IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,907

LEO ALEXANDER JONES,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

SUMMARY INITIAL BRIEF ON APPELLANT'S APPEAL FROM THE DENIAL OF HIS MOTION FOR FLA. R. CRIM. P. 3.850 RELIEF AND IN SUPPORT OF APPELLANT'S APPLICATION FOR STAY OF EXECUTION

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PRELIMINARY STATEMENT

This case is before the Honorable Court on the appeal of the circuit court's denial of Rule 3.850 relief and the underlying applications for a stay of execution and an evidentiary hearing. On Tuesday, November 12, 1991, this Court issued a temporary of Mr. Jones' execution, effective until noon, Friday, November 15, 1991. The Court scheduled oral argument for 10:00 a.m., Thursday, November 14, 1991, and requested counsel to provide briefs by noon, Wednesday, November 13, 1991. Given the time constraints involved in this action, Mr. Jones' counsel cannot provide this Court with a professionally proper brief. This brief therefore presents a summary of the reasons why the circuit court's denial of Rule 3.850 relief, a stay of execution and an evidentiary hearing was improper. Mr. Jones requests and urges that this Court enter a stay of execution, and grant an evidentiary hearing.

Citations in this brief designate references to the records, followed by the appropriate page number, as follows: "R. ___" -- Record on Direct Appeal to this Court; "PC-R. ___" -- Record on Appeal from denial of the 1986 Motion to Vacate Judgment and Sentence; "H. ___" -- Transcript of hearing conducted in the circuit court on November 10, 1991; "App. ___" -- Appendix to Rule 3.850 motion. All other citations will be self-explanatory or will otherwise be explained.

INTRODUCTION

Mr. Jones is innocent of the offense for which he was convicted and sentenced to death. The circuit court refused to hear the evidence, summarily denying Mr. Jones' Rule 3.850 motion without permitting an evidentiary hearing. The evidence is summarized in this Introduction, and will be related to Mr. Jones' claims for relief in the discussion of the individual issues presented below.

Leo Jones is innocent of the offense for which he awaits execution. The murder was committed by another man, Mr. Glen Schofield who, in the years since Mr. Jones' conviction and death sentence, has bragged to numerous people that he shot and killed Officer Szafranski and that Leo Jones is on death row for something he did not do. Mr. Schofield's confessions are consistent with evidence uncovered at the time of trial, and with evidence which has only since been uncovered.

This evidence when viewed cumulatively presents a compelling case of innocence. By the State's own admission, the evidence if presented to a jury would "create a debatable question" (H. 59). Despite this admission, the State argues, and convinced the circuit court to rule, that Mr. Jones should be executed without a full and fair opportunity to investigate, develop and evaluate this evidence at a full and fair evidentiary hearing.

Mr. Jones was convicted and sentenced to death for the May 23, 1981, murder of Jacksonville police officer Thomas Szafranski. The murder occurred in Jacksonville at the

intersection of 6th and Davis Streets at about 1:00 a.m. Officer Szafranski was driving the third car of a trio of police cars and was shot as he was about to turn from 6th Street onto Davis Street going north, following the other two police cars which had already turned north onto Davis. After he was shot, Officer Szafranski's car came to a stop partially in the 6th and Davis intersection (See App. 20).

Immediately after the shooting, numerous police cars converged on the scene. No one had witnessed the actual shooting. Some witnesses indicated the shots had come from the area of a vacant lot which was on the east side of Davis, directly in front of 6th Street (App. 19); others said the shots had come from a downstairs apartment of an apartment building on the east side of Davis, south of the vacant lot (App. 19).

Attention focused on the apartment building, which police began searching. In an upstairs apartment, police found Mr. Jones and Mr. Bobby Hammond, who were taken into custody and transported to the police department. After hours of interrogation, beatings, and coercion, Mr. Hammond told police that he had seen Mr. Jones leave the apartment with a gun, heard a shot, and then seen Mr. Jones return to the apartment with a gun. Mr. Hammond also told police that a man named Glen Schofield had been in the apartment that night (App. 13). Mr. Hammond was released immediately after giving these statements.

Also after hours of interrogation, beatings, and coercion, Mr. Jones signed a statement written by Detective Eason,

admitting involvement in the shooting. Mr. Jones was charged with murder, and ultimately tried, convicted, and sentenced to death.

The only evidence against Mr. Jones at trial was his presence in the Davis Street apartment, the presence of guns in his apartment, Bobby Hammond's coerced statement, which he retracted several times, and Mr. Jones' supposed statement, which he also retracted. The State's theory at trial was that Mr. Jones had come down from his apartment to a vacant apartment on the ground floor, fired the shots from a window of the vacant apartment, and then immediately run back upstairs to his apartment. Tests on the bullet recovered from the scene proved inconclusive in terms of linking the bullet to any of the rifles seized from Mr. Jones' apartment (R. 1048). Mr. Jones testified that the guns in the apartment belonged to Glen Schofield (R. 1214). Other evidence indicated that Mr. Jones had not committed the offense. For example, police performed a neutron activation test on Mr. Jones' hands, checking for the presence of gunpowder residue which would indicate he had recently fired a gun. The test was negative (R. 1074-75). A witness, Early Gaines, who lived in a nearby apartment told police:

> Sometime after midnight tonight I was laying in my bed when I heard two gunshots just outside my window. Right after that I heard someone shuffling around in that same area like someone was running or moving fast. The next thing I knew a lot of police cars were outside.

(App. 14). Notes from police files indicate that Mr. Gaines "heard someone running down alley right after shooting" (App. 14).

Police considered Mr. Schofield to be a suspect in Officer Szafranski's murder early on in their investigation. Police notes indicate that Mr. Schofield was listed as a suspect in the case (App. 15). Police reports reflect that during interrogation approximately nine hours after the offense, Bobby Hammond informed Detective Eason that Glen Schofield had been in Mr. Jones' apartment on the evening of the offense (App. 13). The next day, May 24, Detective Eason began attempting to locate Mr. Schofield (Apps. 12, 13). He summarized these activities in this report as follows:

> The writer ran a N.C.I.C. Check on the <u>subject</u> Glen Schofield on 5-25-81 and found that he was wanted for Violation of Probation. The writer obtain photographs of the <u>suspect</u> and had a Police Bulletin with the description of the <u>suspect</u> and information in regards to this writer wanting to talk with the <u>suspect</u> concerning the shooting of Officer Szafranski distributed throughout the Sheriff's Office and through the State of Florida.

(App. 13) (emphasis added). All of this was done by Detective Eason after he allegedly obtained a confession from Mr. Jones -- a confession which did not implicate Mr. Schofield. Why?

On June 2, Detective Eason learned that Mr. Schofield was being held in the St. Johns County Jail and went to interview him (App. 13). Mr. Schofield admitted he had been at Mr. Jones'

apartment the night of the offense, but denied involvement in the shooting (App. 13).

On June 3, Detective Eason, accompanied by Detective Moneyhun, interviewed Mr. Schofield again (App. 13). Mr. Schofield provided the same information regarding the night of the shooting, but also told the detectives that his girlfriend's name was Patricia Ferrell and provided three phone numbers where Ms. Ferrell might be reached "in case [the detectives] needed her in the investigation" (App. 13). After Detective Eason informed Assistant State Attorney Ralph Green about the interviews with Mr. Schofield, Mr. Green asked that a sworn statement be taken from Mr. Schofield (App. 13). When asked to give a sworn statement concerning his prior statements about the murder, Mr. Schofield, on advice of counsel, refused to give a sworn statement.

Mr. Schofield was important enough to the State to be subpoenaed to appear before the grand jury. A praecipe for the subpoena, bearing Mr. Jones' case number, and the subpoena are in the State's files (App. 16). Mr. Schofield's significance is also reflected by the fact that he was listed as a witness by both the State and the defense (Apps. 17, 18).

Other significant evidence was not heard at Mr. Jones' trial. Bobby Hammonds testified in a pretrial deposition and at the motion to suppress hearing that he and Mr. Jones had been severely beaten after their arrest and that he had made statements implicating Mr. Jones only to get the police to stop

beating him (See R. 354-72). Mr. Hammonds' brother confirms that when he saw Mr. Hammonds the day of the arrest, Mr. Hammonds had been badly beaten (App. 11). Mr. Jones' mother and an assistant public defender who saw Mr. Jones the day after his arrest confirm that Mr. Jones also had been badly beaten (Apps. 9, 10). This evidence casts significant doubt on Mr. Hammonds' statements implicating Mr. Jones and on Mr. Jones' "confession."

Mr. Jones' "confession" is also suspect standing alone. The two-sentence statement was written by Detective Eason, not Mr. Jones. The statement is extremely brief, providing only the barest information. It contains no details such as which gun was used or why the officer was shot. Surely, a detective questioning a suspect would want to know these things, and a man truly "confessing" would provide much more than the barest inculpatory information. Indeed, after the statement was taken, the detectives reenacted the way the shooting was supposed to have occurred (App. 13) -- a procedure which could only indicate that the detectives were unsure of the "confession's" reliability.

The detectives were also concerned about another suspect in the shooting. After Bobby Hammonds told police that Glen Schofield was in the apartment earlier that night, police located and interviewed Schofield, who denied involvement in the shooting and gave the name of his girlfriend, Patricia Ferrell, as an alibi (App. 13). The police never interviewed Ms. Ferrell. Ms. Ferrell (now Owens) now states that she was not with Mr.

Schofield during the time in question, but that later Schofield did ask her to provide an alibi for him (App. 1). Ms. Owens also states that Mr. Schofield often complained about the police harassing him and that when she asked him if he had killed Officer Szafranski, he asked her if she thought he would "say something that will put me in prison for the rest of my life" (App. 1).

Witnesses place Mr. Schofield at the scene of Officer Szafranski's murder, carrying a rifle. Linda Atwater was at Mr. Jones' apartment shortly before the shooting. As she left the apartment building, Mr. Schofield passed her running into the building, carrying a rifle and saying, "Them crackers are after me" (App. 2). After Ms. Atwater drove a short distance down the street, she saw the flashing lights of police cars behind her at the intersection near Mr. Jones' apartment building (App. 2). Daniel Cole and Denise Reed were walking down a street near Mr. Jones' apartment building when they heard a shot. Within minutes, they saw Glen Schofield running from the area behind Mr. Jones' apartment building holding a rifle in his hands (Apps. 4, 5).

Glen Schofield has confessed numerous times to numerous people that he killed Officer Szafranski. After being released from prison in 1989, Mr. Schofield bragged about shooting the officer to Patricia Owens (App. 1). In prison in the mid-1980's, Mr. Schofield had confessed to Paul Marr, Frank Pittro, Franklin Prince, and others (Apps. 6, 7, 23). In 1990, apparently while

in jail, he confessed to Michael Richardson (App. 24). Each of these confessions contained details of the offense consistent with the evidence at trial and the information provided by other witnesses. The confessions were made to many different people, at different times and places. All of this -- plus the sheer number of the confessions -- speaks to the probative nature of the confessions.

Despite evidence that both Mr. Hammonds and Mr. Jones received beatings at the hands of the police, and despite reports from both that their statements were given to police upon coercion on the morning after their arrest because of the beatings, Mr. Hammonds ultimately testified at trial that in fact he was telling the truth and that his original statements implicating Mr. Jones were not the result of any coercion. We now know, although defense counsel, the jury, and this Court were not allowed to know, that this was simply not the truth. Since the circuit court hearing, counsel for Mr. Jones has learned:

> 1. I am Donorena Harris, a State of Florida investigator employed by the Office of the Capital Collateral Representative. I am the investigator assigned to the Leo Jones case.
>
> 2. On November 11, 1991, at 11:30 p.m. EST, I interviewed Bobby Hammonds, who currently resides in California. Earlier in the evening, Valerie Hammonds spoke to Bobby Hammonds who provided to her his location and telephone number. Ms. Hammonds is the wife of Arty Hammonds, Bobby's brother and knows Bobby personally. When I called Mr. Hammondss, he told me about his involvement in the Leo Jones case.

3. Mr. Hammonds said that he was asleep in Leo Jones' apartment when he was awakened by several Jacksonville police officers. The police officers beat him about his head and face with the butts of their guns and their flashlights. Mr. Hammonds heard the officers beating Leo Jones.

4. Mr. Hammonds said that after he and Leo Jones were taken to the Jacksonville Police Memorial Building, he was questioned about the murder of a Jacksonville police officer. Mr. Hammonds stated the police officers beat him during the interrogation and told him what his statement should say. Mr. Hammonds said he refused at first. Then, one of the police officers unloaded all of the bullets in his handgun, except one. The officer talked to Hammonds and pulled his trigger at the same time, according to Hammonds. The officer threatened to hurt Hammonds if he refused to provide the information as the police told it to him.

5. Although Hammonds said he knew nothing about the shooting of a Jacksonville police officer, Hammonds said he signed a statement incriminating Leo Jones because he feared for his life. Hammonds said the information in the statement was not true, specifically mentioning that he did not see Mr. Jones with a rifle on that evening.

6. Mr. Hammonds was told that he would be called to testify at Leo Jones' trial. Mr. Hammonds said that he was again beaten by a Jacksonville police officer in Jacksonville prior to the trial.

7. Mr. Hammonds was reluctant to discuss this matter by telephone because he fears the Jacksonville police community. He stated his preference for a face to face interview, at which time, he would provide more information.

8. This interview culminates a three-week search for Mr. Hammonds who has moved frequently, lived in several states over the past ten years and left no forwarding addresses. Mr. Hammonds whereabouts proved so elusive that CCR

> contracted with Global Search Service to assist me in locating Mr. Hammonds. Global was unsuccessful and indicated that Mr. Hammonds was a difficult case.

(Supplemental Emergency Application for Stay of Execution, Attachment 1).[1]

Despite the cumulative effect of this compelling evidence of Mr. Jones' innocence -- and Mr. Schofield's guilt -- the circuit court refused to consider much of the evidence because of procedural bars and rejected some of it on the merits because it "would not conclusively prove that a jury would not have convicted the Defendant." In short, the State and the circuit court below would have Mr. Jones executed because he did not produce this evidence sooner -- evidence which the State conceded "would create a debtatable question" among jurors. Even the circuit court judge speculated "off the record" that this evidence would cause this Court to have to look at the cumulative weight of all this evidence and the numerous confessions to different people at different times. Both the State and the circuit court hide behind procedural niceties in order to avoid dealing with the cumulative effect of this compelling evidence.

Clearly, this evidence indicating that Mr. Schofield committed the offense would have made all the difference to Mr.

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[1]This new evidence clearly warrants a new Rule 3.850 claim premised upon Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). See Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), there this Court granted a stay of execution to a virtually identically situated defendant. However, due to the exigencies of the circumstances, Mr. Jones is dependent upon this Court to grant him the time necessary to gain access to the courts and present this claim.

Jones' defense. Not only would such evidence have created reasonable doubt on its own, but also such evidence would have cast considerable doubt on the key components of the State's case. This evidence cannot be ignored. This evidence presents a colorable showing of factual innocence which demands that a stay of execution be entered and the case be remanded for an evidentiary hearing.

Mr. Jones is entitled to a full, fair, and adequate opportunity to vindicate his constitutional rights pursuant to the post-conviction process established under Rule 3.850. See, e.g., Holland v. State, 503 So. 2d 1250 (Fla. 1987). Florida law, Holland, supra; Fla. R. Crim. P. 3.850, as well as the federal constitution guarantee Mr. Jones that opportunity.[2]

Florida provides a mechanism pursuant to which Mr. Jones may seek to vindicate his rights, see Fla. R. Crim. P. 3.850. The Legislature has provided counsel, see Fla. Stat. sec. 27.701, et. seq. (1985), and thus promised Mr. Jones the effective assistance

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[2]See Michael v. Louisiana, 350 U.S. 91, 93 (1955)(Due Process Clause guarantees defendant "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court."), quoting Parker v. Illinois, 333 U.S. 571, 574 (1948); Case v. Nebraska, 381 U.S. 336, 337 (1965)(Clark, J., concurring)(federal constitution guarantees defendant "adequate corrective [state-court] process for the hearing and determination of [his] claims of violation of federal constitutional guarantees); see also id. at 340-47 and nn.5-6 (Brennan, J., concurring)(same). Florida extended the right to seek Rule 3.850 relief; it must "assure the indigent defendant an adequate opportunity to present his claims fairly." Ross v. Moffitt, 417 U.S. 600, 616 (1974). Having extended the right to seek redress under Rule 3.850, the State must provide a forum, and that forum's consideration of Mr. Jones' claim must comport with due process. Bounds v. Smith, 430 U.S. 817 (1977); Evitts v. Lucey, 469 U.S. 387 (1985).

of an advocate in that process. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988). However, as discussed below, the process will fail in Mr. Jones' case, unless this Court exercises its lawful authority to stay this execution, and to permit him to properly present his claims. Mr. Jones sets forth herein facts which demonstrate "he might be entitled to relief under Rule 3.850," State ex. rel. Russell v. Schaffer, 467 So.2 d 698, 699 (Fla. 1985); therefore a stay of execution is proper to permit consideration of the claims for relief. Mr. Jones can and will show the wrongfulness of his convictions and death sentence if given an adequate opportunity. This Court has the authority, and constitutional duty, to provide it. State v. Crews, 477 So. 2d 984 (Fla. 1985). Due process, equal protection, the sixth amendment, and the eighth amendment's "need for reliability in the determination that death is the appropriate punishment," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), countenance no less. This Court should not allow a human being to be put to his death before his substantial claims of innocence have fully, fairly, and properly been heard, especially when the claims asserted are as substantial as those herein presented.

The right to an "adequate opportunity" to be heard and "adequate corrective process" is not lost simply because this pleading is not Mr. Jones' first application for post-conviction relief, and neither can it be ignored that a stay of execution is warranted on the basis of the nonfrivolous nature of Mr. Jones' claims. See, e.g., Harich v. State, No. 73,930 (Fla.

March 30, 1989)(granting stay of execution to post-conviction litigant whose capital conviction and sentence previously affirmed in Rule 3.850 proceedings); Lightbourne v. Dugger, No. 73,609 (Fla. Jan. 31, 1989)(granting stay of execution to post-conviction litigant whose capital conviction and sentence previously affirmed in Rule 3.850 proceedings); Hall v. State, No. 73,029 (Fla. Sept. 1988)(granting stay of execution to post-conviction litigant whose capital conviction and sentence had been previously affirmed in Rule 3.850 proceedings); Clark v. State, No. 72,303 (Fla. April 1988)(granting stay of execution to post-conviction litigant whose capital conviction and sentence had been previously affirmed in Rule 3.850 proceedings); Johnson v. State, No. 72,231 (Fla. April 1988)(granting stay of execution to post-conviction litigant whose capital conviction and sentence had been previously affirmed during state and federal post-conviction proceedings); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987)(affirming circuit court's grant of stay of execution in case involving successive post-conviction motion and denying State's motion to vacate stay), subsequent history in, State v. Sireci, 536 So. 2d 231 (Fla. 1988)(granting post-conviction relief); State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985)(affirming circuit court's grant of stay of execution to successive post-conviction litigant and denying State's motion to vacate stay because "[t]he State has failed to show an abuse of the trial court's discretion in finding that the files and

records do not conclusively show that the defendant is entitled to no relief . . .").

In Mr. Jones' case, as in Lightbourne and Harich, the "files and records" do not "conclusively" show that he is entitled to "no relief." A stay is proper in order to permit full consideration of his claims. See also Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987)(granting stay of execution and relief to successive post-conviction litigant although identical claim had been rejected earlier by state and federal courts); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987)(granting stay of execution and post-conviction relief to litigant presenting successive post-conviction proceeding); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(same); McCrae v. State, 510 So. 2d 874 (Fla. 1987)(granting relief to post-conviction litigant presenting third motion to vacate pursuant to Rule 3.850).

The facts upon which Mr. Jones' claims are predicated were unknown to Mr. Jones. Trial counsel failed to comply with his constitutionally mandated duty and learn of these facts. Henderson v. Sargeant, 926 F.2d 706 (8th Cir. 1991); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc); Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986). Collateral counsel failed to comply with his statutorily mandated duty and learn of these facts. Spalding v. Dugger. These facts establish Mr. Jones' innocence of the homicide charged. The ends of justice require consideration of these facts now. McCleskey v. Zant, 111 S. Ct. 1454 (1991)(habeas relief appropriate in successor

petition where constitutional violation caused conviction of one who is innocent of the crime). "Fundamental fairness" may override State's interest in finality. Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness." exists. Witt v. State, 387 So. 2d 922, 925 (Fla. 1980).

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

Mr. Jones' allegations, which must be taken as true, Lightbourne v. Dugger, 549 So.2 d 1364 (Fla. 1989), establish that evidence was not presented to the trier of fact which would have had to entertain a reasonable doubt as to guilt. As counsel for the Appellee put it below, the evidence would have created a "debatable question" for the jury (H. 59). A full evidentiary hearing is required, see, e.g., Arango v. State, 437 So. 2d 1099 (Fla. 1983); Demps v. State, 416 So. 2d 808 (Fla. 1982); Smith v. State, 461 So. 2d 1354 (Fla. 1985), for the files and records do

not conclusively show that Mr. Jones is entitled to "no relief" on his claims -- claims which could not earlier have been brought. Sireci, supra.

The interests of justice mandate that a stay of execution be granted and that the claims be fully determined on their merits after full and fair evidentiary development: the constitutional errors herein asserted "precluded the development of true facts" and "perverted the jury's deliberations concerning the ultimate question[s] whether in fact [Leo Jones was guilty of first-degree murder and should have been sentenced to die.]" Smith v. Murray, 477 U.S. 527, 537 (1986) (emphasis in original). Under such circumstances, no procedural bars can be applied, for the ends of justice require that the claims be heard. McCleskey; Moreland; Witt.

Mr. Jones' claims are properly before the Court. A stay of execution and full and fair factual and legal resolution are required.

ARGUMENT I

THE BASES OF THE CIRCUIT COURT'S DENIAL OF ALL OF MR. JONES' CLAIMS WERE ERRONEOUS

The circuit court summarily denied Mr. Jones' Rule 3.850 motion in part on the basis of a procedural bar and in part on the merits. Each basis of the circuit court's denial of a stay of execution, an evidentiary hearing, and Rule 3.850 relief is erroneous. Mr. Jones' Rule 3.850 motion presented meritorious claims demonstrating that he is factually innocent of the offense

for which he awaits execution. These claims require an evidentiary hearing and a stay of execution.

A. THE CIRCUIT COURT ERRED IN APPLYING A PROCEDURAL BAR TO MR. JONES' CLAIMS

This is an extraordinary case. If this were Mr. Jones' first Rule 3.850 motion, there can be no doubt that his execution would be stayed and an evidentiary hearing ordered. Mr. Jones' Rule 3.850 motion presented facts which demonstrate he is factually innocent of the offense for which he was convicted and sentenced to death, and, on the basis of those facts, presented claims premised upon Brady v. Maryland, 373 U.S. 83 (1963), Strickland v. Washington, 466 U.S. 668 (1984), and Richardson v. State, 546 So. 2d 1037 (Fla. 1989). After the circuit court denied relief, additional facts came to light supporting a claim premised upon Giglio v. United States, 405 U.S. 150 (1972)(See Supplemental Emergency Application for Stay of Execution).

These are the types of claims which have been traditionally recognized as properly presented in Rule 3.850 motions and which have been traditionally recognized as requiring an evidentiary hearing for their proper resolution. See, e.g., Squires v. State, 513 So. 2d 138 (Fla. 1987)(allegations of Brady violations require evidentiary hearing); Gorham v. State, 521 So. 2d 1067 (Fla. 1988)(same); Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990)(allegations of ineffective assistance of trial counsel require evidentiary hearing); Mills v. Dugger, 559 So. 2d 578 (Fla. 1990)(same); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990)(newly discovered evidence requires evidentiary hearing);

Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989)(allegations of Brady/Giglio violations require evidentiary hearing). Under this precedent and in light of the extensive non-record facts presented in Mr. Jones' Rule 3.850 motion, Mr. Jones would be entitled to an evidentiary hearing. A Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). The circuit court did not attach to its order any portion of the files or records which conclusively demonstrate Mr. Jones is entitled to no relief, and the Appellee cannot contend that such a conclusive showing could be made.

Clearly, if this were Mr. Jones' first Rule 3.850 motion, a stay of execution and an evidentiary hearing would be required. However, this is Mr. Jones' second Rule 3.850 motion. Thus, despite the extensive and compelling facts presented in the Rule 3.850 motion demonstrating Mr. Jones' factual innocence, the State argued and the circuit court agreed that the claims should be summarily denied on the basis of a procedural bar.

The State made this argument even though agreeing that the facts presented in Mr. Jones' Rule 3.850 motion would have created a "debatable question" for the jury (H. 59). However, the ends of justice require consideration of the facts and claims presented in Mr. Jones' Rule 3.850 motion. McCleskey v. Zant, 111 S. Ct. 1454, 1471 (1991)(habeas relief appropriate in

successor petition where constitutional violation caused conviction of one who is probably innocent of the crime); Kuhlman v. Wilson, 477 U.S. 436, 454 and n. 17 (1986)(ends of justice requires consideration of successor petition where claims are "supplement[ed] . . . with a colorable showing of factual innocence"; "colorable showing of factual innocence" is "a fair probability that . . . the trier of the facts would have entertained a reasonable doubt of [the petitioner's] guilt"). "Fundamental fairness" may override the State's interest in finality. Moreland v. State, 582 So. 2d 618, 619 (Fla. 1991). "The doctrine of finality should be abridged only when a more compelling objective appears, such as ensuring fairness." Witt v. State, 387 So. 2d 922, 925 (Fla. 1980). Such a "compelling objective" clearly exists in Mr. Jones' case -- the case of an innocent man facing imminent execution.

Further, the circuit court did not consider, nor allow evidentiary resolution regarding, Mr. Jones' proffers that collateral counsel, the Office of the Capital Collateral Representative (CCR), has not fulfilled its obligations to Mr. Jones, through no fault of Mr. Jones or CCR (See Rule 3.850 motion, p. 6; H. 44-45). That proffer and the discussion herein demonstrate that procedural bars which the State may assert with regard to some of the claims presented should not be permitted to overcome Mr. Jones' right to be heard. The circumstances involved in the litigation of the prior collateral proceedings were such that no attorney, no matter how knowledgeable could

render reasonably competent assistance. Mr. Jones' former attorneys did not and could not render competent assistance. It is not at all surprising that there were omissions in pleading, investigation, and presentation. No attorney should be required to function under the circumstances with which former counsel had to deal in this case, for no attorney can function effectively under such circumstances.

The circumstances were and are systemic. Hopefully, those sad days will one day be part of a by-gone era in capital litigation in Florida. The recent efforts to correct such circumstances should relegate them to a distant time to be remembered but never allowed to reappear. But those circumstances did directly and adversely affect Leo Jones' case.

United States v. Cronic, 466 U.S. 648 (1984), spoke to circumstances in which no attorney could render effective assistance. Precisely such circumstances affected Mr. Jones' collateral litigation. In Spalding v. Dugger, 526 So.2d 71 (Fla. 1988), this Court noted that capital petitioners in Florida are entitled to the effective post-conviction assistance of counsel. The statute creating the CCR office requires as much. Mr. Jones, however, did not receive the assistance to which he was entitled.

The circumstances surrounding Mr. Jones' prior post-conviction actions were infected by external factors. CCR received Mr. Jones' case under the pressure of an impending execution date at a time when death warrants were outstanding on numerous other CCR clients, necessitating the filing of other

substantial post-conviction pleadings. The litigation of Mr. Jones' federal action after a stay of execution was granted was also impeded by external factors of numerous death warrants in CCR cases and CCR's case overload.

This Court's Committee on Post-Conviction Relief Proceedings in capital cases, chaired by Justice Overton, has recently commented on the problems of litigating capital cases under such circumstances and has made recommendations to deal with such problems (Attachment 1). It has rightly attempted to address the problems arising from circumstances such as those which infected the litigation of Mr. Jones' case, in part, because of concerns that the pressures created by death warrants and overburdened counsel may compromise the fairness of the process and the reliability of the outcome. Yet, Mr. Jones' prior post-conviction actions were litigated under circumstances which were the antithesis of those recommended by the Special Supreme Court Committee.

It is now widely recognized that holding the first round of post-conviction proceedings under the threat of execution, posed by a pending death warrant, is inherently unfair to the person facing the death penalty. For example, the Powell Committee, appointed by Chief Justice Rehnquist and chaired by former Associate Justice Powell, commented:

> Judicial resources are expended as the prisoner must seek a stay of execution in order to present his claims. Justice may be ill-served by conducting judicial proceedings in capital cases under the pressure of an impending execution. ... The merits of

> capital cases should be reviewed carefully and deliberately, and not under time pressure. This should be true both during state and federal collateral review.

Report on Habeas Corpus in Capital Cases, 45 Cr. L. Rptr. 3239, 3240 (Sept. 27, 1989) (hereinafter Powell Committee Report).

In October, 1990, Chief Justice Shaw of the Florida Supreme Court, in order to address this very problem, established the Special Supreme Court Committee on Postconviction Relief Procedures in Capital Cases because, in part, of the inability of the Capital Collateral Representative (CCR) to provide effective representation to death sentenced inmates in Florida collateral proceedings. Counsel for the Appellee was represented on the Committee and concurred in the Committee's report. In its Report filed on May 31, 1991, the Committee explicitly and commendably recognized that "each death row inmate should have competent counsel to represent him or her in postconviction relief proceedings." (Attachment 1). The Committee further recognized that the pace of warrant signings and CCR's caseload had overwhelmed CCR's ability to meet its obligation of representing death row inmates. Id.

The Overton Committee thus explicitly recognized that inmates are entitled to competent counsel in postconviction relief proceedings, and implicitly recognized that the pace of warrant signings and lack of adequate funds and staff for CCR has rendered CCR unable to provide competent representation. Of course, such findings assume that postconviction proceedings play an important role in ensuring that the process which results in a

death sentence is free from legal error, and that such proceedings should be conducted in an appropriate manner, given the gravity of the issues presented. The circumstances at the time that Mr. Jones' prior submissions were made and litigated demonstrate, however, in a clear and convincing fashion, that CCR was unable to provide Mr. Jones the competent postconviction counsel to which he was entitled, although he was entitled to meaningful assistance, by law, see section 27.702, Fla. Stat. (1987); see Spalding v. Dugger, 526 So.2d 71 (Fla. 1988), and by the need for fair and reliable procedures in post-conviction proceedings, as recognized by both the Powell and Overton Committees.

Thus, for example, because of the onerous circumstances under which CCR has been forced to litigate Mr. Jones' case throughout CCR's representation of Mr. Jones, there was a direct adverse effect on the litigation of Mr. Jones' case. The circumstances were those that led to the creation of the Overton Committee. The first warrant for the execution of Leo Jones was signed by former Governor Bob Martinez on September 12, 1988, setting his execution for November 10, 1988. At the time the warrant for Mr. Jones' execution was signed, there were five pending warrants in CCR cases, and two other warrants were signed in CCR cases the same day. Throughout the fall of 1988, more warrants were signed, so that during the pendency of Mr. Jones' warrant, fourteen other cases with death warrants overlapped with Mr. Jones' death warrant. These warrants were part of a stated

policy of Governor Martinez of signing warrants to "keep the pressure on" defense attorneys in postconviction proceedings, primarily CCR. According to Governor Martinez' stated policy, there was a conscious decision to try to affect Mr. Jones' legal representation by overburdening counsel with cases. The multiple warrants placed intolerable pressure on CCR as it tried to obtain stays of execution simultaneously for all of its clients. Added to this pressure was the fact that CCR was already critically underfunded and understaffed to meet the burden of multiple warrants.

The multiple, independent but mutually reinforcing circumstances of lack of funds and staff, multiple warrants, and a crushing caseload of nonwarrant cases in which pleadings had to be prepared and oral arguments and evidentiary hearings conducted combined to render CCR incapable of providing adequate representation to Mr. Jones at any time during the litigation of Mr. Jones' case. CCR has never had the funding or staff required to handle its caseload, including the period during which CCR has represented Mr. Jones. This deficiency in funding and staffing was recognized by the Overton Committee. In a letter transmitting the committee's report to Chief Justice Leander Shaw, Justice Overton noted that members of the committee "expressed a willingness to assist in obtaining pro bono counsel to provide some temporary relief to the Capital Collateral Representative until his office receives proper and adequate funding to provide timely representation of these death penalty

defendants." The Overton Committee's report stated that "the capital collateral representative has asserted in several cases that he is unable to represent death penalty inmates in postconviction relief matters because of a lack of funds and staff" and continued:

> Further, the committee recognized that the office of the capital collateral representative was created and funded to handle approximately twelve to fifteen postconviction proceedings per year. During 1988, 1989, and 1990, the governor signed 38, 40, and 38 death warrants, respectively, and the Florida Supreme Court affirmed the imposition of the death penalty on direct appeal in 19, 8, and 19 cases respectively. These numbers are not likely to decrease in the coming years.

The Overton Committee also "recognize[d] that the capital collateral representative needs additional staff and funds in order to handle his current caseload. However, because of the level of funding presently available and the number of death penalty cases presently pending in the courts, it is not possible for that office to represent all of these defendants in a timely manner." The committee recommended that the Florida Bar and the Volunteer Lawyer's Resource Center of Florida, Inc., attempt to find pro bono counsel for ten new death penalty cases within the next year, but recognized that "this temporary assistance will not eliminate the need for adequate funding. . ." As the Overton Committee recognized, CCR has historically been underfunded and understaffed, and remains underfunded and understaffed to this day.

The combination of death warrants, ongoing litigation in nonwarrant cases, and inadequate funding and staffing has meant that throughout the period during which CCR has represented Mr. Jones, CCR's attorneys, investigators, and support staff have only been able to respond to crises and the most pressing deadlines. Just dealing with crises and pressing deadlines required a superhuman effort, resulting in serious health and burnout problems for the staff.

What this overload has meant to CCR's clients, such as Mr. Jones, is that CCR has never had the luxury of fully investigating or preparing a case. Rather, once a crisis or pressing deadline in a case has passed, the staff have had to move on to another crisis or pressing deadline in other cases. This is what happened in Mr. Jones' case: once his execution was stayed by the United States District Court in the fall of 1988, CCR's staff had to concentrate on other death warrants, due dates, or hearing dates. The only work done on Mr. Jones' case after his execution was stayed was done in response to deadlines. CCR simply did not and does not have the funding or staffing to do otherwise.

Quite simply, the CCR staff was unable to represent Mr. Jones effectively. CCR assumed responsibility for Mr. Jones' representation under warrant, with seven other warrant cases and numerous non-warrant cases competing for resources. Once Mr. Jones' execution was stayed, other more pressing emergencies demand CCR's time and attention. There was never an opportunity

to fully investigate, prepare, and litigate Mr. Jones' case. Mr. Jones received merely what the schedule demanded, but no investigation because the resources were not available. Under the circumstances, CCR could not provide adequate representation in compliance with the statutory mandate.

What has happened in Mr. Jones' case is the nightmare CCR has dreaded throughout its existence. The facts presented in Mr. Jones' Rule 3.850 motion establish that he is innocent of the offense for which he awaits execution. Those facts were not presented before because CCR simply could not do its job. If this Court does not act or relies upon the procedural bars argued by the State, Mr. Jones could well be executed for a crime he did not commit. In such circumstances, "fundamental fairness," Moreland, requires a stay of execution and an evidentiary hearing.

B. THE CIRCUIT COURTS' RULING IS ERRONEOUS AND IS BASED UPON THE WRONG STANDARD.

Mr. Schofield's presence at the scene in possession of a rifle, his animosity toward the police, his other suspicious behavior, his confessions, and his recent contradictory statements (App. 8) are more than mere coincidence. This newly discovered evidence supports what Mr. Jones has contended all along -- that someone else committed the murder. This evidence, if available at the time of trial, would most certainly have affected the outcome. This evidence establishes that an innocent man, Leo Jones, was wrongfully convicted. Fundamental fairness

demands that Mr. Jones' claim be heard. Moreland v. State, 582 So. 2d 618 (Fla. 1991).

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

> There is no principled reason why some claims based on newly discovered evidence must be brought under rule 3.850 and others must be brought under coram nobis. We believe the only currently viable use for the writ of error coram nobis is where the defendant is no longer in custody, thereby precluding the use of rule 3.850 as a remedy. See Dequesada v. State, 444 So.2d 575 (Fla. 2d DCA 1984); 28 Fla.Jur.2d Habeas Corpus § 158 (1981).
>
> For these reasons, we hold that all newly discovered evidence claims must be brought in a motion pursuant to Florida Rule of Criminal Procedure 3.850, and will not be cognizable in an application for a writ of error coram nobis unless the defendant is not in custody. We recede from Hallman and its progeny to the extent inconsistent with this holding. Therefore, we deny Richardson's application for leave to petition for a writ of error coram nobis. Richardson may, however, file a motion pursuant to Florida Rule of Criminal Procedure 3.850 in the trial court for all claims which are properly cognizable under that rule.

At the time of his previous Rule 3.850 motion, Richardson was not the law, and Mr. Jones was denied his ability to present a newly discovered evidence claim. Now, Mr. Jones properly presents this claim and is entitled to an evidentiary hearing. He has provided information which must be taken "at face value" and accepted as true. It thus is "sufficient to require an evidentiary hearing."

Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990).

Despite the circuit court's ruling below that most of the evidence proffered by Mr. Jones was procedurally barred, the circuit court did make a ruling on the merits concerning the information obtained from Mr. Richardson and Mr. Prince. The court ruled:

> As to the newer witnesses, Prince and Richardson, even accepting the contents thereof as true would not conclusively prove that a jury would not have convicted the Defendant.

Curiously, the court felt compelled to comment on the cumulative effect of all of the evidence presented, the evidence which the court felt was procedurally barred and the evidence it considered on the merits.[3] The court stated:

> The Court finds that what could have been ascertained by trial or collateral counsel early on in light of the particular facts of the case could not form a basis for newly discovered evidence. The essence of the older and more recent affidavits, even if true, would only go to the issue as to whether or not the alleged third party confessor made the statement to the affiant and not whether such statements are true in fact. Certainly it would be pure speculation as to whether such statements, even if true, would have compelled a verdict of acquittal of the Defendant, particularly in view of the overwhelming evidence against him.

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[3]The circuit court speculated "off the record" that this evidence would cause this Court to have to look at the cumulative weight of all this evidence and the numerous confessions by Mr. Schofield to different people at different times.

In ruling on the sufficiency of Mr. Jones' proffered evidence, the circuit court applied the "conclusiveness test" of petition for a writ of error coram nobis. See, Hallman v. State, 371 So. 2d 482, 485 (1979). Assuming that the "conclusiveness test" is the appropriate standard, Mr. Jones argues that the circuit court's ruling is wrong.

First, the circuit court did not have before it the information obtained from Mr. Bobby Hammonds that his testimony before Mr. Jones' jury was not true. Mr. Hammonds' testimony against Mr. Jones was the State's key evidence.

Mr. Hammonds now says that his trial testimony was false - that he did not see Mr. Jones with a rifle on the night of the murder. Instead, he says all of that testimony was the result of physical beatings and coercion. This new information not only questions Mr. Hammonds' testimony, but directly supports Mr. Jones' contention and testimony at trial that he confessed as a result of police beatings and coercion. Mr. Hammonds' recent statement directly calls in to question the "overwhelming evidence" upon which the circuit court ruled. In light of the recent information from Mr. Hammonds, Mr. Jones argues that he has met the stringent "conclusiveness test." See, Riley v. State, 433 So. 2d 976 (1983)(Boyd, J., dissenting)(arguing that a third party confession in light of all the evidence at trial and additional evidence proffered by the defendant was sufficient to warrant an evidentiary hearing).

See also, Tafero v. State, 406 So. 2d 89, 94 (Fla. App. 3 Dist. 1981)(arguing that evidence of another person's guilt may never satisfy the concluseness test absent other factors such as recanted testimony of a key witness).

Moreover, Mr. Jones urges this Court to explicitly adopt the "probability test" enunciated in Fla. Rule of Criminal Procedure 3.600(a)(3), in favor of the "conclusiveness test" in death cases. Since his dissent in Hallman v. State, 371 So. 2d 482, Justice Overton has argued for the application of the "probability test" in capital cases. Justice Overton reasoned:

> This holding by the majority in effect says that we no longer have any responsibility to assure justice and fairness in the application of the death penalty in this case and uses the need for finality in our decisions as a basis for that determination.
>
> . . .
>
> it is also important to recognize that if the settlement of the malpractice suit had been discovered subsequent to trial but in sufficient time to permit filing of a motion for new trial under Florida Rule of Criminal Procedure 3.600(a)(3), the "probability test" of a motion for a new trial would have been applied in this case rather than the "conclusiveness test" of a petition for a writ of error coram nobis.
>
> A death case should be an exception to the "conclusiveness test." In my view, the rigid application of the "conclusiveness test" is not proper in cases where the death penalty has been imposed. As Mr. Justice Stevens reasoned in writing for the plurality in Gardner v. Florida, 430 U.S. 349, 351, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), the death penalty is different from any other means of punishment, both in its severity and in its finality. I also believe our failure to

> consider these allegations on the merits in the sentencing phase will result in a weakening of our death penalty statute and could lead to a reversal of this cause under the principles expounded by the United States Supreme Court in Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). The majority in Lockett stated that: "The need for treating each defendant in a capital case with that degree of respect due to the uniqueness of the individual is far more important than in noncapital cases." 438 U.S. at 605, 98 S.Ct. at 2965, 57 L.Ed.2d at 990.
>
> In conclusion, the majority's mistake in this case is not allowing the issue of the alleged malpractice to be considered on its merits in regard to the appropriateness of the death penalty in this cause.
>
> I would find the petition for writ of error coram nobis to be prima facie sufficient insofar as it pertains to a new sentencing proceeding and direct the trial court to determine the truthfulness of the allegations, and, if the allegations are true, a new sentencing proceeding should commence.

Justice Overton has continually adhered to the appropriateness of the "probability test." (Riley v. State, 433 So. 2d 976, 981 (1983)(Overton, J., dissenting)(disagreeing with the broad-brush use of the conclusiveness test in death cases.) Preston v. State, 531 So. 2d 154, 160 (1988)(Overton, J., specially concurring calling for adoption of the "probability test"). Darden v. State, 521 So. 2d 1103 (1988)(Overton, J., concurring).

Justices' Barkett and Kogan have also explicitly called for the adoption of the "probability test" instead of the conclusiveness test. State v. Zeigler, 494 So. 2d 957, 959 (1986)(Barkett, J., dissenting)(rejecting the conclusiveness

test."); Darden v. State, 521 So. 2d 1103, 1106 (1988)(Barkett, J., specially concurring); Preston v. State, 531 So. 2d 154, 160 (1988)(Overton, Kogan, J., specially concurring). Moreover, this Court has most recently applied the "probability test" in deciding a "newly discovered evidence" claim without explicitly rejecting the "conclusiveness test" in favor of the "probability test." Preston v. State, 531 So. 2d 154, 158 (1988)(finding that the newly discovered evidence would not "probably" have caused the jury to find Preston innocent.). Lower courts have also noted that this Court's ruling in Richardson v. State, 546 So. 2d 1037 (Fla. 1989), replacing the petition for a writ of error coram nobis with the Florida Rule of Criminal Procedure 3.850 motion as the proper mechanism for raising such claims, implicitly includes relaxation of the rigorous coram nobis standard of proof. Williams v. State, 582 So. 2d 143, 144 (Fla. App. 2 Dist. 1991); Young v. State, 569 So. 2d 785 (Fla. App. 2 Dist. 1990); Neely v. State, 565 So. 2d 337 (Fla. App. 4 Dist. 1990).

Mr. Jones urges this Court to adopt the "probability test" in death cases. Death is different, both in its severity and in its finality. Under the "probability test," Mr. Jones has clearly established that the proffered newly discovered evidence would "probably have changed the verdict." The state conceded in circuit court that the proffered evidence, absent Mr. Hammonds' recantation, would "create a debatable question." With Mr. Hammonds' recent recantation, debatable questions amongst jurors

causes reasonable doubt. Mr. Jones has met the "probability test" standard. His execution should be stayed and his case should be remanded for a full and fair evidentiary hearing at which time his evidence could be evaluated in light of the proper standard -- the "probability test."

ARGUMENT II

MR. JONES WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Leo Jones is innocent of the offense for which he awaits execution. The murder was committed by another man, Glen Schofield, who, in the years since Mr. Jones' conviction and death sentence, has bragged to numerous people that he murdered Officer Szafranski and that Leo Jones is on death row for something he did not do. The evidence of Schofield's confessions which has come to light since Mr. Jones' trial is discussed in other portions of this pleading and warrants careful, judicious consideration.

However, there was also evidence of Schofield's guilt which was readily available at the time of Mr. Jones' trial. This evidence would have raised more than a reasonable doubt regarding Mr. Jones' guilt. It was not made known to Mr. Jones' jury for one simple reason: trial counsel failed to investigate the key evidence which would have exonerated Mr. Jones, ignoring the signals that an investigation of Schofield's involvement was required. Trial counsel's failure to fulfill his duties

undermines confidence in the outcome of Mr. Jones' trial, and will result in the execution of an innocent man unless this Court acts.

Police considered Glen Schofield to be a suspect in Officer Szafranski's murder early on in their investigation. Police notes indicate that Schofield was listed as a suspect in the case (App. 15). Police reports reflect that during interrogation approximately nine hours after the offense, Bobby Hammond informed Detective Eason that Glen Schofield had been in Mr. Jones' apartment on the evening of the offense (App. 13). The next day, May 24, Detective Eason began attempting to locate Schofield (Apps. 12, 13).

On June 2, Detective Eason learned that Schofield was being held in the St. Johns County Jail and went to interview Schofield (App. 13). Schofield admitted he had been at Mr. Jones' apartment the night of the offense, but denied involvement in the shooting (App. 13).

On June 3, Detective Eason, accompanied by Detective Moneyhun, interviewed Schofield again (App. 13). Schofield provided the same information regarding the night of the shooting, but also told the detectives that his girlfriend's name was Patricia Ferrell and provided three phone numbers where Ferrell might be reached "in case [the detectives] needed her in the investigation" (App. 13). After Detective Eason informed Assistant State Attorney Ralph Green about the interviews with

Schofield, Green asked that a sworn statement be taken from Schofield (App. 13).

Schofield was important enough to the State to be subpoenaed to appear before the grand jury. A praecipe for the subpoena, bearing Mr. Jones' case number, and the subpoena are in the State's files (App. 16). Schofield's significance is also reflected by the fact that he was listed as a witness by both the State and the defense (Apps. 17, 18).

Despite the facts that Schofield was a suspect who was investigated by the police, that the State subpoenaed him to appear before the grand jury, and that the State listed him as a witness, defense counsel did little or nothing to investigate Schofield's involvement in the murder. At the 1986 evidentiary hearing, defense counsel testified:

> [Defense Counsel:] I went to St. Augustine and interviewed Schofield in the jail down there and the lady that testified today, today is the first time I've ever known her to be identified by name who said she was Schofield's girlfriend. It was the Schofield story came up at some time well into the case about Schofield had been in the apartment and that some girl, his girlfriend had picked him up. I tried to find out through everyone in the family who that was. The comment was that it was a girl that lived out east, which I took to mean the eastside. Nobody knew her name. Said, well, we can find her, I need to talk to her, and she was supposed to have picked him up some five or six blocks away from the shooting area.
>
> Q From whom did you hear that?
>
> A From different -- it was a rumor on the street and there was people in his family or friends of his that told me that and that's what prompted me to find Schofield who

was incarcerated in St. Johns County and I went down there and talked to Schofield.

Q Do you remember what Schofield was doing in the St. Johns County Jail?

A Yes, Schofield was charged with robbing a -- I think it was a savings and loan and escape and there might have been some other charges. He was under a high degree of security when I talked to him, but the jailers would not live [sic] me alone with him because he had escaped from that jail and there were very paranoid about him getting away from them again. I remember that because I seldom have that problem interviewing clients. They stood right by the door, out of earshot because they didn't know me in St. Johns County that well and Schofield was totally uncooperative.

Q Did he talk to you at all?

A Yeah.

Q What did he say?

A He told me -- to clean it up a little bit -- he was not very nice. He told me that he knew Leo Jones, he never admitted being there that day, but he said he was aware of Leo's problems and unless I could guarantee him some help on his case he wasn't interested in helping any other person and I asked him about his girlfriend and who that was and he told me right, very quickly, it was none of my business and invited me to leave unless I could help him.

Q Did the thought occur to you that Mr. Schofield might have been involved in the homicide of Officer Szfranski?

A Oh, sure. I had heard the rumor that Schofield might have been the one who did the shooting and was trying to pursue that through the girlfriend or somebody else that he might have -- nobody else ever professed any knowledge of Schofield being around there that night with the exception of Bobby Hammond and he changed stories on me

through [sic] or four times so I couldn't put any believeablility in Bobby Hammond.

(PC-R. 215-17).

> Q Okay. You also listed Mr. Schofield as a possible witness, did you not?
>
> A Yes, because I was in hopes that Schofield would, since it was such a serious crime, that Schofield, if he knew anything that was exculpatory, that we could use him. That's why we listed everybody, the best we knew, so that if we had to supplement the discovery the state would not be in a position to say they were surprised and I tried to list everybody that I had any idea we would be using.

(PC-R. 218-19).

Although a police report indicated that Schofield admitted having been in Mr. Jones' apartment the night of the murder, defense counsel simply accepted Schofield's statement that he had not been there that day. Although defense counsel had "heard the rumor" that Schofield might have committed the crime and knew that a girlfriend of Schofield's might have relevant information, defense counsel just left it to Mr. Jones' family to figure out who this girlfriend was and to locate her. Defense counsel, however, had the information he needed to locate Schofield's girlfriend: a police report listing three phone numbers for her (App. 13). See Henderson v. Sargeant, 926 F.2d 706, 711 (8th Cir. 1991)("Reasonable performance of counsel includes an adequate investigation of the facts of the case, consideration of viable theories, and development of evidence to support those theories. Counsel has a duty . . . to investigate all witnesses

who allegedly possessed knowledge concerning [the defendant's] guilt or innocence.").

Had defense counsel performed adequately and reviewed the police reports, he could have located Mr. Schofield's girlfriend, Patricia Ferrell. Ms. Ferrell, now Ms. Owens, had a great deal to say regarding Schofield's activities at the time of Officer Szafranski's murder:

> 1. I am Patricia Owens. I live in Jacksonville, Florida. I was formerly Patricia Ferrell.
>
> 2. I had an 11-year relationship with Glen Schofield, who I met in Jacksonville. Glen had just come to Jacksonville from prison when we met in 1979. Glen and I started going together and within a few months, we started going together.
>
> 3. After living in Jacksonville for a year, we moved to New Jersey. Glen and I returned to Jacksonville in the spring of 1981 and moved into the Emerson Arms Apartments. Glen spent no time at home with me, preferring to hang out around 4th and Davis where he sold drugs.
>
> 4. Glen complained to me about how he was being harassed by the police. Glen said there was a police officer who was always going around bothering people. Glen meant the police officer was bothering the people on the corner selling drugs. Glen made these statements before and after a Jacksonville police officer was killed in 1981.
>
> 5. On the day that the police officer was killed, Glen came home around 6 or 7 a.m. I had not seen Glen since Friday or Saturday. He changed his clothes and left. After Glen left our apartment, I heard from several people that a police officer was killed early that day.
>
> 6. The next time I saw Glen was Monday around 10 a.m. He told me, "when those

> people come here, tell them I was here." Glen meant for me to tell the police that he was at home with me when the officer was killed. I told Glen that I knew that a police officer was killed. I had heard in the street that Glen who killed the police officer and I asked him did he do it. Glen said, "what do you think? Do you think I'm going to say something that will put me in prison for the rest of my life?" A week later, Glen robbed a bank and went to prison for eight years.
>
> 7. In 1989, Glen got out of prison and bragged to me and others about killing the police officer a lot of times. I believed Glen killed the police officer because he liked to hurt people. He had all kinds of guns in his possession, including rifles. Several of the rifles had scopes.
>
> 8. I was never questioned about the 1981 police shooting. If I had been asked, I would have been willing to provide the information contained in this affidavit.

(App. 1).

The information readily available from Patricia Owens (had counsel but dialed the phone numbers appearing in the police reports) would certainly have required follow up investigation. Patricia Owens would certainly have been asked to identify friends and acquaintances who may have possessed additional evidence linking Glen Schofield to the homicide. One such acquaintance, Linda Atwater, would have identified Mr. Schofield as carrying a gun and complaining about the police who were after him moments before the police arrived to investigate the homicide:

> 1. I am Linda Atwater. I live in Jacksonville, my home all of my life.

> 2. I went to Leo Jones' apartment in 1981 on the day a Jacksonville police officer was killed. I was at Leo's apartment to borrow money from him. I had seen Leo Friday night and asked him if he could loan me $250 to pay my rent. He told me he did not have the money on him but I was to come to his apartment the next day.
>
> 3. I arrived at Leo's apartment sometime after midnight. I went into the apartment and sat down while Leo counted the money. I heard someone else moving around in the apartment, but i [sic] did not see who it was. Leo gave me the money and said he would see me later. Leo was in a good mood and smiled at me as I was leaving.
>
> 4. On my way down the stairs, Glen Schofield passed me running upstairs. Glen was really mad. He was holding a big gun. The gun looked like a rifle or shotgun. I asked Glen, "why are you running up the stairs like that?" Glen said, "Them crackers are after me." I assumed Glen was talking about the police because I saw the police shake him down on 3rd and Davis earlier that day. While a police officer was searching the person with Glen, I saw Glen throw his drugs on the ground.
>
> 5. I got in my car, which was parked on the corner of 6th and Davis, across the street from Leo's apartment. As I drove off, I saw three police cars and one or two more down the street. As I got farther down the street, past 6th and Davis, I looked back and saw lots of flashing police car lights. I knew something was wrong, but I did not turn around and go back to 6th and Davis to Leo's apartment to find out what happened.
>
> 6. I was dating Leo at the time. I knew Patricia Owens. No one ever questioned me about the police officer shooting.

(App. 2).

With any follow up investigation, counsel also could have located Catherine Dixon, the girlfriend of Schofield's close

friend Tony Brown (Schofield and Brown were arrested together and charged with robbery shortly after the Szafranski homicide). Ms. Dixon also had a great deal to say about Schofield's activities the night of Officer Szafranski's murder:

> 1. I am Catherine Joann Dixon. I was born and raised in Jacksonville.
>
> 2. I was in the vicinity of Sixth and Davis Streets when a Jacksonville police officer was killed. My boyfriend, Tony Brown, and I were at the Brother's Barbecue Restaurant on Davis Street when we heard the shots. After the shots were fired, Tony and I went home to our apartment located at 969 North Liberty. We were waiting on Tony's friend, Glen Schofield, to take us home. But after he never showed up we walked on home. By the time of the shooting, we had not seen Glen for several hours.
>
> 3. Tony and I had been with Glen and his girlfriend earlier that night. We split up around 8 or 9 that night and had planned to meet up later. Glen knew to look for us in the Davis Street area.
>
> 4. After I woke up the next morning, I saw a rifle in my bedroom closet. I asked Tony "Whose gun is this?" Tony would not say. I also asked him, "What kind of gun is this?" and he said it was a 30-30. I knew that Glen had brought the gun to my house probably sometime during the night while we were out. Glen liked guns and was always bringing them to our house. I know that Tony did not bring the gun to the house because we were together most of that day. Anyway, Tony never kept a gun in my house because my thirteen year old daughter lived with us.
>
> 5. I did not think any more about the gun because Tony and I planned an all day beach trip. We left during the morning for Fernandina Beach and returned that night. During the drive back to Jacksonville, we had an argument. As soon as the car pulled up in front of my apartment, I jumped out of the car and headed into my house. I grabbed the

> rifle, which was a 30-30 with a scope on top, and ran to my neighbor's house. Tony was so mad I thought he might shoot me. As soon as I got inside of my neighbor's house and she saw the gun, she stopped me and told me to take it out of her house. When I stepped outside of the house, Tony came up behind me. As he grabbed for my hand, the gun went off.
>
> 6. Tony took the gun and I never saw it again. Soon after that day, Tony and Glen Schofield were arrested for robbing a bank. Tony has been in jail or prison ever since.

(App. 3).

Defense counsel's failure to investigate and present evidence such as the testimony of Ms. Owens, Ms. Atwater, and Ms. Dixon could only have resulted from neglect. Code v. Montgomery, 799 F.2d 1481 (11th Cir. 1986). No strategic reason could account for counsel's omissions. Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc). Indeed, the defense at trial was that someone else committed the murder. At the 1986 evidentiary hearing, defense counsel testified:

> Q Now, you were approaching the trial of the murder case and you have given us some idea of what your strategy was for the trial, but if you could capsulize for us that strategy at this point?
>
> A Well, Leo Jones did not commit the murder and any other person in the world could have had a potential to commit the murder, that his confession was coerced, that it was not a freely and voluntarily given confession and it should be taken, I think, as the instruction goes with great caution or weighed with great caution and so forth and that was basically it, that he just did not do it. The circumstances and the facts presented by the state did not add up to the fact that Leo Jones beyond a reasonable doubt committed the murder.

Q Would you say that the night that this crime occurred was an emotionally charged night from the standpoint of the Police Department?

A No question about it in my mind.

Q Would you also say that your defense was based very much on the thought that the police had probably jumped to a conclusion in assuming that your client had committed the crime?

A Oh, yeah, because they had a man in custody and the biggest problem we had then was that they had him -- they way that Mr. Jones and Mr. Hammond had conducted themselves in comparison to the other citizens in the other apartments was not consistent with -- was not consistent with guilt -- I mean with innocence and that the police had assumed immediately that they had the right people and they didn't -- didn't conduct a search of the area. Once they got Jones they quit.

Q Right.

A In other words, I thought they could have done a better job for searching for alternatives to the crime being solved and that was one of the -- they got him, they jumped to that conclusion and that's it.

(PC-R. 289-91). Testimony from witnesses such as Ms. Owens, Ms. Atwater, and Ms. Dixon was certainly consistent with this defense.

Counsel's failure to telephone Patricia Owens (Ferrell) deprived Mr. Jones of powerful evidence in his defense. The only evidence against Mr. Jones was a "confession," which counsel argued was involuntary as a result of beatings Mr. Jones received from the police, and the presence in Mr. Jones' apartment of a rifle, which was never connected to Officer Szafranski's

shooting. Evidence connecting Schofield to the shooting would have thoroughly negated the probative value of Mr. Jones having a rifle in his apartment, particularly in light of Mr. Jones' testimony that the guns in the apartment belonged to Schofield (R. 1214). Evidence was received that gunpowder residue tests on Mr. Jones' hands produced negative results (R. 1074-75).

Other available evidence was and is consistent with the testimony of Ms. Owens, Ms. Atwater, and Ms. Dixon. A witness, Early Gaines, who lived in a nearby apartment told police:

> Sometime after midnight tonight I was laying in my bed when I heard two gunshots just outside my window. Right after that I heard someone shuffling around in that same area like someone was running or moving fast. The next thing I knew a lot of police cars were outside.

(App. 14). Notes from police files indicate that Mr. Gaines "heard someone running down alley right after shooting" (App. 14).

Evidence connecting Schofield to the shooting would also have provided crucial support for Mr. Jones' testimony that he signed the statement written be Detective Eason only to get the police to stop beating him, particularly in light of other available evidence demonstrating that Mr. Jones was severely beaten by the police. For example, in a deposition, Bobby Hammond described the treatment he and Mr. Jones received from the police:

> Q When you got to the police station, where was it that you saw Leo get hit?
>
> A In the parking lot.

Q Was that underneath the building, or on the street?

A Underneath the building.

Q And who was hitting him?

A The same two officers that was hitting me.

Q The black officer and the other officer?

A Right. They was saying that I think he did it.

Q Talking about who?

A Leo.

Q All right.

A I think he did it, so they went over and started hitting on him. You know, I was looking and I seen them hit him in the stomach and in the arm, and I don't know what else they did in the room, because when I seen him he got two bruises up here.

Q He didn't have those bruises before that night, did he?

A No. When I seen him, he didn't have them. When I seen him in that little room over here, and I look at him, you know.

Q Did you get hit anymore at the police station?

A Yes.

Q Who hit you down there?

A It was the same two and another one.

Q Were they uniformed officers?

A Uniformed.

Q Did the detectives ever hit you?

A No.

Q It was the uniformed guys?

A The detective was the one who told them to stop. Detective Eason.

Q And where were they hitting you?

A They were hitting me everywhere. On the arm, face, back. You know, they put a chair and told me to sit down, I was handcuffed, and every time I'd go to sit down, they'd pull the chair back.

Q Is that the uniformed officers?

A Yes.

Q Why were they doing that?

A I don't know.

Q Were they asking you questions that you weren't answering?

A No, they weren't asking me questions. They were telling me to sit down so they could ask me some questions, and I would go to sit down, and I seen them kept, you know. So I kept turning around, and they said for me to sit down, we ain't going to hit you. At times they would swing, and one of them kicked me, you know. I think it was a sergeant or something. All I remember was that it was three officers, you know, that I seen doing all the hitting.

Q All right. Did they take you anyplace between Davis Street and the police station? Did you stop anywhere on the way, or did you go straight?

A Yeah. We went to Springfield Bank.

Q All right.

A The Springfield Bank over here on Main Street for the black officer to pick up his car.

Q All right.

A   And the other officer, he brought me in. I was telling him that the black officer put the handcuffs on hard, and that they were going to stop my circulation right here. I was telling him that they were tight, would he loosen these up. And he told me to shut up. We were riding along and an officer came up and I was telling him that them things are on too tight, and he just turned my arm and pushed me against that little iron thing on the steps.

Q   Did you get hit over at Springfield when you were stopped over there? Did anything happen to you over there?

A   No. The only thing he did was hit me with the flashlight, that was it, that's when they left me alone and go over to Leo and said that I think he did it. They got Leo out of the car and hit on him.

Q   Did you hear Leo make any statements to them? Did you hear him say anything while you were close enough to hear him?

A   I didn't hear nothing.

Q   All right. They got you down here, and how long did they keep you over at the police station, talking to you?

A   About two or three hours. I know it was a long time. I couldn't tell the time. I don't know.

Q   All right. You gave them a statement over there at 2:30 Saturday afternoon, and this thing happened like Friday night, early Saturday morning?

A   Yes.

Q   And this was like 2:30 the next afternoon?

A   Yes.

Q   Were you at the police station all the time, from the time you were arrested until you gave them the statement?

A No. I went to the hospital. They carried me to the hospital and then come back.

Q Did they take y'all together to the hospital?

A No, in separate cars.

Q But you were over there at the same time?

A Yeah, we go there at the same time.

Q Did they treat you at the hospital?

A They give me a shot because of my eye.

Q What was wrong with your eye?

A It was swollen, bruised.

Q What was that from?

A Beating. They got pictures of them. Not at this hospital, but the other one where I went and got an operation.

Q When was it that you first told them that Leo -- what you told them about Leo going out with the gun and coming back in, and that kind of thing?

A When I told them?

Q Yes.

A I told them -- like I said, I didn't want to get involved, so I told them that I didn't see nothing. And they, you know, that you seen something. He said that you ain't going to lay down there and heard a shot and not hear.

Q Did you originally tell them that you didn't hear a shot and you didn't know anything?

A Yeah, at first. And then he said -- I told him, you know.

Q Why did you change your mind and tell them?

A I was tired of them beating on me. Man, they scared me and they was beating on me.

Q Did they promise to do anything else to you, like charge you with first degree murder or anything like that?

A Yeah, that too. They said, you know, that you don't know what you got yourself into. One officer told them, you know, the same two that were beating me, he said that he was going to kill me if his partner died, or something. You know, he was going to kill me. He called me and told me that I wasn't no nigger, you know, something like that. I kept on trying to talk to him, you know, and he told me to shut up. So I shut up.

* * *

Q Did you ever ask for an attorney? To talk to an attorney?

A No, I never did. They just asked me, you know, if I needed an attorney, and I was saying to myself, for what, I didn't do nothing, you know.

Q So, they told you that you could have an attorney?

A What?

Q They told you that you could have an attorney?

A No -- yeah, they did, they gave me a little sheet of paper and told me to read it.

Q Did you read it?

A Yes. I read it and signed the thing about I have the right to remain silent, you know.

Q Did you understand what that meant?

A What?

Q Did you understand that you didn't have to talk?

A What?

Q Did you understand, from reading that paper, that you did not have to talk to them anymore? You didn't have to answer any questions?

A Was that what that was for?

Q Did you know that then?

A I didn't know that. I didn't know that.

Q Did you get hit or beat after you signed that?

A I was beat up then.

Q No. Did you get hit any after you signed it?

A After I signed that paper, no. No, no, no. I didn't get hit no more. Because like I said, I was talking to Mr. Eason then. The detective.

Q Did they tell you that Leo had made a statement, or said anything to them?

A The only thing is that they come in there and said that Leo said that you did it. You know, and I shook my head and said, no, man, I don't believe that there, just like that there.

Then they go and asked me if I wanted some water, and I said, "Yeah, I'll go ahead and get some." They turned it on and I get down there and they'd let it go. So I just turned around, you know. They asked Leo if he wanted some water and they did him the same way.

Q How did you know he did that same thing to Leo?

A   Because I was right there in the hallway when they were bringing Leo out of the room.

* * *

Q   Did you get injured in any other way during the time you were being questioned over there? You told me about getting hit and kicked, but did you get hurt in any other way?

A   No. They was just putting these up there and I was feeling pain and all that there.

Q   Let me ask you this, Bobby, if the police had not been hitting on you, would you have given them that statement that you did?

A   What's that?

Q   That statement that you gave them on the Twenty-third, the sworn statement?

A   If they hadn't hit me?

Q   Yes.

A   Like I said, I didn't want to be involved. I wouldn't have gave it to them, I didn't want to be involved. With them hitting on me and the man putting the gun -- they had me handcuffed, and they came in there and sat down with the gun.

Q   Who did that?

A   An officer.

Q   Which one was he, the white one or the black one?

A   The white one.

Q   The same one that was at the house?

A   Yes.

Q   He sat down at the police station over here?

A Put me in the chair and had me handcuffed. I was telling the other police officer that -- would he loosen them up, right here. I got a dead nerve there.

Q What, from the handcuffs?

A Yeah. They was on so tight.

Q All right.

A And he tried to make me talk. Then he sat down with the gun, you know, pointing it at me, man.

Q Was that a pistol?

A A pistol. A .357 Magnum.

Q Pointed it at your face?

A Yeah. I turned around and said, "Man, don't do me like that there."

Q What did he say to you when he pointed the gun at you?

A He didn't say nothing. But the other officer said -- had me handcuffed, and he said, "Let me take the handcuffs off before you shoot him." But he never did take them off.

Q How many times did they do that with the gun routine?

A They did that twice. They sat down and did it one time, and I was on the other side of the wall and they put it at my head.

Q Did you think they were going to shoot you?

A I don't know.

Q Were you afraid that they were going to shoot you?

A Yes. Afraid to death.

Q Did the policeman make you any other promises or what they would do for you if you cooperated and gave a statement?

A What kind of promises?

Q Like not prosecute you or turn you loose, that kind of thing?

A No. The only thing they said was that they wanted to know all I seen and we'll let you walk out of here today, because he said that he told my brother. When I was in the hospital, he said that Bobby didn't do nothing, the only thing is if he just let us know what he seen and we'll let him go.

Q I see. After you gave the statement, at 2:30 in the afternoon, did you get to go home that afternoon?

A Yes.

(R. 354-72). Mr. Hammond provided similar testimony at the hearing on the Motion to Suppress (Transcript of Hearing on Motion to Suppress, pp. 58-82).

The brother, Arty Hammonds, that Bobby referred to in his deposition, was never contacted by Mr. Jones' counsel regarding his observations of Bobby following the beating Bobby endured at the hands of the police. However, Arty Hammonds stated:

1. I am Arty Hammonds, Jr. My younger brother, is Bobby Hammonds.

2. I was called by one of my relatives early Sunday morning, May 23rd, and told that Bobby was in jail.

3. I went to the Duval County Jail where I found Bobby. I was told by Detective Eason that everybody rushed in and went crazy. I thought Eason meant that the police officers shot Bobby. When I saw Bobby, I understood what Eason was saying.

> 4. I could hardly recognize Bobby when I saw him. His head was a mass of blood knots. His face was swollen and he had a lot of cuts on his face. Bobby was also in shock. He could hardly talk and sounded confused. Bobby was obviously very frightened. Bobby tried to tell me what happened, but Eason and another officer cut Bobby off and would not let him talk to me.
>
> 5. Later, when Bobby came home, I asked him how he got hurt. He told me that a black officer along with several officers beat him with their fists and their rifle butts in Leo's apartment. First, Bobby said they beat him when he was on the couch, and then they took him to another room in the apartment and beat him some more. The black officer began to kick Bobby and told him to "cry, nigger, cry."
>
> 6. At some point, Bobby said the police officers, "I'm having chest pains." Bobby said they stopped beating him and took him to the hospital.
>
> 7. I was never contacted by anyone or asked what I knew about the injuries inflicted on my brother, Bobby. If I had been asked, I would have been willing to tell what is contained in this affidavit.

(App. 11).

Other people who saw Mr. Jones the day after his arrest can also attest to the injuries he received from the police. Mr. Jones' mother describes:

> When Leo got arrested I went to see him at the jail the next day. I didn't even recognize him because his mouth was so swollen and his face was bashed up. He told me that the police had beat him up while he was handcuffed. He said they pulled a chair out from under him when he tried to sit down and stomped his back, and threw water in his face. He told me that he was not involved in the shooting, but that he had told the police he was involved to get the police to stop

> beating him. You can still see an injury on his ear from that beating.

(App. 9).

A public defender who saw Mr. Jones the day after his arrest described similar injuries:

> Comes now the Affiant, William P. White, III, after having been duly sworn and states as follows:
>
> On May 23, 1981, serving in my capacity as Chief Assistant Public Defender, I was attending weekend bond hearings in courtroom 9 of the Duval County Courthouse in Jacksonville, Florida. On the calendar that Saturday morning was an individual named, Leo Alexander Jones, charged with Attempted murder in the first degree, Grand Theft, Possession of a Controlled Substance and Battery on a Law Enforcement Officer. This was the same individual represented by me in clemency proceedings before the Governor of the State of Florida at this time.
>
> On May 23, 1981, I had the opportunity to observe Mr. Jones prior to the arrival of his privately retained attorney. Mr. Jones had abrasions on his face and neck and appeared to be in a daze. He represented to me that he had been beaten on two separate occasions by law enforcement officers of the Jacksonville Sheriff's Office following his arrest earlier that same morning. Prior to learning that Mr. Jones' family had retained private counsel, I made arrangements to have an investigator from the Office of the Public Defender photograph Mr. Jones in order to preserve any evidence of physical injury. When Mr. Jones' attorney arrived in the courtroom I had no further direct contact with Mr. Jones or his case until I was appointed by Judge Soud [sic] in this clemency proceeding.

(App. 10).

Additionally, a mental health professional has examined Mr. Jones and found damage which may have resulted from the beating. (App. 21).

Clearly, testimony indicating that Schofield committed the offense would have made all the difference to Mr. Jones' defense. Not only would such evidence have created considerable reasonable doubt on its own, but also such evidence would have cast considerable doubt on the key components of the State's case.

Under Strickland v. Washington, 466 U.S. 668, 686 (1984), ineffectiveness of counsel is proven when the defendant can show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Counsel's failures in Mr. Jones' case demonstrate that Mr. Jones' trial did not produce a just result. Where an adversarial testing does not occur and confidence is undermined in the outcome, relief is appropriate. Id., at 688. Given a full and fair evidentiary hearing, Mr. Jones will prove the result of his trial was unreliable and the prejudice he has suffered because of counsel's deficient performance. He is entitled at a minimum, to an adequate evidentiary hearing on this claim.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Chambers v. Armontrout, 907 F.2d

825 (8th Cir. 1990)(en banc); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989); Henderson v. Sargent, 926 F.2d 706, 712 (8th Cir. 1991)(given "counsel's complete failure to pursue a viable defense, we find trial counsel ineffective for failing to investigate the plausible defense theory that [another person] committed the murder"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

In particular, counsel have been found to be prejudicially ineffective for failing to impeach key state witnesses with available evidence, Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); Moffett v. Kolb, 930 F.2d 1156 (7th Cir. 1991); and for failing to investigate the possibility that other people had motive and opportunity to commit the crime. Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991).

Counsel's failure to investigate and present evidence of Schofield's involvement in the offense deprived Mr. Jones of his constitutional right to present a defense as guaranteed by the sixth and fourteenth amendments. See Washington v. Texas, 388

U.S. 14, 17 (1967); Chambers v. Mississippi, 410 U.S. 284, 285 (1973). A fair adversarial testing did not occur.

In Strickland v. Washington, 466 U.S. 668, 696 (1984)(emphasis added), the Supreme Court held:

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

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). See also Kimmelman v. Morrison, 477 U.S. 365 (1986). Even a single error by counsel may be sufficient to warrant relief. Kimmelman v. Morrison; Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991).

Mr. Jones' trial counsel rendered deficient performance. As a result, Mr. Jones was prejudiced. The jury and judge did not hear evidence necessary for an adversarial testing. Confidence in the fundamental fairness of the guilt-innocence determination is undermined. Since the files and records do not conclusively

establish that Mr. Jones is entitled to no relief, a stay of execution and an evidentiary hearing are required.

Moreover, since the facts presented in this motion establish the fair probability that Mr. Jones would have established a reasonable doubt as to his guilt in the minds of the trier of fact, fundamental fairness demands that this motion be entertained on the merits. Moreland v. State; Witt v. State. Rule 3.850 relief must issue.

ARGUMENT III

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. JONES IS INNOCENT OF THE OFFENSE FOR WHICH HE WAS CONVICTED AND SENTENCED TO DEATH, AND THUS HIS CONVICTION AND DEATH SENTENCE VIOLATE THE EIGHTH AND FOURTEENTH AMENDMENTS.

Evidence uncovered since the time of Mr. Jones' capital trial establishes that Mr. Jones is innocent of the offense for which he was convicted and sentenced to death. Consideration of this evidence is required, for it establishes that Mr. Jones' conviction and death sentence violate the eighth and fourteenth amendments.

Mr. Jones was convicted and sentenced to death for the May 23, 1981, murder of Jacksonville police officer, Thomas Szafranski. The murder occurred in Jacksonville at the intersection of 6th and Davis Streets at about 1:00 a.m. Officer Szafranski was driving the third car of a trio of police cars and was shot as he was about to turn from 6th Street onto Davis Street going north, following the other two police cars which had already turned north onto Davis. After he was shot, Officer

Szafranski's car came to a stop partially in the 6th and Davis intersection.

Immediately after the shooting, numerous police cars converged on the scene. No one had witnessed the actual shooting. Some witnesses indicated the shots had come from the area of a vacant lot which was on the east side of Davis, directly in front of 6th Street (App. 19); others said the shots had come from a downstairs apartment of an apartment building on the east side of Davis, south of the vacant lot (App. 19).

Attention focused on the apartment building, which police began searching. In an upstairs apartment, police found Mr. Jones and Bobby Hammond, who were taken into custody and transported to the police department. After hours of interrogation, beatings, and coercion, see Claim I, supra, Hammond told police that he had seen Mr. Jones leave the apartment with a gun, heard a shot, and then seen Mr. Jones return to the apartment with a gun. Hammond also told police that a man named Glen Schofield had been in the apartment that night (App. 13). Hammond was released immediately after giving these statements.

Also after hours of interrogation, beatings, and coercion, see Claim I, supra, Mr. Jones signed a statement written by Detective Eason, admitting involvement in the shooting. Mr. Jones was charged with murder, and ultimately tried, convicted, and sentenced to death.

The only evidence against Mr. Jones at trial was his presence in the Davis Street apartment, the presence of guns in his apartment, Bobby Hammond's coerced statement, which he retracted several times, and Mr. Jones' supposed statement, which he also retracted. Other evidence indicated that Mr. Jones had not committed the offense. For example, police performed a neutron activation test on Mr. Jones' hands, checking for the presence of gunpowder residue which would indicate he had recently fired a gun. The test was negative (R. 1074-75). A witness, Early Gaines, who lived in a nearby apartment told police:

> Sometime after midnight tonight I was laying in my bed when I heard two gunshots just outside my window. Right after that I heard someone shuffling around in that same area like someone was running or moving fast. The next thing I knew a lot of police cars were outside.

(App. 14). Notes from police files indicate that Mr. Gaines "heard someone running down alley right after shooting" (App. 14).

Police considered Glen Schofield to be a suspect in Officer Szafranski's murder early on in their investigation. Police notes indicate that Schofield was listed as a suspect in the case (App. 15). After Bobby Hammond informed Detective Eason that Glen Schofield had been in Mr. Jones' apartment on the evening of the offense (App. 13), Detective Eason began attempting to locate Schofield the next day, May 24 (App. 13).

On June 2, Detective Eason learned that Schofield was being held in the St. Johns County Jail and went to interview Schofield (App. 13). Schofield admitted he had been at Mr. Jones' apartment the night of the offense, but denied involvement in the shooting (App. 13).

On June 3, Detective Eason, accompanied by Detective Moneyhun, interviewed Schofield again (App. 13). Schofield provided the same information regarding the night of the shooting, but also told the detectives that his girlfriend's name was Patricia Ferrell and provided three phone numbers where Ferrell might be reached "in case [the detectives] needed her in the investigation" (App. 13). After Detective Eason informed Assistant State Attorney Ralph Green about the interviews with Schofield, Green asked that a sworn statement be taken from Schofield (App. 13). When asked to give a sworn statement, Mr. Schofield refused. (App. 13).

Schofield was subpoenaed by the State to appear before the grand jury. A praecipe for the subpoena, bearing Mr. Jones' case number, and the subpoena are in the State's files (App. 16). Schofield was listed as a witness by both the State and the defense (Apps. 17, 18).

Since the time of Mr. Jones' trial, evidence has been discovered indicating that Schofield warranted the attention of the police because he indeed was the person who shot and killed Officer Szafranski. Witnesses have now come forward who saw Schofield arriving at the scene with a rifle, vowing to get back

at the police for harrassing him, who saw Schofield fleeing the scene carrying a rifle, and who heard Schofield confess to the murder.

One such witness is Linda Atwater, who has attested:

> 1. I am Linda Atwater. I live in Jacksonville, my home all of my life.
>
> 2. I went to Leo Jones' apartment in 1981 on the day a Jacksonville police officer was killed. I was at Leo's apartment to borrow money from him. I had seen Leo Friday night and asked him if he could loan me $250 to pay my rent. He told me he did not have the money on him but I was to come to his apartment the next day.
>
> 3. I arrived at Leo's apartment sometime after midnight. I went into the apartment and sat down while Leo counted the money. I heard someone else moving around in the apartment, but i [sic] did not see who it was. Leo gave me the money and said he would see me later. Leo was in a good mood and smiled at me as I was leaving.
>
> 4. On my way down the stairs, Glen Schofield passed me running upstairs. Glen was really mad. He was holding a big gun. The gun looked like a rifle or shotgun. I asked Glen, "why are you running up the stairs like that?" Glen said, "Them crackers are after me." I assumed Glen was talking about the police because I saw the police shake him down on 3rd and Davis earlier that day. While a police officer was searching the person with Glen, I saw Glen throw his drugs on the ground.
>
> 5. I got in my car, which was parked on the corner of 6th and Davis across the street from Leo's apartment. As I drove off, I saw three police cars and one or two more down the street. As I got farther down the street, past 6th and Davis, I looked back and saw lots of flashing police car lights. I knew something was wrong, but I did not turn around and go back to 6th and Davis to Leo's apartment to find out what happened.

6. I was dating Leo at the time. I knew Patricia Owens. No one ever questioned me about the police officer shooting.

(App. 2).

Two other witnesses saw Schofield fleeing from the scene carrying a rifle:

1. My name is Daniel Cole. I was born and raised in Jacksonville.

2. On May 22, I went to the Center Theater with my former girlfriend, Denise Reed. When we missed the last bus, we had to walk home. As we walked down 4th Street sometime after midnight and crossed Madison Street, Denise and I heard a shot. Within minutes of hearing the shot, we saw Glen Schofield running from the area behind Leo Jones' house down Madison Street. Schofield looked at us as he ran towards the Blodgett Homes holding a rifle in his hand.

3. We continued to walk down 4th Street to Davis and then headed towards 6th and Davis Streets, where we saw a police car in the middle of the street. When we reached 5th Street, a police officer told us to walk to 6th and Davis and put our hands on the building wall of a store across the street from a two-story apartment building. We saw several people standing in front of the bar, next door to the apartment building. The police did not ask Denise or I for a statement. We stood at 6th and Davis until the police put two men in police cars and drove off. My girlfriend, who knew both men, told me that the man without shoes and socks was Leo Jones.

4. After the police drove off with Leo and Bobby, we were told to go home. Denise and I talked about what we had seen as we walked home. We decided not to say anything because we knew that Glen Schofield was dangerous and still on the street. I feared for Denise's safety as well as my own. Based on what I knew about Schofield, we had good reason to fear him.

5. I had heard that Schofield killed somebody and had served time for the murder. Everybody who knew him feared him because he was the type of person to threaten you with violence and carry out what he said.

6. For years, I have thought about what I saw but have been too afraid to say anything until now. Although I know that Glen Schofield is in prison, I am still concerned about giving this statement. However, I feel certain that Schofield killed the police officer and that Leo Jones is innocent of this crime.

(App. 4).

1. I am Denise Reed. I was born and raised in Jacksonville.

2. On May 22, my former boyfriend, Daniel Cole, and I walked home from a movie after missing the bus.

3. As we walked down 4th Street, we saw Glen Schofield running down Madison Street with a rifle in his hand. I have known Glen Schofield since I was a young child and I am sure the person running down Madison Street was Glen. We continued to walk down 4th Street to Davis Street. At Davis Street, near 6th, we saw a police car diagonally parked on Davis Street.

4. Danny and I decided to walk towards the car to find out what happened. As we did, we were confronted by several angry police officers. They said that they were not leaving until they got the nigger who fired the shot. I was not only very frightened to tell what I saw to the police officers -- who felt certain that Leo Jones did the shooting -- but also I was afraid of Glen Schofield.

5. I have known of Glen Schofield for many years and knew he was a person to be feared. He had a reputation for violence. I heard that he killed someone before this incident happened and several years after the officer was shot. Glen had a relationship

> with one of my childhood friends, who he once held hostage along with their children.
>
> 6. I did not come forward for other reasons. I was never sure about the value of the information, or that my testimony would be significant. I also discussed what I saw with my mother and other family members, who feared for my safety. I married in 1983 and shared this information with my husband, who feared the police community as well as Glen Schofield and his gang.
>
> 7. Although I am older now -- I was 22 years old, then -- I am still frightened about saying what I know. I do believe if I do not speak out now, an innocent man will be executed.

(App. 5).

Other witnesses have stated that Schofield was in the area of 6th and Davis Streets the night of Officer Szafranski's murder, that Schofield harbored a grudge against the police, that Schofield asked a girlfriend to give him an alibi for that night, and that Schofield hid a gun at a friend's house that night. For example, Patricia Owens has attested:

> 1. I am Patricia Owens. I live in Jacksonville, Florida. I was formerly Patricia Ferrell.
>
> 2. I had an 11-year relationship with Glen Schofield, who I met in Jacksonville. Glen had just come to Jacksonville from prison when we met in 1979. Glen and I started going together and within a few months, we started going together.
>
> 3. After living in Jacksonville for a year, we moved to New Jersey. Glen and I returned to Jacksonville in the spring of 1981 and moved into the Emerson Arms Apartments. Glen spent no time at home with me, preferring to hang out around 4th and Davis where he sold drugs.

> 4. Glen complained to me about how he was being harassed by the police. Glen said there was a police officer who was always going around bothering people. Glen meant the police officer was bothering the people on the corner selling drugs. Glen made these statements before and after a Jacksonville police officer was killed in 1981.
>
> 5. On the day that the police officer was killed, Glen came home around 6 or 7 a.m. I had not seen Glen since Friday or Saturday. He changed his clothes and left. After Glen left our apartment, I heard from several people that a police officer was killed early that day.
>
> 6. The next time I saw Glen was Monday around 10 a.m. He told me, "when those people come here, tell them I was here." Glen meant for me to tell the police that he was at home with me when the officer was killed. I told Glen that I knew that a police officer was killed. I had heard in the street that Glen killed the police officer and I asked him did he do it. Glen said, "what do you think? Do you think I'm going to say something that will put me in prison for the rest of my life?" A week later, Glen robbed a bank and went to prison for eight years.
>
> 7. In 1989, Glen got out of prison and bragged to me and others about killing the police officer a lot of times. I believe Glen killed the police officer because he liked to hurt people. He had all kinds of guns in his possession, including rifles. Several of the rifles had scopes.
>
> 8. I was never questioned about the 1981 police shooting. If I had been asked, I would have been willing to provide the information contained in this affidavit.

(App. 1).

Catherine Dixon, the girlfriend of Schofield's close friend Tony Brown, also knew about Schofield's activities the night of Officer Szafranski's murder:

1. I am Catherine Joann Dixon. I was born and raised in Jacksonville.

2. I was in the vicinity of Sixth and Davis Streets when a Jacksonville police officer was killed. My boyfriend, Tony Brown, and I were at the Brother's Barbecue Restaurant on Davis Street when we heard the shots. After the shots were fired, Tony and I went home to our apartment located at 969 North Liberty. We were waiting on Tony's friend, Glen Schofield, to take us home. But after he never showed up we walked on home. By the time of the shooting, we had not seen Glen for several hours.

3. Tony and I had been with Glen and his girlfriend earlier that night. We split up around 8 or 9 that night and had planned to meet up later. Glen knew to look for us in the Davis Street area.

4. After I woke up the next morning, I saw a rifle in my bedroom closet. I asked Tony "Whose gun is this?" Tony would not say. I also asked him, "What kind of gun is this?" and he said it was a 30-30. I knew that Glen had brought the gun to my house probably sometime during the night while we were out. Glen liked guns and was always bringing them to our house. I know that Tony did not bring the gun to the house because we were together most of that day. Anyway, Tony never kept a gun in my house because my thirteen year old daughter lived with us.

5. I did not think any more about the gun because Tony and I planned an all day beach trip. We left during the morning for Fernandina Beach and returned that night. During the drive back to Jacksonville, we had an argument. As soon as the car pulled up in front of my apartment, I jumped out of the car and headed into my house. I grabbed the rifle, which was a 30-30 with a scope on top, and ran to my neighbor's house. Tony was so mad I thought he might shoot me. As soon as I got inside of my neighbor's house and she saw the gun, she stopped me and told me to take it out of her house. When I stepped outside of the house, Tony came up behind me. As he grabbed for my hand, the gun went off.

> 6. Tony took the gun and I never saw it again. Soon after that day, Tony and Glen Schofield were arrested for robbing a bank. Tony has been in jail or prison ever since.

(App. 3).

Schofield has also confessed to committing the murder:

> 1. My name is Frank Pittro. I am presently incarcerated at Martin Correctional Institution.
>
> 2. In 1985 I was incarcerated at Union Correctional Institution. At that time I was living in the Southwest Unit. I also worked in the Southwest Unit kitchen.
>
> 3. While working in the Southwest kitchen I met an inmate by the name Glen Schofield. He worked in the kitchen with me.
>
> 4. Schofield was the type of inmate to talk big and brag. He often talked about drugs, girls, and how he was able to commit crimes and not get caught. On more than one occasion Schofield talked to me about the time he killed a Jacksonville Police Officer and got away with it.
>
> 5. Schofield told me that he shot the Jacksonville police officer and killed him. Schofield stated that the police officer was harassing him for a long time. He then described how he took a high calibre rifle and shot the Jacksonville police officer. Schofield then told me that he ran through an apartment building and out the back to get away from the police.
>
> 6. Schofield also told me that a man by the name of Leo Jones was busted for killing the police officer. Schofield made it very clear that Leo Jones had nothing to do with the killing of the police officer. Schofield also told me that Leo Jones was sentenced to death for killing the police officer.
>
> 7. Schofield was very convincing every time he told me about his killing the Jacksonville police officer. Schofield made

it very clear that he did not like the police officer and shot and killed him.

8. No one ever asked me about my conversations with Schofield. If I had been asked, I would have told the truth.

(App. 6).

1. I, Donorena Harris, am employed as an investigator by the Office of the Capital Collateral Representative (CCR), a State of Florida agency located at 1533 S. Monroe St., Tallahassee, FL 32201. CCR represents Florida's indigent death-sentenced prisoners in collateral proceedings. I investigate the cases of CCR clients who are seeking post-conviction relief.

2. I interviewed Paul Marr October 10, 1991, in the course of CCR's representation of Leo Jones.

3. Mr. Marr recounted conversations he had with Glen Schofield during 1985 at the Union Correctional Institution, where both Marr and Schofield were incarcerated. Marr and Schofield worked in the kitchen together and also lived in the same dorm.

4. Glen Schofield sought out Marr to assist him with his legal case. During their discussions of the case which led to Schofield's imprisonment, Marr said Schofield described other crimes which he committed.

5. Schofield described to Marr how he killed a Jacksonville police officer who had been harrassing him and escaped a police blockade. Earlier, Schofield saw the police officer in the neighborhood and went to an apartment building where he obtained a rifle of some calibre. According to Marr, Schofield shot the officer while he was in his police cruiser. Schofield returned the rifle to the apartment, exited through the back door of the apartment building and ran a few blocks, where he was picked up by a woman friend. Marr said Schofield described the events of the police shooting on several occasions and boasted about escaping detection.

> 6. Schofield was concerned about future investigations because at least two or three people knew he did the shooting, including a woman friend, whose husband was a former death row inmate, and the woman who picked him up and could place him at the scene, according to Marr. Marr said Schofield was also concerned about Leo Jones' family, who were conducting their own investigation and looking for witnesses.
>
> 7. Marr found the name of Leo Jones' attorney, wrote to him and offered to testify about what he knew, provided that his testimony would not be known to Schofield. Marr said that he feared Schofield, who bragged about the murders and other violent crimes that he committed. Marr said he personally witnessed Schofield attempting to stab other inmates. Marr said he was transferred in late 1985 to Apalachee Correctional Institution and never saw Schofield again.

(App. 7).

Counsel for Mr. Jones is continuing to investigate evidence establishing Mr. Jones' innocence of the offense for which he was convicted and sentenced to death. This investigation is ongoing, for each discovery is producing additional indications that further witnesses exist who must be located and interviewed.

Another witness to whom Glen Schofield confessed that he shot Officer Szafranski has been located. That witness, Franklin Prince, attests:

> 1. I am Franklin Delano Prince. I am an inmate at Union Correctional Institution.
>
> 2. In April 1985, I was moved from the Florida State Prison to Union Correctional Institution, where I met Glen Schofield.
>
> 3. Sometime during 1985 or 1986, Glen Schofield told me he killed a Jacksonville

police officer and that Leo Jones was in prison for that murder.

4. Glen Schofield confessed to killing the Jacksonville police officer to many people, including another inmate named John Davis.

(Attachment A).

Mr. Prince is aware of other persons to whom Mr. Schofield has confessed his involvement in the shooting of Officer Szafranski. Although Mr. Prince was able to provide the name of one such person, counsel's investigator was not able to obtain additional names as prison officials ended the investigator's visit with Mr. Prince:

1. I am Donorena Harris, a State of Florida investigator employed by the Office of the Capital Collateral Representative.

2. On November 8, 1991, I interviewed Franklin Delano Prince at the Union Correctional Institution (UCI). I drafted an affidavit during the course of the interview. At 4:50 p.m., as Mr. Prince was about to provide the names of other UCI inmates who heard Glen Schofield confess to the murder of a Jacksonville police officer, I was asked to leave the prison by a UCI Classifications Officer. The officer said Mr. Prince needed to be returned to his cell for supper.

3. Mr. Prince did provide the name of one UCI inmate, John Davis, who heard the confession of Glen Schofield. John Davis, according to Prince, wrote Governor Chiles several weeks ago about the confession of Glen Schofield.

(Attachment B).

As Ms. Harris's affidavit indicates, further information regarding Mr. Schofield's confessions may be in the possession of the Florida Governor's office. However, as Ms. Harris's

affidavit also indicates, the possibility that such information exists was not learned until approximately 4:50 p.m. on Friday afternoon. Thus, since Monday, November 11 is a holiday, the possibility that the State possesses additional exculpatory evidence cannot be confirmed until Tuesday morning, November 12.

All of this information has only recently been uncovered by counsel for Mr. Jones, and is the result of just a superficial investigation. Schofield's presence at the scene in possession of a rifle, his animosity toward the police, his other suspicious behavior, his confessions, and his recent contradictory statements (App. 8) are more than mere coincidence. This newly discovered evidence supports what Mr. Jones has contended all along -- that someone else committed the murder. This evidence, if available at the time of trial, would most certainly have affected the outcome. This evidence establishes that an innocent man, Leo Jones, was wrongfully convicted. Fundamental fairness demands that Mr. Jones' claim be heard. Moreland v. State, 582 So. 2d 618 (Fla. 1991).

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

> There is no principled reason why some claims based on newly discovered evidence must be brought under rule 3.850 and others must be brought under coram nobis. We believe the only currently viable use for the writ of error coram nobis is where the defendant is no longer in custody, thereby precluding the use of rule 3.850 as a remedy.

> See Dequesada v. State, 444 So.2d 575 (Fla. 2d DCA 1984); 28 Fla.Jur.2d Habeas Corpus § 158 (1981).
>
> For these reasons, we hold that all newly discovered evidence claims must be brought in a motion pursuant to Florida Rule of Criminal Procedure 3.850, and will not be cognizable in an applicaiton for a writ of error coram nobis unles the defendant is not in custody. We recede from Hallman and its progeny to the extent inconsistent with this holding. Therefore, we deny Richardson's application for leave to petition for a writ of error coram nobis. Richardson may, however, file a motion pursuant to Florida Rule of Criminal Procedure 3.850 in the trial court for all claims which are properly cognizable under that rule.

At the time of his previous Rule 3.850 motion, Richardson was not the law, and Mr. Jones was denied his ability to present a newly discovered evidence claim. Now, Mr. Jones properly presents this claim and is entitled to an evidentiary hearing. He has provided information which must be taken "at face value" and accepted as true. It thus is "sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989); Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990).

Mr. Jones urges this Court to recognize the importance this evidence would have had on the outcome of the trial. This evidence unquestionably undermines confidence in the reliability of Mr. Jones' conviction, a conviction which resulted in a sentence of death. The eighth amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v. Alabama, 477 U.S. 625 (1980). Such matters cannot be treated through mechanical rules and stiff principles.

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

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

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

The evidence presented in this Rule 3.850 motion demonstrates that the result of Mr. Jones' trial is unreliable. Richardson and Rule 3.850 provide to this Court the authority to "produce just results." The Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gregg v. Georgia, 428 U.S. 153, 187 (1976); Reid v. Covert, 354 U.S. 1, 45-56 (1957)

(Frankfurter, J., concurring); id. at 77 (Harlan, J., concurring). This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence, including those phases specifically concerned with guilt, Beck v. Alabama, 447 U.S. 625, 637-38 (1980); sentence, Lockett v. Ohio, 438 U.S. 586, 604 (1978); appeal, Gardner v. Florida, 430 U.S. 349, 360-61 (1977); and post-conviction proceedings. Amadeo v. Zant, 108 S. Ct. 1771 (1988). Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Gregg v. Georgia, 428 U.S. 153, 187 (1976), including full and fair post-conviction proceedings. See, e.g., Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980); Evans v. Bennet, 440 U.S. 1301, 1303 (1979) (Rehnquist, Circuit Justice).

The eighth amendment mandates this Court not dismiss this newly discovered evidence. Mr. Jones submits that it more than sufficiently questions the reliability of his conviction and death sentence. There exists a fair probability that had this evidence but been presented to the jury a reasonable doubt would have been entertained. Kuhlman v. Wilson, 477 U.S. 436, 454 n. 17 (1986). Fundamental fairness demands Rule 3.850 relief. Moreland v. State, 582 So. 2d 618 (Fla. 1991); Witt v. State, 387 So. 2d 922 (Fla. 1980). When viewed in conjunction with the evidence never presented because of trial counsel's deficient performance, there can be no question that his conviction cannot

withstand the requirements of the eighth amendment and fourteenth amendment due process. Mr. Jones is entitled to a full and fair evidentiary hearing at which time he can establish his right to a new, <u>fair</u> trial, for the outcome of the original proceedings is constitutionally unreliable. A stay of execution, an evidentiary hearing and, thereafter, Rule 3.850 relief are proper.

ARGUMENT IV

THE STATE'S INTENTIONAL WITHHOLDING OF MATERIAL EXCULPATORY EVIDENCE VIOLATED MR. JONES' FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, THE FLORIDA CONSTITUTION, CHAPTER 119 OF THE FLORIDA STATUTES, AND THE FLORIDA RULES OF CRIMINAL PROCEDURE.

Leo Jones is innocent of the offense for which he awaits execution. The murder was committed by another man, Glen Schofield. On November 8, 1991, Mr. Jones provided this Court with compelling evidence that Mr. Jones was innocent of this offense and that Mr. Schofield was the actual perpetrator. See Emergency Motion to Vacate Judgment and Sentence and Consolidated Emergency Application for Stay of Execution.

After filing the above-mentioned motion to vacate, undersigned counsel learned that the State has information since May 1990 that Mr. Schofield had admitted shooting Officer Szafranski to Mr. Michael Edward Richardson. During the late afternoon of November 8, 1991, undersigned counsel received information from Assistant State Attorney John Jolly concerning his discovery of information which he felt a duty to disclose to Mr. Jones's counsel. The information was the existence of a report of an admission by Mr. Schofield that he had shot and killed Officer Szafranski. Mr. Jolly, to his credit, immediately provided undersigned counsel with this information.

The information provided establishes that on May 12, 1990, Assistant State Attorney Laura Starratt received information from Mr. Michael Edward Richardson that Mr. Schofield claimed responsibility for the shooting of Officer Szafranski. Although

it is unclear whether that information was initially provided by Mr. Richardson in way of a letter or was verbally reported to Ms. Starratt, the information was reduced to writing on May 12, 1990, by either Mr. Richardson or Ms. Starratt. See Attachment C.

On July 16, 1990, the Office of the State Attorney reported this information to the Jacksonville Sheriff's Office. The Sheriff's Office interviewed Mr. Richardson on July 17, 1990, during which time he reported hearing Mr. Schofield admit to killing Officer Szafranski. A formal report was prepared by the Sheriff's Office and is reproduced below:

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This information is unquestionably material exculpatory evidence -- evidence that the State had an affirmative duty to disclose. For eighteen (18) months, the State withheld this critical evidence. Finally, on the eve of Mr. Jones's execution, Mr. Jolly complied with the State's constitutional duty to disclose this information. Undersigned counsel commends Mr. Jolly and in no way means to impute any wrongdoing on his part. Mr. Jolly was just assigned to Mr. Jones's case and immediately disclosed the information upon discovering it. However, he did only what the State should have done in May 1990.

Undersigned counsel is now faced with additional exculpatory evidence which was withheld from Mr. Jones by the State. This evidence must be investigated and may lead to additional exculpatory information. In fact, additional evidence is being discovered as this pleading is being prepared.

Moreover, undersigned counsel also learned late on November 8, 1991, that the Governor's Office may have received additional exculpatory evidence within recent weeks. This information was obtained by Ms. Donna Harris, an investigator with the Office of CCR:

> 1. I am Donorena Harris, a State of Florida investigator employed by the Office of the Capital Collateral Representative.
>
> 2. On November 8, 1991, I interviewed Franklin Delano Prince at the Union Correctional Institution (UCI). I drafted an affidavit during the course of the interview. At 4:50 p.m., as Mr. Prince was about to provide the names of other UCI inmates who heard Glen Schofield confess to the murder of a Jacksonville police officer, I was asked to

> leave the prison by a UCI Classifications Officer. The officer said Mr. Prince needed to be returned to his cell for supper.
>
> 3. Mr. Prince did provide the name of one UCI inmate, John Davis, who heard the confession of Glen Schofield. John Davis, according to Prince, wrote Governor Chiles several weeks ago about the confession of Glen Schofield.

(Attachment B). Undersigned counsel intends to make a formal request for this evidence from the Governor's Office on November 12, 1991, the next day that the Governor's Office is open. If this information exists, additional investigation will obviously have to be undertaken.

The prosecution's suppression of evidence favorable to the accused violates due process. Brady v. Maryland, 373 U.S. 83 (1967); Agurs v. United States, 427 U.S. 97 (1976); United States v. Bagley, 105 S. Ct. 3375 (1985). Thus, the prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. United States v. Bagley, supra. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible or the misconduct. Williams v. Griswald, 743 F.2d at 1542. The obligation to disclose continues after a conviction has been returned; in fact, the obligation continues so long as the defendant has legal avenues to pursue to challenge his conviction in reliance on the exculpatory evidence. Monroe v. Butler, 690 F. Supp. 521 (E.D. La. 1988). The State's action of withholding

exculpatory evidence violated Mr. Jones's fifth, sixth, eighth and fourteenth amendments. Monroe v. Butler, 883 F.2d 331 (5th Cir. 1988).

There can be little doubt that material evidence was withheld from Mr. Jones -- evidence which would have made a difference to his post-conviction proceedings -- evidence which establishes his right to an evidentiary hearing and ultimately a new trial. The undisclosed evidence is certainly cognizable in Rule 3.850 proceedings. Richardson v. State, 546 So. 2d 1037 (Fla. 1989). The State's action precluded presentation of this evidence in a Rule 3.850 motion. Its disclosure now requires consideration of this newly-discovered evidence along with all other evidence of Mr. Jones's innocence in order to determine whether a new trial is warranted, and in order to determine whether Mr. Jones's execution would violate the eighth amendment.

Mr. Jones is entitled to a full, fair and adequate opportunity to vindicate his constitutional rights pursuant to the post-conviction process established under Rule 3.850. See, e.g., Holland v. State, 503 So. 2d 1250 (Fla. 1987). Florida law, Holland, supra; Fla. R. Crim. P. 3.850, as well as the federal constitution guarantee Mr. Jones that opportunity. See Michael v. Louisiana, 350 U.S. 91, 93 (1955) (due process clause guarantees defendant "a reasonable opportunity to have the issue as to the claimed right heard and determined by the state court."), quoting Parker v. Illinois, 333 U.S. 571, 574 (1948); Case v. Nebraska, 381 U.S. 336, 337 (1965) (Clark, J.,

concurring) (federal constitution guarantees defendant "adequate corrective [state-court] process for the hearing and determination of [his] claims of violation of federal constitutional guarantees); see also id. at 340-47 and nn.5-6 (Brennan, J., concurring) (same). Florida extended the right to seek Rule 3.850 relief; it must "assure the indigent defendant an adequate opportunity to present his claims fairly." Ross v. Moffitt, 417 U.S. 600, 616 (1974). Having extended the right to seek redress under Rule 3.850, the State must provide a forum, and that forum's consideration of Mr. Jones' claim must comport with due process. Bounds v. Smith, 430 U.S. 817 (1977); Evitts v. Lucey, 469 U.S. 387 (1985).

Moreover, Mr. Jones's claim requires consideration not just of this one piece of newly-discovered evidence, but of the cumulative effect of all the evidence of Mr. Jones's innocence. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991).

A stay of execution, full and fair evidentiary resolution, and post-conviction relief are appropriate.

ARGUMENT V

THE STATE KNOWINGLY PRESENTED FALSE AND MISLEADING EVIDENCE AT MR. JONES' CAPITAL TRIAL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

At trial, Bobby Hammonds provided crucial evidence for the State against Mr. Jones. Undersigned counsel upon being assigned the case on October 1, 1991 realized that Mr. Hammonds testimony at trial was significant and directed that investigative efforts be made to locate Mr. Bobby Hammonds. Mr. Hammonds was

considered an important witness in light of his testimony concerning the beatings that he and Mr. Jones received at the hands of police officers on the night of their arrest, that he had retracted his statements several times, and the overall weakness of his ultimate trial testimony during which much of his testimony was the result of leading questioning by the prosecution.

Although Mr. Hammonds had not been located at the time of the hearing in circuit court on Sunday, November 10, 1991, counsel indicated on the record that investigation was continuing, including efforts to locate Mr. Hammonds, and proffered a summary of counsel's efforts on locating Mr. Hammonds:

> The only other thing I would like to put on the record, Your Honor, is when I got this case on 1, October of this year, the thing that I directed Ms. Harris to do -- and she has done it and I want to put this on the record -- was to try to locate Mr. Bobby Hammonds. Mr. Bobby Hammonds, despite our heroic efforts, has not yet been located. We have contacted everyone in his family, we have contacted the maritime marine union to which he last worked, we have contacted his last known addresses, we have even hired an agency called Global Search, who in my experience for the past two years, has been able to find anybody and Mr. Hammonds has not been found. I need to put that on record, Your Honor.

(H. 77).

At approximately 11:30 p.m., Monday, November 11, 1991, Ms. Donorena Harris talked with Mr. Bobby Hammonds by telephone. Ms.

Harris relates the following concerning her conversation with Mr. Bobby Hammonds:

> I, DONORENA HARRIS, being duly sworn hereby depose and say:
>
> 1. I am Donorena Harris, a State of Florida investigator employed by the Office of the Capital Collateral Representative. I am the investigator assigned to the Leo Jones case.
>
> 2. On November 11, 1991, at 11:30 p.m. EST, I interviewed Bobby Hammonds, who currently resides in California. Earlier in the evening, Valerie Hammonds spoke to Bobby Hammonds who provided to her his location and telephone number. Ms. Hammonds is the wife of Arty Hammonds, Bobby's brother and knows Bobby personally. When I called Mr. Hammondss, he told me about his involvement in the Leo Jones case.
>
> 3. Mr. Hammonds said that he was asleep in Leo Jones' apartment when he was awakened by several Jacksonville police officers. The police officers beat him about his head and face with the butts of their guns and their flashlights. Mr. Hammonds heard the officers beating Leo Jones.
>
> 4. Mr. Hammonds said that after he and Leo Jones were taken to the Jacksonville Police Memorial Building, he was questioned about the murder of a Jacksonville police officer. Mr. Hammonds stated the police officers beat him during the interrogation and told him what his statement should say. Mr. Hammonds said he refused at first. Then, one of the police officers unloaded all of the bullets in his handgun, except one. The officer talked to Hammonds and pulled his trigger at the same time, according to Hammonds. The officer threatened to hurt Hammonds if he refused to provide the information as the police told it to him.
>
> 5. Although Hammonds said he knew nothing about the shooting of a Jacksonville police officer, Hammonds said he signed a statement incriminating Leo Jones because he

feared for his life. Hammonds said the information in the statement was not true, specifically mentioning that he did not see Mr. Jones with a rifle on that evening.

6. Mr. Hammonds was told that he would be called to testify at Leo Jones' trial. Mr. Hammonds said that he was again beaten by a Jacksonville police officer in Jacksonville prior to the trial.

7. Mr. Hammonds was reluctant to discuss this matter by telephone because he fears the Jacksonville police community. He stated his preference for a face to face interview, at which time, he would provide more information.

8. This interview culminates a three-week search for Mr. Hammonds who has moved frequently, lived in several states over the past ten years and left no forwarding addresses. Mr. Hammonds whereabouts proved so elusive that CCR contracted with Global Search Service to assist me in locating Mr. Hammonds. Global was unsuccessful and indicated that Mr. Hammonds was a difficult case.

(Attachment 1).

This evidence warrants an immediate stay of execution to allow Mr. Jones the ability to present this crucial evidence to the circuit court.[4] Mr. Jones was convicted and sentenced to death largely upon the testimony of Mr. Hammonds and his own alleged confession. Aside from this evidence, the State had very

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[4]This new evidence clearly warrants a new Rule 3.850 claim premised upon Brady v. Maryland, 373 U.S. 83 (1963), and Giglio v. United States, 405 U.S. 150 (1972). See Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), there this Court granted a stay of execution to a virtually identically situated defendant. However, due to the exigencies of the circumstances, Mr. Jones is dependent upon this Court to grant him the time necessary to gain access to the courts and present this claim.

little: there were no eyewitnesses, no evidence that the rifles found in Mr. Jones' apartment were conclusively linked to the killing, and no evidence that Mr. Jones had fired a weapon.

Despite evidence that both Mr. Hammonds and Mr. Jones received beatings at the hands of the police, and despite reports from both that their statements were given to police upon coercion on the morning after their arrest because of the beatings, Mr. Hammonds ultimately testified at trial that in fact he was telling the truth and that his original statements implicating Mr. Jones were not the result of any coercion. We now know, although defense counsel, the jury, and this Court were not allowed to know, that this was simply not the truth.

Rather, Mr. Hammonds' original statements and ultimately his testimony at trial were the result of coercion and threats from the State. In fact, he did not testify truthfully at trial, but was told what to say by the agents of the State. Defense counsel and Mr. Jones' jury were never made aware of the government misconduct which led to this testimony. The government misled the jury, presented false testimony, and allowed its witnesses to lie. The government not only failed to correct the lies -- it used them.

This evidence now shows what Mr. Jones has claimed all along: That his confession and the evidence from Mr. Hammonds was the result of government coercion and misconduct. Much of the testimony provided by the government's witnesses was simply false, and the State knew or should have know it was false.

Quite simply, Mr. Jones' conviction and death sentence resulted from appalling governmental misconduct.

If the State could concede that the evidence presented to the circuit court on Sunday, November 10, 1991 could "create a debatable question" concerning Mr. Jones' innocence, then his additional evidence leaves no doubt. Mr. Jones is innocent.

This case involves more than a simple violation of Brady v. Maryland, 373 U.S. 83 (1963). As long as fifty years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935). The fourteenth amendment's Due Process Clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935).

A prosecutor not only has the constitutional duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, supra, but also to correct the presentation of false state-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of false evidence violates due process whether it relates to a substantive issue, Alcorta, supra, the credibility of a State's witness, Napue, supra; Giglio v. United States, 405

U.S. 150, 154 (1972), or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

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

Accordingly, in cases involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. United States v. Bagley, 473 U.S. 667, 679 (1985), quoting United States v. Agurs, 427 U.S. at 102. This test is in essence the Chapman v. California, 386 U.S. 18 (1967), standard. Bagley, 473 U.S. at 679 n.9. In sum, the most

rudimentary requirements of due process mandate that the government not present and not use false or misleading evidence, and that the State correct such evidence if it comes from the mouth of a State's witness. The defendant is entitled to a new trial if there is <u>any reasonable likelihood</u>, <u>Bagley</u>, <u>supra</u>, that the falsity affected the verdict. This motion demonstrates that these principles were flouted during the proceedings resulting in Mr. Jones' capital conviction and sentence of death. Thus, if there is "any reasonable likelihood" that Mr. Hammonds' uncorrected false and/or misleading testimony <u>affected</u> the verdicts at guilt-innocence or sentencing, Mr. Jones is entitled to relief. Obviously, here, there is much more than just a possibility -- as the factual allegations in this Supplemental Emergency Application for a Stay of Execution demonstrate.

It must be noted that when the "inquiry is whether the state authorities knew" of the falsity of a government witness' testimony, "[i]t is of no consequence that the facts pointed to may support only knowledge of the police because such knowledge <u>will be imputed to state prosecutors</u>." <u>Williams v. Griswald</u>, 743 F.2d 1533, 1542 (11th Cir. 1984) (citations omitted) (emphasis supplied). In this regard, the Eleventh Circuit Court of Appeals' opinion in <u>Brown v. Wainwright</u>, 785 F.2d 1457 (1986), is very much on point:

> The government has a duty to disclose evidence of any understanding or agreement as to prosecution of a key government witness. <u>Haber v. Wainwright</u>, 756 F.2d 1520 (11th Cir. 1985); <u>Williams v. Brown</u>, 609 F.2d 216, 221

> (5th Cir. 1980); U.S. v. Tashman, 478 F.2d 129, 131 (5th Cir. 1973). The government, in this case, did not disclose. The government has a duty not to present or use false testimony. Giglio [v. U.S., 405 U.S. 150 (1972)]; Williams v. Griswald, 743 F.2d 1533, 1541 (11th Cir. 1984). It did use false testimony [testified to by the informants]. If false testimony surfaces during a trial and the government has knowledge of it, as occurred here, the government has a duty to step forward and disclose. Smith v. Kemp, 715 F.2d 1459, 1463 (11th Cir.), cert. denied, 464 U.S. 1003, 104 S. Ct. 510, 78 L.Ed.2d 699 (1983) ("The state must affirmatively correct testimony of a witness who fraudulently testifies that he has not received a promise of leniency in exchange for his testimony."). It did not step forward and disclose when [the informants] testified falsely. The government has a duty not to exploit false testimony by prosecutorial argument affirmatively urging to the jury the truth of what it knows to be false. See U.S. v. Sanfilippo, 564 F.2d 176, 179 (5th Cir. 1977) (defendant's conviction reversed because "The Government not only permitted false testimony of one of its witnesses to go to the jury, but argued it as a relevant matter for the jury to consider"). Here the government [argued for Leo Jones' capital conviction and death sentence on the basis of the informants' testimony].

785 F.2d at 1464 (footnotes omitted). Moreover, "[i]t is of no consequence that the falsehood [bears] upon the witness's credibility rather than directly upon [the] defendant's guilt." Brown, 785 F.2d at 1465, quoting Williams v. Griswald, and Napue v. Illinois.

Mr. Jones respectfully submits that a stay of execution is required, in order to allow full and fair resolution of this substantial factual and legal issue. See Lightbourne v. Dugger, 549 So. 2d 1364 (1Fla. 1989).

CONCLUSION

Mr. Jones' claims are properly before the Court. He therefore respectfully urges that a stay of execution and a full and fair evidentiary hearing be granted.

WHEREFORE, Mr. Jones respectfully requests an order staying his execution, and vacating his unconstitutional capital conviction and sentence of death.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 13, 1991.

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