IN THE SUPREME COURT OF FLORIDA

CASE NO. 83,623

JAMES FRANKLIN ROSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT COURT,
IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Rose's Fla. R. Crim. P. 3.850 motion for post-conviction relief. This proceeding challenges both Mr. Rose's conviction and his death sentence imposed upon resentencing. References in this brief are as follows: The trial and original sentencing record is cited as "T. ___" with the appropriate page number following thereafter. The resentencing record is cited as "S. ___". The record on Mr. Rose's original appeal of the denial of his Rule 3.850 motion is cited as "PC-R1. ___." The record on appeal in these post-conviction proceedings is cited as "PC-R2. ___." Defense exhibits introduced at the evidentiary hearing in the circuit court are cited as "Def. Ex. ___" with the appropriate exhibit number indicated. State exhibits introduced at the evidentiary hearing are cited as "St. Ex. ___" with the appropriate exhibit number indicated.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Rose 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 appropriate in this case, given the seriousness of the claims involved and the stakes at issue, and Mr. Rose accordingly requests that the Court permit oral argument.

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STATEMENT OF THE CASE

Mr. Rose was charged with first-degree murder and kidnapping, and entered a plea of not guilty. At the original trial, the jury could not reach a verdict and a mistrial was declared (T. 1480). At the retrial, the jury convicted after receiving an Allen-type charge, and a judgment of conviction was entered on May 6, 1977. The jury, after telling the trial court that it was deadlocked at a 6-6 vote on the recommendation of a penalty, was instructed with another Allen-type charge, and eventually returned a recommendation of death. Mr. Rose was sentenced to death. On appeal, this Court affirmed the convictions, but vacated the sentence of death and directed that a new jury sentencing be held. Rose v. State, 425 So. 2d 521 (Fla. 1982).

Upon retrial of the penalty phase, the death penalty was reimposed and this Court affirmed. Rose v. State, 461 So. 2d 84 (Fla. 1984). On August 5, 1986, a death warrant was signed. On August 18, 1986, Mr. Rose filed an original habeas corpus petition and motion for stay of execution in this Court. This Court granted a stay of execution in order to consider the habeas petition, but subsequently denied relief. Rose v. Dugger, 508 So. 2d 321 (Fla. 1987).

Mr. Rose filed a Rule 3.850 motion in the trial court presenting valid prima facie claims for relief. The State responded that as to a number of the factual claims presented, "[t]he State agrees that in order to determine the validity of

[the claims] it is necessary to hold an evidentiary hearing" (PC-R1. 117, Response to Motion to Vacate). The trial court nevertheless denied a hearing and signed an order drafted by the State which contradicted the State's own earlier position that a hearing was necessary. A rehearing motion filed on behalf of Mr. Rose was summarily denied by the trial court.

Timely notice of appeal was filed. On appeal, this Court reversed and "direct[ed] the trial court to reconsider Rose's motion and to hold an evidentiary hearing on the ineffective assistance of counsel claims and any other appropriate factual issues presented in the motion." Rose v. State, 601 So. 2d 1181, 1184 (Fla. 1992).

An evidentiary hearing on Mr. Rose's claims that trial counsel and resentencing counsel provided ineffective assistance was conducted in October, 1993. While proceedings were pending in the trial court, Mr. Rose filed a Supplemental Motion to Vacate Judgment and Sentence (PC-R2. 913-28). The trial court denied relief on all claims (PC-R2. 811-12, 1032-37, 1067). As to claims upon which no evidentiary hearing was allowed, the trial court attached no portions of the files and records to its various orders. Id. Mr. Rose timely filed a notice of appeal.

STATEMENT OF THE FACTS

A. THE GUILT/INNOCENCE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

1. THE WHEREABOUTS OF JAMES ROSE AND LISA BERRY AT THE CRUCIAL TIMES.

At Mr. Rose's trial, the time at which events occurred was a central issue, as the State and defense informed the jury in argument (T. 661). The State's theory was that on October 22, 1976, Lisa Berry left the bowling alley with Mr. Rose between 9:30 and 10:00 p.m., that between 9:50 p.m. and 10:23 p.m., Mr. Rose killed Ms. Berry, that Mr. Rose then drove a 21-mile round trip to dispose of the victim's body, and returned to the bowling alley no later than 11:30 p.m. (T. 1215-16, 1219, 1226). The Jury was instructed that the State was required to prove that the offense occurred within two hours either side of 11:00 p.m. (T. 1258). Ms. Berry was first noticed missing between 11:30 and 11:45, after Mr. Rose had returned to the alley. Available to the defense, but not used at trial, was both impeachment and substantive testimony that Lisa Berry was seen at the bowling alley between 11:00 p.m. and 11:45 p.m., well after Mr. Rose had returned, after he had already displayed the red stain on his leg, and at a time demonstrating that he could not have committed the offense.

At the evidentiary hearing, trial counsel Thomas Bush testified that the State's case against Mr. Rose was circumstantial and that the time as to when Mr. Rose could have committed the murder was an important factor (PC-R2. 70). Mr. Bush explained:

> We put the State in the box to the time that it could have occurred. And we had forced the State through a medical examiner to give us within a two hour period when the murder could have occurred. Once we had that two hour period narrowed down, we then tailored our defense to make time critical.

(PC-R2. 71).

> We used witness statements in pretrial proceedings and we used the statement of a Dr. Fattah to put the State in the position that if they were going to prove that Jim Rose was guilty of the crime, that he would have to have committed it between 9:30 in the evening and 11:30 in the evening.

(PC-R2. 72).

Several people who were at the bowling alley on the night of the victim's disappearance and who knew the victim gave statements to the police that they saw the victim during and after the time the State contended Mr. Rose was abducting and murdering her. These statements were all taken on October 23, 1976, the day after the victim disappeared. Mr. Rose's jury was not told about these statements.

Mr. Thomas Dusch gave police a statement in which he said he arrived at the bowling alley at 10:00 p.m. on October 22, 1976 (Def. Ex. 13, p.1). Mr. Dusch was sitting at the snack bar with several people, including Linda Nieves, who was working at the snack bar. Id. at 1-2. Mr. Dusch asked Ms. Nieves what time she was closing the snack bar, and "she said she hoped to close by 12 A.M." Id. at 2. Mr. Dusch's statement continues:

> Linda [Nieves] looked at the clock and it was about 11:45 P.M. and the little blonde girl came into the doorway of the snack bar, looked around and walked out. I had another

> coffee and then Barbara [the victim's mother] came in and asked if anyone had seen Lisa, that she was missing. I said she was just here a little while ago.

(Def. Ex. 13, p.2). Later in his statement, Mr. Dusch added:

> Q. When the little blonde came inside the snack bar, who was with you?
>
> A. Mary Lou and Linda.
>
> Q. Did you know the girl to be Barbara Berry's daughter?
>
> A. I didn't know her name but I saw her before.
>
> Q. What was she wearing when you saw her?
>
> A. Green sweater and a pink pair of slacks.

Id. at 3.[1] At a pretrial deposition Mr. Dusch testified he arrived at the bowling alley "[b]etween 10:00 and a quarter after 10:00" (St. Ex. 3, p.3), but trial counsel never asked whether or what time Mr. Dusch saw the victim (St. Ex. 3).

At the evidentiary hearing, Mr. Dusch testified that his statement to police was true (PC-R2. 503) and he was sticking to it (PC-R2. 507). Nobody had talked to him about the statement "except when they come and talked to me about a month ago" (PC-R2. 503).

Mr. Robert Autry also gave a statement to police the day after the victim's disappearance. Mr. Autry arrived at the bowling alley at 9:00 p.m. (Def. Ex. 12, p. 1). He identified a photograph of Lisa Berry and explained, "we bowl every Friday

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[1] At trial, witnesses testified that Lisa Berry was wearing a green sweater and pink slacks the night she disappeared from the bowling alley (T. 772).

night...and we showed up to bowl and all three of Barbara's kids were there, we'd seen them there before, we saw them there last night." Id.. Mr. Autry continued:

> And after we finished bowling we were all just sitting around, this was about 20 m[i]nutes after 11, approximately, and I recalled seeing the girl at around that time, and one of our partners remarked you know those kids hang on Walt who is a boy that bowls with Barbara, like they were his grandkids...[W]e were still setting [sic] there and guess it was about 10 minutes to 12, somewhere in that neighborhood that they called the girl and discovered that she was missing and started looking for her...
>
> Q. Let me interrupt you for a second, Robert, when you make reference to "that girl" or "the girl," you are referring to Lisa Lynn Berry, am I correct?
>
> A. Yes, Lisa, Lisa Berry.

(Def. Ex. 12, p. 2).

Mr. Autry also saw Mr. Rose in the bowling alley that evening. Mr. Autry first saw Mr. Rose "somewhere in the neighborhood of 10, between 10 and 10:15, we were in our second game of bowling" (Def. Ex. 12, p. 5). Mr. Autry also saw Mr. Rose at about "five minutes till 12." Id. at 3. At about 12:15 a.m., several people left the bowling alley in their cars to search for Lisa Berry, including Mr. Rose in his white van: "Approximately 15-20 minutes past 12 we left, and there was several vehicles, the van was included, it was driven by Jim, and I would have to estimate approx. 15-20 minutes later we all returned." Id. at 4. At the evidentiary hearing, the State stipulated to Mr. Autry's statement and to the facts that Robert

Autry would testify that his statement to police was true and that he never recanted it (PC-R2. 508-09).[2]

Robert Autry's son, Joseph Autry, also gave a statement to police the day after Lisa Berry disappeared from the bowling alley. Joseph Autry's statement corroborates Robert Autry's statement regarding seeing Lisa Berry at the bowling alley. Joseph identified a photograph of Lisa Berry (Def. Ex. 14, p.2), and said he had seen her with a boy at the bowling alley. Id.[3] Joseph saw Lisa Berry with the boy after Joseph had finished bowling two games. Id. at 3.[4] After he finished bowling 2 games, Joseph went to the restaurant, which is when he saw Lisa Berry with the boy. Id. at 4. After he left the restaurant and was on his way to the pinball room, Joseph saw Lisa again, this time alone. Id. While Joseph was playing pinball, Lisa "was still in my sight." Id. Joseph saw Lisa for thirty to forty minutes after he had quit bowling:

> Q. Can you give me approx. the amount of time that went by from the time you quit bowling to the time that you noticed Lisa was gone?
>
> A. It was about a half hour to forty minutes.

---

[2]Robert Autry was subpoenaed by the defense as a witness at the evidentiary hearing, but called the State Attorney to say he couldn't appear (PC-R2. 507-08). The State then stipulated to his testimony.

[3]The boy was not James Rose. Joseph Autry identified a photograph of James Rose (Def. Ex. 14, p. 2).

[4]Robert Autry stated that they were in their second game of bowling at 10 or 10:15 (Def. Ex. 12, p.5).

> Q. From the time you quit bowling to your going down to the restaurant and getting a coke, to your returning to the game room where you first saw Lisa standing by the window, your going in and playing the pinball machine where you could play it and still see Lisa, you played three games, then you ceased playing this game, came back out, walked across and got another coke and Lisa was still there and you turned around and came back from getting the coke and Lisa was gone.
>
> A. Yes, sir.
>
> Q. You say that this took from 30-40 minutes?
>
> A. Yes, sir. From the time we quit bowling til [sic] I last saw her.
>
> Q. After you went back into the pinball room how long did you stay in that room before coming back out and assisting in the search? Approximately?
>
> A. From the last time I saw her til I went looking for her, approximately 20 minutes.

(Def. Ex. 14, p. 5). Only twenty minutes passed from the last time Joseph saw Lisa until he began helping to look for the missing girl. Id.

At the evidentiary hearing, Joseph Autry testified that he remembered giving a statement to police on October 23, 1976, and that the statement was true (PC-R2. 501-02). Joseph also testified that he had never changed or recanted his statement in any way. Id.

Linda Nieves also gave a statement to police the day after the victim disappeared from the bowling alley. The night of the victim's disappearance, Ms. Nieves was in charge of the bowling alley snack bar, where Mr. Dusch was sitting when he saw the

victim at 11:45 p.m. Ms. Nieves knew Lisa "from coming in the bowling alley with her mom...She comes in and talks to me" (Def. Ex. 20, p.1). Before that night, Ms. Nieves had seen Lisa at the bowling alley "[a] lot of times - more than a dozen I'd say." Id. On the night of Lisa's disappearance, Ms. Nieves first saw her about 10:00 p.m.: "She was in there earlier tonight and I asked her if she wanted a soda...that was about 10 o'clock." Id. Ms. Nieves also saw Lisa at about 11:45 p.m., the same time Mr. Dusch saw her:

> Q. Linda, how about telling me briefly what you know about the incident as it occurred this evening?
>
> A. About quarter to twelve her daughter came into the restaurant, stopped just a couple of feet in towards the door and stopped, looked around, walked back out, it was getting pretty slow in there and I just happened to check the clock to see what time it was and it was exactly a quarter to twelve. I looked out to see if the bowlers were finished or almost finished because I wanted to start packing up because it was slow and I figured I'd be ready when it was time to close. Approx. 10-15 minutes at the tops her momma came in and asked me if I seen Lisa and I told her a few minutes ago she was at the door and right after that everybody started searching cause we couldn't find her.

(Def. Ex. 20, p. 1).

At the evidentiary hearing, Ms. Nieves identified her statement to police and testified that it was truthful (PC-R2. 480). Ms. Nieves testified her statement was accurate and that when she gave the statement, she did her best to be honest and straightforward (PC-R2. 481). Ms. Nieves also testified she had never changed her statement from what she had told the police

(PC-R2. 480-81). On cross-examination, Ms. Nieves was asked if it was possible that the girl she saw at 11:45 p.m. was not Lisa Berry. Ms. Nieves answered:

> I thought it was her in my knowledge. I said it was always a possibility that may be other, but to my knowledge at the time I thought it was her.

(PC-R2. 482).

> The little girl was at the door several feet from me. At the time I assumed it was her. But it could be someone else.

(PC-R2. 483-84). Ms. Nieves also knew Lisa's sister Tracy and could tell the two girls apart:

> Q. Okay. Do you recall Lisa Berry having a sister Tracy?
>
> A. Yes.
>
> Q. And that she was a year younger?
>
> A. A year or two, yes.
>
> Q. Did she look like Lisa?
>
> A. A little bit. Not exact, no.

(PC-R2. 484). Also on cross, Ms. Nieves testified that she did not remember anyone talking to her about her statement in 1976 (PC-R2. 483). When she gave her statement, Ms. Nieves was upset because she was worried about the child but she was not confused (PC-R2. 485).

Other witnesses also provided police statements in which they reported seeing the victim after 10:30 p.m. Walter Isler provided a statement to law enforcement officers pretrial explaining that he had seen Lisa Berry in the bowling alley at

some time "going on 11" (Def. Ex. 21, p. 2). Mr. Isler testified at trial that he last saw Jim Rose at 10 p.m. (T. 741). He testified that he "didn't remember" and "didn't recall" what his statement was about his seeing Ms. Berry (T. 757). During closing, the prosecutor (inaccurately) argued that Mr. Isler denied making a statement about Ms. Berry (T. 1215). Yet Detective McLellan, who took the statement, had recorded the session with Mr. Isler. Counsel had been provided with detective's name, the tape, and a transcript. In his statement, Mr. Isler clearly states that he last saw Lisa Berry around 11:00 p.m. that evening at the bowling alley.

Fay Grebowski also provided a recorded statement to Detective McLellan on October 23, 1976. She saw Lisa as late as 11:00 on the evening of the offense:

> Q. OK, now the little girl was there at 10:15, right?
>
> A. Right.
>
> Q. All right. When he left, did Lisa stay in the group or did she leave?
>
> A. No, she left.
>
> Q. You don't know where she went?
>
> A. No, I don't.
>
> Q. What time was it when she came back with the little boy?
>
> A. I would say it was about 11:00.

(Def. Ex. 19, p. 2). Defense counsel had her statement, but Ms. Grebowski was also not called at the trial.

John Hass was yet another witness who provided a sworn statement that Lisa was at the bowling alley well after Mr. Ross had left. His statement was also provided to defense counsel. The statement was taken and recorded by Detective Page on October 23, 1976, at 6 p.m., and provided the following exonerating information which the jury never heard:

> Q. At what time do you remember last seeing Lisa?
>
> A. She was still in the circle after Jim left and I last remember seeing her approximately 10:30 p.m.
>
> * * *
>
> Q. When Jim left at 10:05 p.m., Lisa was still there?
>
> A. Yes.

(Def. Ex. 22, pp. 1-2).

Denise Schauer, who worked at the bowling alley, also gave a statement to police. Ms. Schauer knew Lisa Berry and saw her twice on the night she disappeared, first at 9:00 p.m. and "then it must have been between 10:00 and 10:30 when I saw her again" (Def. Ex. 16, p. 2). Lisa Berry's mother, Barbara Berry, also gave police a statement in which she reported that she last remembered seeing her daughter "[a]round 10 or it could have been after" (Def. Ex. 18, p. 2).

At the evidentiary hearing, trial counsel testified that the statements discussed above were in his file at the time of trial (PC-R2. 78, 82, 83, 88, 90, 94, 98-99, 100). The State also stipulated that trial counsel had all of these statements at the time of trial (PC-R2. 438-42; 496-97). Further, trial counsel

testified that at trial, the court required the State to subpoena all witnesses whose names had been provided in discovery and that therefore the witnesses who gave statements to police were available to testify at trial (PC-R2. 80-81; Def. Ex. 1). Subpoenas were issued by the State for all of the witnesses discussed above (Def. Ex. 3).

At the evidentiary hearing, trial counsel testified regarding his reasons for not presenting the witnesses discussed above. Trial counsel's main reason for not presenting the testimony of these witnesses was that he wanted to be able to present two closing arguments (PC-R2. 157, 162-63, 185, 267). According to trial counsel, closing argument is a way of testifying (PC-R2. 270).

Trial counsel testified that one of the reasons he did not call Thomas Dusch was because Dusch had seen blood on Mr. Rose's pants (PC-R2. 163). Counsel testified that he did not call Robert Autry in part because Autry had seen blood on Mr. Rose's pants and van (PC-R2. 171), and that he did not call John Hass in part because Hass had seen blood on Mr. Rose's van (PC-R2. 175). Without the testimony of Dusch, Autry, and Hass, five lay witnesses who were at the bowling alley testified to seeing blood on Mr. Rose's pants (T. 725-26, 728, 730 [Margaret Szabo]; T. 743-44, 755 [Walter Isler]; T. 765-66, 769 [Joseph Szabo]; T. 779 [Barbara Berry]; T. 815 [Barry Daniello]). Two police officers testified to seeing blood on Mr. Rose's pants (T. 858, 867 [Charles Walker]; T. 879 [Arthur McLellan]). Two other police

officers testified that they questioned Mr. Rose about the blood seen on his pants (T. 912 [John Bukata]; T. 1052-53 [Allen Vansant]). One forensic chemist and one serologist also testified regarding blood on Mr. Rose's pants (T. 1131 [John Pennie]; T. 1173-74 [George Duncan]). Regarding the blood on Mr. Rose's van, one lay witness and two police officers testified to seeing it (T. 750-53 [Walter Isler]; T. 859-62, 864, 870-71 [Charles Walker]; T. 877-78, 881-85, 896-98, 903-05 [Arthur McLellan]); two police officers testified to asking Mr. Rose about it [T. 925 [John Bukata]; T. 1052-53 [Allen Vansant]; and one evidence technician and two serologists testified about collecting and examining it (T. 977-78, 992 [Charles Tipton]; T. 1115 [Patricia Jackson]; T. 1168-73 [George Duncan]).

Trial counsel testified that he did not call some of the witnesses, such as Robert Autry, because they had heard Mr. Rose explain the blood on his pants by saying he had cut himself changing a tire (PC-R2. 171). At trial, two lay witnesses from the bowling alley testified to hearing Mr. Rose's tire changing statement (T. 727 [Margaret Szabo]; T. 743 [Walter Isler]). Another lay witness testified that Mr. Rose said he cut himself getting under his van to fix something (T. 780, 791 [Barbara Berry]). Two police officers testified that while at the bowling alley, Mr. Rose said he cut himself getting under the van to fix something (T. 858, 874 [Charles Walker]; T. 879, 881, 886-89, 901-02 [Arthur McLellan]). Three other police officers testified that when they later questioned Mr. Rose about the blood on his

pants, he said he had cut himself getting under the van to fix something (T. 922-24 [John Bukata]; T. 952-53 [Edward King]; T. 1054 [Allen Vansant]).

Trial counsel testified that he did not call some of the time witnesses, such as Robert Autry, in part because they had seen grease on the blood spots on Mr. Rose's pants (PC-R2. 171). The State argued at trial that Mr. Rose tried to cover up the blood spots with grease (T. 1224). Two lay witnesses from the bowling alley testified at trial to seeing grease on Mr. Rose's pants (T. 748, 754 [Walter Isler]; T. 767 [Joseph Szabo]). One police officer testified at trial to seeing grease on Mr. Rose's pants (T. 879, 905 [Arthur McLellan]). One lay witness testified at trial to observing that Mr. Rose changed his pants at the bowling alley (T. 848, 850 [Judy Mastropaolo]).

Trial counsel testified that he did not call some time witnesses, such as John Hass and Robert Autry, because they had looked at Mr. Rose's van at the bowling alley and concluded that no tire had been changed (PC-R2. 190). At trial, two lay witnesses testified to this same observation (T. 748-50, 760 [Walter Isler]; T. 765 [Joseph Szabo]). One police officer also testified to this conclusion (T. 878-79 [Arthur McLellan]).

Trial counsel testified that he did not call some of the time witnesses because they would support the State's jealousy motive (PC-R2. 165, 213), because they said Mr. Rose was in the bar drinking while others were looking for the missing victim (PC-R2. 170), or because they said Mr. Rose was up to something

after 12:15 a.m. because be drove in and out of the bowling alley parking lot a couple of times during the search for the victim (PC-R2. 183). All of these matters also came out at trial. Walter Isler testified to Mr. Rose appearing to be jealous (T. 739-41). Mr. Isler also testified that Mr. Rose was in the bar drinking while others were looking for the victim (T. 746, 753). Two witnesses testified to Mr. Rose driving in and out of the parking lot during the search for the victim (T. 804-05, 807, 808-09 [Barry Daniello]; T. 848-50 [Judy Mastropaolo]).

Trial counsel also testified that he brought in the time witnesses' statements through cross-examination of State witnesses (PC-R2. 173, 176, 246, 254, 255, 263). For example, trial counsel testified that he cross-examined Officer McLellan regarding Walter Isler's statement that he saw the victim at "going on 11" (PC-R2. 255). Trial counsel testified:

> [The time witnesses' statements were] brought out by me on cross examination. They never heard from some of those witnesses themselves, but they heard from those witnesses through the mouths of other people. I mean I asked the detectives and others didn't Linda Nieves tell I that it was 11:45 she saw Lisa Lynne Berry and he would have to say yes. Weren't you told by Walt Isler about this particular time of 10:30 when Lisa Berry was there, yes. I mean all of that was brought out.

(PC-R2. 263).

The time witnesses gave their statements to Officers McLellan, Hoffman or Page (see Def. Exs. 12, 13, 14, 15, 16, 18, 19, 20, 21, 22). Page did not testify at trial. McLellan and Hoffman were not asked any questions by either the State or

defense on the issue of time or whether these witnesses made those pretrial statements (T. 876-910 [Testimony of Arthur McLellan]; T. 1004-1011 [Testimony of Richard Hoffman]).

2. VAN SIGHTINGS

Other evidence indicating Mr. Rose had not committed the offense was presented at the evidentiary hearing. This evidence also was not presented by defense counsel. Jim Hughes, for example, in his deposition testified that he knew Mr. Rose's van, had previously seen it, and recalled that it had "monkey decals" on the windows (Def. Ex. 11, pp. 12-13). Those decals, he testified, were not on the windows of the white van he saw on the night of the offense. Id. at 13. Mr. Hughes testified at trial and the State elicited that he saw a white van the night of the offense behind a convenience store (T. 816-23), where the victim's clothing was later discovered (T. 1222). Defense counsel did not ask Hughes whether the van he saw had decals such as those on Mr. Rose's van (see T. 825-29 [cross-examination of Hughes]).

Margaret Cobb also provided a recorded statement pretrial in which she stated that she had seen a white van parked near the area in which the victim's body was found (Def. Ex. 17). She stated that she saw this white van between 11:55 p.m. and 12:05 a.m. on the night of Lisa Berry's disappearance, Id. at 1, a time at which no one disputes that Mr. Rose was at the bowling alley in the presence of others. This evidence was not presented to Mr. Rose's jury.

3. **THE "JEALOUS BOYFRIEND" MOTIVE.**

The State tried to show that Mr. Rose killed Lisa Berry because he thought her mother was romantically involved with Walter Isler, a member of the bowling team (see T. 1214). The State's theory was that Mr. Rose became enraged when Lisa asked Isler if he was "going to breakfast" with her mother.[5] The State's presentation of this theory was intended to convey to the jury that the breakfast comment meant Mr. Isler would be staying with Barbara Berry that night, and have breakfast the following morning.

The State argued that Mr. Rose became upset and angry when he heard the "breakfast" comment (T. 1214). Mr. Isler's recorded statement was taken on October 23, 1976, by Detective McLellan (Def. Ex. 21). Trial counsel had it (PC-R2. 113). About the "breakfast" comment, the witness said, "[w]ell, [Mr. Rose] didn't get upset or anything" (Def. Ex. 21 at 1). Mr. Isler further explained in this statement that he and Ms. Berry were not dating. Id. at 4. Mr. Isler also stated in his deposition that "there was nothing unusual about his [Mr. Rose's] attitude [that night]," and that "nothing happened."

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[5]The State's theory at the first trial, which has resulted in a hung jury, was not this; rather, then, the State argued some kind of sex motive involving Lisa. The trial judge viewed this argument as so outrageous and insupportable that he admonished the State not to use it at the retrial (T. 632). It was at the retrial that the State then presented the "jealous boyfriend" motive theory. This theory was then used by the State again (including the reading of transcripts from the retrial) at the second penalty phase ordered after this Court's remand for resentencing.

A number of witnesses testified pretrial about the remark. Mr. Isler himself told the detective in his recorded statement that there was nothing between him and Barbara Berry, and explained in that same statement that the customary practice was to "finish bowling; we go out to breakfast. She takes her car, I take my car, she goes home and I go home and that's it" (Def. Ex. 21 at 4). John Hass also testified at deposition that "we usually go out every night after bowling to Denny's and eat breakfast, and that's all" (Hass Deposition at 5). Barbara Berry herself stated during deposition that she did not hear the statement, but that "Walt and Faye had told me that Lisa had asked Walt if we were going out to breakfast after bowling" (Berry Deposition at 13). Faye Grebowski said that the statement was actually, "Walt, are we going out to Denny's to eat when we get through bowling?" (Def. Ex. 19 at 1). She swore that this statement was only a reference to "breakfast after bowling" in her deposition as well (Grebowski Deposition, p. 8).

B. THE PENALTY PHASE INEFFECTIVE ASSISTANCE OF COUNSEL CLAIM.

Mr. Rose was represented by Michael Entin during the new penalty phase. Prior to his appointment to represent Mr. Rose, Mr. Entin was unfamiliar with Mr. Rose's case. Also, Mr. Entin had never handled a capital penalty phase case prior to representing Mr. Rose (PC-R2. 286). Before being appointed to represent Mr. Rose, Mr. Entin was not familiar with aggravating and mitigating factors (PC-R2. 308). Neither co-counsel nor an investigator was appointed to assist Mr. Entin (PC-R2. 297-98).

Mr. Entin testified that co-counsel would have been very helpful (PC-R2. 298).

The trial judge was in a hurry to complete this case (PC-R2. 287). Mr. Entin was appointed on April 18, 1983, and the new penalty phase was originally scheduled for May 11, 1983 (PC-R2. 286-87). The case was continued one time until July 5, 1983; thus, Mr. Entin had only 79 days within which to prepare (PC-R2. 291). Also during this time period, Mr. Entin was married and took a 10-day honeymoon (PC-R2. 291). Additionally, after the appointment, it took Mr. Entin a week to obtain the files on Mr. Rose's case (PC-R2. 286, 291). Thus, Mr. Entin had 62 days within which to prepare for the resentencing (PC-R2. 291). Mr. Entin testified he could have done more to prepare for the resentencing, but the court made it clear there would be no more continuances (PC-R2. 290). Mr. Entin would have done more preparation had he been given more time, but as it was he "jammed to do what I had to do" (PC-R2. 319).

Mr. Entin did not obtain Mr. Rose's high school records, nor records of Mr. Rose's hospitalization for physical injury (PC-R2. 308-09). He also did not obtain Mr. Rose's prison records, and admitted he does not know if he knew that good prison behavior is a mitigating factor (PC-R2. 309-311). Mr. Entin did not retain a mental health expert to assist during the new penalty phase (PC-R2. 311; 320), although he knew Mr. Rose had problems with mental illness (PC-R2. 320).

Mr. Entin testified that evidence of Mr. Rose's brain damage, low level of intellectual functioning, and his inability to obtain his Graduation Equivalency Diploma (GED) would have been helpful during the new penalty phase (PC-R2. 315). Mr. Entin also testified that evidence from a mental health expert showing Mr. Rose had a mental deficiency as the result of life-long chronic alcoholism would be beneficial (PC-R2. 317), in addition to evidence of Mr. Rose's referral as a child for mental health treatment (PC-R2. 318). Mr. Entin testified he definitely would have wanted the new penalty phase jury to know Mr. Rose was brain-damaged (PC-R2. 318).

During the post-conviction evidentiary hearing Mr. Rose presented evidence of mitigation that was not considered by any judge or jury prior to the evidentiary hearing. First, Mr. Rose's former wife, Cheryl Mincey, testified she and Mr. Rose met while they were in high school and married in 1965 (PC-R2. 354). Mr. Rose was an alcoholic who drank to excess, and who never received treatment for his disease (PC-R2. 355; 361). Ms. Mincey described Mr. Rose's family's financial condition as poor, and testified his family was also uneducated (PC-R2. 356). Mr. Rose was also uneducated, not having graduated from high school. He also had to repeat several grades during his elementary school years (PC-R2. 356). He was a slow learner (PC-R2. 361).

Ms. Mincey testified Mr. Rose was close to his mother, and did not know his natural father. Not knowing his father was something that bothered Mr. Rose, almost as if there was a

missing link in his life (PC-R2. 358-59). During his marriage to Ms. Mincey, Mr. Rose maintained regular employment, and in contrast to the nature of offense for which he was convicted, never physically assaulted her (PC-R2. 359). When not under the influence of alcohol, Mr. Rose was a loving, affectionate, and good husband (PC-R2. 360). Ms. Mincey did not testify during Mr. Rose's new penalty phase, although she would have been willing to do so (PC-R2. 361).

Dr. Jethro Toomer, Ph.D., also testified during the post-conviction evidentiary hearing. Dr. Toomer is a clinical and forensic ps ychologist (PC-R2. 381). He has practiced psychology for 15 years, is a tenured professor at Florida International University, and is a Diplomat of the American Board of Professional Psychology (PC-R2. 381). He has been qualified as an expert in court in his field of expertise hundreds of times (PC-R2. 382). The court accepted him in Mr. Rose's case as an expert in clinical and forensic psychology (PC-R2. 383).

Dr. Toomer analyzed Mr. Rose through several methods, and conducted a psychosocial evaluation (PC-R2. 384). He administered several psychological tests and reviewed numerous records and documents, in addition to speaking with Mr. Rose's first wife (PC-R2. 384). The background materials relied upon by Dr. Toomer are included with the record on appeal in this case (Def. Exs. 8,9).

Dr. Toomer diagnosed Mr. Rose with a significant longstanding borderline personality disorder and long-standing

brain damage (PC-R2. 385).[6] He opined both of these disabilities had tremendous and significant impact on Mr. Rose's overall behavior. Dr. Toomer also diagnosed longstanding substance abuse, primarily the abuse of alcohol (PC-R2. 386).

Dr. Toomer testified there was evidence Mr. Rose suffered from abuse as a child, and said, "child abuse is a very critical dimension in terms of overall development" (PC-R2. 388-389). He also testified Mr. Rose was the product of a dysfunctional family and did not receive the appropriate nurturing and emotional support, which necessarily made it difficult later for Mr. Rose to function (PC-R2. 394-95). Mr. Rose did not know his father, and thus felt abandoned, and was raised in a hostile environment (PC-R2. 396). For example, Mr. Rose was locked for extended periods of time in a closet and once his family tried to lose him (PC-R. 396). Dr. Toomer explained the lifelong effects of growing up in a dysfunctional family environment:

> I think probably a good point to begin would be with the family circumstances and family orientation. This is reflected both in terms of self report from Mr. Rose and both in terms of the documents that we alluded to. There is a history of a dysfunctional family environment. And what we are talking about here is basically a situation where an individual does not receive the appropriate nurturing case and emotional support that provides the armor that enables one to be able to copy and adjust as one develops.
>
> That's a critical dimension because without those basic -- Those basic needs being met early on, it becomes increasingly difficult for an individual to function

[6] Dr. Toomer specifically rejected an anti-social personality disorder diagnosis for Mr. Rose (PC-R2. 416).

appropriately later. Because the ability to function, quote unquote, normally in terms of abiding by rules and regulations, in terms of making appropriate judgments, in terms of weighing consequences, those kinds of skills often referred to as higher order thought processes don't just occur, they occur, as a result of a certain foundation being laid. That foundation is basically a situation where there is nurturing, where there is caring, where there is stability, predictability and support.

> When that does not occur, you have in essence set the stage for a dysfunctional individual. That is without some additional intervention. You set the stage for a dysfunctional individual because those skills that are required in order for one to adjust and function appropriately in society, those skills have never been taught. So what you have are individuals who are chronologically moving in this direction (indicating), but whose emotional skills and adaptability -- And adaptive skills are basically down here (indicating). So chronologically they are fifteen, twenty, twenty-five, emotionally they are eight, nine, ten whatever. So that decision making is impaired, the ability to weight consequences is impaired, their judgment is impaired and that hampers their overall adjustment, their interpersonal relationships, kinds of decisions and choices they make and what have you. And that's the pattern that evolved from this dysfunctional family that Mr. Rose was a part of.

(PC-R2. 394-96).

Dr. Toomer explained Mr. Rose's school records showed a troubled experience, although he was not a discipline problem:

> Q. Turning to his school records as to what happened to him when he got to school, what did you learn from the school records?
>
> A. Well, his school records basically reflect that -- Reflect a troubled experience, for want of a better word. He was described by his teachers in terms of narrative comments that were contained as beying immature, but having a positive

> disposition, coming from a poor background and having insufficiently developed work habits. The records also reflected that -- Describe him specifically as being good natured, who tried very hard, but who was, quote unquote, slow, who could not master the material. And the teachers comments attributed some of that to having no routine at home, no predictability, if you will.
>
> And he was described as being like by the people with whom he associated, that is his school group, but just being unable to master and accomplish the tasks that were appropriate for his particular -- For his particular age. He was described as slow, but did not manifest any disciplinary problems. He was however retained in fourth grade, fifth grade and again in seventh grade. And he left school at age seventeen prior to, you know, completing his education.

(PC-R2. 397-98). Mr. Rose did not receive a high school diploma and was retained in the fourth, fifth, and seventh grades (PC-R2. 397-98). According to Dr. Toomer's calculations, Mr. Rose would have been 16 or 17 years of age in the eighth grade (PC-R2. 398). Mr. Rose has an I.Q. of 84 and was unable to pass the test to be admitted to the army (PC-R2. 407). Mr. Rose's prison records also describe his educational background, indicating that his IQ is 84, he could not pass the GED test, and he could not pass a test to get in the army (PC-R2. 407).

Hospital records reviewed by Dr. Toomer showed Mr. Rose was treated at Holy Cross Hospital for a 30-foot fall in which he suffered head trauma, had residual blackouts, and recurring dizziness (PC-R2. 399). Other incidents in which Mr. Rose suffered head trauma include his being struck with a baseball bat and being in an automobile accident in 1975 (PC-R2. 399). Mr. Rose's admission to a hospital approximately one year after his

fall for abnormal behavior, including blackouts and chest pain, was consistent with brain damage (PC-R2. 401). Also, his history of headaches and blurred vision was consistent with having suffered head trauma (PC-R2. 401). The information in Mr. Rose's records regarding his headaches, blackouts and slowness in school would indicate to a mental health expert that there was organic impairment requiring further evaluation (PC-R2. 409-10).

Dr. Toomer testified that there is a discrepancy between Mr. Rose's emotional age and his chronological age in that Mr. Rose's emotional age is "much less" than his chronological age (PC-R2. 431). Mr. Rose's organic impairment is "of long standing and is significant" (PC-R2. 432). Dr. Toomer explained the effects of alcohol and stress upon a person with organic brain damage and borderline personality disorder:

> Q. One more item, Doctor, that is in regard to a person with organicity, is there a -- Any special significance to the consumption of alcohol for such a person?
>
> A. That is an absolute prohibition. Individuals who are suffering even minimal brain damage or organicity are always advised to refrain from the use of any type of alcoholic substance. That is considered to be a very volatile kind of mixture if you will. There is already substantial impairment sub par impairment in terms of higher order functioning, higher order thought processes. You put alcohol into that, into that mixture and it causes the individual's level of functioning to decrease even that much more.
>
> Q. And in regard to a borderline personality disorder, what is the effect of stress, of an unusual stress on a person with a borderline personality disorder?

> A. Borderline -- I made the distinction earlier in terms of the sociopath and the borderline. Borderline stress is basically the one single ingredient, not that there aren't others, but stress can almost be guaranteed to create all kinds, all forms of maladaptive behavior in terms of individuals who are borderline, who suffer from borderline personality disorders. With antisocial personality disorder it tends to be a loss of control, perceived or real. But with borderline stressors tend to create all kinds of problems because their ability to cope is so minimal.
>
> Q. Is it possible under extreme stress for such person to have a psychotic episode who is a borderline?
>
> A. By all means. One characteristic of borderline personality disorder is a manifestation of what are called mini-psychotic where an individual for very short periods of time lose contact with reality and then regain if after a period.

(PC-R2. 433-34). Dr. Toomer testified that a person with borderline personality disorder can have psychotic episodes (PC-R2. 434), and that Mr. Rose's records indicate that he was once characterized as schizoid (PC-R2. 435).

Dr. Toomer testified Mr. Rose's overall adjustment to the prison environment was acceptable and described his behavior as good:

> Q. Now with regard to his prison records, when you reviewed those, what is the overall description of his behavior in prison?
>
> A. Overall from a review of his prison records his adjustment and his functioning in that particular environment was for the most part -- Was for the most part acceptable. His behavior was described as good. There was not a lot of disciplinary reports. I believe there was one disciplinary report, but generally overall his behavior has been

commendable. That is the absence of numerous disciplinary reports.

> Q. Again, Doctor, I would refer you to some prison records out of Volume II and this is a report --
>
> A. Yes.
>
> Q. -- And what does it reflect in regard to his disciplinary records?
>
> A. It said that -- I'm reading from the report, the records reflect that the subject has not received any disciplinary reports while serving his sentence. He maintained a clear disciplinary record during his previous incarceration.
>
> Q. And let's see if we can find a date.
>
> A. This is 11-29-71.
>
> Q. So does that report reflect his good adjustment to prison?
>
> A. That's correct, yes.
>
> Q. Are there numerous other instances in here in which they refer to his good behavior?
>
> A. Yes. Overall his adjustment in terms of the absence of disciplinary reports is commendable.

(PC-R2. 403-04).

Dr. Toomer explained that Mr. Rose's good adjustment to prison was consistent with Mr. Rose's borderline personality disorder and brain damage because prison provides the structure needed by a person with Mr. Rose's disabilities:

> When we talk about the borderline personality disorder, we are talking about an individual who basically -- Whose behavior is basically characterized by maladaptive pattern of adjustment in all spheres of life

both in terms of work, in interpersonal relationships, emotionality and the like.

And what you find in almost all cases with individuals suffering the effects of a borderline personality disorder is a history of trauma, of abandonment, of early neglect and dysfunction. What tends to happen is the person is ill equipped and spends his or her life basically compensating for deficits that have come about as a result of that impoverishment, emotionally impoverished. Perhaps financially, too, but primarily emotionally impoverishment. So as a result what you get is an individual who is basically dysfunctional. Now that is -- That is the bottom line.

Now in addition to that what you get is part of the pattern of attempting to just as oftentimes you get behavior that is maladaptive. You get a reliance, a dependance upon alcohol and substance abuse, sometimes to self medication. In terms of all of the abuse, the anxiety, because you aren't talking about an individual who is coping appropriately, you're talking about an individual who is constantly trying to make up for the early on deficits.

And so if you have a situation like that, you have got an individual who may very well rely on drugs, alcohol, who may act out.

And then in addition to that, if you have an individual who has organic impairment, it's going to make the trip even that much longer and that much more difficult because the individual is going to be ill equipped to make the kinds of appropriate decisions that are required.

Q. And how would a person like that function in a prison environment?

A. A person like that would function very appropriately because what you have in that kind of an environment is structure. And that is what is required. Structure provides predictability. Structure provides stability, two basic and very critical elements missing from one's early on development. So individuals would function very well in that kind of structured environment.

> In fact, in a number of instances when Mr. Rose was evaluated the recommendation -- The treatment recommendation was a structured facility where he could receive treatment, but evidently nothing was ever followed up on.

(PC-R2. 404-06).

According to Dr. Toomer, Mr. Rose met the criteria for the statutory mitigating circumstance of under the influence of an extreme emotional or mental disturbance at the time of the offense (PC-R2. 422), based upon Mr. Rose's longstanding borderline personality disorder, organic brain damage and alcohol abuse (PC-R2. 423), and upon his consumption of alcohol on the night of the offense (Id.). Dr. Toomer also opined Mr. Rose's ability, at the time of the offense, to appreciate the criminality of his conduct or conform his conduct to the requirements of law was impaired (PC-R2. 423-24). Mental health impairments would have played a part in Mr. Rose's prior conviction, which was used as an aggravating factor (PC-R2. 424). Records establish Mr. Rose was drinking during the prior offense (Id.). The court would not permit Dr. Toomer to explain how Mr. Rose's alcoholism, brain damage and borderline personality disorder affected his behavior at the time of the prior offense (PC-R2. 425-27).

On cross-examination, the State questioned Dr. Toomer regarding his testimony on Mr. Rose's good behavior in prison. Showing Dr. Toomer four disciplinary reports (DRs) from Mr. Rose's Department of Corrections records (St. Ex. 1), the State inquired:

Q. That's fine, Doctor. But let's go on to my question about four DR's.

A. Fine.

[Q]. Doesn't that, in fact, substantiate that results and dispute your whole testimony here today?

A. No. I indicated to you that there were DR's. I said overall considering his entire history, I said that his entire history had generally been without disciplinary -- Without disciplinary reports. I didn't say it was absent of any disciplinary reports. I'm saying overall since 1977.

Q. Doctor, you said one DR in 1971, is that not correct?

A. That's what I had in my -- I have all of those in my notes that are considered, that are right here.

Q. so, in other words, these were not provided to you by CCR, you never had these in that material that they gave you?

A. What?

Q. These four DR's.

A. No, I said to you I have them in my notes, but I only noticed one of them when I was testifying. Only because they were on another page, but I have those in my notes. I've seen those. I was speaking overall. Since 1977 the question was with regard to his overall pattern of adjustment.

Q. Doctor, wouldn't four DR's between 1977 and 1983 be fairly indicative then of antisocial behavior --

A. No, no.

Q. -- In your opinion?

A. No, not in my opinion.

(PC-R2. 453-54). On redirect examination, Dr. Toomer explained that Mr. Rose's prison "behavior in general had been commendable, not to suggest that there had been a total absence [of disciplinary reports], but that overall his behavior was not characterized by a large number of disciplinary reports" (PC-R2. 473).

As Dr. Toomer testified on cross-examination (PC-R2. 454), the background materials he reviewed in conducting his evaluation contained the four disciplinary reports referred to by the State (Def. Ex. 9, Tab 8). None of the disciplinary reports was for any violent behavior; rather one was for disobeying a verbal order, one was for possession of miscellaneous contraband, one was for possession of negotiables and one was for possession of marijuana (St. Ex. 1).

Further, as Dr. Toomer testified, Mr. Rose's prison record contains numerous reports of his good behavior from his prior incarceration and from his incarceration on death row before his resentencing. When Mr. Rose went to prison in 1971, his classification report stated:

> Records reflect that the subject has not received any disciplinary reports while...serving this sentence. He maintained a clear disciplinary record during his previous incarceration.

(Reclassification and Progress Report, 11/29/71, Def. Ex. 9, Tab 8, p. 111).[7] A progress report in 1972 stated:

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[7]Defense Exhibit 9, Tab 8, contains several hundred unnumbered pages of Department of Corrections records. The page numbers provided in the citations in the text are approximate.

> In all areas within the institution positive reports have been received....[T]he subject has well demonstrated his capabilities of functioning within a structure[d] atmosphere such as an institution.

(Reclassification and Progress Report, 4/17/72, Def. Ex. 9, Tab 8, p. 117). Later in 1972, prison staff reported:

> [Mr. Rose] has made an above average adjustment. In all areas within the institution positive reports have been made....During this period of confinement no problems have been encountered to date....[H]is work performance has been rated excellent.

(Reclassification and Progress Report, 10/27/72, Def. Ex. 9, Tab 8, p. 127). In 1973, prison staff reported Mr. Rose had no disciplinary reports and "receive[s] favorable reports from throughout the Institution" (Reclassification and Progress Report, 4/16/73, Def. Ex. 9, Tab 8, pp. 134-35). Mr. Rose again received a favorable report in October 1973 (Reclassification and Progress Report, 10/15/73, Def. Ex. 9, Tab 8, p. 143). In 1974, prison staff reported:

> This individual has maintained a clear disciplinary record during this report period. Reports indicate that he readily complies to all rules and regulations and is a well behaved individual. It is also noted that he has had no disciplinary difficulty during the entirety of his sentence.

(Reclassification and Progress Report, 5/20/74, Def. Ex. 9, Tab 8, p. 165). Later in 1974, prison staff reported, "During his incarceration at this facility subject has maintained a clear disciplinary record and appears to be adjusting well in the

community based programs" (Reclassification and Progress Report, 10/27/74, Def. Ex. 9, Tab 8, p. 181).

Mr. Rose received similar progress reports while on death row before his resentencing. In 1977, prison staff reported, "Subject maintained a clear disciplinary record on his previous incarceration and is also maintaining a clear disciplinary record on this sentence" (Reclassification and Progress Report, 5/17/77, Def. Ex. 9, Tab 8, p. 284). In 1978, prison staff reported, "Since his incarceration he has received one Disciplinary Report....The Classification Team feels that Inmate Rose will continue to be a well behaved Inmate and not experience any serious problems on Death Row" (Progress Review, 7/7/78, Def. Ex. 9, Tab 8, p. 321). In 1980, prison staff reported, "Subject is not considered to be a management problem due to his receipt of satisfactory quarters reports and his ability to maintain a clear disciplinary report record for over one year" (Progress Review, 7/15/80 Def. Ex. 9, Tab 8, p. 342). In 1981, prison staff reported, "Wing officers state that Inmate Rose has caused no problems and a review of his disciplinary report record indicates he has maintained a clear disciplinary report record since March of 1979" (Progress Review, 6/17/81 Def. Ex. 9, Tab 8, p. 344). In 1982, prison staff reported, "Subject is not considered to be [a] management probl[em] due to his ability to maintain a clear disciplinary report record since Marc[h] 1979, as well as receiving satisfactory quarters reports" (Progress Review, 6/8/82 Def. Ex. 9, Tab 8, p. 349).

SUMMARY OF ARGUMENT

1. According to the State's case at Mr. Rose's trial, the only time Mr. Rose could have committed the offense was between 9:30 and 11:30 p.m. Nine witnesses gave statements to police in which they said they saw the victim alive at the bowling alley at various times between 10:00 and 11:45 p.m. However, Mr. Rose's jury never heard about any of these witnesses' statements, and thus never heard compelling exculpatory evidence indicating that Mr. Rose could not have committed the offense. The jury never heard these statements because trial counsel did not present them. Trial counsel had the statements and believed time was a critical issue in the case. He did not present the statements because he wanted to reserve opening and closing arguments and because some of the time witnesses had observed other matters which were damaging to Mr. Rose. Trial counsel's decision was wholly unreasonable. Closing argument cannot substitute for facts showing the defendant could not have committed the crime. The other damaging matters observed by some of the time witnesses were testified to repeatedly by numerous witnesses at trial. Failing to call witnesses with such compelling exculpatory evidence, particularly when that evidence was completely consistent with the theory of defense, is unreasonable. Mr. Rose was deprived of the effective assistance of counsel and is entitled to a new trial.

2. At resentencing, Mr. Rose was represented by an attorney who had no experience with a capital penalty phase, who was not

familiar with aggravating and mitigating factors, and who was given too little time to prepare. Resentencing counsel did not obtain records regarding Mr. Rose's background nor obtain the assistance of a mental health expert. Such a failure to investigate is deficient performance. Had counsel properly investigated, mitigating evidence regarding Mr. Rose's abused childhood, brain damage, borderline personality disorder, alcoholism and good prison behavior would have been discovered. Mr. Rose was prejudiced and is entitled to resentencing.

3. At resentencing, the defense requested that the resentencing jury be given instructions defining felony murder and premeditated murder so that the jury could assess the basis of Mr. Rose's conviction and thereby assess his level of culpability. The requested instructions were denied. This claim was then presented on direct appeal and denied. The claim is now cognizable under James v. State. Under Espinosa v. Florida, Mr. Rose was denied his Eighth Amendment right to have the jury correctly instructed on matters necessary to the jury's sentencing determination. Without the requested instructions, the jury could not assess the "circumstances of the offense" and thus could not reach a reliable and individualized sentencing decision.

4. At the time of trial, the State withheld evidence showing that Mr. Rose had invoked his right to counsel during a custodial interrogation. As a result, Mr. Rose was deprived of a

full and fair suppression hearing, and his statements were admitted in violation of the Constitution.

5. The procedure by which Broward County provides funds for the representation and defense of indigent capital defendants creates a conflict of interest which deprived Mr. Rose of the effective assistance of counsel, of the assistance of experts, and of a transcript of his mistrial. Mr. Rose was prejudiced.

6. Mr. Rose was deprived of full and fair postconviction proceedings by the trial court's refusal to allow proffers of excluded testimony, exclusion of relevant testimony, failure to allow evidentiary resolution of some claims, and failure to attach files and records to its orders denying evidentiary resolution of some claims.

7. Mr. Rose's statements made during a custodial interrogation after police failed to honor his invocation of the right to counsel were admitted at trial and resentencing in violation of the Constitution.

8. At trial and resentencing, the State misrepresented the victim's manner of death by manipulating the testimony of the medical examiner, depriving Mr. Rose of a fair trial.

9. The trial court's answering a question posed by jurors during their deliberations in the absence of Mr. Rose and the failure to make a record of this event violates due process.

ARGUMENT I

MR. ROSE RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT/INNOCENCE PHASE OF HIS TRIAL.

The standard for determining whether Mr. Rose received effective assistance of counsel was articulated by the United States Supreme Court in Strickland v. Washington, 104 S. Ct. 2052 (1984). In Strickland, the Court said the defendant must show (1) counsel's performance was deficient; and (2) the deficient performance prejudiced the defense. Strickland, 104 S. Ct. at 2064.

This Court must apply a reasonableness standard in evaluating whether Mr. Rose's counsel was effective. Strickland, 104 S. Ct. at 2064; Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991)("...counsel's performance must be evaluated for 'reasonableness under prevailing professional norms'"). "[M]erely invoking the word strategy to explain errors [is] insufficient since..." decisions must be assessed for reasonableness. Horton, 941 F.2d at 1461. "[C]ase law rejects the notion that a 'strategic' decision can be reasonable when the attorney has failed to investigate his options and make a reasonable choice between them." Horton, 941 F.2d at 1462.

Upon showing deficient performance, "[t]he defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."

Strickland, 104 S. Ct. at 2068 (emphasis added). The standard is **less than proof by a preponderance of the evidence**. Agan v. Singletary, 12 F.3d 1018 (11th Cir. 1994). In other words, it is not necessary that Mr. Rose show it is more likely than not that the outcome of his guilt/innocence phase would have been different; instead, he need only show by proof less than a preponderance of the evidence that confidence in the outcome is undermined.

"In every case [this] [C]ourt should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results." Strickland, 104 S. Ct. at 2069. That is, "an ineffectiveness claim...is an attack on the fundamental fairness of the proceeding whose result is challenged." Strickland, 104 S. Ct. at 2070.

The issue then is whether Mr. Rose's counsel "function[ed]...to make the adversarial testing process work in [this] particular case[?]" Strickland, 104 S. Ct. at 2066. This Court's focus should be whether all of the evidence was presented to the jury for its consideration. If not, the adversarial testing required to insure a fundamentally fair outcome did not occur.

"[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, 104 S. Ct. at 2063 (emphasis added). Conversely, if important or exculpatory evidence is not presented to the jury, an adversarial testing does not occur. If no adversarial testing occurs, the proceedings are unfair as the result of ineffective assistance of counsel. Davis v. State, 627 So. 2d 112, 113 (Fla. 1st DCA 1993)("It is reasonable to conclude that the failure to call a witness possessed of exculpatory evidence and of whom trial counsel should have been aware constitutes deficient performance"). The determination whether counsel was ineffective results naturally once this Court decides if an adversarial testing occurred.

Trial counsel admitted the issue of time, i.e., whether Mr. Rose could have committed the offenses in the time period required by the State's theory, was an important factor in the case (PC-R2. 70). In fact, he said the issue of time was critical (PC-R2. 71), and the defense was tailored to focus on time (PC-R2. 71). Bearing this in mind, however, trial counsel neglected to present the only witnesses who could have established Mr. Rose could not have committed the offenses for which he was convicted. Mr. Rose has been prejudiced.

Several witnesses gave pretrial statements and/or pretrial testimony that conclusively showed Mr. Rose was not the person responsible for the disappearance and death of the victim. Those statements, and that testimony, was available to trial counsel, yet the evidence was not presented to the jury.

The State's theory at trial was (1) Mr. Rose committed the offenses between 9:50 p.m. and 10:23 p.m. on October 22, 1976 (T. 1215-1216; 1219; 1226); (2) between 10:23 p.m. and 11:30 p.m., he drove a 21-mile round trip and disposed of the victim's body (T. 1226); and (3) he returned to the bowling alley at 11:30 p.m. (T. 1226). Several persons, however, saw the victim between 11:00 and 11:45 p.m., which means Mr. Rose could not have committed the offenses. To Mr. Rose's prejudice, none of these persons was called to testify.

In denying relief, the circuit court relied upon trial counsel's testimony that he did not call the time witnesses because some of them had made observations, such as seeing blood on Mr. Rose's pants, which were damaging to Mr. Rose (PC-R2. 1033). However, twice during the hearing, the circuit court judge stated that he had not reviewed the record in Mr. Rose's case (PC-R2. 193 ["Unfortunately I'm not acquainted with the record, nor was I present when the record was being made"]; PC-R2. 233 ["Well, you have had the benefit of that record which I haven't"]). Thus, the court could not know of the numerous witnesses who testified at trial to the damaging information despite counsel's failure to call the time witnesses and the consequent unreasonableness of trial counsel's testimony. The circuit court recognized that trial counsel's strategy was "to narrow the permissible time period of death" (PC-R2. 1033), but never assessed whether it is reasonably competent performance for

an attorney with this professed strategy not to call the only witnesses who supported that strategy.

In denying relief, the circuit court also relied upon trial counsel's testimony that he did not call witnesses because he wanted to preserve opening and closing argument (PC-R2. 1033). The circuit court did not address trial counsel's testimony that he believed closing argument was a way of testifying (PC-R2. 269), nor did the circuit court address the reasonableness of such a position when the jury is specifically instructed that the arguments of the attorneys are not evidence. The circuit court's order does not discuss whether it is reasonable for an attorney to trade fact witnesses for a closing argument when the very theory of the defense was based upon evidence only the omitted fact witnesses could provide. In this case, witnesses were available to show that Mr. Rose could not have committed the offense, but rather than present those witnesses, counsel unreasonably chose to rely upon oratory. This is unreasonable attorney performance.

The circuit court's order does not address the prejudice to Mr. Rose beyond simply stating that prejudice had not been established (PC-R2. 1034). Had the court reviewed the record, it would have realized that Mr. Rose suffered substantial prejudice. As previously explained, the State's case required that Mr. Rose have committed the offense between 9:30 p.m. and 11:30 p.m., and the jury was specifically instructed that the State was required to prove the offense occurred within two hours either side of

11:00 p.m. There is no dispute that Mr. Rose could not have committed the offense after 11:30 p.m., because he had then returned to the bowling alley and was constantly observed by witnesses and the police until he was taken to the police station. However, witnesses who could have exonerated Mr. Rose by showing that the victim was alive up until 11:45 p.m. There was no adversarial testing of Mr. Rose's guilt or innocence. Trial counsel failed to call Linda Nieves to testify.[8] In her pretrial statement she said she saw the victim at the bowling alley on October 22, 1976 at 11:45 p.m. (Def. Ex. 20). Trial counsel knew of her statement (PC-R2. 82). Ms. Nieves testified at the evidentiary hearing that her original statement was true and correct, and that she had not changed or recanted its contents (PC-R2. 423-424). The lower court did not make a finding against the credibility of Ms. Nieves' testimony.

Trial counsel failed to call Thomas Dusch to testify. In his pretrial statement he corroborated Ms. Nieves' statement by saying he also had seen the victim at the bowling alley on October 22, 1976, at 11:45 p.m. (Def. Ex. 13). Trial counsel also knew of this statement (PC-R2. 78). At the evidentiary hearing Mr. Dusch testified his statement was true and correct, and he had not changed or recanted its contents (PC-R2. 444-45).

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[8]At the evidentiary hearing, trial counsel agreed (1) an order was entered requiring the State to produce **all** witnesses for trial; and (2) all witnesses discussed in this brief were available to testify at the trial (PC-R2. 80).

The lower court did not make a finding against the credibility of Mr. Dusch's testimony.

Trial counsel failed to call Robert Autry to testify. He said in his pretrial statement that he saw the victim at the bowling alley on October 22, 1976, at 11:20 p.m. (Def. Ex. 12). During the evidentiary hearing the State stipulated Mr. Autry would have testified his statement was true and correct, and he had not changed or recanted its contents (PC-R2. 451-52).

Trial counsel failed to call Joseph Autry to testify. In his pretrial statement he corroborated Robert Autry's statement about seeing the victim at the bowling alley and stated he saw the victim until twenty minutes before people noticed she was missing. He also testified at the evidentiary hearing that his statement was true and correct, and he had not changed or recanted its contents (PC-R2. 443-44). The lower court did not make a finding against the credibility of Mr. Autry's testimony.

Trial counsel also failed to call other witnesses who could have established that the victim was alive during the time the State argued the murder was occurring. Walter Isler had told police that he had seen Lisa Barry in the bowling alley some time "going on 11." When Mr. Isler testified at trial that he did not remember making this statement, trial counsel did not use the statement as impeachment or to refresh Mr. Isler's recollection. Counsel also did not ask Detective McLellan about Mr. Isler's statement. Fay Grebowski told police she had seen the victim in the bowling alley at about 11:00 p.m. John Hass told police he

had seen the victim in the bowling alley at about 10:30 p.m. Denise Schauer told police she had seen the victim in the bowling alley between 10:00 and 10:30 p.m. The victim's mother, Barbara Berry, told police she last remembered seeing her daughter "[a]round 10 or it could have been after."

None of the statements of these witnesses were provided to Mr. Rose's jury. Contrary to trial counsel's testimony, counsel did not ask the detectives who took the statements about the statements. Counsel elicited no testimony from any witness regarding these statements. Thus, the jury did not know that nine witnesses could provide evidence that the victim was seen alive in the bowling alley at various times from 10:00 p.m. until 11:45 p.m., the time period when the State contended Mr. Rose was committing the offense. Mr. Rose was clearly prejudiced by counsel's omissions.

Further, counsel also failed to inform the jury of other evidence discrediting the State's case. The jury was not told that the van Jim Hughes saw at the convenience store on the night of the offense was <u>not</u> Mr. Rose's van because Hughes knew what Mr. Rose's van looked like. The jury was not told that on the night of the offense, between 11:55 p.m. and 12:05 a.m., Margaret Cobb saw a white van at the location where the victim's body was later discovered. This van, too, could not have belonged to Mr. Rose because no one disputes that he was at the bowling alley at that time. The jury was not told of the numerous statements witnesses made to police establishing that Mr. Rose did not react

jealously when the victim asked about going to breakfast. Again, Mr. Rose was prejudiced by trial counsel's omissions.

Characterizing trial counsel's decisions as "strategy" does not mean they were reasonable, and thus, a strategic decision does not automatically insulate trial counsel from a claim of ineffectiveness. Horton, supra. Trial counsel's decisions were unreasonable for several reasons. First, he admitted that "[i]f eight witnesses could have cleared Jim Rose, I would have had them up there" (PC-R2. 199). Yet, he failed to call **the only witnesses** who could "have cleared" Mr. Rose. Second, he also admitted if Dr. Davis[9] had testified, he would have called the time witnesses to testify because he would have given up his rebuttal argument by having Dr. Davis testify (PC-R2. 207-08); however, without Dr. Davis' testimony to contradict the State's theory as to the cause of death, evidence that Mr. Rose could not have killed the victim was even more important. Third, trial counsel admitted he knew evidence of the blood found on Mr. Rose's person would be admissible in the retrial (PC-R2. 112-13), and that this evidence was critical (PC-R2. 136). However, trial counsel did not present the only evidence (the testimony of the time witnesses) which could have established that the blood on Mr. Rose's pants and van could not have come from the victim

[9]Dr. Davis was a forensic pathologist retained at trial by the defense, to show that the State's medical examiner's opinion that the victim could have been struck in the head by a hammer was incorrect. Ultimately, Dr. Davis did not testify at trial.

because she was still alive when Mr. Rose returned to the bowling alley and people observed the blood stains.

Finally, trial counsel's testimony regarding why he did not call the time witnesses was clearly based upon mistaken recollections of the record. For example, trial counsel believed he otherwise introduced the time witnesses statements through his cross-examination of State witnesses. He testified he asked the detectives to whom the statements were given if the statements had, in fact, been made to them (PC-R2. 263). The record is contrary to trial counsel's belief. Specifically, these witnesses gave their statements to Detectives Arthur McLellan, Richard Hoffman, or C.G. Page. Detective Page did not testify at trial. Detectives McLellan and Hoffman were not asked any questions by either the State or defense on the issue of time or whether these witnesses made those pretrial statements.

Additionally, trial counsel testified he did not call some of the time witnesses because they had also made observations damaging to Mr. Rose. This explanation, however, is also contradicted by the record. As is set forth in the Statement of Facts, these witnesses would not have given any unfavorable evidence that was not already admitted through numerous other sources. Trial counsel conceded that time was the crucial issue in the case; yet, the only way to create the "time issue" was to call these witnesses.

It remains uncontradicted that the jury did not hear any evidence about the conflict in time, or that the victim was

sighted at times that made it impossible for Mr. Rose to have committed the offenses for which he was convicted. The evidence from the witnesses was clear, unequivocal, and unrecanted. Nine witnesses saw the victim at the bowling alley at a time that made it impossible for Mr. Rose to have committed the offenses for which he was convicted. Trial counsel's failure to present the testimony of these witnesses was unreasonable, and Mr. Rose was significantly prejudiced. Given the jury's difficulty in reaching a verdict, there is a reasonable probability of a different outcome had the time witnesses' testimony been presented. Mr. Rose is entitled to a new trial at which there will be a true adversarial testing.

ARGUMENT II

MR. ROSE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING.

Resentencing counsel testified that he had only 62 days in which to prepare for Mr. Rose's penalty phase, that he had no prior experience with a capital penalty phase, that he was not familiar with aggravating and mitigating factors prior to being appointed to represent Mr. Rose, and that he would have done much more to prepare had he been given the time. Resentencing counsel testifed he did not obtain records regarding Mr. Rose's background and conducted no investigation into mental health issues. Had he obtained evidence that Mr. Rose was abused as a child, had a borderline personality disorder, suffered from brain damage, and was an alcoholic, resentencing counsel believed that such evidence would have been helpful at the penalty phase.

Resentencing counsel provided ineffective assistance, and Mr. Rose was prejudiced.

Resentencing counsel's performance was deficient because counsel failed to investigate mitigation. Failure to investigate available mitigation constitutes deficient performance. Hildwin v. Dugger, 20 Fla. L. Weekly S39 (Fla. Jan. 19, 1995); Deaton v. Singletary, 635 So. 2d 4 (Fla. 1994); Heiney v. State, 620 F.2d 171 (Fla. 1993); Phillips v. State, 608 So. 2d 778 (Fla. 1992); Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 451 So. 2d 596 (Fla. 1989).

Strickland's prejudice standard requires showing "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceedings would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, 466 U.S. 668, 694 (1984).[10] Confidence in the outcome is undermined when the court is unable "to gauge the effect" of counsel's omissions. State v. Michael, 530 So. 2d 929, 930 (Fla. 1988). Prejudice is established when trial counsel's deficient performance deprives the defendant of "a reliable penalty phase proceeding." Deaton v. Singletary, 18 Fla. L. Weekly S529, 531 (Fla. Oct. 7, 1993).

[10] A defendant is not required to show that counsel's deficient performance "[m]ore likely than not altered the outcome in the case." Strickland, 466 U.S. at 693. The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome.

The evidence presented in post-conviction established numerous mitigating circumstances. The evidence established that at the time of the offense Mr. Rose was suffering from an extreme emotional disturbance. See Fla. Stat. sex. 921.141(6)(b). The evidence established that at the time of the offense, Mr. Rose's capacity to conform his conduct to the requirements of law was impaired. See Fla. Stat. sec. 921.141(6)(f). The evidence established that Mr. Rose suffers from organic brain damage, a recognized nonstatutory mitigating factor, see State v. Sireci, 536 So. 2d 231 (Fla. 1988), was abused as a child, also a recognized nonstatutory mitigating factor, see Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990), had a history of severe alcohol abuse, another recognized nonstatutory mitigating factor, see Carter v. State, 560 So. 2d 1166, 1168 (Fla. 1990), and is able to function appropriately in a structured environment such as a prison, also a recognized nonstatutory mitigating factor. See Valle v. State, 502 So. 2d 1225, 1226 (Fla. 1987).

The circuit court found that resentencing counsel "did not obtain any hospital records, medical records or prison records, but he obtained two psychiatric reports which he introduced in evidence. He did not seek the appointment of a mental health expert" (PC-R2. 1034). However, the circuit court then concluded that resentencing counsel's performance was not deficient (PC-R2. 1035). Contrary to the circuit court's conclusion, deficient performance is established when an attorney does not conduct the

basic investigation for a capital penalty phase. See Hildwin; Deaton; Heiney.

The circuit court's order refers to the State's questioning of Dr. Toomer regarding Mr. Rose's good behavior in prison, stating that Dr. Toomer testified "he examined the prison records very carefully and found no disciplinary action taken against defendant. When informed on cross-examination there were at least four (4) such actions on record, he was quite shaken" (PC-R2. 1034). The circuit court's recitation is wholly contrary to the record. As detailed in the Statement of the Facts, Dr. Toomer testified on direct that Mr. Rose had a good overall prison record with few disciplinary reports and referred to one disciplinary report. On cross-examination, Dr. Toomer testified that he had reviewed all four of the disciplinary reports presented by the State and maintained his position that so few disciplinary reports were uncommon given the length of time Mr. Rose had been in prison and reflected good behavior in prison. Further, the quotations from Mr. Rose's prison records presented in the Statement of the Facts demonstrate that prison officials believed Mr. Rose to be well-behaved and well-adjusted.

The circuit court concluded that prejudice had not been established because "the Florida Supreme Court has already ruled in the case at bar that the aggravating circumstances were so severe that even a jury override would have been upheld" (PC-R2. 1035). However, the circuit court did not consider that this ruling was made on the then-existent record, which did not

include the mitigating evidence presented at the evidentiary hearing.

These mitigating factors were unrebutted and could not have been ignored by the jury and judge. Prejudice is established under such circumstances. See Hildwin v. Dugger, 20 Fla. L. Weekly S39, S40 (Fla. Jan. 19, 1995) (prejudice established by "substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992) (prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) (prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla, 1989) ("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different").[11] The evidence presented at Mr. Rose's hearing is identical to that which established prejudice in these cases, and Mr. Rose is similarly entitled to relief.

The mitigation established at the evidentiary hearing would have totally changed to picture of Mr. Rose presented at the

[11]Prejudice was found in these cases despite the existence of numerous aggravating factors. See Hildwin v. Dugger, 20 Fla. L. Weekly at S39 (four aggravating factors); Phillips v. State, 476 So. 2d 194 (Fla. 1985) (four aggravating factors); Mitchell v. State, 527 So. 2d 179 (Fla. 1988) (three aggravating factors); Lara v. State, 464 So. 2d 1173 (Fla. 1985) (same); Bassett v. State, 449 So. 2d 803 (Fla. 1984) (same).

penalty phase. There, the State relied upon Mr. Rose's prior conviction while the defense presented nothing to explain or reduce the aggravating weight of that conviction.[12] In contrast, the unrebutted mental health evidence clearly established that Mr. Rose has suffered serious mental disturbances since early childhood and that these mental disturbances resulted from factors such as brain damage and his upbringing over which Mr. Rose had no control and about which Mr. Rose had no choice. Thus, the mental health evidence would have substantially diminished the weight of the aggravating circumstances.

Further, it is not dispositive that some evidence was presented at Mr. Rose's penalty phase. Hildwin v. Dugger, 20 Fla. L. Weekly at S40 n.7. Compare State v. Lara, 581 So. 2d at 1289 (prejudice established by evidence of statutory mitigating factors and childhood abuse) with Lara v. State, 464 So. 2d at 1175 (at penalty phase, defense presented evidence regarding childhood abuse). See also Cunningham v. Zant, 928 F.2d 1006, 1017-19 (11th Cir. 1991). The evidence presented at the penalty phase does not even scratch the surface of the available mitigation. None of the voluminous and unrebuttable evidence available in the medical, prison and school records was

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[12] Resentencing counsel presented no evidence explaining the prior offense, although Mr. Rose's mental health impairments existed at the time of that offense. At the evidentiary hearing, the circuit court would not allow inquiry in this area (PC-R2. 426).

presented. None of the available evidence regarding mental health mitigating factors was presented.

The sentencing judge found that no mitigation had been established. In such circumstances, evidence establishing unrebutted mitigating factors cannot be considered cumulative to what was presented. The defense has a burden of proof at the penalty phase. Under Florida law, a mitigating factor should be found if it "has been reasonably established by the greater weight of the evidence: 'A mitigating circumstance need not be proved beyond a reasonable doubt by the defendant. If you are reasonably convinced that a mitigating circumstance exists, you may consider it as established.'" Campbell v. State, 571 So. 2d 415, 419-20 (Fla. 1990), quoting Fla. Std. Jury Instr. (Crim.) at 81. Establishing a fact "by the greater weight of the evidence" requires presenting evidence of a certain weight--evidence which adds weight in not cumulative by is necessary to meet the burden of proof. Further, once established, the weight of a mitigating factor matters in the ultimate decision between life and death because Florida's capital sentencing scheme requires the sentencers to weigh mitigation against aggravation. See Stringer v. Black, 112 S. Ct. 1130 (1992).

Further, what counsel did not do at the penalty phase regarding mental health evidence did more harm than good, particularly in the light of the available but unpresented mental health mitigation. mr. Rose was evaluated in 1976 by Drs. Eichert and Taubel on competency and sanity. However, counsel

did not interview either doctor, and unreasonably failed to produce either of them to testify to the jury and judge about mitigation. More importantly, counsel did not request an updated examination, though the reports were nearly seven years old and did not address mitigation. Neither did he advise the psychologists whose reports he used (or any psychologist) of mr. Rose's prior diagnoses, or of his background and history -- since he failed to investigate, he did not know of it himself -- and he failed to ask any mental health expert to conduct diagnostic testing. Indeed, counsel never asked that any expert evaluate the mental health statutory and nonstatutory mitigating circumstances which existed in this case. See State v. Michael, 530 So. 2d 929, 930 (Fla. 1988).

Counsel, unprepared, could do no more than submit the old reports. Counsel's deficiencies were thoroughly exploited by the prosecutor:

> On December 16th, Dr. Eichert and Taubel examined Jim Rose at the same time. At the same time. Saw him one time, they administered no psychological tests, nothing of an objective nature, or at least from their records it doesn't so indicate, and being men who can look into the mind of another human being and tell us all about in an hour or two-hour examination, they issued these reports.

(S. 845). Plenty of statutory and nonstatutory mental health evidence was available in this case.

The lower court's conclusion that no prejudice resulted from trial counsel's omissions is contrary to law. The lower court's decision assumes that the sentencers could simply ignore numerous

unrebutted statutory and nonstatutory mitigating factors. Florida law does not permit capital sentencers to ignore established mitigation. See Farr v. State, 621 So. 2d 1368, 1369 (Fla. 1993) ("We repeatedly have stated that mitigating evidence must be considered and weighed when contained anywhere in the record to the extent it is believable and uncontroverted") (emphasis in original). The evidence established that at the time of the offense Mr. Rose suffered from an extreme emotional disturbance, that at the time of the offense Mr. Rose's capacity to conform his conduct to the requirements of law was impaired, that Mr. Rose suffers from organic brain damage, that Mr. Rose suffers from a borderline personality disorder, that Mr. Rose has a lengthy history of serious alcohol abuse, that Mr. Rose suffered abuse as a child, and that Mr. Rose can behave appropriately in a structured environment such as a prison. These are all recognized mitigating factors which the sentencers could not legally ignore and which would have entirely altered the balance of aggravation and mitigation at the penalty phase. Based upon these mitigating factors, the jury could quite reasonably have returned a life recommendation which could not have been overridden. Confidence in the outcome of the resentencing is undermined, and Mr. Rose is entitled to relief.

ARGUMENT III

THE RESENTENCING COURT'S REFUSAL TO ALLOW EVIDENCE AND ARGUMENT REGARDING WHETHER MR. ROSE'S CONVICTION RESTED UPON PREMEDITATED OR FELONY MURDER OR TO PROVIDE INSTRUCTIONS DEFINING PREMEDITATED AND FELONY MURDER VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

This issue was presented on direct appeal from Mr. Rose's resentencing (see Initial Brief of Appellant, pp. 12-13), as the State agreed below (PC-R2. 799) and as the circuit court ruled (PC-R2. 811). This Court affirmed the death sentence without specifically addressing this argument. See Rose v. State, 461 So. 2d 84 (Fla. 1984). Mr. Rose respectfully urges the Court to reconsider the issue, as it goes to the fundamental fairness and proportionality of his death sentence. The claim is cognizable in these proceedings under James v. State, 615 So. 2d 668 (Fla. 1993).

At Mr. Rose's resentencing, defense counsel sought to argue that Mr. Rose's conviction rested upon felony murder rather than premeditated murder and thus requested that the resentencing jury be instructed on the definitions of felony murder (S. 820-21). Defense counsel argued that these instructions were essential to the jury's determination of Mr. Rose's level of culpability and thus to whether he deserved a death or life sentence. Id. The requested instructions were denied (S. 821). When counsel raised the matter again, the court again denied the requested instructions (S. 835). The denial of these instructions was then raised in Mr. Rose's direct appeal from resentencing (Rose v.

State, Fla. Sup. Ct. No. 63, 996, Initial Brief of Appellant, pp. 12-13). On direct appeal, Mr. Rose argued:

> Appellant timely requested in writing that the trial court read the definition to the jury of murder thus explaining to the jury that first degree murder consists of both felony murder and premeditated murder in order for the jury to understand the alternative ways in which the crime could have been committed in this case (R-235). Appellant's request was denied and appellant renewed his request at the charge conference and argued again at the time the instructions were given that the court should instruct the jury on the definition of felony- and premeditated murder (R-820-823).

(Initial Brief of Appellant at 12).

> The jury in entitled to know, and must know in order to properly perform its function, the legal significance of the facts and circumstance. Otherwise [the] jury has no adequate basis to measure greater or lesser culpability or the relative weight of the aggravation. Whether the evidence was sufficiently strong for a satisfactory conclusion of premeditated murder or whether the conviction rested more heavily on a finding of felony-murder alone was not irrelevant to this jury's function.

(Id. at 13).

Under Espinosa v. Florida, 112 S.Ct. 2926 (1992), Mr. Rose was entitled to have his jury receive correct instructions under which to make its sentencing determination. In James v. State, this Court held that claims premised upon Espinosa were cognizable in Rule 3.850 proceedings if they were preserved at trial and on direct appeal. Mr. Rose's claim was raised at trial and on direct appeal and thus is now cognizable in these proceedings. Mr. Rose is entitled to resentencing.

Although Mr. Rose's resentencing jury was never allowed to consider the felony murder versus premeditated murder question, Mr. Rose's conviction could only rest upon felony murder. The evidence of guilt in Mr. Rose's case was exclusively circumstantial. It is no accident that the only sentencing jury forbidden from wrestling with the weakness of the evidence of Mr. Rose's guilt was also the only jury to recommend death by other than a bare margin. The first jury to hear Mr. Rose's case deliberated over two days on the guilt determination, and eventually, after an unsuccessful Allen charge, a mistrial was declared (T. 1332-1478). At the second trial, the jury also deliberated for a lengthy time, and did not return a guilt verdict until it was also given an Allen charge (T. 1274). The jury then voted 6-6 on their sentencing recommendation, and did not reach a death decision until also receiving an Allen charge on that issue (T. 1302-03).

After this Court vacated the death sentence because of the improper penalty phase Allen charge, a new jury was impaneled for a sentencing recommendation only. The jurors could not have been told more often that the basis of Mr. Rose's conviction was not at issue -- that it had already been determined by another jury. The trial judge made it clear during pre-trial proceedings there would be no disputing the basis of Mr. Rose's conviction for first degree murder and kidnapping during sentencing:

(i) In determining counsel, the Court noted it was "not talking about retrying the whole case" (S. 15). During the first

continuance hearing in May, the trial judge stated his own limited view of the upcoming resentencing: "the Court is only going to consider the advisory phase and he's already been found guilty" (S. 2).

(ii) Just before resentencing, defense counsel moved for a continuance, citing his need to gather and prepare more evidence regarding Mr. Rose's level of guilt on the murder charge. In denying the motion, the trial judge noted: "well, the problem you lost sight of is you are going into aggravating and mitigating circumstances. The guilt has been affirmed" (S. 54). Defense counsel's efforts to convince the Court that the basis of Mr. Rose's conviction would be relevant in mitigation were unsuccessful (S. 55). The court twice again repeated the limitation on presenting evidence and argument regarding the basis of Mr. Rose's conviction during the hearing (S. 69-70), and the second penalty trial began that day.

Before they ever entered the box, prospective jurors were told their mission was limited:

(i) The Court's opening instructions were that Mr. Rose had already been found guilty of the first degree murder of an eight year old girl, and "you are not going to concern yourself with the questions of Mr. Rose's guilt ... it's already been determined" (S. 77). The court read jurors the indictment saying Mr. Rose had been convicted on the charge that "he did unlawfully and feloniously and from a premeditated design to effect the

death of a human being, known as Lisa Berry, did kill and murder her" (S. 80).

(ii) The State quickly and repeatedly reinforced the Court's admonition, telling prospective jurors that Mr. Rose was "already guilty" (S. 91-92), that they must "accept" the guilty verdict to be fair jurors (S. 95), and that they were not there to "re-decide guilt" (S. 170, 148, 210, 219, 221), only to recommend a sentence based on the statutory aggravating and mitigating circumstances (S. 120).

(iii) Defense counsel, laboring under the court directive, made statements during jury selection that "guilt [was] not at issue" (S. 123, 124, 125, 131), and that Mr. Rose "had committed this crime" (S. 132, 137).

(iv) When a juror expressed reluctance to recommend death unless guilt was shown "without even a shadow of a reasonable doubt" (S. 168), that opinion was quashed, with the State responding that jurors had to accept the fact Mr. Rose was guilty (S. 170, 171). Said the prosecutor, the jury was there only to "help the judge" in making a sentence decision (S. 178).

Just prior to beginning the sentencing hearing, the trial court was presented with a request to instruct the jury on the definitions of felony murder and premeditated murder to preserve the opportunity to argue Mr. Rose's limited culpability. That request was denied: "Yeah, but we are not getting onto that" (S. 821).

There was no counterbalance to these restrictions on the defense. The State was permitted to repeatedly argue its theory for the basis of Mr. Rose's guilt both during its opening and closing argument, over defense objection (S. 241). The State consistently argued those facts as if conclusively found but the defense was forbidden from countering that argument by the trial court's repeated ruling that the basis of Mr. Rose's guilt could not be questioned at the penalty phase. There was some argument by the defense raising questions regarding Mr. Rose's level of culpability, but counsel noted his "hands were tied," because Mr. Rose had already been convicted (S. 249-57).[13] The State then proceeded to have the entire record of the guilt trial read to the jury, although they were repeatedly told that they could not reconsider guilt.

During closing, defense counsel was cautioned when he seemed, in the Court's words, to be "getting close" to arguing Mr. Rose's level of guilt (S. 854), even though the State argued the prior jury had found Mr. Rose guilty of murder in the course of a kidnapping (S. 844). While the defense tried to argue Mr. Rose may only have been guilty of felony murder, and the circumstantial nature of the State's case (S. 853-56, 865), the Court's refusal to instruct on either, and its repeated

[13]The only evidence the defense was permitted to present was that rebutting the hammer-blow theory (S 782-92; 799-801), but solely under the theory that it rebutted "heinous, atrocious, and cruel" evidence.

admonition of guilt made the argument incomprehensible and ineffective.

Because of the trial court's proscriptions, the resentencing jury was not permitted to assess Mr. Rose's level of culpability in determining whether a life or death sentence was appropriate. "[T]he death penalty must be proportional to the culpability of the defendant." Jackson v. State, 575 So. 2d 181, 190 (Fla. 1991). In Jackson, this Court explained:

> Individualized culpability is key, and "[a] critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." . . . Hence, if the state has been unable to prove beyond a reasonable doubt that a defendant's mental state was sufficiently culpable to warrant the death penalty, death would be disproportional punishment.

Jackson, 575 So. 2d at 190, quoting Tison v. Arizona, 481 U.S. 137, 156 (1987). After reviewing the evidence in Jackson, this Court remanded for imposition of a life sentence, 575 So. 2d at 193, concluding:

> Although the evidence against Jackson shows that he was a major participant in the crime, it does not show beyond every reasonable doubt that his state of mind was any more culpable than any other armed robber whose murder conviction rests solely upon the theory of felony murder.

Jackson, 575 So. 2d at 192.

As in Jackson, in Mr. Rose's case, the evidence was wholly circumstantial and was insufficient to prove an intent to kill. Mr. Rose's conviction could only have been based upon felony

murder. The resentencing jury thus should have been allowed to consider Mr. Rose's level of culpability.

The State theorized at trial that Lisa Berry died from hammer blows, but bolstered the obvious weakness of that theory by strongly urging a first-degree felony murder verdict. In fact, no one knows how Lisa Berry was killed and the record of this case contains few clues. No jury, and no court has ever found Mr. Rose guilty of anything more than felony-murder, and the evidence and jury finding reveals no more than, at most, Lisa Berry died while she was in Mr. Rose's custody without her mother's consent. There is no proof that Mr. Rose intended to commit any felonies, including first-degree murder.

The State charged Mr. Rose in a two-count indictment with kidnapping and murder (T. 8). Under Florida law, first degree premeditated murder can be proven solely through a felony-murder theory, and the death during the felony can be accidental. The State opposed vigorous defense motions made pretrial to require the State to at least inform the defense which theory it was going to pursue (T. 32, 44, 187-96). The State argued felony-murder during its opening statement, and emphasized (incorrectly) the kidnapping here could be proven solely by showing Lisa Berry was with Mr. Rose without her mother's consent (T. 637-38), although kidnapping is a specific intent crime.[14] At closing,

[14]Kidnapping has three elements: (1) confinement of the victim against her will; (2) with no lawful authority; and (3) with intent to hold for ransom, commit a felony, inflict bodily harm, or interfere with the performance of any government function. See sec. 787.01, Fla. Stat. When the victim is a

the State concluded its argument by telling the jury it could find Mr. Rose guilty of first-degree murder on the theory the victim was killed during a kidnapping (T. 1230). It conceded the facts did not show a "Lindbergh-type" kidnapping and urged all that was necessary for first degree murder was that the State prove Lisa Berry died while with Mr. Rose without her mother's consent (T. 1228-29).

It is clear the jury's verdict of guilt on the first degree murder charge lacks a finding of premeditation. The jury was subjected to the State's argument on felony-murder, and was instructed on that theory (T. 1244, 1246, 1250, 1252, 1255). The verdict form does not reflect any finding of guilt of premeditated murder, only first-degree murder, and a finding of guilt of kidnapping, both consistent with a pure felony-murder verdict.

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child under age 13, the confinement is considered to be against the victim's will if it is done without parental consent. Sec. 787.01(10(b), Fla. Stat. Thus, confinement of a child under 13 without parental consent displaces only the first element of kidnapping, and does not obviate the need for proof of intent. The State never proved the third element of the kidnapping charge alleged in the indictment: i.e., that Mr. Rose acted "with intent to: 3. inflict bodily harm upon or to terrorize the victim or another person." Sec. 787.01(a)(3), Fla. Stat. If the State were alleging that this kidnapping was separate but related to the commission of the murder, then the indictment would have charged Mr. Rose with a violation of Fla. Stat. sec. 787.01(a)(2). However, the State alleged that Mr. Rose's alleged kidnapping was separate from the murder, and the State failed to present any evidence of an intent to inflict bodily harm or terrorize Lisa Berry separate from her eventual death. Thus, an essential element of kidnapping was never proved.

The trial court's findings in imposing the death sentence also demonstrate the troubling issue of finding intent in this record. In the first death sentence finding, the court found the killing occurred during the course of a kidnapping, and refused to find that the killing was heinous, atrocious or cruel, or that it was cold and calculated. In addition, it refused to instruct the jury on heinous, atrocious, and cruel at the second penalty phase, finding insufficient evidence of the manner of death. Likewise, while the issue of premeditation was vigorously litigated on appeal, this Court said only that there was sufficient evidence to uphold the verdict of guilty of "kidnapping and first-degree murder," Rose v. State, 425 So. 2d 521, 523 (Fla. 1982), a finding of no more than felony murder. The evidence fairly read proves no more than the death of the victim while she was with Mr. Rose, a death as likely caused by a vehicular accident as anything. No view of the evidence results in a finding of intent.

(1) The physical evidence

The physical injuries to the victim reveal her death was caused by blunt force to the head. While Dr. Fatteh speculated that a hammer blow might have caused death (T. 686-7), he also testified that the head injuries could have been caused by the victim's head moving toward a blunt object "like a concrete floor" (T. 607). The testimony of qualified medical examiners at the second sentencing hearing is more revealing and credible. Both Dr. Davis and Dr. Wright testified that the nature of the

injuries <u>excluded</u> the possibility of the victim being killed by blows from a hammer or other object. It is more likely the head injuries resulted from a hard fall, with the head moving toward a broad, flat surface.

The serology evidence shows blood consistent with the victim's inside Mr. Rose's van, on his pants, and on the right front fender wheel. Assuming the blood typing was accurate, this evidence shows no more than the victim's presence in Mr. Rose's van (possibly after death), and is consistent with a drunken Mr. Rose accidentally hitting her in the bowling alley parking lot. The blood on the fender well is explained no other way.

A "crushed" hair similar to the victim's was found inside Mr. Rose's sock. That Mr. Rose was innocently with Lisa Berry the evening of the crime is not disputed. There was <u>no</u> testimony that hairs remaining on Ms. Berry's head were crushed and no reason why the pressure on the hair could not have happened after it left her head, or on her fall to the ground upon being hit by the van. The green fiber from Lisa Berry's sweater (found on Mr. Rose) should have been there, since she sat on his lap earlier in the evening. Likewise, premeditation is not shown by the victim's blouse (assuming, again, it was hers) being found in Mr. Rose's van.

(2) <u>The motive</u>

While the State had apparently suggested a sexual murder motive in the first trial (which resulted in a mistrial), the State's theory at the second trial was a "jealousy" motive. The

State's argument concerning this "motive" consists of testimony that (a) Mr. Rose was often jealous of Barbara Berry; (b) Mr. Rose had made a statement <u>two months</u> prior to the crime that he could hurt Barbara Berry (T. 786-7), and (c) the victim had asked another man in Mr. Rose's presence whether they were going to breakfast, producing a "quizzical" look from Mr. Rose. The premise of the motive is that through either a diabolical scheme to get back at Barbara Berry for her imagined unfaithfulness, or some Freudian "transference" of his anger, Mr. Rose in cold blood killed Lisa Berry, Barbara's daughter.

The State's suggested motive is unpersuasive (and is never sufficient of the testing of quantum of proof) in the face of the remoteness of the "I can hurt you" statement; that just <u>two weeks</u> prior to Lisa Berry's death, Jim Rose and Barbara Berry had expressed their love for each other and discussed marriage; that Mr. Rose had always liked and been liked by Ms. Berry's children; and that the bowling alley meeting had been for the purpose of reconciliation (there was no evidence Barbara Berry actually was seeing the other man).

(3) <u>The inconsistent statements and the suspicious actions of Mr. Rose.</u>

Mr. Rose's several inconsistent explanations of his whereabouts the evening of the death, and actions reflecting "guilty knowledge," do not mean he felt guilty of murder. They reflect as logically a tragic accident in which the "slightly intoxicated" Mr. Rose ran over Lisa as he pulled out of the

bowling alley parking lot, together with an ill-conceived plan to hide Lisa's death.

The evidence also demonstrates the physical impossibility of Mr. Rose killing Lisa Berry, driving a round trip of twenty-one miles in twenty minutes, stopping to make a phone call and returning to the bowling alley, as the State contends.

This record does not support a finding of intent to kill. But the resentencing jury was not allowed to consider on what basis the guilt phase jury rested their findings of guilt as to kidnapping or first degree murder. The sentence of death is disproportionate to the crime. The jury was "precluded from considering, as a mitigating factor, . . . the circumstances of the offense [which Mr. Rose proffered] as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586, 604 (1978). Mr. Rose's sentence is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution.

ARGUMENT IV

THE STATE'S KNOWING USE OF FALSE TESTIMONY CONCERNING, AND COUNSEL'S INEFFECTIVENESS IN FAILING TO CHALLENGE THE ADMISSION OF, MR. ROSE'S STATEMENTS VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Trial counsel challenged the voluntariness of all statements the police extracted from Mr. Rose during their extensive custodial questioning. After hearing the motion to suppress (T. 204-469), the trial court granted the motion in part, excluding all statements made to Sergeant LaValle as violative of Miranda. However, the trial court denied the motion as to statements made

to the other officers (T. 54). On appeal, Mr. Rose challenged on Fifth and Sixth Amendment grounds the admissibility of the statements made during the late evening and early morning hours of October 23, 1976 (Initial Brief of Appellant, pp. 37-41). This Court affirmed without discussing the statements claim. Rose v. State, 425 So. 2d 521 (1982).

Trial counsel questioned at length the officers involved in the various interrogations of Mr. Rose. But much was unknown to defense counsel. The most important aspect of what the State never disclosed to the defense involved the State's misrepresentation of the facts surrounding Mr. Rose's invocation of his right to counsel.

The police testimony at the suppression hearing revealed that Mr. Rose had asked to consult with counsel, and was permitted to contact an attorney, Don Fogan, at the outset of the 2:00 a.m. interrogation (T. 292-3). Sgt. LaValle portrayed the call as a sham, saying he did not think Mr. Rose had actually made the call because he was on the phone "no more than five seconds" (T. 292-3). Sgt. LaValle's deposition testimony, not brought out at the suppression hearing, was that Mr. Rose told him he had asked his attorney whether to take the polygraph being offered. Following the phone call, Sgt. LaValle testified at the suppression hearing, he asked Mr. Rose "if he would mind talking to me, and he said he didn't" (T. 293).

Sgt. LaValle testified falsely that after Mr. Rose spoke to Attorney Fogan, Sgt. LaValle asked for Mr. Rose's permission to

talk to the attorney but Mr. Rose refused, saying the attorney was not going to represent him because Mr. Rose owed him some money. Through such testimony and its later use, the State deliberately deceived the court and defense counsel in its portrayal of Mr. Rose's phone call. The State argued that the call was a fake -- saying the call was a mere pretext to buy time. Documentary evidence obtained directly from Sheriff's Department files under the Public Records Act demonstrates that the State, and its law enforcement officers, knew that Mr. Rose <u>had</u> contacted an attorney (because they checked), that Mr. Rose <u>had</u> invoked his right to counsel, and but for his indigency would have been represented by counsel.

Trial counsel was provided with reports of the interrogation beginning at 2:30 a.m., completed by both LaValle and McLellan. LaValle's report, dated 10-23-76, relates the following information relevant to Mr. Rose's request for counsel at the initiation of questioning:

> the circumstances that I was sure he would give his approval for a polygraph examination. Mr. Rose then related that Mr. Fogan will not represent him and wants no part of him as he still owes him a lot of money from the last time he had gotten into trouble. Besides he had no intentions of ever taking a polygraph examination as <u>all he was doing was buying some time</u>. He related that he has taken polygraph tests before and .... He states that the minute he walks into a polygraph room he starts to shake.
>
> Mr. Rose was asked if he had any objections to just talking with the undersigned reference the investigation and he consented to conversation.

(LaValle Report).

Attorney Makemson, on behalf of trial counsel, deposed Sgt. LaValle on January 11, 1977. The deposition is important because it shows the information available to counsel pretrial (sworn testimony of police officers) upon which he formulated his challenges to the admissibility of the statements given by Mr. Rose.

At that deposition, Sgt. LaValle testified to the attorney conversation and implied that he did not believe Mr. Rose actually contacted an attorney:

> A. He wanted to call his attorney. I said, "Fine. Be my guest."
>
> Q. Did he have an attorney in mind at that time?
>
> A. He called a number.
>
> Q. You don't know who it was?
>
> A. Later I was told by him supposedly who it was.
>
> Q. Who?
>
> A. He advised me. He was on the phone a very brief time. I wasn't listening to his conversation. He was on the phone a very brief time and he hung the phone down and he says his attorney advised him not to take a polygraph test.
>
> Q. Do you know who the attorney was?
>
> A. I didn't at that time. I said, "Who is your attorney?" and he said, "Robert Fogan." And I advised Mr. Rose that Mr. Fogan and I have known each other for years and due to that nature of this case, maybe he wasn't aware of it, because if he had nothing to do with this missing child, the easiest way we could eliminate him as a suspect would be to

> give him a polygraph test. This way we could concentrate our efforts elsewhere, and with his permission I would call up Mr. Fogan and speak to Bob and explain the circumstances. At that time he told me that Mr. Fogan was not going to be representing him because he had represented him one other time and he owed Mr. Fogan money, and I says, "Well, still let me talk to him." He says, "Well, no," and as I got it down here, because it's been a while, his own statement was, "Besides he had no intention of ever taking a polygraph examination as all he was doing was buying some time."
>
> Q. Those were his words?
>
> A. Those were Rose's words, yes, sir.

(LaValle Deposition, pp. 6-7). At the end of the January 7th deposition, Sgt. LaValle was asked whether he talked to any other people and he said, "No, I don't think so."

Detective McLellan was deposed about two weeks later, on January 20, 1977. Detective McLellan described his involvement in the investigation, then was specifically questioned about Mr. Rose's phone call:

> Q. Did you recommend that he or did you have any conversations with any other detectives and recommend he be interrogated any further?
>
> A. Throughout the next day, Sergeant LaValle interrogated him with the possibility of him taking the polygraph, which he agreed to take. By the way, once we got back to the station he refused to take the test saying he had just told me that just to try and convince me he was telling the truth. He had a conversation with the lawyer that night, I believe, I think it was Bob Fogan.
>
> Q. Did you call Bob for him?
>
> A. He wanted to call an attorney and we allowed him to call an attorney, and it turned out to be Bob.

> Pete LaValle spoke to Bob later and what went on, I don't know.

(McLellan Deposition, pp. 18-19) (emphasis supplied).

The sworn testimony of the officers pretrial thus was: a statement from LaValle (1) that he thought Mr. Rose was faking a call to his attorney, and (2) that he had spoken with no one else in the case; from McLellan, counsel was told only that it was his understanding LaValle had called Fogan, but he did not know what happened. Trial counsel could only surmise from these two statements that LaValle either did not call Fogan, or, more likely, LaValle had called Fogan and determined that Mr. Rose actually had not called him (because LaValle made it clear at deposition he did not believe Mr. Rose had called).

At the suppression hearing of February 28, 1977, McLellan was not asked about the call to Fogan, but LaValle was asked, and while under oath he testified that Mr. Rose previously agreed to take a polygraph, but first made what he believed was a sham call:

> A. Well, when he first came in, he requested to make a phone call, which he was allowed to do.
>
> Q. Whom did he call? Do you know?
>
> A. He supposedly called an attorney by the name of Robert Fogan.
>
> Q. You say "supposedly". Do you know whether he called him, or not.
>
> A. I don't believe he did. I think he mentioned later he hadn't.
>
> Q. Tell us what he did. What do you mean?

A. I was called in purposely for the purpose of taking a polygraph examination.

Q. Then what happened?

A. When the gentleman came in, he introduced himself.

Q. Yes.

A. I advised him I was the polygraph examiner. He said he wished to call his attorney, I said, "Fine. There's the phone." I allowed him to call.

* * *

Q. That was approximately what time?

A. Approximately 2:30.

Q. In the morning of Saturday ...

A. October 23rd; right.

Q. After you indicated what you just indicated to us, what did he respond?

A. <u>I allowed him to make the phone call. He was on no more than five seconds, and he hung up.</u>

He advised me that his attorney suggested that he not take a polygraph examination.

Q. Did you ever conduct one?

A. No.

Q. What then occurred after you had that conversation, which you indicate was some attempt at a phone call?

A. I asked him if he would mind talking to me, and he said he didn't....

(T. 292-3)(emphasis supplied). Based on the State's sworn testimony that Mr. Rose had not made a real request for counsel, the challenge to Mr. Rose's statement did not focus on the invocation of that right. However, neither trial counsel nor the

court knew that the State withheld evidence showing Mr. Rose _had_ legitimately sought counsel, but was denied that right due to his indigency, and that LaValle had testified falsely on that point at deposition and at the suppression hearing. Documentary evidence withheld from trial counsel shows that LaValle deliberately deceived the defense and the court, and that he in fact _knew_ Mr. Rose had made a real attempt to obtain counsel. No counsel was made available without charge to Mr. Rose, as _Miranda_ and its progeny require, although he was indigent and in custody. Alternatively, if the failure to develop this issue was not based on the State's (e.g., LaValle's) deception, then it was based on ineffective assistance of counsel.

In a supplemental police report dated October 24, 1976, Detective McLellan related the following account of Mr. Rose's phone call:

> ...after talking to the attorney on the phone Mr. Rose advised Detective Sergeant Lovell [sic] that the attorney had advised him not to participate in the polygraph examination. When asked the name of the attorney that he had spoken to Mr. Rose replied that this attorney was Robert Fogan. _Due to the fact that Mr. Fogan is well known to both myself and Sergeant Lovell, he was recontacted telephonically and he advised that he had talked to Rose, however he had refused to represent Rose mainly due to the fact that Rose still owed him money from a prior legal representation_. When confronted with these facts Mr. Rose admitted to Sergeant Lovell that he had never intended to take the polygraph, that the only reason he had advised me that he would submit to this test was to stall for time. For further details as to conversation between Mr. Rose and Sergeant Lovell, please see supplements by Sergeant Lovell.

(Supplemental Report, p. 7) (emphasis supplied).

At the evidentiary hearing, trial counsel testified he could not remember whether at the time of the suppression hearing the State had revealed confirming that Mr. Rose had talked to attorney Fogan (PC-R2. 120). Trial counsel reviewed McLellan's report (Def. Ex. 23) and testified that the report does say the State had confirmed Mr. Rose's call to attorney Fogan (PC-R2. 122). Trial counsel testified that he recalled fighting with the State about discovery (PC-R2. 123). If trial counsel had known that McLellan's testimony about the supposedly phony phone call was not true, counsel would not have let the testimony stand but would have presented the testimony of the detective who verified the call (PC-R2. 126).

The State's withholding of the critical portion of McLellan's report misled defense counsel, and ultimately the courts, and resulted in counsel's performance being deficient. As a result, Mr. Rose was deprived of his right to a full and fair hearing on the suppression issue originally. Rule 3.850 relief is proper.

ARGUMENT V

THE PROCEDURE BY WHICH SPECIAL ASSISTANT PUBLIC DEFENDERS AND EXPERT WITNESSES ARE APPOINTED TO HANDLE CAPITAL CASES AND THE MANNER IN WHICH THEY ARE FUNDED IN BROWARD COUNTY CREATES AN IRRECONCILABLE CONFLICT OF INTEREST IN VIOLATION OF MR. ROSE'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS THE CORRESPONDING PROVISIONS OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Information regarding the procedures employed for appointment and funding of special assistant public defenders and experts for capital cases in the Seventeenth Judicial Circuit, which includes Broward County, Florida, has only recently surfaced, when Broward County Judge Tyson described the previously undisclosed conflict of interest arising in Broward County. Judge Tyson, a Broward County circuit court judge, was recently faced with a request for funds to pay the fee of a special public defender. Judge Tyson noted that he was burdened with a conflict of interest by virtue of the county's budgeting process. He explained on the record:

> THE COURT: And yet they have not funded enough money.
>
> I'm in a bad position in that way.
>
> In a way, I have a conflict of interest because the funds that the County Commission gives the Judiciary is for administrative purposes and also to cover the special public defenders that have been appointed and the costs.
>
> If there are overruns on that, they will take it from the Judiciary, such as that phone in there, they wanted to take that out in order to operate the Judiciary.

They're thinking a bunch of things, so I have a conflict of interest as to whether I want his client any money in a broad sense.

We're having overruns with the special public defenders, particularly with the homicides and other items.

We're trying to keep it down.

We're getting into a marginal area, as I indicated to him.

(State v. Correia, Case No. 92-22313 CF; transcript at pp. 2-3).

THE COURT: The other thing that went through my mind is, all right, so someone accepts a million dollars for a case, that's my fee, and I have three affidavits saying that a million dollars is a reasonable fee. But it's all gone, there's no money for costs, and I say, wait a minute, I don't find that a million dollars is a reasonable fee, despite these affidavits, so I'm not going to give the costs.

I am getting into the position of being an advocate on one side.

* * *

So I'm now putting it to the test in light of the pressure that the County Commission placed upon us, for the purposes of appointing a special public defender in homicides or anything else.

They say this is a money problem and you're here to represent them.

How do you want me to do this? Are they going to reimburse the Judiciary more money because he's charged with a crime?

Are you going to say, Judge, do what you have to do, but we have to take your telephone out of your Courtroom and take a few chairs out so you can pay for this?

MR. HONE: I certainly don't want you to lose your phone.

(State v. Correia, Case No. 92-22313 CF; transcript at pp. 5-7).

> THE COURT: Could you report back to find out if additional money will be budgeted to the Judiciary, so if the public defender monies run out, they won't take it from the administrative side, so we'll have chairs to sit on and a telephone.

(State v. Correia, Case No. 92-22313 CF; transcript at pp. 8-9).

> MR. HONE: The County has a statutory obligation to support the Judiciary as far as providing buildings and Courtrooms.
>
> THE COURT: But at the moment, they will deduct it from the budget that has been appropriated for the year onto the administrative side what they appropriated for the Judiciary, if there are overruns in the special public defender for costs, they will take it from the Judiciary costs, the administrative side.

(State v. Correia, Case No. 92-22313 CF; transcript at 10).

> [THE COURT]: You being aware of this happening, in the broad sense, how will this be funded if it continues on, which it has in the last several years.

(State v. Correia, Case No. 92-22313 CF; transcript at 12).

The county fund from which special assistant public defenders and expert witnesses in capital cases are paid is the same fund from which Broward County Circuit Court judges receive funding for capital improvements. Judges receive monies from this fund to purchase items, including but not limited to computers, telephones, law books, and other necessary office equipment.

To resolve these conflicting uses of county funds, many Broward Circuit judges, including Judge Futch, Mr. Rose's trial and resentencing judge, engage in the practice of negotiating

lesser fees with special assistant public defenders in order to increase the available funds for their own purposes. Because expert witnesses are also paid from this same fund, special assistant public defenders appointed to capital cases are also expected to "shop for the best deal" before the Court will approve an expert or simply go without experts.[15] The competence of the attorney and/or expert takes a back seat to the judge's personal motives in a determination of appointment in capital cases.

This situation gives rise to an irreconcilable conflict of interest in capital cases litigated in Broward County. Because Mr. Rose was tried in Broward County, was represented by a Special Assistant Public Defender, and received the assistance of two court-appointed experts[16], Mr. Rose was prejudiced by this conflict. There was no testimony from a mental health expert at

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[15] At the evidentiary hearing, the circuit court stated on the record that Judge Futch was not quick to appoint confidential experts (PC-R2. 142). Mr. Rose's trial counsel testified that experts would have been helpful if Judge Futch would have authorized the funding (PC-R2. 141). Trial counsel also was not permitted funds to obtain a transcript of the mistrial (PC-R2. 64). Resentencing counsel testified that Judge Futch would not go over the cap on attorney's fees (PC-R2. 288), and would not authorize funds for co-counsel or an investigator (PC-R2. 297, 298). This conflict of interest could explain Judge Futch's hesitancy to fund experts, co-counsel or investigators. An evidentiary hearing is required.

[16] These experts were retained only for competency and sanity. These experts were not confidential and they did not evaluate Mr. Rose for mitigation purposes. In addition, these experts did not testify. An evidentiary hearing is required to determine why only experts who could give limited assistance to Mr. Rose were appointed by the Court.

Mr. Rose's trial or at his resentencing as Mr. Rose's counsel simply relied on cold mental health reports being placed into the record. Additionally, these old mental health examinations were inadequate as to psychological testing and evaluation of mitigation. This situation is particularly relevant to Mr. Rose's case due to the inter-relationship between the county's budgeting process and the procedures for appointment of special assistant public defenders and expert witnesses on capital cases.

In Tumey v. Ohio, 273 U.S. 510 (1927), the Supreme Court found a due process violation where the presiding judicial officer had either a direct or indirect interest in the proceedings. In Tumey, the presiding judicial officer received a percentage of the fines that were collected. In addition, the presiding judicial officer was also the mayor. The city of which he was mayor also received the proceeds from the fines which were collected. Due process was violated because the judicial officer benefited directly (he collected a percentage of the fines) and indirectly (the municipality of which he was mayor benefited from the fines collected). Here, the Circuit Court and Judge Futch were in the same situation. Judge Futch's rulings limiting Mr. Rose's defense and the Circuit Court's consideration of Mr. Rose's Motion to Vacate Judgment and Sentence and Mr. Rose's evidentiary hearing insured financial prosperity for their offices and the entire Broward County judiciary. This was an undisclosed conflict which violated due process.

Because the Circuit Court would of necessity be a material witness regarding this conflict of interest issue, Mr. Rose moved the Court to recuse itself from presiding over Mr. Rose's post-conviction proceedings. The Circuit Court erred in denying the disqualification motion.

The Supreme Court has recognized the basic constitutional precept of a neutral, detached judiciary. Marshall v. Jericho, Inc., 446 U.S. 238, 242 (1980). Due process guarantees the right to a neutral detached judiciary in order:

> to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests.

Carey v. Piphus, 425 U.S. 247, 262 (1978). See also In Re Murchison, 349 U.S. 133 (1955).

In Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), this Court did not address the issue of judicial impartiality because of a procedural bar[17]; however, Justice Barkett[18] disagreed with the majority and placed the burden of disclosure on the judge. Lightbourne, 549 So. 2d at 1367-68.

In capital cases, judicial scrutiny must be more stringent than it is in non-capital cases. The impartiality of the judiciary is particularly important in "this first-degree murder case in which [Mr. Rose's] life is at stake and in which the

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[17]Mr. Rose does not have the same procedural problems as the facts relied upon by Mr. Rose have only recently been made available through Judge Tyson's remarks in Correia.

[18]Justices Kogan and Shaw joined in Justice Barkett's dissent as to this issue.

circuit judge's sentencing decision is so important". Livingston v. State, 441 So. 2d 1083, 1087 (1983).

As a result of this situation, Mr. Rose's rights to a fair trial, due process, and the effective assistance of competent counsel have been violated pursuant to the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Mr. Rose's trial and resentencing were presided over by a biased judge, and Mr. Rose's Rule 3.850 Motion, supplemental motion and evidentiary hearing were presided over by a biased court in violation of due process. The claims presented in Mr. Rose's Rule 3.850 motion and supplemental motion must be reviewed by an impartial tribunal. An evidentiary hearing is required as to Judge Futch's and the Circuit Court's bias as the files and records in this case by no means show that Mr. Rose is "conclusively" entitled to "no relief" on these claims. See Lemon v. State, 498 So. 2d 923 (Fla. 1986) (emphasis added); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984). Mr. Rose is entitled to Rule 3.850 relief.

ARGUMENT VI

MR. ROSE WAS DENIED FULL AND FAIR POST-CONVICTION PROCEEDINGS BECAUSE THE TRIAL COURT PRECLUDED HIM FROM PROFFERING EVIDENCE, BECAUSE THE TRIAL COURT PRECLUDED THE PRESENTATION OF SOME EVIDENCE, BECAUSE THE TRIAL COURT DID NOT REVIEW THE RECORD, AND BECAUSE THE TRIAL COURT DID NOT ATTACH ANY PORTIONS OF THE RECORD IN DENYING AN EVIDENTIARY ON CERTAIN CLAIMS.

Mr. Rose's post-conviction counsel attempted to proffer, without success, evidence during Mr. Rose's post-conviction evidentiary hearing. For example, Mr. Rose's post-conviction counsel attempted to ask trial counsel regarding the denial of his request for a transcript of the mistrial (PC-R2. 64). The State's objection was sustained, and the court would not permit a proffer of the question and answer although post-conviction counsel argued that the question was relevant to whether the denial of the transcript hindered trial counsel's representation of Mr. Rose (PC-R2. 64-67).

At another point, post-conviction counsel attempted to ask trial counsel whether he understood Florida law did not provide criminal defendants with confidential experts (PC-R2. 141). The court sustained the State's objection and would not allow a proffer of the question and answer although post-conviction counsel argued that the inquiry was relevant to whether counsel's failure to obtain experts was a result of counsel's understanding of the law or a result of the particular trial judge's practices (PC-R2. 141-44).

Additionally, post-conviction counsel attempted to ask resentencing counsel whether evidence of brain damage and child abuse is the kind of evidence upon which a jury could reasonably base a life recommendation (PC-R2. 324-25). The court sustained the State's objection and refused to allow a proffer or any argument (Id.). The trial court also would not permit post-conviction counsel to ask Dr. Toomer whether intoxication at the time of the offense can be mitigating even if the intoxication does not rise to the level of not knowing right from wrong (PC-R. 429). The court refused to allow a proffer on this questions, either (Id.). The trial court also did not permit post-conviction counsel to pursue questions of Dr. Toomer regarding whether Mr. Rose's mental health problems affected his behavior at the time of his prior offense (PC-R2. 426).

The actions of the lower court were erroneous. In Rozier v. State, 636 So. 2d 1386 (Fla. 4th DCA 1994), the court said, "The primary purpose of a proffer is to include the proposed evidence in the record so the appellate court can determine whether the trial court's ruling was correct. [citation omitted]. Accordingly, refusing to allow a proffer of evidence is error because it precludes full and effective appellate review." Id. at 1387. Further, Rule 3.850 proceedings must be conducted in accordance with due process. Rose v. State, 601 So. 2d 1181 (Fla. 1992). Mr. Rose is entitled to a new evidentiary hearing at which he is allowed a full and fair opportunity to present support for his claims.

Moreover, the circuit court judge denied Mr. Rose relief on some claims and an evidentiary hearing on other claims without having reviewed the record. The evidentiary hearing was not conducted by the original trial judge. Twice during the hearing, the judge stated that he was "not acquainted" with the record (PC-R2. 193) and had not "had the benefit of" the record (PC-R2. 233). Under Rule 3.850 and in order to provide Mr. Rose with full and fair consideration of his claims, the circuit court judge was required to review the record. The court could not determine the scope of the evidentiary hearing without reviewing the record and could not fairly and fully consider the evidence presented at the hearing without reviewing the record.

Finally, the circuit court erroneously denied an evidentiary hearing on some of Mr. Rose's claims. In its order determining which claims would be heard at the evidentiary hearing (PC-R2. 811), the court did not attach portions of the files and records conclusively showing Mr. Rose was not entitled to relief on the claims upon which no evidentiary hearing was allowed. See Fla. R. Crim. P. 3.850; Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). Nor did the Court's order denying Mr. Rose's supplemental Rule 3.850 motion attach any portions of the files and records (PC-R2. 1067). Mr. Rose had requested an evidentiary hearing on Grounds A, B, D, I and J of his Rule 3.850 motion and on Claims I and II of his supplemental motion (PC-R2. 788-93, 927). The court allowed an evidentiary hearing on Grounds A and B only.

Mr. Rose's Ground D of his Rule 3.850 motion and Claim I of the supplemental motion alleged violations of Brady v. Maryland, 373 U.S. 83 (1963), Giglio v. United States, 405 U.S. 150 (1972), and their progeny and, alternatively, deprivation of the effective assistance of counsel. Mr. Rose's Grounds I and J involve facts which are not "of record."[19] Mr. Rose's Claim II of the supplemental motion alleged that he was deprived of the effective assistance of counsel and of the assistance of experts by Broward County's practices for providing funds to criminal defendants. These arguments presented classic Rule 3.850 evidentiary issues which have been traditionally resolved through evidentiary hearings in Florida capital cases.

A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla R. Crim. P. 3.850; Roberts v. State, 568 So. 2d 1255 (Fla. 1990); Heiney v. State, 558 So. 2d 398 (Fla. 1990); Lightbourne v. State, 549 So. 2d 1364 (Fla. 1988), cert. denied 110 S.Ct. 1505 (1990). Mr. Rose's claims discussed above involve classic post-conviction factual issues requiring full and fair evidentiary resolution. The question of whether a capital inmate

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[19]When the issues presented in Grounds I and J were previously presented to this Court in a state habeas corpus petition, the Court noted, "Essentially, Rose is collaterally attacking a trial court judgment by means of a habeas petition contrary to Rule 3.850." Rose v. Dugger, 508 So. 2d 321, 325 (Fla. 1987). This statement indicates that these issues, which involve facts not "of record" are appropriately presented in a Rule 3.850 motion.

was denied effective assistance of counsel during either the capital guilt innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its full and fair resolution. See, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Squires v. State, 513 So. 2d 138 (Fla. 1987); Steward v. State, 420 So. 2d 862, 864 & n.4 (Fla. 1982), cert. denied, 460 U.S. 1103 (1983); Blanco v. Wainwright, 507 So. 2d 1377, 1384 (Fla. 1987). Additionally, where, as here, a capital post-conviction litigant presents properly pled claims demonstrating a violation of Brady v. Maryland, 373 U.S. 83 (1963), an evidentiary hearing is warranted. Squires v. State, 513 So. 2d 138, 139 (Fla. 1987); Muhammad v. State, 603 So. 2d 488 (Fla. 1992); Lightbourne v. State, 549 So. 2d 1364 (Fla. 1989); Gorham v. State, 521 So. 2d 1067 (Fla. 1988).

In deciding whether to deny a Rule 3.850 motion or claim without an evidentiary hearing, the Court must first determine "whether the motion [or claim] on its face conclusively shows that [the defendant] is entitled to no relief." Squires v. State, 513 So. 2d 138, 139 (Fla. 1987); Roberts; Heiney; Lightbourne; O'Callaghan. The circuit court erred in denying an evidentiary hearing on some of Mr. Rose's claims and in failing to attach portions of the files and records to its orders. A remand for further proceedings is appropriate.

ARGUMENT VII

MR. ROSE'S IN-CUSTODY STATEMENTS WERE OBTAINED AND ADMITTED OVER HIS ASSERTION OF HIS DESIRE TO CONSULT WITH COUNSEL IN VIOLATION OF THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS.

In Argument IV, Mr. Rose discussed the questions involved in the statements issue which were not developed originally because of withholding of evidence by the State and ineffectiveness of counsel. As a result, Mr. Rose submits that he is entitled to the vacation of the judgment and sentence. Mr. Rose invoked his right to counsel and tried to obtain counsel. Although he was indigent and in custody, counsel was not provided and the right to counsel was not scrupulously honored. There was no voluntary waiver of counsel on Mr. Rose's part -- he wanted a lawyer. Since the invocation of counsel occurred during LaValle's questioning, already found to be unconstitutional by the trial court, the state cannot demonstrate waiver.

Furthermore, Edwards v. Arizona, 451 U.S. 477 (1981), requires suppression of Mr. Rose's post-request statements, even on the basis of the record evidence (see, e.g., T. 292-96; 318; 428; 459). Mr. Rose's case was pending on appeal when Edwards was decided. This Court did not apply Edwards, and Mr. Rose submits that the claim is now appropriate for review. Mr. Rose's single contact with an attorney does not cut off his rights to an attorney's presence during questioning under Edwards. See Minnick v. Mississippi, 111 S. Ct. 486 (1990). This Court should examine this claim on its merits, and thereafter grant relief.

ARGUMENT VIII

THE MANNER IN WHICH LISA BERRY WAS KILLED WAS MISREPRESENTED AT TRIAL, EITHER BECAUSE OF AN INCOMPETENT MEDICAL ASSESSMENT, THE STATE'S USE OF FALSE OR MISLEADING TESTIMONY, OR BOTH, RENDERING THE CONVICTIONS AND DEATH SENTENCE VIOLATIVE OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The case against Mr. Rose was circumstantial. The State made much of finding a hammer in the canal in which the victim's body was found (T. 1057), and emphasized that Mr. Rose, a painter by trade, had no hammer in his van when it was searched. The jury and court heard that Mr. Rose was questioned about a hammer (T. 1057). Also, two witnesses were called by the State in an attempt to link Mr. Rose to the hammer by comparison of paint residue on the hammer with paint samples from Mr. Rose's van (T. 1117-1331; 1142-45). The State argued that Lisa Berry died because of three blows to the head in opening (T. 649) and closing (T. 1219), and that it was "reasonable to assume the hammer was thrown that night" (T. 12-13).

Linking the hammer to Mr. Rose would have been meaningless without showing that it was used in the offense. The State's medical examiner, Abdulleh Fatteh, testified that the cause of Lisa Berry's death was severe head injuries (T. 677). Those injuries, he testified, were caused by blunt force (T. 678). When the State first asked what type of blunt instrument caused Lisa's death, the defense objection to that testimony was sustained (T. 683). Dr. Fatteh then described the disfiguration of the body by post-mortem causes (T. 685), and again described

the instrument used as blunt and with no sharp edge (T. 686). In response to the State's continued questions, Dr. Fatteh testified the instrument used "could be a hammer" (T. 686). The defense's objection this time was overruled, and the State proceeded to develop this theory, later presented in summation.

On cross-examination, Dr. Fatteh continued with his hammer theory. He said that even if Lisa was hit by a hammer, there would not necessarily be a fracture to the skull (T. 699). Dr. Fatteh's testimony about the hammer and its use by the State in this case involved the same improper use of forensic evidence by the State as that upon which relief was granted in Troedel v. Wainwright, 667 F. Supp. 1456 (S.D. Fla. 1986), affirmed, 828 F.2d 670 (11th Cir. 1987).[20] An evidentiary hearing was necessary to resolve the claim in Mr. Rose's case, but the circuit court denied this claim without an evidentiary hearing.

The evidence the State developed through Dr. Fatteh was misleading and inaccurate. Dr. Joseph H. Davis, an eminently qualified medical examiner, was provided all the materials Dr. Fatteh had at his disposal in making an assessment on the manner of death. He was appointed early on pursuant to a defense request, and his deposition was taken by the State on March 9, 1977. He related that the evidence was unequivocal that a hammer

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[20]In Argument II(A)(i), Mr. Rose also discussed the evidence which counsel had available to him which would have undermined the State's presentation but which counsel ineffectively failed to use. The fact that the defense can rebut the State's theory, however, does not excuse the use of misleading evidence.

could not have been the instrument that killed Lisa Berry and that the nature of the injuries makes it clear that death occurred as the result of Ms. Berry's head hitting a broad flat surface (Davis deposition, pp. 41-44, 48-51).

The jury and court were misled by the State's presentation of Dr. Fatteh's' hammer-blow (or hand or foot) theory. Dr. Fatteh learned of this theory before his autopsy. The Rule 3.850 motion pled that the State knew his interpretation was false but persuaded and/or allowed Dr. Fatteh to testify to it. The presentation of Dr. Fatteh's testimony, and the State's arguments based thereon, either through State manipulation, Dr. Fatteh's incompetence, or ineffective assistance of counsel deprived Mr. Rose of a fair trial.

The Rule 3.850 motion also pled that the State knew it could manipulate Dr. Fatteh to say what the State wanted, and that information about the doctor's lack of expertise was known to the State but not provided to the defense. As the Rule 3.850 motion discussed, evidence of this is reflected by transcripts of proceedings in other cases involving Dr. Fatteh and the same State Attorney's office that prosecuted Mr. Rose. In State v. Tucker, for example, the State attacked Dr. Fatteh's credibility and asserted that he was incompetent. State v. Tucker, No. 80-9519, pp. 1048-9 (emphasis supplied).

As the 3.850 motion pled, the state thought the same at the time of Mr. Rose's trial, but used Dr. Fatteh's misleading testimony anyway. It is not the only time agents of the State

tried to pressure Dr. Fatteh to testify favorably to their cause. Dr. Fatteh related such pressures in his resignation letter to the Medical Examiner's Office. This letter would have been produced at an evidentiary hearing, but no such hearing was allowed by the circuit court.

Years later, the State again used Dr. Fatteh's testimony at the penalty phase as a basis for arguing that Mr. Rose should be put to death. The State certainly knew that his testimony was unreliable at that time, as it did at trial.

Dr. Fatteh's testimony was critical to the State's hammer blow theory. Mr. Rose's trial counsel, resentencing counsel. and current counsel could not properly challenge Dr. Fatteh's trial testimony because of evidence that remains undisclosed--critical photographs of the victim's skull. The young victim's skull would certainly have been fractured if she had been struck in the head by a hammer and the resultant blood spatter would have appeared on the clothing of the victim and the suspect.

The photographs which are being withheld were the subject of motions and hearings before the circuit court, which ordered the medical examiner's office to produce these photographs as requested by Mr. Rose. To this date, the photographs have not been disclosed (See PC-R2. 913-18).

The use of Dr. Fatteh's unreliable testimony to establish the State's case and rebut the defense theory both as to guilt and penalty violated the Sixth, Eighth and Fourteenth Amendments. These facts were all pled in the 3.850 motion. This Court has

consistently held that evidentiary hearings are appropriate to resolve claims based on Brady and its progeny in Rule 3.850 actions. See Squires; Gorham; Hoffman (discussed in Argument IV supra). Nothing in the files and records conclusively rebutted this claim, and no such records were attached to the order denying Rule 3.850 relief. Hoffman. An evidentiary hearing should be ordered by this Honorable Court.

ARGUMENT IX

THE GUILT PHASE PROCEEDINGS WERE FUNDAMENTALLY UNFAIR AND UNRELIABLE, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Errors occurring during the guilt phase of Mr. Rose's capital proceedings possibly rendered those proceedings and their result fundamentally unfair and unreliable. However, no record exists of this portion of those proceedings. An evidentiary hearing is necessary in order to reconstruct the record and in order to allow Mr. Rose to establish his entitlement to relief. The circuit court erred in denying an evidentiary hearing.

Among the possible legal errors in the missing record were that Mr. Rose may not have been personally present when, after retiring to deliberate, the jury reconvened in the courtroom and was admonished and separated overnight; and that Mr. Rose and/or his counsel may not have been notified of the jury's questions and the judge's responses, in violation of Ivory v. State, 351 So. 2d 26 (Fla. 1977). The circumstances concerning the jury's questions may have been relevant and persuasive, had those circumstances been known, as they pertain to the Court's

determination on direct appeal of the error and prejudice resulting from the "Allen charge" given by the judge on the following morning.

A. THE POSSIBLE IVORY VIOLATION

The issue here is the lack of a complete record, not at this time the legal errors that may be revealed by that record when it is completed. The possible Ivory error is not fully supported by the present record, but there are sufficient indications of a possible Ivory violation to require completion and review of the record.

By statute, Mr. Rose was entitled to a complete record in the direct appeal of his capital case. Section 921.141(4), Fla. Stat. (1994). See Delap v. State, 350 So. 2d 462 (Fla. 1977). Until news accounts were discovered, Mr. Rose had no indication that anything had occurred except that the jury had retired to deliberate at 2:43 p.m. and had been discharged overnight at 9:20 p.m. The record and the clerk's notes indicate only that the jury retired at 2:43 p.m. and that court recessed for the evening at 9:20 p.m. Since the news accounts reveal that something did occur during this period and that what occurred may have been important to his direct appeal, Mr. Rose seeks the right to a complete record, lest the decision on appeal be forever flawed.

This record gives no hint that any proceedings occurred, except the discharge of the jury overnight, after the jury retired to deliberate at 2:43 p.m. until discharge at 9:20 p.m. The record does show that the court reporter and the clerk each

noted that court was recessed at 9:20 p.m. on May 5th but do not note any other proceedings. The trial court's statement the next morning indicates only that the jury was admonished[21] and court was recessed "at 9:20 last night" "with the consent of the State and the defense that we do that without a record last night" (emphasis added).

In contrast to the record maintained by the Clerk of the Court and the transcript of the proceedings, three separate contemporaneous news accounts by three different newspapers report that there was much activity after the jury retired for deliberations. All of the reports indicate that the jury, during deliberations, asked that the opening and closing arguments and testimony be read back -- one article states that the request was made "just before" the jury asked to be discharged, another article reports that it was a "short time" after the jury began deliberations, and the third does not identify a time. One article further reports other communications. After two hours of deliberation the jury asked for charts to be sent into the jury room and at 8:00 p.m. the jury requested the photographs of the victim. Again, none of these proceedings appear in the record maintained by the clerk nor in the transcript and there are no written documents, such as written notes from the jury, that would reveal that questions were asked.

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[21]The standard understanding of an "admonition" is the instruction to the jurors not to talk to anyone or to let anyone talk to them about the case during the recess.

There is no indication on the record that there was an agreement to excuse the court reporter during the jury's deliberation. Even if the court reporter had somehow been excused, there is no indication that the clerk was also excused. Had the jury's questions been properly handled, there should have been some notation of them in the clerk's minutes. In fact, the appropriate procedure when a jury has a question, is to "re-convene[] court" with all parties, including the defendant and his attorney, present. Slinksy v. State, 232 So. 2d 451, 452 (Fla. 4th DCA 1970), quoted in Curtis v. State, 480 So. 2d 1277, 1278 (Fla. 1985).

Even if it were assumed that both the court reporter and the clerk had been excused for the entire period of deliberations and that everyone agreed therefore "to make a summary announcement for the record" when court began the next day, that "announcement" did not include any references to the jury's questions, nor to the answers provided during the prior afternoon and evening. At the evidentiary hearing, trial counsel testified that he was not aware the jury had sent out a question during deliberations (PC-R2. 145). The hearing court would not allow questions regarding whether trial counsel had waived the defense's presence for a jury question. Id. Assuming the court did reconvene during deliberations to respond to the jury's questions, although by agreement that reconvention was off the record, it would be logical to conclude that an announcement for

the record summarizing the off the record proceedings would also include the earlier reconvening of court to respond to questions.

The factual basis for this violation of Mr. Rose's right to a fair trial can be proven at an evidentiary hearing. There are several indications that an Ivory violation occurred.[22]

The circuit court's failure to hold an evidentiary hearing on this issue should be reversed, and this case should be remanded for further proceedings.

B. MR. ROSE'S POSSIBLE ABSENCE WHILE THE JURY WAS INSTRUCTED DURING DELIBERATIONS AND LATER PERMITTED TO SEPARATE DURING GUILT PHASE.

The record also implies that Mr. Rose was not present either when the jury's questions were answered by the judge and later when the jury was instructed and discharged for the night, and Mr. Rose affirmatively states he was not present at either time.

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[22] This case was tried two months before this Court's decision in Ivory which for the first time made explicit the error in ex parte communications with the jury. Independent news articles each reported the jury's questions during the period of deliberations, but the official records of the clerk and court reporter omit any notation of the occurrence. Had court been "reconvened" to answer the jury's questions, the clerk should have noted the proceedings in open court, and should have noted the presence of Mr. Rose. One of the news articles reports on the jury's request to have testimony read back used a quote from the trial judge in the past tense, where the judge explained what he had done, "'I've denied that,' Futch said. 'I told them they would just have to rely on their memories.'" Had the question and answer taken place in a "reconvened court" as is required, then it can be assumed that the judge would not have been required to explain what had happened in the past tense. None of the news articles reported a reconvening of court for supplemental instructions to the jury. There is an inference in the record that the jury did ask questions previously during deliberations because of the judge's inquiry whether the jury had questions that morning: "Do you have any questions this morning, before you go back and deliberate?" (OR 1274).

Neither is there a record -- or any other -- waiver of Mr. Rose's presence. Mr. Rose's right to be present at all critical stages of his capital trial is absolute both under Rule 3.180(a)(5), Fla. R. Crim. P. ("the defendant shall be present: ... At all proceedings before the court when the jury is present"), and pursuant to the sixth amendment. See Francis v. State, 413 So. 2d 1175 (Fla. 1982). A missing or ambiguous record is an insufficient basis to conclude that Mr. Rose was either present or waived voluntarily his right to be present. Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982) (record must "affirmatively demonstrate" a voluntary waiver). The remedy for a presence violation is a new trial. An evidentiary hearing at which the record may be reconstructed and Mr. Rose's entitlement to relief established is necessary.

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Appellant respectfully submits that he is entitled to relief from his unconstitutional convictions and death sentence, to an evidentiary hearing, and to all other relief which the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 20, 1995.

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