

**FILED**

SID J. WHITE

JAN 14 1992

IN THE SUPREME COURT OF FLORIDA

CASE NO.

79207

CLERK, SUPREME COURT

By

Chief Deputy Clerk

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MCARTHUR BREEDLOVE,

Petitioner/Appellant,

v.

STATE OF FLORIDA; HARRY K. SINGLETARY, JR.,

Respondents/Appellees.

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

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SUMMARY BRIEF AND APPLICATION FOR STAY OF EXECUTION  
PENDING THE PRESENTATION AND DISPOSITION OF  
PETITIONER/APPELLANT'S APPEAL FROM THE DENIAL  
OF HIS MOTION FOR FLA. R. CRIM. P. 3.850 RELIEF  
AND SUPPORTING MOTIONS, AND PENDING DISPOSITION  
OF PETITIONER'S APPLICATION FOR HABEAS CORPUS RELIEF

---

LARRY HELM SPALDING  
Capital Collateral Representative  
Florida Bar No. 0125540

THOMAS H. DUNN  
Assistant CCR  
Florida Bar No. 871753

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

COUNSEL FOR APPELLANT

**PRELIMINARY STATEMENT**

This Honorable Court has before it the appeal of the circuit court's summary denial of Mr. Breedlove's motion for post-conviction relief, brought pursuant to Fla. R. Crim. P. 3.850, and Mr. Breedlove's petition for a writ of habeas corpus, which is presently pending before the Court. A death warrant is currently pending against Mr. Breedlove, and his execution is scheduled for January 22, 1992. Given the time constraints involved in this action, Mr. Breedlove's counsel cannot provide this Court with a proper brief professionally addressing each of the claims presented in the Rule 3.850 motion and the many reasons why the circuit court's disposition of the motion was fundamentally improper and erroneous. Neither can Mr. Breedlove's counsel provide the Court with a proper reply addressing the many errors in the State's response to his petition for a writ of habeas corpus. This application for a stay of execution therefore addresses some of the more obvious reasons why the circuit court's denials of an evidentiary hearing and Rule 3.850 relief were erroneous.

On the basis of this application for a stay of execution, it is respectfully requested that the Court enter a stay, and allow the normal briefing schedule to go forward so as to allow Petitioner/Appellant the opportunity to properly brief and present his Rule 3.850 appeal, and to properly reply to the erroneous contentions presented in the State's response to the application for habeas corpus relief, and to allow the Court the

opportunity to properly review and fully consider this case. The claims presented by Petitioner/Appellant and the issues involved in this action are important and substantial. A stay of execution is proper.

In this summary brief, references to the transcripts and record of these proceedings will follow the pagination of the Record on Appeal. The trial proceedings will be referred to as "R. \_\_\_\_." The record on appeal from the summary denial of this post-conviction motion will be referred to as "PC-R. \_\_\_\_."

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STATEMENT OF THE CASE

**A. INTRODUCTION**

This case is before the Court on appeal of the summary denial of Mr. Breedlove's Rule 3.850 motion. A death warrant is currently pending against Mr. Breedlove, and his execution is scheduled for January 22, 1992. Even though numerous factual issues were raised -- issues classically resolved through an evidentiary hearing in Rule 3.850 proceedings -- the lower court summarily denied the motion without allowing an evidentiary hearing, without making any findings of fact, without ever resolving the factual questions involved, and without attaching to the order denying Rule 3.850 relief anything from the record that conclusively established that Mr. Breedlove was entitled to no relief. The circuit court summarily denied the motion despite trial counsel's affidavit attesting that there was virtually no investigation of Mr. Breedlove's case; despite admissions by two of the mental health experts who testified at trial on Mr. Breedlove's behalf that they had no background materials and no information concerning the offense and that such materials were needed to do a professional evaluation; and despite the State's reliance upon non-record materials in responding to Mr. Breedlove's allegations. The files and records in this case by no means conclusively show that Mr. Breedlove is entitled to no relief -- to the contrary, the files and records demonstrate that Mr. Breedlove may well be entitled to relief and that he certainly is entitled to the opportunity to present the facts

supporting his claims at an evidentiary hearing. If allowed to do so, he will establish his entitlement to relief. A stay of execution is proper.

**B. STATEMENT OF THE FACTS**

Count I of the indictment alleged that the homicide in this case was committed "from a premeditated design . . . or while [defendant] was engaged in the perpetration of, or in an attempt to perpetrate" a burglary (R. 1). At trial, the State proceeded solely on the latter theory, and abandoned any contention that Mr. Breedlove was guilty of premeditated first-degree murder (R. 466, 532-33, 1158-59, 1199). The victim died from a single stab wound inflicted by a knife which the perpetrator obtained from the kitchen (R. 633, 766). The only issue at trial was identity; the only direct evidence which inculpated Mr. Breedlove was a post-arrest statement (R. 1121-1202, 1207-23, R. 130-35).

The incident which gave rise to the charges in this case occurred during the early morning hours of November 6, 1978 at a house located at 1315 Northeast 146th Street in Miami (R. 716, 726-731). The only eyewitness to the events inside the house was Carol Meoni, who was then residing there with the victim, Frank Budnick (R. 716-18). Ms. Meoni did not observe the actual assault upon Mr. Budnick; she awakened as Mr. Budnick was leaving their bedroom after having been wounded (R. 726-27).

Ms. Meoni was unable to identify the assailant; she testified that she had only observed "this, like, shadow or something going out of the door" before Budnick left the bedroom

(R. 726). She testified that she had followed Budnick out of the house (R. 726-28). As she left, she observed a knife in the doorway of the house; she subsequently observed Budnick lying on the ground near the street (R. 727).

Police officers were summoned to the scene; the first officers arrived at approximately 3:00 A.M. (R. 611-12). The knife and other physical evidence were recovered from the house, and numerous latent fingerprints, none of which were introduced into evidence, were taken (R. 632-33, 642, 669, 675-77, 678-91). The officers also observed scratches on the lock plates of the utility room door of the house (R. 675-78), and found a purse belonging to Ms. Meoni on the ground in the back yard (R. 615, 672-73).

The two Public Safety Department detectives assigned to investigate the case, Julio Ojeda and Charles Zatreparek, commenced their investigation on the morning of November 6, 1978 (R. 873-77, 1007). They initially directed that investigation toward finding the bicycle on which a witness had seen an individual leave the area of the Meoni residence (R. 877-81, 1008).

Mr. Breedlove was stopped by North Miami Beach police officers on the night of November 8, 1978, and was subsequently arrested on charges of obstruction of an officer by a disguised person and loitering (R. 45-47, 67-81, 797-804). The blue bicycle was subsequently discovered at the home of Mr. Breedlove (R. 813, 890-93, 1010-11). The officers also spoke with Mr.

Breedlove's mother, Mary Gibson, and with his brother, Elijah Gibson (R. 908-09, 1012). Based upon the information obtained from the Gibsons and the discovery of the bicycle, the officers decided to interrogate Mr. Breedlove, who was then incarcerated in the Dade County Jail (R. 961-62, 971-72, 1010, 1065-66).

During the interrogation, Mr. Breedlove denied involvement in the offense (R. 921-40). At the conclusion of the statement, he was placed under arrest for the homicide in this case (R. 943-44). Subsequently, on November 21, 1978, Mr. Breedlove allegedly made both an oral and a formal statement to Zatreparek, in which he admitted having committed the burglary and having assaulted the victim (R. 1030, R. 130-34).

The jury returned guilty verdicts on the murder charge, the burglary charge, and the theft charge, but found Mr. Breedlove not guilty on the attempted murder charge (R. 154-58).

At the advisory sentencing hearing, the prosecution presented: a sergeant from the Los Angeles Police Department, who testified regarding two sexual assaults for which Mr. Breedlove had previously been convicted; Dr. Ronald Wright, who testified regarding the pain suffered by the victim prior to his death; and two psychiatrists, who had been appointed by the court prior to trial to determine the competency of Mr. Breedlove (R. 1291-1302). The defense introduced the testimony of a psychiatrist and two psychologists, who testified that Mr. Breedlove suffers from paranoid schizophrenia (R. 1324-73).

The jury returned an advisory verdict recommending the imposition of the death penalty (R. 178). The trial court then orally imposed sentence (R. 1477-81); it subsequently entered a formal sentencing order (R. 183-90).

Mr. Breedlove appealed his convictions and sentence. His conviction and sentence were affirmed. Breedlove v. State, 413 So. 2d 1 (Fla. 1982). On October 4, 1982, certiorari was denied by the United States Supreme Court. Breedlove v. Florida, 459 U.S. 882 (1982).

On November 30, 1982, a motion for post-conviction relief on Mr. Breedlove's behalf was filed in Dade County Circuit Court. The motion raised two claims: (1) denial of the right to be present at a critical state of the proceedings, and (2) a claim under Brady v. Maryland, 373 U.S. 83 (1963). The first claim was abandoned during the course of litigation in circuit court.

The motion was summarily denied on January 4, 1991. This Court affirmed the trial court's order. Breedlove v. State, 580 So. 2d 605 (Fla. 1991).

On November 18, 1991, a death warrant was signed by the Governor. Undersigned counsel began representation of Mr. Breedlove on November 25, 1991, after volunteer counsel could not be located. Counsel has been unable to effectively represent his client, and Mr. Breedlove of necessity filed his motion to vacate judgment and sentence on December 18, 1991.

This was Mr. Breedlove's second motion for Fla. R. Crim. P. 3.850 relief. Nevertheless, Mr. Breedlove's case is in a unique

procedural posture. By necessity, Mr. Breedlove filed a successive motion for post-conviction relief. His former post-conviction attorney explains:

My name is Elliot H. Scherker and I am employed as an Assistant Public Defender in the Appellate Division of the Office of the Public Defender of the Eleventh Judicial Circuit of Florida. I have been so employed since October of 1975.

I was assigned primary responsibility for the appellate representation of Mr. McArthur Breedlove after his conviction for first-degree murder and the imposition of a death sentence in 1979. I represented him on direct appeal to the Supreme Court of Florida, and before the Supreme Court of the United States on a petition for a writ of certiorari. Breedlove v. State, 413 So. 2d 1 (Fla.), cert. denied, 459 U.S. 882 (1982).

On November 30, 1982, I filed a motion for post-conviction relief on Mr. Breedlove's behalf in Dade County Circuit Court. The motion raised two claims: (1) denial of the right to be present at a critical stage of the proceedings, and (2) a claim under Brady v. Maryland, 373 U.S. 83 (1963), alleging that the detectives who coerced Mr. Breedlove into making inculpatory statements would probably have been impeached with undisclosed evidence of their own racketeering and drug-related activities. The first claim was abandoned during the course of the litigation in circuit court.

The motion was summarily denied on January 4, 1991. I represented Mr. Breedlove on appeal from the order denying the motion. The Supreme Court of Florida affirmed the trial court's order. Breedlove v. State, 580 So. 2d 605 (Fla. 1991).

I was employed as an assistant public defender throughout my representation of Mr. Breedlove in appellate and post-conviction proceedings. The Dade County Public Defender has also represented Mr. Breedlove in all pretrial, trial, and sentencing proceeding,

with representation provided by Assistant Public Defenders Eugene F. Zenobi, Jay L. Levine, and David Finger.

I did not investigate or raise any claims of ineffectiveness of counsel, either at trial or on appeal, in the course of my representation of Mr. Breedlove. I believed that I would have been ethically and legally precluded from pursuing any such claims because to have done so would have engendered a conflict of interest.

I never discussed this matter with Mr. Breedlove. I proceeded with my representation in his case to extent allowable under Florida law.

Prior to oral argument on the post-conviction appeal in the Supreme Court of Florida, I was contacted by a staff attorney from the Florida Volunteer Lawyers Resource Center who suggested that I should withdraw as Mr. Breedlove's counsel in order that any viable claims of ineffective assistance of counsel could be investigated and presented to the courts. After the affirmance of the trial court's order denying relief, I was contacted by Assistant Attorney General Ralph Barreira, counsel for the state before the Supreme Court of Florida, who expressed to me a similar view on behalf of the state.

The circuit court reviewed Mr. Breedlove's Rule 3.850 motion on the merits. As the circuit court ruled, Mr. Breedlove's claims of ineffective assistance of counsel are properly presented. Mr. Breedlove cannot be deemed to have waived any ineffective assistance of counsel claim when the same office whose effectiveness would be at issue was still representing him. Under Florida law, an attorney may not challenge the ineffectiveness of his own law office. Adams v. State, 380 So. 2d 421, 422 (Fla. 1980). Likewise, the U. S. Court of Appeals for the 11th Circuit found "cause" for a petitioner's failure to

raise an ineffective assistance issue in his first state habeas petition because the petitioner's trial counsel also represented him in the first habeas proceeding. Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988).

Moreover, this situation has forced undersigned counsel to prepare this case under the exigencies of a warrant. The Volunteer Lawyer's Resource Center did not transfer Mr. Breedlove's case to this office until November 25, 1991. The death warrant was signed by the Governor because the Resource Center was unable to recruit counsel for Mr. Breedlove and the case could not proceed without substitute counsel. Against his articulated policy not to sign death warrants until death sentenced inmates have completed their entire post conviction review in the State and Federal Courts, the Governor signed this warrant on Mr. Breedlove obviously to get the case moving. The death warrant has now made it necessary for this office to take on representation of Mr. Breedlove. Undersigned counsel has done so. There is absolutely no further reason to continue the litigation of this case under the exigencies of a death warrant. As reflected by the substance of Mr. Breedlove's claims, the files and records in this action by no means show that Mr. Breedlove is entitled to "no relief," and much less so "conclusively" make such a showing. See Lemon v. State, 498 So. 2d 923 (Fla. 1986). The relief sought herein should be granted. The death warrant has served its purpose. A stay of execution is now warranted.



**ARGUMENT**

**ARGUMENT I**

**THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. BREEDLOVE'S MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING WAS ERRONEOUS AS A MATTER OF LAW AND FACT.**

The lower court summarily denied Mr. Breedlove's claims in an order without conducting any type of hearing, without adequately discussing whether (and why) the motion failed to state valid claims for Rule 3.850 relief (it does), without any explanation as to whether (and why) the files and records conclusively showed that Mr. Breedlove is entitled to no relief (they do not), and without attaching those portions of the record which conclusively show that Mr. Breedlove is entitled to no relief (the record supports Mr. Breedlove's claims). The lower court's order in its entirety reads as follows:

THIS CAUSE having come before the Court on the Defendant's Second Motion to Vacate Judgment and Sentence and Motion for Stay of Execution, and this Court after having reviewed the motions, the State's response thereto, as well as the transcripts of the trial proceedings and other relevant court records and files, and having heard argument of counsel, and being otherwise fully advised of the premises therein, hereby DENIES the Defendant's Second Motion to Vacate Judgment and Sentence and Motion for Stay of Execution, and finds as follows:

1. That the second motion is untimely, but because the instant case involves the death penalty, the Court will consider the motion on its merits.

2. That Claim II, alleging a violation of Brady v. Maryland, 373 U.S. 83 (1963), is procedurally barred as it was raised on

direct appeal. Breedlove v. State, 413 So.2d 1 (Fla. 1982).

3. That Claims I and III, alleging ineffective assistance of trial counsel at the guilt-innocence stage and the penalty stage, respectively, is without merit under the standards of Strickland v. Washington, 466 U.S. 668 (1984).

(PC-R. 324).

A motion for rehearing was timely filed by Mr. Breedlove. That motion was denied at approximately 10:00 a.m., January 14, 1992.

The lower court's summary denial of Mr. Breedlove's Rule 3.850 motion was incorrect. The issues presented in the Rule 3.850 motion were of the type plainly requiring evidentiary resolution of facts that are not "of record." Questions relating to the State's failures to provide discovery, and questions of trial counsel's deficient performance at both the guilt and penalty phases of trial, were all presented by the motion to vacate and all involved matters that must be dealt with in an evidentiary hearing.

Despite the circuit court's statement that he accepted everything pled as true, the court failed to explain his summarily denial in light of trial counsel's affidavit:

10. The jury came back with a finding of guilty on a Friday afternoon. Mr. Zenobi asked me if I could do the second phase of Mr. Breedlove's trial. He said he could not proceed with the second phase. This was my first penalty phase case. I had literally the weekend to prepare. I had done absolutely no investigation of Mr. Breedlove's background, nor had Mr. Zenobi. The case amounted to the testimony of mental

health experts who were unprepared to testify. I did not even talk with them until the morning of their testimony. They had been provided no background information. We knew absolutely nothing about Mr. Breedlove's life history or background. As at the guilt innocence phase of the trial, there was no adequate investigation concerning the second phase of Mr. Breedlove's trial.

11. I had no tactical or strategic reason for failing to do this investigation. Had I learned of Mr. Breedlove's abusive history as a child and his serious substance abuse problem, I would have presented that evidence to the jury. Moreover, I would have provided that information to the mental health experts.

(PC-R. 281-84).

The files and records in this case do not conclusively show that Mr. Breedlove is entitled to no relief. To the contrary, the record supports trial counsel's recollection that there was no investigation or preparation of Mr. Breedlove's penalty phase case. The three mental health experts who testified on behalf of Mr. Breedlove at trial all stated they were provided with absolutely no background materials concerning Mr. Breedlove and no information concerning Mr. Breedlove's pre-trial statements or the circumstances of the offense (R. 1332-36, Dr. Center; R. 1351-1365, Dr. Levy; R. 1373-1385, Dr. Miller).

During cross-examination, Dr. Levy was forced to make this concession before Mr. Breedlove's jury:

Given I did not have this kind of information, I had to go on what I have. What I have is a human being who is in front of me, and I have been hired by the public defender's office to examine him and to give my expert opinion.

Q You were hired by the public defender's office to come in here today, and that is Mr. Zenobi and Mr. Levine.

A Yes.

Q They were the ones that did not provide you with these documents that may have assisted you in informing your opinion. Is that right, sir?

A It looks that way.

(R. 1355-56).

Dr. Miller made a similar prejudicial concession before Mr. Breedlove's jury when asked on cross-examination about why he had not asked the prosecutor for background materials when the defense counsel failed to provide him with the information. He responded:

I had not anticipated testifying, and so I received the subpoena just through the mail under the door. The next working day is this morning. I am sitting around the house waiting. I had no idea I would be called today to come to court. I got a call at ten o'clock this morning.

Q So this is just a last minute thing. Mr. Zenobi and Mr. Levine asked you to come into court at the very last minute?

MR. LEVINE: Objection.

THE COURT: Sustained.

Q [By Mr. Stelzer] You found a subpoena asking you to appear in court--

MR. LEVINE: Objection; repetitious.

THE COURT: Let's go on with it.

Q [By Mr. Stelzer] Would you have liked to have had an opportunity to be provided those documents Mr. Godwin and I

offered to let you see, to assist you in reaching an opinion?

A Any material that is pertinent would be useful to look at.

(R. 1375).

Moreover, trial counsel's closing argument at the penalty phase demonstrates that he did not investigate Mr. Breedlove's case, and thus did not know about Mr. Breedlove's abusive upbringing and serious substance abuse problem and that he would have used such information had he investigated. During his closing argument, counsel was forced to talk about a "hypothetical" child in an attempt to "humanize" Mr. Breedlove because he knew nothing about Mr. Breedlove:

So why would you kill him? Why would you recommend that he die in the electric chair? Out of vengeance? out of hate? Do you hate McArthur Breedlove? Do you hate him for the illness that five doctors have recognized?

No matter how they characterized it, every single one of them recognizes a long-standing psychological illness.

Do you hate him for the illness? It is like hating someone who has cancer.

Dr. Mutter told you, "It starts in late childhood. It could be hereditary. It could be environmental."

We do not know what caused him to look and act the way he does.

Anyway, you know what causes certain types of cancer. Do you hate him for developing a cancer?

Look at a baby in an incubator. Perhaps a future sociopath. The doctor said, "It could be the result of the environment."

Do you know what awaits that baby? Does love await that baby, so that the baby may grow up to be loving? Does compassion await that baby, so that the baby will grow up to be compassionate, or does loneliness await that baby, so the baby will grow up brutal and alone? Do you hate that baby? Do you hate that baby because brutality and loneliness await him? Can you bring yourself to do it [sic]?

Look at a little child in any school yard you will go to. You will see one child who stands apart, and you wonder what caused that child to forsake the companionship and the laughter of the other children, and you want to go up to that child and ask him what makes the other children forsake him.

You want to reach out. You want to reach out to that child, and that child turns to you, and out of that little face look those eyes, and do you hate that child for what he has become? Do you hate him for the brutality and loneliness that await him; that caused that child to have that face?

(R. 1455-57). The record supports Mr. Breedlove's claim of ineffective assistance of counsel.

The State by its actions admitted that an evidentiary hearing is required. The State's response to Mr. Breedlove's motion to vacate relied upon "non-record" material in attempting to refute his claims of ineffective assistance of counsel at the guilt-innocence phase of his trial (PC-R. 130-135). Not only did the State ask the circuit court to rely on non-record materials, but it asked the court to make credibility findings without hearing the witnesses' testimony (PC-R. 130-135). An evidentiary hearing is required. The summary denial was improper.

As this Honorable Court's precedents and Rule 3.850 itself make clear, 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); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Breedlove's motion alleged facts which, if proven, would entitle him to relief. In fact, the circuit court stated on the record, "I've taken everything that you referred to in your motion as being true. I think you're right. That's the way I have to deal with it" (PC-R. 44). The files and records did not "conclusively show that Mr. Breedlove is entitled to no relief," and the circuit court's summary denial of his motion, without an evidentiary hearing, was therefore erroneous. Indeed, the circuit court attached to its order denying relief nothing which rebutted Mr. Breedlove's claims and stated no rationale based upon the record for denying relief. See Hoffman v. State, 571 So. 2d 449 (Fla. 1990).

Mr. Breedlove's verified Rule 3.850 motion alleged (supported by factual proffers) the extensive non-record facts concerning claims which have traditionally been raised in Florida post-conviction proceedings and tested through evidentiary hearings. Mr. Breedlove is entitled to an evidentiary hearing with respect to these claims: there are no files and records

which conclusively show that he will necessarily lose. Even if that was what the lower court judge believed, in such instances the judge must attach "a copy of that portion of the files and records which conclusively show that the prisoner is entitled to no relief . . ." Fla. R. Crim. P. 3.850; Hoffman; Lemon, supra. Otherwise, an evidentiary hearing is proper. The lower court attached no portion of the record, nor addressed any of these matters in his order. This case involves matters that are not "of record," and the circuit court erred in denying an evidentiary hearing and in summarily denying the motion to vacate. Facts not "of record" are at issue in this case; such facts cannot be resolved now by this Court, as there is no record to review. The lower court erred in declining to allow factual, evidentiary resolution.

In O'Callaghan, supra, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance of counsel claim were not "of record." See also Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983). This Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Groover v. State, 489 So. 2d 15 (Fla. 1986); Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990); Zeigler v. State, 452 So. 2d 537 (Fla. 1984); Vaught, supra; Lemon, supra; Squires, supra; Gorham, supra; Smith v. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc v. State, 415 So. 2d



721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Arango v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Breedlove was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of Rule 3.850 relief was erroneous. A stay of execution is warranted. Mr. Breedlove's case should be remanded for a full and fair evidentiary hearing.

#### ARGUMENT II

**MR. BREEDLOVE 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.**

The indictment in this case alleged that the homicide was committed "from a premeditated design . . . or while . . . engaged in the perpetration of, or in an attempt to perpetrate" a burglary (R. 1). At trial, the State relied solely on a felony murder theory, and abandoned any contention that Mr. Breedlove was guilty of premeditated first-degree murder (R. 466, 532-33, 1158-59, 1199). The only issue at trial was identity; the only direct evidence against Mr. Breedlove was a post-arrest statement (R. 1121-1202, 1207-23, 130-35).

The incident upon which the charges in this case were based occurred during the early morning hours of November 6, 1978, in Miami (R. 716, 726-731). The only eyewitness to the events inside the house was Carol Meoni, with whom the victim, Frank Budnick, was living (R. 716-18). Ms. Meoni did not observe the

actual assault upon Mr. Budnick, but she awakened as Budnick was leaving their bedroom after having been wounded (R. 726-27).

Meoni could not identify the assailant. She testified that she had only observed "this, like, shadow or something going out of the door" before Budnick left the bedroom (R. 726). A neighbor, Joan Fournier, testified that she was awakened by noise from the Meoni residence during the early hours of November 6th, and that she observed a man riding a bicycle (R. 590-93). She could not identify this person or give any description of him except that he was "maybe five foot ten and he looked husky, about 190, but I am not sure about that" (R. 593).

Police officers were subsequently summoned to the scene. The first officers arrived at approximately 3:00 a.m. (R. 611-12). The knife and other physical evidence were recovered from the house, and numerous latent fingerprints, none of which were introduced into evidence, were taken (R. 632-33, 642, 669, 675-77, 678-91). A fingerprint examiner employed by the Dade County Public Safety Department, George Hertel, testified that he compared five of the latent fingerprints with standard fingerprints of Mr. Breedlove, and that none matched (R. 844-45).

The two detectives assigned to investigate the case, Julio Ojeda and Charles Zatreparek, began their investigation on the morning of November 6, 1978 (R. 873-77, 1007). They initially directed that investigation toward finding the bicycle on which a witness had seen an individual leave the area of the Meoni residence (R. 877-81, 1008).

Mr. Breedlove was stopped by North Miami Beach police officers on the night of November 8, 1978, and was subsequently arrested on charges of obstruction of an officer by a disguised person and loitering (R. 45-47, 67-81, 797-804). A blue bicycle was later discovered at Mr. Breedlove's home (R. 813, 890-93, 1010-11). The officers spoke with Mr. Breedlove's mother, Mary Gibson, and with his brother, Elijah Gibson (R. 908-09, 1012). The officers then decided to interrogate Mr. Breedlove, who was then incarcerated in the Dade County Jail (R. 961-62, 971-72, 1010, 1065-66).

During the interrogation, Mr. Breedlove denied involvement in the offense (R. 921-40). However, Detective Ojeda testified that in the absence of Detective Zatreparek, Mr. Breedlove made certain statements which the detective deemed significant (R. 988). Specifically, Ojeda testified that, on two occasions when Zatreparek was out of the interrogation room, Mr. Breedlove stated that he had taken the blue bicycle "two doors down from the murder" and that no fingerprints would be found inside the house because he "was not in that house" or because he had been wearing socks (R. 938, 940-42). Mr. Breedlove told the officers that he had blood on his trousers that night when he had returned to his home because he had been in a fight at a convenience store. Ojeda testified that, during the course of an accusation that he was being "framed[d]," Mr. Breedlove stated: "I suppose the blood on my pants, you are going to say, comes from the man inside the house" (R. 939-40). Ojeda testified that

this admission was deemed significant because neither he nor Zatreparek had informed Mr. Breedlove of the sex of the victim (R. 941). At the conclusion of the statement, Mr. Breedlove was arrested for homicide (R. 943-44). Subsequently, on November 21, 1978, Mr. Breedlove made a statement to Zatreparek, in which he admitted committing the burglary and assaulting the victim (R. 1030, 130-34).

Prior to trial, the defense moved to suppress the statements which the officers obtained from Mr. Breedlove on November 9th, and during the second interrogation on November 21, 1978 (R. 69-70). Mr. Breedlove testified at the hearing on the motion that he had been physically abused by the interrogating officers on November 9th, and had participated in the interrogation due to the abuse (R. 321-23). Detective Zatreparek denied having beaten Mr. Breedlove (R. 348).

Mr. Breedlove also testified that, on November 21st, he had told the officers who brought him from the Dade County Jail to the police station for interrogation that he did not want to be questioned (R. 312). Mr. Breedlove testified that his refusal to be questioned was heard by the corrections officer who brought him from his cell (R. 312); this testimony was corroborated by the corrections officer (R. 273-77, 300-02, 89-91).

The crux of the defense at trial was that the State had introduced no independent evidence of guilt, that its case was based solely upon Mr. Breedlove's statements, and that those statements were involuntary (R. 1123-40, 1143-54, 1210-16).

Evidence was readily available to support these theories of defense, but was not presented because trial counsel failed to investigate and prepare. One of Mr. Breedlove's attorneys explains:

JAY L. LEVINE, having been duly sworn deposes and says:

1. My name is Jay L. Levine. I am an attorney in private practice in Miami, Florida.

2. In 1978 and 1979, I was an assistant public defender for the Dade County Public Defender's Office. My current law partner David Fingar was also an assistant public defender at that time. Sometime in November 1978, I was assigned to represent MacArthur Breedlove who was a suspect in a homicide investigation.

3. Mr. Fingar and I went to the jail and advised Mr. Breedlove that we would represent him and not to talk to any law enforcement personnel. We were later informed that Mr. Breedlove had talked with law enforcement personnel and allegedly confessed to the murder. We spoke with Mr. Breedlove, and he advised us that he had been threatened and told the police what they wanted to hear. Mr. Fingar and I were very disappointed to hear that. We went back to our office and advised our supervisor, Mr. Eugene Zenobi, that we felt it would be best if we did not continue with our representation of Mr. Breedlove.

4. At that time, Mr. Zenobi took over Mr. Breedlove's representation. Mr. Fingar and I had undertaken no investigation or preparation on Mr. Breedlove's case other than to speak with him on the two previous occasions.

5. Before Mr. Breedlove's trial, I sat in on one deposition that Mr. Zenobi took. It was the deposition of Mr. Breedlove's mother. During the deposition, which related solely to the guilt phase, it was very

apparent that Mr. Zenobi had never spoken with Mr. Breedlove's mother. In fact, Mrs. Breedlove thought that the prosecutors, Mr. Stelzer and Mr. Godwin, were her son's attorneys. I was surprised to learn that Mr. Zenobi had not spoken with Mr. Breedlove's mother prior to this time.

6. I heard nothing else about the case until approximately two weeks before trial. Mr. Zenobi approached me in the presence of Mr. Fingar and requested that I sit in on Mr. Breedlove's trial as second chair. I expressed my concern that I knew nothing about the trial and was unprepared. Mr. Zenobi stated that he just wanted me there to help him protect the record. I agreed to assist him in that role.

7. Just prior to trial, there was a hearing on Mr. Breedlove's suppression motion. I was sitting in the courtroom when the officers brought Mr. Breedlove out. He said hello and asked me who the other person at counsel table was, referring to Mr. Zenobi. When I realized that he was serious and had never spoken to Mr. Zenobi, I became alarmed. On further questioning, I learned from Mr. Breedlove that he had not seen anyone from my office since Mr. Fingar and I had last seen him in November.

8. I questioned Mr. Breedlove in the courtroom about the circumstances surrounding the confession and learned of a correctional officer who may have testimony relevant to the motion to suppress. According to Mr. Breedlove, he had told the officer that he did not want to talk to the detective. I informed Mr. Zenobi of this and he instructed me to go to the jail in an attempt to locate the correctional officer. Luckily, I was able to find him and brought him to the courtroom to testify at the suppression hearing. This is just one example of how unprepared Mr. Zenobi and myself were to try this case.

9. It was apparent to me that Mr. Zenobi was not adequately prepared to try this case. Mr. Breedlove was never even spoken to until the eve of trial and

absolutely no investigation was done. Mr. Breedlove's mother and brother were never interviewed except for the depositions. Although there were inconsistencies with Mr. Breedlove's confession and the evidence, Mr. Zenobi was unprepared to present them to the jury. No independent investigation of any theories of defense was conducted. There was no tactical or strategic reason for not conducting this investigation.

10. The jury came back with a finding of guilty on a Friday afternoon. Mr. Zenobi asked me if I could do the second phase of Mr. Breedlove's trial. He said he could not proceed with the second phase. This was my first penalty phase case. I had literally the weekend to prepare. I had done absolutely no investigation of Mr. Breedlove's background, nor had Mr. Zenobi. The case amounted to the testimony of mental health experts who were unprepared to testify. I did not even talk with them until the morning of their testimony. They had been provided no background information. We knew absolutely nothing about Mr. Breedlove's life history or background. As at the guilt innocence phase of the trial, there was no adequate investigation concerning the second phase of Mr. Breedlove's trial.

11. I had no tactical or strategic reason for failing to do this investigation. Had I learned of Mr. Breedlove's abusive history as a child and his serious substance abuse problem, I would have presented that evidence to the jury. Moreover, I would have provided that information to the mental health experts.

(PC-R. 281-84, Affidavit of Jay L. Levine). For no tactical or strategic reason, counsel failed to fulfill their duty to Mr. Breedlove, who was substantially prejudiced by counsel's omissions.

For example, evidence was available at the time of trial indicating that Mr. Breedlove was at home at the time of the

murder. Elijah Gibson, Mr. Breedlove's brother, provided a statement to Detective McElveen, who reported:

. . . GIBSON continued by stating that he went to sleep at approximately 1:30 A.M. on 6 November 1978, and was awakened by his brother, McARTHUR BREEDLOVE, who had been thrown out of the house earlier over a domestic-type argument with GIBSON's mother, MARIETTA GIBSON. At the time he was awakened, at approximately 2:30 A.M., by McARTHUR BREEDLOVE, BREEDLOVE advised GIBSON that he wanted a glass of water and a cigarette, and he sat down for approximately an hour, after which he left on GIBSON's bicycle.

GIBSON continued by stating that somewhere between 4:00 and 4:30, McARTHUR BREEDLOVE, arrived back at the residence. . . .

(Report of Det. S. McElveen, 11/21/78, p.7)(emphasis added). Mr. Gibson also stated to the officer that it was at this later time that he observed bloodstains on the trousers of Mr. Breedlove, which had been cut at the knees Id. Detective McElveen's report was not provided to the defense.

This statement is of critical importance. A neighbor of the victim testified at trial that she had been awakened by noises from the residence where the offenses occurred at approximately 2:30 a.m. (R. 592-93, 598-99). More importantly, the record clearly reflects that the first police broadcast regarding these offenses was issued at 3:04 a.m., and that the first police officers arrived at the scene four minutes later (R. 621). Thus, the statement of Elijah Gibson establishes that Mr. Breedlove was at home between 2:30 a.m. and 3:30 a.m. -- the time during which the homicide occurred. Indeed, it establishes that Mr. Breedlove



did not leave the residence on a venture which resulted in him returning home with bloodstains on his trousers until after police officers had responded to the location of the homicide.

This statement is also important when considered in light of Mr. Breedlove's various statements. When Mr. Breedlove was initially interrogated on November 9, 1978, he denied involvement in the offenses; he admitted, after being confronted with statements of Gibson and his mother, that he had in fact had blood on his trousers, but stated that it was the result of a physical altercation in which he had been involved that night (R. 929). The statement of Gibson to Detective McElveen is totally consistent with this statement by Mr. Breedlove.

Some two weeks after the initial interrogation, Mr. Breedlove was again questioned, and at this time, admitted culpability (R. 133-34). One of the key elements of the defense at trial, raised both in a pre-trial motion to suppress these latter statements and at trial, was that the statements were obtained by threats of and by the use of physical and psychological coercion (R. 309, 321-23, 1123-40, 1143-54, 1210-16). Thus, the statement of Elijah Gibson, which is consistent with the initial statement of Mr. Breedlove, is powerful evidence that Mr. Breedlove's later statements were in fact coerced.

Had defense counsel properly investigated and prepared, they could have obtained this exculpatory information from Elijah Gibson. Mr. Gibson has provided a sworn affidavit in which he states:

I, ELIJAH GIBSON, having been duly sworn do hereby depose and say:

1. My name is Elijah Gibson and I live in Miami, Florida. I have lived in the Miami area all of my life. I am presently thirty-one years old.

2. McArthur Breedlove is my step-brother. We both have the same mother -- Mary E. Gibson. McArthur lived at our house.

3. I remember when McArthur was arrested in 1978. The police said he committed first degree murder. They also came by the house and asked me and mama questions. I tried to tell the police what I remembered about the day they said McArthur killed some man but they kept threatening me and calling me a liar.

4. The police kept asking me about a brown khaki shirt and pants they found while looking around. I told them that they were my work clothes. There was paint on them and the police kept telling me it was blood. I tried to explain that the clothes were mine but they wanted me to say that I seen McArthur wearing the bloody clothes. I was going by the name of Robert Breedlove when my boss gave me the work clothes. That is why McArthur's last name was on the clothes.

5. The police kept telling me that they knew I helped McArthur kill some man. The officers told me that if I cooperated and helped them get McArthur that I would be safe. The police would say things like, "we're gonna get you too. We're gonna give you big prison time. We know you were with McArthur." They kept telling me those things over and over. I was very scared.

6. The police also told me that they would pin other crimes on me if I did not help them bust McArthur. The police kept at me and made me say things. I remember them describing some jewelry and telling me that I saw McArthur with it. They were putting so much pressure on me and I went ahead and said McArthur had the jewelry.

7. The police also pressured me into saying I saw blood on McArthur's clothes. That is not true and I don't really remember saying it. If I did it was under the pressure from the police.

8. The police did not ask me to read over my statements to make sure they were true. I just remember how they kept threatening to send me to prison.

8. I gave two different statements about McArthur. Both times I was high on heroin. I was high and I was afraid the police were going to put me away so I said what they wanted to hear. I was very nervous, scared, and high.

9. The police also took advantage of my mama. She is an alcoholic. She has been that way all of her life. When the police came to talk she was drunk. The police were giving her wine. They were putting alot of pressure on her. I remember how on the way downtown the police stopped by the store and brought my mama even more wine. They was getting her drunk and telling her what to say. I tried to stop them from telling her what to say but they wouldn't stop.

10. I remember the day the police said McArthur killed the man. I was with McArthur most of the day. We went over to William's store to play pool. We were in and out of there from sometime in the morning until about seven or eight o'clock at night. McArthur was using drugs and drinking beer all day.

11. McArthur had about seven quarts of Budweiser. He was also using cocaine and heroin. McArthur would buy them already mixed together. He would shoot them into his arm. McArthur shot-up about ten times throughout that day.

12. McArthur left and went off by himself about seven or eight o'clock. I did not see him again until about 2:00 a.m. When he came home I was still very high from the drugs we used while shooting pool.

13. When McArthur left at seven or eight he had a dime each of cocaine and heroin. When he came back at two a.m., the dimes were gone and he had two "twenties" each of cocaine and heroin. The seal on one of the "twenties" was broken. McArthur also had some new needles.

14. When McArthur left the store at seven he was riding my yellow bike. He was also riding it when he came back at two.

15. McArthur went out back of the house and shot-up again. He was also drinking out of a bottle of whiskey that he brought with him. McArthur was addicted to the cocaine and heroin and when he was using drugs, he drank alcohol.

16. McArthur left again for about a half-an-hour. He went down to the store to buy more beer.

17. I started using cocaine in about 1973. At that time I was snorting it but I remember McArthur using the cocaine and heroin mix back then. He always used a needle to get high. Ever since McArthur came back from California he has been shooting-up the cocaine/heroin mix.

(PC-R. 285-88, Affidavit of Elijah Gibson).

As Mr. Gibson's affidavit demonstrates, he could have provided defense counsel the information contained in Detective McElveen's report had counsel taken the simple step of interviewing Mr. Gibson. The necessity of interviewing Mr. Gibson was evident from what counsel knew about the State's case: counsel knew that the detectives had spoken to Elijah Gibson on November 9, 1978, when they went to Mr. Breedlove's home; counsel knew that the detectives had confronted Mr. Breedlove with Mr. Gibson's statements during the November 9, 1978, interrogation;

counsel knew that Mr. Gibson had provided a more formal statement at the police department on November 9, 1978.

In addition to the information available from Elijah Gibson regarding Mr. Breedlove's whereabouts on the night of the offense, information was also readily available to support the defense contention that Mr. Breedlove's statements were the result of physical and psychological coercion. For example, shortly after Mr. Breedlove's arrest, a neighbor of Mr. Breedlove's stepfather saw two police officers bring Mr. Breedlove to his stepfather's home. Mr. Breedlove was in handcuffs, his shirt was ripped, and his face was bruised:

1. My name is Charlie Williams and I live in North Miami Beach, Florida. I have lived in North Miami Beach since 1957. I am presently fifty-one years old.

2. I have known McArthur Breedlove since he was a young boy. I worked for his father from 1957 until sometime in the late 1960's. I worked with McArthur himself for about seven years.

3. McArthur was pretty much an easy going guy. He was a regular dude and what I would consider a nice fellow. Unfortunately, McArthur started running with a bad crowd and ended up being a drug addict. Everyone around the neighborhood knew who he was hanging with. It was common knowledge that McArthur was an addict. Most of his old drug friends either died of an overdose or AIDS.

4. I last saw McArthur right after he was arrested. Two police officers brought McArthur to Ruby Lee Breedlove's house. McArthur was wearing handcuffs. His shirt was torn and he had bruises all over his head. It was pretty clear that the police were roughing him up.

5. I was never contacted by McArthur's attorney back in 1979. I would have told them everything I know about McArthur.

(PC-R. \_\_\_\_). Additionally, an inmate who was in the same cell as Mr. Breedlove in the Dade County Jail remembers a time when Mr. Breedlove was taken out of the cell and came back later holding his stomach and crying. Mr. Breedlove said that the police had forced him to confess:

1. My name is John Lane. I live in North Miami Beach, Florida. I am presently forty years old.

2. I was doing time in the county jail when McArthur Breedlove was arrested and charged with first degree murder. Right after they arrested McArthur they put him in the same cell as me. I was in cell 5-B-1. It was a large cell with alot of other inmates.

3. I knew McArthur from the streets. He had been a drug addict for a long time. Everyone knew that McArthur was addicted to cocaine and heroin. I would see him around quite a bit while he was running around.

4. I immediately recognized McArthur and talked with him when he came into the cell. He kept complaining because he was being forced to quite his habit. McArthur was really nervous and shaking. He was also having fits when he would start sweating. I gave him some sweet candy to help calm him down. It helped him a little bit but McArthur kept telling me that he needed his "junk."

5. I remember that McArthur was called out of the cell. When he came back he was holding his stomach and moaning. He told me that he had confessed to a murder. McArthur told me that he was beat up by the police and forced to make a confession. I asked McArthur, "Why didn't you tough it out?" He said that he couldn't stand the beating.

6. I never spoke with McArthur's attorney. I would have told them everything I knew about McArthur.

(PC-R. \_\_\_\_). This evidence was readily available at the time of Mr. Breedlove's trial, but defense counsel failed to investigate and prepare, and thus failed to present it.

Defense counsel also failed to investigate and prepare, and thus to present, substantial evidence establishing Mr. Breedlove's intoxication at the time of the offense. Defense counsel did not follow up on the signals indicating that an investigation regarding Mr. Breedlove's history of substance abuse and his intoxication at the time of the offense was necessary. Defense counsel knew that Mr. Breedlove had told the detectives that on the night of the offense he had been drinking. The reports of the mental health experts who evaluated Mr. Breedlove for competency and sanity before trial indicated Mr. Breedlove's history of substance abuse and the possibility that Mr. Breedlove could have been impaired at the time of the offense if he had been using drugs and/or alcohol. Dr. Jaslow's report noted that Mr. Breedlove experienced "blackouts, primarily with drinking," that he began drinking at age sixteen, that he "used alcohol heavily and also many of the drugs," that he had experienced "periods of amnesia . . . in the involvement with alcohol and drugs," that "he couldn't afford a car since he was so much into alcohol and drugs," that he had received treatment for his alcohol problem, that "he was particularly involved with stimulants, cocaine, and acid," that "he was somewhat forgetful

at this time as a result of his indulgence in alcohol and drugs," and that he found it "rather frightening not to be under the influence, for he felt that he couldn't really handle the responsibilities of a normal reality existence" (Report of Albert C. Jaslow, M.D., 2/21/79). Likewise, Dr. Mutter reported that Mr. Breedlove's drug history began at age sixteen, that Mr. Breedlove said he had used LSD at least 50 times, that Mr. Breedlove "described blackouts and loss of memory with drugs and alcohol," that Mr. Breedlove "stated he drinks large quantities -- as much as one fifth or one quart of vodka daily" that "[i]t is possible that he did have diminished mental capacity as a result of drug and alcohol intoxication," and that Mr. Breedlove "will most likely need drug and alcohol rehabilitation" (Report of Charles B. Mutter, M.D., 2/22/79).

Despite these signals that Mr. Breedlove had been heavily involved in drugs and alcohol for a number of years and that his capacity might have been diminished at the time of the offense as a result of intoxication, defense counsel conducted no investigation regarding intoxication. Evidence was readily available regarding Mr. Breedlove's history of alcohol and substance abuse and regarding Mr. Breedlove's intoxication at the time of the offense. Family members recall that Mr. Breedlove's addiction to alcohol and drugs began when he started drinking cough syrup and dropping acid. He quickly escalated his drug use to include speed and a wide range of amphetamines. His drug intake increased until he was completely controlled by and



addicted to cocaine and heroin. He was shooting up hundreds of dollars a day in cocaine and heroin.

Records from the Atascadero State Hospital in California indicate that in 1969, mental health professionals believed Mr. Breedlove "would profit from [a] treatment program which was primarily designed for people with addictive disorders. He has become aware of his past dependence on narcotics and feels he needs help." Those records also indicate that Mr. Breedlove had used "heroin, marijuana, amphetamines and barbiturates," that he "has been dependent upon and probably addicted to numerous drugs including cocaine and heroin which have been taken mainline in the vein of his left forearm," and that he "has used amphetamines such as methedrine, barbiturates, such as seconal or red devils, and has also smoked marijuana." These records further indicate that Mr. Breedlove was "addicted to cocaine, heroin, methedrine, and barbiturates, which may have given him a temporary psychotic reaction."

After his return to Florida from California, Mr. Breedlove's struggle with alcohol and drugs continued. His addiction to cocaine and heroin was again out of control.

On the day preceding and night of the offense, Mr. Breedlove was consuming large quantities of drugs and alcohol. His brother, Elijah Gibson, relates:

10. I remember the day the police said McArthur killed the man. I was with McArthur most of the day. We went over to William's store to play pool. We were in and out of there from sometime in the morning until about seven or eight o'clock at night.

McArthur was using drugs and drinking beer all day.

11. McArthur had about seven quarts of Budweiser. He was also using cocaine and heroin. McArthur would buy them already mixed together. He would shoot them into his arm. McArthur shot-up about ten times throughout that day.

12. McArthur left and went off by himself about seven or eight o'clock. I did not see him again until about 2:00 a.m. When he came home I was still very high from the drugs we used while shooting pool.

13. When McArthur left at seven or eight he had a dime each of cocaine and heroin. When he came back at two a.m., the dimes were gone and he had two "twenties" each of cocaine and heroin. The seal on one of the "twenties" was broken. McArthur also had some new needles.

14. When McArthur left the store at seven he was riding my yellow bike. He was also riding it when he came back at two.

15. McArthur went out back of the house and shot-up again. He was also drinking out of a bottle of whiskey that he brought with him. McArthur was addicted to the cocaine and heroin and when he was using drugs, he drank alcohol.

16. McArthur left again for about a half-an-hour. He went down to the store to buy more beer.

17. I started using cocaine in about 1973. At that time I was snorting it but I remember McArthur using the cocaine and heroin mix back then. He always used a needle to get high. Ever since McArthur came back from California he has been shooting-up the cocaine/heroin mix.

(PC-R. 285-88, Affidavit of Elijah Gibson).

After his arrest, Mr. Breedlove suffered through withdrawal from drugs and alcohol. Butch Johnson, who had known Mr.

Breedlove since childhood and who was a cellmate when Mr. Breedlove first was put in jail, explains Mr. Breedlove's addiction and his withdrawal symptoms:

1. My name is Butch Johnson. I live in North Miami Beach, Florida. I have lived in the Miami area all of my life.

2. I have known McArthur Breedlove since we were both young. We lived in the same neighborhood. When we were older I saw him around a lot.

3. When McArthur was arrested in November 1978, he was put into the same jail cell as me. We were in a large cell with about twenty-five or thirty other people.

4. While in the county jail McArthur was in really bad shape. He was going through withdrawal from his cocaine and heroin addiction. McArthur went through the shakes and sweats. He was always very nervous and pacing. On many occasions McArthur talked to me about how it was hell being cut off from his drugs. He also talked about how bad he needed a fix. After about two weeks, McArthur was called out and I never saw him again.

5. Out on the streets McArthur had a terrible drug habit. He has always been known to use cocaine and heroin. It was always well known that McArthur used needles while in the streets. McArthur ran with big time drug addicts. On numerous occasions I witnessed McArthur shooting up cocaine and heroin. Those are the kinds of drugs that once you start using needles you have to have it everyday.

6. McArthur's attorney never talked to me. I would have told them everything I knew about McArthur.

(PC-R. 289-90, Affidavit of Butch Johnson).

The evidence discussed above was available at the time of Mr. Breedlove's trial, but defense counsel failed to investigate.

Additionally, defense counsel did not provide evidence such as is discussed above to a mental health expert or ask a mental health expert to explain the effects of alcohol and drugs on the ability to form specific intent. Counsel failed to present an available mental health defense through mental health experts who could have explained the effects of alcohol and cocaine on the ability to form specific intent. See Gurganus v. State, 451 So. 2d 817 (Fla. 1984).

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. Breedlove's case demonstrate that Mr. Breedlove's 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. Breedlove 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 failures to investigate and present evidence regarding Mr. Breedlove's whereabouts on the night of the offense, regarding the voluntariness of Mr. Breedlove's statements, and regarding Mr. Breedlove's history of alcohol and

drug abuse and his intoxication at the time of the offense deprived Mr. Breedlove 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. Breedlove's trial counsel rendered deficient performance. As a result, Mr. Breedlove 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. Breedlove is entitled to no relief, a stay of execution and an evidentiary hearing are required.

### ARGUMENT III

**THE STATE'S FAILURE TO DISCLOSE MATERIAL,  
EXCULPATORY EVIDENCE AT THE TIME OF MR.  
BREEDLOVE'S TRIAL VIOLATED THE FIFTH, SIXTH,  
EIGHTH, AND FOURTEENTH AMENDMENTS.**

The indictment in this case alleged that the homicide was committed "from a premeditated design. . . or while . . . engaged in the perpetration of, or in an attempt to perpetrate" a burglary (R. 1). At trial, the State relied solely on a felony murder theory, and abandoned any contention that Mr. Breedlove was guilty of premeditated first-degree murder (R. 466, 532-33, 1158-59, 1199). The only issue at trial was identity; the only direct evidence against Mr. Breedlove was a post-arrest statement (R. 1121-1202, 1207-23, 130-35).

The incident upon which the charges in this case were based occurred during the early morning hours of November 6, 1978, in Miami (R. 716, 726-731). The only eyewitness to the events inside the house was Carol Meoni, with whom the victim, Frank Budnick, was living (R. 716-18). Ms. Meoni did not observe the

actual assault upon Mr. Budnick, but she awakened as Budnick was leaving their bedroom after having been wounded (R. 726-27).

Meoni could not identify the assailant. She testified that she had only observed "this, like, shadow or something going out of the door" before Budnick left the bedroom (R. 726). A neighbor, Joan Fournier, testified that she was awakened by noise from the Meoni residence during the early hours of November 6th, and that she observed a man riding a bicycle (R. 590-93). She could not identify this person or give any description of him except that he was "maybe five foot ten and he looked husky, about 190, but I am not sure about that" (R. 593).

Police officers were subsequently summoned to the scene. The first officers arrived at approximately 3:00 a.m. (R. 611-12). The knife and other physical evidence were recovered from the house, and numerous latent fingerprints, none of which were introduced into evidence, were taken (R. 632-33, 642, 669, 675-77, 678-91). A fingerprint examiner employed by the Dade County Public Safety Department, George Hertel, testified that he compared five of the latent fingerprints with standard fingerprints of Mr. Breedlove, and that none matched (R. 844-45).

The two detectives assigned to investigate the case, Julio Ojeda and Charles Zatreparek, began their investigation on the morning of November 6, 1978 (R. 873-77, 1007). They initially directed that investigation toward finding the bicycle on which a witness had seen an individual leave the area of the Meoni residence (R. 877-81, 1008).



Mr. Breedlove was stopped by North Miami Beach police officers on the night of November 8, 1978, and was subsequently arrested on charges of obstruction of an officer by a disguised person and loitering (R. 45-47, 67-81, 797-804). A blue bicycle was later discovered at Mr. Breedlove's home (R. 813, 890-93, 1010-11). The officers spoke with Mr. Breedlove's mother, Mary Gibson, and with his brother, Elijah Gibson (R. 908-09, 1012). The officers then decided to interrogate Mr. Breedlove, who was then incarcerated in the Dade County Jail (R. 961-62, 971-72, 1010, 1065-66).

During the interrogation, Mr. Breedlove denied involvement in the offense (R. 921-40). However, Detective Ojeda testified that in the absence of Detective Zatreparek, Mr. Breedlove made certain statements which the detective deemed significant (R. 988). Specifically, Ojeda testified that, on two occasions when Zatreparek was out of the interrogation room, Mr. Breedlove stated that he had taken the blue bicycle "two doors down from the murder" and that no fingerprints would be found inside the house because he "was not in that house" or because he had been wearing socks (R. 938, 940-42). Mr. Breedlove told the officers that he had blood on his trousers that night when he had returned to his home because he had been in a fight at a convenience store. Ojeda testified that, during the course of an accusation that he was being "framed[d]," Mr. Breedlove stated: "I suppose the blood on my pants, you are going to say, comes from the man inside the house" (R. 939-40). Ojeda testified that

this admission was deemed significant because neither he nor Zatreparek had informed Mr. Breedlove of the sex of the victim (R. 941). At the conclusion of the statement, Mr. Breedlove was arrested for homicide (R. 943-44). Subsequently, on November 21, 1978, Mr. Breedlove made a statement to Zatreparek, in which he admitted committing the burglary and assaulting the victim (R. 1030, 130-34).

Prior to trial, the defense moved to suppress the statements which the officers obtained from Mr. Breedlove on November 9th, and during the second interrogation on November 21, 1978 (R. 69-70). Mr. Breedlove testified at the hearing on the motion that he had been physically abused by the interrogating officers on November 9th, and had participated in the interrogation due to the abuse (R. 321-23). Detective Zatreparek denied having beaten Mr. Breedlove (R. 348).

Mr. Breedlove also testified that, on November 21st, he had told the officers who brought him from the Dade County Jail to the police station for interrogation that he did not want to be questioned (R. 312). Mr. Breedlove testified that his refusal to be questioned was heard by the corrections officer who brought him from his cell (R. 312); this testimony was corroborated by the corrections officer (R. 273-77, 300-02, 89-91).

The crux of the defense at trial was that the State had introduced no independent evidence of guilt, that its case was based solely upon Mr. Breedlove's statements, and that those statements were involuntary (R. 1123-40, 1143-54, 1210-16).

Unknown to defense counsel, the State possessed evidence which supported the defense theory. That evidence, however, was not disclosed to the defense.

For example, the State possessed evidence indicating that Mr. Breedlove was at home at the time of the murder. Elijah Gibson, Mr. Breedlove's brother, provided a statement to Detective McElveen, who reported:

. . . GIBSON continued by stating that he went to sleep at approximately 1:30 A.M. on 6 November 1978, and was awakened by his brother, McARTHUR BREEDLOVE, who had been thrown out of the house earlier over a domestic-type argument with GIBSON's mother, MARIETTA GIBSON. At the time he was awakened, at approximately 2:30 A.M., by McARTHUR BREEDLOVE, BREEDLOVE advised GIBSON that he wanted a glass of water and a cigarette, and he sat down for approximately an hour, after which he left on GIBSON's bicycle.

GIBSON continued by stating that somewhere between 4:00 and 4:30, McARTHUR BREEDLOVE, arrived back at the residence. . . .

(Report of Det. S. McElveen, 11/21/78, p.7) (emphasis added). Mr. Gibson also stated to the officer that it was at this later time that he observed bloodstains on the trousers of Mr. Breedlove, which had been cut at the knees Id. Detective McElveen's report was not provided to the defense.

This statement is of critical importance. A neighbor of the victim testified at trial that she had been awakened by noises from the residence where the offenses occurred at approximately 2:30 a.m. (R. 592-93, 598-99). More importantly, the record clearly reflects that the first police broadcast regarding these

offenses was issued at 3:04 a.m., and that the first police officers arrived at the scene four minutes later (R. 621). Thus, the statement of Elijah Gibson establishes that Mr. Breedlove was at home between 2:30 a.m. and 3:30 a.m. -- the time during which the homicide occurred. Indeed, it establishes that Mr. Breedlove did not leave the residence on a venture which resulted in him returning home with bloodstains on his trousers until after police officers had responded to the location of the homicide.

This statement is also important when considered in light of Mr. Breedlove's various statements. When Mr. Breedlove was initially interrogated on November 9, 1978, he denied involvement in the offenses; he admitted, after being confronted with statements of Gibson and his mother, that he had in fact had blood on his trousers, but stated that it was the result of a physical altercation in which he had been involved that night (R. 929). The statement of Gibson to Detective McElveen is totally consistent with this statement by Mr. Breedlove.

Some two weeks after the initial interrogation, Mr. Breedlove was again questioned, and at this time, admitted culpability (R. 133-34). One of the key elements of the defense at trial, raised both in a pre-trial motion to suppress these latter statements and at trial, was that the statements were obtained by threats of and by the use of physical and psychological coercion (R. 309, 321-23, 1123-40, 1143-54, 1210-16). Thus, the statement of Elijah Gibson, which is consistent

with the initial statement of Mr. Breedlove, is powerful evidence that Mr. Breedlove's later statements were in fact coerced.

The State also did not disclose a list of suspects that law enforcement had initially investigated regarding the homicide.

Detective Zatreparek's report states:

This investigator, along with DETECTIVE OJEDA, responded to Station #6 and obtained a list of known burglars and cat burglars, as well as individuals who had been stopped in the past for loitering and prowling in the immediate neighborhood of the scene. This list has been made a part of this case file, and was submitted to the Latent Identification Section in an attempt to compare any of these individuals with the fingerprints which were found on the scene.

(Report of Det. C. Zatreparek, 11/18/78). This portion of Detective Zatreparek's report was not disclosed, nor was the list of thirteen suspects which was submitted for fingerprint comparisons.

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 for the

misconduct. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984).

Material, exculpatory evidence was withheld from Mr. Breedlove -- evidence which would have made a difference to his trial and to defense counsel's preparation for trial. Mr. Breedlove is entitled to a stay of execution and an evidentiary hearing.

#### ARGUMENT IV

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

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

As part of the duty to provide effective assistance of counsel, a capital defense attorney must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether

a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

The state and federal courts have expressly and repeatedly held that trial counsel in a capital sentencing proceeding has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), vacated and remanded, 467 U.S. 1211 (1984), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985). Trial counsel here did not meet these rudimentary constitutional standards. Cf. King v. Strickland, supra; see also O'Callaghan v. State, supra; Thomas v. Kemp, 796 F.2d at 1325. As explained in Tyler v. Kemp, supra:

In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the

jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Id. at 743 (citations omitted).

In O'Callaghan v. State, 461 So. 2d at 1354-55, the Florida Supreme Court examined allegations that trial counsel ineffectively failed to investigate, develop, and present mitigating evidence. O'Callaghan, 461 So. 2d at 1355. The Court found that such allegations, if proven, were sufficient to warrant Rule 3.850 relief and remanded the case for an evidentiary hearing.

Counsel's highest duty is the duty to investigate, prepare and present the available mitigation. Where counsel unreasonably fails in that duty, the defendant is denied a fair adversarial testing process and the results of the proceeding are rendered unreliable. Bassett v. State, 451 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988). See also Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence), cert. denied, 107 S. Ct. 602 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did



not pursue a strategy, but "simply failed to make the effort to investigate").

Mr. Breedlove's counsel failed in these duties. He failed to fully investigate and develop crucial evidence in mitigation. No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or on the failure to properly investigate and prepare. See Nealy v. Cabana; Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Mr. Breedlove's sentence of death is the resulting prejudice. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

Proper investigation and preparation would have revealed a wealth of information constituting valid and significant statutory and nonstatutory mitigation. Glaringly absent is any mention of the obvious mitigation of Mr. Breedlove's intoxication at the time of the offense, and his history of substance abuse. Defense counsel had access to information that would have clearly established the two statutory mitigating factors that Mr. Breedlove's capacity to conform his conduct to the requirements of the law was substantially impaired and that at the time of the offense Mr. Breedlove was suffering from an extreme mental or emotional disturbance because of the combined effects of substantial impairment from intoxication at the time of the offense and his mental defects. Other available mitigating evidence included a an extremely abusive and unstable childhood, child neglect, a severely dysfunctional home, an extensive

history of alcoholism in Mr. Breedlove's family, a sustained and heavy pattern of substance abuse by Mr. Breedlove himself, and a history of emotional and psychological disturbances which would have supported the conclusions of the mental health experts who testified at the penalty phase. Circumstances such as these are readily recognized as valid mitigating factors, and would have helped the jury understand Mr. Breedlove as an individual.

Mr. Breedlove remained in the Dade County Jail for almost three months without receiving a visit from a Public Defender attorney or investigator. He did not receive any written communication during that period. His guilt phase attorney never talked with him or met him until February 26, 1979 at a suppression hearing just one week before trial. His penalty phase lawyer was assigned that role just three days prior to the commencement of the penalty phase. Other than requests for mental health evaluations, nothing was done to investigate or prepare for Mr. Breedlove's penalty phase case.

Mr. Breedlove's penalty phase lawyer describes the representation which Mr. Breedlove received:

My name is Jay L. Levine. I am an attorney in private practice in Miami, Florida.

In 1978 and 1979, I was an assistant public defender for the Dade County Public Defender's Office. My current law partner David Finger was also an assistant public defender at that time. Sometime in November 1978, I was assigned to represent MacArthur Breedlove who was a suspect in a homicide investigation.

Mr. Finger and I went to the jail and advised Mr. Breedlove that we would represent him and not to talk to any law enforcement personnel. We were later informed that Mr. Breedlove had talked with law enforcement personnel and allegedly confessed to the murder. We spoke with Mr. Breedlove, and he advised us that he had been threatened and told the police what they wanted to hear. Mr. Finger and I were very disappointed to hear that. We went back to our office and advised our supervisor, Mr. Eugene Zenobi, that we felt it would be best if we did not continue with our representation of Mr. Breedlove.

At that time, Mr. Zenobi took over Mr. Breedlove's representation. Mr. Finger and I had undertaken no investigation or preparation on Mr. Breedlove's case other than to speak with him on the two previous occasions.

Before Mr. Breedlove's trial, I sat in on one deposition that Mr. Zenobi took. It was the deposition of Mr. Breedlove's mother. During the deposition, which related solely to the guilt phase, it was very apparent that Mr. Zenobi had never spoken with Mr. Breedlove's mother. In fact, Mrs. Breedlove thought that the prosecutors, Mr. Stelzer and Mr. Godwin, were her son's attorneys. I was surprised to learn that Mr. Zenobi had not spoken with Mr. Breedlove's mother prior to this time.

I heard nothing else about the case until approximately two weeks before trial. Mr. Zenobi approached me in the presence of Mr. Finger and requested that I sit in on Mr. Breedlove's trial as second chair. I expressed my concern that I knew nothing about the case and was unprepared. Mr. Zenobi stated that he just wanted me there to help him protect the record. I agreed to assist him in that role.

Just prior to trial, there was a hearing on Mr. Breedlove's suppression motion. I was sitting in the courtroom when the officers brought Mr. Breedlove out. He said hello and asked me who the other person at counsel

table was, referring to Mr. Zenobi. When I realized that he was serious and had never spoken to Mr. Zenobi, I became alarmed. On further questioning, I learned from Mr. Breedlove that he had not seen anyone from my office since Mr. Finger and I had last seen him in November.

I questioned Mr. Breedlove in the courtroom about the circumstances surrounding the confession and learned of a correctional officer who may have testimony relevant to the motion to suppress. According to Mr. Breedlove, he had told the officer that he did not want to talk to the detective. I informed Mr. Zenobi of this and he instructed me to go to the jail in an attempt to locate the correctional officer. Luckily, I was able to find him and brought him to the courtroom to testify at the suppression hearing. This is just one example of how unprepared Mr. Zenobi and myself were to try this case.

It was apparent to me that Mr. Zenobi was not adequately prepared to try this case. Mr. Breedlove was never even spoken to until the eve of trial and absolutely no investigation was done. Mr. Breedlove's mother and brother were never interviewed except for the depositions. Although there were inconsistencies with Mr. Breedlove's confession and the evidence, Mr. Zenobi was unprepared to present them to the jury. No independent investigation of any theories of defense was conducted. There was no tactical or strategic reason for not conducting this investigation.

The jury came back with a finding of guilty on a Friday afternoon. Mr. Zenobi asked me if I could do the second phase of Mr. Breedlove's trial. He said he could not proceed with the second phase. This was my first penalty phase case. I had literally the weekend to prepare. I had done absolutely no investigation of Mr. Breedlove's background, nor had Mr. Zenobi. The case amounted to the testimony of mental health experts who were unprepared to testify. I did not even talk with them until the morning of their testimony. They had

been provided no background information. We knew absolutely nothing about Mr. Breedlove's life history or background. As at the guilt innocence phase of the trial, there was no adequate investigation concerning the second phase of Mr. Breedlove's trial.

I had no tactical or strategic reason for failing to do this investigation. Had I learned of Mr. Breedlove's abusive history as a child and his serious substance abuse problem, I would have presented that evidence to the jury. Moreover, I would have provided that information to the mental health experts.

(PC-R. 281-84, Affidavit of Jay L. Levine). No effort was made to do any type of background investigation of Mr. Breedlove. No effort was ever made to interview any of Mr. Breedlove's associates around the time of the homicide to determine what they knew about Mr. Breedlove's mental health or substance abuse problems.

Although Mr. Breedlove was evaluated by several mental health experts they had no background information, no information about the facts of the offense, and no information about Mr. Breedlove's mental state on the night of the homicide. As a result, they were easily attacked by the State during cross examination. Had they been provided with this information, they could have easily dealt with the State's cross-examination.

Because of counsel's lack of investigation and preparation, Mr. Breedlove's judge and jury received an incomplete picture of Mr. Breedlove. As a result, he lost the full impact of compelling statutory and nonstatutory mitigating evidence. Although counsel presented the testimony of several mental health

experts their lack of investigation and preparation is apparent from the record. The mental health experts, because of inadequate time to prepare and insufficient background information were unable to explain Mr. Breedlove's mental illness and brain damage in the context of his life history and background. Reasonable investigation would have resulted in the jury seeing the total picture of Mr. Breedlove's life history, his mental health problems and his significant substance abuse problem. This total picture would have presented the significant statutory and nonstatutory mitigation evidence in a consistent and rational manner.

Instead, Mr. Breedlove was sentenced to die by a judge and jury who never knew that he grew up under appalling conditions and suffered a lifetime of abuse, rejection, abandonment, emotional deprivation, and drug addiction. His mother was an alcoholic who grossly neglected him, both emotionally and physically. Mary Etta Gibson gave birth to McArthur Lee Breedlove, the first of many children, without the assistance of a physician or a hospital, on January 1, 1947 in Wrightsville, Georgia.

McArthur was born out of wedlock to his eighteen year old mother. His biological father refused to acknowledge Mary Etta or McArthur and immediately fled, leaving them to fend for themselves. While still an infant, McArthur and his mother moved to Miami, Florida where she hoped to find a way to provide McArthur a good life. While McArthur was still less than a year

old his mother married Ruby Lee Breedlove. Together they attempted to provide McArthur a good environment to grow. However, McArthur's chances in life were immediately impaired due to his mother's chronic alcoholism, which included heavy consumption during the critical stages of McArthur's fetal development, and the vicious beatings administered by the hand of his step-father.

Mary Etta was raised without the benefit of an education and spent the vast majority of her life working tremendously long hours in the fields of a farm in rural Georgia. This rugged and poverty ridden life prevented Mary Etta from interacting with or exploring the world around her. Consequently, while moving age-wise into her upper teens Mary Etta's emotional maturity and understanding of adulthood was severely stunted and remained at the age of a youngster. At the time Mary Etta gave birth to McArthur she was but a child herself in all respects outside of her biological capabilities. McArthur's natural father immediately abandoned them, leaving Mary Etta to single handedly care for her new born son. In an attempt to improve her life, and that of McArthur's, she sought out a companion. After marrying Ruby Lee, within a year of McArthur's birth, the size of the family quickly accelerated. Mary Etta and Ruby Lee had four additional children during the first four years of their marriage. Thus Mary Etta was never provided the opportunity to develop, emotionally, beyond that of a child herself while being

thrown into the demanding life of caring for and raising a growing family.

Mary Etta's perceptions of what a parent should be were greatly distorted. She was further crippled by a myriad of personal problems including alcoholism and mental instability. Mary Etta initiated what would become a life long addiction to alcohol while a young teenager. At the time of McArthur's birth, she was well on her way to being a full fledged alcoholic. This overpowering addiction would forever prevent Mary Etta from fulfilling even the most basic definition of motherhood.

Additionally, she herself was the victim in a marriage riddled with extensive neglect and violence. Ruby Lee Breedlove was a strict man who relied on strong arm tactics to enforce his bizarre view of family life. Ruby Lee worked two jobs which kept him outside of the home for more than fifteen hours a day. In an attempt to maintain control over the household while absent, Ruby Lee terrorized his children and wife. He would beat his then young children and wife, for minor infractions, with reckless abandon while in the home. These merciless beatings were a continual reminder of who ruled the roost and allowed Ruby Lee to remain absent from the home and maintain his power. He would often stop by the house unexpectedly and, if finding anything or anyone out of place, would quickly lose his temper and immediately pummel his defenseless children and/or wife.

McArthur's mother quickly grew weary of her dismal life and the daily struggles of raising children and tolerating an abusive



husband. Subsequently, her alcohol consumption accelerated at an alarming rate. However, now she insisted that McArthur participate in her deceiving Ruby Lee. Mary Etta would have McArthur purchase her alcohol after Ruby Lee went to work and then hide the remaining booze when the family anticipated his return. However, on numerous occasions Ruby Lee came home and McArthur was still outside the house hiding the alcohol. Ruby Lee would question the whereabouts of McArthur. Mary Etta would lie and say that McArthur was unruly, disobedient, and out running around against Ruby Lee's liking. Upon his return to the home, McArthur would be greeted with a series of crashing blows from the powerful hands of an outraged Ruby Lee. McArthur would lie on the floor, bruised, bloodied, and puzzled by the betrayal of his mother. Surprisingly, McArthur never fought back. His friends and siblings describe him as being calm, quiet, and level-headed while a young boy. Right or wrong, he respected his parents and weathered the beatings, hoping they would stop.

Mary Etta's compassion for her children continued to vanish and she further neglected them by leaving them alone for long periods of time, throughout the late evening hours, to pursue extra-marital affairs. Ruby Lee drew the line, filed for divorce and claimed that Mary Etta was an unfit mother. The courts agreed and sent Mary Etta packing. The court's decision was much to her liking for she was openly eager to continue her drinking and fancy-free life style without the burden of raising children or the abuse associated with Ruby Lee's quick temper.

Unfortunately for McArthur, the divorce was only the latest in a series of painful blows. The then ten-year-old was continually being dealt vicious and mind wrenching setbacks. Not only did he survive the abandonment of his natural father, the demented abuse of his step-father, but now his natural mother - after years of betrayal and emotional torture - completely severed the ties and left him behind to suffer Ruby Lee's abuse. McArthur was forced to digest the realization that his natural mother would never protect him or be a true ally. This was the first of the many breaking points in McArthur's life. Somehow he was able to absorb the abuse, abandonment, neglect, alcoholism and forge on with his young life. However, following the day his mother said farewell, McArthur was never the same. It was becoming clear to those who truly knew McArthur that he was a boy who had been hurt deeply by his mother's abandonment. He loved his mother dearly, despite her rejection, and would dream of the day when she would care for him. Mary Etta's refusal to allow him to move with her and start a new life was a knock out punch. The deep rooted sadness that McArthur was able to suppress through the earliest years of his life surfaced and he would forever lose his ability to solve problems and overcome life's obstacles.

Not long after the bitter divorce, Ruby Lee quickly married a woman by the name of Virginia Jenkins. Virginia had two daughters from a previous marriage. Ruby Lee quickly adopted the two girls and everyone anticipated one large happy family.

However, Virginia, like Mary Etta, had a quenchless thirst for alcohol. She never neglected the children to the degree that Mary Etta did, but the alcohol created severe problems and a different type of emotional torture.

Ruby Lee was disgusted with Virginia's drinking and began administering savage beatings to her in the presence of the children. The horror filled one-sided poundings frightened McArthur. He would often cry and beg his father to stop. These cries for mercy only further outraged Ruby Lee. He would then turn and strike and slug McArthur and his siblings. These type of beatings continued throughout the marriage. It was commonplace for Virginia, McArthur, and the other children to be battered, bruised, bloodied, and simply rendered defenseless by the outraged and out-of-control Ruby Lee Breedlove. McArthur's siblings describe the beatings as criminal. His sisters say that, without a doubt, Ruby Lee would be jailed for child abuse by today's standards.

As the violence escalated, McArthur was sinking deeper into a severe state of depression. Not only was he living under the rule of a ruthless and sinister man but he had to watch, from a distance, as his step-mother slid deeper into an alcohol induced stupor. McArthur longed for his natural mother's companionship, love, compassion, and guidance. However, the sight of McArthur renewed her hate for Ruby Lee and the horrendous years spent under his control. Simply put, Mary Etta hated everything associated with Ruby Lee Breedlove and McArthur was at the center

of that hate. Despite the chronic abuse, psychological terrorism, and rejection, McArthur was capable of loving his natural mother. Somehow McArthur retained the desire to love and help his mother. However, she put as much distance between her life and McArthur as possible.

While still a young teenager, McArthur had already been exposed to more violence and abuse than most people ever see. Yet McArthur had no desire to fight back. He continued to offer respect to his step-parents while working to keep the family together. However, following a final and extraordinary beating at the hands of Ruby Lee with a bull whip, McArthur had no choice but to head into the streets hoping to find some sort of peace. During his desperate search to escape the mind-twisting depression and confusion, McArthur slid under the curse of highly addictive and damaging drugs.

McArthur started by drinking cough syrup and dropping acid. This high quickly escalated to speed and a wide range of amphetamines. McArthur's intake increased as did the addictive nature of the drugs. Suddenly, McArthur was completely controlled by and addicted to cocaine and heroin. Without really knowing what or how it happened, McArthur was shooting-up hundreds of dollars a day in cocaine and heroin. The addiction continued until everything McArthur did was geared toward obtaining a supply of cocaine and heroin. The next fix was foremost in McArthur's mind.

McArthur finally ended up on the streets in California where his drug addiction led him to serious trouble with the law. He was eventually convicted of a sexual assault and sentenced in prison. His mental health problems and severe substance abuse problem became apparent at that time.

Following his return from California, McArthur's struggle with life continued. Out of pure desperation, he stayed with Ruby Lee and his family. McArthur was left traumatized by his experience and misfortune in California. He not only spent time in state prison, but McArthur was shot several times and spent a year in the hospital recovering. This left McArthur unsure and unable to interact with mainstream life. His addiction to cocaine and heroin was again out of control and dominating every single facet of McArthur's life. Additionally, he would spend hours on end sitting, staring, and drifting in his own world oblivious to the conversation and actions of those around him. His drug addiction and bizarre behavior escalated and he lost any ability to think clearly beyond immediate circumstances. His decision making became spontaneous and reactive.

McArthur was quickly reminded that Ruby Lee had never adopted him and felt no obligation to provide assistance or a home. Simply put, he was driven out.

After being rejected once again, McArthur was permitted to live with his mother, her husband and their three children. Mary Etta was not interested in McArthur's well being or with being a loving mother. As long as McArthur could provide money, he could

stay. Mary Etta needed money for booze and McArthur was her vehicle for obtaining the money. This arrangement was troubled because his mother's alcoholism had made her an extremely bitter woman. She made no effort to hide her lack of enthusiasm for McArthur's arrival and offered him no support in his efforts to adapt to his environment. Instead of assisting McArthur and accepting him as her own flesh and blood, Marry Etta continued to chastise and emotionally batter McArthur. At this point, McArthur's life was nothing more than a crippling drug cycle. He would locate a stash, get high, come down, and look for another fix. The grip of the addiction was relentless. McArthur was not able to think logically. He only knew that he needed his cocaine and heroin fix.

The jury should have heard that McArthur's life has been full of physical and emotional abuse, severe drug addiction, and strong potential for brain damage. Yet counsel failed to present this evidence to the jury. Counsel failed to present this information because no investigation was conducted. Had counsel conducted a reasonable investigation he would have discovered this information and gained the assistance of Mr. Breedlove's family and friends.

His step-brother, Arthur Lee Breedlove would have assisted:

1. My name is Arthur Lee Breedlove. I live in Miami, Florida. I have lived in the Miami area most of my life. I am presently forty-one years old. McArthur Breedlove is my step-brother. We have the same mother but different fathers.

2. While I was growing up I was very close with McArthur. We were like two peas in a pod. We did everything together. We would do things like go fishing or to the movies. McArthur was always a good brother. He cared about his family and he was easy going.

3. Me and McArthur have the same natural mother - Mary Etta Gibson. She has always been an alcoholic. The alcohol made her mean. She would say mean things to McArthur all the time. Mary Etta would say things like "you know that you are a son of a bitch," or "you are mama's baby, Papa's maybe." This really hurt McArthur because he really did not know who his father was. Additionally, she always told McArthur that he was "nothing but a wasted fuck." Those things really tore him up. She was always telling him that he was no good and nothing but a bad person. You know, if you hear something enough times you begin to believe it. That happened to McArthur. It was like she did not like him.

4. Mary Etta also had McArthur hide her booze from our father - Ruby Lee Breedlove. He did not like drinking and would get really mad if he found out that Mary Etta was drinking. Mary Etta always tried to hide her drinking from our father. She would only drink when Ruby Lee was out of the house. For many years he worked two jobs. He ran a trash collection and hauling business during the day. Sometimes Ruby Lee would come home early or during one of his trash runs and catch McArthur out of the house after our mother sent him out to hide the bottles. Ruby Lee would want to know where McArthur had been. Mom would lie and say that McArthur was being unruly and out against her orders. At that point all hell would break loose. Dad would get really mad and whip on McArthur. These whipping were real bad. They were so rough and violent that it would hurt just to watch.

5. Mom being an alcoholic and dad being violent was really hard on McArthur. Being caught in the middle of the lies and being punished for no reason got old real quick.

Mom lying to dad and directly involving McArthur was no good. He wanted to love both of our parents. However, they were pulling him in different directions and playing him off one another. As a result he was caught right in the middle of their lies.

6. When McArthur was about ten years old Mary Etta and Ruby Lee divorced. Us children ended up staying with dad. He married a woman by the name of Virginia Jenkins. She had two daughters and they stayed with us. Mary Etta moved out but she lived close by. The divorce was hard on McArthur because he was separated from our mother. Not only did she leave but McArthur never even knew his real father. This made McArthur sad and he would always shy away from a conversation about his real father. So after the divorce he was like an orphan.

7. McArthur always made it his business to go and visit our mother. When Ruby Lee found out he would get real upset with McArthur. He would make McArthur's life hell. Ruby Lee eventually forced McArthur to choose one side or the other. If he was going to live in Ruby Lee's house he was not to go visit Mary Etta.

8. Virginia loved McArthur and treated him like he was her own child. She also tried to get our step-father to pay more attention to McArthur. Virginia was a hard-working woman.

9. However, Virginia and Ruby Lee had a lot of fights. Ruby Lee is the type of person to take pressures from the job home with him. So, on many nights he would come home and go off over nothing. His quick temper would snap and he would put a whipping on Virginia or McArthur. It was rough. When Ruby Lee would whip on Virginia, us kids would try to stop him. McArthur was never a fighter but he loved Virginia and sometimes Ruby Lee was so rough that McArthur would protect her.

10. Ruby Lee was so tough on Virginia that he drove her to drinking. This made Ruby Lee real mad. When he would come home



in one of his moods he would immediately start looking for signs that Virginia was drinking. Of course, they would start arguing and Ruby Lee would whip on her. Virginia drank Beefeater gin. I remember that she would drink a little less than a pint bottle in one day.

11. After McArthur got back from California he got tired of Ruby Lee treating him real bad and he decided to go stay with our mother. Mary Etta was still drinking real bad. Just like before she was mean to McArthur. She only wanted him around so he could give her money for booze. When McArthur did not have money she would drive him away. Because McArthur "chose" his mother, Ruby Lee would not help him. McArthur had nothing to fall back on or no one to really help him out. He ended up spending most of his time in the streets.

12. McArthur was also real bad into the drugs. He used cocaine and heroin for many years. He always shot up. I remember one time I needed to use the bathroom but McArthur was in there for a real long time. I kept knocking on the door and telling him to hurry up. After he came out I found a syringe on the back of the commode. I yelled at McArthur and broke the syringe. He got real mad at me. About a week later McArthur told me that the syringe was for his drugs. He explained to me that he was still shooting up cocaine and heroin mixed together. He told me that he was using every day. McArthur also said that he was going to try and get help. This happened about a month or so before McArthur was arrested for murder.

13. I was never contacted by McArthur's attorneys at the time of his trial. I would have told them everything I know about McArthur.

(PC-R. 319-323).

Mr. Breedlove's step-sister Olabell Breedlove was also available to provide compelling testimony concerning Mr. Breedlove's background:

1. My name is Olabell Breedlove. I live in Miami, Florida. I have lived in the Miami area all of my life. I am presently thirty-six years old.

2. I am McArthur Breedlove's step-sister. Virginia Breedlove is my natural mother. A man named Bo Jenkins is my natural father. Virginia was married to Mr. Jenkins before marrying my step-father, Ruby Lee Breedlove. Mr. Jenkins is also brothers with McArthur's natural mother, Mary Etta Gibson. So when my mother married Mr. Breedlove, I became McArthur's step-sister and first cousin. I was very young - I believe three years old - when my mother and Ruby Lee got married.

3. After Ruby Lee and Virginia married, I lived in the same house with McArthur. I remember him as being a wonderful big brother. He always helped me out with school and other things. McArthur was a very sharing person and cared very much about the well being of his younger step-brothers and sisters. While we were growing up I never saw McArthur start fights or be cruel to other people.

4. Ruby Lee was a strict man who had a very bad temper. He wanted everyone to do exactly as he said and for the house to be run in a very specific manner. When something went even a bit different than he wanted, Ruby Lee would lose his temper and fly into a rage. When this happened, he became very violent.

5. Ruby Lee also had a nervous problem. He was frequently upset, hyper, and pacing around the house. He always seemed to be very frustrated and on edge. Again, even the smallest things would set him off and he would respond quickly and violently.

6. Many of Ruby Lee's violent attacks were aimed at McArthur. He would beat McArthur with his fists, belts and extension cords. These beatings were fierce and, with out exception, far too rough. These were not beatings designed to help a young child understand right from wrong. Instead, they

were vicious attacks from hands of a frustrated man. Ruby Lee would take a full wind up and simply unload on McArthur again and again and again. When it was over, McArthur would be bloody and covered with knots, bruises and welts. The bruises would last for a month. Beatings of this calibre happened a few times per week.

7. McArthur never retaliated against the violent whippings. McArthur never had a bad temper and he never even raised a hand to strike back at Ruby Lee. I never remember McArthur being disrespectful toward our step-father.

8. Ruby Lee also beat up on Virginia. These beatings happened every week. Just like what happened to McArthur, Virginia was the victim of a violent man's frustrations. Virginia was usually beat up right in front of us kids. It was the most horrible sight in the world. It was very hard on us and I remember how sad McArthur would be.

9. McArthur would sometimes tell Ruby Lee to stop hurting Virginia. This only made Ruby more mad. He would go grab his belt and say, "didn't I tell you not to get involved. This is between us." Ruby Lee would then strike McArthur with the belt.

10. When McArthur was about eighteen, Ruby Lee beat him with a bull whip. McArthur was out one night and Ruby Lee was in one of his bad moods. When McArthur came home the door was locked. Ruby Lee grabbed his bull whip and unlocked the door. When McArthur walked in he jumped out and whipped him. Ruby Lee went wild and who knows what would have happened if my mother had not jumped in and eventually stopped Ruby Lee. It was a terrible night. After that night I remember McArthur telling me, "I gotta get away from here. Me and daddy are not getting along. I gotta get away from here."

11. Before Ruby Lee married my mother he was married to McArthur's mother, Mary Etta Gibson. Ruby Lee and Mary did not get along and they divorced. Mary drinks and she is an alcoholic. She is very irresponsible

and her alcohol always comes first. Mary never did anything to try and help McArthur.

12. Virginia also drank alcohol. She was usually able to care for us children but she did drink everyday. Her drinking was a big part of the problems between her and Ruby Lee.

13. Ruby Lee was strongly opposed to drinking. He would get angry when my mother drank. This is strange because when I was young I remember that Ruby Lee had a still and made moonshine. He also drank the alcohol up until he became a diabetic and was forced to stop.

14. The pressure on McArthur was intense. He was raised in a violent household and his natural mother was a mean alcoholic. This was very hard on McArthur. He started using drugs. McArthur got high because it made him happy and eased the pressure. Since Ruby Lee ran him out of the house, McArthur was pretty much on his own and there was no one left to provide him emotional support. He started doing his own thing, spending time in the streets and running around with known drug users.

15. When McArthur returned from California he was a totally different person. His entire mental state changed. McArthur was real distant. I would talk with him and it was like he was not even in the same place as me. He would spend hours just sitting and staring out into space. If I walked up to him, he would look up but not say anything to me. This was completely opposite of the McArthur I knew from our childhood.

16. Again McArthur was running around with a wild crowd. They were know drug dealers. Everyone knew that McArthur had a real bad drug habit and was addicted to cocaine and heroin. Me and my brothers and sisters talked about McArthur's problem but he was real distant. After his return from California it was hard to communicate with McArthur.

17. I get a really sick and disgusted feeling when I think back about all of the physical abuse that was taking place in our home. By today's standards, Ruby Lee would be behind bars for the way he beat McArthur. What Ruby Lee did to McArthur was not a pretty site and I would not wish such treatment upon my worse enemy.

18. I was never contacted by McArthur's attorney. I would have told them everything I know about McArthur.

(PC-R. 314-18).

Juanita Anderson also witnessed the abuse that her step-brother, Mr. Breedlove endured:

1. My name is Juanita Anderson and I live in North Miami Beach, Florida. I have lived in the Miami area most of my life. I am thirty-five years old.

2. My natural mother is Virginia Breedlove. My mother was originally married to Bo Jenkins. Bo is my natural father. Ruby Lee Breedlove is my step-father. I was a baby when my mother married Ruby Lee.

3. McArthur was never able to enjoy his life while growing up. He was basically an abandoned child living in an extremely hostile environment. McArthur never had any attention unless he was being beaten. His natural mother, Mary Etta Gibson, is a real bad alcoholic. Her alcohol was more important to her than her own children. She never did anything for McArthur and left him to be raised by Ruby Lee and my mother.

4. Mary Etta convinced McArthur that he was no good. After that, Ruby Lee made him feel like an outsider. My mother was good to McArthur and tried to help him. However, Ruby Lee was so rough and abusive to McArthur that any good done for him was taken away. As a result McArthur was always depressed, lonely, and upset. He felt all alone.

5. Ruby Lee was a very strict man with a quick temper. There were many days when Ruby Lee would be fine and then suddenly get real mad without any warning. He would then start beating on McArthur. Sometimes he would use his fists and other times he would use a belt or cord. He would beat McArthur real bad. I'll tell you this, I would never do to my children what Ruby Lee did to McArthur.

6. Even though Ruby Lee would beat him, McArthur was always easy. He would never fight back or act violent. He would just try to protect himself and wait for Ruby Lee to stop. These beatings made McArthur real sad. A child thinks you don't love him when you beat him. That is the way McArthur felt.

7. Ruby Lee and my mother would also fight. These fights were one sided and very rough. Ruby Lee would get so violent that we would have to worry about Virginia maybe getting hurt real bad. I mean we would have to worry every time they fought. These fights would happen alot.

8. When Ruby Lee would beat up Virginia, McArthur would get real upset. He would have tears in his eyes. He would then say, "why are you fighting. Please stop." McArthur is a real sensitive person and these fights scared him and made him sad. Sometimes we would try to stop them. remember once when I had to pull a knife on Ruby Lee to make him stop beating on my mother. Ruby Lee put alot of violence in our house and McArthur was always the calmest one around.

9. Sometimes Ruby Lee would get so mad because of his nerve problem. For years he took pills to calm down his nerves. Virginia tricked Ruby Lee and told him the pills were for something else so that he would take them. So Ruby Lee did keep getting the pills from the doctor. My mother did this for herself and us children.

10. Ruby Lee was so rough on McArthur that he finally had to leave at about the age

of seventeen. McArthur ended up running around all over the place. I know that he got into some trouble in California. When he got back he was into drugs real bad. From late 1972 until 1975 McArthur was running around with some heavy users. I told him not to mess with the drugs. But he was so depressed that he needed the drugs to keep him from thinking about how bad his life was. For McArthur, using drugs made him feel better and it was the easy way out.

11. I got a job with a magazine and was away from Miami from 1975 to 1978. When I returned to Miami, McArthur was using the drugs even worse. Ruby Lee had run him out of the house and McArthur was staying mostly at his mother's house. The drugs were controlling him because he was addicted. Getting his next fix was in the front of McArthur's mind. Everything he did was because he was on drugs.

12. Sometime in 1978 I walked in on McArthur and he was about to shoot-up. He was just ready to put the needle into his arm. I took the needle from him and yelled at him for using drugs. He told me that he wanted help but that he just couldn't stop.

13. When McArthur got back from California it was like he had two personalities. He was always switching back and forth. The changes in him was more than changing moods. I really believe that he has two people in him. I could have a normal conversation with McArthur and then fifteen minutes later he would not remember the conversation. If I tried to tell him about our conversation he would say, "what are you talking about." Some times when he would go through these changes, and be unable to remember things that just happened, he would also get real depressed. There were also times when McArthur would act like he was in another world. He would just sit there and not even be able to respond. McArthur was always going through these changes.

14. McArthur has been alone all of his life. No one gave him the love he needed.

All you had to do was look at McArthur and you could see the pain on his face.

15. McArthur's attorneys never talked to me back in 1978. If I had been contacted by them, I would have told them everything I know about McArthur's life.

(PC-R. 309-313).

Although much of the abuse that Mr. Breedlove endured was at the hands of his step-father, Ruby Lee, his step-father cared about him and was willing to testify:

1. My name is Ruby Lee Breedlove. I live in North Miami Beach, Florida. I have lived in South Florida most of my life. I am presently sixty-three years old.

2. I raised McArthur Breedlove from when he was just a little boy. I married his mother, Mary Etta Jenkins, when McArthur was less than a year old. His mother never did anything for McArthur. Ever since I met her she had a drinking problem. She was not a real mother.

3. After we got married I was working two jobs. I would work from six in the morning until four in the afternoon on my Demolition Trash Hauling business. At night I would work in the Biscayne Building. I worked both of these jobs for many years. I was away from the house a lot and I depended on Mary Etta to raise up our children like a mother should.

4. Mary Etta had such a drinking problem that she would ignore the children so she could drink and run around with other men. I would give my money to Mary Etta and tell her to buy the children nice clothes. She would buy them clothes but the next thing I knew she needed more money for new clothes. When I asked her why the kids always needed new clothes she would say, "because their clothes are worn out and they don't look good." However, I found out that she was too drunk to care for the children. She made the children wear their clothes until they were



too dirty to wear anymore and then throw them over the fence behind our house. On the other side of the fence was a empty field with high grass.

5. Mary Etta also used a lot of the money to buy herself some wine. She loved to drink wine. She would spend her days having drinking parties with some of the other women in the neighborhood. They would sit around all day and drink. Mary Etta would take all of her empty wine bottles and throw them over the fence too. When I went in the field I couldn't believe my eyes. There were empty wine bottles everywhere. I asked her why she threw her wine bottles behind the fence and she said, "I did not want you to find them."

6. Mary Etta used to carry a canteen around with her. She always told me that the canteen was filled with water so that she could stay cool. But, whenever I smelled the canteen it was full of wine. She could handle a lot of the wine and not act drunk.

7. In 1958 I was still working both my night and day job. One of my girls told me that at night time when I gone mama was with another man. Mary Etta would even sometimes bring the man into the house. Well, I was mad because she was not at home taking care of the children. I took off from work early one night and I caught her with this other man. They were in his car in an alley behind the house. I went and got my gun and surprised them. I said, "I should kill both of you but I won't." Right after that I hired a lawyer and divorced her. The judge said she was an unfit mother and gave me custody of the children.

8. Then I married a woman named Virginia. Virginia was a good mother. She was a clean woman and she worked hard to keep the children clean too. Virginia and I had a pretty good relationship. Sometimes we would slap one another and fight. However, we tried to move on and forget about our ups and downs. Virginia did drink but she would not go out to clubs and drink. She was not one to make a fool of herself. She always drank

at home. We figured that what we did in our house was our business.

9. When McArthur was little he was a good boy. I had a good relationship with McArthur. However, he did resent me when I married Virginia. McArthur wanted me to stay married with his mother. Sometimes we would argue.

10. After McArthur came back from California he was a different person. He would act like two different persons. He would be real nice like always and then suddenly he would start acting real strange. He would not act like McArthur.

11. McArthur would go out and sit under a tree, with his head hanging down, and his legs crossed. He would just sit like that for a long, long time. I remember one time I took the younger kids to the zoo in Palm Beach and McArthur went with us. He did not want to go inside the zoo. After being inside the zoo for a few hours I went out in the parking lot to check on McArthur. There he was sitting under a tree, his legs crossed, and his head hanging down. I walked up on him and he did not even notice me. When he did this he was not sleeping but just staring.

12. After his stay in California, McArthur had a real bad drug problem. One time I was looking around the neighborhood for McArthur. A neighbor told me that he was over in another house I owned nearby. I went inside the house and called out for McArthur. I did not get an answer so I started looking around. Eventually I found McArthur on the floor of a closet. I thought he was dead. I patted him on the face and he moaned. I carried him outside and tried to wake him up. For over thirty minutes he just sat there looking around but not really knowing where he was. He acted like someone who just woke up real frightened. But McArthur sat like that for a long time. My neighbor came over to help me. He told me that McArthur had overdosed because he shot-up in his arm. My neighbor then told me: "McArthur has been addicted to drugs for years and he was hiding

it from you." This happened about two weeks before McArthur was arrested for murder.

13. McArthur's attorneys never talked to me after he got arrested for murder. I would have told them everything I know.

(PC-R. 304-08).

Mr. Henry Washington, Mr. Breedlove's uncle was also available to tell the jury about Mr. Breedlove:

1. My name is Henry Washington. I live in North Miami Beach, Florida. I have lived in the Miami area most of my life. I am McArthur Breedlove's uncle. I am a brother of his step mother, Virginia Breedlove. I am presently fifty-two years old.

2. I have known McArthur since he was a little boy. I used to go fishing with McArthur and his brothers. We did all kinds of things together when we were young. McArthur was always a nice person. I do not remember ever seeing him raise his voice. McArthur was always level headed. My sister, Virginia, married McArthur's step-father, Ruby Lee, when McArthur was about ten years old.

3. I have lived close to Ruby Lee's house for a long, long time. I was always close to my sister Virginia and living close to her was nice. We were able to get together nearly everyday and talk about things. She was an extremely open person when talking with me. She used to tell me everything about her life. She died in December 1985.

4. On numerous occasions Virginia told me about how bad her and Ruby Lee's marriage was. She would tell me about how he would beat her up. Ruby Lee was a quick tempered man. He would lose his temper and beat Virginia with his fists, cords, or belts. Virginia would usually have cuts and bruises all over her body.

5. You see, Virginia liked to drink a lot and that was what caused all of the

confusion. Ruby Lee did not like drinking and when he would find out that Virginia had been drinking he would go off. There would be all kinds of hollering and screaming and then Ruby Lee would beat her up real bad. Virginia was a little woman and Ruby Lee is quite strong. She was no match for him, especially when he was in one of his violent rages. She used to tell me all of the details of the abuse. She told me so many things that I cannot remember everything. But one thing is for sure, Ruby Lee would beat her, and the children, real bad. Virginia was the type of person who would not want anyone outside of the house to see her drink. She drank everyday. Additionally, Virginia was able to drink a lot and not act drunk.

6. Because of all the abuse, McArthur was brought up in a real bad environment. Ruby Lee would beat him real bad. And I mean beat him up real bad, real often. These beatings had a bad effect on McArthur. He was always sad and depressed. When ever I would see him around he would be moping. He was always hanging his head down and looking real sad.

7. Over the years I became good friends with McArthur's step-sister, Iverlean. We spent a lot of time together. She also used to tell me about how Ruby Lee beat up on McArthur. She told me about how McArthur was addicted to drugs. Iverlean explained to me that McArthur used needles and how he would shoot-up. Actually, everyone in the family knew he was an addict. But it was Iverlean and her other step-sisters who told me the most about McArthur's cocaine and heroin addiction. Iverlean is now homeless and an addict herself. I last spoke with her about five or six weeks ago. She is somewhere out in the streets of Miami.

8. Sometime in the late sixties McArthur moved out to California. After he came back, sometime around 1973 or so, I saw him all of the time. He was still real bad on drugs. Virginia and Ruby Lee were still fighting all of the time. Eventually McArthur was unable to take the abuse from

Ruby Lee and he moved out. I know he spent some time over at his natural mother's house. Her name is Mary Etta Gibson.

9. McArthur needed some help but Mary Etta was not the person to help him. Mary Etta has always been a heavy drinker. As she got older she became nothing but a bitter old alcoholic. Iverlean lived with Mary Etta too. She would tell me stories about how Mary Etta was a real nasty and hateful woman. She used to yell at McArthur and say things like, "get your ass away from me. I can't stand you kids, that is why I left your daddy. Get your ass away from me." She would also say things like, "I'd rather spend my whole life being poor, drunk, and hard-up than spend another day around you." Ruby Lee had been so abusive and violent with Mary Etta that she turned against her own children. She just wanted to be away from the whole mess.

10. Being rejected by Mary Etta was not good for McArthur. He was on drugs real bad and he did need someone to help him. There was no way that Ruby Lee was going to do anything for him. I feel that if McArthur had been raised in a good home he would have been able to stay off drugs. Ruby Lee is such a mean and violent man that it did something to his kids. Most of McArthur's brothers and sisters have had problems with drug abuse at some point in their lives. It just happened that McArthur got in so deep that he could not stop.

11. I have never spoken with any of McArthur's attorneys. However, if I had been contacted when McArthur got arrested I would have told them everything I know about him. I was living in North Miami Beach.

(PC-R. 300-03).

A family friend, Mr. Bell also had useful information which Mr. Breedlove's jury never heard:

1. My name is George Bell. I live in North Miami Beach, Florida. I have known McArthur Breedlove for over thirty years. I

own and run a grocery store in the neighborhood. Before that I worked for Eastern Airlines for twenty-four years. I am presently forty-eight years old.

2. I spent alot of time around McArthur since he was young. We played games in the neighborhood and just hung around together. McArthur was always an easy going guy.

3. Something happened to McArthur when his step-father, Ruby Lee Breedlove, divorced his mother, Mary Etta Gibson, and married Virginia Jenkins. He would talk to me about how the divorce bothered him. He would say things like, "my mama's suffering." He would get real sad and depressed when talking about her. McArthur would then try to play it off like he was happy but I could see that he was depressed. I can't quite put my finger on it but something snapped inside McArthur when Ruby Lee divorced Mary Etta. McArthur was the kind of person who always wanted to keep everyone together and happy. Because of that the divorce really affected him.

4. When McArthur returned from California he was not the same McArthur that I remember before he left. He was really heavy into drugs. I remember how he used to talk about the LSD that he brought back with him. He would complain because he was not able to get any in Florida. McArthur was also addicted to cocain and heroin. For the longest time he was using needles to shoot-up the drugs.

5. I have always lived a clean life. I don't curse, drink, smoke, or use drugs. McArthur respected that and would always tell me, "go on George, you have to leave because I'm gonna fire up." I would leave and McArthur would shoot up and get high. McArthur did not want people who did not use drugs around him when he was shooting up.

6. McArthur was using everyday. It got to the point that the only reason McArthur worked was so he could raise money for drugs. McArthur never did anything, I mean anything, unless he was high. He was

slow and easy when he was straight. When he was high he moved fast, worked fast, and did everything fast. McArthur was completely controlled by his drug habit. He was not a bad person but lost sight due to his addiction.

7. McArthur was another victim of drugs. It is sad that he has to give his life.

8. I was never contacted by McArthur's attorney. I would have told them everything I know about him.

(PC-R. 393-95).

Counsel also failed to present this information to the mental health experts. This information was essential in describing McArthur's mental deficits. The jury when asked to weigh the value of McArthur's life needed to know his background. Powerful mitigating and explanatory evidence was available in this case. Such evidence would have permitted the capital sentencer to see, understand, and sympathize with Mr. Breedlove because of the abuse, rejection, and hostility of his home and street environments that shaped him during his critical formative years. This sort of "humanizing" evidence would have clearly shown that there was a McArthur Breedlove worth saving.

Trial counsel failed to investigate, develop and present this compelling and important information to Mr. Breedlove's jury. Just as significant, this information was not given to the mental health experts. As a result, they were unable to explain Mr. Breedlove's mental illness and brain damage within the context of Mr. Breedlove's life history. In fact, compelling evidence was available from Mr. Breedlove's family and friends

which corroborated the mental health experts findings concerning Mr. Breedlove's significant mental health problems.

Moreover, trial counsel failed to investigate, develop, and present evidence of Mr. Breedlove's severe and long-term substance abuse problem. Had counsel conducted a reasonable investigation, he could have established that Mr. Breedlove's substance abuse problems aggravated his already existing mental health problems and that his substance abuse problem was most likely the results of the combined effects of heredity, his impoverished and difficult childhood, and his mental illness and brain damage. Dr. Jethro Toomer will testify that an understanding of Mr. Breedlove's substance abuse problem is essential to an adequate assessment of mental health statutory and nonstatutory mitigation. At trial, the mental health experts had virtually none of this information.

Trial counsel failed to investigate and prepare, and thus to present, substantial evidence establishing Mr. Breedlove's intoxication at the time of the offense. Defense counsel did not follow up on the signals indicating that an investigation regarding Mr. Breedlove's history of substance abuse and his intoxication at the time of the offense was necessary. Defense counsel knew that Mr. Breedlove had told the detectives that on the night of the offense he had been drinking. The reports of the mental health experts who evaluated Mr. Breedlove for competency and sanity before trial indicated Mr. Breedlove's history of substance abuse and the possibility that Mr. Breedlove



could have been impaired at the time of the offense if he had been using drugs and/or alcohol. Dr. Jaslow's report noted that Mr. Breedlove experienced "blackouts, primarily with drinking," that he began drinking at age sixteen, that he "used alcohol heavily and also many of the drugs," that he had experienced "periods of amnesia . . . in the involvement with alcohol and drugs," that "he couldn't afford a car since he was so much into alcohol and drugs," that he had received treatment for his alcohol problem, that "he was particularly involved with stimulants, cocaine, and acid," that "he was somewhat forgetful at this time as a result of his indulgence in alcohol and drugs," and that he found it "rather frightening not to be under the influence, for he felt that he couldn't really handle the responsibilities of a normal reality existence" (Report of Albert C. Jaslow, M.D., 2/21/79). Likewise, Dr. Mutter reported that Mr. Breedlove's drug history began at age sixteen, that Mr. Breedlove said he had used LSD at least 50 times, that Mr. Breedlove "described blackouts and loss of memory with drugs and alcohol," that Mr. Breedlove "stated he drinks large quantities -- as much as one fifth or one quart of vodka daily" that "[i]t is possible that he did have diminished mental capacity as a result of drug and alcohol intoxication," and that Mr. Breedlove "will most likely need drug and alcohol rehabilitation" (Report of Charles B. Mutter, M.D., 2/22/79).

Despite these signals that Mr. Breedlove had been heavily involved in drugs and alcohol for a number of years and that his

capacity might have been diminished at the time of the offense as a result of intoxication, defense counsel conducted no investigation regarding intoxication. Evidence was readily available regarding Mr. Breedlove's history of alcohol and substance abuse and regarding Mr. Breedlove's intoxication at the time of the offense. Family members recall that Mr. Breedlove's addiction to alcohol and drugs began when he started drinking cough syrup and dropping acid. He quickly escalated his drug use to include speed and a wide range of amphetamines. His drug intake increased until he was completely controlled by and addicted to cocaine and heroin. He was shooting up hundreds of dollars a day in cocaine and heroin.

Records from the Atascadero State Hospital in California indicate that in 1969, mental health professionals believed Mr. Breedlove "would profit from [a] treatment program which was primarily designed for people with addictive disorders. He has become aware of his past dependence on narcotics and feels he needs help." Those records also indicate that Mr. Breedlove had used "heroin, marijuana, amphetamines and barbiturates," that he "has been dependent upon and probably addicted to numerous drugs including cocaine and heroin which have been taken mainline in the vein of his left forearm," and that he "has used amphetamines such as methedrine, barbiturates, such as seconal or red devils, and has also smoked marijuana." These records further indicate that Mr. Breedlove was "addicted to cocaine, heroin, methedrine,

and barbiturates, which may have given him a temporary psychotic reaction."

After his return to Florida from California, Mr. Breedlove's struggle with alcohol and drugs continued. His addiction to cocaine and heroin was again out of control.

On the day preceding and night of the offense, Mr. Breedlove was consuming large quantities of drugs and alcohol. His brother, Elijah Gibson, relates:

10. I remember the day the police said McArthur killed the man. I was with McArthur most of the day. We went over to William's store to play pool. We were in and out of there from sometime in the morning until about seven or eight o'clock at night. McArthur was using drugs and drinking beer all day.

11. McArthur had about seven quarts of Budweiser. He was also using cocaine and heroin. McArthur would buy them already mixed together. He would shoot them into his arm. McArthur shot-up about ten times throughout that day.

12. McArthur left and went off by himself about seven or eight o'clock. I did not see him again until about 2:00 a.m. When he came home I was still very high from the drugs we used while shooting pool.

13. When McArthur left at seven or eight he had a dime each of cocaine and heroin. When he came back at two a.m., the dimes were gone and he had two "twenties" each of cocaine and heroin. The seal on one of the "twenties" was broken. McArthur also had some new needles.

14. When McArthur left the store at seven he was riding my yellow bike. He was also riding it when he came back at two.

15. McArthur went out back of the house and shot-up again. He was also drinking out

of a bottle of whiskey that he brought with him. McArthur was addicted to the cocaine and heroin and when he was using drugs, he drank alcohol.

16. McArthur left again for about a half-an-hour. He went down to the store to buy more beer.

17. I started using cocaine in about 1973. At that time I was snorting it but I remember McArthur using the cocaine and heroin mix back then. He always used a needle to get high. Ever since McArthur came back from California he has been shooting-up the cocaine/heroin mix.

(PC-R. 285-88, Affidavit of Elijah Gibson).

Linda Breedlove, Mr. Breedlove's sister-in-law, describes Mr. Breedlove's severe drug problem and her observations of him on the day of the murder:

1. My name is Linda Breedlove. I have lived in South Florida since 1976. I was born and raised in Georgia. I am presently twenty-nine years old. I have been married to McArthur's step-brother, Arthur Lee, for about eight years.

2. I knew McArthur for about three months before he was arrested and eventually sentenced to death. I met him through his step-brother Elijah Gibson. I would visit Elijah's mama's house everyday. That is where I would see McArthur. He was always in and out. McArthur was a nice person. He did not talk much. He would usually go off by himself and be real depressed. McArthur was pretty much a loner and he acted like he had no one to talk with about what was making him depressed. I remember that McArthur would spend hours sitting around with his head hanging down. He always seemed depressed.

3. McArthur was a drug addict. He had a terrible drug problem. I am not exactly sure about the type of drugs he was using but I know that he was using a needle and syringe. I also know that he used the

syringe everyday. When I would be visiting his mama's house, McArthur would go out into the back yard behind the tree and shoot-up. He would get high, leave the house, come back and do it again. Everyone knew that McArthur was an addict.

4. I saw McArthur on the day he was supposed to have killed a man. He was at his mama's house sometime around noon. Like always, he went out back, got high and left. I was at the house around eight o'clock at night. McArthur stopped by house. I was only there for a few minutes after McArthur stopped by. The next thing I knew McArthur was arrested and in jail.

5. After McArthur was arrested I would still visit Mary Etta's house. She is an alcoholic. She has always been that way and at that time she was drinking wine everyday. One time when I was at her house there were some of her friends in the front yard talking. I overheard their conversation. They were talking about how they saw the police give Mary Etta wine so that she would talk about McArthur. I believe what I heard that day because Mary Etta had a real bad drinking problem and she would do just about anything for wine.

6. I was never contacted by McArthur's attorneys after he was arrested. I would have told them everything I know about him. I was available and living in the area.

(PC-R. 298-99).

After his arrest, Mr. Breedlove suffered through withdrawal from drugs and alcohol. Butch Johnson, who had known Mr. Breedlove since childhood and who was a cellmate when Mr. Breedlove first was put in jail, explains Mr. Breedlove's addiction and his withdrawal symptoms:

1. My name is Butch Johnson. I live in North Miami Beach, Florida. I have lived in the Miami area all of my life.

2. I have known McArthur Breedlove since we were both young. We lived in the same neighborhood. When we were older I saw him around a lot.

3. When McArthur was arrested in November 1978, he was put into the same jail cell as me. We were in a large cell with about twenty-five or thirty other people.

4. While in the county jail McArthur was in really bad shape. He was going through withdrawal from his cocaine and heroin addiction. McArthur went through the shakes and sweats. He was always very nervous and pacing. On many occasions McArthur talked to me about how it was hell being cut off from his drugs. He also talked about how bad he needed a fix. After about two weeks, McArthur was called out and I never saw him again.

5. Out on the streets McArthur had a terrible drug habit. He has always been known to use cocaine and heroin. It was always well known that McArthur used needles while in the streets. McArthur ran with big time drug addicts. On numerous occasions I witnessed McArthur shooting up cocaine and heroin. Those are the kinds of drugs that once you start using needles you have to have it everyday.

6. McArthur's attorney never talked to me. I would have told them everything I knew about McArthur.

(PC-R. 289-90, Affidavit of Butch Johnson).

Mr. John Lane, another cellmate of Mr. Breedlove's made similar observations:

1. My name is John Lane. I live in North Miami Beach, Florida. I am presently forty years old.

2. I was doing time in the county jail when McArthur Breedlove was arrested and charged with first degree murder. Right after they arrested McArthur they put him in the same cell as me. I was in cell 5-B-1.

It was a large cell with alot of other inmates.

3. I knew McArthur from the streets. He had been a drug addict for a long time. Everyone knew that McArthur was addicted to cocaine and heroin. I would see him around quite a bit while he was running around.

4. I immediately recognized McArthur and talked with him when he came into the cell. He kept complaining because he was being forced to quite his habit. McArthur was really nervous and shaking. He was also having fits when he would start sweating. I gave him some sweet candy to help calm him down. It helped him a little bit but McArthur kept telling me that he needed his "junk."

5. I remember that McArthur was called out of the cell. When he came back he was holding his stomach and moaning. He told me that he had confessed to a murder. McArthur told me that he was beat up by the police and forced to make a confession. I asked McArthur, "Why didn't you tough it out?" He said that he couldn't stand the beating.

6. I never spoke with McArthur's attorney. I would have told them everything I knew about McArthur.

(PC-R. 296-97).

Trial counsel presented none of this evidence to Mr. Breedlove's jury. Furthermore, the judge and jury never heard about the severe effect that substance abuse and intoxication has on a mentally ill and brain damaged person. Defense counsel failed to have an expert explain how Mr. Breedlove's substance abuse problem affected him. Post-conviction counsel has obtained that assistance from an expert. Dr. Toomer will testify how Mr. Breedlove's severe addiction problem affected him.

The absence of any evidence at the penalty phase regarding Mr. Breedlove's intoxication at the time of the offense was plainly prejudicial. A solid penalty defense of intoxication was available but counsel failed to investigate or present this defense. Without question evidence of intoxication at the time of the offense is relevant mitigation under Florida law.

Hargrave v. Dugger, 832 F.2d 1528, 1534 (11th Cir. 1987); Foster v. Dugger, 518 So. 2d 901, 902 n.2 (Fla. 1987); Waterhouse v. Dugger, 522 So. 2d 341, 344 (Fla. 1988).

By this omission, counsel ineffectively deprived Mr. Breedlove of the statutory mitigation found in Fla. Stat. sec. 921.141(6)(f), which describes:

The capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired.

This omission also deprived Mr. Breedlove of the benefit of the mitigating factor of 921.141(6)(e), which provides:

The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance.

In discussing these mitigating factors, the Florida Supreme Court recognized that

A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Perri v. State, 441 So. 2d 606, 609 (Fla. 1983). The available evidence of intoxication at the time of the offense and evidence of Mr. Breedlove's drug addiction could, separately or in



combination with his other serious mental health problems, have established these statutory mitigating factors. Armed with evidence that counsel could have discovered, mental health experts would have conclusively established statutory mitigation and would have presented substantial nonstatutory mental health mitigating evidence. Cf. State v. Michael, 530 So. 2d 929 (Fla. 1988).

Trial counsel's failure to present evidence of intoxication at the time of the offense was unreasonable attorney conduct and clearly prejudicial. This evidence would have made a difference.

Dr. Toomer will provide expert testimony concerning Mr. Breedlove's mental state at the time of the offense. He will graphically explain how Mr. Breedlove's intoxication affected his behavior on the night of the offense. Moreover, he will explain Mr. Breedlove's mental health problems in the context of his severely abusive upbringing and his resulting substance abuse problem.

The only evidence presented at Mr. Breedlove's penalty phase was from three mental health experts who were provided with no background information about Mr. Breedlove, none of his pre-trial statements and no information concerning the facts of the offense. As a result, they were unable to testify to valuable mitigating evidence both statutory and non-statutory, and were unable to refute the State's expert's findings: findings which are clearly refutable. In support of these allegations, Mr.

Breedlove proffered Dr. Toomer's summary report in his motion for rehearing in circuit court:

My evaluation of Mr. McArthur Breedlove conducted on December 11, 1991 for approximately three hours at the Florida State Prison. The procedure consisted of the psychodiagnostic interview, and administration of the Bender-Gestalt Designs, Revised-Beta Examination, Carlson Psychological Survey, House-Tree-Person Drawings and Thematic Apperception Test (TAT). In addition, I was able to examine a variety of background material on Mr. Breedlove including but not limited to Florida Supreme Court Records, State of California Department of Correction Records, portions of the trial transcript, records of statements and testimony provided by the defendant, mental health expert reports, and background statements from family members and friends as well as hospital, prison, and school records.

The results of my findings regarding the subject's intellectual and personality functioning are consistent with history and reports of behavior manifested throughout his life. The subject's deficits appear to be long standing in nature and contributed to the offense for which he has received a death sentence. The deficits include mental and intellectual deficits, severe substance abuse, and likely organic brain disturbance. All of these deficits combine to impact mental health issues related to mitigating factors both statutory and non-statutory.

A review of the records indicates that mental health experts at trial had inadequate time and background material to conduct a complete evaluation. There is no indication that there was information available concerning the subject's history of instability resulting from an extremely abusive and dysfunctional home life nor information regarding the history of family alcoholism. There was no indication that the subject's severe history of psychoactive substance abuse was properly investigated and assessed nor was his history of sustained

psychological dysfunction. Specific circumstances of the offense and statements provided by the defendant also appear unexamined.

The subject's history, the records I have reviewed and the results of the evaluation provide evidence of two statutory mitigating circumstances: One, that the crime was committed while Mr. Breedlove was under the influence of extreme mental or emotional disturbance and secondly, the capacity of Mr. Breedlove to conform his conduct to the requirements of the law were substantially impaired at the time of the offense. Moreover, this background information establishes important non-statutory mitigating circumstances concerning Mr. Breedlove's extremely abusive upbringing and his dysfunctional home life.

It is the opinion of the undersigned that the full array of background materials I have described was necessary, in order to conduct a complete and professional psychological evaluation and without such information the validity of findings would have at best been incomplete. The background materials provided directly refute the alternative diagnosis by the State's mental health experts that Mr. Breedlove suffers from an anti-social personality disorder. There is no evidence of any anti-social characteristics displayed by Mr. Breedlove before he was 15 years old which precludes an anti-social diagnosis.

(PC-R. \_\_\_\_, Report of Jethro W. Toomer, Ph.D., dated January 13, 1992).

Undersigned counsel has also spoken with Dr. Eli Levy, who testified at the penalty phase, concerning his evaluation of Mr. Breedlove, and this information was also included in the motion for rehearing. Dr. Levy agrees with Dr. Toomer that he was unable to provide a professional evaluation and useful testimony concerning mitigating evidence at Mr. Breedlove's trial. He

indicated that he was notified at the last minute that he was to testify and received no preparation concerning his testimony. Dr. Levy confirmed he received absolutely no background information about Mr. Breedlove and no information concerning the facts of the case. Dr. Levy in fact asked counsel for this information. He has recently received a wealth of background information from undersigned counsel and has indicated that this was the information he needed at the time of his evaluation and testimony in Mr. Breedlove's case. He admits that without that information he was unable to provide useful information to Mr. Breedlove's jury about his abusive upbringing and severe substance abuse problem. Dr. Levy also stated that had he been provided with this information, he could have professionally addressed the statutory mitigating circumstance of whether Mr. Breedlove's capacity to conform his conduct to the requirements of the law was substantially impaired. Dr. Center, who also testified at the penalty phase, has also related to undersigned counsel that he agrees with the above mentioned observations of Dr. Levy. This information was proffered to the circuit court during argument on the motion for rehearing this morning, January 14, 1992 (PC-R. \_\_\_).

Counsel failed to investigate, develop, and present any of this significant mitigating evidence. As a result, compelling and substantial statutory and nonstatutory mitigation evidence was lost. The importance of this information concerning Mr. Breedlove's intoxication at the time of the offense and his long-

term substance abuse problem is unquestionable. The jury and judge failed to receive this significant evidence and how it relates to the two mental health mitigating factors: factors which the trial judge gave no weight to in determining whether Mr. Breedlove should live or die. This evidence would have made a difference.

To determine whether a resentencing is necessary because of defense counsel's deficient performance, consideration must be given to the import of Lockett v. Ohio, 438 U.S. 586, 605 (1978), and its progeny:

"In contrast to the carefully defined standards that must narrow a sentencer's discretion to impose the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to decline to impose the death sentence." McCleskey v. Kemp, 481 U.S. 279, 304 (1987) (emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the [sentencer] must be allowed to consider and give effect to mitigating evidence relevant to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential if the [sentencer] is to give a "'reasoned moral response to the defendant's background, character, and crime.'" Franklin, 487 U.S., at --- (opinion concurring in judgment) (quoting California v. Brown, 479 U.S., at 545 (concurring opinion)). In order to ensure "reliability in the determination that death is the appropriate punishment in a specific case," Woodson, 428 U.S., at 305, the [sentencer] must be able to consider and give effect to any mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime.

. . . Our reasoning in Lockett and Eddings thus compels a remand for resentencing so that we do not "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." Lockett, 438 U.S., at 605; Eddings, 455 U.S., at 119 (concurring opinion). When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Penry v. Lynaugh, 109 S. Ct. 2934, 2951-52 (1989) (emphasis added), citing Lockett, supra. The prejudice to Mr. Breedlove resulting from counsel's deficient performance is just as clear. Confidence in the outcome is undermined, and the results of the penalty phase are unreliable. An evidentiary hearing must be conducted, and Rule 3.850 relief is proper.

#### CONCLUSION

No claim or aspect of a claim which, given the time constraints, has not been specifically discussed herein is waived or abandoned. Mr. Breedlove's lower court submissions are all incorporated hereby, and presented for this Honorable Court's review.

Based on the foregoing, it is respectfully urged that a stay of execution be entered and that a briefing schedule be issued. Mr. Breedlove also respectfully requests that this Honorable Court remand this cause for an evidentiary hearing, and that the Court vacate his unconstitutional capital conviction and sentence of death for all of the reasons presented to this Court in this brief and in petitioner/appellant's prior submissions.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on January 14, 1992.

LARRY HELM SPALDING  
Capital Collateral Representative  
Florida Bar No. 0125540

THOMAS H. DUNN  
Assistant CCR  
Florida Bar No. 871753

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

By: 

Counsel for Petitioner

Copies furnished to:

Ralph Barriera  
Assistant Attorney General  
Ruth Bryan Owen Rhode Building  
Dade County Regional Service Center  
401 N.W. Second Avenue, Suite 921N  
Miami, FL 33128