No. 76458

IN THE SUPREME COURT
OF THE STATE OF FLORIDA

JOHN ERROL FERGUSON, or DOROTHY FERGUSON,
Individually and as Next Friend on Behalf of
JOHN ERROL FERGUSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE ELEVENTH JUDICIAL CIRCUIT

BRIEF OF APPELLANT

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STATEMENT OF THE CASE

Following his convictions for murder in 1978, John E. Ferguson ("Ferguson") was sentenced to death in 77-28650-D ("the Carol City case") and in 78-5428 ("the Hialeah case"). This Court affirmed Ferguson's convictions, but reversed the death sentences because the trial court failed properly to consider and weigh statutory mitigating factors. 1/ On remand, a different judge, without an evidentiary hearing, resentenced Ferguson to death in both cases. On appeal, this Court affirmed. 2/

Thereafter, Ferguson brought a post-conviction proceeding under Fla. R. Crim. P. 3.850 in the Dade County Circuit Court urging that the findings and sentence against him be set aside. That court denied all relief, and in doing so issued four rulings Ferguson now appeals to this Court: (1) notwithstanding ex parte contacts between circuit court judges and the prosecution, those judges need not have recused themselves, and their ex parte contacts did not taint their subsequent rulings in the post-conviction proceedings; (2) the post-conviction proceedings may lawfully continue notwithstanding the compelling evidence that Ferguson is not competent to assist his counsel in those proceedings; (3) on the merits, Ferguson's death sentences may stand,

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1/ Ferguson v. State, 417 So. 2d 631 (Fla. 1982); Ferguson v. State, 417 So. 2d 639 (Fla. 1982).

2/ Ferguson v. State, 474 So. 2d 208 (Fla. 1985).

notwithstanding the numerous errors that occurred during his trials, including acknowledged Hitchcock instructional error and the gross failure of his counsel to adduce significant, available mitigating evidence; and (4) numerous claims of prejudicial error must be stricken from the proceedings due to counsel's failure to raise them on direct appeal, notwithstanding that those errors concern fundamental rights not subject to procedural default.

Because a reversal on either the ex parte contacts or the competency issue would obviate any need for the Court to address the merits of the errors affecting the underlying death sentences, those two issues are addressed first. Nevertheless, because the Hitchcock and inadequacy-of-counsel errors by themselves make clear that the death sentences must in any case be set aside, the Court may elect to consider the merits first. In whatever order the Court considers the four rulings at issue, taken together those rulings have plainly prejudiced Ferguson's rights, and his convictions and sentences should be set aside.

SUMMARY OF ARGUMENT

As the United States Supreme Court has recently noted, this Court is committed to ensuring that no capital punishment be approved until the defendant's opportunity to avoid such a sentence has been fully protected. Parker v. Dugger, __ U.S. ____, 111 S.Ct. 731, 112 L.Ed.2d 812 (U.S. Jan. 22, 1991). This opportunity includes, most importantly, full and fair

consideration of all factors that might have caused a jury to recommend life, rather than death. Id.

In this case, defendant Ferguson's opportunity to avoid a death sentence was compromised in four crucial ways. First, the trial court repeatedly engaged in ex parte contacts with the prosecution regarding these post-conviction proceedings and, after having done so, issued opinions adopting almost verbatim the prosecution's position on the matters at issue, without even addressing Ferguson's arguments. Such contacts by a trial judge in this State are never permissible, but even if a showing of prejudice were necessary, there has been a sufficient showing here.

Second, just as a defendant may not be either tried, convicted, or executed if he is incompetent, so too may he not be forced to avail himself of post-conviction proceedings while incompetent. This is particularly so in a case, such as the present one, where the post-conviction proceedings involve factual investigations requiring the defendant's cooperation and consultation with counsel. The lower court erred in holding that such a defendant's competence is irrelevant. The court also erred in agreeing with the prosecution that the record demonstrates Ferguson to be competent to assist his counsel in these proceedings.

Third, even if this Court were to approve the rulings below notwithstanding the lower court's ex parte contacts, and were to permit these post-conviction proceedings to continue

notwithstanding the persuasive demonstration of Ferguson's inability to assist his counsel, Ferguson's death sentence should be reversed. As detailed in this brief, not only were the juries who heard Ferguson's cases the product of racially-based peremptory challenges, but they (1) were unable to consider substantial mitigating factors that Ferguson's counsel unjustifiably failed to present, (2) were misadvised by the trial judge concerning their discretion to consider mitigating factors, (3) were significantly misled by false testimony given by a state police official, and (4) were deprived of the opportunity to hear crucial impeachment evidence affecting key prosecution witnesses. Whether taken together or singly, these prejudicial errors deprived Ferguson of the full and fair hearing to which this Court is committed and which the state and federal Constitutions require.

Finally, eight other prejudicial errors occurring during Ferguson's trials were improperly stricken and were therefore not even considered in determining whether Ferguson's rights were fully and fairly protected. Under the decisions of this Court and the U.S. Supreme Court, all of the stricken claims involved fundamental issues that must be considered on post-conviction review even if not raised at trial or on direct appeal.

I. THESE RULE 3.850 PROCEEDINGS SHOULD BE STAYED PENDING A VALID DETERMINATION THAT FERGUSON IS COMPETENT TO ASSIST HIS COUNSEL IN THE PROCEEDINGS

Because Ferguson's capacity to assist his counsel in these Rule 3.850 proceedings was critical in light of the significant factual issues to be raised in the proceedings, on December 1, 1987 his counsel filed a Motion To Stay Proceedings on the ground that Ferguson was incompetent to participate and provide necessary assistance in the proceedings. The Motion was supported by counsel's affidavit, which asserted Ferguson's "failure to communicate" and the fact that counsel "was unable to secure Mr. Ferguson's assistance in discussing matters important to the preparation of a Motion for Post-Conviction Relief on his behalf." Prettyman Affidavit attached to Motion to Stay Proceedings, filed December 1, 1987. 3/

On July 22, 1988, Judge Snyder ordered a hearing to determine Ferguson's competence, which was held on August 24 and 25, 1988, after Ferguson was examined by court-appointed

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3/ Certain materials which were designated by counsel for inclusion in the record before this Court were not in fact included by the Clerk of the Circuit Court. On March 22, 1991, this Court granted counsel's motion to supplement the record with the omitted materials. In this brief, counsel cite to those materials directly, rather than to a page number of the appellate record. In addition, also not formally included in the current appellate record are the trial transcripts of the underlying convictions and sentences, which were retained by this Court after the direct appeals in those cases. Because this Court noted in its March 22, 1991 Order that those transcripts are already before it, citations here are to the appellate record in the prior appeals.

doctors, as well as by his own doctors. In addition to the testimony of the experts who examined Ferguson, both the State and Ferguson introduced reports and testimony concerning his mental health beginning in 1971. (These reports and testimony are outlined in Appendix I, attached hereto.)

By Order dated February 23, 1989, Judge Snyder determined that Ferguson "is competent to proceed with * * * post-conviction proceedings" and that "incompetency is not an issue for a court to address when a motion for post-conviction relief is filed." R.1008. 4/ Furthermore, in an Order dated April 12, 1989, Judge Snyder denied Ferguson's motion, based on the judge's ex parte contacts with the prosecution, to vacate the judge's competency determinations. R.1066-1077.

As shown below, (a) Judge Snyder's ex parte contacts with the prosecution regarding the competency proceedings taint the judge's competency rulings and require that they be set aside; (b) Judge Snyder's determination that competency is irrelevant in Rule 3.850 proceedings is incorrect as a matter of law; and (c) Judge Snyder's determination that Ferguson is competent to assist his counsel in these proceedings is not supported by, and is contrary to, the record. For all these reasons, until a valid determination has been made that

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4/ The symbol "R" denotes the record on appeal before the Court in this case (No. 76,458).

Ferguson is competent to assist his counsel, the proceedings should be abated, and this Court need not reach the merits of the issues addressed in the proceedings.

A. Ferguson's Rights Were Violated by Ex Parte Communications between Prosecutors and Judges Dealing with Ferguson's Case

1. The Record Makes Clear that Ex Parte Contacts Preceded Judge Snyder's Competency Rulings. In January 1988, Ferguson's counsel first learned from an assistant state attorney of an ex parte communication between the prosecution and Judge Snyder's predecessor, Judge Friedman, during which Ferguson's case was discussed in the absence of his counsel. Counsel objected. 5/

At a hearing before Judge Snyder on May 19, 1988, the judge indicated a willingness to entertain ex parte communications with any attorney in the case "at any time they wish to come into my office to talk about the situation * * *." 6/ He instructed an assistant state attorney to contact him whenever the State needed assistance in getting anything done. R.1030.

5/ These facts, and those set forth below, are all supported by Affidavits attached to Ferguson's Motion for Reconsideration or for an Evidentiary Hearing, filed April 24, 1989 (R.1079-94).

6/ Attachment A to Certificate of Counsel in Support of Motion To Disqualify Judge and To Vacate Prior Orders, at 30 (R.1023).

On May 24, 1988, Ferguson's counsel learned from an assistant state attorney that she had again discussed the case with Judge Snyder in the absence of Ferguson's counsel. Counsel repeated his objection. Two days later, Ferguson's counsel renewed on the record his objections to recurring ex parte communications between the court and the prosecution, to which Judge Snyder simply replied: "you are entitled to your opinion." 7/

Judge Snyder's February 23, 1989, order denying Ferguson's motion to stay the post-conviction proceedings adopted, virtually without exception, the factual assertions, the assessments of witness credibility, and the legal conclusions urged by the state, R.1000-13, and ignored virtually all of Ferguson's factual assertions and his principal legal arguments. It thus became apparent that Ferguson had been prejudiced and that this prejudice may well have arisen from the ex parte communications. Accordingly, Ferguson's counsel requested a hearing in which he could examine in court the two state prosecutors regarding the number and nature of their ex parte communications with the court. Judge Snyder scheduled the hearing for March 31, 1989.

7/ Attachment B to Certificate of Counsel in Support of Motion To Disqualify Judge and To Vacate Prior Orders, at 8 (R.1039).

On March 23, 1989, Ferguson filed a Motion to Disqualify Judge and To Vacate Prior Orders ("Motion to Disqualify"), R.1014-16, citing the Due Process Clauses of the United States and Florida Constitutions, as well as Florida procedural rules. The motion was supported by a Memorandum of Points and Authorities, as well as a Certificate of Counsel. R.1017-52. Ferguson's counsel, relying on the promise of a hearing, had hoped to supplement the motion with further evidence uncovered at the hearing.

However, Judge Snyder, without holding the hearing as promised and without prior notice, instead issued an Order on April 12, 1989 denying Ferguson's recusal motion. 8/ Although he wrote that "Fla. R. Crim. P. 3.230, rather than F.S. 38.10, controls", April 12 Order at 2 n.2 (R.1067), he nevertheless relied on both rules in holding that Ferguson's motion was deficient for technical reasons. Id. at 2-4, 6-7 (R.1067-69, 1071-72). Thus, he held that the motion was unsworn and not verified by a party, not accompanied by two affidavits, and not timely because counsel had failed to move for disqualification until after the Court's February 23 unfavorable ruling. The judge also ruled that no prejudice had been proven in addition to the ex parte communications and that the prosecutorial statements were hearsay. Id. at 10 (R.1075).

8/ See Order of Honorable Arthur I. Snyder, issued April 12, 1989 ("April 12 Order") (R.1066-77).

Ferguson, out of an abundance of caution, filed on April 25, 1989 a Motion for Reconsideration Or For An Evidentiary Hearing ("Motion for Reconsideration"), supported by a Memorandum of Points and Authorities, an Affidavit of Counsel, Ferguson's Affidavit, and an Affidavit of Ferguson's Next Friend, 9/ providing additional supporting documentation in verified form. On May 1, 1989, Judge Snyder denied the Motion without opinion, and refused to hold a hearing. 10/

2. The Ex Parte Contacts Vitiate Judge Snyder's Rulings as a Matter of Law

a. Procedural Posture. The State argued below that the Motion to Disqualify was untimely. But it was filed the first time counsel detected prejudice. As we argue below, prejudice need not be shown. But even if we are wrong, Judge Snyder placed Ferguson in an untenable position. If Ferguson had filed his Motion immediately upon learning of any ex parte contact, the court's ruling makes clear that the Motion would have come too early because not accompanied by a showing of prejudice resulting from the contact. 11/ Yet when Ferguson

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9/ See Motion for Reconsideration or for an Evidentiary Hearing (R.1079-94).

10/ See Judge Snyder's Order, issued May 1, 1989 (R.1095).

11/ Moreover, in January 1988 the first known ex parte communications were with another judge who was soon out of the case (Judge Friedman). If the Motion had thereafter been filed before Judge Snyder had taken any affirmative action in the case, Ferguson almost certainly would have been met with the

[Footnote continued]

requested a hearing to learn the content, frequency, and results of any contacts, the request was denied; and when, as his only other recourse, Ferguson moved to disqualify Judge Snyder on the basis of the only available evidence of prejudice -- the first ruling apparently reflecting the results of the ex parte contacts -- Judge Snyder declared that the Motion came too late.

The other technical objections to Ferguson's original Motion to Disqualify are moot. Rather than argue about which rules apply, Ferguson fully complied with whatever standards might govern: the Motion was certified, a party swore to it, and three affidavits supported it. 12/

b. Constitutional Violations. Recusal may be constitutionally compelled under the Due Process Clause of the Fourteenth Amendment even in the absence of actual judicial bias. Aetna Life Ins. Co. v. Lavoie, 475 U.S. 813, 825, 106 S.Ct. 1580, 1587, 89 L.Ed.2d 823, 835 (1986).

11/ [Footnote continued]

response that no prejudice could possibly be demonstrated, since that is precisely what Judge Snyder held in his Order even after his prejudicial ruling on Ferguson's competency. April 12 Order at 9 (R.1074).

12/ Moreover, the technical requirements of Florida's laws governing disqualification of judges need not be strictly complied with when the alleged ex parte communications take place outside the presence of the party moving for disqualification. Layne v. Grossman, 430 So. 2d 525, 526 (Fla. 3d DCA), petition denied, 438 So. 2d 832 (Fla. 1983).

The ex parte contacts between two judges 13/ and the prosecution in Ferguson's case prevented him from having a fair hearing, barred him from meaningful access to state-created post-conviction remedies, and thwarted his right to effective assistance of counsel. They thus violate the Due Process Clause of The Fourteenth Amendment to the U.S. Constitution and Article I, Section 9 of the Florida Constitution.

In Morgan v. United States, 304 U.S. 1, 58 S.Ct. 773, 82 L.Ed. 1129 (1938), the Supreme Court invalidated the Secretary of Agriculture's order because those contesting it had not been accorded a full hearing -- that is, "a fair and open hearing." 304 U.S. at 18, 58 S.Ct. at 776, 82 L.Ed. at 1132. 14/ Such a hearing, said the Court, "embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them." Id. In language which remarkably reflects the situation here, except that this is a death case instead of rate-fixing, the Court ruled:

13/ For ease of reference, we hereafter refer only to Judge Snyder, but of course the same rules and the same conclusions apply to Judge Friedman.

14/ The Supreme Court's ruling would apply, a fortiori, in a criminal or quasi-criminal proceeding. See Gardner v. Florida, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977) (criminal defendant in capital case must have full access to presentence report, which would otherwise constitute impermissible ex parte communication with the court). See also Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967); Kent v. United States, 383 U.S. 541, 86 S.Ct. 1045, 16 L.Ed.2d 84 (1966).

> [W]hat would not be essential to the adequacy of the hearing if the Secretary himself makes the findings is not a criterion for a case in which the Secretary accepts and makes as his own the findings which have been prepared by the active prosecutors for the Government, after an ex parte discussion with them and without according any reasonable opportunity to the respondents in the proceeding to know the claims thus presented and to contest them. That is more than an irregularity in practice; it is a vital defect. [304 U.S. at 22, 58 S.Ct. at 778, 82 L.Ed. at 1134.]

The ethical proscriptions of ex parte communications discussed below were crafted in order to permit a party's attorney to function adequately in the adversary system. Heavey v. State Bar, 17 Cal. 3d 553, 559, 551 P.2d 1238, 1241, 131 Cal. Rptr. 406, 409 (1976). Ferguson's counsel was excluded from certain conferences, impeded in his ability to zealously represent his client, and thereby denied meaningful access to post-conviction remedies. 15/ In a capital case, where the right to counsel is guaranteed as a matter of state law, §§ 27.7001, 27.701-708, Fla. Stat. (1988), the exclusion of counsel constituted a violation of Ferguson's due process rights.

In his April 12 Order denying Ferguson's Motion to Disqualify, Judge Snyder adopted the State's view that ex parte

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15/ See Bounds v. Smith, 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977); Johnson v. Avery, 393 U.S. 483, 89 S.Ct. 747, 21 L.Ed.2d 718 (1969); Smith v. Bennett, 365 U.S. 708, 81 S.Ct. 895, 6 L.Ed.2d 39 (1961).

communications must be "coupled with other facts and circumstances demonstrating either bias or prejudice * * *" before disqualification is justified. R.1074 (emphasis in original). But neither due process, ethical standards, nor state law require a showing that the judge is actually biased or prejudiced against a party before that party can succeed in its recusal motion. Rather, under Florida law, recusal of the judge "depends upon the reasonable subjective belief of the petitioner and not on whether he or she has successfully established the actual existence of prejudice." 16/

c. Florida Rule Violations. Under Florida law, "the impartiality of the trial judge must be beyond question * * *." State ex rel. Aguiar v. Chappell, 344 So. 2d 925, 926 (Fla. 3d DCA 1977). Accordingly, "[a] judge must not only be impartial, he must leave the impression of impartiality upon all who attend court." State v. Steele, 348 So. 2d 398, 401 (Fla. 3d DCA 1977). 17/ Canon 3 C(1) of the Florida Bar Code of Judicial Conduct requires that "[a] judge should disqualify himself in a proceeding in which his impartiality might

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16/ Caleffe v. Vitale, 488 So. 2d 627, 629 (Fla. 4th DCA 1986). See also United States v. Heldt, 668 F.2d 1238, 1271 (D.C. Cir. 1981), cert. denied, 456 U.S. 926, 102 S.Ct. 1971, 72 L.Ed.2d 440 (1982).

17/ See also Scott v. United States, 559 A.2d 745, 749 (D.C. 1989) (quoting United States v. Nobel, 696 F.2d 231, 235 (3d Cir. 1982), cert. denied, 462 U.S. 1118, 103 S.Ct. 3086, 77 L.Ed.2d 1348 (1983)).

reasonably be questioned * * *." Under this Canon, a judge's impartiality "might reasonably be questioned" even in the absence of actual bias or prejudice. Thus, a judge should recuse himself when there is "an appearance of bias or prejudice sufficient to permit the average citizen reasonably to question [the] judge's impartiality * * *." United States v. Heldt, 668 F.2d at 1271 (emphasis in original). 18/

It is impossible to square these requirements with the notion that a defendant carries the burden of proving actual prejudice. Instead, the Florida courts have recognized that ex parte communications with the presiding judge may "reasonably cause a litigant to be apprehensive of the fairness of the trial judge," thus requiring disqualification. Deren v. Williams, 521 So. 2d 150, 152 (Fla. 5th DCA 1988). Such communications have a tendency to give rise to an "appearance of a special relationship that would reasonably substantiate

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18/ The Florida courts have repeatedly emphasized that even the appearance of prejudgment, bias or prejudice warrants recusal -- so much so that a writ of prohibition will issue after such an appearance becomes clear. E.g., Pearlman v. Grossman, 433 So. 2d 63 (Fla. 3d DCA 1983), citing Irwin v. Marko, 417 So. 2d 1108, 1109 (Fla. 4th DCA 1982). Thus, a well-founded fear that a party is not being judged by an impartial tribunal is enough to warrant disqualification of that tribunal. E.g., Kasser v. Woodson, 549 So. 2d 802 (Fla. 5th DCA 1989); St. George Island, Ltd. v. Rudd, 547 So. 2d 958, 960 (Fla. 1st DCA 1989); Roudner v. MacKenzie, 536 So. 2d 299 (Fla. 3d DCA 1988). Even the impression of partiality has caused the reversal of a criminal conviction. Dreissan v. State, 431 So. 2d 692, 693-694 (Fla. 3d DCA 1983).

[the excluded party's] fear that he may not receive a fair trial." Caleffe v. Vitale, 488 So. 2d at 629. Indeed, ex parte communications between the prosecution and the judge often have the subtle effect of "attitudiniz[ing the court] against the interest of the defendants and in favor of the prosecution." Turner v. State, 100 Fla. 1078, 1087, 130 So. 617, 620 (1930).

But the rules go beyond appearances. Canon 3 A(4) of the Florida Bar Code of Judicial Conduct provides that "[a] judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding" (emphasis added). This proscription specifically applies to ex parte "communications from lawyers." Fla. Bar Code Jud. Conduct, Canon 3 A(4), commentary. Canon 3 A(4)'s "exacting limits on all such [ex parte] communications are founded upon the entitlement of legal adversaries to have the judge free of outside communications concerning the proceeding without their knowledge and opportunity to respond." 19/

19/ ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1346 (1975) (citing E. Thode, Reporters Notes to Code of Judicial Conduct, ABA, p. 54 (1973)).

Courts, including this one, have sanctioned judges as well as attorneys for engaging in ex parte communications, even in civil cases. 20/ It is inconceivable that conduct which, because of its impropriety and prejudice, would result in court-imposed sanctions is not ground for reversal in a death case. As this Court said only four years ago of Canon 3(A)(4): "This canon implements a fundamental requirement for all judicial proceedings under our form of government. * * * This canon was written with the clear intent of excluding all ex parte communications except when they are expressly authorized by statutes or rules." In re Inquiry Concerning a Judge: Clayton, 504 So. 2d at 395. 21/

20/ E.g., In re Inquiry Concerning A Judge: Clayton, 504 So. 2d 394, 395 (Fla. 1987); In re Inquiry Concerning A Judge: Leon, 440 So. 2d 1267, 1269 (Fla. 1983); In re Disciplinary Proceedings Against Aulik, 146 Wis. 2d 57, 73, 429 N.W.2d 759, 767 (Wis. 1988); In re Fisher, 31 Cal. 3d 919, 920, 647 P.2d 1075, 184 Cal. Rptr. 296 (1982); In re Inquiry Concerning a Judge: Strugis, 529 So. 2d 281, 283 (Fla. 1988) (violation of Code even though motives were proper); In re Lewis, 535 N.E.2d 127, 128-129 (Ind. 1989); In re Filipowicz, 54 A.D.2d 348, 350, 388 N.Y.S.2d 920, 921-922 (1976). See also State v. Leslie, 136 Ariz. 463, 464, 666 P.2d 1072, 1073 (Ariz. 1983) (judge disqualified for ex parte contacts and new trial ordered in first degree case); State v. Emanuel, 159 Ariz. 464, 465-466, 768 P.2d 196, 200-201 (Ariz. Ct. App. 1989) (rejecting waiver argument and vacating sentence).

21/ The most insidious problem with ex parte communications is that even a good and vigilant judge can be subtly influenced by such contacts. No matter how pure the intent, such one-sided communications may allow the judge to be improperly influenced or inaccurately informed. A mere favorable impression of the prosecutor or a simple negative remark about out-of-town pro bono counsel might incline a judge to rely unduly on counsel

[Footnote continued]

Thus, Ferguson is not required to show actual prejudice from the undisputed ex parte contacts occurring in this case. But if this Court disagrees, Judge Snyder's February 23 Order finding Ferguson competent to assist his counsel provides indicia of prejudice. All of his legal arguments and factual analyses were so completely ignored by Judge Snyder's Order that a reasonable person would believe that Ferguson's arguments had not even been taken into account. Moreover, the Order accepted all of the State's arguments -- and in language strikingly similar (and in part, absolutely identical) to that in the prosecution's brief.

3. The Appropriate Remedy. The proper remedy is to vacate retroactively all orders subsequent to the first ex parte communication. The U.S. Supreme Court has ruled that a litigant need not establish actual prejudice in a recusal proceeding in order to obtain a retroactive remedy dismissing a final judgment. Liljeberg v. Health Servs. Acquisition Corp., 486 U.S. 847, 108 S.Ct. 2194, 100 L.Ed.2d 855 (1988). The Court there granted retroactive relief from a final judgment more than ten months after the Fifth Circuit upheld the

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21/ [Footnote continued]

for one party. Indeed, one small piece of damaging information about the defendant privately transmitted can well provide the psychological key to an entire ruling. The possibilities for such subtle, yet prejudicial, exchanges are limitless.

judgment, because it was subsequently discovered that the trial judge had violated 28 U.S.C. § 455(a), which essentially incorporates Canon 3 C(1) of the American Bar Association's Code of Judicial Conduct. Under Liljeberg, the test for a retroactive remedy requires the consideration of three risks: "injustice to the particular litigants, injustice to other litigants as a result of affording relief to the particular litigants, and undermining public confidence in the judicial system." Scott v. United States, 559 A.2d at 754. 22/

The balance here must be struck in favor of Ferguson. He faces the intolerable risk of prejudice in a case that will determine whether he lives or dies. The prosecution would have this Court believe that subjecting it to "the long and tortuous process of resolving the defendant's post-conviction motions all over again" is somehow greater. 23/ A civilized society

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22/ In Scott, a recent case applying Liljeberg, the trial judge during the sentencing phase of a criminal case was negotiating with the Justice Department for a job. After sentencing, and while the defendant's appeal was pending, the defendant learned of the negotiations. The Court of Appeals found a violation of Canon 3 C(1) and ordered the retroactive remedy of a new trial. That remedy was held appropriate without a showing of actual prejudice and despite the fact that the judge's discussions with the Justice Department were totally unrelated to the defendant's case.

23/ See State Attorney's Response in Opposition to the Motion to Disqualify Judge and to Vacate Prior Orders, at 5 (R.1057).

cannot allow the "convenience" of the State to take precedence over the life of a human being. 24/

Obviously, Ferguson cannot know on this record when the first ex parte communication took place. The proper remedy, therefore, is to order a hearing to determine the facts. This was Judge Snyder's initial reaction, and it was only upon reflection that he decided to deny the Motion instead. We respectfully submit that he was right the first time. 25/

24/ In Belton v. United States, 581 A.2d 1205 (D.C. 1990), despite the seriousness of the defendant's offenses and his failure to object, the court reversed because the sentencing judge had indicated at a hearing that he had held brief ex parte conversations with third parties about the defendant. Id. at 1208, 1210-15. Even though the sentencing judge explained that as soon as defendant's name had been mentioned by third parties, he cut off the conversation, id. at 1211, the court reversed.

As to the defendant's failure to object, the court held, first, that it would have been expecting too much to charge a judge with bias just prior to the discretionary act of sentencing, and, second, the judge himself should have been aware of the ethical restraints against him. Id. at 1212. The case was remanded for a new sentencing before a different judge. Id. at 1215.

25/ Even ex parte contacts in administrative proceedings involving formal rulemaking have been held to vitiate the agency's decision and to require a remand for an evidentiary hearing. Sangamon Valley Television Corp. v. United States, 269 F.2d 221 (D.C. Cir. 1959); Home Box Office, Inc. v. FCC, 567 F.2d 9, 51-59 (D.C. Cir.), cert. denied, 434 U.S. 829, 98 S.Ct. 111, 54 L.Ed.2d 89 (1977); see 5 U.S.C. § 557(d) (1988). In both cases, the court ordered the FCC to hold "an evidentiary hearing to determine the nature and source of all ex parte pleas and other approaches that were made to" the Commission or its employees since the beginning of rulemaking proceeding. Sangamon Valley, 269 F.2d at 225; Home Box Office, Inc., 567 F.2d at 58.

After the facts are determined, the appropriate remedy would be to vacate all orders entered after the first ex parte communication.

B. As a Matter of Law, a Capital Defendant Must Be Competent To Assist in Post-Conviction Proceedings

If the undisputed ex parte contacts do not require a further hearing below and do not vitiate the lower court's competency ruling, the Court will have to address Judge Snyder's determination that a capital defendant need not be competent to assist in post-conviction proceedings. This determination was wrong as a matter of law.

Post-conviction proceedings are often highly factual in nature. Many "are concerned in large part with original actions seeking * * * vindication of fundamental civil rights. Rather than preserving claims that have been passed on by [other] courts, they frequently raise heretofore unlitigated issues." Bounds v. Smith, 430 U.S. at 827, 97 S.Ct. at 1498, 52 L.Ed.2d at 82. Since further factual investigation was required to support his Rule 3.850 claim, Ferguson's cooperation was critical.

The court below ruled that the principles of Drope v. Missouri, 420 U.S. 162, 95 S.Ct. 896, 43 L.Ed.2d 103 (1975) (persons unable to assist counsel may not be tried) are inapplicable to post-conviction proceedings. Ferguson recognizes that the application of Drope and its federal and Florida progeny to post-conviction proceedings has not yet been

thoroughly considered by this Court or the U.S. Supreme Court. However, analytically there is no difference between the applicability of due process rights in pre- and post-conviction proceedings, provided the proceeding is a material stage in which punishment is to be determined. Fundamental fairness demands that a person be competent at any stage of the criminal process in which he has an opportunity to present a claim against execution -- especially one which is not wholly based on the record and as to which factual issues are critical.

In reaching his contrary determination, Judge Snyder relied on Jackson v. State, 452 So. 2d 533 (Fla. 1984), which involved a request for a post-conviction competency hearing solely on the basis of state criminal statutes and criminal rules. This Court held that reliance on these criminal procedure provisions was "misplaced," id. at 536, because they are inapplicable in the civil context of Rule 3.850 proceedings. This Court was not asked to -- and plainly did not -- consider the due process protections of the Florida and U.S. Constitutions, which apply with full force to post-conviction proceedings, whether labeled civil or criminal. 26/

26/ "The availability of a procedure to regain liberty lost through criminal process cannot be made contingent upon a choice of labels." Smith v. Bennett, 365 U.S. at 712, 81 S.Ct. at 897-898, 6 L.Ed.2d at 42.

Moreover, as Justice Overton's opinion in Jackson makes clear, the Jackson claim did not present "factual matters in issue that must be determined," 452 So. 2d at 537 (Overton, J., specially concurring), but only questions of law or matters limited to the record, as to which the petitioner's cooperation with counsel was not important. By contrast, Ferguson's motion presents critical issues as to which his ability to recall and communicate facts to counsel is essential. Accordingly, the trial court erred in relying on Jackson and on the fact that a 3.850 proceeding bears a "civil" rather than "criminal" label.

C. The Record Demonstrates that Ferguson Is Not Competent To Assist his Counsel in These Proceedings

Judge Snyder found that Ferguson "does not suffer from a major mental illness;" that he is "malingering, * * * [that he has] a sickness * * * of convenience," and that he is competent. R.1074. For three reasons, these determinations cannot be supported on this record. First, they cannot be squared with the overwhelming evidence that Ferguson has suffered from chronic paranoid schizophrenia for seventeen years and that he was found to be suffering from a major mental illness by every expert examining him over a period of time who was familiar with his history. Second, it is inherently incredible that he could have consistently and successfully faked that disease for seventeen years. Finally, the testimony relied on below was far too incomplete and unsophisticated to support a finding of competence.

1. The Overwhelming Evidence of Record Shows that Ferguson Suffers from Chronic Paranoid Schizophrenia. The record demonstrates a consistent pattern of schizophrenia in Ferguson over a seventeen-year period. Since even the experts on whom the State relies admit that schizophrenia is an incurable disease, R.2333, 2337-38, 2591, in order for this Court to affirm Judge Snyder's finding that Ferguson is not now suffering from that disease, it would have to ignore his entire seventeen-year mental health history. 27/

a. 1971-1988 Examinations. In the period 1971-1976 -- before the offenses for which Ferguson is now under sentence of death -- he was examined on ten different occasions by six different physicians, all of whom diagnosed him as suffering from schizophrenia or as psychotic; only one found him competent, concluding that he was paranoid schizophrenic but at that time in remission. Appendix I. Moreover, Ferguson was either in prison or in a state mental hospital during most of this entire period and twice was found not guilty of criminal conduct by reason of insanity. Furthermore, hospital physicians consistently diagnosed Ferguson as suffering from schizophrenia. R.1589-1601. Not

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27/ For the Court's convenience, attached to this brief as Appendix I is Ferguson's full chronological mental health history. Appendix II is a summary of the seventeen-year mental health expert evidence of Ferguson's schizophrenia.

one of the six examining physicians or any of the hospital treating physicians even suggested the possibility that Ferguson was feigning his symptoms.

After his 1978 arrest for murder, Ferguson was examined by four physicians and three psychologists. One physician found "evidence of an active psychosis" and that Ferguson was "marginally sane and incompetent at this time * * * [having] been insane and incompetent in the past repeatedly over many years." R.1585-88. Two physicians found him competent, although both noted prior episodes of psychosis or paranoid schizophrenia, and one noted "signs of a major mental disorder." R.801-817. One psychologist found that he was not psychotic at the time of the examination. For the first time there was a suggestion that Ferguson was feigning some of his symptoms of mental illness. Id. In part because of this suggestion, Ferguson was examined and tested by three other psychologists, two of whom specifically and expressly ruled out malingering on the basis of psychological tests and their clinical interviews, R.1579-84, 1589-1601; paranoid schizophrenia was either diagnosed or "strongly" suggested. Id. The third, without any review or discussion of Ferguson's history of schizophrenia, asserted that Ferguson was disturbed

but competent; however, he did not make a finding that Ferguson was malingering. R.801-817. See generally Appendix I. 28/

Judge Snyder's Order paid almost no attention to Ferguson's substantial pre-1988 medical history. Yet that history demonstrates beyond any reasonable question that he suffered from schizophrenia and, since the experts agree that the disease is incurable, that he suffers from this major mental illness today.

b. Examinations and Testimony in 1988. In 1988 four physicians (Drs. Merikangas, Stillman, Corwin and Miller) and two psychologists (Drs. Elenewski and Haber) examined Ferguson in advance of the competency hearing. Drs. Elenewski, Stillman and Merikangas found him to be suffering from paranoid schizophrenia and incompetent; Dr. Corwin found him to be incompetent and suffering from schizophrenic illness.

28/ During his ten-year imprisonment under sentence of death, Ferguson was examined by at least three prison psychiatrists, all of whom found him to be suffering from paranoid schizophrenia and incompetent. R.145-470, 1668-78, 1681-82. The State suggested that a fourth prison psychiatrist, Dr. Sotomayer, had examined Ferguson and had found him not to be suffering from schizophrenia. Final Argument and Memorandum of Law in Support of Court Finding the Defendant Competent to Participate and Proceed with Post-Conviction Proceedings, filed October 14, 1988 at 15-16. Judge Snyder seemed to rely quite heavily on the State's version of Dr. Sotomayer's notes. A more careful reading shows that throughout the period in question, Dr. Sotomayer was largely quoting Ferguson concerning the symptomatic relief provided by medication. The same Dr. Sotomayer had previously noted Ferguson's incoherence and other symptoms of mental illness, and on 5/22/83 had diagnosed him as suffering from paranoid schizophrenia. R.145-470.

R.1532-35, 1683-86, 1687-94, 1695-99. Dr. Miller found him to be competent and not suffering from a severe major mental disorder. R.823-827, 828-832. Dr. Haber found him competent and suffering from a sociopathic personality disorder. R.838-847.

The experts who testified in 1988 -- including court-appointed Drs. Miller and Haber -- all agreed that multiple contacts over time and careful consideration of the complete medical history are important in diagnosing schizophrenia. R.2106, 2349, 2590-93. Of the six experts who examined him in 1988 and whose reports and testimony are central to the competency issue herein, the four who saw him on more than one occasion and who took his long medical history into careful consideration (including a psychologist who conducted a psychological test which he had administered ten years previously) unanimously found him incompetent.

In contrast, psychologist Haber, on whom Judge Snyder's Stay Order heavily relies, saw Ferguson only once and then for only 1-3/4 hours, and he was unable to administer any psychological tests. R.2340, 2406. Furthermore, he was not even aware of the critical history of pre-1976 mental illness, R.2315, and he failed to take into account any part of the seventeen-year record in his report. R.838-847. In addition, he gave no weight to the nearly unanimous view that Ferguson suffers from schizophrenia, even though he testified that "a high degree of conformity" among examining professionals is a

good sign that "there is a bona fide mental disorder." R.2416-17. Judge Snyder also relied on the report and testimony of Dr. Miller, who saw Ferguson only once and only for 1-1/2 hours, R.2561, and who admitted in his testimony that he was not even sufficiently familiar with the seventeen-year medical history to know that Ferguson had been taking anti-psychotic medications for a long period of time. R.823-827, 828-832, 2579.

c. Psychotropic Medication. Throughout the periods that Ferguson was hospitalized and imprisoned from 1971 through 1988, he received powerful anti-psychotic medications. R.41-144, 145-470, 1554-56, 2046, 2048. His medications were described in undisputed testimony as "major tranquilizers * * * used for the treatment of serious mental illness, such as schizophrenia." R.2046. Dr. Merikangas and the court-appointed experts (Drs. Miller and Haber) agreed that it would be improper for treating physicians to prescribe such drugs if he were not suffering from a psychosis. R.2050-51, 2341-42, 2347, 2581-82.

More significantly, the undisputed evidence shows that these medications have radically different effects on psychotics as opposed to persons who do not suffer from schizophrenia. "The fact that this man * * * can tolerate real high doses of anti-psychotic medication is indicative of the seriousness of his illness. Were you to take the same level, chances are you would not be conscious." Elenewski, R.2245. Court-appointed expert Dr. Miller agreed. "[I]f a person who

is not psychotic gets anti-psychotic medicine, * * * that person would probably be rendered sleepy or drowsy." R.2585-86.

There is nothing in Ferguson's extensive medical records indicating that he responded to his medications with drowsiness or unconsciousness. R.145-470. To the contrary, the record contain frequent references to complaints of sleeplessness and descriptions of Ferguson as being "alert." See, for example, R.176, 266, 325, 339. Court-appointed expert Dr. Haber described Ferguson as "hyperalert" during his examination. R.838-847. Nevertheless, Judge Snyder did not even refer to this history of medications.

2. It Is Inherently Incredible that Ferguson Faked All of his Symptoms for Seventeen Years. In light of Ferguson's medical history, to uphold Judge Snyder's finding, the Court would have to determine that Ferguson has been consistently and successfully faking all of his classic symptoms over a seventeen-year period. The Court would further have to find that, despite his drugs, Ferguson had the memory and sophistication on at least twenty-four different occasions to fool fourteen forensic and treating psychiatrists and psychologists, trained to detect malingering. See generally Appendix I. Moreover, the Court would have to determine that Ferguson knew that true schizophrenics will present such subtle symptoms as flat or inappropriate affect, loosened associations, thought blocking, concretistic thought, psychomotor retardation, and ideas of reference -- all of which trained examiners have reported in Ferguson. Appendix II.

The latter point was underscored by Dr. Merikangas, a Yale expert on the subject of psychiatric malingering, R.1518-21, 2038-40, who testified on Ferguson's symptoms as follows:

> Those [subtle signs of schizophrenia] are not the kind of things that malingerers produce in general. * * * [I]n the case of malingering of psychiatric problems they will claim to hear voices, which is something no one can disprove but which should be accompanied by the [subtle signs of schizophrenia], which are much more difficult to malinger. [R.2069.]

Dr. Merikangas also testified that even he could not have carried out the successful long-term charade Judge Snyder attributed to Ferguson. "I might be able to for a brief time, but certainly not for seventeen years in many different settings with constant observation. * * * [Ferguson] is not malingering any major features of his mental illness." R.2109. Even Drs. Haber and Miller, on whose opinions Judge Snyder relied, admitted that it is difficult to keep up the act of malingering over a long period of time. R.2452, 2601.

3. Ferguson Could Exaggerate His Symptoms and Still Be Suffering from Schizophrenia and Be Incompetent To Assist Counsel. The experts on whom Judge Snyder relied (Drs. Haber and Miller) overlooked a key factor -- that even if Ferguson may have exaggerated or feigned some of his symptoms, this does not mean he must therefore be competent.

One of the major factors underlying the Haber and Miller conclusion that Ferguson does not suffer from a major

medical disease was their observation not only of classic schizophrenia symptoms but of extensive memory impairment, a symptom which both found to be consistent with organic brain damage and inconsistent with schizophrenia. R.2290-91, 2547-51. In large part on the basis of these observations (neurological tests having ruled out organic brain damage), they concluded that Ferguson must necessarily be malingering his significant memory loss. R.823-827, 828-832, 2296-2303. From this determination that Ferguson was malingering some of his symptoms, both experts erroneously concluded that all of his symptoms must have been faked. 29/

Court-appointed expert Dr. Corwin was the only testifying physician who examined Ferguson three times, two of which were years ago. He testified that Ferguson's 1988 symptoms might include "conscious exaggerations." R.2173. But, giving appropriate weight to the long history of psychosis, his analysis of possible malingering was considerably more sophisticated than Drs. Miller's and Haber's -- and, unlike theirs, was entirely consistent with the entire

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29/ The assumption that memory impairment is not a symptom of schizophrenia is simply incorrect. Memory impairment has been noted since 1971 as one of the indicia supporting prior diagnoses of Ferguson's disease. See Appendix II. Moreover, the Diagnostic and Statistical Manual of Mental Disorders (3d ed. Rev.), American Psychiatric Ass'n (1987), at p. 190, describes memory impairment and disorientation as occasionally associated features of schizophrenia.

record. Dr. Corwin testified that Ferguson was psychotic, incompetent and consciously malingering to some limited extent. R.2173-74.

Significantly, both Drs. Miller and Haber accepted the reasonableness of the Corwin thesis. Dr. Haber testified, "It's possible * * * [that] a person [could] be truly incompetent in the sense that he cannot adequately assist his attorney and still be in part malingering." R.2347. He described the Corwin thesis as "an interesting * * * opinion. I respect it. I certainly think it's possible." R.2428. And in very telling responses to cross-examination, he admitted that he could not tell which signs of disorientation he observed were and were not malingering. R.2463-64.

Dr. Miller, too, recognized that Ferguson might be both mentally ill and malingering, R.2563, but he nonetheless testified that if he observes malingering, he always finds competence, even in the face of evidence of psychosis. R.2599-2600. 30/

Thus, both Drs. Haber and Miller, on whom Judge Snyder relied, agreed that a person can be both incompetent and

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30/ Both Drs. Haber and Miller were unable to identify specifically when Ferguson was allegedly lying. R.2364, 2563. Indeed, the record shows that one of the few symptoms these doctors specifically identified as purported malingering -- Ferguson's blurred vision -- was probably genuine. Dr. Merikangas discovered that Ferguson's vision improved with use of Dr. Merikangas's reading glasses. R.2088.

malingering; yet both concluded that Ferguson does not suffer from a major mental illness from the finding of malingering alone. It is the application of this faulty analysis to Ferguson, who indisputably suffers from chronic schizophrenia, that puts Drs. Haber and Miller out of step with all the experts in the seventeen-year period who have diagnosed Ferguson's schizophrenia. Their conclusion that Ferguson is not suffering from a major mental illness and is therefore competent cannot withstand analysis and should not have been accepted by Judge Snyder. 31/

* * * *

For all the foregoing reasons, this Court should conclude that Ferguson is not competent to assist his counsel

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31/ Judge Snyder also relied on certain lay testimony in finding Ferguson to be malingering all of his symptoms of schizophrenia, R.1006; on certain letters purported to have been written by Ferguson; and on testimony of Drs. Miller and Haber that a person with the symptoms presented to them by Ferguson would not have been able to compose the letters in question. R.1007. However, Judge Snyder did not even refer to, much less analyze, the evidence and arguments presented by Ferguson that (i) persons suffering from this major mental illness can, particularly when medicated and not under stress, perform in the normal ways the prison guards testified about; (ii) the letters were written well before 1988 and are not particularly useful in establishing the author's present mental health situation, even if Ferguson was the author, which was not established; (iii) Dr. Haber testified that even persons suffering from paranoid schizophrenia can write lucid letters; (iv) each of the lay witnesses testified that their contacts with Ferguson were extremely limited; and (v) two of the prison guards had observed symptoms of schizophrenia or other severe mental illness in Ferguson. See R.932, 940-945.

in these proceedings and should therefore abate the proceedings. 32/ Alternatively, the Court should set aside Judge Snyder's rulings on that issue and remand for further proceedings to address the significance of the ex parte contacts. Either resolution would obviate the need for the Court to review the merits of the issues raised by Ferguson in these Rule 3.850 proceedings.

II. THE NUMEROUS PREJUDICIAL ERRORS OCCURRING DURING FERGUSON'S TRIALS ENTITLE HIM AT THE VERY LEAST TO NEW SENTENCING PROCEEDINGS

In the event the Court determines that the ex parte contacts do not vitiate the competency rulings and that Ferguson is sufficiently competent to assist his counsel in these Rule 3.850 proceedings, the Court must reach the merits of the issues raised by Ferguson in these proceedings. We address those issues in two sections -- issues the lower court found properly preserved (Section II), and those it found waived (Section III). In this Section II we show that even if

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32/ Ferguson's incompetence was recently reaffirmed at a hearing held before the Honorable George H. Pierce, Acting Circuit Judge, at Florida State Prison, Starke, Florida, on February 22, 1991. At that hearing, relying on the testimony of Dr. Robert E. Bell, Jr. (the attending psychiatrist at the prison) that Ferguson suffers from a mental illness, cannot care for himself, and must be moved to a psychiatric facility, Judge Pierce ordered Ferguson transferred to a medical institution. Ferguson has moved this Court for leave to submit the transcript of this hearing and Judge Pierce's order to the lower court, for eventual inclusion in a supplemental record to this Court.

this Court limited its review to the five errors the trial court did not find waived, those errors, particularly taken together, entitle Ferguson at the very least to new sentencing proceedings. 33/

Before addressing each of those five errors in turn, as an initial matter we note that the June 19, 1990 Order of the court below dismissing Ferguson's claim on each of the issues must be reviewed with particular care -- and should be viewed with some measure of circumspection -- in light of the manner in which that Order was adopted. Following the Rule 3.850 hearing held on May 19, 1990, counsel for both Ferguson and the State filed lengthy and detailed Proposed Findings and Conclusions setting forth each side's positions on the substantial testimony and documentary evidence in the case. Both parties filed with the court on Thursday, June 14, 1990. On the following Tuesday, June 19, 1990, the court issued "its" Order by simply signing the State's 35-page submission, without changing or adding to the State's position on even a single point of fact or law. This sequence of events calls into question the extent to which the various findings and conclusions in the June 19, 1991 Order reflect the kind of truly critical and independent weighing of the evidence and analysis required of a trial court in a case of this importance.

33/ The Brady and Batson errors are sufficiently significant to warrant retrials on the merits.

A. Ferguson Was Denied Effective Assistance of Counsel by the Failure To Investigate and Present Compelling and Readily Available Mitigating Evidence

At the post-conviction hearing held May 17, 1990, Ferguson presented testimony from his mother and five of his siblings describing the extreme poverty, physical and psychological abuse, and trauma inflicted upon him as a child. See R.2919-3025, 3060-70, 3175-79. He also introduced psychiatric, school, court, and prison records, which documented his disturbed adolescent and adult life, spent primarily in prisons and later in state mental hospitals. See Exhibits from the May 17, 1990 Hearing ("Ex. (5/17/90)") B through M. Finally, Ferguson presented expert testimony from Robert Link, Esq., an attorney with extensive experience in Florida capital cases, who testified that these uncontradicted facts about Ferguson's life should have been discovered by trial counsel and could have provided strong and credible evidence in support of at least two statutory and more than a dozen nonstatutory mitigating circumstances. See R.3071-3116, 3132-53.

But, in stark contrast with the substantial evidence proffered at the post-conviction hearing, almost no mitigating evidence whatever was presented to the juries at the sentencing phases of either the Carol City or the Hialeah trials. Indeed, defense counsels' entire evidentiary presentations at sentencing comprised barely two pages of the Carol City

transcript and not even a single page of the Hialeah transcript. RCC.1051-53; RH.1438-39. 34/ Ferguson's Carol City trial counsel has now admitted that he simply made no effort to locate Ferguson's prior psychiatric or other institutional records, R.3032-35, 3042-45, 3050-55, 3057-59, 3201, while his Hialeah trial counsel has testified that he never investigated Ferguson's deprived family background, because he mistakenly believed that such non-statutory mitigating evidence was inadmissible under Florida law. R.3165-66. Given these admitted failures by trial counsel to investigate and present readily available mitigating evidence, as well as trial counsel's ineffectiveness at sentencing in other respects, each of the death sentences imposed on Ferguson must be vacated under this Court's recent holding in Stevens v. State, 552 So. 2d 1082, 1085-88 (Fla. 1989). Accord, e.g., Middleton v. Dugger, 849 F.2d 491, 493-495 (11th Cir. 1988).

1. Summary of Substantial Mitigating Evidence Readily Available But Not Presented at Ferguson's Trials

a. Ferguson's Childhood. Ferguson was born February 27, 1948, the third of eight children born to Dorothy Ferguson between 1945 and 1958 by four different fathers.

34/ The symbol "RCC" denotes the transcript of testimony and proceedings contained in the record on appeal in this Court in the Carol City case, no. 55,137. The symbol "RH" denotes the transcript of testimony and proceedings contained in the record on appeal in this Court in the Hialeah case, no. 55,498.

R.2920-22. Until he was seven years old, Ferguson lived with his mother and siblings in a one-bedroom house in the Overtown section of Miami. R.2923. Ferguson's father, James Ferguson, and an uncle also lived in this one-bedroom house during at least part of this period. R.2990.

James Ferguson was an alcoholic who drank excessively and physically abused Ferguson's mother in front of the children. R.2924. When Ferguson was five years old, his mother had the police physically evict his drunken and abusive father from the home. R.2925. Thereafter, Ferguson's father provided little or no financial support to the family, and Ferguson's mother was forced to attempt to support her family by braiding the hair of neighborhood children. Id.

In 1955, Ferguson moved with his mother and siblings to a housing project in the Liberty City section of Miami, where they lived until 1960. During this period, Dorothy Ferguson continued to support herself and her children by braiding hair for neighbors and by receiving public assistance "for a short time." R.2926. One of Ferguson's older half-sisters, Patricia Blue, described the dire poverty in which Ferguson lived during these years:

> Times was pretty hard because my mother never had enough money and things like that. * * * She * * * always talk[ed] about being broke. We didn't, people use to give her clothes and stuff for us, okay.
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> * * *
>
> [W]e used to complain we never had anything new like the rest of the kids in the neighborhood did. I know

> it bothered him [Ferguson] a lot * * * Most of the clothes that we got were for girls. It wasn't like for boys. [R.2991-93.]

During this same period, Ferguson's mother became involved with a number of men, including the two men who fathered her sixth, seventh, and eighth children. R.2929-30, 2964-65, 2999, 3005-06. Ferguson's sisters testified that their mother "always put her boyfriends first." R.3001. They testified, for example, concerning one particularly dramatic incident when Mrs. Ferguson sent her children away to live on their own for an entire summer in an isolated, rural house, with no indoor toilets, plumbing, or electricity, so that she could be alone with one of her boyfriends who disliked children. R.2995-99, 3062-63. Ferguson was particularly disturbed by this rejection. R.2996-99, 3062-63.

Despite her relationships with other men, Dorothy Ferguson continued throughout the 1950s to take Ferguson for periodic visits with his father at a bar in Overtown. R.2928-29, 3061-62. Ferguson's father continued drinking heavily during this period, including during visits with his son. R.2928-29. Mrs. Ferguson testified, however, that Ferguson maintained a strong attachment to his father and was "very depressed about his father not being in the home." R.2929.

Notwithstanding these deprived circumstances, Ferguson attended and made reasonable progress in school during the years that he lived in the Liberty City projects. Between the

Fall of 1954 and the Fall of 1960, he advanced from first to sixth grade. Ex. (5/17/90) B. Dorothy Ferguson described her son during this period as "very quiet," as "a follower," and as a healthy and obedient child. R.2928, 2949-50.

b. Ferguson's Adolescence. During the early 1960s, between the ages of twelve and sixteen, Ferguson was confronted with a series of traumatic experiences that profoundly affected the rest of his life. Beginning in the late 1950s, Ferguson's mother had become involved with a man named Emory Williams, whom she described at the post-conviction hearing as "a jealous-type fellow * * * very abusive-type." R.2930. One of Ferguson's sisters testified that Williams was "a wife beater" and an "alcoholic." R.2958-59. On several occasions, Ferguson was forced to attempt to defend his mother against Williams' violent attacks. R.2932-33, 2961-63, 2974-75.

Despite this abusive conduct, in late 1960 or early 1961 Dorothy Ferguson moved with six of her children to Orlando, where they lived with Williams in his two-bedroom apartment for approximately six months. R.2930-32. While in Orlando, Ferguson's mother and Williams apparently married, although Mrs. Ferguson testified at the post-conviction hearing that she never in fact considered herself married to Williams, because he had forced her to go through the marriage ceremony by concealing a gun in his pocket. Id. Ferguson and his siblings, however, believed that their mother had remarried and that the abusive Williams had become their stepfather. R.2932, 2962.

In June or July of 1961, Dorothy Ferguson fled with her children back to Miami in an attempt to escape Williams' continued violent abuse. R.2933-34, 2960. During the following eighteen months, Ferguson's family moved repeatedly, living in at least five different places. R.2934-35, 2962-63. But Williams followed the family to Miami and continued to abuse Ferguson's mother. As one of Ferguson's sisters testified: "No matter where we moved, * * * he [Williams] found us." R.2960. Ferguson's sisters testified to repeated violent incidents during this time period, in which Williams beat Mrs. Ferguson, punched her in the head, tried to stab her with a knife, and fired a gun at their home. R.2960-62, 2973-75.

In the midst of this upheaval and violence, Ferguson's father died suddenly on December 27, 1961, as a result of his chronic alcoholism. Ferguson was thirteen years old at the time. His mother testified that Ferguson was depressed following his father's death, R.2936-37, and one of his sisters testified that Ferguson felt a severe loss from his father's death. R.2975. Three months later, Ferguson was committed as a ward of the Florida School for Boys of Okeechobel on a charge of breaking and entering. Ex. (5/17/90) C. This was Ferguson's first known problem with the law. He was released from the School for Boys in February 1963, but later was sent back for the period from January 6, 1964 to September 29, 1964, for reasons not reflected in the records. Id.

Ferguson's progress in school also came to an end following the death of his father. Ex. (5/17/90) B. Ferguson remained in the seventh grade during the school years 1961-62, 1962-63, and 1963-64, and then dropped out of school in January 1965, at the age of sixteen. Id. Dorothy Ferguson attributed her son's withdrawal from school to his "being depressed * * * thinking about his father." R.2939-40. Three months after dropping out of school, Ferguson was arrested and charged in Juvenile Court with rape. Id. He was tried and convicted as an adult of assault with intent to commit rape and sentenced to ten years in state prison. Id.

c. Ferguson's Adult Life. Ferguson was paroled from prison on December 31, 1968, at the age of twenty, and returned to live with his mother. R.2941. One of his half-sisters testified that, during this time period, Ferguson was "calm and collected, very quiet, very personable," and concerned about his family. R.3007-11.

Then, in October 1969, Ferguson was shot four times and nearly killed by a Dade County Public Safety Department Officer, Edward Hartmann, in the parking lot of a fast food restaurant. See R.1536-37; accord R.471-636 (records from Jackson Memorial Hospital). Hartmann alleged that he shot Ferguson only after Ferguson had fired several shots which missed him. R.1536-37. But Ferguson's mother testified at the post-conviction hearing that, when she visited her son at Jackson Memorial Hospital shortly after the shooting, he told

her he had not shot at Officer Hartmann. R.2953. Ferguson in fact was acquitted by a jury of all charges related to his alleged assault on Officer Hartmann. See Section II.C. infra.

Ferguson's mother and sisters testified concerning the serious and lasting effects of the injuries suffered by Ferguson as a result of the October 1969 shooting. R.2943-44, 2965-66, 3011-12. There was testimony, for example, that following the shooting Ferguson's behavior became "strange," "hostile," and "aggressive," and that he would "drift into space" or look about the room in a paranoid fashion during conversation with family members. R.2943-44, 2968-69, 2976-78, 3011-15. There also was testimony that Ferguson complained of serious headaches and would sit alone in a bedroom talking loudly to himself for hours. R.2943-44, 2977-78. 35/

On May 20, 1971, three months after his trial and release in connection with the October 1969 shooting incident, Ferguson was arrested and charged in Dade County Circuit Court with robbery. See R.1545-53. In response to a request from

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35/ Ferguson's half-sister Patricia Blue, who was employed during this time at the Dade County State Attorney's Office, testified that one of her co-workers informed her that her brother was having serious mental problems during the period he was being held in jail awaiting trial on charges arising from the shooting incident. Ms. Blue visited Ferguson in jail and found him to be "a totally different person," both physically and mentally: "He looked different. He was acting weird. He said he was seeing things there and that they were putting things in his food and, you know, he was rambling on and on * * *. He looked like a very disturbed person." R.3013-14.

Judge Paul Baker, Ferguson was examined by two psychiatrists, each of whom diagnosed him as suffering from a serious mental disorder that rendered him unable to distinguish between right and wrong. Exs. (5/17/90) D and E. Eventually, in October 1975, Judge Arden Siegendorf found Ferguson not guilty by reason of insanity of the 1971 robbery charges. See R.1545-53.

For most of the five years between August 1971 and July 1976, Ferguson was incarcerated in state mental institutions. See Ex. (5/17/90) K, and R.1589-1601. At the post-conviction hearing, Ferguson presented the court with ten separate reports, prepared by five different psychiatrists who had examined him during these years. See Exs. (5/17/90) D through M and Appendix I and II. Those reports contain extensive discussions of interviews with Ferguson, during which he reported having recently spoken with his father and actively hallucinated about such things as seeing angels or having roaches in his brain. Id. Each of these ten reports concluded that he suffered from a major mental and emotional disorder.

2. Ineffective Assistance of Counsel at the Sentencing Phase of the Carol City Case. During the sentencing phase of the Carol City trial, in an effort to link Ferguson to his earlier criminal convictions, the State presented testimony from seven different witnesses, including Officer Hartmann, who falsely testified that Ferguson actually had shot him four times and had been convicted of assault with intent to commit

murder in connection with the 1969 shooting incident. RCC.1033. 36/ In response, defense counsel Robbins presented only one witness, Ferguson's mother, from whom he elicited a grand total of 76 words of testimony. RCC. 1051-53. That testimony provided the jury with absolutely no information concerning Ferguson's tragic and often violent family background, or his long-term incarceration in boys school, prisons, and mental hospitals beginning at age fourteen. Id.

This Court has firmly established that evidence of a troubled family or personal background -- such as the evidence amply available with respect to Ferguson -- is admissible and often is extremely important in capital sentencing proceedings. 37/ This Court further has held that evidence of a defendant's impaired mental or psychological condition -- such as that reflected in the numerous diagnoses and reports of Ferguson's paranoid schizophrenia from the early and mid-1970s -- is admissible both to prove statutory and non-statutory mitigating circumstances, 38/ and to "weaken the aggravating

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36/ See Section II.C. infra, concerning the independent constitutional violation resulting from Hartmann's false testimony.

37/ See Stevens, 552 So. 2d at 1086; Holsworth v. State, 522 So. 2d 348, 354 (Fla. 1988); Brown v. State, 526 So. 2d 903, 908 (Fla.), cert. denied, 488 U.S. 944, 109 S.Ct. 371, 102 L.Ed.2d 361 (1988).

38/ Amazon v. State, 487 So. 2d 8, 13 (Fla.), cert. denied, 479 U.S. 914, 107 S.Ct. 314, 93 L.Ed.2d 288 (1986); Mines v. State, 390 So. 2d 332, 337 (Fla. 1980), cert. denied, 451 U.S. 916, 101 S.Ct. 1944, 68 L.Ed.2d 308 (1981).

factors" relied upon by the State. 39/

The United States Supreme Court's very recent decision in Parker v. Dugger, supra, further underscores the importance of the nonstatutory mitigating evidence available in this case. In Parker, as here, a Florida capital defendant was convicted of a brutal first-degree murder and involving numerous aggravating factors; but, again as here, nonstatutory mitigating factors also were shown. Most significantly, there was evidence that the defendant may have been mentally impaired at the time of the killing and had a difficult childhood. The Supreme Court in Parker held it imperative that both the trial court and this Court carefully review this type of mitigating evidence before approving a death sentence, so as to ensure protection of the defendant's constitutional right to an "'individualized determination on the basis of the character of the individual and the circumstances of the crime.'" Parker, 111 S.Ct. at 739, 112 L.Ed.2d at 826 (quoting Zant v. Stephens, 462 U.S. 862, 879, 103 S.Ct. 2733, 2744, 77 L.Ed.2d 235, 251 (1983) (emphasis in original)). This holding in Parker, as well as the similarity of the key mitigating evidence in Parker to that available here, makes clear that Ferguson's mitigating

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39/ Elledge v. Dugger, 823 F.2d 1439, 1447 (11th Cir.), cert. denied, 485 U.S. 1014, 108 S.Ct. 1487, 99 L.Ed.2d. 715 (1987); Huckaby v. State, 343 So. 2d 29, 33-34 (Fla. 1977); accord Middleton, 849 F.2d at 495.

evidence would have been of considerable significance to a full and fair sentencing determination.

It is equally certain that defense counsel in a capital case has a duty to conduct "reasonable investigations" into his client's background to determine whether there exists mitigating evidence of the types described above. Stevens, 552 So. 2d at 1085-87; Middleton, 849 F.2d at 493. Any decision "to limit an investigation as to available mitigating circumstances * * * 'must flow from an informed judgment'" about what evidence is likely to be uncovered. 40/ At the post-conviction hearing, expert witness Link testified without contradiction that at the time of the Carol City trial a reasonable investigation of mitigating evidence necessarily should have included inquiries into both the defendant's family background and his medical, psychological, school, and court records. R.3091-94, 3149-51. 41/

40/ Johnson v. Dugger, 911 F.2d 440, 464 (11th Cir. 1990) (quoting Harris v. Dugger, 874 F.2d 756, 763 (11th Cir.), cert. denied, ___ U.S. ___, 110 S.Ct. 573, 107 L.Ed.2d 568 (1989)); accord Stevens, 552 So. 2d at 1087.

41/ Link worked in the Public Defender's Office in Dade County during the years prior to and during the Carol City and Hialeah trials and has had extensive experience both in litigating and in training lawyers to work on capital cases. R.3072-74. He also has been accepted as an expert witness in seven other post-conviction cases involving capital sentencing issues and has testified in at least one of those cases that trial counsel's assistance in the sentencing phase was not ineffective. R.3074-75, R.3112-14, R.3147-48; see also Middleton, 849 F.2d at 494 (relying upon expert testimony from Link in vacating death sentence).

The evidence presented at the post-conviction hearing demonstrates that Robbins clearly failed to conduct "reasonable investigations" of the type required by Stevens and Middleton. With respect to Ferguson's family background, although Robbins testified that he remembered speaking to Ferguson's mother and one of his sisters, he recalled nothing about the substance of those conversations. R.3041-42. Ferguson's mother, however, clearly recalled that, in her meetings with Robbins, he asked her no questions about her son's "upbringing," R.2946, and one of Ferguson's half-sisters testified that she had spoken to Robbins for the limited purpose of retaining him as counsel. R.3016. Ferguson's other siblings testified without contradiction that Robbins had never even attempted to contact them, although each of them resided in Dade County at the time of the Carol City trial. R.2967, 2979, 3068, 3179. This Court in Stevens accepted precisely this type of testimony in concluding that trial counsel was ineffective in failing to investigate adequately the defendant's family background. 552 So. 2d at 1085 n.7. 42/

42/ Robbins also admitted at the post-conviction hearing that he had made no effort to locate any school, court, or hospital records pertaining to Ferguson. R.3034-35. Link testified that he could conceive of no tactical reason for not at least investigating a defendant's prior family history by talking with relatives and by securing certain basic documents such as a defendant's school records. R.3092, 3100-01.

With respect to Ferguson's extensive history of psychiatric problems, Robbins testified that his investigation was limited to a review of four reports prepared in May 1978, shortly before the Carol City trial, each of which focused narrowly on the question of whether Ferguson was competent to stand trial at that time. R.3034, 3050-51, 3201; 801-817. Although two of those reports made vague references to the fact that Ferguson had been examined by psychiatrists in the early 1970s, Robbins admitted that he never attempted to locate any reports from, or to determine the results of, those earlier examinations. R.3050-51, 3057-58 ("[o]bviously I did not investigate these prior reports"). As a result, Robbins was never aware that Ferguson repeatedly had been diagnosed as a severely disturbed paranoid schizophrenic. Robbins admitted that he had no tactical or strategic reason for not attempting to locate Ferguson's earlier psychiatric reports, R.3051, and he further admitted that he would have used those earlier reports or information derived therefrom at the sentencing phase of the Carol City trial had he been aware of their existence. R.3035, 3052-55.

The consequences of Robbins' ineffective performance in the Carol City case were considerably greater than those which led the courts to vacate death sentences in Stevens and Middleton. Trial counsel in Stevens had failed to investigate his client's troubled family background, which in many respects was similar to, and certainly was no more traumatic than,

Ferguson's. 552 So. 2d at 1085-87. Trial counsel in Middleton had failed to discover several documents reflecting his client's two-week stay as a child at a state hospital and his incarceration in youth services and prison facilities. 849 F.2d at 493-494. Here, Robbins' deficient performance left uncovered both Ferguson's disturbed family background and his long history of psychiatric treatment and incarceration. As Link testified, these two types of mitigating evidence -- both of which easily would have been discovered by even the barest of competent investigations -- could have been used in combination to present an extremely compelling mitigation case. R.3093-95, 3143-44.

Not one of the reasons endorsed by the court below for denying post-conviction relief based on Robbins' ineffective assistance can withstand scrutiny. First, the suggestion that Robbins adequately discharged his obligation to investigate Ferguson's psychiatric history simply by reviewing the four competency reports submitted in May 1978, see Order Denying Motion and Supplement to Motion for Post-Conviction Relief dated June 19, 1990 ("Order (6/19/90)") at 10, ignores completely the fact that those reports said almost nothing about Ferguson's extensive history of institutionalization and diagnosed psychiatric illness. As noted above, only two of the four reports made even the most conclusory mention of Ferguson's prior psychiatric treatment, and those reports do not begin to disclose the quantity or quality of mitigating

evidence contained in the numerous prior reports that Robbins never even attempted to locate. Compare R.801-817 with Exs. (5/17/90) B through M. While the receipt by Robbins of the four May 1978 reports should have heightened his duty to locate the prior psychiatric reports referred to therein, it is inconceivable that his mere review of those four facially incomplete reports could have discharged completely his duty to conduct a reasonable investigation into Ferguson's psychiatric history. Accord R.3091-92, 3149-51 (Link).

Second, the contention adopted by the court below that Robbins made a "tactical decision" not to present psychiatric evidence in mitigation, see Order (6/19/90) at 10-12, flatly ignores the fact that Robbins never investigated, and therefore never knew, what psychiatric evidence could have been presented. Thus, Robbins' failure could not possibly have been "the result of an informed decision." Stevens, 522 So. 2d at 1087; accord Johnson, 911 F.2d at 463-464; Middleton, 849 F.2d at 494; R.3092-93 (Link). Moreover, at the post-conviction hearing, Robbins specifically refused to agree with the State's repeated attempts to characterize his failure to present psychiatric evidence as a strategic decision, R.3044-45, 3057-58, and he flatly rejected the suggestion that he would not have presented additional psychiatric evidence even if he

had obtained the prior psychiatric reports. R.3035, 3052-55. 43/

Finally, the lower court's conclusion that Robbins' deficient performance at sentencing did not prejudice Ferguson's case before the jury is unsupported by the record. As Link summarized in his testimony, an adequate investigation of Ferguson's family and psychiatric background would have permitted Robbins to present "very strong" and "very credible" evidence in support of two statutory and between thirteen and seventeen non-statutory mitigating circumstances. R.3095-3103, 3143-44. Based on his extensive experience, Link testified that he personally has tried cases in which juries recommended life imprisonment despite the defendant's "bad, serious,

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43/ The court below entered no findings or conclusions on Ferguson's claim that Robbins was ineffective in failing to investigate Ferguson's family background. It instead merely adopted the State's contention that "Robbins was not ineffective for failure to present additional testimony concerning the Defendant's family background." See Order (6/19/90) at 12 (emphasis added). This contention, again, ignores the fact that, because Robbins never even investigated his client's family background, he was not in a position to make an informed or reasonable decision whether to present additional testimony from Ferguson's mother or to call one or more of Ferguson's doctors or siblings. In addition, the lower court's assertion that Ferguson's half-sister, Ms. Blue, was unwilling to testify at the Carol City trial is directly contradicted by the only evidence in the record on point, Ms. Blue's own testimony. R.3024-25.

horrible crimes," where substantial mitigating evidence of the type available here was presented. R.3149; accord R.3110. 44/

This Court similarly has recognized that where, as here, trial counsel fails to discover or present "substantial mitigation evidence" and does "virtually nothing on [his client's] behalf during the penalty phase of trial," it is impossible to conclude that trial counsel's ineffectiveness was harmless. Stevens, 552 So. 2d at 1085, 1088 n.13. Indeed, the prejudice to Ferguson under the circumstances here is apparent from the often acknowledged facts that a "disadvantaged background," such as that exemplified by Ferguson's childhood and adolescent life, may significantly affect a jury's view of a defendant's culpability, see, e.g., California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934, 942 (1987) (O'Connor, J., concurring), and that psychiatric evidence, such as that which Robbins failed to discover or present, "has the potential to totally change the evidentiary picture by altering the causal relationship that can exist between mental illness and homicidal behavior." Middleton, 849 F.2d at 495.

44/ See, e.g., Amazon v. State, 487 So. 2d at 13; Moody v. State, 418 So. 2d 989 (Fla. 1982), cert. denied, 459 U.S. 1214, 103 S.Ct. 1213, 75 L.Ed.2d 451 (1983); Jones v. State, 332 So. 2d 615 (Fla. 1976).

As Link testified, if this Court were to endorse the lower court's ruling that even the very substantial and compelling mitigating evidence available here could never reasonably be expected to cause a jury to recommend life imprisonment, in light of the facts of the crimes in question, then for all practical purposes the lower courts in this State could dispense with the jury's input at the sentencing phase altogether and impose death sentences automatically in all cases involving extremely aggravating circumstances. R.3136-37. That clearly is not the law. A new sentencing hearing in the Carol City case should therefore be ordered.

3. Ineffective Assistance of Counsel at the Sentencing Phase of the Hialeah Case. The entire evidentiary presentation by the defense at the sentencing phase of the Hialeah trial consisted of trial counsel's calling and then dismissing Ferguson's mother as a witness. RH.1438-39. After Mrs. Ferguson was called to the witness stand and stated that she was willing to testify, Ferguson's trial counsel announced: "Judge, I think we are going to withdraw her at this time." Id. The trial court, after confirming that counsel in fact wished to take the unusual step of withdrawing a witness who already had been introduced to the jury, then stated: "Counsel, that is your choice." Id. Incredibly, the defense presented nothing else to the jury during the

sentencing phase. 45/ In short, as was the case in Stevens, Ferguson's Hialeah trial counsel "essentially abandoned the representation of his client during sentencing." 552 So. 2d at 1087.

Link, the only expert witness who testified at the post-conviction hearing, concluded that trial counsel's performance at sentencing in the Hialeah case fell below the objective standard of reasonableness expected of defense counsel in capital cases in at least three critical respects. R.3077-78, 3101-09. First, as Ferguson's mother and siblings testified, trial counsel in the Hialeah case, Hacker, made little or no effort to investigate Ferguson's tragic family background. R.2946-47, 2967, 3068. At the post-conviction hearing, Hacker admitted that he never even attempted to investigate or present non-statutory mitigating evidence on Ferguson's behalf, because he believed at the time of the Hialeah trial that such evidence was inadmissible under Florida law. R.3166-67. Hacker's basis for so limiting his efforts was not only unreasonable but also flatly contrary to the precedent established in Lockett v. Ohio, 438 U.S. 586, 98

45/ Although the jury did receive testimony during the guilt-innocence phase of the Hialeah trial from psychiatrists and psychologists called by both the State and the defense, that testimony focused exclusively on whether Ferguson should be found not guilty by reason of insanity under the M'Naughton standard, without ever addressing the factors relevant to mitigation at sentencing. See R.3104-05; RH.948-1300.

S.Ct. 2954, 57 L.Ed.2d 973 (1978), which was decided several months prior to the Hialeah trial. Moreover, as Link testified, even before the decision in Lockett, competent counsel in Florida investigated and presented, when available, non-statutory mitigating evidence of precisely the type that Hacker overlooked in preparing for the Hialeah trial. R.3093-94, 3101, 3113-14. 46/

Second, trial counsel never presented the jury with testimony directed at establishing either of the two statutory mitigating circumstances related to Ferguson's psychiatric problems. See R.3162-65. As Link testified, "[t]he ultimate question needed to be asked [was] as to whether [Ferguson] was under the influence of a severe mental or emotional disturbance at the time of the offense," so that the jury would have an evidentiary basis for determining whether Ferguson qualified for leniency under either Fla. Stat. §§ 921.141(6)(b) or

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46/ The court below adopted the State's contention that trial counsel's performance was "not deficient," solely because Hacker testified at the post-conviction hearing that his co-counsel, Phelps, had spoken by telephone to one or more of Ferguson's sisters during the Hialeah trial. See Order (6/19/90) at 24. Hacker readily admitted, however, that he had no idea why Phelps had spoken to Ferguson's family or what they had discussed. R.3160. In light of the testimony from Ferguson's siblings that they had not been contacted in regard to mitigating evidence, Hacker's vague testimony about Phelps' phone call cannot possibly support a conclusion that trial counsel adequately discharged his duty to conduct a reasonable investigation of Ferguson's family background. See Stevens, 552 So. 2d at 1085-87 & n.7.

(f)(1977). R.3104. 47/ Trial counsel's failure to elicit testimony relevant to the statutory mitigation standards was particularly unreasonable and damaging to Ferguson in light of the fact that the State's own psychiatric experts apparently would have supported Ferguson's position on mitigation.

For example, the competency report submitted to the trial court in May 1978 by Dr. Mutter -- one of the psychiatrists who testified for the State during the guilt-innocence phase of the Hialeah trial -- specifically stated that Ferguson's "[j]udgment and insight were grossly impaired" and that he was showing "signs of a major mental disorder." R.801-817. As Link testified, had trial counsel presented the jury with this type of testimony from the State's own expert witnesses, rather than merely attacking those

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47/ In light of the fact that both the State and the defense presented psychiatric testimony on the M'Naughton standard during the guilt-innocence phase of the trial, Link testified that trial counsel could have elicited testimony on the issue of psychiatric mitigation either during the course of questioning on the insanity defense or separately during the sentencing phase of the case. R.3133. The lower court's reliance on Chestnut v. State, 538 So. 2d 820 (Fla. 1989), is misplaced in attempting to criticize Link's conclusions on this subject. See Order (6/19/90) at 24. Chestnut stands merely for the unremarkable proposition that a trial court may exclude evidence of diminished capacity where the defendant has not entered a plea of not guilty by reason of insanity and diminished capacity evidence is not otherwise relevant to any issue in the case. That case plainly does not prohibit a trial court from allowing psychiatric testimony at the guilt-innocence phase of a capital case that addresses both a defendant's pending insanity plea and his potential later claim for leniency in sentencing.

witnesses' conclusions on the M'Naughton standard, it would have been "very difficult for the State to say no, * * * there [are] no mitigating factors." R.3104-05.

Third, Link testified that the argument given at sentencing by Hacker's assistant, Phelps, was "very ineffectual" and fell below the standard of competence expected of attorneys handling capital cases. R.3078, 3105-06. After first pointing out to the jury that Ferguson's prior treatment and institutionalization for mental problems had accomplished very little, incredibly Phelps then suggested that the best solution was to provide persons like Ferguson with "proper treatment" so that they could be released into society. RH. 1453-158. Not only was this argument pointless in light of the jury's limited discretion at sentencing to choosing between life imprisonment and death, but it also served to remind the jury that Ferguson had previously been treated and released from a psychiatric institution. As Link observed, in responding to Phelps' rambling soliloquy on "what are we going to do to attack this problem of people who are ill and then released from prison," the prosecutor was able to provide the jury with a simple and undeniably effective answer: the death penalty. R.3105. 48/

48/ Link further testified that his opinion concerning Phelps' ineffectiveness was bolstered by Phelps' failure to object during the prosecutor's closing argument to three clearly

[Footnote continued]

As this Court has acknowledged, "'[i]t should be beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness.'" Stevens 552 So. 2d at 1087 (quoting Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), cert. denied, 474 U.S. 998, 106 S.Ct. 374, 88 L.Ed.2d 367 (1985)). Moreover, after recognizing that a properly conducted capital sentencing proceeding involves "weigh[ing] the aggravating circumstances against any mitigating circumstances," this Court has held that, "when counsel fails to develop a case in mitigation, the weighing process is necessarily skewed in favor of the aggravating factors argued by the state." Stevens, 552 So. 2d at 1086-87. That is precisely what happened in this case. Given the "substantial mitigating evidence" that was either not investigated or not effectively presented, it is clear that trial counsel's deficient performance skewed the jury's deliberations in favor of a sentence of death and prejudiced Ferguson's defense. See id.; Middleton, 849 F.2d at 494-495.

48/ [Footnote continued]

objectionable and very damaging statements: (1) appealing at length to sympathy for the victims of the crimes, RH. 1441-43; (2) attempting to reduce the jury's sense of responsibility in sentencing, RH. 1444; and (3) drawing attention to the high costs to taxpayers of keeping prisoners incarcerated for life, RH. 1452.

Indeed, the record in the Hialeah case provides unusually clear and compelling evidence that the jury might well have recommended against a sentence of death had it been fully and properly informed of the mitigating evidence concerning Ferguson. When the jury was polled at the conclusion of the sentencing phase, two of the first four jurors stated that they had voted against recommending a sentence of death for Ferguson. RH. 1469. After that point, the trial court interrupted the polling and reminded the jurors that they were not being asked to reveal their individual votes on sentencing, but instead were to state only whether the recommendation of death reported to the court by the foreperson was a majority verdict. Id. The fact that the jury plainly was divided in its sentencing recommendation, even after trial counsel's clearly deficient performance, makes all the more clear that effective assistance of counsel at the sentencing phase of the Hialeah trial could have altered the outcome of the jury's verdict on sentencing. For that reason alone, a new sentencing hearing should be ordered.

B. Hitchcock Errors at Both Trials Entitle Ferguson to New Sentencing Hearings before New Juries

In Hitchcock v. Dugger, supra, the United States Supreme Court held that a trial court instructing a jury at the sentencing phase of a capital case cannot suggest that it would be improper for the jury to consider evidence of nonstatutory mitigating circumstances in arriving at a sentencing

recommendation. 481 U.S. at 398-399, 107 S.Ct. at 1824, 95 L.Ed.2d at 353. Any such restriction "creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. at 605, 98 S.Ct. at 2965, 57 L.Ed.2d at 990; see also Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S.Ct. 869, 875, 71 L.Ed.2d 1, 9 (1982). 49/ As we will show, the requirements of Hitchcock were violated at both the Carol City and Hialeah trials, thereby depriving Ferguson of fair sentencing hearings, in violation of both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.

1. The Carol City and Hialeah Instructions Unconstitutionally Suggested that the Jury Could Consider only Specific Statutory Mitigating Factors. The trial judge in the Hialeah case told the jurors that he would instruct them "on the factors in aggravation and mitigation that you may consider." RH. 1438 (emphasis added). At the conclusion of the sentencing phase of the Hialeah trial, the Judge then

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49/ This risk is incompatible with the "special 'need for reliability'" in capital sentencing mandated by the "fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment." Johnson v. Mississippi, 486 U.S. 578, 584, 108 S.Ct. 1981, 1986, 100 L.Ed.2d 575, 584 (1988) (quoting Gardner v. Florida, 430 U.S. at 363-364, 97 S.Ct. at 1207-08, 51 L.Ed.2d at 405-406 (1977) (White, J., concurring), and Woodson v. North Carolina, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944, 961 (1976)).

improperly instructed the jurors that "the mitigating circumstances which you may consider if established by the evidence are these: [listing the statutory mitigating circumstances]." RH. 1461. The State conceded and the court below held that these instructions violated Hitchcock. State's Proposed Factual Findings and Conclusions of Law Regarding Hearing of May 17, 1990, filed June 14, 1990 at 26; Order (6/19/90) at 28. 50/ At the same time, the State and the lower court challenged whether similar instructions given in Carol City also violated Hitchcock.

Prior to the closing arguments at the sentencing phase of the Carol City trial, the court informed the jurors that "you will be instructed on the factors in aggravation and mitigation that you may consider." RCC. 1023 (emphasis added). After the closing arguments, the trial court again instructed the jury that its deliberations must be limited to the statutorily enumerated aggravating and mitigating factors. RCC. 1023, 1072-1075. 51/ The court's instructions, therefore, twice informed the jury that it could consider only those mitigating circumstances specifically enumerated in the

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50/ The trial court erroneously held that the Hitchcock violation in the Hialeah case was harmless. See Section 2, infra.

51/ These Carol City instructions were identical to the instructions recently found to violate Hitchcock in Aldridge v. Dugger, No. 89-5573, slip op. at 18 (11th Cir. Feb. 20, 1991).

statute. In this respect, the Carol City instructions were identical to those given the Hialeah jury, which the State concedes violated Hitchcock and which the court expressly found to be in violation of Hitchcock.

These unconstitutional Carol City instructions were reinforced by the prosecutor's closing argument. The prosecutor first drew the jury's attention to the trial court's specific enumeration of the mitigating circumstances that the jury was permitted to consider:

> Now, the Court recognizes because all defendants are entitled to a benefit, a mitigating factor, the Court has enumerated what factors should apply in this case or in any case involving death and you are bound by this law, and the Judge will tell you so. [RCC. 1060 (emphasis added).]

Then, after listing the seven statutorily enumerated mitigating circumstances, the prosecutor concluded by stating:

> Those are the circumstances that you have to consider, and if those circumstances apply in this case, you must follow the law. [RCC. 1062.]

By thus discussing mitigation solely in terms of the statutory factors and specifically reminding the jury to follow the court's instructions with regard to its consideration of mitigating circumstances, the prosecutor reinforced the court's

erroneous instructions and exacerbated the Hitchcock violation. 52/

These errors were in no way cured by the court's brief statement at the conclusion of its instructions to the jury to the effect that "[t]he aggravating circumstances which you may consider are limited to those upon which I have just instructed you [the statutorily enumerated factors]," and then, apparently as an afterthought, that "there is no such limitation upon the mitigating factors which you may consider." RCC. 1075. 53/

The court below, relying on Adams v. State, 543 So. 2d 1244 (Fla. 1989), concluded that this statement "clearly and unambiguously" informed the jury that its consideration was not limited to the statutory mitigating factors. See Order (6/19/90) at 14. That was error. The Adams curative instruction was specifically designed to remedy any confusion caused by the prosecutor's closing argument. It did not come on the heels of erroneous instructions from the court itself.

52/ See Delap v. Dugger, 890 F.2d 285, 304-305 (11th Cir. 1989), cert. denied, ___ U.S. ___, 110 S.Ct. 2628, 110 L.Ed.2d 648 (1990); Downs v. Dugger, 514 So. 2d 1069, 1072 (Fla. 1987); see also Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988).

53/ Cf. Martin v. Dugger, 515 So. 2d 185, 187 (Fla. 1987) (no Hitchcock error where defendant's trial counsel obtained a "special jury instruction" -- not an afterthought -- informing the jury that mitigating evidence need not be limited to statutory factors and this Court otherwise found it "clear" that "neither the trial court, the jury nor the defense counsel" considered themselves limited to statutory mitigating factors only).

Here, the Carol City trial court's afterthought instruction did not address or even purport to address the constitutionally erroneous instructions already given by the court itself. At best, the trial court's statement merely contradicted what the court already told the jury in several different ways earlier. 54/ Moreover, the afterthought instruction must be placed within the context of the jury instructions read as a whole. 55/ When so read, they cannot fairly be said to have informed the jury of its duty to consider evidence of all mitigating circumstances. Certainly there was at the least a "reasonable likelihood" that the jury applied the challenged instructions in an improper manner. 56/

Nor can the Hitchcock errors be ignored, as the court below suggested, merely because the original trial court or the

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54/ The Supreme Court has admonished: "Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." Francis v. Franklin, 471 U.S. 307, 322, 105 S.Ct. 1965, 1975, 85 L.Ed.2d 344, 358 (1985).

55/ California v. Brown, 479 U.S. at 541, 107 S.Ct. at 839, 93 L.Ed.2d at 940; Cupp v. Naughten, 414 U.S. 141, 147, 94 S.Ct. 396, 400, 38 L.Ed.2d 368, 373 (1973); Diez v. State, 359 So. 2d 55, 56 (Fla. 3d DCA 1978).

56/ See also Cage v. Louisiana, ___ U.S. ___, 111 S.Ct. 328, 112 L.Ed.2d 339 (1990) (death sentence unanimously reversed where the instructions could have been read by reasonable jurors as having a different meaning than that prescribed to them by the state courts) (per curiam).

resentencing court may have understood that there was no limit to their consideration of nonstatutory mitigating circumstances. A sentencing court cannot properly rely on a jury recommendation that resulted from an unconstitutional procedure. See Delap, 890 F.2d at 304. 57/ Accordingly, Ferguson's death sentences at both trials resulted from procedures violating the constitutional principles of Hitchcock.

2. The State Did Not Establish that the Hitchcock Errors Were Harmless Beyond a Reasonable Doubt. The court below adopted the state's position that the Hitchcock violations in both cases were harmless. Order (6/19/90) at 14-16, 28-29. However, for that to be so, the State must carry the "heavy burden" of proving "beyond a reasonable doubt" that those violations did not "contribute" to the imposition of death sentences in either case. State v. DiGuilio, 491 So. 2d 1129, 1135-36, 1138 (Fla. 1986); accord O'Callaghan v. State, 542 So. 2d 1324, 1326 (Fla. 1989) (discussing harmless error analysis in Hitchcock context). As will be shown, the State did not -- and cannot -- meet this burden here.

57/ See also Jones v. Dugger, 867 F.2d 1277, 1280 (11th Cir. 1989) ("[Hitchcock] 'error can only be cured by a sentencing proceeding before a new advisory jury'") (quoting Magill v. Dugger, 824 F.2d 879, 894 (11th Cir. 1987)); Armstrong v. Dugger, 833 F.2d 1430, 1436 (11th Cir. 1987); Steinhorst v. State, No. 72,695 (Fla. Jan. 15, 1991), slip op. at 6 (unless Hitchcock error is harmless, death sentence must be set aside where "the record reflects some ambiguity with respect to the trial judge's understanding of the significance of nonstatutory mitigating evidence").

When addressing the harmless error question, the Court must consider all the substantial nonstatutory mitigating evidence previously described, i.e., the evidence proffered by Ferguson at the May 17, 1990 hearing as well as other such evidence placed in the record at the Carol City and Hialeah trials. See Hall v. State, 541 So. 2d 1125, 1126-28 (Fla. 1989); see also, Meeks v. Dugger, No. 71,947 (Fla. Jan. 10, 1991), slip op. at 7-8. The Hitchcock errors here may be found harmless only if the State can demonstrate beyond a reasonable doubt that a properly instructed jury presented with all of the evidence now in the record would not have had a "reasonable basis" for recommending life imprisonment. Hall v. State, 541 So. 2d at 1128. 58/ On the evidence of record, this beyond-a-reasonable-doubt standard cannot possibly be met. Indeed, as a matter of law that evidence provides ample grounds to support a recommendation of life imprisonment in both the Carol City and Hialeah trials.

Under Florida law, anything in the life of a defendant that might demonstrate the inappropriateness of a death

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58/ As this Court has repeatedly held, a jury's recommendation of life imprisonment that has a reasonable basis in the record cannot be overridden by the trial court. See Tedder v. State, 322 So. 2d 908 (Fla. 1975); see also Buford v. State, 570 So. 2d 923, 924 (Fla. 1990); Hall, 541 So. 2d at 1128. Accordingly, Tedder precludes a finding of harmless error where, as here, a properly instructed jury would have had a reasonable basis for a recommendation of life imprisonment. See Hall, supra.

sentence constitutes evidence of mitigating circumstances. See Parker v. Dugger, supra; Meeks, supra, slip op. at 8-9; Buford, 570 So. 2d at 925; Stevens v. State, 552 So. 2d at 1086 (Fla. 1989) ; Hall, 541 So. 2d at 1126-28; Brown, 526 So. 2d at 908. Evidence relating to character, mental illness, mental or emotional handicap, a family background and personal history filled with poverty, neglect, and violence, or an employment history indicating a potential for rehabilitation all could be sufficient. See Brown, 526 So. 2d at 907; Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988); Ferry v. State, 507 So. 2d 1373, 1376 (Fla. 1987); Washington v. State, 432 So. 2d 44, 48 (Fla. 1983). As earlier detailed, the record in this case now contains substantial evidence establishing each of these nonstatutory mitigating factors.

This evidence of nonstatutory mitigating circumstances is further strengthened by the evidence now in the record demonstrating that, in spite of the adverse family circumstances in which he was raised, Ferguson showed love and concern for his sisters and their children, attempted to help his mother support the family, and developed an interest in art. R. 2927, 2939-2941, 2948, 2955-2956, 2966-2967. These positive character traits constitute still further mitigating circumstances, because they show a potential for rehabilitation and productivity within the prison system. See Stevens, 552 So. 2d at 1086.

In spite of all these mitigating factors, the court below deemed the Hitchcock errors harmless beyond a reasonable doubt, ostensibly because the aggravating circumstances surrounding the offenses at issue were so substantial that they would easily outweigh any mitigating factors. There are three answers to this view. First, acceptance by this Court of such a conclusion would, "in practice, * * * do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances." Knight v. Dugger, 863 F.2d 705, 710 (11th Cir. 1988) (emphasis added). 59/ Indeed, the need for an individualized sentencing decision provides the foundation for the Hitchcock decision itself. See id. Accord, Parker, 111 S.Ct. at 739, 112 L.Ed.2d at 826.

Second, in light of the numerous nonstatutory mitigating circumstances which the Hitchcock errors withdrew from the jurors' consideration in this case, on no fair reading of the record can those errors be deemed harmless beyond any

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59/ See also Delap v. Dugger, 890 F.2d at 306 n.23 ("This court has cast doubt upon the argument that a Hitchcock error may be deemed harmless because the aggravating factors are strong and a properly instructed jury would not have reached a different result"); Demps v. Dugger, 874 F.2d 1385, 1395 (11th Cir. 1989) (Clark, J., specially concurring) ("This court does not undertake the task of weighing the nonstatutory mitigating evidence against the statutory aggravating circumstances to determine whether the evidence would have persuaded the jury to recommend life"), cert. denied, ___ U.S. ___, 110 S.Ct. 1834, 108 L.Ed.2d 963 (1990).

reasonable doubt. Here, as in Hall v. State, the "substantial mitigating evidence" present in the record makes it "a remarkable exercise in speculation" to conclude, beyond a reasonable doubt, that the juries' consideration of nonstatutory mitigating evidence with proper instructions would not have affected the outcomes of the Carol City and Hialeah sentencing proceedings and in no event would have avoided a death sentence. See 541 So. 2d at 1128. 60/

Finally, the cumulative impact of the Hitchcock violations and counsel's deficient performance should be considered by this Court in determining whether Ferguson received a full and fair opportunity to receive a recommendation for life from the jury. Because the jury was misled about its discretion to weigh nonstatutory mitigating facts, and because counsel failed to present substantial factors that this Court and the Supreme Court have found sufficient to justify a recommendation for life, this Court simply cannot determine with any assurance -- much less beyond a reasonable doubt -- that a fairly informed jury would not have had a reasonable basis for recommending against the death penalty. That penalty must therefore be set aside.

60/ See also Aldridge, supra, slip op. at 21 (rejecting the state's contention that "none of the mitigating factors would have changed the outcome of the sentencing"); Copeland v. Dugger, 565 So. 2d 1348, 1349-50 (Fla. 1990) (where "the potential body of mitigating evidence" in the case was "impressive," court found there was reasonable doubt as to whether Hitchcock error was harmless) (emphasis in original).

C. The State's Use of False Testimony During the Sentencing Hearing in the Carol City Case Violated Ferguson's Due Process Rights

The Hitchcock and ineffective-counsel errors were not the only matters prejudicing Ferguson's rights to a full and fair hearing. The State also elicited and failed to correct false testimony from Officer Edward Hartmann of the Dade County Public Safety Department during the sentencing phase of the Carol City case. Officer Hartmann testified that, in the wake of an October 1969 shooting incident involving himself and Ferguson, Ferguson was convicted and sentenced on the charge of assault with intent to commit murder. RCC. 1032-33.

The court records, however, reflect that the jury found Ferguson not guilty on the assault with intent to commit murder charge, as well as all other charges related to any alleged assault on Officer Hartmann. 61/ Hartmann further falsely testified that he had been present at the time of Ferguson's conviction on that charge. See RCC. 1033. Also false was Officer Hartmann's testimony that Ferguson actually had shot him four times during the October 1969 incident, given that Hartmann's own prior statements reveal that any shots fired by Ferguson missed the officer. See Mov. C (R.1536-37).

61/ See Petitioner's Proposed Findings, Ex. 2; Motion to Supplement Ex. 1 (R.1714-17).

The State took no action to correct any of this false testimony. 62/

The United States Supreme Court consistently has asserted that a conviction obtained through the knowing use of false testimony is fundamentally unfair and deprives a defendant of the right to due process guaranteed by the Fourteenth Amendment. Accordingly, a conviction or sentence

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62/ While the court below still had jurisdiction over Ferguson's 3.850 petition, Ferguson filed a motion to supplement the petition in order to challenge the false testimony as an additional ground for post-conviction relief. The court below, however, denied this motion to supplement as untimely, without addressing the merits, i.e., the prejudicial effect of the testimony. This was error.

By its own terms, Rule 3.850 allows a motion for post-conviction relief to be filed more than two years after the petitioner's judgment and sentence become final when "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." Fla. R. Crim. P. 3.850 (emphasis added). Here, Ferguson's counsel had no reason to suspect that Hartmann's testimony was false until June 1990. Prior to that time, documents in counsel's possession discussing Ferguson's criminal record were consistent with the false testimony given by Hartmann. See R.1744, 1746-54. When counsel were preparing proposed findings of fact and conclusions of law after the May 17, 1990 evidentiary hearing in this case, they discovered a record among the files of one of Ferguson's Carol City co-defendants indicating that Ferguson had been found not guilty of assault with intent to commit murder in the case stemming from the shooting incident. Counsel promptly verified this information and, within ten days of discovering the court records establishing that Hartmann's testimony was inaccurate, filed the motion to supplement raising this due process claim. See R.3190-91. Thus, Ferguson's counsel filed the motion as soon as the diligent inquiry required by Rule 3.850 brought the facts underlying this claim to counsel's attention.

obtained by means of such misconduct must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. 63/

Because the Dade County State's Attorneys Office was responsible for prosecuting both the Carol City case and the charges stemming from the October 1969 shooting incident, the State undoubtedly had knowledge of the falsity of Officer Hartmann's testimony in the Carol City case. See Johnson v. Trickey, 882 F.2d 316, 319 (8th Cir. 1989). 64/ Moreover, after reviewing the relevant court records prior to eliciting testimony regarding the 1969 shooting incident at the Carol City trial, the prosecutor could not have escaped the fact that Ferguson had been acquitted of all charges pertaining to the alleged assault on Hartmann. See, e.g., RCC. 1026. Yet, in spite of this knowledge and in the face of his "affirmative

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63/ See United States v. Bagley, 473 U.S. 667, 678, 105 S.Ct. 3375, 3381-82, 87 L.Ed.2d at 491 (1985); United States v. Agurs, 427 U.S. 97, 103-106, 96 S.Ct. 2392, 2397-98, 49 L.Ed.2d 342, 349-351 (1976); Giglio v. United States, 405 U.S. 150, 153-154, 92 S.Ct. 763, 766, 31 L.Ed.2d 104, 108 (1972); Brady v. Maryland, 373 U.S. 83, 87, 83 S.Ct. 1194, 1196-97, 10 L.Ed.2d 215, 218 (1963); Napue v. Illinois, 360 U.S. 264, 269, 79 S.Ct. 1173, 1177, 3 L.Ed.2d 1217, 1221 (1959).

64/ Cf. Giglio, 405 U.S. at 154, 92 S.Ct. at 766, 31 L.Ed.2d at 109 ("The prosecutor's office is an entity and as such it is the spokesman for the Government"); United States v. Ruiz, 711 F. Supp. 145, 147 (S.D.N.Y. 1989) ("The relevant entity for knowledge of the falsity of the testimony is the entire prosecution team, which includes individuals involved at all stages of the investigation").

duty" to correct testimony that he knew, or should have known, to be false, 65/ the prosecutor allowed Hartmann's false testimony to go uncorrected and specifically asked Hartmann a question inaccurately suggesting that Ferguson had been convicted of assault with intent to commit murder. See RCC. 1033.

At the very least there is a reasonable likelihood that Officer Hartmann's false testimony, which indicated that Ferguson had been convicted of a notorious violent felony -- the intentional shooting of a police officer -- could have influenced a juror's choice between a death sentence and life imprisonment and thereby affected the judgment of the sentencing jury. 66/ As the Supreme Court explained in Bagley, this materiality standard is equivalent to the constitutional harmless-error-beyond-a-reasonable-doubt standard of Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705

65/ See Lee v. State, 324 So. 2d 694, 697 (Fla. 1st DCA 1976) ("The State prosecutor has an affirmative duty to correct what he knows to be false and to elicit the truth") (emphasis in original); see also Agurs, 427 U.S. at 103, 96 S.Ct. at 2397, 49 L.Ed.2d at 349; United States v. Kaufmann, 803 F.2d 289, 291 (7th Cir. 1986); United States v. Phillips, 664 F.2d 971, 1026 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982).

66/ This standard does not require Ferguson to establish that correction of the false testimony probably would have resulted in a sentence other than death. See Brown v. Wainwright, 785 F.2d 1457, 1464 (11th Cir. 1986).

(1967). 67/ Under that standard, the false testimony presented in the Carol City case cannot reasonably be characterized as harmless, particularly in light of the Hitchcock and ineffectiveness errors affecting this sentence. The death sentences obtained through reliance on Officer Hartmann's false testimony were therefore imposed in violation of Ferguson's right to due process of law under the Florida and United States Constitutions and must be vacated.

D. The State's Failure To Disclose Impeachment Evidence also Violated Ferguson's Due Process Rights

1. The State Withheld Material Evidence that Police Officers who Testified against Ferguson Were Engaged in Drug-Related Criminal Activity. Another serious violation of Ferguson's rights occurred when the State failed to disclose important impeachment evidence that could have been used against prosecution witnesses. Ferguson's trial counsel served on the State two separate but identical demands for discovery, one dated April 13, 1978 for the Carol City case, and the other dated April 27, 1978 for the Hialeah case. 68/ Those discovery

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67/ See Bagley, 473 U.S. at 679-680 & n.9, 105 S.Ct. at 3382 & n.9, 87 L.Ed.2d at 492-493 & n.9; United States v. Rivera Pedin, 861 F.2d 1522, 1529-30 & n.13 (11th Cir. 1988).

68/ See Demands for Discovery in Case No. 77-28650 and in Cases Nos. 78-5427 and 78-5428. DCC. 32-33, DH. 66-67. The symbol "DCC" denotes material other than transcripts of testimony and proceedings contained in the record on appeal in this Court in the Carol City case, No. 55,137. The symbol "DH" denotes

[Footnote continued]

demands included specific requests for information which might impeach the testimony or disclose the criminal history of potential prosecution witnesses. 69/

68/ [Footnote continued]

material other than transcripts of testimony and proceedings contained in the record on appeal in this Court in the Hialeah case, No. 55,498.

69/ The demands called upon the State to produce, inter alia:

> (xii) Any and all evidence and information within the State's possession or control which may be favorable to the Defendant * * * [including, but] not limited to, the following materials:
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> a. Any written or recorded statement made by any person to the police or to any agent of the State Attorney's Office which tends to establish the Defendant's innocence or to impeach or contradict the testimony of any witnesses whom the State may call at the trial of this case.
>
> b. Any police investigation report which tends to establish the Defendant's innocence or to impeach or contradict the testimony of any witness whom the State will call at the trial of this cause.
>
> c. The names and addresses of any an all witnesses who might establish the Defendant's innocence or impeach or contradict any witness whom the State may call at the time of this case.
>
> d. Any other information or material which would tend to establish the Defendant's innocence or to impeach or contradict the testimony of any witness whom the State may call at the trial of this cause.
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> * * *
>
> (xiii) Complete criminal history records, if any there be, of all those persons listed in paragraph (i) [as having "any information which may be relevant to the offense(s) charged"] * * *. See State v. Coney, 294 So. 2d 82 (Fla. 1974). [Emphasis added.]

At no point did the State provide defense counsel with any evidence relevant to impeachment of the police officers who investigated or were to testify against Ferguson. Nor did they provide the juries with any information to suggest that the police officers involved in the cases were anything other than upstanding law enforcement officials with unblemished records.

However, two years after Ferguson's convictions, state and federal authorities made public the fact that they had been conducting an extensive, long-term investigation of drug-related criminal activity by detectives assigned to the Homicide Section of the Dade County Public Safety Department between 1977 and 1979. That investigation, which culminated in a 40-count federal indictment and numerous convictions in United States v. Alonso, 70/ implicated in a wide-ranging criminal conspiracy many of the detectives who had been responsible for investigating the Carol City and Hialeah cases. The indictments in the Alonso case charged Dade County homicide detectives with, among other things, engaging in a conspiracy involving drug trafficking as well as stealing narcotics and cash from the scenes of drug-related killings.

Significantly, testimony at the Alonso trial provided clear evidence of drug-related criminal conduct by each of the three police officers who provided critical testimony against

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70/ A copy of the indictment appears at R.1257-95.

Ferguson in the Carol City and Hialeah trials -- Detectives Robert Derringer, Charles Zatrepalek, and Michael MacDonald. For example, there was testimony during the Alonso trial that Detective Derringer had threatened to kill at least one narcotics dealer and that one of Derringer's fellow detectives had admitted that homicide detectives had arranged for the killing of between seven and twenty people as part of their drug-related conspiracy. See Alonso Tr. 6014-15 (R.1296-97). 71/

Derringer, who was the State's lead investigator in the Carol City case, was convicted in September 1982 of civil rights and tax offenses for his role in the Alonso conspiracy. Detective Zatrepalek, who was the State's lead investigator and key witness against Ferguson in the Hialeah case, turned State's evidence and testified against a number of the defendants at the Alonso trial, in exchange for which his guilty plea to conspiracy to commit the crime of possession of narcotics was accepted and other related charges dropped. In addition to admitting to his own complicity in the Alonso conspiracy, Zatrepalek also testified about the involvement in drug trafficking of Detective MacDonald, another important prosecution witness against Ferguson at both the Carol City and

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71/ The man who testified to these facts before a grand jury has entered the federal witness protection program, and defense counsel have been unable to locate him.

Hialeah trials. See Alonso Tr. 8114-20 (R. 1298-1304). All three of these detectives were deeply involved in the Hialeah and Carol City cases. 72/

The public records in the Alonso case further demonstrate that the state and federal investigations into the network of police corruption described above began well in advance of the filing of the discovery demands and the trials in the Carol City and Hialeah cases. Indeed, an investigation into these matters by the Internal Review Section of the Dade County Public Safety Department was under way at least as early as January 1978, 73/ and state officials were familiar with and

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72/ For example, Detective Zatrepalek testified that he was the lead investigator in the Hialeah case, RH. 819, 846, went to the scene of the crime and searched the area, RH. 820, 835-37, 849-859, transmitted two vials to a lab technician, RH. 561-562, recovered certain guns, RH. 833, interrogated Ferguson's girlfriend with Detective MacDonald, RH. 830-831, 846-848, searched Ferguson's apartment and personally removed clothing, RH. 829-830, 848-849, talked with and investigated about 200 people in connection with the case, RH. 833-835, 839-840, interviewed Ferguson in custody for some 10-13 hours along with Detectives Derringer and MacDonald, RH. 820-829, 831-832, 840-841, 843, 876, and, most importantly, overheard and repeated at trial Ferguson's alleged confession. RH. 831. Detective Derringer testified in the Hialeah case that he was present when the gun allegedly found in Ferguson's possession was turned over to another detective, RH. 787-789, personally retrieved and reviewed the files in regard to the gun, RH. 777, 783-784, identified the gun's owner, RH. 786, and interrogated Ferguson. R.H. 771, 789, 795. Detective MacDonald testified that he interviewed Ferguson's girlfriend, RH. 858-859, 865, arranged a "gun lineup" and had photos taken there, RH. 859, 861, saw the girlfriend pick out from the lineup a gun found on Ferguson, RH. 863, and interviewed Ferguson with Zatrepalek and heard Ferguson's alleged confession. RH. 864-874.

73/ See Investigation File 78-007, which appears at R.1325-57.

cooperated in the ongoing federal Alonso investigation during 1978. See Alonso Tr. 3328-47 (R.1305-24).

2. The Withheld Evidence Prejudiced Ferguson's Right to a Full and Fair Hearing. The State's failure to disclose the above information violated Ferguson's Fourteenth Amendment due process rights, as well as his due process rights under the Florida Constitution and Florida rules. As the United States Supreme Court has suggested, law enforcement officers who use drugs may display impaired perception and judgment, indifference to the missions of drug enforcement, and even vulnerability to corruption or complicity with the drug trade. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 670, 109 S.Ct. 1384, 1393, 103 L.Ed.2d 685, 705 (1989); see also White v. Fraternal Order of Police, 909 F.2d 512, 517 (D.C. Cir. 1990). Here, the situation was even more serious because the police officers had a possible motive to entrap, or fabricate testimony about, Ferguson. And to the extent that the record does not include all of the facts necessary to substantiate such a charge, this is because the trial court refused in 1987 to grant Ferguson's motion for a hearing, and for funds to enlist the help of lay and expert testimony, to develop and prove every aspect of the police corruption and its relationship to this case. 74/

74/ Motion for Post-Conviction Relief, Oct. 15, 1987, at 17-19.

Due process requires state prosecutors to disclose all "evidence favorable to an accused" that is "material either to guilt or to punishment," once the defendant has requested such disclosure. Brady v. Maryland, 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 218. This includes evidence creating "a reasonable doubt that did not otherwise exist." United States v. Agurs, 427 U.S. at 112, 96 S.Ct. at 2402, 49 L.Ed.2d at 355 (1976); see Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986). This duty to disclose continues throughout pre-trial and trial proceedings, requiring state prosecutors to disclose evidence favorable to the accused as it comes into the State's possession. The disclosure includes any evidence that might be used to impeach government witnesses. 75/

These same principles are embodied in Fla. R. Crim. P. 3.220(b)(2), which like Brady, requires a prosecutor "to disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused." Rule 3.220(b)(1) further requires the disclosure of any written statements in the State's "possession

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75/ "Impeachment evidence, * * * as well as exculpatory evidence, falls within the Brady rule. Such evidence is 'evidence favorable to an accused,' Brady, 373 U.S. at 87, 83 S.Ct. at 1196, [10 L. Ed. 2d at 218], so that, if disclosed and used effectively, it may make the difference between conviction and acquittal." United States v. Bagley, 473 U.S. at 676, 105 S.Ct. at 3380, 87 L.Ed.2d at 490 (1985) (citations omitted).

or control" made by persons with information relevant to the offenses charged. 76/

a. The Hialeah Suppression Hearing. By far the most damaging evidence presented against Ferguson at the Hialeah trial was the testimony of Detectives Zatrepalek and MacDonald that, on April 5, 1978, the night of his arrest, Ferguson made statements to the officers inculpating himself in the Hialeah crimes. Without these statements, the State had very little evidence to support its case. Prior to trial, defense counsel moved to suppress all evidence related to the alleged inculpating statements.

76/ "The state attorney is responsible for evidence which is being withheld by other state agents, such as law enforcement officers, and is charged with constructive knowledge and possession thereof, for discovery purposes." State v. Zamora, 538 So. 2d 95, 96 (Fla. 3d DCA 1989). Accord, United States v. James, 495 F.2d 434 (5th Cir.), cert. denied, 419 U.S. 899, 95 S.Ct. 181, 42 L.Ed.2d 144 (1974); State v. Del Guadio, 445 So. 2d 605 (Fla. 3d DCA), review denied, 453 So. 2d 45 (Fla. 1984). As the District Court of Appeal noted in State v. Coney:

> It is the State of Florida, and not the state attorney, who is obligated under the Constitution to afford each defendant a fair trial. [272 So. 2d 550, 553 (Fla. 1st DCA 1973), writ discharged, 294 So. 2d 82 (Fla. 1974).]

Thus, the Coney court held that a state attorney must produce Brady material available to the prosecutor from other state agencies, from state law enforcement officials, or from federal officials acting in cooperation with agents of the State. Coney, 272 So. 2d at 552-555.

At a suppression hearing held August 22 and 23, 1978, defense counsel made two arguments. First, counsel argued that the questioning of Ferguson on the night of April 5, 1978, violated his Sixth Amendment and due process rights because it occurred outside the presence of defense attorneys after those attorneys had instructed the police not to question Ferguson in their absence. 77/ In support of this argument, Frederick Robbins, Esq., and Neil Nameroff, Esq., testified that, during the day of April 5, they had specifically instructed the police, including Detectives Derringer, Zatrepalek, and MacDonald, not to question Ferguson outside the presence of counsel. SRH. 50, 394. 78/ Second, defense counsel argued that any statements made by Ferguson on April 5 were coerced by the physical and psychological abuse of the homicide detectives in violation of his Fifth Amendment and due process rights. Ferguson testified in support of this argument. Id. at 67-84.

In response, the State presented testimony from Detectives Derringer, Zatrepalek, and MacDonald. Each denied having been told by either attorney not to question Ferguson outside their presence, as well as the specific incidents of

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77/ For the most recent reaffirmance by the United States Supreme Court that this type of interrogation is unconstitutional, see Minnick v. Mississippi, ___ U.S. ___, 111 S.Ct. 486, 112 L.Ed.2d 489 (1990).

78/ The symbol "SRH" denotes the supplemental record on appeal in this Court, case no. 55,498.

coercive and abusive conduct testified to by Ferguson. Id. at 114, 325, 348.

In denying the motion to suppress, the trial judge accepted completely the testimony of Detectives Derringer, Zatrepalek, and MacDonald over the contrary testimony of Attorneys Robbins and Nameroff, as well as Ferguson himself. The ruling therefore turned exclusively on a positive evaluation of the credibility of the testimony of the detectives -- evaluations that almost certainly would have been affected by a disclosure that each of those detectives, at the time of the suppression hearing, was under investigation for serious drug-related criminal offenses.

b. The Guilt Phases of the Carol City and Hialeah Trials. The testimony of Detective Derringer was also critical at the Carol City trial. He testified at length about the police investigation, thus providing important connections and inferences in support of the State's theory of the case. Had the jury been informed about the drug-related criminal activities of Derringer and his fellow detectives, critical aspects of his testimony would have been discredited or rejected altogether.

Detective Derringer also testified against Ferguson at the Hialeah trial. Although his testimony there ostensibly was offered to connect Ferguson to the weapon used in the Hialeah crime, it in fact insinuated to the jury that Ferguson was

responsible for the Carol City drug-related murders. 79/ Even more significantly, without evidence of Zatrepalek's and MacDonald's involvement in the drug-related criminal conspiracy, defense counsel had no effective means whatever of discrediting their testimony and supporting Ferguson's position that the inculpatory statements were never made.

c. The Sentencing Phases of the Carol City and Hialeah Trials. Nowhere would evidence from the Alonso investigation have been more useful to defense counsel than at the sentencing phases of the two trials. The juries were charged with weighing the moral culpability of the defendant, and yet the State withheld evidence bearing precisely on the degree of Ferguson's culpability. 80/

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> Mr. Phelps [defense counsel]: There is an innuendo here that Ferguson was responsible for this [other] guy's demise.
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> Mr. Kaye [prosecutor]: You bet. [RH. 775.]

Defense counsel timely objected. Id. The receipt of the inflammatory testimony was itself error. See, e.g., Jackson v. State, 451 So. 2d 458 (Fla. 1984); Dixon v. State, 426 So. 2d 1258 (Fla. 2d DCA 1983); Fla. Stat. Ann. § 90.404.

80/ Good faith is no excuse. "[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 373 U.S. at 87, 83 S.Ct. at 1196-97, 10 L.Ed.2d at 148; Arango v. State, 467 So. 2d 692, 693 (Fla.), vacated on other grounds, 474 U.S. 806, 106 S.Ct. 41, 88 L.Ed.2d 34 (1985).

Ferguson lived in a community in which the police themselves tolerated the killing of drug dealers and then profited from their elimination, as shown by the Alonso record. In such a community, a person like Ferguson -- with his multi-year history of institutionalization for mental problems -- might well have failed to grasp the full significance of the law which he allegedly violated. These factors could well have led the jury to recommend a sentence short of death.

Similarly, had Hialeah defense counsel known of the police corruption and criminal conspiracy, he might have succeeded in portraying Ferguson as a seriously-impaired man caught on a treadmill of violence set in motion by others. The evidence at least could have served as nonstatutory mitigating evidence.

E. Ferguson Was Denied Effective Assistance of Counsel by Trial Counsel's Failure to Object to the Prosecutor's Use of Racially Based Peremptory Challenges

A final prejudicial error affected both Ferguson's convictions and his sentence: trial counsel's failure to object to the prosecutor's systematic use of peremptory challenges to exclude all blacks from the juries in the Carol City and Hialeah trials violated Ferguson's Sixth Amendment right to the effective assistance of counsel and his Fourteenth Amendment right to Due Process. Ferguson submits that counsel's failure to object satisfies both the deficient

performance and the prejudice prongs of the ineffective assistance standard.

Testimony presented at the May 17, 1990 evidentiary hearing starkly revealed that counsel's performance was plainly unreasonable "under prevailing professional norms" and therefore deficient under Strickland v. Washington, 466 U.S. 668, 688, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674, 694 (1984). See R.2890-95, 2909-12, 2916. Moreover, there could be no sound strategic reason for counsel's failure to challenge the prosecution's systematic exclusion of blacks from the juries and seek some form of redress from the court. R.2911-2912.

Ferguson also satisfied the prejudice prong of the Strickland standard because there is a "reasonable probability" -- i.e., a probability "sufficient to undermine confidence in the outcome" -- that, but for trial counsel's demonstrated errors, the result of Ferguson's trials would have been different. See Strickland, 466 U.S. at 693-694, 104 S.Ct. at 2068, 80 L.Ed.2d at 697-698. Because the danger that undetected racial prejudice may affect the subjective judgments inherent in a capital sentencing hearing is exacerbated by the systematic impanelling of an all-white jury, experienced criminal defense attorneys believe that the exclusion of blacks from a jury by the prosecution solely on the basis of race is an important factor that could influence the outcome of a case. R.2912. In addition, counsel's failure to object prevented Ferguson from taking advantage directly of this

Court's decision in State v. Neil, because Ferguson's sentence was still on direct appeal when Neil was decided. See, e.g., Miami v. Cornett, 463 So. 2d 399, 400 n.1 (Fla. 3d DCA 1985).

III. NONE OF THE CLAIMS PRESENTED BY FERGUSON SHOULD HAVE BEEN DISMISSED BECAUSE OF HIS FAILURE TO RAISE THEM AT TRIAL OR ON DIRECT APPEAL

The circuit court struck eight of the claims presented by Ferguson because of his failure to raise them at trial or on direct appeal. Order filed December 19, 1989 (R.1510-13). This omission was not a sufficient reason to bar the court's consideration of the merits of any of these claims.

A. The Claim Concerning the Inadequate Determination of Competence to Stand Trial

The circuit court relied on Bundy v. State, 497 So. 2d 1209, 1210 (Fla. 1986), for the rule that the defendant's failure to pursue a competence-to-stand- trial claim on direct appeal precludes him from raising the claim in a 3.850 motion. 81/ But Bundy is in direct conflict with an earlier decision of this Court, Hill v. State, 473 So. 2d 1253 (Fla. 1985), and is in conflict as well with the principles articulated in Pate v. Robinson, 383 U.S. 375, 86 S.Ct. 836, 15 L.Ed.2d 815 (1966).

81/ The competency claim against which the State asserts this defense is the one associated with the Carol City case. The competency claim associated with the Hialeah case was raised on direct appeal. See Ferguson v. State, 417 So. 2d at 634-635.

This Court has spoken with contradictory voices on whether Florida's procedural default rule applies to claims pertaining to trial competency. In Bundy the Court held that competence-to-stand-trial claims should have been raised on direct appeal. In Hill, however, decided just a year before Bundy, the Court decided in the post-conviction petitioner's favor that a Rule 3.850 claim that the trial court erred in not conducting a plenary hearing on the question of competence to stand trial. 473 So. 2d at 1254-59. Like Bundy, Hill raised nothing on direct appeal pertaining to his competence to stand trial. See Hill v. State, 422 So. 2d 816 (Fla. 1982), cert. denied, 460 U.S. 1017, 103 S.Ct. 1262, 75 L.Ed.2d 488 (1983). Notwithstanding the same "default," the Court considered Hill's claim and vacated his conviction. Hill, rather than Bundy, is in keeping with controlling constitutional principles, first announced by the United States Supreme Court in Pate v. Robinson.

In Pate, the petitioner failed to request a competency hearing at trial, and the State argued that this amounted to a waiver of his right to have the trial court determine his competence to stand trial. The Court disagreed, noting that "it is contradictory to argue that a defendant may be incompetent, and yet knowingly or intelligently 'waive' his right to have the court determine his capacity to stand trial." 383 U.S. at 384, 86 S.Ct. at 841, 15 L.Ed.2d at 821. Other courts have properly understood that this principle

requires post-conviction courts to entertain competency claims on their merits even though they are first raised in a post-conviction proceeding. 82/ This Court should proceed on the same basis, adhering to its practice in Hill and rejecting the rule it followed in Adams and Bundy.

B. The Claim that the Jury's Sense of Responsibility for its Role in the Sentencing Process Was Diminished

In his 3.850 petition, Ferguson contended that the original jury instructions had prejudicially diminished the jury's sentencing responsibility. The circuit court's determination that Ferguson's "Pait-Caldwell" claim cannot now be considered because it was not raised on appeal is erroneous for two reasons.

First, the claim is one of fundamental error, which this Court has long allowed to be presented for the first time in post-conviction proceedings. See, e.g., Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965). Claims that the jury's sense of responsibility was diminished by argument or instruction have long been recognized by this Court as claims of fundamental error, which "fall within the exception" to the

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82/ See, e.g., Kibert v. Peyton, 383 F.2d 566, 569 (4th Cir. 1967); Bruce v. Estelle, 483 F.2d 1031, 1037 (5th Cir. 1973), cert. denied, 429 U.S. 1053, 97 S.Ct. 767, 50 L.Ed.2d 770 (1977); Bundy v. Dugger, 816 F.2d 564, 567-568 (11th Cir.), cert. denied, 484 U.S. 870, 108 S.Ct. 198, 98 L.Ed.2d 149 (1987).

rule that errors must be preserved by contemporaneous objection. See Pait v. State, 112 So. 2d 380, 385 (Fla. 1959).

Notwithstanding this Court's characterization in Pait of Caldwell-type error as "fundamental error," in the post-Caldwell Rule 3.850 decisions which have considered Pait-Caldwell error, the Court has not confronted Pait's conclusion that this kind of error is fundamental error. The Court has instead held that a Pait-Caldwell error is waived by a failure to raise it on direct appeal. The circuit court relied on several of these cases in deciding to strike Ferguson's Pait-Caldwell claims.

At the very least, there is a conflict between Pait and the post-Caldwell Rule 3.850 cases as to whether Pait-Caldwell error can be waived. The Court should confront the conflict and reaffirm, for all the reasons articulated in Pait, that Pait-Caldwell error is fundamental error reviewable even when raised for the first time in a Rule 3.850 proceeding.

The second reason that the Pait-Caldwell claim is available for consideration in a Rule 3.850 proceeding is that a failure to raise a claim at trial or on direct appeal can always be excused if counsel's failure amounted to ineffective assistance of counsel. Murray v. Carrier, 477 U.S. 478, 488-489, 106 S.Ct. 2639, 2645-46, 91 L.Ed.2d 397, 408-409 (1986). Here, counsel were ineffective in both of Ferguson's trials and appeals for failing to preserve and present the

Caldwell claim. As the United States Supreme Court recognized in Dugger v. Adams, 489 U.S. 401, 109 S.Ct. 1211, 103 L.Ed.2d 435 (1989), the penalty phase instructions and argument such as those used by the prosecutor in Ferguson's trials violated principles of state law which were well settled at the time of trial. 489 U.S. at 408, 109 S.Ct. at 1215-16, 103 L.Ed.2d at 443 (citing Pait v. State, 112 So. 2d at 383-384, and Blackwell v. State, 76 Fla. 124, 79 So. 731, 735-736 (1918)). Counsel's failure to make such an objection and argument thus amounted to deficient performance under Strickland. Further, there can be no legitimate dispute that the instructions and argument here diminished the jury's sense of responsibility for its role in the sentencing process. Thus, an objection and argument on appeal likely would have succeeded, and counsel's deficient performance plainly prejudiced Ferguson under Strickland's standards.

Inexplicably, the circuit court struck, without providing any reason, Ferguson's allegation that "counsel was ineffective for not raising the [Pait-Caldwell] claim * * *." R.1511. There was no question that Ferguson asserted this allegation in the circuit court. Moreover, there is no question that he had to do so. Murray v. Carrier, 477 U.S. at 488-489, 106 S.Ct. at 2645-46, 91 L.Ed.2d at 409 (ineffective assistance of counsel constitutes cause for procedural default and must be presented to state courts as independent claim). There was no reason for the circuit court to strike this allegation.

C. The Claim that the Prosecutor's Exclusion of All Black Prospective Jurors Denied Due Process, Equal Protection, and a Fair Trial

The circuit court's reliance on Ferguson's failure to raise the Batson-Neil claim at trial or on appeal is misplaced for two reasons.

First, this claim is also a claim involving fundamental error. It deprives a defendant of one of the essential components of a fair trial: an impartial fact-finder. For more than a century, the Supreme Court has proscribed the purposeful exclusion of blacks from juries, because their exclusion serves as "a stimulant to that race prejudice which is an impediment to securing to individuals of the [black] race that equal justice which the law aids to secure to all others." Strauder v. West Virginia, 100 U.S. 303, 308, 25 L.Ed. 664, 666 (1880). It thus makes "'juries ready weapons for officials to oppress those accused individuals who by chance are numbered among unpopular or inarticulate minorities.'" Batson v. Kentucky, 476 U.S. 79, 87 n.8, 106 S.Ct. 1712, 1717 n.8, 90 L.Ed.2d 69, 81 n.8 (1986) (quoting Akins v. Texas, 325 U.S. 398, 408, 65 S.Ct. 1276, 1281, 89 L.Ed. 1692, 1699, (1945) (Murphy, J., dissenting)).

There can be no dispute that the denial of the right to trial before an impartial judge and jury is fundamental error. In a variety of contexts, the Supreme Court has recognized this

proposition. For example, it can never be harmless error. 83/ And in determining whether a newly-decided rule of law should be enforced retroactively, in Teague v. Lane, 489 U.S. 288, 313-314, 109 S.Ct. 1060, 1077, 103 L.Ed.2d 334, 358 (1989), the Supreme Court referred to the right to trial by an impartial fact-finder as an example of the "components of basic due process" which presumptively would be given retroactive effect.

The circuit court's rejection of the notion that Batson-Neil error is fundamental error rested in part on its view that neither Batson nor Neil has been enforced retroactively. Order (6/19/90) at 8-9. However, neither the decision that Batson would not be enforced retroactively, Allen v. Hardy, 478 U.S. 255, 106 S.Ct. 2878, 92 L.Ed.2d 199 (1986), nor this Court's determination in Neil that it would not be applied retroactively, State v. Neil, 457 So. 2d 481, 488 (Fla. 1984), rested on an analysis of whether Batson-Neil error was "fundamental." The retroactivity analysis used in Allen and Neil predated the retroactivity analysis later adopted in Teague v. Lane and did not call for a determination of whether the legal issue in question involved a "fundamental" right. See Allen v. Hardy, 478 U.S. at 260, 106 S.Ct. at 2881, 92 L.Ed.2d at 205-206; State v. Neil, 457 So. 2d at 488.

83/ Chapman v. California, 386 U.S. at 23, 87 S.Ct. at 827-828, 17 L.Ed.2d at 710 (1967); Rose v. Clark, 478 U.S. 570, 577-578, 106 S.Ct. 3101, 3105-06, 92 L.Ed.2d 460, 470 (1986). Accord Arizona v. Fulminante, 59 U.S.L.W 4235, 4237 (White, J., dissenting); id. at 4243 (Rehnquist, C.J.) (U.S. March 26, 1991).

For these reasons, this Court must determine -- to our knowledge, for the first time -- whether Batson-Neil error is "fundamental error" under state law. And in so doing, the court should view Batson-Neil error for what it is: the deprivation of the right to trial by an impartial jury. 84/

The second reason that the Batson-Neil claim is available for consideration in a Rule 3.850 proceeding is that trial and appellate counsel in both trials were ineffective for failing to raise the claim. This deficiency -- fully set forth at Section II.E., supra -- also requires that this Court decide the merits of the claim.

D. The Claim that the Instructions Shifted the Burden of Proof to Ferguson on the Element of Sanity in the Hialeah Case

The circuit court's default determination here also fails on the grounds of fundamental error and ineffective assistance of counsel.

The court relied on Smith v. State, 521 So. 2d 106 (Fla. 1988), for the proposition that this claim does not involve fundamental error. However, Smith stands for just the opposite proposition. In Smith, the court considered a different instruction from the one given in Ferguson's case and

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84/ If the Court reaches this state of analysis, it must also revisit the question of whether Batson and Neil should be retroactively enforced. Teague's adoption of a fundamental rights analysis has so changed retroactivity law that neither Allen nor Neil should be adhered to without re-analysis.

decided that it did not shift the burden of proof to the defendant on the element of insanity. Id. at 108. Implicit in the court's analysis was the recognition that if the instructions did shift the burden to the defense on the element of sanity, there would be fundamental error. Accord, Martin v. Wainwright, 497 So. 2d 872, 874 (Fla. 1986).

Further, defense counsel provided ineffective assistance in failing to object to the burden-shifting instruction at trial and to raise it as error on appeal. The defendant's sanity has long been treated in Florida as an element of the offense, which the State must prove beyond a reasonable doubt. See, e.g., Yohn v. State, 476 So. 2d 123, 128 (Fla. 1985); State ex rel. Boyd v. Green, 355 So. 2d 789, 793-794 (Fla. 1978). In addition, several years before Ferguson's trial, due process plainly prohibited the State from utilizing a mandatory rebuttable presumption as a mechanism for establishing an element of the offense -- as the State did with its presumption of sanity in Ferguson's case. 85/ Accordingly, Ferguson's counsel plainly had the legal basis for objecting to the presumption of sanity instruction in the Hialeah case, but

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85/ See Francis v. Franklin, 471 U.S. at 317-318 & n.5, 105 S.Ct. at 1972-73 & n.5, 85 L.Ed.2d at 355-356 & n.5 (1985) (tracing evolution of due process protection against mandatory rebuttable presumptions).

they unreasonably failed to do so. That failure, for which there could be no strategic basis, was prejudicial. 86/

E. The Claim that the "Heinous, Atrocious, or Cruel" Aggravating Circumstance Was Unconstitutionally Vague

The circuit court's default finding concerning this claim is to no avail because this Court permits claims of this sort to be made even though not previously raised at trial or on direct appeal.

The gravamen of this claim is that the heinous, atrocious, or cruel aggravating circumstance is unconstitutional across the board; it is not simply a complaint about the instructions concerning this circumstance in Ferguson's case. The claim is, therefore, just like the one decided in Smalley v. State, 546 So. 2d 720 (Fla. 1989), which the Court addressed despite the absence of objection at trial.

This Court has long entertained on the merits claims which attack the constitutionality of the Florida statute as applied notwithstanding the absence of trial objection. This exception to the procedural default rule applies to post-conviction proceedings as well as to direct appeals. See, e.g., Henry v. State, 377 So. 2d 692 (Fla. 1979).

86/ As with the Pait-Caldwell claim, the circuit court summarily struck the allegations of ineffective assistance of counsel in relation to the burden-shifting claim. For the reasons noted in relation to the Pait-Caldwell claim, the circuit court had no basis for striking these allegations.

F. The Claim that the Florida Statute Failed To Narrow Sentencing Discretion

For the same reason, the circuit court's default finding cannot defeat Ferguson's claim concerning the failure of the Florida statute to narrow sentencing discretion. This claim is also one which broadly attacks the constitutionality of the statute: since anyone convicted of first degree murder could -- through the felony murder and cold, calculated, and premeditated aggravating circumstances -- be sentenced to death, the statute has failed to narrow the class of death-eligible persons as required by the Eighth Amendment. It is thus a claim which focuses on a systemic defect rather than on defective instructions in a particular case.

G. The Claim that the Scheme for Weighing Aggravating and Mitigating Circumstances Is Unconstitutional

This claim likewise is one which attacks the operation of the Florida statute. Though the claim focuses on the presumption in favor of the death sentence created by the instructions in Ferguson's case, it acknowledges that these instructions mirrored the Florida death penalty statute and in that respect is a challenge to the constitutionality of the statue. Supplement to 3.850 Petition at 89 n.46 (R.1203). The standard jury instructions have reflected the same deficiency

for years. Accordingly, under the teaching of Smalley and Henry, this claim as well must be decided on its merits. 87/

CONCLUSION

For all the foregoing reasons, the rulings below should be vacated and the matter remanded for further proceedings concerning the trial court's ex parte contacts. Alternatively, the proceedings should be stayed until such time as Ferguson is competent to assist his counsel in the proceedings. Alternatively, Ferguson's conviction and sentence should be set aside based on the prejudicial errors demonstrated in these proceedings. Or, alternatively, at the very least the circuit court's refusal to consider certain of Ferguson's claims should

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87/ If this Court were to agree that the circuit court erred in dismissing all or any of the claims raised by Ferguson and discussed in this Section III, we would request an opportunity for supplemental briefing on the merits of such claims.

be set aside and those claims remanded with instruction that they be considered on their merits.

Respectfully submitted,

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