So. 2d **444** (Fla. **1989).**

In contrast, the error at issue in Clemons -- an improperly phrased instruction to the jury on an otherwise properly admissible aggravating factor -- does not involve misinformation of constitutional magnitude, as the Clemons opinion itself reflects. In circumstances such as those involved in Mr.

Preston's case and Johnson v. Mississippi (where misinformation as opposed to an inadequate instruction involving admissible information is given to the jury), the Clemons opinion makes clear that a different standard of review is warranted. Indeed, at footnote 5 of the Clemons opinion (slip op. at 14 n.5), the Court noted that the defendant in Johnson v. Mississippi had had his death sentence vacated and the case remanded for resentencing before the jury precisely because an inadmissible aggravating factor, one resting on the vacated prior conviction and thus resting on "misinformation of constitutional magnitude," had been considered. This was contrasted to the situation in Clemons, where the jury received an inadequate instruction on an otherwise admissible aggravating factor. As the court explained:

> We find unpersuasive Clemons's argument that the Mississippi Supreme Court's decision to remand to a sentencing jury in Johnson v. State, 511 So. 2d 1333 (1987), rev'd, 486 U.S. 578 (1988), on remand, 547 So. 2d 59 (1989), a case in which the court reversed the death sentence because it depended in part on a jury finding that the "especially heinous" aggravating factor was present, indicates that the Mississippi Supreme Court acted arbitrarily in refusing to do the same in this case. Johnson is distinguishable because in that case the jury had found both that the defendant had been convicted of a prior violent felony and that the murder was especially heinous, atrocious or cruel. In fact, the prior conviction the jury relied upon had been vacated and thus the jury was permitted to consider inadmissible evidence in determining the defendant's sentence. This Court noted in vacating the sentence that the Mississippi Supreme Court's refusal to rely on harmless-error analysis in upholding the sentence was "plainly justified" because the error "extended beyond the mere invalidation of an aggravating circumstance supported by evidence that was otherwise admissible" and in fact permitted the jury "to consider

> evidence that [was] revealed to be materially inaccurate." 486 U.S., at 590.

Clemons, supra, slip op. at 14-15 n.5 (emphasis added).

As Clemons demonstrates, there is a difference between an inadequate instruction on a properly admissible aggravating factor, and allowing the jury and judge to consider an aggravating factor that is based on information that is "revealed to be materially inaccurate**and that therefore should not have been considered at all. The harmless error analysis applicable to the latter circumstances has already been established by this Court: The jury's consideration of an aggravating circumstance based on a prior conviction that is no longer valid can only be deemed harmless beyond a reasonable doubt if there exists other convictions that would support that same aggravating factor. See Burr v. State, 550 So. 2d 444, 446 (Fla. 1989)(The evidence of a collateral crime later held to be inadmissible provided much of the basis for two of the three aggravating circumstances); Duest v. State, 15 F.L.W. 41, 42 (FLa. Jan. 18, 1990)(Distinguishing Johnson because "in the instant case evidence was introduced that Duest had been convicted of armed robbery. This conviction remains undisturbed. Therefore, there is still a basis for the aggravating circumstance of prior conviction of a violent felony"); Castro v. State, 547 So. 2d 111, 116 (Fla. 1989)("[W]e cannot say beyond any reasonable doubt that had the jury not heard McKnight's irrelevant, prejudicial testimony, it might not have determined that a life sentence was appropriate under the circumstances."); see also Daughertv v. State, 533 So. 2d 287 (Fla. 1987) (because the aggravating factor was supported by

other previous convictions, even excluding the invalid one, the error could be deemed harmless beyond a reasonable doubt). The State has yet to cite a case in which **all** of the evidence supporting an aggravating factor based on a defendant's prior conviction has been shown to be materially inaccurate -- and therefore where the aggravating factor should never have gone to the jury in the first instance, and where as a result the death verdict from the jury is rendered "arbitrary and capricious," Johnson, supra -- but where the error is still ruled harmless beyond a reasonable doubt. No such case exists, as all the case law shows, see Burr; Castro; Duest; Dausherty, precisely because such errors cannot be deemed harmless beyond a reasonable doubt under Florida's capital sentencing statute and standards. Jury resentencing is plainly required in Mr. Preston's case. Indeed, as the circuit court noted at the hearing, the jury relied on this aggravating factor and the circuit court did as well. Proper sentencing under section **921.141** is the only proper remedy in this case.

One other matter arising from the Clemons opinion needs to be noted. In Clemons, the court wrote:

> [B]ecause the Mississippi Supreme Court's opinion is virtually silent with respect to the particulars of the allegedly mitigating evidence presented by Clemons to the jury, we cannot be sure that the court fully heeded our cases emphasizing the importance of the sentencer's consideration of a defendant's mitigating evidence. We must, therefore, vacate the judgment below. . .

Clemons, supra, **slip** op. at **12.** The same **holds** true in Mr. Preston's case, as the circuit court's original sentencing order and this Court's pre-Hitchcock v. Dugger direct appeal opinion

were also silent with respect to the particulars of the nonstatutory mitigating evidence presented to the jury on Mr. Preston's behalf. Rule 3.850 is not the proper place to reweigh and resentence. See Hall v. State, supra. That has to be done in a proper sentencing proceeding under Fla. Stat. sec. 921.141. As in Hall, and as in Johnson, the **"judgment"** (in this case Mr. Preston's sentence of death) must be **"vacated,"** and proper sentencing proceedings should be had without the invalid aggravating factor based on the "deadly missile" conviction upon which the State originally relied.

The jury's 7-5 death verdict has been shown to be unreliable. Resentencing is appropriate. We therefore urge that this Honorable Court stay this execution, vacate Mr. Preston's sentence of death, and direct a proper resentencing before a new jury.

CLAIM II

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

Mr. Preston has presented newly discovered evidence that demonstrates that he was wrongfully convicted and sentenced to death, that he is in fact innocent, and that he can prove his innocence. Despite this compelling evidence, the circuit court dismissed the claim as being procedurally barred. The court in its order denying relief based the procedural default finding on the fact that Mr. Preston never called the issue up for hearing and never filed a motion for rehearing in the prior Rule 3.850

proceedings. Nothing could be further from the truth, and it is respectfully submitted that this Court and the circuit court fundamentally erred in the previous disposition of this claim.

As the record demonstrates, on November **24, 1986,** Mr. Preston filed, along with his memorandum on the issues and evidence presented at the Rule **3.850** evidentiary hearing, a pleading captioned "Defendant's Supplemental Support for Motion to Vacate Judgment and Sentence Pursuant to Fla. R. Crim. P. **3.850"** (H. **1263-88).** Through this pleading, Mr. Preston presented evidence to the court, in the form of sworn affidavits from several witnesses, which showed that Robert Preston was innocent, that his brother, Scott Preston, had confessed (and in fact bragged) to several people prior to trial that he was responsible for the murder at issue, that he (Scott) was in fact involved with Marcus Morales, and that a representative of the State Attorney's office had this information a year before Mr. Preston's trial (See H. **1263-88).** Mr. Preston's pleading explained that ongoing investigative efforts had uncovered the evidence presented therein, and that the evidence was submitted to the court as soon as it was discovered. Counsel ursed that the court conduct further fact-findins proceedings concerning this evidence and the issues it implicated. The State never responded to these issues and evidence, and the court never ruled on the requests made. The motion itself urged that the Court schedule an "expeditious hearing."

On December **10, 1386,** Mr. Preston filed another pleading renewing his request that the court re-open the hearing to allow further fact-finding proceedings regarding the evidence discussed

above ("Defendant's Consolidated Addendum to Motion to Vacate Judgment and Sentence, and Renewed Request for Further Fact-Finding Proceedings," H. 1292-97). This pleading was never acknowledged or responded to by the State, and the court again did not rule. Again, Mr. Preston urged that a hearing be allowed.

Finally, on February 13, 1987, the Circuit Court entered an order denying the Rule 3.850 motion (H. 1307-1313). The order did not address Mr. Preston's supplemental pleadings, and made no reference to the evidence presented thereby or the requests for further proceedings made therein. Mr. Preston filed a Motion for Rehearing of the court's order on February 26, 1987, again urging the court to consider the evidence discovered after the hearing and presented in the supplemental pleadings, and renewing the request for further fact-finding proceedings regarding that evidence (H. 1314-43). The court denied rehearing, in a single-sentence form order, on June 18, 1987 (H. 1344).

What is readily apparent from the circuit court's current order is that the circuit court in 1986 never read the pleadings and therefore never made any rulings concerning the newly discovered evidence nor Mr. Preston's repeated request for an evidentiary hearing on this evidence. The circuit court's reliance now on a procedural bar is not warranted. Just as the court should have heard the evidence in 1986, this Court should remand the case so that the circuit court can properly hear the evidence now. See Richardson v. State, 546 So. 2d 1037 (Fla. 1989). The lower court's misperception was based on the fact

that it simply did not read the supplemental pleadings previously, and thus did not know that Mr. Preston was asking for a hearing on these issues, over and over again.

The State's theory at trial was entirely circumstantial. There was no direct evidence connecting Mr. Preston to the offense: no incriminating statements; no identification evidence; no scene witnesses; no accomplice testimony.

At the time of trial, keys bearing the name "Marcus Morales" were found in the ash tray of the victim's car on the morning that the murder occurred. Although defense counsel made appropriate Brady requests, the name Marcus Morales was not contained in the State's witness lists and no reference to the keys bearing that name was made in any of the discovery materials provided by the State (See, e.g., R. 2210-11, 2230, 2279).

Trial counsel learned of the existence of these keys in the middle of trial, quite by accident, and far too late to effectively use the information. The matter first arose during the State's case-in-chief, while Fred Roberts, a police officer who assisted in processing the victim's car, was testifying as to his inventory of items removed from the car. One of these items was "a key ring identified by a tag as belonging to Marcus Morales with two keys" that had been found in the car's ashtray (R. 684). Taken by surprise, defense counsel interrupted the direct examination and interjected, "Identified as what?" (Id.)

Trial counsel attempted to adjust to this abruptly "discovered" evidence in his subsequent cross-examination. Officer Roberts testified on cross-examination that he had made no effort to find out who Morales was and what his keys were

doing in the car (R. **691**). Another investigator, Lieutenant Martin Labrusciano, testified that he did not check his files for a Marcus Morales (R. **1212**). As subsequent witnesses testified, defense counsel asked each if they knew of Morales. All said **"no"** (See R. **719, 945, 1085, 1112, 1119, 1372, 1380**).

The defense raised the Morales matter, in a motion for a new trial, as a discovery violation. The court asked whether anyone knew who Morales was, and the prosecutor, at the time, answered **"no"** (R. **2987**). Defense counsel and the court both agreed that had the defense known about the keys prior to trial, the defense would have found out who Morales was, and would have investigated this issue (R. **2996**). However, the court denied Mr. Preston's motion for a new trial, holding he had failed to demonstrate the materiality of the keys **(R. 2998)**.

Trial counsel could not demonstrate the materiality of the Marcus Morales evidence because the State withheld it. By the time a State's witness fortuitously blurted out the information, trial was already underway. Defense counsel from that point on made every effort to determine the identity of Marcus Morales and the nature of his involvement in the offense, but it was simply too late.

It is against this background that the newly discovered evidence discussed below should be considered.

Evidence uncovered since the trial demonstrates the materiality of the withheld "Marcus Morales" evidence and the magnitude of the constitutional violation engendered by the State's suppression of such evidence and other related, even more

compelling evidence of Mr. Preston's factual innocence.

Marcus Morales lived in the immediate area at the time; he was a drug dealer: and, he was the frequent companion of Scott Preston, the brother of Robert Preston (See H. 1281). This information alone would have been critical to the case, and could have been developed and effectively employed by the defense had the State not withheld the "Marcus Morales" information. There is much, much more, however: Scott Preston, the brother of Robert Preston, himself committed the offense for which Robert Preston was convicted and sentenced to death, and in all likelihood Scott Preston was in the company of Marcus Morales at the time (See H. 1263-78).

In April of 1980, more than one year prior to the trial, the Seminole County State Attorney's Office received a letter from Steven Hagman, an inmate at the Lake Butler Correctional Institution (See Affidavit of Steven Hagman, H. 1268-70). Mr. Hagman informed the State Attorney's Office that Scott Preston, a fellow inmate at Lake Butler, had confessed to him that he, and not his brother Robert, had abducted and killed Earline Walker:

> 1. My name is Steven F. Hagman and I reside at the Martin Correctional facility.
>
> 2. In 1980, I was incarcerated at the Lake Butler, Florida, Correctional Facility. At the time, Scott Preston was also incarcerated at Lake Butler and slept in the bunk across from mine.
>
> 3. While we were at Lake Butler, Scott Preston told me that he and another person had robbed, raped, and murdered the "Walker woman". Scott Preston told me that he kidnapped the woman from a convenience store and then took her to where he raped and killed her. Scott Preston, when he described what he did, uave me a number of specific

details about what he did to the Walker woman.

4. I never met or talked to Robert Preston, Scott's brother. Scott did tell me that Robert was indicted for the murder.

5. Scott Preston and I played cards together while at Lake Butler. While we were playing cards, he would describe how he "did" the "Walker murder". He would then laush about it. He would go into it in detail. He described the area where he killed the woman -- he told me that it was done in a field and he even described how the leaves looked on the ground when he did it. He specifically told me about the stabbins. He explained how he took the woman out of the store to the area where she was stabbed, and save me many details about the stabbins. When he discussed the stabbins, he would set excited and he would act the stabbins out for me, raisins his arm and bringing it down as if he was stabbins the woman. Scott told me that he hid his bloody clothes and some of the money he had taken from the woman after the murder. The way Scott laushed about what he did bothers me even today.

6. In April of 1980, I wrote a letter to the Seminole County State Attorney explaining that I had this information from Scott Preston which, I believed, would be helpful to the investigation of the Walker murder. I knew the State Attorney was putting a case together against Scott's brother, Robert, because that was what Scott told me. I wrote to the State Attorney that Scott had told me specific things about the murder that only the real killer would know.

7. No one answered my letter until about a year after I wrote it. Then, in 1981, I was taken to the Seminole County Jail. I was then taken to a room and interviewed by a person who introduced himself as an Assistant State Attorney. There was a third person in the room. I don't remember anyone telling me what his name was. This other person did not say anything. Only the Assistant State Attorney asked me questions.

8. The Assistant State Attorney asked only a few questions. I told him what I had

heard from Scott. The whole thing lasted no more than a half hour. He then said the interview was over and they sent me back to my cell. The Assistant State Attorney looked very upset while he talked to me because what I was saying did not "jive" with the story that he had about what happened to the Walker woman.

9. No one else ever asked me anything about any of this. No other State Attorney, or police officer, or defense attorney, asked me anything or talked to me except for what the Assistant State Attorney asked me in that interview.

10. No one has talked to me about any of this until Mr. Jerry Justine of the West Palm Beach Public Defender's Office talked to me on November 20, 1986. If anyone had asked me, I would have told them what I knew.

(App. 12) (emphasis added).[13]. Mr. Preston's evidentiary hearing was concluded weeks before Mr. Justine fortuitously uncovered Mr. Hagman.

Steven Hagman did not and does not know Robert Preston. His only knowledge of the circumstances surrounding the offense and the arrest of Robert Preston was that which he had learned from his conversations with Scott (Id.). Thus the State knew as early as April, 1980, that Scott Preston had confessed to the murder of Earline Walker, and that he had committed it with another. Of course, the State had apparently also known of Marcus Morales' potential involvement (See supra).

Steven Hagman was not the only person to whom Scott Preston confessed: other witnesses with absolutely no motive to

[13]For the Court's convenience the affidavits discussed herein are included in Mr. Preston's Appendix. The affidavits are reproduced as originally presented to the Rule 3.850 Court and in the coram nobis action before the Florida Supreme Court.

fabricate have provided under oath accounts of Robert Preston's innocence and Scott Preston's guilt. Most of the evidence, in fact, has come from Scott Preston's own mouth. Scott Preston made all of the relevant statements prior to Robert Preston's trial. Scott Preston had no compunction over allowing his brother to face a capital trial and receive a sentence of death for a crime which Scott had committed. Given Scott Preston's history and background, this is not surprising (**See** Affidavit of John Yazell; Affidavit of James MacGeen; Affidavit of Glenn Yazell, infra).

John Yazell knew both Bob and Scott Preston from the neighborhood, and was incarcerated with Scott Preston at Lake Butler in **1980:**

> **1.** My name is John A. Yazell and I reside at **506** West Allen, Springfield, Illinois.
>
> 2. During the **1970's** and early **1980's,** I resided in the State of Florida in Altamonte Springs. My brother, Glenn, and I lived in a neighborhood near where Scott and Bob Preston lived. This was near the Bear Lake Elementary School.
>
> **3.** During this time I knew both Scott and Bob Preston. Scott and I were friends.
>
> **4.** From **1978** to **1980** Scott Preston and I were incarcerated together at the Lake Butler Correctional Facility for a number of months. We were in the same dormitory. While at Lake Butler, we hung around together and talked a lot. We often played cards together, and we also played cards with other inmates.
>
> 5. While we were at Lake Butler, Scott Preston told me that he killed "the Walker woman". He told me that the night that the woman was murdered, his brother, Bob, was drunk and high and that Bob passed out.

6. Scott told me that he planned the robbery for 4-5 days before he did it. When he went to rob the convenience store where Earline Walker worked, he decided that he was also going to kill her.

7. Scott told me the details of how he "did" the robbery, rape, and murder. In fact, he would brag about it. He would also laugh about it. I always thought Scott was a sick man. To him, the whole thing was something to laugh about. He told me about the things over and over again while we played cards.

8. He told me that on the night he killed Earline Walker he went to her store and waited outside for hours for the traffic to die down. When nobody was around, he went into the store and robbed her. He then made her leave the store with him, and made her drive the car out. He then took her to a field where he raped her and "cut her up." He said that when he was killing her he "wanted to make her tit into a tobacco pouch." He gave me all of the details of how he "chopped her up" over and over again. He would say, "I put X's on her head and body because I wanted it to look like a freak did it." He would tell me how he liked making the cops think it was some kind of freak sacrifice.

9. When I would ask him why he killed her, instead of just robbing her, he told me that a few days before the murder he had gone barefoot into the store with a girl and Earline Walker had said to him, "Get out of the store you long-haired hippie bastard." Other times he would say that he killed her the way he did because he "liked doing that to women."

10. The way he talked about it, it sounded like he did it with somebody else. He did tell me a lot of times that Bob was not with him when all this happened. Bob had passed out at home from getting high.

11. It really freaked me out when I heard all this stuff. I didn't think it was right for Scott to let his brother take the rap for something he never did. I would ask Scott how he could let his brother take the rap for this, and Scott would answer that

"Bob can beat the case on appeal because there are flaws in the case, I made sure of that." He would also say that he had "secret evidence" that "will get Bob out on appeal." He would tell me, "I can prove Bob did not do it," and that, "I am just waiting for seven years to go by for the statute of limitations to run so that when the secret evidence gets Bob out they can't come after me for it."

12. Scott would bras about how he had the cops fooled. He said that on the night he killed Earline Walker, he wore Bob's jacket. He told me that the cops had found a pack of Marlboros in the woman's car with Bob's fingerprints on it. Scott said that everybody knew he smoked Marlboros and Bob didn't, Bob smoked Kools. The cops hadn't fisured this out. Scott explained that the reason the cops found Bob's fingerprints on the pack was that he had asked Bob to buv him some Marlboros earlier in the dav. Bob had left the cigarettes in his jacket after he came back from buying them. After Bob passed out, Scott put on Bob's jacket. He said that it "worked out conveniently" for him, and that it was "like an accidental plan," because the Marlboros fell out of Bob's jacket in the car. The cops then thousht Bob did the murder, althoush Scott did it. He would bras about how the cops never figured anyone of this out.

13. While we were in Lake Butler tosether, and even afterwards when we sot out, Scott has talked about this murder to me and over the details about how he did it.

14. I've known Bob for a lona time and he is not the kind of person who would do something like this. Evervone who knows Scott, on the other hand, knows that he is the kind of person who would do this kind of thing.

15. Not only has Scott described to me the details of how he robbed, raped, and murdered the "Walker woman," he has also told me about other murders he has done. He says that he likes raping and murdering women. After he sot out of jail, he told me that he and a guy named Morales picked up a girl who was hitchhiking highway 1792 around Altamonte Springs and raped her and killed her. He said they were driving around in a white van

that night. This happened, according to Scott, around 1982 or 1983. He never said a name, just she was young 19-20 had cash and weed on her and that he was very worried because the law found her purse the very next day and his prints were all over it. Also mentioned they dumped her behind some kind of apartment or condominium that was under construction nearby. He said that he raped her and "cut her up" behind a condo subdivision in Altamonte. He has also told me that he has raped and killed other women. He has told me about 6 or 7 women he has killed. He said that one woman put up a fight so he killed her first, then he raped her. Scott says that he does it because it's better that way. He gets off on talking about how he has done all these things. He is proud of how the cops have never caught him for killing Earline Walker or any of the other women.

16. Scott is a very sick person. Many people are very afraid of him. I am afraid, too. I have a wife and kids to worry about, and Scott is very dangerous.

17. Scott has always been sick. When we were young, he used to torture cats and dogs. He would pour kerosene on cats and set them on fire. He would hang cats from a clothesline.

18. As we grew up, Scott became even worse. We all knew that he could kill anybody -- he is very dangerous. Once, when we were sitting in a group together, he tried to burn the feet of a friend, Walter Ising, of ours. We all tried to stop him from doing that kind of stuff.

19. Scott sometimes talks about how he makes a living by pulling robberies. If anyone tries to get in his way, we all know that he would have no problem killing them.

20. I am sure that other guys who were locked up at Lake Butler with us would know that Scott killed Earline Walker -- he used to talk about it. Scott gets very excited when he talks about how he has killed women. He enjoys tellins these stories. Not so much enjoys tellins stories as, tellins the story to certain individuals he trusts, to set feed back and partners. The talks were fairly private.

21. No defense attorney ever asked me anything about any of this at the time of Robert Preston's trial. If someone would have asked me, I would have told them. My brother, Glenn Yazell, and our friends could have explained these things about Scott.

22. On November 20, 1986. Robert Preston's lawyer, Billy H. Nolas, called me on the phone at my home in Springfield, Illinois. That was the first time I spoke to Mr. Nolas. I told him then what is contained in this affidavit. He asked if I would be willing to put these things in writing and I said **"yes".** None of Robert Preston's other lawyers had ever contacted me about any of this. My conversation with Mr. Nolas was the first time any lawyer had asked me about any of this information. Before that, I did not know how to reach any of Robert Preston's lawyers.

23. I know that the wrong person has been sentenced to die for Earline Walker's murder. I know that Bob Preston is innocent and I know that Scott Preston is guilty. I know this because Scott Preston told it to me -- he told me how he killed that woman many times. I believe in the death penalty, but I don't think that it is fair to execute a person for somethins he never did. Scott Preston is the murderer, not Bob. Scott Preston is also very danserous. If he is allowed to remain free, I know that he will kill more women. Something has got to be done about all this.

(App. 13)(emphasis added). As related by John Yazell's affidavit, the involvement of "Marcus **Morales"** becomes a very significant matter. The account presented in this affidavit and in those related immediately below in fact goes a long way towards explaining the Marcus Morales **"keys"** found in the victim's car (See supra).[14]

[14]**Neither** Mr. Hagman nor Mr. Yazell were known to counsel, or called to testify, at the time of the original Rule 3.850 evidentiary hearing.

James MacGeen was also acquainted with the Preston brothers, with Marcus Morales, and with State witness Donna Maxwell. Mr. MacGeen's affidavit explains:

> 1. My name is James Tait MacGeen and I am 28 years old. I live in Apopka, Florida, where I have lived most of my live.
>
> 2. I lived in the same neighborhood as Scott and Bob Preston from 1973 until 1978, and knew them both very well. Bob and I were close friends, and spent a lot of time together during those years. I only knew Scott because he was Bob's brother -- because I spent a lot of time with Bob, at his house and in the neighborhood, I necessarily came into contact with Scott Preston frequently.
>
> 3. Bob was a friendly, outgoing guy, and was real easy to get along with. Scott, on the other hand, was a sick person. Scott didn't seem to have any friends -- everyone was either disgusted by him or afraid of him -- that's how weird he was. Scott's favorite activity was inflicting pain on people, small animals, or anything else he could find. Bob and I and the rest of the guys in the neighborhood were just into having a good time and hanging out, so Scott never really fit in with our group.
>
> 4. One of Scott's favorite pasttimes was torturing small animals. I remember one time when he caught two stray cats behind his house -- he tied their tails together and hung them over the clothesline, watching and laughing until they clawed each other to death. This was not an isolated occasion -- he used to do this sort of thing all the time. Another one of his favorite tricks was to catch cats, pour gasoline on them, set them on fire, and let them go. Scott wasn't a young kid when he did these things, either -- he was sixteen or seventeen the last time I saw him do it. I wouldn't be su[r]prised if he still does it.
>
> 5. Everyone who knew the Preston boys at the time Bob got arrested for murder suspected that Scott either did it himself or was involved in it. Knowing what kind of person Scott was, it was easy to believe that

he could and would do that kind of thing. By the same token, everyone that knew Bob couldn't believe that he was capable of such a thing.

6. I don't just suspect that Scott was involved in the murder -- I know he was, because he told me so several days after Bob was arrested. It didn't surprise me one bit when Scott came by my house right after Bob was arrested and told me that he was involved in the murder and asked me if he could stay at my house so the police wouldn't find him and arrest him. When I told him to get lost, he asked me if I would take him to Ocala instead, so he could hide out. I told him to get lost again. I also wasn't surprised to hear that Marcus Morales' keys were found at the scene of the crime. Morales was a Puerto Rican drug dealer in our neighborhood and he was always hanging around with Scott.

7. I knew Donna Maxwell real well, too. I was going out with her at the time that the murder occur[r]ed. I know that at least part of the story that I now understand she told at Bob's trial wasn't true, because I was with her that night. She and I were at the Crown Lounge in Altamonte Springs drinking together until at least 10:30 the night before Earline Walker died. She left and I stayed, but I don't know where she went when she left. I do know that she didn't have any transportation at the time, and was dependent on other people to take her places. She didn't even have a bicycle, much less a car. Wherever she went after she left the Crown, she would have had to go with someone else. If she did go to Scott and Bob's house after she left the Crown, it's not likely that she walked, because it was about 4 or 5 miles from the bar to their house.

8. Donna and I talked some about what happened to Bob after that. I didn't know any of the specifics about his trial or anything, so I believed her when she told me that she didn't testify at his trial because they didn't need her. I didn't know that she actually did testify, and what her testimony was, until the second time I talked to Bob's current lawyers in November of this year. Donna Maxwell told me that she was scared of Scott, which I can certainly understand, and

that Scott had told her exactly what to say in case anybody asked her about that night. All I know is that if Donna was with Scott or Bob that night, she couldn't have been there before 11:30 that night.

9. I knew Bob well, and still can't believe that he could have killed anyone. I knew him well enough to know that at the time the murders occurred, Bob was doing incredible amounts of H.P on a daily basis. I know this because I had done it with him on numerous occasions. If Bob was doing H.P that night, which knowing Bob he probably was, it's not likely that he could even remember anything that happened, even if he could have done anything in that condition.

10. I was never contacted by any attorney or investigator about what I know about Bob or Scott Preston until October of 1986. The first time I met Bob Preston's attorney, Mr. Billy Nolas, was the night of October 20, 1986. That night he spent about 15 minutes asking me questions regarding what I knew about Bob Preston's drug addiction. I explained to him what I knew about Bob's use of drugs and agreed to testify to that information at a hearing held on October 21-23, 1986. I spoke again with Mr. Nolas after the hearing and shared with him the information that is contained in this statement. At Mr. Nolas' request, I met with his investigator, Ms. Theresa Farley, and Mr. Tim Schroeder on November 21, 1986 and agreed to sign this affidavit. Had I been asked to testify to the judge and jury during Bob's trial or answer any questions at any time regarding what I know about Bob and Scott Preston, I would have cooperated with all that I know.

(App. 14)(emphasis added).[15] Glenn Yazell's affidavit provides compelling evidence as well:

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[15] Mr. MacGeen and Mr. Glenn Yazell (see infra) were called at the evidentiary hearing regarding Mr. Preston's history of drug abuse. As their affidavits reflect, what they knew about Robert Preston's innocence was not told to post-conviction counsel until after the conclusion of the evidentiary hearing.

1. My name is Glenn Yazell and I am 26 years old. I first met Bob Preston when I was about 13 or 14 years old. We lived in adjacent neighborhoods in Altamonte Springs near Bear Lake Elementary School.

2. Me and my brother, John, knew Bob and his brother Scott from the neighborhood. In the mid-1970's we and the other teenagers in the area would hang out and party. Most of us would drink and do drugs for fun. Bob was always an easy-going guy and got along with everyone, but everybody hated Bob's brother, Scott.

3. Scott always acted very weird and people would always avoid him. He never really had any friends and everyone would always stay as far away from him as they could. He spent a lot of time in juvenile detention since wherever he went there was trouble. When he would come back home, he always seemed even more screwed up than before he left.

4. Everyone in the neighborhood was shocked that Bob Preston was accused and arrested for the murder of Earline Walker. No one ever believed that Bob was guilty - it just didn't fit. It did, however, sound like somethins that Scott was capable of and most everyone I know believes that Scott Preston is guilty of Earline Walker's death. Scott is just the kind of person who would stand silent while his brother was convicted of somethins he did.

5. In the Spring of 1978, shortly after the Walker murder, I hired Scott to clean up a yard of a customer for whom a [sic] drilled a well. Right after that, Scott started coming by my house when I wasn't at home and hanging around as if we were good friends. My wife, Carla, was very upset about this because Scott was acting so strange and she was very afraid of him. Scott kept bringing gifts to Carla that were things that belonged to Bob. At first I just told Carla to not worry about Scott, because in a way I felt sorry for him because he was so weird and he didn't have any friends.

6. One time, Scott came by my house when Carla was there alone and took a knife from the kitchen and hid it under the

wood stove. He was talking real crazy and kept asking her if he could light the stove. She kept telling him he couldn't but he kept asking. Finally, a male friend of ours came by and Carla talked him into staying until Scott left because she was so afraid. Later when Carla told me this story, I told Scott if he came to my house again I would call the police. He never bothered us again.

7. I believe that Scott Preston is guilty of the murder that Bob Preston is convicted of because Scott specifically confessed this to my bother, John. Even before I knew about Scott's confession to John, I believed that Scott was responsible for Earline Walker's death. I have also spoken to many other people that know both Bob and Scott and everyone I spoke to shares this opinion. In fact, most people believe that Scott has been involved in other murders as well and are afraid to have any contact with him at all because of how sick he is.

8. I was never contacted by any attorney or investigator about what I know about Bob or Scott Preston until October of 1986. The first time I met Bob Preston's attorney, Mr. Billy Nolas, was on October 20, 1986. At that time he spent a short while asking me questions about Bob Preston's drug problems. I told him what I knew about Bob's addiction to drugs and agreed to testify to that information at a hearing held on October 21-23, 1986. I spoke with Mr. Nolas after the hearing and shared with him the information that is contained in this statement. At Mr. Nolas' request, I met with his investigator, Ms. Theresa Farley, on November 20, 1986 and agreed to sign this affidavit. If I had been asked to testify to the judge and jury during Bob's trial or answer any questions at any time regarding what I know about Bob and Scott Preston, I would have cooperated with all that I know.

(App. 15)(emphasis added).

Mr. Preston can now prove his innocence and his entitlement to post-conviction relief. He respectfully prays that the Court now hear the claim and allow a full and fair evidentiary hearing. Mr. Preston has consistently asserted the issue as soon as it

became available and urged, time and again, that it be heard. Cf. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987) (evidentiary hearing allowed because as soon as predicate for claim became known to counsel, the claim was presented to the Court). The many weaknesses in the State's wholly circumstantial case, the fact that the jury was concerned, deliberated at length, and posed questions to the Court, eventually voting for death by the narrowest of margins (7-5), and the "Marcus Morales" issue all demonstrate that the State's case at trial far from conclusively or overwhelmingly established guilt. Nor could it: the evidence which has come to light during the post-conviction process demonstrates that Robert Preston has been wrongly convicted and sentenced to die, that he is in fact innocent, and that he can prove his innocence. He urges that the Court allow him to be heard now, before an execution forever forecloses an innocent man's opportunity to be heard.

Mr. Preston's request for relief based upon newly discovered evidence is properly before this Court. Richardson v. State, 546 So. 2d 1037 (Fla. 1989). As the Florida Supreme Court noted in Richardson:

> The 1984 amendment to rule 3.850, while not making any substantive changes, implicitly recognized that a motion pursuant to rule 3.850 is the appropriate place to bring newly discovered evidence claims by including, as one of the exceptions to the two-year time limitation for bringing claims under the rule, situations where "the facts upon which the claim is predicated were unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." The Florida Bar re Amendment to Rules of Criminal Procedure, 460 So.2d 907, 907 (Fla. 1984).

Mr. Preston is entitled to an evidentiary hearing. Richardson was not available at the time that the Supreme Court reviewed this case on Mr. Preston's petition for a writ of coram nobis. Here, the facts alleged are more than sufficient to warrant evidentiary resolution. See Smith (Frank Lee) v. State, 15 F.L.W. 81 (Fla. Feb. 15, 1990). Mr. Preston can establish that newly discovered evidence exists which was "unknown to the movant or his attorney and could not have been ascertained by the exercise of due diligence." Rule 3.850. This is more than a colorable showing of factual innocence. Proper resolution before this Court is required. Moreover, Mr. Preston alleges that the information related herein should have been discovered by trial defense counsel, had proper investigation been conducted, and that trial defense counsel rendered prejudicially ineffective assistance in failing to investigate, uncover, and present it. Such contentions involve classic Rule 3.850 evidentiary issues. See Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Squires v. State, 513 So. 2d 138 (Fla. 1987). Mr. Preston also alleges that much of the information (and doubtless the information concerning witness Hagman) was known to the State and not disclosed to the defense. This case thus also presents a classic Rule 3.850 evidentiary claim under Brady v. Maryland, 373 U.S. 83 (1963), and its progeny. See Gorham, supra; Sauires, supra.

In conjunction therewith, Mr. Preston also notes that the State Attorney's office, Sheriff, and other law enforcement agencies have consistently refused to provide the petitioner or his counsel with access to Public Records. See Fla. Stat.

section 119. The State is thus continuing to withhold information to which Mr. Preston should have access, particularly in light of the claim asserted by Mr. Preston in these proceedings. See Amadeo v. Zant, 108 S. Ct. 1771 (1988). On the basis of section 119, Fla. Stat., as well as on the basis of the due process and equal protection clauses of the fourteenth amendment and the fifth, sixth, and eighth amendments, Mr. Preston herewith also respectfully urges that the Court order the State Attorney and law enforcement to provide disclosure.

Mr. Preston urges this Court to recognize the importance this evidence would have had on the outcome of the trial. This evidence unquestionably undermines confidence in the reliability of Mr. Preston's conviction, a conviction which resulted in a sentence of death. The eighth amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Such matters cannot be treated through mechanical rules.

The United States Supreme Court has noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challensed. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because

> of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984)(emphasis added).

The evidence presented in this claim demonstrates that the result of Mr. Preston's trial is unreliable. Richardson, Smith and Rule 3.850 provide to this Court the authority to "produce just results." The United States Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gregg v. Georgia, 428 U.S. 153, 187 (1976); Reid v. Covert, 354 U.S. 1, 45-56 (1957) (Frankfurter, J., concurring); id. at 77 (Harlan, J., concurring). This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including those phases specifically concerned with guilt, Beck v. Alabama, 447 U.S. 625, 637-38 (1980); sentence, Lockett v. Ohio, 438 U.S. 586, 604 (1978); appeal, Gardner v. Florida, 430 U.S. 349, 360-61 (1977); and post-conviction proceedings. Amadeo v. Zant, 108 S. Ct. 1771 (1988). Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Greaa v. Georgia, 428 U.S. 153, 187 (1976), including full and fair post-conviction proceedings,

see, e.g., Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980); Evans v. Bennet, 440 U.S. 1301, 1303 (1979) (Rehnquist, Circuit Justice), and a full determination of claims of innocence. Smith v. Murray, 106 S. Ct. 2661 (1986).

There is no more important safeguard allowed to a post-conviction litigant than the right to be heard on claims seeking to correct miscarriages of justice. The conviction and execution of an individual presenting a colorable showing of factual innocence, before the facts demonstrating innocence have been fully and fairly adjudicated in an evidentiary forum, is the paramount example of a miscarriage of justice. As the United States Supreme Court has explained, procedural impediments to the claimant's right to be heard (such as procedural default) do not and cannot foreclose a post-conviction litigant's right to be heard on issues involving factual innocence. See Smith v. Murray, 106 S. Ct. 2661, 2668 (1986); Murray v. Carrier, 106 S. Ct. 2639, 2650 (1986); Kuhlman v. Wilson, 106 S. Ct. 2616, 2627 (1986); see also Friendly, J., Is Innocence Irrelevant? Collateral Attack on Criminal Judgments, 38 U. Chi. L. Rev. 142 (1970).

The United States Supreme Court has in fact made clear that any procedural impediment which may be asserted by a State Respondent,

> must yield to the imperative of correcting a fundamentally unjust incarceration . . .

Murray v. Carrier, 106 S. Ct. at 2650 (citation omitted), and thus,

> . . . where a constitutional violation has

> probably resulted in the conviction of one who is actually innocent, a federal habeas court may grant the writ [of habeas corpus] . . .

irrespective of any asserted procedural bar. Id. The Supreme Court has also explained that a litigant should not be foreclosed from presenting a "substantial claim that the alleged error undermined the accuracy of the guilt or sentencing determination," Smith v. Murray, 106 S. Ct. at 2668, and that the "ends of justice" require the full and fair determination of the merits of issues involving "a colorable claim of factual innocence." Kuhlman v. Wilson, 106 S. Ct. at 2627. A "colorable showing" has been defined as a showing sufficient to demonstrate that "the trier of facts would have entertained a reasonable doubt of his [the defendant's] guilt." Id., 106 S. Ct. at 2627 n.17. That showing has been made here.

The eighth amendment mandates that this Court not dismiss this newly discovered evidence claim. Mr. Preston submits that it more than sufficiently questions the reliability of his conviction and death sentence. There can be no question that his conviction cannot withstand the requirements of the eighth and fourteenth amendments. Mr. Preston is entitled to a full and fair evidentiary hearing at which he can establish his right to a new, fair trial, for the outcome of the original proceedings is constitutionally unreliable. An evidentiary hearing and, thereafter, Rule 3.850 relief are proper.

CLAIM III

MR. PRESTON'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS WERE VIOLATED BY THE STATE'S DELIBERATE SUPPRESSION OF MATERIAL, EXCULPATORY EVIDENCE, AND APPELLATE COUNSEL WAS PREJUDICIALLY INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE ON DIRECT APPEAL.

Keys bearing the name "Marcus **Morales"** were found in the ash tray of the victim's car on the morning that the murder at issue occurred. Although defense counsel made appropriate Bradv requests, the name Marcus Morales was not contained in the State's witness lists and no reference to the keys bearing that name was made in any of the discovery materials provided by the State **(See, e.g.,** R. **2210-11, 2230, 2279).**

Trial counsel learned of the existence of these keys in the middle of trial, quite by accident, and far too late to effectively use the information. The matter first arose during the State's case-in-chief, while Fred Roberts, a police officer who assisted in processing the victim's car, was testifying as to his inventory of items removed from the car. One of these items was **"a** key ring identified by a tag as belonging to Marcus Morales with two keys" that had been found in the car's ashtray (R. **684).** Taken by surprise, defense counsel interrupted the direct examination and interjected, "Identified as what?" (Id.)

Trial counsel attempted to adjust to this abruptly discovered evidence in his subsequent cross-examination. Officer Roberts testified on cross-examination that he had made no effort to find out who Morales was and what his keys were doing in the car (R. **691).** Another investigator, Lieutenant Martin Labrusciano, testified that he did not check his files for a

Marcus Morales (R. **1212**). As subsequent witnesses testified, defense counsel asked each if they knew of Morales. All said **"no"** (See R. **719, 945, 1085, 1112, 1119, 1372, 1380**).

The defense raised the constitutional violation, see Brady v. Maryland, **373** U.S. **83** (1963), and discovery violation, see Roman v. State, **528** So. 2d **1169** (Fla. **1988**), engendered by the State's suppression of Marcus Morales' keyring as grounds for a new trial. The court asked whether anyone knew who Morales was, and the prosecutor, at the time, answered **"no"** (R. **2987**). Defense counsel and the court both agreed that had the defense known about the keys prior to trial, the defense would have found out who Morales was, and would have investigated this issue (R. **2996**). However, the court denied Mr. Preston's motion for a new trial, holding he had failed to demonstrate the materiality of the keys (R. **2998**).

Trial counsel could not demonstrate the materiality of the Marcus Morales evidence because of the State's efforts to withhold it. By the time a State's witness fortuitously blurted out the information, trial was already underway. Defense counsel from that point on made every effort to determine the identity of Marcus Morales and the nature of his involvement in the offense, but it was simply too late.

Evidence uncovered since the trial demonstrates the materiality of the withheld Marcus Morales evidence and the magnitude of the constitutional and discovery violation engendered by the State's suppression of such evidence. It is now apparent that Marcus Morales lived in the immediate area at

the time, that he was a drug dealer, and that he was the frequent companion of Scott Preston, the brother of Robert Preston (See H. 1281). This information alone would have been critical to the case, and could have been developed and effectively employed by the defense had the State not deliberately withheld "Marcus Morales." There is much more, however: the state successfully withheld evidence indicating that Scott Preston, the brother of Robert Preston, himself committed the offense for which Robert Preston was convicted and sentenced to death, and that in all likelihood Scott Preston was in the company of Marcus Morales at the time (See H. 1263-78). The investigation of the withheld "Marcus Morales" evidence would have led to more exculpatory evidence. Of course, the circumstances under which trial counsel learned of "Marcus Morales" (in the middle of trial) precluded any such investigation.

The evidence relating to Scott Preston, his involvement with Marcus Morales, and the State's Brady and discovery violations with regard to these issues, cf. Roman v. State, supra, is detailed in Claim 11, supra. In the interests of brevity, that evidence -- evidence withheld by the State at the time of trial (see, e.g., Affidavit of Steven Hagman, App. 12) and evidence which could have been developed had the State even disclosed "Marcus Morales" -- will not be detailed again herein, and Mr. Preston respectfully refers the Court to Claim 11. He notes, however, the following.

In April of 1980, more than one year prior to the trial, the Seminole County State Attorney's Office received a letter from Steven Hagman, an inmate at the Lake Butler Correctional

Institution (See Affidavit of Steven Hagman, App. 12). Mr. Hagman informed the State Attorney's Office that Scott Preston, a fellow inmate at Lake Butler, had confessed to him that he, and not his brother Robert, had abducted and killed Earline Walker (Id.). The State knew as early as April, 1980, that Scott Preston had confessed to the murder of Earline Walker, and that he had committed it with another. Of course, the State's law enforcement agents had long known of Marcus Morales' possible involvement (R. 684). The State was much more successful in suppressing the Scott Preston evidence. No witness blurted out that Scott Preston had confessed to the crime, and the defense thus had no idea that such evidence existed. Had trial counsel had the time and opportunity to investigate Morales, he would have learned of Scott Preston's involvement.

Steven Hagman was not the only person to whom Scott Preston confessed: present counsel has uncovered others who knew of Scott's involvement in the offense (see Apps. 13, 14, 15). Had the State disclosed the information in its possession to the defense prior to trial, trial counsel could have developed and presented even more compelling evidence of Mr. Preston's innocence to the jury.

John Yazell knew both Bob and Scott Preston from the neighborhood, and was incarcerated with Scott Preston at Lake Butler in 1980. John Yazell's affidavit discusses, in detail, how Scott Preston had described his involvement with "a guy named Morales" to Yazell well before Mr. Preston's capital trial:

> Not only has Scott described to me the details of how he robbed, raped, and murdered

> the "Walker woman," he has also told me about other murders he has done. He says that he likes raping and murdering women. After he got out of jail, he told me that he and a guy named Morales picked up a girl who was hitchhiking Highway 1792 around Altamonte Springs and raped her and killed her. He said they were driving around in a white van that night. This happened, according to Scott, around 1982 or 1983. He never said a name, just she was young 19-20 had cash and weed on her and that he was very worried because the law found her purse the very next day and his prints were all over it. He said that he raped her and "cut her up" behind a condo subdivision in Altamonte. . . He gets off on talking about how he has done all these things. He is proud of how the cops have never caught him for killing Earline Walker or any of the other women.

James MacGeen was also acquainted with the Preston brothers and with Marcus Morales. Scott Preston had also discussed the "Walker Murder" and Morales' involvement with MacGeen:

> Everyone who knew the Preston boys at the time Bob got arrested for murder suspected that Scott either did it himself or was involved in it. Knowing what kind of person Scott was, it was easy to believe that he could and would do that kind of thing. By the same token, everyone that knew Bob couldn't believe that he was capable of such a thing.
>
> I don't just suspect that Scott was involved in the murder -- I <u>know</u> he was, because he told me so several days after Bob was arrested. It didn't surprise me one bit when Scott came by my house right after Bob was arrested and told me that he was involved in the murder and asked me if he could stay at my house so the police wouldn't find him and arrest him. When I told him to get lost, he asked me if I would take him to Ocala instead, so he could hide out. I told him to get lost again. I also wasn't surprised to hear that Marcus Morales' keys were found at the scene of the crime. Morales was a Puerto Rican drug dealer in our neighborhood and he was always hanging around with Scott.

(Mr. MacGeen has also provided information regarding one of the

State's key witnesses, Donna Maxwell, information which severely undermines the credibility of her trial testimony (See App. 14)).

The evidence relating to Marcus Morales was material, and highly exculpatory. Had it been disclosed, a wealth of information would have been available to and could have been developed by the defense which would have absolutely undermined the State's wholly circumstantial case at Mr. Preston's capital trial and sentencing proceedings. The withheld "Marcus Morales" evidence alone was sufficient to establish Mr. Preston's entitlement to relief pursuant to Brady V. Maryland; its relationship to the withheld Scott Preston evidence places Mr. Preston's entitlement to relief beyond question.

Mr. Preston notes here, as he has in his original Rule 3.850 motion and appeal, that although he has continuously sought disclosure of public records (as is his entitlement pursuant to Fla. Stat. Section 119.01, et seq.), the State to this day continues to withhold its files. He respectfully urges the Court direct the State to disclose its files as Florida's public records' law clearly mandates, see Tribune Co. v. Public Records, 493 So. 2d 480 (Fla. App. 1986), and as is required by the fifth, sixth, eighth, and fourteenth amendments. Cf. Amadeo v. Zant, 108 S. Ct. 1771 (1988).

The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the state's withholding of evidence such as that discussed herein renders a criminal defendant's trial fundamentally unfair. Bradv v. Maryland, 373 U.S. 83 (1963); United States v. Bagley, 105 S.

Ct. 3375 (1985); Aranso v. State, 497 So. 2d 1161 (Fla. 1986). A defendant's right to confront and cross-examine witnesses against him is violated by such state action as well. See Chambers v. Mississippi, 93 S. Ct. 1038, 1045 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Moreover, counsel cannot be effective when deceived; consequently, Mr. Preston's sixth amendment right to effective assistance of counsel was also violated by the State's suppression. Cf. United States v. Cronic, 466 S. Ct. 648 (1984). The resulting unreliability of a guilt or sentencing determination derived from proceedings such as those in Mr. Preston's case also violates the eighth amendment requirement that in capital cases the Constitution cannot tolerate any margin of error. See Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Gardner v. Florida, 430 U.S. 349 (1977). Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated.

Counsel for Mr. Preston made repeated requests for exculpatory, material information pretrial. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Preston (Dennis Wayne) v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Bradv, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt-innocence).

The Bagley materiality standard is met, and reversal

required, once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [both phases of the capital] proceeding would have been **different."** Bagley, supra, 105 S. Ct. at **3833.** Such a probability undeniably exists here.

Confidence in the outcome has been undermined. Id. Mr. Preston is entitled to a full and fair evidentiary hearing at which time he can establish his entitlement to relief.

CLAIM IV

MR. PRESTON WAS DEPRIVED OF HIS RIGHTS TO AN INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF THE PRESENTATION OF CONSTITUTIONALLY IMPERMISSIBLE VICTIM IMPACT INFORMATION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Preston's capital trial and sentencing proceedings were permeated with impermissible victim impact evidence and argument in violation of Booth v. Maryland, **482** U.S. **496, 107** S. Ct. **2529 (1987),** and South Carolina v. Gathers, **109** S. Ct. **2207 (1989).** This began during the guilt phase of the trial. The State called the victim's mother to testify about the victim's church work **(See** R. **498-99),** and then highlighted this testimony during its closing argument at the guilt-innocence phase of trial **(See** R. **1803, 1887).** According to the State's argument, the victim's background and personal characteristics made the crime even worse than it would normally be, as it would be more "terrifying to a woman of Ms. Walker's background" (R. **1804).** Her background, as the State argued to the jury, was that of a "religious person, [who] had worked with the ministry" (R. **1887).**

During the penalty phase the victim's religious background and her relationship to her family, friends, and the community became an even more important feature of the State's case. At that point, in its argument to the jury, the State **"need[ed]** to bring Earline Walker into this case" (R. **1988).** The State did "bring her into the case at [that] point" (Id.), explaining to the jury how **"cheerful"** she normally was, how **"concerned"** about people she had been, how she was involved in various **"ministries"** and church work, and how she "went through life giving pleasure" to all who knew her, all the while "having sad moments" (Id.). The State exhorted the jury to sentence Mr. Preston to death because of who Earline Walker was, what she did, and the impact of her death on others (e.g., those close to her). This is precisely what Gathers and Booth prohibit. This information was not relevant to any of the statutory aggravating factors.

This case involves blatant Booth and Gathers error. Under Jackson V. Dugger, **547** So. 2d **1197** (Fla. **1989),** claims founded upon Booth are cognizible in these post-conviction proceedings. In this case, the error is the same as that in Gathers, and thus is fundamental eighth amendment error. The circuit court denied this issue on the basis that it was procedurally barred. To the extent that counsel did not object to this impermissible victim impact evidence and argument on the basis of Booth and Gathers, counsel was ineffective for failing to object properly. An evidentiary hearing is warranted to determine this issue. Further, this issue should be examined on its merits. Relief is appropriate here, as it was in Jackson, supra.

CLAIM V

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

Mr. Preston's sentencing jury was instructed that it could consider in aggravation whether the crime was @@especiallywicked, evil, atrocious or cruel.@@ In Cartwriaht v. Maynard, 822 F.2d 1477, 1488 (10th Cir. 1987) (in banc), affirmed 108 s. Ct. 1853 (1988), the jury was given a more detailed instruction on the heinous, atrocious or cruel aggravating factor, yet the instruction was found constitutionally inadequate. In Maynard v. Cartwriaht, 108 S. Ct. 1858 (1988), the Supreme Court unanimously held that such an instruction did not "adequately inform juries what they must find to impose the death penalty.@@

This Court has also applied several limiting constructions to the heinous, atrocious or cruel aggravating factor. E.g., Rhodes v. State, 547 So. 2d 1201 (Fla. 1989)(cannot be based on actions after the death of the victim); Cochran v. State, 547 So. 2d 928 (Fla. 1989)(cannot be based on single gunshot wound): State v. Dixon, 282 So. 2d 1, 9 (Fla. 1973)(aggravator directed only at consciousless or pitiless crime which is unnecessarily torturous to victim). The sentencing jury in Mr. Preston's case was not instructed on any of the limiting constructions applicable to this aggravator, despite the fundamental significance of the jury's sentencing role in a Florida capital sentencing proceeding. See Mann v. Duaser, 844 F.2d 1446 (11th

Cir. 1988) (in banc), cert. denied, 109 S. Ct. 1353 (1989).

When presented with this issue on direct appeal, this Court did not have the benefit of Cartwright, and did not itself apply an adequate "limiting construction" to the "heinous, atrocious or cruel" aggravating circumstance. The circuit court denied this issue on the basis that it was procedurally barred, and also on the basis that this Court has held Cartwright inapplicable to Florida capital sentencing proceedings. Appellant urges this Court to reconsider this issue, and to order a new sentencing proceeding on this basis of this constitutional instructional error.

CLAIM VI

THIS COURT'S FAILURE TO REMAND FOR RESENTENCING AFTER STRIKING AN AGGRAVATING CIRCUMSTANCE ON DIRECT APPEAL DENIED MR. PRESTON THE PROTECTIONS AFFORDED UNDER FLORIDA'S CAPITAL SENTENCING STATUTE AND VIOLATED DUE PROCESS, EQUAL PROTECTION, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The trial court's sentence of death was based on four aggravating circumstances. However, on direct appeal this Court struck the "cold, calculated and premeditated" aggravator as invalid. Preston v. State, 444 So. 2d 947 (Fla. 1984). This Court's failure to then remand the case for resentencing is in direct conflict with its own well-established standards, for in this case there was a wealth of statutory and nonstatutory mitigation before the jury. In Elledge v. State, 346 So. 2d 1003 (Fla. 1977), this Court held that if improper aggravating circumstances are found, "then regardless of the existence of other authorized aggravating factors we must guard against any unauthorized aggravating factor going into the equation which

might tip the scales of the weighing process in favor of death."

As in Alvin v. State, 14 F.L.W. 457 (Fla. Sept. 14, 1989), Schafer v. State, 537 So. 2d 988 (Fla. 1989), Nibert v. State, 508 So. 2d 1 (Fla. 1987), and Elledge, supra, this Court should have remanded for resentencing, for there is no way to know whether the jury and judge would have imposed death had they not relied on the invalid aggravator. This Court is not the sentencer under Florida law. In fact, a reviewing court is ill-equipped to perform the factual balancing called for at the sentencing stage of the trial. Adamson v. Ricketts, 865 F.2d 1011, 1036 (9th Cir. 1988)(in banc).

This Court's failure to follow its own case law and remand for resentencing deprived Mr. Preston of his rights to due process and equal protection and violated the eighth and fourteenth amendments. The circuit court denied this issue because it did not feel it was the "proper forum", and it believed the issue to be without merit. Certainly this Court is the proper forum, and the Court should reconsider this claim on its merits. Relief is proper.

CLAIM VII

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

At the penalty phase of Mr. Preston's capital trial, prosecutorial argument and judicial instructions informed the jury that death was the appropriate sentence unless "mitigating

circumstances exist to outweigh any aggravating circumstances" (R. 1929, 2026, 2027). Such shifting of the burden to the defendant conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and State v. Dixon, 283 So. 2d 1 (Fla. 1973). As set forth in Dixon, a capaital sentencing jury is required to consider whether the State has proven that "the aggravating circumstances outweigh the mitigating circumstances." That straightforward standard was never applied in this case.

Such shifting of the burden to the defendant to prove that life is the appropriate sentence violates the eighth and fourteenth amendments, as the Court of Appeals for the Ninth Circuit recently held in Adamson v. Ricketts, 865 F.2d 1011 (9th Cir. 1988)(in banc). Mr. Preston's capital sentencing proceeding was fundamentally unfair and unreliable. The jury's ability to fully assess the mitigation was restrained by this construction, and the sentence thus violates Penry v. Lynaugh, 109 S. Ct. 1935 (1989), Lockett v. Ohio, 438 U.S. 586 (1978), and Mills v. Maryland, 108 S. Ct. 1860 (1988).

In being instructed that mitigation must outweigh aggravation before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not fully consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. Thus the jury was constrained in its consideration of the mitigating evidence, Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon, supra, in determining the appropriate

penalty. The jury was not allowed to make a "reasoned moral response" to the issues at sentencing or to **"fully"** consider mitigation, Penry v. Lynaugh, susra. This error **"perverted"** the jury's deliberations concerning the ultimate question of whether Mr. Preston should live or die. Smith v. Murray, **106** S. Ct. **2661, 2668 (1986).** Under Smith v. Murray, no procedural bars may be applied to such an issue.

A reasonable juror given the instruction at issue here could have well understood that mitigating circumstances were factors calling for a life sentence, that aggravating and mitigating circumstances had differing burdens of proof, and that life was a possible penalty, while at the same time understanding, based on the instructions, that Mr. Preston had the ultimate burden to prove that life was appropriate. This violates the eighth amendment. The United States Supreme Court currently has before it certiorari proceedings in a case presenting a very similar question. See Walton v. Arizona, 110 S. Ct. **49 (1989).** A stay of execution until Walton is decided by the United States Supreme Court would be more than reasonable under the circumstances.

The circuit court denied this issue on the basis that it was procedurally barred. However, the failure to object to this error at trial or on appeal can only be the result of ineffective assistance of counsel. This claim should be considered on its merits, and thereafter, relief should be granted.

CONCLUSION

This case presents important issues. It also involves a capital petitioner who continues to assert that he is factually innocent. There was no reason for a death warrant in this case

-- Mr. Preston's Rule 3.850 motion was filed as soon as the Fifth District Court of Appeals denied the State's appeal of Judge Mize's grant of relief. We therefore pray that this Honorable Court enter a stay of execution and grant the relief sought in this action. The lower court, after all, found the facts in Mr. Preston's favor, but nevertheless denied relief. The lower court erred, and we pray that this Court now correct those errors.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY a true copy of the foregoing has been furnished by Federal Express delivery to Kellie Nielan, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 4th day of April, 1990.

Billy H. Nash
Attorney