IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,498

ROY ALLEN STEWART,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT,
OF THE ELEVENTH JUDICIAL CIRCUIT
IN AND FOR DADE COUNTY, STATE OF 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

M. ELIZABETH WELLS
Assistant CCR
Florida Bar No. 0866067

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

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Stewart's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied Mr. Stewart's claims following a limited evidentiary hearing.

The following symbols will be used to designate references to the record in this instant cause:

"R" -- Record on Direct Appeal to this Court;

"PC-R" -- Record on 3.850 Appeal to this Court;

"PC-R2" -- Record on Second 3.850 Appeal to this Court;

"PC-R3" -- Record on Third 3.850 Appeal to this Court.

All other citations will be self-explanatory or will be otherwise explained.

REQUEST FOR ORAL ARGUMENT

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

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INTRODUCTION

The circuit court found "that the three persons directly involved in the conviction and appeals on behalf of the state have, at one time or another, asserted that the death penalty is inappropriate in this case" (PC-R3. 2032). These three attorneys were the two trial prosecutors and the former Assistant Attorney General who handled the direct appeal, the prior Rule 3.850 proceedings, and the federal habeas corpus proceedings. They all testified at the evidentiary hearing below. Their testimony detailed why Mr. Stewart's death sentence should not be carried out. That testimony warrants careful scrutiny by this Court.

STATEMENT OF CASE AND FACTS

On May 3, 1979, Mr. Stewart was charged by grand jury indictment of first degree murder, sexual battery, burglary and robbery. He pled not guilty. On July 2, 1979, the jury returned guilty verdicts on all charges. Sentencing was held on July 5, 1979. Mr. Stewart challenged the jury instructions regarding the aggravating factors. Counsel objected to including all of the statutory aggravating factors in the instructions (R. 2268). He also objected to the lack of guidance the jury received as to the aggravating factors (R. 2256, 2259). However, the trial judge ruled ~~he~~ she would "follow the standard jury instructions" (R. 2263). The jury returned an advisory sentence of death. Judge Nesbitt sentenced Mr. Stewart to death on July 27, 1979. On direct appeal, Mr. Stewart challenged the jury instructions as deficient and failing to give the jury sufficient guidance. This Court

affirmed the conviction and sentence on direct appeal. Stewart v. State, 420 So. 2d 862, 865 (Fla. 1982) ("the standard sentencing instructions adequately covered the matters in the proposed instructions").

On March 6, 1984, Governor Graham signed a death warrant for Mr. Stewart. A Rule 3.850 Motion to Vacate Conviction and Sentence involving one issue was filed on March 16, 1984. The issue raised was whether defense counsel was ineffective in the penalty phase of Mr. Stewart's trial. A stay was issued by the circuit court and an evidentiary hearing was held. Counsel for Mr. Stewart presented the testimony of numerous family members, friends, and a school teacher, who testified about substantial mitigation in Mr. Stewart's past. Counsel also presented the testimony of Dr. Barry Crown and Dr. Syvil Marquit, mental health experts, who testified that Mr. Stewart suffered from mental illness for most of his life, that he had a long history of alcohol and drug use, that he was under the influence of a serious mental disturbance at the time of the offense, that his capacity to appreciate the wrongfulness of his conduct was substantially impaired due to a combination of drug and alcohol abuse at the time of the offense, that he had psychological problems even in early childhood, and that he suffered from a blackout at the time of the offense. The circuit court found that counsel's performance at the sentencing phase of the proceedings was deficient under the first prong of the Strickland v. Washington test (R. 44)("At an early stage of the

representation, defense counsel should have come to the inescapable conclusion that all hope of obtaining a verdict of not guilty should have been abandoned and substantial time should have been expended preparing for the penalty phase."). The circuit court, however, declined to find that Mr. Stewart was prejudiced by such deficient performance and denied relief. This Court affirmed the circuit court's finding on the question of deficient performance -- i.e., that counsel's performance was deficient. See Stewart v. State, 481 So. 2d 1210, 1212 (Fla. 1985)(Affirming the circuit court's ruling that Appellant had proven the deficient performance prong over the state's argument that counsel was not deficient, and noting that "[t]he circuit court obviously found sufficient competent substantial evidence to support its conclusion,...and we will not disturb such a finding of fact."). This Court also affirmed the circuit court's ruling that prejudice had not been sufficiently established and denied relief.

However, certain facts were not of record in that appeal. On May 16, 1983, Attorney Robert E. Godwin, one of the two assistant state attorney's who prosecuted Mr. Stewart's case, had written a letter to Governor Graham stating due to his recent discovery of the mitigation which was not presented at the penalty phase of Mr. Stewart's trial, he felt that Mr. Stewart should not be on death row (PC-R3. 1921-22). Mr. Godwin would not have pursued a death sentence but instead advocated for a life sentence had he known of the unpresented mitigation which

was discovered during the post-conviction litigation (PC-R3. 2589, 2593, 2604). Neither the letter not Mr. Godwin's testimony was presented to the court in the evidentiary hearing in 1985. The collateral counsel who represented Mr. Stewart in 1985 testified in 1991 that she knew of Mr. Godwin's letter, but did not present it or Mr. Godwin in 1985 as a personal favor to Mr. Godwin and contrary to Mr. Stewart's best interest (PC-R3. 2640). On September 29, 1986, Attorney Lance Stelzer, the other assistant state attorney who prosecuted Mr. Stewart's case wrote a similar letter to Governor Graham, stating that in light of the unpresented mitigating factors, he did not favor the death penalty for Mr. Stewart (PC-R3. 1919). These facts not of record in the appeal of the first Rule 3.850 proceeding were presented at the evidentiary hearing in 1991 from which this appeal arises.

On September 10, 1986, Governor Graham signed a second death warrant for Mr. Stewart. A second Rule 3.850 Motion was filed on September 25, 1986. The sole issue in that motion was that the death penalty is improperly imposed in Florida in a racially discriminatory manner. The circuit court denied this second motion, and on appeal this court affirmed the circuit court's denial. Stewart v. State, 495 So. 2d 164 (Fla. 1986). The federal district court thereafter denied federal habeas relief. A stay was granted by the Eleventh Circuit Court of Appeals on October 7, 1986. Thereafter, the Eleventh Circuit denied federal habeas relief. Stewart v. Dugger, 877 F.2d 851 (11th Cir. 1989).

Following the federal litigation, former collateral counsel for Mr. Stewart withdrew as counsel of record, and the Office of the Capital Collateral began representation of Mr. Stewart. In April of 1990, this office made requests pursuant to Fla. Stat. 119 to all law enforcement agencies that participated in the 1979 investigation and prosecution of the homicide of Margaret Haizlip. At that time, undersigned counsel obtained the records of the Office of the State Attorney and the Metro Dade Police Department (MDPD). Upon review of these files, counsel discovered that there existed no written hard data to back up any of the state's testimony or argument at trial about purported latent fingerprint eliminations.

Also, for the first time, Mr. Stewart's attorneys were afforded the opportunity to review the neighborhood canvass done by the MDPD officers responding to the crime scene within hours after the discovery of Mrs. Haizlip's body. These neighborhood surveys are one in the same with the neighborhood surveys specifically requested by defense counsel (R. 50) and ordered to be produced by the trial court in 1979. Id. From the surveys, counsel learned of a suspect who lived within two blocks of the victim, and who was mentioned by a number of neighbors as the likely perpetrator of the homicide.

In 1990, Vanessa Brown came forward and revealed for the first time that she had testified falsely in her pretrial deposition and trial testimony. Ms. Brown, the very person upon whom the state relied on in making out probable cause in

obtaining an arrest warrant for Mr. Stewart and the very person who later would contend that Roy Stewart had confessed to her on the night of the offense, was interviewed the day after the homicide and reported then that the only significant event she recalled happening on February 13th and the early morning of the 14th were some dogs barking at about 3:00 a.m. Ms. Brown indicated in 1990 that she falsely implicated Mr. Stewart in order to get the benefit of a secret and previously undisclosed deal with the state. Mr. Stewart's trial counsel reviewed Ms. Brown's 1990 affidavit and indicated it was Brady material which he would have used at Mr. Stewart's trial had he been advised of the facts contained therein.

On June 8, 1990, Governor Martinez signed Mr. Stewart's third death warrant setting the execution for July 10, 1990. An Emergency Motion to Vacate Judgment and Sentences was filed in the circuit court on July 7 and a hearing was held in the circuit court July 8 - 11. This Emergency Motion contained seven claims. Mr. Stewart's Brady/Giglio claim was denied without an evidentiary hearing.

On July 10, during the stay hearing on the Emergency Motion, former Assistant Attorney General Calvin Fox contacted the office of undersigned counsel to relate his concerns about the innocence of Mr. Stewart. Although factual innocence was not a claim in the Emergency Motion to Vacate, Judge Salmon agreed to allow Mr. Fox to proffer his testimony. As a result of the testimony of Mr. Fox concerning the problems he discovered with the

investigation and prosecution of this case, Judge Salmon entered a temporary stay of execution and allowed counsel for Mr. Stewart to file an amended Motion to Vacate addressing the factual innocence claim (PC-R3. 2524). An Amendment to the Motion to Vacate was filed on August 29, 1990 and an evidentiary hearing was held on the claims on February 11-12, 1991. Evidence was received as to Mr. Stewart's claim of innocence arising from Mr. Fox' testimony and as to the penalty phase ineffective assistance claim arising from Mr. Godwin's testimony. On July 2, 1991, the circuit court denied Mr. Stewart's Amended Motion to Vacate Judgment and Sentences. This appeal followed.

SUMMARY OF ARGUMENT

1. Newly discovered evidence establishes that, had the jury heard all of the relevant evidence, it probably would have acquitted Mr. Stewart. The assistant attorney general who handled Mr. Stewart's case for the state from the direct appeal in 1982 through the second post-conviction motion in 1986 conceded in the hearing that this evidence is sufficient to undermine confidence in the outcome. Mr. Stewart has made a "colorable" showing of his innocence. The circuit court erroneously denied this claim.

2. The state violated Mr. Stewart's constitutional rights when it withheld from defense counsel exculpatory evidence which it possessed. That state had a wealth of exculpatory evidence it never disclosed to the defense. It failed to correct false or misleading testimony which accrued to its benefit and Mr.

Stewart's detriment. Mr. Stewart did not learn of the false evidence until Vanessa Brown came forward in 1990 and revealed the fact that there was a secret, undisclosed deal which caused her to fabricate a story implicating Mr. Stewart. Confidence is undermined in the outcome as a result of the state's action or inaction.

3. In September 1984, an evidentiary hearing was held in the circuit court on the issue of ineffective assistance of counsel. Although the circuit court found that counsel's performance was deficient, the court failed to find prejudice. This ruling was affirmed by this Court. Stewart v. State, 481 So. 2d 1210 (Fla. 1985). At the time of those rulings, neither this Court nor the circuit court were aware that the trial prosecutors themselves, because of the mitigation which trial defense counsel failed to develop or present, concluded that death was not an appropriate penalty in this case. Mr. Stewart requests that this Court reconsider this issue in light of this newly discovered evidence of prejudice which was not presented previously because prior collateral counsel breached her duty of loyalty to Mr. Stewart.

4. Espinosa v. Florida establishes that Mr. Stewart's death sentence was the product of constitutionally invalid jury instructions and the improper application of statutory aggravating circumstances.

5. Mr. Stewart's right to a reliable capital sentencing determination was violated when the state urged that he be sentenced to death on the basis of nonstatutory aggravation and other impermissible factors, in violation of the Eighth and Fourteenth Amendments.

ARGUMENT I

MR. STEWART IS FACTUALLY INNOCENT OF THE CAPITAL CRIME OF WHICH HE WAS CONVICTED.

In Richardson v. State, 546 So. 2d 1037 (Fla. 1989), this Court held that where a defendant has obtained new and previously unpresented evidence of innocence, the defendant should present the evidence in a 3.850 motion. Similarly, the United States Supreme Court's case law in this area has been that a capital defendant may at any time present a "colorable" showing of innocence. See Smith v. Murray, 477 U.S. 527 (1986); Murray v. Carrier, 477 U.S. 478 (1986); Kuhlmann v. Wilson, 477 U.S. 436 (1986). Most recently, this Court explained that the standard is whether the new evidence would probably produce an acquittal on retrial. Jones v. State, 591 So. 2d 911 (Fla. 1991).

Evidence uncovered since the time of Mr. Stewart's capital trial and initial post-conviction proceedings establishes that Mr. Stewart is innocent of the offense for which he was convicted and is innocent of the death sentence. Consideration of this evidence is required, for it establishes that Mr. Stewart's conviction and death sentence violate the Eighth and Fourteenth Amendments. Jones v. State, 591 So. 2d 911 (Fla. 1991).

Assistant Attorney General Calvin Fox handled Mr. Stewart's case for the state from the direct appeal in 1981 through the appeal in the Eleventh Circuit in 1987. This included handling the case when Ms. Greene filed the first Rule 3.850 Motion in 1984 and the second Rule 3.850 Motion in 1986 (PC-R3. 2702). In defending the state in the post-conviction action, Mr. Fox went beyond the record material (PC-R3. 2288) and investigated the case in depth (PC-R3. 2289). Mr. Fox concluded that the evidence of guilt was insufficient to support the judgment and sentence. Unfortunately Mr. Stewart's counsel at the time failed to raise an issue to which Mr. Fox could respond with his concerns.

On July 10, 1990, Mr. Fox's testimony was proffered regarding his opinion as to the claim of innocence in the case of Mr. Stewart and the basis of his opinion. Mr. Fox repeated his testimony in the evidentiary hearing on February 12, 1991. He stated that in reviewing the defense to the ineffective assistance of counsel claim, he came to the conclusion that there was a strong claim of innocence:

> Well, I was arguing to the Court that there was clearly a colorable claim of innocence here and that Mr. Goldstein's defense of Mr. Stewart was therefore imminently proper and imminently well maintained. <u>There was a very strong and colorable claim of innocence</u>, which is a bizarre thing where you wind up going to the other side of the case and defending the lawyer's. In the defense of the case, you argue the merits of the defense. In that posture, I had a completely different look at their case than I did for example on the initial direct appeal.

(PC-R3. 2292-93)(emphasis added). He did not realize there was a claim of innocence until defending the state in the post-

conviction motion. The more he became familiar with the case, the more his legal doubts were confirmed.

Mr. Fox worked for the Attorney General's office for approximately ten years and in that time handled some 1500 cases for the state. In reviewing these cases, he studied police investigations of hundreds of crime scenes. Based on this experience, he came to the conclusion that the crime scene investigation in Mr. Stewart's case was extremely poor. In response to a question about what caused him concern about the investigation, Mr. Fox answered:

> The description of the murder and the confession does not fit the actual facts concerning the death of the lady. The State completely botched the investigation of the scene. They threw away critical evidence.
>
> I came to learn during these proceedings that they also had not pursued other defendants who had much more legitimate contact with the decedent than did Mr. Stewart.
>
> And the thing about him taking the car, trying to take the car, if he had the keys why did he try to use a knife and broke off the ignition? There were just things that were in the confession that did not fit the physical evidence at all.

(PC-R3. 2703). These problems with the investigation led Mr. Fox to conclude that there is a very strong claim of innocence in this case and that Mr. Stewart cannot have committed the capital offense in the case (PC-R3. 2297-98).

Mr. Fox pointed out that there are photographs showing Kleenex all over the place that were apparently scooped up and thrown away rather that being examined or tested. The significance of this in his opinion was that, since the victim

kept a very neat house and the Kleenex was scattered all over the place, it had to be left by someone who was there during the evening when she was murdered (PC-R3. 2295). "The crime scene is like a place where you will examine every inch of it for evidence" (PC-R3. 2295). As noted before, this testimony was from a former Assistant Attorney General who had reviewed over 1500 criminal cases and handled sixty-seven death penalty proceedings (PC-R3. 2731).

Mr. Fox concluded that practically every point in the confession was inconsistent with the physical facts. The description of the murder in the confession did not fit the investigation. The description of Mr. Stewart leaving the scene was totally inconsistent with the way the scene turned out. One of the many incongruous points in the confession observed by Mr. Fox concerned the victim's car.

> One of the things that I remember distinctly is, there's something in his confession that says that he took her pocketbook and took her keys and everything. But the person who committed the crime obviously tried to start her car with a knife. I think the blade broke off in the ignition. It doesn't make sense that he would confess to taking her keys and pocketbook and, at the same time, would start the car with a knife.

(PC-R3. 2311).

There was great emphasis by the state at the evidentiary hearing that Mr. Fox had chosen not to voice his concerns about Mr. Stewart's innocence until July 1990. Mr. Fox testified that it was not until he defended trial counsel's handling of the case that he appreciated the claim of innocence (PC-R3. 2323). The situation in the Attorney General's Office at the time Mr. Fox

was employed there was such that there was no leeway in a death penalty case not to sign pleadings on behalf of the state. Furthermore, every time Mr. Fox defended the case on behalf of the state on legal grounds, the issue of whether or not Mr. Stewart actually did the crime was not really involved (PC-R3. 2314). Mr. Fox explained why he did not come forward immediately after leaving the Attorney General's Office:

> Your Honor, I told Miss Green, when I left the State, I said, Robin, I want you to call me because I want to come forward on this case. Because, of all the cases I've ever handled for the State, this case, I believe, requires me to come forward. And I told her I wanted to hear the next time anything else occurred in this case. Now that's -- I haven't heard anything from anybody until I went to the State Attorney's Office to deliver a pleading last Thursday and she told me there was a warrant for Mr. Stewart. I told here what I just told the Court, <u>that I don't think the man did it. That that is not a capital offense</u>.

(PC-R3. 2313)(emphasis added). Out of the 1500 cases or so that Mr. Fox handled, 67 death cases, Mr. Fox <u>never</u> in any other case came forward and testified that there was a legitimate claim of innocence (PC-R3. 2731).

To corroborate Mr. Fox' testimony, Mr. Stewart called Dr. John Arden, a forensic pathologist who had performed approximately 2500 forensic autopsies. Dr. Arden testified about inconsistencies with the confession and the crime scene. As part of his training as a forensic pathologist, Dr. Arden had taken numerous courses in crime scene investigation as well as visiting many crime scenes in the course of his work. To facilitate his analysis of the case, Dr. Arden studied various police reports, the medical examiner's report, photographs of the scene and the

victim, the handbag strap and iron cord which were exhibits at trial, trial testimony of some witnesses, and the alleged confessions of Mr. Stewart (PC-R3. 2610, 2612-13).

The most glaring inconsistency with the confession and the evidence as presented at trial by the prosecution concerned the ligature marks found on the victim's neck. After comparing photographs of the victim with Mr. Stewart's alleged confession, the autopsy report, and the pathologist trial testimony, Dr. Arden discovered that they were all inconsistent (PC-R3. 2646). The autopsy report only gave a brief and insufficient description calling the ligature mark a "circle of contusion" (PC-R3. 1934). The only photograph taken of the neck close up showed a ligature mark from the center of the neck to the far left side. This mark was absent on the right front side of the neck. There was no photograph of the back of the neck and no evidence in the medical report concerning the back of the neck even though this was a case where the victim was clearly strangled. The pathologist testified at trial that the ligature mark was only absent in a small area in the back.

> It did not completely encircle the neck. It outlined the front part of it. Both lateral sides, and then, in the back, there was a small area where there were no contusions at all.

(R. 1266). But in his confession, Mr. Stewart allegedly stated that the cord was wrapped once around her neck and pulled with both hands. And Sergeant Simmons stated at trial that Mr. Stewart told him he wrapped the cord around the victim's neck several times. This was reiterated in his Supplementary Police

Report of April 26, 1979. Not one piece of evidence at trial concerning the ligature mark was consistent with Mr. Stewart's confession. Upon considering this conflicting evidence, Dr. Arden came to the conclusion that the ligature marks were not caused at all in the manner described in the confession (PC-R3. 2619).[1]

The state attempted to refute this testimony by showing that intervening clothing could cause the gap in the ligature mark shown in the photo. But, Dr. Arden was very clear that it would have to be a substantial amount of hair or clothing to leave a gap of that size. He did not see hair of great length or thickness that could serve as padding. There was no mention of any padding that would be sufficient to cause such a gap in any of the police reports, and there was nothing shown in the photographs that could have interfered with the mark (PC-R3. 2623-25, 2681). Though there was some clothing shown in a photo on the left arm, the ligature mark in the photograph was on the left side of the neck. The large gap in the mark that would have required substantial padding was on the right side of the neck. Had the strangulation of this victim happened in the way in which the defendant confessed or in the way that Sergeant Simmons testified that the defendant told him it did, there would be a ligature mark all of the way around the neck (PC-R3. 2680).

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[1]Mr. Fox also came to this same conclusion after reviewing the evidence in the case. As a result, he believed that Mr. Stewart did not strangle the victim (PC-R3. 2324).

In a desperate attempt to defuse the impact of Dr. Arden's testimony, the state attempted to downplay the importance of the confession to their case at trial. But, Mr. Fox clearly stated that the confession was critical to the prosecution (PC-R3. 2703). It is also apparent from the Judge's Sentencing Order of July 26, 1979, that the confession was relied upon by the state in obtaining both a conviction and a sentence of death. The finding of the court in the order stated many details which were clearly based on Mr. Stewart's alleged confession (R. 1182-8).

The pathologist at trial also testified that no food or food particles were found in the victim's stomach at the time of the autopsy (R. 1305). The autopsy was performed at 7:30 p.m. the following day, February 23, 1979 (PC-R3. 1933). According to the confession of Mr. Stewart relied upon by the state at trial, the victim ate a bologna sandwich between thirty minutes and one hour before her death. Dr. Arden testified that it would be unusual for a stomach to empty totally within one hour. Post mortem also could not account for the stomach emptying in such a short time. Dr. Arden stated that prolonged unconsciousness would be more likely to delay emptying than to hasten the process (PC-R3. 2630-32).[2]

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[2]Dr. Arden noted other evidence from the crime scene investigation supporting Mr. Stewart's innocence. Mr. Stewart testified at trial that he had been in the victim's home before the night of February 22, 1979, to help her hang some curtain rods (R. 1925-6). This explained why Mr. Stewart's fingerprint was on one of the door frames in the house. In rebuttal, the state called the victim's granddaughter, Carol Myers, who testified that she had never seen curtains on either one of the windows of the victim's bedroom (R. 2030). But, a Supplementary Police report of Detective

The circuit court's duty was the very narrow one of ascertaining whether there was new evidence fit for a new jury's judgment. Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).[3] More properly the issue was whether honest minds, capable of dealing with evidence, would have probably reached a different conclusion, because of the new evidence, from that of the first jury. Id. Instead, the circuit court totally ignored evidence that a jury would never ignore. In analyzing a claim of newly discovered evidence, a court must "evaluate the weight of both the newly discovered evidence and the evidence which was introduced at trial." Jones v. State, 591 So. 2d at 916. A proper evaluation of the evidentiary hearing record and the trial record establishes that the new evidence, "had it been introduced at the trial, would have probably resulted in an acquittal." Jones v. State, 591 So. 2d 911, 916 (Fla. 1991).

The evidence presented demonstrates that the result of Mr. Stewart's trial is unreliable. The United States Supreme Court has repeatedly held that because of the "qualitative difference"

Pontigo stated that there were "white and green curtains which are observed to be in the closed position" observed on the window in the victim's bedroom (PC-R3. 1970). Another discrepancy noted by Dr. Arden was that the confession related events as occurring in the living room (R. 76-90) but the police reports noted the body was found in the bedroom (PC-R3. 1943). Finally, Dr. Arden further testified that the amount of wounds noted on the victim's body by the pathologist at trial were inconsistent with Mr. Stewart's confession (PC-R3. 2627).

[3]At the time of the evidentiary hearing and the decision denying Rule 3.850 relief, the decision in Jones had not yet issued. Despite Mr. Stewart's arguments, the circuit court did not apply the proper standard to Mr. Stewart's claim.

between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gregg v. Georgia, 428 U.S. 153, 187 (1976). This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including those phases specifically concerned with the guilt, Beck, 447 U.S. at 637-38. Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Gregg, 428 U.S. at 187, including a full determination of claims of innocence. Smith v. Murray. Any procedural impediment which may be asserted by a state Respondent,

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

Murray v. Carrier, 477 U.S. 478, 495 (1986).

The facts presented below establish Mr. Stewart's innocence of the homicide charged. The ends of justice require consideration of these facts now. McCleskey v. Zant, 111 S. Ct. 1454 (1991) (habeas relief appropriate in successor petition where constitutional violation caused conviction of one who is innocent of the crime). "Fundamental fairness" may override state's interest in finality. Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged

only when a more compelling objective appears, such as ensuring fairness." exists. Witt v. State, 387 So. 2d 922, 925 (Fla. 1980).

It would be a gross miscarriage of justice to refuse to consider Mr. Stewart' claims. Mr. Stewart, an innocent man, was tried and convicted of a homicide he did not commit. An innocent person must show "a fair probability" that the trier of the facts would have entertained a reasonable doubt of his guilt. Kuhlmann v. Wilson, 477 U.S. 436, 454 n. 17 (1986)("the prisoner must 'show a fair probability that, in light of all the evidence . . . the trier of the facts would have entertained a reasonable doubt of his guilt.'").[4]

Since the circuit court failed to apply the standard this Court enunciated in Jones v. State, the matter should at least be remanded for reconsideration. Under the Jones standard, a new trial is warranted. Mr. Stewart has shown a probability that the new evidence establishes a reasonable doubt as to his guilt. A new trial is warranted.

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[4]Moreover, Mr. Stewart's claim requires consideration not just of this one piece of newly-discovered evidence, but of the cumulative effect of all the evidence of Mr. Stewart's innocence, including that presented in Argument II, infra. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

ARGUMENT II

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

The circuit court erroneously denied the above claim with respect to the state's withholding of material evidence concerning the false statement made by Vanessa Brown to the police implicating Mr. Stewart in the homicide. No evidentiary hearing was permitted on this claim.

Exculpatory information withheld by the state violates due process of law under the Fourteenth Amendment. Brady v. Maryland, 373 U.S. 83 (1967). If there is a reasonable probability that the withheld information could have affected the conviction or sentence, a new trial is required. United States v. Bagley, 473 U.S. 667 (1985). Under the Bagley test if the undisclosed evidence is material and its suppression undermines confidence in the outcome of the trial, then the defendant has been deprived of a fair trial and relief is warranted.

Indeed, up until Ms. Brown's appearance, Mr. Stewart was completely unknown to the two Metro Dade Homicide detectives conducting the investigation into Mrs. Haizlip's death -- before then, those detectives had focused their attention on two prime suspects known to be active in the Cutler Ridge/Perrine area. This investigation (into suspects more likely involved than Mr. Stewart) suddenly and without explanation terminated with Ms. Brown's appearance in this case, as reflected by a memorandum obtained from the state's files (PC-R3. 756).

Mr. Stewart was arrested, indicted, and ultimately sentenced to death because of the information allegedly provided by Vanessa Brown to the state. Ms. Brown has now admitted in an affidavit that the information in her statement to the police on March 20, 1979, implicating Mr. Stewart in the homicide was a complete fabrication (PC-R3. 748-54). Mr. Stewart never confessed to her that he killed the victim or had anything at all to do with the crime.

Trial counsel, Stanley Goldstein, sensed that something was amiss with Ms. Brown's statement to the police, but efforts by trial counsel to discover any evidence of wrongdoing were unsuccessful. Counsel continually articulated his suspicions both pre-trial and during trial, but he had no concrete evidence to support it and the state turned over nothing concerning Ms. Brown and her agreements.

Although only 21 at the time, Ms. Brown had assembled an extensive resume of arrests and convictions by 1979, including fourteen arrests for narcotics and narcotics paraphernalia with a history of heroin offenses beginning at age 17. She had also been arrested three times for theft, and had three convictions for prostitution and three convictions for escape (PC-R3. 802-03). What was most impressive about her frequent contacts with the criminal justice system was her consistent ability to obtain withheld adjudications or probation notwithstanding her record. What counsel was never informed of was that Ms. Brown was a

police informant whose account and later testimony was not reliable. See Gorham v. State, 597 So. 2d 782 (Fla. 1992).

On March 20, 1979, Ms. Brown was arrested on two felony counts of forgery, theft and marijuana charges. The forgery counts alone carried a possible penalty of ten years. § 775.082, Fla. Stat. (See PC-R3. 803). Ms. Brown, who was terrified of jail and would do anything to get out, let it be known that she had information concerning the murder (PC-R3. 750-51). Within a few hours Detective Singleton was at the jail. Ms. Brown agreed to give a false statement in return for a deal that would allow her to get out of jail. The statements given by Ms. Brown to the detectives were either made up by her or given to her by Detective Singleton (PC-R3. 751-52).

Though Mr. Goldstein suspected a deal had been made in return for Ms. Brown's testimony, he was unable to turn up any evidence of it. Indeed, when he attempted to explore the possibility of such a deal at trial with Detective Simmons, the detective steadfastly maintained that no such "deal" was in existence:

> MR. GOLDSTEIN (DEFENSE COUNSEL):
>
> Q. Did you make any deals with Vanessa Brown? Did you promise her she wouldn't be prosecuted?
>
> DETECTIVE SIMMONS: No, sir.

(R. 1813)(emphasis added). Detective Singleton, who did not testify at trial, was seated at counsel's table with the Assistant State Attorney throughout the trial (R. 969), and when Detective Simmons testified (R. 1813). But Ms. Brown had in fact

received a deal and was released from jail on the very day that Detective Singleton received her statement. Defense counsel knew none of this even though he continually requested information concerning Ms. Brown from the state. Moreover, the false testimony that there was no deal was never corrected.

Brown's own account concerning these events is quite telling. As she has explained in an affidavit which was submitted below in support of Mr. Stewart's Brady claim:

> I remember the night that she was killed because that was the night Roy Stewart came to my door and asked if he could sleep on my couch. I recall that my ex-husband Larry was staying at my house that night and recall hearing someone knock late during the night at my door. When I answered it, Roy Stewart was standing there and, as usual, he was messed up on drugs. Because my children and husband were there, I would not let Roy inside but spoke with him on the front step. Roy never said that he had killed Ms. Haizlip. In fact, Roy was so messed up that he could barely talk that night. He was in no condition to harm anyone. He could barely even stand up. I figured that he had been over to her place and she did not want him there because he was so messed up. I told this to my husband.
>
> Something happened at Mrs. Haizlip's that evening. I recall the next day when I woke up seeing yellow tape and a lot of activity around Mrs. Haizlip's house. I was interviewed by a police officer the next morning. Back then I was just trying to take care of my drug habit and two children. Larry was also pretty heavy into a drug habit and passing bad checks and selling large amounts of marijuana. He wanted nothing to do with the cops. I did not want to get involved at first. This soon changed.
>
> On March 20 of 1979, I was arrested for bad check charges and possession of marijuana. I was terrified of jail and would do anything to get out so I let it be known that I had information regarding the Haizlip murder and within a few hours Detective Singleton was at the women's detention center. I told Detective Singleton before he took my statement that I would give a statement only if he would get me out of jail. This

was made absolutely clear to Detective Singleton and we both understood it. Detective Singleton also said that he would also work something out with the judge in my case. I told the officers what they wanted to hear because of these promises.

I have recently read the statement I gave then and cannot testify that the information in there is either true or of my own knowledge -- in fact, given my motivation to avoid jail at any cost, I know that most of the statement is false, made up by me or given to me by Detective Singleton. The sole purpose of the statement was for me to get out of jail. It worked because hours after I gave the statement I was released by Detective Singleton.

Detective Singleton told me that I should not tell anyone about how he got me out of jail in exchange for my statement, a statement that Detective Singleton, by the way he fed me the facts he wanted included, knew was false. He also told me that I should not tell anyone that I would be paid a reward for my statement by the Perrine Women's club, which paid me three thousand dollars for my false testimony. I was paid the three thousand dollars and, characteristic of the type of person I was back then, took the money, bought cocaine and heroin, and then went on a three day binge, injecting all the drugs I had bought.

* * *

Before trial I was arrested again, once again Detective Singleton came to where I was and told me that I would have to give a deposition to the defense. Once again I told him that if he got me out of jail, I would do the deposition, and once again I was released.

Prior to my deposition I was again told by Detective Singleton that I should deny that they were going to help me out on my check charge and that I should not say anything about the reward or that Detective Singleton had got me out of jail. At the deposition I gave pretty much the same story as in my statement but, as I was told to do, left the dates as to when I spoke with Roy unclear. Ultimately in July of 1979, I was given probation a few days after Stewart was given the death sentence.

At trial the State told me when to appear and after my testimony Detective Singleton told me I should drop out of sight. As promised my pending charges were ultimately dropped as the detectives had promised.

(PC-R3. 748-54).

Trial counsel made reasonable efforts both before and during trial to discover evidence to impeach Ms. Brown, but due to the state's intentional withholding of material evidence and use of false testimony, was unable to do so. Collateral counsel, Robin Greene, representing Mr. Stewart in post-conviction proceedings from 1982-89 also made efforts through her investigator to contact Ms. Brown to discover if trial counsel's suspicions concerning a deal were well founded. Though the state withheld all information that would indicate a deal had been accepted by Ms. Brown in return for her testimony, counsel still attempted to find evidence to impeach this very damaging testimony. Ms. Brown was unwilling to come forward at that time and discuss the secret and undisclosed deal that she had with the state.

The knowledge of the deal made by the police with Ms. Brown and the completely fabricated statement she gave to the police falsely implicating Mr. Stewart in the homicide were unavailable to Mr. Stewart and his counsel until July 1990. Under Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), the facts upon which this claims is based were unknown to either Mr. Stewart or his counsel. Despite efforts to uncover the truth, it was not until July of 1990 that Ms. Brown was willing to tell the truth.

Ms. Brown's falsehoods came at the state's direction. Her falsehoods had quite an effect on this case. Once the state secured Brown's prefabricated statement on March 20, 1979, all

investigation into two prime suspects in this case, Carl Johnson and Charles Johnson, was aborted while in progress. This secondary effect of Brown's lies significantly inhibited the truth-seeking function of the trial. The information regarding Carl Johnson and Charles Johnson already in the possession of the Metro-Dade homicide officers at the time of the Brown statement was never disclosed to defense counsel. To the contrary, the account provided by the state's witnesses at trial concerning other suspects was grossly inaccurate. Neither was defense counsel ever informed that the pursuit of these suspects ended with Brown's false statement.[5]

Trial counsel's intuition regarding the shortcomings of the investigatory practices employed in this case and concerning the

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[5]Files from the Metro-Dade Police Department, including the forensic evaluations, which were not previously disclosed to the defense show that what was disclosed to the defense at trial was not the whole truth. Had defense counsel been provided with even a few of the reports from the Metro-Dade files, a truly compelling reasonable doubt defense would have been deployed on Mr. Stewart's behalf. It is beyond dispute that the Assistant State Attorney argued at trial that every suspect's finger prints were compared against the latent recovered from the homicide scene in arriving at Mr. Stewart as the only possible individual who could have committed the murder (R. 997-8)(opening argument); (R. 1714)(testimony of detective Simmons that Charles Johnson's fingerprints were obtained from an arrest and compared with those at the crime scene); (R. 1716)(testimony of Detective Simmons that Albert Dilaney's [sic] fingerprints were compared against latent removed from the scene); (R. 1767)(same). Indeed, during his closing the prosecutor told Mr. Stewart's jury point blank that all other suspects were eliminated via latent eliminations (R. 2094-5). Yet, there is no indication in the Metro-Dade files that the fingerprint eliminations that the detective testified occurred and that the prosecutor argued occurred, did in fact occur. The reality here is the exact opposite of the grossly misleading argument made by the Assistant State Attorney to Mr. Stewart's jury.

state's use of Brown told him something was seriously wrong. Accordingly, defense counsel took great pains in vigorously challenging each and every police officer and forensic examiner called by the state to the extent that the trial prosecutor devoted the majority of his closing argument responding to the attack which counsel had tried to mount against the investigation (See, e.g., R. 2075-97).

Mr. Stewart's former trial counsel and now Judge, Stanley Goldstein, explained in an affidavit submitted below the significance of Vanessa Brown:

> Prior to trial I knew that Vanessa Brown was an important witness in the case. I knew that Ms. Brown was an individual with a long criminal record including multiple narcotics arrests and convictions.
>
> I also knew that at the time of the murder of Ms. Haizlip, Vanessa Brown lived directly across the street from the scene of the crime on Wayne Avenue. I also knew that shortly prior to trial Ms. Brown was arrested on forgery, theft and drug offenses.
>
> Given Ms. Brown's past criminal record, as well as her arrests shortly before Mr. Stewart's trial, I had strong suspicions that Ms. Brown had been given a "deal" by the State in exchange for her statement. In fact, I distinctly remember asking Detective Simmons on cross-examination whether or not any deals had been made. As always, I was told that no such understandings, agreements, or deals were in existence. These were the same responses given to me when I made formal and informal discovery requests.
>
> Throughout trial the theory of defense was that of reasonable doubt. Although I believe that Mr. Stewart was in Ms. Haizlip's residence on the night of the offense (they knew each other and he had visited her in the past), all of the information which I was able to collect regarding the crime scene led me to believe that someone else had actually committed the murder.
>
> Accordingly, from the outset I attempted to develop information which would shed light on the

involvement of other individuals. Evidence recovered at the scene of the crime generally supported this theory. For example, a syringe was found in the front yard which could not be connected to Mr. Stewart; two foot prints were also found at the front of the residence which were inconsistent with the shoes recovered from Mr. Stewart; additionally, a tire track from a bike was also found which could not be connected to Mr. Stewart. All of this in addition to other items of evidence suggested the presence of another individual or individuals who likely committed the murder.

Notwithstanding my best efforts and numerous applications to the Trial Judge, information and/or evidence supporting my theory of the defense was either not provided or only grudgingly provided by the State. Nothing concerning Vanessa Brown's deals were provided to me. No information whatsoever concerning her cooperation with the State was ever disclosed, nor was it ever disclosed that her deposition account was not accurate.

I have recently been read the affidavit of Vanessa Brown, who now goes by the name of Vanessa Hamrick. Her affidavit confirms my suspicions regarding her cooperation with the State in 1979.

Specifically, it was never disclosed by any of the prosecutors involved in this case nor by any law enforcement officer (Detectives Simmons and Singleton were the investigating officers) that after Ms. Brown's arrest on March 20, these officers intervened with the jail authorities to procure Ms. Brown's release immediately after she provided them with a statement incriminating Mr. Stewart.

Likewise, I was never advised that a deal had been worked out between the State and Ms. Brown which would allow her to plead guilty to the two felony fraud counts in exchange for probation notwithstanding her long criminal history.

In addition, I was never advised that Ms. Brown was instructed that she should not disclose the existence of her deal with the State and/or the three thousand dollars in reward money she would receive for her cooperation in Mr. Stewart's case. I in fact distinctly recall Detective Simmons' testimony denying that any deals had been struck with Ms. Brown.

Furthermore, I do not recall ever being provided with police reports which revealed that Ms. Brown had been interviewed on two occasions shortly after the murder and had provided no useful information to the police at that time. Without question, had I been provided with such information, I would have used it during Ms. Brown's deposition and proffer for impeachment purposes and in an attempt to allow me to have Ms. Brown called as a court witness during trial.

As previously stated, the theory of the defense was one of reasonable doubt. The State was well aware of this. I have recently spoken with attorneys from the Office of the Capital Collateral Representative who are now representing Mr. Stewart. I have been advised that two other possible suspects for this murder existed at the time of the offense and were actively pursued by the homicide unit at the time approximate to Ms. Brown's statement of March 20, 1979. Records recently disclosed by the Metro-Dade Police Department Identification Unit pursuant to Fla. Stat. sec. 119 reveal that neither of these suspects' prints were eliminated as contributors of fingerprints at the scene of the crime, although there were prints at the scene that were not Mr. Stewart's. (As I noted previously, Mr. Stewart and the victim knew each other, and he had been in her residence prior to the offense.) Had I been aware of this information, I most certainly would have used it in defending Mr. Stewart. This would have been perfectly consistent with my theory of reasonable doubt.

Detective Simmons testified that latent examinations were conducted involving both suspects (Carl Johnson and Charles Johnson). This testimony undermined the defense presented and had a strong effect on the jury. It is only recently that I have learned that this testimony was not accurate. As is now evident, no comparisons were done involving these suspects. I certainly would have actively used this information had it been disclosed at the time of the original proceedings in Mr. Stewart's case.

I have also recently learned that one of these suspects, Mr. Carl Johnson, had a history of erratic and violent behavior and was known in the area of the offense as an individual with violent propensities. In addition, I have been advised that Mr. Carl Johnson was arrested a few days after the murder of Ms. Haizlip at Ms. Haizlip's home on Wayne Avenue for loitering. This was precisely the type of information that I was attempting to obtain from the State in discovery. I

> certainly would have used it in Mr. Stewart's defense. However, the State failed to provide me with the police reports surrounding this incident, or any of the facts noted above, including the fact that Mr. Carl Johnson lived only two blocks from the scene of the crime.
>
> Likewise, I have recently been informed by Mr. Stewart's present attorneys that another prime suspect under suspicion by Metro-Dade homicide for the murder of Ms. Haizlip, Mr. Charles Johnson, was involved in an attempted burglary of the very home in which Ms. Haizlip was murdered only months prior to the present offense. That report reflects that Mr. Charles Johnson was riding a red bike. Once again, I most certainly would have used this critical information in support of Mr. Stewart's defense. However, as with the other information discussed above, the police report or any other information about this was never provided to me.

(PC-R3. 823-28).

The prosecution's deliberate suppression of material exculpatory evidence violates due process. Brady; Agurs v. United States, 427 U.S. 97 (1976); Bagley. The prosecutor must reveal to the defense any and all information that is helpful to the defense, regardless of whether defense counsel requests the specific information. See id. at 3380. It is of no constitutional significance whether the prosecutor, law enforcement, or other state agent is responsible for the nondisclosure. Griffin v. State, 598 So. 2d 254 (Fla. 1st DCA 1992); Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). In Mr. Stewart's case both the prosecutor and the police failed to reveal exculpatory information to the defense.

Where the state suppresses material exculpatory and impeachment evidence, due process is violated when the material evidence relates to the credibility of a state's witness, as was the case in Mr. Stewart's trial. Napue v. Illinois, 360 U.S. 264

(1959); Giglio v. United States, 405 U.S. 150 (1972). Moreover, the state has an affirmative obligation to correct false testimony. Here, the state failed in that duty.

Here the state's suppression of evidence precluded the defense from knowing information which suggested Vanessa Brown fingered Mr. Stewart in order to protect herself or someone close to her. The state's action precluded the defense from knowing crucial information necessary to the presentation of that defense. Moreover, Mr. Stewart's factual proffers must be taken as true. Lightbourne v. Dugger. Accepting Vanessa Brown's affidavit and Judge Goldstein's affidavit, a Brady claim has been established. Therefore, an evidentiary hearing was warranted. Lightbourne v. Dugger.

The circuit court denied an evidentiary hearing on this claim because it concluded the claim was "procedurally barred" (PC-R3. 2522). However, the circuit court failed to credit Mr. Stewart's allegation that Vanessa Brown was previously unavailable. This allegation had to be taken as true. Lightbourne v. Dugger. Accepting the allegation as true established cause as explained in Lightbourne. Therefore, an evidentiary hearing was required.

A procedural bar, after all, is inapplicable where as here the facts upon which the claims are predicated were unknown to Mr. Stewart or his counsel at the time of trial, when his prior post-conviction application was filed, or at any other time in the past. The facts could not reasonably have been ascertained,

for the state kept them concealed. As Judge Goldstein, Mr. Stewart's former trial counsel explained, formal and informal discovery demands were made. They were not complied with. To the contrary, the facts were misrepresented (even before the jury) by the very same law enforcement officers and prosecutors involved in the trial. Trial counsel and former collateral counsel relied on the state's good faith: discovery demands were made, discovery was ordered, and counsel in good faith believed that the state had in good faith complied. It is only now that the true facts have come to light. It was only in 1990 that Vanessa Brown came forward and revealed the true facts which were previously unavailable.

Mr. Stewart's Rule 3.850 motion set out the recently discovered evidence demonstrating that Brady and its progeny were violated in this case. As this Court noted in a case in the identical procedural posture as Mr. Stewart's: "Accepting the allegations . . . at face value, as [the law requires at this juncture, before an evidentiary hearing has been held] . . ., they are sufficient to require an evidentiary hearing with respect to whether there was a Brady violation." Lightbourne, 549 So. 2d at 1365. The violations of Mr. Stewart's rights pled in this appeal show that state misconduct precluded the development of true facts and resulted in the presentation of falsehoods during the trial proceedings in this case. Cf. Smith v. Murray, 477 U.S. 527, 538 (1986). Former counsel reasonably relied on the state's good faith. The state had said to counsel

that it had turned over all the facts. In fact, the state did not.

A defendant cannot be faulted for not raising a claim earlier when it is the state itself that suppresses the "tools" upon which the claim can be based. Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985); see also Freeman v. Georgia, 599 F.2d 65, 69 (5th Cir. 1979). As the United States Supreme Court explained in Reed v. Ross, "the failure of counsel to raise a constitutional issue reasonably unknown to him is one situation in which [an exception to procedural bar rules] . . . is met." 468 U.S. 1, 14 (1984). See also Amadeo v. Zant, 486 U.S. 214, 222 (1988). These standards of the United States Supreme Court are the same ones applied by this Court. Mr. Stewart's claims therefore must be determined on their merits, for they are a paradigm of claims involving interference by state officials which precluded the petitioner from bringing the claims earlier. See Brown v. Allen, 344 U.S. 443, 486 (1953), cited in Murray v. Carrier, 477 U.S. 478, 488 (1986). See also Amadeo v. Zant. In this regard, in related factual contexts, the United States Supreme Court has held time and again that procedural obstacles are insufficient to overcome a post-conviction petitioner's entitlement to relief when it is the state's own misconduct that resulted in the petitioner's failure to urge the claim in previous proceedings. Amadeo v. Zant.

The claims presented in this appeal involve issues whose factual basis could not have been and was not known during prior

litigation in this case. Founded upon Brady, and its progeny, the facts supporting these claims were unknown at the time of trial, for they were suppressed by the state. The suppression continued throughout the prior post-conviction proceedings. The state comes before this Court not with clean hands, but in breach of a fundamental constitutional duty -- the duty to reveal to the defense evidence that could affect the result at trial and that is favorable to the defense, and to present only truthful evidence to the factfinder.

Mr. Stewart was entitled to evidentiary hearing on the Brady/Giglio claim which was contained in his motion to vacate. The circuit court erred in denying the claim without affording a full evidentiary hearing.

ARGUMENT III

ROY ALLEN STEWART WAS PREJUDICED BY INEFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. STEWART'S PRIOR COLLATERAL COUNSEL FAILED TO PRESENT EVIDENCE OF PREJUDICE AS A FAVOR TO THE PROSECUTOR AND IN VIOLATION OF HER OBLIGATION TO MR. STEWART.

In Mr. Stewart's original 3.850 proceedings in 1983, the circuit court found that counsel's performance at the sentencing phase of the proceeding was deficient (PC-R. 44). The court denied relief after ruling that Mr. Stewart had failed to establish prejudice. This Court affirmed. Stewart v. State, 481 So. 2d 1210 (Fla. 1985). Neither this Court nor the circuit court knew then that the unpresented mitigation would have convinced the trial prosecutor not to seek a death sentence,

something that plainly establishes prejudice. This evidence was not presented in the initial Rule 3.850 proceeding because collateral counsel did not call the trial prosecutor to testify as a personal favor to the prosecutor even though the failure to present this evidence was not in Mr. Stewart's best interest. The ruling as to prejudice should be revisited in light of this newly presented evidence.

Assistant State Attorney Robert Godwin testified in the evidentiary hearing below that sometime after the trial of Mr. Stewart he became aware of unpresented mitigating evidence which was developed in collateral proceedings that caused him to reevaluate his stance on Mr. Stewart's death sentence (PC-R3. 2585, 2586). This mitigating evidence was the evidence presented to the circuit court in 1984 in support of the ineffective assistance of counsel claim. After learning of this mitigation, Mr. Godwin wrote a letter to Governor Graham expressing his belief that in light of the new evidence concerning Mr. Stewart's mental and emotional status and condition at the time of offense, he felt it would be appropriate to spare Mr. Stewart from the death penalty (PC-R3. 1921-22, 2586). At the 1991 evidentiary hearing, Mr. Godwin testified that had he known of this mitigating evidence in 1979, he would have opposed imposition of the death penalty (PC-R3. 2589, 2593, 2604).[6]

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[6]In 1986, Assistant State Attorney Lance Stelzer also wrote a letter to Governor Graham expressing his view that he no longer actively favored the death penalty for Mr. Stewart (PC-R3. 1919). Mr. Stelzer testified below that his feelings in this matter are still the same as those stated in his 1986 letter, in other words

Mr. Godwin's view is premised upon the mitigation not discovered and presented by trial counsel due to trial counsel's deficient performance. It is not necessary that the errors of counsel more likely than not determined the outcome to render the proceeding unfair, but only that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington 446 U.S. 668, 693 (1984).[7] Mr. Godwin also pointed out that this was the only instance in which he has ever written to the Governor and/or testified in a hearing that he would not have sought death in a capital case he prosecuted (PC-R3. 2605).

Both Mr. Godwin and Mr. Stelzer testified that this mitigation was new information not presented at trial (PC-R3. 2581, 2587).[8] Mr. Godwin recalled that the evaluations done by

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he no longer believes that a death sentence is justified in Mr. Stewart's case (PC-R3. 2564, 2565). In response to a question from the defense/petitioner, Mr. Stelzer answered "Do I actively favor the death penalty at this moment for Roy Stewart -- No" (PC-R3. 2564).

[7]"[W]e believe that a defendant need not show that counsel's deficient conduct more likely than not altered the outcome in this case." Strickland, 466 U.S. at 693.

[8]Mr. Stelzer also stated that as far as he was concerned the aggravating and mitigating circumstances was not a numbers game. He would weigh aggravating circumstances against mitigating circumstances (PC-R3. 2578). Since the mitigation was not presented at Mr. Stewart's penalty phase, it was not possible to conduct the appropriate weighing. It is clear that Mr. Stewart was prejudiced by this. Neither the prosecution, judge nor jury was aware that there was this wealth of mitigation to consider in determining whether Mr. Stewart should be put to death for his

the psychiatrists in 1979 were done for the purpose of determining competency (PC-R3. 2595). Each of the doctors who were originally involved indicated that they had not been provided with sufficient information and needed to conduct further examinations (R. 1152-53, 1158, 1161-62). Dr. Sanford Jacobson noted in an addendum to his report dated May, 23 1979 that additional information regarding how drugs and alcohol affected the defendant's behavior at the time of the offense might alter the opinion expressed regarding his ability to meet the test for criminal responsibility. Mr. Godwin pointed out that as he was unaware of Mr. Stewart's background in 1979, it makes sense that the psychiatrists would not have had this information either (PC-R3. 2588). In 1983, this was "new information, new facts".[9]

Mr. Godwin's letter to Governor Graham was written in 1983 and was in existence at the time of the prior 3.850 proceedings. However, Robin Greene did not present this letter to the circuit court at that time as a personal favor to Mr. Godwin in violation of her duty of loyalty to Mr. Stewart (PC-R3. 2640). The failure to present this letter in 1984 was due to collateral counsel's abandonment of Mr. Stewart in favor of a personal friendship with a witness. This breach of client loyalty prejudiced Mr. Stewart

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crime. Moreover, defense counsel failed to attack the aggravating factors as well.

[9]Mr. Stelzer agreed that there was new evidence since 1979. These facts were unknown to the prosecution at the time of trial as the trial defense failed to investigate, develop or present existing mitigating evidence.

and warrants this Court's consideration of the evidence at this juncture.[10]

Special Assistant Public Defender Robin Greene undertook representation of Mr. Stewart in post-conviction proceedings in 1982. Ms. Greene represented Mr. Stewart's interests in the 1984 evidentiary hearing which resulted in the circuit court's finding that defense counsel's performance was deficient at the penalty phase at trial. Mr. Stewart's case was the first case Ms. Greene had ever handled in post-conviction. Ms. Greene testified that she was in possession of Mr. Godwin's letter at the time of the evidentiary hearing on the issue of IAC. For personal reasons entirely unrelated to Mr. Stewart's case, Mr. Godwin had indicated to Ms. Greene that he did not wish to give evidence in the hearing at that time. Ms. Greene testified that though Mr. Godwin did wish to tell the truth, he did not wish to testify. She therefore decided not to call Mr. Godwin to explain. Ms. Greene stated in the evidentiary hearing that she knew the client's interests should come before a witness' interests and she failed Roy Stewart in this regard. She should have attached Mr. Godwin's letter to the Rule 3.850 Motion and subpoenaed him (PC-R3. 2640). In re-direct examination Ms. Greene reiterated that she did say she did not fulfill her responsibility to her client (PC-R3. 2647). Mr. Stewart was prejudiced as a result.

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[10]As to Mr. Stelzer, his letter to Governor Graham was not in existence at the time of the prior proceedings. Therefore, it could not have been discovered and/or presented.

Ms. Greene was very clear that she felt this evidence would have been important on the issue of prejudice. Had she subpoenaed Mr. Godwin and had him explain his letter, it certainly would have made a difference. Though she was unaware of Mr. Stelzer's views until his letter in 1986, she felt that these two letters would certainly have established prejudice which resulted from trial counsel's deficient performance (PC-R3. 2642).

Had the prosecutors been aware of this mitigating evidence in 1979, there may never have been a penalty phase in Mr. Stewart's case. Under Florida law, the state may waive penalty phase proceedings by choosing to present no evidence. Mr. Godwin stated that there were brief plea discussions with defense counsel. Initially, defense counsel asked for a plea. Based upon the then known facts, the prosecutors said no; they were seeking death (PC-R3. 2589). Prosecutors may exercise discretion in determining whether to seek death. Silagy v. Peters, 905 F.2d 986 (7th Cir. 1990). Had Mr. Godwin known about the mitigation he would have recommended that the death penalty not be sought. Ultimately, the decision rested with the State Attorney Janet Reno. Ms. Greene testified that Mr. Godwin's views would have carried weight with State Attorney Janet Reno who does not believe in the death penalty, and that there is a reasonable probability that Ms. Reno would have agreed to a waiver of death (PC-R3. 2651).

Had trial counsel investigated and advised of the available mitigation at the time of trial in 1979, they would have realized that his was not an appropriate case for the death penalty. It is probable that the state would not have sought death and Mr. Stewart's case would never have reached the penalty phase. The prejudice is obvious. Had Mr. Stewart received effective assistance of counsel, Mr. Stewart would never have received a death sentence.

In denying Mr. Stewart's current motion to vacate, the circuit court noted "[t]he essence of the position of one of the former state attorneys is that if he had known of the mitigating factors he learned about in the post-conviction proceedings [], he would not have pursued the death penalty in the case" (PC-R3. 2032). The circuit court concluded that this evidence was as a matter of law "not sufficient" ("the announced change of position of the prosecutors of the case is not sufficient to vacate the judgments that have been reached")(PC-R3. 2033). The circuit court's conclusion is error as a matter of law. Trial counsel's deficient performance was clearly prejudicial as this new evidence now establishes. But for trial counsel's failures, there is a reasonable probability of a different outcome.

ARGUMENT IV

ESPINOSA V. FLORIDA ESTABLISHES THAT MR. STEWART'S DEATH SENTENCE WAS THE PRODUCT OF CONSTITUTIONALLY INVALID JURY INSTRUCTIONS AND THE IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Mr. Stewart's jury failed to receive complete and accurate instructions defining the aggravating circumstances in a constitutionally narrow fashion. The jury was told to consider eight aggravating factors that lacked specific definition. The trial court only found five aggravating circumstances applicable. The jury was not advised on the elements of the aggravating factors which the state had to prove beyond a reasonable doubt. As a result, the jury was given unbridled discretion to return a death recommendation. Specifically relying upon the tainted death recommendation, the judge sentenced Mr. Stewart to death.

A. THE JURY INSTRUCTIONS GIVEN

At the beginning of his penalty phase Mr. Stewart's jury was instructed on eight aggravating factors (R. 2277-78). Those instructions were:

> The aggravating circumstances that you may consider are limited to such of the following as may be established by the evidence: One, the crime for which the defendant is to be sentenced was committed while the defendant was under sentence of imprisonment. Two, that at the time of the crime for which he is to be sentenced, the defendant had been previously convicted of another capital offense, or of a felony involving the use of threat or violence to some person. Three, that the defendant, in committing the crime for which he is to be sentenced, knowingly created a great risk of death to many persons. Four, the crime for which the defendant is to be sentenced was committed while the defendant was engaged in or an accomplice in the commission of an attempt to commit flight after committing or attempting to commit any robbery, arson,

> burglary, kidnapping, aircraft piracy, or the unlawful throwing, placing, or discharging of a destructive device or bomb. Five, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody. Six, that the crime for which the defendant is to be sentenced was committed for pecuniary gain. Seven, that the crime that the defendant is to be sentenced was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law. Eight, the crime for which the defendant is to be sentenced was especially heinous, atrocious or cruel. "Heinous" means extremely wicked or shockingly evil. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain; utter indifference to or enjoyment of the suffering of others; pitiless.

(R. 2277-78).[11] In imposing a death sentence the trial court found five of those aggravating factors applicable, specifically rejecting three of the aggravating circumstances the jury had been initially instructed upon (R. 1182-88). The three aggravators rejected by the judge were "great risk of death to many persons", "for the purpose of avoiding or preventing lawful arrest", and "to disrupt or hinder the lawful exercise of any governmental function." The jury was not advised of the narrowing constructions which caused the judge to conclude these aggravations were not present. Mr. Stewart's jury could have impermissibly relied on these aggravators, and thus the trial court's reliance on the jury's verdict was improper. The jury did not receive instructions on the narrowing constructions which rendered these aggravators inapplicable.

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[11]The trial court's final instructions on aggravating circumstances included "under sentence of imprisonment", "prior violent felony", "during the commission of a felony", "pecuniary gain", and "heinous, atrocious, or cruel".

B. PROCEDURAL HISTORY

On June 15, 1979, Mr. Stewart's trial attorneys first raised a vagueness objection to the standard jury instructions for aggravating factors in a Motion to Declare Florida Statute Section 921.141 Unconstitutional (R. 139). Mr. Stewart's motion stated, "[t]he aggravating and mitigating circumstances as enumerated in Florida Statute §921.141 are impermissibly vague and overbroad" (R. 139). As to the aggravating factor of "especially cruel, heinous or atrocious", Mr. Stewart's motion stated, "[a]lmost any capital felony would appear specially cruel, heinous and atrocious to the layman, particularly any felony murder" (R. 141). At the time of trial, Mr. Stewart's trial attorney reraised his objections in a charge conference:

> As far as the pecuniary gain ... I believe the legislative intent when they passed this particular aggravating circumstance and when they construed this particular aggravating circumstance to concern more murder-for-hire than they were with murder that took place in the matter of this case.

(R. 2256). Mr. Stewart's trial attorney also challenged the aggravator of "heinous, atrocious and cruel":

> To a layman, no capital crime might appear to be less than heinous, but a trial judge -- peered in the facts of the credibility of the request and the knowledge to the facts of the case as to the criminal activity -- what they are saying is that to most of the population, any murder is heinous. Therefore, it would be an aggravating circumstance, and therefore, every murder case would be grounds for electrocution.

(R. 2259). Counsel also objected to instructing the jury on all aggravating factors and in failing to instruct the jury that impermissible doubling of aggravators was not allowed.

Mr. Stewart's direct appeal attorney also raised a vagueness challenge to the jury instructions. In his direct appeal brief, Mr. Stewart's attorney argued that the jury received "deficient and improper instructions [] in the sentencing phase" and that the judge relied on a "severely tainted jury recommendation" (Stewart v. State, Fl. S. Ct. No. 57,971, Initial Brief of Appellant, p. 40). Mr. Stewart's direct appeal attorney went on to argue "the law should not be used merely as a tool for after-the-fact analysis by lawyers and judges, but should be shared with the jury, so that their recommendation of sentence will be based upon these well-recognized principles rather than upon caprice and emotion" (Id. at 48). In his reply brief on direct appeal, Mr. Stewart's attorney cited Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977)(quoting Proffitt v. Florida, 428 U.S. 242, 258 (1976), for the proposition "the sentencing authority's discretion must be 'guided and channeled by requiring 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'" (Reply brief at 13). Mr. Stewart's appellate attorney went on to state "[w]here the basis for a jury sentencing judgment could 'only be the subject of sheer speculation', that judgment can not be sanctioned. Godfrey v. Georgia, 100 S. Ct. 1759, 1765 (1980)." (Id. at 14). This Court rejected Mr. Stewart's arguments as meritless.

C. ESPINOSA V. FLORIDA IS A CHANGE IN LAW.

On June 8, 1992, the United States Supreme Court reversed this Court's longstanding jurisprudence and held Maynard v. Cartwright, 486 U.S. 356 (1988), is applicable in Florida. Sochor v. Florida, 112 S. Ct. 2114 (1992). On June 29, 1992, in Espinosa v. Florida, 112 S. Ct. 2926 (1992), the United States Supreme Court again reversed this Court and held that this Court had previously failed to correctly apply Maynard and Godfrey v. Georgia, 446 U.S. 420 (1980):

> Our examination of Florida case law indicates, however, that a Florida trial court is required to pay deference to a jury's sentencing recommendation, in that the trial court must give "great weight" to the jury's recommendation, whether that recommendation be life, see Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975), or death, see Smith v. State, 515 So. 2d 182, 185 (Fla. 1987), cert. denied, 435 U.S. 971 (1988); Grossman v. State, 525 So. 2d 833, 839 n.1 (Fla. 1988), cert. denied, 489 U.S. 1071-1072 (1989). Thus, Florida has essentially split the weighing process in two. Initially, the jury weighs aggravating and mitigating circumstances, and the result of that weighing process is then in turn weighed within the trial court's process of weighing aggravating and mitigating circumstances.
>
> It is true that, in this case, the trial court did not directly weigh any invalid aggravating circumstances. But, we must presume that the jury did so, see Mills v. Maryland, 486 U.S. 367, 376-377 (1988), just as we must further presume that the trial court followed Florida law, cf. Rogers v. Arizona, 497 U.S. 639, 653 (1990), and gave "great weight" to the resultant recommendation. By giving "great weight" to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found. This kind of indirect weighing of an invalid aggravating factor creates the same potential for arbitrariness as the direct weighing of an invalid aggravating factor, cf. Baldwin v. Alabama, 472 U.S. 372, 382 (1985), and the result, therefore, was error.

112 S. Ct. at 2928. In light of Sochor and Espinosa, the United States Supreme Court granted certiorari review and reversed eight other Florida Supreme Court decisions. See Beltran-Lopez v. Florida, 112 S. Ct. 3021 (1992); Davis v. Florida, 112 S. Ct. 3021 (1992); Gaskin v. Florida, 112 S. Ct. 3022 (1992); Henry v. Florida, 112 S. Ct. 3021 (1992); Hitchcock v. Florida, 112 S. Ct. 3020 (1992); Hodges v. Florida, 52 Cr.L. 3015 (U.S. Oct. 5, 1992); Ponticelli v. Florida, 52 Cr.L. 3015 (U.S. Oct. 5, 1992); Happ v. Florida, 52 Cr.L. 3063 (U.S. Nov. 2, 1992).

Espinosa represents a change in Florida law which must now be applied to Mr. Stewart's claims. In Thompson v. Dugger, 515 So. 2d 173, 175 (Fla. 1987), this Court held Hitchcock v. Dugger, 481 U.S. 393 (1987), to be a change in Florida law because it "represent[ed] a sufficient change in the law that potentially affect[ed] a class of petitioners, including Thompson, to defeat the claim of a procedural default." The same can be said for Espinosa. The United States Supreme Court demonstrated this proposition by reversing a total of ten Florida death cases on the basis of the error outlined in Espinosa and Sochor.

Moreover, an examination of this Court's jurisprudence demonstrates that Espinosa overturned two longstanding positions of this Court. First, this Court's belief that Proffitt v. Florida, 428 U.S. 242 (1976), insulated Florida's "heinous, atrocious or cruel" circumstance from Maynard error was soundly rejected. ("The State here does not argue that the 'especially wicked, evil, atrocious, or cruel' instruction given in this case

was any less vague than the instructions we found lacking in Shell, Cartwright or Godfrey," 112 S. Ct. at 2928). Second, this Court's precedent that Eighth Amendment error before the jury was cured or insulated from review by the judge's sentencing decision was also specifically overturned. ("We merely hold that, if a weighing State decides to place capital-sentencing authority in two actors rather than one, neither actor must be permitted to weigh invalid aggravating circumstances" 112 S. Ct. at 2929).

Mr. Stewart is entitled to relief under both Espinosa and Sochor. His death sentence must be reversed. His capital jury was instructed to consider eight aggravating circumstances. Three of the aggravating factors were held not to be properly applied in Mr. Stewart's case, and three more of the aggravators merely repeated an element of felony murder and thus did not properly narrow and channel sentencing discretion. Instructions on the remaining aggravators failed to adequately define what the

jury must find in order to conclude the aggravators were present.

D. HEINOUS, ATROCIOUS OR CRUEL

As to the last aggravating factor submitted for the jury's consideration, the jury was simply told "the crime . . . was especially heinous, atrocious, or cruel. 'Heinous' means extremely wicked or shockingly evil. 'Atrocious' means outrageously wicked and vile. 'Cruel' means designed to inflict a high degree of pain; utter indifference to or enjoyment of the suffering of others; pitiless. " (R. 2278).[12] No additional words were given to the jury to explain what was necessary to establish the presence of this aggravator. This instruction is virtually identical to the one found inadequate in Shell v. Mississippi, 111 S. Ct. 313 (1990).

In Mr. Stewart's case, the jury was never guided or channeled in its sentencing discretion. No constitutionally sufficient limiting construction was ever applied to the "heinous, atrocious, or cruel" aggravating circumstance before this jury. Shell v. Mississippi. Moreover, this aggravator only applies where evidence shows beyond a reasonable doubt that the defendant knew or intended the murder to be especially heinous, atrocious or cruel.[13] In addition, this aggravator is not

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[12]At trial, the state interjected improperly its personal belief that "this is about as heinous, atrocious and as cruel a crime as you will ever see in your life" (R. 2416) and that this crime was "probably as heinous and atrocious and cruel as you could get" (R. 2418).

[13]Omelus v. State, 584 So. 2d 563, 566 (Fla. 1991)(this "aggravating factor cannot be applied vicariously"); Porter v. State, 564 So. 2d 1060, 1063 (Fla. 1990)(heinous, atrocious or

applicable for any acts after the victim is dead or unconscious.[14] In Mr. Stewart's case, the jury did not receive an instruction regarding the limiting construction of this aggravating circumstance. Under Espinosa, it must be presumed that the jury found this aggravator and weighed it against the mitigating circumstances. The judge considered the jury's death recommendation in sentencing Mr. Stewart. As a result, an extra thumb was placed on the death side of the jury's scale. Espinosa. Accordingly, this instruction was erroneous and prejudicial to Mr. Stewart.

E. THE DOUBLING OF AGGRAVATORS

Mr. Stewart's jury was instructed over objection that it must consider as two separate aggravating factors that the homicide was "committed while he was engaged in ... the crime of robbery" (R. 8333) and that "the crime was committed for financial gain" (R2. 856-57). In other words, the jury was told that it could consider both these aggravators present and "determine whether mitigating circumstances exist that outweigh

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cruel aggravator does not apply when the crime was "not a crime that was meant to be deliberately and extraordinarily painful")(emphasis in original).

[14] Herzog v. State, 439 So. 2d 1372 (Fla. 1983)(After the victim became unconscious, Mr. Herzog suffocated the victim with a pillow, strangled the victim with a telephone cord, and stashed the victim's body. These acts by Mr. Herzog were held by this Court to be irrelevant to this aggravator.); Jones v. State, 569 So. 2d 1234 (Fla. 1990)(After the victim's death, Mr. Jones committed acts that would have constituted a sexual battery. However, this Court held that it is not sexually battery if the victim is dead.); Owen v. State, 560 So. 2d 207 (Fla. 1990)(After the victim's death, Mr. Owen had sex with the victim. Same result as Jones.).

the aggravating circumstances" (R. 1833). Yet, under Florida law, these two aggravating factors merged in Mr. Stewart's case. Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Rogers v. State, 511 So. 2d at 533. In White v. State, 403 So. 2d 331 (Fla. 1981), this Court noted "the same circumstance [robbery] cannot also constitute a basis for finding the existence of the aggravating circumstance of . . . pecuniary gain." 403 So. 2d at 337. Likewise in Provence, this Court reiterated this limitation:

> While we would agree that in some cases, such as where a larceny is committed in the course of a rape-murder, subsections (d) and (f) refer to separate analytical concepts and can validly be considered to constitute two circumstances, here, as in all robbery-murders, both subsections refer to the same aspect of the defendant's crime. Consequently, one who commits a capital crime in the course of a robbery will always begin with two aggravating circumstances against him while those who commit such a crime in the course of any other enumerated felony will not be similarly disadvantaged.

337 So. 2d at 786. Mr. Stewart's trial attorney cited Provence in his proposed jury instruction #10 that was denied by the trial court. The proposed jury instruction argued "[w]here two or more aggravating circumstances refer to the same aspect of the crime, you shall consider them as constituting only one aggravating circumstance" (R. 1102). This Court refused to correct the error on direct appeal.

In Mr. Stewart's case, the jury did not receive an instruction regarding this limitation on the consideration of aggravating circumstances. The jury was specifically told to place an extra thumb on the death side of the scale. Under Stringer v. Black and Espinosa this was Eighth Amendment error. As a result, the penalty phase instructions on aggravating circumstances told the jury to weigh an invalid aggravating factor. The judge in relying upon the death recommendation indirectly weighed the extra thumb on the death side of the scale. Espinosa. Accordingly, Mr. Stewart was prejudiced by the Eighth Amendment error.

F. PECUNIARY GAIN

The jury was instructed "that the crime for which the defendant is to be sentenced was committed for pecuniary gain" (R. 2444, 2278). The jury was given no guidance to the elements of this aggravating circumstance. In fact, the state argued at closing of penalty phase "[the crime] was committed partly for physical satisfaction, but clearly it was also committed partly for pecuniary gain" (R. 2403)(emphasis added). The state also argued "the crime for which the defendant committed, in part at least, was committed for pecuniary gain" (R. 2404). Assistant State Attorney Stelzer testified at the evidentiary hearing that he did not necessarily think that pecuniary gain was the primary motive (PC-R3. 2577). Ms. Greene testified at the hearing that she was in agreement with Mr. Stelzer, and although she was aware that Mr. Stewart took the watch, she did not think the evidence

showed that the murder was committed for the purpose of pecuniary gain (PC-R3. 2645). At the charge conference, Mr. Stewart's trial attorney argued "I believe the legislative intent when they passed this particular statute and when they construed this particular aggravating circumstance to concern more murder-for-hire than they were with murder that took place in the matter of this case" (R. 2256).

The law is clear that the aggravator of "pecuniary gain" is not applicable unless it is the primary or sole motive for the crime. This Court struck a lower court's finding of this aggravator because "[t]here was not, however, sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt." Peek v. State, 395 So. 2d 492 (Fla 1980)(quoted in Initial Brief of Appellant on Direct Appeal at 48-9); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982)(followed in Rogers v. State, 511 So. 2d 526 (Fla. 1987)); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988)("[I]t has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain.").

Mr. Stewart's jury failed to receive any limiting instructions on the aggravator of "pecuniary gain." In fact, the prosecutor argued that no such limitation was applicable. As a result, the instruction on this aggravator "fail[ed] adequately to inform [Mr. Stewart's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. at 361-62. Mr. Stewart's jury must be presumed to have relied on this vague

jury instruction. Stringer v. Black 112 S. Ct. 1130 (1992). This was Eighth Amendment error and it was not harmless beyond a reasonable doubt.

G. UNDER SENTENCE OF IMPRISONMENT

Mr. Stewart's jury was instructed that it could consider that "the crime . . . was committed while the defendant was under sentence of imprisonment" (R. 2277, 2443). The jury was not told that the weight of this aggravator was less if the defendant had not committed the homicide after escaping. In Songer v. State, 544 So. 2d 1010 (Fla. 1989), this Court indicated the gravity of this aggravator is diminished since the defendant "did not break out of prison but merely walked away from a work-release job." 544 So. 2d at 1011.

The jury was not advised that the weight of this aggravator was lessened if Mr. Stewart obtained his release from prison by legal and non-violent means. In considering this aggravator, the jury needed to be fully instructed. In Mr. Stewart's case, the jury did not receive an instruction regarding this limitation on the consideration of aggravating circumstances. As a result, the penalty phase instructions on aggravating circumstances "fail[ed] adequately to inform [Mr. Stewart's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. at 361-62. In Espinosa, the United States Supreme Court stated that juries in Florida must be adequately instructed on aggravating circumstances. Accordingly, Mr. Stewart was prejudiced by the

unbridled discretion and the extra heavy thumb on the death side of the scale by his sentencing jury.

H. THE AUTOMATIC AGGRAVATOR.

Mr. Stewart was charged with first-degree murder: "Murder from a premeditated design to effect the death of" the victim in violation of Florida Statute 782.04. An indictment such as this which "tracked the statute" charges both premeditated and felony murder. Lightbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). In this case, Mr. Stewart was convicted on the basis of felony murder. Since felony murder was the basis of Mr. Stewart's conviction, the use of the underlying felony as an aggravating factor violated the Eighth Amendment. State v. Middlebrooks, ___ S.W. 2d. ___, slip op No. 01-S-01-9102-CR-00008 (Tenn. Sept. 8, 1992); Engberg v. Meyer, 820 P.2d 70 (Wy. 1991). This is because the aggravating circumstance of "in the course of a felony" was not "a means of genuinely removing the class of death-eligible persons and thereby channeling the jury's discretion." Stringer v. Black, 112 S. Ct. 1130, 1138 (1992). In this case, felony murder was found as a statutory aggravating circumstance. The murder was committed while the defendant was engaged in the commission of a robbery. Unlike the situation in Lowenfield v. Phelps, 484 U.S. 231 (1988), the narrowing function did not occur at the guilt phase. Thus, the use of this non-narrowing aggravating factor "create[d] the possibility not only of randomness but of bias in favor of the death penalty." Stringer, 112 S. Ct. at 1139.

The sentencing jury was instructed to consider the underlying felony as an aggravating circumstance which justified a death sentence. Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the Eighth Amendment: an automatic aggravating circumstance is created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). "[L]imiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Maynard v. Cartwright, 486 U.S. at 362. In short, since Mr. Stewart was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violates the Eighth and Fourteenth Amendments.

I. GREAT RISK OF DEATH, AVOIDING ARREST, AND COMMITTED TO DISRUPT THE LAWFUL EXERCISE OF ANY GOVERNMENTAL FUNCTIONS

The jury was instructed it could consider as aggravating circumstances that "the defendant ... knowingly created a great risk of death to many people", "the crime ... was committed to disrupt or hinder the lawful exercise of any governmental function or the enforcement of law", and that "the crime ... was committed for the purpose of avoiding or preventing lawful arrest or effecting an escape from custody" (R. 2277-78). The jury was

given no guidance as to the elements of these aggravating circumstances. Without guidance as to the elements of these aggravating factors the jury was free to find the factors present. The judge, in considering this Court's case law, of which the jury was ignorant, correctly concluded that these aggravators were invalid in Mr. Stewart's case. However, the jury was instructed to weigh these invalid aggravating factors in returning its death recommendation. Under Stringer v. Black, this was Eighth Amendment error.

These aggravating factors are presumed weighed and considered by the jury. The trial court found they did not apply. Thus, still yet another extra thumb was added to the death side of the scale in the jury sentencing. This was Eighth Amendment error. Stringer v. Black, 112 S. Ct. 1130 (1992). Consideration of this invalid aggravator cannot be harmless beyond a reasonable doubt. Sochor v. Florida, 112 S. Ct. 2114 (1992).

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Stringer, 112 S. Ct. at 1137.

J. PREJUDICE

In Mr. Stewart's case the jury received no adequate guidance as to the "elements" of the aggravating circumstances against which mitigation was to be balanced. Therefore, the sentencing

jury was left with vague, illusory or improper aggravating circumstances. Yet, the pivotal role of a Florida jury in the capital sentencing process demands that the jury be informed of such limiting construction so their discretion is properly channeled. Failure to provide Mr. Stewart's sentencing jury with such limitations is constitutionally improper under the Eighth Amendment. The failure to instruct on the limitations left the jury free to ignore the limitations, and left no principled way to distinguish Mr. Stewart's case from a case in which the limitations were applied and death, as a result, was not imposed. Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). "A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance." Stringer v. Black, 112 S. Ct. at 1139. The jury, here, was left with the open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwright.

Mr. Stewart is entitled to relief under both Espinosa and Sochor. His death sentence must be reversed. His capital jury was instructed to consider invalid aggravating circumstances. No consideration was given to the fact that three of the eight aggravating factors given to the jury were invalid. This Court

must now conduct an harmless-error analysis which comports with the Eighth Amendment and Stringer v. Black. As a matter of law, there must be doubt that, had the jury been correctly instructed, sufficient aggravating factors would not have been found to warrant a death sentence. Hallman v. State, 560 So. 2d 223 (Fla. 1990).

This Court must now consider the error which resulted when the jury received an inadequate instructions of each of the five aggravating circumstances and was thus permitted to weigh each of these invalid aggravating circumstances. Stringer v. Black explained:

> A vague aggravating factor employed for the purpose of determining whether a defendant is eligible for the death penalty fails to channel the sentencer's discretion. A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than he might otherwise be by relying upon the existence of an illusory circumstance. Because the use of a vague aggravating factor in the weighing process creates the possibility not only of randomness but also of bias in favor of the death penalty, we cautioned in Zant that there might be a requirement that when the weighing process has been infected with a vague factor the death sentence must be invalidated.

Stringer v. Black, 112 S. Ct. at 1139.

Application of the harmless beyond a reasonable doubt standard requires this Court to presume an error was harmful unless and until the state proves that there is no possibility that the jury vote for death would have changed but for the extra thumbs on the death side of the scale. Brown v. Dugger, 831 F.2d 1547 (11th Cir. 1987). It would be impossible to understand how

the jury vote would not have been affected by the erroneous application of "heinous, atrocious, and cruel," and the other aggravators. Plainly, the state made the former, the "most serious" aggravator, the main stay of its case and relied on it to persuade the jury the death was the appropriate sentence. Maxwell v. State, 603 So. 2d 490 (Fla. 1992). However, this was not the only "extra thumb" placed on the death side of the scale.

In the prosecution's closing argument they conceded that Mr. Stewart presented the mitigation of his father's death, an auto accident, being fired, a family fight (R. 2411), and drug abuse (R. 2412).[15] Mr. Stewart's jury could have relied on this mitigation and this would have provided a reasonable basis for a life recommendation that would have foreclosed a jury override. This must be analyzed in combination with the unconstitutionally vague aggravating circumstances placing extra thumbs on the death side of the scale. The taint of Mr. Stewart's sentencing jury was not harmless beyond a reasonable doubt.

The jury may have found these circumstances warranted a life sentence. Had the jury viewed the mitigating evidence without

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[15]The first postconviction court's order found deficient performance for Mr. Stewart's trial attorney's lack of presentation of mitigation, including "evidence of Stewart's mental impairment ... [d]efendant's childhood, relationship with his father, the effect upon him of his father's death, his work habits, his prior parole activity, his use of drugs and alcohol and his mental status. Two of the witnesses are psychologists. The psychologists conferred with the Defendant, administered batteries of tests to him, reviewed his prior records. They expressed their opinion that the Defendant was mentally ill; Dr. Marquit concluded that the Defendant was not only mentally ill at the time he murdered Ms. Haizlip, but throughout his life" (First postconviction order at 5).

the inflammatory comments of the prosecution in penalty phase closing, their verdict most certainly would have been different. Under Stringer v. Black, the application of invalid aggravating circumstances constituted Eighth Amendment error which cannot be found to be harmless beyond a reasonable doubt. Accordingly, Mr. Stewart's sentence of death must be vacated, and a new jury sentencing proceeding ordered.

ARGUMENT V

MR. STEWART'S RIGHT TO A RELIABLE CAPITAL SENTENCING PROCEEDING WAS VIOLATED WHEN THE STATE URGED THAT HE BE SENTENCED TO DEATH ON THE BASIS OF NONSTATUTORY AGGRAVATION AND OTHER IMPERMISSIBLE FACTORS, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

This case presents as egregious an example of prosecutorial overreaching in an attempt to obtain a death sentence as is possible to imagine. The focus of the state's case -- particularly its case for death -- was that Mr. Stewart should be convicted and sentenced to death because the victim was elderly, a widow, living alone, of small physical stature, teaching preschool children, and a pioneer of South Florida. This theme began early in the state's case during its voir dire examination, as the following demonstrates:

> ASSISTANT STATE ATTORNEY SELTZER:
>
> When we talked about publicity, one more fact that might make somebody remember.
>
> She was a seventy-eight year old woman who lived in a small home in South Dade off of US-1, and I believe the evidence might show that she was discovered dead by someone at a day care center where she had been working. It is a nursery school, church related day care center.

With those additional facts, is there anybody who remembers the case any better or remembers the facts of the case?

(R. 200)(emphasis added).

. . .

MR. SELTZER: Think back to when you lived in the South Dade area. Think back to February and the newspapers and possibly the television.

Do you remember hearing about a case involving a seventy-eight year old woman who was working at the Good Shepherd Day Care Center, who was found murdered in her home by somebody who worked in the center, and came to see why it was she didn't come to work?

Do you remember seeing anything about that case?

(R. 488)(emphasis added).

Likewise the state's opening argument sought to take full advantage of the victim's religious affiliations, her employment as a preschool teacher, and her role of family matriarch to her daughter and granddaughter, knowing full well the caustic effect this impermissible evidence would have on Mr. Stewart's jury. The following is illustrative:

ASSISTANT STATE ATTORNEY SELTZER:

Margaret Haizlip was seventy-six years old. She was living at 9790 Wayne Avenue in a small residence that is off of US-1 at approximately 179 Street between US-1 and Franjo Road, down near the Perrine area of Dade County. She was living alone, her husband having passed away several years ago, in a small residence occupied by her and occasionally visited by her daughters and grandchildren.

Mrs. Haizlip, at seventy-six, was still an active woman who drove a car and at the time this incident took place, was working at the Good Shepherd Day Care Center in South Dade. It is a charitable function taking care of young children. She was working in the morning and she would go to the day care center in the

morning and care for the children and come home at noon and lead her active life at the age of seventy-six.

On the late night hours of February 22nd or the early morning hours of February 23rd, 1979, the active life of seventy-six year old Margaret Haizlip was snuffed out by the defendant in this case, Roy Allen Stewart, who beat her, raped her, strangled her, robbed her, and attempted to steal her car.

On the morning of February 23rd, 1979, Mrs. Patricia Gaskell, who also worked at the Good Shepherd Day Care Center, became worried when Mrs. Haizlip did not show up for work that morning. She had never before failed to show up to work without calling. This was the first time that had ever happened.

(R. 989-91)(emphasis added).

In his closing argument to the jury during the penalty phase, the prosecutor interjected prejudicial and inflammatory comments, denying Mr. Stewart an individualized sentencing determination and rendering his sentence of death arbitrary, capricious and unreliable. For example, the state attorney argued:

This woman has a granddaughter who will never see her grandmother again. This woman has a daughter who will never see her mother again, and who left a note, that was blown up, which says, "Hi, Mom. Just stopped by to see you and tell you that I love you." And it is signed "Nana," who is obviously a relative of Mrs. Haislip -- and her granddaughter -- are never going to see her again, because it isn't like TV, and she isn't coming back.

(R. 2117)(emphasis added).

In the finest tradition of saving the best for last, the state left nothing for the jury's imagination and proceeded again to enumerate each and every piece of impermissible evidence during the penalty phase closing argument that had been previously introduced at trial. Having "gotten" Stewart, it was

now time to evoke an unprincipled and emotional response within the jury so they could kill him. The performance was as masterful as it was both unethical and unconstitutional. Defense counsel objected to no avail. The message was unmistakable: ignore Mr. Stewart's character and background and focus only impermissible aggravating factors:

> ASSISTANT STATE ATTORNEY SELTZER: The type of person you are talking about is not somebody who deserves your careful consideration. He doesn't deserve a break. That is what he is asking you for now.
>
> "Give me a break. I didn't give Margaret Haizlip a break. Well, yes, I did. I broke nine of her ribs and her larynx, as well. I did that all prior to the time I raped her and bit her and then strangled her. I gave her a break, I guess."
>
> MR. GOLDSTEIN: Objection, I think it is improper.
>
> THE COURT: Overruled.

(R. 2411-12)(emphasis added). See also (R. 2417)("old woman who never did anything to anyone"); (R. 2418)("old woman").

The state even introduced a letter from the victim's relatives with the express purpose of unconstitutionally inflaming the jury emotions:

> ASSISTANT STATE ATTORNEY SELTZER: I could probably say for a lot longer. I don't see a need to do it. This is real life; it isn't television or the movies. She is not going to come back.
>
> The note just expresses the type of feeling of love and warmth and joy that was in that house prior to the time that Mr. Stewart ended the life of Margaret Haizlip. The note read: "Hi, Mom, just stopped by to say hello and I love you." And you have it as an exhibit. That tells you what happened in that house and how absolutely atrocious it was to have an old lady like that to suffer through this. It shows a type of feeling that was one in the house and shows the type

> that never again, as a result of the defendant in this case, will be felt.

(R. 2419)(emphasis added).

The prosecutor's argument was irrelevant and inflammatory -- it conveyed no information pertaining to the defendant's culpability. Instead, the state entreated the jurors to put themselves in the victim's place and use their ideas about what the victim experienced as a basis for sentencing Roy Stewart to die. This classic example of the long-condemned "Golden Rule" argument, see Adams v. State, 192 So. 2d 762 (Fla. 1966); Pait v. State, 112 So. 2d 380 (Fla. 1969), violated the Eighth and Fourteenth Amendments.

These improper comments by the prosecutor obviously impacted on the jury's ultimate decision. The overwhelming effect that these comments had on the judge is evident in his sentencing order. For example:

> FINDING:
>
> The victim, Margaret Haizlip, a woman of small physical stature, in her late seventies, was a pioneer of South Florida living in a small home across from Stewart's temporary residence. About 10:00 p.m. Mrs. Haizlip was out on her front porch and saw Stewart. She waived to him, invited him into her home and fixed him a sandwich.

(R. 1113).

According to the court's sentencing order, Mr. Stewart deserved death because the victim "was of small physical stature," because the victim "was in her late seventies," because she "liv[ed] in a small home," and because the victim was "a pioneer of South Florida." None of these considerations is

relevant to an individualized capital sentencing determination. He wholeheartedly embraced the impassioned ragings of the prosecutor in finding five aggravating factors and no mitigating factors. He concluded that death was the appropriate punishments.

Both the state and the court misrepresented the law and committed fundamental error. Wilson v. Kemp, 777 F.2d 621, 624 (11th Cir. 1985). In addition, the prosecutor's statements improperly diminished the jury's sense of responsibility for its recommendation. The remarks by the prosecutor served to constrain the jury in their evaluation of mitigating factors in violation of Penry v. Lynaugh. This prevented them from allowing the natural tendencies of human sympathy from entering into their determination of whether any aspect of Mr. Stewart's character required the imposition of a sentence other than death. This undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full panoply of mitigation presented by Mr. Stewart.

The admission of repeated irrelevant and misleading evidence and argument by the state was error. The cumulative effect of these repetitive improprieties "was so overwhelming as to deprive [Mr. Stewart] of a fair trial." Nowitzke v. State, 572 So. 2d 1346, 1350 (Fla. 1990). The prosecutor's improper argument rendered Mr. Stewart's death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth, and Fourteenth Amendments.

To the extent that trial counsel failed to object or to refute the state's misconduct, he rendered ineffective assistance of counsel. Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Kimmelman v. Morrison, 477 U.S. 365 (1986). Moreover, counsel's failure to object was deficient performance. Murphy v. Puckett, 893 F.2d (5th Cir. 1990). Mr. Stewart was prejudiced. The Court should vacate Mr. Stewart's unconstitutional sentence of death.

CONCLUSION AND RELIEF SOUGHT

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Mr. Stewart respectfully submits that he is entitled to a relief, and respectfully urges that this Honorable Court set aside his unconstitutional capital convictions and sentence of death.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November ___, 1992.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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

M. ELIZABETH WELLS
Assistant CCR
Florida Bar No. 0866067

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

By: 
Counsel for Appellant

Copies furnished to:

Fariba Komeily
Assistant Attorney General
Department of Legal Affairs
401 N.W. Second Avenue
Suite 921N
Miami, FL 33128