IN THE SUPREME COURT OF FLORIDA

CASE NO. 85,410

RALEIGH PORTER

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE TWENTIETH JUDICIAL CIRCUIT, IN AND FOR CHARLOTTE COUNTY, STATE OF FLORIDA

SUMMARY INITIAL BRIEF ON APPELLANT'S APPEAL FROM THE DENIAL OF HIS MOTION FOR FLA. R. CRIM. P. 3.850 RELIEF AND IN SUPPORT OF APPELLANT'S APPLICATION FOR STAY OF EXECUTION

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INTRODUCTION

Judge Richard Stanley, in an interview published on Thursday, March 23, 1995, explained at what point in time the sentencing decision was made in Mr. Porter's case: "When the judgment was brought out by the jury that he was guilty," Stanley said, "I knew in my own mind what the penalty should be, and I sentenced him to it." The Gainsville Sun, March 23, 1995, at 10A.[1] Undersigned counsel has talked to two reporters who have interviewed Judge Stanley during the past week.[2] Undersigned counsel has been advised that Judge Stanley has further stated that about the time of the Porter case he was speaking at a public forum where he was advocating for the death penalty. During the appearance, Judge Stanley expressed his view that he would be delighted to be able to personally carry out executions if he could pull his gun out of his boot and shoot the death sentenced individual between the eyes.

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[1]This article appeared in the Gainesville Sun on the very day undersigned counsel was in Fort Myers arguing the Rule 3.850 motion before Judge Anderson. Counsel was advised via the telephone by his office immediately before the argument on Judge Stanley's published comments. Counsel proffered Judge Stanley's comments in support of Claim III of the motion to vacate at the hearing. Subsequently, counsel was able to investigate further. He presents Mr. Porter's claim arising from Judge Stanley's comments herein as expeditiously as possible.

[2]These two reporters are Alan Judd who wrote the article appearing in the Gainesville Sun and John Pancake with the Miami Herald who interviewed Judge Stanley on the evening of Thursday, March 23rd and called undersigned counsel on Friday, March 24th for a reaction. Counsel spoke to Mr. Pancake at approximately 6:00 p.m. on Friday, March 24th and learned of Judge Stanley's comments.

These comments constitute newly discovered evidence not previously available which demonstrate that the sentencing judge not only was biased, having publicly advocated for the right to shoot death sentenced individuals, but also did not follow the law in that he made the decision as to Raleigh Porter's sentence before the penalty phase had even commenced. Certainly had Mr. Porter been advised of Judge Stanley's public comments regarding his desire to shoot death sentenced individuals between the eyes when pronouncing the sentence, he would have reasonably been in fear that he would not receive a fair sentencing because of Judge Stanley's public statements. Certainly had Mr. Porter been advised that Judge Stanley decided that he would impose a death sentence prior to the commencement of the penalty phase and prior to Mr. Porter's opportunity to present mitigating circumstances, he would have reasonably been in fear that he would not receive a fair sentencing because the result had already been determined. The failure to disclose Judge Stanley's predisposition precluded the presentation of a valid motion to disqualify.

In 1981, this Court ordered a resentencing because the judge in his written findings purportedly relied upon the deposition of Larry Schapp. Of course this deposition was not in the record.[3] Only the State and defense counsel had been provided with copies. The fact that the judge's written findings relied upon this deposition and that the defense did not know that the judge would

[3]In fact on direct appeal to this Court, the record had to be expanded to include the Schapp deposition which was not of record.

consider the deposition certainly indicates that either the State drafted the order or the judge engaged in ex parte contact in order to obtain a copy. Because the State Attorney's file was either lost or destroyed, and the version reconstructed in 1994 is admittedly not complete, undersigned counsel can only speculate as to how references to the deposition got in the written findings. Be that as it may, Judge Stanley's comments to the press clearly indicate that the decision to impose a death sentence was made in 1978 when the jury returned its guilty verdict. Thus, the resentencing was an empty gesture devoid of meaning. Judge Stanley has now revealed in newly published statements that the decision to impose death was made at the time the guilty verdict was returned in 1978.

Judge Stanley's predetermination of Mr. Porter's sentence, as he has now publicly stated, must certainly constitute fundamental error. The most basic tenet of our judicial system must be the fairness and impartiality of the trier of fact. See Powell v. Allstate Ins. Co., 20 Fla. L. Weekly S37 (Fla. January 19, 1995). Judge Stanley's actions, first in presiding over the sentencing despite his predetermination, and second in publicly boasting of his conduct and his predilection for the death penalty, seriously undermines the integrity of the entire Florida judiciary. His actions are simply outrageous and establish that Mr. Porter's death sentence rests upon an illegal override of the jury's life recommendation.

In addition to the judge's predetermination of the sentence, Mr. Porter was deprived an adequate adversarial testing when the jury and the judge did not learn that Larry Schapp, a State's witness, was a co-defendant. This information was critical not only at the guilt-innocence phase, but also in terms of sentencing. Schapp's statements were relied upon in Judge Stanley's sentencing order to support the finding of two aggravating circumstances. Moreover, Schapp's statements were discussed at length by this Court in affirming Mr. Porter's override death sentences.

On August 22, 1978, Mr. Porter was arrested and charged with felony/murder. According to a police report contained in the reconstructed State Attorney file which was disclosed in 1994, the police searched a trunk of a car for evidence. "Inside the trunk portion was in fact a portable radio and set of sterling silverware which had been described to this writer by subject Schapp prior to this discovery. At this time we returned to the Charlotte County Sheriff's Department where this writer conferred with Assistant State Attorney, Gene Berry, and was advised by Mr. Berry that Schapp should be charged with Accessory After the Fact and bond of $25,000 placed on the defendant. The subject was properly booked into the Charlotte County Jail for the above charge and a bond of $25,000.00 placed on this subject at the time" (PC-RII. 23-24).

According to Schapp's pretrial deposition, he had been questioned by law enforcement on the evening of August 22, 1978.

He indicated that he knew he might be charged as an accessory, but no one told him that he would be: "I spoke with Kleynan on it, and he said that it would be up to the State Attorney's Office" (PC-RII. 103). In Schapp's deposition, he also revealed that on the night he was questioned by the police he had spoken to Stephan Widmeyer, Mr. Porter's attorney and Mr. Schapp's questioner at the deposition. Mr. Schapp indicated that he did not recall the exact words he spoke to Mr. Widmeyer that night at the police station: "I don't recall the exact words I said to you there, whether I have knowledge, or I have knowledge of the murders that just happened" (PC-RII. 102-03). Mr. Schapp also disclosed that the day after being questioned, he stopped by Mr. Widmeyer's office and spoke to him: "Nobody has really questioned me besides Kleynen, except the date after that, I stopped by your office, and spoke with you about the jail sentence, how I felt" (PC-RII. 104-05). Mr. Schapp indicated that the jail sentence he was concerned with was possible jail time for a DWI charge: "I knew Porter was in jail, and I would possibly be sent to jail for a DWI charge" (PC-RII. 105). At the deposition, Mr. Widmeyer then asked: "Backing up a little bit in time, when you were helping to dispose of this stuff, were you frightened for your safety then?" Mr. Schapp responded: "Yes, I was" (PC-RII. 105).

Mr. Berry was present for this deposition. He did not reveal at any time during the deposition that Mr. Schapp had been booked as an accessory to the murder.

All three of the individuals present for the deposition knew that Mr. Widmeyer had represented Mr. Schapp on the DWI charge.[4] All three individuals knew that Mr. Schapp had talked to Mr. Widmeyer on August 22 and August 23 in his capacity as Mr. Schapp's counsel, and not in Mr. Widmeyer's capacity as Mr. Porter's counsel. Yet, no one disclosed that critical fact.

Mr. Porter had met with Mr. Widmeyer on August 22 and advised Mr. Widmeyer, his attorney, that Mr. Schapp had been involved and was a material witness who could help Mr. Porter. Mr. Porter instructed Mr. Widmeyer to contact Mr. Schapp right away in order to gain his assistance. Mr. Widmeyer agreed and promised to talk to Mr. Berry in order to obtain discovery and learn what Mr. Schapp had told the police. In that context, Mr. Schapp's deposition made it appear that Mr. Widmeyer had simply done his job -- what Mr. Porter had asked of him. However, the truth was that Mr. Widmeyer was Mr. Schapp's attorney, and that during the meetings with Mr. Schapp, Mr. Widmeyer was acting as Mr. Schapp's counsel, helping Mr. Schapp "to dispose of this stuff". See PC-RII. 105.

On August 24, 1978, Larry Schapp while represented by his attorney, Stephan Widmeyer, entered into a negotiated disposition of his then pending DWI which was being prosecuted by Gene Berry. This was Mr. Schapp's third DWI charge; he had two prior convictions in less than four years. As a result, the charge

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[4]Gene Berry was also the prosecutor in Schapp's DWI case (PC-RII. 7).

carried a minimum mandatory thirty day jail sentence. As Mr. Widmeyer has recently explained: "In exchange for a plea of nolo contendere, Mr. Schapp would receive a thirty day deferred jail sentence, would be required to attend driving school, and would be required to pay a fine" (PC-RII. 8).

Robert Jacobs, who was assigned by the public defender's office to serve as Mr. Porter's co-counsel, has recently stated: "I was unaware that Mr. Widmeyer represented Larry Schapp at the time of the negotiated disposition on the DWI charge on August 24, 1978. I did not know that the State was considering charging Mr. Schapp as an accessory to the murder at the time the DWI negotiated disposition occurred. As Mr. Porter's attorney, I would have expected the State to disclose this information to me. This was highly relevant and material information that the State should have disclosed but did not" (PC-RII. 11).

Mr. Widmeyer has recently acknowledged that Mr. Schapp was not cross-examined at trial regarding the State's decision to charge Mr. Schapp as an accessory. Mr. Widmeyer has stated: "I believe cross-examination regarding this matter was necessary" (PC-RII. 8). He also stated: "Because of the significance of this type of information, I would have expected the prosecution to disclose this to me." Id. Mr. Widmeyer does not recall whether the State failed to disclose the accessory charges against Mr. Schapp or whether, burdened by the conflict, he was unable to cross-examine Mr. Schapp about matters learned in the

course of the attorney-client relationship that he shared with Mr. Schapp.

Mr. Schapp was also not cross-examined about the fact that he received less than the minimum mandatory as a result of the deal that Mr. Widmeyer negotiated on his behalf. Certainly, Mr. Widmeyer would have had knowledge of this which he gained in the course of the attorney-client relationship with Mr. Schapp.

Mr. Schapp was also not cross-examined about the fact that he was allowed to reopen his August 22nd statement to the police on August 25th after the negotiated disposition of the DWI charge had been entered. The facts he recalled on August 25th were significantly different from the facts recalled on the 22nd, or in the words of the police, Mr. Schapp had remembered "better facts" (PC-RII. 92). The August 25th facts were much more inculpatory as to Mr. Porter, and in fact included those matters that Judge Stanley later used to justify his predetermined decision to impose a death sentence.

Similarly, Mr. Widmeyer represented another of the State's witnesses, Matha Thomas. While Mr. Thomas languished in jail on pending charges, he announced on August 25, 1978,[5] that Mr. Porter had confessed to him. On September 5, 1978, his attorney, Mr. Widmeyer, stipulated to a bond reduction that allowed Mr. Thomas to get out of jail, and then Mr. Widmeyer withdrew from further representation of Mr. Thomas. Mr. Thomas' replacement

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[5]This was the same day that law enforcement "reopened" the Schapp statement.

counsel, Robert Norton, was advised that no work was necessary on Mr. Thomas' case.[6] As a result, Mr. Thomas' case was continued until after Mr. Porter's trial and Mr. Norton did no work to prepare for Mr. Thomas' trial. However, at Mr. Porter's trial no questions were asked of Mr. Thomas about the bond reduction that only occurred because of his claim that Mr. Porter confessed to him. Nor were there any questions about the continuance of Mr. Thomas' trial date. After Mr. Porter's conviction and sentence of death, all charges against Mr. Thomas were dropped.

Clearly, Mr. Porter's counsel at the 1978 proceedings was either burdened by an actual conflict of interest or the State withheld exculpatory evidence. Either way, material exculpatory evidence necessary for an adequate adversarial testing was not presented, and the jury convicted Mr. Porter. Also as a result, Judge Stanley overrode the jury's unanimous life recommendation and imposed a death sentence.

In 1981 at Mr. Porter's resentencing, his appointed counsel was Wayne Woodard. Mr. Woodard had prosecuted Mr. Porter in 1976 and advised the author of the 1976 PSI that Mr. Porter should be given a prison sentence (PC-RII. 123, 125). In 1978 at the time of Mr. Porter's trial, Mr. Woodard was law partners with Robert Norton, who was Mr. Thomas' attorney at the time he testified against Mr. Porter. Mr. Woodard, who is now a county court judge in Charlotte County, recently advised undersigned counsel that he

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[6]Mr. Norton does not recall whether he was advised of this by Gene Berry or Stephan Widmeyer.

was unaware that Mr. Widmeyer had represented Mr. Schapp on the 1978 DWI charges. Mr. Woodard was also not advised that Gene Berry had instructed the police on August 22, 1978, to charge Mr. Schapp as an accessory to the murder. Mr. Woodard has indicated that if he had known these facts he would have presented them during the 1981 resentencing proceedings.

Again, it is clear that Mr. Porter was not provided with exculpatory evidence in 1981. It is also clear that Mr. Porter's 1981 attorney was also burdened by a conflict of interest. The matters that were not brought out in 1978 remained undisclosed in 1981 even though all the defense attorneys involved in this case agree that this information was critical exculpatory evidence in that it seriously impeached the State's two key witnesses, particularly on those matters that the judge's sentencing order indicated was the basis for the death sentence.

This Court must consider these matters at this juncture. Critical information necessary in order to piece together what in fact transpired at Mr. Porter's capital proceedings was not previously disclosed. Judge Stanley's statements to the press were not previously available. These statements, admitting that the decision to impose death was made in advance of the penalty phase proceedings, were made to the media only within the past week. In these same press statements, Judge Stanley revealed his public advocacy of the death penalty in which he expressed the desire to be able to personally carry out an execution by

shooting death sentenced individuals between the eyes with the gun he carried in his boot.

Mr. Porter's collateral counsel was not advised of Mr. Widmeyer's role as Mr. Schapp's counsel until Monday, March 13, 1995. Though collateral counsel had spoken to Mr. Widmeyer a number of times over the years, Mr. Widmeyer neglected to reveal his role as Mr. Schapp's counsel because he had forgotten (PC-RII. 8). Neither Mr. Jacobs nor Mr. Woodard knew that Mr. Widmeyer had represented Mr. Schapp, and thus neither were in a position to advise collateral counsel. The State knew of Mr. Widmeyer's role as Mr. Schapp's counsel, but did not disclose this to collateral counsel. The State Attorney's file, which had been either lost or destroyed, was reconstructed in late 1994 and disclosed at that time, but did not contain any reference to Mr. Widmeyer's role as Mr. Schapp's counsel. Finally, collateral counsel, who had tried to locate Mr. Schapp in 1985 and during the time period thereafter, was unable to find Mr. Schapp and thus could not learn from him of Mr. Widmeyer's role as Mr. Schapp's counsel. Only when a woman, identifying herself as Mr. Schapp's ex-wife, suggested that undersigned counsel's office contact Mr. Schapp's attorney to learn more information and indicated she believed that the attorney was a public defender named "Woodard", did counsel have any inkling that the identity of Mr. Schapp's counsel may be of significance. Even then, when the public defender's office was contacted, the initial response was that the public defender's office had never represented Mr.

Schapp. It was only because of the specific information from Mr. Schapp's ex-wife that counsel pursued the matter and requested written confirmation which led to the discovery that Mr. Widmeyer had been Mr. Schapp's counsel.

It was the discovery of that critical piece of information that cast new light on Mr. Widmeyer's conduct vis-a-vis Mr. Schapp and exposed the fact that Mr. Widmeyer had conducted Mr. Porter's case while burdened with an actual conflict of interest. The learning of this piece of information on March 13, 1995, was akin to the optic test for color blindness--knowing about Mr. Widmeyer's role as Mr. Schapp's counsel was like being able to see color; it revealed a claim that was invisible before.

In addition, the State Attorney's Office reconstructed its previously lost or destroyed Porter file in 1994. Contained in that reconstructed file was the police report indicating Mr. Schapp was arrested as an accessory on August 22, 1978. Mr. Jacobs and Mr. Woodard both claim they were unaware of the report. Mr. Widmeyer acknowledges that cross-examination about that report should have occurred.

It was also in late 1994 that Matha Thomas finally agreed to sign a release allowing undersigned counsel to talk to Mr. Norton about his representation of Mr. Thomas in 1978-79. Up until that time, Mr. Thomas had refused to waive attorney-client privilege. The information revealed by Mr. Norton only became available at that time.

Under the circumstances here, Mr. Porter could not previously have discovered the necessary evidence to establishing the claims he presents. These claims are substantial and demonstrate that the proceedings leading to Mr. Porter's conviction and sentence of death were in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and in violation of the Florida Constitution and Florida law. Each player in the court proceedings failed to deliver on their constitutional obligations. The judge was biased and decided to impose a death sentence even before the penalty phase started. The prosecutor failed to disclose exculpatory evidence and failed to alert either the court or Mr. Porter to the conflict of interest of which the prosecutor knew. Mr. Widmeyer, trial counsel, was burdened by an undisclosed actual conflict of interest. Mr. Jacobs, the more experienced co-counsel from out of town, was not advised of the conflict and was not advised of exculpatory evidence. Mr. Woodard, resentencing counsel, was also left in the dark as to exculpatory evidence relating to Mr. Schapp. He too was burdened by conflicts of interest. As a result, the proceedings were not an adequate adversarial testing. Mr. Porter's substantial claims warrant Rule 3.850 relief. At a minimum, they require a stay of execution and an evidentiary hearing.

PRELIMINARY STATEMENT

This case is before the Court on the appeal of the circuit court's denial of Rule 3.850 relief and the underlying

application for a stay of execution. Given the time constraints involved in this action, this brief presents a summary of the reasons why the circuit court's denial of a stay of execution and Rule 3.850 relief was improper. Mr. Porter requests and urges that this Court enter a stay of execution.

Citations in this brief designate references to the records, followed by the appropriate page number, as follows: "R. ___" -- Record on Direct Appeal to this Court; "RS. ___" -- Record on Appeal from Resentencing; "PC-RI. ___" -- Record on Appeal from denial of the 1985 Motion to Vacate Judgment and Sentence; "PC-RII. ___" -- Record on Appeal from denial of 1995 Motion to Vacate. All other citations will be self-explanatory or will otherwise be explained.

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STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Twentieth Judicial Circuit, in and for Charlotte County, entered the judgment of conviction and sentence at issue in this cause. Judge Richard Stanley was the presiding judge who overrode the unanimous jury recommendations of life imprisonment and sentenced Mr. Porter to death.[7]

Raleigh Porter was arrested on August 22, 1978, for two counts of first-degree murder, and his case went to trial some three (3) months later, on November 28, 1978. Steven Widmeyer was appointed to represent Mr. Porter, and Robert Jacobs was later brought in from Fort Myers to assist Mr. Widmeyer by conducting the penalty phase proceedings. Mr. Widmeyer had been hired as a public defender on July 1, 1978, having graduated from the Washburn University School of Law on December 28, 1977. On June 19, 1978, Mr. Widmeyer had been admitted as a member of the Florida Bar. He commenced employment as a public defender in Charlotte County on July 1, 1978.

Mr. Widmeyer conducted the trial and judge sentencing, while Mr. Jacobs, the more experienced attorney, conducted the penalty phase before the jury. On November 30, 1978, the jury returned a general verdict, finding Mr. Porter guilty on both counts of first-degree murder (R. 182-83).

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[7]Judge Stanley also overrode an unanimous life recommendation in Walsh v. State, 418 So. 2d 1000 (Fla. 1982). There, the defendant was convicted of killing a police officer but the Florida Supreme Court found the override improper.

On November 30, 1978, the day before the penalty phase was scheduled to be conducted, Judge Stanley entered a Judgment and Sentence finding Mr. Porter guilty and indicating that Mr. Porter was "[t]o be executed," and "in the event, that in the future, the death penalty is overturned, the defendant shall be returned to Charlotte County for sentencing of life terms" (R. 187).

At the December 1, 1978, penalty phase before the jury, Mr. Jacobs presented the testimony of Raleigh Porter. Through this testimony the jury was able to see and hear Mr. Porter. This afforded the jury the opportunity "to make an individualized assessment" of Mr. Porter and the appropriate sentence. Penry v. Lynaugh, 492 U.S. 302, 319 (1989). Hearing his testimony afforded the jury a basis for judging Mr. Porter "as [a] uniquely individual human being []." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The jury here heard Mr. Porter testify:

Q How old are you, Raleigh?

A Twenty-two.

Q Have you ever been convicted of a crime before?

A I pled guilty to receiving stolen property one time.

Q Is that the only conviction of crime you have?

A Yes, sir.

Q Are you married?

A Yes, sir.

Q Do you have any children?

A Two.

> Q Do you have anything that you wish to say to the Jury at this time, as to this part of the trial?
>
> A At this time, I sort of feel like I'm a fetus. You are all my surrogate mother. It's up to you if you're going to abort me or let me live.

(R. 744). The jury recommended life imprisonment on both counts (R. 184-85). The jury's vote for life was unanimous.

At the judge sentencing on December 11, 1978, Mr. Widmeyer again represented Raleigh Porter. Mr. Jacobs was not present. At the sentencing, Mr. Widmeyer presented no evidence to Judge Stanley (R. 787). Mr. Widmeyer was unaware of the Judgment and Sentence entered before the penalty phase proceedings indicating that the judge had already imposed a death sentence. Mr. Widmeyer appeared without Mr. Jacobs for the sentencing because he anticipated that a life sentence would be imposed in light of the jury's recommendation. However, at the sentencing proceeding, Judge Stanley had a gun on the bench and was wearing brass knuckles, as Mr. Widmeyer later tried to inform this Court in a sworn affidavit:

> COMES NOW the undersigned, and, having been duly sworn, deposes and states as follows:
>
> 1. That he was counsel for the above defendant at all stages of the trial proceeding, including sentencing.
>
> 2. That he was present with defendant at defendant's sentencing.
>
> 3. That at the time of sentencing and during the pronouncement of sentence and the Court's reading of its findings of fact and conclusions of law, the sentencing judge did

> have on his right hand in plain view of defendant and the undersigned a set of lead "knucks", and also had on his bench, partially covered but with the butt visible to the undersigned, a handgun of undetermined size and caliber.

(PC-RII. 79).[8] Mr. Widmeyer first realized that a life sentence may not be imposed when he saw the brass knuckles and the gun on the bench.[9] Mr. Widmeyer had not anticipated the possibility that the judge would not follow the jury's recommendation.

In overriding the jury's unanimous recommendation and sentencing Mr. Porter to death, Judge Stanley found three aggravating circumstances: (1) pecuniary gain; (2) avoiding arrest; and (3) heinous, atrocious or cruel.[10] The "avoiding

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[8]Mr. Porter's direct appeal counsel attempted to expand the record on appeal to include Mr. Widmeyer's affidavit so that this Court could take into account Judge Stanley's actions during the sentencing proceeding (PC-RII. 81-82). Upon a motion by the State, Mr. Widmeyer's affidavit was stricken (PC-RII. 83). In granting the State's motion to strike the affidavit, the affidavit was literally removed from the record and destroyed (PC-RII. 84). Only when the Attorney General's Office disclosed its files earlier this month on Mr. Porter pursuant to a Chapter 119 public records request was Mr. Widmeyer's affidavit discovered in the disclosed records.

[9]Certainly, Judge Stanley's comments to the press during this past week better explain the presence of the gun and the brass knuckles.

[10]During the penalty phase charge conference, defense counsel Jacobs submitted a proposed expanded jury instruction regarding the HAC factor, which provided as follows:

> The aggravating circumstance of "especially heinous, atrocious, or cruel" means a murder which is accompanied by such additional acts as to set the crime apart from the norm. It is the conscienceless or pitiless crime which is unnecessarily torturous to the victim. This aggravating circumstance does not apply

(continued...)

arrest" aggravator was premised upon testimony contained in Larry Schapp's deposition which the jury did not hear.[11] The judge set forth in his written findings justifying the death sentence that "the aggravating circumstances outweigh the mitigating circumstances" (R. 191). In terms of the aggravating circumstances of pecuniary gain and avoiding arrest, the following conclusions appeared in the sentencing order:

> 1. The two capital murders were committed while the defendant was engaged in the commission of a robbery for pecuniary gain. Testimony during the trial showed that the defendant, who had recently been released from the Florida State Prison, wanted an automobile, and from the first intended to steal it. He discussed this with his room mate, Larry Schapp, and mentioned that the victim should be newly arrived in the area and not well known. This way he could kill the owner of the car and possibly the neighbors would not even know a car had been stolen which would allow the defendant more time to get away with the automobile. The

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[10](...continued)
where the victim dies instantaneously and painlessly without additional acts.

State v. Dixon, 283 So. 2d 1, 9 n.8 (Fla. 1973).
Cooper v. State, 336 So. 2d 1133, 1141 (Fla. 1976).

(R. 236). In arguing that this was the proper definition of heinous, atrocious, or cruel, defense counsel noted that "the two cases, State v. Dixon and Cooper v. State . . . stand for that proposition" (R. 752). The State argued that the language found in the statute was the proper definition "as to what the aggravating circumstance can be" (R. 753). Judge Stanley agreed with the State's argument. The requested instruction was then denied (R. 753).

[11]Again, there is no explanation for how the judge obtained access to Mr. Schapp's deposition which was not in the record.

person or persons selected to be victims would be left to chance.

On August 21, 1978, the Walraths had been selected as the victims and the defendant went to their home for the purpose of carrying out his plan. Upon entering their home he killed both of them and stole numerous items including their automobile and television set, from them.

2. The capital felonies were committed for the purpose of avoiding or preventing a lawful arrest in that, as specified in #1 above, defendant ab initio intended to kill the victims to allow him more time to abscond with their automobile.

(R. 189-90).

On direct appeal, this Court affirmed the convictions, but vacated the death sentences and remanded for a resentencing by the trial judge, because the trial court had improperly relied on the deposition testimony of Larry Schapp without advising or affording Mr. Porter an opportunity to rebut, contradict, or impeach this testimony, in violation of Gardner v. Florida, 430 U.S. 341 (1977). Porter v. State, 400 So. 2d 5 (1981). The deposition was not in the record. Only the State and defense counsel had copies, and the defense was unaware that the judge would consider what was in the deposition.

Resentencing was held before Judge Stanley on August 3, 1981. According to Judge Stanley's newly discovered comments, the decision to impose the death sentence was made in 1978 when the guilty verdict was returned. At the resentencing, Mr. Wayne Woodard, who had prosecuted Mr. Porter in 1976, represented Mr. Porter. Mr. Woodard called Larry Schapp to the stand. Mr.

Woodard cross-examined Mr. Schapp about his criminal record, including his arrest in July of 1981 on charges which were nolle prossed two weeks before Mr. Porter's resentencing. At the conclusion of the 1981 proceedings, Mr. Woodard, who was law partners in 1978-79 with Robert Norton, also presented the nolle prosse filed in January of 1979 in Matha Thomas' case. When the nolle prosse was entered in 1979, Mr. Norton represented Mr. Thomas. Judge Stanley again formally sentenced Mr. Porter to death and entered an almost identical sentencing order as in 1978 (RS. 21-22).

On appeal from the resentencing, this Court affirmed the sentences of death in Porter v. State, 429 So. 2d 293 (Fla. 1983). This Court again emphasized the testimony of Larry Schapp in determining the propriety of the override:

> Following the hearing, the trial court again sentenced Porter to death. In aggravation the court found the murders to have been especially heinous, atrocious, and cruel as well as making two other findings as follows:
>
> > 1. The two capital felonies were committed while the defendant was engaged in the commission of a robbery for pecuniary gain. Testimony during the trial showed that the defendant, who had recently been released from the Florida State Prison, wanted an automobile, and from the first intended to steal it.
> >
> > On August 21, 1978, the Walraths had been selected as the victims and the defendant went to their home for the purpose of carrying out his plan. Upon entering their home he killed both

> of them and stole numerous items including their automobile and television set, from them.
>
> 2. The capital felonies were committed for the purpose of avoiding or preventing a lawful arrest in that, as specified in # 1 above, defendant ab initio intended to kill the victims to allow him more time to abscond with their automobile.
>
> Porter now claims that omitting reference to Schapp's deposition means that the trial court relied only and entirely, in resentencing, on the material presented at trial. Because the evidence regarding Porter's plan to steal a car and leave no witnesses comes from Schapp's deposition and not from any trial testimony, Porter claims that the state did not carry its burden of proof regarding the findings set out above and that the court, therefore, erred in making those findings. We disagree.
>
> The mandate of this Court required only that Porter be allowed to rebut, contradict, or impeach Schapp's deposition testimony. The defense attempted only to impeach Schapp's statement. It offered no evidence, i.e., testimony or evidence at resentencing that Porter did not say what Schapp claimed he said, to rebut or contradict that statement. Impeaching a witness goes only to that witness' credibility, and in the absence of rebuttal or contradictory evidence the trial court could justifiably rely on Schapp's deposition testimony. The essential findings of the trial judge are supported by the record.

Porter, 429 So. 2d at 295-96.

On September 30, 1985, a death warrant was signed setting Mr. Porter's execution for October 28, 1985. At that time, the Office of the Capital Collateral Representative (CCR) had just been created and the statutory right to representation in capital

collateral proceedings extended to all of Florida's death row inmates.[12] Volunteer counsel recruited for Mr. Porter's case agreed to work on the case so long as CCR provided assistance.

As a result of the pending execution, Mr. Porter filed his initial Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850 on October 22, 1985, requesting, inter alia, a stay of execution and an evidentiary hearing. The trial court denied all relief that same day, and this Court affirmed the summary denial of this motion as well as the request for a stay of execution three days later. Porter v. State, 478 So. 2d 33 (Fla. 1985).

Mr. Porter then filed a Petition for a Writ of Habeas Corpus in the United States District Court for the Middle District of Florida. On October 26, 1985, the district court denied the habeas corpus petition and request for evidentiary hearing. On appeal to the Eleventh Circuit Court of Appeals, the Court granted a stay of execution, and remanded the case to the district court for an evidentiary hearing on the claims involving ineffective assistance of counsel and conflict of interest. Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). Volunteer counsel thereupon ceased participation in the case, and CCR undertook sole representation of Mr. Porter. An evidentiary hearing was conducted in federal district court commencing on October 6, 1988.

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[12]The statute was effective July 1, 1985, and CCR opened on September 15, 1985.

During the pendency of Mr. Porter's case in the federal district court, this Court issued its decision in Cochran v. State, 547 So. 2d 928 (Fla. 1989). In that case, Justices of this Court seemingly recognized that Mr. Porter's case was one of several override death sentences which had been affirmed during a period of time when it had not been properly or consistently applying the standard set forth in Tedder v. State, 322 So. 2d 908 (Fla. 1975). Based on this apparent acknowledgement, Mr. Porter filed a state habeas corpus petition. Mr. Porter also argued that the trial judge had failed to apply the proper narrowing construction of "heinous, atrocious or cruel" in violation of Maynard v. Cartwright, 486 U.S. 356 (1988), since he refused to give the jury a narrowing construction because of the State's position that the statutory language provided all the guidance that was necessary. This Court subsequently denied relief. Porter v. Dugger, 559 So. 2d 201 (Fla. 1990). As to the claim under Cochran, this Court said the prior affirmance, even if erroneous, was the law of the case. As to Maynard, the case was ruled inapplicable to Florida's capital sentencing scheme.

The federal district court denied all relief following the evidentiary hearing. Porter v. Dugger, 805 F. Supp. 941 (M.D. Fla. 1992). On appeal, the Eleventh Circuit affirmed the denial of all relief. Porter v. Singletary, 14 F. 3d 554 (11th Cir. 1994). A petition for certiorari to the United States Supreme Court was denied. Porter v. Singletary, 115 S. Ct. 532 (1994).

An application for Executive Clemency was filed on Mr. Porter's behalf on January 25, 1995, requesting, inter alia, the opportunity to present Mr. Porter's case to the clemency board since all facts relevant to clemency had not been developed until the postconviction process was initiated by the signing of the first death warrant, and thus had never been presented in terms of clemency. On March 1, 1995, Governor Chiles signed Mr. Porter's second death warrant, and Mr. Porter's execution is scheduled to be carried out on March 29, 1995, at 7:00 A.M. at the Florida State Prison.

On March 20, 1995, Mr. Porter filed his pending motion to vacate in the Charlotte County circuit court. The matter was assigned to Judge Darryl Casanueva, who had represented Matha Thomas in proceedings in 1988. Mr. Porter filed a motion to disqualify Judge Casanueva based upon that attorney-client relationship. Judge Casanueva addressed the motion orally at a hearing held on March 21, 1995. He recalled representing Matha Thomas in 1988, took a recess, and thereafter granted the motion.

The case was reassigned to Judge Issac Anderson from Fort Myers. He scheduled oral argument for March 23, 1995, at 1:30 p.m. After affording counsel an opportunity to argue, he entered an order denying the motion to vacate as well as the application for a stay of execution. Mr. Porter filed his notice of appeal on March 24, 1995.

ARGUMENT I

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. PORTER'S JURY'S UNANIMOUS LIFE RECOMMENDATION WAS OVERRIDDEN BY A BIASED JUDGE WHO WAS PREDISPOSED TO SENTENCING MR. PORTER TO DEATH EVEN BEFORE THE PENALTY PHASE WAS CONDUCTED, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND IN VIOLATION OF THE FLORIDA CONSTITUTION AND FLORIDA LAW.

A. INTRODUCTION.

Newly discovered evidence, comprised of facts which first came to light in a newspaper article published March 23, 1995, establish that Raleigh Porter was sentenced to death by a judge who was biased against him, and who harbored such a predisposed attitude to impose a death sentence in this case that he made up his mind to impose death even before the penalty phase proceeding was conducted.[13] Mr. Porter's postconviction counsel have as

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[13]Undersigned counsel who was in Fort Myers preparing for the circuit court argument on the morning of March 23rd was orally advised of the article shortly before the 1:30 p.m. hearing. Counsel made a proffer that the trial judge who imposed Mr. Porter's death sentence had acknowledged and admitted that his decision to impose death was made prior to the commencement of the penalty phase proceedings. Counsel made this proffer in conjunction with his claim of newly discovered evidence. It was premised upon remarks reported by Alan Judd which appeared in the Gainesville Sun. Subsequent to the denial of Mr. Porter's motion to vacate, counsel returned to Tallahassee. While in transit, a decision had to be made as to whether to send out a notice of appeal via federal express. This notice of appeal was sent out. This Court's clerk's office then notified undersigned counsel's office that simultaneous briefing was set for noon on Monday, March 27, 1995. Counsel briefly stopped at his office upon arrival in Tallahassee at 7:30 p.m., saw the Gainesville Sun article, and went home to rest. On Friday, March 24, 1995, counsel received a phone message from John Pancake with the Miami Herald. When the call was returned at approximately 6:00 p.m., Mr. Pancake advised counsel that Judge Stanley had submitted to (continued...)

expeditiously as possible investigated this claim since the publication of Judge Stanley's remarks on March 23, 1995. These facts only recently came to light and were not previously ascertainable. These remarks require an evidentiary hearing at this time.

B. NEWLY DISCOVERED EVIDENCE.

This claim is properly brought at this time. When an "allegation of [judicial] bias is based on a fact newly discovered by the defense, it is an issue properly considered in the rule 3.850 motion." Zeigler v. State, 452 So. 2d 537, 540 (Fla. 1984). In Zeigler, this Court remanded for an evidentiary hearing when faced with newly discovered evidence of bias on part of the trial judge. Mr. Zeigler presented evidence that the trial judge, prior to trial, made a statement to the effect that if the prosecutor got a conviction, "I'll fry the son of a bitch." Id. at 539. In determining that this allegation warranted an evidentiary hearing, the Court explained that this "statement reflects [] on the sentencing attitude of the judge" and that, if true, the statement "would possibly support resentencing." Id. See also Card v. State, 20 Fla. L. Weekly at

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[13](...continued)
an interview on the evening of March 23rd in which he again stated his decision to impose death was made when Mr. Porter's jury returned its guilty verdict. Judge Stanley further related how he had spoken at a public forum in favor of the death penalty about the time of the sentencing. The judge said he had been asked by a death penalty opponent about his ability to actually pull the switch. Judge Stanley's reported response was that was okay so long as he could reach in his boot, pull out his gun, and shoot the death sentenced individual between the eyes when pronouncing the sentence.

S33 (Fla. Jan. 12, 1995) ("We believe the allegations of the petition are sufficient to require an evidentiary hearing on the question of whether Card was deprived of an independent weighing of the aggravators and the mitigators").

On Thursday, March 23, 1995, the Gainesville Sun, in an article concerning Mr. Porter's case, reported that Judge Stanley indicated that he had made the decision to sentence Mr. Porter to death the moment the jury returned with the guilty verdict: **"When the judgment was brought out by the jury that he [Raleigh Porter] was guilty, . . . I knew in my own mind what the penalty should be, and I sentenced him to it."** The Gainesville Sun, March 23, 1995, at 10A. Mr. Porter's postconviction counsel has also spoken to two reporters who have interviewed Judge Stanley during the past week. These reporters are Alan Judd with the Gainesville Sun and John Pancake with the Miami Herald. Counsel has been advised that Judge Stanley further stated that about the time of the Porter case, he was speaking at a public forum advocating the death penalty. During this public appearance, Judge Stanley expressed his view that he would be delighted to be able to personally carry out executions if he could pull his gun out of his boot and shoot the death-sentenced individual between the eyes.[14]

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[14]In an affidavit from Stephan Widmeyer, Mr. Porter's defense counsel, which direct appeal counsel attempted to introduce into the record on direct appeal, Mr. Widmeyer explained that Judge Stanley had a gun on his bench and was wearing brass knuckles when he sentenced Mr. Porter to death. See PC-RII. 79. Mr. Porter's direct appeal counsel attempted to (continued...)

In 1981, this Court ordered a resentencing because the judge in his written findings purportedly relied upon the deposition of Larry Schapp. Porter v. State, 400 So. 2d 5 (Fla. 1981). Of course this deposition was not in the record.[15] Only the State and defense counsel had been provided with copies. The fact that the judge's written findings relied upon this deposition and the defense did not know that the judge would consider the deposition certainly indicates that either the State drafted the sentencing order or the judge engaged in ex parte contact in order to obtain a copy.[16] Because the State Attorney's file was either lost or

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[14](...continued)
expand the record on appeal to include Mr. Widmeyer's affidavit so that this Court could take into account Judge Stanley's actions during the sentencing proceeding (PC-RII. 81-82). Upon a motion by the State, Mr. Widmeyer's affidavit was stricken by the Court (PC-RII. 83). In granting the State's motion to strike the affidavit, the Court literally removed the affidavit from the record and destroyed it (PC-RII. 84). Only when the Attorney General's Office disclosed its files earlier this month on Mr. Porter pursuant to a Chapter 119 public records request was Mr. Widmeyer's affidavit discovered in the disclosed records. This affidavit has never been considered by the Court.

[15]Direct appeal counsel filed a motion before this Court to have the Schapp deposition made a part of the record, and the Court granted the request. The deposition was not, however, part of the record before Judge Stanley.

[16]Under either scenario, Mr. Porter's constitutional rights were violated. It is improper for the trial court to direct the prosecutor to draft the sentencing order in a capital case, Patterson v. State, 513 So. 2d 1257, 1262 (Fla. 1987), and it is improper for the trial court to engage in ex parte communications with the prosecution. Spencer v. State, 615 So. 2d 688 (Fla. 1993); Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). See also Canon 3A(4), Code of Judicial Conduct ("A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding").

destroyed, and the version reconstructed in 1994 is admittedly not complete, undersigned counsel can only speculate as to how references to the deposition appeared in the judge's written findings. Be that as it may, Judge Stanley's comments to the press clearly indicate that the decision to impose a death sentence was made in 1978 when the jury returned its guilty verdict. Thus, the resentencing was an empty gesture devoid of any meaning. Section 921.141 of the Florida Statutes (1977) required "[n]otwithstanding the recommendation of a majority of the jury, the court, after weighing the aggravating and mitigating circumstances, shall enter a sentence of life imprisonment or death." This Court recently explained that under this section it is error when the sentencing "court fail[s] to weigh aggravating and mitigating circumstances prior to pronouncing sentence." Layman v. State, ___ So. 2d ___, Case No. 81,173 (Fla. March 23, 1995).

Further, this Court's holding in Tedder v. State, 322 So. 2d 908 (Fla. 1975), required the sentencing judge to give great weight to the jury's recommendation. Certainly, a judge can give no weight to the jury's recommendation when he decides what the sentence will be before the jury penalty phase proceedings even occur. Judge Stanley's recent remarks to the press establish that he gave no consideration to the jury's unanimous life recommendation. In Lucas v. State, 417 So. 2d 250 (Fla. 1982), this Court had reversed a death sentence and remanded for a judge resentencing because the judge erroneously considered a

nonstatutory aggravating circumstance. Id. In again reversing the reimposition of the death penalty on remand, the Court noted that "it was [the trial judge's] responsibility to exercise a reasoned judgment in weighing the aggravating and mitigating circumstances on remand." Id. at 251. Because the court failed to do so, and in fact entered the almost identical sentencing order as the original order, the Court concluded that the trial court failed to "engage[] in a reasoned consideration." Id. at 251 & n.1.

Here, Judge Stanley has now admitted in his media statements that he did not engage in a weighing process in 1981 since his decision to impose death was made in 1978. This evidence was not previously available. Collateral counsel cannot inquire of a judge's thought processes. State v. Lewis, 19 Fla. L. Weekly S545, S546 (Fla. 1994). Counsel had no means to obtain the judge's admission of a predetermined death sentence until he voluntarily disclosed it to the media. However, Judge Stanley's admission now establishes that Rule 3.850 relief must issue in light of Mr. Porter's unconstitutional death sentence.

C. ERROR OCCURRED.

Judge Stanley's predetermination of Mr. Porter's sentence, as he has now publicly stated, constitutes a deprivation of due process which rises to the level of fundamental error. The most basic tenet of our judicial system is the fairness and impartiality of the trier of fact. See Powell v. Allstate Ins. Co., 20 Fla. L. Weekly S37 (Fla. January 19, 1995). Whether bias

and partiality surface in connection with racial, religious, or ethnic remarks, or in connection with prejudgment of sentence in the context of a capital case, the person subjected to such bias and prejudgment is stripped of the "guarantee of equal treatment [which] has been carried forward in explicit provisions of our federal and state constitutions." Id. at S38. Just as evidence of racial, religious, or ethnic animus towards a defendant by jurors, when exposed, establishes a violation "of the guarantees of both the federal and state constitutions which ensures all litigants a fair and impartial jury and equal protection of the law," id., it follows that evidence of a judge's open, blatant, and acknowledged bias establishing that a sentencing determination had been made before the evidence had even been presented also constitutes a constitutional violation of the highest magnitude.[17]

During criminal trials, jurors are continually and firmly admonished not to pre-determine the issues before hearing all of the evidence. See Standard Jury Instruction 1.01 (1995) ("You should not form any definite or fixed opinion on the merits of the case until you have heard all the evidence, the argument of the lawyers and the instructions on the law by the judge"). While it should go without saying that the same admonishment applies to a judge, such did not occur in Raleigh Porter's case.

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[17]Judge Stanley also overrode a unanimous life recommendation in a case in which the defendant was convicted of killing a police officer. This override death sentence, however, was reversed by this Court on direct appeal. Walsh v. State, 418 So. 2d 1000 (1982).

Before hearing the evidence presented at the penalty phase, and instead of engaging in the constitutionally-required independent weighing of all the evidence, Judge Stanley made up his mind when the jury returned with the guilt verdict.[18]

In upholding the constitutionality of Florida's capital sentencing scheme, this Court went to great lengths to explain that the manner in which the statute was written "provided a system whereby the possible aggravating and mitigating circumstances are defined, but where the weighing process is left to the carefully scrutinized judgment of jurors and judges." State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973) (emphasis added).

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[18]Judge Stanley's media remarks about his predisposition and belief that he as the sentencing judge should carry out the execution by shooting the death sentenced individual between the eyes rings true in light of Mr. Porter's defense counsel sworn affidavit describing Judge Stanley's behavior at the sentencing proceeding:

> COMES NOW the undersigned, and, having been duly sworn, deposes and states as follows:
>
> 1. That he was counsel for the above defendant at all stages of the trial proceeding, including sentencing.
>
> 2. That he was present with defendant at defendant's sentencing.
>
> 3. That at the time of sentencing and during the pronouncement of sentence and the Court's reading of its findings of fact and conclusions of law, the sentencing judge did have on his right hand in plain view of defendant and the undersigned a set of lead "knucks", and also had on his bench, partially covered but with the butt visible to the undersigned, a handgun of undetermined size and caliber.

(PC-RII. 79).

Inherent in the Court's analysis is the fact that a "weighing" of aggravating and mitigating circumstances will occur. See also Proffitt v. Florida, 428 U.S. 242, 253 (1976)("Under Florida's capital-sentencing procedures, in sum, trial judges are given specific and detailed guidance to assist them in deciding whether to impose a death penalty or imprisonment for life.... On its fact the Florida system thus satisfies the constitutional deficiencies identified in Furman").

In assuring itself that the imposition of the death penalty in this State was sufficiently channeled, the Court emphasized that, after a defendant is found guilty of a capital murder, "this defendant is nonetheless provided with five steps between conviction and imposition of the death penalty--each step providing concrete safeguards beyond those of the trial system to protect him from death where a less harsh punishment might be sufficient." Id. (emphasis added). As the first step, one of the so-called "concrete safeguards," this Court explained that "[f]irst, the question of punishment is reserved for a post-conviction hearing so that the trial judge and jury can hear other information regarding the defendant and the crime of which he has been convicted before determining whether or not death will be required." Id. In Raleigh Porter's case, Judge Stanley, by deciding what the sentence would be before the case even went to the jury to determine punishment, violated this first fundamental tenet of capital jurisprudence. Raleigh Porter was

not provided this first "critical safeguard" to protect him from the unlawful infliction of the death penalty.

This Court further emphasized that the requirement of written findings was "an important element added for the protection of the convicted defendant" because "[d]iscrimination or capriciousness cannot stand where reason is required." Id. In Mr. Porter's case, no "reasoned" assessment of the penalty was conducted by Judge Stanley before the sentencing decision was made. He had already determined what sentence he would impose, no matter what. This "concrete safeguard" was further violated when Judge Stanley entered his judgment and sentence indicating that Mr. Porter was to be sentenced to death on the same day the guilt verdict was determined by the jury. Judge Stanley's recent media remarks demonstrate that there can be no benign explanation for his November 30th sentencing order. Just as importantly, the remarks establish that the resentencing did not cure the error.[19] To this day, the judge still maintains that the decision to impose death was made November 30, 1978, the day before the penalty phase began.

It is not a recent development in the law which requires a trial judge to independently weigh the aggravating and mitigating circumstances, after hearing all the evidence, before arriving at

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[19]Mr. Porter presented a challenge to his death sentence in a habeas petition filed on March 23, 1995, based upon the November 30, 1978, entry of a death sentence. The State's Response argued that the 1981 resentencing cured any error. However, Judge Stanley's remarks to the media establish that is not true. The 1981 resentencing was but an empty gesture.

a sentencing determination. This requirement was announced in Dixon. A trial judge may not abdicate his solemn and constitutional obligation to conduct an independent weighing of the aggravating and mitigating circumstances presented at the penalty phase, as well as factor in the "great weight" to which the jury's recommendation is entitled under Florida law. The trial judge must consider the jury's recommendation "before imposing a sentence." Lamadline v. State, 303 So. 2d 17, 20 (Fla. 1974). See Tedder v. State, 322 So. 2d 908 (Fla. 1975).

In Messer v. State, 330 So. 2d 137 (Fla. 1976), this Court put circuit court judges on specific notice that the jury recommendation had to be considered when determining what sentence to impose:

> The expression by the trial court that the verdict of the jury is merely advisory and that he could consider psychiatric reports at the time he performed the actual sentencing, in our opinion, violates the legislative intent which can be gleaned from Section 921.141, Florida Statutes. It is clear that the Legislature in the enactment of Section 921.141, Florida Statutes, sought to devise a scheme of checks and balances in which the input of the jury serves as an integral part.

Messer, 330 So. 2d at 142.

Yet despite this clear directive, Judge Stanley decided to impose a death sentence prior to the commencement of the penalty phase. He did this not only without considering the jury's recommendation, but also without knowing of the mitigating circumstances which were to be weighed against the aggravating

circumstances which had also not been disclosed. His actions thereby violated Lockett v. Ohio, 438 U.S. 586 (1978).

When a trial judge attempted to shirk the "serious responsibility" of independently weighing the aggravation against the mitigation and delegate to the State Attorney the task of preparing the sentencing order, this Court wrote:

> With regard to his first contention, we find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson v. State, 513 So. 2d 1257, 1261 (Fla. 1987) (emphasis in original).

When a trial judge is determined to impose a death sentence, prior to even hearing the evidence in aggravation and mitigation and knowing what the jury's recommendation will be, "[i]t is inconceivable . . . that any meaningful weighing process can take place." Van Royal v. State, 497 So. 2d 625, 630 (Fla. 1986) (Ehrlich, J., concurring). As recently as last week, this Court reversed a death sentence because "the court failed to weigh aggravating and mitigating circumstances prior to pronouncing sentence." Layman v. State, No. 81,173 (Fla. March 23, 1995) (citing § 921.141(3), Fla. Stat. (1991)). This decision was premised upon the same statute which was the law at the time of

Mr. Porter's sentencing. In Mr. Porter's case, the violation of the statute was even more egregious. Judge Stanley not only failed to weigh the aggravating and mitigating factors prior to pronouncing sentence, but he failed to even wait to hear the evidence before arriving at a prejudgment of what the sentence would be (See R. 187).

"A trial judge's announced intention . . . to make a specific ruling [and sentence defendant to maximum sentence] regardless of any evidence or argument to the contrary, is the paradigm of judicial bias and prejudice." Gonzalez v. Goldstein, 633 So. 2d 1183, 1184 (Fla. 4th DCA 1994). Not only did Judge Stanley's prejudged decision to sentence Mr. Porter to death violate his constitutional and statutory duties, but his conduct constitutes a blatant disregard for the canons of judicial conduct:

> Our legal system is based on the principle that an independent, fair and competent judiciary will interpret and apply the laws that govern us. The role of the judiciary is central to American concepts of justice and the rule of law. Intrinsic to all sections of this Code are the precepts that judges, individually and collectively, must respect and honor the judicial office as a public trust and strive to enhance and maintain confidence in our legal system. The judge is an arbiter of facts and law for the resolution of disputes and a highly visible symbol of government under the rule of law.

In Re Code of Judicial Conduct, 643 So. 2d 1037, 1041 (Fla. 1994). In terms of the specific judicial canons, Judge Stanley's conduct is violative of the very first canon listed:

CANON 1

A JUDGE SHALL UPHOLD THE INTEGRITY AND INDEPENDENCE OF THE JUDICIARY.

> An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing high standards of conduct, and shall personally observe those standards so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

Id. at 1043. Certainly, Judge Stanley's determination to impose death before the evidence regarding sentencing was even presented seriously compromises the "independence" and "honor" of the judiciary as envision by this Court when approving the Code of Judicial Conduct. See also Canon 2A ("A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary").

Judge Stanley's action, first in presiding over the sentencing despite his predetermination,[20] and second in publicly boasting of his conduct and his predilection for the

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[20]Judge Stanley's action should be compared to the action of Judge Schaeffer in Scott v. Dugger, 604 So. 2d 465 (Fla. 1992). Judge Schaeffer had been the sentencing judge in Mr. Scott's case. After imposing the death sentence, she later presided over the co-defendant's trial. When the co-defendant's jury recommended a life sentence, she gave it great weight and imposed a life sentence. She thereupon wrote Florida's Governor and recommended clemency for Mr. Scott because had she known of the co-defendant's life sentence at the time of Mr. Scott's sentencing, she would have imposed a life sentence for Scott as well. When Mr. Scott filed a Rule 3.850 motion, Judge Schaeffer recused herself because she had already decided that Mr. Scott should received a life sentence.

death penalty, seriously undermines the integrity of the Florida judiciary:

> When trial judges take an oath to uphold the law, that includes taking on the responsibility for sentencing in capital cases, including the potential imposition of the death penalty in those cases where the circumstances mandate its application in accord with legislative policy and judicial restraints. However, such a decision is controlled by the circumstances of each particular case, and cannot be made until those circumstances are developed through the detailed sentencing process required in capital cases. The constitutional validity of the death sentence rests on a rigid and good faith adherence to this process. Confidence in the outcome of such a process is severely undermined if the sentencing judge is already biased in favor of imposing the death penalty where there is "any" basis for doing so. Such a mindset is the very antithesis of the proper posture of a judge in any sentencing proceeding.

Hildwin v. Dugger, 20 Fla. L. Weekly S39, S41 (Fla. 1995) (Anstead, J., concurring)(emphasis added).

Judge Stanley's actions are simply outrageous and establish that Mr. Porter's death sentence rests upon an illegal override of the jury's unanimous life recommendation. Before deciding what sentence to impose, Judge Stanley neither conducted any weighing of the aggravating and mitigating circumstances presented in this case, nor did he give great weight to the jury's unanimous life recommendation nor did he consider nonstatutory mitigation. According to his interviews with the media, his mind was made up the minute the jury found Mr. Porter guilty. Judge Stanley denied Mr. Porter due process and equal protection of the law. And Judge Stanley's action deprived Mr.

Porter of his Fifth, Sixth, Eighth, and Fourteenth Amendment rights. Relief is warranted.

ARGUMENT II

MR. PORTER WAS DENIED AN ADVERSARIAL TESTING AT BOTH THE GUILT AND SENTENCING PHASES OF HIS CAPITAL TRIAL BECAUSE EITHER COUNSEL WAS BURDENED BY AN ACTUAL CONFLICT OF INTEREST OR THE STATE FAILED TO DISCLOSE IT HAD TO CHARGED LARRY SCHAPP AS A CO-DEFENDANT AND FAILED TO DISCLOSE A DEAL WITH MATHA THOMAS FOR HIS TESTIMONY, ALL IN VIOLATION OF MR. PORTER'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

A. LARRY SCHAPP.

Larry Schapp was a critical witness for the State at Mr. Porter's trial and resentencing. Mr. Schapp claimed Mr. Porter had confessed committing the homicide to him. The details Mr. Schapp gave regarding this alleged confession appeared in Mr. Schapp's pretrial deposition and were relied upon in the written findings of fact as justifying Mr. Porter's sentence of death. However, unknown to Mr. Porter's jury and sentencing judge, Mr. Schapp was booked on accessory charges. He also faced mandatory jail time on a pending DWI. When the accessory charges were not pursued and when the State agreed to deferred jail time, Mr. Schapp reopened his statement to the police in order to add details incriminating Mr. Porter.

On July 27, 1978, Larry Schapp had been arrested and charged with Driving While Intoxicated (PC-RII. 56). This was Mr. Schapp's third DWI; he had two prior convictions. The police issued a citation and released Schapp on his own recognizance (Id.).

On August 17, 1978, Stephan Widmeyer, an Assistant Public Defender who was Mr. Schapp's counsel, filed a Notice of Hearing in the case of State of Florida v. Larry Schapp, Case No. 78-1474 (PC-RII. 7).[21] In this pleading, Mr. Widmeyer indicated that a hearing on a petition had been set for August 24, 1978, at 1:00 P.M. (Id.).[22]

On August 24, 1978, instead of the scheduled motion hearing in State v. Schapp, a negotiated disposition of the charges against Schapp was entered, whereby Schapp pled nolo contendere to the charge of Driving While Intoxicated, in exchange for a thirty (30) day deferred jail sentence which was converted into community service hours, as well as attendance at DWI school, a revocation of his drivers license for 24 months, and one year probation (PC-RII. 8; 56-60). The law at the time provided a mandatory minimum of thirty days in jail for a third DWI. Thus, Mr. Schapp received less than the minimum when deferral of jail time was granted. Appearing at the August 24, 1978, court hearing on Schapp's behalf was Assistant Public Defender Stephan Widmeyer (PC-RII. 7).

Raleigh Porter was arrested on August 22, 1978, and charged with two counts of first-degree murder, offenses which had taken

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[21]Mr. Widmeyer had graduated from law school on December 28, 1977, and was admitted to the Florida Bar on June 19, 1978. He commenced employment as an Assistant Public Defender on July 1, 1978.

[22]Mr. Widmeyer's representation of Mr. Schapp was unknown to Mr. Porter and his collateral counsel until Monday, March 13, 1995, as explained infra.

place on August 21, 1978, the day before his arrest. Following his arrest, Mr. Porter was taken to the Charlotte County Sheriff's Department, where he was formally taken into custody and processed. According to the Charlotte County Sheriff's Department Booking Report, Mr. Porter was officially booked at 5:15 P.M. on August 22 (PC-RII. 85). At approximately 7:55 P.M. on August 22, Mr. Porter was interviewed by Assistant Public Defender Widmeyer and a public defender investigator. At that point, Mr. Widmeyer assumed representation of Mr. Porter. During Mr. Widmeyer's interview of Mr. Porter, Mr. Widmeyer was advised that Larry Schapp was Mr. Porter's roommate. Mr. Widmeyer noted that he had seen Mr. Schapp out in the hallway talking to the police. Mr. Porter told Mr. Widmeyer that Mr. Schapp was involved and was a witness who would help Mr. Porter. Mr. Widmeyer said he would get with Gene Berry, the prosecuting attorney, immediately and find out what Schapp had said to the police. Mr. Widmeyer explained that he was entitled to discovery and would demand it immediately from Berry. He also promised he would talk to Schapp.

At this same time on the evening of August 22, Larry Schapp was in fact present at the Charlotte County Sheriff's Department waiting to be interviewed by law enforcement personnel regarding his involvement in the murders. At approximately 7:30 P.M. of August 22, 1978, Schapp commenced his initial taped statement to law enforcement, which was later transcribed into written form (PC-RII. 86-89). Prior to discussing any information, Schapp was

read his Miranda warnings because he was a suspect. He then indicated his willingness to make a statement (PC-RII. 86). In fact, the police had been advised by prosecuting attorney, Gene Berry, that Schapp should be charged as an accessory to the felony/murder (PC-RII. 23-24). During his statement, schapp detailed that during the evening of August 21, he heard on the radio that there had been a breaking and entering and a murder, and he went to Mr. Porter's apartment to "find out if he was the one that did it or not" (PC-RII. 86). Schapp explained that he had met Mr. Porter approximately six weeks earlier, and during the interim, Schapp "found out that he [Mr. Porter] had been in prison for Breaking and Entering before, . . . [s]o when I heard it on the radio I went over there [to Mr. Porter's] apartment" (Id.). After arriving at Mr. Porter's apartment, schapp stated that Mr. Porter "had some stuff you know to dispose of" (Id.). Schapp explained that he and another person "put [the stuff] in the car and took it out and we disposed of the TV. We got rid of that and both of us were a little bit upset and didn't bother gettin' the rest of the stuff out of the car" (Id.). Schapp also indicated that he confronted Raleigh Porter about what had happened, and that Mr. Porter told him that he had strangled the people (PC-RII. 87). When specifically asked whether Mr. Porter had indicated how he strangled the people, Schapp emphasized, "No. He just said he strangled 'em" (Id.). Schapp further explained that after he assisted in disposing of the items, he "wanted to get out of there as quick as I could" because he was

"as nervous as could be" and "scared to death to do something about it" (PC-RII. 86). Schapp's statement was concluded at 7:45 P.M. (PC-RII. 89). According to a police report, after a portable radio was found in the trunk of a car as schapp had told the police it would be, "this writer conferred with Assistant State Attorney, Gene Berry, and was advised by Mr. Berry that Schapp should be charged with Accessory After the Fact and bond of $25,000 placed upon the defendant. The subject was properly booked into to Charlotte County Jail for the above charge and a bond of $25,000.00 was placed on this subject at this time" (PC-RII. 23-24).

Neither during his initial interview with Mr. Porter (nor at any time thereafter), did Mr. Widmeyer ever advise Mr. Porter that he (Widmeyer) was representing Mr. Schapp in a criminal case (PC-RII. 62-63). After his interview with Mr. Porter was over, Mr. Widmeyer saw Mr. Schapp at the Charlotte County Jail that evening and briefly spoke to him.[23] The next day Mr. Schapp went to see his attorney, Mr. Widmeyer, for advice (PC-RII. 7-8). He knew he might be charged as an accessory to murder. He was concerned about the pending DWI and the mandatory jail time. He did not want to be locked up in the jail with Mr. Porter. After Mr. Schapp met with his attorney Mr. Widmeyer, they appeared in court together on August 24th. They entered a nolo plea and Mr.

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[23] Collateral counsel has been unable to locate Mr. Schapp despite diligent efforts during the past ten years. Mr. Widmeyer does not independently recall the August 22nd conversation with Mr. Schapp. The State has produced no records explaining how Mr. Schapp secured his release from jail.

Schapp received deferred jail time so that Mr. Schapp would not be in jail with Mr. Porter. No accessory charges were pursued by the State Attorney's Office.

On August 25, 1978, law enforcement officials reopened Schapp's statement. In this second statement, taken at the Charlotte County Sheriff's Department at 2:20 P.M., schapp indicated that this second statement was being taken because there were some matters that he had "since recalled" (PC-RII. 90). Schapp explained that he now recalled a different reason why he went to Mr. Porter's apartment on the evening of August 21:

> Well, a number of times in the evening Raleigh and I would talk and he'd been tryin' to get a car in the worst way so he could have transportation. Number one so he could go over and see his wife in Arcadia, or just have transportation to get around. He had made a statement to me of a thought that he had had. He asked me what I thought about it, was that he was gonna look for an older couple that maybe had just recently moved into a place where not too many people knew them, and they would have a late model car where they could possibly have the title on premise [sic], and what he was planning on doin' was breaking in, stealing the title, and disposing of the evidence, such as whoever was in there, so there would be no link with him and people wouldn't be lookin' for the car, due to the fact that nobody knew the older people and it would take a while to trace it down, and he was thinkin' of leavin' a phoney bill of sale that he was payin' them so much a week on the car, and that's how he got it. That's why when I heard it on the radio what had happened - I though he was blowin' a lot of hot steam and was talkin' about it. I told him somethin' like that would never work and he was crazy for thinkin' of it. The best thing to do was just save his money and get himself a clunker

> if he wanted a car that bad. So when I heard it on the radio I just started putting two and two together. That's why I went down there [to Raleigh Porter's apartment].

(Id.)[24]

During this second statement of August 25, Schapp also remembered what the law enforcement official termed "better facts"[25] regarding what Mr. Porter had purportedly told him about the murders:

> Right. I called him - I knocked on the door, I called him outside, and we walked up a ways, and I told him what I heard on the radio, and I asked him, I says, "Was that you?" and he didn't hesitate at all, he says, "Yes, it was". I asked him why he did it. He didn't really give me an answer. And after a little other conversation and what not, what it boiled down to is that he said he had just walked up to the door, knocked onto the door, and they let him in, and that he had strangled 'em. I asked him how he had strangled 'em and he had said he had strangled 'em with the light cord.

(PC-RII. 92). The facts relied upon in this second or "reopened" statement which did not appear in the initial statement were the facts specifically appearing in the written findings of fact which purportedly justified the sentence of death.

The pre-trial deposition of Larry Schapp, taken by Mr. Widmeyer, reveals that Mr. Widmeyer saw Larry Schapp at the

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[24]It was this information suddenly "recalled" during the "re-opened" statement the day after Schapp's DWI charge was disposed of without actual jail time that the trial judge and this Court relied on in finding two aggravating circumstances. Porter v. State, 429 So. 2d 293 (Fla. 1983).

[25]See PC-RII. 92.

Charlotte County Sheriff's Department on the evening of Mr. Porter's arrest:

> Q What happened after that, after you told one of the deputies?
>
> A Went down to the Sheriff's Department, and took my statement.
>
> Q Okay. I saw you that nicrht, at the Sheriff's Department down there.
>
> A Yes.
>
> Q I didn't know that you were involved in all this then, and I asked you what you were doing there, and you said -- I think these were your words, they say I have knowledse. Okay. That implies to me, that you didn't come forth freely, that they had taken you down there.
>
> A No, I came forth freely. Klein was the officer's name, I think.
>
> Q Kleynan. can you tell me why you said that to me that way, they say I have knowledse?
>
> A I don't recall the exact words I said to you there, whether I have knowledse, or I have knowledqe of the murders that just happened.

(PC-RII. 102-03)[26] (emphasis added).

Schapp's answers to Mr. Widmeyer's further questioning further reveals that he had been concerned about the possibility of being charged as an accessory to the murders:

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[26]This deposition was taken prior to Mr. Porter's trial. Nowhere in that deposition or anywhere else in the record is it revealed that Widmeyer was Schapp's attorney. Without information revealing that Widmeyer represented Schapp, the consultation between Widmeyer and Schapp is presumably as a result of Mr. Porter's request that Widmeyer talk to Schapp about being a witness for Mr. Porter.

Q In your conversations with one of the authorities, that followed your initial contact with one of the investigators, did anyone ever mention to you the possibility that you misht be chargeable as an accessory?

A That I might be charged?

Q That you could be.

A I realized I could be, yes. No one mentioned that.

Q Nobody ever mentioned you could be charged as an accessory?

A I asked the cruestion myself.

Q Who did you speak about that with?

A I spoke with Kleynan on it, and he said that it would be up to the State Attorney's Office.

(PC-RII. 103)[27] (emphasis added).

Schapp also explained during the deposition that he was fearful of having to spend time in jail with Mr. Porter:

Q Were you frightened for your safety?

A Frightened for my safety?

Q Um hmm (indicating in the affirmative).

A Yes, after it happened, and I knew Porter was in jail, and I would possibly be sent to jail for a DWI charge, Yes. I was.

Q So the thought of being in the same jail with him did not make you happy?

[27]Despite Mr. Schapp's statement, prosecutor Berry, who was present during this deposition, sat still and never disclosed that he had directed that Schapp be charged as an accessory to murder on August 22, and that the police reports indicated Schapp was in fact booked.

A No, sir, not in the least.

Q Backing up a little bit in time, when YOU were helping to dispose of this stuff, were YOU frishtened fox your safetv then?

A Yes, I was.

Q Did you think that Porter would harm you if you didn't do what he asked?

A I wasn't sure what he would do. I was just scared, that's the only way I can put it. I just didn't want to cross anybody.

(PC-RII. 105) (emphasis added).

Schapp further detailed in his deposition that he had gone to Mr. Widmeyer's office the day after he had given his August 22 statement to law enforcement:

Q Did anybody question you besides Kleynen?

A Has anybody questioned my besides Kleynen?

Q Yes.

A Nobody has really questioned me besides Kleynen, except the date after that, I stopped by your office, and spoke with YOU about the jail sentence, how I felt.

Q Has Mr. Berry spoke with you about that?

A No.

(PC-RII. 104-05) (emphasis added).

1. EXCULPATORY AND IMPEACHMENT EVIDENCE REGARDING SCHAPP WAS WITHHELD BY THE STATE CONTRARY TO BRADY V. MARYLAND.

Evidence which supported the theory of defense was obviously exculpatory. Brady v. Maryland, 373 U.S. 83 (1963); United

States v. Spagnoulo, 960 F.2d 995 (11th Cir. 1992); Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Gorham v. State, 597 So. 2d 782 (Fla. 1992). Evidence which would have seriously impeached the credibility of a key defense witness to the effect that Schapp was a co-defendant who had gotten a deal on pending criminal charges so that he would not have to go to jail was exculpatory at both the guilt and penalty phases of the trial. Gorham v. State, 597 so. 2d at 784 (State violates due process by not disclosing impeachment evidence regarding a State's witness). However, such exculpatory evidence was not disclosed to defense counsel. As a result, Mr. Porter was denied his sixth Amendment rights to an adversarial testing. Mr. Schapp was not only a material witness, but he was a co-defendant. Certainly, if the State disclosed proper Brady material, Mr. Widmeyer had to have known that the State had booked Schapp as an accessory, and that he had somehow secured his release from jail.

At the time of Raleigh Porter's trial, the State suppressed evidence that it had charged Larry Schapp as a co-defendant in this case. In a police report disclosed in the 1994 reconstructed State Attorney files, it was revealed that a police officer "conferred with Assistant State Attorney, Gene Berry, and was advised by Mr. Berry that Schapp should be charged with Accessory After the Fact and bond of $25,000 placed on the defendant. The subject was properly booked into the Charlotte

County Jail for the above charge and a bond of $25,000.00 placed on this subject at the time" (PC-RII. 23-24).[28]

Stephan Widmeyer has provided a sworn affidavit in which he states that the fact that Schapp had been charged as an accessory to the murder was significant information warranting cross-examination:

> 7. A police report indicates that on August 22, 1978, Gene Berry thought that Schapp should be charged as an accessory to first-degree murder. This was not brought out before the jury at Mr. Porter's trial. Because of the significance of this type of information, I would have expected the prosecution to disclose this to me. I believe that the cross-examination regarding this matter was necessary.

(PC-RII. 8). As Mr. Widmeyer indicates, this information was "significant," and he would have wanted to utilize this information during his cross-examination of Schapp at Mr. Porter's trial. However, Mr. Widmeyer did not cross-examine Mr. Schapp about these matters. Either the State failed to disclose or Mr. Widmeyer, burdened by an actual conflict of interest, was constricted by the attorney-client privilege enveloping his role as Schapp's counsel. See Section 2, infra.

Robert Jacobs, co-counsel at Mr. Porter's trial, has indicated in a sworn affidavit that he was definitely never informed of this critical exculpatory information. Mr. Jacobs "did not know that the State was considering charging Mr. Schapp

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[28]No booking report has been disclosed by the state, nor were any records disclosed which explain how Schapp secured his release from jail by the following day, when he went to Mr. Widmeyer's office.

as an accessory to the murder at the time the DWI negotiated disposition occurred. As Mr. Porter's attorney, I would have expected the State to disclose this information to me. This was highly relevant and material information necessary that the State should have disclosed but did not" (PC-RII. 11).

Wayne Woodard, Mr. Porter's resentencing counsel, has also indicated to collateral counsel that he was similarly uninformed about the fact that the prosection had charged Schapp as an accessory. Mr. Woodard informed Mr. Porter's collateral counsel that the prosecution had never disclosed this information to him, and that he would have used this significant information in his representation of Mr. Porter in 1981.

There can be no question that schapp was an important witness for the prosecution, Schapp claimed that Mr. Porter confessed the murders to him. When Judge Stanley overrode the unanimous life recommendation, he relied specifically upon Larry Schapp's statements. He relied upon those points Schapp claimed he remembered in his "re-opened" statement to the police after he pled nolo to his third DWI and avoided jail time as did the Florida Supreme Court. However, because of the State's misconduct in failing to disclose this police report, neither the judge nor the jury knew that pursuant to Gene Berry's directive, police had booked Schapp as an accessory.

In Gislio v. United States, 405 U.S. 150 (1972), the United States Supreme Court found a due process violation under the principles announced in Brady v. Maryland when the prosecution

failed to disclose to defense counsel a deal it had made with a key state witness. The Supreme Court explained that because the prosecution did not disclose the fact that an unindicted co-defendant had received a promise for leniency in exchange for his testimony against the defendant, and because the credibility of the witness was "an important issue in the case," "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." Id. at 154. In Mr. Porter's case, a similar non-disclosure occurred; the prosecution had charged Schapp as a co-defendant, later agreed to a negotiated disposition to a pending DWI charge so that Schapp could avoid jail time, and never revealed these facts to defense counsel, the judge, or the jury. That Schapp was an "important" witness in this case is to state the obvious--the trial court and this Court relied almost exclusively on Schapp's statements in upholding the override in this case.

Not only did the prosecution fail to disclose the fact that it had charged Schapp with being an accessory, but it failed to correct the false testimony Schapp provided at the deposition. When questioned by Mr. Widmeyer during the deposition, Schapp testified that although he believed that he could be charged for his involvement, "[n]o one mentioned that" (PC-RII. 103). The police report, however, reveals otherwise: it was revealed that a police officer "conferred with Assistant State Attorney, Gene Berry, and was advised by Mr. Berry that Schapp should be charged

with Accessory After the Fact and bond of $25,000 placed on the defendant. The subject was properly booked into the Charlotte County Jail for the above charge and a bond of $25,000.00 placed on this subject at the time" (PC-RII. 23-24). Not only was Gene Berry aware that Schapp should be and was in fact charged and booked as an accessory, Schapp was as well, yet did not mention this during the deposition. Because only Schapp and Berry knew the truth, this false testimony went uncorrected. Certainly the jury never was made aware of these facts, facts which Mr. Widmeyer has stated warranted cross-examination (PC-RII. 8).

This precise issue was addressed by the United States Supreme Court in Napue v. Illinois, 360 U.S. 264 (1959). In Napue, the Court emphasized that "a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment." Id. at 269. "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears." Id. (citing Alcorta v. Texas, 355 U.S. 28 (1957)). The Court went on to hold:

> The principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes to the credibility of the witness. The jury's estimate of the truthfulness and reliability of any given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

Napue, 360 U.S. at 269. Of course, the prosecution's failure to disclose impeachment evidence, and its failure to correct what it knows to be false testimony, is as relevant to sentencing issues as it is to guilt-innocence issues. Brady v. Maryland; Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Scott v. State, 20 Fla. L. Weekly S133 (Fla. March 16, 1995).

In Brown v. Wainwright, 785 F. 2d 1457 (11th Cir. 1986), the Eleventh Circuit held that "[t]he government has a duty to disclose evidence of any understanding or agreement as to prosecution of a key government witness." Id. at 1464. The Court went on to note that "the government has a duty not to present or use false testimony . . . (and) [i]f false testimony surfaces during a trial and the government has knowledge of it, as occurred here, the government has a duty to step forward and disclose." Id. In discussing how these principles applied to the case before it (facts which are strikingly similar to those presented in Mr. Porter's argument), the Court wrote:

> The state's argument misconceives the constitutional concerns addressed by Gislio. It is a constitution we deal with, not semantics. "The thrust of Gislio and its progeny has been to ensure that the jury knows the facts that might motivate a witness in giving testimony . . . " Smith v. Kemp, 715 F.2d 1459, 1467 (11th Cir.), cert. denied, 464 U.S. 1003, 104 S.Ct. 510, 78 L.Ed.2d 699 (1983), which testimony "could have affected the judgment of the jury." Giglio, 405 U.S. 154, 92 S.Ct. at 766, quoting Napue v. Illinois, 360 U.S. 264, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959).
>
> The constitutional concerns address the realities of what might induce a witness to testify falsely, and the jury is entitled to

> consider those realities in assessing credibility. The jury at Brown's trial was entitled to know whether Floyd was testifying under an agreement that might make it possible for him to avoid prosecution for the Barksdale murder, and, if he was, to consider this in measuring his credibility. The agreement that we now know was struck gave Floyd immunity from prosecution in a capital case in which, by his own testimony, he had come to the scene when the crime with Brown, had been at the scene when the crime was committed, had fled with Brown, and later the same day had participated with Brown in another crime of violence with a similar modus operandi with respect to the female victim. It is not for the state to now say that the agreement was not important because Floyd really did not get very much in the trade, because it might not have been able to convict him of the Barksdale murder. Floyd got the benefit of the bargain for immunity. He was never even indicted for the Barksdale crimes.

Id. at 1465 (emphasis added).

The Eleventh Circuit went on to hold that relief was warranted:

> If knowledge of the agreement struck with [prosecution witness] Floyd for favorable treatment on the [defendant's] case could reasonably have led a jury to disbelieve his testimony, Brown's conviction and sentence were constitutionally invalid. There is a reasonable likelihood that disclosure to the jury that Floyd was testifying under an agreement that might save his skin could have affected the jury's verdict and sentence. This is the type of incentive that existed in Giglio where non-disclosure of a plea agreement invalidated the conviction. The false testimony was used in an effort to rehabilitate Floyd's credibility after Brown's defense counsel had brought out two possible reasons Floyd might have had for implicating Brown. The evidence was material.

> We reject the state's contention that the false testimony was not material because it was merely cumulative of Floyd's possible bias. In the normal evidentiary sense cumulative evidence is excluded because it is repetitious. The testimony here did not merely reinforce a fact that the jury already knew; the truth would have introduced a new source of potential bias. See U.S. v. Sanfilippo 564 F.2d 176, 178 (5th Cir. 1977) ("The fact'that the history of a witness shows that he might be dishonest does not render cumulative evidence that the prosecution promised immunity for testimony").

Brown, 785 F. 2d at 1466 (footnote omitted).

The facts in Brown, where relief was granted, are very similar to those in Mr. Porter's case. Here, the prosecution failed to disclose to the defense that it had charged Schapp as a co-defendant to Raleigh Porter, and in fact had booked him into the Charlotte County Jail. Two days later, Schapp is obviously out of jail, and is permitted to "reopen" his statement to law enforcement in which he embellishes on his prior statement and provides the most damaging facts about what Mr. Porter purportedly told him. These "better facts," as they were labeled by the police, served as the basis for the aggravating circumstances set forth in the trial court's sentencing order, as well as the basis for this Court's sustaining of the override. None of these facts were ever disclosed to defense counsel, who was therefore unable to bring them out on cross-examination. Defense counsel has stated that this information should have been the subject of cross-examination before the jury. As the Brown court emphasized, "[t]he thrust of Giglio and its progeny has

been to ensure that the jury knows the facts that might motivate a witness in giving testimony." Id. at 1465. In this case, because of the prosecution's suppression of this evidence, the jury was kept in the dark.

Raleigh Porter's trial was "based upon prosecutorial concealment and not upon disclosure." Ouimette v. Moran, 942 F. 2d 1, 13 (1st Cir. 1991). In Ouimette, the First Circuit found a due process violation under Brady and Napue because "a jury uninformed of [the key state witness'] criminal records and his deals with the state heard this star witness for the state implicate Ouimette without impeachment." Id. at 11. "[B]ecause the prosecutor himself was responsible for the defendant's inability to cross-examine the government witness fully, . . . his actions created at least a 'reasonable likelihood' of affecting [the jury's] conviction of Ouimette." Id. Mr. Porter's case presents an identical situation.

Evidence of this Brady violation has only now come to light, as Mr. Porter pled before. Mr. Porter has been provided with a right to the assistance of collateral counsel. The legislature created CCR in 1985 prior to Mr. Porter's first death warrant, thereby extending the right to collateral counsel to all death sentenced individuals. CCR assisted volunteer counsel in investigating Mr. Porter's case in 1985. Counsel interviewed three defense attorneys and was not advised of the exculpatory evidence involved herein. Counsel looked for Mr. Schapp but could not locate him. It was not until 1995 that counsel

received any information regarding his whereabouts. Counsel could not learn of this exculpatory evidence from Mr. Schapp since he was unavailable. In 1994, the State Attorney's Office "reconstructed" the previously lost or destroyed prosecutor's file in Mr. Porter's case. The State Attorney's Office agreed to disclose this "reconstructed" file. The police report detailing Mr. Berry's instructions to charge Mr. Schapp as an accessory was contained in that "reconstructed" file. Mr. Porter exercised due diligence.

Mr. Porter's unrefuted allegations, including the affidavits submitted with his motion, must be taken as true at this juncture. Lishtbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989); Scott v. State, 20 Fla. L. Weekly S133 (Fla. March 16, 1995). Accepting them as true, it is clear that an evidentiary hearing is required for the same reasons set forth in Lightbourne and Scott.

2. **DEFENSE COUNSEL HAD AN UNDISCLOSED ACTUAL CONFLICT OF INTEREST.**

On August 22nd, when Mr. Widmeyer met with his new client Raleigh Porter (and his first charged in a homicide), Mr. Widmeyer learned from both Mr. Porter and Mr. Schapp that schapp was involved in the murders. Mr. Widmeyer was told by Mr. Porter during his intake interview that Mr. Porter had been staying with Schapp. Mr. Widmeyer inquired whether it was the man outside with the short sleeve shirt. Clearly at that moment, Mr. Widmeyer, a brand new attorney, saw his two different clients' cases converging. After Mr. Porter told Mr. Widmeyer that Schapp

was involved and thus an important and potentially favorable witness, Mr. Widmeyer talked to Mr. Schapp. He was advised by Schapp that Schapp had been questioned by police because he had knowledge about the murder.[29]

The following day, August 23, 1978, Mr. Widmeyer met with his client Larry Schapp. At that time, Mr. Schapp discussed with his attorney his desire to remain out of jail and thus out of contact with Mr. Porter. Mr. Schapp knew that the State could pursue accessory charges, and so confided to Mr. Widmeyer, according to his deposition testimony.

On August 23, 1978, when Mr. Widmeyer met with Larry Schapp, Mr. Widmeyer possessed an actual conflict of interest. Mr. Porter had already advised Mr. Widmeyer that he wanted Larry Schapp as a witness. Mr. Schapp advised Mr. Widmeyer that he wished to avoid jail time on the pending charges and he wished to avoid Mr. Porter. Mr. Schapp was also afraid that the State would pursue accessory charges, a fact also known by Mr. Widmeyer. Clearly, Mr. Schapp was a co-defendant to Mr. Porter.

Unbeknownst to Mr. Porter, Mr. Widmeyer obtained on August 24, 1978, a disposition of Mr. Schapp's charges which avoided the mandatory jail time. Mr. Schapp's charges as an accessory to felony/murder were not pursued. And on the next day, August 25,

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[29]What more may have occurred between Mr. Widmeyer and Mr. Schapp is unclear. Mr. Schapp is unavailable. Mr. Widmeyer does not remember. A police report indicates Mr. Schapp was booked and held on $25,000 bond. However, according to Mr. Schapp's deposition, he was out of jail the next day when he went to Mr. Widmeyer's office.

1978, he was permitted to change his statement to the police to further inculpate Mr. Porter.

Mr. Widmeyer never told Mr. Porter about his representation of Schapp. Mr. Widmeyer similarly did not tell his co-counsel, Robert Jacobs, Mr. Widmeyer deposed Larry Schapp without the assistance of Mr. Jacobs. Present for the deposition was Mr. Berry, who also knew about Mr. Widmeyer's role as Schapp's attorney. But none of those three individuals who knew what had happened revealed it -- during the deposition, at trial, or after.

Mr. Porter's judge and jury were not advised that the prosecutor had decided to charge Schapp as an accessory. The jury and judge did not know that Mr. Widmeyer negotiated deferred jail time for Schapp, and that thereafter Mr. Schapp was able to reopen his statement to include "better facts" for the State. Yet, it was on the basis of Larry Schapp's deposition and these "better facts" that the judge overrode the unanimous life recommendation.

Mr. Widmeyer was burdened by an actual conflict of interest because he simultaneously represented both Raleigh Porter and the co-defendant Schapp. At no time was it ever disclosed that Mr. Widmeyer represented Schapp on his DWI charge at the same time he represented Raleigh Porter for first-degree murder. Nor was it ever disclosed that Mr. Widmeyer, acting as Schapp's counsel, negotiated a settlement for Schapp whereby Schapp would receive

less than the minimum sentence under the law at the time for a third DWI conviction.

The fact that Mr. Widmeyer, while representing Raleigh Porter for capital murder, simultaneously represented the co-defendant, Larry Schapp, and negotiated a favorable disposition of pending charges against him in order to avoid the mandatory jail time, was never previously disclosed by either Mr. Widmeyer or by the State. Mr. Widmeyer has recently declared in a sworn affidavit:

> 2. According to the court records in case number 78-1474, Larry Schapp was arrested and charged with Driving While Intoxicated in July, 1978. The file also reflects that I represented him as an assistant public defender. In furtherance of my representation of Mr. Schapp, I filed various pleadings on his behalf, including a demand that the prosecution provide me with discovery. Assistant State Attorney Gene Berry filed the State's answer to my discovery demand.
>
> 3. On August 17, 1978, I filed a petition for a hearing to determine the legality of a number of issues arising from Mr. Schapp's arrest, and accompanied the petition with a notice of hearing. My notice of hearing scheduled the petition hearing for August 24, 1978.
>
> 4. On August 22, 1978, I conducted an intake interview at the Charlotte County Jail with Raleigh Porter, who had been arrested and charged with capital murder earlier that day. Mr. Porter made reference to Larry Schapp during the interview and I noted that I had seen him outside the interview room.
>
> 5. The next day, August 23, 1978, Larry Schapp came to my office to discuss his case because his hearing on the DWI petition was scheduled for the next day, August 24.

6. At the August 24, 1978, hearing in Mr. Schapp's case, the court record reflects the entry of a negotiated settlement with the State. In exchange for a plea of nolo contendere, Mr. Schapp would receive a thirty day deferred jail sentence, would be required to attend driving school, and would be required to pay a fine.

7. A police report indicates that on August 22, 1978, Gene Berry thought that Schapp should be charged as an accessory to first-degree murder. This was not brought out before the jury at Mr. Porter's trial. Because of the significance of this type of information, I would have expected the prosecution to disclose this to me. I believe that the cross-examination regarding this matter was necessary.

(PC-RII. 7-8).

Robert Jacobs did not know that Mr. Widmeyer represented Mr. Schapp. Mr. Jacobs has in this regard stated:

2. In 1978, I represented Raleigh Porter in the penalty phase at his capital murder trial. I was co-counsel with attorney Stephan Widmeyer.

3. At Mr. Porter's trial, Larry Schapp was called as a witness for the prosecution and gave evidence against Mr. Porter.

4. I have reviewed the attached documents in case number 78-1474, which reflect that Stephan Widmeyer represented Larry Schapp on a Driving While Intoxicated charge in August of 1978 (Attachment A). The attached disposition reflects that on August 24, 1978, a negotiated disposition was entered on the DWI charge (Attachment B). I have also reviewed the attached police report which reflects that two days before that disposition, the State considered charging Larry Schapp as an accessory after the fact to first-degree murder in Mr. Porter's case (Attachment C). The police report also reflects that it was Assistant State Attorney Gene Berry's belief that Mr. Schapp should be charged as an accessory. In addition to

handling the Porter prosecution, Gene Berry also handled the Schapp case, as the attached documents establish (Attachment D).

5. I was unaware that Mr. Widmeyer represented Larry Schapp at the time of the negotiated disposition on the DWI charge on August 24, 1978. I did not know that the State was considering charging Mr. Schapp as an accessory to the murder at the time the DWI negotiated disposition occurred. As Mr. Porter's attorney, I would have expected the State to disclose this information to me. This was highly relevant and material information necessary that the State should have disclosed but did not. Since I did not know of Mr. Widmeyer's representation of Larry Schapp, I was not in a position to advise Mr. Porter concerning this obvious conflict.

6. I did not learn of Mr. Widmeyer's representation of Schapp and its significance to Mr. Porter's case until Monday, March 13, 1995.

(PC-RII. 10-11).

Undersigned counsel has also spoken with Wayne Woodard. Counsel proffered below that Mr. Woodard would testify that he was not aware that Mr. Widmeyer had represented Schapp on the DWI charge. Further, had he known of the accessory charges against Mr. Schapp he would have presented them during the 1981 resentencing proceedings to show that the "better facts" were remembered only after negotiations with the State.

At no time was it ever disclosed that Mr. Widmeyer represented the uncharged co-defendant Larry Schapp on his DWI charge at the same time he represented Raleigh Porter for first-degree murder. Nor was it ever disclosed that Mr. Widmeyer, acting as Schapp's counsel, negotiated a settlement for Schapp

whereby Schapp would receive less than the minimum sentence under the law at the time for a third DWI conviction.[30] Nor was it disclosed that Schapp was booked as an accessory, and that his release had somehow been secured by the following day.

Undersigned counsel has used due diligence. None of the attorneys involved advised counsel of Mr. Widmeyer's representation of Schapp. Mr. Widmeyer did not recall this fact and thus could not advise undersigned counsel or his predecessors. Neither Mr. Jacobs nor Mr. Woodard knew that Mr. Widmeyer represented Schapp while the State treated him as an uncharged co-defendant. The State did not disclose this information. Mr. Berry was the prosecuting attorney on both cases, yet he never placed anything on the record, sought a waiver of the conflict, advised counsel, informed the court, or

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[30] At the time, Florida law provided as follows regarding the possible penalties for DWI:

> **316.193** Driving while under the influence of alcoholic beverages, model glue, or aontrolled substances.
>
> * * *
>
> **(2) Any person who is convicted of a violation of subsection** (1) shall **be punished:**
>
> * * *
>
> (c) **For** a third or subsequent conviction within a **period** of 5 years from the date of the first of 3 or more **convictions** for violations of this section, by **imprisonment** for not less than 30 days nor more than 12 months and, in the discretion of the court, a fine **of** not more than $1,000.

§ 316.193, Fla. Stat. (1977) (emphasis added).

anything of the sort. During post-conviction proceedings, neither the State Attorney's Office nor the Attorney General's office advised undersigned counsel that Mr. Widmeyer represented Mr. Schapp, a co-defendant, and obtained a negotiated settlement which allowed Mr. Schapp to avoid mandatory jail time.

Undersigned counsel only learned of this from happenstance when counsel was given a false lead which led to the discovery that Mr. Widmeyer had represented Larry Schapp. Mr. Porter's postconviction counsel, past and present, unsuccessfully attempted to locate Larry Schapp because he had testified at Mr. Porter's trial. At the time of Mr. Porter's prior warrant in 1985, counsel attempted to locate Mr. Schapp, but to no avail. Michael Mello, who was assigned to Mr. Porter's case during the 1985 death warrant, has recently stated that, in addition to being unable to locate Schapp, "we received no information regarding Mr. Widmeyer's role as Mr. Schapp's counsel. None of the witnesses we talked to gave us any indication that Mr. Widmeyer had represented Mr. Schapp. We simply had no basis for knowing that Mr. Widmeyer represented Mr. Schapp. There was nothing in the record to indicate such a relationship" (PC-RII. 46). The investigator assigned to Mr. Porter's case at the time verified in a sworn statement that she attempted to locate Larry Schapp in 1985 but was unable to do so (PC-RII. 44-45).

At the time of the evidentiary hearing conducted in federal district court in 1988, efforts were again made to locate Mr. Schapp to no avail. See PC-RII. 44-45. Martin McClain, who had

been assigned to Mr. Porter's case several months in advance of the hearing, spoke to all three attorneys -- Widmeyer, Jacobs, and Widmeyer -- in anticipation of the hearing, and in "none of my discussions with these three attorneys did I learn that Mr. Widmeyer had represented Larry Schapp" (PC-RII. 47). Moreover, there was nothing in the record which indicated Mr. Widmeyer's prior representation of Schapp, and "I received no information from either the State Attorney's office or the Attorney General's Office indicating that Mr. Widmeyer had ever represented Mr. Schapp" (Id.).[31]

The investigator presently assigned to Mr. Porter's case has provided a sworn affidavit in which he indicates that he has also attempted to locate Larry Schapp. After being unable to do so, the investigator finally stumbled across a phone number listed under the last name Schapp from a computer credit search (PC-RII. 49). When he called that number, he spoke to a woman who claimed to be Larry Schapp's ex-wife (Id.). When asked if Larry Schapp had ever spoken to her about the Porter case, this woman indicated that he had not, but that he might have talked to his attorney -- someone from the public defender's office by the name of Woodard. Based on this information that there might be a connection between Woodard and Schapp, Todd Scher, the other attorney assigned to Mr. Porter's case, contacted the public defender's office in order to verify if Wayne Woodard had ever

[31]The State Attorney's Office was obviously aware of this situation. Gene Berry was the prosecutor of both Raleigh Porter and Larry Schapp.

represented Larry Schapp (PC-RII. 51-53). The secretary at the public defender's office, based on her twenty-plus years working in the office, denied that Wayne Woodard had ever represented Larry Schapp or that anyone in that office ever had represented Schapp. It was only after Mr. Scher insisted that the secretary check whatever records were available because he had received information that Mr. Woodard had in fact represented Schapp did the secretary agree to conduct a search. Later that same day, the secretary confirmed that she conducted a search of her records, and discovered to her surprise that the Public Defender's Office had represented Larry Schapp for a DWI charge in 1978. However, the secretary reported to Mr. Scher that it was not Wayne Woodard who represented Schapp, but rather Stephan Widmeyer. The secretary indicated that she would forward the records which she had discovered (PC-RII 53). These documents were in fact received, and were attached to Mr. Scher's affidavit (PC-RII. 54-61).

Mr. Porter submits that the meaning of the word "due" in the phrase "due diligence" is the same as the meaning of the word "due" in the phrase "due process." In Darden v. Wainwright, 477 U.S. 168 (1986), the United States Supreme Court condemned the prosecutor's closing argument to the jury: "That argument deserves the condemnation it has received from every court to review it." Id. at 179. However, the Supreme Court found that the improper closing argument did not violate due process. Specifically, the Court said: "we agree with the District Court

below that 'Darden's trial was not perfect -- few are -- but neither was it fundamentally unfair." Id. at 183. Thus, it is clear that due process does not mean perfect process; it simply means that process which is due.[32]

Mr. Porter's counsel has expended that diligence which was due under the circumstances, They talked to the trial and resentencing attorneys. They talked to Matha Thomas, who would not waive attorney-client privilege in order to permit counsel to speak to his attorney. Mr. Porter's collateral counsel also tried to speak to Mr. Schapp. However, efforts to locate him were fruitless; he could not be found.

No one provided any information hinting at the possibility that Mr. Schapp was also represented by one of Mr. Porter's attorneys. Nothing in the record indicated that Mr. Porter's counsel also represented Mr. Schapp. And certainly, the State, despite its knowledge of the conflict, did not alert collateral counsel. Had the State at any time disclosed that Mr. Schapp had been represented by Mr. Widmeyer and collateral counsel failed to investigate, then the State could argue a lack of due diligence. But given the State's own silence, this Court must accept Mr. Porter's proffered facts and find due diligence was exercised.

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[32]Due diligence is defined as that which is "properly to be expected from, and ordinarily exercised by, a reasonable and prudent man under the particular circumstances; not measured by any absolute standard, but deaending on the relative facts of the special case." Blacks Law Dictionary (emphasis added). As indicated above, no one ever disclosed Schapp's representation by Widmeyer, nor could Schapp ever be located.

It is clear and undisputed that Mr. Widmeyer's representation of Larry Schapp was never disclosed by anyone who was aware of the relationship. Counsel were never informed nor had any reason to believe that Schapp was represented by Mr. Widmeyer at the same time as Raleigh Porter was represented by him. Counsel exercised due diligence in talking to the three defense attorneys and looking for Mr. Schapp. He had no information that the identity of Mr. Schapp's DWI attorney was of significance. Without a waiver from Mr. Schapp, collateral counsel could not have talked to the attorney. Certainly the State never disclosed to Mr. Porter or his counsel that Schapp had been represented by Mr. Widmeyer on the DWI charge, a fact which was clearly known by prosecutor Berry, who was prosecuting both the Porter and Schapp cases.[33]

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[33]The predecessor to the present Eleventh Circuit Court of Appeals has held that state action is established in such a case like Mr. Porter's when "the activities of the prosecutor in offering the negotiated plea to one defendant with full knowledge that [the defendant's] attorney also represented another defendant." Alvarez v. Wainwright, 522 F.2d 100, 104 (5th Cir. 1975). "[R]equisite state action can be shown where there is significant involvement of the state through knowledge or awareness of the ineffectiveness of the retained counsel by functionaries of the state judicial system such as the trial judge or the prosecutor." Id. at 104. In Mr. Porter's case, "[r]equisite state action is present [] because the Assistant State Attorney was actively involved in the facts creating the conflict of interest." Id. Prosecutor Berry knew that Mr. Widmeyer represented both Raleigh Porter and Larry Schapp, and either disclosed only to the conflicted attorney or failed to disclose that Schapp was being considered as chargeable as a co-defendant, and entered into a negotiated settlement with Mr. Widmeyer regarding Schapp's third DWI charge. Yet Assistant State Attorney Berry never disclosed in any way any of these facts.

Because he simultaneously represented Raleigh Porter as well as Larry Schapp, trial counsel was burdened by an actual conflict of interest which adversely affected his representation of Mr. Porter. Cuyler v. Sullivan, 466 U.S. 335 (1980). An attorney's simultaneous representation of conflicting interests results in counsel's "struggle to serve two masters," Glasser v. United States, 315 U.S. 60, 75 (1942), both of whom are owed a legal and ethical duty of undivided loyalty. Because "the duty of loyalty . . . [is] perhaps the most basic of counsel's duties," Strickland v. Washington, 466 U.S. 668, 692 (1984), such a "struggle" cannot be countenanced under the Sixth Amendment due to the fact that "[t]he purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Id. at 691-92. The reliability of the proceedings is therefore premised upon legal representation free from conflicting loyalties.

This Court recently reversed a conviction and sentence of death in circumstances similar to those present here:

> We can think of few instances where a conflict is more prejudicial than when one client is being called to testify against another. As seen by the facts set forth earlier in this opinion, Boyne was a key witness against Guzman. The State contends that Boyne's waiver of the attorney-client relationship was sufficient to cure any prejudice that might have been caused by the public defender's representation of both Boyne and Guzman. While such a waiver might have cured any conflict the public defender had insofar as its representation of Boyne was concerned, that waiver does not waive

> Guzman's right to conflict-free counsel. See Also . Regulating Fla.Bar 4-1.7(a) ("A lawyer shall not represent a client if the representation of that client will be directly adverse to the interests of another client, unless: . . . each client consents after consultation.")(emphasis added). As seen by the very situation that arose at the trial in this case, Boyne's waiver was unquestionably insufficient to cure the conflict as it affected both Guzman and the public defender's office itself. In this instance, the public defender was placed in the untenable position of having to decide whether he should become a witness in Guzman's trial to testify directly contrary to statements made to him by another client. Importantly, this type of testimony does not just affect this case, it could have broad ramifications on all criminal defense attorneys given that an attorney is prohibited from being a witness in a trial in which the attorney's client is a party. See R. Regulating Fla.Bar 4-3.7(a) ("A lawyer shall not act as advocate in a trial in which the lawyer is likely to be a necessary witness on behalf of the client....").
>
> Boyne's testimony in this case was significant, particularly in view of the fact that Guzman testified in his own behalf and denied his participation in any respect with this robbery-murder. As such, we find that an actual conflict of interest and prejudice has been shown in this record and, consequently, that the denial of the motion to withdraw was reversible error. See Foster v. State, 387 So.2d 344 (Fla.1980).

Guzman v. State, 644 So. 2d 996, 999 (Fla. 1994).

According to Widmeyer, Jacobs and Woodard, the State also withheld the fact that it had advised law enforcement to charge Larry Schapp as an accessory. The State had an obvious duty to

disclose this information to Mr. Porter's counsel.[34] The State also had a duty to disclose to Mr. Porter and the trial court the fact that Mr. Widmeyer was representing Mr. Porter and his uncharged co-defendant, Larry Schapp. The State knew that Mr. Widmeyer was representing both Raleigh Porter and Larry schapp, and also knew that Larry Schapp was charged as a co-defendant, yet failed to disclose this information and prevented an adequate adversarial testing.

Mr. Porter's allegations, including the affidavits submitted with this motion, must be taken as true at this juncture. Lishtbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989); Scott v. State, 20 Fla. L. Weekly S133 (Fla. March 16, 1995). Accepting them as true, it is clear that an evidentiary hearing is required for the same reasons set forth in Lishtbourne and Scott.

B. MATHA LEE THOMAS.

Larry Schapp was not the only prosecution witness that had been represented by Mr. Widmeyer at the time he represented Raleigh Porter. At the time he cross-examined Matha Lee Thomas at Raleigh Porter's trial, defense counsel Widmeyer had an actual conflict of interest because of his prior representation of witness Matha Lee Thomas, the jailhouse informant who came forward and revealed that Mr. Porter had confessed to having

[34] If the State merely disclosed it to Mr. Widmeyer, an obviously conflicted attorney, such disclosure was not passed on; it simply added to Mr. Widmeyer's actual conflict, representing two co-defendants.

committed the murders. Newly discovered evidence establishes that the prosecutor who handled the Porter case, Gene Berry, had a prior personal relationship with Matha Thomas, the details of which were never presented to Mr. Porter's sentencing jury and judge. Moreover, because Matha Thomas has waived his attorney-client privilege in September of 1994, further details of what occurred in 1978 between Thomas and the state have come to light. The details of the relationship between Berry and Thomas, and the information from Thomas's counsel, were only recently discovered because Thomas only recently waived his attorney-client privilege with respect to this case.[35]

1. THE FACTS UNDERLYING THE THOMAS CONFLICT.

Raleigh Porter was represented at trial by attorney Stephan Widmeyer. Mr. Widmeyer was hired on July 1, 1978, to be an assistant public defender in Charlotte County. On July 27, 1978, Thomas was charged with the crime of uttering a forged instrument, as well as a violation of probation (App. 20). Unable to meet his bond of $1,575, Thomas remained in the Charlotte County Jail (App. 21). While in jail, Thomas spoke to a representative from the Charlotte County Public Defender's Office. On July 27, 1978, that office was appointed to represent Thomas, and Assistant Public Defender Widmeyer assumed responsibility for Thomas' case.

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[35]At the federal court evidentiary hearing conducted in 1988, Thomas had expressly refused to waive his attorney-client privilege regarding his involvement in this case.

Mr. Porter was arrested on August 22, 1978, and Mr. Widmeyer commenced his representation during the evening of August 22 when he visited Mr. Porter in the Charlotte County Sheriff's Department. On August 25, 1978, Thomas, Mr. Widmeyer's client, gave a statement to law enforcement regarding comments purportedly made by Mr. Porter, also Mr. Widmeyer's client, while they were both in the county jail,

On September 5, 1978, the same day Mr. Widmeyer withdrew from Thomas' case, Mr. Widmeyer and Gene Berry, the prosecutor of both the Thomas and Porter cases, entered into a stipulation to reduce Mr. Thomas' bond from $1,575 to $500 (PC-RII. 112). The reduction in bond was agreed to in order to facilitate Thomas' release from jail. At the time Berry stipulated to the bond reduction, he was aware of Thomas' statement against Mr. Porter, as was Mr. Widmeyer.

On September 19, 1978, an order was entered setting Thomas' case for trial on October 31, 1978, prior to Mr. Porter's scheduled trial date (PC-RII. 114). On October 9, 1978, a motion for continuance of Thomas' trial was filed by Thomas' new counsel, Robert Norton (PC-RII. 115). On October 23, 1978, the prosecutor stipulated with Mr. Norton to the continuance of the trial to a later date to be set by Judge Stanley, who was presiding over Mr. Porter's trial (PC-RII. 116). Following Mr. Porter's trial in November of 1978, Mr. Norton was informed that the charges against his client had been nolle prossed by Gene Berry (PC-RII. 118).

At the federal court evidentiary hearing, Thomas testified that the charges against him were dismissed in light of his testimony at Mr. Porter's trial:

> Put it like this here, after, like I say, after Mr. Porter's trial and everything, there was a little article come up in the paper where Mr. Barry said that, you know, in enlightment [sic] of the -- that I come up to trial and everything, he seen fit to take a nolle pross, I mean, no file on the charges of uttering a forged instrument.

The dismissal of the charges against Thomas was clearly on the line at the time of his testimony at Mr. Porter's trial, when Mr. Widmeyer cross-examined him.

The record unambiguously reveals that Mr. Widmeyer did not cross-examine Thomas on the issue of when his bond was reduced, or on the fact that the stipulation was entered into within a week of the time Thomas went to the police regarding Mr. Porter, or on the fact that Thomas' trial was continued until after Mr. Porter's trial or, most importantly, on the issue of whether Thomas would receive or expected to receive any benefit as a result of his testimony against Mr. Porter.

2. NEWLY DISCOVERED FACTS.

Newly discovered evidence previously unascertainable by postconviction counsel establishes that the prosection had in fact entered into a deal with Matha Thomas in exchange for his testimony against Raleigh Porter. As with the evidence discussed regarding Larry Schapp, this new evidence of a deal with Thomas requires an evidentiary hearing. These allegations must be accepted as true. Lishtbourne v. Dugger, 549 So. 2d at 1365.

The jury was not informed of these facts, and therefore no reliable adversarial testing occurred during either the guilt or sentencing phases of Mr. Porter's capital trial.

As noted earlier, Thomas waived his attorney-client privilege in September, 1994. Pursuant to that waiver, Mr. Porter's postconviction counsel contacted Robert Norton,[36] the attorney who assumed Thomas' representation in the Uttering a Forged Instrument charge following the withdrawal of Stephan Widmeyer. After reviewing the court file in the Thomas case, Mr. Norton confirmed that he did represent Thomas following Mr. Widmeyer's withdrawal. Following his appointment to represent Thomas, Mr. Norton received a notice on September 19, 1978, from Judge Stanley that the Thomas case had been set to go to trial on October 31. On October 9, Mr. Norton filed a motion for continuance, requesting that the trial be set for a later date. At that point, Mr. Norton has now disclosed that he had not done anything in Thomas' case in terms of preparing for trial, engaging in discovery, etc. A few weeks later, on October 25, Gene Berry stipulated to a continuance of Thomas' trial until a date to be set by Judge Stanley. The next thing that happened was Mr. Norton received a letter from Gene on January 9, 1979, indicating that he had nolle prossed the uttering a forged instrument and probation violation charges against Thomas.

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[36]This is the same Robert Norton who, during 1978 and early 1979, was law partners with Wayne Woodard, Mr. Porter's resentencing attorney.

Mr. Norton explained that between the date that he was appointed to represent Thomas and the time that the charges were dropped, he took no affirmative steps to engage in discovery and prepare for trial.[37] Just after he was appointed, he received a phone call from either Gene Berry or Stephan Widmeyer informing him that no action would be taken in the Thomas case in the near future, and that it would therefore be unnecessary to begin preparing for trial as he normally would. Mr. Norton had stipulated with Gene Berry to a continuance of Thomas' trial because continuances always benefit the defendant. However, Mr. Berry never contacted Mr. Norton about re-setting Thomas' trial. The next thing that occurred was Mr. Norton's receipt of the letter from Gene Berry wherein he indicated that he was nolle prossing the charges against Thomas.

The fact that Mr. Norton received a phone call wherein he was informed that no work needed to be done in Thomas' case to prepare for trial as he normally would is newly discovered, and buttresses Mr. Porter's claim that a deal had been struck between Thomas and the prosecution while Mr. Widmeyer represented Mr. Thomas. In light of the series of events which transpired between his arrest and the nolle prossed of the charges, Mr. Norton's recollections substantiate the fact that the prosecutor had arranged a benefit for Thomas, and his charges were then

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[37] Mr. Norton's billing in Thomas' case corroborates the fact that little active work was done in the case. Mr. Norton billed only two (2) hours spent on the case, for a total of $100.00 (PC-RII. 199-22).

dismissed by the prosecutor after winning a death sentence against Raleigh Porter.

Additional evidence not previously available further substantiates this claim. Matha Thomas, in light of his waiver of confidentiality, recently provided a sworn statement indicating that he had a personal relationship with Gene Berry pre-dating their involvement in Mr. Porter's case:

> 2. On March 8, 1995, Michael R. Chavis an investigator from the Office of the Capital Collateral Representative (CCR) interviewed me about my knowledge of the Raleigh Porter case and assistant state attorney Gene Berry. I told the investigator from CCR that I had known Mr. Berry before the Raleigh Porter case took place. Mr. Berry and a bail bondsman from the area used to go hunting on land my father owned. This was when I was first introduced to Mr. Berry. He eventually asked me if I was interest [sic] in doing some yard work for him. I told him I was and I did this yard work for him at his home. All this took place before I got arrested on the Uttering a Forged Instrument Charge and before I got involved in Raleigh Porter's case. So Mr. Berry and I had new [sic] each other prior to the time he dropped my charges after I testified at Porter's trial.

(PC-RII. 29).

In addition to acknowledging a prior relationship with Assistant State Attorney Berry, Thomas also revealed that after the Porter trial, Mr. Berry approached him about helping him catch drug runners:

> 3. Gene Berry also came to talk to me after the Raleigh Porter case was over. Mr. Berry asked me if I could help him catch some people who were using my father's land to drop drugs from airplanes. I told him I was

not interested because I did not want to have anything to do with busting drug runners.

(PC-RII. 29-30).

These facts are clearly significant. See Gorham v. State, 597 So. 2d at 784 (State must disclose its relationship with witnesses when that relationship establishes a bias or motive which would serve as a basis of impeachment). Given the information Mr. Norton revealed due to the waiver of the attorney-client privilege, it is clear that the dropping of Thomas' charges by the prosecution was simply a formality which was carried out in exchange for Thomas' favorable testimony against Raleigh Porter. Moreover, the fact that prosecutor Berry negotiated a deal with Thomas is substantiated even more by the fact that Thomas and the prosecutor had a personal relationship prior to Thomas' arrest and prior to his coming forward while in jail with his statement that Mr. Porter had confessed to him. The fact that prosecutor Berry came back to Thomas after the Porter trial was over and requested his "assistance" in catching drug runners is further proof of their close personal friendship.

This Court must accept these allegations as true, and therefore they are sufficient to require an evidentiary hearing. Lishtbourne v. Dugger, 549 So. 2d at 1365. These facts were not previously known to postconviction counsel, despite the exercise of due diligence because of Thomas' past refusal to waive the attorney-client privilege. The facts establish that a deal was orchestrated by the prosecution with the prosecutor's friend, Matha Thomas. Either the prosecution failed to disclose this

clearly exculpatory evidence under **Brady**, or Mr. Widmeyer had an actual conflict of interest. Neither the jury nor the judge were presented with this evidence.

c. **NO ADVERSARIAL TESTING OCCURRED.**

The United States Supreme Court has explained:

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

Strickland v. Washinston, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and *material either to guilt or punishment"'. United States v. Baslev, 473 U.S. 667, 674 (1985), quoting Brady v. Marvland, 373 U.S. 83, 87 (1963). Failure to disclose impeachment evidence also results in a violation of Brady, Gislio v. United States, 405 U.S. 150, 154 (1972), as does the failure to disclose deals and/or favorable treatment by the prosecution with key government witnesses. Brown v. Wainwrisht, 785 F.2d 1457 (11th Cir. 1986). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence is undermined in the outcome. Smith v. Wainwrisht, 799 F.2d 1442 (11th Cir. 1986).

Here, Mr. Porter was denied a reliable adversarial testing. Whether defense counsel had an actual conflict of interest which he failed to disclose to Mr. Porter regarding his representation of Larry Schapp and Matha Thomas, *or* whether the prosecution failed to disclose to defense counsel the fact that Schapp was going to be charged as a co-defendant and that Mr. Thomas' charges would be dropped if he testified favorably for the prosecution, no one disputes that neither the sentencing judge nor the jury heard the evidence in question. The jury did not hear important evidence casting doubt on Schapp's credibility. A similar analysis is applicable for the newly discovered evidence regarding Thomas' deal with the prosecution and the evidence of the personal relationship between Thomas and prosecutor Gene Berry. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Id. at 691-92. The Sixth Amendment also guarantees the right to expose to a jury a witness' vulnerability to prosecution by the State. Davis v. Alaska, 415 U.S. 308, 318 (1974). This bears directly on such a witnesses' credibility.

This guarantee has been compromised in Mr. Porter's case due to the circumstances described in this claim. The prosecution's suppression of evidence favorable to the accused violates due process. United States v. Baglev. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or

punishment, and regardless of whether defense counsel request the specific information. A defendant's right to present favorable evidence is violated by such state action. See Chambers v. Mississippi, 410 U.S. 284 (1973); see also Giglio v. United States, 405 U.S. 150 (1972). Here, evidence favorable to the defense, evidence that supported and furthered the defense, was not disclosed to the defense, as the affidavits from Mr. Widmeyer and Mr. Jacobs establish. If it was disclosed to Mr. Widmeyer who the State knew to represent Schapp and Thomas, the failure to present this impeachment evidence to Mr. Porter's judge and jury was the actual effect of the conflicting duties of loyalty imposed upon Mr. Widmeyer.

The law in Florida is clear when an attorney is placed in Mr. Widmeyer's predicament, the conflict must be disclosed or counsel allowed to withdraw. Guzman v. State, 644 So. 2d 996, 999 (Fla. 1994). In Guzman, the public defender, in circumstances identical to those faced by Mr. Widmeyer, advised Mr. Guzman and the trial court of the conflict arising from his representation of the state witness, Mr. Guzman's cellmate, who claimed Mr. Guzman had confessed to the crime. The trial court refused to allow the public defender to withdraw even though Mr. Guzman did not waive the conflict. Unlike the situation in Guzman, here the conflicted public defender did not reveal the conflict to either Mr. Porter or to the trial court. Mr. Porter's prosecuting attorney knew about the conflict, but did not disclose it to either the judge or to Mr. Porter. The jury

in did not get the benefit of any cross-examination about the potential benefit to the witnesses in question.

In Guzman, the conflicted attorney advised the trial court about the conflict. Because the trial court did nothing, this Court reversed. Here, the conflicted lawyer did not disclose his conflict and by his inaction advanced the interests of the witnesses over the interests of Mr. Porter. As a result, Mr. Porter did not know of the conflict and was precluded from objecting (PC-RII. 62-63).

Evidence of the conflict was not disclosed to either Mr. Porter or post-conviction counsel. Neither the State nor Mr. Widmeyer advised Mr. Porter's post-conviction counsel of Mr. Widmeyer's representation of Mr. Schapp. Mr. Schapp was unavailable. Mr. Thomas refused to waive attorney-client privilege so that undersigned counsel could speak to Mr. Norton. Undersigned counsel had no basis for suspecting that Mr. Schapp and Mr. Porter was represented by the same counsel.

At this stage, Mr. Porter's unrefuted allegations must be accepted as true. Lishtbourne. This undisclosed evidence establishes that Mr. Porter's counsel was burdened by an actual conflict of interest and that Mr. Porter did not receive a constitutionally adequate adversarial testing. Under Guzman prejudice must be presumed, and a new trial or at the very least a new judge sentencing ordered.

No constitutionally adequate adversarial testing occurred in Raleigh Porter's case. Confidence is undermined in the outcome.

The conviction and sentence of death are rendered unreliable. Mr. Porter was convicted and sentenced without a constitutionally adequate adversarial testing. Accordingly, an evidentiary hearing must be held, and thereafter, Mr. Porter's conviction and sentence must be vacated and a new trial and/or new judge sentencing ordered.

ARGUMENT III

NO ADVERSARIAL TESTING OCCURRED AT MR. PORTER'S CAPITAL RESENTENCING PROCEEDINGS BECAUSE CRITICAL EXCULPATORY IMPEACEMENT EVIDENCE WAS NOT DISCLOSED TO DEFENSE COUNSEL, AND/OR BECAUSE DEFENSE COUNSEL WAS BURDENED BY AN UNDISCLOSED ACTUAL CONFLICT OF INTEREST, IN VIOLATION OF MR. PORTER'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Porter's jury unanimously recommended a life sentence. The trial judge overrode that recommendation on the basis of Larry Schapp's deposition which contained matters not heard by the jury. On direct appeal, Mr. Porter's override death sentences were vacated and reversed because of a violation of Gardner v. Florida, 430 U.S. 349 (1977). Porter v. State, 400 So. 2d 5 (Fla. 1981). The judge had not advised the defense that he was considering the Schapp deposition, nor did he explain how he obtained a copy of the deposition, since it was not in the trial record.

In 1981, Wayne Woodard was assigned by the public defender's office to represent Mr. Porter at the resentencing. However, Mr. Woodard had prosecuted Mr. Porter in 1976 on a buying and receiving stolen property charge. According to the 1976 PSI, Mr.

Woodard advocated that prison time be given to Mr. Porter PC-RII. 123-25. Mr. Woodard's prior prosecution of Mr. Porter was not disclosed to Mr. Porter nor was Mr. Porter given an opportunity to waive the conflict. Mr. Porter did not recognize Mr. Woodard.

In July of 1981, approximately thirty days after the Florida Supreme Court announced that Mr. Porter should be resentenced, Gene Berry, Assistant State Attorney, had Larry Schapp arrested on a felony charge. This charge was nolle prossed a couple of weeks before Mr. Porter's resentencing in August of 1981.

Mr. Woodard did not know that Mr. Widmeyer had represented Larry Schapp on his third DWI charge. See Argument II, supra. Nor did he know that Gene Berry had advised law enforcement on August 22, 1978, to charge Schapp as an accessory to the felony/murder. See Argument II, supra. As a result, he did not know to cross-examine Mr. Schapp about these matters at the 1981 resentencing. Had he known, he would have cross-examined Mr. Schapp about his potential criminal liability in the murders and the very light disposition of his third DWI charge.

Also undisclosed to Mr. Porter was the fact that Wayne Woodard had been practicing in a law firm in 1978 with Robert Norton, Matha Thomas' attorney after Mr. Widmeyer withdrew in September of 1978. While Mr. Norton represented Matha Thomas, Mr. Woodard was his law partner.

At the resentencing proceeding, Mr. Woodard presented to the trial court the fact that the charges against Matha Lee Thomas had been nolle prossed by the State shortly after Mr.

Porter's trial and after he was sentenced to death (RS. 34).[38] Mr. Woodard indicated that he was submitting this information to the court "in regard to impeachment of Mr. Thomas' testimony of what, in fact, happened and that was not available at sentencing" (RS. 35). When the court inquired as to whether the State made Thomas a promise, Mr. Woodard responded, "I have no way of knowing that, Your Honor. All I know is the fact that the charge was dismissed right after sentencing" (Id.).

In fact, Mr. Woodard had been law partners with Robert Norton, the attorney who was appointed to represent Matha Thomas after Mr. Widmeyer withdrew, at the time Mr. Norton represented Thomas. Assistant State Attorney Berry responded at Mr. Porter's sentencing that he "fail[ed] to see where [the dismissal of the charges against Thomas] has any material aspect to sentencing" (Id.).

However, the facts reveal that the prosecution had struck a deal with Thomas in exchange for his testimony. Had the state disclosed this information, the judge would have been precluded from overriding the life recommendation. The underlying facts which establish the Thomas conflict are detailed in Argument II, supra, at subsection B, and will not be repeated here. In addition to the facts alleged in Argument II, newly discovered evidence previously unascertainable to postconviction counsel

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[38]Of course as we now know (see Argument I, supra), Judge Stanley had decided to impose the death sentence on Mr. Porter when the jury returned its guilty verdict, notwithstanding the evidence to be later presented at the penalty phase and notwithstanding the jury's recommendation.

establishes that the prosection had in fact entered into a deal with Matha Thomas in exchange for his testimony against Raleigh Porter. As with the evidence discussed in Argument II, this new evidence of a deal with Thomas requires an evidentiary hearing. This was precisely the type of evidence Mr. Woodard would have wanted and used at the resentencing to impeach Thomas' trial testimony and to establish mitigation which would have precluded the trial court from again overriding the jury's unanimous life recommendation. No reliable adversarial testing occurred.

Pursuant to Thomas' waiver of his attorney-client privilege in 1994, Mr. Porter's postconviction counsel contacted Robert Norton, the attorney who assumed Thomas' representation in the Uttering a Forged Instrument and probation violation charges following the withdrawal of Stephan Widmeyer.[39] After reviewing the court file in the Thomas case, Mr. Norton confirmed that he did represent Thomas following Mr. Widmeyer's withdrawal. Following his appointment to represent Thomas, Mr. Norton received a notice on September 19, 1978, from Judge Stanley that the Thomas case had been set to go to trial on October 31. On October 9, Mr. Norton filed a motion for continuance, requesting that the trial be set for a later date. At that point as Mr. Norton has now disclosed, he had not done anything in Thomas' case in terms of preparing for trial, engaging in discovery, etc. A few weeks later, on October 25, Gene Barry stipulated to a

[39]Again in the fall of 1978, Wayne Woodard was a member of Robert Norton's law firm.

continuance of Thomas' trial until a date to be set by Judge Stanley. The next thing that happened was Mr. Norton received a letter from Gene on January 9, 1979, indicating that he had nolle prossed the uttering a forged instrument and probation violation charges against Thomas. See (PC-RII. 109-22).

Mr. Norton has now explained that between the date that he was appointed to represent Thomas and the time that the charges were dropped, he took no affirmative steps to engage in discovery and prepare for trial.[40] Just after he was appointed, he received a phone call from either Gene Berry or Stephan Widmeyer informing him that no action would be taken in the Thomas case in the near future, and that it would therefore be unnecessary to begin preparing for trial as he normally would. Mr. Norton had stipulated with Gene Berry to a continuance of Thomas' trial because continuances always benefit the defendant. However, Mr. Berry never contacted Mr. Norton about re-setting Thomas' trial. The next thing that occurred was Mr. Norton's receipt of the letter from Gene Berry wherein he indicated that he was nolle prossing the charges against Thomas.

The fact that Mr. Norton received a phone call wherein he was informed that no work needed to be done in Thomas' case to prepare for trial as he normally would is newly discovered, and adds a critical yet up-to-now unascertainable fact which buttresses Mr. Porter's claim that a deal had been struck between

[40]As noted earlier, the affidavit for attorney's fees reflects only two (2) hours spent on the case, for a total of $100.00 (PC-RII. 119-22).

Thomas and the prosecution. In light of the series of events which transpired between his arrest and the nolle prosse of the charges, Mr. Norton's recollections substantiate the fact that the prosecutor had arranged a benefit for Thomas while Mr. Widmeyer was Thomas' counsel, and his charges were then dismissed by the prosecutor after winning a death sentence against Raleigh Porter.

Additional evidence not previously available further substantiates this claim. Matha Thomas, in light of his waiver of confidentiality, recently provided a sworn statement indicating that he had a personal relationship with Gene Berry pre-dating their involvement in Mr. Porter's case:

> 2. On March 8, 1995, Michael R. Chavis an investigator from the Office of the Capital Collateral Representative (CCR) interviewed me about my knowledge of the Raleigh Porter case and assistant state attorney Gene Berry. I told the investigator from CCR that I had known Mr. Berry before the Raleigh Porter case took place. Mr. Berry and a bail bondsman from the area used to go hunting on land my father owned. This was when I was first introduced to Mr. Berry. He eventually asked me if I was interest [sic] in doing some yard work for him. I told him I was and I did this yard work for him at his home. All this took place before I got arrested on the Uttering a Forged Instrument Charge and before I got involved in Raleigh Porter's case. So Mr. Berry and I had new [sic] each other prior to the time he dropped my charges after I testified at Porter's trial.

(PC-RII. 29).

In addition to acknowledging a prior relationship with Assistant State Attorney Berry, Thomas also revealed that after

the Porter trial, Mr. Berry approached him about helping him catch drug runners:

> 3. Gene Berry also came to talk to me after the Raleigh Porter case was over. Mr. Berry asked me if I could help him catch some people who were using my father's land to drop drugs from airplanes. I told him I was not interested because I did not want to have anything to do with busting drug runners.

(PC-RII. 29-30).

These facts are clearly significant. See Gorham v. State, 597 So. 2d at 784. Given the information Mr. Norton revealed due to the waiver of the attorney-client privilege, it is clear that the dropping of Thomas' charges by the prosecution was simply a formality which was carried out in exchange for Thomas' favorable testimony against Raleigh Porter. Moreover, the fact that prosecutor Berry negotiated a deal with Thomas while Mr. Widmeyer was his counsel is substantiated even more by the fact that Thomas and the prosecutor had a personal relationship prior to Thomas' arrest and prior to his coming forward while in jail with his statement that Mr. Porter had confessed to him. The fact that prosecutor Berry came back to Thomas after the Porter trial was over and requested his "assistance" in catching drug runners was never presented to either the judge or the jury. This was impeachment evidence which should have been presented.

This Court must accept these allegations at face value, and therefore they are sufficient to require an evidentiary hearing. Lishtbourne v. Dugger, 549 So. 2d at 1365. These facts were not previously known to postconviction counsel, nor were they

discoverable through due diligence because of Thomas' past refusal to waive the attorney-client privilege.

In addition to being relevant to the original proceedings, the facts alleged in this claim are highly relevant to Mr. Porter's resentencing and without a doubt should have been disclosed to resentencing counsel pursuant to Brady v. Maryland. Scott v. State, 20 Fla. L. Weekly S133 (Fla. March 16, 1995); Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Gorham v. State, 597 so. 2d 782 (Fla. 1992). The credibility of Thomas was key to the prosecution's case for death, and any evidence, particularly evidence reflecting a prior personal relationship with the very prosecutor who would later drop charges, is a compelling basis upon which a jury could have reasonably relied in unanimously votingfora life sentence for Mr. Porter. See Douglas v. State, 575 so. 2d 165, 167 (Fla. 1991) ("[t]he credibility of [the state's primary witness] concerning the circumstances surrounding this murder could have reasonably influenced the jury's [life] recommendation"). The fact that Mr. Berry regularly used Mr. Thomas as an informant would have been valuable impeachment evidence. This was precisely the type of evidence Mr. Woodard was looking for in order to impeach Thomas' damaging trial testimony.

In addition to the information not disclosed to Mr. Woodard by the prosecution, it has also been discovered that Mr. Woodard was a member of the Charlotte County State Attorney's Office in 1976, at the time of Mr. Porter's prosecution for

Buying/Receiving Stolen Property (his only prior conviction). Mr. Woodard was not only a member of the State Attorney's Office, but was the actual prosecutor who prosecuted Mr. Porter for this prior conviction and asked that Mr. Porter be sent to prison (PC-RII. 125). Mr. Woodard had a duty to withdraw from representing Mr. Porter at his capital resentencing proceedings given the fact that he prosecuted Mr. Porter for a crime which he also had the duty to minimize or lessen the weight of in terms of its impact in the trial court's sentencing determination. Certainly, Mr. Woodard should have put his prior role as a prosecutor on the record so that Mr. Porter, who did not recognize Mr. Woodard, would be advised (PC-RII. 62-63).

Mr. Woodard was laboring under an actual conflict of interest while he represented Mr. Porter at his resentencing proceeding. "[T]he possibilities for actual conflicts are very real when attorneys 'switch sides' in a subsequent criminal case involving the same defendant." Maiden v. Bunnell, 35 F. 3d 477 (9th Cir. 1994). As the Seventh Circuit Court of Appeals recently explained:

> Although not every conflict of interest is "so egregious as to constitute a violation of the Sixth Amendment," [United States v. Alvarez, 580 F.2d [1251,] 1258 [(5th Cir. 1978)], government employment in a prosecutorial role against one defendant and subsequent representation of that defendant in a defense capacity is not moper.

United States v. Ziegenhasen, 890 F.2d 937, 940 (7th Cir. 1989) (emphasis added). Noting that "the prosecutorial role that Ziegenhagen's counsel took in the earlier convictions was

substantial enough to represent an actual conflict of interest," the Seventh Circuit concluded that "there may have been countless ways in which the conflict could have hindered a fair trial, the sentencing hearing, or even this appeal. We cannot say that there was nothing another attorney could have argued based on the record to more zealously advocate on this defendant's behalf." Id. at 940-41. Further, Mr. Woodard had been Mr. Norton's partner at the time Mr. Norton represented Thomas.

"Determining whether an attorney has an actual conflict requires a closer examination of the facts of each particular case, with a particular eye to whether the attorney will, in the present case, be required to undermine, criticize, or attack his or her own work product from the previous case." Maiden, 35 F.3d at 481. In Mr. Porter's case, Mr. Woodard was in such a position of having to present Mr. Porter's prior conviction which Mr. Woodard himself had obtained in the light most mitigating to Mr. Porter. Because he was unable to do so, no mention whatsoever is made of Mr. Porter's prior conviction by Mr. Woodard at the resentencing. No adversarial testing occurred, and a hearing is required.

Moreover, Mr. Porter cannot be said to have waived the conflict of interest with Mr. Woodard, who he did not recognize. Certainly, "the trial court did not ascertain whether [Mr. Porter] knew a possible conflict existed and might affect his case, or whether he knew he had the right, in such a situation, to have a different attorney appointed." Maiden, 35 F.3d at 481

n.5. "Courts have a 'serious and weighty responsibility' to ascertain with certainty that a defendant has waived a constitutional right." Id. (quoting Johnson v. Zerbst, 304 U.S. 458, 465 (1938); United States v. Christenson, 18 F.3d 822, 826 (9th Cir. 1994)).

No adversarial testing occurred at Mr. Porter's resentencing. The United States Supreme Court has explained:

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

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Failure to disclose impeachment evidence also results in a violation of Brady, Giglio v. United States, 405 U.S. 150, 154 (1972), as does the failure to disclose deals and/or favorable treatment by the prosecution with key government witnesses. Brown v. Wainwright, 785 F.2d 1457 (11th Cir. 1986). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence

is undermined in the outcome. Smith v. Wainwriaht, 799 F.2d 1442 (11th Cir. 1986).

Here, Mr. Porter was denied a reliable adversarial testing. Whether defense counsel had an actual conflict of interest which he failed to disclose to Mr. Porter, or whether the prosecution failed to disclose to defense counsel the true facts regarding Thomas, it cannot be disputed that the sentencing judge at the resentencing did not hear important evidence in question. "The purpose of the Sixth Amendment guarantee of counsel is to ensure that a defendant has the assistance necessary to justify reliance on the outcome of the proceeding." Id. at 691. See also Garcia v. State.

In Brown v. Wainwright, the Eleventh Circuit held that, in circumstances such as those present in Mr. Porter's case, relief is warranted:

> If knowledge of the agreement struck with [prosecution witness] Floyd for favorable treatment on the [defendant's] case could reasonably have led a jury to disbelieve his testimony, Brown's conviction and sentence were constitutionally invalid. There is a reasonable likelihood that disclosure to the jury that Floyd was testifying under an agreement that might save his skin could have affected the jury's verdict and sentence. This is the type of incentive that existed in Giglio where non-disclosure of a plea agreement invalidated the conviction. The false testimony was used in an effort to rehabilitate Floyd's credibility after Brown's defense counsel had brought out two possible reasons Floyd might have had for implicating Brown. The evidence was material.
>
> We reject the state's contention that the false testimony was not material because

> it was merely cumulative of Floyd's possible bias. In the normal evidentiary sense cumulative evidence is excluded because it is repetitious. The testimony here did not merely reinforce a fact that the jury already knew; the truth would have introduced a new source of potential bias. See U.S. v. Sanfilippo, 564 F.2d 176, 178 (5th Cir. 1977) ("The fact that the history of a witness shows that he might be dishonest does not render cumulative evidence that the prosecution promised immunity for testimony").

Brown, 785 F. 2d at 1466 (footnote omitted).

In Mr. Porter's case, the prosecution kept hidden from defense counsel the true relationship between Thomas and prosecutor Berry, evidence from which the jury could reasonably have determined that Thomas' testimony was simply incredible. In fact, at the resentencing, defense counsel Woodard attempted to impeach Thomas with evidence tending to establish his bias (RS. 34). At no time during those proceedings did Gene Berry disclose his relationship to Thomas, or the fact that after the Porter trial he (Berry) had sought Thomas' assistance in catching drug runners. "The government has a duty to disclose evidence of any understanding or agreement as to prosecution of a key government witness." Id. at 1464. In Mr. Porter's case, this critical evidence was not disclosed, and therefore both the trial and resentencing proceedings were rendered unreliable.

Significant constitutional guarantees have been compromised in Mr. Porter's case. Resentencing counsel failed to present exculpatory evidence to the judge because either he was burdened by a conflict or the State failed to disclose exculpatory

evidence. Where a defense attorney is burdened by a conflict of interest, prejudice is presumed. Guzman v. State, 644 So. 2d at 999. Here, evidence favorable to the defense, evidence that supported and furthered the defense, was not revealed to the sentencing judge either because it was not disclosed to resentencing counsel or because resentencing counsel was burdened by a conflict which actually affected his performance. This allegation must be accepted as true. Lishtbourne; Scott. At a minimum this undisclosed evidence undermines confidence in the outcome of the guilt phase and certainly the resentencing. Certainly, prejudice should be presumed.

No constitutionally adequate adversarial testing occurred in Raleigh Porter's case. Because counsel was burdened by an actual conflict, prejudice must be presumed. In any event, confidence is undermined in the outcome. Mr. Porter was convicted and sentenced without a constitutionally adequate adversarial testing. Accordingly, a stay should be entered, an evidentiary hearing must be held, and thereafter, Mr. Porter's conviction and sentence must be vacated and a new trial and/or new judge sentencing ordered.

ARGUMENT IV

NEWLY DISCOVERED EVIDENCE ESTABLISHING MR. PORTER'S GOOD CONDUCT IN PRISON AND HIS REHABILITATION REQUIRES THAT THIS COURT GRANT RULE 3.850 RELIEF AND IMPOSE A LIFE SENTENCE.

In Scott v. Dugger, 604 So. 2d 465 (Fla. 1992), this Court recognized that claims of newly discovered evidence may establish

that a death sentence must be reduced to a life sentence. Specifically, the Court wrote:

> Two requirements must be met in order to set aside a conviction or sentence because of newly discovered evidence. First, the asserted facts "must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant or his counsel could not have known them by the use of due diligence. Hallman, 371 So. 2d at 485. Second, "the newly discovered evidence must be of such a nature that it would probably produce an acquittal on retrial." Jones v. State, 591 SO. 2d 911, 915 (Fla. 1992). The Jones standard is also applicable where the issue is whether a life or death sentence should have been imposed. Id.

Scott, 604 So. 2d at 468 (emphasis in original).

The Court explained that evidence was newly discovered if it could not have been previously discovered because it had not existed. In Scott, the co-defendant's life sentence "was not imposed until after Scott's direct appeal was completed. Thus, this fact could neither be known nor discovered at the time that this Court reviewed Scott's death sentence." Id.

Moreover, the co-defendant's life sentence was obviously relevant mitigating evidence which would have resulted in a life sentence for Mr. Scott had it been known at the time of his sentencing. The trial judge had stated: "if the co-defendant [had] already been sentenced to life, I would have sentenced Mr. Scott to life despite the jury's recommendation." Id. at 469. That the holding and rationale in Scott applies to the instant situation is further established by the dissenting opinion in Scott. Justice Grimes, the lone dissenter, disagreed with the

majority's rationale that newly discovered evidence such as a co-defendant's life sentence should serve as the basis for overturning a death sentence. Id. at 470 (Grimes, J., dissenting). Justice Grimes explained that under Scott, "a defendant's good record in prison following the affirmance of his sentence to death could serve as a new nonstatutory mitigating circumstance to be used in collaterally attacking his original sentence." Id. Mr. Porter pleads in this claim exactly that: Mr. Porter's good prison record and efforts to rehabilitate himself constitute mitigation which had it been presented at the time of the judge sentencing proceedings would have precluded an override. As Justice Grimes specifically indicated, it is therefore clear that the analysis in Scott applies to the instant facts.

This claim of newly discovered evidence is properly alleged and presented at this time, and as such is not subject to the time limitations of Rule 3.850. See Johnson v. Singletary, 647 so. 2d 106, 110 (Fla. 1994) ("such claims [of newly discovered evidence] are not subject to the time limitations of Florida Rule of Criminal Procedure 3.850"). Moreover, Mr. Porter's argument should not be read to imply that newly discovered mitigating evidence such as exists in his case should result in the reduction of all death sentences. There must be some basis for concluding that the new evidence, i.e. the prison record, would have resulted in a life sentence. Here, Mr. Porter's case involves an override of a jury's unanimous recommendation of life

imprisonment, a fact which requires a distinct analysis in terms of the availability of mitigating evidence and its impact on the propriety of the override. This Court has emphasized that it "must reverse an override if there is a reasonable basis in the record to support a jury's recommendation of life." Parker v. State, 643 So. 2d 1032, 1034 (Fla. 1994) (emphasis added). Regarding evidence which was not presented at the time of trial because it was not available in terms of not being investigated due to ineffective assistance of counsel, the Court has likewise reversed override death sentences when it was established that mitigating evidence existed which would have precluded the override. See, e.g., Torres-Arboleda v. Dugger, 636 So. 2d 1321, 1326 (Fla. 1994) ("Had these facts been discovered and presented to the court at Torres-Arboleda's original sentencing, there would have been a reasonable basis in the record to support the jury's recommendation and the jury override would have been improper"). Because Mr. Porter's case involves a jury override, had the evidence of his exemplary prison record and his rehabilitation been presented to the sentencer, an override would have been precluded.

An en banc panel of the Supreme Court of Arizona was recently faced with a similar situation. In State v. Richmond, 886 P. 2d 1329 (Ariz. 1994) (en banc), the Arizona high court imposed a life sentence on Mr. Richmond because "[t]he law governing capital cases has changed significantly since his initial 1974 sentencing and, apparently, so has Richmond."

Richmond, 886 P. 2d at 1331. After being confronted with the numerous changes in capital jurisprudence as well as compelling evidence that Mr. Richmond had been rehabilitated and was a changed person, the court found that life, not death, should be the appropriate sentence:

> [C]apital sentencing law has undergone significant change since Richmond committed his offense. The resulting legal maze makes it troublesome for us to reaffirm his death sentence in a sensible and nonarbitrary manner. This difficulty, together with evidence that defendant has apparently changed since his crime, persuades us that we should reduce his sentence to life in prison and bring an end to this unfortunate saga.

Id. at 1334.

There are good policy reasons for allowing newly discovered evidence in the form of good prison conduct to be used to establish that a life sentence is warranted in circumstances where the Scott v. Dugger test is met. Individuals who seek to atone for their crimes and positively contribute to society should be accorded encouragement. To do otherwise is to declare death row an unredeemable trash heap.

Mr. Porter received a unanimous life recommendation from his jury in 1978. The trial judge overrode that recommendation and imposed death in 1978 and at a resentencing in 1981. Obviously, Mr. Porter's death row prison record was not in existence in 1978. Nor was the prison record that has accumulated since 1982 available in 1981. Yet a good prison record is relevant mitigation. Skipper v. South Carolina, 476 U.S. 1 (1986); State v. Richmond. It is as admissible as a co-defendant's life

sentence, and as relevant in terms of sentencing considerations. There is no question but that at a resentencing held today Mr. Porter would be able to introduce his good prison record since 1982 as relevant mitigation which would provide a reasonable basis for his unanimous life recommendation, and thus would preclude an override. Torres-Arboleda v. Dugger; Stevens v. State, 552 so. 2d 1082 (Fla. 1989).

The United States Supreme Court in Skipper emphatically underscored the notion that "evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating." Skinner, 476 U.S. at 5. "[E]vidence of adjustability to life in prison unquestionably goes to a feature of the defendant's character that is highly relevant to a jury's sentencing determination." Id. at 7 n.2. The Supreme Court further explained that exclusion from the jury's consideration of evidence that a defendant "should be spared the death penalty because he would pose no undue danger to his jailers or fellow prisoners and could lead a useful life behind bars if sentenced to life imprisonment" would violate Eddings v. Oklahoma, 455 U.S. 104 (1982).

This Court has likewise emphasized the highly relevant nature of Skinner-type evidence in terms of a true assessment of whether the death penalty is appropriate. "Unquestionably, a defendant's potential for rehabilitation is a significant factor in mitigation." Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988). Such evidence is "clearly mitigating in the sense that it

might serve as a basis for a sentence less than death." Id. The principle that "[d]eath is a unique punishment in its finality and in its total rejection of the possibility of rehabilitation," State v. Dixon, 283 So. 2d 1, 7 (Fla. 1973),[41] will simply be disregarded in Mr. Porter's case unless consideration of his prison record is factored into the sentencing determination in this case.

Recently, Mr. Porter was evaluated by a competent mental health expert who found that Mr. Porter's seventeen (17) years on death *row* have produced an exemplary prison record and a changed Raleigh Porter. The mental health evaluation was proffered in full below. It must be accepted as true at this juncture. The report established a wealth of nonstatutory mitigation now present after seventeen years on death row:

> Raleiuh Porter is now 39 vears of age and has been on death row for 17 years. He has been in wrison since the first man was executed following reinstatement of the death penalty. He has had a total of six write uws, the last in 1982. At 39 years of age, he is viewed as the "old man" of death row. He provides counsel and suwwort to other prisoners. He has reunited with is children and helps them through difficult times. He knows the Raleigh Porter who first arrived on death row, but cannot identify with him. He reads "whatever I can set mv hands on" and is ctiven books by the other inmates. He has focused on calligraphy and is an exwert. He does not understand, but is now able to accept, the

[41] See also Lowe v. State, No. 77,972, slip op. at 20 (Fla. March 9, 1995) (Kogan, J., concurring in part, dissenting in part) (noting "the general policy that death should not be imposed where the evidence supporting a potential for rehabilitation is strong").

rules of the prison. "It is just the way it is."

Raleigh Porter is an unusual inmate. His past history and current interview describe an intelligent, educated, and emotionally solid man. The past traumatic and chaotic life experiences do not indicate that this boy would achieve his maturity in adulthood. He had minimal nurturing and support as a child, yet he is able to have empathy for his children and accept his mother's frailties. He achieved poorly in school, yet through self teaching, he is an educated man. An impulsive youth is now a thoughtful man. Mr. Porter did not follow the rules as a child, but now accepts the rules and can question the system appropriately. The majority of physically and sexually traumatized children continue to have anxiety symptoms in adulthood, as does Mr. Porter. It is not unusual for neglected children and inmates to be suspicious, as is Mr. Porter.

At no time during his youth and young adulthood was Mr. Porter involved in a sustained, appropriate rehabilitation program, but he has gained wisdom. He accepts the responsibility for his sentence, but wants the opportunity to provide somethins of value to other inmates. He sees his strensths as that of a mediator. He sets along well with the prison officers. He understands the svstem, but is not part of it.

Raleigh recognizes his greatest change through the years at that of "allowing." He has learned to accept others as they are. He sees his role as that of a peacemaker and to use his talents to explain and help others understand each other. He has a good sense of humor and can laugh at the inconsistencies and foolishness of life.

Raleigh knows the pain of isolation and separation from his children. Raleigh is now involved with his children, as well as in contact with his mother. His daughter's stepfather sexually abused her when she was nine years of age, and he is able to support her through difficult times.

There is no doubt that Raleigh's childhood taught him to steal in order to gain independent from a sexually and physically abusive stepfather. That created a catastrophic pattern in Raleigh. It led to death row, where Raleigh has undergone a metamorphosis. With above-average intelligence, with no personality or mental disorders, Raleigh has been provided a structured setting in which to learn and to grow. He recognizes the destructive coping techniques he acquired. He has developed empathy for others, an extremely important milestone. He quite iustifiablv views himself as a different Raleigh Porter than the one who arrived on death row in 1978.

* * *

Cognitive and Academic Functioning

The Wechsler Adult Intelligence Scale - Revised is a core instrument, giving information about the overall level of intellectual functioning, demonstrating the presence or absence of significant intellectual deficits or possible altered functions. The Verbal IQ of 117, the Performance IQ of 134, and the Full Scale IQ of 127 places him in the overall superior range of mental ability when compared to other's his age of the general population. Although the subtest scores of the Performance or nonverbal section of the test were above the verbal, all subtest scores were in the average or above average range.

* * *

Academic skills as measured by the Wide Range Achievement Test - Revised (WRAT-R) are Spelling, 12th grade level, and Reading, Above 12th grade level. Academic records indicate that during his formal schooling, his academic skills were below his potential. The known environmental and family trauma would be expected to cause such a delay and prevent him from performing at his superior range potential.

Given an average home environment, these intellectual measures would be typical of a

high school student who would be awarded scholarships and complete a college education.

* * *

A comparison of intellectual functioning during the emotionally turbulent junior high school years with the current assessment further emphasizes this man's growth and stability.

Intelligence Tests:

	WISC, 9\3\69	WAIS-R, 2\2\95
Verbal IQ	101	117
Performance IQ	111	134
Full Scale IQ	107	127

Academic	WRAT	WRAT-R
Reading Recognition	6.3 grade	Above 12th grade
Spelling	5.5	12th grade

* * *

Raleish Porter is a clear example of a throw awav child who became a throw away adult. Despite pervasive physical and sexual abuse and neglect, Mr. Porter never received appropriate treatment or support as a child. He was placed in juvenile institutions where he was again physically and sexually abused. He was convicted of First Degree Murder with the unanimous recommendation for Life Imprisonment by the Jury. This recommendation was overridden by the Judge who sentenced him to death. At the penalty phase, there was no introduction of mitigation that was available at the time of the original trial through family members and professionals. At this juncture, Mr. Porter has now been confined on death row for seventeen years.

As a child, Raleigh Porter was not supported or protected by his mother in his youth nor by his attorney as an adult. He was not

provided the opportunity to claim his considerable talents through any known rehabilitation program except from an occasional teacher who could see this boy's strengths. However, seventeen years on death row, in a structured environment, have in many ways provided the stability and safe harbor necessary to fully come to sriws with a history of physical and sexual abuse.

Raleigh Porter has made remarkable gains in intellect, maturity, compassion, and reswonsibilitv, but not due to societal or family intervention wrior to his incarceration. His arowth is particularly noteworthy because he now carries with his a sense of self worth and reswonsibilitv that develowed through his years alone in wrison. His desire it to make a difference with his ram'Iv and with the inmates, and to wass on to others what he has learned throush his self searching. Certainly Raleigh Porter has the tools, ability, and desire to contribute to society in a positive fashion. This contribution can be behind bars, helwinq others in wrison.

Mr. Porter is a psychologically different man than the one who was found guilty of First Degree Murder. His prison record, his psychological test results, and subjective observations support this conclusion. The proqnosis for continued qrowth and stability is positive. Mr. Porter has made mistakes and has rectified errors of judqment, character, and behavior through a lons weriod of self examination and qrowth.

Mr [redacted]orter is not only [redacted]diffe[redacted]t man today than he was when he first arrived at death row; he is also an intellisent, well-adjusted individual who has qained insight into his past and his criminal behavior. Certainly, this is an unusual picture from my experiences evaluating defendants in the forensic setting. Raleiqh Porter has used his time on death row to make himself over. He has obeved the rules. He has helwed those around him. He has been a sood influence on others. From my experience as a consultant with the Wyomins Women's Prison, it would seen that Raleigh Porter's prison record in

> the kind of prison record it would be wise to encourage in others on death row.

(PC-RII. 31-34)(emphasis added).

As noted by Dr. Fleming, Mr. Porter has accumulated an exemplary prison record. In addition, he is a changed man who has sought to rehabilitate himself. Compare State v. Richmond, 886 P. 2d at 1336 ("There is significant evidence of [the defendant's] changed character"). These facts were not known at the time his death sentence was imposed.[42] They could not have been known for exactly the same reason Mr. Scott's co-defendant's life sentence could not have been known. Yet, as in Scott v. Dugger, these facts which previously did not exist and were not knowable or discoverable are "unquestionably" highly relevant mitigation. Skipper. In fact, had this evidence been available at the time of Mr. Porter's judge sentencing, the judge would have been precluded from overriding the jury's unanimous life recommendation. See Torres-Arboleda v. Dugger; Stevens v. State, 552 So. 2d 1082 (Fla. 1989). This situation is identical to that in Scott v. Dugger. The newly discovered "would probably" have resulted in a life sentence. Scott, 604 So. 2d at 468.

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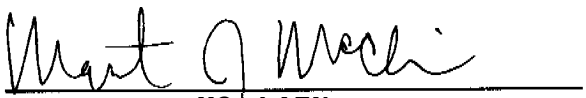
[42]After Mr. Porter's current warrant was signed, undersigned counsel learned that additional prison records have been hidden in a place called the "tunnel" at Florida State Prison which, despite Chapter 119 requests, had never been disclosed to undersigned counsel. Access to the records was only permitted if counsel paid cash up front. Since CCR as a state agency could not pay cash up front, undersigned counsel had to use their own funds, in excess of one hundred dollars ($100) per day to gain access to these files. Despite continuous inspection of these previously undisclosed files, review of the files at FSP is still ongoing. Additional evidence will be provided as it is disclosed. (See PC-RII. 64-78).

Accordingly, Mr. Porter is entitled to an evidentiary hearing and Rule 3.850 relief at this time.

CONCLUSION

Based upon the foregoing arguments, Mr. Scott respectfully requests that this Court stay his execution, reverse the lower court, remand for an evidentiary hearing, and grant all other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Summary Initial Brief On Appellant's Appeal From The Denial Of His Motion For Fla. R. Crim. P. 3.850 Relief And In Support Of Appellant's Application For Stay Of Execution has been furnished by hand delivery, to all counsel of record on March 27, 1995.



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