IN THE SUPREME COURT OF FLORIDA

CASE NO.

RICHARD H. ANDERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT COURT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

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

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

"R." -- record on direct appeal to this Court;

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

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

REQUEST FOR ORAL ARGUMENT

Mr. Anderson 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. Anderson, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

On May 19, 1987, a Florida Department of Law Enforcement agent discovered an unoccupied car in the long term parking lot at Tampa International Airport with what appeared to be blood all over the front seat. The agent reported this car to the Tampa Airport Police (R. 336-42). Airport police secured the area and requested assistance from the FDLE mobile crime lab (R. 343-45). The car belonged to Mr. Robert Grantham.

In June of 1987, FDLE agent Velboom interviewed Connie Beasley (R. 540, 436). In this interview, Ms. Beasley denied any knowledge of the murder of Robert Grantham and indicated that she did not know Richard Anderson (R. 437). On the evening of July 1, 1987, Agent Velboom returned to Ms. Beasley's place of work and arrested her for accessory after the fact to the murder of Robert Grantham (R. 444, 447, 542, 568). When Ms. Beasley was interviewed after her arrest, she told the FDLE agents that Richard Anderson told her he had killed Robert Grantham, but she was not present (R. 543, 569, 574, 579-80). Richard Anderson was also arrested by FDLE agents on July 1, 1987 (R. 893-908).

On July 15, 1987, Ms. Beasley testified before the grand jury which indicted Mr. Anderson (R. 543, 583-84, 587-88). Once again, Ms. Beasley related a different story about the events surrounding the murder. She stated that Mr. Anderson and Mr. Grantham left Mr. Anderson's apartment together on May 7, 1987, but that she was not with them (R. 589). In this story to the grand jury, Ms. Beasley stated that Mr. Anderson returned later

that evening without Mr. Grantham and told her he had killed Grantham (R. 590). At trial, Ms. Beasley admitted that this statement was also untrue (R. 543-44, 587, 593-95).

Based upon Ms. Beasley's perjured testimony, an indictment against Mr. Anderson was issued on July 15, 1987, charging him with one count of first degree murder and related offenses (R. 2747). Mr. Anderson pled not guilty to the charges.

On July 24, 1987, Connie Beasley negotiated with the prosecutor for a plea to third degree murder and a maximum sentence of three years. She then told the prosecutor yet another version of the homicide. In this version, she was present when Mr. Anderson shot Mr. Grantham (R. 544-45, 584-87). Ms. Beasley's plea to third degree murder was entered on September 9, 1987 and sentencing was postponed until after Mr. Anderson's trial (R. 608).

Mr. Anderson's trial by jury began on February 8, 1988. The main witness against Mr. Anderson was Ms. Beasley. At trial, Ms. Beasley repeated the version of the murder that she told the prosecutor after her plea negotiations (R. 544-45, 584-87). Mr. Anderson testified in his own behalf at the trial.

In Ms. Beasley's testimony, she stated that Robert Grantham was a friend of her father's whom she met in April of 1987 (R. 451, 550-51). Soon after this initial meeting, Grantham began calling her at work, and eventually offered to pay her $30,000 if she would become his lover. She testified that she told him she was not interested and to stop calling her (R. 452-55, 552, 553).

Ms. Beasley also testified that she did not like Mr. Grantham and that she thought he was a "scum bag" (R. 562). Ms. Beasley told Mr. Anderson about Grantham's offer, and Mr. Anderson told her she should accept (R. 456, 556).

Ms. Beasley testified that when told of this offer, Mr. Anderson stated that he would go to bed with or kill Grantham for $30,000 (R. 457, 556-57). Mr. Anderson testified that he only said he would go to bed with Grantham for the money, not that he would kill him (R. 1492, 1494, 1499).

According to both the testimony of Ms. Beasley and Mr. Anderson, Ms. Beasley then offered to go to bed with Grantham the next time she spoke with him on the phone (R. 458). The plan was for Ms. Beasley to meet with Grantham after he returned from a trip to Las Vegas (R. 464-65, 558, 1503). Grantham called Ms. Beasley on Thursday, May 7, and told her he was returning from Las Vegas that evening. He asked her if she would pick him up at the Orlando Airport and she agreed (R. 468, 559, 1503). Ms. Beasley and Mr. Anderson met at a shopping center in Bartow, where Mr. Anderson left his car. He then drove Ms. Beasley to the Orlando Airport in her car (R. 469-71, 559-60, 1505, 1571).

After this, Mr. Anderson's and Ms. Beasley's accounts differ. Mr. Anderson testified that he waited in the airport bar for 30 to 40 minutes and did not see Ms. Beasley and Grantham leave the airport (R. 1506, 1572). He returned to Tampa and asked a friend, Kay Bennett, to drive him to Bartow to pick up his car (R. 1507-10, 1572-74). He then got something to eat and

waited for Ms. Beasley to signal him on his beeper when she was through with Grantham as they had agreed earlier (R. 1508). When Ms. Beasley did beep Mr. Anderson, he returned to his apartment (R. 1512, 1577). Ms. Beasley was hysterical, pacing back and forth, and smoking a cigarette (R. 1513-14, 1578). She told Mr. Anderson she shot Grantham and she thought she killed him. Grantham was in his car. Mr. Anderson went outside and found Grantham slumped over in the driver's seat of his car (R. 1514, 1579-80).

Mr. Anderson told Ms. Beasley that he would call an ambulance, but Ms. Beasley said "No, no, they'll take my babies...Please help me" (R. 1515, 1581). Mr. Anderson agreed to help. They both got into Grantham's car with the body of Mr. Grantham. Mr. Anderson drove down to Williams Road, pulled off the road, and left Grantham and his suitcase there (R. 1516, 1584). Mr. Anderson and Ms. Beasley returned to Mr. Anderson's apartment where Ms. Beasley showered and changed clothes. She told Mr. Anderson that Grantham had given her $2,600 and said he wanted to see her a couple more times. He threatened to tell her father if she said anything or bothered him about it (R. 1517-19, 1585). Ms. Beasley had become angry because she did not want to have sex with Grantham and because he was rough with her (R. 1519, 1586). Mr. Anderson drove Grantham's car to Tampa Airport and Ms. Beasley followed. They returned to his apartment and both showered and Mr. Anderson put their clothes in separate trash bags which he put in the dumpsters at other apartment

complexes. He found his gun on the end table by the sofa. He kept the gun in a drawer in the bathroom and had in the past showed Ms. Beasley where it was. He threw this gun in the river (R. 1519-24).

Ms. Beasley's final version of the events surrounding the death of Grantham was similar to Mr. Anderson's, but she testified that Mr. Anderson shot Grantham (R. 489). According to Ms. Beasley, she and Mr. Anderson had a plan to take Grantham to the Sabal Park Holiday Inn, where Mr. Anderson would rob Grantham (R. 473-74). Ms. Beasley and Grantham did go to the Holiday Inn where they had dinner and drinks, but Mr. Anderson was not there (R. 480). She and Grantham went to Mr. Anderson's apartment. Mr. Anderson was not there either (R. 481). Grantham wanted to have sex, but Ms. Beasley stalled (R. 482). Eventually, Mr. Anderson entered the apartment, said he had been drinking, and asked for a ride home from Grantham. All three of them got into Grantham's car, with Grantham driving and Mr. Anderson in the back seat (R. 484-86). Mr. Anderson had black gloves and a small silver gun with a brown handle (R. 487-88). Mr. Anderson directed Grantham to a place called Breckenridge, but when Grantham turned in, Mr. Anderson told him it was the wrong place and to make a U-turn (R. 487-89). Ms. Beasley testified that Mr. Anderson then shot Grantham four times and he fell into her lap, bleeding. She shifted the car into park and Mr. Anderson got out and pushed Grantham's body to the floor and he got in the driver's seat. Ms. Beasley got into the rear of the car (R. 489-

490). They then drove to a wooded area where they left Grantham and his suitcase (R. 492-96).[1]

Ms. Beasley then testified that they returned to her apartment where she showered while Mr. Anderson looked through Grantham's satchel for money. He found $2,600 and put it into a drawer (R. 500-02). Mr. Anderson then drove Grantham's car to Tampa Airport parking lot and Ms. Beasley followed in her car. They left the car there and returned to Mr. Anderson's apartment where he showered. He put his clothes and Grantham's satchel in the garbage bag with Ms. Beasley's clothes and took them to a dumpster. After dumping the clothes, he went to a bridge where he threw off his gun and gloves (R. 503, 512-14).

At the close of the prosecution's case, defense counsel moved for judgment of acquittal, and again at the close of the evidence, arguing that the corpus delicti of first degree murder had not been proved (R. 1458-71, 1875). The court summarily denied his motion.

On February 17, 1988, the jury rendered a verdict of guilty. (R.2154). On February 18, 1988, the jury recommended a death sentence for the first degree murder conviction (R. 2265). At the sentencing hearing defense counsel informed the court that the accomplice, Ms. Beasley, was sentenced to one year and one day in prison (R. 2282). On February 26, 1988, the trial court imposed a sentence of death on the count of first-degree murder (R. 2285-89). The court found two aggravating circumstances:

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[1]Mr. Grantham's body was never found.

(1) prior violent felony and (2) the capital felony was committed for pecuniary gain and in a cold, calculated, and premeditated manner (treated as one factor) (R. 2285). This Court affirmed Mr. Anderson's convictions and sentences on direct appeal. Anderson v. State, 574 So. 2d 87 (1991), cert. denied 112 S.Ct. 114 (Oct. 7, 1991).

On October 12, 1992, Mr. Anderson filed his first Motion to Vacate under Rule 3.850. This was Mr. Anderson's first post-conviction action of any kind. Although the law allowed until October 7, 1993, for Mr. Anderson to file for post-conviction relief, Mr. Anderson, in accordance with the Governor's request, initiated the Rule 3.850 motion.

Mr. Anderson's Motion to Vacate Judgment of Conviction and Sentence With Special Request for Leave to Amend set out sixteen claims for relief (PC-R. 8-44), including claims on ineffective assistance of counsel. Mr. Anderson specifically pled that his motion was incomplete due to the failure of the state to fully comply with Chapter 119. Without seeking an answer from the State the trial court summarily denied relief on October 14, 1992 (PC-R. 45). On October 29, 1992, Mr. Anderson filed a Motion for Rehearing. This motion was also summarily denied on November 4, 1992 (R. 46-62). Notice of appeal timely followed (PC-R. 63-64).

SUMMARY OF ARGUMENT

1. Numerous state agencies have withheld files and records in violation of Chapter 119, Fla. Stat., and the Eighth and Fourteenth Amendments. Mr. Anderson is unable to prepare an

adequate 3.850 Motion until he has received these public records and been afforded due time to review the materials and amend his 3.850 Motion.

2. Mr. Anderson is entitled to a full evidentiary hearing on all the claims raised in his Rule 3.850 motion. Mr. Anderson pled specific, detailed claims for relief which are not conclusively refuted by this record. The trial court erroneously denied Mr. Anderson's 3.850 motion for lack of a verification. The trial court's two summary denial orders do not comply with the well established requirements of Rule 3.850.

3. Mr. Anderson did not receive an adversarial testing at either the guilt phase or the penalty phase of his capital trial in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

4. The failure to prove the corpus delicti of murder in the first degree was fundamental error in violation of Mr. Anderson's rights under the Eighth, Sixth and Fourteenth Amendments to the Constitution.

5. Mr. Anderson's death sentence was tainted by unconstitutionally vague instructions to the jury and by improper application of the statutory aggravators of "cold, calculated, and premeditated", "pecuniary gain", and "prior violent felony" contrary to United States Supreme Court holdings in Espinosa v. Florida and Richmond v. Lewis, and in violation of the Eighth and Fourteenth Amendments.

6. In penalty phase of Mr. Anderson's trial, the prosecutor's argument was improper and inflammatory and the prosecutor argued non-statutory aggravating factors to both the judge and the jury. This argument and the sentencing court's reliance on it rendered Mr. Anderson's conviction and resulting death sentence fundamentally unfair and unreliable in violation of the Sixth, Eighth and Fourteenth Amendments.

7. Mr. Anderson's jury was repeatedly misled as to the real weight of their responsibility in the sentencing process in violation of the Eighth and Fourteenth Amendments.

8. Mr. Anderson's judge failed to consider mitigating factors which were clearly set out in the record in violation of the Eighth and Fourteenth Amendments.

9. Mr. Anderson's trial court proceedings were fraught with procedural and substantive errors. He did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. These errors cannot be harmless when viewed as a whole.

ARGUMENT I

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. ANDERSON'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS 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. ANDERSON CANNOT PREPARE AN ADEQUATE 3.850 MOTION UNTIL HE HAS RECEIVED PUBLIC RECORDS MATERIALS AND BEEN AFFORDED DUE TIME TO REVIEW THOSE MATERIALS AND AMEND.

Effective legal representation was denied Mr. Anderson because public records from the following agencies were not received by Mr. Anderson's collateral counsel:

a. The Pinellas County Sheriff's Office. These files were requested under Chapter 119. On September 21, 1992 the arrest and booking records of Mr. Anderson were mailed to undersigned counsel. At that time the Sheriff's Office claimed no exemptions, yet failed to provide counsel with any other files or records, including police reports and investigative notes. Mr. Anderson is entitled to all of the files and documents within the possession of the Sheriff's Office. If the Sheriff's Office 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).

b. The Hillsborough County Sheriff's Office. Chapter 119 records were requested for the Hillsborough County Sheriff's Office. An investigator for Mr. Anderson contacted the

Sheriff's Office and was informed that the 119 request had not been received. A second request was sent by facsimile. A telephone call confirmed that this request had been received. Mr. Anderson's investigator was informed that the Sheriff's Office was working on the request. However, no records from the Hillsborough County Sheriff's Office have been received in the office of undersigned counsel, nor has counsel been informed of any reason for the delay or of any claimed exemptions.

c. The Florida Department of Law Enforcement. Lab reports from the Florida Department of Law Enforcement were not available to undersigned counsel at the time the motion to vacate was filed. Counsel for the Florida Department of Law Enforcement has stated that Personnel files will be available at some time in the future, but, due to staff shortages, was unable to say when this may be. An oral exemption was claimed for surveillance tapes, but no written memorandum stating under which section the exemption is claimed has been received. In any event, Mr. Anderson is entitled to an in camera inspection on the materials claimed to be exempt. See Kokal; Jennings.

d. Office of the State Attorney, Hillsborough County. Some files from the State Attorney's Office were collected. However, the investigator for Mr. Anderson was informed that 3 video and 13 audio tapes would be copied and sent to the Office of the Capital Collateral Representative. No tapes

have been received in this office nor has counsel been informed of any 119 exemptions claimed.

e. Clerk of the Circuit Court, Pinellas County. Counsel for Mr. Anderson has not received Circuit Court files and records requested under Chapter 119.

f. Office of the State Attorney, Pinellas County. Counsel for Mr. Anderson has not received any files or records from the Pinellas County State Attorney's Office which were requested under Chapter 119, nor has counsel been informed of any claimed Chapter 119 exemptions.

g. The Florida Parole Commission. Mr. Anderson is entitled to his files and documents from the Florida Parole Commission. CCR requested Mr. Anderson's files from the Parole Commission. This request was flatly denied. The erroneous position taken by the Parole Commission is that these materials are not subject to Chapter 119. Mr. Anderson 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 this motion.[2]

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[2]On January 2, 1992, this Court, in Mendyk v. State, 592 So. 2d 1076 (Fla. 1992), held that Parole Commission files were subject to Chapter 119 disclosure, and that upon receipt of those files, a capital defendant would have an additional 60 days to supplement his or her motion to vacate to add any claims arising from the withheld files. Inexplicably, the Parole Commission failed to address the mandate in Mendyk. This Court is presently considering the identical issue in Parole Commission v. Jerry T. Lockett, No. 80,264. Mr. Anderson is entitled to the Parole Commission records under Mendyk; he is also entitled to an

(continued...)

Once all of the files are received, follow up investigation will be required in terms of additional records requests and interviews. It is counterproductive to proceed with the investigation when it would have to be redone after reviewing the files. CCR cannot afford the luxury of duplicative effort, particularly in light of the present budget limitations. Unless and until counsel have had a full opportunity to review all of the records and fully develop all of his claims, Mr. Anderson will be denied his rights under Florida law and the Eighth and Fourteenth Amendments.

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. 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. Anderson should likewise be given an extension of time and

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[2](...continued)
Lockett, No. 80,264. Mr. Anderson is entitled to the Parole Commission records under Mendyk; he is also entitled to an additional 60 days upon full disclosure in which to supplement this motion.

allowed to amend once the requested records have been disclosed. A contrary ruling would be a denial of equal protection.

Mr. Anderson continues to seek the public records necessary to determine what post-conviction claims he has to present to the trial court. This Court has held it is proper for capital post-conviction litigants to present in Rule 3.850 motions claims premised upon Chapter 119. Moreover, to the extent any state agency invokes an exemption, Mr. Anderson is entitled to have this Court conduct an in camera inspection to determine the validity of the claimed exemption. Jennings.

Until the State fully discloses these records, Mr. Anderson cannot know if other claims may exist in this case under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1970); United States v. Cronic, 466 U.S. 648 (1984); Richardson v. State, 546 So. 2d 1037 (1989); Roman v. State, 528 So. 2d 1169 (Fla. 1988); and Strickland v. Washington, 466 U.S. 668 (1984). Mr. Anderson's request for leave to supplement is integral to his rights in the post-conviction process; and as this Court has held, due process is what governs post-conviction litigation. Holland v. State, 503 So. 2d 1250 (Fla. 1987); see also Brown v. State, 596 So. 2d at 1028; Woods v. State, 531 So. 2d 79 (Fla. 1988).

The people of Florida have long been committed to open government and to an open judicial process. "Unlike other states where reform of the judicial system has sometimes lagged, Florida has developed a modern court system with procedures for merit

appointment of judges and for attorney discipline. We have no need to hide our bench and bar under a bushel. Ventilating the judicial process, we submit, will enhance the image of the Florida bench and bar and thereby elevate public confidence in the system." In re Petition of Post-Newsweek Stations, 370 So. 2d 764, 780 (Fla. 1979). Throughout this state's history, Floridians have required that their government function in full view of the citizenry. E.g., Davis v. McMillian, 38 So. 666 (Fla. 1905). Although recognizing that open government may have certain disadvantages, Floridians have consistently determined that the costs are inconsequential compared to the benefits. Open Gov't Law Manual, p. 5 (1984). This determination underlies the Florida Public Records Act which gives effect to the policy that "all state, county, and municipal records shall at all times be open for a personal inspection by any person." Section 119.01, Fla. Stat. (1991).

Florida's courts have repeatedly held that the Public Records Act is to be liberally construed in favor of open government. Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775 (Fla. App. 4 Dist. 1985). Such open government preserves our freedom by permitting full public participation in the governing process. City of Miami Beach v. Berns, 245 So. 2d 38 (Fla. 1971); Board of Public Instruction v. Doran, 224 So. 2d 693 (Fla. 1969); see Wolfson v. State, 344 So. 2d 611 (Fla. 2d DCA 1977). Thus, every public record is subject to the examination and inspection provisions of the Act unless a specific statutory

exemption applies. Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc., 370 So. 2d 633 (Fla. 1980).

Exemptions to disclosure are construed narrowly and limited to their purposes. Information gathered or held while that purpose is not being served are not exempt. Tribune Company v. Cannella, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), rev'd on other grounds, 458 So. 2d 1075 (1984), app. dismd, 105 S. Ct. 2315 (1985) (criminal investigative information exemption did not prevent disclosure of records); see also State v. Nourse, 340 So. 2d 966 (Fla. 3d DCA 1976) (exceptions to the general law are construed narrowly).

As to the merits of the motion, the trial court also failed to follow the law. Under the two-year filing limitation period of Rule 3.850, Mr. Anderson's motion is not due to be filed until October 7, 1993. However, Mr. Anderson's Rule 3.850 motion was filed one (1) year before that date in order to make a good faith effort to initiate the litigation and compel compliance with Chapter 119.

> In March, the Bar agreed it would try to find volunteer attorneys to help relieve overburdening at the Office of Capital Collateral Representative. The deal was part of the final report of the Supreme Court Committee on Postconviction Relief which sought to bring some order to the often chaotic death sentence appeal process.
>
> The committee, chaired by Justice Ben F. Overton, has an agreement with the governor's office to hold off signing death warrants if the appeals process is moving in a timely fashion.

Florida Bar News, October 15, 1991. In order to avoid litigating under the exigencies imposed by a death warrant, Mr. Anderson filed the motion even though it was incomplete due to the state's failure to timely comply with public records requests. Mr. Anderson was and is entitled to Chapter 119 compliance and a reasonable time thereafter to review the Chapter 119 material and amend his motion to vacate. Other capital defendants have been afforded this right. Provenzano; Kokal; Mendyk; Jennings; Engle. The trial court's action was arbitrary and inconsistent with the treatment of other identically situated capital defendants and was a violation of equal protection and due process.

This Court must therefore grant Mr. Anderson's request for leave to amend the instant motion. See Provenzano v. State, 18 Fla. L. Weekly ___ (Fla. Feb. 11, 1993). Counsel in good faith initiated Rule 3.850 proceedings in order to obtain the benefit of Chapter 119 for Mr. Anderson. Yet, the trial court has erroneously denied him his rights by denying the motion.

The state's failure to provide the requested records has delayed Mr. Anderson's post-conviction investigation and made it impossible for him to fully plead and raise any violations which may become apparent from the records which he seeks. The failure to comply with Chapter 119 law constitutes external impediments which have thwarted Mr. Anderson's efforts to establish he is entitled to post-conviction relief. The matter must be remanded to permit Mr. Anderson an opportunity to pursue Chapter 119 materials.

ARGUMENT II

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

On October 12, 1992, Mr. Anderson filed his first Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend and for Evidentiary Hearing.[3] He pled detailed claims relating to ineffective assistance of counsel in both guilt and penalty phase, issues this Court has held require an evidentiary hearing.

On October 14, 1992, the Hillsborough County trial court summarily denied the motion as follows:

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[3]Mr. Anderson had requested this leave to amend because at the time he filed his Motion to Vacate (on October 12, 1992) the Florida Parole Commission had refused to provide records requested under Chapter 119 and he had failed to receive full Chapter 119 files from numerous other agencies. As Mr. Anderson pointed out in his Motion to Vacate, under Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), he was entitled to a sixty day extension of time within which to file his Rule 3.850 motion in order to allow review of the Chapter 119 materials. However, as noted in the motion to vacate he has not received full access to Chapter 119 materials. In an effort to comply with the agreement reached with the Governor's Office to ensure that no warrant was signed, Mr. Anderson filed his Motion to Vacate one year in advance of the time provided under Rule 3.850. According to the law, the trial court was required to order compliance with Chapter 119, and then afford Mr. Anderson a reasonable time from Chapter 119 compliance to amend the motion to vacate. Provenzano v. Dugger.

ORDER SUMMARILY DENYING DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND AND FOR EVIDENTIARY HEARING

DEFENDANT'S MOTION TO VACATE JUDGMENTS OF CONVICTION AND SENTENCE WITH SPECIAL REQUEST FOR LEAVE TO AMEND AND FOR EVIDENTIARY HEARING is summarily denied for the following reasons:

1. Said Motion fails to comply with the oath requirement of Rule 3.850.

2. Said Motion is facially insufficient because the allegations thereof set forth grounds which were or should have been raised on direct appeal and/or contain mere conclusions.

The Defendant is hereby notified of his thirty (30) day right to appeal this Order.

DONE AND ORDERED at Tampa, Hillsborough County, Florida, this 14th day of October, 1992.

/s/
M. WM. GRAYBILL, CIRCUIT JUDGE

(PC-R. 45). This order had no attachments.

Mr. Anderson filed a timely motion for rehearing on October 29, 1992 (PC-R. 46-62). This too was summarily denied on November 4, 1992 (PC-R. 46). The denial was stamped on the first page of the Motion for Rehearing and no separate order was entered by the Court. There were no attachments.

The trial court denied the motion to vacate on two grounds, the first being the lack of verification. Mr. Anderson's motion to vacate, signed by undersigned counsel, was filed without verification from Mr. Anderson. The oath requirement of Rule 3.850 was added in 1977. See Scott v. State, 464 So. 2d 1171, 1172 (Fla. 1985); The Florida Bar, 343 So. 2d 1247 (Fla. 1977). In considering the amendments, the committee proceeded on the theory that the motions coming under the purview of the rule were filed by prisoners. 343 So. 2d at 1265 (Committee Note). The

oath requirement was adopted to safeguard against the filing of post-conviction motions based upon false allegations. Where a motion to vacate fails to include an oath, this Court held that a dismissal must be without prejudice. Scott v. State. The trial court ignored that law in denying Mr. Anderson's motion with prejudice.

Since the creation of the Office of the Capital Collateral Representative on October 1, 1985, death sentenced inmates are provided counsel who prepare Rule 3.850 motions. The Office of the Capital Collateral Representative is responsible for providing representation to any person convicted and sentenced to death who is unable to secure counsel due to indigency. Fla. Stat. § 27.702. Thus, all death sentenced individuals in Florida are represented by counsel in post-conviction proceedings. When a Rule 3.850 Motion is filed on behalf of a death sentenced individual by capital collateral counsel, counsel for the defendant signs the pleading. An attorney who files false pleadings is subject to disciplinary proceedings under the Florida Code of Ethics. Thus, the concern which gave rise to the verification requirement is satisfied by the obligations imposed upon counsel.

With the exception of one case, all cases from this Court dealing with the lack of verification in a capital case are prior to the creation of CCR. In the one capital case in which this Court did affirm the trial court's dismissal of the Motion to Vacate, the defendant was not represented by CCR, and in fact,

the filing of the motion to vacate occurred before CCR was fully operational. Gorham v. State, 494 So. 2d 211 (Fla. 1986). And in Gorham this Court ruled, as it has consistently ruled, that the petition for postconviction relief was dismissed without prejudice. 494 So. 2d at 212.

In State v. Duckett, Case Nos. 87-1347-CF and 88-0262-CF, CCR, on behalf of Mr. Duckett, filed a Rule 3.850 motion over counsel's signature without including a verification by Mr. Duckett. A Motion to Dismiss based on lack of verification was filed by the state. After hearing argument, the circuit court judge ruled that it was not necessary for the motion to be verified by the defendant and denied the Motion to Dismiss (see PC-R. 62). This Court should rule that it is not necessary for Mr. Anderson's Rule 3.850 motion to be verified by the defendant when it is signed by his capital collateral representative. If this Court does rule that a verification is required, this Court must hold that the dismissal may only be without prejudice.

After ruling that the motion failed to comply with the oath requirement of Rule 3.850, the trial court then ruled on the sufficiency of the motion. But if the trial court was correct that the motion was not properly filed, then that court is precluded from further ruling because of lack of jurisdiction. After the rendition of a judgment and sentence, the trial judge loses jurisdiction of the case until the filing of a properly filed motion. See State v. Pinto, 273 So. 2d 408, 411 (Fla. 3d DCA 1973); State v. Farmer, 384 So. 2d 311, 313 (Fla. 5th DCA

1980). Therefore, after finding that this motion did not comply with the oath verification, the trial court erroneously ruled upon the motion.

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). 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," Rodriguez 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. Anderson] 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 two 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).

Recently, this Court 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.
>
> The state argued that the entire record is attached to the order in the Court file before us, thus fulfilling this requirement. However, such a construction of the rule would render its language meaningless. The record is attached to *every* case before this Court. Some greater degree of specificity is required. Specifically, unless the trial court's order states a rationale based on the record, the court is required to attach those specific parts of the record that directly refute each claim raised.

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

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. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

Mr. Anderson has pled substantial, serious allegations which go to the fundamental fairness of his conviction and to the appropriateness of his death sentence. "Needless to say, these are serious allegations which warrant a close examination. Because we cannot say that the record conclusively shows [Mr. Anderson] 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. Anderson was -- and is -- entitled to an evidentiary hearing on his Rule 3.850 pleadings. Hoffman. Mr. Anderson 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. Anderson'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.

Under Rule 3.850 and this Court's well-settled precedent, a post-conviction movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Hoffman; Lemon; O'Callaghan; Gorham. Mr. Anderson has alleged facts which, if proven, would entitle him to relief. Furthermore, the files and records in this case do not conclusively show that he is entitled to no relief.

In stark contrast to the clear and unmistakable requirements of law is the trial court's denial in this cause. It makes no use of the record or files in this case to show conclusively that Mr. Anderson is not entitled to relief. It attempts no analysis whatsoever. The order ignores the express requirements of Rule 3.850 and is oblivious to the substantial body of caselaw from this Court holding that courts must comply with the rule.

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. Anderson's 3.850 claims.

ARGUMENT III

RICHARD ANDERSON WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING GUILT PHASE OF HIS TRIAL AND WHEN COUNSEL'S DEFICIENT PERFORMANCE IN PENALTY PHASE RESULTED IN MR. ANDERSON'S SENTENCE OF DEATH. AS A RESULT, MR. ANDERSON WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Anderson was entitled to the effective assistance of counsel at his capital trial. Strickland v. Washington, 466 U.S. 668 (1984). This right extended both to the guilt and penalty phases of that trial. This right requires counsel to adequately investigate possible lines of defense at both phases of the trial. Decisions made with less than adequate investigation are not reasonable. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). Counsel is also required to bring to bear those skills necessary to insure an adversarial testing. This includes knowledge of the applicable law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). At Mr. Anderson's trial, counsel failed to act as a zealous advocate. He failed to conduct adequate investigation and to know the law and insure an adversarial testing.[4]

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[4]Mr. Anderson has been forced to plead this claim without full Chapter 119 compliance. Certainly, when full compliance occurs, (continued...)

A. NO ADVERSARIAL PENALTY PHASE

During the penalty phase of trial, defense counsel announced that Mr. Anderson did not wish to present any witnesses during the penalty phase (R. 2168). The Court asked defense counsel if he had any questions he wished to ask Mr. Anderson regarding this alleged "waiver":

> THE COURT: You wish to question Mr. Anderson concerning what you just said, Mr. Ober?
>
> MR. OBER: Mr. Anderson, you heard my statement to Judge Graybill. Is there anything that you would like to add to that?
> Do you concur in the statements I made or do you disagree with them, those I mentioned or anyone else that, perhaps, we hadn't discussed, who will assist you in this second phase proceeding?
>
> THE DEFENDANT: I concur with the statements you made.
>
> MR. OBER: And--
>
> THE DEFENDANT: I would rather not have any witnesses testify on my behalf that you mentioned or that could, in fact, be called.

(R. 2168, 2169). The Court only asked Mr. Anderson one question concerning his alleged waiver of penalty phase.

> THE COURT: Mr. Anderson, are you on any kind of drugs or medication that would affect your ability to understand what's going on today?
>
> THE DEFENDANT: No, sir, not at all.

(R. 2168, 2169). No further inquiry was made. Counsel failed to know the law and seek the appointment of an attorney to present

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[4](...continued)
additional matters may come to light which require amendment at that point in time. See Provenzano v. State, 18 Fla. L. Weekly ___ (Fla. Feb. 11, 1993).

the available mitigation. See Klokoc v. State, 589 So. 2d 219 (Fla. 1991). Had counsel taken this simple reasonable step, a life sentence would have resulted.

Further, counsel failed to zealously represent Mr. Anderson's interest and argue as advocate for his best interest. See Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991)(counsel seized on client's apathy as an excuse for throwing in the towel).

However, an accused must "knowingly and intelligently" forego the traditional benefits associated with right to counsel. Johnson v. Zerbst, 304 U.S. 458, 464-65 (1938); Faretta v. California, 422 U.S. 806 (1975). A higher mental state is required than what is required merely for a finding of competency to proceed with counsel. The record here does not disclose that Mr. Anderson ever "knowingly and intelligently" waived his right to effective counsel, or "knowingly and intelligently" waived mitigation.

In Faretta, a heightened level of understanding and cognition was required to in effect waive counsel. Footnote 3 of the Faretta opinion quotes the exchange between the court and the defendant. Mr. Faretta was questioned, inter alia, on his understanding of the hearsay rule, how peremptory challenges and challenges for cause are used, and how to conduct voir dire. Mr. Faretta responded in narrative fashion to many of the questions. 422 U.S. at 808. Furthermore, the court there informed Mr. Faretta that "he was making a mistake" and emphasized that in

further proceedings [he] would received no special favors" Id. at 2527 (footnote omitted). The Supreme Court also pointed out in footnote 2 that the judge would require Faretta to abide by all procedural rules, that questions would have to be put correctly or proper objection would be sustained, and that only experienced trial lawyers were sufficiently familiar with those rules and Mr. Faretta was not. No such inquiry was made of Mr. Anderson.

Case law has consistently interpreted Faretta to require a court to conduct a hearing to ensure that the defendant is fully aware of the dangers and disadvantages of proceeding without counsel. Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984). The record must establish that the defendant knows what he is doing and his choice is made with open eyes. Faretta, 422 U.S. at 835. The defendant "must be competent to make the choice to proceed pro se." Orazio v. Dugger, 876 F.2d 1508, 1512 (11th Cir. 1989).

The standard imposed by state and federal courts for assessing the validity of a waiver by a state prisoner to the sixth amendment right to assistance of counsel is the traditional inquiry under Johnson v. Zerbst as to whether the defendant was knowingly, intelligently and voluntarily relinquishing his constitutional right to counsel. Westbrook v. Arizona, 384 U.S. 150 (1966); Orazio v. Dugger; Dorman v. Wainwright 798 F.2d 1358 (11th Cir. 1986); Ford v. Wainwright, 526 F.2d 919, 921 (5th Cir. 1976).

Trial counsel completely failed to elicit any information from Mr. Anderson which demonstrated his knowledge of procedural rules or substantive law, possible mitigation, the nature of penalty phase. Trial counsel failed to adequately advise either his client or the court. Further, counsel was ineffective in relying on his client to make legal decisions regarding what evidence should be presented in mitigation that were his responsibility to make despite what Mr. Anderson wanted. Case law rejects the notion that a lawyer may "blindly follow" the commands of his client. Eutzy v. Dugger, 746 F. Supp. 1492, 1499 (N.D. Fla. 1989), citing Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). As the Thompson court explained, "[a]n attorney has expanded duties when representing a client whose condition prevents him from exercising proper judgment." Thompson, 787 F.2d at 1452. In order for Mr. Anderson to receive a meaningful trial, the trial court must have the benefit of adversary proceeding with diligent advocacy. See Klokoc v. State, 589 So. 2d 219, 221-22 (Fla. 1991).

Mr. Anderson was given the ultimate penalty with no adequate inquiry ever being made. The humanity of a person about to be sentenced for a capital offense is the critical question at the penalty phase of a capital case. Evidence bearing on who Mr. Anderson was and where he came from would have suggested that his personality and motivations could be explained, at least in part, by his personal history and would have shown that there was a Mr. Anderson worth saving. It is precisely this kind of evidence the

United States Supreme Court had in mind when it wrote Lockett v. Ohio, 438 U.S. 586 (1978) and Eddings v. Oklahoma, 455 U.S. 104 (1982). The Lockett Court was concerned that unless the sentencer could consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants will be treated not as unique human beings, but as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is just the kind of humanizing evidence that "may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). It could have made a difference between life and death in this case.

B. MENTAL HEALTH ASSISTANCE

Furthermore, 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 1275, 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. Kenley v. Armontrout, 937

F.2d 1298 (8th Cir. 1991); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Counsel must assure that the client is not denied a professional and professionally conducted mental health evaluation. See Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984); Fessel; Mason v. State, 489 So. 2d 734 (Fla. 1986).

A qualified mental health expert serves to assist the defense "consistent with the adversarial nature of the fact-finding process." Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990). See also Liles v. Saffle, 945 F.2d 333 (10th Cir. 1991). Under Florida law, an indigent defendant is entitled to an appointed mental health expert to assist in the preparation of a defense. Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla. 1 DCA 1991). The mental health expert also must protect the client's rights, and violates these rights when he or she fails to provide competent and appropriate evaluations. State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

Florida law made Mr. Anderson's mental condition relevant to guilt/innocence and sentencing in many ways: (a) specific intent to commit first degree murder; (b) statutory mitigating factors; (c) aggravating factors; and (d) myriad nonstatutory mitigating factors. Mr. Anderson was entitled to professionally competent mental health assistance on these issues. Ake v. Oklahoma.

Generally agreed upon mental health principles require that an accurate medical and sound background history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from personality disorder. R. Strub and F. Black, Organic Brain Syndrome, 42 (1981). The history has been called "the single most valuable element to help the clinician reach an accurate diagnosis" (Kaplan and Sadock). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly patients with ailments -- such as head injury, drug addiction, alcoholism -- that may cause brain damage and thus effect memory and recall. Because patients are an unreliable data source and their personal history may be distorted by their own organic or mental disturbance, the patient cannot be relied upon for an accurate history. Mason v. State, 489 So. 2d 734 (Fla. 1986).

Mr. Anderson asserts that he was deprived of effective representation at his trial. Counsel failed to present any mitigation, and the state failed to disclose exculpatory evidence. Counsel for Mr. Anderson ignored his duty to his client in penalty phase. Counsel never requested the appointment of a special counsel to represent the public interest in bringing forth mitigating factors to be considered by the court in the sentencing proceeding. See Klokoc v. State, 589 So. 2d 219 (Fla.

1991). Mr. Anderson did not have an adequate adversarial testing of either his guilt or his sentence.

C. FAILURE TO OBJECT

The adversarial process in Mr. Anderson's trial also broke down when defense counsel failed to object to blatantly improper penalty phase argument by the state attorney (R. 2223-33)(see Argument VI). First, defense counsel was prejudicially deficient by allowing the jury to consider factors outside the scope of their deliberations. Second, by failing to object to it and ask for a curative instruction, counsel allowed the jury to consider it as if it had been proper and relevant to the issue of Mr. Anderson's sentence. Third, defense counsel's failure to object waived the issue for consideration on direct appeal. Counsel's inability to effectively litigate this issue was prejudicially deficient performance under Strickland.[5]

The improper prosecutorial argument went without objection by defense counsel. Improper argument by a prosecutor reaches the threshold of fundamental unfairness if it is "so egregious as

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[5]Counsel have been found to be prejudicially ineffective for failing to function as the government's adversary. Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988)(quoting United States v. Cronic, 466 U.S. 648, 666 (1984)); for failing to raise objections, to move to strike, or to seek limiting instruction regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnel v. Cauthron, 540 F.2d 938 (8th Cir. 1976), for taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-817; and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963.

to create a reasonable probability that the outcome was changed." Brooks v. Kemp, 762 F.2d 1383, 1403 (11th Cir. 1985). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickland v. Washington, 466 U.S. 668 (1984). A duty to bear such skill and knowledge as will render the trial a reliable adversarial testing process is placed upon defense counsel under Strickland. Courts have repeatedly recognized that reasonably effective counsel must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

Clearly, defense counsel was ineffective for his failure to object. Well-established Florida law has condemned such impermissible argument. Starting with Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), this Court sounded an alarm that instances of prosecutorial misconduct were improper. "We are deeply distrubed [sic] as a Court by the continuing violations of prosecutorial duty, propriety and restraint. Later, in Jackson v. State, 522 So. 2d 802 (Fla. 1988), this Court agreed that "the prosecutor's comment that the victims could no longer read books, visit their families, or see the sun rise in the morning as Jackson would be able to do if sentenced to life in prison was improper because it urged consideration of factors outside the scope of the jury's deliberations." Id, at 809. Bertolotti and

Jackson lay out the deficient performance of defense counsel when they fail to object to prosecutorial misconduct. See also, Hudson v. State, 538 So. 2d 829 (Fla. 1989). Plainly, the omission by the defense counsel in Mr. Anderson's case meets the deficient performance standard set forth in Strickland.

An identical closing argument was condemned in Jackson:

> [B]ut what about life in jail? What can one do in jail? You can laugh; you can cry, you can eat, you can read, you can watch tv, you can participate in sports, you can make friends.
>
> In short, you life to find out about the wonders of the future. In short, it is living. People want to live.
>
> If Geraldine Birch had the choice of life in prison or being in that dugout with every one [of] her organs damaged, her vagina damaged, what choice would Geraldine Birch have made? People want to live.
>
> See, Geraldine Birch didn't have that choice because this man right here, Perry Taylor, decided for himself that Geraldine Birch should die. And for making that decision he too deserves to die.

Taylor v. State, 583 So. 2d 323, 329 (Fla. 1991). This Court agreed, again, that the state attorney's argument was improper because it urged consideration of factors outside the scope of the jury's deliberations. This time defense counsel objected because he was "aware that the prosecutor had used this argument before . . ." This Court reversed saying, "[T]he prosecutor overstepped the bounds of proper argument." Id. at 330. This Court further reprimanded the state attorney for telling the trial court that this type of closing argument was permissible.

> the Jackson opinion, which was issued a year before this trial, clearly prohibits this type of argument. While neither counsel called the court's attention to Jackson, the very brief to which the prosecutor referred cited Jackson for the proposition that such an argument should not be made. Finally, any doubt that the prosecutor should have known of Jackson is belied by the fact that the Jackson case was tried by his own state attorney's office.[6]

583 So. 2d at 330. The distinction lies in the attorney's timely objection to the offending comments. When timely objection is made the offending argument constitutes reversible error. The prejudice to Mr. Anderson is obvious. Had defense counsel performed effectively Mr. Anderson would be entitled to relief. Even if not successful at trial, the objection would have preserved the issue for review. Because of counsel's failure, Mr. Anderson's jury was left to consider impermissible factors for which he had no recourse for review by the appellate courts. Clearly, the improper conduct by the prosecutor "permeated" the trial, therefore, relief is proper. See Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

D. PREJUDICE

The remaining question is whether Mr. Anderson suffered prejudice by the failure to investigate, present mitigation, challenge aggravation, object to prosecutorial misconduct, and subject the state's case to an adversarial testing. The issue is whether a reasonable probability exists of a different outcome

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[6]The brief used to substantiate the prosecutor, Mr. Benito's, argument was Hudson v. State, 538 So. 2d 829 (Fla. 1989), which only addressed this issue in a footnote.

but for counsel's deficient performance. It is not the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Confidence is undermined in the outcome when the trial cannot be "relied on as having produced a just result." Harris v. Reed, 894 F.2d 871, 879 (7th Cir. 1990).

Moreover, in applying the Strickland test consideration must given to the fact that:

> [I]n adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.

Strickland, 466 U.S. at 696.

This Court held in Michael that prejudice has been shown in a capital proceeding where there is an "inability to gauge the effect" of counsel's omission which constituted deficient performance. 530 So. 2d at 930. See State v. Lara, 581 So. 2d at 1289 ("had such evidence been presented, the jury might well have recommended a penalty other than death").

A capital sentencing must be individualized and focused on the defendant's personal culpability:

> Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of

> the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)(concurring opinion).

Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). Here, the judge and jury knew nothing of Mr. Anderson's background. The sentencers thus could not assess Mr. Anderson's personal culpability. Prejudice is apparent.

Because "[t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing the particularized characteristics of the defendant [,]" when trial counsel fails "to provide [mitigating] evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s the defendant's] ability to receive an individualized sentence." Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991) (citations omitted). Confidence in the outcome at sentencing is undermined, and this sentence of death is not sufficiently reliable to satisfy the Eighth Amendment.

Mr. Anderson's claim of ineffective assistance of counsel requires an evidentiary hearing for its proper resolution. The state's case was never forced to undergo the "crucible of meaningful adversarial testing." Cronic. Crucial elements of the state's case passed before the jury unchallenged, its weaknesses unrevealed. This failure was due in part to trial court and state interference, Cronic; Blanco v Singletary, 943

F.2d 1477 (11th Cir. 1991), and in part to trial counsel's own failing, Strickland. Mr. Anderson's factual allegations -- which must be accepted as true at this juncture, see Blackledge v. Allison, 431 U.S. 63 (1977) -- demonstrate deficient performance and prejudice. Confidence in the outcome of the proceedings is undermined. This Court should remand for an evidentiary hearing in order for a factfinder to hear the relevant facts, and to properly, fully, and fairly address these questions on the merits. See Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984); Squires v. State, 513 So. 2d at 138.

ARGUMENT IV

THE FAILURE TO PROVE THE CORPUS DELICTI OF MURDER IN THE FIRST DEGREE WAS FUNDAMENTAL ERROR IN VIOLATION OF MR. ANDERSON'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The state did not prove by substantial evidence the corpus delicti for murder in the first degree and such failure is fundamental error fatal to the constitutionality of Mr. Anderson's sentence. At trial, counsel for Mr. Anderson moved for judgment of acquittal at the close of state's evidence and again at the close of evidence arguing that the corpus delicti of first degree murder had not been proved (R. 1458-71, 1875). The court summarily denied his motion. Notwithstanding the judge's ruling, the state did not carry its burden of proof on the corpus delicti for first degree murder or the underlying kidnapping charge.

The state has the burden to bring forth 'substantial evidence' tending to show the commission of the charged crime. State v. Allen, 335 So. 2d 823 (1976). The term "corpus delicti" has been regularly used in appellate decisions to mean the legal elements necessary to show that a crime was committed. State v. Allen. "The state therefore must show that a harm has been suffered of the type contemplated by the charges (for example, a death in the case of a murder charge...)...". Id. at 825.

The Florida homicide statute, §782.04 Fla. Stat., requires that the state prove the unlawful killing of a human being from premeditated design or that it was committed by a person engaged in the perpetration of certain enumerated crimes (i.e., felony murder). The state could not prove the threshold issue -- that an unlawful killing of a human being had occurred.

The state did not prove by substantial evidence the elements of murder. Under Allen, the state was required to prove the existence of every element of the crime in order to prove that the act charged occurred. It was error for the judge to overrule Mr. Anderson's judgment of acquittal.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Anderson's trial and death sentence. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985). This error is so fundamental and basic, it must be cognizable in post-conviction proceedings. This error must be corrected. Mr. Anderson's sentence of death is

inherently unreliable and fundamentally unfair. Mr. Anderson was denied his fifth, sixth, eighth and fourteenth amendment rights.

ARGUMENT V

MR. ANDERSON'S DEATH SENTENCE WAS TAINTED BY CONSTITUTIONALLY INVALID JURY INSTRUCTIONS AND BY IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

At the penalty phase charge conference Mr. Anderson objected to the jury being instructed on the cold, calculated, and premeditated aggravating factor (R. 2213). This objection was overruled (R. 2214). An objection by Mr. Anderson to the proposed jury instruction on the aggravating factor of pecuniary gain was also overruled (R. 2212-13). These objections were renewed at the close of the instructions to the jury (R. 2259).

The jury was given the following instruction regarding the cold, calculated, and premeditated aggravating factor:

> 3. 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. 2255-56). The jury was also given the jury instruction on pecuniary gain that Mr. Anderson objected to:

> 2. The crime for which the defendant is to be sentenced was committed for financial gain.

(R. 2255).

In addition, the prosecutor argued the cold, calculated and premeditated factor to the jury in a manner which further diluted the jury's understanding of the aggravator. He argued:

> And another one is that the crime for which Mr. Anderson is to be sentenced was committed in a cold, calculated and premeditated manner without pretense or moral or legal justification. There was no fight between Mr. Anderson and Mr. Grantham that gave him even the pretense of the reason to harm, much less kill Robert Grantham.

(R. 2228-29). The jury was not instructed against doubling the aggravating factors of pecuniary gain and cold, calculated and premeditated. After considering the court's and prosecutor's imprecise instructions, the non-unanimous jury returned a death recommendation (R. 2265). Relying on the death recommendation, the trial court later imposed a death sentence (R. 2288-89). The trial judge found two aggravating factors, finding that the aggravators of pecuniary gain and cold, calculated and premeditated were to be treated as one (R. 2285). Yet, the jury, a co-sentencer, was not advised of this ruling and thus weighed an extra thumb on the death side of the scale.

Recently, the United States Supreme Court issued Richmond v. Lewis, 113 S. Ct. 528 (1992). The issue in Richmond concerned the constitutionality of Arizona's "especially heinous, atrocious, cruel or depraved" aggravating factor and the review which must be conducted when a capital sentencer has considered an invalid aggravating factor. The Supreme Court reiterated that "in a 'weighing' state, 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." 113 S. Ct at 534. After concluding that the sentencer

in Richmond had considered an invalid aggravating factor and that the state appellate court had not remedied this error, the Supreme Court held, "Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand." 113 S. Ct. at 535. In Mr. Anderson's case, no "sentencing calculus" was performed in which the narrowing constructions of vague and facially overbroad aggravating factors was considered. Consideration, i.e. great weight, was given to the tainted death recommendation. Richmond and Espinosa v. Florida, 112 S. Ct. 2926 (1992),[7] teach that the jury is an integral part of the Florida "sentencing calculus." The judge sentencing does not cure sentencing error in Florida because under Florida law the judge must give great weight to the jury's recommendation, Tedder v. State, 322 So. 2d 908 (1975), and the "jury is a co-sentencer under Florida law." Johnson v. Singletary, 18 Fla. L. Weekly 90 (Fla., Jan. 29, 1993).

Mr. Anderson's jury was told to consider invalid aggravation. Under Espinosa, "we must presume the jury found [the invalid aggravating factors]," and "we must further presume that the trial court followed Florida law . . . and gave 'great

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[7]Even though Espinosa dealt specifically with a challenge to the heinous, atrocious or cruel aggravating factor, the logic of that decision applies to all aggravating factors in Florida. See Hodges v. Florida, 113 S. Ct. 33 (1992)(decision vacated and matter remanded in light of Espinosa where aggravator at issue was cold, calculated and premeditated.)

weight' to the resultant recommendation." 112 S. Ct. at 2928. Since the jury's death recommendation was contaminated with invalid aggravation, the entire "sentencing calculus," Richmond, was contaminated with invalid aggravation. Moreover, the facially overbroad and vague statutory definition of the aggravating circumstances was not cured by the application of an adequate narrowing construction during the jury's sentencing calculus. This error requires this Court to conduct a harmless error analysis as to the jury's recommendation or to remand for jury resentencing. Richmond; Espinosa.[8]

Florida's facially overbroad death penalty statute was applied to Mr. Anderson in violation of the Eighth Amendment. Moreover, "the Florida penalty phase jury is a co-sentencer under Florida law." Johnson v. Singletary. Since the jury was not advised of narrowing constructions adopted by this Court, the jury was left with vague and overbroad aggravating factors which it placed on the death side of the scale. This Court cannot assume the error did not taint the jury sentencing. Stringer v. Black, 112 S. Ct. 1130 (1992).

In Mr. Anderson's case, the Florida Statute defines one of the aggravating factors at issue as follows: "[t]he capital

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[8] The error before the jury cannot be found harmless beyond a reasonable doubt. There was substantial nonstatutory mitigation established at trial (See Argument VIII, infra.). Moreover, a properly instructed jury may have concluded that the aggravating factors were not sufficient to warrant a death recommendation. Under such circumstances, the error before Mr. Anderson's jury cannot be found harmless beyond a reasonable doubt, and jury resentencing is required.

felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Fla. Stat. section 121.141(5)(i)(1981). The statute does not further define this aggravating factor. This statutory language is and was facially vague.[9] Richmond, 113 S. Ct. at 534.

The Supreme Court of the United States explained in Richmond that, not only must a state adopt "adequate narrowing construction[s]," but those construction must actually be applied either by the sentencer or by the appellate court in an appellate reweighing. Richmond, 113 S. Ct. at 535 ("Where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand.").

In Mr. Anderson's case, the penalty phase jury was not given "adequate narrowing construction[s]," but instead was simply instructed on the facially vague statutory language. As previously explained in Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990): "It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face." However here, the facially vague and unconstitutional statutory language was applied by the sentencer in Mr. Anderson's case. Thus, Richmond controls: "Where the

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[9]This Court specifically noted that this factor would be overbroad absent a narrowing construction. Porter v. State, 564 So. 2d 1060, 1063-64 (Fla. 1990).

death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand" (113 S. Ct. at 535). In other words the "adequate narrowing construction" must be applied by the sentencer who conducts a weighing after considering and applying the narrowing construction. However, Mr. Anderson's jury did not receive the necessary narrowing construction.

The error here extend beyond jury instructions. Florida's facially vague death penalty statute was applied to Mr. Anderson in violation of due process. The necessary limiting constructions were not applied by the jury. No sentencing calculus free of this taint has ever occurred. This was fundamental error. State v. Johnson, 18 Fla. L. Weekly 55 (Fla., Jan. 14, 1993). It denied Mr. Anderson a liberty interest in violation of due process and the Eighth Amendment. Espinosa must be read as a change in Florida law rendering this issue cognizable in post-conviction proceedings.

Mr. Anderson's death sentence resulted from a facially overbroad statute which was not limited through the application of narrowing constructions. The error was fundamental error cognizable in post-conviction proceedings. Espinosa was a change in Florida law which warrants consideration of this issue now. This claim is cognizable in Rule 3.850 proceedings, and relief must be granted.

ARGUMENT VI

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

During closing argument, Mr. Skye, the prosecutor, urged the jurors to sentence Mr. Anderson to death on the basis of numerous impermissible and improper factors. In an attempt to dissuade the jury from recommending life imprisonment, Mr. Skye made the following argument:

> Yes, 25 years is a long time. Not as long as Robert Grantham will be dead. Life, it's a long time. Mr. Ober will tell you, yes, it is a long time, but it's life. He'll still get up every morning, see the sun come up, have friends, read books, get letters and visits from his family. It's life. Something that he denied Robert Grantham. Something he stole from Robert Grantham. And we still don't know where Robert Grantham is.

(R. 2232)(emphasis added).

After this attempt by Mr. Skye to appeal to the fears of the jurors, he went further to comment that:

> Some people, I submit to you, by their course of conduct in the things they do, in fact, forfeit their right to live. And the death penalty is appropriate to protect society from them. Enough is Enough.

(R. 2233). These comments went without objection by defense counsel.

These identical prosecutorial arguments have been consistently condemned as improper by this Court. In Taylor v.

State, 583 So. 2d 323 (Fla. 1991), another attorney from the same Hillsborough County State Attorney's Office gave the identical closing argument:

> [B]ut what about life in jail? What can one do in jail? You can laugh; you can cry, you can eat, you can read, you can watch tv, you can participate in sports, you can make friends.
>
> In short, you life to find out about the wonders of the future. In short, it is living. People want to live.

Taylor, 583 So.2d at 329. This Court agreed that the state attorney's argument was improper because it urged consideration of factors outside the scope of the jury's deliberations.

This Court also held the same arguments to be improper in Jackson v. State, 522 So. 2d 802 (Fla. 1988) and Hudson v. State, 538 So. 2d 829 (Fla. 1989), saying the prosecutor overstepped the bounds of proper argument. Citing to Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), this Court sent out the parameters of improper argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may reasonably be drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so that their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

See, 522 So. 2d at 809.

Here, there is no question that Mr. Skye's argument was meant to evoke an emotional response from the jury. It had obviously worked time and again as is evidenced by the litany of

cases from the same State Attorney's office[10] before being reversed by this Court. Cf. Presnell v. Zant, 959 F.2d 1524, 1528 (11th Cir. 1992). However, this Court's rebuke fell on deaf ears as state attorneys continued to make the exact same improper argument in Taylor, even arguing that a Hudson footnote condoned the argument (583 So. 2d at 330). Clearly, confidence in the outcome of Mr. Anderson's trial has been undermined when jurors are exposed to such emotional oratory.

The cumulative effect of this closing argument was to "improperly appeal to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v. DeChristoforo, 416 U.S. 647 (1974); See also, United States v. Eyster, 948 F.2d 1196, 1206 (11th Cir. 1991). In Rosso v. State, 505 So. 2d 611 (Fla. 3rd DCA 1987) the court defined a proper closing argument:

> The proper exercise of closing argument is to review the evidence and to explicate those inferences which may be reasonably drawn from the evidence. Conversely, it must not be used to inflame the minds and passions of the jurors so their verdict reflects an emotional response to the crime or the defendant rather than the logical analysis of the evidence in light of the applicable law.

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[10]See, Taylor v. State, 583 So. 2d 323 (Fla. 1991); Jackson v. State, 522 So. 2d 802 (Fla. 1988); Hudson v. State, 18 Fla L. Weekly 67 (Fla. 1993).

Rosso, 505 So. 2d at 614. The prosecutor's argument went beyond a review of the evidence and permissible inferences. He intended his argument to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989). He intended that Mr. Anderson's jury consider factors outside the scope of the evidence.

The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So. 2d at 614. This Court has called such improper prosecutorial commentary "troublesome." Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985).

Arguments such as those made by the state attorney in Mr. Anderson's penalty phase violate Due Process and the Eighth Amendment, and render a 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 had 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).[11]

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

ARGUMENT VII

MR. ANDERSON'S SENTENCING JURY WAS MISLED BY COMMENTS AND INSTRUCTIONS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED ITS SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Anderson's jury was repeatedly instructed by the court and the prosecutor that it's role was merely "advisory" (R. 586-87, 665-66, 3191, 3194), in violation of law. However, because great weight is given the jury's recommendation the jury is a co-sentencer in Florida. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Johnson v. Singletary, 18 Fla. L. Weekly 90 (Fla. Jan. 29, 1993). Here the jury's sense of responsibility would have

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

been diminished by the misleading comments and instructions regarding the jury's role. This diminution of the jury's sense of responsibility violated the Eighth Amendment. Caldwell v. Mississippi, 472 U.S. 320 (1985). See Pait v. State, 112 So. 2d 380 (Fla. 1959). Counsel's failure to object was deficient performance which prejudiced Mr. Anderson. Relief is proper.

Counsel's failure to object to the adequacy of the jury's instructions and the impropriety of prosecutor's comments was deficient performance arising from counsel's ignorance of the law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). The intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate, and is a misstatement of the law. The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Anderson's jury, however, was led to believe that its determination meant very little.

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

relief. Counsel's failure to object prejudiced Mr. Anderson. This Court must vacate Mr. Anderson's unconstitutional sentence of death.

ARGUMENT VIII

MR. ANDERSON WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE REFUSED AND FAILED TO FIND THE EXISTENCE OF MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS.

In sentencing Mr. Anderson to death, Mr. Anderson's sentencing judge found no mitigation. This was error of law. The record reveals that the court failed to consider the substantial and significant mitigation which was before the court. At the time of Mr. Anderson's trial it was axiomatic that the Eighth Amendment required a capital sentencer, "not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any circumstance of the offense that the defendant proffers as a basis for a sentence less than death." Eddings v. Oklahoma, 455 U.S. 104, 110 (1982), quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978). No less clear was the fundamental tenet that "the sentencer may not refuse to consider or be precluded from considering any relevant mitigation." Eddings, 455 U.S. at 114. In Mills v. Maryland, 108 S. Ct. 1860 (1988), the United States Supreme Court in surveying the prime directive of Lockett and its progeny stressed the ability of the sentencer to consider all evidence of mitigation unimpeded:

> [I]t is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute, Lockett v. Ohio; Hitchcock v. Dugger, ___ U.S. ___ 107 S. Ct. 1821, 95 L.Ed. 2d (1987); by the sentencing court, Eddings v. Oklahoma; or by evidentiary ruling, [w]hatever the cause, the conclusion would necessarily be the same: Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence, in plain violation of Lockett, it is our duty to remand this case for resentencing."

Mills at 1866, quoting Eddings v. Oklahoma, 455 U.S. at 117 (O'Connor, J., concurring). During his capital trial, Mr. Anderson presented evidence that he had been treated disproportionately to his co-defendant, Connie Beasley. At the time of trial, the judge and jury were told of a plea agreement which gave Ms. Beasley a maximum sentence of three years for the same crime in which Mr. Anderson was sentenced to death (R. 608). Later, at sentencing, the judge was informed by defense counsel that Ms. Beasley had been sentenced, to one year and one day (R. 2282). In his sentencing order, the judge failed to acknowledge Ms. Beasley's actual sentence of one year, and instead wrote that her sentence had yet to be imposed (R. 3023). Further, evidence was adduced at trial that confirmed that Mr. Anderson had been gainfully employed before his arrest with the Tampa Forklift Company (R. 857). The evidence was uncontradicted and unimpeached. The state attorney conceded in closing that these mitigating factors existed (R. 2229-30).

According to the sentencing order, the trial judge found that no statutory mitigating circumstances existed and that the non-statutory mitigating circumstance of Ms. Beasley's lesser

sentence was "clearly" outweighed by the aggravating factors (R. 3023). The court's refusal to find disparate treatment and gainful employment or to consider these as mitigating factors was erroneous. The judge considered and rejected the mitigating factors as a matter of law.

This evidence constituted mitigation. Cheshire v. State, 568 So. 2d 908 (Fla. 1990); Scott v. Dugger, 604 So. 2d 465, 468 (Fla. 1992). The jury and judge were required to weigh these mitigating factors against the aggravating circumstances. According to his sentencing order the judge did not weigh all of the mitigating circumstances (R. 3023). The judge failed to understand what constitutes mitigation, and thus erred as a matter of law in not considering and weighing the unrefuted mitigation.

It is error for the trial court to completely ignore mitigation. As this Court has found:

> When addressing mitigating circumstances, the sentencing court must expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence and whether, in the case of nonstatutory factors, it is truly of a mitigating nature. See Rogers v. State, 511 So.2d 526 (Fla.1987), cert. denied, 484 U.S. 1020, 108 S.Ct. 733, 98 L.Ed.2d 681 (1988). The court must find as a mitigating circumstance each proposed factor that is mitigating in nature[4] and has been reasonably established by the greater weight of the evidence: "A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established." Fla.Std.Jury Inst. (Crim.) at 81.

> 4.This is a question of law. A mitigating circumstance can be defined broadly as "any aspect of a defendant's character or record and any of the circumstances of the offense" that reasonably may serve as a basis for imposing a sentence less than death. Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2964-65, 57 L.Ed.2d 973 (1978). Valid nonstatutory mitigating circumstances include but are not limited to the following:
>
> 1) Abused or deprived childhood.
> 2) Contribution to community or society as evidenced by an exemplary work, military, family, or other record.
> 3) Remorse and potential for rehabilitation; good prison record.
> 4) Disparate treatment of an equally culpable codefendant.
> 5) Charitable or humanitarian deeds.

Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990). This finding is in accord with federal law:

> [j]ust as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. . . . The sentencer, and the [appellate court], may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.

Eddings v. Oklahoma, 455 U.S. 104, 114-15 (1982).

The trial court clearly erred in refusing to recognize the uncontested mitigation in the record. Mr. Anderson was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Zant v. Stephens, 103 S. Ct. 2733, 2744 (1983); Eddings v. Oklahoma, 102 S. Ct. 869, 874-875 (1982); Lockett v. Ohio. Relief is warranted.

ARGUMENT IX

MR. ANDERSON'S TRIAL COURT PROCEEDINGS WERE 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. Anderson 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. Anderson'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 outcome of the trial.

The flaws in the system which sentenced Mr. Anderson to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Anderson's direct appeal; 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 is proper.

CONCLUSION

On the basis of the arguments presented herein, Mr. Anderson respectfully submits that he is entitled to an evidentiary hearing. Mr. Anderson respectfully urges that this Honorable Court remand to the trial court for such a hearing, and that the Court set aside his unconstitutional conviction and death sentence.

CERTIFICATION

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 February 12, 1993.

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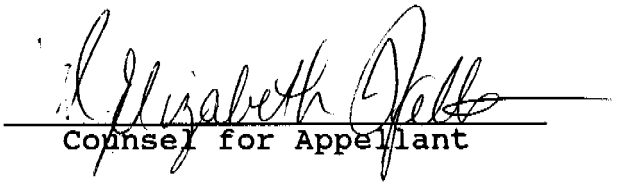
By: 
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