IN THE

SUPREME COURT OF FLORIDA

CASE NO. 77,865

TODD MICHAEL MENDYK,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

APPEAL FROM THE CIRCUIT COURT OF
THE FIFTH JUDICIAL CIRCUIT, IN
AND FOR HERNANDO COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

SUSAN HUGINS ELSASS
Staff Attorney
Florida Bar No. 0854573

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Mendyk's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied relief, despite the showing that Mr. Mendyk was entitled to an evidentiary hearing. Mr. Mendyk then filed a Motion for Rehearing which was also denied. This appeal follows.

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

REQUEST FOR ORAL ARGUMENT

Mr. Mendyk has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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STATEMENT OF THE CASE

Mr. Mendyk was indicted by a grand jury for first-degree murder on April 16, 1987, in the Circuit Court of the Fifth Judicial Circuit, Hernando County. On May 4, 1987, an information was filed charging Mr. Mendyk with one count of kidnapping and two counts of sexual battery involving physical force. Mr. Mendyk entered a plea of not guilty. On October 8, 1987, Mr. Mendyk's trial commenced before the Honorable L. R. Huffstetler, Jr.

The trial date was moved up eleven days from the October 19, 1987 trial setting. This change in scheduling occurred three days before the trial began on October 8th. Defense counsel, Alan Fanter, objected and asked that trial be continued until October 19, 1987, because assigned co-counsel, Charlie Vaughn, was conducting another trial and would be unavailable until that trial was completed. Mr. Fanter observed that Mr. Vaughn would be conducting the penalty phase and would be done with his other trial by the time Mr. Mendyk's penalty phase began. (R. 2). However, according to Mr. Fanter, Mr. Vaughn's presence at voir dire was critical so that he could have input and so the jury would not be confused when "three days in[to] the trial, all of a sudden [we] have a new attorney." (R. 3). The State responded "the only reason [Mr. Fanter] wanted Charlie Vaughn here was for Charlie Vaughn to learn how to try these kind of cases. And the people of the State of Florida don't have the time and the money to hold this trial up a few days so that the Public Defender's Office can conduct an educational seminar for Charlie Vaughn." (R. 4).

Mr. Fanter also argued for a continuance because the defense had been unable to investigate Williams rule evidence purportedly being introduced through Mr. Cousins, a prisoner then incarcerated in South Carolina. To this the prosecutor responded:

> As to the second reason for a continuance, all witnesses known to the state have been listed on the witness list and filed with the Public Defender's Office. We do not intend to call Mr. Cousins, who was the only witness that I've interviewed that knows anything about what happened in South Carolina. Now, Mr. Cousins has been known to the Public Defender's Office since September the 21st or 22nd.
>
> If the Public Defender's Office has failed to prepare for trial by failing to go to South carolina when they should have, then that's their problem, not ours. We have not withheld any witnesses or any evidence,

> certainly not wilfully and I know of nobody else in South Carolina or anywhere else that has any relevant information about this case. If I did, I would have interviewed them and listed them as a witness.

(R. 5). The prosecutor explained Cousins would not testify at the guilt phase, but might be called at the penalty phase.

Mr. Fanter responded:

> Now, if I'm going through phase one and all of a sudden they bring it in and say ten days has gone by and we're going to use this guy, I've accomplished nothing and this Court has prevented me from preparing my defense. You know, if they're going to spring that on us, he's not going to use him in two phase, say it now, exclude that testimony or I need to go up to South Carolina.

(R. 7). Thereupon the judge denied the continuance "since the Judge [presiding over Mr. Vaughn's other case] determined that his trial was more important than Mr. Vaughn's assistance over here with you, I'm going to deny your motion." (R. 8).

Pursuant to a motion for a change of venue the case was tried in Lake County, Florida. During the guilt phase, Mr. Fanter conceded Mr. Mendyk was guilty of kidnapping which was tantamount to conceding first degree murder. (R. 1161). Mr. Fanter argued to the jury that his client, Mr. Mendyk, should "rot in jail" for life. (R. 1163). Not surprisingly, a guilty verdict was entered on October 19, 1987. While the guilt phase was being conducted Mr. Mendyk expressed suicidal ideation in jail which prompted the administration of psychotropic medication. (PC 713). Neither defense counsel nor the trial court were advised of this medication in order to consider if Mr. Mendyk was still competent to proceed.

The penalty phase was conducted on October 20, 1987, with Mr. Vaughn representing Mr. Mendyk. The prosecuting attorney, Mr. Hogan, proffered Mr. Cousins' testimony. The proffer contained false evidence. It was contrary to Mr. Cousins' guilty plea, his prior sworn statement and all of the evidence in existence in South Carolina. Since Mr. Vaughn had not investigated the matter, and received no discovery, he was ignorant of the falsity of the proffered testimony.[1] Mr. Hogan

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[1]Mr. Hogan also failed to disclose that he had promised Mr. Cousins use immunity:

> Cousin wanted to know what guarantees he had that he could not be further prosecuted for the information he had to tell. Assistant State Attorney Tom Hogan then wrote a short statement that was signed by all parties sitting in the room. This statement assured Cousin that

announced he would not present the highly prejudicial testimony of Mr. Cousins which was to the effect that Mr. Mendyk had planned a prior murder as part of a Satanic ritual. However, Mr. Hogan reserved the right to recall Mr. Cousins later in the day after Mr. Mendyk had rested. Defense counsel presented no evidence in Mr. Mendyk's behalf. The jury then retired and returned a death recommendation. Mr. Mendyk was sentenced on November 10, 1987, and the judge's sentencing order was entered the same day.

Mr. Mendyk appealed his convictions and sentence. His conviction and sentence were affirmed. Error was found to have occurred at the penalty phase in the introduction of pornographic magazines seized at Mr. Mendyk's home. However this Court said the error, standing alone, was harmless. Mendyk v. State, 545 So. 2d 846 (Fla. 1989). On November 27, 1989, certiorari was denied by the United States Supreme Court. Mendyk v. Florida, 110 S. Ct. 520 (1989). On October 19, 1990, Mr. Mendyk's petition for clemency was denied and his death warrant was signed. On November 6, 1990, due to the exigencies of the situation, Mr. Mendyk filed a pro forma petition for extraordinary relief and for a writ of habeas corpus, seeking leave to amend. Mr. Mendyk's execution was stayed by this Court on November 26, 1990; the Court then ordered that Mr. Mendyk's post-conviction pleadings be filed by January 25, 1991. Mr. Mendyk timely filed his Rule 3.850 Motion in circuit court; the State's Response was filed February 6, 1991. Pursuant to Mr. Mendyk's Motion to Disqualify, filed on January 31, 1991, the Honorable Richard Tombrink, Jr. entered his recusal on February 8, 1991.

The Honorable Victor J. Musleh entered an Order Denying Defendant's Motion for Post Conviction Relief on March 11, 1991. Mr. Mendyk filed his Motion for Rehearing on March 20, 1991. His motion was denied on April 18, 1991. Defendant's Notice of Appeal was timely filed on April 29, 1991.

> all information obtained from him would be used in the prosecution of Todd Mendyk. The statement further indicated that Cousin would not be prosecuted by the State of Florida or by the State of South Carolina for any additional information he gave us in connection with the homicide of Thomas Fisher.

(PC 729).

SUMMARY OF ARGUMENTS

1. The trial court erred in summarily denying Mr. Mendyk's 3.850 motion without ordering an evidentiary hearing and without ordering compliance with Chapter 119. The trial court erred by failing to attach the portions of the record that support its summary denial. Under this Court's case law, an evidentiary hearing was required on the 3.850 motion, because the files and records do not conclusively establish that Mr. Mendyk is not entitled to relief.

2. Exculpatory evidence was not disclosed by the State to trial counsel. This evidence demonstrated that Mr. Mendyk was intoxicated the night of the homicide. Without the evidence, the trial court concluded that Mr. Mendyk had failed to demonstrate that he was intoxicated or in any way impaired on the night of the offense. The undisclosed evidence would have established that Mr. Mendyk was intoxicated and his judgment impaired. This undisclosed evidence would have constituted impeachment evidence of co-defendant Frantz. In fact the State failed to disclose evidence that State agents believe Frantz was lying. The State also presented false evidence to the sentencing court and threatened to present it to the sentencing jury if the defense opened the door. This evidence was to the effect that Mr. Mendyk was a satanist who had killed before. The State knew this evidence was false, yet used to it in violation of due process to threaten the defense in order to get a death sentence. The State also hid evidence that Mr. Mendyk's competency during the trial was in decline and that another competency determination was warranted. Confidence in the trial court's conclusions and the outcome of the trial is undermined. Certainly, the file and records do not conclusively establish that Mr. Mendyk is entitled to no relief. Accordingly, an evidentiary hearing must be ordered.

3. Trial counsel's performance at the penalty phase was deficient. As the State noted he had no capital experience and was assigned the case as a learning experience. He presented no mitigating evidence. This was because he failed to properly investigate. No investigation was conducted into Mr. Cousins and his false proffered testimony. Counsel was totally unprepared. He failed to present ample available evidence of Mr. Mendyk's mental illness and of statutory and non-statutory

mitigation. Under the circumstances, confidence is undermined in the outcome. Certainly the files and records do not conclusively establish that Mr. Mendyk is entitled to no relief; an evidentiary hearing must be ordered.

4. Mr. Mendyk's mental health evaluation was rendered inadequate by trial counsel's deficient performance and by the prosecution's suppression of evidence. The expert was not asked to evaluate for voluntary intoxication or mental health mitigation. As a result, Mr. Mendyk was effectively denied his constitutional right to the assistance of a mental health expert.

5. Trial counsel's performance at the guilt phase was deficient. Counsel abandoned his client, conceded guilt and asked the jury to let his client "rot in jail" for life. As a result of counsel's deficient performance evidence of Mr. Mendyk's intoxication negating his ability to form specific intent was not presented to the jury. Confidence is undermined in the outcome. The files and records do not conclusively establish that Mr. Mendyk is entitled to no relief; an evidentiary hearing must be ordered.

6. The trial court erred in not ordering the Pasco and Hernando Sheriff's Offices and the Parole Commission to comply with Chapter 119 of the Public Records Act. This matter must be remanded for compliance with Chapter 119, and thereafter, Mr. Mendyk be given leave to amend.

7. Mr. Mendyk was convicted on the basis of improperly obtained statements in violation of his rights under the fifth, eighth and fourteenth amendments.

8. Mr. Mendyk was deprived of a fair trial when the prosecutor made improper and outrageous comments to the jury and his counsel failed to object and combat the prosecutorial misconduct.

9. The jury was not instructed to determine whether Mr. Mendyk was guilty of felony murder or premeditated murder in violation of his rights under the sixth, eighth and fourteenth amendments.

10. Mr. Mendyk was impermissibly shackled in the presence of the jury in violation of the fifth, sixth, eighth and fourteenth amendments.

11. The jury instructions regarding heinous, atrocious or cruel were inadequate under Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

12. The jury instructions regarding cold, calculated and premeditated were inadequate under Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

13. The death sentence rests upon an unconstitutional automatic aggravating circumstance in violation of Maynard v. Cartwright, 108 S. Ct. 1853 (1988) and Lowenfield v. Phelps, 108 S. Ct. 546 (1988).

14. The introduction of nonstatutory aggravating factors so perverted the sentencing phase of Mr. Mendyk's trial that it resulted in the totally arbitrary and capricious imposition of the death penalty in violation of the eighth and fourteenth amendments of the United States Constitution.

15. Mr. Mendyk was denied his rights to an individualized and fundamentally fair and reliable capital sentencing determination as a result of the presentation of information concerning the victim and other constitutionally impermissible victim impact information, contrary to the eighth and fourteenth amendments.

16. The jury's sense of responsibility was improperly diminished under Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v. Dugger, 481 U.S. 393 (1987) and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc).

17. The jury was erroneously instructed that under Florida law Mr. Mendyk bore the burden of proving a life sentence was warranted.

18. The admission of numerous inflammatory photographs violated Mr. Mendyk's fifth, eighth and fourteenth amendment rights.

19. The jury was misled and incorrectly informed that a majority vote was necessary for a life recommendation at capital sentencing, in violation of the fifth, sixth, eighth and fourteenth amendments.

20. Mr. Mendyk was denied a fair trial under the sixth, eighth and fourteenth amendments due to a combination of harmful procedural and substantive errors.

ARGUMENT I

THE CIRCUIT COURT'S SUMMARY DENIAL OF MR. MENDYK'S MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

The lower court summarily denied Mr. Mendyk's claims in an order prepared by the State, without conducting any type of hearing, without adequately discussing whether (and why) the motion failed to state valid claims for Rule 3.850 relief (it

does), without any explanation as to whether (and why) the files and records conclusively showed that Mr. Mendyk is entitled to no relief (they do not), and without attaching those portions of the record which conclusively show that Mr. Mendyk is entitled to no relief (the record supports Mr. Mendyk's claims). The trial court's order fails, under Florida law, to satisfy the requirements of Rule 3.850 and precludes adequate review on appeal. The order fails to cite the specific portion or portions of the record relied upon in making its disposition of each of the claims. At the end of the order, the trial court incorporated by reference the entire record. The court did not, in any part of its State-prepared order, specifically identify what portion or portions of the enumerated records conclusively refute each of the twenty-one (21) separate claims asserted by the defendant. The record in Mr. Mendyk's case is lengthy, containing multitudinous facts, claims, issues and citations of authority.

This Court, in its recent opinion in Hoffman v. State, 571 So. 2d 449 (Fla. 1990), noted that the trial court failed to attach to its order summarily denying relief the portion or portions of the record conclusively showing that relief was not required. In response to the argument that the entire record was attached to the order in the Court file and fulfilled Rule 3.850's requirement, this Court concluded that "such construction of the rule would render its language meaningless." Hoffman, 571 So. 2d at 450. As the Court noted,

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

Id. (first emphasis in original; second and third emphasis added).

The process which resulted in the order was itself improper. Post-conviction proceedings are governed by principles of due process, Holland v. State, 503 So. 2d 1250 (Fla. 1987), and due process requires that the court at least grant the opportunity to present argument as well as conduct an evidentiary hearing. Courts should hear evidence presented by both parties and make informed rulings. Here, the trial court simply adopted the State's order summarily denying Mr. Mendyk's motion. Mr. Mendyk was never allowed the opportunity to have counsel argue his case. The

court directed the State to submit a proposed order denying relief which allowed the state to submit additional argument in favor of a summary denial. Mr. Mendyk was given no such opportunity.

Mr. Mendyk was (and is) entitled to an evidentiary hearing on his Rule 3.850 pleadings, Lemon v. State, 498 So. 2d 923 (Fla. 1986); Mr. Mendyk was (and is) also entitled in these proceedings to that which due process allows -- a full and fair hearing by the court on his claims. Cf. Holland. Mr. Mendyk's due process rights to a full and fair hearing were abrogated by the lower court's summary denial without affording proper evidentiary resolution.

Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Mendyk has alleged facts which, if proven, would entitle him to relief. These facts were never presented at trial and have never been properly controverted by the State. The files and records in his case do not "conclusively show that he is entitled to no relief," and the trial court's summary denial of his motion was therefore erroneous.[2]

The need for an evidentiary hearing in Mr. Mendyk's case is identical to the need for an evidentiary hearing in Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990), and Mills v. Dugger, 559 So. 2d 578 (Fla. 1990). In light of affidavits and other supporting material submitted by Mr. Mendyk, an evidentiary hearing was (and is) required. The files and records in the case by no means conclusively show that he will lose. In fact the files and records corroborate the Rule 3.850 claims. The circuit court did not address the wealth of material submitted to the court in Mr.

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[2]In fact, the record supports Mr. Mendyk's claim. The prosecutor noted the impropriety of having Mr. Vaughn conduct the penalty phase as a learning experience. Further the defense team asked for a continuance because of the lack of preparation. The State responded that that was not the State's problem and claimed full compliance with its discovery obligation. Yet disclosure of considerable exculpatory material was never made; and, as a result, the judge and jury were unaware of significant facts. Further the record clearly establishes that trial counsel abandoned his duty of loyalty to Mr. Mendyk, conceding guilt during guilt phase closing and asking for a conviction so Mr. Mendyk could "rot in jail" for life.

Mendyk's Offer of Proof. Mr. Mendyk's claims, proffers and affidavits were more than sufficient to require evidentiary resolution. Nothing "conclusively" rebutted them, and nothing was attached to the order which showed that they were "conclusively" rebutted. Lemon. Indeed, in a case such as this, where facts are in dispute, the refusal to allow an evidentiary hearing makes no sense at all. Blackledge v. Allison, 431 U.S. 63 (1977).

Facts not "of record" are at issue in this case; they are contained in the 3.850 motion and the supporting offer of proof. They must be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Obviously, whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. See Bassett v. State, 541 So. 2d 596 (Fla. 1989). Mr. Mendyk's claim that he was denied a professionally adequate mental health evaluation is also a traditionally recognized Rule 3.850 evidentiary claim. See State v. Sireci, 502 So. 2d 1221 (Fla. 1987). Moreover, Mr. Mendyk's claims that the State withheld material exculpatory evidence and presented false evidence can obviously be resolved only through an evidentiary hearing. See Lightbourne; Gorham. Since no hearing was allowed, however, Mr. Mendyk was never properly heard on these claims. This Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See Hoffman, Mills, Heiney, Lightbourne, Lemon, O'Callahan. These cases control: Mr. Mendyk was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of the Rule 3.850 motion and motion for rehearing were erroneous.

Finally, as this Court's recent opinions in State v. Kokal, 562 So. 2d 324 (Fla. 1990), and Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), make crystal clear, the lower court's verbatim acceptance of the State's position that Mr. Mendyk was not entitled to relief pursuant to Fla. Stat. sec. 119 was absolutely wrong. This case should be remanded in order to afford Mr. Mendyk the access to documents pursuant to section 119 to which he has always been entitled; at the very least an in camera inspection must be ordered.

Mr. Mendyk was (and is) entitled to an evidentiary hearing and disclosure under

Chapter 119, and the trial court's summary denial of his Rule 3.850 motion was erroneous. This Court should reverse that denial and remand this case for a full and fair evidentiary hearing and 119 disclosure.

ARGUMENT II

MR. MENDYK'S CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE RENDERED FUNDAMENTALLY UNFAIR AND UNRELIABLE, AND VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHEN THE PROSECUTION WITHHELD MATERIAL AND EXCULPATORY EVIDENCE AND DELIBERATELY AND KNOWINGLY PRESENTED AND USED FALSE EVIDENCE AND ARGUMENTS IN ORDER TO INTENTIONALLY DECEIVE THE JURY, THE COURT AND DEFENSE COUNSEL.

This case involves much more than a simple violation of Brady v. Maryland, 373 U.S. 83 (1963). As long as fifty years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violated a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935). The fourteenth amendment's Due Process Clause demands at a minimum that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). "A prosecutor must refrain from improper methods calculated to produce a wrongful conviction." United States v. Rodriguez, 765 F.2d 1546, 1559 (11th Cir. 1985)(citing Berger, Id. at 88).

The prosecution has the constitutional duty to disclose fully any deals it may make with its witnesses. United States v. Bagley, 105 S. Ct. 3375 (1985); Giglio v. United States, 405 U.S. 150 (1972). The state must comply with Rule 3.220 of the Florida Rules of Criminal Procedure. Roman v. State, 528 So. 2d 1169 (Fla. 1988). The State has a duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); and to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). Where, as here, the State uses false or misleading evidence, and suppresses material exculpatory and impeachment evidence, due process is violated whether the material evidence relates to a substantive issue, Alcorta; the credibility of a State's witness, Napue; Giglio; or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967). Such State misconduct also violates due process

when evidence is manipulated by the prosecution. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

Here, the State violated these principles. Evidence which undermined the credibility of the State's star witness, Mr. Mendyk's co-defendant, was suppressed. State agents who dealt with Mr. Mendyk's co-defendant were convinced he was not being truthful, yet the State hid this information. The State knowingly presented false evidence to the sentencing judge and defense attorney. The effect was devastating. The defense had failed to prepare, and as a result defense counsel's presentation of mitigation was chilled by the State's misconduct.

Further, the withholding by the State of evidence of drug usage and of poor mental health and/or instability deprived counsel of information which should have led to a mental health evaluation for penalty phase purposes. The State hid evidence of mitigating circumstances. The State surreptetiously administered psychotropic medication to a suicidal Mr. Mendyk. Defense counsel was deceived and failed to present mitigating evidence or even have a mental health mitigation evaluation conducted. The evidence withheld undermines confidence in the outcome. The undisclosed evidence would have led either to conviction of a lesser offense or imposition of a lesser sentence.

A. Evidence of State's Interrogation of Frantz

The State's star witness, Phillip Frantz, Mr. Mendyk's co-defendant, gave a taped statement concerning the crime. Thereafter Frantz talked to the prosecuting attorney and told of matters not contained on the tape. This statement to the prosecuting attorney was never disclosed.[3] Frantz explained to the prosecutor how the police did not honor his request for a lawyer. He was told after his request for a lawyer if he did not talk the police would give Mr. Mendyk the chance to blame Frantz. He was told if he wanted to talk "the judge will be more lienient [sic]." The prosecutor's notes of this conversation with Frantz stated:

> (82) After Miranda, [Frantz] 1st told
> Alan Arvick & other det.
> short, heavy set, dark hair

[3]The State was obligated under Rule 3.220 to provide the defense with "any statement of any kind or manner made by [a person known to have relevant information] and . . . summarized in any writing."

No mustache or beard } Ralph Decker

No, I want a lawyer
"before I say anything I don't know
what you have but
I want to see my lawyer

then said okay you have a right to, then
started telling [Frantz] all the ways they
could connect him to the murder

(83) told [Frantz] had way to take prints from
body; & ref: pieces of skin, hair, etc.

(84) told [Frantz] that if have anything to
say you'd better tell us
now cause if not
we'll go see your friend & he may blame
it all on you

(85) told [Frantz] to sit & think as going to
talk to T

as [Frantz] though about it, made scene --
c. 15 min.

"if talk now, a real good chance that the
Judge will be more lienient on you"

"If say it now, it will look alot better for
you"

(PC 75).

The prosecutor's notes also reflect that the discussion between the police and Frantz was not on tape. "No tape of this." (PC 75). He clearly knew the importance of this evidence and just as clearly withheld the information. This evidence would have been a valuable tool for the defense. "Tell us now," the prosecutor wrote, "cause if not we'll go see your friend and he may blame it all on you." Id. This evidence was crucial for the defense to explain to the jury that the State coerced Frantz by making him choose whether he would help the State get the chance to get a death sentence on Mr. Mendyk or whether Mr. Mendyk would be given the chance to get a death sentence on Frantz. The evidence was critical to explain Frantz' motives. He wished to save himself, and the State had explained if he did not talk, he might miss his opportunity. As explained in Davis v. Alaska, 415 U.S. 308, 316-17 (1974), "the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." Here, the State failure to disclose Frantz's statement to the prosecuting attorney detailing

how he was convinced to testify against Mr. Mendyk precluded full "exposure of [Frantz'] motivation in testifying." Id.

The evidence would also have constituted Williams rule evidence demonstrating the Hernando County Sheriff's Office did not comply with Edwards v. Arizona, 451 U.S. 477 (1981). Just as the police did not honor Mr. Frantz's invocation of his right to counsel, the police refused to honor Mr. Mendyk's invocation. This was important exculpatory evidence, the suppression of which undermines confidence in the outcome of the proceedings.

B. Frantz's Prior Inconsistent Statements

One of the main points that the State established through Mr. Frantz's testimony was the absence of intoxication at the time of the incident. This testimony was contrary to undisclosed statements to the prosecuting attorney. The State did nothing to alert the defense to prior inconsistent statements.

Mr. Frantz's agreement with the State was that he would receive three concurrent life sentences in return for a guilty plea to first degree murder, kidnapping, and principal to sexual battery. Additionally, he agreed to testify against Todd Mendyk. At trial Frantz testified on the use of drugs and alcohol on the night of the crime:

> Q Okay. On April 8th when he came to the house where you were living in spring Hill, Hernando County, Florida, what was the purpose of Todd Mendyk visiting you on that day?
>
> A We were sitting around smoking pot and drinking beer.

(R. 974).

> Q Were you doing anything else while you were driving to Brooksville?
>
> A We drank some beer and smoked a couple joints.

(R. 975).

Much of the State's case involved disproving an anticipated defense of intoxication. Mr. Frantz's testimony on that point was explicit:

> Q Okay. Did you have any more beer there at Eddie Craven's?
>
> A No.
>
> Q Okay. How long were you at Eddie Craven's house?
>
> A Approximately a half-hour.

Q Okay. So, when you left Eddie Craven's house were you drunk?

A No. I was in control of my faculties. I could drive.

Q Was Mr. Mendyk drunk?

A I don't believe so.

Q Who drove?

A I did.

Q Why did you drive, if it was Mr. Mendyk's truck?

A I drove almost all the time when we went out.

Q Why?

A There were quite a few reasons. He was illegal to drive, his license had been suspended. He had just previously gotten two tickets, one for suspended license, and one for improper tag. And also, when we were drinking, I didn't like for him to drive, because I had driven with him when we were drinking, he didn't drive very well.

Q He didn't drive well when he was drinking?

A (Affirmative nod.)

Q Are you saying that he was drunk? Or are you saying he was drinking?

A He was drinking. He wasn't drunk.

(R. 977-78)(emphasis added).

On cross-examination, Mr. Frantz admitted marijuana use and alcohol abuse (R. 1025-6), and that he had provided the marijuana (R. 1035). Mr. Frantz continued to testify that the effect of the alcohol and drugs was minimal:

Q All right. You say that you and Todd Mendyk were smoking marijuana, several marijuana cigarettes during the course of the hours prior to the abduction, is that correct?

A Yes.

Q Did you smoke any after, any marijuana after the girl was abducted from the swamp?

A No.

Q Smoke any marijuana after you left Eddie Craven's house?

A No.

Q And you said that was about 12:30?

A Yes.

Q Did you drink any more beer after you left Eddie Craven's house?

A No.

Q Did you drink any more beer at any time during the course of the next several hours?

A No.

Q You say that during the course of this event that you -- and you assume Mr. Mendyk was under the influence to some extent, anyway, of marijuana?

A Yes.

Q Would you say that he was stoned or smashed?

A No.

Q Had you seen him function under the influence after smoking marijuana on previous occasions?

A Yes, every day.

(R. 1040-41)(emphasis added).

The trial testimony came after the State made a deal with Mr. Frantz. However, the State's notes of a pre-deal, April 17, 1987, statement which were not provided to the defense,[4] provided:

> Need Alco/drug m/h eval's
>
> * * *
>
> It was usual practice to drink/smoke every pm till pass out.
>
> 8. Left Todd, D, Alfred & Karen at the house, drinking & smoking mj.
>
> D & Todd not leave house b/w 7:15 & 10:30 p.m.
>
> 9. [T]hen drank Schnapps with the beer.
>
> 10. Probably had 7 beers plus Schnapps bottle (several shots) & 4 or 5 joints of good mj (brown pot), then another joint with John.

(PC 700-01).

While Frantz's testimony played down the use of alcohol and drugs after 11:30 p.m., the State's notes of Frantz's statement indicate heavy substance abuse continued:

> 11. C. 11 or 11:30 p.m. Todd suggested to D that they go out and see what was going on.

---

[4]The State was obligated under Rule 3.220 to provide the defense with "any statement of any kind or manner made by [a person known to have relevant information] and . . . summarized in any writing."

> 12. Todd's truck, but D drove drinking 6 pack & smoked another joint. Todd not handle booze so D usually drive when drinking.

(PC 702).

Frantz told the State that he usually drove when they were drinking because "Todd (could) not handle booze." (PC 702). Frantz also told the State:

> Todd (was) more wasted than (Frantz the co- defendant).

(PC 702). Thus according to Frantz' undisclosed statement Mr. Mendyk had been smoking marijuana and drinking alcohol throughout the day. After 7:15 pm, Mr. Mendyk had seven beers, several shots of Schnapps, and six joints. After 11:30 p.m., Mr. Mendyk had another six pack and another joint. Finally, according to Frantz, Mr. Mendyk did not handle the effects of alcohol as well as Frantz himself did, and Todd was "wasted".

The prosecutor argued to the jury:

> The defendant and Phillip Frantz were at his house at 11:00 p.m. on the 8th, and they were both sober when they left there. They were both sober when they left there. So even though he smoked marijuana, possibly drank beer possibly that day, who knows exactly how much, he was sober at 11:00 o'clock when he left there. And we know that the last time he smoked marijuana was at 12:00 to 12:30, at Eddie Craven's house, just entering the day of the night. They had no more marijuana. So that's not a defense in this case.

(R. 1131). The undisclosed statements were contrary to Frantz's trial testimony[5] and contrary to the prosecutor's closing. The nondisclosure undermines confidence in the outcome.

C. Evidence Frantz Was Not Telling The Truth

Frantz's testimony at trial was pivotal (R. 972-1042). This testimony was

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[5]During Frantz' sentencing proceedings of November 18, 1987, Frantz blamed everything that happened on drugs:

> I know that no good can come from what happened, but I hope that people will see what I did to myself with drugs and alcohol and learn from my mistakes.
>
> There's never a reason to take drugs or abuse alcohol, and it's a big lie and you only hurt yourself. So many people suffer just senselessly when they use drugs, and I know I can never make up for what I've done, and I accept my punishment for what I did.

(Sentencing of Phillip Frantz, November 18, 1987, p. 3) (PC 838) (emphasis added). However, Mr. Mendyk's jury never heard that what happened was caused by drugs and alcohol.

the key to the State's claim that Mr. Mendyk alone should be put to death. However, in Frantz's Post Sentence Report Detective Ralph Decker was reported to have said:

> It is my opinion that Frantz was responsible for far greater degradation and deviant sexual assault upon the victim and actual complicity in the homicide then he has ever admitted to. Frantz has made self serving statements that limited his participation in this crime.

(PC 842). Furthermore, in the same document, Michael Dippolito, Corrections Supervisor, agreed with Detective Decker:

> It is the opinion of this supervisor that Frantz is not completely telling the truth of his involvement in this crime.

(PC 843). The date of this document, 10/22/84, indicates it was dictated contemporaneously with Mr. Mendyk's trial. Detective Decker's statement would have to have been given sometime before the date it was dictated. Decker's statement demonstrates that the State knew Phillip Frantz's trial testimony was false. The defense was not told that Frantz had told the prosecutors of extensive drug and alcohol use which left Mr. Mendyk "more wasted." The defense was not told that the State believed that Frantz was far more culpable than he admitted, and yet was given life. The jury was led by Mr. Frantz to believe that Mr. Mendyk was not under the influence of drugs or alcohol and that Mr. Mendyk was much more culpable than Frantz. In other words, Mr. Mendyk deserved death even though Frantz got life. However undisclosed evidence that the State believed Frantz was lying undermines confidence in the outcome.

D. <u>False Testimony Regarding Prior Criminal Activity</u>

The State also presented evidence to the circuit court which was false and extremely prejudicial concerning Mr. Mendyk's alleged connection to a prior homicide. The evidence was presented in the form of a proffer during the penalty phase proceedings. The State sought to present this evidence to the jury. The State called John Cousins who was serving time for voluntary manslaughter in South Carolina; his testimony was proffered to the Court. Cousins' testimony, which contradicted all of his prior sworn statements, described a South Carolina murder in which Mr. Mendyk allegedly was involved. In fact, as the State knew, all South

Carolina charges against Mr. Mendyk had been dismissed because he was exonerated pretrial of any involvement in the homicide.

Cousins' proffered testimony to the sentencing judge was that the murder was a satanic ritual, in which the participants were to drink the victim's blood. Cousins claimed that the murder was jointly planned with Mr. Mendyk. Cousins further elaborated:

> Q All right. Did you discuss with Todd Mendyk this need to consume blood?
>
> A Yes.
>
> Q How many times? Can you give us an estimate of how many times you had discussed with Todd Mendyk about human blood, about consuming blood to give you, to strengthen your own character?
>
> A It wasn't many.
>
> Q How many? Two? Three?
>
> A Perhaps.
>
> Q Perhaps as many as three?
>
> A Maybe. I'm not positive.
>
> Q But more than one?
>
> A Yes.

(R. 1235)

> Q Where did you stab him at?
>
> A In his neck.
>
> Q For what purpose? To get the blood?
>
> A Yes.

(R. 1237).

Neither prior to, nor during, the proffer did the State disclose that Mr. Cousins had been granted use immunity by the prosecuting attorney, Mr. Hogan:

> Cousin wanted to know what guarantees he had that he could not be further prosecuted for the information that he had to tell. Assistant State Attorney Tom Hogan then wrote a short statement that was signed by all parties sitting in the room. This statement assured Cousin that all information obtained from him would be used in the prosecution of Todd Mendyk. The statement further indicated that Cousin would not be prosecuted by the State of Florida or by the State of South Carolina for any additional information he gave us in connection with the homicide of Thomas Fisher.

(PC 729).

The prosecution, after proffering Cousins' testimony, suddenly had a change of heart and agreed not to call Cousins in its case in chief. However the State made clear that Cousins could be recalled to the stand, obviously depending upon the defense's evidence in mitigation.

> MR. HOGAN: I ask this witness to remain until the conclusion of the testimony today, Judge. At that point, we'll make a decision as to if we need to recall him. If not, he'll be returned to South Carolina.
>
> THE COURT: Let's conduct him back to wherever he came from. I think this will be a good time to take a ten-minute recess.

(R. 1247)(emphasis added). The Court was influenced by this testimony; the sentencing process was contaminated with extremely prejudicial lies. But more importantly the State used the testimony as a hammer against the defense, threatening to present the evidence if the defense opened the door. Not surprisingly, with this proverbial "gun" pointed at its head, the defense chose not to present any mitigation.[6]

The proffered testimony was not only inflammatory and highly prejudicial -- it was a lie. Except for the fact that Cousins killed a man, the story bears little or no resemblance to the truth. The State had, in fact, sent Detective Arick along with prosecuting attorney, Tom Hogan, to South Carolina to investigate. The records there established Cousins proffered testimony was a lie, yet those records were not disclosed to defense. Perhaps even more astonishingly the prosecutor presented Cousins' proffered testimony knowing it to be a lie and knowing the chilling effect it would have on the defense. The prosecutor, Tom Hogan, knew the evidence was a total fabrication because he had seen the records, yet it was presented to the court and never corrected. (PC 728).

The truth as shown in the South Carolina records is that Mr. Mendyk did not even know a murder had been committed. The victim, a hitchhiker, was drunk and suicidal, and got in a fight with Cousins. During the course of the fight Cousins stabbed the victim in the neck. The victim ran off and died. There is nothing -- no mention anywhere in the South Carolina records -- of the bizarre things that

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[6]Of course if discovery had been complied with, or if the defense had been given the chance to investigate, the defense would have known the gun was not real.

Cousins said in his Florida proffer. In fact, Cousins gave sworn statements in South Carolina which completely contradict his proffered testimony at Mr. Mendyk's trial.

The South Carolina records, if disclosed, would have led to the South Carolina defense lawyers. Mr. Mendyk's South Carolina attorney, Kathryn K. Andrews, if contacted, would have stated:

> 4. On or about March 23, 1985, my husband advised me that he had learned that two enlisted personnel from his submarine had been arrested in connection with a homicide in Charleston County. He expressed great concern over one of the men, Todd Michael Mendyk, who was charged as an accessory. As I recall, my husband felt that Todd was an intelligent young man. After some discussion, I decided to go to the County Jail and speak with Mr. Mendyk. I was aware that he would qualify for appointment of counsel and that my office's screener would not see him until after the weekend. My primary motivation for making a special trip to the jail to see Mr. Mendyk was my husband's concern for him.
>
> 5. I told Mr. Mendyk who my husband was, and asked if that relationship would pose any problems for him. He said it would not, and I requested that his case be assigned to me.
>
> 6. Prior to my representation of Todd Mendyk, he had no criminal record except for a speeding ticket. To my knowledge, he had no formal disciplinary action taken against him in eighteen months in the Navy.
>
> 7. The only evidence the State ever produced to support the charge of accessory after the fact to murder was the fact that Mr. Mendyk was with the murder defendant and the victim prior to the incident, and nearby at the time of the incident. There was never any evidence that Mr. Mendyk saw the incident or knew that it happened. The scenario was basically this: four young enlisted men were drinking and club-hopping when a hubcap fell off the car. Mr. Mendyk and another recovered the hubcap; meanwhile, the other two young men had an argument, the victim refused to back off, and the perpetrator swung a knife at the victim. The victim ran off. The victim's body was found the next morning; he had been cut on the neck and bled to death.
>
> 8. Mr. Mendyk's charge was eventually dismissed on or about August 14, 1985. He voluntarily took a police polygraph and passed.
>
> 9. In the course of my representation, shortly after Mr. Mendyk's arrest, I directed my investigator, Jesse Williams, to interview potential witnesses who were Mr. Mendyk's shipmates. Notes in my file indicate that I requested that the investigator interview the following: David Mackey, Charles F. Preslar, and William McFarland. Each of these gave statements to the police about admissions of the murder defendant.
>
> 10. On March 28, 1985, according to notes in my file, Mr. Williams advised me that he had spoken with three fellows on the boat, and that "everyone had talked in favor of Mendyk -- not [a] troublemaker -- not like him to be UA [on unauthorized absence]."
>
> * * *
>
> 18. It became apparent to me in the course of my representation of Todd Mendyk that he had a substance abuse problem. He was drinking

heavily at the time of the incident for which he was arrested. He was reportedly drinking the day after the incident, and as a result did not report for duty that day or until after noon the next day. This behavior was unusual according to the witnesses my investigator interviewed, and the information I received from others connected with the submarine that Mr. Mendyk's co-workers were afraid that something bad had happened to him. My notes reflect that the defendant charged with murder told shipmates that he was afraid Mr. Mendyk was dead because he had not returned to duty.

* * *

25. On or about January 15, 1991, I received a call from Mr. Mendyk's current counsel, Susan Elsass. She advised me that Todd is on death row in Florida. This was the first I had heard of Todd's present difficulties. I was quite surprised. I was never contacted by Todd's trial counsel. When he was tried in 1987, I was still employed in Charleston, South Carolina. I would have been willing to cooperate with counsel and testify at Todd's trial, had counsel contacted me. I would have told counsel what I knew of Todd, and about my feeling that he suffered from serious mental health problems. Based on both my experience representing Todd, and my experience preparing and trying capital cases in Charleston, I would have advised trial counsel that it was imperative that he obtain a thorough mental health evaluation of his client.

26. It is likely that some of the shipmates who spoke in Todd's favor when interviewed by my investigator would have still been assigned to the USS Casimir Pulaski or another duty station in Charleston, and I could have assisted in contacting them if requested by trial counsel. The investigator, Jesse Williams, unfortunately died last year, but he was well and, to the best of my recollection, still employed by my office in 1987 when Todd was tried in Florida. Based on my long working relationship with Mr. Williams, I believe he would have cooperated with counsel, as well.

27. The defendant charged with murder, John Cousin, entered a guilty plea to a lesser charge. His attorney, Danny Beck, had left the public defender's office to go into private practice in another city shortly before the plea, and I represented Mr. Cousin at his guilty plea. I am positive that I was aware of no conflict between Mr. Cousin and Mr. Mendyk at that time.

28. I have been advised that Mr. Cousin testified that he and Mr. Mendyk had a plan to kill the victim and the fourth man in the car, Edward Brown. This testimony is inconsistent with all the facts known to me at the time, including Mr. Cousin's statements about the incident at the time. The following information is drawn from my file on Mr. Mendyk, and is not privileged information as to Mr. Cousin.

28. In the first place, the evidence was that the victim had requested a ride when the other three men stopped at a 7-Eleven store just minutes prior to the argument which ended in his stabbing; he was unknown to the others in the car beforehand. This evidence indicates to me that there was no time or opportunity for Mr. Cousin and Mr. Mendyk to develop the alleged plan to kill the victim, since all four men were in the car together from the time the victim joined the others.

29. In the second place, there was never any evidence that Mr. Mendyk showed any aggression toward Mr. Brown in accordance with the alleged plan described by Mr. Cousin.

30. In the third place, there were statements from shipmates of

the victim indicating that on the evening in question, he was very drunk, that he was speaking about suicide, that he was very distraught because he would not be permitted to see his underage girlfriend anymore, and that he was behaving aggressively. This evidence is consistent with the evidence about the incident itself, which indicated that the argument between the victim and Mr. Cousin involved discussion of the girlfriend, and that Mr. Cousin swung his knife because the victim would not back off.

31. In the fourth place, my file indicates that Mr. Cousin told shipmates after the incident that he had cut a sailor, and that he "didn't know how bad." The shipmates did not know whether to believe him, but later saw on the news that a sailor had been found dead from a stab wound. This evidence is inconsistent with Mr. Cousin's allegation that there was a murder plan because it demonstrates no intent to kill and no knowledge that he had killed. It also demonstrates that Mr. Cousin, shortly after the incident, felt no need to hide his involvement, which would be a logical component of a murder plan.

32. Had Mr. Mendyk's trial counsel contacted me with information about the substance of Mr. Cousin's testimony, I would have advised him of the ways that the testimony was inconsistent with the actual facts of the incident. I would have suggested that his investigation encompass whether any inducements were offered to Mr. Cousin for his testimony, since it was contrary to all that I knew about the case.

(PC 858-69).

Mr. Cousins' attorney, Daniel Beck, if contacted, would have stated:

2. In 1985 I represented John Gary Cousin in the case State vs. Cousin, Indictment No. 85-GS-10-1381, on a murder charge. During the time that I represented Mr. Cousin, he never mentioned Satanism, voodooism, domination or bondage to me.

3. I have reviewed, Detective Allan Arick's report dated September 14, 1987 and from the transcript of State vs. Mendyk, Circuit Court Case No. 87-179-CF and 87-219- CF. I was shocked to see that Mr. Cousin made claims of satanism, voodooism, etc., concerning Todd Mendyk and Mr. Cousin's 1985 South Carolina charges.

(PC 871).

The prosecution went to South Carolina; they investigated; they knew Cousins' proffered testimony was a fabrication. Detective Alan Arick did the investigation in South Carolina, and was accompanied by the prosecutor, Tom Hogan. The details of the trip are covered in Detective Arick's report of September 14, 1987.[7] Though proper request had been made, including a standing request, and though this report was discoverable, it was never released to the defense. Had the report been turned over, an effective defense counsel would have been able to investigate the report

[7]Obviously September 14th is several weeks before October 8th, the day the trial commenced. Clearly there was time for the prosecution to provide the report, completed September 14th, to the defense prior to the October 8th trial.

and would have found that the case file contained none of the bizarre behavior indicated by Cousins in his proffered testimony. In fact, there were prior sworn statements from Cousins contradicting the proffer. There were also statements from other witnesses contradicting Cousins' proffered testimony.

Obviously Prosecutor Hogan and Detective Arick had access to South Carolina police reports. The first page of Arick's report of 9/14/87 states:

> "(Sgt. Tommy Blackwood of the North Charleston Police Department) indicated he had the case file on hand involving the death of Thomas Fisher."

(PC 728-29). In the undisclosed South Carolina files are many witness statements which show a totally different story than that which Cousins told the Court. John Cousins told several people a very different story immediately following his killing of Fisher. He told a fellow Seaman, David Mackey:

> Then, I asked him "What's up." John, then, told me that he had stabbed a guy last night."
>
> . . .
>
> John said that the guy had told them that he was in the Navy and that he was UA. John said "the guy then told them that he was here in Charleston looking for his girlfriend;" that's all John said he told them. O.K., this is a blank space to me. John then said he told the guy that if he had to search for the girl she is not worth having as a girlfriend. From what I can understand they were standing on one side of the car talking. John said that when he said this the guy got very upset. John said that he then walked around the other side of the car. He said that the guy then followed him around the car. He said that he and the guy got face to face and the guy was cursing at him and hassling him. John said that he pushed the guy away from him. He said that the guy then tried to hit him. Then, he said that's when he stabbed the guy in the neck. He said the guy then grabbed his neck and ran off.

(Sworn statement of David Mackey, 3/22/85) (PC 845-46).

Cousins told the same story to William McFarland, another seaman and roommate of Todd Mendyk. Note that the story recounted in Mr. McFarland's sworn statement includes Mr. Cousins' action of placing his murder weapon in Todd Mendyk's room:

> I asked him what he meant and he said he had stabbed somebody. He told me the guy kept coming at him and getting in his face and Cousin pushed him away he said but the guy kept coming back at him, so he said he stabbed the guy. He told me the guy was hitchhiking and he picked him up. Cousin said they were talking and the guy told Cousin that he was looking for his girlfriend and Cousin said he made a smart comment about the guys girlfriend and the guy started wanting to fight. Cousin said he put the knife back in Mendyk's room. He placed the knife in a drawer in my room. This conversation took place about 12:30 p.m. The drawer he placed the knife in belongs to my roommate Mendyk. Cousin then left.

(Sworn statement of William McFarland March 22, 1985) (PC 849-50).

The reason for the fight with the victim, Fisher, is addressed by several shipmates of Fisher's who claimed the victim was suicidal. Such a statement is made by fellow Seaman Robert Wilson:

> During the time that we were drinking, Thomas Fisher talked about killing himself, he said this because he thought that he did not have any friends.

(Sworn statement of Robert Wilson, March 21, 1985) (PC 852).

The South Carolina police reports which were not disclosed to Mr. Mendyk's counsel gave a completely different view of the crime committed solely by Cousins than did Cousins' proffered testimony. Cousins' own sworn statement concerning the crime recounts the same circumstances as he told everyone else in 1985:

> (Fisher) was looking for his girlfriend. I told him that if he had to look for her she wasn't worth it. He got mad and began cursing me. We began arguing and he got in my face and I pushed him away. He started coming back toward me and I pulled the knife out. He kept coming and we started wrestling around. The next thing I knew was he got stabbed around the neck and shoulders. It happened so quick; it was an accident. He, then, took off running. I put the knife in my pocket and got back in the car. The driver and Todd had never gotten out of the car. Todd was sitting in the back seat. When I got in, the driver asked me where the other guy was, I told him that he had freaked out and had took off.
>
> The knife had blood on it. I put it in my chest of drawers. On Thursday afternoon, I opened my drawer and saw the knife. I took it out and went and put it in Todd's drawer. Later that evening, I went back to Todd's room, got the knife, and walked to a Pier near the bowling alley and threw the knife in the water. "Wait, this is bullshit! I can't do this." The knife is hidden in; the knife is hidden in the ceiling in Barracks 65. I'll take you and show you where the knife is and will voluntarily turn my clothes over to Det. Hawkins.

(Sworn statement of John Cousins, 3/22/85) (PC 854-56).

Mr. Hogan had this material; he kept the defense from knowing of or investigating the incident. Then the prosecution used this obviously perjured testimony to prejudice the Court and to threaten the defense. Mr. Hogan, the prosecuting attorney, did not correct the false testimony, did not disclose prior inconsistent sworn statements, and did not alert the defense in any way to the wealth of material in South Carolina contradicting Cousins. Instead the prosecuting attorney pointed the proverbial "gun" at the defense table, saying he would keep Cousins around for the rest of the day and see if it was necessary to recall him. Not surprisingly, the defense presented no mitigating evidence. As a result of the

State's conduct Mr. Mendyk was deprived of an individualized sentencing. Due process was violated. The error was not harmless. The death sentence is not reliable.

E. Medication Administered to Mr. Mendyk During Trial

During his trial, Mr. Mendyk was housed in the Lake County Jail. According to jail records, Mr. Mendyk was suicidal during his trial. As a result, he was medicated with Vistaril. (Lake County Sheriff's Department, Incident Report 10-11-87) (PC 713). The prosecutor, Tom Hogan, was even involved in the decision-making regarding the dosage of the psychotropic medication:

> 10-16-87 Per telephone conversation with T. Hogan S/A we may continue to give Visteral [sic] 25 mg TID per Dr's order but the dose must not be increased.

(PC 714).

Defense counsel was not provided with the information regarding Mr. Mendyk's suicidal ideation which prompted medicating Mr. Mendyk during the trial. This information was critical for counsel to know. It raises a question about Mr. Mendyk's competency, and certainly would impact on an attorney's consultations with his client. An attorney conferring with a client needs to know when the state has put the client on psychotropic medication.

This Court has previously held that a pretrial finding of competency does not control where evidence arises at trial reflecting a change in the defendant's mental functioning. Certainly it was important for counsel to know whether Mr. Mendyk was competent when counsel decided to concede guilt. When new evidence suggests that the defendant may no longer be competent, further examination is required. Lane v. State, 388 So. 2d 1022 (Fla. 1980). This may occur at the conclusion of the guilt phase and require postponement of the penalty phase proceedings. Pridgen v. State, 531 So. 2d 951 (Fla. 1988). The question is whether there is a reasonable ground to believe the defendant may be incompetent. If so, a competency hearing is required under due process. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

Here the State failed to disclose to the defense Mr. Mendyk's crazy behavior which precipitated medication. The State did not disclose the medication to the defense or the court in order to permit a competency determination. The State's

action violated due process.

F. Evidence of Mr. Mendyk's Emotional And Mental Health Problems

In the State Attorney's investigator file, a memo dated April 17, 1987, on its third page, the following is noted:

Mendyk childhood:

- Child of a disturbed pregnancy
- Deprived of Emotional & Sensory development in early years
- Little or no support, hugging
  No love
- Brain Scan would show damage to the Limbic Brain

(PC 696). Obviously the State possessed undisclosed and unpresented mitigating evidence, which the jury never heard.

The State's "investigator" file even contained instructions to Detective Ralph Decker on how to handle Mr. Mendyk in order to obtain information:

Ralph - Next interview

- Convince him that you will reject him if he doesn't tell you everything
- Intellectualize with him
- Play on his shame and guilt
- Con him into speaking about his Mother

(PC 697). This is obviously evidence relevant to Mr. Mendyk's claim that his statements were not voluntary under Arizona v. Fulminante, 111 S. Ct. 1246 (1991).

It is clear that the State failed to disclose exculpatory evidence. Brady v. Maryland, 373 U.S. 83 (1963). This evidence included mitigation as well as evidence undermining the knowingness or voluntariness of statements made by Mr. Mendyk to Decker after Decker conferred with a mental health expert in order to exploit Mr. Mendyk's weaknesses. Defense counsel would have pursued suppression of these statements on this basis had he but known. He would have had a reasonable probability of succeeding. Harrison v. Jones, 880 F.2d 1299 (11th Cir. 1989).

The above information and more (contained in the State Attorney's file but never provided to defense) would have alerted defense counsel to the mental health

mitigation. It would have established the need for a mental health expert to review for mental health mitigation. Had a mental health expert been asked to evaluate for mitigation, a wealth of mitigating factors would have been identified. The State knew this; but the State worked to keep the defense in the dark, much to Mr. Mendyk's detriment. The death sentence is unreliable.

G. Alcohol and Drug Usage

The State also knew that a tremendous amount of alcohol and marijuana had been consumed in the few hours immediately prior to the incident, much more than was apparent at trial. The notes from the prosecutor's conference with co-defendant Frantz, dated April 17, 1987 reflected Frantz said:

> "...was usual practice to drink/smoke every (evening) until pass out (sic)."
>
> "Need alco/drug m/h eval's"
>
> "(John) left Todd, (Frantz), Alfred (?) and Karan at the house, drinking and smoking Mj."
>
> "...probably had 7 beers plus schnapps bottle (several shots) and 4 or 5 joints of good Mj (brown pot) then another joint with John."
>
> Todd suggested to Frantz that they go out and sea (sic) what was going on.
>
> . . .
>
> Todd's truck, abut Frantz drove drinking 6 pack and smoked another joint.
>
> . . .
>
> Todd not handle booze so Frantz usually drive when drink (sic).
>
> . . .
>
> Todd more wasted than Frantz.
>
> . . .
>
> Mendyk came over at 6-6:30, beers, pot -- over 4-4 1/2 hours.
>
> Went out got 6-pack. drove around drunk - smoked pot... Went to Eddie Craven's house - smoked joint...

(State Attorney's file, handwritten *notes re prosecution*) (PC 700-02).

These statements regarding Mr. Mendyk's drug and alcohol usage on the night of the homicide were not disclosed. Again Frantz was a witness whose name was disclosed pursuant to Fla. R. Crim. P. 3.220. However that rule further provides

for disclosure of statements and explains:

> (ii) The statement of any person whose name is furnished in compliance with the preceding paragraph. The term "statement" as used herein . . . includes any statement of any kind or manner made by such person and written or recorded or summarized in any writing or recording.

Despite the clear language in the rule, Frantz' statements to the prosecutors were not disclosed. These statements detailed the extensive drug and alcohol usage. As a result the statements were exculpatory. Their nondisclosure precluded presentation of mitigation and rebuttal of the cold, calculated and premeditated aggravating circumstance. Of course, the nondisclosure deprived Mr. Mendyk of evidence of voluntary intoxication at the guilt phase. Confidence must be undermined in the outcome.

H. Police Reports Were Withheld

In the Sheriff's report of Detective Ralph Decker, dated 5/29/87, the first two pages (marked "No Disc") were never turned over to the defense. This particular report details statements by Frantz's mother, who was arrested at the scene with the co-defendants. She was obviously a material witness whose statements were discoverable under Rule 3.220. In her statement, Norma Frantz acknowledges her son's marijuana use. (PC 741).

Sergeant Royce Decker's 4/20/87 report was withheld. The report contained details of the victim's body as it was found at the crime scene. At trial Sergeant Decker presented these details in a most inflammatory manner. Defense counsel, lacking the report, was unable to effectively object to his testimony and/or cross-examine. Prejudice is obvious.

Similarly the prosecuting attorney marked "no disc" on substantial portions of the Sheriff's Narrative Report dated 4/12/87 and Alan Arick's 4/27/87 report. The State's conscious suppression of these statements by persons with relevant information was improper and further undermines confidence in the outcome.

I. Conclusion

It is clear from the facts alleged that the State's failure to fully disclose the information discussed above was a substantial violation of Mr. Mendyk's right to discovery. Rule 3.220 of the Florida Rules of Criminal Procedure provides in pertinent part:

(a) Prosecutor's Obligation.

(1) After the filing of the indictment or information, within fifteen days after written demand by the defendant, the prosecutor shall disclose to defense counsel and permit him to inspect, copy, test and photograph, the following information and material within the State's possession or control:

(i) The names and addresses of all persons known to the prosecutor to have information which may be relevant to the offense charged, and to any defense with respect thereto.

* * *

(ii) the statement of any person whose name is furnished in compliance with [paragraph i]. The term "statement" as used herein means a written [adopted or adopted] statement . . . or . . . a substantially verbatim recital of an oral statement [made to a state agent or officer] . . . The court shall prohibit the State from introducing in evidence the material not disclosed, so as to secure and maintain fairness in the just determination of the cause.

* * *

(2) As soon as practicable after the filing of the indictment or information the prosecutor shall disclose to the defense counsel any material information within the State's possession or control which tends to negate the guilt of the accused as to the offense charged.

Failure to honor Rule 3.220 requires a reversal unless the State can prove the error is harmless. Roman v. State, 528 So. 2d 1169 (Fla. 1988). Here names and statements of witnesses material to the defendant's case were undisclosed. Certainly the nondisclosure cannot be found to be harmless. In all probability it affected the result, and confidence in the outcome and fairness of Mr. Mendyk's trial is therefore undermined.

The prosecution's suppression of evidence favorable to the accused violates due process. Bagley; United States v. Agurs, 427 U.S. 97 (1976); Brady. A prosecutor must reveal to defense counsel any and all information helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. Bagley. Claims based on discovery violations and/or Brady are clearly cognizable in a Rule 3.850 motion for post-conviction relief. See, e.g., Roman; Arango v. State, 467 So. 2d 692 (Fla. 1985).

Not only did the State withhold evidence here, but it intentionally presented evidence to create a false impression. The State's knowing use of false or misleading evidence is "fundamentally unfair" because it is "a corruption of the

truth-seeking function of the trial process." Agurs, 427 U.S. 97 at 103-04 and n.8. The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the rudimentary demands of justice." Giglio, 150 U.S. at 153. Consequently, unlike in cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the Court has applied a strict standard . . . not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104.

Accordingly, in cases "involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict." Bagley, 105 S. Ct. at 3382 (quoting Agurs, 427 U.S. at 102). This is in essence the Chapman v. California, 386 U.S. 18 (1967), harmless beyond a reasonable doubt standard. Bagley, 473 U.S. at 679 n.9. In sum, the most rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the state correct such evidence if it comes from the mouth of a State's witness. Under Bagley, the defendant is entitled to a new trial if there is any reasonable likelihood, that the falsity affected the verdict. Here, knowingly, the State allowed false and misleading testimony to go uncorrected at trial. In fact the State used false evidence to coerce the defense into not presenting mitigation. Certainly this cannot be harmless beyond a reasonable doubt. Relief under Giglio, Bagley, and Roman is more than proper.

In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court explained that the purpose of the right to counsel was to assure a fair adversarial testing. The Court also noted that, despite counsel's best efforts, there may be circumstances where counsel could not insure a fair adversarial testing, and thus where counsel's performance is rendered ineffective. Here, defense counsel was led to believe that the State had evidence that Mr. Mendyk was a Satan-worshiper who had murdered before. The defense did not know this was false evidence. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington, 466 U.S. 668 (1984). However, the

prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. The prosecution intimidated the defense with false evidence.

The prosecution thwarted counsel and insured that Mr. Mendyk was denied the effective assistance of counsel. Without full disclosure under Rule 3.220 counsel was denied the information necessary to a reasonable investigation of available impeachment and exculpatory evidence. As a result, no adversarial testing occurred. Mr. Mendyk was convicted without the effective assistance of counsel. Defense counsel was browbeaten into not presenting mitigation. Mr. Mendyk's trial was "a sacrifice of [an] unarmed prisoner [] to gladiators." United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975), cert. denied sub nom., 423 U.S. 876 (1975); Sielaff v. Williams, 423 U.S. 876 (1975).

The prosecution's behavior was outrageous. An evidentiary hearing is required. Lightborne v. Dugger, 549 So. 2d 1314 (Fla. 1989); Lemon v. State, 498 So. 2d 923 (Fla. 1986).

ARGUMENT III

MR. MENDYK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Mr. Mendyk pled each in his 3.850 motion. Given a full and fair evidentiary hearing, he can prove each. He is entitled, at a minimum, to an adequate evidentiary hearing on these claims.

The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality

opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." 428 U.S. at 206. This includes consideration of that in a defendant's background which makes him less morally culpable than someone without those obstacles or handicaps. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). Therefore, the state and federal courts have expressly and repeatedly held that trial counsel in a capital sentencing proceeding has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985). Trial counsel here did not meet these rudimentary constitutional standards. As explained in Tyler:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Tyler, 755 F.2d at 743 (citations omitted).

Mr. Mendyk's counsel failed in his duty to investigate and prepare available mitigation. Counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings.[8] Counsel failed to discover and use the wealth of mitigating evidence available in Mr. Mendyk's background -- mitigating evidence which establishes reason for finding Mr. Mendyk less morally culpable -- mitigating evidence without which no individualized consideration could occur. In fact, counsel presented no mitigation at all beyond Mr. Mendyk's age. Had counsel

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[8]Of course, at the last minute the trial date was advanced eleven days. Counsel asked for a continuance citing lack of penalty phase preparation. However, the circuit court denied the motion at the State's urging.

adequately prepared and discharged his sixth amendment duties, overwhelming mitigating evidence would have been uncovered. As the Eleventh Circuit has said, ineffective assistance exists where evidence of mitigation is readily available, and counsel inexplicably fails to present and argue the evidence. Cunningham v. Zant, 928 F.2d at 1017-19.

Counsel's failure in this regard was not based on "tactics;" rather, it was based on the failure to adequately investigate and prepare. No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, see Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), or on the failure to properly investigate and prepare. See Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). Only if adequate investigation has been conducted may counsel make reasonable tactical decisions. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc). Proper investigation and preparation in Mr. Mendyk's case would have revealed a wealth of information constituting valid and significant statutory and nonstatutory mitigation and thus an overwhelming case for life. The unpresented mitigation included: Mr. Mendyk's serious mental health problems, his intoxication at the time of the offense, his history of substance abuse, and an abusive childhood. Defense counsel could have established three statutory mitigating factors[9]: (1) Mr. Mendyk's capacity to conform his conduct to the requirements of the law was substantially impaired, (2) Mr. Mendyk was suffering from an extreme mental or emotional disturbance at the time of the offense, and (3) Mr. Mendyk had no significant history of prior criminal activity. Other available mitigating evidence included child abuse in his critical developmental period, a history of family alcoholism, Mr. Mendyk's sustained and heavy pattern of substance abuse, a history of emotional and psychological disturbances, and disparate treatment of his co-defendant. Circumstances such as these are readily recognized as valid mitigating factors, and would have given the jury an understanding of Mr. Mendyk, the individual. Moreover, the usage of drugs and alcohol on the night of the offense would have negated the presence of "heightened premeditation", a necessary prerequisite for one of the

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[9]These would have been in addition to the age mitigating factor identified by the sentencing judge.

three aggravating circumstances found by the circuit court.

No mitigation was presented because counsel failed to investigate. As a result, counsel did not learn that Todd Mendyk's life had been a difficult one. Even his gestation and birth were problematic. His Mother was ill throughout her pregnancy with Todd, and hospital records indicate that he was a malnourished baby. (PC. 1300). His early home life was most traumatic. Both he and his mother were the victims of his natural father's physical abuse, as records of the Elgin, Illinois, Police Department show. (PC 1295). However trial counsel did not obtain these records. Time and time again, Rowland Corwin, Todd's father, hit Gloria Corwin and her baby:

Q. Neverthless, he proceeded to beat and strike you?

A. Yes.

Q. And that caused you great pain and physical suffering, is that correct?

A. Yes.

Q. In fact, there were several other occasions when he has beaten you and struck you?

A. Yes.

Q. And generally they have occurred while he was intoxicated?

A. Always.

* * *

Q. And therefore you fear for your safety and welfare if you remain?

A. Mostly my son, yes.

(Transcript, Corwin v. Corwin hearing at 5-6) (PC 926-27).

Had she been contacted, Todd's grandmother would have said:

3. Gloria married a man that turned out to be very abusive and overly dominating. Gloria's husband, Rowland Corwin, or Mick as he was known, turned out to be alcoholic. I know that Mick's father was also alcoholic. When Mick would drink, he would act crazy. Once, Mick shot a pet raccoon that Gloria had. There was no reason for that.

4. Gloria and Mick had to move many times because Mick would get drunk and break up the furniture. On one occasion, I arrived there just as the police were getting there. The house was a shambles from Mick's destructiveness. I picked up my daughter and grandson and took them back to my house.

5. On too many occasions I would have to drive over to Gloria's

to pick up Gloria and Todd and take them back to my house. Mick would attack my daughter and have her in fear for her and Todd's lives. Mick would beat her up and she would call me. I would go get her and Todd and bring them to my house. Mick would sober up and plead with Gloria to come home. He would convince her that he could straighten out his life and she would go back with him until he got drunk again and started hitting her.

6. No one has ever asked me about Mick and Gloria. I would have told Todd's attorney about how Gloria was in fear for her and Todd's lives and I would have answered any other questions that the attorney had.

(Affidavit of Doris Weber) (PC 886-87).

Todd's mother related:

6. What convinced me to stay away from Mick was my fear for our son, Todd. Sometimes when Mick beat me, I would be holding Todd. Mick started acting even more bizarre. He took three family pets out in the woods and shot them for no reason. He told me he was going to shoot the family dog -- and he did. When we were separated, he took Todd out one day. He came back drunk and carrying a gun. That was it for me.

7. After our divorce, I have heard about other wives he has hurt. I worked with one of these women. He hurt her so bad that she was out of work for a month. When she came back to work, both of her eyes were still black circles from his beating.

(Affidavit of Gloria Mendyk) (PC 877).

So, Todd Mendyk began a life in his bedroom, cut off from normal human interaction. He turned to books for solace. Before he reached adolescence, his life consisted only of reading and going to school, where he was able to function in that ordered environment. But even these pursuits were problematic. He would worry himself and push himself to do his school assignments "perfectly," and overreact to any real or imagined mistakes he made. Todd never had many friends. He was most comfortable when he was alone, with less pressure and stress. Todd's mother's affidavit stated:

8. Todd has always been very precise. Even as a young child (age 2), he would lose patience with himself if things he was doing weren't done just right. As a student, he would redo school projects over and over to satisfy himself. He was never angry with others, but often angry with himself. He wasn't very verbal as a child, but he was a good child. If things weren't done his way, he would get upset. Teachers never complained about him because he liked school, and he was quiet and meticulous.

9. Even as a child, Todd was a loner. He would go into his room and read all the time. He had three walls in his room that were lined with bookcases and full of books. He would read all the time. He could read a book and five years later he could tell you the whole story in that book.

(PC 877-78).

He never had a relationship of any sort with his stepfather, David Mendyk, so he missed normal boyhood opportunities to learn about himself and others. Todd's mother's affidavit stated:

> 14. Dave Mendyk, Todd's stepfather, was the only real father that Todd ever had. Even so, Todd was never close to Dave. It just seemed that they never could bond together. As Todd got older, they became further apart. In fact, Todd has never been close to anyone.

(PC 879).

Todd believed that his stepfather didn't like him because he was not his natural son. So, unlike most boys, Todd stayed in his bedroom--reading and thinking--without adult direction or guidance. When he was in the tenth grade, Todd ran away from home after he was beaten by his stepfather for smoking cigarettes. As his sister would have related had she been asked:

> 6. My dad used to have a drinking problem. He told me he stopped drinking on my 15th birthday. Dad is a total provider. He doesn't ever complain. He works six days a week, and on Sunday he reads the papers. He's in bed at 9:00 p.m. every night. My parents fought a lot. I couldn't talk to my Dad, and he didn't understand why. My Mom and I are close, though.
>
> 7. I remember one time when my Dad beat Todd up. Dad caught Todd smoking cigarettes. He knocked Todd out of his chair and started hitting him. Dad is a big guy. He made Todd eat all the cigarettes. Todd had a black eye and a busted lip, and his face was swollen. He looked bad -- like three guys had beat him.

(Affidavit of Tina Mendyk) (PC 883).

He hitchhiked to Maryland, to look for his only boyhood pal. He wandered around Ocean City for several weeks, before calling home. Todd finally returned home when his grandmother wired him some money.

Todd never completed high school, but he did manage to get his GED. Shortly thereafter he joined the Navy, with special parental permission since he was underage. He was even able to complete submarine training. But, Todd's fragile mental balance was tipped shortly before his nineteenth birthday, when he was arrested in Charleston, South Carolina, as an accessory to murder. Although all charges against Todd were eventually dropped, the experience left him in a psychological tailspin. Mr. Mendyk's mental illness began to take control.

Mr. Mendyk's trial counsel did not investigate the incident in South Carolina.

He did not contact the logical person -- Mr. Mendyk's South Carolina counsel. If he had he would have learned:

> 18. It became apparent to me in the course of my representation of Todd Mendyk that he had a substance abuse problem. He was drinking heavily at the time of the incident for which he was arrested. He was reportedly drinking the day after the incident, and as a result did not report for duty that day or until after noon the next day. This behavior was unusual according to the witnesses my investigator interviewed, and the information I received from others connected with the submarine that Mr. Mendyk's co-workers were afraid something bad had happened to him. My notes reflect that the defendant charged with murder told shipmates he was afraid Mr. Mendyk was dead because he had not returned to duty.
>
> 19. In addition to evidence of alcohol abuse, I had indications that Mr. Mendyk was involved with use of other drugs. He and the other two enlisted men who were together the night of the incident reported in their police statements that they used marijuana. While I have no recollection of the facts and did not represent him on the charge, Mr. Mendyk returned to the Navy base in August of 1985 after an arrest for possession of drug paraphanalia.
>
> 20. During the time of my representation of Mr. Mendyk, I recall having serious concerns about his inability to exercise judgment, impulsiveness, and inability to prioritize. The evidence against him was almost non-existent, and it was my feeling all along that the case would be dismissed. Once the charges were dismissed, Mr. Mendyk would have returned to his previous status with the Navy, and there would have been no long term consequences as a result of the accessory charge, either legally or in terms of his military career. However, since Mr. Mendyk left the Navy for a period of time, he faced serious military penalties. Since he was unavailable to me and the prosecutor, and did not retain other counsel, it took me much longer than it should have for the charges to be dismissed. Had Mr. Mendyk been absent much longer, the prosecutor might have tried him in his absence, despite the lack of evidence.
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> * * *
>
> 22. I do not recall any satisfactory explanation for the more lengthy period of unauthorized absence while his charge was pending. I believe I discussed Mr. Mendyk's absence with him, although my notes contain no information about where he was or what he did. I recall that I was confused and could not understand why he had left. It was certainly against his interest, both in terms of his legal situation and his Navy career. Again, my impression is that he was significantly disorganized and distracted for an unknown reason. As noted above, to my knowledge his performance in the Navy prior to this incident was adequate, and this behavior represented a change.
>
> 23. Mr. Mendyk struck me as somewhat unusual in his demeanor. He was somewhat detached or distant, and I was never able to establish a real trust or rapport with him. I do not believe there was a personality conflict or tension because of my husband's position in the Navy. Mr. Mendyk stated that he was comfortable with me representing him, and seemed grateful for my assistance. Although the charge was fairly serious, and I would expect the circumstances to be quite upsetting to most young military men without prior records, Mr. Mendyk seemed almost preoccupied, like he could not focus on the charge and what to do about it. I never knew why.

24. Based on the observations related above, I had the feeling that Todd Mendyk had some mental health problems which appeared to be increasing in intensity and affecting various aspects of his life. In the early part of my representation of him, I was certain that the charge would be dismissed and did not consider a mental health evaluation. After he returned from his unauthorized absence, I was much more concerned about his mental health, but his charge was dismissed within a very short time. Had the case looked as though it would proceed to trial, there is no question in my mind that I would have needed a mental health evaluation to ensure adequate representation.

(PC 862-66).

Todd's ability to maintain self-control was shattered. The Navy found him to be "dependent on drugs," and offered to send him to drug rehabilitation (PC 908). However, Todd refused, unable to admit his drug problem.

The next year and a half of Todd's life was a steady decline. By day, Todd worked regularly as a laborer with his stepfather. By night, however, he continued to abuse drugs, including alcohol. Amongst his peers, he was known as a "druggy." He regularly consumed vast amounts of marijuana, beer, hashish and whiskey; on occasion, he would take LSD, eat mushrooms, etc. Some of this drinking and doping was done with his stepfather's awareness -- again, Todd was given no discipline or guidance. Todd's sister would have reported:

9. Todd kept doing drugs, and also drank a lot, after he came home from the Navy. Todd smoked hash and pot all the time. I found some coke vials that were his. Todd drank a lot of beer, and also Jim Beam. It was nothing for him to drink a half gallon of Jim Beam in one evening.

10. About six months before his arrest, Todd started hanging out with Phil Frantz. Phillip was gross. He reeked of pot. My parents didn't want him around because he was really messed up on drugs. Todd always put on a big front with Phillip.

11. But, after a while, Todd started looking scruffy and acting strange and angry. His memory deteriorated. Todd had been working regularly with my Dad at West Hernando Pools and Spas. One time, right before the arrest, Dad told Todd to do something and Todd threw a hammer. Todd would yell and scream if he was mad. It was really weird.

12. I was really angry when Todd was arrested. I was fifteen and my brother had been my best friend. Todd's attorneys never spoke to me.

(PC 884).

A friend of Mr. Mendyk's would have reported if he had been asked:

1. My name is Eddie Craven and I live in Spring Hill, Florida. I know Phillip Frantz and I used to work with Todd Mendyk's mother, Gloria, at Luigi's. I would see Todd when he would come in now and then. Todd was a quiet person, who wouldn't say much but would appear to just sit back and take things in. Todd's dad would come in and drink

beer while he was waiting for Gloria.

2. On April 9, 1987, Phil and Todd came over to the house where I lived with Tammy Muller. I got angry because they scared Tammy by looking in the windows. I don't know what they wanted. Tammy told me later that Phil had a knife in his sweatshirt.

3. Phil and Todd were not straight when they came to our house. They were acting strange. When they talked, they didn't make sense. It was real off the wall.

4. They left after about a half hour or so. I was glad to see them go. Phil had worn a glove with the fingertips cut off. It was just too weird for me.

5. Phil's nickname was "Captain Quaalude" because he was so heavy into drugs. Both Phil and Todd hung out with people who did a lot of drugs.

6. I wasn't asked questions about these things, and I would have answered them if I had been asked.

(PC 889-90).

Todd's attorneys never spoke with his mother either in order to investigate Mr. Mendyk's background:

I never met Todd's trial attorney. I would have answered any questions he had. If the attorney had told me I could have helped, I would have testified for my son. I would have said then what I am saying now.

(PC 880). Absolutely no investigation was done to gather mitigation. Nor did counsel investigate the State's case. Even though Cousins was listed as a witness in September, a month before trial, counsel did nothing to learn of the South Carolina incident. Obviously to his detriment, he relied on the State to disclose discoverable material. Counsel ineffectively waived the statutory mitigation factor that Mr. Mendyk had no significant history of prior criminal activity. Fla. Stat. sec. 921.141(6)(a) (1987). No strategy can be ascribed to such a waiver since the mitigation factor clearly applied to Mr. Mendyk. Prejudice is clear.

There also existed a wealth of information about Mr. Mendyk's mental health problems, available at the time of trial, which forcefully demonstrates clear reasons why the death penalty should not be imposed. Defense counsel did not investigate, prepare nor present this evidence during the sentencing phase. Counsel obtained a mental health evaluation for competency and sanity, but never inquired of the expert regarding mitigation. As a result the jury had no idea who Todd Mendyk was.

Had counsel talked to Mr. Mendyk's prior South Carolina counsel and followed through on her judgment that a mental health evaluation for the penalty phase was critical, he would have discovered the presence of mitigating circumstances. Dr. Pat Fleming, a licensed psychologist, evaluated Mr. Mendyk in 1991 and determined that Mr. Mendyk suffered from schizophrenia, marked by a well-developed delusional system, marked loosening of association and grossly inappropriate affect. Additionally, Dr. Fleming found that Mr. Mendyk had a history of significant substance abuse, which intensified his schizophrenic disorganization. According to Dr. Fleming, Mr. Mendyk had diminished mental capacity.

Dr. Fleming identified significant collateral mitigation including a dysfunctional family background, addiction to drugs and alcohol, and unusual and chaotic beliefs:

> The typical onset of schizophrenia develops in adolescence or early adult life, usually between 15 and 35 years. It can occur in children as young as seven years. The onset is insidious that it is impossible to identify the specific date. Environmental stressors play an important role. In Mr. Mendyk's case, his behavior prior to the first major disorganization was clear. At age 16, began alcohol and drug use, continued to be a loner, began some truancy, discovered his father's identity, and suddenly disappeared to find his "best friend" whom he had not seen in several years. To date, he is unable to identify his psychological state at the time of his disappearance. This may well have been his first schizophrenic episode.
>
> Mr. Mendyk demonstrates a thought disorder typical of schizophrenics. It is difficult for him to give a simple answer to the simplest of questions. He provides immense details that support and explain his central delusional theme. Mr. Mendyk has difficulty in understanding why others do not understand his motivation and the rightness of his actions.
>
> Mr. Mendyk has long periods where he appears to be eccentric and unusual, but is not psychotic. He continues to maintain his delusional belief system. He fluctuates between a manic thought and behavior state and one of complete withdrawal. He has not caused significant problems while incarcerated.

(PC 1233-34)

Dr. Fleming concluded:

> It is my professional judgment that Mr. Mendyk has a diminished mental capacity which is consistently different from that of the "normal" man due to the Schizophrenic disorder. It is my professional judgment that the capacity of the defendant to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was substantially impaired due to this severe psychiatric disorder.
>
> It is my professional judgment that in addition to the psychiatric dysfunction the long-standing alcohol and drug abuse further impaired

his capacity to conform his conduct to the requirements of law.

There are additional mitigating factors that, at the discretion of the court, could be considered. Mr. Mendyk was the product of a dysfunctional home, an alcoholic and abusive father and stepfather, ineffective parenting with limited emotional bonding, resulting in social isolation and restrictive emotional experiences. The alcohol and drug abuse also raises the question of additional cognitive deficits secondary to this abuse.

A combination of factors have been identified: dysfunctional childhood, social isolation and alienation, psychological and physical abusive environment, alcohol and drug abuse, and the pervasive effects of the schizophrenic disorder. The schizophrenic disorder permeated thoughts, affect, mood, and influenced every facet of everyday living. In my opinion Mr. Mendyk's interest and reading in the occult and Satanism were not related in a significant way to the present crime.

Unfortunately this young man was never afforded treatment for any of his problems. Any one of these conditions would be considered mitigating, the combination is debilitating and renders this defendant incapable of conforming his behavior to the expected standards.

(PC 1235-36).

Dr. George W. Barnard was a court-appointed mental health expert prior to trial. Counsel failed to ask Dr. Barnard to evaluate for mitigating circumstances. Had Dr. Barnard been asked he would have identified mitigating factors as being present. (PC 1366-69). See Argument IV, infra.

Trial counsel failed to investigate, develop, and present evidence of Mr. Mendyk's long-term substance abuse problems. Had counsel conducted a reasonable investigation, he would have found that these problems aggravated his already existing mental health problems and that his substance abuse problems resulted from the combined effects of his heredity, his isolated childhood, and his mental illness.

There was evidence that Mr. Mendyk was stopped by police a week before the homicide while he appeared to be driving drunk, (PC 991), yet counsel failed to know or investigate this. This evidence related to Mr. Mendyk's drug and alcohol problem and should have been presented.

Trial counsel presented none of the available mitigating evidence to Mr. Mendyk's jury. This was because counsel failed to adequately investigate and prepare. The judge and jury never heard about the severe effect that substance abuse has on a mentally ill person. Had he been asked, Dr. Barnard could have explained this. (PC 1366-69). The absence of any evidence at the penalty phase

regarding Mr. Mendyk's intoxication at the time of the offense was plainly prejudicial. Without question, evidence of intoxication at the time of the offense is relevant mitigation under Florida law. Waterhouse v. State, 522 So. 2d 341, 344 (Fla. 1988). The same is true of all the other available but unpresented mitigation regarding impaired capacity, mental or emotional disturbance, abusive and neglectful childhood and disparate treatment of co-defendant.

Recently, in Stevens, this Court affirmed the necessity of appropriate background investigation at the penalty phase of trial. A new sentencing is required when counsel fails to investigate and as a result, substantial mitigating evidence is never presented to the judge or jury. Like trial counsel in Stevens, defense counsel here neglected to develop mitigation, "made inexcusable misrepresentations," and "essentially abandoned the representation of his client during sentencing." Stevens, 552 So. 2d at 1087. Clearly Mr. Mendyk was abandoned by counsel.

In Strickland v. Washington, the Supreme Court noted:

> [T]he ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

466 U.S. at 696 (emphasis added). In Blake, the Eleventh Circuit noted the interplay between Lockett v. Ohio, 438 U.S. 586 (1978), and its progeny and the prejudice prong of Strickland:

> Certainly [petitioner] would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the state's showing of aggravating circumstances. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978). Here, [counsel's] failure to seek out and prepare any witnesses to testify as to mitigating circumstances just as effectively deprived him of such an opportunity. This was not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure--albeit prompted by a good faith expectation of a favorable verdict--to prepare for perhaps the most critical stage of the proceedings. We thus believe that the probability that Blake would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome.

Blake, 758 F.2d at 535 (emphasis added).

Here, had trial counsel conducted a reasonable investigation he would have been able to present statutory and non-statutory mitigating evidence and negate the State's claim of "heightened premeditation." Other instances of counsel's ineffectiveness at penalty phase are presented elsewhere in this brief. They include: failure to object to prosecutorial overreaching (see Argument VIII); failure to object to improper jury instructions (see Arguments IX, XI, XII, XIII, XVII, and XIX); failure to properly object to victim impact statements (see Argument XV); failure to object to repeated dilution of jury responsibility (see Argument XVI); failure to object to the introduction of nonstatutory aggravators (see Argument XIV); failure to object to his client being shackled (see Argument X); and failure to provide his client with a constitutionally adequate mental health evaluation (see Argument IV).

To determine whether a resentencing is necessary because of defense counsel's deficient performance, consideration must be given to the import of Lockett, and its progeny:

> "In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the [sentencer] must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the [sentencer] is to give a "'reasoned moral response to the defendant's background, character, and crime.'" Franklin, 487 U.S., at --- (opinion concurring in judgment)(quoting California v. Brown, 479 U.S., at 545 (concurring opinion)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson, 428 U.S., at 305, the [sentencer] must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.
>
> . . . Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605; Eddings, 455 U.S., at 119 (concurring opinion). When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Penry v. Lynaugh, 109 S. Ct. 2934, 2951-52 (1989)(emphasis added). The prejudice to Mr. Mendyk resulting from counsel's deficient performance is just as clear. This

Court affirmed Mr. Mendyk's death sentence without any of this compelling mitigation evidence[10]. Confidence in the outcome is undermined, and the results of the penalty phase are unreliable. An evidentiary hearing must be conducted, and Rule 3.850 relief is proper.

ARGUMENT IV

MR. MENDYK WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERT WHO EVALUATED MR. MENDYK WAS NOT PROVIDED WITH THE NECESSARY BACKGROUND INFORMATION AND WAS NOT ASKED TO EVALUATE FOR THE PRESENCE OF MITIGATION OR INTOXICATION NEGATING SPECIFIC INTENT.

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1976)(quoting United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974)). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, and to assure that the client is not denied a professional and professionally conducted mental health evaluation. See State v. Michael, 530 So. 2d 929 (Fla. 1988).

A qualified mental health expert serves to assist the defense "consistent with the adversarial nature of the fact-finding process." Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990). Under Florida law, an indigent defendant is entitled to an appointed mental health expert to assist in the preparation of a defense. Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla. 1 DCA 1991). The mental health expert also must protect the client's rights, and violates these rights when he or she fails to provide competent and appropriate

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[10]Three statutory mitigating factors and a myriad of nonstatutory mitigating factos could have been presented in addition to the one found by the circuit court. Certainly this must undermine confidence in the outcome where the circuit court identified only three aggravating factors.

evaluations. State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason v. State, 489 So. 2d 734, 736-37 (Fla. 1986).

Florida law made Mr. Mendyk's mental condition relevant to sentencing in many ways: (a) specific intent to commit first degree murder; (b) statutory mitigating factors contained in Fla. Stat. secs. 921.141(6)(a)-(g); (c) aggravating factors; and (d) myriad nonstatutory mitigating factors. Mr. Mendyk was entitled to professionally competent mental health assistance on these issues. As this Court held in Mason:

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

Here, counsel failed to provide the mental health expert with background information concerning Mr. Mendyk because counsel never obtained any background information. The expert had to rely solely upon the self-report of Mr. Mendyk. Counsel's performance was deficient in that it failed to insure a reliable evaluation.

Of even greater significance is the fact that the mental health expert was never even asked about the existence of mitigation, diminished capacity, or voluntary intoxication. Had counsel effectively represented Mr. Mendyk he would have been able to present evidence of statutory and nonstatutory mental health mitigation. Had counsel but asked the court-appointed mental health expert, the expert would have identified substantial non-statutory mitigation, and conclusively established statutory mitigation. This Court has previously held the failure to have a court-appointed mental health expert evaluate the defendant in order to render an opinion regarding the applicability of mitigating circumstances was ineffective assistance which undermined confidence in the resulting sentence of death. State v. Michael, 530 So. 2d 929 (Fla. 1988). The situation here is identical and requires the same result. See Cunningham v. Zant, 928 F.2d 1006 (11th

Cir. 1991). Moreover the mental health expert was not asked to consider the effects of alcohol and drugs on Mr. Mendyk's ability to form specific intent.

Although the trial court's Order Appointing Mental Health Expert mentions Fla. R. Crim. P. 3.216(a), the expert, George W. Barnard, M.D., was directed by that Order to consider only issues of competency to stand trial and insanity at the time of the crime (R. 1361-64). Counsel did not seek Dr. Barnard's assistance with the case beyond Mr. Mendyk's sanity. (Letter from Alan R. Fanter, Assistant Public Defender, to George W. Barnard, M.D. (August 13, 1987) (PC 946)).

Dr. Barnard has recently stated:

> I was never asked at any time prior to or at Mr. Mendyk's trial to evaluate Mr. Mendyk's mental state and background with regard to mental health evidence which may have been considered in mitigation of sentence. Had I been asked to formulate and provide an opinion in this regard, there certainly existed important mental health mitigating evidence of which I was aware at the time and regarding which I would have been more than willing to testify. My original report in fact made reference to some of the nonstatutory mitigating evidence of which I was aware and with regard to which I could have provided expert testimony. In that report I noted:
>
> > Past History: He was born in Elgin, Illinois, on April 18, 1966. His mother is 45 and has a bad heart. He did not know his father. His parents divorced when he was three. His mother remarried when he was about three or four, and his stepfather is 41. He has one half- sister, but no full siblings. As he was growing up, he had problems getting along with his stepfather, who was an alcoholic. At times his stepfather got drunk and slammed the defendant against the wall. At age 15 he beat the defendant after he was caught smoking a cigarette. He ran away from home at age 16 because he was tired of putting up with his stepfather.
>
> * * *
>
> As he was growing up at times he became angry at his stepfather who would backhand him against the wall, and then he would calm down for a few minutes. He said that his biological father was said to have beaten his mother, but he had no memory for that.
>
> * * *
>
> Factors such as Mr. Mendyk's history of alcohol and substance abuse, and his use of alcohol and marijuana the night of the offense would also have been highly relevant with regard to mitigation. Such substances impair judgment and control, effect one's emotions and thought processes, and effect one's behavior. Such substance abuse was noted in my original report.
>
> Based upon the information which was known to me at the time, I could have testified to mitigating factors. My report, which was not prepared to answer questions regarding mitigation, stated that Mr. Mendyk suffered from child abuse, an alcoholic family, alcohol and drug abuse, history of suicidal ideation and explosive episodes. Mr. Mendyk

obviously suffered severe emotional turmoil for a long period of time.

* * *

At the time of the original trial, I would have been willing to discuss such mitigating circumstances had I been asked to do so. Had I been asked questions in that regard, I could have requested additional background and collateral information. Such information at times is critical in assessing mental health status and mental health for penalty phase issues. Psychological testing would also have been appropriate to reveal factors not obtained with a clinical interview.

Since the time of my initial evaluation, I have reviewed additional materials regarding Mr. Mendyk which have been recently provided to me. This is the type of information I would have requested from trial counsel had I been asked to evaluate for a penalty phase. These materials include notes by law enforcement agents regarding drug and alcohol use, records from the Department of Corrections, school records, mental health reports, psychological testing results, statements by Mr. Mendyk, official court transcripts and other information. Had I been provided with extensive background information at the time of an evaluation for penalty phase of Mr. Mendyk, my opinions and ultimate conclusions with regard to evidence of a mitigating nature would have been further strengthened. In addition, I am now able to better appreciate Mr. Mendyk's problems during his early developmental history, preoccupation with fantasy, and extremely poor judgment. Certainly his statements to me regarding the offense reflect very poor judgment which affected his thinking at the time of the offense.

(Affidavit of George W. Barnard, M. D.) (PC 1366-69).

In sum, Mr. Mendyk was denied his fifth, sixth, eighth, and fourteenth amendment rights. In conflict with Ake, Mr. Mendyk was sentenced to death in violation of his due process and equal protection rights. Counsel's ineffectiveness resulted in the violation of Mr. Mendyk's rights to present intoxication as a defense at the guilt phase and compelling penalty phase evidence. Evidence which would have made a significant difference went unpresented: substantial statutory and nonstatutory mitigation should have been established; aggravating factors should have been undermined. Important, necessary and truthful information was withheld from the tribunal charged with deciding whether Mr. Mendyk should live or die. This deprivation violated Mr. Mendyk's rights. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

Full and fair evidentiary resolution is proper and thereafter 3.850 relief. State v. Michael. The files and records by no means show that Mr. Mendyk is "conclusively" entitled to "no relief" on this and its related claims. See Lemon v. State, 498 So. 2d 923 (Fla. 1986)(emphasis added); O'Callaghan, 461 So. 2d at 1355.

This Court should remand this case for a full and fair evidentiary hearing.

ARGUMENT V

MR. MENDYK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In Strickland v. Washington, 466 U.S. 668, 688 (1984) the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and show: 1) unreasonable attorney performance, and 2) prejudice. Courts have repeatedly ruled that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). An attorney is responsible for presenting legal argument consistent with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Counsel is prejudicially ineffective for failing to function as the government's adversary, Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988); for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976); for taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963. Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial.

In Mr. Mendyk's case, his counsel failed to insure an adversarial testing and a reliable outcome. Each of the errors committed by Mr. Mendyk's counsel is sufficient, standing alone, to warrant Rule 3.850 relief. Each undermines confidence in the fundamental fairness of the guilt-innocence determination. The allegations are more than sufficient to warrant a Rule 3.850 evidentiary hearing under O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), and Lemon v. State, 498 So. 2d 923 (Fla. 1986).

A. Defense Counsel Abandoned His Client

Prior to trial, defense counsel asked for a continuance because, due to an unexpected conflict, co-counsel was not present. Defense counsel specifically feared this absence because co-counsel was supposed to handle the penalty phase (R. 3). According to defense counsel penalty phase was a major concern because "there's no way getting around a felony murder." (R. 7). Although Mr. Mendyk was clothed in a presumption of innocence, with the right to remain totally silent, defense counsel made no effort to show Mr. Mendyk's innocence. Despite Mr. Mendyk's not guilty plea defense counsel conceded Mr. Mendyk was guilty of kidnapping (R. 1161) and thus, under the instructions, was guilty of first-degree murder. This is in itself reversible. Francis v. Spraggins, 720 F.2d 1190, 1194 (11th Cir. 1983) ("[C]ounsel does not have license to anticipate [] and to concede [guilt] during the guilt/innocence phase simply because an adverse verdict appears likely.") Mr. Mendyk pled not guilty and therefore was entitled to a "fair trial;" however, defense counsel made these damaging and unsolicited concessions. Mr. Mendyk did not consent to this de facto guilty plea. Absent a formal guilty plea, a reversal is required.

Moreover in closing argument, defense counsel requested that Mr. Mendyk be "let to rot in prison for the rest of his life" (R. 1163). This represented a statement by counsel which "separated himself from his client" and "stressed the inhumanity of the crime." King v. Strickland, 714 F.2d 1481 (11th 1983), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984). Mr. Mendyk's case is also virtually identical to what occurred in Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). There the defense counsel described the crime as horrendous and "acted with reckless

disregard for his client's best interests." 861 F.2d at 629. The Tenth Circuit held "A defense attorney who abandons his duty of loyalty to his client and effectively joins the State in an effort to attain a conviction or death sentence suffers from an obvious conflict of interest." Id. In both King and Osborn, a reversal was ordered because of counsel's conduct.

In closing argument, defense counsel conceded Mr. Mendyk's guilt by stating that Mr. Frantz was equally as culpable as Mr. Mendyk. (R. 1162-1163). Defense counsel failed to learn or present the State's belief that Frantz was lying and minimizing his role in the crime. (Excerpts from Phillip Frantz' Postsentence Report) (PC 842-43). Counsel failed to present evidence that Frantz told the prosecutor he decided to confess and finger Mr. Mendyk when the police told him if Frantz did not cooperate maybe Mr. Mendyk would lay the blame on him. This was important evidence for the jury to hear. Counsel did not get the evidence which would have permitted an argument that Frantz was lying to save himself. Defense counsel's concession of guilt and request that his client "rot in prison" was an abandonment of Mr. Mendyk which deprived Mr. Mendyk of an adversarial testing. Relief is required.

B. Defense Counsel Failed to Adequately Investigate, Develop and Present Amply Available Evidence in Support of a Mental Illness Defense.

Defense counsel provided no evidence or witnesses concerning Mr. Mendyk's mental health. Reasonable counsel would have been alert to Mr. Mendyk's delusional attitude. Investigation was necessary to provide the mental health expert with adequate background information. Mr. Mendyk was a loner, and his only reality was that of his fantasy books. Mr. Mendyk's psychological growth was developed on his own without adult guidance or the testing of reality. Mr. Mendyk's fantasy world was actually a thought disorder-schizophrenia. Mr. Mendyk "snapped" under the influence of alcohol, drugs and Frantz.

Mr. Mendyk's fantasies were well-documented by several police officers in depositions and in police narratives, some of which were available to defense counsel. The defense counsel had some concern about the effect of Mr. Mendyk's delusions on Mr. Mendyk's sanity, as noted in a letter written to the

court-appointed expert Dr. Barnard. However, defense counsel did not provide Dr. Barnard with any of the available background information that indicated a mental illness existed in Mr. Mendyk. Thus, defense counsel's failure to adequately inform Dr. Barnard was unreasonable and prejudicial. Mental illness and voluntary intoxication can negate specific intent. Counsel failed to contact Mr. Mendyk's prior counsel in South Carolina. (PC 858-69). She possessed considerable information concerning Mr. Mendyk and had concluded he had significant mental problems. The mental health expert should have known this.

Defense counsel also failed to file a memorandum of law as requested by the court regarding the appointment of an expert in the areas of the occult and satanism (R. 1357), and defense counsel unreasonably opted to do an in camera hearing and nothing else. The failure to even cite Ake v. Oklahoma, 470 U.S. 68 (1985), was deficient performance which prejudiced Mr. Mendyk. Counsel was not given the expert he requested.

This failure of defense counsel to act effectively in the pursuit of this mental health defense theory certainly was unreasonable and prejudiced the outcome of Mr. Mendyk's trial. Counsel failed to learn of Mr. Mendyk's suicidal ideation while in jail. Counsel failed to know his client was receiving psychotropic medication during trial. Counsel failed to present this information to the circuit court in order to have Mr. Mendyk's competency evaluated.

C. Defense Counsel's Failure to Adequately Investigate, Develop, and Present Amply Available Evidence in Support of a Voluntary Intoxication Defense.

Defense counsel provided no defense theory as to Mr. Mendyk's mental health despite Mr. Mendyk's delusions and substance abuse. Reasonable, effective counsel would have been alerted to Mr. Mendyk's substance abuse problem and the value of a voluntary intoxication defense. Defense counsel failed to challenge the State's false evidence that no drugs or alcohol were consumed after 12:30 a.m. However, Frantz's deposition and others' statements showed that marijuana and beer were consumed at Eddie Craven's home until approximately 2:00 a.m. and possibly later. They drove by the Presto store at 2:35 a.m. Frantz was driving because he could not trust Mr. Mendyk's driving after Mr. Mendyk drank and smoked too much. Frantz's

deposition taken October 7, 1987 is full of reports of Frantz and Mendyk consuming drugs: "used speed a couple of times" (p. 5), "smoked a couple of joints" (p. 9), "smoked a couple more joints" (p. 10), "had a 6 pack of beer" (p. 14), "[Mendyk] had a buzz," "smoked joint while driving around" (p. 10) and "smoked 1 joint at Cravens" (p.11). During the trial, Frantz testified that both were high on marijuana. (R. 1035). Frantz's mother, in a deposition taken July 8, 1987, states "I'm a psych nurse, I have seldom seen Todd [Mendyk] when I didn't feel he was under the influence of drugs." (p. 10). Even the State says in closing argument that "we know that he [Mendyk] was a heavy user, at times, of marijuana and beer." (R. 1331). However, despite the State attempting to refute a voluntary intoxication defense, defense counsel remained unreasonably silent on substance abuse.

Decisions made on less than reasonable investigation are not strategic or reasonable. Nixon v. Newsome. Todd Mendyk was consuming large amounts of alcohol and marijuana prior to and including April 8-9, 1987. Hernando County Sheriff's records indicate Todd Mendyk was involved in an alcohol-related traffic violation less than two weeks before this crime, and a full 196 days before this trial. (Circuit Court File 4-87-503-T-D)(PC 996). The public defender's office was appointed to represent Mr. Mendyk on this alcohol-related violation 164 days before Mr. Mendyk's penalty phase in this trial. Substance abuse evidence should have been presented by the defense. It was not. As a result, the jury was not given instruction on the effects of drugs and alcohol on Mr. Mendyk's ability to form specific intent and the diminished capacity defense. Therefore, the jury was not allowed to decide the effect of Todd Mendyk's substance abuse problem on his ability to form the specific intent required by the charge of murder. The defense counsel's failure was prejudicial to the jury's fact finding function.[11] Confidence is undermined in the outcome.

Evidence was available to establish that Mr. Mendyk was a substance abuser and was intoxicated at the time of the offense. In addition to Frantz, counsel could have contacted Eddie Craven who would have related:

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[11]Mr. Mendyk was also prejudiced by this failure at the penalty phase. Had this evidence been presented at the guilt phase, it could have been considered at the penalty phase.

> 3. Phil and Todd were not straight when they came to our house [on April 9, 1987].

(PC 889). A mental health expert could have testified about the substantial effects of marijuana and beer on Mr. Mendyk in light of his significant mental defects. In fact, the confidential expert's report to the defense counsel dated September 22, 1987, clearly detailed Mr. Mendyk's substance abuse. (PC 952).

There was ample evidence available to trial counsel relating to Mr. Mendyk's intoxication and its effect on his ability to form specific intent. But counsel did not investigate, develop, or present this evidence of intoxication. Mr. Mendyk suffered from a severe chemical dependence disorder. Evidence was available that Mr. Mendyk had a significant history of alcoholism and drug addiction.

Mr. Mendyk's Navy files stated Mr. Mendyk had a drug problem. (PC 908). Mr. Mendyk's South Carolina defense attorney would have provided evidence of drug and alcohol abuse. Family members would have also indicated a family history of alcoholism. (PC 876, 883, 886). In this regard:

> That alcoholism is familial is beyond dispute; various studies of alcoholic groups reveal that up to 50 percent of their fathers, 30 percent of their brothers, 6 percent of their mothers, and 3 percent of their sisters are also alcoholic.

Kaplan and Sadock, Textbook of Forensic Psychiatry IV, p. 416. Ample evidence was available to counsel that supported a hereditary addiction disorder. If Mr. Mendyk's family had known of the importance of the family history of addiction and in particular the defendant's acute substance abuse, they would have testified. However, these family members were never asked by counsel to so testify.

Defense counsel never sought an instruction on voluntary intoxication defense. Florida courts have consistently held that a voluntary intoxication defense must be pursued by competent counsel if there is evidence of intoxication, even under circumstances in which trial counsel explains in post-conviction proceedings that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985). The key question is whether the record reflects any evidence of voluntary intoxication. Gardner v. State, 480 So. 2d 91 (Fla. 1985). There was evidence of voluntary intoxication, but counsel failed to request the instruction.

Trial counsel's failure in this regard was prejudicially ineffective -- had he presented the ample available evidence in support of a voluntary intoxication defense, Mr. Mendyk's jury would have been instructed with regard to the defense of voluntary intoxication. Had the jury been so instructed, there is a reasonable probability that the jury would have returned a verdict of second-degree murder. Certainly confidence is undermined in the outcome.

D. Defense Counsel's Failure to Object or Argue Effectively Prejudiced Mr. Mendyk's Sixth, Eighth, and Fourteenth Amendment Rights.

Defense counsel repeatedly failed to object and/or adequately argue against the State's lay witnesses' many opinions as to Todd Mendyk's capacity (R. 552-53, 775, 978, 1041). No foundation was provided for any of these opinions. Nowhere does the record show that defense counsel questioned or adequately objected to improper videotaping of the trial. See Argument XX. Thus, Todd Mendyk's right to a fair trial was prejudiced.

Defense counsel ineffectively argued the voluntariness of Mr. Mendyk's April 9, 1987, statements by failing to investigate whether the State had administered any drugs or employed psychological coercion during their interrogation of Mr. Mendyk. In addition, defense counsel failed to investigate whether Mr. Mendyk was improperly shackled during this interrogation. The presence of either or both of these factors would have caused the April 9, 1987, statements to be inadmissible, and there is a reasonable possibility that this prejudiced Mr. Mendyk's trial outcome.

Defense counsel failed to challenge a juror with strong views in favor of the death penalty (the juror felt that the death penalty should be used for more crimes than murder) (R. 436) because of Mr. Mendyk's wish to keep the juror. Defense counsel was ineffective in relying on Mr. Mendyk's jailhouse bravado in spite of defense counsel's desire to challenge the juror. See Foster v. Dugger, 823 F.2d 402, 407 n.16 (11th Cir. 1987), cert. denied, 487 U.S. 1241 (1988).

Defense counsel also unreasonably delayed deposing Phillip Frantz, a key State witness, and failed to even receive a transcribed copy of this important testimony prior to Mr. Mendyk's trial (important because of its many references to drug abuse and as a valuable impeachment tool for Phillip Frantz's contrary in-court

testimony). Nixon. Defense counsel also declined a copy of Phillip Frantz's audiotaped confession prior to Mr. Mendyk's trial. In such circumstances adequate cross-examination necessary for an adversarial testing could not occur. Confidence is undermined in the outcome in light of the pivotal nature of Frantz's testimony.

Defense counsel continually failed on direct and redirect to object to the State's incessant leading questions of key witnesses' critical testimony. Defense counsel failed to adequately argue against the State's use of highly prejudicial color slides taken prior to the victim's autopsy (these slides were certainly not necessary for Dr. Sass to identify the victim or cause of death). See Argument XVIII.

Defense counsel failed to object to the State's prejudicial closing argument which included impermissible commentary on Mr. Mendyk's right to counsel and on victim impact:

> He sat here this entire time with his Public defender, this Judge, with you folks. And the last thing Lee Ann Larmon ever saw was this face right here. (Indicating). This is the last thing Lee Ann Larmon ever saw. She was forced to beg him for her life. And he had gotten an incredible high in choking it out of her.
>
> And he has had lawyers, and he has had a Judge, and he has got a jury, but he'll never answer for any of those crimes until you folks find him guilty as charged, and place him before this Judge.
>
> What does Lee Ann Larmon have? What is Lee Ann Larmon guilty of? Lee Ann Larmon is guilty of working in a convenience [store] to put herself through school. She had a trial. She didn't have a jury. She didn't have a Judge. She didn't have a lawyer. She had Todd Mendyk. And Todd Mendyk found her guilty of working in a convenience store, and being a 23 year old female, relatively attractive. And Todd Mendyk sentenced her to be kidnapped from that store. And Todd Mendyk sentenced Lee Ann Larmon to be sexually battered, to have a broom handle stuck into her vagina. And Todd Mendyk sentenced her to have his penis placed in her mouth. And Todd Mendyk sentenced her to hang from a tree by wires until he decided to get an incredible high, and appoint himself executioner, and he choked the life out of her. A moral outrage. And you folks have this case, take it back to the jury room, and return a verdict. Let it be an honest one. That's all we want. Let's just speak the truth.

(R. 1153-54). See Vela v. Estelle; Cunningham v. Zant.

Defense counsel failed to effectively cross-examine and impeach key State

witnesses, including Frantz, due to a lack of investigation and knowledge of the evidence and depositions. In addition, defense counsel unreasonably failed to impeach Dr. Sass, the medical examiner. Thus, defense counsel denied Mr. Mendyk the right to confront the State's witnesses. See Nixon v. Newsome. Defense counsel failed to challenge the State's argument in the alternative as to premeditated or felony murder and the jury not being instructed to determine which theory they considered. See Argument IX. Defense counsel failed on repeated occasions to object to the State's Booth violations. (R. 263, 405, 434, 659, 662-6, 1146-53; see Argument XV). Defense counsel failed to object to Caldwell violations by the Court and the State (see Argument XVI).[12] Defense counsel also failed to object to hearsay testimony by key State witnesses on how Mr. Mendyk "felt" during the murder and how Mr. Mendyk "reacted" to the death (R. 1003, 1004, 1071-2).

At one point, defense counsel instructed the State on how to ask questions on direct. (R. 776). This violated his duty of loyalty. Osborn v. Shillinger. The defense abandoned Mr. Mendyk and worked to obtain a conviction so that Mr. Mendyk would "rot in jail." Relief is required.

E. Conclusion

The defense counsel provided deficient performance that prejudiced Mr. Mendyk's trial outcome. Each of defense counsel's errors alone undermines confidence in the outcome, and viewed in their totality they certainly establish the likelihood of a different outcome. Mr. Mendyk is entitled to vindication of his sixth, eighth, and fourteenth amendment rights. An evidentiary hearing and 3.850 relief must be granted.

ARGUMENT VI

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. MENDYK IN THE POSSESSION OF THE CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Despite requests by Mr. Mendyk's counsel, several agencies have refused to

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[12]Much of the Caldwell violates occurred during the voir dire when penalty phase counsel was not present.

release public records pertaining to this matter, in violation of Chapter 119, Fla. Stat. These agencies are: 1) Hernando County Sheriff; 2) Florida Parole Commission; and 3) Pasco County Sheriff.

Concerning the Hernando County Sheriff, the trial court's pre-prepared order summarily denying Mr. Mendyk's Rule 3.850 Motion is inaccurate. It says that the sheriff has complied with CCR's Chapter 119 request because the record shows that Mr. Mendyk's trial counsel was shown a copy of a videotape. This fact has nothing to do with Mr. Mendyk's post-conviction Chapter 119 request. Current counsel was refused access to the videotape. (PC 1214-15). This violated State v. Kokal, 562 So. 2d 324 (Fla. 1990).

The Parole Commission claims an exemption from Chapter 119. No such exemption exists in the law. Nothing in Chapter 119 (The Florida Public Records Act), Chapter 940 (pertaining to executive clemency) or Chapter 947 (pertaining to Parole and Probation Commission) establishes any such exemption. Public records exemptions cannot be assumed -- they must be expressly stated in the statutes. Miami Herald Pub. Co. v. City of North Miami, 452 So. 2d 572 (Fla. 3rd DCA 1984), cause remanded and approved, 468 So. 2d 218 (Fla. 1985). Nor can the executive declare by rule that public records of an agency of the state are exempt. This is prohibited by Fla. Const. art. III, sec. 3. The Florida Parole Commission, by law, is not exempt from Chapter 119. This Court has held the Commission is subject to law. Wainwright v. Turner, 389 So. 2d 1181 (Fla. 1980). Nothing in the statute indicates any legislative intent to exempt the Commission from the Public Records Act. Accordingly access to the commission's file must be granted to Mr. Mendyk.

Pasco County deputies (Fairbanks and Vaughn) testified at Mr. Mendyk's trial concerning their talks and their reports with Mr. Mendyk about this crime not a Pasco County crime. Yet the Pasco County Sheriff is refusing to disclose these reports. These reports are not exempt from Chapter 119. Moreover to the extent that the Pasco County Sheriff contends that the file is "an active criminal investigation" (PC. 1224), Mr. Mendyk is entitled to have the circuit court conduct an in camera inspection and determine whether there exists "a reasonable, good faith anticipation of securing an arrest or prosecution in the foreseeable future." Sec.

119.011 (3)(d)(2).

Mr. Mendyk has properly presented his claims to access under Chapter 119 in his 3.850 motion. This court has recently addressed this issue in State v. Kokal, 562 So. 2d 324 (Fla. 1990) and in Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). The Court ruled that a death-sentenced petitioner may present such claims in post-conviction proceedings.

The failure to provide the requested records has delayed Mr. Mendyk's post-conviction investigation and made it impossible for him to fully plead his cause. Mr. Mendyk hereby asks that this Court compel production of the requested records and grant additional time to amend his motion to vacate judgment and sentence with any claims or relevant factual data which are inaccessible at this time due to the failure to provide the requested records. This Court has not hesitated to do so under similar circumstances. See Kokal; Provenzano.

Mr. Mendyk's rights to due process and equal protection in accordance with the fourteenth amendment to the United States Constitution as well as Chapter 119, Florida Statutes have been violated and relief is warranted. The circuit court order summarily denying Mr. Mendyk's post-conviction motion is erroneous as a matter of fact and of law.

ARGUMENT VII

THE RECENT DECISION OF MINNICK V. MISSISSIPPI,111 S. CT. 486 (1990), ESTABLISHES THAT THIS COURT ERRONEOUSLY DECIDED MR. MENDYK'S DIRECT APPEAL AND AS A CONSEQUENCE MR. MENDYK HAS BEEN DEPRIVED OF THE RIGHTS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Following his arrest on April 9, 1987, Mr. Mendyk told the police "I ought to have an attorney." (R. 1053, 1912). Detective Ralph Decker asked if he had a specific attorney in mind but Mr. Mendyk said no. (R. 1913, 1053). Decker told Mr. Mendyk he would "honor his request" and if Mr. Mendyk wanted to talk then he would have to reinitiate the conversation. (R. 1053, 1912). After he requested an attorney, Mr. Mendyk did not ask to talk to Decker. (R. 1923). His request for counsel was ignored. Mr. Mendyk was never allowed to consult with an attorney and the police made absolutely no effort to arrange for an attorney's presence. (R. 1925).

Decker left the room for a short time and returned to seize Mr. Mendyk's clothing. (R. 1915). While collecting the clothes, Decker improperly initiated a conversation with Mr. Mendyk. (R. 1916).[13] Mr. Mendyk mentioned to Decker he was not like other people. Decker asked what he meant. (R. 1916-17). Mr. Mendyk indicated that he isolated himself from the outside world and never let his thoughts out "and that's why we had to get the girl." (R. 1918). Decker inquired, "what girl?" (R. 1918). Mr. Mendyk responded the girl from the Pick Quick Store. Decker then asked Mr. Mendyk if he wanted to continue even though he previously requested counsel. Mr. Mendyk indicated he would proceed. (R. 1919). Mr. Mendyk was not readvised of his rights and he then gave an inculpatory statement. (R. 1919).

Subsequently, Detective Decker revealed to Detective Clinton Vaughn of the Pasco County Sheriff's Department some details of Decker's conversations with Mr. Mendyk. (R. 1934). Decker did not tell Vaughn of Mr. Mendyk's request for an attorney. (R. 1935); presumably, he did confirm Mr. Mendyk's uncertain mental state.[14] Vaughn then initiated contact with Mr. Mendyk. Although Vaughn was investigating a similar crime in Pasco County, before he began the interview Vaughn knew that he would be discussing the details of the Larmon death with Mr. Mendyk. (R. 1939). Vaughn subsequently initiated another interview with Mr. Mendyk a few days later despite the fact that he now knew that Mr. Mendyk had invoked his sixth amendment rights. (R. 1941).

Mr. Mendyk moved to suppress these various statements in circuit court. The judge ruled that Decker improperly initiated the interrogation of Mr. Mendyk on April 9, 1987, following Mr. Mendyk's request for counsel. As a result the judge ruled the response to the question "What girl?" was inadmissible. The judge found the taint of the illegality ceased when Decker asked if Mr. Mendyk wanted to talk even though he previously requested counsel. Accordingly the inculpatory statement that followed was held to be admissible. The judge also ruled that the first

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[13]An undisclosed statement from Frantz reflected that the police ignored Frantz's request for counsel and continued to talk to him in order to obtain a confession. (PC. 75).

[14]According to Decker, Mr. Mendyk was suicidal.

statement to Detective Vaughn was admissible even though Detective Vaughn saw Mr. Mendyk at Decker's suggestion. However, a subsequent statement was initiated by Detective Vaughn after Mr. Mendyk invoked his sixth amendment rights and thus was inadmissible.

During guilt phase, the State introduced the April 9, 1987, inculpatory statement to Decker. Detective Vaughn was called only in the penalty phase to testify about the first statement he took from Mr. Mendyk. However, the testimony was limited, a page of transcript. Vaughn reported that Mr. Mendyk had indicated an early decision to kill. (R. 1215).

This issue raised now was raised on direct appeal, but new case law has established this Court erred. On December 4, 1990, the United States Supreme Court decided Minnick v. Mississippi, 111 S. Ct. 486 (1990), clarifying its earlier holding in Edwards v. Arizona, 451 U.S. 477 (1981). "The issue in the case before us is whether Edwards protection ceases once the suspect has consulted with an attorney." Minnick, 111 S. Ct. at 488.

The Supreme Court's 6-2 majority concluded that the Mississippi Supreme Court's reading of Edwards was in error:

> In Miranda v. Arizona, supra, 384 U.S., at 474, 86 S. Ct., at 1627, we indicated that once an individual in custody invokes his right to counsel, interrogation "must cease until an attorney is present"; at that point, "the individual must have an opportunity to confer with the attorney and to have him present during any subsequent questioning." Edwards gave force to these admonitions, finding it "inconsistent with Miranda and its progeny for the authorities, at their instance, to reinterrogate an accused in custody if he has clearly asserted his right to counsel." 451 U.S., at 485, 101 S. Ct., at 1885. We held that "when an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights." Id., at 484, 101 S. Ct., at 1884-1885. Further, an accused who requests an attorney, "having expressed his desire to deal with the police through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police." Id., at 484-485, 101 S. Ct., at 1885.

Minnick, 111 S. Ct. at 489.

Mr. Mendyk asked for an attorney early on April 9, 1987 (R. 1912). There is no question that Det. Decker then reentered to seize evidence from Mr. Mendyk for testing and that Mr. Mendyk did not request to speak with Det. Decker. At trial

Decker testified to this fact:

> Q And isn't it a fact that that conversation was not initiated, now was that contact -- Let me just say that contact with Mr. Mendyk was not initiated by him? He didn't ask to talk to you; did he?
>
> A No, he didn't.

(R. 1923). At the end of Mr. Mendyk's response to Det. Decker's question as to why Mr. Mendyk was different, Mr. Mendyk stated that was why he had to get the girl. Det. Decker responded with the direct question: "what girl?" Decker's question ("what girl?") cannot be construed as concern for Mr. Mendyk's mental health. In fact, the trial judge found that Decker initiated interrogation in violation of Edwards. The judge, however, ruled that Edwards could be circumvented by asking the suspect to waive his previously asserted right to counsel. Minnick spells out that this ruling was in error.

Mr. Mendyk's April 9, 1987, statement was improperly admitted at trial and thus a new trial is necessary. It follows that every subsequent statement obtained after police reinitiated contact should have been suppressed.[15] The trial court erred in its ruling on the April 9, 1987, statement to Decker: "The Court feels that the inquiry, 'you want to waive your right to an attorney' that had earlier been invoked, was sufficient." (R. 1970-71). Minnick's per se rule is in contradistinction to the trial court's ruling and mandates a new trial in light of the violation of Mr. Mendyk's fifth, eighth and fourteenth amendment rights. Towne v. Dugger, 899 F.2d 1104 (11th Cir. 1990); Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988).

Subsequent police-initiated contacts by Pasco Sheriff's Det. Vaughn[16] also

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[15]In addition, all subsequent statements to Decker should be suppressed due to the "false friends" relationship created by Decker. Decker was a key player in all of Mr. Mendyk's statements, and unlike in Lyons v. Oklahoma, 322 U.S. 596 (1944), Mr. Mendyk's mental freedom "to confess to or deny a suspected participation in a crime" and his false relationship with Decker in light of Mr. Mendyk's thought disorder are "so close that one must say the facts of one control the character of the other." Leyra v. Denno, 347 U.S. 556, 561 (1954)(quoting Lyons, 322 U.S. at 602-03).

[16]Det. Vaughn's reports have never been viewed by Mr. Mendyk due to the Pasco County Sheriff's denial of Mr. Mendyk's 119 request (see Argument VI). In addition Mr. Vaughn is known to this Court as an officer who doesn't believe in recording statements. See Derrick v. State, 16 F.L.W. 221 (Fla. March 21, 1991).

yielded inadmissible statements from Mr. Mendyk. The trial court ruled that Mr. Mendyk's first statement was admissible because Vaughn elicited the statement during proper questioning regarding a separate but similar crime, although the trial court properly suppressed Mr. Mendyk's second statement to Vaughn. In Arizona v. Roberson, 486 U.S. 675 (1988), the court held that if the suspect has requested counsel, a law enforcement officer cannot in the absence of counsel's presence interrogate a suspect regarding a different crime. Thus, Det. Vaughn should not have initiated an interrogation of Mr. Mendyk even about a different crime. (See R. 1938, 1944). The statement obtained was inadmissible in light of Roberson. In addition, Minnick's per se rule disallows any and all police-initiated interrogation following a fifth amendment right to counsel request without the presence of Mr. Mendyk's attorney. There is no doubt that Mr. Mendyk did not initiate contact with Det. Vaughn.

Moreover, new evidence shows that Decker "befriended" Mr. Mendyk, relying on the assistance of a mental health expert who gave (Ralph) Decker explicit instructions on how to interview Mr. Mendyk:

> Ralph - Next interview
>
> - Convince him that you will reject him if he doesn't tell you everything
>
> - Intellectualize with him
>
> - Play on his shame and guilt
>
> - Con him into speaking about his Mother

(PC 697). The use of a mental health analyst as a state agent is inconsistent with due process of the law. See Leyra v. Denno, 347 U.S. 556 (1954) (In addition, Mr. Mendyk, like Leyra, was "physically and emotionally exhausted." Leyra, 347 U.S. at 561); Walls v. State, 16 F.L.W. 254 (Fla. April 11, 1991)(The use of a psychiatric evaluation against the accused violates the due process provision of the Fla. Const., art. I sec. 9 when "conducted in whole or in part by means of an illegal subterfuge"); see also Stano v. Dugger, 901 F.2d 898 (11th Cir. 1990)(en banc)(the exploitation of Mr. Stano's mental vulnerabilities was held to require an evidentiary hearing on a Brady claim, and Mr. Stano, like Mr. Mendyk, was "grandiose" and had "an abnormal need for attention and affection due to mental

illness" -- this closely resembles the instruction given to Ralph -- "convince him that you will reject him if he doesn't tell you everything"). Mr. Mendyk was "tricked and cajoled" into making a statement to Decker. See United States v. Anderson, 929 F.2d 96 (2d Cir. 1991).

Mr. Mendyk should not fall prey to John Gay's famous couplet: "An open foe may prove a curse, But a pretended friend is worse." (quoted in Spano v. People of New York, 360 U.S. 315, 323 (1959)). In Spano, the United States Supreme Court held that the defendant's "will was overborne by official pressure, fatigue and sympathy falsely aroused." Spano, 360 U.S. at 323. In Spano, as here, the police were not "trying to solve a crime, or even to absolve a suspect" but were merely "securing a statement from defendant on which they could convict him." Spano, 360 U.S. at 323-24. The Spano court stated that when this was the officer's intent that a confession must be "careful[ly] scrutin[ized]." Spano, 360 U.S. at 324.

As this Court noted in Walls, "ours is an accusatorial and not an inquisitorial system" [quoting Miller v. Fenton, 474 U.S. 104, 110 (1985)]. The United States Supreme Court in Miller stated:

> Certain interrogation techniques, either in isolation or as applied to the unique characteristics of a particular suspect, are so offensive to a civilized system of justice that they must be condemned under the due process clause . . .

Miller, 474 U.S. at 109. "The police must obey the law while enforcing the law; that in the end life and liberty can be as much endangered from illegal methods used to convict those thought to be criminals as from the actual criminals themselves." Spano, 366 U.S. at 320-21. Like the involuntary statements in Arizona v. Fulminante, 111 S. Ct. 1246 (1991), Mr. Mendyk's statements were coerced under the totality of the circumstances test. See Dunkins v. Thigpen, 854 F.2d 394, 397 (11th Cir. 1988) ("Even if a defendant has initiated contact with the police after requesting counsel, any statements made are still inadmissible unless they are the product of a knowing and voluntary waiver.") Mr. Mendyk's statements were obtained by subterfuge and were thus inadmissible.

Mr. Mendyk's statements must be suppressed. A new trial is required. Mr. Mendyk's statements were illegally obtained pursuant to the fifth, sixth and

fourteenth amendments of the United States Constitution and art. I secs. 9, (16)a, 23 of the Florida Constitution. In addition, the statements to Decker and Vaughn were in violation of Edwards as explained in Minnick. Rule 3.850 relief is warranted and Mr. Mendyk requests this Court to set aside his convictions, obtained by these statements in violation of his fifth and fourteenth amendment rights. Minnick establishes that this Court erred on direct appeal when it previously considered this claim. This claim is therefore cognizable now. Moreover, new evidence establishes that the State used psychological assistance to overbear Mr. Mendyk's will in order to obtain a "confession." The statements thus violated his eighth and fourteenth amendment rights. See Arizona v. Fulminante, 111 S. Ct. 1246 (1991). Rule 3.850 relief is mandated.

ARGUMENT VIII

DEFENSE COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO THE PROSECUTOR'S INFLAMMATORY, EMOTIONAL AND IMPROPER COMMENTS WHICH VIOLATED OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The prosecutor distorted Mr. Mendyk's trial with flagrantly improper commentary, thus destroying any chance of a fair trial. No curative instructions were given. The remarks were of the type that this Court has found "so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy." Garron v. State, 528 So. 2d 353, 358 (Fla. 1988). These remarks, implying that Mr. Mendyk somehow abused our legal system by exercising his right to a jury trial, are strikingly similar to those recently condemned by the Eleventh Circuit. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). The Cunningham Court clearly denounced remarks of a Georgia prosecutor that the defendant was not entitled to sixth amendment rights and the resulting impression that passion rather than reason should inform the jury process.

At guilt-innocence closing, the assistant state attorney, impermissibly commented on Mr. Mendyk's sixth amendment rights to trial and to counsel:

> He sat here this entire time with his Public defender, this Judge, with you folks. And the last thing Lee Ann Larmon ever saw was this face right here. (Indicating). This is the last thing Lee Ann Larmon ever saw. She was forced to beg him for her life. And he had gotten an incredible high in choking it out of her.

> And he has had lawyers, and he has had a Judge, and he has got a jury, but he'll never answer for any of those crimes until you folks find him guilty as charged, and place him before this Judge.
>
> What does Lee Ann Larmon have? What is Lee Ann Larmon guilty of? Lee Ann Larmon is guilty of working in a convenience to put herself through school. She had a trial. [sic] She didn't have a jury. She didn't have a Judge. And Todd Mendyk found her guilty of working in a convenience store, and being a 23 year old female, relatively attractive. And Todd Mendyk sentenced her to be kidnapped from that store. And Todd Mendyk sentenced Lee Ann Larmon to be sexually battered, to have a broom handle stuck into her vagina. And Todd Mendyk sentenced her to have his penis placed in her mouth. And Todd Mendyk sentenced her to hang from a tree by wires until he decided to get an incredible high, and appoint himself executioner, and he choked the life out of her. The moral outrage. And you folks have this case, take it back to the jury room, and return a verdict. Let it be an honest one. That's all we want. Let's just speak the truth.

(R. 1153-1154).

It is is improper to urge that a criminal defendant's exercise of constitutional rights is a ground for discrediting his defense. Brooks v. Kemp, 762 F.2d 1383, 1411 (11th Cir. 1985)(en banc)(citing Griffin v. California, 380 U.S. 609 (1965)). See also Lesko v. Lehman, 925 F.2d 1527 (3rd Cir. 1991). The prosecutor's inflammatory, emotional and thoroughly improper comment and argument to the jury rendered Mr. Mendyk's conviction and death sentence fundamentally unfair and unreliable in violation of the sixth, eighth and fourteenth amendment.

These comments by the prosecutor were improper argument and clearly prejudiced Mr. Mendyk's right to a fair trial as guaranteed by the sixth, eighth and fourteenth amendments. See United States v. Young, 470 U.S. 1 (1985).

Trial counsel rendered ineffective assistance by failing to object. Vela v. Estelle, Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979). Moreover counsel's failure to object was deficient performance under Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990), which prejudiced Mr. Mendyk. Had counsel objected, Mr. Mendyk would be entitled to relief. Rule 3.850 relief is warranted. This error rendered the trial result "unreliable" under the law of Penry. The Court should vacate Mr. Mendyk's unconstitutional conviction and sentence of death.

ARGUMENT IX

MR. MENDYK'S CAPITAL CONVICTION AND DEATH SENTENCE, RESULTING FROM PROCEEDINGS WHICH DID NOT PROVIDE FOR A UNANIMOUS, VOTE BY THE JURY AS TO WHETHER THE PETITIONER WAS GUILTY OF PREMEDITATED OR FELONY MURDER, VIOLATES THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO RAISE THIS FUNDAMENTAL ERROR WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

In Florida, the "usual form" of indictment for first-degree murder under Fla. Stat. sec. 782.04 (1985), is to "charg[e] murder . . . committed with a premeditated design to effect the death of the victim." Barton v. State, 193 So. 2d 618, 624 (Fla. 2d DCA 1968). When a defendant is charged with a killing through premeditated design, he is also charged with felony murder, and the jury can return a verdict of first-degree murder on either theory. Blake v. State, 156 So. 2d 511 (Fla. 1963). Mr. Mendyk was charged with first-degree murder in the "usual form": murder "from a premeditated design to effect the death of" the victim. (R. 1325).

Mr. Mendyk was indicted under two, alternative, theories of first-degree murder. At trial, the State proceeded on both premeditated and felony murder theories. The prosecution argued that it had proven guilt under either the premeditation or felony murder theories.

> Murder in the first degree. This is on the indictment that was returned by a Grand Jury. And on the indictment -- you'll have a copy of the indictment, and you will see that he was charged with premeditated murder, we talked about earlier. <u>You are to consider felony murder, or you are to consider premeditated murder</u>.

(R. 1124).

The trial court then instructed the jury that first degree murder could be proven by either proof of premeditation, or proof of a killing in the course of perpetrating an enumerated felony.

> Murder in the first degree: There are two ways in which a person can be convicted of murder, first-degree murder. <u>One is known as premeditated murder. And the other is known as felony murder</u>.

(R. 1167).

As to their verdict, the jurors were never told or instructed that they must agree as to whether Mr. Mendyk was guilty of premeditated murder or whether he was guilty of felony murder. In other words, the jury was only told that it must determine "guilty" or "not guilty," and as to the degree of each crime, but never

told that it needed to decide which of the State's two theories of first degree murder was present.

The guilty verdict returned by the jury did not specify whether the jury found Mr. Mendyk guilty of premeditated murder or felony murder or whether there was any agreement in the jury between the two. The jury simply recited:

> We the jury find as follows as to the defendant in this case: Number 1, the defendant is guilty of murder in the first degree as charged in the indictment. Foreman, Merle Osborn. Date, 10/19/1987. No other number is checked on that page.

(R. 1192).

It is well settled that an unanimous jury verdict as to degree as well as to guilt is required in a capital case. In United States v. Gipson, 553 F.2d 453 (5th Cir. 1977), the court reasoned that "[t]he unanimous jury requirement 'impresses on the trier of fact the necessity of reaching a subjective state of certitude on the facts in issue.'" Gipson, 553 F.2d at 457, quoting In re Winship, 397 U.S. 358, 364 (1970). The court went on to say that "[r]equiring the vote of twelve jurors to convict a defendant does little to insure that his right to a unanimous verdict is protected unless this prerequisite of jury consensus as to the defendant's course of action is also required." Gipson, 553 F.2d at 458. See, e.g., United States v. Beros, 833 F.2d 455 (3rd Cir. 1987) ("persuaded by the analysis and rationale" of Gipson, the court held that "[w]hen the government chooses to prosecute under an indictment advancing multiple theories, it must prove beyond a reasonable doubt at least one of the theories to the satisfaction of the entire jury."); United States v. Payseno, 782 F.2d 832 (9th Cir. 1986)(general unanimity instruction is not sufficient when different theories of guilt are presented to jury, citing Gipson).

Recently, in Sheppard v. Rees, 909 F.2d 1234, 1237-38 (9th Cir. 1990), the Ninth Circuit reversed a first-degree murder conviction, stating:

> Where two theories of culpability are submitted to the jury, . . . it is impossible to tell which theory of culpability the jury followed in reaching a general verdict. See Mills v. United States, 164 U.S. 644, 646 (1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir. 1986).

Requiring juror unanimity on a single theory of first degree murder is necessary to effectuate the reasonable doubt standard enunciated in In re Winship, 397 U.S. 357 (1970). Premeditated and felony murder are not merely different

methods of performing the same act. There are significant differences. Indeed, the only common element of the two crimes is that someone died. Fla. Stat. sec. 782.04(1)(a)1-(1)(a)2. Without jury agreement as to what specific acts a defendant performed, the reasonable doubt standard is emasculated. The prosecutor argued both theories of first degree murder. The trial court instructed the jury on both theories of first degree murder, but provided only one verdict form for the jury to return their judgment as to the charge. Under these circumstances, it is impossible to know whether every essential element of either premeditated murder or felony murder was proven against Mr. Mendyk. In re Winship, 397 U.S. at 361.

The potential for prejudice extends beyond the guilt phase and invades the penalty phase. The jury's constitutional confusion does not disappear simply by assuming that unanimous convictions on underlying felonies assure a felony murder conviction. In penalty phase, those same underlying felonies were presented to the jury as an aggravating circumstance; this is unconstitutional. See Argument XIII. Mr. Mendyk's jury verdict was deficient and a new trial is mandated. Counsel's failure to object to this fundamental error was deficient performance under Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Harding v. Davis, 878 F. 2d 1341 (11th Cir. 1989); and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Rule 3.850 relief is mandated.

ARGUMENT X

THE PREJUDICIAL SECURITY MEASURES IMPLEMENTED DURING MR. MENDYK'S TRIAL IN THE JURY'S PRESENCE ABROGATED THE PRESUMPTION OF INNOCENCE, DILUTED THE STATE'S BURDEN TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND INJECTED MISLEADING AND UNCONSTITUTIONAL FACTORS INTO THE SENTENCING PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THIS FUNDAMENTAL ERROR.

The security measures employed during Mr. Mendyk's trial, in particular the imposition of leg shackles on Mr. Mendyk, violated due process. The prejudice from the shackling, in the circumstances of this case, far outweighed any possible danger and caused an unconstitutional conviction and sentence. Mr. Mendyk was left in leg shackles during the penalty phase of his trial in the presence of the jury. There was no showing on the record of any necessity for the shackling of Mr. Mendyk. The

effect on the jury of the shackles was impermissible in that it raised a question of future dangerousness. He was denied a fair trial.

The United States Supreme Court analyzed the effect of security measures in Holbrook v. Flynn, 475 U.S. 560 (1986):

> Central to the right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, is the principle that "one accused of a crime is entitled to have his guilt or innocence determined solely on the basis of the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued custody, or other circumstances not adduced as proof at trial." Taylor v. Kentucky, 436 U.S. 478, 485, 98 S. Ct. 1930, 1934, 56 L.Ed.2d 468 (1978).

Holbrook, 475 U.S. at 567. "[C]ertain practices pose such a threat to the 'fairness of the factfinding process' that they must be subjected to 'close judicial scrutiny.'" Holbrook, 475 U.S. at 568 (quoting Estelle v. Williams, 425 U.S. 501, 503-04 (1976)); see also Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991); and Norris v. Risley, 918 F.2d 828 (9th Cir. 1990); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

"Due process requires that shackles be imposed only as a last resort." Spain v. Rushen, 883 F.2d 712, 728 (9th Cir. 1989). In Spain, the court recognized five (5) inherent disadvantages to physical restraint of defendants on the fairness of the trial:

> (1) Physical restraints may cause jury prejudice, reversing the presumption of innocence;
>
> (2) Shackles may impair the defendant's mental faculties;
>
> (3) Physical restraints may impede the communication between the defendant and his lawyer;
>
> (4) Shackles may detract from the dignity and decorum of the judicial proceedings; and
>
> (5) Physical restraints may be painful to the defendant.

Spain, 883 F.2d at 721.

In Bello v. State, 547 So. 2d 914 (Fla. 1989), this Court granted a new sentencing to a capital defendant who was shackled during the penalty phase of his trial. The Court recognized that shackling is an inherently prejudicial restraint and that the constitutional concern centers on possible adverse effects on the presumption of innocence. Bello, 547 So. 2d at 341. In Bello, defense counsel objected to the shackling but the trial judge overruled the objection. Here defense

counsel was ineffective in not raising objections and the court gave no reason, nor inquired into the need, for the leg shackles. This was deficient performance under Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Harding v. Davis, 878 F. 2d 1341 (11th Cir. 1989). In Bello, this Court held that the defendant was entitled to a new trial because the trial judge made no appropriate inquiry, that "[Shackling] must not be done absent at least some showing of necessity." Bello, 547 So. 2d at 918. The error, here, was fundamental in nature. There can be no reason for not objecting and demanding record inquiry. That Mr. Mendyk's counsel did not object constitutes deficient performance which prejudiced Mr. Mendyk. This Court should remand this case for an evidentiary hearing.

ARGUMENT XI

THE JURY INSTRUCTIONS REGARDING THE STATUTORY AGGRAVATING CIRCUMSTANCE HEINOUS, ATROCIOUS OR CRUEL VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Mendyk challenged the application of this aggravating factor on direct appeal. The manner in which the jury and judge were allowed to consider "heinous, atrocious or cruel" provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe all murders to be heinous, atrocious or cruel. Mills v. Maryland, 108 S. Ct. 1860 (1988). Jurors must be given adequate guidance as to what constitutes "especially heinous, atrocious, or cruel." Maynard v. Cartwright, 108 U.S. 1853 (1988). This Court failed to address this in the direct appeal.

Recently, the Supreme Court explained its Maynard holding:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey.

Walton v. Arizona, 110 S. Ct. 3047, 3056-57 (1990).

In Walton, the Arizona capital scheme did not provide for a jury in the penalty phase of a capital trial. Thus, the Court's conclusion that no error occurred in Walton is not controlling here. That is because in Florida a jury in the penalty phase returns a verdict recommending a sentence. The jury's verdict is binding as

to the presence and weight of aggravating circumstances as well as the sentence recommended unless no reasonable person could have reached the jury's conclusion. Hallman v. State, 560 So.2d 223 (Fla. 1990). See Ferry v. State, 507 So.2d 1373 (Fla. 1987) ("The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.") The Florida standard for an override is exactly the same standard that the United States Supreme Court adopted for federal review of a capital sentencing decision. In Lewis v. Jeffers, 110 S. Ct. 3092, (1990), the Supreme Court stated:

> Rather, in determining whether a state court's application of its constitutionally adequate aggravating circumstance was so erroneous as to raise an independent due process or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in Jackson v. Virginia, 443 U.S. 307 (1979). We held in Jackson that where a federal habeas corpus claimant alleges that his state conviction is unsupported by the evidence, federal courts must determine whether the conviction was obtained in violation of In re Winship, 397 U.S. 358 (1970), by asking "whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." 443 U.S., at 319 (citation omitted); see also id, at 324 ("We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. Sections 2254 -- if the settled procedural prerequisites for such a claim have otherwise been satisfied -- the applicant is entitled to habeas corpus relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt") (footnote omitted). The Court reasoned:
>
> > "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic fact to ultimate facts. Once a defendant has been found guilty of the crime charged, the factfinder's role as weigher of the evidence is preserved through a legal conclusion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." 443 U.S., at 319 (footnote omitted).
>
> These considerations apply with equal force to federal habeas review of a state court's finding of aggravating circumstances.

Jeffers, 110 S. Ct. at 3102-03. The significance of this is that certainly a federal court conducting the review mandated by Lewis v. Jeffers cannot be regarded as the sentencer. In Florida, therefore, the courts, which review the jury's recommendation in order to determine whether it has a "reasonable basis" and whether a "rational factfinder" could have reached the jury recommendation, are not replacing the jury as sentencers for eighth amendment purposes.

In Florida a capital jury and judge both act as sentencers in the penalty phase. Because the jury's factual determinations are binding so long as a reasonable basis exists, it must be regarded as a sentencer. In fact, that was the holding in Hitchcock v. Dugger, 481 U.S. 393 (1987); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied 109 S.Ct. 1353 (1989); Hall v. State, 541 So.2d 1125 (Fla. 1989).

Here, the jury was not told what was required to establish the heinous, atrocious or cruel aggravator at issue here. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Cochran v. State, 547 So. 2d 528 (Fla. 1989); Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Mr. Mendyk's jury was not advised of the limitations on the "heinous, atrocious or cruel" aggravating factor. (R. 1216). However, Mr. Mendyk's penalty phase counsel, who was doing the trial as an educational experience, did not know eighth amendment jurisprudence and failed to ask for adequate jury instructions regarding this aggravating factor. Counsel's failure was a result of his ignorance of the law. This was deficient performance. See Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). As a result, Mr. Mendyk was prejudiced. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Rule 3.850 relief is required.

ARGUMENT XII

THE JURY INSTRUCTIONS REGARDING THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS VIOLATED OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Mendyk challenged this application of this aggravating factor on direct appeal. The Florida Supreme Court rendered its decision in Rogers v. State, 511 So. 2d 526 (Fla. 1987), on July 9, 1987. That decision established an overbroad application of the cold, calculated and premeditated and premeditated aggravating circumstance occurred here. Yet, this Court failed to apply that decision to Mr. Mendyk. Moreover, the decision in Maynard v. Cartwright, 108 S. Ct 1853 (1988), applies to overbroad applications of aggravating circumstances and holds them to be violative of the eighth amendment. As the record in its totality reflects, the sentencing jury never applied the limiting construction of the cold, calculated and premeditated aggravating circumstance as required by Rogers and Maynard v. Cartwright. Because Mr. Mendyk was sentenced to death based on a finding that his

crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the proper definitions, Mr. Mendyk's sentence violates the eighth and fourteenth amendments. The jury was not advised that "heightened" premeditation was required. Certainly without such an instruction the jury did not properly construe the statutory language and understand the obvious legislative intent as explained in Rogers.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, (Fla. 1989). In fact, Mr. Mendyk's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Mendyk's jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwright.

Penalty phase counsel who conducted the proceedings for educational purposes did not know the law. He was ignorant of Rogers. This was deficient performance under Harrison v. Jones, 880 F. 2d 1279 (11th Cir. 1989). Mr. Mendyk suffered prejudice as a result. Murphy v. Puckett, 893 F. 2d 94 (5th Cir. 1990). Rule 3.850 relief is required.

ARGUMENT XIII

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

According to this Court the aggravating circumstance of "in the course of a felony" is not sufficient by itself to justify a death sentence in a felony-murder case. Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(no way of distinguishing other felony murder cases in which defendants "receive a less severe sentence"); Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987)("To hold, as argued by the State, that these circumstances justify the death penalty would mean that every murder during the course of a burglary justifies the imposition of the death penalty").

However, here, the jury was instructed on this aggravating circumstance and told that it was sufficient for a recommendation of death unless the mitigating circumstances outweigh the aggravating circumstance. The jury did not receive an instruction explaining the limitation contained in Rembert and Proffitt. There is no way at this juncture to know whether the jury relied on this aggravating circumstance in returning its death recommendation.[17] In Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988), the Supreme Court held that the jury instructions must "adequately inform juries what they must find to impose the death penalty." Hitchcock v. Dugger, 481 U.S. 393 (1987), and its progeny require Florida sentencing juries to be accurately and correctly instructed in compliance with the eighth amendment.

Trial counsel rendered ineffective assistance of counsel in that he did not object to the state's argument before the jury that the finding of these automatic aggravating circumstances requires the imposition of death. Trial counsel was also ineffective in not requesting that the jury be adequately instructed that if only the automatic aggravating factor was found that an advisory opinion of life was required. Surely the jury should have been informed that the automatic aggravating circumstance alone would render a death sentence violative of the eighth amendment. Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Zant v. Stephens, 462 U.S. 862, 876 (1983); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984). A new sentencing is required.

ARGUMENT XIV

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS PERVERTED THE SENTENCING PHASE OF MR. MENDYK'S TRIAL SO THAT IT RESULTED IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION. COUNSEL'S FAILURE TO OBJECT TO THIS FUNDAMENTAL ERROR WAS DEFICIENT PERFORMANCE.

This Court, in Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) stated:

> We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.

---

[17]There is also no way to know whether the jury convicted of felony-murder or premeditated murder. If the former, the finding of this aggravating factor does not narrow those who are death eligible.

> Strict application of the sentencing statute is necessary because the sentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition. Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

See also Robinson v. State, 520 So. 2d 1 (Fla. 1988). The eighth amendment requires that the sentencer consider specifically defined aggravating circumstances. See Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988).

The prosecutor in his sentencing closing argument before the judge specifically referred to Mr. Mendyk's lack of remorse, a factor that cannot be considered as an aggravating circumstance. Pope v. State, 441 So. 2d 1073 (Fla. 1983); Colina v. State, 570 So. 2d 929 (Fla. 1990). The prosecutor argued "[H]e felt no remorse and would do it again." (R. 1272)(emphasis added). The prosecutor stressed Mr. Mendyk's lack of remorse in an attempt to elicit an emotional response from the sentencer. This Court has repeatedly stated: "[I]t is error to consider lack of remorse for any purpose in capital sentencing." Trawick v. State, 473 So. 2d 1235, 1240 (Fla. 1985) (citing Pope).

In this case the prosecutor managed to combine improper comment on lack of remorse with improper comment on future dangerousness: "[H]e felt no remorse and would do it again." (R. 1272)(emphasis added). "'[A] person may not be condemned for what might have occurred. The attempt to predict future conduct cannot be used as a basis to sustain an aggravating circumstance.' [Emphasis in original.]" Dougan v. State, 470 So. 2d 697, 702 (Fla. 1985), (quoting White v. State, 403 So. 2d 331, 337 (Fla. 1981). See also King v. State, 514 So. 2d 354, 360 (Fla. 1987). Defense counsel's failure to object was deficient performance which prejudiced Mr. Mendyk. See Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Counsel's failure was a result of his ignorance of eighth amendment jurisprudence.

Over defense objection, the State was permitted to introduce highly prejudicial material in penalty phase. (R. 1218-1220). The State's witness read a list of books and magazines on nonconforming sexual behavior seized from Mr. Mendyk's bedroom in his parents' home. On appeal, this Court agreed that the introduction of these materials was "unquestionably" inflammatory, and an abuse of

trial court's discretion. Mendyk v. State, 545 So. 2d 846, 849 (Fla. 1989). Although the Court found the error harmless, this finding must be reconsidered in light of the recent holding in Colina, that improperly introduced nonstatutory aggravating evidence is harmful error. Colina, 570 So. 2d at 932. Moreover, a statutory mitigating circumstance on which a life recommendation could have been based was found to be present. In addition, substantial mitigation should have been presented at trial and is before this Court now. The error was not harmless.

The introduction of nonstatutory aggravating factors resulted in a capricious sentencing of Mr. Mendyk in violation of the eighth and fourteenth amendments. This fundamental error entitles Mr. Mendyk to relief. Rule 3.850 relief is warranted.

ARGUMENT XV

MR. MENDYK'S RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED WHEN THE STATE URGED THAT HE BE SENTENCED TO DEATH ON THE BASIS OF VICTIM IMPACT AND OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF BOOTH V. MARYLAND, SOUTH CAROLINA V. GATHERS, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

As a result of the State's efforts, Mr. Mendyk was sentenced to death in proceedings which allowed for the unchecked exercise of passion, prejudice and emotion. Here, as in South Carolina v. Gathers, 109 S. Ct. 2207 (1989) and Booth v. Maryland, 107 S. Ct. 2529 (1987), the prosecutor's efforts were intended to and did "serve no other purpose than to inflame the jury [and judge] and divert [them] from deciding the case on the relevant evidence concerning the crime and the defendant." Booth, 107 S. Ct. at 2535. Since a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977)(opinion of Stevens, J.)(emphasis added), such efforts to fan the flames are "inconsistent with the reasoned decision making" required in a capital case. Booth, 107 S. Ct. at 2536. Mr. Mendyk's death sentence is in violation of the eighth and fourteenth amendments and must be vacated.

Beginning with voir dire, when penalty phase counsel was not present, the prosecutor stated:

> MR. HOGAN: Do you understand that in this case a twenty-three year old girl was brutally murdered and there will be photographs of that?

(R. 259).

MR. HOGAN: Okay. Now, in this case you're going to hear that the victim in this case was working at a convenience store to put herself through college, junior college.

(R. 263).

JUROR CRAWFORD: I have a daughter twenty-three and she's a dentist's assistant. I have a son who is in construction.

(R. 405).

MR. HOGAN: Mr. Defoe, Lee Ann Larmon was a young woman, twenty-three, somewhat in your daughter's age group, who was also living with her parents at home while she sent to school.

(R. 434).

And during the State's opening statement:

She was working in a convenience store while going to junior college, working the midnight shift. Twenty-three years of age.

(R. 473).

And again during direct examination:

Q. You knew her through your work?

A. Yes, I did.

Q. Do you know her on a personal basis?

A. Just basically talking with her when I was a patrol deputy, and when I was a detective I would stop in and have a cup of coffee. Very nice girl.

(R. 659).

Even when such evidence was <u>finally</u> objected to:

Q. Now, Mr. Hochkins, did Lee Ann Larmon work on the day shift or the night shift?

A. When she was in my store, she worked the night shift.

Q. Why is that?

A. She was going to school in the daytime.

MR. FANTER: Objection, Your Honor. It's irrelevant, why she was working. That has nothing to do with what happened that night. It's totally irrelevant.

. . .

THE COURT: It's been brought in earlier without objection, that she was working, and then going to school.

MR. FANTER: That was during opening statement. There was no evidence to prove the point. And I object to that point at this time. There has been no proffer of evidence yet.

. . .

THE COURT: I feel it's relevant, and I'm going to overrule the objection. In addition, I feel that this next objection is going to be of the photograph.

MR. FANTER: Absolutely.

MR. HOGAN: I feel that it has appropriate value.

MR. FANTER: This is -- I know. That's fine. You want me to voice my objection for the record at this time? Four folks have identified the picture of the victim. I don't dispute the fact that it is Lee Ann Larmon. All of this is put in to overkill. This is a picture of a dead body of a nice woman. It's --

MR. HOGAN: Judge, This was a picture -- this was not a picture of her dead. It was a picture of her living. It's relevant...

(R. 662).

During the penalty phase, the prosecutor continued his impermissible emotional diatribe relating to the victim's personal characteristics and worth:

About that time, Lee Ann Larmon would look up from the floor and out into the plate-glass window, she would have seen the blue Ford pickup truck pull up. She was looking at her Avon book. She had mopped the floor when she had gone to work, like every other night. And she was going to school in the day.

(R. 1146).

What does Lee Ann Larmon have? What is Lee Ann Larmon guilty of? Lee Ann Larmon is guilty of working in a convenience to put herself through school. She had a trial. [sic] She didn't have a jury. She didn't have a Judge. She didn't have a lawyer.

(R. 1153).

This record is replete with error. Mr. Mendyk was sentenced to death on the basis of the constitutionally impermissible "victim impact" and "worth of victim" argument which the United States Supreme Court condemned in Booth and Gathers. The Booth court concluded that "the presence or absence of emotional distress of the victim's family, or the victim's personal characteristics are not proper sentencing considerations in a capital case." Booth, 107 S. Ct. at 2535. These are the very same impermissible considerations urged on the jury in Mr. Mendyk's case. See also Penry v. Lynaugh, 109 S. Ct. 2934, 2951 (1989)(death sentence cannot be premised on "an unguided emotional response").

A sentence of death cannot stand when it results from prosecutorial comments or judicial instructions which mislead the jury into imposing a sentence of death.

Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633 (1985); Wilson v. Kemp, 777 F.2d 621, 626 (11th Cir. 1985). A defendant must not be sentenced to die by a jury which may have "failed to give its decision the independent and unprejudiced consideration the law requires." Wilson, 777 F.2d at 21 (quoting Drake v. Kemp, 762 F.2d 1449, 1460 (11th Cir. 1985)(en banc)); see also Potts v. Zant, 734 F.2d 526 (11th Cir. 1984). A sentencing proceeding is flatly unreliable when the jurors are misled about their role in the sentencing proceeding or about the matters which they must consider in determining a proper sentence under the circumstances.

To whatever extent defense counsel failed to adequately object to the prosecutor's improper arguments, counsel provided ineffective assistance. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Rule 3.850 relief is proper.

ARGUMENT XVI

MR. MENDYK'S SENTENCING JURORS WERE REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Mendyk's eighth amendment rights. Todd Mendyk should be entitled to relief under Mann, for there is no discernible difference between the two cases. Anything less would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

Throughout Mr. Mendyk's trial, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase (R. 135-36, 144, 146-147, 169-70, 182, 208-09, 218, 221-23, 238, 243, 258-59, 305, 355, 362, 366, 373, 387, 1269-70, 1281, 1287-89). In preliminary instructions to the jury in the penalty phase of the trial, the judge emphatically told the jury that the decision as to punishment was his alone. After closing arguments in the

penalty phase of the trial, the judge reminded the jurors of the instruction they had already received regarding their lack of responsibility for sentencing Mr. Mendyk, but noted that the "formality" of a recommendation was required.

Counsel's failure to object to the adequacy of the jury's instructions and the impropriety of prosecutor's comments was deficient performance arising from counsel's ignorance of the law. Harrison v. Jones, 880 F. 2d 1279 (11th Cir. 1989). The intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Mendyk's jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer was erroneously instructed. Counsel's failure to object prejudiced Mr. Mendyk.

In Caldwell, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere." 472 U.S. at 328-29. The same vice is apparent in Mr. Mendyk's case, and Mr. Mendyk is entitled to the same relief. This Court must vacate Mr. Mendyk's unconstitutional sentence of death.

ARGUMENT XVII

THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. MENDYK OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Mendyk's capital proceedings. To the contrary, the burden was shifted to Mr. Mendyk on the question of whether he

should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Mendyk's jury was unconstitutionally instructed, as the record makes abundantly clear (See R. 1269, 1278, 1280, 1284-86).

The prosecutor argued that the mitigation had to outweigh the aggravating factors in order for the jury to recommend a life sentence (R. 1278, 1280).

Under Hitchcock, Florida juries must be instructed in accord with eighth amendment principles. This error undermined the reliability of the jury's sentencing determination. For each of the reasons discussed above the Court must vacate Mr. Mendyk's unconstitutional sentence of death.

ARGUMENT XVIII

THE ADMISSION OF NUMEROUS INFLAMMATORY PHOTOGRAPHS VIOLATED MR. MENDYK'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

At Mr. Mendyk's trial the State introduced a total of thirty-six (36) photographs of the victim's body, in addition to showing an edited videotape of the body at the crime scene. The court admitted the photographs over defense counsel's objections. Over and over again, the prosecutor was permitted to introduce highly prejudicial photographs, with no purpose but to provoke an emotional response from the jury. Initially, Hernando Sheriff's Lt. Royce Decker published an edited-for-trial videotape of the crime scene highlighting the victim's body from several angles (R. 583-87). Then, over objection of defense counsel, he was allowed to publish blowups of the victim. (R. 596, 599). Then, Hernando Sheriff's Detective James Blade published another photograph of the victim, again despite objection. (R. 657). Next, Granville Hochkin, identified yet another photograph of the victim at the morgue. (R. 661). Defense counsel continued his objections, to no avail. (R. 664-67). The next witness, Gary Kimbel, was permitted to publish five (5) new photographs of the victim. (R. 696-99). Finally, the Medical Examiner, Dr. Sass, published a series of both slides and photographs of the victim. (R. 711-20). These pictures and testimony had virtually no probative value, and their prejudice clearly outweighed any conceivable probative value. The testimony and the photographs presented were calculated to inflame and prejudice the jury.

Photographs should be excluded when the risk of prejudice outweighs its relevancy. Alford v. State, 307 So. 2d 433, 441-42 (Fla. 1975). Photographs should also be excluded when they are repetitious or "duplicatous." Alford (admission of photographs was proper when there were no duplication); Adams v. State, 412 So. 2d 850 (Fla. 1982) (exclusion of two additional photographs was properly based on the trial court's exercise of reasonable judgment to prohibit the introduction of "duplicatous photographs"); see also Mazzarra v. State, 437 So. 2d 716, 718-19 (Fla. 1st DCA 1983)(gruesome photographs admissible when they are not repetitious).

Florida law is clear that "[p]hotographs should be received in evidence with great caution." Thomas v. State, 59 So. 2d 517 (Fla. 1952). Although relevancy is a key to admissibility of such photographs under Adams, limits must be placed on "admission of photographs which prove, or show, nothing more, than a gory scene." Thomas, 59 So. 2d at 517. One such limit, clearly at issue here, is on large numbers of unduly prejudicial photographs. See Straight v. State, 397 So. 2d 903, 907 (Fla. 1981). When a trial court permits the introduction of an unnecessarily large number of inflammatory photographs, reversible error has been committed. Young v. State, 234 So. 2d 341, 348 (Fla. 1970). Courts must consider the shocking nature of the photos and whether jurors are thereby distracted from fair factfinding. Czubak, 570 So. 2d 925, 929 (Fla. 1990).

The photographs presented in this case were extremely repetitive and cumulative; they were also unnecessarily grotesque and inflammatory. They were introduced to divert attention from the defendant and towards the victim. "A verdict is an intellectual task to be performed on the basis of the applicable law and facts." Jones v. State, 569 So. 2d 1234 (Fla. 1990). What occurred here violated the eighth amendment principles discussed in Jones. The State's use of these photographs distorted the actual evidence against Mr. Mendyk. There was no valid reason to enter this number of photographs at any stage of the proceedings. Rule 3.850 relief is proper.

ARGUMENT XIX

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. MENDYK'S DEATH SENTENCE WAS THUS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Mendyk's sentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of this Court have made clear, the law of Florida is not that a majority vote is necessary for the recommendation of a life sentence; rather, a six-six vote is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 471 U.S. 1143 (1985); Harich v. State, 437 So. 2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). However, Mr. Mendyk's jury was erroneously informed that, even to recommend a life sentence, its verdict had to be by a majority vote. These erroneous instructions are like the misleading information condemned by Caldwell v. Mississippi, 472 U.S. 320 (1985), and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 109 S. Ct. 1353 (1989), because they create "a misleading picture of the jury's role." Caldwell, 472 U.S. at 342 (O'Connor, J., concurring). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the most fundamental requirements of the eighth amendment.

There can be no question that the jury charged with deciding whether Mr. Mendyk should live or die was erroneously instructed. The trial court erroneously instructed the jury that a majority vote was necessary for recommending either life imprisonment or a death sentence. (R. 1287-88). The incorrect statements that the jury had to reach a majority verdict "interject[ed] irrelevant considerations into the fact finding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). This error by itself undermined the reliability of the jury's sentencing determination; however, it must also be analyzed in conjunction with all the other incorrect jury instructions and the total effect on Mr. Mendyk's sixth amendment right to a fair trial. For each of the reasons discussed above this Court

should vacate Mr. Mendyk's unconstitutional sentence of death.

Moreover, counsel's failure to object to the instructions was deficient performance under Harrison v., Jones, 880 F.2d 1279 (11th Cir. 1989), and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). The prejudice to Mr. Mendyk resulting from counsel's deficient performance is also clear. Confidence is undermined in the outcome. Rule 3.850 relief must be granted and a new sentencing ordered.

ARGUMENT XX

MR. MENDYK'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Due process is a fundamental constitutional guarantee.

> [Our] decisions underscore the truism that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' Cafeteria Workers v. McElroy, 367 U.S. 886, 895, 81 S. Ct. 1743, 1748, 6 L.Ed.2d 1230 (1961). '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 2600, 33 L.Ed.2d 484 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, supra, 416 U.S., at 167-68, 94 S. Ct. at 1650-1651 (Powell, J., concurring in part); Goldberg v. Kelly, supra, 397 U.S., at 263-266, 90 S. Ct., at 1018-1020; Cafeteria Workers v. McElroy, supra, 367 U.S., at 895, 81 S. Ct., at 1748-1749. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail."

Mathews v. Eldridge, 425 U.S. 319, 334-35 (1976)(emphasis added).

Mr. Mendyk contends that he did not receive the fundamentally fair trial to which he was entitled under the eighth and fourteenth amendments. It is Mr. Mendyk's assertion that the process itself has failed him. It has failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive. In short, once indicted, Mr. Mendyk was essentially guaranteed a death sentence. The trial was but a cog in the machinery that the State had set in motion.

The flaws in the system which sentenced Mr. Mendyk to death are many, as he had pointed out in his 3.850 motion and proffer as well as on direct appeal. While there are means for addressing each individual error, the fact is that addressing these errors on an individual basis will not afford constitutionally adequate safeguards against an improperly imposed death sentence. Furman v. Georgia, 408 u.S. 238 (1972). However, the claims which arise as a result of Mr. Mendyk's trial should not only be considered separately. Rather, it is Mr. Mendyk's contention that these claims should be considered in the aggregate, for when the separate infractions are viewed in their totality it is clear that Mr. Mendyk did not receive the fundamentally fair trial to which he was entitled under the eighth and fourteenth amendments.

In addition to constitutional claims, some improprieties may clearly undermine any possibility of a fair trial. In this case, the judge's new wife, who had recently gone into the business of filming videos, was permitted to "practice" by videotaping Mr. Mendyk's trial. The record shows that the jury knew the judge's wife was behind the cameras. (R. 72). At one point the trial was stopped so that film could be changed. (R. 563). Despite the dictates of the judicial code, there were two (2) -- not one (1) -- video cameras in the courtroom. See Fla. Code of Judicial Conduct Canon 3, Standards of Conduct and Technology Governing Electronic Media and Still Photography Coverage of Judicial Proceedings (1979). This filming was not done to further public awareness of the judicial process; at best, it was done for commercial purposes. When a CCR staff member asked how to obtain a copy of the videotapes, she was told it would cost $2,500.

Subsequent to being sentenced to death, in an error-filled trial, the final violation of his rights occurred. On October 19, 1990, over twelve (12) months prior to his deadline for submitting this very Motion to Vacate, Mr. Mendyk was read a death warrant signed by the Governor. He was told that the State, rather than allowing him the time guaranteed to him to file this Motion under Rule 3.850, had decided to execute him earlier than expected. Thus, the final deprivation of his "rights" occurred.

The above facts demonstrate the complete one-sidedness of Mr. Mendyk's trial.

Taken separately, they speak of serious constitutional violations. Taken together, they speak of egregious violations which show that the trial and it's result were fundamentally unfair. In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." In Allett v. Hill, 422 So. 2d 1047, 1050 (4th DCA 1982), the district court, in the context of a civil action, held that the combined effect of three errors made by the trial court, though probably harmless if viewed individually, required reversal and remand for retrial on all issues.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the State to prove that the individual errors did not affect the verdict, and more importantly, that the cumulative impact of these errors did not affect the verdict. The record below is devoid of this analysis and the State has clearly failed to meet its burden. Relief is proper.

CONCLUSION

On the basis of the arguments presented herein, Mr. Mendyk respectfully submits that he is entitled to an evidentiary hearing. Mr. Mendyk respectfully urges that this Honorable Court remand to the trial court for such a hearing, and that the Court set aside his unconstitutional conviction and death sentence.

Respectufully Submitted,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

SUSAN HUGINS ELSASS
Staff Attorney
Florida Bar No. 0854573

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

By: _____
COUNSEL FOR APPELLANT

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been forwarded by United States Mail, postage prepaid, first class, to Kelly Nielan, Assistant Attorney General, Department of Legal Affairs, 210 North Palmetto Avenue, Suite 447, Daytona Beach, Florida 32114, this 30th day of May, 1991.

By: _____
COUNSEL FOR APPELLANT