IN THE SUPREME COURT OF FLORIDA

CASE NO. 80,518

GROVER REED,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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

M. ELIZABETH WELLS
Assistant CCR
Florida Bar No. 0866067

KENNETH D. DRIGGS
Special Assistant CCR
Florida Bar No. 304700

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

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Reed's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Reed's claims without an evidentiary hearing.

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

"R" -- record of documents and pleadings on direct appeal to this Court;

"PC-R" -- record on 3.850 appeal to this Court;

"PC-RS" -- supplementary record on 3.850 appeal containing transcripts of trial court proceedings.

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

REQUEST FOR ORAL ARGUMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

In December 1985, Grover Reed, a woman companion, and two children, arrived in Jacksonville from Tennessee. Through Traveler's Aid they met Irvin and Betty Oermann who allowed them to live in their home December 11-22, 1985. Sometime after that, Mr. Reed's party established themselves in a nearby mobile home park. The Reeds and the Oermanns continued to be involved in what Mr. Oermann described as a helping relationship (R. 368-374). On February 27, 1986, Mr. Oermann left his wife at home about 5:40 - 5:45 p.m. He returned at 9:50 p.m. and found his wife had been murdered (R. 385-386).

On April 2, 1986, Mr. Reed was arrested. The public defender was appointed shortly after Mr. Reed's arrest (R. 2) and an experienced assistant, Alan Chipperfield, was assigned the case (R. 5). The public defender filed a number of motions on behalf of Mr. Reed (R. 23-88, 91-204) including a Notice of Intention to Claim Alibi based upon the testimony of Mr. Mark Stephen Rainey (R. 27-28). Having determined through discovery that the state's case would be heavily dependant on the testimony of experts, the public defender on July 24, 1986, filed a Motion to Incur Costs of Expert Witnesses (R. 39-41).

The day after the public defender filed the bulk of his motions the prosecutor sought to remove him from the case. In a Motion for Court to Determine Conflict of Interest the state disclosed that it was listing a public defender client, Mr. Dell Spearing, as a witness for the prosecution and asked the court to

remove the public defender (R. 89-90). The trial court granted the state's motion and appointed Richard Nichols as substitute trial counsel for Mr. Reed (R. 205). The state later elected not to use Mr. Spearing, the source of conflict, at trial.[1]

The trial court granted the public defender's motion for defense experts but substitute trial counsel indicated he would not need them (R. 79-81). At trial the state presented expert testimony purportedly linking Mr. Reed to the crime through hair (R. 652-675), fingerprints (R. 676-712), and blood (R. 627-640).

The fingerprint expert testified not only that he had found Mr. Reed's fingerprint on a check found at the scene, but that through a chemical test he could determine that whoever left the print was sweating heavily and that it was made within ten days (R. 685-689). Both these points, which went unrebutted by trial counsel, became central to the state's guilt phase closing argument (R. 775-777).

The body fluids expert testified that the victim had blood type O and was a secretor, meaning trace elements of her blood could be found in other body fluids (R. 632). He testified that Mr. Reed had blood type O but was a non-secretor, meaning trace elements of his blood would not be found in his body fluids, including sperm. (R. 634). Here, spermatozoa was seen on slides confirming its presence. (R. 637). The expert then detected "on the vaginal swab H antigenic activity. Now, H antigenic activity

---

[1]Mr. Reed contends that the state's action was deliberately designed to manipulate the quality of his representation.

is consistent with or is equivalent to blood type O" (R. 637-38). The expert then testified that these findings were consistent with Mr. Reed being the perpetrator (R. 638), ignoring the earlier statement that Mr. Reed was a non-secretor and the victim a type O secretor, and leaving the impression this was incriminating evidence (R. 634). Again, the prosecutor relied heavily on this testimony in his guilt phase closing argument (R. 772). The jury was confused about the body fluids testimony, asking to have it transcribed for their use in deliberations. The trial court refused, having the testimony read to them instead. (R. 830-835).

The defense rested without presenting any guilt phase testimony (R. 716-720). A conviction followed (R. 836-837). Trial counsel then entered into a stipulation with the prosecutor that no penalty phase testimony would be presented to the jury, (R. 846-847), and the jury heard nothing further. The jury deliberated twenty (20) minutes and returned an 11-1 death recommendation. (R 909-910).

The public defender had filed a written objection to unconstitutionally vague statutory aggravating factors of heinous, atrocious, or cruel, and cold, calculated and premeditated (R. 63). Trial counsel expressly adopted the motion (R. 37), but it was denied by the trial court (R. 48-49).

The jury was instructed on six aggravating factors:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: One, the defendant has been previously convicted of another capital offense or

of a felony involving the use or threat of violence to some person. The crime of sexual battery and the crime of robbery are felonies involving the use or threat of violence to another person. Two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or an attempt to commit the crime of sexual battery. Three, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest; four, the crime for which the defendant is to be sentenced was committed for financial gain; five, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel; six, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 897-898).

Before sentencing trial counsel gave the Court extensive mental health records on Mr. Reed which had not gone to the jury:

MR. NICHOLS: All right, sir. Your Honor, as I indicated, we will not -- we don't have any witnesses to be called to present anything to the Court at this time. However, I'd like to file with the clerk and ask the Court to consider the sentencing hospital records from Hendersonville Hospital <u>that have to do with Mr. Reed's mental state as a result of some drug dependency and some toxic response to some lead from, I think it was what they allege was sniffing gasoline over a long period of time</u>, and I'd also like to file with the clerk and ask the Court to consider the records from the Department of Mental Health and Mental Retardation of Middle Tennessee Mental Health Institute which <u>relate to Mr. Reed's past emotional and drug problems</u>.

Your Honor, I have a couple of <u>additional letters</u> to file with the clerk and ask the Court to consider and I believe -- I don't know what date the Court is going to set for the actual sentencing. I'm under the impression that I'll be receiving some additional letters which I'd like to, if I might, just file with the clerk and have a copy of it delivered to your office so that you'll have those available to you as you consider this matter.

(R. 921-922)(emphasis added).

In sentencing Mr. Reed to death the trial court found all six of the aggravating factors that the jury was instructed on present (R. 389-91). The court rejected all statutory mitigation, noting that trial counsel stipulated he was not entitled to the mitigating factor of "no significant criminal history", that Mr. Reed's age of 25 was not significant, and that the defense presented no evidence that the mental mitigators were present:

> While no evidence was offered to show that any of these three mitigating factors existed, the Court has, nonetheless, considered the psychiatric examination report of Dr. Ernest Miller and Karen Kaldor, dated October 31, 1986, and finds that there is no evidence to sustain a finding that any of the three factors exist.

(R. 391-392).

As to non-statutory mitigation, the sentencing court observed "no evidence has been presented to show the existence of any other factors which should be considered in mitigation" (R. 392). The trial court did not address the hospitalization records belatedly presented by trial counsel.

The sentencing court concluded with the observation that in the complete absence of mitigation no weighing was necessary:

> It is, therefore, clear to the Court that no mitigating factors exist and consequently the extreme weight of the statutory aggravating circumstances that exist demands that this Court follow the recommendation of the jury.

(R. 392).

Trial counsel's appointment carried over to direct appeal. On June 1, 1987, he filed a ten page, one issue brief. The

single argument was three pages and three lines long. The argument challenged the state's exclusion of black jurors based on Swain v. Alabama, 380 U.S. 202 (1965), making no mention of State v. Neil, 457 So. 2d 481 (Fla. 1984), or Batson v. Kentucky, 476 U.S. 79 (1986). This court recognized the inadequacy of trial counsel's appellate work and directed that it be rebriefed:

> The Court has received an initial brief in this appeal of a death sentence which raises only a single point and which does not address the appropriateness of the death sentence. On its face this brief does not appear to be a good faith effort to address all the issues available on appeal. We, therefore, relinquish jurisdiction of this cause to the trial court and direct that court to, within fifteen days, determine either that Reed's current counsel can fulfill his responsibilities as an appellate lawyer by filing an adequate supplemental brief or that new counsel should be appointed.

Reed v. State, No. 70,069 (September 9, 1987)(emphasis added). Subsequently the office of the public defender took over the appeal and filed a second brief with this Court.

This Court reversed Mr. Reed's convictions under Neil and State v. Slappy, 522 So. 2d 18 (Fla. 1988), cert. denied, 108 S. Ct. 2873 (1988). Reed v. State, 14 Fla. L. Weekly 298 (Fla. June 15, 1989). The opinion focused on the prosecutor's reasons for excusing three black prospective jurors. The state then filed a Motion for Rehearing and on March 1, 1990, the Court reversed itself, affirming Mr. Reed's conviction and death sentence. Reed v. State, 560 So. 2d 203 (Fla. 1990).

This court observed that the critical elements of the state's case were as follows:

> The most significant evidence of Reed's guilt may be summarized as follows:
>
> (a) Witnesses said they had seen Reed wearing his baseball cap on the day of the murder before the probable time of death but not thereafter. They positively identified the cap as Reed's because of the presence of certain stains and mildew.
>
> (b) Reed's fingerprints were found on checks that had been taken from the Oermann home and had been found in the yard.
>
> (c) An expert witness gave testimony that hairs found on the body and in the baseball cap were consistent with Reed's hair.
>
> (d) Another expert witness gave testimony that the semen found in the body could have been Reed's.
>
> (e) Reed's cellmate, Nigel Hackshaw, gave testimony that Reed had admitted breaking into the Oermann house and killing Mrs. Oermann.

560 So.2d at 204. Mr. Reed's Neil/Slappy/Batson claims were denied on the inadequate record before the Court. 560 So. 2d at 205-206. In reviewing the death sentence this Court struck two of the six aggravating factors -- prior violent felony and the cold, calculated factors -- but affirmed with the observation "There remain four aggravating circumstances balanced against a total absence of mitigating circumstances." 560 So.2d at 207.

Mr. Reed filed a Motion to Vacate Judgment of Convictions and Sentence With Leave to Amend on February 28, 1992 (PC-R. 1-216). Among other claims, Mr. Reed pled ineffective assistance of trial counsel during the guilt phase for his failure to adequately deal with the Neil/Slappy/Batson hearing; his failure to prepare for the extensive use of expert witnesses in the trial; and his failure to investigate and employ the alibi defense already developed by the public defender. Mr. Reed pled an absolute innocence claim based on expert testimony on body fluids. He pled further ineffective assistance at penalty phase

based on a complete failure to investigate and present substantial legally recognized mitigation.

On April 16, 1992, the trial judge signed an order prepared ex parte by the state giving the state thirty days to file an answer (PC-R. 217). On May 11, 1992, the state filed a Motion to Compel Production of Documents, requesting that Mr. Reed serve an appendix to the Rule 3.850 motion on the state, although Mr. Reed had not prepared an appendix to his motion (PC-R. 218-19). On the same date, the state attorney served via facsimile an Order obtained ex parte from the court compelling production of this non-existent appendix (PC-R. 240).[2]

On June 1, 1992, the state filed a Motion to Produce asking the trial court to order Mr. Reed to produce the entire trial, appellate, and clemency attorney files (PC-R. 223). Mr. Reed responded to this motion, noting that the state had provided no authority for the novel position that they were entitled to these files (PC-R. 293). The trial court did not grant the state's motion.

On June 29, 1992, the state filed a Response to Motion for Post-Conviction Relief (PC-R. 295-304). In it the state argued that Mr. Reed had no present right to confidentiality in his attorneys files (PC-R. 295). The state opposed an evidentiary hearing on all claims.

---

[2]These ex parte orders provided the grounds for a Motion to Disqualify Judge Southwood based upon this Court's opinion in Rose v. State, 601 So. 2d 1181 (Fla. 1992) (PC-R. 239-89). The Motion to Disqualify was granted and the case was reassigned to Judge Wiggins (PC-R. 290-92).

The trial court heard oral argument on July 23, 1992 (PC-RS. 30-96). On August 25, 1992, the trial court summarily denied all relief (PC-R. 309-317). The court denied all claims of ineffective assistance based upon its perception that Mr. Reed had refused to make available trial counsel's files (PC-R. 312-315). However, no order had ever been entered ruling on the state's motion to produce. This appeal timely followed (PC-R. 318).

SUMMARY OF THE ARGUMENTS

1. Mr. Reed's motion to vacate was dismissed for non-compliance with a non-existent order. In the court below, the state sought to compel undersigned counsel to disclose trial counsel's, appellate counsel's, and clemency counsel's files. Counsel for Mr. Reed asserted that there is no authority for this provided in law, and to compel production of these files would be a violation of the attorney/client privilege. The trial court denied all claims of ineffective assistance of counsel based upon its perception that Mr. Reed had refused to make trial counsel's files available to the state. However, no order had ever been entered ruling on the state's motion to produce.

2. Mr. Reed pled substantial claims relating to ineffective assistance of counsel in both guilt and penalty phase issues that this Court has held require evidentiary hearing. Contrary to this Court's law, the trial court summarily denied relief without attaching any records or files conclusively showing Mr. Reed was entitled to no relief. This summary denial was in error. This court must reverse the order, and order a full and complete evidentiary hearing on Mr. Reed's 3.850 claims.

3. Critical exculpatory evidence was not presented to Mr. Reed's jury during the guilt phase of his trial. Counsel failed to present a credible defense, conceded issues of guilt, failed to know the law, failed to investigate the case, and failed to secure defense experts on Mr. Reed's behalf. In addition, the state withheld critical evidence which proves that Mr. Reed did not commit this crime. No adversarial testing occurred.

4. No adversarial testing occurred during the penalty phase at Mr. Reed's trial. Counsel presented no evidence during penalty phase on Mr. Reed's behalf. Substantial statutory and non-statutory mitigation concerning Mr. Reed's extensive mental history, abusive childhood and drug abuse was available for presentation. Counsel had hospital records documenting Mr. Reed's mental health problems and inexplicably failed to present

these records to the jury. Mr. Reed's sentence of death cannot stand.

5. The prosecutors inflammatory comments and arguments at guilt phase and penalty phase invited the jury to convict Mr. Reed and sentence him to death on wholly impermissible factors. The prosecutor repeatedly resorted to emotional theatrical appeals to the jury. Counsel for Mr. Reed compounded this error by emphasizing many of these irrelevant and emotionally charged points.

6. Mr. Reed's sentence was tainted by improper jury instructions in violation of the Eighth and Fourteenth amendments. This court struck two aggravating factors on direct appeal, but no sentencing calculus free from the taint of these unconstitutionally vague factors ever occurred.

7. Access to the files and records pertaining to Mr. Reed in the possession of certain state agencies have been withheld in violation of Chapter 119.01 Et seq., Fla. Stat., The Due Process clause and Equal Protection clauses of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment and the corresponding provisions of the Florida Constitution. Mr. Reed is unable to fully plead his post-conviction issues until he has received and reviewed all public records.

8. In sentencing phase, the burden was shifted to Mr. Reed on the question of whether he should live or die. This impermissible shifting of the burden of proof in the jury instructions deprived Mr. Reed of his rights to Due Process and Equal Protection of law, as well as his rights under the Eighth and Fourteenth Amendments. Counsel's failure to object was ineffective assistance.

9. Mr. Reed's trial was fraught with procedural and substantive errors, which cannot be harmless when viewed as a whole since the combination of errors deprived him of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT I

MR. REED'S MOTION TO VACATE WAS ERRONEOUSLY DISMISSED AND DENIED FOR FAILURE TO PROVIDE THE STATE A COPY OF ALL ATTORNEYS' FILES. ANY WAIVER OF THE ATTORNEY-CLIENT PRIVILEGE MUST BE NARROWLY CONSTRUED PURSUANT TO THE DICTATES OF FLORIDA LAW AND THE REQUIREMENTS OF RULES OF PROFESSIONAL CONDUCT.

The Circuit Court dismissed Mr. Reed's ineffective assistance of counsel claims according to the order drafted by the state because Mr. Reed failed to turn over to the state a copy of all attorneys' file in collateral counsel's possession.

However, no order directing such disclosure was ever entered. Thus, Mr. Reed's motion to vacate was dismissed and denied for non-compliance with a non-existent order.

A. The Facts of the Case.

Mr. Reed filed his motion to Vacate Judgement of Convictions and Sentence With Leave to Amend. He plead ineffective assistance of trial counsel in both the guilt and penalty phases of his trial. Mr. Reed's motion did not quote or cite to any document in trial counsel's file. He did quote extensively from fifteen affidavits in support of his claims. He also identified by name and summarized the anticipated post-conviction testimony of a neuropsychologist and a forensic evidence expert.

The trial court found his motion sufficient to require an answer from the state (PC-R. 217). The state moved to compel the production of an appendix in spite of the fact no case law or court rule required Mr. Reed to file one (PC-R. 218-19). The state through ex parte contact obtained an order directing the filing of an appendix (PC-R. 220). Mr. Reed responded that an appendix had not been prepared (PC-R. 221).[3] Undeterred, the state filed another motion to produce all attorneys' files (PC-R. 223-24). Mr. Reed responded to the motion, noting that the state had provided no authority for this erroneous position (PC-R. 293-94). No order to compel production of the files followed.

---

[3]At this point in the proceedings, Judge Southwood recused himself because of the ex parte contact initiated by the state.

In their response to Mr. Reed's 3.850 motion the state argued that all his ineffective assistance of counsel claims should be denied if Mr. Reed failed to turn his copies of all defense and clemency attorney files over to the state (PC-R. 295-304).

The trial court heard oral argument in this case on July 23, 1992. The state again argued in favor of its motion for production and that Mr. Reed's ineffective assistance claims should be "stricken" since he had not provide the state with all of defense counsel's files (PC-RS. 43-46). The state took the position that they could not even respond to Mr. Reed's 3.850 without trial counsel's files and dismissed his reliance on the attorney-client privilege as "Peak (sic) a boo law" (PC-RS. 45).

Mr. Reed argued that trial counsel should be approached by the state on this matter:

> Now where the attorney client privilege may be waived is with the trial attorney, and that's for him to decide. The trial attorney is governed by the cannon of ethics just like anybody else, and it's for him to decide under the rules what is necessary for him to disclose to defend himself. It's his decision.
>
> At this point in time I have received no indication from Mr. Nichols that he doesn't have the file, that he needs my permission for anything. All that's happened is the state demanded that C.C.R. turns over the file, and Kite (sic) specifically says C.C.R. is not to do it, the Florida Supreme Court opinion.

(PC-RS. 62, which incorrectly attributes these remarks to the state; see also PC-RS. 71).[4]

---

[4]The state conceded in the hearing that it was trial counsel's file that they sought, and not the file of post-

(continued...)

Without ordering Mr. Reed to turn over his copy of trial counsel's files to the state, or even undertaking an in camera inspection of their contents, the trial court adopted the state's argument and denied all ineffective assistance claims:[5]

CLAIM III
(Ineffective Counsel)

> Mr. Reed's remaining allegations of ineffective assistance of trial counsel will be considered together.
>
> Although Mr. Reed's petition makes specific accusations of misconduct by counsel (backed by references to counsel's files) Mr. Reed has refused to waive the attorney-client-privilege. Mr. Reed seems to assert that he has the right to level charges of malpractice or misconduct against a member of the Florida Bar and then sit on any evidence which might disprove his allegations.
>
> The Court finds that Mr. Reed initially waived the privilege by filing the Rule 3.850 petition. See Section 90.503(4), Florida Statutes; Wilson v. Wainwright, 248 So.2d 249 (Fla. 1st DCA 1971). By refusing to disclose counsel's files, Mr. Reed has reasserted his privilege and has precluded the state from obtaining the discovery to which it is entitled from any source. The Court notes that if Mr. Reed is not asserting a bona fide privilege, then his willful avoidance of discovery and strident refusal to behave equitably undercuts any threshold credibility his petition had at the time it was filed. The Court does not attribute any dishonesty or misconduct to Reed or his attorneys but gives them the benefit of the doubt

---

[4](...continued)
conviction counsel (PC-RS. 88). Undersigned counsel asserted at this argument that trial counsel was in possession of his original file, and that he was the appropriate person for the state to speak with regarding the motion (Id.). Although the state was aware of the issues to be argued at this status hearing, the state chose not to have trial counsel attend the hearing.

[5]The Circuit Court asked both parties to submit draft orders ruling in their favor. The Court signed the state's draft order unchanged.

in finding that the attorney-client privilege has been invoked.

> Given Mr. Reed's decision to withhold evidence from the Court and to invoke the attorney-client privilege, no evidentiary hearing can be conducted. The loss of this crucial evidence would render any subsequent hearing pointless.

(PC. 312-13)(emphasis added). It should again be noted that nothing in Mr. Reed's motion refers to trial counsel files. The court below is apparently confusing post-conviction counsel's work product -- the affidavits and reports of experts -- which are quoted extensively in the motion, with trial counsel's work.

The state (PC-R. 295, 298) and trial court (PC-R. 312) rely on a 1971 lower court opinion to sustain their position, Wilson v. Wainwright, 248 So. 2d 249 (Fla. 1st DCA 1971). Actually, Wilson is directly in line with Mr. Reed's position. Wilson involved an ineffective assistance of counsel claim made in a habeas corpus action. The opinion held that trial counsel could respond to the suggestions of ineffective assistance of counsel through a deposition and through testimony at a hearing:

> Thus, we hold that a lawyer who represents a client in any criminal proceeding may reveal communications between him and his client when accused of wrongful conduct by his client concerning his representation where such revelation is necessary to establish whether his conduct was wrongful as accused. This is so whether the lawyer is retained by the defendant or appointed by the State to represent him and includes lawyers serving as public defender and their assistants.

Wilson, 248 So. 2d at 250, (emphasis added). This does not stand for the total disclosure of all defense counsel files as the state here has argued. Nor does it support the state's

contention that collateral counsel must disclose all files. Instead, it holds that the state should go directly to trial counsel and talk to him.

The attorney-client privilege and client confidentiality are critical components of the present day judicial process without which the adversary system would fail. It is based upon a simple premise -- without the assurance that an attorney-client communication will remain confidential, no client will be willing to freely disclose a complete statement of the facts to his counsel. This is particularly true where an attorney could be compelled to reveal privileged material to a third party. Without an assurance that an attorney cannot be forced to reveal privileged material to a third party, attorneys will be reluctant to elicit a complete statement of facts or to conduct a complete investigation of a case. The effect would be to chill attorney-client communications and severely hamper the ends of justice. Full and free communication is essential in a criminal case, and even more critical in a death case where sensitive information such as other crimes, alcoholism, child abuse, and sexual abuse can mean the difference between life and death.

B. The History of the Attorney-Client Privilege.

The necessity of attorney-client confidentiality is deeply-rooted in Roman law. As the legal system has matured, the basis for the privilege has evolved:

> This theory, which continues as the principal rationale of the privilege today, rests upon three propositions. First the law is complex and in order for members of the society to comply with it in the

> management of their affairs and the settlement of their disputes they require the assistance of expert lawyers. Second, lawyers are unable to discharge this function without the fullest possible knowledge of the facts of the client's situation. And last, the client cannot be expected to place the lawyer in full possession of the facts without the assurance that the lawyer cannot be compelled, over the client's objection, to reveal the confidences in court. The consequent loss to justice of the power to bring all pertinent facts before the court is, according to the theory, outweighed by the benefits to justice (not to the individual client) of a franker disclosure in the lawyer's office.
>
> This clearly utilitarian justification, premised on the power of the privilege to elicit certain behavior on the part of clients, has a compelling common-sense appeal. The tendency of the client in giving his story to his counsel to omit all that he suspects will make against him is a matter of every day professional observation. It makes it necessary for the prudent lawyer to cross-examine his client searchingly about possible unfavorable facts. In criminal cases the difficulty of obtaining full disclosure from the accused is well known, and would certainly become an absolute impossibility if the defendant knew that the lawyer could be compelled to repeat what he had been told.

McCormick, Evidence, sec. 87 at 314-15 (4th ed.1992)(footnote omitted)(emphasis added).

The evidentiary attorney-client privilege as codified by statute is integrally related to the Rules of Professional Conduct. Any erosion of the privilege would have far reaching consequences for the fundamental system of ethics:

> Our system of litigation casts the lawyer in the role of fighter for the party whom he represents. A strong tradition of loyalty attaches to the relationship of attorney and client, and this tradition would be outraged by routine examination of the lawyer as to the client's confidential disclosures regarding professional business. To the extent that the evidentiary privilege, then, is integrally related to an entire code of professional conduct, it is futile to envision drastic curtailment of the privilege without

substantial modification of the underlying ethical system to which the privilege is merely ancillary.

McCormick, sec. 87 at 316-17 (emphasis added)(footnote omitted).

C. The Law in Florida.

The existence of a privilege and its extent are matters of state law. The federal courts must defer to state law in this matter.

Florida has always recognized the critical importance of a viable attorney-client privilege. As this Court has observed in another context:

> One of the oldest privileges existing in this country is the attorney-client privilege. See Upjohn Co. v. United States, 449 U.S. 383, 101 S.Ct 677, 66 L.Ed.2d 584 (1981). Its purpose is to allow open and uninhibited discourse between the attorney and the client.

Neu v. Miami Herald Publishing Co., 462 So. 2d 821, 826 (Fla. 1985)(McDonald, J., dissenting).

The Florida Bar ethics rules have long emphasized the importance of the full and free communication between attorney and client to facilitate the full development of facts essential to proper representation of a client:

Canon 4

A Lawyer Should Preserve the Confidences and Secrets of a Client

ETHICAL CONSIDERATIONS

> **EC 4-1.** Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that

volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.

(emphasis added).

The Rules of Professional Conduct provide for very narrowly proscribed exceptions to the privilege:

Rule 4-1.6 Confidentiality of Information

(a) A lawyer shall not reveal information relating to representation of a client except as stated in paragraphs (b), (c), and (d) unless the client consents after disclosure to the client.

(b) A lawyer shall reveal such information to the extent the lawyer believes necessary:

(1) To prevent a client from committing a crime; or

(2) To prevent a death or substantial bodily harm to another;

(c) A lawyer may reveal such information to the extent the lawyer believes necessary:

(1) To serve the client's interest unless it is information the client specifically requires not to be disclosed;

(2) To establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and client;

(3) To establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved;

(4) To respond to allegations in any proceeding concerning the lawyer's representation of the client; or

(5) To comply with the Rules of Professional Conduct.

> (d) When required by a tribunal to reveal such information, a lawyer may first exhaust all appellate remedies.

Fla. Bar R. Prof. Conduct 4-1.6, (1992)(emphasis added).

The only times when a lawyer must reveal confidences or secrets of a client are when necessary to prevent the commission of a crime or to prevent serious bodily harm to another. Otherwise, the lawyer may do so only to the extent he reasonably believes necessary to respond to allegations in any proceeding concerning the lawyer's representation of the client.

The Comment to the Rule regarding confidentiality of information refers to the critical nature of the attorney-client privilege:

> The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance.

Fla. Bar R. Prof. Conduct 4-1.6 cmt.

In a dispute concerning a lawyer's conduct, the Rules of Professional Conduct limit disclosure to those proceedings in which actual misconduct of an attorney is alleged:

> **Dispute concerning lawyer's conduct**
>
> Where a legal claim or disciplinary charge alleges complicity of the lawyer in a client's conduct or other misconduct of the lawyer involving representation of the client, the lawyer may respond to the extent the lawyer reasonably believes necessary to establish a defense.

Id. (emphasis added).[6]

Mr. Reed has not precipitated any disciplinary action, malpractice suit, or criminal charge against his attorney. Nor has Mr. Reed made any allegations of misconduct or wrongdoing against his attorney. An allegation of ineffective assistance of counsel is rarely an accusation of misconduct or wrongdoing:

> We note that most cases of ineffective assistance of counsel do not rise to the level of a disciplinary violation. . . .

The Florida Bar v. Sandstrom, 609 So. 2d 583 (Fla. 1992) fn. 1.

The Comment to Rule 4-1.6 repeatedly emphasizes the importance of limiting to the bare minimum any disclosures deemed necessary by the attorney:

> In any event, disclosure should be no greater than the lawyer reasonably believes is necessary to vindicate innocence, the disclosure should be made in a manner which limits access to the information to the tribunal or other persons having a need to know it, and appropriate protective orders or other arrangements should be sought by the lawyer to the fullest extent practicable.

Fla Bar R. Prof. Conduct 4-1.6 cmt.

Even if there is a charge of wrongdoing, the Comment exhorts attorneys to make every effort to limit disclosure:

> As stated above, the lawyer must make every effort practicable to avoid unnecessary disclosure of information relating to a representation, to limit disclosure to those having the need to know it, and to obtain protective orders or make other arrangements minimizing the risk of disclosure.

---

[6]In the comment to the Rules, misconduct is related to such behavior as "complicity of the lawyer in a client's conduct"; a third party accusation of the lawyer's complicity in wrongdoing; and a civil, criminal, or professional disciplinary proceeding against an attorney alleging a wrong.

Id.

Finally, even in those situations where an attorney shall disclose information to prevent a crime or bodily harm, attorneys are cautioned that "In any case, a disclosure adverse to the client's interest should be no greater than the lawyer reasonably believes necessary to the purpose" (Id.).

The basis for the universal and time-honored protection of the attorney-client privilege is the necessity of confidentiality for the successful functioning of the adversary system. Without complete disclosure by the client, an attorney cannot effectively prepare and present a case, and the client cannot "obtain the full advantage of the legal system." This consideration becomes even more critical in a criminal case when the constitutional rights to assistance of counsel and the protection against self-incrimination are vital due process concerns.

This Court must zealously guard attorney-client confidentiality in order to assure the viability of the adversary system. Even in a malpractice action, Florida law only permits a lawyer to disclose confidential information to the extent it is reasonably necessary:

> Mrs. Adelman, in suing her ex-lawyer for legal malpractice, has not waived her attorney-client privilege with this lawyer as to the entire world, as such waiver is limited solely to the legal malpractice action. The ex-lawyer may only reveal confidential information relating to his representation of Mrs. Adelman to the extent necessary to defend himself against the malpractice claim, Fla.Bar R.Prof.Conduct 4-1.-6(c)(2)....

Adelman v. Adelman, 561 So. 2d 671, 673 (Fla. 3 DCA 1990) (emphasis added).[7]

The courts, the legislature, and the Florida Bar have all recognized the competing interests between the necessity of attorney-client confidentiality and the need for an attorney to defend a malpractice action or a grievance proceeding. In such situations the attorney may disclose a particular document if necessary to defend himself against a claim of wrongful conduct. However, only those documents reasonably necessary to defend can be revealed.

D. The Circuit Court Erred.

The conflict between the need for confidentiality and the need for an attorney to defend against an allegation of wrongdoing has been resolved by leaving to the attorney the initial decision as to which documents it is reasonable to disclose, so long as s/he makes every effort practicable to avoid unnecessary disclosure. Here, the circuit court punished Mr. Reed for relying on the attorney-client privilege as to copies of trial counsel's files in his possession.[8] Trial counsel, who

---

[7]Even in the most extreme case, this Court has clearly protected the attorney/client privilege against encroachment. See Turner v.State, 530 So. 2d 45 (Fla. 1987). This privilege extends beyond the immediate representation and even beyond death of the client.

[8]McCormick discusses "a judicial tendency to view privileges from the standpoint of their hindrance to litigation." McCormick, Evidence, sec. 75 at 281 (4th ed. 1992). He further comments:

(continued...)

holds the originals, was never approached by the state or the court. Mr. Reed should have been granted an evidentiary hearing on his claims.[9]

In conclusion, Florida law has ample provisions to safeguard both the attorney-client privilege and the truth-seeking process without the creation of new exceptions to the privilege as

---

[8](...continued)

> At the same time it is desirable, whenever possible, to avoid a choice between the automatic and total override of privilege whenever a criminal defendant asserts a need for privileged matter, and the dismissal of the charges if the privilege is to be sustained. At least in those instances where accomplishment of the privilege objective does not necessitate absolute protection, an in camera weighing of the potential significance of the matter sought as against the considerations of privacy underlying the privilege may represent a desirable compromise.

Id., sec. 77 at 291.

[9]If, in the course of the hearing, trial counsel had wished to refer to a document either during direct or cross examination, he would have so informed the court. At such time, if the document was moved into evidence and Mr. Reed had no objection, the document would have been admitted into evidence. If Mr. Reed had raised an objection the court could have heard argument and conducted an in camera review of the document if appropriate. This procedure protects the viable operation of the adversary system by (1) providing an opportunity for the attorney to defend himself when reasonably necessary while (2) assuring that a lawyer will be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. The proper remedy would be to hear argument on the objection; to determine relevancy, necessity and constitutionality of revealing a given document; and to conduct an in camera review if appropriate. This simple remedy, which is the law in Florida and has been applied in other jurisdictions as well, also protects the criminal defendant's constitutional rights to the assistance of counsel and to not incriminate himself.

proposed by the state. Certainly, Mr. Reed should have at least notice via a court order directing disclosure before dismissal of his motion to vacate is imposed as a sanction.

ARGUMENT II

MR. REED IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS RULE 3.850 CLAIMS.

On February 28, 1992, Mr. Reed filed his first post-conviction motion under Rule 3.850. He pled detailed substantial claims relating to ineffective assistance of counsel in both guilt and penalty phase, issues this Court has held require an evidentiary hearing. The trial court heard oral argument on July 23, 1992 (PC-RS. 30-96), and asked that counsel for both parties submit proposed orders (PC-RS. 95). On August 25, 1992, the trial court summarily denied all relief (PC-R. 309-317). The order signed was the proposed order submitted on behalf of the state.[10] The court denied all claims of ineffective assistance based upon its perception that Mr. Reed had refused to make

---

[10]The order drafted by the state and signed by the trial court is, at best, confusing. Although each claim in the Rule 3.850 motion is independently and specifically denied in the order, the conclusion states:

> WHEREFORE, IT IS ORDERED AND ADJUDGED: That the Motion for Post-Conviction Relief is DENIED as to all Claims except Claims III, V, VII and VIII, which shall be addressed by separate order pending resolution of related discovery issues and further argument on the need for an evidentiary hearing.

(PC-R. 317). It appears that counsel for the state was undecided whether the Court should deny on these claims or allow an evidentiary hearing, so submitted a proposed order which did both. The trial court signed the proposed order without making any changes, failing to clarify the order.

available trial counsel's files (PC-R. 312-315). This appeal timely followed (PC-R. 318).

A trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138 (4th DCA 1992). The trial court did neither here. A trial court may not summarily deny without "attach(ing) portions of the files and records conclusively showing the appellant is entitled to no relief," Rodriquez v. State, 592 So. 2d 1261 (2nd DCA, 1992). See also Bell v. State, 595 So. 2d 1018 (2nd DCA 1992); Brown v. State, 596 So. 2d 1026, 1028 (Fla. 1992).

The law strongly favors full evidentiary hearings in death row post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows on its face that [Mr. Reed] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982). "This Court must determine whether the [] allegations . . . are sufficient to require an evidentiary hearing. Under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion

and record conclusively show that the movant is not entitled to relief (citations omitted)." Harich v. State, 484 So. 2d 1239, 1240 (Fla. 1986)(emphasis added). "Because an evidentiary hearing has not been held . . . we must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record." 484 So. 2d at 1241 (emphasis added). See also Mills v. State, 559 So. 2d 578, 578-579 (Fla. 1990)(citation omitted) ("treating the allegations as true except to the extent rebutted by the record, we find that a hearing on this issue is needed.") "The law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984).[11]

This Court has explained:

> Without reaching the merits of any of these claims, we nevertheless believe that a hearing is required under rule 3.850. In its summary order, the trial court stated no rationale for its rejections of the present motion. It failed to attach to its order the portion or portions of the record conclusively showing that relief is not required and failed to find that the allegations were inadequate or procedurally barred.

* * *

---

[11]The record in Mr. Reed's case does not conclusively show that Mr. Reed is entitled to no relief, a fact that is apparent from the court's order denying Rule 3.850 relief. The court finds that a decision by trial counsel not to call certain witnesses on Mr. Reed's behalf "could have been strategic" (PC-R. 314). Whether or not trial counsel's actions were strategic is of course a factual determination requiring resolution in an evidentiary hearing.

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

Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990)(emphasis added). See also Lemon v. State, 498 So. 2d 923 (Fla. 1986).

Some fact-based post-conviction claims by their nature can only be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So. 2d 1250, 1252-53 (Fla. 1987). "The movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." State v. Crews, 477 So. 2d 984, 984-985 (Fla. 1985). "Accepting the allegations . . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989).

Mr. Reed has pled substantial, serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. The Court erroneously denied Mr. Reed's Rule 3.850 motion. "Needless to say, these are serious allegations which warrant a close examination. Because we cannot say that the record conclusively shows [Mr. Reed] is

entitled to no relief, we must remand this issue to the trial court for an evidentiary hearing." Demps v. State, 416 So. 2d 808, 809 (Fla. 1982) (citation omitted).

Mr. Reed was -- and is -- entitled to an evidentiary hearing on his Rule 3.850 pleadings. Hoffman. Mr. Reed was -- and is -- entitled in these proceedings to that which due process allows -- a full and fair hearing by the court on his claims. Hoffman; Holland v. State. Mr. Reed's due process right to a full and fair hearing was abrogated by the lower court's summary denials, which did not afford proper evidentiary resolution.

As in Hoffman, this Court has "no choice but to reverse the order under review and remand," 571 So. 2d at 450, and order a full and complete evidentiary hearing on Mr. Reed's 3.850 claims.

ARGUMENT III

MR. REED WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT PHASE OF MR. REED'S TRIAL. AS A RESULT, MR. REED WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JURY'S GUILT VERDICT.

Through manipulation of the conflict counsel process the state robbed Mr. Reed of a defense lawyer who was prepared and in whom he had confidence, and substituted one who failed to prepare, failed to investigate the facts, failed to inform himself of the law, and failed to defend his client. Mr. Reed received only the shadow of a defense. The Sixth Amendment was so completely abused in this case that confidence in the outcome is undermined.

A. Jury Selection.

During the selection of the jury in Mr. Reed's trial the prosecutor used ten peremptory challenges, eight of them excusing black prospective jurors. Reed v. State, 560 So. 2d 203, 205 (Fla. 1990). Defense counsel made a motion for mistrial and the court held a hearing, during which defense counsel was completely silent, failing to even recognize State v. Neil, 457 So. 2d 481 (Fla. 1984). The trial court then denied the motion (R. 308-15).

If there was any question as to whether trial counsel had bothered to inform himself on the law of jury selection and race, it was removed on direct appeal. Trial counsel was appointed to continue representing Mr. Reed on direct appeal. On June 1, 1987, he filed a ten page, one issue brief. The single argument was three pages and three lines long. His challenge to the state's exclusion of black jurors was based on Swain v. Alabama, 380 U.S. 202 (1965). Trial counsel failed to inform himself of Neil and Batson v. Kentucky, 476 U.S. 79 (1986), both of which should have been central to his brief and to his 1986 argument in the trial court.

This Court recognized trial counsel's inadequate representation and issued the following order:

> The Court has received an initial brief in this appeal of a death sentence which raises only a single point and which does not address the appropriateness of the death sentence. On its face this brief does not appear to be a good faith effort to address all of the issues available on appeal. We therefore, relinquish jurisdiction of this cause to the trial court and direct that court to, within fifteen days, determine either that Reed's current counsel can fulfill his responsibilities as an appellate lawyer by filing an

adequate supplemental brief or that new counsel should be appointed.

Reed v. State, No. 70,069, Order (September 9, 1987)(emphasis added). Subsequently the Office of the Public Defender took over the appeal.

Mr. Reed then challenged the state's peremptory challenges under Neil, State v. Slappy, 522 So. 2d 18 (Fla. 1988), cert. denied, 108 S. Ct. 2873 (1988), and Batson on direct appeal. In June 1989, this Court agreed with Mr. Reed's argument by holding he was entitled to a new trial because the state had exercised at least three peremptory challenges against blacks in a prohibited racially discriminatory manner. Reed v. State, 14 F.L.W. 298 (Fla., June 15, 1989). The Court found the state's rationalizations for peremptory challenges of the three black prospective jurors were not supported by the record, and further pointed out that the state had not asked these individuals about the matters it embraced to rationalize the peremptories.

Before this opinion became final the state filed a motion to rehear and nine months later it was supplanted by an affirmance of Mr. Reed's conviction and death sentence. Reed v. State, 560 So. 2d 203 (Fla. 1990). This Court relied upon Kibler v. State, 546 So. 2d 710, 712 (Fla. 1989), which issued the same day as the first Reed opinion, to the effect that "the objecting party must ordinarily do more than simply show that several members of a cognizable racial group have been challenged in order to meet his initial burden." This record is clear as to trial counsel's failure to bring out anything after making his motion. This

Court finally denied Mr. Reed's Neil/Batson argument with the comment that on the record the state's peremptories "had at least some facial legitimacy," Reed, 560 So. 2d at 206.

The state relied heavily on unsupported, non-record reasons for the peremptory challenges of the three black jurors this Court found the most troubling in it's first Reed opinion. In his 3.850 motion Mr. Reed pled specific answers these three candidate jurors would have given had trial counsel asked (PC-R. 29-32). Had these answers been in the record this Court's initial opinion would have stood and Mr. Reed would not be in post-conviction now. See Hill v. State, 547 So. 2d 175, 176 (Fla. 4th DCA 1989); McKinnon v. State, 547 So. 2d 1255, 1256-57 (Fla. 4th DCA 1989); Knight v. State, 559 So. 2d 327, 329 (Fla. 1st DCA 1990); Mitchell v. State, 548 So. 2d 823, 824 (Fla. 1st DCA 1989); Shelton v. State, 563 So. 2d 820, 821 (Fla. 4th DCA 1990); Wright v. State, 586 So. 2d 1024, 1029 (Fla. 1991); and Roundtree v. State, 546 So. 2d 1042, 1044-45 (Fla. 1989).

The trial court's dismissal of this claim as "simply a reargument of the jury selection arguments raised in his direct appeal" (PC-R. 310), is simply not correct. Mr. Reed pled specific allegations of ineffective assistance of counsel which must be presumed to be true and which can only be dealt with in an evidentiary hearing.

B. Guilt Phase Claims.

1. Failure to Seek Defense Experts.

The Public Defender filed motions for the appointment of defense experts (R. 39-41, 80-81) which trial counsel failed to utilize in spite of the fact this case was grounded in the testimony of state experts. They were a serologist (R. 627-40), a fingerprint expert who presented critical testimony as to the age of the print (R. 676-712), an expert in body hair (R. 652-75), and a medical examiner (R. 440-74).

a. Serology Evidence

Trial counsel's cross-examination of Paul Doleman, the state's serology expert (R. 627-640), shows that he had only a marginal grasp of Doleman's testimony. While there was a copy of the deposition of this expert in the state attorney's files, there was no copy in the trial attorney file, indicating a lack of preparation.

Paul Doleman's testified that the victim had type O blood (R. 631) and was a "secretor" of her blood type (R. 632). He explained that a secretor "will demonstrate their blood, in this case blood type O, in their body fluids other than blood" (R. 632). Mr. Doleman testified that defendant Grover Reed also has blood type O (R. 634), but that Mr. Reed is a non-secretor and that a non-secretor "does not demonstrate their blood type, in this case, blood type O, in their other body fluids other than blood" (R. 634). He continued, "Grover Reed's blood type cannot

be found in his other body fluids, again such as saliva or seminal fluid . . . or spermatozoa" (R. 634).

Mr. Doleman testified that a vaginal swab taken from the victim indicated both spermatozoa and seminal fluid (R. 637), and that testing on this vaginal swab detected H antigenic activity (Id.).[12] According to his testimony, H antigenic activity is consistent with or equivalent to blood type O (R. 637-8).

When counsel for the state asked Mr. Doleman if this was consistent with Mr. Reed having intercourse with the victim, Mr. Doleman responded that he was "able to make a determination that Grover Reed falls into the population, the male population, that could have had intercourse with Betty Oermann" (R. 638). The implication was that Grover Reed is guilty because the vaginal swab reacted showing that the seminal fluid came from someone with type O blood. Grover Reed has type O blood, but he is a non-secretor, so if in fact it was the seminal fluid reacting then it would rule him out completely as a suspect. Defense counsel failed to cross examine Mr. Doleman, instead limiting his cross examination to a one page discourse on the percentage of the population which could also have been the perpetrator (R. 639). Counsel missed this point entirely, because he had not obtained an expert to advise him, or to testify and clear up the

---

[12]There was no testimony as to the chain of custody, and despite the implication that the above may be true, Mr. Doleman stated in his deposition he only assumed the swabs were done by the medical examiner. Defense counsel did not cross-examine Mr. Doleman on the chain of custody and did not object to the admission of this evidence.

misleading and confusing evidence offered by the state's expert. This despite counsel's prior statement that "this testimony is going to be real critical in the case" (R. 79).

The state emphasized this erroneous and misleading conclusion of Paul Doleman in closing argument, arguing that the blood testing could have eliminated Mr. Reed, but instead was consistent with Mr. Reed committing this rape (R. 772-3). Counsel's failure to object to this patently untrue and misleading prosecutorial argument was prejudicially ineffective. See Vela v. Estelle, 708 F.2d 954, 963 (5th Cir. 1983).

Counsel's actions failed to put the state's evidence through proper adversarial testing. Mr. Doleman's testimony was confusing and misleading. This confusion is apparent in the jurors' request to have the entire testimony of Mr. Doleman in the jury room (R. 275). Juror David Booker's letter to the court is indicative of the confusion:

> Using the second characteristic of Grover Reed's blood, as I understand it, his blood type can not be obtained from his saliva or sperm.
>
> What I would like to know is whether or not his testimony is consistent to the fact that the sperm could and did contain Grover Reed's blood type.

(R. 261)(emphasis added). This letter demonstrates that the jury felt it had to resolve what it saw as internal conflict in Doleman's testimony. They may have chosen to resolve the conflict by believing 1) that Grover Reed's seminal fluid could show his blood type, 2) Doleman erred when he described Mr. Reed as a non-secretor or, 3) Doleman erred in his description of a

secretor. Any of these false assumptions could only lead to a conviction.

The defense counsel was totally ineffective for failure to recognize the problem, for failure to get the expert help that he needed, and for not even appearing to make a good faith effort to address this issue. Trial counsel's performance was unreasonable by all standards. Prejudice has been shown. The results of Mr. Reed's trial were patently unreliable due to a total lack of adversarial testing and misleading of the jury on such a critical issue. Confidence is certainly undermined in the results of this trial. Strickland v. Washington, 466 U.S. 668, 694 (1984).

Implied throughout the trial, and stated specifically in the sentencing is that whoever killed the victim is the same person who raped her. However, the state's own evidence proves conclusively that Mr. Reed cannot be the person who raped the victim. This evidence supports what Mr. Reed has contended all along -- that someone else committed the murder.

Mr. Reed's request for relief is based on three grounds: 1) the state intentionally misrepresented evidence of its experts' findings to the jury, and the jury was misled; 2) the trial attorney was totally ineffective and did not take an adversarial role in the trial due to failure to investigate or prepare for the state's evidence or to secure expert witnesses on behalf of Mr. Reed, allowing false and misleading testimony to be given to the jury; 3) new evidence in the form of arguments and documents by the state since the trial indicates that not only was the

court and jury misled, but that Mr. Reed cannot be guilty of these offenses.

George Z. Bateh, Assistant State Attorney and prosecutor for this case stated before the Executive Clemency Board that the semen that was found in the vagina of the victim "was found to be consistent with the blood type of the defendant." Grover Reed's presentence investigation states specifically on page 2:

> The defendant provided blood and the blood matched the sperm found in the victim's vagina.

The above indicates that the semen exhibited the characteristics of H antigenic activity, indicating that the individual who deposited it has type O blood and is a secretor of their blood types (R. 632-634, 638).

Yet, testimony at trial by the state's own expert demonstrates that Grover Reed is a non-secretor, and that his blood type cannot be found in any of his body fluids, including semen (R. 634). These statements made by the state indicate that the semen came from someone else -- someone who is a secretor of blood type O. These statements, evidence given by the state, prove that Grover Reed is innocent. They have scientifically proven he cannot have been the rapist, therefore implying beyond a reasonable doubt he was also not the murderer.

This evidence would have raised more than a reasonable doubt regarding Mr. Reed's guilt. It was not made known to Mr. Reed's jury for one simple reason: trial counsel failed to investigate the key evidence which would have exonerated Mr. Reed and ignored the signals that an investigation of the state's evidence and an

independent expert were required. Trial counsel's failure to fulfill his duties has resulted in the conviction of an innocent man. Whether through his own failures or because of the conduct of the state, counsel was ineffective. Strickland, United States v. Cronic, 466 U.S. 648 (1984). Conviction of an innocent person is prejudice, per se.

The Eighth Amendment mandates this Court not dismiss this evidence. Mr. Reed submits that it more than sufficiently questions the reliability of his conviction and death sentence. There exists a fair probability that had this evidence but been properly presented to the jury a reasonable doubt would have been entertained. When viewed in conjunction with the evidence never presented because of trial counsel's deficient performance, there can be no question that his conviction cannot withstand the requirements of the Eighth Amendment and Fourteenth Amendment Due Process.

b. Body Hair Expert

Testimony by the state's hair expert, James Luten, indicated that there were four hairs found at the scene which could have come from Grover Reed. Two were head hairs which came from Mr. Reed's cap (R. 665-66) and one head hair which was found on the floor (R. 667-68). The fourth hair was a single pubic hair, reportedly found on the victim's body which could have been Mr. Reed's (R. 669-670). Mr. Luten qualifies his opinion with respect to the pubic hair in both his deposition and at trial, noting that it was not possible to make a positive

identification. (Deposition of James Luten, p. 16, 18-19, R. 673).

Counsel failed to counter this testimony concerning hair with any expert on behalf of Mr. Reed, even though counsel noted that he was not an expert and should consult one (R. 79-81). His failure to so much as consult with an independent expert on behalf of his client was unreasonable, especially in light of the fact that the expense was authorized and recommended by the Court (R. 79-81).

Furthermore, counsel stipulated to the chain of custody of the hair standards and the suspect hair which Mr. Luten examined (R. 662-663). Trial counsel had never investigated the chain of custody in regard to the hairs, despite the fact there were several indications that there could be problems with the evidence. Mr. Luten, the state's hair expert, would or could not say that what he tested was really Grover Reed's hair sample (R. 664). Testimony from Paul Doleman, the serology expert, indicated that he examined the pubic hair combings and the victim's hair prior to Mr. Luten.[13] Yet counsel never investigated the obvious questions raised: 1) what was the chain of custody if both the pubic hair combings and victim's hair standards were given to the serologist, 2) was there a Negro

[13]Mr. Doleman testified in his deposition that he was asked to examine the suspect hair to determine if it had any Negroid characteristics (Deposition of Paul Doleman).

suspect[14] and if so, 3) why was trial counsel not informed in discovery? Nowhere at trial or in the depositions does trial counsel question the chain of custody of this evidence. He relies on his blind faith in the system despite the fact his client's life was at stake. There was no adversarial testing despite the implications raised by Mr. Doleman's deposition and Mr. Luten's testimony. Strickland; Cronic.

c. Fingerprints

Perhaps the most damaging testimony at trial was that of state fingerprint expert Bruce Scott (R. 676-712). He examined prints lifted from checks of the victim found in the backyard of the murder scene. His identification of them as that of Mr. Reed was of no great consequence given his recently living in the home. However, the expert went on to testify that, based upon his testing, he could fix the age of the print as outside the time when Mr. Reed lived in the home. Not only that, but his testimony that Mr. Reed was sweating heavily at the time the prints were made went unchallenged (R. 687-8).

The reason for the testimony is obvious; the state wished to limit the time the fingerprint could have been deposited on the check to the day of the crime. They knew that, in fact, Mr. Reed did have many reasons and chances to handle the checks, and the state had to find a way to limit the time period. The whole

---

[14]Mr. Reed's present collateral counsel notes that despite proper Rule 119 requests to the State Attorney and the Jacksonville Sheriff's Office, complete information regarding other possible suspects has not been forthcoming.

reason for this creative testimony was that this print was the only evidence which in any way could definitely link Mr. Reed to the crime. The state had to place it in the proper (if false) time frame and show guilt by implying that the print was placed on the check when Mr. Reed was perspiring heavily from either stress or exercise (R. 689). This testimony is not supported by fact or scientific evidence.

As Mr. Reed advised the trial court in his Rule 3.850 motion, he is prepared to present expert testimony that Mr. Scott's science was faulty, and that the science does not allow for his conclusions as to the age of the fingerprint or as to sweating. Trial counsel was ineffective for failing to employ a defense expert -- already authorized through predecessor counsel's motion -- to prepare him for adequate cross examination of Mr. Scott and to give the jury defense testimony on the subject.

2. Failure to Investigate and Present a Credible Defense.

Trial counsel presented no defense. His case amounted to a dare that the state could not prove guilt. For no discernible reason, trial counsel chose to put forward no defense even though he believed the state had a strong case against his client. In fact, counsel so noted this belief for the record: "They've got as compelling a circumstantial evidence case as I've ever been exposed to in 14 years of doing this kind of thing . . . " (R. 514-515).

In his noticeably weak opening statement trial counsel hints he will impeach state witnesses with what they might have read in local newspapers (R. 362), but fails to do so and rather hopefully argues that the circumstantial evidence will be inconclusive (R. 361-367). The state called fourteen witnesses, five of whom defense counsel did not cross examine (R. 382, 439, 519, 427, and 543). No defense witnesses were called by trial counsel, in spite of his statements about the strength of the state's circumstantial evidence case (R. 514-515). Instead of relying on real witnesses practically handed to him by the public defender's office in their preparation, trial counsel relies on a closing argument in which, for the first time, he announces a theory of defense which he has failed to develop in any respect during testimony:

> MR. NICHOLS: And what if there were testimony that he entered that house with the intention of either asking for money and thinking there was no one there and getting money and what if he was horrified to have found Betty Oermann there having been murdered and raped and in that state of confusion and drinking or whatever his -- whatever his situation was then, went ahead and took Betty Oermann's purse and left and when confronted by the police lied about his hat and left a fingerprint and did those things? Now, the question, and this may be the most significant question that you can ask yourselves, and that is can you be sure, can you eliminate that as a hypothesis based on the evidence that has been presented to you. Can you know beyond a reasonable doubt that it could not have happened that way?

(R. 788-790). Of course, no such testimony existed because counsel inexplicably presented no evidence on behalf of Mr. Reed.

Trial counsel made this decision without investigating and considering a substantial, credible alibi defense that had

already been developed by the public defender. His choice of a non-defense rather than a defense was clearly ineffective assistance of counsel. Substantial evidence was available for presentation that would have supported an alibi defense.

At trial, the victim's husband testified that he left his wife alive and unharmed at 5:40 to 5:45 p.m. (R. 385) and that he returned home to find her dead at 9:50 p.m. (R. 386). A logical defense for Mr. Reed would be to establish his whereabouts from 5:40 to 9:50 p.m. Trial counsel never investigated or attempted to present such a defense in spite of the fact that evidence placing Mr. Reed away from the scene of the crime during these hours existed, and the fact that the public defender's office had all but issued the subpoenas for him.

On June 13, 1986, a witness for the state, Mark Rainey, testified under oath that Mr. Reed was at Ware's Trailer Park in his trailer from around 5:00 p.m. until 8:30 or 9:00 p.m. on the night of the crime (Deposition of Mark Rainey, pp. 48-50). On July 24, 1986, the public defender filed a Notice of Intention to Claim Alibi using Mr. Rainey as the principle witness (R. 27-28). Rainey testified at trial as a witness for the state (R. 476-482). In spite of the comments in his deposition concerning this critical evidence and of his availability, trial counsel asked Mr. Rainey no questions about Mr. Reed's whereabouts on the night of the crime and failed to even cross examine Mr. Rainey at all (R. 482).

Mr. Rainey also identified Chris Niznik, Mr. Reed's female companion, as being with him when Mr. Reed returned. Although Ms. Niznik did not know the exact time Mr. Reed returned, she had a firm recollection that he arrived back at the trailer park at sundown (Statement of Chris Niznik, July 24, 1986, pp. 13-14; Statement of Chris Niznik, April 4, 1986, p. 18). Ms. Niznik's statements must be considered with a recorded sunset time 6:24 p.m. on February 27, 1986. It should also be noted that it took a minimum of 15 minutes to jog from the murder scene to the trailer park, and very likely 20 minutes or more (Deposition of Debra Hipp, October 16, 1986, pp. 16-17). Even though Mr. Reed shared a home with Ms. Niznik at the time of the crime, trial counsel never saw her as a witness worth interviewing. He never sought to investigate what, if anything, she might say.[15]

Trial counsel failed to investigate and develop the obvious alibi defense which included other possible witnesses, for instance "Lee" who was present with Rainey when he first saw Mr. Reed (Deposition of Mark Rainey, p. 48). Trial counsel need only cover a minimal period of time as even the state witness most hostile to Mr. Reed place him at the trailer park by 7:30.

---

[15]In its case in chief, the state presented testimony from Lisa Ann Smith that Mr. Reed had threatened the Oermann's for kicking the couple out of their home and that the couple were kicked out of the home because of drugs (R. 519). Had trial counsel bothered to interview Ms. Niznik, he would have found her testimony would contradicted Smith's. Ms. Niznik's recollection was that they were not asked to leave the Oermann's over drugs and that Mr. Reed had not threatened them (Affidavit of Christine Niznik).

Trial counsel had an obligation to thoroughly and competently investigate Mr. Reed's case including a review of the preparation already completed for him by the Public Defender's Office. "The appropriate standard for evaluating counsel's pretrial investigation is reasonableness under the circumstances." Futch v. Dugger, 874 F.2d 1483, 1486 (11th Cir. 1989), citing to Foster v. Dugger, 823 F.2d 402, 405 (11th Cir. 1987), U.S. cert. denied, 108 S. Ct. 2915 (1988). See also Goodwin v. Balkcom, 684 F.2d 794, 815 (11th Cir. 1982). "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel," Gaines v. Hopper, 575 F.2d 1145, 1149-1150 (5th Cir. 1978). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981) and Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991). When the only available defense relies on an alibi, it is ineffective not to interview and consider those witnesses whose testimony provide the basis of that defense. Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986). Here, trial counsel's decision -- or non-decision if he simply neglected to be aware of what the public defender had prepared and to consider it -- was not reasonable.

3. Failure to Impeach the State's Witnesses.

Counsel has 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). In this case

the conviction rests partially on the testimony of Mr. Nigel Hackshaw and Ms. Debra Hipp who presented incorrect, biased or misleading evidence.

a. Nigel Hackshaw

At the time of Mr. Reed's trial, substantial information was available regarding Nigel Hackshaw which would have impeached his testimony and credibility, and which would therefore have raised substantial doubt about whether any of his testimony was to be believed. This evidence was not used by trial counsel.

Mr. Hackshaw, a jailhouse snitch, misrepresented the crime for which he was imprisoned, misrepresented his dealings with the state in Mr. Reed's case, and misrepresented his involvement with Mr. Reed. Evidence concerning these misrepresentations never reached the jury, either through the failure of defense counsel to investigate, or the failure of the state to disclose the information. Either way, the following did not reach the jury, therefore there was no adversarial testing of the state's case. Strickland, Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Mr. Hackshaw testified that he never spoke to the state Attorney's Office or the Sheriff's Office until "seven days after (he was) sentenced" (R. 591). However, existing records show that his sworn statement to the state occurred only one day after he was sentenced, and, moreover, evidence uncovered by post conviction counsel establishes that the state knew of Mr. Hackshaw well before he pled guilty.

Concerning his case, Mr. Hackshaw said he was hit in the head with a lead pipe and implied he stabbed his victim in self defense (R. 590). Yet Mr. Hackshaw's Presentence Investigation states that after the victim was stabbed, a third person entered the room with a tire iron, rather than a lead pipe, and nowhere is there any indication that Mr. Hackshaw was ever hit in the head. The state not only allowed Mr. Hackshaw to present this false credibility evidence, the state argued it in closing (R. 769-771).

Trial counsel also had the sworn statements of two other jailhouse informers, Dale (sic) Spearing and David Wilson (R. 854-855), which contradicted the testimony given by Mr. Hackshaw at trial. Although Mr. Hackshaw testified in a sworn statement that Mr. Spearing was present at the alleged confession of Mr. Reed, Mr. Spearing's statement of July 7 indicates that Mr. Hackshaw had walked out of hearing range during the conversation he had with Mr. Reed. Both Mr. Spearing and Mr. Wilson admit to seeing the crime on a Crime Watch TV show. Their testimony reflects nothing more than television and newspaper reports, with occasional flourishes which are not backed by the evidence. Mr. Hackshaw also admitted in a sworn statement that he spoke to Mr. Wilson about the alleged confession "several weeks after", yet his testimony did not reflect this conversation. Counsel had this information available, but failed to present it or use it to impeach Mr. Hackshaw's testimony.

Trial counsel's failure to prepare and attack the credibility of this witness allowed the state to mislead the jury. Counsel failed to function as the government's adversary, Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988); failed to object to improper prosecutorial jury argument, Vela v. Estelle; and failed to impeach this key state's witness with available evidence. Nixon v. Newsome.

b. Debra Hipp

Debra Hipp was a critical witness for the state, providing testimony linking the hat found at the scene to Mr. Reed on the day of the murder (R.499-500). Yet, unknown to trial counsel or the jury, Ms. Hipp was subject to pressure by the State Attorney's Office. Files from the State Attorney's Office show that during the period from April 25, 1986, through the time of the trial, Ms. Hipp was being actively investigated and prosecuted for unlawful use of electricity from a tampered meter. The last document filed in Ms. Hipp's case was the charging document filed on November 12, 1988, six days before Mr. Reed's trial began. There is nothing showing a resolution of the case against Ms. Hipp since the trial of Mr. Reed, in November 1986.

Had trial counsel been aware of the possibility of undue influence on this witness by the state, he could have presented this evidence of possible bias to the jury. Whether because of trial counsel's failure to investigate this witness or because of the conduct of the state, trial counsel was rendered ineffective.

In addition, a field investigation report withheld by the

state indicates that Mr. Reed was observed by an officer in Ms. Hipp's car at 4:00 p.m. on the day of the murder, a long distance from the scene, passed out drunk in the back seat of the car. This critical report, contemporaneous with the officer's observations, contains a detailed list of Mr. Reed's clothing, and fails to mention a hat. This report is also consistent with the affidavit of Christine Niznik, Mr. Reed's girlfriend whom trial counsel failed to interview, who states that she had not seen "the hat on (Mr. Reed) or even in her house during the latter part of February, 1986." Trial counsel was ineffective in his failure to discover and use impeachment evidence against Ms. Hipp as to her bias and the factuality of her testimony. The adversarial process failed.

4. Counsel's Concession of Guilt and Aggravating Factors.

Counsel's poor preparation was compounded by his repeated concessions of guilt and aggravating factors to the judge and jury:

> MR. NICHOLS: I'm not complaining about not knowing about this in advance. What I'm complaining about is the introduction of this drug aspect of this case. The state is sitting on a first degree murder case that almost every element of their proof cannot be refuted by me. They've got as compelling a circumstantial evidence case as I've been ever been exposed to in 14 years of doing this kind of thing and to potentially create a reversible situation by injecting this into it, there's no need for it, it's treading on very dangerous kind of ground, it's absolutely -- it adulterates the atmosphere of the trial and it should be improper.

(R. 514-15)(emphasis added). The fact that this is the only recorded sidebar may indicate that it was the only one loud

enough for the reporter to hear. If there is any possibility that even one jury member overheard this comment, then a new trial must be granted. This comment was so prejudicial that its mere utterance by defense counsel is prejudice per se.

Trial counsel conceded before the jury that the crime was heinous, atrocious, or cruel, and the jury was therefore able to find this as an aggravating circumstance and recommend death as a sentence.

> the facts of this case are so awful, so repulsive and offensive
>
> . . .
>
> the very facts make people want to convict whoever is responsible for this case,

(R. 741).

> This is such a heinous event, and it is heinous, and this is such a despicable human being.

(R. 792). Then, in his closing statement, trial counsel effectively conceded that the victim was raped.

Trial counsel gave a hypothesis that Mr. Reed robbed the victim after finding her dead (R. 787-789), and then conceded robbery:

> I think that you can legitimately on this evidence find him guilty of a theft and that theory is very bit as consistent with the established facts as the speculation of the state.

(R. 790)(emphasis added). This cannot be harmless error. The state was relieved of the burden to prove the alleged robbery by counsel's concession. The robbery was then used as aggravation to justify the death penalty (R. 935). Prejudice is clear.

Counsel also gave the following non-statutory aggravators to the jury for their consideration:

> We know that Grover Reed was without money and was really in a drifting kind of environment, he and a girl that he wasn't married to and children that were borne [sic] out of wedlock,

(R.787)(emphasis added).

> Being a drifter and being a father of illegitimate children and being a vagrant and somebody who is living off somebody else's good will doesn't make you a rapist and a murderer. Being a thief . . .

(R. 789)(emphasis added). None of this was relevant to the issues to be decided, nor was it before the jury prior to trial counsel telling them.

C. Conclusion.

Trial counsel had an obligation to thoroughly and competently investigate Mr. Reed's case and zealously advocate on his behalf. Instead, counsel failed to do even the minimum required by law. Decisions limiting investigation "must flow from an informed judgment." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). "An attorney has a duty to conduct a reasonable investigation." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). See also Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991). No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, or on the failure to properly investigate and prepare. Kenley v. Armontrout; Kimmelman v. Morrison, 477 U.S. 365 (1986). Trial counsel failed to adequately investigate Mr. Reed's case, and no

tactical motive can be ascribed to this failure to effectively represent Mr. Reed's interests. Relief is proper.

ARGUMENT IV

MR. REED WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE PENALTY PHASE OF MR. REED'S TRIAL. AS A RESULT, MR. REED WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF MR. REED'S DEATH SENTENCE.

Mr. Reed's counsel presented absolutely nothing to Mr. Reed's penalty phase jury (R. 846-47). In fact, trial counsel all but admitted on the record that he had not undertaken any penalty phase preparation (R. 842-43). This in spite of the fact that an enormous amount of very powerful mitigation, both documentary and live testimony, was readily available to trial counsel had he conducted even a casual investigation. Mr. Reed's Rule 3.850 motion quotes at length from fifteen affidavits from mitigation witnesses post-conviction counsel would present at an evidentiary hearing. These include his grandmother, Leather Meador (PC-R. 138-41), his mother, Betty Lou Meador (PC-R. 141-44); an aunt and uncle who observed his childhood first hand (PC-R. 144-46); three siblings who shared the neglect and abuse in Mr. Reed's life (PC-R. 146-52), and three childhood school teachers who observed him (PC-R. 152-56). There was nothing general or conclusory about the testimony offered by Mr. Reed in support of these ineffective assistance claims. He offered graphic, detailed, first hand testimony. In no instance did

trial counsel contact or investigate these witnesses for possible presentation at penalty phase.

Grover Reed grew up in what amounted to a textbook definition of a dysfunctional, impoverished family. Grover's mother drank heavily throughout her pregnancy with him (PC-R. 139), and Grover was born into a home marked by alcohol induced fighting between his mother and his father. At the time he was two months old, a fight between his parents escalated when his drunken father threw scalding water on his mother, and culminated in his mother shooting his father to death (PC-R. 139, 141). After his father's murder, Grover's mother began drinking even more heavily, and often left the children unattended for days at a time (PC-R. 139). Eventually, Grover's grandmother grew concerned about Grover and his siblings, and decided to check on their well-being. She traveled to her daughter's home, but discovered that the family was not there. Further investigation led to the home of the children's paternal grandparents. There she discovered the four children, unattended by any adult, and surrounded by filth and squalor in a house littered with wine and whiskey bottles (PC-R. 139-140, 145). Grover was about eight months old at this time (PC-R. 142). Grover's grandmother took the children home with her, and successfully sought custody of all four of the children.

After this incident, Grover's mother moved to Texas, and did not make contact with her children for a period of four or five years (PC-R. 140). When Grover was about six years old, his

mother, who had since re-married a serviceman by the name of Charles Lassman, asked that the children be allowed to come live with her in Texas (PC-R. 140). Grover's grandmother agreed to this request and the four children went off to Texas to live with their mother and her new husband. Unbeknownst to the children or the grandmother, Charles Lassman was a man with a drinking problem and a violent temper. He did not hesitate to beat the children when they did something that angered him, using belts, ropes and sometimes his fists. Soon after moving to Texas, Grover began wetting his bed. Unfortunately, this particularly infuriated Mr. Lassman, who beat Grover on each occasion this occurred (PC-R. 143). The beatings made Grover even more nervous, causing him to wet his bed nightly, and a vicious cycle began with Grover enduring a beating each day for wetting his bed (Id.). In addition to the beatings from Mr. Lassman, Grover and his siblings endured beatings from their mother, who used wet ropes and electrical cords to beat the children (PC-R. 151). As a result of the beatings, Grover was often bruised from head to toe (PC-R. 151). Eventually, Grover's grandmother was called to rescue the children and they returned to live with her in Tennessee (PC-R. 140). But Grover was not the same after this experience, and was an extremely nervous child when he returned to Tennessee (PC-R. 148).

Beginning at age ten or twelve, Grover began sniffing gasoline to get high on almost a daily basis. This brought convulsions, and very strange, violent and assaultive behavior.

By age twenty his violence under the influence of gasoline and alcohol had escalated to the point where he was hospitalized in the Middle Tennessee Mental Health Institute (PC-R. 156-57). This behavior was observed by various family members and friends over extended periods of time, all of whom were available to testify at Mr. Reed's trial.

The most informed witness to Mr. Reed's substance abuse during the period leading up to the crime was the girlfriend with whom he lived, Chris Niznik. In quoting her affidavit (PC-R. 166-69), Mr. Reed made the trial court aware of her graphic, detailed testimony which included:

> Grover learned how to cook stovetop, a drug injected intravenously, from a couple we met in Texas. Stovetop is a drug made from a mixture of muriatic acid, meth amphetamines and other drugs cooked and then frozen. After it crystallizes, you inject it. Once Grover tried it, he was hooked. At first Grover could not stop using it, injecting it every day for several weeks. Then, he used it two or three times a week, and always on weekends. Grover also sniffed gas to get high.
>
> One day, during the fall of 1985, I went to the store and left Grover at home. When I returned, he was in the middle of the floor sniffing gas out of a gas can. Grover was talking crazy and was really off the wall. He looked wild. I tried to get the gas can away from him, but he became so enraged that he tried to push me down a flight of stairs. I left the apartment, but eventually returned.
>
> I became very frightened of Grover after the gasoline incident. Drugs were making him increasingly more violent. He fought me all the time. Grover was always irrational, when under the influence of beer or stovetop. If he did not have one or the other, he would steal my check, or anything else to get beer or the drugs to make the stovetop.

(PC-R. 167). Mr. Reed also presented the trial court with the affidavits of two people living in the same trailer park with Mr. Reed and observing his heavy drug and alcohol use at the time of the murder (PC-R. 169-71).

Trial counsel failed to appreciate that this kind of evidence was mitigation. He apparently had Mr. Reed's substance abuse hospitalization records at the time of the penalty phase, but did not present them to the jury. Instead he dropped them on the court as an afterthought after penalty phase was concluded (R. 921-922).

Because of trial counsel's failure to appreciate the significance of such medical records Mr. Reed's sentencing jury never was told that in late 1981 at age twenty (20) he was diagnosed at the Middle Tennessee Mental Health Institute as suffering from "sedative substance (valium) dependence" which included "Lead Encephalopathy due to Chronic Lead Poison" and "Seizure Disorder caused by Valium Withdrawal or lead Encephalopathy." Admission documents showed Mr. Reed to be disoriented, suffering from "paranoid delusions that people are after him," and "experiencing both visual and auditory hallucinations." An October 26, 1981, Tennessee Department of Mental Health admission summary states:

> The pt. was unable to communicate any medical hx [history] due to active audio-visual hallucinations, and gross, jerking movements of all extremities, as well as garbled speech. The pt. was screaming that people were 'out to get him,' the 'house is on fire and I'm going to burn' as well as other statements which we could not understand.

The jury also never was informed that at age seventeen (17) Mr. Reed suffered a head injury so extensive that surgical reconstruction of his face with a silastic implant was required. Moreover, trial counsel failed to retain a mental health expert to consider the implications of this history with his condition at the time of the present crime. The information presented above would not only have established significant non-statutory mitigating evidence and a sympathetic and powerful mitigation case, but was also necessary and useful background evidence which should have been provided to a mental health expert. Counsel had sufficient evidence before him to indicate that there were mental health issues which needed to be evaluated in the context of mitigation evidence. Despite the "red flags", counsel did not seek the assistance of a mental health expert for preparation of a penalty phase case.

A psychologist obtained by undersigned counsel has evaluated Mr. Reed with regard to statutory and nonstatutory mitigation, undertaking the evaluation trial counsel should have sought originally. This psychologist concluded that Mr. Reed suffered from an underlying Organic Brain Syndrome compounded by features of emotional disturbance, both of which were probably exacerbated by acute intoxication during the time frame of the murder. Based upon this evaluation, the psychologist concluded that Mr. Reed was under the influence of extreme mental or emotional disturbance at the time of the crime and that his capacity to

conform his conduct to the requirements of the law was substantially impaired. The psychologist further found:

> Additionally, a number of non-statutory mitigating factors would appropriately be brought to the Court's attention which would include: impaired judgement, educational depravation, neglect, cultural depravation, emotional depravation, physical abuse, emotional abuse, alcohol abuse, adult child of an alcoholic, drug abuse, lead poisoning, organic brain syndrome, personality disorder, history of mental illness, deficiency of positive role models, lack of violent history, interaction of organic brain syndrome, alcohol and other possible conditions.

(PC-R. 176-77).

A confidential defense mental health expert was appointed in response to a motion by the public defender (R. 23-24). Trial counsel not only failed to insure that this expert was used in a confidential way (R. 37-39), but failed to provide him any background material or even speak with him.

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see e.g. O'Callaghan v. State, 461 So. 2d 1354, 1355

(Fla. 1984), and to assure that the client is not denied a professional and professionally conducted mental health evaluation. Mason v. State, 489 So. 2d 734 (Fla. 1986).

Trial counsel never had the appointed expert evaluate Mr. Reed's state of mind at the time of the offense as it pertained to a voluntary intoxication defense, or as it pertained to mental health statutory and nonstatutory mitigating factors. Trial counsel also did not provide the appointed expert with important background information on Mr. Reed, important evidence reflecting Mr. Reed's state of mind at the time of the offense, and important evidence of Mr. Reed's intoxication at the time of the offense.

The Due Process clause requires protection of a criminal defendant's right to adequate mental health assistance as a matter of fundamental fairness, in order to assure reliability in the truth determining process. Ake. Mr. Reed was denied professionally competent mental health assistance due to trial counsel's ineffectiveness.

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 as well as guilt phase issues. Cave v. Singletary, 971 F.2d 1513 (11th Cir. 1992); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). Trial counsel here did not meet these rudimentary constitutional standards. 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. State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 451 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988).

Mr. Reed's defense counsel was not prepared for penalty phase. He had not discussed with Mr. Reed's family the extensive history of substance abuse and the seriously dysfunctional family background. Evidence regarding Mr. Reed's sad history and mental disabilities "constituted the only means of showing that [Mr. Reed] was perhaps less reprehensible than the facts of the murder indicated." Harris v. Dugger, 874 F.2d 756, 764 (11th Cir. 1989). Prejudice is apparent. Mr. Reed was sentenced to death by a judge and jury who heard none of the available mitigation which would have allowed an individualized capital sentencing determination. "Counsel's performance may be found ineffective if s/he performs little or no investigation." Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991). Because trial counsel failed to pursue, develop, and present mitigation, Mr. Reed did not have an individualized sentencing. Middleton; Harris.

Given the overwhelming amount of mitigation neglected by trial counsel and remembering that not a single witness was presented on Mr. Reed's behalf at any point in this proceeding,

it cannot be said that failing to present this testimony was harmless. Mr. Reed's trial counsel was unquestionably ineffective. Confidence is undermined in the outcome. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different. An evidentiary hearing must now be ordered, and thereafter a resentencing.

ARGUMENT V

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENT, THE INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS, AND THE COURT'S RELIANCE ON THESE NON-STATUTORY AGGRAVATING FACTORS RENDERED MR. REED'S CONVICTION AND RESULTING DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

This case provided too many temptations for emotional, theatrical appeals for the state -- and even trial counsel -- to resist. Mr. Reed was often tried on who he was, unrelated events going on in his life, and who the victim and her husband were. None of this was relevant to his guilt of first degree murder or whether a death sentence was the appropriate penalty. Trial counsel was ineffective in his consistent failure to object to these emotional appeals from the state. Trial counsel was even more clearly ineffective when it was he who, for no conceivable reason, injected these matters into the record to the detriment of his own client.

The state repeatedly emphasized that the victim was the wife of a local minister, as in his guilt phase opening argument:

> The evidence is going to show that Ms. Oermann was the dutiful wife of Reverend Ervin Oermann, who is the

pastor of Grace Lutheran Church here in Jacksonville in the Riverside section.

The evidence is going to show that Ms. Oermann was 57 years old, that she and Reverend Oermann had been married for about 35 years and that they had three grown children.

The evidence is also going to show that Reverend Oermann and his wife actually lived the Christian principles that Reverend Oermann preached in his church.

December 11th is an example of how they lived those christian principles.

(R. 348)(emphasis added). The victim's husband was never referred to or addressed as anything but the Reverend (R. 348, 349, 350, 351, 353, 859, 867, and 868). When the victim's husband testified, the state again rarely missed an opportunity to emphasize that he was "Reverend Oermann" (R. 367) and to inject irrelevant emotional concerning his occupation as a minister, the length of his marriage to his wife, and the number of children they had, without objection from trial counsel (R. 368-369, 372-411).[16]

The state also introduced the totally irrelevant factor that Mr. Reed was not married to his girlfriend and that he had fathered one or two children by her (R. 372). Trial counsel failed to object to this clearly improper line of questioning.

In his guilt phase closing, the state injected another highly prejudicial, inflammatory, and improper element by

---

[16]In fact, on cross examination of the victim's husband, trial counsel further prejudiced his client by again emphasizing that the witness was a minister (R. 411). This continued throughout the trial (R. 787).

suggesting that the jailhouse informant, Nigel Hackshaw, was in danger because of his testimony against Mr. Reed: ". . . and he was also told the State Attorney's Office would contact the prison officials to keep this defendant away from him (Mr. Reed) when he's in prison" (R. 771)(emphasis added). Trial counsel ineffectively failed to object to his non-record assertion.

Trial counsel surprisingly emphasized many of the irrelevant and emotionally charged points that the state had successfully injected into the record in his guilt phase closing, noting that Mr. Reed was a drifter, a father of illegitimate children, and a vagrant (R. 787, 789).

Because there was no additional testimony presented at penalty phase, the guilt phase became the basis for the jury's sentencing recommendation. In his penalty phase closing argument, the state continued to emphasize emotional victim impact and other irrelevant matters:

> Good morning, members of the jury. Betty Oermann is dead. On February 27th, 1986, she was a living, breathing, loving, caring woman. She was a 57 year old wife of Reverend Ervin Oermann. Her life, and there is evidence of this, was a living example of those Christian principles that Reverend Oermann preached, that her husband preached. On February 27th that defendant executed her. He beat Betty Oermann, he choked her, he raped her, he robbed her and he cut her throat. Betty Oermann is no longer able to experience the joys of life, the loving companionship of her husband, her children, the fellowship of her friends. It was Betty Oerman's God given right to live, to experience life's fullness. The defendant ended that on February 27th, 1986 by brutally beating, raping, robbing and then executing Betty Oermann.

(R. 859-860)(emphasis added). The prosecutor urged the jurors to sentence Mr. Reed to death on the basis of numerous impermissible

and improper factors. In an attempt to dissuade the jury from recommending life imprisonment, the state made the following argument:

> And let me mention this to you, please do not be swayed by any pity or sympathy for the defendant. What pity or sympathy or mercy did he show Betty Oermann?
>
> If you follow the law in this case, you will see that the aggravating factors clearly outweigh the mitigating factors and that the law in this case, fairness in this case, demands a recommendation of death, and my final point, I ask you to show that defendant the same mercy and sympathy that he showed Betty Oermann on February 27th, 1986 and that was none. Thank you.

(R. 878)(emphasis added). These comments, clearly improper Golden Rule argument, went without objection by defense counsel.

Aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882, 884 (Fla. 1979). See also Riley v. State, 366 So. 2d 19 (Fla. 1979) and Robinson v. State, 520 So. 2d 1 (Fla. 1988).

The state's appeals for a jury response to victim impact material were clearly outside the limits of established Florida law. In Welty v. State, 402 So. 2d 1159, 1162 (Fla. 1981), a death penalty case, this Court held "we acknowledge and adhere to the well-established rule in Florida that a member of the deceased victim's family may not testify for the purpose of identifying the victim where nonrelated, credible witnesses are available to make such identification. . . . The basis for this rule is to assure the defendant as dispassionate a trial as

possible and to prevent interjection of matters not germane to the issue. . . ." See also Lewis v. State, 377 So. 2d 640, 643 (Fla. 1979). "[T]he law insulates jurors from the emotional distraction which might result in a verdict based on sympathy and not on the evidence presented." Jones v. State, 569 So. 2d 1234, 1239 (Fla. 1990). The Welty holding has been widened to prohibit any testimony about a victim which does not "prove or tend to prove a fact in issue." Stano v. State, 473 So. 2d 1282, 1285 (Fla. 1985); see also Taylor v. State, 583 So. 2d 323, 328 (Fla. 1991)(to be relevant, evidence (about the victim) must tend to prove or disprove a fact in issue).

Here, Mr. Reed was tried for first-degree murder, rape, and robbery. But the state obtained a conviction and a death sentence by prosecuting him on the personal characteristics of the victim, for his being poor and underemployed, for being a drug user, for living with a woman without benefit of marriage, for fathering illegitimate children, and for being ungrateful. The verdict and sentence in this case had as much to do with these emotional and irrelevant issues as with evidence of actual guilt. Trial counsel was ineffective for failing to know the law, for failing to object, and for contributing to the whole mess. Confidence in both the guilt and punishment verdicts of this trial are undermined.

Arguments such as those made by the state attorney in Mr. Reed's guilt and penalty phases violate Due Process and the Eighth Amendment, and render his conviction and death sentence

fundamentally unfair and unreliable. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(en banc); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989); Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986). Here, as in Potts, because of the improprieties evidenced by the prosecutor's argument, the jury "failed to give [its] decision the independent and unprejudicial consideration the law requires." Potts, 734 F.2d at 536. In the instant case, as in Wilson, the state's closing argument "tend[ed] to mislead the jury about the proper scope of its deliberations." Wilson, 777 F.2d at 626. In such circumstances, "[w]hen core Eighth Amendment concerns are substantially impinged upon . . . confidence in the jury's decision will be undermined." Id. at 627. Consideration of such errors in capital cases "must be guided by [a] concern for reliability." Id. This Court has held that when improper conduct by the prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).[17]

For each of the reasons discussed above, this Court should vacate Mr. Reed's unconstitutional conviction and sentence of death. Relief is warranted.

---

[17]Moreover, counsel's failure to object was deficient performance which prejudiced Mr. Reed.

ARGUMENT VI

MR. REED'S SENTENCE WAS TAINTED BY IMPROPER INSTRUCTIONS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. NO MEANINGFUL HARMLESS ERROR ANALYSIS WAS PERFORMED.

Mr. Reed's penalty phase jury was instructed on six aggravating circumstances:

> The aggravating circumstances that you may consider are limited to any of the following that are established by the evidence: One, the defendant has been previously convicted of another capital offense or of a felony involving the use or threat of violence to some person. The crime of sexual battery and the crime of robbery are felonies involving the use or threat of violence to another person. Two, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of or an attempt to commit the crime of sexual battery. Three, the crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest; four, the crime for which the defendant is to be sentenced was committed for financial gain; five, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel; six, the crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification.

(R. 897-98). All six factors were found present by the sentencing court (R. 389-91).

On direct appeal this Court ruled that two of the six were invalid -- the prior violent felony agg which violated Wasko v. State, 505 So. 2d 1314 (Fla. 1987) and the cold, calculated factor which could not satisfy Rogers v. State, 511 So. 2d 526 (Fla. 526), cert. denied, 484 U.S. 1020 (1988). Reed v. State, 560 So. 2d 203, 207 (Fla. 1990), cert. denied, 111 S. Ct. 230

(1990).[18] Yet, the jury was erroneously instructed to consider these aggravating factors. Under Stringer v. Black, 112 S. Ct. 1130 (1992), the Court erred in not ordering a new jury sentencing. This Court affirmed the death sentence but did not consider the effect of this error on the jury. Such an analysis failed to conform with the Eighth Amendment. See Sochor v. Florida, 112 S.Ct. 2114 (1992); Clemons v. Mississippi, 110 S. Ct. 1441 (1990); Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

Because a Florida penalty phase jury is a co-sentencer under Florida law, see Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992), the Eighth Amendment prohibition against weighing invalid aggravating circumstances applies with equal vigor to what the jury weighs in its deliberations. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993). See also Sochor, 112 S. Ct. at 2119 (there is Eighth Amendment error when the sentencer weighs an invalid aggravating circumstance in reaching the ultimate decision to impose a death sentence). This Court did not reweigh or conduct a harmless error analysis as required by Sochor. The Eighth Amendment taint remains and penalty phase relief is required.

In addition, the jury instructions on all six aggravating factors failed to give the jury meaningful guidance as to what was necessary to find these factors present. These instructions violate Espinosa; Stringer; Sochor; Maynard v. Cartwright, 486 U.S. 356 (1988); Richmond v. Lewis, 113 S. Ct. 528 (1992), and

---

[18]However, in view of trial counsel's complete failure to present mitigation -- "a total absence of mitigating circumstances" -- argued above, this Court affirmed.

the Eighth and Fourteenth Amendments. Mr. Reed was sentenced to death in violation of the Eighth Amendment. His jury received erroneous instructions which tainted its death recommendation. No limiting constructions adopted by this Court were given to the jury.

The weight the jury accorded these aggravating factors would have been lessened had it received accurate instructions. Thus, extra thumbs were placed on the death's side of the scale. Stringer. "By giving 'great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor that we must presume the jury found." Espinosa. As a result, Mr. Reed's sentence of death must be vacated. Espinosa; Sochor.

"[I]n a 'weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." Richmond, 113 S. Ct. at 534. A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535. In Mr. Reed's case, the jury instructions did not cure the facially vague and overbroad statute. The jury did not receive instructions as to the narrowing constructions, also

known as the elements, of the aggravating circumstances. The jury who under Florida law is a co-sentencer, see Johnson v. Singletary, was left with "open-ended discretion" in violation of Maynard, the Eighth and Fourteenth Amendments, and in violation of due process.

The Espinosa error must be considered in conjunction with the Sochor error in Mr. Reed's case. Mr. Reed's penalty phase is so tainted by Eighth and Fourteenth Amendment error that a new penalty phase must be ordered.

ARGUMENT VII

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. REED IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119.01 ET SEQ., FLA. STAT., THE DUE PROCESS CLAUSE AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Effective legal representation was denied Mr. Reed because the following agencies have not fully complied with collateral counsel's Chapter 119 requests. The Office of the State Attorney, the Sheriff's Office and the Parole Commission have yet to turn over the documents required by statute and the Constitution. The state has unlawfully refused to comply with what the law requires. Agencies of the state continue to pursue a course of illegal conduct by withholding records in direct violation of Chapter 119.01 et seq. (1991).

The state's action of withholding exculpatory evidence violated and continues to violate Mr. Reed's Fifth, Sixth, Eighth

and Fourteenth Amendment rights. Monroe v. Butler, 883 F.2d 331 (5th Cir. 1988). One of the most glaring examples of failure to comply with collateral counsel's Chapter 119 request is the almost total absence of reports in the state attorney's files dealing with the multiple jailhouse informants. No reports of any kind except for sworn statements and/or depositions have been released on Mr. Hackshaw, Mr. Spearing or Mr. Wilson. The absence of such documentation is highly suspicious and even more conspicuous in light of the one document received. This document concerned another jailhouse informant named Ronald Siskey. It is noteworthy that the state violated Brady v. Maryland, 373 U.S. 83 (1963), by not disclosing information regarding, or even the existence of, this individual to the defense. The implications are that the Office of the State Attorney and Sheriffs' Office have similar documents on the other three informants and others yet undisclosed, and have yet to release them to Mr. Reed.

A further indication that the state has purged its files and/or withheld evidence in violation of Chapter 119 is that nowhere in the file is there a mention of Nigel Hackshaw, its prime jailhouse informant and witness, prior to his sworn statement. His name does not appear in any notes or memos. He just suddenly appears and makes a sworn statement. The state would have the Court believe that it would discover this man and have him testify without a single written memo or note. In addition, the files turned over by the state attorney contain almost no handwritten notes and no memos. This fact alone

stretches the credibility of any attorney or judge involved in capital litigation. If the state attorney feels that some records are not subject to Chapter 119, exemptions must be stated. At that time, an in camera inspection of any claimed exemptions must be provided. See State v. Kokal, 562 So. 2d 364 (Fla. 1990); Jennings v. State, 583 So. 2d 316 (Fla. 1991).

The Sheriff's files similarly contain almost no notes or memos. It appears that they, as with the state attorney files, have been stripped of documents which would show the extent of the state's investigation. Any Chapter 119 exemptions must be stated and an in camera inspection must be provided. See Kokal; Jennings.

Mr. Reed also requested public records in the possession of the Florida Parole Commission on January 24, 1991. The Parole Commission have yet to respond at all. Should they continue to be unresponsive or refuse to turn over the requested files, Mr. Reed is forced into the untenable position of litigating without full disclosure of that which the state is required to have turned over for his defense. Under such circumstances this Court must grant leave to amend the Rule 3.850 Motion.[19]

This Court has held that capital post-conviction defendants are entitled to Chapter 119 records disclosure. Kokal; Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Mendyk v.

---

[19]Undersigned counsel is aware of this Court's opinion in Parole Commission v. Lockett, No. 80,264 (Fla. April 22, 1993). The opinion is not final until rehearing is determined. As of this date, the time in which to file a motion for rehearing has not expired, and rehearing has not been determined.

State, 592 So. 2d 1076 (Fla. 1992). Further, the Court has extended the time period for filing Rule 3.850 motions after Chapter 119 disclosure. Jennings; Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano; Kokal; Mendyk. In these cases, sixty (60) days was afforded to litigants to amend Rule 3.850 motions in light of newly disclosed Chapter 119 materials. Thus, this Court has indicated sixty (60) days constitute a reasonable period of time to fully review Chapter 119 materials. Mr. Reed should likewise be given an extension of time and allowed to amend once the requested records have been disclosed. A contrary ruling would be a denial of equal protection.

ARGUMENT VIII

THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. REED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Reed's capital proceedings. To the contrary, the burden was shifted to Mr. Reed on the question of whether he should live or die. In so instructing a capital sentencing jury, the court

injected misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 486 U.S. 356 (1988). Mr. Reed's jury was erroneously instructed, as the record makes abundantly clear (see R. 897). Mr. Reed had the burden or proving that life was the appropriate sentence. Counsel's failure to object was as a result of ignorance of the law and constituted deficient performance which prejudiced Mr. Reed. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Mr. Reed's sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation presented by Mr. Reed. For each of the reasons discussed above, the Court must vacate Mr. Reed's unconstitutional sentence of death.

ARGUMENT IX

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

Mr. Reed contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991). It is Mr. Reed's contention that the process itself failed him. It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

The flaws in the system which sentenced Mr. Reed to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Reed's direct appeal and Mr. Reed's Rule 3.850 Motion; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not reliable. Relief must issue.

CONCLUSION

On the basis of the arguments presented herein, Mr. Reed respectfully submits that he is entitled to an evidentiary hearing on the guilt and penalty phase issues, and thereafter, a new trial, or at the very least, a new penalty phase in the trial court. Mr. Reed respectfully urges that this Honorable Court remand to the trial court for such proceedings, and that the Court set aside his unconstitutional conviction and death sentence.

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 April 26, 1993.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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

M. ELIZABETH WELLS
Assistant CCR
Florida Bar No. 0866067

KENNETH D. DRIGGS
Special Assistant CCR
Florida Bar No. 304700

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

By: 
Counsel for Appellant

Copies furnished to:

Mark Menser
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050