IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,686

BARRY HOFFMAN,

Appellant,

v.

STATE OF FLORIDA.

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
FOR THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's second summary denial of Mr. Hoffman's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850, and involved claims traditionally brought under Rule 3.850. However, again no evidentiary reeolution of the facts was allowed.

The following shall be uaed in this brief to designate references to the record: "R. ___" (Record on Direct Appeal); "PC-R1. __" (first postconviction record on appeal); "PC-R2. ___" (second postconviction record on appeal); "PC-R3. ___" (record on appeal on motion to release Mr. Alton's sealed recorde). All other citations shall be self-explanatory or otherwise explained.

REQUEST FOR ORAL ARGUMENT

Mr. Hoffman has been sentenced to death and the reeolution of the issues involved in this action shall affect the question of whether he lives or dies. This Court haa 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 thia ease, given the seriousness of the claims involved and the stakes at issue, and Mr. Hoffman through counsel accordingly respectfully requests that the Court permit oral argument.

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STATEMENT OF THE CASE AND FACTS

On September 7, 1980, Frank Ihlenfeld, a 54 year old narcotics trafficker and Linda Sue Parrish, a 20 year old proatitute were murdered in their motel room at the Ramada Inn in Jacksonville Beach, Florida. An intensive investigation that included wiretaps and undercover operatives was undertaken, and the investigation focused on Jamee Provost, who was suspected of having procured the murders (PC-R2. 24-25). The investigation ultimately resulted in the arrest of Barry Hoffman, a heroin addict, caught up in the drug world to support his habit. Mr. Hoffman was under the influence of narcotics when apprehended and questioned, and without counsel present gave statements that purported to be incriminating (PC-R2. 40).

Mr. Hoffman was indicted on two counts of murder on October 28, 1981, and was later charged by information with conspiracy in March of 1982. The cases were consolidated upon the State's motion (R, 37). On June 28, 1982, the Court accepted Mr. Hoffman's pleas of guilty to two counts of first degree murder, and agreed to sentence him to two concurrent life sentences with the conepiracy charge nolle prossed (R. 78). As part of the plea agreement, Mr. Hoffman was to testify against Mr. Mazzara in exchange for a guilty plea with a life sentence. Without adequate investigation, Mr. Hoffman's attorney, Richard Nichols, "advised" him to take the plea in order to avoid a capital trial, Mr. Hoffman was interviewed, without counsel present, by Michael Obringer, who would later prosecute Mr. Hoffman (PC-R2. 10). Mr. Hoffman testified at Mazzara's trial only to his innocence (PC-R2. 10-12). Subsequently, an uncounseled Mr. Hoffman withdrew his plea without counsel, Mr. Nichols, present again (PC-R2. 15, 17-18). The plea was withdrawn on September 24, 1982, after Mr. Nichols withdrew as counsel (R. 52, PC-R2. 2).

Mr. Jack Harris, an airline pilot, was then appointed to represent Mr. Hoffman; this was Mr. Harris' first capital ease. Mr. Harris was unaware of Mr. Hoffman's extensive drug problem, documented in his unobtained Air Force medical records (PC-R2. 40). Mr. Hoffman received an honorable discharge due to his heroin addiction problems. Id. Mr. Harris was also unaware of Mr.

Hoffman'e secreting and using of drugs in jail just prior to involuntary statements being taken. Id. In fact, Mr. Harrie never realized that eeveral hours of wiretap recordings used in a drug investigation were potentially critical and relevant to Mr. Hoffman's defense. Id.

The trial took place in January, 1983. Mr. Hoffman was convicted of one count of first degree murder, one count of second degree murder, and one count of conspiracy (R. 120-21). The penalty phase was conducted on Yanuary 20, 1983. Mr. Hoffman made a brief statement to the jury. No witnesses were presented by defense counsel. The jury recommended death (R. 122). The court imposed a sentence of death on February 11, 1983 (R. 127). In its findinge of fact, Mr. Hoffman's trial court found the aggravating circumstance of heinoue, atrocious, and cruel without notice or an opportunity to be heard by Mr. Hoffman (R. 134). In addition, the trial court belittled the statutory mitigating factor of no significant history of conviction of prior criminal activity, stipulated to by the State and the defense, because Mr. Hoffman was a drug abuser (R. 135). Mr. Hoffman was also sentenced to 100 years imprisonment for the second degree murder conviction (R. 128), and 30 years imprisonment for the conspiracy conviction (R. 140). This Court affirmed on direct appeal. Hoffman v. State, 474 So. 2d 1178 (Fla. 1985).

Mr. Hoffman's first postconviction motion and accompanying appendix were filed on October 2, 1987. In less than one week, the circuit court summarily denied this motion in a one-line order on October 7, 1987 (PC-R1. 290). Mr. Hoffman's motion for rehearing was pending before the circuit court for over a year before it was denied. On February 8, 1989, Mr. Hoffman filed a timely notice of appeal. This Court reversed saying:

> In the case below, Hoffman came forward with allegations based on affidavits and other information clearly establishing colorable claims under rule 3.850. For example, he has alleged that the state withheld the names of other persons who purportedly confeeesd to the murders of which Hoffman was convicted. At argument, the state conceded that such a claim, if valid, would require relief under Bradv v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Hoffman also has alleged claims of ineffective assistance of counsel and the failure of counsel to be present when Hoffman testified in the separate trial of his co-conspirator.

> Without reaching the merits of any of these claims, we nevertheless believe that a hearing is required under rule 3.850. In its eummary order, the trial court stated no rationale for its rejection of the present motion. It failed to attach to its order the portion or portions of the record conclusively showing that relief is not required and failed to find that the allegations were inadequate or procedurally barred.
>
> The state argued that the entire record is attached to the order in the Court file before us, thus fulfilling this requirement. However, such a construction of the rule would render its language meaningless. The record is attached to every case before this Court. Some greater degree of specificity is required. Specifically, unless the trial court's order states a rationale based on the record, the court is required to attach those specific parte of the record that directly refute each claim raised.
>
> We thus have no choice but to reverse the order under review and remand for a full hearing conforming to rule 3.850.
>
> Finally, Hoffman also petitions us to reverse a denial of access to state attorney records he requested under chapter 119, Florida Statutes (1987). At argument the state conceded that this issue was reeolved in favor of Hoffman by our recent opinions in State v. Kokal, 562 So.2d 324 (Fla.1990), and Provenzano v. Duaaer, 561 So.2d 541 (Fla.1990). Under these opinions, Hoffman clearly is entitled to access these records.
>
> We reverse the court below and remand for further proceedings in conformity with this opinion and with Kokal and Provenzano. On remand, the trial court shall allow Hoffman thirty days to amend hie petition, computed from the date the state delivera to Hoffman the records to which he is entitled under chapter 119.

Hoffman v. State, 571 So. 2d 449 (Fla 1990)(emphasis in original).

Pursuant to this Court's order, Mr. Hoffman filed an amended motion to vacate on June 17, 1991, within thirty days of partial Chapter 119 disclosures. The State filed no response. The court again signed an order summarily denying Mr. Hoffman 3.850 relief (quoted in full):

> This matter was considered upon the motion for postconviction relief filed by the defendant, June 17, 1991. It affirmatively appears from a reading of the motion that it is legally insufficient to justify relief under Rule 3.850 of the Florida Rules of Criminal Procedure and it is, therefore,
>
> ORDERED AND ADJUDGED that the defendant'e motion for postconviction relief is hereby DENIED.
>
> THE DEFENDANT IS HEREBY ADVISED THAT HE HAS THE RIGHT TO APPEAL THE DENIAL OF HIS MOTION, PROVIDED SUCH APPEAL IS FILED WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS ORDER.
>
> DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, this 26th day of August, 1991.

(PC-R2. 119)(emphasis added). This order was clearly a form order used by the circuit court to routinely deny Rule 3.850 motiona. After this Court ruled that Mr. Hoffman's motion to vacate "clearly establish[ed] colorable claime under Rule 3.850" and "that a hearing is required under Rule 3.850," the circuit court denied Mr. Hoffman relief because it "appears from a reading of the motion [to vacate] that it is legally insufficient to justify relief under Rule 3.850."

Prior to filing the amended motion to vacate, Mr. Hoffman had received some of the files ordered by this Court in Hoffman v. State, 571 So. 2d 449 (Fla. 1990), but not all. Mr. Hoffman had received from the Duval County State Attorney's office partial files on James White and Chris Sprinkle, and a one-inch thick file on Mr. Mazzara (PC-R2. 108). Mr. Mazzara had been tried and convicted on the same charges as Mr. Hoffman. The Duval County State Attorney's office denied Mr. Hoffman access to filee on: Robert Alton, Keith Hodge, James "Bubba" Jackson, Jr., George "Rocco" Marshall, Leon McCumbers, Wayne "Bones" Merrill, and James Provost (PC-R2. 107). Mr. Hoffman also sought access to a sealed record in Robert Alton's circuit court file. However, the circuit court, despite a signed release, denied access. In addition, the State Attorney denied Mr. Hoffman access to their wire intercept file (PC-R2. 106; App. B). In a belated reeponse to Mr. Hoffman's chapter 119 request, the Florida Department of Law Enforcement also denied Mr. Hoffman access to their wire intercept file (App. E). The Duval County jail provided no records of Mr. Hoffman (PC-R2. 106). Likewise, the Duval County Sheriff's Office provided no files on Mr. Hoffman. Id. However, the circuit court in summarily denying Mr. Hoffman's motion to vacate refused to enforce Chapter 119.

SUMMARY OF ARGUMENTS

1. On 2 October 1987, Mr. Hoffman filed a motion to vacate, and within one week the trial court in a form order summarily denied Mr. Hoffman relief. In Hoffman v. State, 571 So. 2d 449 (Fla. 1990), this Court ruled that Mr. Hoffman had "clearly establish[ed] colorable claims under Rule 3.850"

and this Court "remand[ed] for a full hearing conforming to Rule 3.850." Hoffman, 571 So. 2d at 450. However, without stating "a rationale based on the record" or "attach[ing] those specific parts of the record that directly refute each claim raised," the trial court again summarily denied Mr. Hoffman relief after a reading of Mr. Hoffman's amended motion to vacate. Mr. Hoffman requests that this court again order a full hearing, but fairness to Mr. Hoffman and judicial economy require a new judge be assigned.

2. Regarding Fla. Stat. Chapter 119, Mr. Hoffman still has not received full compliance by the State. The Jacksonville State Attorney's Office has still denied access to many files critical to Mr. Hoffman's defense, including files on suspects, and codefendants. In addition, the State Attorney's Office and the Florida Department of Law Enforcement have denied Mr. Hoffman access to their respective wire intercept files. The State Attorney'a Office only turned over partial files on Mr. Mazzara and Mr. White, co-defendants tried and convicted for the same crime as Mr. Hoffman. In addition the circuit court has refused to release Mr. Alton's eealed circuit court records -- despite a signed release by Mr. Alton. Mr. Hoffman respectfully requests this Court to order the State to fully comply with Chapter 119 before Mr. Hoffman receives an evidentiary hearing.

3. The State failed to disclose critical impeachment and exculpatory evidence, in violation of Bradv v. Maryland, 373 U.S. 83 (1963) and its progeny. For example, as this Court noted in Hoffman: "[Mr. Hoffman] has alleged that the State withheld the names of other persons who purportedly confessed to the murders of which Hoffman was convicted. At argument, the State conceded that such a claim, if valid, would require relief under Bradv." Hoffman 571 So. 2d at 450. In addition, the State still has not fully complied *with* the dictates of Fla. Stat. §119. Mr. Hoffman requests this Court to reorder an evidentiary hearing, but before a new judge.

4. Without adequate investigation, Mr. Hoffman's trial attorney, Richard Nichols, "advised" Mr. Hoffman to plead guilty and testify againet Mr. Mazzara to avoid the electric chair, regardless of guilt or innocence. Mr.

Nichols' conduct was unreasonable. Woodard v. Collins, 898 F. 2d 1027 (5th Cir. 1990). This bad lawyering left an uncounseled Mr. Hoffman in repeated unprotected contact with his future prosecutor, Mr. Obringer. Upon Mr. Nichols return, he learned Mr. Hoffman had proclaimed Mr. Hoffman's innocence at Mr. Mazzaras's trial, and Mr. Nichols withdrew as counsel. However, thie was after Mr. Hoffman was unrepreeented by counsel during critical stages of his proceedings, including numerous interviews with his future prosecutor and the pro se withdrawal of hie acceptance of the plea offer. Mr. Hoffman never waived his right to counsel and coneistently requested the assistance of cousnel. Mr. Hoffman was the victim of not only bad lawyering (as in Woodard), but no lawyering. As ordered by this Court in Hoffman, an evidentiary hearing is required.

5. Mr. Hoffman received ineffective assistance of counsel at the guilt/innocence phase of his trial. Mr. Hoffman's court-appointed attorney was unaware of Mr. Hoffman's long-term drug addiction (including an honorable discharge from the army because of heroin addicition and the taking of drugs when involuntary statements were seized by the State in Jackson, Michigan), of other suspects (including those who confessed to the same crime as Mr. Hoffman's charge), of deals offered the State's star witness (George Marshall), of hairs clutched in the female victim's hands and type "o" blood found in the victim's hotel room that did not match Mr. Hoffman, Mr. White, or the victims. Mr. Hoffman's trial outcome was prejudiced, regardless of whether it was ineffective assistance of counsel and/or Brady violations. As this Court ordered, an evidentiary hearing is still required, but before a new trial judge.

6. Mr. Hoffman, a lifelong substance abuser dependent on numerous brain damaging drugs, was under the influence of narcotics at the time of his arrest and interrogation, and was rendered incapable of knowingly and voluntarily waiving Miranda rights. He in fact believed that he had preserved his right to silence by signing the waiver form provided to him by law enforcement personnel. His mental impairment was of such a severity that any

statements made during that time could not have been knowingly, intelligently, and voluntarily made. His attorney, however, failed to properly investigate and prepare, and therefore rendered prejudicially deficient assistance on this issue. An evidentiary hearing is necessary, on the basis of the facts alleged in the amended motion to vacate, in order for thia claim to be properly resolved.

7. Mr. Hoffman's trial attorney, Mr. Harris, did not adequately prepare for penalty phase. This was Mr. Harris' first capital trial. Mr. Harris did not request Mr. Hoffman's school, hospital, military or any other records, and thus he was unaware of the extent of Mr. Hoffman'a drug abuse. Witnesses of Mr. Hoffman's drug abuse were not asked to testify on this subject matter; adequate investigation simply did not occur. Statutory mitigating factors were lost. An evidentiary hearing must again be ordered by this Court, but before a new judge.

8. Without notice to or an opportunity to be heard by Mr. Hoffman, the trial court found the aggravating circumstance of heinous, atrocious and cruel. This Lack of notice cut off Mr. Hoffman's ability to litigate the applicability of this aggravating factor and created "an impermissible riek that the adversary process may have malfunctioned in this case." Lankford v. Idaho, 111 S. Ct. 1723 (1991).

9. Mr. Hoffman's trial counsel rendered ineffective assistance during the penalty phase proceedings by failing to object to the trial court's improper instruction concerning the mitigating factors stipulated to by the State and the defense, to the prosecutor's argument which directly contravened the stipulation, or to the judge's bias concerning the mitigating factors applicable to Mr. Hoffman. Counsel's failures resulted in violations of the sixth, eighth, and fourteenth amendments, and an evidentiary hearing is necessary in order for this claim to be properly resolved.

10. During his closing arguments at the guilt-innocence and the penalty phaeee of trial, the prosecutor intentionally misstated facts, testified, manipulated evidence, and bolstered the credibility of the

government's witness, so infecting the proceedings as to make the conviction and sentence of death fundamentally unreliable. Trial counsel'e failure to do anything at all about this pervasive prosecutorial mieconduct was prejudicially deficient attorney performance. Here, there was no objection, no motion for mistrial, nothing. An evidentiary hearing is necessary.

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

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

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

ARGUMENT I

FOR A SECOND TIME, MR. HOFFMAN HAS BEEN DENIED *AN* ADVERSARIAL TESTING BY HIS RULE 3.850 TRIAL COURT'S SUCCESSIVE SUMMARY DENIAL OF MR. HOFFMAN'S MOTION *TO* VACATE WITHOUT AN EVIDENTIARY HEARING IN VIOLATION OF THIS COURT'S PRIOR RULING AND THE SUMMARY DENIALS WERE ERRONEOUS AS A MATTER OF LAW AND FACT.

In Mr. Hoffman's previous appeal from the summary denial of his motion to vacate, this Court stated:

> In the case below, Hoffman came forward with allegations based on affidavits and other information clearly establishing colorable claims under rule 3.850. For example, he has alleged that the state withheld the names of other persons who purportedly confessed to the murders of which Hoffman was convicted. At araument, the state conceded that such a claim, if valid, would require relief under Bradv v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963). Hoffman also has alleged claims of ineffective assistance of counsel and the failure of counsel to be present when Hoffman testified in the separate trial of his co-conepirator.
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> Without reaching the merits of anv of these claims. we nevertheless believe that a hearing is required under rule 3.850. In its summary order, the trial court stated no rationale for its rejection of the present motion. It failed to attach to its order the portion or portions of the record conclusively showing that relief is not required and failed to find that the allegations were inadequate or procedurally barred.
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> The state argued that the entire record is attached to the order in the Court file before us, thus fulfilling this requirement. However, such a construction of the rule would render its language meaningless. The record is attached to every case before this Court. Some greater degree of specificity io required. Specifically, unless the trial court's order states a

rationale based on the record. the court is required to attach those specific warts of the record that directly refute each claim raised.

We thus have no choice but to reverse the order under review and remand for a full hearing conformina to rule 3.850.

Finally, Hoffman also petitions us to reverse a denial of access to state attorney records he requested under chapter 119, Florida Statutes (1987). At argument, the state conceded that thie issue was resolved in favor of Hoffman by our recent opinions in Stake v. Kokal, 562 So.2d 324 (Fla.1990), and Provenaano v. Duaaer, 561 So.2d 541 (Fla.1990). Under these opinions, Hoffman clearly is entitled to access these records.

We reverse the court below and remand for further proceedings in conformity with this opinion and with Kokal and provenzano. On remand, the trial court ehall allow Hoffman thirty days to amend his petition, computed from the date the state delivers to Hoffman the records to which he is entitled under chapter 119.

Hoffman, 571 So. 2d at 450 (emphasis added),

In response to thie Court's remand "for a full hearing conforming to rule 3.850," the circuit court again summarily denied Mr. Hoffman's amended motion to vacate (quoted in Eull):

This matter was considered upon the motion for postconviction relief filed by the defendant, June 17, 1991. It affirmatively appears from a reading of the motion that it is legally insufficient to justify relief under Rule 3.850 of the Florida Rules of Criminal Procedure and it is, therefore,

ORDERED AND ADJUDGED that the defendant's motion for postconviction relief is hereby DENIED.

THE DEFENDANT IS HEREBY ADVISED THAT HE HAS THE RIGHT TO APPEAL THE DENIAL OF HIS MOTION, PROVIDED SUCH APPEAL IS FILED WITHIN THIRTY (30) DAYS FROM THE DATE OF THIS ORDER.

DONE AND ORDERED in Chambers, at Jacksonville, Duval County, Florida, this 26th day of August, 1991.

/s/
CIRCUIT JUDGE

(PC-R2. 119).[1]

The State did not respond to Mr. Hoffman's amended motion to vacate. Thus, Mr. Hoffman's most current postconviction record consists of only Mr. Hoffman's amended motion to vacate, the trial court's order summarily denying relief, and Mr. Hoffman's notice of appeal,

[1]An examination of the denial establishes that the order is a form order which was simply eigned and dated by the judge.

This Court's prior ruling wae that Mr. Hoffman's motion to vacate "clearly establish[ed] colorable claims under rule 3.850." The trial court's ruling that Mr. Hoffman's amended motion to vacate was "legally insufficient" is clearly erroneous. Mr. Hoffman's amended motion to vacate supplemented and strengthened Mr. Hoffman's claims in light of the partial Chapter 119 disclosures. This Court was clear in stating that Mr. Hoffman's original motion to vacate was not "legally insufficient." Thus Mr. Hoffman's similar amended motion to vacate has already been arguably held by this Court not to be "legally insufficient." The circuit court erred in ruling otherwise.

The circuit court eummarily denied Mr. Hoffman's claims without conducting any type of hearing, without adequately discussing whether (and why) the motion failed to state valid claims €or Rule 3.850 relief (it does as noted by this Court previously), without any explanation as to whether (and why) the files and records conclusively showed that Mr. Hoffman is entitled to no relief (they do not), and without attaching those portions of the record which conclusively show that Mr. Hoffman is entitled to no relief (the record supports Mr. Hoffman's claims). The circuit court's order failed, under Florida law including this Court's earlier ruling in this case, to satisfy the requirements of Rule 3.850 and precludes adequate review on appeal. The order failed to cite the specific portion or portions of the record relied upon in making its disposition of each of the claims. The circuit court denied Mr. Hoffman's amended motion to vacate after only a reading of the motion itself (PC-R2. 119). The court did not specifically identify what portion or portiona of the enumerated records conclusively refute each of the separate claims asserted by the defendant. The record in Mr. Hoffman's case is lengthy, containing multitudinous facts, claims, issues, and citations of authority.

This Court's earlier opinion in Hoffman v. State, 571 So. 2d 449 (Fla. 1990), noted that Mr. Hoffman's trial court failed to attach to its order summarily denying relief the portion or portions of the record conclusively showing that relief was not required. In response to the argument that the

entire record was attached to the order in the Court file and fulfilled Rule 3.850'8 requirement, this Court concluded that "euch construction of the rule would render its language meaningless." Hnffman, 571 So. 2d at 450. As this Court noted,

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

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

The process which resulted in the order was itself improper. Poetconviction proceedings are governed by principlee of due process, Holland v. State, 503 So. 2d 1250 (Fla. 1987), and due process requires that the court at least grant the opportunity to present argument as well as conduct an evidentiary hearing as earlier ordered by this Court. Mr. noffman still has never been allowed the opportunity to have counsel argue hie case. Twice Mr. Hoffman's trial court summarily denied him Rule 3.850 relief -- in a form order (requiring only the filling in of the defendant's name, the date the 3.850 was filed, the date the order was signed, and the trial judge's signature).

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

Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Hoffman; Lemon; O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Hoffman has alleged facts which, if proven, would entitle him to relief. For

example in Hoffman thie Court noted that the State conceded at oral argument that Mr. Hoffman's claim, "if valid, would require relief under Brady v. Maryland." This Court in Hoffman ruled "a hearing is required under rule 3.850." These facts were never presented at trial and have never been properly controverted by the State. The files and records in his ease do not "conclusively show that he is entitled to no relief," and the trial court'e summary denial of hie motion was therefore erroneoue.

The need for an evidentiary hearing in Mr. Hoffman's amended motion to vacate is identical to or greater than the need €or the evidentiary hearing already required by this Court in Hoffman, 571 So. 2d at 450. In light of the allegations presented by Mr. Hoffman, this Court ruled that Mr. Hoffman had "clearly establish[ed] colorable claims under Rule 3.850." Id. Thus, Mr. Hoffman is still entitled to an evidentiary hearing. The files and recorde in the case by no means conclusively show that he will lose. In fact, the files and records corroborate the Rule 3.850 claims. The circuit court still has not addressed the material submitted to the court in Mr. Hoffman's appendix to the original motion to vacate. Mr. Hoffman hae alleged uncontroverted facts, and the failure by the circuit court to conduct an evidentiary hearing makes no sense at all. Moreover, the circuit court's refuaal to comply with this Court's earlier opinion demonstrates bias warranting recusal. This Court should again order an evidentiary hearing but before a new circuit court judge.

Facts not "of record" are at issue in this case; they are contained in the original 3.850 motion and appendix, and the amended 3.850 motion. They must be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Obviously, whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedinge is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. Hoffman; Basaett v. State, 541 So. 2d 596 (Fla. 1989). Moreover, Mr. Hoffman's claims that the State withheld material exculpatory evidence and presented false evidence can obviously be resolved only through an evidentiary

hearing. See Hoffman, 571 So. 2d at 450. This Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. Hoffman; See Heiney v. Duaaer, 558 So. 2d 398 (Fla. 1990); Mills v. Duaaer, 559 So. 2d 578 (Fla. 1990). Mr. Hoffman was (and is) entitled to an evidentiary hearing, and the trial court's repeated summary denials of Mr. Hoffman's Rule 3.850 motion6 were erroneous.

Mr. Hoffman has been twice denied a forum to adversarially teat his "clearly establish[ed] colorable claims under rule 3.850." Hoffman, 571 So. 2d at 450. Mr. Hoffman's amended motion to vacate was uncontroverted, yet, in a form order the circuit court ruled the motion "legally insufficient" in direct conflict with this Court's prior ruling. This Court is left with no alternative except to accept Mr. Hoffman's uncontroverted allegations as true and vacate his convictions and sentence or, in the least, remand Mr. Hoffman aaain for an evidentiary hearing before a new trial judge.

ARGUMENT II

THE CONTINUING FAILURE OF THE STATE TO DISCLOSE PUBLIC RECORDS VIOLATES THIS COURT'S ORDER; CHAPTER 119, FLA. STAT.; THE DUE PROCESS *AND* EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT; THE EIGHTH AMENDMENT OF THE U.S. CONSTITUTION; AND, THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

On December 17, 1990, Mr. Hoffman made a formal request to the Office of the Duval County Sheriff for all public records pertaining to Mr. Hoffman. The Sheriff's office claimed they did not have any files. The Duval County Jail also claimed they had no records or materials on Barry Hoffman even though he had been jailed there. On December 17, 1990, Mr. Hoffman made a formal request to the Office of the State Attorney of the Fourth Judicial Circuit for all public records pertaining to Mr. Hoffman. On March 14, 1991, the Office of the State Attorney provided a copy of some records. However, the materials provided were not complete. On March 25, 1991, Mr. Hoffman repeated the earlier Chapter 119 request because the materials provided were incomplete (App. A). On April 2, 1991, additional material was provided, although in a letter dated April 9, 1991, the State Attorney'a Office specifically refused to disclose the wire intercept file (App. B). On April

12, 1991, another Chapter 119 requeet was made repeating the request for accese to files still not disclosed (App. C). On April 17, 1991, in an effort to assist the State, another letter was sent identifying case numbers which had been discovered while reviewing the partial Chapter 119 dieclosures to that point (App. D). On May 16, 1991, additional materials ware discloeed. However, at that point it wae decided to file the Rule 3.850 motion and seek to have the circuit court order additional Chapter 119 compliance.

This Court'e opinion of December 13, 1990, ordered the State to comply with Mr. Hoffman'e public recorde request, and allowed Mr. Hoffman to amend hie motion to vacate after disclosure by the State of the improperly withheld public recorde. Hoffman v. State, 571 So. 2d 449 (Fla. 1990). See also Jennings v. State, 583 So. 2d 316 (Fla. 1991); *State* v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1991). Despite the State's failure to disclose all requested information, Mr. Hoffman filed an amended motion to vacate on 17 June 1990, including an updated Chapter 119 claim.[2]

Public records exemptions cannot be assumed -- they must be expressly etated in the statutes. Miami Herald Pub. Co. v. City of Narth Miami, 452 So. 2d 572 (Fla. 3d DCA 1984), cause remanded and approved, 468 So. 2d 218 (Fla. 1985). The State Attorney'e Office failed to cite any exemptions pursuant to section 119, Fla. Stat. in its refusal to provide the wire intercept file. Thus, Mr. Hoffman is unable to assess the legality of the application and the orders granting the wiretaps because of the State'e improper withholding of these doeumenta. Further, Mr. Hoffman is requesting the substance of the intercepted phone calls. Mr. Hoffman is entitled to all the intercepted material. At the very least, the trial court should have granted an "in camera" hearing pursuant to Pennsylvania v. Ritchie, 480 U.S. 39 (1987). See

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[2]On 10 September 1991, the Florida Department of Law Enforcement denied Mr. Hoffman access to wire intercept records (App. E). This refusal of accese was after the trial court had summarily denied Mr. Hoffman's amended motion to vacate. The Florida Department of Law Enforcement did not claim any other exclusions from Mr. Hoffman's Chapter 119 request.

also Jennings v. state, 583 So. 2d 316 (Fla. 1991); Mendvk v. State, Nos. 77,865 and 76,906 (Fla. Jan 2, 1992).

The State Attorney denied Mr. Hoffman any and all access to files on Robert Lee Alton (who took a polygraph via the Sheriff's office), Keith William Hodge (a suspect), James Maurice "Bubba" Jackson, (Case 882-1055 conspiracy to traffic in cocaine, a suspect with a confession), George "Rocco" Marahall, III (a codefendant granted full immunity and known to have taken a polygraph via the Sheriff's Office), Leon McCumbers, Wayne "Bones" Merrill (a confessed lookout, who was a confidential informant against the Provost organization and took a polygraph via the Sheriff's Office), and James Provost (the head of a drug family and a key target of the federal and state police, including wiretaps). The State's withholding of these files violates Mr. Hoffman's due process and equal protection rights. Kokal; Provenzano. If the State Attorney desires to claim any exemptions, then an in camera inspection should have been ordered. Mendvk v. State, Nos. 77,865 and 76,906 (Fla. Jan 2, 1992).

The State Attorney haa turned over a one-inch thick file on Leonard Joseph Mazzara, who was convicted of two counts of firat-degree murder and conspiracy to commit first-degree murder (PC-R2. 108). Clearly, this was not the complete file.[3] In addition, the State Attorney turned over a partial file on James Robert White, who was Mr. Hoffman's codefendant and aleo convicted of these killings. The State Attorney also disclosed a partial file on Chris Steve Sprinkle, who was a suspect.

As part of Mr. Hoffman's investigation for hie amended motion to vacate, Mr. Hoffman obtained a circuit court file on Robert Lee Alton, who was a roommate of the codefendant, James White, and Mr. Alton was deposed in Hoffman

[3]Unfortunately, experience has taught undersigned counsel that the Fourth Judicial Circuit's State Attorney's Office has in the past been unwilling to comply with Chapter 119. In May, 1991, in another case (Engle v. State) it was represented on the record that a one-inch-thick file in a capital case was the complete file. Subsequently when there was a change in the State Attorney which resulted in the Office's disqualification and a transference of the case to another office, it waa disclosed that in fact the complete file filled three banker boxes, and that additional Chapter 119 disclosure was neceeaary.

v. State. In State v. (Robert Lee) Alton, Case No. 30-3125-CF, Division T, the circuit court file included a sealed record of a pre-disposition report. On June 6, 1991, the trial court denied Mr. Hoffman's motion to release sealed records (PC-R3. 5). On June 9, 1991, Robert Lee Alton authorized a release of his records, including "pre-sentence reports," to Mr. Hoffman's current counsel (PC-R3. 7). On June 19, 1991, Mr. Hoffman filed a motion to reconsider order denying defendant's motion to release sealed records, including Mr. Alton's signed release of these records (PC-R3. 1). On September 30, 1991, despite Mr. Alton'e release, the trial court again denied Mr. Hoffman access to this aealed record (PC-R3. 8). The second denial by the trial court resulted in this matter being appealed to this Court in a notice of appeal filed in the circuit court on October 15, 1991 (PC-R3. 9). Mr. Hoffman requests this Court to order the release of this sealed document so that Mr. Hoffman can effectively defend himself. Justice requires nothing less.

Mr. Hoffman is entitled to all public records detailed above. "The basic premise of the Public Records Act is that all state, county and municipal records in Florida are open to public inspection and examination unless specifically exempted by statute." Tribune Co. v. Public Records, 493 So. 2d 480, 483 (Fla. 2DCA 1986), review denied, 503 So. 2d 327 (Fla. 1987). See Kokal, 562 So. 2d at 326. It is obvious from the record that the State Attorney's Office, the Jacksonville Beach Police Department, and the Florida Department of Law Enforcement have not complied with the law or the earlier ruling of this Court. Mr. Hoffman requests this Court to again order the State to disclose this information or, in the least, claim a Chapter 119 exemption. If the State is to claim any exemptions, then this Court should order the trial court to grant an in camera hearing. In addition, this Court should order the release of Mr. Alton's sealed documents in Mr. Alton's circuit court file.

ARGUMENT III

MR. HOFFMAN'S RIUHTS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, *AND* BY BRADY V. MARYLAND, 373 U.S. 83 (1963), *AND* ITS PROGENY, WERE DENIED WHEN THE STATE WITHHELD FROM THE DEFENSE IMPORTANT MATERIAL EXCULPATORY AND IMPEACHMENT EVIDENCE.

In Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990), this Court noted while addreseing the Bradv claim that at oral argument "the State conceded that such a claim, if valid, would require relief under Bradv v. Maryland." Mr. Hoffman is still waiting to prove hie claim in a hearing required under Rule 3.850. The circuit court has again summarily denied Mr. Hoffman relief. The circuit court's action must once again be reversed, and because of the circuit court's wilful refusal to give Mr. Hoffman a hearing, a new judge assigned to the case.

There was much more to the Ihlenfeld-Parrish murders than was ever revealed to the jury at Mr. Hoffman's trial. Indeed, there waa much more than was ever revealed to either of Mr. Hoffman's attorneys. Mr. Hoffman's appendix filed with the original motion to vacate revealed much of the undisclosed information which was exculpatory and/or impeachment evidence. All of it was "material". This case is especially euspect since the claim involvee some nineteen houra of wiretaps (still not dieclosed), undercover surveillance, and countless suspects. Mr. Hoffman's trial defense attorney8 were never permitted access to or discovered any of that information.

The law has long recognized that in criminal cases there is a "particular need for full cross-examination of the State's star witness." McKinzy v. Wainwriaht, 719 F.2d 1525, 1528 (11th Cir. 1982). Material that can be used to challenge the credibility of the State's star witness is critical to the defense, and if it is withheld by the State it is a Bradv violation requiring relief. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991); Oiumette v. Moran, 942 F.2d 1 (1st Cir. 1991). Here, the State's "star witness" was a cooperating accomplice about whom critical information waa withheld from the defense, court, and jury. George "Rocco" Marshall's teatimony about hie

status was incomplete and misleading. During trial, the jury was told that Mr. Marshall waa offered immunity for simply "telling the truth." The prosecutor, himself, elicited that testimony (See R. 683-684). An undisclosed police report belies this contention (PC-R1. 286). The agreement was for specifically described testimony and not for truthful testimony. There was more to thie agreement with the State than wae ever heard at Mr. Hoffman'e trial. Mr. Marshall had additionally agreed to provide the state with "all knowledge of the Provost organization he ha[d] prior to and after the homicides" (See PC-R1. 286). The prosecutor's benefit by deliberately withholding thie information is obvious. If Mr. Marshall were ehown at trial to be an important member of the Provost organization, the jury would have given his testimony little, if any, weight. More importantly, however, the terms of the agreement between Mr. Marshall and the State demonstrate the nexus between the investigation of the narcotics dealers and the murders. Mr. Hoffman's attorneys would then have been alerted to the dovetailing of theae investigations, and this would have opened up a floodgate of challenges to this testimony as well as an exploration of this dual investigation (PC-R2. 25).

Marshall's incomplete and misleading testimony on these issues was not corrected by the trial prosecutor. The State failed to alert the defense that one of its witnesses provided false or misleading testimony. Napue v. Illinois, 360 U.S. 264 (1959); Moonev v. Holohan, 294 U.S. 103 (1935). The State failed to correct such testimony. Alcorta v. Texas, 355 U.S. 28 (1957). When a case involvea "a corruption of the truth-seeking function of the trial process" and "prosecutorial misconduct", as in Mr. Hoffman's ease, a strict standard of materiality is applied measured by "'any reasonable likelihood' that this knowing prosecutorial suppression of evidence 'could have affected the judgment of the jury.'" Oiumette, 942 F.2d at 11. As previously ordered by this Court, an evidentiary hearing is required.

The law enforcement officers uncovered information that was critical to an effective defense. Some nineteen hours of wiretap tapes of this

investigation exist to which Mr. Hoffman's attorneys were and still are refused accees. The State also failed to disclose the extent of the deal with Mr. Marshall. Some aspects were disclosed, but Mr. Marshall aleo agreed to tell "all he knew" of the drug operation. In addition, the police documented Mr. Marshall's deal for killing Mr. Ihlenfeld and Me. Parrish. Mr. Marshall's drug debt to Provost would be cancelled, and Mr. Marshall would receive ownership of band equipment. Mr. Marshall received immunity from proeecution on the condition "Marshall will testify that Lenny Mazzara asked him to find two person to burn, kill, victims" (PC-R1. 286). Yet, defense counsel was not provided with any of this critical information.

As late as July 27, 1981, state investigators euspected that James Maurice "Bubba" Jackson was involved in the Jacksonville murders (See PC-R1. 280). The affidavit accompanying the arrest warrant for Jackson stated:

> David Jack is a personal acquaintance of James Maurice Jackson, Jr., aka Bubba Jackson, who is the subject individual of this affidavit and search warrant.
>
> The following information was personally given to your affiant by the said David Jack:
>
> > Approximately a week to ten days after the homicides referred to in this affidavit occurred, James Maurice Jackson, Jr., aka Bubba Jackson, came to the residence of David Jack and engaged David Jack in a convereation. Jamee Maurice Jackson, Jr., aka Bubba Jackson stated that a very bad thing had gone down at the Ramada-Inn and that it was something that he had had to do. James Maurice Jackson, Jr., aka Bubba Jackeon stated that he was talking about the two people that had been killed at the Ramada-Inn in Jacksonville Beach, Florida. James Maurice Jackson, Jr., aka Bubba Jackson further explained that one of the persons he had killed was named Frank and that it was a shame that a person so young had to be involved in something Like that and that this person was a girl (Linda Sue Parrish, the female deceased was twenty (20) years old). When asked by David Jack why he did it, James Maurice Jackson, Jr., aka Bubba Jackson responded that his people (the deceased Ihlenfeld) were blackmailing his (Jackson's) people.
> >
> > James Maurice Jackson, Jr., aka Bubba Jackson further stated that the handle of the knife he had used had broken from the blade during the killing. He also stated that he had attempted to clean UP the room after the murders.
> >
> > David Jack also stated that he has been in the presence of the said James Maurice Jackson, Jr., aka

> Bubba Jackson on several occasione during which James Maurice Jackson, Jr., aka Bubba Jackson discussed hie dealinge in controlled substances. He has also persanally witnessed James Maurice Jackson, Jr., aka Bubba Jackson receiving messages on a beeper device. The messages were to call "Frank" immediately.
>
> The body of the deceased male, Frank Ihlenfeld, was found to contain a knife blade which had become detached from the blade handle and the blade was located in the back of Frank Ihlenfeld when found by investigators in Room #205 of the Ramada-Inn, Jacksonville Beach, Florida. Your affiant as investigating officer and the Jacksonville Beach Police Department and the Florida Department of Law Enforcement have not released any information concerning the broken knife blade found the deceased back [sic] to anv media or news service. This information has been confined solely to law enforcement officials. James Maurice Jackeon, Jr., aka Bubba Jackson has been arraeted and convicted for possession of controlled substances on at least two occasions. James Maurice Jackson, Jr., aka Bubba Jackson is presently under two five-year concurrent sentences €or possession of controlled subetances €or which his probation has been revoked. He is presently free an supersedeas [eic] bond of $10,000 pending an appeal of these convictions.
>
> Your affiant also personally interviewed the wife of David Jack, Mre. David Jack:
>
> Mrs. David Jack etated that she was at her home with her husband, David Jack on the evening in which James Maurice Jackson, Jr., aka Bubba Jackson came to the home as referred to by David Jack in this affidavit. She etated that she was not in the presence of her husband or James Maurice Jackson, Jr., aka Bubba Jackson during the entire time that James Maurice Jackson, Jr., aka Bubba Jackson was in her home. She waa able to overhear a portion of his conversation with her husband, David Jack. She stated she overheard James Maurice Jackson. Jr., aka Bubba Jackson state that he had to kill those two people at the request of his people in order to repay a debt. Mrs. David Jack is a long time resident of Duval County, Florida, is the mother of one child and had no criminal record.

(PC-R1. 274-75)(emphasis added). Defense counsel was never provided this or any other information regarding Mr. Jackson. Certainly had they known, they would have investigated and presented this evidence (PC-R2. 29).

Another of the euspects here was Wayne "Bones" Merrill who, according to his wife, admitted being the "look-out" man €or the two men that killed Ihlenfeld and Parriah (PC-R1. 282). Fla. R. Crim. 3.220(b)(1)(iii) requires the prosecutor to disclose "any statements contained in police reports or report summaries" and any addresses of witnesses to the etatements. Bones and his wife were not disclosed to Mr. Hoffman's trial attorneys nor their

address. Bones was a key player in the Provoet organization which included Bubba Jackson. Bones never testified at Mr. Hoffman's trial. Certainly Bones' link to Mr. Jackson and to the murder itself was critical information for the defense to know (PC-R2. 29). Had counsel known, evidence would have been presented at trial to show that Mr. Hoffman was not involved in the murder; it was in fact committed by Bubba Jackson or Mr. Marshall and Bones. Id.

Other undisclosed suspects were Junior Jordan, Leon McCumbers (PC-R1. 265), Clarence Eugene Robinson (PC-R1. 267), Chris Steve Sprinkle (PC-R1. 269), and Keith William Hodge (Id.). Certainly when a murder investigation involves more than one suspect, particularly a auapect who admits complicity, the defense is entitled to such information. Had counsel had this information it could have been investigated and presented to the jury in order to establish Mr. Hoffman did not commit the murder and that his statements were not voluntary (PC-R2. 29-30).

Unknown to Mr. Hoffman's trial attorneys, the police in an affidavit relied on a "Bubba" Jackson confession for a search warrant to seize "Bubba" Jackson's blood and hair samples. None of this, however, was provided, and none of it was uncovered by defense counsel, whoee investigation was inadequate. However, the information was critical and would have been used and presented at trial if counsel had known this information.

The investigation also showed that the medical examiner had recovered:

> specifically from the hands of the female deceaeed, Linda Sue Parrish, . . . several hairs. These exhibits have been examined by a hair and fabrics comparieon expert from the Florida Department of Law Enforcement. That examination revealed that these exhibits, from the hands of the female deceased, Linda Sue Parrish, were male Caucasian head hair and male eaucaeian pubic hair. The expert etates that the male Caucasian head hair is not the head hair of the male deceased, Frank Ihlenfeld. No samplee of the male deceased's, Frank Ihlenfeld, are available for compariosn [sic] with the male pubic hair found in the hands of the female deceased, Linda Sue Parrieh.

(PC-R1. 275-76). The jury never knew that the hair clutched in the female victim's right and left hands was teeted and did not match Mr. Hoffman's hair samples (PC-R2. 30). The evidence at trial was that Barry Hoffman and Jamee

White, a black man, were the only two who actually went into the room. The male victim's head hair was not consistent with that found in Ms. Parrieh's hand, ruling out the possibility that it was simply his hair found on her. The undisclosed test results established the hair was not Mr. Hoffman's. James White was a black man, thus it was not his hair. Since it did not match Mr. Hoffman, Mr. White, or the male victim, this undermined the State's theory. The head hair was a vital piece of evidence that either was never turned over to the defense or was ineffectively ignored by defense counsel.

The State never disclosed the blood type of many of the other suspects. At the scene, Type 'O' blood was found both on the male victim's panta and on a cigarette butt. Neither victims had type 'O' blood. Neither Mr. White nor Mr. Hoffman had type 'O' blood. Obviously, evidence that any of the other suspects had type 'O' blood would have been critical (PC-R2. 31).

Mr. Hoffman met with Mr. Obringer on numerous occasions, all of them without counsel. Fla. R. Crim. 3.220 (b)(1)(iii) requires the prosecutor to disclose:

> (iii) Any written or recorded statements and the substance of any oral statements made by the accused, including a copy of any statemanta contained in police reports or report summaries, together with the name and address of each witness to the statements.

(emphasis added). The substance of Mr. Hoffman's many statements to Mr. Obringer were not disclosed and neither were the names of the witnesses present €or the statements. This information is material because Mr. Hoffman was being threatened with the death sentence if he did not testify in a co-defendant's trial -- Lennie Mazzara. Thus, the information seized by Mr. Obringer was directly related to the case later made against Mr. Hoffman. The subetance of Mr. Hoffman's atatements could have revealed that he in fact denied guilt, gave contradictory or incorrect statements, or simply that Mr. Hoffman was in fear of the Provost organization or the death sentence, Any of these statements if withheld would be a Bradv violation, and the substance of any and all rtatements not disclosed violated Rule 3.220 (b)(1)(iii). In

addition, if any of these statements were recorded, then they should have been disclosed. The prosecutor also has a duty to:

> (c) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the proeecutor, except when the prosecutor is relieved of this responsbility by a protective order of the tribunal.

Fla. R. of Prof. Conduct 4-3.8(c). Thus, any of Mr. Hoffman's statements to Mr. Obringer that he wae a lesser participant, that he was under the domination of the Provoat organization or others, that he was a drug addict, and that noted Mr. Hoffman's character or mental health should have been disclosed. Mr. Obringer had an independent, affirmative duty to disclose any of this mitigating evidence to Mr. Hoffman'e attorneys. This information was improperly withheld from Mr. Hoffman, and was certainly material to Mr. Hoffman's defense.

The undisclosed evidence was material. The materiality standard must be analyzed with a view to the complete puzzle. Mr. Hoffman's puzzle is made up of several pieces and when viewed on the basis of their cumulative effect, a reversal is required. See Jean v. Rice, 945 F.2d 82 (4th Cir. 1991); Chaney v. Brown, 730 F.2d 1334, 1356 (10th Cir. 1984).

As noted by this Court's earlier opinion, at oral argument the State conceded that, if valid, Mr. Hoffman's Brady claim would require relief. In addition, this Court held that Mr. Hoffman had "clearly establish[ed] colorable claims under Rule 3.850" and ordered a "full hearing conforming to Rule 3.850." Hoffman, 571 So. 2d at 450. Mr. Hoffman filed an amended motion to vacate pursuant to this Court's ruling, and the State filed nothing. In a form order, the trial court summarily denied Mr. Hoffman relief "from a reading *of the* motion." (PC-R2. 119). Fairness and judicial economy require this Court to again order a full hearing but before a new circuit court judge.

ARGUMENT IV

MR. HOFFMAN WAS DENIED HIS RIUHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, *AND* FOURTEENTH AMENDMENTS, WHEN MR. HOFFMAN WAS "ADVISED" TO TAKE A PLEA OFFER WITHOUT *ANY* INVESTIGATION *AND* WHEN CRITICAL STAGES OF THE PROCEEDINGS WERE CONDUCTED WITHOUT COUNSEL AND MR. HOFFMAN WAS SUBJECTED TO PROSECUTORIAL VINDICTIVENESS.

The sixth amendment guarantee of the right to the assistance of counsel is beyond dispute:

> The Sixth Amendment stande as a conetant admonition that if the constitutional safeguards it providee be lost, justice will not "still be done." It embodiea a realistic recognition of the obvioue truth that the average defendant doee not have the profeeaional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.

Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938)(footnotes omitted).

> [L]awyers in criminal courts are neeeesities, not luxuries. . . . A defendant's need for a lawyer is nowhere better etated than in the moving words of Mr. Justice Sutherland in Powell v. Alabama:
>
> > "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman hae small and sometimes no skill in the science of law. If charged with a crime, he is incapable, generally, of determining €or himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have [sic] a perfect one. He requires the auidina hand of counsel at every step in the proceedings against him. Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence." 287 U.S., at 68-69, 53 S.Ct., at 64, 77 L.Ed. 158.

Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). The constitutional right to the assistance of counsel during critical etages, i.e., when the defendant must deal with the government or the court, is carved in constitutional stone. "The adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate,'" United States v. Cronic, 466 W.S. 648, 656 (1984), quoting Anders v. California, 386 U.S. 738, 743 (1967), and the proceedings are rendered fundamentally unreliable and unfair if a criminal defendant is deprived of the right to counsel at a

"critical stage" of the proceedings. Cronic, 466 W.S. at 659. Prejudice is presumed from this fundamental deprivation.

A critical stage has bean defined in United States v. Wade, 388 U.S. 218 (1967), to include "any stags of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." 388 U.S. at 226. The question to be answered is "whether potential substantial prejudice to defendant's rights inheres in the particular Confrontation and the ability to counsel to help avoid that prejudice." 388 U.S. at 227. critical stages are those eteps "in the criminal justice process 'where the results might well eettle the accused's fate.'" Maine v. Moulton, 474 U.S. 159, 170 (1985), quoting Wade, 388 U.S. at 224.

Mr. Hoffman, however, etood by himself at critical stages of the proceedings at which he wae entitled to counsel., and for which there was no waiver of counsel (PC-R2. 5). This is a per se violation of the sixth amendment. While specific prejudice need not be proven, the prejudice resulting from this fundamental error is apparent: proceeding alone, but without having waived Counsel, Mr. Hoffman did things and made statements which placed him in the electric chair. When he appeared with counsel, he was guaranteed a twenty-five year prison sentence. When he appeared without eouneel, he set in motion hie death sentence.

Mr. Hoffman was arrested in October of 1981, and attorney Nichols was appointed to represent him on October 29, 1981. On June 25, 1982, Mr. Hoffman filed a pro se pleading entitled "Dismiss Ineffective Counsel" (R. 40). The motion recited that counsel had not performed properly, had not done what Mr. Hoffman requested, and had not been interested and concerned about Mr. Hoffman's caee. A hearing was held on the motion that same day.

At that hearing, counsel requested permission to withdraw. After inquiry, the Court learned that the differences between Mr. Hoffman and Mr. Nichols concerned what the attorney waa and was not doing in the case (see R. 46), that Mr. Hoffman did not wish to represent himself, and that he simply

wanted other counsel (see R. 42, 46-47). The Court made specific findings with regard to whether Mr. Hoffman was representing, should represent, or could represent himself:

> Now, whatever you consider -- you don't have the qualifications to make a judgment call on a trial.
>
> You have the right to repreeent yourself if you wish, but you know the State is asking €or the death penalty in this case.
>
> MR. HOFFMAN: I know.
>
> THE COURT: So, your life is at etake.
>
> MR. HOFFMAN: That's why I'm doing what I'm doing.
>
> THE COURT: I don't think it's proper you should repreeent youreelf when you are playing with your own life. I think you are adequately represented by Mr. Nichols. I will not allow him to withdraw or allow you to "fire him." You don't have that luxury. It just isn't available to you. If I thought €or one moment that he was not representing you properly, I would discharge him. But I don't feel that way.

(R. 47).

Without conducting an adequate investigation, Mr. Nichole "advised" Mr. Hoffman to enter a plea of guilty in exchange for a Life eentence regardless of guilt/factual innocence. Mr. Hoffman wae convinced that if this plea offer was not accepted, then he would end up in the electric chair. The normal presumption of reasonable professional conduct is not warranted "when a lawyer advises his client to plea bargain to an offense which the attorney has not investigated. Such conduct is alwaye unreaeonable." Woodard v. Collins, 898 F.2d 1027, 1029 (5th Cir. 1990). Mr. Hoffman's trial outcome was prejudiced, because an uncounseled Mr. Hoffman worked closely with his future prosecutor, Mr. Obringer. In addition, an uncounseled Mr. Hoffman would later proclaim his innocence and reject thie plea, leaving him on a path to a new attorney and the electric chair. Critical inveetigation into Mr. Hoffman's case including the involuntarinese of his statements, an extensive history of drug abuse, an alibi defense, and other possible suspects, was never conducted.

Three days later, Mr. Hoffman entered a plea of guilty in the presence of counsel:

> MR. NICHOLS: . . . The agreement made between the State and defendant is that thie recommendation is being made in exchange

for the defendant's agreement to assist the State in the prosecution of another defendant charged in the same incident, Mr. Mazzara, and that the sentencing on Mr. Hoffman would be postponed until after the trial of Lennie Mazzara.

Other than that, I believe there are no other terme or conditions as part of the agreement.

* * *

THE COURT: Mr. Hoffman, I want you to listen very carefully to me.

You have entered a plea of guilty and by doing so you have given up the right to trial by jury or *by* the Court.

You have given up the right to require the State of Florida to prove your guilt beyond a reasonable doubt;

You have given up the right to cross examine witnesses that might testify against you;

You have given up the right to compel witnesses to come into court and testify in your defense;

You have given up the right to remain silent OK your right againet self-incrimination;

You have given up the right to an appeal;

Do you understand that?

MR. HOFFMAN: Yes, sir.

THE COURT: Has anyone threatened you or made any promises to you to make you plead guilty?

MR. HOFFMAN: No, air.

THE COURT: Are you pleading guilty because you are guilty?

MR. HOFFMAN: (Pause) Yes, sir.

THE COURT: Do you know that you could be, if you went to trial, be facina electrocution?

MR. HOFFMAN: Yes, I do.

THE COURT: Have you discussed it with Mr. Nichols and are you now satisfied with his services?

MR. HOFFMAN: Yea, sir.

THE COURT: The facts, please.

I would like the record to reflect I have already been through the trial of one defendant and I *know the* facts backward and forward.

MR. OBRINGER: Your Honor, the state would be prepared to show that in 81-9299 on or about August 7th, 1980 in Jacksonville Beach, Florida, this defendant, along with another, James White,

acting together and in concert, effected the death of one Frank Ihlenfeld and one Linda Sue Parrish, both being human beinge.

The evidence would show, Your Honor, that Mr. Ihlenfeld's throat was cut. That was personally done by Mr. Hoffman. Further, that he aided -- at least aided and abetted in the killing of Linda Sue Parrish who was the female companion of Mr. Ihlenfeld at the time.

All this occurred in Duval County, Florida, and it was accomplished by Mr. White and Mr. Hoffman acting in concert to effect the deaths.

THE COURT: Any exceptions to the facts as outlined by the State?

MR. NICHOLS: Only that I think the date is September 7th, 1980 instead of August 7th.

MR. OBRINGER: I meant to say September 7th, 1980, Your Honor.

THE COURT: . . . . I will pass it for sentencing until August 20th with the underatanding, Mr. Hoffman, so you won't have any misunderstanding, that you will get a one lifetime sentence on each count, with 25 years minimum mandatory, to run concurrently. That means you will only serve one lifetime sentence. The State would then nol pros the conspiracy case. But in order to accomplish this you must testify candidly and truthfully at the trial of Mr. Mazzara.

Do you understand?

MR. HOFFMAN: Yes, sir.

THE COURT: Your failure to do that will mean the "deal" is off and you will go to trial and then the chips will fall where thev mav;

Do you understand?

MR. HOFFMAN: Yes, sir.

(R. 77-81)(emphasis added).

Approximately three monthe later, Mr. Hoffman was indeed called as a witness in the trial of a co-defendant. Mr. Hoffman's attornev was not present. Neither was he present during various discussions between Mr. Hoffman and the state attorney (PC-R2. 20). The record does not contain an express waiver of counsel as required in Faretta v. California, 422 U.S. 806 (1975).

Mr. Hoffman made decisions, answered questions from the Court and the State, and performed acts which required counsel's input, advice, and

assistance, all without the assistance of counsel, which critically prejudiced him:

Q I'm going to call your attention to July, late July, early August of 1980.

During that time period did you ever have a conversation with Mr. Marshall, Rocco Marshall, concerning doing some work for Mr. Mazzara?

A No.

Q Have you ever had a convereation with him concerning doing any job or doing any type of special work?

A No, I did not.

Q For Mr. Mazzara?

A No.

Q How about for Mr. Marshall?

A No.

Q You never had any conversation?

A No, I did not.

MR. OBRINGER: Your Honor, may Couneel approach the Bench?

THE COURT: Yes.

(Couneel for the State and Defenee approached the Bench where the following aide-bar conference was had outside of hearing of jury:)

MR. OBRINGER: Judge, I'm going to request leave of the Court to take the jury out. I think I will have to call him ae a hostile witness.

THE COURT: I will excuse the jury.

MR. OBRINGER: All right.

THE COURT: We will get into it and see what is going to happen.

MR. OBRINGER: All right.

. . . .

BY MR. OBRINGER:

Q Mr. Mazzara, did you ever -- excuse me. Mr. Hoffman, did you ever conspire with Mr. Mazzara or Mr. Rocco Marshall to kill Linda Sue Parrish or Frank Ihlenfeld?

A No I didn't.

Q Who hired vou?

A No one hired me.

Q You did it all on your own?

A I didn't kill anybody.

Q You didn't kill anybody?

A No, I didn't.

Q You have entered a plea of guilty, even though you killed no one?

A Yeah.

Q Okay.

A I was told if I didn't I would get the electric chair.

Q That's the only reason you entered a plea of guilty?

A Yes, I did.

Q Have you ever told me to the contrary?

A Yes, I did.

MR. OBRINGER: Your Honor, at this time I have to inform the Court that this is a surprise to me, coming as late as 9:45 thia morning in view of Mr. -- Mr. Hoffman's testimony in my office with Me. Lipsitz at which time he testified in my presence similar to the testimony he gave at deposition to Mr. Dempsey and at numerous pretrial conferences in this case.

I am at this time moving the Court for permission to call thie witness as a Court witness in order for me to cross examine and impeach thie witness.

I'm informing the Court in the State of Florida's opinion the plea aareementa with the witness herein, Barrv Hoffman, are now null and void. We intend to try him for both first degree murders.

But he is still subject to subpoena here today.

That's my request of the Court.

A Your Honor, I would like to withdraw my plea at this time myeelf.

THE COURT: Well, this is not the appropriate time to do it. We have to take first things first.

. . . .

THE COURT: Yes.

MR. OBRINGER: Would you announce that to the jury, please; that he is now being called as a witnees by the Court and both sidee have the opportunity to cross examine and impeach him.

THE COURT: That's correct.

The witness has returned to the room and the defendant is present.

Are you ready for the jury to come back in?

MR. OBRINGER: Yes, sir.

THE COURT: All right.

You may bring the jury back.

(Jury present)

THE COURT: All right.

Go ahead.

MR. OBRINGER: Your Honor, I think you have an announcement for the jury.

THE COURT: Yes.

Mr. Barry Hoffman is now being called as the Court's witness, which gives both the attorneys an opportunity to cross examine him and he will be considered now as a hostile witness.

MR. OBRINGER: A what witness?

THE COURT: Hostile witness,

MR. OBRINGER: Thank you, Your Honor.

BY MR. OBRINGER: [jury present]

Q Now, you have entered a plea of guilty to killing Ihlenfeld and Parrish, have you not?

A That's true.

Q You aay now you didn't do it?

A That's true.

Q Have you told me as little as an hour ago that you did in fact kill them?

A I would have told you anything.

MR. OBRINGER: Okay.

. . . .

CROSS EXAMINATION

BY MR. DEMPSEY:

Q Mr. Hoffman, would you tell this jury and the Court why you have made theee etatements in the past which are inconsistent with your present testimony under oath?

A Yes, sir. I wae told by my lawyer that I was going to get convicted no matter what, no matter if I did it or not, and

the beet thing for me to do was plead guilty and that way I would not get the death penalty, I would get twenty-five years. Since that time I have been threatened daily with the death penalty; that if I didn't lie about it, lie against Mr. Mazzara, that I would get the death penalty.

Q Who hae threatened you?

A Mr. Obringer. The State.

Q Anyone else?

A My lawyer really didn't threaten me. He just told me what was going to happen.

. . . .

RECROSS EXAMINATION

BY MR. OBRINGER:

Q Do you underetand your testimony today violates your plea agreements?

A Yes, sir, I sure do.

BY MR. OBRINGER:

Q Do you understand your plea agreement is off now?

A Yes, sir.

Q And we will eeek to have the death penalty impoeed upon you?

A Yes, sir.

Q Now, the Court appointed an attorney for you, Richard Nichols, did they not?

A Yes, eir.

Q And did Mr. Nichols advise you to enter a plea of guilty?

A Yes, he did.

Q Didn't he tell you that the evidence against you is overwhelming?

A No.

(R. 220-236)(emphasis added).

Two days later, Mr. Hoffman filed a pro se motion to withdraw plea. A hearing was held a week later. At this hearing, Mr. Hoffman's attorney moved to withdraw. No motion by Mr. Hoffman was filed requesting that Mr. Hoffman be allowed to proceed pro se, no record inquiry occurred regarding whether Mr. Hoffman wished to proceed pro se and, in fact, ultimately new counsel was

appointed. A eummary of the proceeding: a) counsel was allowed to withdraw: b) Mr. Hoffman alone (without an attorney, without an attorney'a advice and input, and without an express waiver of counsel) waa allowed to withdraw hie guilty plea; and c) preparations began to obtain new couneel for Mr. Hoffman. The plea was withdrawn without benefit of couneel (PC-R2. 16).

The withdrawal of counsel was fairly detailed and took some time:

> MR. OBRINGER: 81-9299 and 82-2527, Barry Hoffman.
>
> MR. NICHOLS: Your Honor, since I have returned I have been advised about the events at the trial of Mr. Mazzara. I have had an opportunity to talk to Mr. Hoffman a few moments this morning. I don't have a written motion, but I want -- I would like to make an oral motion to withdraw from representation of Mr. Hoffman and explain the reasons to the Court.
>
> It is my understanding from the events at the trial of Mazzara and my conferences with Mr. Hoffman that it seems to me that, at least hypothetically, that he will have to rely as part of hie defense upon either inadequacy or incompetency of counsel, to-wit: myself prior to his making statements to Mr. Obringer. It may be that I could hypothetically continue to represent Mr. Hoffman until some point down the road, but I -- in view of an efficient way to handle the ease from this point on it would seem to me more appropriate to have aomeone else take up the defenae now rather than let more time go by and then get forced into a situation where we have to start everything again. I have discussed that with Mr. Obringer this morning. I don't want to apeak for him, but I don't think that he really eeriously has a different point of view on it.
>
> MR. OBRINGER: Your Honor, I have spoken with Mr. Nichols about it, My problem is, as the Court may have heard during the trial, we have probably 20 hours of depoeitions with Mr. Hoffman in which he describes in great detail his participation in the murders and conspiracy. That deposition was given with the counsel and advice of Mr. Nichols pursuant to his plea of guilty to these two murder cases. I can see where it may very well be possible that his explanation for that will be advice to which he does not now agree and that he would probably claim he got bad advice from his lawyer. I can see where that's going to be a problem. I can tell the Court in all likelihood that in our case in chief, if not then certainly our rebuttal, we will use the sworn testimony of Mr. Hoffman and certainly hie involvement in these murders.
>
> THE COURT: All right.
>
> I will allow Mr. Nichole to withdraw.

(R. 115-16)(emphasis added).

It took much less time for the then uncounseled (not by a voluntary, on-the-record waiver) defendant to withdraw his plea:

But I will appoint an attorney and he will be in touch with you.

MR. NICHOLS: Your Honor, would you like me to file a written motion withdrawing from and prepare an order?

THE COURT: Yes. I think you had better.

Detail it.

MR. NICHOLS: I will, sir.

MR. OBRINGER: Do you want to aet it for next Friday for appearance of counsel?

THE COURT: Yes, that's a good time. I'm sure I can get an attorney by then.

MR. OERINGER: What's that date, Your Honor; the 1st?

THE COURT: October let. That's on both eaees. Keep them together.

MR. OBRINGER: Your Honor, there is also a pro se motion by Mr. Hoffman to withdraw any and all guilty pleas that have been entered.

The State would urge the Court to grant it. The State, as it announced at trial, does not feel bound by any plea negotiations.

THE COURT: Yes. At the Mazzara trial he wished to withdraw the pleas. I told him at that time it wasn't the proper time to do it. This is a good time for the Motion to Withdraw.

MR. OBRINGER: Your Honor, the pleas were entered as to the two murder counts in 81-9299. There was no plea entered in 82-2527 pursuant to the plea agreement.

I would ask the Court to announce that the plea hae been withdrawn.

THE COURT: I will allow you to withdraw your guilty plea on the murder charges, two counts, in 81-9299.

I will enter the not guilty plea on his behalf.

MR. NICHOLS: Yes, sir.

THE COURT: I will look at the motions just to be sure.

All right. I have read your motion. It's highly critical of the attorney.

I will grant the motion.

But I don't want any granting of the motion to indicate that I'm being critical of Mr. Nichols. I'm not.

MR. HOFFMAN: Yes, sir.

THE COURT: So, I shall enter a not guilty plea on your behalf.

I will set it for appearance of counrel on October 1st.

(R. 117-19).

Of course, a criminal defendant hae a constitutional right to represent himself, however:

> When an accused managea hie own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counrel. For this reason, in order to represent himself, the accueed must "knowingly and intelligently" forgo those relinquished benefits. Johnson v. Zerbet, 304 U.S., at 464-465, 58 S.Ct., at 1023. Cf. Von Moltke v. Gillies, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self- representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct., at 242.

Faretta v. California, 422 U.S. 806, 835 (1975). No "knowing and intelligent" waiver of the right to counsel was ever made by Mr. Hoffman. To the contrary, he had indicated previously to the court that he did not want to proceed without counsel, cf. Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988), and the court specifically found that Mr. Hoffman did not "have the qualificatione to make a judgment call on a trial." (R. 47).

It is thus plain that Mr. Hoffman was without counsel, although he never waived the right to counsel. It is similarly clear that Mr. Hoffman did not have effective assistance of counsel at critical stages of his capital prosecution, including the accepting and withdrawing of the plea offer. Harding v. Davis, 878 F.2d 1341 (11th 1989). Moreover, there were at leart twenty hours of depositions, and many meetings between Mr. Obringer, Mr. Hoffman'e State Attorney, and Mr. Hoffman, the defendant, which took place in counsel's absence. During post-plea conferences, Mr. Hoffman was left unguided in answering the State's questions, and thus a weary Mr. Hoffman fell prey to the State's traps. Mr. Hoffman knew to say what the State wanted to hear or face the electric chair. Certainly, Mr. Hoffman's statements were coerced (PC-R2. 20).

Our syetem is inquisitorial, not accusatorial, and the police are not allowed to reinterrogate a suspect once counsel hae been appointed, unless suspect's counsel is present. This protects layman from making coerced, involuntary etatements. This fear of coercion is not lessened by substituting the State Attorney as the interrogator. Although the prosector later agreed not to use any of the unrecorded post-plea statements at Mr. Hoffman's trial, the prosecutor had access to an uncounseled Barry Hoffman. Barry Hoffman was, not unlike the defendant in Minnick v. Mississippi, 111 S. Ct. 486 (1990), advised that what he said could be used against him, but this did not satisfy the requirement of counsel being present. Barry Hoffman cannot be expected to know when his United States and Florida constitutional rights as well as statutory and caselaw privileges or rights are being violated. Barry Hoffman should not be given less protection because to avoid the electric chair he agreed to work with the State on another case. At the very least, Mr. Obringer should not have been allowed to continue to proeecute Barry Hoffman after he had worked so closely with Mr. Hoffman. Mr. Obringer should have been remaved from the case and the Jacksonville State Attorney's Office disqualified from the case or a Chinese wall erected around Mr. Obringer and all others who knew Barry's confidences and secrets. Fla. R. Crim. Pro. 4-1.10(a); (PC-R2. 20-21).

In this context, there can be no showing of harmless error. While holding that some constitutional violations may be subjected to a harmless error analysis, the United States Supreme Court has noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," and cited the rule established in Gideon v. Wainwright, (the right to counsel) as one such right. Chapman v. California, 386 U.S. 18, 23-24 (1967). Mr. Hoffman's entitlement to relief is clear, for his sixth amendment rights were denied. This error is quite troubling in a capital case, particularly where the decisions made by the defendant without counsel literally resulted in a sentence of death. At the least, an evidentiary hearing is required, for the files and records not only do not

rebut Mr. Hoffman's claim, they eupport it. See Hoffman v. State, 571 So. 2d 449 (Fla. 1990); Lemon v. State, 498 So. 2d 923 (Fla. 1986). Without adequate investigation, Mr. Hoffman'r attorney's "advice" to accept the plea regardless of guilt to avoid the electric chair was deficient performance. Woodard v. Collins, 898 F.2d 1027 (5th Cir. 1990). Counsel's failure to attend the meetings between the prosecutor and Mr. Hoffman was ineffective assistance. Counsel's failure to be present when Mr. Hoffman failed to honor hie guilty plea and then in fact withdrew it was ineffective assistance. Mr. Hoffman suffered the injustice of not only bad lawyering (as in Woodard) but no lawyering (as described in United States v. Cronic, 466 U.S. 648 (1984)). Mr. Hoffman has "clearly establish[ed] colorable claims under Rule 3.850," and as this court also noted Mr. Hoffman is deserving of "a full hearing conforming to Rule 3.850." Hoffman, 571 So. 2d at 450.

An evidentiary hearing is also required on Mr. Hoffman's related claim of prosecutorial vindictiveness -- a claim involving facts which axe not "of record" and which are not rebutted by the "files and records'' in the case. The due process clause of the fourteenth amendment protect8 against prosecutorial vindictiveness, see Blackledge v. Perry, 417 U.S. 21, 27 (1974), particularly in the context of a capital prosecution. See United States v. Jackson, 390 U.S. 570 (1968); see also Corbitt v. New Jersey, 439 U.S. 212, 217 (1978); United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir. 1977); Hess v. United States, 496 F.2d 936, 938 (8th Cir. 1974). Of course, judicial. vindictiveness is also forbidden. North Carolina v. Pearce, 395 U.S. 711, 723-726 (1969).

Mr. Hoffman has been severely punished as a result of exercising his constitutional rights. Mr. Obringer was on Barry Hoffman'e case for the plea agreement and the subsequent trial. Not only was he sentenced to death on Count I of the Indictment, he was also more severely punished on Count II than he would have been under the plea agreement. By pleading to first degree murder under Count 11, Mr. Hoffman was to receive life imprisonment with a minimum mandatory twenty five years, to run concurrent with the same sentence

on Count I. Pursuant to the plea, the conepiracy charge was to be dismissed (R. 73). After being convicted of second degree murder, Mr. Hoffman was eentenced to one hundred years imprisonment, with the trial court retaining jurisdiction €or a third of that term [after being informed by the State that he could not retain jurisdiction for half of the term] (R. 1236-38). Mr. Hoffman was also sentenced to a term of thirty years imprisonment on the conspiracy conviction, to run consecutive to the other eentencea (R. 1236-37). In addition to the increased sentence, Mr. Obringer could have altered hie trial strategy in accord with information improperly seized from Barry Hoffman (PC-R2. 23). Until the plea offer is fully eatisfied, Mr. Hoffman could not have been contacted without the presence or consent of his counsel. Fla. R. of Prof. Conduct 4-4.2. If Barry Hoffman is considered a client of the State because of hi8 working relationship with the State as a State witness in another caee, then there are conflict of interest concerns. Fla. R. of Prof. Conduct 4-1.7(b) and 4-1.9.

Although prejudice need not be shown under these facts, Mr. Hoffman was prejudiced by making critical decisions regarding his case without benefit of counsel. The prosecution's and the court's vindictiveness further emphasizes the disastrous results of Mr. Hoffman's inadequate and, at certain critical stages, nonexistent representation.

Mr. Hoffman's claims are facially sufficient to show that he may be entitled to relief. An evidentiary hearing on these questions is neceseary as ordered by this Court, and the circuit court's repeated refusal to consider Mr. Hoffman's claims on the merits requires extraordinary relief. This Court should reorder an evidentiary hearing before a different circuit court judge.

ARGUMENT V

MR. HOFFMAN WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT-TNNOCENCE PHASE OF HIS CAPITAL TRIAL, *AND* HIS CONVICTIONS *AND* SENTENCE OF DEATH VIOLATE THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

In Strickland v. Washington, 466 U.S. 668, 688 (1984) the Supreme Court held that eounael has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland

requires a defendant to plead and show: 1) unreasonable attorney performance, and 2) prejudice. Courts have repeatedly ruled that "[a]n attorney does not provide effective assistance if he faile to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc). See also Goodwin v. Balkcorn, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to inveatigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective aseistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Carawav v.Beto, 421 F.2d 636, 637 (5th Cir. 1970). An attorney is responsible for presenting legal. argument consistent with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

Mr. Hoffman was denied the effective aseistance of counsel at the guilt-innocence phase of his capital proceedings. Mr. Hoffman's court-appointed defense attorneye' performance was prejudicially deficient in a number of respects. The inadequate performance involved the actions and inactions of the original attorney and successor trial counsel. Some of these matters have been discussed in preceding portions. The representation afforded Mr. Hoffman was unreasonably and prejudicially deficient in a number of reepects.

Counsel ineffectively failed to inveetigate, secure, and present for the suppression hearing expert and lay testimony regarding Mr. Hoffman's long-term drug addiction, and the influence of drugs an his mental state at the time of his interrogation, and thus failed to present evidence that would have eupported Mr. Hoffman's testimony that at the time of his interrogation he was highly intoxicated and mentally impaired. An investigation of Mr. Hoffman's background would have disclosed that he was honorably discharged from the Army because of a heroin addiction. Also, there was evidence presented at trial that a bag of marijuana wae found on Mr. Hoffman at arrest. Mr. Hoffman wae using drugs up until the time of his arrest. The State's theory of the case

was that these homicides were drug related. Defense counsel argued at trial that Mr. Hoffman was an addict and under the influence of drugs at the time of his arrest. But neither of the witnesses called by the defense were ever asked about Mr. Hoffman's drug use and addiction. Investigation would have uncovered numerous witnesses to corroborate that Mr. Hoffman was addicted to drugs both at the time of the offense and at the time of the alleged confession. Theee witnesses would have alerted Mr. Hoffman'e counsel to the necessity for a jury instruction regarding voluntary intoxication (PC-R2. 41).

Indeed, counsel failed completely to conduct effective investigation pretrial. There were numerous suspects in the case. Others had confessed to this crime. Counsel's failure to investigate these other suspects and the other information surrounding law enforcement'e investigation was prejudicially deficient.[4] Exculpatory evidence as well as information which could have been used to impeach the State's key witness was not uncovered (PC-R2. 41).

Counael failed to be present during the many hours when Mr. Hoffman was interviewed by the State, and failed to be preeent, to advise, couneel, and assist Mr. Hoffman when he was called to testify at the Mazzara trial. This war part of Mr. Hoffman's plea agreement. Neither did counsel show up during the interrogations and de-briefings between Mr. Hoffman and the prosecuting attorney prior to the Mazzara trial. During critical stages, a legally naive/unarmed gladiator, Mr. Hoffman, was left alone against the State -- counsel's absence resulted in Mr. Hoffman's death sentence. Mr. Mazzara, who according to the State was the instrumental procurer of theee murdere, was not sentenced to death. Mr. Hoffman, who appeared unrepresented at critical stages of the proceedingr, was Sentenced to death (PC-R2. 41-42).

The defense attorney's inadequate pretrial investigation resulted in his inability to conduct a proper cross-examination of the State's witnesses, particularly Rocco Marshall. Mr. Marshall received great benefits from his

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[4]Mr. Hoffman's main contention is that the State failed to disclose this information. To the extent that the State may argue disclosure occurred, then counrel should have investigated and presented this evidence.

teetimony, including the fact that he walked free after having been indicted on two first degree murder charges. But Marshall had also agreed to tell the State "all he knew" of the drug operation and "testify that Lenny Mazzara asked him to find two person to burn, kill victims." (PC-R1. 286). The agreement was not dependent upon truthful testimony. Counsel did not investigate, relying on the State's discovery. Defense counsel denied Mr. Hoffman the right to confront the State's witness. See Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). Counsel failed to present the available impeachment (PC-R2. 42).

Counsel also failed to investigate the information on "Bubba" Jackson. Investigation would have uncovered that Bubba Jackson was involved in the drug organization run by Jimmy Provost. According to a police affidavit, Jackson had confeeaed to this crime and had given specific details that only the culprit would know. There was a link between the drug organization and the killings. Defense counsel was unaware of this, and thus the relevance of the State's wire intercept file regarding the drug investigation. This wire intercept file still has not been disclosed to Mr. Hoffman. See Argument 11. Jackson was never even mentioned at Mr. Hoffman's trial though this evidence would clearly have been crucial evidence for the judge and jury to consider. Similar counsel failed to preeent evidence that Mr. Merrill (Bonee) acted ae a lookout and a confidential informant regarding the Provost's drug empire (PC-R2. 42-43).

Counsel €or Mr. Hoffman mentioned in opening argument that Mr. Hoffman'a hair was not found at the scene of the homicide. What counsel failed to ever argue or produce was evidence that the victim Linda Parrish had male Caucasian hair clutched in both hands and this did not match Mr. Hoffman's hair. According to the State's case the only other person present at the homicide wae James White, a black man. Certainly, this was another critical piece of exculpatory evidence that should have been used by the defense. The failure to produce critical exculpatory evidence fell below an objective standard of reaeonablenesa (PC-R2. 43). Moffett v. Kolb, 930 F.2d 1156, 1161 (7th Cir.

1991); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991). Confidence in the outcome of the proceedings is undermined. This Court should remand for an evidentiary hearing in order for a factfinder to hear the relevant facts, and to properly, fully, and fairly address these questions on the merits. See smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Squires v. State, 513 So. 2d at 138. In light of the circuit court's refueal to follow this Court's prior ruling, a new judge should be assigned.

ARGUMENT VI

THERE WAS NO KNOWING *AND* INTELLIGENT WAIVER OF MIRANDA RIGHTS IN MR. HOFFMAN'S CASE! HIS DRUG-INDUCED MENTAL IMPAIRMENTS PRECLUDED HIM FROM COMPREHENDING, AND VALIDLY WAIVING, THOSE RIGHTS; DEFENSE COUNSEL RENDERED INEFFECTIYE ASSISTANCE IN LITIGATING THIS ISSUE.

After Mr. Lukepae, an FBI agent, had Mr. Hoffman in custody, Mr. Hoffman called James (Jimmy) Provost. During the conversation, Mr. Hoffman made a statement that invoked his right to counsel. However, Mr. Lukepas had no notes of the conversation and did not inquire into whether Mr. Hoffman was requesting counsel. This conversation would be included in the evidence seized by the wiretaps; however, Mr. Hoffman has been denied access to these public records (PC-R2. 33-34). See Argument 11.

Mr. Hoffman was in cuetody for thirteen to fourteen hours prior to a statement being obtained. While in custody, Mr. Hoffman continued to take drugs he had on him at the time of his arrest. The FBI seized his pot and flushed it down the toilet, but they did not search Mr. Hoffman for additional drugs. Mr. Hoffman wae taking quaaludea and doing cocaine, while in the holding cell. When Mr. Hoffman was taken to Jacksonville, Mr. Hoffman suffered withdrawal symptoms and was placed in Duval County Jail's detoxification program. Mr. Hoffman was under the influence of drugs and alcohol at the time of the offense and at the time of his interrogation by the police. His state of mental impairment made it impossible for him to understand the "rights" to which he was entitled under the Constitution, or to in any way knowingly, intelligently and voluntarily waive what he could not comprehend (PC-R2. 34).

The inquiry into the validity of a waiver has two distinct dimensions. Firet, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the coneequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both a free choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Moran v. Burbine, 475 U.S. 412 (1986). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each case, upon the particular facts and circumstances surrounding that case, includina the backsround. experience. and conduct of the accused." Johnson v. Zerbst, 304 W.S. 458, 464 (1938); Miranda v. Arizona, 384 U.S. 436, 475 (1966)(applying Johnson v. Zerbst, standard to waiver of Miranda rights). The accused's mental state is the critical factor. But here the accused's mental state was never properly investigated by trial counsel (PC-R2. 34-34A).

In Mr. Hoffman's case, his ability to rationally and understandingly waive his rights to silence and counsel should have been evaluated at the time of trial. Counsel, however, conducted no investigation into the facts and circumstances surrounding the statements made by his client (who was a serious drug addict, as counsel knew, or should have known). Counsel sought no mental health assistance whatsoever on the issue. Mr. Hoffman's trial attorney only had three months to learn Mr. Hoffman's case, and ha never considered having Mr. Hoffman's mental health evaluated. All he did is put his client on the stand, unprepared. This is not effective assistance. Given the particular importance of the etatement, a statement made during a time when the client wae under the influence of narcotics and afraid for his safety, counsel's failures to investigate and prepare *were* prejudicially deficient performance (PC-R2. 34A-35).

Mr. Hoffman's attorney made a motion to suppress, in part because "At the time said atatements, admissions and/or confessions were allegedly made, the Defendant, BARRY HOFFMAN, was substantially under the influence of certain narcotic, hallucinogenic, hypnotic, and/or mind-altering drugs" (R. 38). At the hearing, defense counsel preeented only Mr. Hoffman's testimony, but failed to preaent other available lay or expert teetimony, and failed to even prepare his client prior to his client's taking the stand. As a result, important facts were never heard (PC-R2. 35).

A psychiatric evaluation of Mr. Hoffman performed by Dr. James Fox concluded that Mr. Hoffman suffers from mixed eubstance abuse and etated, in part :

> Drug addiction is one of the most crippling diseases recognized in the medical profession. As a psychological disorder, drug addiction, and its attendant features, is divided into two broad classifications: substance use dieorders and substance-induced organic mental disorders. Substance use disorders refer to the maladaptive behavior associated with addiction. Substance-induced organic mental disorders refers to the direct acute or chronic effects of substances in the central nervous eystem. Mr. Hoffman has suffered from both disorders.
>
> Mr. Hoffman has a life-long history of substance dependence. Opiate dependence is documented, and it is a disorder that is so devastating that, once dependence is established, eubstance procurement and use usually dominates the individual's life. Pereona with opiate dependence have a high annual death rate. Suicide rates are obviously high.
>
> While under the influence of opiates, an individual may suffer from a substance-induced organic mental disorder. For example, opiate organic mental disorders feature neurological dysfunction, impairment in attention and memory, and extremely poor judgment. Cocaine organic mental disorder features violence, hypervigilence, and grandiosity.

(PC-R1. 98-9).

While Mr. Hoffman testifed on three different occasions as to hie drug usage during that period of time, his statements alone were apparently viewed by the court as self-serving and therefore not given much weight. Counsel rendered ineffective assistance in failing to produce available lay or expert testimony regarding Mr. Hoffman's dependence on drugs and in particular his use of drugs on the day of his arrest and "confession." That testimony was available (PC-R2. 36).

Dr. Fox's assessment of Mr. Hoffman's mental etate at the time of arrest was:

> As reported in the above evaluation and based on Mr. Hoffman's history it seems likely that at the time of hie arrest that he was significantly addicted to and intoxicated with both opiate and sedative hypnotic eubatances. If a legal question exists regarding voluntariness of a confession, a mental health expert could provide probative evidence regarding the effect of substance use disorder and substance uee organic mental disorder on voluntarineee. It is, for example, highly plausible that Mr. Hoffman was not at the time of the confeseion fully able to comprehend the nature of the questions being asked him by the arresting officers, nor to comprehend the seriousness of his situation. Becauee of his life-long dependence and intoxication it is likely that he could have made statements at that time to satisfy the needs of the moment without an ability to comprehend their long range impact on hie aituation.
>
> At the time of my evaluation, his mental status evaluation reveals a man with a history of drug abuse and drug addiction with aome mild evidence of organic impairment of his brain. This is not surprising considering hie drug hietory. It is also indicated that confusion, irrationality, and impaired judgment at the time of his arrest for the offense waa due to the acute nature of hi0 drug abuse (substance-use organic mental disorder) and not to long term organic brain syndrome.

(PC-R1. 99-100).

All of this evidence eupports the fact that Mr. Hoffman waa not coherent and rational at the time of the interrogation. Because of his long term drug dependence (which was not investigated), his emotional makeup and his intoxication on the night involved (which aleo were not inveetigated), Mr. Hoffman did not possees the mental etate by which he could have rationally understood the consequences of "waiving" his Miranda rights. In fact, he stated that he believed that by signing the "form" he was asserting his right to silence (R. 241). Teetimony of friends, family and experts could have established Mr. Hoffman's lack of comprehension at the time the statement was elicited. Like the involuntary statement taken in Arizona v. Fulminante, 111 S. Ct. 1246 (1991), Mr. Hoffman's Statements were involuntary under "the totality of the circurnetancee" test. Moreover, where ae here the police seized some drugs off Mr. Hoffman'e person, they clearly had to know of his drug addiction (PC-R2. 37-38).

Any waiver by Mr. Hoffman could not have been made with a full awareness both of the nature of the right being abandoned and the consequences of the

decision to abandon it. In addition, if the wiretap disclosure reveale that Mr. Hoffman did invoke hie right to cousnel, then any waiver is not valid. See Towne v. Duaaer, 899 F.2d 1104 (11th Cir. 1990); Cervi v. Kemp, 855 F.2d 702 (11th Cir. 1988). Counael failed hie client when he failed to develop and present evidence that would have established that Mr. Hoffman's waiver was not voluntary, rational or intelligent (PC-R2. 38).

Claims such as the instant are precisely the type necessitating an evidentiary hearing €or proper resolution. See Squires v. State, 513 So. 2d 138 (Fla. 1987). There was much lay evidence which should have been presented to establish Mr. Hoffman'e longstanding drug addiction and abuse and hie resulting mental state on the night of his arrest, and expert testimony should have been pursued. The circuit court's repeated eummary denial of this claim wae erroneoue. This Court ahould reverse and remand this case for a full and fair evidentiary hearing before a new judge.

ARGUMENT VXI

MR. HOFFMAN RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH! EIGHTH AND FOURTEENTH AMENDMENTS.

In Strickland v. Washinuton, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing procese." 466 U.S. at 688 (citation omitted). Courts have repeatedly pronounced that "[a]n attorney doee not provide effective aesistance if he fails to investigate sources of evidence which may be helpful to the defsnee." Davis v. Alabama, 569 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 466 U.S. 903 (1980). Decisions limiting investigation "must flow from an informed judgment." Harris v. Duuaer, 874 F.2d 756, 763 (11th Cir. 1989). "An attorney has a duty to conduct a reaeonable investigation." Middleton v. Duaaer, 849 F.2d 491, 493 (11th Cir. 1988). See also Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991); Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991). Reasonably effective counsel must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway

v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). "[D]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably preaent the defendant's fate to the jury and to focus the jury on any mitigating factors." Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). An attorney is charged with knowing the law and what constitutes relevant mitigation. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Moreover, counsel has the duty to ensure that hie or her client receives appropriate mental health aeeistance, State v. Michael, 530 So. 2d 929 (Fla. 1988); Kenley v. Armontrout, 937 F. 2d 1298 (8th Cir. 1991); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's level of mental functioning is at issue. Defenae counsel's failure to investigate any available mitigation constitutes deficient performance. State v. Lara, 581 So. 2d 1288 (Fla. 1991).

Mr. Hoffman's trial counsel did not meet these constitutional standards. He did not conduct a sufficient investigation on which to base any "informed judgment." All participants knew that this case involved drugs. The State in its opening argument at the guilt-innocence phase presented the motivation for the conspiracy and murder as a drug partnership gone bad (R. 470), and references to the drug world and Mr. Hoffman's purported role in it continued throughout. What the jury never learned is that Barry Woffman'e true role in the drug world was that of a serious narcotics addict, a victim of that very drug world, and that his drug abuse and drug addiction resulted in the mental, emotional and behavioral dysfunction that serious and prolonged drug use engenders (PC-R2. 46).

Barry began ignorantly using drugs at the age of twelve or thirteen, more as a reault of his tragic home environment than volitionally. Since then, he was never able to do without druga. Without exception, family and friende who knew him throughout his life observed the tragic role that druga played in determining Barry's destiny. Miriam Hoffman, Barry's mother recalled:

> I know that Barry began using drugs at the age of 13. He would Leave empty glue and cough syrup

containers in the basement. At about this time, the school frequently called me at work to say that Barry was truant. I didn't know what to do with Barry, and my energies were directed towards making sure the family had a place to live and food to eat. In retrospect I believe that Barry should have been given drug treatment and counseling. Instead what happened is that his drug use escalated, and he finally ended up addicted to heroin.

(PC-R1. 110). Miriam Hoffman observed her son's chronic drug addition throughout his teenage and adult years and how it destroyed his marriage and, indeed, his very life.

Tillman Pollack, a family friend, remembered:

When Barry wae 12 or 13, Sam told me that Barry had been sniffing glue. He seemed upset that Barry was doing this, but he didn't do anything about it. Sam wae a drug user himself; he smoked marijuana long before it was fashionable. Though Sam smoked marijuana, he looked down on people who ueed stronger drugs. Sam never spoke to me again about Barry's drug use.

(PC-R1. 122).

Kate Berry, Barry's sister-in-law, recalled:

Barry's drug addiction was one of the things that Sheldon and I frequently discussed. I know that Barry has a serious history of drug abuse. Sheldon reported that Barry began taking cough syrup with codeine when he was 12 or 13 years old. Sheldon said he always found it strange that Barry left the empty bottles around the house; it was as if he wanted to be caught and be helped by his family. In spite of these "pleas for help," Barry's drug use continued, and he began using stronger drugs.

(PC-R1. 114).

Pat Richman, a longtime friend of Barry's brother, related:

Barry was on drugs for almost the entire time I knew him. I've always considered him something of a lost soul. He was a good kid, but his addiction to drugs always seemed to be stronger than he was. He began using cough syrup with codeine at a very young age, and progressed to heroin, cocaine, dilaudid and quaaludee. Barry is a passive person, and was very easily led into drug use by his "friends."

I know that Barry tried to stop using drugs, and that Sheldon put him in substance abuee programe several times. Hie main addictions were to heroin and dilaudid, and he could never quit taking them for long. It broke my heart to watch him deteriorate over the years. He was a sweet, gentle person whose life was taken over by a powerful and devastating drug dependency. Because he was chemically different than other people, he never really matured normally. At the age of 30, he thought and acted more like a teenager than a grown man.

The last time I saw Barry was in the Fall of 1981, a few weeks before he wae arrested in Michigan. He was in Baltimore and

we happened to run into each other. I remember that the first thing I said to him was "Barry, are you straight?" I asked him that becauee I instantly knew that he was still addicted to the opiates; he just looked thin and unhealthy. We had some coffee and talked for a while. He wanted to talk about the past, and I triad to follow his conversation. He spoke very slowly, rambled, and wae generally confused. Though I was very happy to see Barry, I came away from that visit more worried about him than ever.

(PC-R1. 118-119).

Other than Barry's brother, Sheldon, the family allowed Barry Hoffman to live as a drug addict, without help or treatment, despite hie obvious use of serious, brain damaging drugs. Hie mother had neither the will nor the ability to give him the help that he needed. His father, preoccupied with gambling, smoking marijuana, and stealing, gave him little attention, and none of it of any value. Miriam Hoffman reported:

> Barry, Sheldon, Sam and I lived almost exclusively on what I earned at Sears and Roebuck. I worked there €or 28 years. Sam wasn't much of a provider, nor was he much of a husband or father. When the children were young, we lived on about $40.00 a week. Thie amount was significantly depleted by Sam's stealing. He would take the houeehold money and use it for gambling and Cod knows what else. I often suspected that he spent it on other women, and direct proof of this would not have surprised me in the leaet. Sam also had a habit of forging my name on loan applications.
>
> Sam would take a job every now and then, but more often than not he was at home watching television or out gambling. He mostly gambled on pool and at the racetracks. One of the reasons Sam didn't work often is because he stole from his employers. He was once forced to leave Baltimore when one such employer threatened him with prosecution when a cash register was $600.00 short at the close of a business day. It apparently hadn't been difficult €or the boas to figure out who had stolen the money. I divorced Sam in 1964 because I could no longer cope with his stealing and gambling. All he did was make life more difficult for me and my sons. He was immature, and I thought he set a very bad example €or Barry, who was easily influenced by him. Sam moved to New Orleans and remarried. He died in 1979 of a blood dieorder. I have been single ever since my divorce.
>
> Because I had to work, I was not at home when Barry was growing up. Sam, who was often home, paid little attention to Barry and what Barry was doing. Barry was a follower, a passive type. He was also a slow learner. The school once suggested that Barry be kept back a year, but I was afraid that the other children would be too young for him.

(PC-R1. 109-110).

Tillman Pollack, a long time friend of Sam Hoffman, verified Miriam Hoffman's description:

> Though I loved Sam like a brother, I'd be a liar if I said that he wae anything other than what he was--a lazy, complacent person. He alwaye wanted to play the part of a "big guy," someone with money and etanding in the community, but the truth is that he never really made any money. He and his family lived in a modest apartment on a modest budget. Sam would never have even owned a ueed car if it hadn't been €or his wife, who worked eteadily at a eales job. He gambled some, but never had the large sums he would have liked to spend this way.
>
> Sam was alwaye getting fired from his jobs becauee he would steal from his employera. He lost a job in a store in Washington, D.C. in the early 1960s this way. He was once forced to leave Baltimore to keep from being prosecuted for theft by another company for which he worked.
>
> Because Sam wasn't much of a provider, hie wife belittled him and didn't reepect him. Though that made for a rocky relationship, I don't believe her treatment of Sam was inappropriate.

(PC-R1. 121-22).

Sheldon's widow described the Hoffman family's failure to help Barry in the following way:

> Sam and Miriam Hoffman never got along terribly well. I think this was largely due to Sam's gambling and embezzling. Sam wae a real dandy. He epent the houeehold money on clothes and gambling, even when there wasn't enough to pay for the necessities the family needed. Though the family clearly knew of Barry's drug problem, the parents never tried to help him in any way. Miriam wasn't home during the day, and she had her hands full with making whatever money she could; Sam just had different interests.

(PC-R1. 115).

Barry grew up in a family which constantly and unfairly compared him with his older brother, Sheldon. His mother still does, even though Sheldon died in 1979:

> ... [Barry] wae very different from his brother, who was very bright and eucceeded at everything he did.

(PC-R1. 110).

Other people who knew Barry and his family remember how badly Barry was affected as he began to realize that he was the unfavored son:

> My name is Kate Berry and I am Sheldon (Hoffman) Maas' widow. I knew Barry, Miriam and Sam Hoffman. Sheldon and I often spoke of his family, Barry in particular. Sheldon loved Barry and felt sorry for him. Sheldon was the family favorite, and he always thought that fact must have been painfully obvious to Barry. Sheldon was good looking and bright. He went to college and dental school, and he had lots of friends. Barry was four years younger, rather passive, dropped out of school in the 10th

grade, and never could seem to make much out of hi8 life because of hie drug addiction and other problems.

(PC-R1. 114).

Even though Barry understood that he was disfavored over his brother, Sheldon, he still admired Sheldon. Sheldon, in fact, was the one person in his life who he could turn to for support. Miriam Hoffman explained:

> Sheldon died of a heart attack in 1979, within a few months of Barry's father. My family ha8 a strong history of heart disease. I have had three heart attacks and am on medication. Barry had a heart attack a few yeara ago in Florida State Prison. I have never recovered from Sheldon's death. When Sheldon died, Barry lost the onlv relative he ever went to for help and support.

(PC-R1. 111)(emphasis added).

This evidence and much, much more was available. Counsel failed to obtain school records, hospital records, and military records, all documenting Mr. Hoffman's life. Mr. Hoffman was consumed with drugs throughout his life and up until the time of hi5 arrest on these charges. The drugs affected (and damaged) this drug addict's brain. Defense counsel did not investigate this. This was not as a result of strategy or tactic. Miriam Hoffman, Tillman Pollack, Kate Berry, and Patricia Richman, among others, have a11 attested to their willingness to provide whatever information they could, if only hie attorney had contacted them. But that contact was never made (PC-R2. 52-53).

Defense counsel called both Mr. Hoffman'e ex-wife, Lillian Hoffman, and his girlfriend, Kathy Taylor, as witnesses at the guilt phase. Though both of these witnesses had lived with Mr. Hoffman and were in a position to observe Mr. Hoffman in his daily life, neither were asked anything about his drug addiction and the effect it had on him. In fact, neither of these witnesses were called during penalty phase though both clearly knew much about Mr. Hoffman's background. Lillian Hoffman was called during the State's guilt phase case; counsel failed to subpoena her as a defense witness and have her available for the penalty phase (PC-R2. 53).

At the time of the homicides and the time of his arrest, Mr. Hoffman was continuing his life-long addiction to drugs and alcohol. In fact, thie abuse escalated in the months prior to the homicides and continued up until his

arrest. Though defense counsel wae aware of Mr. Hoffman's drug abuse, he made no effort to discover witnesses who could testify to it during the penalty phase. Mr. Hoffman's drug abuse waa apparent uae to his friends and acquaintances, who could have testified about his abuse and addiction. Counsel failed to investigate this and, as a result, the jury decided Barry Hoffman'a fate without eufficient information (PC-R2. 53).

Defense counsel should have known that addiction to opiates and their long-term use have serious consequences on an individual's mental functioning, behavior, and behavioral controls. The dysfunction caused by druge is real, aevere, and debilitating. Investigation in a case in which a defense attorney represents a serious drug addict calls for the assistance of a mental health professional in order for counsel to ascertain the effects of the drugs on hie client's functioning. Here, the debilitating effects of drug dependency and the constellation of factors in Mr. Hoffman's life that mads him vulnerable to long term drug dependency were never investigated. Drugs affect the addict's brain. Counsel, however, sought no mental health assistance. As a reeult, available mitigation was not presented to the jury.

During post-conviction proceedings, Mr. Hoffman had the benefit of a mental health evaluation. Dr. Robert Fox, M.D., a highly qualified psychiatrist and neurologist, was provided with historical evidence concerning Mr. Hoffman and conducted an extsnaive psychiatric and neurological examination of Mr. Hoffman. His diagnosis reveals that Mr. Hoffman has suffered from one of the most crippling diseases recognized in the medical profeseion. Dr. Fox's report was reproduced in full in the Appendix to Mr. Hoffman's original Rule 3.850 motion (PC-R1. 90-101). Some pertinent portions of the report are reproduced immediately below:

> Barry Hoffman is the second son of Miriam Hoffman born in Baltimore Maryland, 11/8/47. He had an older half-brother, Sheldon, who was the son of a previous marriage. Hie father was both a ehoe salesman and an aluminum siding salesman. His parents were divorced when Barry was approximately fourteen years of age and at that time his father left Baltimore and moved to New Orleans. He describes his mother as having been a very rtern and hard working woman who, as his father was a failure at most of his work, was the breadwinner in the family, working primarily at Sears Roebuck and other jobs to rupport Barry and his brother. He

wae consequently not well-supervised as a youth. He recalle always having had a difficult life because he waa over shadowed by an older, smarter and more well liked brother. Hie memory of his childhood is one in which he spent all of his time away from the house and on the streets. He had a significant school hiatory of truancy and began using illicit druga at around the age of twelve. He says that he began by drinking cough medicine with codeine and sniffing glue and then he progressed to heroin at around the age of eixteen.

He left echool in the tenth grade and from that time on spent much of hi8 time by his report involved in the using and dealing of drugs. He joined the Armed Services in April 1966 and wae discharged in November 1966 with an honorable discharge, under medical conditions. The medical conditione apparently was his prior heroin addiction which was discovered. Through the mid-1960's to the early-1970's he was married. When he finished the drug treatment program that he was involved in, he and his wife separated and he moved to New Orleans to live with his father. He remarried. He later separated from his second wife and, while living in Jacksonville, Florida, ha worked intermittently at the only trade he hae had which is as a pipe fitter. During this period of time he again resumed his drug use and this was controlled primarily by the amount of money that he had available to him to purchaee drugs. During 1979 and 1980 when he was living in Jacksonville, Florida he became involved by his own report with a number of local drug dealers, primarily Leonard Mazzara and George Marshall with whom he was dealing quaaludes and other drugs. The detaile of his involvement with these individuals can be found in the appendices to this report.

For the year following the crime in this case, he was continuously a heavy dilaudid and cocaine user. He says that during the course of this year on a number of occasions he heard that the Jacksonville police were looking for him in regards to the murders and in fact he said he spoke with Officer Dorn in regards to these murders and was told that he was not under suepicion €or them. In early September of 1981 he left the area and went to visit two of his friends living in Ontario, Canada. It was during this trip that he was apprehended by the FBI in Jackeon, Michigan.

He states that at the time of his arrest at the bus station in Jackson, Michigan that he had been injecting combinations of dilaudid and cocaine generally referred to as "speed balls" on a daily basis and that morning he had injected in the Detroit bus atation approximately twelve milligrams of dilaudid and one gram of cocaine. On the bus from Detroit to Jackson he had been smoking marijuana and at the time of his arrest he had a number of quaalude capsules and a small quantity of cocaine that was not discovered by the police. He says that during the course of his interrogation he was able to go into the men's room and take these druge that he had with him. His recounting of the interrogation with Special Agent Lukepas and Detectives Dorn and Maxwell are essentially the same as found in the record of his trial and will not be repeated here.

In the course of the evaluation he reiterated that during this interrogation he waa significantly intoxicated with dilaudid, cocaine and marijuana and that he was sleep deprived. He feels that hie memory was significantly impaired because of the presence of these drugs and in addition becauee of the length of time that

he was being held in the police station that he began to withdraw from the dilaudid he had been uaing on a daily basis and this made it even more difficult for him to understand the questions that were being asked of him and the atatements that he was being asked to make. As he etated during the examination and on cross examination at his trial, he does not recollect making any incriminating statements about himself in regards to these murders but only responding to statements and descriptions of the murdera made by the arresting officers. He has no recollection as to how they concluded that he confeeeed to these murders. My opinion as to the veracity of hie atatements will appear below in another section of this report.

* * *

Conclusions - On the basis of review of the background information available and the psychiatric evaluation performed, it is possible to offer the following opinion in regards to Barry Hoffman. It is clear that Barry Hoffman has Buffered from eignificant problem with drug addiction since he was an early teenager. This drug abuse and drug addiction history hae been the primary guiding factor during the past twenty-five years of his life and has a direct bearing on any and all activities that he hae engaged in during that time period. Without question, this serious dieorder would have to be considered highly relevant and mitigating, if he is guilty, particularly any eubstance use organic mental disorder.

Aa reported in the above evaluation and based on Mr. Hoffman's history it seems likely that at the time of hie arrest that he was significantly addicted to and intoxicated with both opiate and sedative hypnotic substances. If a legal question exists regarding voluntariness of a confeseion, a mental health expert could provide probative evidence regarding the effect of eubstance use disorder and substance use organic mental dieorder on voluntariness. It is, for example, highly plausible that Mr. Hoffman was not at the time of the confession fully able to comprehend the nature of the questions being asked him by the arresting officers, nor to comprehend the seriousness of his situation. Because of his life-long dependence and intoxication it is likely that he could have made statements at that time to satisfy the needs of the moment without an ability to comprehend their long range impact on his situation.

At the time of my evaluation, his mental status evaluation reveals a man with a history of drug abuse and drug addiction with some mild evidence of organic impairment of his brain. This is not surprising considering his drug history. It is also indicated that confusion, irrationality, and impaired judgment at the time of hie arrest for the offense was due to the acute nature of his drug abuse (substance-use organic mental disorder) and not to long term organic brain syndrome.

Mitigating circumstances ungueetionably accompany mixed substance use disorder and substance use organic mental disorder. Mixed subetance use disorder eeriously compromises an individual's ability to function in the world. When substance procurement and use become the motivating forces in a person's life, all else becomes relatively insignificant. The ability to adequately access situatione and events, eepecially those requiring reasoned judgments, is diminished.

> A person suffering from a aubstance-induced organic mental disorder may present signs of neurological dyefunction. Attention, memory and judgment are impaired. The consequences of theee impairments on an individual's ability to appreciate and/or conform his or her behavior to accepted norms can be dramatic. Impairmsnta of this type make reasoning and adequate mental functioning difficult at best. The compromieed attention, memory and judgment produced by this dirorder are often severe enough to produce mental disturbance that is extreme in nature.
>
> Each of these disorders has serious implications regarding mental functioning, behavior, and behavioral controls, and statutory and non-atatutory mitigating cireumetancea under Florida capital sentencing law. Mr. Hoffman has suffered from them both.

(PC-R1. 94-97; 99-101).

Many mental health professionals were available in Florida and the Jacksonville area to conduct a mental health evaluation at the time of Mr. Hoffman's trial. Defense counsel did not ask for an evaluation. This was not as the result of a tactical or strategic choice (PC-R2. 60). See State v. Michael, 530 So. 2d 929 (Fla. 1988). This was prejudicially deficient performance. O'Callaqhan, 461 Sa. 2d 1354 (Fla. 1984).

In addition to this information, Mr. Hoffman's trial counsel had other information in hie file which, had he used it, would have provided the sentencing jury with a better understanding of Mr. Hoffman's alleged participation in the crimes €or which he was convicted. During the sentencing phase charge conference, defense counsel mentioned to the judge that he would like a jury instruction which would reflect the fact that Mr. Hoffman acted under the substantial domination of his alleged-conspirator, Leonard Mazzara (R. 1155). Later, for no apparent reason whatsoever, he declined to argue for the instruction (R. 1164).

Mr. Hoffman'e trial attorney had the deposition of Thomas Maxwell, taken on February 11, 1982, in his files. Detective Maxwell had played a prominent role, in absentia, in the guilt-innocence proceedings as Detective Dorn's partner. Moat importantly, he was present and acting as note-taker during the presentation of Mr. Hoffman's alleged confession (R. 238). When Maxwell's deposition was taken, he testified that his notes of the interrogation contained a statement by Mr. Hoffman. During the alleged confession, Mr. Hoffman, according to this evidence, supposedly stated that he had performed

for alleged co-conspirator Mr. Mazzara as he waa requeeted because he lived in terror of Mr. Mazzara and James Provost:

> Q (by Mr. Weetling): What did he [Barry Hoffman] say, to your knowledge?
>
> A (by Detective Maxwell): Is it okay if I --
>
> Q You can read it if you want to.
>
> A Refreeh my memory (examining documents).
>
> Q Would it be easier to read it in the record?
>
> A No, because it wouldn't make any aense. These are just notes. He had stated that he had killed the people in the room. He said that it was either them or me, which he was -- seemed to be -- he atated he was afraid of Provost and Mazzara, and Lennie wanted these people killed. And he said, you know, he just felt like either I kill them or they're going to kill me.
>
> Q Why was he afraid of Provost?
>
> A He had just heard so much about him.
>
> Q Did he feel that Provost had anything to do with this?
>
> A He said that since the relationship of Jimmy and Lennie, you know, was so close, that, you know, it was like a little family, and if he wae afraid of one of them, just like being afraid of aomebody in the whole family.

(PC-R1. 147-48).

Becauee facts concerning Mr. Hoffman's "confession" were presented by the State and already in evidence, there could have been but one explanation for counsel's failure to present this probative information to the jury: he forgot. Such evidence, from the government's own witnesses, would have necessarily had a dramatic impact on the jury's determination of whether Mr. Hoffman lived or died. The evidence mitigated, and there was nothing to be gained by keeping it quiet.

Had defense counsel obtained Mr. Hoffman's military records, he would have discovered his honorable discharge due to heroin addiction. Also, counsel made no effort to obtain any medical or school records. This decision was not based upon tactic or strategy (PC-R2. 62). Had defense counsel contacted any of Barry's friends at the time of the homicide, he would have discovered that it was well known that James Provost and Lennie Mazzara were dangerous and Barry was in fear of both of them. When the State seized

etatements from Mr. Hoffman, the State was aware of Mr. Hoffman's fear for the Provost organization. It is clear from the record that counsel had no strategy reason to exclude this evidence and the only reason the jury and judge did not hear it wae counsel's failure to investigate. Failure to discover material mitigating evidence warrante a new sentencing. Bassett v. State, 541 So. 2d 596 (Fla. 1989).

Mr. Hoffman's claim of ineffective assietance of counsel at sentencing requires an evidentiary hearing for its proper resolution. The jury never learned the truth about Barry Hoffman. The truth is that he suffered from a serious and crippling disease -- drug addiction. The jury had no way of knowing that Barry's addiction began when he was little more than a child, and that hie heavy and prolonged drug intake which continued up to the time of hie arrest caused neurological dyafunctions, impaired judgment, impaired capacity, and extreme emotional disturbance. The jury knew nothing of Mr. Hoffman's background and history or how the factors in his life made him vulnerable to long-term drug dependency. The fact that Detective Maxwell had recorded Mr. Hoffman's fear of and domination by Leonard Mazzara was not presented. Mr. Hoffman's jury needed to know who he was, Because of counsel's failure to investigate and preeent this crucial and readily available evidence in mitigation, confidence in the outcome of the penalty proceedings is undermined. Michael, 530 So. 2d at 930.

Mr. Hoffman's factual allegations -- which must be accepted as true at this juncture, see Blackledge v. Allison, 431 U.S. 63 (1977) -- demonstrate deficient performance and prejudice. None of the significant lay and mental health evidence outlined above was provided to the judge and jury who were to decide whether Mr. Hoffman was to live or die. This Court should remand to the trial court for an evidentiary hearing before a new circuit court judge.

ARGUMENT VIII

THE TRIAL JUDGE'S POST-PENALTY PHASE APPLICATION, WITHOUT NOTICE, OF THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS *AND* CRUEL DENIED MR. HOFFMAN HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

During penalty phaae charge conference, the prosecutor clearly etated that he believed the aggravating circumstance of heinous, atrocious and cruel did not apply:

> [THE COURT:] Is anybody asking for 8?
>
> MR. OBRINGER: That's the especially heinous, atrocious or cruel --
>
> THE COURT: Yes.
>
> MR. OBRINGER: I have done some research.
>
> THE COURT: They have taken the word heinous out of it.
>
> MR. HARRIS: They changed it to wicked, evil.
>
> I will object if the Court does give that inetruction. I would rather have the word heinous, which is in the statute. Wicked, evil might have a different connotation, like a wicked little girl..
>
> THE COURT: Yes. It's not --
>
> MR. HARRIS: Yes, it's not a very high standard.
>
> MR. OBRINGER: The case eeemed to talk about the infliction of pain and --
>
> THE COURT: Prior to the killing.
>
> <u>There is no evidence of that here</u>.
>
> MR. HARRIS: Yes. There was a big fight, and it wasn't pleasant, but he intended to render the victim unconscious.
>
> THE COURT: Yes.
>
> There is one case that says rendering them unconscious and then killing them comes under that. Why I don't know.
>
> MR. OBRINGER: I don't have any faith in that case.
>
> THE COURT: Yes.
>
> MR. OBRINGER: The new case8 seem to talk about the infliction of pain and suffering.
>
> MR. HARRIS: Torturing. Like the Palmes thing. They had the guy in the box and tortured him.
>
> THE COURT: Right.

MR. OBRINGER: Right.

I will not request.

THE COURT: I won't give that.

(R. 1161-63) (emphaeis added).

By the end of the conference, it was clear that sec. 921.141(5)(h), Fla. Stat., heinoue, atrocious or cruel, was an aggravator that was not going to be argued to the jury (R. 1163-64). This was becauae the parties and the court all agreed it was not present. However, at the subsequent sentencing the judge found thia aggravator present and imposed death in reliance on it. Due to lack of adequate notice, Mr. Hoffman was unable to advance evidence and argument to create a reasonable doubt that this was not an appropriate aggravator. No notice was given by the judge that he would find heinous, atrocious or cruel despite the State's agreement the facts did not establish this aggravator (PC-R2. 116).

Mr. Hoffman challenged the circuit court's action on direct appeal, thie Court erroneouely found no error in the failure to give any notice that this aggravating factor was at issue. However, this lack of notice created "an impermissible risk that the adversary process may have malfunctioned in thie case." Lankford v. Idaho, 111 S. Ct. 1723, 1733 (1991). In Lankford, a death sentence wae reversed becauae the sentencing judge found an aggravating factor justifying death without any notice to the defense that the aggravator was at issue. The Supreme Court held:

> One of the aggravating circumstancee that the trial judge found as a basis for his sentence was that the "murders of the Bravences were especially heinous, atrocious or cruel, and manifested exceptional depravity." App. 156-157. Even if petitioner had been the actual killer, this finding was even more questionable. The point, however, is that petitioner's counsel had no way of knowing that the court was even considering such a finding, and therefore, she did not discuss that possibility at the sentencing hearing. It is unrealietic to assume that the notice provided by the statute and the arraignment survived the State's responee to an order that would have no purpose other than to limit the issues in future proceedings,

Lankford 111 S. Ct. at 1731 (footnote omitted). Lankford is new law which estabiiehes that thie Court erred on direct appeal when it rejected Mr. Hoffman's argument that it violated due process for the trial court to rely on

thie aggravator after ruling that the aggravator would not be considered (Brief on Direct Appeal at 26). Accordingly Rule 3.850 relief is warranted, and a new sentencing must be ordered.

The sentencing process in this case violated Mr. Hoffman's rights including the sixth and eighth amendments and the due process clause of the fourteenth amendment. A resentencing is required.

ARGUMENT IX

THE PROSECUTOR'S CLOSING ARGUMENTS SO INFECTED THE PROCEEDINGS WITH UNFAIRNESS AS TO RENDER THE RESULTING DEATH SENTENCE FUNDAMENTALLY UNRELIABLE *AND* UNFAIR, IN DEROGATION OF MR. HOFFMAN'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, *AND* DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO *DO* ANTHING ABOUT IT.

During hie closing arguments at the guilt-innocence and penalty phases, the proeecutor intentionally misstated facts, testified, manipulated evidence, and bolstered the veracity of the State's witnesses (PC-R2. 64). His statements so infected the proceedings with unfairness as to make the ultimate sentence of death unconstitutional.

At the time of the penalty proceedings, the jury had already convicted Mr. Hoffman of the second degree murder of Linda Sue Parrish. In fact, the prosecutor had essentially argued at the conclusion of the guilt-innocence proceedings that Mr. Hoffman's alleged co-conspirator, James White, actually killed the second victim:

> Now, ladies and gentlemen, I will go back to what I said a moment ago. Principals. If you believe the way the chain of evente happened, that Hoffman did not cut Parrish's throat, I would submit to you he is still equally guilty because he aided, assisted and helped James Robert White slice the girl's throat and kill her. Under the law Judge Haddock will read you, as a conspirator and as a principal he is equally guilty for the actions of his co-defendant, co-conspirator, James White. He helped him, assisted him in subduing the girl.
>
> Remember Dr. Lipkovic's testimony? There was a big bruise on the girl's ear and -- on her ear lobe. Remember that? If fits perfectly, doesn't it, just like Hoffman said it happened? He punched out the girl, hit her to the floor, subdued her. White killed her. Both are equally guilty of first degree murder.

(R. 1060-1061)(emphasis added).

At the penalty phase, however, the prosecutor changed his mind. In order to elicit a recommendation of death from the jury, the prosecutor had to

alter the strategy he had used in his closing argument during the guilt-innocence proceeding. So he argued that Mr. Hoffman, not Mr. White, killed the second victim:

> Linda Sue Parrish wae a young woman in the wrong place at the wrong time. I would submit to you the evidence showed, number one, that Barry Hoffman told Rocco Marshall that she begged for her Life; that she promised not to tell anyone. He said, "Sure, baby," but hit her, knocked her down and either he killed her or he helped kill her. The evidence is contradictory there. Regardless of what he did, whether he was the actual man who cut her throat, as he bragged he was to Rocco Marshall, or whether, as he told Special Agent Lukepas, "I just knocked her down and James White did the actual murdering," -- regardleea, he participated in that murder. I would submit to you from the evidence that you saw what kind of person he is; the way he butchered Frank Ihlenfeld. I would eubmit to you it's more likely that he was the man who actuallv killed Linda Sue Parrish bv cutting her throat. Regardless, he assisted, aided and abetted in that murder of Linda Sue Parrish, and I would submit to you the evidence shows the reason it was done was to cover up the murder of Mr. Ihlenfeld, to prevent her from being a witness. Not only hae he committed a capital crime, but in the same transaction he committed murder in the eecond degree, another murder. That's one aggravating circumstance.

(R. 1184-1185)(emphasis added).

Once the prosecutor had "established" with the jury that the degree of Mr. Hoffman's involvement in the death of the second victim was again an issue for their consideration, he focused the rest of his rentencing argument on aggravating factors (statutory and nonstatutorv) relating to her death, not the death of the victim for which Mr. Hoffman was subject to a capital sentencing proceeding. He therefore made repeated references to the manner by which she died, why she died, and how scared she wae when she died (PC-R2. 66). In fact, the prosecutor referred to the second victim twenty-four times during his sentencing argument (R. 1181-1191).

In addition to the prosecutor's impermissible references to the second victim, he also argued "facts" to the jury which were not in evidence from Mr. Hoffman's trial, and which were intended to undermine mitigation. In his comments, he mentioned Mr. Hoffman's alleged co-conspirator, James White. About White, the prosecutor stated the following:

> James Robert White, was a fairly immature, relatively uneducated 18-year-old black kid who fell under the domination of two would-be bigshots, Leonard Mazzara and Barry Hoffman.

(R. 1188).

> James Robert White, as I described a few minutes ago, was an 18-year-old, uneducated black kid at the time this happened. He does not share the same spotlight as Barry Hoffman.

(R. 1189).

Except for the fact that Mr. White, Mr. Hoffman's alleged co-conspirator was black, none of the information that the prosecutor provided about Mr. White is in the record. Indeed, much of it had no factual basis at all. The prosecutor argued (and slanted) "facts" which *were* outside the record, never subjected to defense cross-examination, and thua could not be challenged as inaccurate and mieleading. In sentencing Mr. Hoffman to death, the trial court downplayed one of Mr. Hoffman's mitigating factors (that Mr. White and Mr. Mazzara, both codefendants, received sentences of life imprisonment) because of Mr. White's "extreme youth" (R. 1233). In the trial court's written findings eupporting sentence, the trial court noted Mr. White "was extremely young, had little criminal record, and took a secondary role in the murders" (R. 135). Counsel's failure to object was deficient performance which prejudiced Mr. Hoffman.

During the pretrial conference, the judge and counsel had agreed that certain aggravating circumstances did not apply to thie sentencing proceeding (PC-R2. 67). The proeecutor, however, did a complete turnabout, and disavowed the agreement once he appeared before the sentencing jury. Pretrial, all agreed that the aggravating factor, Fla. Stat. sec. 921.141 (5)(e), did not apply to Mr. Hoffman (R. 1160). The judge had interpreted that provision as meaning that "witness-elimination" cwnatituted an aggravating factor, but that it was inapplicable here because the capital felony was committed first and could not be to eliminate a witness. Linda Sue Parrish's subsequent death was a noncapital felony and not relevant to this aggravating factor. The proaecutor argued it anyway:

> I would submit to you it's more likely that he was the man who actually killed Linda Sue Parrish by cutting her throat. Regardlesr, he assisted, aided and abetted in that murder of Linda Sue Parriah, and I would submit to you the evidence shows the reason it was done was to cover up the murder of Mr. Ihlenfeld, to prevent her from being a witness.

(R. 1185).

> That woman's life was snuffed out for the mere simple purpose to keep her mouth shut so she couldn't go to the police. She couldn't identify Hoffman and White. As the old story of the late show goes, dead pigeons don't talk.

(R. 1189).

> . . . the legislature and Courts have determined that certain murdere are worse than others. We don't think it makes any difference to the deceased, but to society certain murders are worse than others. In certain cases society has a riaht to extract from -- from the perpetrators of these. the especially heinous murderers, the ultimate penalty.

(R. 1190)(emphasis supplied).

During his guilt phase closing, the prosecutor also improperly vouched for the truthfulnees of hie witnesses:

> I guess the inference is that these men have come in here and not told you the truth. The inference is that three men like Poleski, a 55 or 56-year-old lawyer from Michigan with nothing to do with this case, he is retired from the FBI and now does approximately what I do in Michigan, Mr. Lukepas, a middle-aged man, and Mr. Dorn would sacrifice their careers and take a chance on lying in court for this? For Barry Hoffman? They are going to throw their jobs away and commit perjury and conspire to commit perjury with Rocco Marshall €or this? Use your good common sense. Who does he think he is that he is that important that these men would risk not only their reputations but risk perjury to convict Barry Hoffman? Use your good common eense. You know, it's a little eaay for -- like Mr. Harris said, -- did Lukepaa come in here and lie? Did Poleski come in here and lie? Did Dorn come in here and lie? And if you think the State of Florida put on a retired FBI agent and now Prosecutor in Michigan, and put on an agent of the federal government, United States Department of Justice, and a Jacksonville Beach detective and had them lie to you, you let Barry Hoffman out of this courtroom in one hour. Right now if you want to. Because if that's what you think the State of Florida did, go right ahead and let Barry Hoffman walk out on the street this afternoon. Ladies and gentlemen, Barrv Louis Hoffman is certainlv not worth thoae gentlemen's reputations and those gentlement's libertv. I wonder who Hoffman thinks he is that he is that important.

(R. 1098-99)(emphasis added).

He further stated:

> Mr. Poleski, a 25-year retired FBI agent, a lawyer since the '50s, now an Assistant District Attorney, Mr. Lukepas, an FBI agent, ten years experience, a thousand miles away, it's not their case, -- Mr. Roy Dorn, a ten-year detective with the Jacksonville Beach Police Department, that's your choice. You can believe those people. Rocco Marshall, totally corroborated by Poleski, Lukepas and Dorn, or you can believe the testimony of Barry Hoffman, a man who, I would submit to you, by his own admieeion is a drug dealer, drug courier, a man who I would submit to you is a contract murderer. The choice is yours. Guilty or not guilty.

(R. 1109).

It is certainly improper for the prosecutor to boleter the credibility of his own witnesses as was done here. But the prosecutor's improper argument also included his own testimony as to why the State offered immunity to one witness:

> Let's first of all talk about Rocco Marahall. I told you on Monday that immunity is a very eensitive subject. Believe me, it givee the State of Florida no enjoyment whataoever to give someone immunity, to let someone involved in crime go free. In fact, it makea me sick to my stomach. But, ladies and gentlemen, the only person named in that conspiracy is not the man seated behind me. And the State of Florida is not obseesed with Barry Louis Hoffman. There are other people to consider. Remember the situation, ladies and gentlemen, what Dorn said about the arrest of Leonard Mazzara? He didn't give a statement. And who knew about this conspiracy? James White, a murderer by the testimony today, a backup murderer at that, but a murderer nonetheless. Barry Louis Hoffman; the number one murderer who wanted a backup. A man, a middleman, who went out and found these people and the man who hatched the plot, Leonard Mazzara. Now, thoee people -- those are your witnesses. If you have got to deal with somebody, use your good common sense, who was the State of Florida going to deal with? Well, do you want us to give immunity to Lennie Mazzara, the man who conjured up this plot to assassinate two people? Do you want James Robert White to get immunity, a backup murderer, at least the backup murderer who kicked Frank Ihlsnfeld and who probably cut the throat, if not assisted in cutting the throat of Linda Sue Parrish? Or do you want Barry Louis Hoffman to walk out of hie courtroom?
>
> Rocco Marshall is no angel. Ladies and gentlemen, the State of Florida would gladly trade Rocco Marshall and a hundred more like him for two actual murderers and the man who hatched the plot. It's not a nice decision to make. But this is sometimes not a nice business. And consider and evaluate the State's actions, what our alternative were. Is that what you want on the atreet of your city with immunity?

(R. 1095-1097). This was not argument based on the evidence presented: it was the State's testimony of why it purportedly made certain decisions. This was clearly improper closing argument.[5] However, counsel failed to object to

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[5] In United States v. Young, 470 U.S. 1, 18-19 (1985), the United States Supreme Court noted that a prosecutor breaches the constitutional guarantee of due process when he implies that he has more information than what is presented to the jury:

> The prosecutor's vouching for the credibility of witnesses and expressing his personal opinion concerning the guilt of the accused poae two dangers: such comments convey the impression that evidence not presented to the jury, but known to the prosecutor, eupporta the charges against the defendant and can thus jeopardize the defendant's right to be tried solely on the

(continued...)

the improper argument. Counsel's performance waa not baaed on strategy or tactic. It was deficient performance which prejudiced Mr. Hoffman.

In the penalty phase argument the prosecutor finally added hie own personal recommendation to the jury:

> I recommend to you, ladies and gentlemen, and I will submit to you that this crime is far and away above your ordinary murder . . . This case is special. This case demands the ultimate penalty.
>
> 1 would humbly request of you ae the attornev for the State to recommend to Judge Haddock that this defendant receive the ultimate penalty. The law and the evidence justify it.

(R. 1191)(emphasis added).

These comments impermissibly injected the prosecutor's personal opinions and testimony into the entire process. See Drake v. Kemp 762 F.2d 1449 (11th Cir. 1985)(en bane). These improper comments certainly were intended to lead the jury to believe that the proeecutor had access to information undisclosed to the jury and thus that he was in a better position to determine whether Mr. Hoffman deserved the death penalty.

Such comments also tend to diminish the jurors' sense of responsibility by signalling them that a higher, more knowledgeable authority -- their State Attorney -- had already decided that Mr. Hoffman deserved death. See Caldwell v. Mississippi, 105 S. Ct. 2633 (1985); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). Arguments such as that described above are also flatly improper because it urges the jury to rely on impermissible factors. See Taylor v. State, 583 So. 2d 323 (Fla. 1991).

Simply put, the prosecutor's arguments at the guilt-innocence and sentencing phases so infected the proceedings as to render the convictions and death eentence fundamentally unfair and unreliable. Defense counsel failed to do anvthing about any of this. He allowed this presentation to go unchecked, interposing no objections. Whether because of ignorance of the law, see Nero

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[5](...continued)
basis of the evidence presented to the jury; and the prosecutor's opinion carries with it the imprimatur of the Government and may induce the jury to truet the government's judgment rather than its own view of the evidence.

v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or indifference, see Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988), counsel's non-performance was deficient. See Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Hie failures to object at all, or to ever aek for a mistrial wae not the result of any conceivable reasonable tactic or atrategy. This is a caee of ineffective assistance of counsel. Rule 3.850 relief is required.

ARGUMENT X

MR. HOFFMAN'S TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE PROCEEDINGS FOR FAILING TO OBJECT TO THE JUDGE'S IMPROPER INSTRUCTION CONCERNING THE PRE-TRIAL STIPULATIONS OF DEFENSE COUNSEL *AND* THE PROSECUTOR; THE JUDGE IMPROPERLY EXHIBITED BIAS CONCERNING THE MITIGATING FACTORS APPLICABLE TO MR. HOFFMAN; AND THE PROSECUTOR FAILED TO HONOR THE STIPULATIONS HE ENTERED INTO, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Prior to the charge conference concerning penalty phaee jury instructions, defense counsel and the prosecutor had agreed and stipulated to two mitigating circumstances -- that Mr. Hoffman had no significant criminal record and that Mr. Hoffman'e co-conspiratore, Leonard Mazzara and James Robert White, had been sentenced to consecutive life sentences (R. 1150). The stipulations agreed to by defense counsel and the prosecutor constituted facts in evidence. They were not facts which could be rebutted or altered.

Deepite the nature of the stipulated-to mitigating circumstances, Mr. Hoffman's defense counsel unreasonably failed to object to the inaccurate and misleading instructions that the judge provided to Mr. Hoffman's sentencing jury and the improper argument given by the prosecutor (PC-R2. 84-85). His failure to do so was not the result of a reasonable tactic or strategy. If defense counsel simply misunderstood the agreements between the prosecutor and himself, he unreasonably failed to present available, critical evidence to the jury. If he understood them but did nothing to correct the error, his efforts were patently ineffective. The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing has a duty to investigate and prepare available mitigating evidence for the sentencer's eonaideration and to object to improper jury instructions. Cunningham v.

Zant, 928 F.2d 1006 (11th Cir. 1991); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Stevens v. State, 552 So. 2d 1082 (Fla. 1989).

After the judge reconvened the jury for the penalty trial, but before evidence waa submitted, oral argument heard, and jury instructions issued, the judge simply apprised the jury of some "agreements" between counsel and gave a description of their content:

> There is a practice in the law which is called stipulation. A stipulation is where both sides in the case agree on certain facts or factors or issues and rather than go through the more formal process of preaenting thoee factors to you through teetimony, they have aareed bv stipulation that those factors will just be told to YOU and you can accept them as havina been presented to you as if they came from the witness stand with the aareement of both parties that those factors may be considered bv you.
>
> There is a stipulation in this case that goee to your advisory verdict.
>
> The first of these is that the defendant, Barry Hoffman, has no significant criminal history.
>
> The second stipulated item that the co-conspirators, Leonard Mazzara and James Robert White, were each sentenced to two consecutive life sentences for the murder of Frank Ihlenfeld -- for the murdere of Frank Ihlenfeld and Linda Sue Parrish.
>
> Those two items have been stipulated into evidence by Counsel for both sides. You may consider them just as if thev had come from the witness stand.

(R. 1178-1179)(emphasis added).

First, by making the announcement when he did in the proceeding8 and failing to repeat it prior to deliberation, the judge virtually ensured that the jury would not understand, even remotely, the impact of the defense/prosecutor agreements. Defense counsel did nothing about this. Second, the judge compounded the error when he issued the final sentencing instructions because he failed to direct that the two mitigating circumstances conetituted facts that the jury must, not may, coneider in their sentencing deliberation:

> Should you find sufficient aggravating circumstancee do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

Among the mitigating circumstances you may coneider, if established by the evidence, are:

That Barry Hoffman has no significant history of prior criminal activity.

Secondly, you *may* consider any other aspect of the defendant's character or record and any other circumstance of the offense.

You may consider the sentences imposed upon the co-conspirators under this provieion.

(R. 1197)(emphasis added). The jury was never directed by the judge to find that two mitigating circumstances existed, and that the proeecutor, himself, had agreed that they did. Not one word of the penalty phaae jury instructions, which the judge intended to give before learning of the stipulations, was altered to incorporate them.

Defense counsel's omissions -- his failures to insist that the jury be properly instructed concerning the effect of the agreed-to mitigating circumstances and his failures to interpose any objection or instruction request -- denied Mr. Hoffman a constitutionally adequate capital sentencing proceeding. The judge failed to instruct the jury that two mitigating circumstances existed as stipulated. Counsel's failure to know the law and to object to the jury instructions constituted ineffective assistance of counsel. See Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). The prejudice is obvious. Mr. Hoffman's death sentence was imposed in violation of the sixth, eighth and fourteenth amendments.

The judge did not accept those two mitigating factors, even though they had been stipulated to by the prosecution. The judge questioned, at the charge conference, whether Mr. Hoffman really lacked any significant criminal history. When the judge pronounced the sentence of death, he announced:

The Court does find that there are some mitigating circumstances in this case.

The Court finds that Mr. Hoffman has no significant history of conviction of prior criminal activity. However, the Court has to balance this finding against the fact that Mr. Hoffman took the witness stand in this case and under oath admitted to making his living part-time or full-time before and after this murder by the selling of druas in this city. So, while I find he has no significant history of conviction, I cannot wicture him as a person who prior to this killing did not commit any other crimes

because by his own admission he did. However, I do find no significant history of conviction of prior criminal activity.

(R. 1232-1233).

The judge then repeated the following in his written findings:

(a) The Defendant has no significant history of conviction of prior criminal activity. However, the Defendant did take the witness stand and admit to making his living in whole or in part by selling drugs both before and after the murder.

(R. 135).

The judge's departure from hie role as an impartial, unbiased reviewer of the evidence, as presented, wae constitutionally impermissible. See Zeigler v. State, 452 So. 2d 537 (Fla. 1984). In addition, this same judge has twice summarily denied Mr. Hoffman's colorable claims under Rule 3.850. Where couneel for the parties have entered into a stipulation for purpoeee of establishing the exietence of certain facts during the sentencing proceeding, it is fundamentally unfair and a violation of the sixth, eighth, and fourteenth amendments for the judge to refuse to honor that stipulation by neglecting to instruct the jury properly and by refusing to fully consider it himself.

Defenee counsel remained silent at each and every juncture of the judge's improper, and Constitutionally defective, treatment of critically important mitigating evidence to which everyone had agreed to enter by stipulation (R. 1150-1155, 1178- 1179, 1232-1233). The facts accepted as mitigation were barely even presented to the jury, the jury was effectively precluded from giving them proper consideration, and the judge explicitly refused to do so. Defense counsel's silence was not the result of reasoned strategy and tactic, and unconstitutionally affected the jury's proper consideration of mitigating evidence.

The proeecutor introduced no evidence during the penalty proceeding. In conference, however, he had stipulated to disparate treatment as a mitigating factor pursuant to what is now Fla. Stat. 921.141(a)(h):

THE COURT: What is the second one?

MR. OBRINGER: That the co-conspirators, Leonard Mazzara and James White, were sentenced to consecutive life sentences.

(R. 1152).

Just minutes after entering into this agreement during this conference, however, Mr. Obringer, the prosecutor, reneged. He urged the jury to find only one mitigating factor:

> Judge Haddock will very shortly instruct you on what those aggravating and mitigating circumstances are. Basically, as the attorney for the State of Florida. I am here to argue to you and explain to you through my argument how the aggravating circumstances fit this case, and, second of all, how there is a lack of mitigating circumstances.
>
> We have stipulated or agree that Mr. Hoffman haa no significant criminal history. That is one mitigating circumstance. I believe I will ehow you in the next few minutes there are at least three aggravating cireumatances, which I would eubmit to you outweigh that one mitigating circumstance.

(R. 1182).

> Let's talk about the mitigating circumstances. You are going to hear from Judge Haddock that the defendant has no significant history of prior criminal activity. That's one.
>
> I would submit to you vou will find no other mitigating circumstance.
>
> Judge Haddock is going to tell you that you can consider as a mitigating circumstance the sentences imposed on the other persons, that is, the backup man, James Robert White, and Leonard Mazzara, the man who paid the money. Ladies and gentlemen, I would submit to you that the aggravating circumstances fit Barry Hoffman . . .

(R. 1187)(emphasis added).

The defense had no notice that these stipulations would not be adhered to. Had theae facts not been agreed to in advance, presumably counsel would have prepared and advanced arguments that addressed the circumstances. Notice of issues to be resolved by the advereary process is a fundamental characterietic of fair procedure. Lack of adequate notice creates an impermissible risk that the adversary process may have malfunctioned. Lankford v. Idaho, 111 S. Ct. 1723 (1991).

Thue, by the time that defense counsel began his closing argument to the rentencing jury, the judge had already provided misleading instructions to the jury about the effect of both stipulations (R. 1178-79) and he had just listened to the prosecutor argue againrt the application of the second stipulation. But defense counsel never once raised an objection, never asked

€or a mistrial and never eought to enforce the stipulation. Couneel'e inaction was deficient performance, and Mr. Hoffman waa prejudiced.

The prosecutor's argument deprived defenae counsel of the benefit of the stipulation concerning the status of the co-conspiratore. This stipulated insruetion was critical to the issue of whether Mr. Hoffman livea or dies. A life sentence may be baaed on disparate treatment of the co-perpetrators. Dolinsky v. State, 576 So. 2d 271, 274 (Fla. 1991); Fuente v. State, 549 So. 2d 625, 658 (Fla. 1989); Pentecost v. State, 545 So. 2d 861, 863 (Fla. 1989); O'Callaghan v. Dugger, 542 So. 2d 1324, 1326 (Fla. 1989); Downs v. Duauer, 514 So. 2d 1069, 1972 (Fla. 1987).

Also, counsel unreaeonably failed to investigate this issue adequately which, because of closing argument by the prosecutor, became critical to the determination of whether Mr. Hoffman would live or die. The prosecutor argued that Mr. Hoffman deserved death, in spite of the status of alleged co-conspirator James White because:

> [h]e was a backup man. James Robert White was a fairly immature, relatively uneducated 18-year-old black kid who fell under the domination of two would-be bigshots, Leonard Mazzara and Barry Hoffman. Unfortunately, he got under these people's influence and did a very horrible thing. That kid is 18 years old. The testimony ehowed Barry Hoffman is 35 years old.

(R. 1188). (Ae noted previously, the majority of these comments are not founded on any evidence.)

What the jury never knew, because trial counsel never presented it, was that alleged co-conepirator Mr. White wae convicted and adjudged guilty of capital murder in the first degree for both victims as well as conspiracy to commit murder in the first degree (PC-R1. 152-53). By contrast, Mr. Hoffman's jury had only found him guilty of one count of first degree murder and one count of second degree murder (R. 1191-1195). There can be no tactical or strategy reason for the failure to present this evidence. Only if adequate investigation has been conducted may counsel make a reasonable tactical decision. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc).

Defense counsel's unreasonable omission wae highly prejudicial because his own argument to the jury was that the ultimate issue for their

conaideration was the fairneee of sentencing Mr. Hoffman to death when his alleged co-conepiratore had received life:

> In mitigation, you heard Mr. Hoffman on the stand. I can tell you until about a month after the killing he was just a normal guy. I think by your verdict you have indicated that you don't believe that entirely, but I think you do believe that up until just prior to the killing he wae a normal guy like everybody else. For 35 years he has lived a productive life. If he did these things it waa only because he got eide-tracked there, like getting involved in the drug world. But if he is in prison for the rest of his life there will be no possibility of something like this happening again. But I think the ultimate thing you need to consider here is just the fairness aspect of it. It's just not fair for Rocco Marshall to go free, and €or Leonard Mazzara to serve a life sentence, and for James White to serve a life sentence. and for Barry Hoffman to go to the electric chair. It is not necessary and it is not right under the circumstances of this case for the State of Florida to take Barry Hoffman's life. The life sentence, with a provision that he be imprisoned for a minimum of 25 years without possibility of parole, would adequately protect the citizens of the State of Florida, and it will abundantly punish Barry Hoffman. Nothing that you do or nothing the Judge can do or nothing the State of Florida can do can bring Frank fhlenfeld and Linda Sue Parrish. And the law does not demand retribution against Barry Hoffman. The law should be applied equally to all.
>
> Considering all these aspects, you must recommend to Judge Haddock that he impose a sentence of life imprisonment.
>
> Thank you.

(R. 1194-1195)(emphasis supplied).

For the reasons described above, Mr. Hoffman was sentenced to death in violation of the sixth, eighth and fourteenth amendments. Counsel's deficiencies were prejudicial and were not reaaonable. Whether due to ignorance, lack of investigation, lack of preparation, or lack of care, a full evidentiary hearing conforming to Rule 3.850 is required in order for this claim of ineffective assistance of counsel to be properly resolved, ae this Court ordered in Hoffman v. State, 571 So. 2d 449 (Fla. 1990).

ARGUMENT XI

THE JURY INSTRUCTIONS REGARDING THE COLD, CALCULATED, *AND* PREMEDITATED AUURAVATING CIRCUMSTANCE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Hoffman challenged this application of this aggravating factor on direct appeal. This Court did not then have the benefit of Rogers v. State, 511 So. 2d 526 (Fla. 1987) or Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

The decision in Rogers established an overbroad application of the cold, calculated, and premeditated aggravating cireumetance occurred there. Yet, this Court failed to apply that decision to Mr. Hoffman. The decision in Maynard applies to overbroad applications of aggravating circumstancee and holds them to be violative of the eighth amendment. As the record in its totality reflects, the sentencing jury never applied the limiting construction of the cold, calculated and premeditated aggravating circumstance as required by Rogers and Mavnard v. Cartwright. Because Mr. Hoffman wae sentenced to death baaed on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the proper definitions, Mr. Hoffman's sentence violated the eighth and fourteenth amendments. The jury waa not advised that "heightened" premeditation was required. Certainly without such an instruction the jury did not properly Construe the statutory language and underetand the obvious legislative intent as explained in Rogers.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630 (Fla. 1989). In fact, Mr. Hoffman's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating cireumatances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Hoffman's jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted €or the jury's eoneideration. Its discretion was not channeled and limited in conformity with Cartwriaht. Moreover, at the time of Mr. Hoffman's trial and appeal, Hitchcock v. Dugger, 481 U.S. 393 (1987) was not yet the law requiring Florida jury instructions which conformed to eighth amendment principles. This was a change in law which warrants consideration of this issue in Rule 3.850 proceedings.

ARGUMENT XII

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

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

Throughout Mr. Hoffman's trial, the court and prosecutor frequently made statements about the difference between the jurors' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phase (R. 1294-95, 307-08, 396, 411, 1124, 1125, 1177, 1195). The judge emphatically told the jury that the decision a8 to punishment was his alone. The judge was not alone in instructing the jurors that they shouldered no responsibility for determining whether Mr. Hoffman lived or died. The prosecutor, following the judge's lead, assured the jurors from the very outset that their sentencing decision would be of little import. This inaccurate statement of the law was reiterated by both the prosecutor and the judge at the close of the guilt/innocence phase of the trial and during the penalty phaae.

Couneel's failure to object to the adequacy of the jury's instructions and the impropriety of prosecutor's comments was deficient performance arising from counsel's ignorance of the law. Harrison v. Jones, 880 F. 2d 1279 (11th cir. 1989). The intimation that a capital sentencing judge haa the sole responsibility for the imposition of sentence, or is in any way free to impose

whatever eentence they see fit, irrespective of the sentencing jury'a own decision, is inaccurate, and is a miastatement of the law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reaeonable parson could differ." Tedder v State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Hoffman's jury, however, was led to believe that its determination meant very little. Under Hitchcock, the sentencer wae erroneously instructed. Counsel's failure to object prejudiced Mr. Hoffman.

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

ARGUMENT XIII

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

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward etandard was never applied at the penalty phase of Mr. Hoffman's capital proceedinge. To the contrary, the burden waa shifted to Mr. Hoffman on the question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Hoffman's

jury was unconetitutionally instructed, as the record makes abundantly clear (See R. 1178, 1195-96).

The judge charged the jury that in order to justify the imposition of the death penalty, they muet determine that any mitigating circumstances outweigh aggravating circumstances (R. 1195-96). Under Hitchcock, Florida juries must be instructed in accord with eighth amendment principles. This error undermined the reliability of the jury's sentencing determination. For each of the reasons discussed above the Court muet vacate Mr. Hoffman's unconetitutional aentence of death.

CONCLUSION

On the basis of the arguments presented herein, Mr. Hoffman respectfully submits that he is entitled to an evidentiary hearing, a new trial, and a resentencing. Mr. Hoffman respectfully urger that this Honorable Court remand to the circuit court for such an evidentiary hearing, order a new judge assigned, and set aside hie unconetitutional conviction and death aentence.

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 January 3, 1992.

LARRY HELM SPALDING
Capital Collateral Repreeentative
Florida Bar No. 0125540

M. ELIZABETH WELLS
Assistant CCR
Florida Bar No. 0866067

JOHN S. SOMMER
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Florida Bar No. 0862126

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

By: _____
Counsel for Defendant

Copies furniehed to:

Carolyn Snurkowski
Assistant Attorney General
Department of Legal Affairs
111-29 North Magnolia Drive
Tallahassee, FL 32301

APPENDIX A

CCR
State of Florida

1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376
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(FAX) (904) 487-1682
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Larry Helm Spalding
Capital Collateral Representative

March 25, 1991

Laura L. Starrett, ASA
Office of the State Attorney
500 DuVal County Courthouse
330 East Bay Street
Jacksonville, Florida 32202-2919

RE: Barry Louis Hoffman

Dear Ms. Starrett:

The Office of Capital Collateral Representative currently represents Barry Hoffman in post-conviction matters. Pursuant to the Order dated December 13, 1990, Case Nos. 73,757 and 74,790, Florida Supreme Court, we are again formally requesting access to public records pursuant to Section 119.01 et seq., Florida Statutes (1985).

In our request dated December 17, 1990, the Office of Capital Collateral Representative specifically requested access to any and all files relating to Barry Hoffman and to the crime for which Mr. Hoffman was convicted. We asked for:

> Information with regard to other suspects or potential suspects, including, but not limited to any documents concerning James Provost, Leonard Mazzara, Maurice "Bubba" Jackson, George Rocco Marshall, Wayne Merrill, Junior Jordan, Leon McCumbers, Clarence Eugene Robinson, Chris Steve Sprinkle, Robert Alton, Donnie Provost or Keith William Hode.

And,

> Request files of any detectives or other officers who participated in the investigation and prosecution of this case or any related cases.

Other case numbers we have gleaned from your files that are directly related to the homicides of Linda Parrish and Frank

Inlenfeld are: James Robert White, case nos. 81-5903 and 82-2527; Leonard Mazzara, case nos. 81-8666 and 82-2527; and George (Rocco) Marshall, originally charged and given complete immunity for his cooperation with the state attorney's office. As of this date, we have not received the case files in case nos. 81-5903 and 81-8666. We have also not received complete transcripts of the wire intercept file.

We request any and all files relating to this double homicide. As you are aware, we are under a time deadline and we would appreciate your immediate attention to this matter. Please contact my investigator, Gary A. Hendrix, upon receipt of this request to make arrangements to pick up the files.

Thank you for your attention and assistance with this matter.

Sincerely,

Martin J. McClain
Chief Assistant CCR

APPENDIX B

State Attorney

FOURTH JUDICIAL CIRCUIT OF FLORIDA
DUVAL COUNTY COURTHOUSE
JACKSONVILLE, FLORIDA 32202-2982

ED AUSTIN
STATE ATTORNEY

AAEA CODE 904
630-2400

April 9, 1991

BY FEDERAL EXPRES

Mr. Martin J. McClain
Capital Collateral Representative
1533 South Monroe Street
Tallahassee, FL 32301

Dear Mr. McClain:

Pursuant to your letter of March 25, 1991, I have made available the files in Case No. 81-5903 and 82-2527 (James Robert White) and Case No. 81-8666 (Leonard Mazzora). Gary Hendrix came to my office on April 2, 1991, and indicated what documents he wanted copied. These copies are available to be picked up immediately.

It is our position that the wire intercept file that you have requested does not fall under the Public Records Act. The authority we rely on is Section 934.09(7)(c), Florida Statutes.

Very truly yours,

Laura L. Starrett

Laura L. Starrett
Assistant Stare Attorney

LLS/pr

CC: Carolyn Snurkowski, Attorney General's Office