

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Thompson's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Thompson'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;

"PC-RS" -- supplementary record on 3.850 appeal.

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

REQUEST FOR ORAL ARGUMENT

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

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT	i
REQUEST FOR ORAL ARGUMENT	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	vi
ARGUMENT I	
ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. THOMPSON IN THE POSSESSION OF CERTAIN STATE AGENCIES WERE WITHHELD IN VIOLATION OF CHAPTER 119, <u>FLA. STAT.</u> , THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.	6
ARGUMENT II	
MR. THOMPSON IS ENTITLED TO AN EVIDENTIARY HEARING ON HIS 3.850 CLAIMS.	10
ARGUMENT III	
MR. THOMPSON WAS DEPRIVED OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.	13
ARGUMENT IV	
MR. THOMPSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. A FULL ADVERSARIAL TESTING DID NOT OCCUR.	24
ARGUMENT V	
MR. THOMPSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S PERFORMANCE WAS DEFICIENT AND, AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.	33

ARGUMENT VI

DUE TO DEFENSE COUNSEL'S INEFFECTIVENESS AND THE SENTENCING COURT'S MISUNDERSTANDING OF THE LAW, MR. THOMPSON WAS DENIED HIS RIGHTS TO EFFECTIVE AND ADEQUATE MENTAL HEALTH ASSISTANCE UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. 47

ARGUMENT VII

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. THOMPSON'S CAPITAL CONVICTION AND SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. 50

ARGUMENT VIII

MR. THOMPSON WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT LIMITED CROSS-EXAMINATION OF THE STATE'S WITNESSES. 53

ARGUMENT IX

MR. THOMPSON WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. V., SECTION 3(B)(1) OF THE FLORIDA CONSTITUTION, FLORIDA STATUTES SECTION 921.141 (1985), AND FLA. R. APP. P. 9.140(b)(4), DUE TO OMISSIONS IN THE RECORD. THE RECORD WAS INCOMPLETE AND MR. THOMPSON WAS DENIED A FULL AND FAIR APPELLATE PROCESS. 57

ARGUMENT X

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND THE INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS RENDERED MR. THOMPSON'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. 59

ARGUMENT XI

COMMENTS AND INSTRUCTIONS BY THE TRIAL COURT DEMONSTRATE THAT THE COURT DID NOT UNDERSTAND THE IMPORTANCE OF THE JURY'S SENTENCING RECOMMENDATION AND THUS DID NOT ACCORD THAT RECOMMENDATION PROPER DEFERENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. DEFENSE COUNSEL'S FAILURE TO OBJECT AND ADEQUATELY LITIGATE THIS ISSUE WAS INEFFECTIVE ASSISTANCE OF COUNSEL. 60

ARGUMENT XII

MR. THOMPSON'S SENTENCING JUDGE MISAPPLIED AGGRAVATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. 61

ARGUMENT XIII

THE SHIFTING OF THE BURDEN OF PROOF AT SENTENCING DEPRIVED MR. THOMPSON OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. 63

ARGUMENT XIV

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD 64

ARGUMENT XV

THE FAILURE TO PROVE THE CORPUS DELICTI OF MURDER IN THE FIRST DEGREE WAS FUNDAMENTAL ERROR IN VIOLATION OF MR. THOMPSON'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. 67

ARGUMENT XVI

AT SENTENCING THE COURT ERRED IN ASSERTING THAT SYMPATHY AND MERCY TOWARDS MR. THOMPSON WERE IMPROPER CONSIDERATIONS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. 69

ARGUMENT XVII

PARKER V. DUGGER IS NEW CASE LAW WHICH ESTABLISHES THAT MR. THOMPSON WAS DENIED HIS CONSTITUTIONAL RIGHTS WHEN THE TRIAL COURT AND THE FLORIDA SUPREME COURT IMPROPERLY FAILED TO ADEQUATELY EVALUATE MITIGATION EVIDENCE AT SENTENCING AND APPELLATE REVIEW. 69

ARGUMENT XVIII

MR. THOMPSON'S TRIAL WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. . . . 74

TABLE OF AUTHORITIES

	<u>Page</u>
<u>Ake v. Oklahoma,</u> 470 U.S. 68 (1985)	34
<u>Alcorta v. Texas,</u> 355 U.S. 78 (1957)	19
<u>Beck v. Alabama,</u> 447 U.S. 625 (1980)	51
<u>Blake v. Kemp,</u> 758 F.2d 523 (11th Cir. 1985)	47
<u>Blanco v. Singletary,</u> 943 F.2d 1477 (11th Cir. 1991)	29, 46, 48
<u>Brady v. Maryland,</u> 373 U.S. 83 (1963)	1, 10, 14, 57
<u>Breedlove v. Singletary,</u> 595 So. 2d 8 (Fla. 1992)	12
<u>Brewer v. Aiken,</u> 935 F.2d 850 (7th Cir. 1991)	48
<u>Caldwell v. Mississippi,</u> 472 U.S. 320 (1985)	61
<u>Carter v. State,</u> 560 So. 2d 1166 (Fla. 1990)	65, 72
<u>Chambers v. Armontrout,</u> 907 F.2d 825 (8th Cir. 1990)	25
<u>Chambers v. Mississippi,</u> 410 U.S. 284 (1973)	31
<u>Chaney v. Brown,</u> 730 F.2d 1334 (10th Cir. 1984)	19, 21
<u>Chapman v. California,</u> 386 U.S. 18 (1967)	20, 56
<u>Cochran v. State,</u> 547 So. 2d 928 (Fla. 1989)	72
<u>Cunningham v. Zant,</u> 928 F.2d 1006 (11th Cir. 1991)	47, 59, 63, 66, 73

<u>Davis v. Alabama,</u> 596 F.2d 1214 (5th Cir. 1979), <u>vacated as moot</u> , 446 U.S. 903 (1980)	25
<u>Davis v. Alaska,</u> 415 U.S. 308 (1972)	56
<u>Delap v. State,</u> 350 So. 2d 462 (Fla. 1977)	58
<u>Eddings v. Oklahoma,</u> 455 U.S. 104 (1982)	67
<u>Espinosa v. Florida,</u> 112 S. Ct. 2926 (1992)	61
<u>Eutzy v. Dugger,</u> 746 F.Supp. 1492 (N.D. Fla. 1989)	43, 47
<u>Evans v. Bennet,</u> 440 U.S. 1301 (1979)	51
<u>Ferguson v. State,</u> 417 So. 2d 639 (Fla. 1982)	57
<u>Furman v. Georgia,</u> 408 U.S. 238 (1972)	61
<u>Gardner v. Florida,</u> 430 U.S. 349 (1977)	51
<u>Garron v. State,</u> 528 So. 2d 353, 358 (Fla. 1988)	59
<u>Giglio v. United States,</u> 405 U.S. 150 (1972)	19
<u>Godfrey v. Georgia,</u> 446 U.S. 420 (1980)	62
<u>Goodwin v. Balkcom,</u> 684 F.2d 794 (11th Cir. 1982)	25
<u>Gorham v. State,</u> 521 So. 2d 1067 (Fla. 1988)	12
<u>Gregg v. Georgia,</u> 428 U.S. 153 (1976)	51, 61
<u>Gurganus v. State,</u> 451 So. 2d 817 (Fla. 1984)	30

<u>Harich v. State,</u> 484 So. 2d 1239 (Fla. 1986)	7
<u>Harrison v. Jones,</u> 880 F.2d 1279 (11th Cir. 1989)	28, 46, 63
<u>Heath v. Jones,</u> 941 F.2d 1126 (11th Cir. 1991)	74
<u>Hitchcock v. Dugger,</u> 481 U.S. 393 (1987)	62, 63
<u>Hoffman v. State,</u> 571 So. 2d 449 (Fla. 1990)	12
<u>Johnson v. State,</u> 442 So. 2d 193 (Fla. 1983)	57
<u>Jones v. State,</u> 591 So. 2d 911 (Fla. 1991)	53
<u>Kenley v. Armontrout,</u> 937 F.2d 1298 (8th Cir. 1991)	48
<u>Kokal v. State,</u> 562 So.2d 324 (Fla. 1990)	9
<u>Lemon v. State,</u> 498 So. 2d 923 (Fla. 1986)	12
<u>Lockett v. Ohio,</u> 438 U.S. 586, 604 (1978)	51
<u>Magwood v. Smith,</u> 791 F.2d 1438 (11th Cir. 1986)	64
<u>Mason v. State,</u> 489 So. 2d 734 (Fla. 1986)	12
<u>Maynard v. Cartwright,</u> 486 U.S. 356 (1988)	5, 62, 63
<u>Mills v. State,</u> 559 So. 2d 578 (Fla. 1990)	7
<u>Muehleman v. State,</u> 18 Fla. L. Weekly S447 (Fla. August 6, 1993)	8, 9
<u>Muhammad v. State,</u> 603 So. 2d 488 (Fla. 1992)	12

<u>Napue v. Illinois,</u> 360 U.S. 264 (1959)	19
<u>O'Callaghan v. State,</u> 461 So. 2d 1354 (Fla, 1984)	12
<u>Olden v. Kentucky,</u> 109 S. Ct. 480 (1989)	56
<u>Quimette v. Moran,</u> 942 F.2d 1 (1st Cir. 1991)	18
<u>Parker v. Dugger,</u> 111 S. Ct. 731 (1981)	6, 58, 67, 70
<u>Pointer v. Texas,</u> 380 U.S. 400 (1965)	53
<u>Porter v. Wainwright,</u> 805 F.2d 930 (11th Cir. 1986)	33
<u>Proffit v. Florida,</u> 428 U.S. 242 (1976)	57, 64
<u>Provenzano v. State,</u> 561 So.2d 541 (Fla. 1990)	9
<u>Reid v. Covert,</u> 354 U.S. 1 (1957)	51
<u>Richardson v. State,</u> 546 So. 2d 1037 (Fla. 1989)	23, 50
<u>Richmond v. Lewis,</u> 113 S. Ct. 528 (1992)	62, 63
<u>Rose v. State,</u> 601 So. 2d 1181 (Fla. 1992)	12
<u>Satterwhite v. Texas,</u> 486 U.S. 249 (1988)	56
<u>Shaw v. Martin,</u> 613 F.2d 487 (4th Cir. 1980)	51
<u>Smith v. Wainwright,</u> 799 F. 2d 1442 (11th Cir. 1986)	21, 22, 26
<u>Squires v. State,</u> 513 So. 2d. 138 (Fla. 1987)	12

<u>Stano v. Dugger,</u> 901 F.2d 898 (11th Cir. 1990)	21
<u>State v. Allen,</u> 335 So. 2d 823 (1976)	68
<u>State v. Crews,</u> 477 So. 2d 984 (Fla. 1985)	12
<u>State v. Sireci,</u> 502 So. 2d 1221 (Fla. 1987)	12
<u>Stevens v. State,</u> 552 So. 2d 1082 (Fla. 1989)	33
<u>Strickland v. Washington,</u> 466 U.S. 668 (1984)	13, 24, 33
<u>Stringer v. Black,</u> 112 S.Ct. 1130, 1136 (1992)	63
<u>Swan v. State,</u> 322 So. 2d 485 (1975)	57
<u>Thompson v. State,</u> 456 So. 2d 444 (Fla. 1984)	65
<u>Thompson v. State,</u> 553 So. 2d 153 (1989)	1, 22, 34, 52, 65, 71
<u>United States v. Bagley,</u> 473 U.S. 667 (1985)	14
<u>United States v. Fessel,</u> 531 F.2d 1275 (5th Cir. 1979)	47
<u>United States v. Gray,</u> 878 F.2d 702 (3rd Cir. 1989)	25
<u>United States v. Young,</u> 470 U.S. 1 (1985)	59
<u>Walton v. Arizona,</u> 110 S. Ct. 3047 (1990)	62
<u>Walton v. Dugger,</u> 18 Fla. L. Weekly S309 (Fla. May 27, 1993)	9
<u>Washington v. Texas,</u> 388 U.S. 14 (1967)	31

Welty v. State,
402 So. 2d 1159 (Fla. 1981) 46

Wilson v. Wainwright,
474 So. 2d 1163 (Fla. 1985) 68

Woodson v. North Carolina,
428 U.S. 280 (1976) 51

Zeigler v. Dugger,
524 So. 2d 419 (Fla. 1988) 62

STATEMENT OF THE CASE

Raymond Thompson was found guilty of first degree murder on June 5, 1986. After a sentencing proceeding the jury recommended a life sentence by a vote of 10-2 (R. 2896). The trial judge sentenced Mr. Thompson to death (R. 3340-51). Mr. Thompson appealed his conviction and sentence to this Court which affirmed. Thompson v. State, 553 So. 2d 153 (Fla. 1989).

On September 19, 1991 a Motion to Vacate the Conviction and Sentence under Fla.R.Crim.P. 3.850 was filed in the circuit court (PC-R. 20). Among other claims, Mr. Thompson pled that the State had concealed significant impeachment evidence regarding its key trial witnesses, in violation of Brady v. Maryland, 373 U.S. 83 (1963). The Rule 3.850 motion also pled ineffective assistance of trial counsel during guilt phase for his failures to present impeachment evidence on the key state's witness, to investigate an involuntary intoxication defense, and to retain a mental health expert to discuss the effect of massive substance abuse on the ability to form specific intent. Mr. Thompson further pled ineffective assistance at penalty phase based on trial counsel's failures to prepare background information, to timely request a mental health evaluation to develop mitigation, and to develop and present statutory and nonstatutory mitigation. The Rule 3.850 motion also pled that state agencies' failures to comply fully with Chapter 119, Fla. Stat., had prevented Mr. Thompson from fully presenting his claims. The motion was summarily denied on September 22, 1991 (PC-R. 39-40).

On November 4, 1991, a Motion for Rehearing was filed (PC-R. 41). This motion was summarily denied on May 10, 1993 (PC-R. 285). Even though the State withheld documents from Mr. Thompson after he had made requests under Chapter 119, Fla. Stat., no review or hearing was held concerning these documents.

SUMMARY OF THE ARGUMENT

1. Mr. Thompson's motion to vacate was dismissed because the time of filing (one year early), access to the files and records of certain state agencies had been withheld in violation of Chapter 119.01 Et seq., Fla. Stat. The trial court erroneously failed to conduct an in camera inspection of documents that the State deemed exempt and failed to afford counsel an opportunity to appear before the court to discuss the outstanding public records issues.

2. Mr. Thompson pled substantial claims relating to Brady violations and ineffective assistance of counsel in both guilt and penalty phase issues that require an evidentiary hearing. Contrary to this Court's law, the trial court summarily denied relief without an evidentiary hearing on the 3.850 motion and did not point out which records or files conclusively show that Mr. Thompson is entitled to no relief. This summary denial was in error. This court must reverse the order, and order a full evidentiary hearing on Mr. Thompson's 3.850 claims.

3. The State withheld critical exculpatory evidence at the time of trial. The witnesses at trial each had received lenient treatment for their testimony. The State was actively working to

have California criminal charges dismissed against one key witness for his testimony. A key FBI witness testified falsely concerning the effort by the State to have these charges dismissed. An evidentiary hearing and relief are required.

4. Counsel was ineffective for not investigating and presenting information at the guilt/innocence stage which would have impeached the State's key witness. Counsel was also rendered ineffective by trial court rulings limiting the examination of witnesses. Counsel further failed to investigate and present evidence concerning the effect of drugs and alcohol on Mr. Thompson's ability to form any specific intent and failed to secure defense experts.

5. No adversarial testing occurred during the penalty phase of Mr. Thompson's trial. Defense counsel was ineffective for failing to investigate and present compelling information about Mr. Thompson's background to the jury and the judge. Substantial statutory and non-statutory mitigating evidence concerning his background including information on the abusive and alcoholic father, the family's poverty and Mr. Thompson's history of debilitating drug abuse was readily available. Counsel failed to investigate this information. Counsel also failed to obtain the assistance of a mental health expert until after the guilty verdict, failed to provide the expert with necessary background information, and failed to have necessary psychological testing performed. Had counsel fulfilled his duties, statutory and nonstatutory mitigation would have been

established which would have been precluded an override. An evidentiary hearing and relief are required.

6. Due to defense counsel's ineffectiveness and the sentencing court's misunderstanding of the law, Mr. Thompson was denied his rights to effective and adequate mental health assistance under the fifth, sixth, eighth, and fourteenth amendments. No background materials were supplied to the mental health experts who were not retained until after guilty verdict. Mr. Thompson did not receive a full adversarial testing of his sentence.

7. Newly discovered evidence establishes that Mr. Thompson was wrongly sentenced to death. According to codefendant Scott Errico, at the time of the offense Mr. Thompson's substance abuse was "massive," his drug binges were "the rule, not the exception," and he was a "legend" of drug abuse. This evidence was previously unavailable, provides more than ample support for the defense mental health expert's conclusions regarding mitigation, and probably would have resulted in a life sentence.

8. Mr. Thompson was unable to confront the witnesses against him when the trial court erroneously limited defense counsel's cross-examination of the state's witnesses. It was critical to the defense to fully cross-examine the key state witness' credibility and to impeach his testimony in regard to his mental instability and violent behavior. Failure to allow full cross-examination of the key witness denied Mr. Thompson's rights under the fifth, sixth, eighth and fourteenth amendments.

9. Mr. Thompson's motion to vacate was dismissed even though there were omissions in the record reflecting that the record on appeal was not complete. No meaningful appellate review could occur without absolute confidence in the meaningful appellate review.

10. The prosecutor's improper remarks invited the jury to convict Mr. Thompson and sentence him to death on wholly impermissible factors. The prosecutor repeatedly resorted to improper argument, resulting in a fundamentally unfair death sentence. Defense counsel's failure effectively to argue this issue constituted ineffective assistance of counsel.

11. The trial judge failed to give the jury's life recommendation the deference it was due. His comments to the jury establish that he did not know the law and did not follow the law when overriding the life recommendation.

12. The trial court misapplied the aggravating circumstances as reflected in the jury instructions on aggravating circumstances contrary to the law in Maynard v. Cartwright, Hitchcock v. Dugger, and the eighth and fourteenth amendments.

13. At sentencing, the burden was shifted to Mr. Thompson to prove whether he should live or die.

14. The trial court's refusal to find or consider the mitigating circumstances clearly in the record was eighth amendment error.

15. At the guilt phase, the State did not prove by substantial evidence the corpus delecti for first degree murder and such failure was fundamental error fatal to the constitutionality of Mr. Thompson's sentence.

16. The trial court refused to recognize that to consider sympathy and mercy based upon mitigating evidence was permissible.

17. Fundamental error was committed in Mr. Thompson's case when the trial court and the Florida Supreme Court failed to adequately evaluate mitigation in light of Parker v. Dugger.

18. Mr. Thompson's trial was fraught with procedural and substantive errors, which cannot be harmless when viewed as a whole since the combination of errors deprived him of fundamentally fair trial.

ARGUMENT I

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. THOMPSON IN THE POSSESSION OF CERTAIN STATE AGENCIES WERE WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Thompson's Rule 3.850 motion and rehearing motion pled that the Office of the State Attorney for Broward County and the Florida Department of Law Enforcement (FDLE) both failed to comply with the Florida Public Records Act, sec. 119, Fla. Stat. (1989). A Chapter 119 letter was delivered to both agencies on May 6, 1991. In that letter CCR requested any and all files relating to Mr. Thompson and to co-defendants Robert Allan Davis

and Robert Marion Stephens. Over four months later, on September 13, 1991, a Friday afternoon six days before the date that counsel had agreed to file Mr. Thompson's 3.850 motion, CCR received six boxes of the State's files containing 11,000 documents. FDLE provided Mr. Thompson with 130 pages of documents even though at the time of trial the State had indicated the agency had over 500 pages.¹ These 130 pages were not provided until October 31, 1991.

Withheld from the State Attorney materials was an accordion folder of documents. No statement was provided with the released material indicating any exemption from the Public Records Act claimed by the State. This exempted file was shown to CCR investigator Jeffrey Walsh (but not the contents), and Assistant State Attorney Zacks said this was the material he personally considered exempt from 119.²

A 3.850 motion was filed on September 19, 1991 and denied three days later. Filed with the 3.850 motion was a request to amend once the State had complied with Chapter 119. In denying the motion to amend the circuit court stated:

¹See, State's Answer to Defendant's Demand for Discovery dated 2-20-85 (PC-R. 44).

²Since this 3.850 motion was dismissed without an evidentiary hearing this Court "must treat [the] allegations as true except to the extent that they are conclusively rebutted by the record." Harich v. State, 484 So. 2d 1239, 1241 (Fla. 1986); See also, Mills v. State, 559 So. 2d 578, 579 (Fla. 1990). The State did not contest and the record does not rebut that records were withheld by Mr. Zacks. Also the circuit court denied the 3.850 motion three days after it was filed, preventing the filing of any motion to compel Chapter 119 compliance.

4. According to the defendant's motion, the State Attorney's Office has given him access to six boxes of State Attorney files pursuant to a "public records" request filed earlier this year. These materials could have been sought at any point in time following the conclusion of the defendant's direct appeal.

5. The Court finds that this Special Request for Leave to Amend is not well founded and further that it is merely a delaying tactic employed by the defendant.

(PC-R. 37-38). The circuit court did not discuss the facts that CCR had requested the State Attorney files over four months before the 3.850 motion was to be filed and that the 3.850 motion was filed nine months before the 2-year time limitation of Rule 3.850. Contrary to the circuit court's ruling, Mr. Thompson had made diligent efforts to initiate post-conviction litigation and to compel Chapter 119 compliance.

The day after denying leave to amend, the circuit court denied the 3.850 motion (PC-R. 39). In a Motion for Rehearing, Mr. Thompson requested an in camera inspection and an evidentiary hearing concerning the chapter 119 claims. When the State finally submitted a response to the motion for rehearing it agreed an in camera hearing was appropriate (PC-R. 209). However, the State did not submit the withheld materials for such a review. Without specifically addressing the 119 issue, the circuit court denied rehearing.

This Court has consistently held that a capital defendant is entitled to Chapter 119 disclosure. "It is well settled that capital post conviction defendants are entitled to chapter 119 records disclosure." Muehleman v. State, 18 Fla. L. Weekly S447,

S447 (Fla. August 6, 1993), citing, Walton v. Dugger, 18 Fla. L. Weekly S309 (Fla. May 27, 1993); Kokal v. State, 562 So.2d 324 (Fla. 1990); Provenzano v. State, 561 So.2d 541 (Fla. 1990).

The Court has further held that if there is a dispute as to documents claimed to be exempt the circuit court must hold an "evidentiary hearing to determine whether the defendant was entitled to the records." Muehleman v. State, 18 Fla. L. Weekly at S447. Here, the circuit court should have conducted an in camera inspection of all documents claimed to be exempt by the State. Walton v. Dugger, 18 Fla. L. Weekly at S310; Kokal, 562 So. 2d at 327. The State agreed to an in camera inspection but never delivered the materials for the in camera inspection nor asserted what exemption was being invoked.

The Florida Department of Law Enforcement also withheld documents without making any claims of exemptions. It should be noted that this agency in conjunction with the FBI was in charge of this massive investigation. At trial, a State's discovery response indicated that the FDLE had generated over 500 pages of documents. However, the FDLE has only disclosed 130 pages of documents. FDLE has not complied fully under 119. No in camera inspection of the documents withheld by the FDLE was conducted, and no evidentiary hearing concerning the chapter 119 issues was held.

Mr. Thompson's rights to due process and equal protection, as well as his rights under Chapter 119, Florida Statutes, have been violated. This Court must remand this matter to the circuit

court so that an evidentiary hearing can be conducted. At the very least an in camera inspection of the documents withheld by Mr. Zacks and the FDLE must occur. Mr. Thompson should be allowed sixty days to amend his 3.850 motion after full disclosure by the State. Muehleman v. State.

ARGUMENT II

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

On September 19, 1992, Mr. Thompson filed his Rule 3.850 motion. The circuit court denied leave to amend on September 21, 1992, and on September 22, 1992, summarily denied the motion stating that it was devoid of facts. The failure of the State to fully provide the requested documents under Chapter 119 prevented Mr. Thompson from fully pleading his claims in the 3.850 motion. The order denying the 3.850 motion had no attachments.

Mr. Thompson timely filed a motion for rehearing on November 4, 1992 (PC-R. 41), presenting the circuit court with claims for relief which required an evidentiary hearing for proper resolution. The issues presented included a substantial claim under Brady v. Maryland, 373 U.S. 83 (1963), that the State had concealed exculpatory evidence concerning deals made with its key trial witness. See Argument III. The motion presented a claim of ineffective assistance of counsel at the guilt phase based on counsel's failure to investigate and present evidence impeaching the testimony of the State's key witness and on counsel's failure to investigate and present readily available evidence of an intoxication defense. See Argument IV. The motion also

presented a claim of ineffective assistance of counsel at the penalty phase, specifically pleading that trial counsel failed to investigate and prepare mitigation that would have shown Mr. Thompson's background of childhood abuse, family background of poverty and his years with an alcoholic father and that would have established statutory and nonstatutory mitigation. See Argument V. The motion also specifically pled that trial counsel failed to even begin to prepare for the penalty phase until after the guilty verdict, that counsel did not obtain the assistance of a mental health expert until after the guilty verdict, and that counsel failed to provide mental health experts with readily available background information concerning Mr. Thompson's long term drug and alcohol abuse. See Arguments V and VI.

These claims, and others, presented specifically pled allegations of fact, including matters that are not of record. Nothing in the files and records refuted the allegations. This case thus involved issues which must be resolved through an evidentiary hearing. The error in denying an evidentiary hearing is manifest in light of the fact that valid factual prima facie claims for relief were presented, claims which were not rebutted by the files and records, and which therefore required an evidentiary hearing for proper resolution.

As this Court's precedents and Rule 3.850 itself make clear, a Rule 3.850 movant is entitled to an evidentiary hearing unless the "motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief."

Fla. R. Crim. P. 3.850.³ The circuit court's order denying rehearing contains no discussion of this standard and does not explain how the attachments to the court's order refute Mr. Thompson's claims or even mention to which claims the various random attachments are relevant. See Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990) ("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").

This Court has not hesitated to remand Rule 3.850 cases for evidentiary resolution. See, e.g., Muhammad v. State, 603 So. 2d 488 (Fla. 1992); Rose v. State, 601 So. 2d 1181 (Fla. 1992); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992). These cases clearly indicate that Mr. Thompson was and is entitled to an evidentiary hearing, and the trial court's summary denial of the Rule 3.850 motion was erroneous.

³Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d. 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988).

ARGUMENT III

MR. THOMPSON WAS DEPRIVED OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE.

Bobby Davis was the State's case against Mr. Thompson. Bobby Davis was the only witness to claim he saw the homicide. Davis had given numerous statements to the FBI and Florida authorities and had worn a body mike in an attempt to obtain incriminating statements from Mr. Thompson shortly before Mr. Thompson's arrest on January 4, 1985. Since the State's case rested entirely upon Davis' testimony, the jury's assessment of Davis' credibility was essential to its determination of Mr. Thompson's guilt or innocence. However, because of the State's withholding of critical impeachment evidence, the jury was never provided the information necessary to assessing Davis' credibility.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

... a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceedings.

Strickland v. Washington, 466 U.S. 668, 685 (1984).

In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the

accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Mr. Thompson was denied a fair trial because the State misled the defense as to Bobby Davis' California criminal convictions and pending prosecutions, and as a result, defense counsel was never able to find out that the State was actively working to have those cases dismissed in exchange for testimony.

In order to secure Mr. Thompson's conviction and death sentence, the State withheld important evidence which would have shown that Bobby Davis was avoid testifying to criminal charges in California and that this testimony was therefore wholly unreliable. This evidence would have established Davis' motive to lie. This evidence has just come to light because the State withheld it from trial counsel. Trial counsel was misled by the State's nondisclosure. There can be no doubt that fundamental fairness was ignored by the State in its prosecution of Mr. Thompson.

On February 12, 1985, defense counsel made his initial request for discovery pursuant to Rule 3.220. Due to the size and complexity of the case, defense counsel continued filing both general and specific demands for discovery, including requests for any and all Brady material, up to and during trial in May,

1986.⁴ The State affirmatively stated in their answer of 2-20-85 that they knew of no criminal record of Davis other than what had been disclosed.

At trial, Davis testified that he moved to Illinois from California in late 1983 to make a better life for himself. He said he wanted to come clean for his family and he wanted to become a good citizen. In exchange for his testimony, the State of Florida gave him a deal -- he pled to three counts of second degree murder and got three concurrent ten year sentences in state court and immunity for any federal crimes for which he could have been prosecuted (R. 1014, 1157). Davis testified that at the time he spoke with FBI agent Greg Parrish, FDLE agent Mike Brown and Assistant State Attorney Kelly Hancock at their first meeting together on July 30, 1984, he was not aware that there were outstanding warrants for his arrest in California (R. 1030). This was false, and the State knew it. Later, during cross-examination, Davis admitted that when he lived in Cottonwood, California in 1982, the police searched his home and found an arsenal of weapons (R. 1100), but he did not know if the California charges were a part of his plea bargain. This was false, and the State knew it.

FBI Agent Parrish testified that at his initial meetings with Davis he was not aware of any outstanding charges against

⁴Defense counsel filed a total of six demands for discovery including a bill of particulars and numerous requests for Brady material specifically (Circuit Court file, motions filed 2-12-85, 5-30-86, 6-4-85, 7-8-85, 7-18-85, 11-27-85).

Davis and no promises were made to Davis in exchange for his testimony (R. 1640-41). On cross-examination Parrish said he had learned of the pending California charges from Mike Brown of FDLE (R. 1662). Brown testified that he began investigating the case on July 30, 1984 at that initial meeting with Parrish, Davis and Kelly Hancock (R. 1801). At that meeting, Brown read Parrish's reports and took a couple of hours for an interview (R. 1802). On July 31, he and Parrish drove Davis around Ft. Lauderdale to identify locations he had talked about in his statements (R. 1803). On redirect, Parrish explained that there was an outstanding warrant in California for Davis for removing a video machine fraudulently and keeping it (R. 1864). Parrish contacted the Redding, California police and told them Davis "was cooperating at this time in a federal investigation and that he [Parrish] would make him available at their pleasure." As a result, Redding police asked Parrish to question Davis regarding the activity, which he did and the case was subsequently dismissed.⁵ Because the State had not disclosed the true nature of the California warrants, defense counsel was forced to accept Parrish's statements because he had nothing to impeach him with. However, Parrish's testimony was false.

In fact, Parrish knew of the California charges much earlier than he led the court and jury to believe. According to a Redding Police Department report which has just now come to

⁵No statements or reports concerning the California warrants were ever provided to defense counsel.

light, Agent Parrish called Officer Brownfield on July 31, 1984, and "asked him to recall the warrant on Davis because he was being used as an informant." He asked that Officer Brownfield remove the arrest warrant from the NCIC computer warrant list. Parrish followed up the July 31, 1984, call with a February 4, 1985, letter advising Redding Police that Davis would be testifying in this case. Parrish sent information from Davis regarding narcotics activity in the Redding area. "As a result of the assistance Davis had given the FBI, they [Parrish] requested that the warrant be recalled and the case dismissed." None of these facts were disclosed. Rather, the State actively concealed the warrant so that defense counsel could not discover the status of the State's key witness. This evidence was critical to Davis' motive for testifying and directly bears on his credibility. The State's action violated due process and the Florida Rules of Criminal Procedure. At no time did the State disclose the obviously exculpatory evidence. At no time did the State stand up and correct the false testimony.

The State knew that Davis was charged with much more than "removing a video machine fraudulently" and actively concealed it from being discovered by defense counsel. In fact, Davis was charged with three counts of Forgery (felony), two counts of Grand Theft (felony) and one count of Petit Theft. These charges were pending at the time of Davis' initial contact on July 31, 1984, and were not dismissed until after Mr. Thompson's trial. Davis had remaining problems from cases pled to on April 8, 1983

for Exhibiting or Using a Deadly Weapon and on December 15, 1982 for Possession of Deadly Weapons charges (which included possession of a switchblade knife and possession of tear gas weapon). As to these cases, Davis failed to complete his probation. However, defense counsel could not discover this because all references to the California charges had been removed from the NCIC computer under the State's direction. Clearly, there was a secret part of Mr. Davis' plea agreement, and the State took deliberate steps to hide Davis' record.

This is exactly the situation in Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991), where the prosecutors failed to disclose the extensive criminal record of the State's chief witness and withheld from defense counsel the true nature of the witness' deals with the State. The court adopted the conclusions of the federal district court judge who said, "I can think of no matter more material than a complete record of previous convictions of the State's star witness, . . . to be used for demonstrating the unworthiness of belief of his testimony against Ouimette." 762 F.Supp. 468, 476 (1991).

Here, the State hid Davis' true criminal record. Agent Parrish pointed his finger at Mr. Brown saying, "I didn't know about the California charges until he told me." Mr. Brown testified that he didn't begin to investigate the case until July 30, 1984 (R. 1801). Yet Parrish called California and asked them to take the warrant off the NCIC computer on July 31, 1984, the day Parrish talked with Davis who later testified he did not know

of pending California charges. The trial testimony was false, and the defense was precluded from finding out that Mr. Davis was a California fugitive. There was absolutely no indication that Davis was getting assistance from the state on the California charges. Under Giglio v. United States, 405 U.S. 150 (1972), evidence of any understanding or agreement as to future prosecution would be relevant to Davis' credibility and the jury was entitled to know of it. In this case, any discussion or promise that FBI Agent Parrish made must be imputed to the rest of the State's team. See, Giglio at 153; Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). Defense counsel was denied the information necessary to adequately prepare a defense for Mr. Thompson in violation of due process.

The State's failure here went far beyond withholding material evidence. The State failed to correct the false testimony given by its star witness and Agent Parrish. The State had an obligation to correct the witness' false statements but failed to do so. Alcorta v. Texas, 355 U.S. 78 (1957). Further, under Napue v. Illinois, 360 U.S. 264, 270 (1959), it makes no difference whether the falsehood relates to credibility of a witness or guilt.

The record reflects that Mr. Hancock did not correct Agent Parrish when he omitted that he had asked the arrest warrant on Davis to be recalled and the case dismissed. Likewise, Mr. Hancock did not correct Mr. Davis when he testified that he did

not know what happened to the California cases. Clearly, the standards of Brady and Napue were flouted in Mr. Thompson's case.

When a prosecutor knowingly allows false and misleading evidence to go to the jury uncorrected, relief is appropriate if there is any reasonable likelihood that the evidence may have affected the jury's verdict. Bagley, 473 U.S. at 678; Giglio, 405 U.S. at 153. According to Bagley this standard is virtually identical to the Chapman v. California, 386 U.S. 18 (1967), harmless beyond a reasonable doubt standard. Bagley, 473 U.S. at 679 n9. False and misleading testimony from Davis and Parrish went to the jury, and prosecutor Hancock never corrected it. No adversarial testing occurred and confidence in the outcome is undermined.

Also, no adversarial testing could occur when the audio tapes, supposedly taken from the body mike worn by Davis during FBI arranged conversations with Mr. Thompson were introduced at trial. The transcripts made by the State were inaccurate and used to mislead the jury. Because of the State's refusal to comply fully with 119 requests, there may be more tapes taken during the investigation which have not been provided and deciphered. Mr. Thompson suggests that more Brady violations may be discovered when 119 has been fully honored. Confidence in the outcome is undermined as a result.

The prosecution's suppression of evidence favorable to the accused violated due process. The prosecutor must reveal to defense counsel any and all information that is helpful to the

defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. The actions of the prosecutor here rendered Mr. Thompson's trial fundamentally unfair under Brady and Giglio. Here, these rights, designed to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated:

A Brady violation occurs where: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. See United States v. Burroughs, 830 F.2d 1574, 1577-78 (11th Cir. 1987, cert. denied, 485 U.S. 969, 108 S.Ct. 1243, 99 L.Ed.2d 442 (1988)). Suppressed evidence is material when "there is a reasonable probability that . . . the result of the proceeding would have been different" had the evidence been available to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S.Ct. 989, 1001, 94 L.Ed.2d 40 (1987) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S.Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)) (plurality opinion of Blackmun, J.).

Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990) (en banc).

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence relevant to punishment, but not guilt/innocence). Under Bagley, exculpatory evidence and material evidence are one and the same.

Materiality must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., Agurs, 427 U.S. at 112; Chaney, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"). Thus, in Mr. Thompson's case the evidence discussed herein must be considered in conjunction with the evidence presented in the Brady claims raised in Mr. Thompson's direct appeal. See Thompson v. State, 553 So. 2d 153, 155-56 (Fla. 1989). The cumulative effect of all this evidence clearly establishes materiality.

The materiality of suppressed or undiscovered evidence takes on a special meaning where the evidence suppressed is relevant to the central theme of the case to wit: the credibility of the key State's witness -- the only "eyewitness" to the alleged homicide. Smith v. Wainwright, 799 F. 2d 1442 (11th Cir. 1986). This theme was critical to both the guilt/innocence and penalty phases of the trial.

Given the nature of the undisclosed evidence and its clear relevance to Mr. Thompson's trial, the suppressed evidence was obviously material. Reversal is clearly warranted. When the suppressed evidence is assessed on the basis of the cumulative

effect, the fact that it creates the reasonable probability that the outcome would have been different is beyond question. Agurs, 427 U.S. at 117. Moreover, it is not Mr. Thompson's burden to prove that the nondisclosure more likely than not changed the outcome. The question is whether confidence is undermined in the outcome.

There can be no question that in this case Brady was violated. Material exculpatory and mitigating evidence was not disclosed to defense counsel. To this date, Mr. Thompson does not know what other Brady violations there may be since FDLE and the State Attorney have not complied with timely 119 requests.

The prosecution's suppression of evidence favorable to the accused clearly violates due process under Brady, Agurs and Bagley.⁶ The judgment and sentence violated Mr. Thompson's rights pursuant to the fifth, sixth, eighth and fourteenth amendments of the federal constitution and the corresponding provisions of the constitution and laws of the State of Florida. An evidentiary hearing is required. The conviction and sentence of death must be vacated by this Court.

⁶To the extent that this evidence constitutes newly discovered evidence the Court should grant relief. New evidence claims are properly raised in a rule 3.850 motion. Richardson v. State, 546 So. 2d 1037 (Fla. 1989).

ARGUMENT IV

MR. THOMPSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. A FULL ADVERSARIAL TESTING DID NOT OCCUR.

Under Strickland v. Washington, 466 U.S. 668, 686 (1984), ineffectiveness of counsel is proven when the defendant can show that counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Under sixth amendment principles, it matters not whether counsel's failing is the result of his own deficient performance or the product of external forces which tie counsel's hands and constrain his performance. Where an adversarial testing does not occur and confidence is undermined in the outcome, relief is appropriate. Id., at 688. Had Mr. Thompson been given an evidentiary hearing, he could have proved the result of his trial was unreliable and the prejudice he has suffered because of counsel's deficient performance. He was entitled at a minimum, to an adequate evidentiary hearing on these claims. See Argument II.

The adversarial process in Mr. Thompson's trial broke down in several significant areas. First, although the State's case rested entirely on the testimony of Robert Davis a.k.a. Bobby Vegas, incriminating impeachment evidence regarding Davis and opinion testimony regarding the unreliability of Davis' account of the facts was not presented. Counsel failed to fully and adequately investigate the state's key witness. Ample

impeachment evidence was available but not presented because of the failure to investigate.⁷ Other witnesses were also available but not discovered. These witnesses could have testified favorably for Mr. Thompson. Counsel's inability to effectively investigate and litigate was prejudicially deficient performance under Strickland.

Second, there was no true adversarial testing of a voluntary intoxication defense though evidence of excessive drug and alcohol use was readily available. No medical expert was asked to assess, much less discuss, massive drug and alcohol effects on the mental process necessary to form specific intent. Counsel's performance in this regard was prejudicially deficient at trial. He failed to investigate, develop and present this defense.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990) (en banc). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[a]t the heart of effective representation is the independent duty to investigate and prepare"); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989).

⁷Mr. Thompson recognizes that counsel may have been misled by the State's failure to disclose. To the extent that occurred, government interference rendered counsel's performance deficient. See Argument III.

Here, counsel failed to investigate, to Mr. Thompson's substantial prejudice. An evidentiary hearing is required.

In this case, the conviction rests on the testimony of Robert Davis, a.k.a. Bobby Vegas. No direct physical evidence was presented and no body was found to substantiate the state's weak circumstantial case against Mr. Thompson. Davis' credibility was the only issue in the case, and thus effective impeachment was critical. In the context of this tenuous evidence, a failure to adequately investigate or effectively litigate key state's witnesses is fatal and prejudicial. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Defense counsel entered his appearance in February of 1985. He obtained the services of an investigative agency to investigate the case six (6) months later. However, the extent of the investigation was limited to "following up leads" which resulted in investigating sightings of James Savoy after he was "allegedly" killed.⁸ None of the investigation was targeted toward the background of or circumstances surrounding Davis, the critical State's witness.

Defense counsel knew of the testimony of Rose Davis, Gail Stephens, and Bobby Weasel through depositions conducted prior to trial. These individuals would have provided significant impeachment to discredit Davis' testimony.

⁸The investigations were performed between August 5, 1985 and July 17, 1986 and resulted in 13 pages of written responses to counsel.

Gail Stephens had testified in her deposition of incidents of Davis' bizarre behavior and violent reputation. Rose Davis had told in deposition of the abuse she had suffered from Davis. The inconsistencies between the Davis testimony and the depositions of Rose Davis and Gail Stephens were glaringly obvious. Yet, Rose Davis and Gail Stephens were not called to testify at trial for no tactical or strategic reason. Gail Stephens testified in deposition of incidents of Davis' bizarre behavior, violent reputation, drug use and an ulterior motive for testifying against Mr. Thompson (Deposition of Gail Stephens, pp. 88, 67, 72-73). Rose Davis testified in deposition concerning the abuse she suffered from Davis' his possession of weapons, his drug use even while working for the FBI, and his marijuana farming in California (Deposition of Rose Davis, pp. 119-120, 114, 37-39.) Her testimony directly impeached the testimony of Davis at trial in the areas of his motivation for gratuitously going to the FBI and his criminal conduct in California.

Although defense counsel attempted to impeach Davis at trial concerning Davis' bizarre behavior, no other impeachment testimony was offered. Neither Rose Davis nor Gail Stephens were called to testify even though inconsistencies in the evidence were obvious. This was deficient performance which prejudiced Mr. Thompson. See Smith v. Wainwright.

Counsel also failed to investigate and follow up the leads provided by Rose Davis and Gail Stephens. Had he conducted an

investigation into these leads counsel would have learned of Vegas' a.k.a. Davis' criminal record.⁹

Counsel was also constrained by the trial court in his presentation of evidence that Davis had a reputation for violent behavior and mental instability. Trial counsel attempted to cross-examine Davis as to his excessive drug use and violent behavior associated with his drug abuse (R. 1117-1120). The trial court refused to allow defense counsel to impeach the witness on these facts on the basis of relevance. Defense counsel argued that the events he was attempting to elicit had direct bearing on Davis' impaired ability to recall events and mental instability which is admissible under §90.608 Florida Evidence Code. The trial court limited counsel to a proffer of the testimony in this area (R. 1140). In the proffer Davis denied the incidents of violence and reputation for lying as related in Gail Stephens' deposition. The court's ruling denied Mr. Thompson an adversarial testing. Moreover counsel's failure to know of the pending California charges rendered him ineffective in arguing this point to the judge. Had he known of the California charges there was a reasonable chance of success. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

The trial court went further by restricting counsel's cross-examination of Bobby Stephens. When counsel attempted to present opinion testimony as to Davis' mental abilities while on drugs

⁹Of course, the State violated Brady by not disclosing this evidence. See Argument III.

and reputation for truthfulness, the court stopped him. Again, defense counsel was forced to proffer the evidence. This time, however, the judge interrupted the examination of Mr. Stephens and began his own inquiry of the witness during counsel's proffer of evidence (R. 2162-2167). Not surprisingly, the evidentiary value of the proffer evaporated, when the judge prosecuted the State's case and rehabilitated the witness adversely to Mr. Thompson's position. The court's action was improper. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). The court ruled the evidence inadmissible as irrelevant and not proper lay opinion (R. 2167). Trial counsel was constrained by the court from presenting any evidence on the key state witness' mental abilities during the time of the alleged murder and accepted the court's interference in the proffer without objecting. Counsel was therefore ineffective. Blanco v. Singletary; Smith v. Wainwright.

Defense counsel failed to raise or argue a voluntary intoxication defense by presenting evidence of Mr. Thompson's intoxication due to alcohol and drug abuse during the time of the alleged homicide. No true adversarial testing of the question could occur as guaranteed. Available witnesses who had seen Mr. Thompson drinking and doing cocaine were not questioned or called by defense counsel. Numerous witnesses were available and would have testified to Mr. Thompson's extensive drug and alcohol use and the debilitating effects the drugs and alcohol had on Mr. Thompson's thought processes. See Arguments V, VII. For

example, witnesses were available to testify that Mr. Thompson's life was completely controlled by his abuse of drugs. In the years preceding and at the time of the offense, Mr. Thompson was dependent on alcohol, marijuana, speed, LSD, quaaludes, and cocaine, a habit and dependency which continued to dramatically increase up to the time of the offense. Witnesses describe him as being out of control, always high on something. He would go on drug binges, not sleeping for several days, experiencing confusion and blackouts until he finally was completely incoherent, unable to speak and unable to control any of his senses. While on drugs, Mr. Thompson would participate in bizarre and uncharacteristic actions he was later unable to recall. Witnesses say that every action Mr. Thompson took was a direct result of his excessive drug abuse. The witnesses would have established a voluntary intoxication defense at the guilt phase of Mr. Thompson's trial.

Counsel's own efforts concerning an intoxication defense were prejudicially deficient. In Florida, the testimony of a mental health expert regarding how intoxication would have affected the defendant and his ability to form specific intent is admissible. Gurganus v. State, 451 So. 2d 817 (Fla. 1984). However, here, counsel did not even seek the appointment of an expert until after the guilty verdict.

No expert was asked to evaluate or testify regarding the effects of excessive cocaine and alcohol abuse on Mr. Thompson, an organically brain damaged individual. A defense premised upon

Mr. Thompson's inability to form specific intent was viable, but counsel failed to investigate despite substantial and available evidence that voluntary intoxication was present during the time of the alleged murder. Counsel's failure to present this defense or to have an expert evaluate the possibility of the defense during guilt phase deprived Mr. Thompson of his constitutional right to present a defense as guaranteed by the sixth and fourteenth amendments. See Washington v. Texas, 388 U.S. 14, 17 (1967); Chambers v. Mississippi, 410 U.S. 284, 285 (1973). An expert's testimony would have established that Mr. Thompson either could not or did not entertain the specific intent or state of mind essential to proof of premeditated or felony murder due to his state of intoxication. A fair adversarial testing did not occur.

Here, the jury and court were in the dark, and did not receive important, available evidence regarding the issue of intent. The jury and court did not know of Mr. Thompson's special mental conditions which rendered him more susceptible to the effects of alcohol and cocaine, nor did they learn that, given his condition, Mr. Thompson could not form intent or premeditate. The jury received no instruction that alcohol or drug intoxication could even be considered on the question of whether Mr. Thompson was capable of forming a specific intent.

Counsel failed to object to Mr. Hancock's presence in prosecuting the case due to a conflict of interest. Counsel knew that Assistant State Attorney Kelly Hancock had originally

withdrawn from prosecuting the case because his roommate, attorney Don Williams, had represented Robert Tippie on marijuana smuggling charges from the Amity Yacht Center bust in June of 1981. Mr. Hancock gave Robert Tippie full immunity from prosecution in this case. Mr. Hancock properly withdrew from this case as having a conflict of interest, and Mr. Carney took over prosecution in the case. In December 1985, Mr. Carney was elected as circuit Judge for Broward County, relieving him of his duties at the State Attorney's Office. Mr. Hancock then took the case back, apparently hoping that no one would remember why he withdrew initially. The conflict remained. Mr. Hancock gave full immunity to Robert Tippie in this case after Mr. Williams, his roommate, had represented Tippie and was supposedly paid by Mr. Thompson. Defense counsel was ineffective in failing to object to Mr. Hancock's participation in the case, despite knowing the conflict was present. Prejudice to Mr. Thompson is presumed under Strickland v. Washington, 466 U.S. at 693.

Mr. Thompson was entitled an evidentiary hearing to prove the facts set forth in this argument. See Argument II. The order of the circuit court should be reversed and this matter remanded for an evidentiary hearing.

ARGUMENT V

MR. THOMPSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S PERFORMANCE WAS DEFICIENT AND, AS A RESULT, THE DEATH SENTENCE IS UNRELIABLE.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). The state and federal courts have expressly and repeatedly held that trial counsel in a capital sentencing proceeding has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986).

Mr. Thompson's defense counsel were not prepared for penalty phase. As the trial court explained to the jury, immediately after the guilt verdict on June 5, 1986, the defense requested a two week delay so that it could "garner up" witnesses (R. 2596).

On June 11, 1986, six (6) days after guilt phase had ended, defense counsel for the first and only time sought an order from the trial court permitting two mental health experts (a psychiatrist and a psychologist) access to Mr. Thompson in order to evaluate his mental health. The next day, on June 12, Dr. Arthur Stillman, the psychiatrist, visited Mr. Thompson and conducted a mental status examination (R. 2708-21). Based upon his examination of Mr. Thompson, Dr. Stillman prepared a report

and testified at Mr. Thompson's penalty phase hearing. Although Dr. Stillman's report stated that psychological testing was necessary, the record establishes that Mr. Thompson was never tested and evaluated by the psychologist. Counsel was ineffective in perfecting Mr. Thompson's rights under Ake v. Oklahoma, 470 U.S. 68 (1985).

At the penalty phase, Dr. Stillman testified that Mr. Thompson's ability to appreciate the criminality of his actions was substantially impaired (R. 2715). Dr. Stillman offered evidence that Mr. Thompson suffered organic brain damage as the result of extensive substance abuse (alcohol and drugs) for the 5 to 10 years prior to his arrest (R. 2708; 2713). Dr. Stillman found that Mr. Thompson had severe memory problems, an inability of concentrate, limited insight and judgment, and difficulty handling frustration (R. 2709-12). Dr. Stillman also found Mr. Thompson to be paranoid, and the victim of extreme stress which led to two serious heart reactions (R. 2715-16). He found a second statutory mitigating factor in that Mr. Thompson was acting under extreme mental and emotional distress at the time of the offense (R. 2717).

Without benefit of any supporting evidence on the record, the trial court totally discarded Dr. Stillman's testimony (R. 3341-47). This Court also rejected the evidence of statutory mitigation proffered by Dr. Stillman. Thompson v. State, 553 So. 2d 153, 157 (1989). However, evidence was readily available to substantiate and corroborate Dr. Stillman's conclusions. Defense

counsel failed to investigate the ample evidence available. As a result they failed to present to the judge and jury a true picture of Mr. Thompson's family background and longstanding and substantial substance abuse, and failed to establish mitigating factors.

Mr. Thompson was sentenced to die by a judge who never knew the true extent of the appalling conditions under which he grew up nor that he suffered a lifetime of abuse, abandonment, poverty and drug addiction. His father was an alcoholic who repeatedly beat his children and wife while grossly neglecting them emotionally and physically. Bessie Elizabeth Thompson gave birth to her son, Raymond Michael, the first of five children, in the tiny Illinois town of Thayer, on February 16, 1930. Raymond's chances in life were immediately impaired due to the negligent and often violent behavior of his father. Charles Thompson was a chronic alcoholic who, when at home, displayed an uncontrollable temper. He frequently pounded Raymond, his siblings, and wife to the point of inflicting severe bodily harm.

Charles Thompson had been and raised, at the turn of the century, as part of a family involved with producing and selling bootleg whiskey in the back hills of Kentucky. He stopped attending school in the fourth grade and went to work in the family business. Charles was the product of a violent, desperate, and uncertain social setting. This left him without even the most basic skills needed to properly care for himself, let alone a wife, Bessie, and a growing family. Bessie herself

was raised without the benefit of a complete formal education or the skills needed to care for the everyday, and often overwhelming, struggles associated with raising children. Nevertheless, within a year of their wedding Charles and Bessie were faced with the responsibilities of raising their first of three sons, Raymond Thompson.

The 1930's was a most troubling and poverty-stricken time. Unfortunately, the first ten years of Raymond's life were encompassed by the hardships of that era. Charles was a man without any marketable skills and thus lacked the means which would have enabled him to provide even the most basic necessities for his family. Consequently, the Thompsons lived in a two-room shack without indoor plumbing or heat to provide warmth during the long and harsh midwestern winters.

Throughout the duration of the great depression, Charles was unable to keep steady work. He took odd jobs, when available, on local farms, shucking corn or the like. His income fell far short of what was needed to maintain an expanding household. Eventually, Charles was able to find a job with the federally-funded Workers Program Administration (WPA); he earned twenty-five cents an hour digging ditches. He was forced to work long hours and would often insist that Raymond accompany him and keep the shovels clean for all of the men participating in the program. In addition, the Thompson family relied on the distribution of rice, beans, and potatoes to avoid starvation. Raymond's brothers remember times when the family went months on

end eating nothing but beans and rice, never being quite able to overcome their hunger. The family was lucky to eat even scraps of meat more than twice a year.

Unfortunately, the pittance for an income and slight food rations were unable to improve the life of the Thompson family. They continued to live in the two room shack. The entire family slept in one bed with warmed bricks to prevent them from freezing to death during the winter months.

Charles became a selfish and mean man. He would not spend any of his small income on the family. Alcohol became more important than food, blankets, or clothing. Raymond and his younger brothers were left with no choice but to miss school and sell rags or haul junk (for pennies at a time) so they could contribute to the family fund. Bessie also tried to assist by baking and working as a maid for others more fortunate. However, money was tight everywhere and their efforts often brought little if any relief. Simply put, life was hell.

The results of the economic collapse and his upbringing as a Kentucky moonshiner distorted Charles Thompson's ability to overcome life's daily struggles. His alcohol consumption accelerated at an alarming rate and he became severely abusive. Charles was spending all of his time in local bars in endless nights of heavy drinking. Any sense of responsibility Charles was able to develop over the years was cast aside and he continuously fell into a drunken rage and viciously beat his wife and children.

Raymond's brothers clearly remember the never-ending and unprovoked beatings that were administered by Charles. He would often start by grabbing a razor strap or a belt and pummel Bessie. She would be reduced to a helpless woman crouched in a corner or in a closet. Charles would then turn on his children. Since Raymond was the oldest, he received the most cruel and damaging effects of Charles' uncontrollable blind rage. It was not unusual for Charles to punch and pound on Raymond until he was bleeding and begging for mercy. If Raymond attempted to protect his mother from Charles' madness, his own beatings became even more torturous.

The life of poverty, alcoholism, perverse violence, and anguish continued without interruption until 1943 when the Thompson family sold their shack, and moved to Elgin, Illinois. Charles joined up with two of his brothers who were operating a series of gas stations. Although his income improved slightly, Charles' selfish and neglectful treatment of his family worsened. He refused to provide his wife or children with clothing, adequate housing, or even a slight amount of love, emotional support, or guidance. The Thompson family was forced to live in rat-and-bug-infested housing. At one point Charles even stooped so low as to insist his family occupy a house that had recently been gutted by fire and was without a roof. The family was then burdened with flooding, invasion of insects, unsanitary conditions, and cold weather. During the winter months it was

common for Raymond to wake and find himself under a thick blanket of snow.

Charles' drinking continued to escalate and as a result his understanding of the role of husband and father became even more distorted. The brutal and alcohol-induced savagery toward Bessie and Raymond somehow grew even worse. Nearly every night Raymond and his family would be waiting for Charles to come home in a drunken stupor and stalk the house as if he were a time bomb waiting to explode. This situation played heavily on Raymond's psychological state.

Charles continued spending most of his time away from the household. He was either at the gas station or occupying a favorite bar stool, drinking himself into oblivion. Due to the extended absence of her husband, Bessie was forced into the crippling situation of attempting to raise the children without the much needed assistance of a father figure. Bessie struggled to provide the best home possible for her children, but Charles' absolute refusal to acknowledge his family's needs prevented her from succeeding. In addition to Charles' neglect, his demented and abusive treatment of Bessie riddled her with terror and left her unbalanced for fear that her husband might appear at any time and explode into a violent storm of sickening brutality.

Raymond bore the responsibility of raising enough money for clothing to ensure that he and his family would have food to eat. This left him little time for school, and again he was deprived access to an environment which could have provided him positive

role models. The economy had not improved much and he was only able to find low paying and unsteady jobs. This left Raymond with no choice but to assist his father at the gas station. He attempted to make the most of this situation but his father consistently failed to show any outward signs of love. As a result, there was no healthy or joyous father-son relationship. There was never a time when Charles spent a birthday or even a single holiday with Raymond. This left Raymond empty and hurting. However, despite all the pain and unexplainable punishment over the years, Raymond continued to seek out some sign of affection, approval, or love from his father.

Raymond received a short-lived reprieve from his father's hell when he served in the Army. After three years in Germany, he returned to his home town hoping that his father had overcome his alcoholism and associated craziness. He wanted more than anything in the world for his father to change, show him love, and stop destroying the family. Raymond was also eager to return to Illinois so that he could somehow improve his mother's life. Raymond was always deeply saddened by the horrible life his mother was forced to live. He loved her very much and was determined to find a way to offer her the many good things in life denied her due to the effects of poverty, violent abuse, and alcoholism.

Raymond eventually grew weary of his father's relentless abuse. In a desperate attempt to escape the emotional nightmare Raymond headed to Florida. However, Raymond's poverty riddled

childhood and the haunting memories of his father's beatings accompanied by a total lack of positive role models left him ill-equipped to handle the everyday pressures and strains of normal adulthood. He was saddled with a deeply rooted love-hate relationship with his father. Raymond continued to long for his father's acceptance, love, and friendship. Raymond knew that his father had raised him in a manner which left a tremendous void in his life and desperately hoped that one day he could become successful and erase all the things which destroyed his father. Furthermore, Raymond felt compelled to provide a better life for his mother, who his father left behind in a state of poverty. Unfortunately, upon his arrival in Ft. Lauderdale, Raymond fell prey to the drug world. Raymond's history left him susceptible to the escapism of drugs. He quickly developed a substance abuse problem involving any and all drugs. In addition, Raymond, like his father, became a heavy user of alcohol and began developing characteristics similar to that of an alcoholic. Raymond found himself not only dependent on alcohol but also marijuana, speed, LSD, and cocaine. This habit and dependency continued and dramatically increased up until the time of his arrest.

By 1970, Raymond's entire life was being completely controlled by his addiction to several drugs. He was using massive amounts of drugs, especially cocaine and quaaludes. However, if cocaine was unavailable Raymond was quick to do any type of drug he could get his hands on. He is described as a

person who was out of control. In fact, many say there was never a time when he was not getting high on something.

In the mid-70's, Raymond's addiction focused upon cocaine and quaaludes. He was ingesting a couple of grams a day. By 1979 his use increased to an entire ounce every two to three days. Raymond's life was being completely controlled by his drug addiction. He was going two, three, even four days or longer without sleep. He would eventually start acting crazy, talking to himself, forget who people were in the middle of a conversation, become confused, blackout, and experience changes in skin color. Raymond's face would turn grey and drawn and then suddenly there would be a flushing of the cheeks. His jaw and face would twitch wildly and his skin would become blotched. Toward the end of a frequent several day binge, Raymond would become completely incoherent, unable to speak and lose control of all of his senses.

Raymond's addiction took on a frightening pattern. He would binge for several days, virtually reaching death. His friends would be left with no choice but to insist that he take numerous quaaludes. This was to ensure that he would pass out, stop his cocaine use, and sleep. After a few days of sleep he would stumble right back and break out another ounce of cocaine. This damaging and uncontrollable cycle continued for several years. Without a doubt, cocaine was controlling and destroying every aspect of Raymond's life. Immediately following his binges, Raymond was often told of bizarre and uncharacteristic stunts or

actions he carried out or participated in while out of his mind on cocaine. He was never able to recall the events in question. Raymond's behavior and moods were constantly changing and growing unpredictable. When he was using only a few grams a day, he was a socialite who loved to attend crowded bars and parties. However, as his use picked up and eventually reached a half-ounce per day, he became extremely paranoid and uncomfortable around people. Raymond's addiction continued to grow and he continued to deteriorate until there was not an action, reaction, or decision made by Raymond that was not directly the result of his excessive drug abuse and addiction to cocaine.

This substantial and compelling mitigating evidence was easily available and accessible to trial counsel, but was not investigated and prepared for presentation to either the jury or the judge. As a result, Mr. Thompson was sentenced to death by a judge which heard little of the available mitigation which was essential to an individualized capital sentencing determination. Had this evidence been presented, an override of the life sentence would have been precluded. Eutzy v. Dugger, 746 F.Supp. 1492 (N.D. Fla. 1989).

At the penalty phase hearing, defense counsel also failed to obtain and present psychological testing, although the defense psychiatrist has strongly urged that such testing be done, and counsel had even obtained a court order to permit a psychologist to so test Mr. Thompson. This failure to pursue and develop corroborating mitigating evidence was deficient performance.

Defense counsel, of course, could have presented this substantial and compelling corroborating evidence at any time from the date of the court's access order (June 11) through the date of the sentencing hearing (August 21, 1986). They did not do so, because they failed to have a psychologist test Mr. Thompson. In fact, although the trial court assumed that defense counsel would present further testimonial evidence at the sentencing hearing, counsel did not do so:

THE COURT: I would think defense ought to go first if they wish to present any people to speak on behalf of Mr. Thompson or Mr. Thompson wishes to speak on his own behalf.

MR. BLACK: Your Honor, we have nothing additional to what we presented at the penalty phase.

(R. 2930).

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

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

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

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

Had counsel properly investigated and prepared for sentencing, statutory and nonstatutory mental health mitigating factors would have been established. As is plain from the

evidence summarized above, Dr. Stillman's conclusions regarding statutory mitigation factors and organic brain damage caused by drug and alcohol abuse were readily supportable. The evidence summarized above has been provided to a qualified neuropsychologist who conducted the testing recommended by Dr. Stillman at the time of trial. The background information and testing establishes that Mr. Thompson suffers from organic brain syndrome and amnesic disorder as a result of long-term severe substance abuse. The background and testing fully substantiate Dr. Stillman's conclusion that two statutory mitigating factors exist and establish numerous nonstatutory mitigating factors such as abusive childhood and history of substance abuse. Trial counsel's failure to investigate and develop this evidence was clearly prejudicial for the evidence establishes more than a reasonable basis for the jury's life recommendation.

Finally, defense counsel were ineffective for failing to present critical evidence showing that the aggravating factor of heinous, atrocious and cruel was improperly applied to Mr. Thompson. The sentencing order contains statements supporting this aggravating factor which speculate on the emotional experience of the victim (R. 3342-43). In fact, defense counsel had in their possession a sworn statement by the state's key witness, Bobby Davis, that the victim was not in "fear and emotional strain," as the court concluded. Defense counsel used the sworn statement to attempt to impeach Bobby Davis on another matter during guilt/innocence phase (R. 1077). If defense

counsel had properly reviewed the statement, he would presumably have understood the importance of Davis' statements about the victim's state of mind. In fact, documents contained within the files of the State Attorney show that the state understood the importance of Davis' statements. Counsel's failure may have been caused by state misconduct; nevertheless the deficient performance prejudiced Mr. Thompson and warrants relief.¹⁰

¹⁰Counsel's performance was deficient in other respects as well. On June 19, 1986, the day prior to the penalty phase hearing, and prior to hearing the evidence in mitigation, the trial court held a charge conference. Defense counsel participated in this conference, despite its obvious untimeliness, and failed to object to the trial court's interference in the presentation of mitigating circumstances to the jury. Counsel was ineffective. See Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

Counsel, during the charge conference, admitted that he had not investigated Mr. Thompson's 1950 rape conviction, and would have to rely upon the prosecutor in order to show whether the conviction was an appropriate basis for establishing an aggravating circumstance (R. 2604-05, 2617). Counsel's performance was deficient. See Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

During the penalty phase hearing of June 20, 1986, counsel further acquiesced to inappropriate trial court interference by failing to properly challenge the court's repeated improper instructions on the role of the jury in the penalty phase and on the need for the defendant to prove that mitigating circumstances outweighed aggravating circumstances.

The sentencing order contains statements relating to convictions that occurred subsequent to Mr. Thompson's trial (R. 2942, 2946). The only reason that the trial court was able to include this information within his sentencing decision is that defense counsel allowed Mr. Thompson to be sentenced after his federal trial and sentencing (R. 3897-98).

Defense counsel further abandoned their duties to Mr. Thompson at the sentencing hearing by allowing the trial court to consider improper evidence in support of the death sentence. The court based his override decision in part upon the letter of the victim's girlfriend, in which she urged that the defendant be executed. The opinion of the victim's family [or friends] is not proper aggravation. See Welty v. State, 402 So. 2d 1159 (Fla. 1981).

Counsel's minimal preparation was prejudicially deficient performance. Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). Counsel's failures encouraged the judge to override the jury's life recommendation.

[H]ad trial counsel prepared and presented a reasonable case in mitigation, had his focused properly on the individualized characteristics of petitioner, the trial judge could not have concluded that the jury's recommendation of life imprisonment lacked support.

Eutzy v. Dugger, 746 F.Supp. 1492, 1500 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. Aug. 10, 1990).

All of these actions on the part of defense counsel clearly establish prejudicially ineffective assistance. An evidentiary hearing is required. Mr. Thompson's sentence of death must be vacated.

ARGUMENT VI

DUE TO DEFENSE COUNSEL'S INEFFECTIVENESS AND THE SENTENCING COURT'S MISUNDERSTANDING OF THE LAW, MR. THOMPSON WAS DENIED HIS RIGHTS TO EFFECTIVE AND ADEQUATE MENTAL HEALTH ASSISTANCE UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

A criminal defendant is entitled to expert psychiatric assistance when the State makes his mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68. 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).

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

Mr. Thompson was deprived of his constitutional right to adequate mental health assistance. Defense counsel did not request the assistance of mental health experts until after Mr. Thompson had been convicted. Failure to prepare a case in mitigation until after a guilty verdict constitutes ineffective assistance of counsel. See Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991).

The court entered orders on June 11, 1986, (six (6) days after Mr. Thompson's convictions and nine (9) days before the penalty phase hearing) for mental health evaluations by both Arthur Stillman, M.D., and Leonard Haber, Ph.D. Dr. Stillman promptly interviewed Mr. Thompson on June 12, 1986. Although Dr. Stillman's report recommended psychological testing, the record shows that Mr. Thompson was never seen or tested by the

psychologist, Dr. Haber, despite the court's order and Dr. Stillman's recommendation. Counsel's failure to get this testing done was deficient performance.

Dr. Stillman testified at the penalty phase hearing of June 20, 1986, that his mental status evaluation of Mr. Thompson revealed significant statutory and non-statutory mitigation. He further testified that he was not provided with access to other family members or to investigation records, both of which are recommended in the profession. See 1 Comprehensive Textbook of Psychiatry/V 461 (H. Kaplan & B. Saddock 5th ed. 1989). Counsel's failure to provide this information was deficient performance.

In his sentencing order of August 21, 1986, the trial court challenged the plausibility of Dr. Stillman's findings (R. 3341-46). The trial court rejected Dr. Stillman's testimony because of the failure to corroborate Dr. Stillman's conclusions through testing and background information. Counsel's failure to provide adequate time and background information to the expert prejudiced Mr. Thompson.

Postconviction counsel provided a mental health expert what trial counsel failed to provide -- adequate background information, sufficient time and access to Mr. Thompson, and proper expert psychological testing. The test results fully substantiate Dr. Stillman's findings of profound memory impairment, increased impulsivity and significant irritability -- all pointing to cerebral damage or insult, most probably the

result of Mr. Thompson's vast substance abuse. The expert who conducted this testing and reviewed the background information has concluded that a wealth of statutory and nonstatutory mitigation, including organic brain syndrome and amnesic disorder, could have been documented and convincingly established had the proper time been given to the task before Mr. Thompson's trial. See Argument V. Had counsel provided the expert with sufficient time, the mitigation could not have been rejected by the sentencing judge and the life recommendation could not have been overruled.

The circuit court did not allow Mr. Thompson to present evidence to support this claim. See Argument II. This Court should reverse the circuit court and grant relief on this matter.

ARGUMENT VII

**NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT
MR. THOMPSON'S CAPITAL CONVICTION AND
SENTENCE ARE CONSTITUTIONALLY UNRELIABLE AND
IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND
FOURTEENTH AMENDMENTS.**

Newly discovered evidence clearly establishes that Mr. Thompson was wrongly sentenced to death. The evidence presented herein demonstrates that the result of Mr. Thompson's trial is unreliable. Richardson v. State, 546 So. 2d 1037 (Fla. 1989), and Rule 3.850 provide the authority to "produce just results." The United States Supreme Court has repeatedly held that because of the "qualitative difference" between death and imprisonment, "there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in

a specific case." Woodson v. North Carolina, 428 U.S. 280, 305 (1976); Beck v. Alabama, 447 U.S. 625 (1980); Lockett v. Ohio, 438 U.S. 586, 604 (1978); Gardner v. Florida, 430 U.S. 349, 357-58 (1977); Gregg v. Georgia, 428 U.S. 153, 187 (1976); Reid v. Covert, 354 U.S. 1, 45-56 (1957) (Frankfurter, J., concurring); Id. at 77 (Harlan, J. concurring). This requirement of enhanced reliability has been extended to all aspects of the proceedings leading to a death sentence. Accordingly, a person who is threatened with or has received a capital sentence has been recognized to be entitled to every safeguard the law has to offer, Gregg v. Georgia, 428 U.S. 153, 187 (1976), including full and fair post-conviction proceedings. See, e.g., Shaw v. Martin, 613 F.2d 487, 491 (4th Cir. 1980); Evans v. Bennet, 440 U.S. 1301, 1303 (1979) (Rehnquist, Circuit Justice).

Scott Errico was Mr. Thompson's codefendant. Mr. Errico was in England, awaiting extradition when Mr. Thompson was tried, convicted, and sentenced. In his initial contact with post-conviction counsel, Mr. Errico provided counsel with information that clearly supports trial testimony on statutory and non-statutory mitigation.

Mr. Errico has provided counsel with information that Mr. Thompson's substance abuse was "massive," that Mr. Thompson's drug binges were "the rule, not the exception," that Mr. Thompson was a "legend" of drug abuse. Mr. Errico has said that he was often called to rescue Mr. Thompson from the effects of several days of bingeing; he has said that it would be necessary to feed

and clothe and bathe Mr. Thompson because he was not able to perform these tasks for himself. Mr. Errico has stated that this abuse was constant and totally debilitating.

At the penalty phase, Arthur Stillman, M.D., testified established that Mr. Thompson's ability to appreciate the criminality of his actions was substantially impaired (R. 2715). Dr. Stillman offered evidence that Mr. Thompson suffered organic brain damage as the result of extensive substance abuse (alcohol and drugs) for the 5 to 10 years prior to his arrest (R. 2708; 2713). Dr. Stillman found that Mr. Thompson had severe memory problems, an inability to concentrate, limited insight and judgment, and difficulty handling frustration (R. 2709-12). Dr. Stillman also found Mr. Thompson to be paranoid, and the victim of extreme stress which led to two serious heart reactions (R. 2715-16). He found a second statutory mitigating factor in that Mr. Thompson was acting under extreme mental and emotional distress in March 1982 (R. 2717).

In Mr. Thompson's case, the trial court, without benefit of any supporting evidence on the record, totally discarded Dr. Stillman's testimony (R. 3341-47). This Court also rejected the evidence of statutory mitigation proffered by Dr. Stillman. Thompson v. State, 553 So. 2d 153, 157 (1989).

Mr. Errico's evidence involves critically important facts which were unavailable at the time of trial. Mr. Errico totally corroborates Dr. Stillman's conclusion and establishes that a life sentence was warranted. Under the trial court's sentencing

order, and this Court's affirmance, this evidence unquestionably undermines confidence in the reliability of Mr. Thompson's conviction and sentence of death.

When the newly discovered evidence is viewed in conjunction with the evidence never presented at trial because of Brady violations, and because of counsel's deficient performance, there can be no question that Mr. Thompson's sentence cannot withstand the requirements of the eighth and fourteenth amendments. The evidence establishes that Mr. Thompson probably would have received a life sentence. Jones v. State, 591 So. 2d 911 (Fla. 1991). An evidentiary hearing and Rule 3.850 relief are proper.

ARGUMENT VIII

MR. THOMPSON WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS WHEN THE COURT LIMITED CROSS-EXAMINATION OF THE STATE'S WITNESSES.

The defendant's right to present a defense and to confront and cross-examine the witnesses against him are fundamental safeguards "essential to a fair trial in a criminal prosecution." Pointer v. Texas, 380 U.S. 400, 404 (1965). Mr. Thompson was denied his right to present a defense and to confront and cross-examine the witnesses against him when trial counsel was precluded from questioning Bobby Davis (Vegas) about his history of mental instability and violent behavior. Mr. Davis had a documented history of violence and mental problems which reflect directly on his ability to recall events and on his motive to exonerate himself for responsibility for his acts.

Bobby Davis, was called as the key witness for the State (R. 881), to recount the events surrounding the alleged homicide of James Savoy. He alleged that Mr. Thompson shot James Savoy in retaliation for Savoy's theft of \$600,000 from Mr. Thompson (R. 960).

It was critical to the defense to fully explore this witness' credibility and to effectively impeach his testimony before the jury. However, effective cross-examination on relevant issues was never permitted. The court ruled that inquiry into Davis' mental instability and violent behavior was irrelevant, and would only allow defense counsel to proffer the testimony outside hearing of the jury (R. 1120). The court ignored § 90.608(1)(d), Fla. Stat., which allows such testimony to explain the mental capacity of a witness at or near the time of a crime and § 90.701.1, Fla. Stat., which allows opinion testimony by a lay witness provided the testimony is based upon personal knowledge or observation.

In addition, Bobby Stephens, a.k.a. Bobby Weasel, was called as a State's witness to attempt to corroborate the testimony of Davis as a co-defendant (R. 2031). Having known Davis for years, Stephens was asked on cross-examination to testify to his opinion of Davis' mental instability and violent behavior during the time of the alleged incident (R. 2158). Again, defense counsel was limited to a proffer of such testimony. Therefore, effective cross-examination on this relevant topic was not allowed.

The prejudice to Mr. Thompson resulting from limitation of cross-examination and confrontation rights is manifest. Bobby Davis accused the defendant of committing murder in the first degree. No body was found and no physical evidence was found to corroborate Davis' testimony. By precluding the defense from exploring his reputation for mental instability and violence, his account of the crime was left unchallenged. Cross-examination of Davis and Stephens would have disclosed that Bobby Davis' credibility was sorely lacking. During the time of the incident he was a violent and dangerous man whose drug use so impaired his ability to reason that he pulled complete strangers out of their cars through the window and threatened them at gunpoint; he also hallucinated so severely that he would shoot at imaginary people, and generally acted crazy (R. 2161).

Had the defense been permitted to examine this witness about these incidents, the defense could have fully contradicted Davis' testimony that he accurately remembered the events surrounding the homicide. In actuality, it was Davis who had the volatile temperament, and it was a distinct possibility, according to Bobby Stephens' testimony, that Davis killed Savoy. The jury was deprived of the evidence necessary to properly evaluate Davis' or Stephens' testimony. Counsel should have been able to ask about these relevant incidents and Stephens' opinion as to Davis' mental stability to impeach the reliability of accuracy of Davis' recollection of events.

Here, Mr. Thompson's cross-examination of Davis and Stephens was limited as in Davis v. Alaska, 415 U.S. 308, 317 (1972). The limitation of cross-examination was similarly based on the misinterpretation and misapplication of a state rule of evidence. The interpretation of this evidentiary rule prevented the defense from challenging Davis' account of the offense. Counsel could not attack Davis' motives for lying about the homicide or recalling accurately what had occurred between Davis and the victim which led to his death. The court's rulings rendered counsel ineffective. See Argument IV.

The limitation of cross-examination of Davis and Stephens denied Mr. Thompson the opportunity of presenting a complete defense. State rules of procedure do not override a defendant's right to elicit evidence in his defense. Olden v. Kentucky, 109 S. Ct. 480 (1989). The error can by no means be deemed harmless beyond a reasonable doubt. Satterwhite v. Texas, 486 U.S. 249 (1988); Chapman v. California, 386 U.S. 18 (1967).

The preclusion of this evidence resulted in the arbitrary imposition of a death sentence in violation of Mr. Thompson's eighth amendment rights. The circuit court should have granted a hearing to develop the testimony that was improperly excluded at trial. The conviction and sentence should be vacated.

ARGUMENT IX

MR. THOMPSON WAS DENIED HIS RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, ART. V., SECTION 3(B)(1) OF THE FLORIDA CONSTITUTION, FLORIDA STATUTES SECTION 921.141 (1985), AND FLA. R. APP. P. 9.140(b)(4), DUE TO OMISSIONS IN THE RECORD. THE RECORD WAS INCOMPLETE AND MR. THOMPSON WAS DENIED A FULL AND FAIR APPELLATE PROCESS.

Florida law insists upon review by the Supreme Court "of the entire record." Fla. Stat. § 921.141(4) (1985) (emphasis added). In Florida capital cases, the chief circuit judge is required "to monitor the preparation of the complete record for timely filing in the Supreme Court." Fla. R. App. P. 9.140(b)(4) (emphasis added).¹¹

Critical motions, orders and exhibits were omitted from the record. Several of these documents were material to Mr. Thompson's postconviction motion. These include: 1) trial court orders accessing mental health experts; 2) the State's answer to Defendant's Demand for Discovery, which contains statements supporting Mr. Thompson's claims alleging violations of Brady v. Maryland, 373 U.S. 83 (1963) (See Claim III), and of Chapter 119 (See Claim I). Additionally, the warrants and supporting affidavits are not of record; witness statements attached to

¹¹Full appellate review of proceedings resulting in a sentence of death is required in order to assure that the punishment accorded to the capital defendant comports with the eighth amendment. See Proffit v. Florida; Johnson v. State, 442 So. 2d 193 (Fla. 1983) (Shaw, J. dissenting); Ferguson v. State, 417 So. 2d 639 (Fla. 1982); Swann v. State, 322 So. 2d 485 (1975); Art. V, § 3(b)(1) Fla. Const.; § 921.141(4) Fla. Stat. (1985).

discovery disclosures are not of record; defense counsel's numerous motions for continuance are not of record; exhibits to Defendant's Sentencing Memorandum are not of record.

Appellate counsel could not be effective without a complete record. Moreover, this Court's review could not be constitutionally complete. See Parker v. Dugger, 111 S. Ct. 731 (1991).

Mr. Thompson did not waive his right to a complete record on appeal, and is entitled to have this court remand this case to the trial court to prepare the entire record on appeal and to correct the appellate record.

The trial judge was required to certify the record on appeal in capital cases. §921.141(4) Fla. Stat. (1985). This was not done. The record on appeal shows that, after several extensions of time (R. 3374, 3377-79), the circuit court clerk (not the trial judge) certified the record to the Florida Supreme Court on August 14, 1987.

When errors or omissions appear, as here, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). Mr. Thompson asserts that his former counsel rendered ineffective assistance in failing to assure that a proper record was provided to the court. An evidentiary hearing and relief are appropriate.

ARGUMENT X

THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND THE INTRODUCTION OF NON-STATUTORY AGGRAVATING FACTORS RENDERED MR. THOMPSON'S CONVICTION AND DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The prosecutor distorted Mr. Thompson's trial and sentencing with frequent improper commentary, thus destroying any chance of a fair trial. The State's arguments at both the guilt-innocence and penalty phases are filled with these vindictive and personal attacks. The remarks were of the type that this Court has found "so egregious, inflammatory, and unfairly prejudicial that a mistrial was the only proper remedy." Garron v. State, 528 So. 2d 353, 358 (Fla. 1988).

At penalty phase closing, the Assistant State Attorney, impermissibly commented on Mr. Thompson's right to jury trial and to counsel (R. 2863-64). The remarks in this case are similar to the improper comments the state used in Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991). These comments by the prosecutor went beyond the bounds of proper argument and clearly prejudiced Mr. Thompson's right to a fair trial. See United States v. Young, 470 U.S. 1 (1985).

This error rendered the trial court's sentence unreliable. This Court should vacate Mr. Thompson's unconstitutional conviction and sentence of death.

ARGUMENT XI

COMMENTS AND INSTRUCTIONS BY THE TRIAL COURT DEMONSTRATE THAT THE COURT DID NOT UNDERSTAND THE IMPORTANCE OF THE JURY'S SENTENCING RECOMMENDATION AND THUS DID NOT ACCORD THAT RECOMMENDATION PROPER DEFERENCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. DEFENSE COUNSEL'S FAILURE TO OBJECT AND ADEQUATELY LITIGATE THIS ISSUE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.

The trial court repeatedly emphasized the "advisory" nature of the jury's sentencing role and plainly misstated the law during voir dire (R. 137-38, 144). Before the jury had the chance to even consider guilt, the court improperly instructed the jury several times that its role was almost without meaning (R. 2572, 2570). The court's last words to the jurors as he sent them home after guilt/innocence phase, and his first words as they arrived for penalty phase denigrated the jury sentencing role and overstated the role of the judge (R. 2599, 2698). During penalty phase instructions, the court again repeatedly misstated the law and usurped the jury's function (R. 2888, 2891-93). The final error was the court's comment upon the jury's sentence (R. 2895). Defense counsel, too, misstated the law in violation of Caldwell (R. 366-68).

The trial judge failed to give the jury's life recommendation the deference it was due. His comments to the jury establish that he did not know the law and did not follow the law when overriding the life recommendation. Where a judge misstates the law on the record, the presumption he knows and follows the law is overcome.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Espinosa v. Florida, 112 S. Ct. 2926 (1992). Mr. Thompson's sentence of death is neither "reliable" nor "individualized". See Caldwell v. Mississippi, 472 U.S. 320 (1985). The judge failed to know and honor Florida law. Mr. Thompson's counsel failed to object and attempt to educate the judge to the proper standards. As a result Mr. Thompson was denied the benefit of the jury's life recommendation. An evidentiary hearing should have been conducted concerning this issue. Mr. Thompson's sentence of death must be vacated.

ARGUMENT XII

MR. THOMPSON'S SENTENCING JUDGE MISAPPLIED AGGRAVATING CIRCUMSTANCES IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The sentencing judge failed to narrow and properly construe aggravating circumstances as his jury instructions reflect. Mr. Thompson's jury was not properly instructed on aggravating factors. The judge simply read his chosen five aggravating factors from the statute without informing the jury of the necessary elements of the circumstances (R. 2888-89).

The eighth amendment requires that any discretion in imposing the death penalty be narrowly limited. Gregg v. Georgia, 428 U.S. 153, 188-89 (1976); Furman v. Georgia, 408 U.S. 238 (1972). Here, the court failed to give any limiting or channeling instructions, giving only the bare statutory language (R. 28888-89).

Presumably these instructions reflect the sentencing judge's understanding of the law. However these instructions and the judge's understanding of the law, was unconstitutional. Richmond v. Lewis, 113 S. Ct. 528 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980); Hitchcock v. Dugger, 481 U.S. 393 (1987).

When the judge is the sentencer in a capital case he is presumed to know and apply the law, which would include narrowing construction of aggravating circumstances. Walton v. Arizona, 110 S. Ct. 3047, 3057 (1990). This presumption is rebutted by the judge instructing his co-sentencer, the jury, with constitutionally vague and infirm aggravating circumstances.

The trial judge, who became the ultimate sentencer when he overrode the jury's recommendation of life, applied unconstitutionally vague versions of the "heinous, atrocious and cruel" and the "cold, calculated and premeditated" aggravating circumstances. A sentencing judge is presumed to use the law upon which he instructed. "Unless there is something in the record to suggest to the contrary, it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed." Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988).

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 aggravators obtain.

Richmond v. Lewis, 113 S.Ct. 528, 534 (1992); Stringer v. Black, 112 S.Ct. 1130, 1136 (1992).

Counsel should have educated the judge and corrected his misapprehension of the law. Counsel's performance was deficient. The judge failed to limit or narrow the aggravating factors in conformity with Florida law and eighth amendment jurisprudence. This Court must reverse the conviction and sentence of death.

ARGUMENT XIII

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

At sentencing, the burden was shifted to Mr. Thompson on the question of whether he should live or die. In so shifting the burden, the court injected misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 486 U.S. 356 (1988). Mr. Thompson had the burden of proving that life was the appropriate sentence. Counsel's failure to object was as a result of ignorance of the law and constituted deficient performance which prejudiced Mr. Thompson. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Mr. Thompson's sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the sentencing determination and prevented the judge from assessing the full panoply of mitigation presented by Mr. Thompson. Mullaney v. Wilbur, 421 U.S. 684

(1975). For each of the reasons discussed above, the Court must vacate Mr. Thompson's unconstitutional sentence of death.

ARGUMENT XIV

THE EIGHTH AMENDMENT WAS VIOLATED BY THE SENTENCING COURT'S REFUSAL TO FIND AND/OR CONSIDER THE MITIGATING CIRCUMSTANCES CLEARLY SET OUT IN THE RECORD.

Pursuant to the eighth and fourteenth amendments, a state's capital sentencing scheme must establish appropriate standards to channel the sentencing authority's discretion, thereby "eliminating total arbitrariness and capriciousness" in the imposition of the death penalty. Proffitt v. Florida, 428 U.S. 242 (1976). On appeal of a death sentence the record should be reviewed to determine whether there is support for the sentencing court's finding that certain mitigating circumstances are not present. Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986). Where that finding is clearly erroneous, the defendant "is entitled to new resentencing." Id. at 1450.

The sentencing judge in Mr. Thompson's case found no mitigating circumstances. Finding five aggravating circumstances, the court imposed death (R. 3340-50). The court's conclusion that no mitigating circumstances were present, however, is belied by the record.

Unrefuted testimony by Arthur Stillman, M.D., established that Mr. Thompson's ability to appreciate the criminality of his actions was substantially impaired (R. 2715). Dr. Stillman, a psychiatrist, offered evidence that Mr. Thompson suffered organic brain damage as the result of extensive substance abuse (alcohol

and drugs) for the 5 to 10 years prior to his arrest (R. 2708; 2713). During guilt/innocence phase, witnesses Bobby Davis and Bobby Stephens both testified to Mr. Thompson's heavy drug use. Dr. Stillman found that Mr. Thompson had severe memory problems, an inability of concentrate, limited insight and judgment, and difficulty handling frustration (R. 2709-12). Dr. Stillman also found Mr. Thompson to be paranoid, and the victim of extreme stress which led to two serious heart reactions (R. 2715-16). He found a second statutory mitigating factor in that Mr. Thompson was acting under extreme mental and emotional distress in March 1982 (R. 2717).

In Mr. Thompson's case, the trial court, without benefit of any contrary evidence on the record, discarded Dr. Stillman's unrefuted testimony (R. 3341-47). The Florida Supreme Court also rejected the evidence of statutory mitigation proffered by Dr. Stillman. Thompson v. State, 553 So. 2d 153, 157 (Fla. 1989). Both courts completely failed to consider that the jury could still have considered Dr. Stillman's testimony as either statutory or non-statutory mitigating evidence. See Carter v. State, 560 So. 2d 1166, 1169 (Fla. 1990) ("Although some reasonable persons might disbelieve portions of [the psychiatrist's] testimony, we have no doubt that other reasonable persons would be convinced by it.") (emphasis added); Thompson v. State, 456 So. 2d 444 (Fla. 1984).

Besides the testimony of Dr. Stillman regarding statutory and non-statutory mitigating factors, many members of Mr.

Thompson's family testified regarding non-statutory mitigation. Mr. Thompson's elderly parents discussed the family's poverty and how Mr. Thompson worked as a child to help support the family (R. 2781; 2797). Both parents also told of Mr. Thompson's devotion to his young son, Charlie, and of his devastation when Charlie was killed in an automobile accident (R. 2782; 2798).

Mr. Thompson's sisters also testified of his love for Charlie, and of the fact that his substance abuse problems, which they had discovered in 1981, were exacerbated by Charlie's death (R. 2826-27; 2840-42). The sisters also told the jury and judge that Mr. Thompson was a good son and a good brother.

Joey Iodice was the teenage son of Mr. Thompson's girlfriend, Claire Iodice. Joey was raised by Mr. Thompson, and testified to what a good father Mr. Thompson was to him. Joey also spoke of his awareness of Mr. Thompson's drug use.¹²

Finally, the judge refused to even instruct upon -- let alone consider -- the statutory mitigating factor of age. Counsel argued this factor to the jury, and Dr. Stillman testified to Mr. Thompson's projected lifespan. However, the judge ruled as a matter of law that it was not an available mitigating circumstance.

Although defense counsel elicited testimony from co-defendants Davis and Stephens about their lesser sentences, and

¹²As much mitigation as was presented it was but the tip of the iceberg. Much more was readily available and not presented because of the failure to fully investigate. Cunningham v. Zant, 928 F.2d 1086 (11th Cir. 1991).

argued disparate treatment to the jury, the trial court did not mention this mitigating factor at all in his sentencing order, although the prosecutor agreed the codefendants were equally guilty (R. 2430). The Tedder standard was misapplied because the circuit court failed to comply with Eddings v. Oklahoma, 455 U.S. 104 (1982). This Court's review was skewed by the circuit court's failure to comply with Eddings. As a result, the decision in Parker v. Dugger, 111 S. Ct. 731 (1991), requires that this sentence of death be vacated.

ARGUMENT XV

THE FAILURE TO PROVE THE CORPUS DELICTI OF MURDER IN THE FIRST DEGREE WAS FUNDAMENTAL ERROR IN VIOLATION OF MR. THOMPSON'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. Thompson's sentence.

At trial, counsel for Mr. Thompson 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. 2231-2241). The court summarily denied his motion (R. 2240-2241). 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.

As to the kidnapping charge, the State had the burden to bring forth 'substantial evidence' tending to show the commission of the charged crime. State v. Allen, 335 So. 2d 823 (1976); Ruiz v. State, 388 So. 2d 610 (Fla. 3d DCA 1980)(rev. den. 1981) 392 So. 2d 1380. The State must show at least the existence of each element of the crime. State v. Allen.

Here, no body was found, and no physical evidence corroborates the incredible stories of the state witnesses, Davis and Stephens. There was no proof, either direct or circumstantial, which indicates that Mr. Savoy is dead. In fact, two witnesses testified that they had seen Savoy on two different occasions after the date Davis testified that Savoy was killed.

All the State produced was a paid witness, Bobby Davis, who testified differently at every proceeding. Of the other two people on board the boat, only Davis incredibly could see the defendant shoot Savoy. None of the people called as State's witnesses have testified that in their opinion Savoy is dead. The State did not bring forth any information that corroborated the testimony of Davis.

This claim involves fundamental constitutional error which goes to the heart of the fundamental fairness of Mr. Thompson's trial and death sentence. See Wilson v. Wainwright, 474 So. 2d 1163 (Fla. 1985). The judgment and sentence of death must be vacated.

ARGUMENT XVI

AT SENTENCING THE COURT ERRED IN ASSERTING THAT SYMPATHY AND MERCY TOWARDS MR. THOMPSON WERE IMPROPER CONSIDERATIONS IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Before deliberations in guilt phase, the jury in Mr. Thompson's trial was repeatedly admonished and instructed by the trial court that feelings of mercy or sympathy could play no part in their deliberations as to Mr. Thompson's ultimate fate (R. 2579). The judge's misunderstanding of the law was confirmed further in his sentencing order (R. 3348).

In Mr. Thompson's case, the judge believed that Florida law precluded considerations of sympathy and mercy. This was error which creates the unacceptable risk that the judge's recommendation of death was the product of his belief that feelings of compassion, sympathy, and mercy towards the defendant were not to be considered in determining the sentence to be imposed. Counsel was ineffective in failing to object to erroneous instructions and to attempt to correct the judge's misconceptions. The sentence must be vacated.

ARGUMENT XVII

PARKER V. DUGGER IS NEW CASE LAW WHICH ESTABLISHES THAT MR. THOMPSON WAS DENIED HIS CONSTITUTIONAL RIGHTS WHEN THE TRIAL COURT AND THE FLORIDA SUPREME COURT IMPROPERLY FAILED TO ADEQUATELY EVALUATE MITIGATION EVIDENCE AT SENTENCING AND APPELLATE REVIEW.

The override of the jury's life verdict and its affirmance violated the sixth, eighth and fourteenth amendments, and resulted in a death sentence that is unreliable, arbitrary, and

capricious. Mr. Thompson further respectfully requests that this claim not be considered in isolation, but that the significant claims related in other portions of this submission be considered in conjunction with this issue, as they too pertain to the validity of this override death sentence. Parker v. Dugger, 111 S. Ct. 731 (1991). Mr. Thompson, like Mr. Parker, presented significant mitigating evidence to the jury and judge during the trial and penalty proceeding. The jury -- by a 10 to 2 vote -- recommended a life sentence. The trial court, rejecting all mitigation, overrode the jury.

The Florida Supreme Court majority on appeal did not review this case in light of the standards discussed in Parker, as the majority's opinion reflects. Nor did the trial court, when determining whether an override was appropriate, review this case in light of these standards.

Several aspects of the sentencing order and the direct appeal opinion are crucial to this discussion. First, the sentencing order states a factual error regarding trial testimony -- "All of the evidence presented to the Jury during the trial indicated that the defendant was the trigger man who shot and killed the victim" (R. 3347). The Florida Supreme Court erroneously adopted this error in its opinion -- "[I]t was Thompson, rather than his accomplices, who inflicted the fatal

shot." Thompson v. State, 553 So. 2d 153, 158 (Fla. 1989).

These statements do not reflect the record.¹³

The sentencing order details the trial court's findings on statutory mitigation (R. 3341). The trial court challenged the plausibility of Dr. Stillman's findings (R. 3341-46). However, the state offered no mental health experts to rebut Dr. Stillman's testimony. The trial court did not discuss the wealth of unrefuted non-statutory mitigation offered by Mr. Thompson. He did, however, discuss defense counsel's "emotional" closing argument, characterizing it as the sole reason for the jury life recommendation. By so structuring his sentencing order, the trial judge presented the following picture for appellate review: 1) Dr. Stillman's unrefuted testimony was incredible; 2) no other testimony was offered on non-statutory mitigation; 3) the jury had nothing to consider but defense counsel's emotional appeal. Again, the record does not support this picture.¹⁴

¹³Two co-defendant participants, Bobby Davis and Bobby Stephens, testified at Mr. Thompson's trial. Both were cross-examined by defense counsel, who was repeatedly able to impeach them with prior inconsistent testimony. Both men were given much lighter sentences (10 years and 15 years, respectively). Davis testified that it was his personal decision to kidnap the victim (R. 929); that he personally beat the victim during the boat ride (R. 957); and that he saw Mr. Thompson shoot the victim (R. 960). Stephens gave conflicting testimony that directly implicated Davis, not Mr. Thompson, in the killing (R. 2123-24).

¹⁴In aggravation, the trial court considered a federal conviction subsequent to this trial. However, this conviction in itself does not justify an override.

When the sentencing judge is presented with evidence not considered by the jury, the jury's recommendation still retains great weight.

(continued...)

Unrefuted testimony by Arthur Stillman, M.D., established that Mr. Thompson's ability to appreciate the criminality of his actions was substantially impaired (R. 2715). Dr. Stillman, a psychiatrist, offered evidence that Mr. Thompson suffered organic brain damage as the result of extensive substance abuse (alcohol and drugs) for the 5 to 10 years prior to his arrest (R. 2708; 2713). During guilt/innocence phase, witnesses Bobby Davis and Bobby Stephens both testified to Mr. Thompson's heavy drug use. Dr. Stillman found that Mr. Thompson had severe memory problems, an inability of concentrate, limited insight and judgment, and difficulty handling frustration (R. 2709-12). Dr. Stillman also found Mr. Thompson to be paranoid, and the victim of extreme stress which led to two serious heart reactions (R. 2715-16). He found a second statutory mitigating factor in that Mr. Thompson was acting under extreme mental and emotional distress in March 1982 (R. 2717). Both the trial court and the Florida Supreme Court discarded Dr. Stillman's testimony and completely failed to consider that the jury could still have considered his testimony as either statutory or non-statutory mitigating evidence. See Carter v. State, 560 So. 2d 1166, 1169 (Fla. 1990).

Besides the testimony of Dr. Stillman regarding statutory and non-statutory mitigating factors, members of Mr. Thompson's family testified regarding non-statutory mitigation. Mr. Thompson's elderly parents discussed the poverty of Mr.

¹⁴(...continued)

Cochran v. State, 547 So. 2d 928, 931 (Fla. 1989).

Thompson's childhood and how his work as a child to help support the family (R. 2781; 2797). Both parents also told of Mr. Thompson's devotion to his young son, Charlie, and of his devastation when Charlie was killed in an automobile accident (R. 2782; 2798). Mr. Thompson's sisters also testified of his love for Charlie, and of the fact that his substance abuse problems, which they had discovered in 1981, were exacerbated by Charlie's death (R. 2826-27; 2840-42). The sisters also told the jury and judge that Mr. Thompson was a good son and a good brother. Joey Iodice was the teenage son of Mr. Thompson's girlfriend, Claire Iodice. Joey was raised by Mr. Thompson, and testified to what a good father Mr. Thompson was to him. Joey also spoke of his awareness of Mr. Thompson's drug use.¹⁵

Finally, the judge refused to even instruct upon -- let alone consider -- the statutory mitigating factor of age. Counsel argued this factor to the jury, and Dr. Stillman testified to Mr. Thompson's projected lifespan. Although defense counsel elicited testimony from co-defendants Davis and Stephens about their lesser sentences, and argued disparate treatment to the jury, the trial court did not mention this mitigating factor at all in his sentencing order.

Mr. Thompson's jury recommended a sentence of life imprisonment. Mr. Thompson presented significant mitigation

¹⁵Again the evidence presented in mitigation was but the tip of the iceberg. Much more in the way of mitigation could have been presented from these witnesses and others. See Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991).

evidence at his trial. Moreover, he presented strong arguments against the five aggravating circumstances found by the judge. No effort has been made to evaluate the mitigation he presented and the arguments he made against the aggravation in the light most favorable to him the prevailing party before the jury. Under Parker, he is entitled to such an evaluation. The sentence must be vacated.

ARGUMENT XVIII

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

Mr. Thompson 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).

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

CONCLUSION

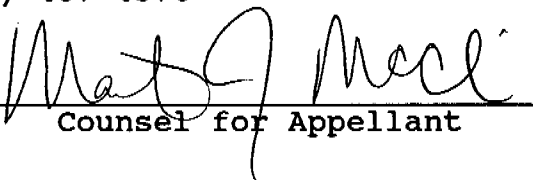
On the basis of these arguments Mr. Thompson respectfully submits that he is entitled to an evidentiary hearing on the Chapter 119, guilt and penalty phase issues, and thereafter, a new trial. Mr. Thompson urges that this Honorable Court remand this matter to the trial court and that the Court set aside his unconstitutional conviction and death sentence.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 11, 1993.

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