IN THE SUPREME COURT OF FLORIDA

CASE NO.

RICKEY BERNARD ROBERTS,

Plaintiff-Appellant,

v.

ROBERT A. BUTTERWORTH, Attorney General,
State of Florida,

Respondent-Appellee.

EMERGENCY MOTION: CAPITAL CASE, DEATH WARRANT SIGNED; EXECUTION IMMINENT.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SECOND JUDICIAL CIRCUIT,
IN AND FOR LEON COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT AND REQUEST FOR STAY OF EXECUTION

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

JENNIFER M. COREY
Florida Bar No. 0999717
Assistant CCR

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
Post Office Drawer 5498
Tallahassee, Florida 32314-5498
(904) 487-4376
Attorney for Plaintiff-Appellant

PRELIMINARY STATEMENT

This case is before the Court on 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. Roberts 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; "PC-R. ___" -- Record on Appeal from denial of the instant Motion to Vacate Judgment and Sentence; "App. ___" -- Appendix accompanying Mr. Roberts' Motion to Vacate. Two hearings conducted in the lower court are paginated individually, separately from the record on appeal. These hearings will be cited as "T.," followed by the date and page numbers, i.e., "T. [2/20/96] ___" and "T. [2/21/96] ___." All other citations will be self-explanatory or will otherwise be explained.

REQUEST FOR ORAL ARGUMENT

The Court has scheduled oral argument for Tuesday, February 27, 1996, at 9:00 a.m.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT i

REQUEST FOR ORAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTRODUCTION 1

A. THIS CLAIM IS PROPERLY BEFORE THIS COURT ON THE MERITS 3

B. TALKING OUT OF BOTH SIDES OF ITS MOUTH, THE STATE HAS AGREED THAT AN EVIDENTIARY HEARING IS REQUIRED 5

C. THE ALLEGATIONS TAKEN AT FACE VALUE ARE SUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING . . . 8

D. MR. ROBERTS IS ENTITLED TO A STAY OF EXECUTION SO THE VALIDITY OF HIS MARYLAND CONVICTION CAN BE RESOLVED 16

STATEMENT OF THE CASE AND OF THE FACTS 18

ARGUMENT I

MR. ROBERTS WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT/INNOCENCE OR PENALTY PHASE OF MR. ROBERTS' TRIAL. AS A RESULT, MR. ROBERTS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE. MOREOVER, NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT AN INNOCENT MR. ROBERTS WAS ERRONEOUSLY CONVICTED 25

ARGUMENT II

MR. ROBERTS' SENTENCE OF DEATH IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS 45

ARGUMENT III

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. ROBERTS' CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION 56

ARGUMENT IV

MR. ROBERTS WAS DENIED A FAIR HEARING BEFORE AN IMPARTIAL TRIBUNAL BY THE LOWER COURT'S DENIAL OF THE MOTION TO DISQUALIFY 72

A. MR. ROBERTS' MOTION TO DISQUALIFY WAS TIMELY FILED 75

B. JUDGE SOLOMON'S EX PARTE COMMUNICATION WITH A POTENTIAL PENALTY PHASE WITNESS TO OBTAIN EVIDENCE USED IN IMPOSING MR. ROBERTS' DEATH SENTENCE REQUIRES JUDGE'S SOLOMON'S DISQUALIFICATION 76

C. JUDGE SOLOMON'S INTERVIEW WITH THE PRESS REQUIRES HIS DISQUALIFICATION 78

D. JUDGE SOLOMON'S FAILURE TO ADHERE TO THE TIME HE SET FOR ENTERING AN ORDER AND HIS REFUSAL TO GRANT AN EVIDENTIARY HEARING STIPULATED TO BY BOTH PARTIES REQUIRE HIS DISQUALIFICATION 79

E. CONCLUSION 80

ARGUMENT V

MR. ROBERTS' DEATH SENTENCE IS BASED UPON THE STATE'S KNOWING AND PRESENTATION OF FALSE TESTIMONY FROM A LAW ENFORCEMENT OFFICER IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS 81

ARGUMENT VI

MR. ROBERTS IS INNOCENT OF FIRST DEGREE MURDER AND HE IS INNOCENT OF THE DEATH SENTENCE 85

CONCLUSION 88

TABLE OF AUTHORITIES

Page

Brady v. Maryland,
373 U.S. 83 (1963) 2, 14, 21, 37

Card v. State,
652 So. 2d 344 (Fla. 1995) 78

Douglas v. Wainwright,
714 F.2d 1532 (11th Cir. 1983) 53

Duest v. Dugger,
555 So. 2d ___ (Fla. 1990) 18, 55

Duest v. Singletary,
967 F.2d 462 (11th Cir. 1992) 46

Espinosa v. Florida,
112 S. Ct. 2926 (1992) 87

Garcia v. State,
622 So. 2d 1325 (Fla. 1993) 12, 41

Gardner v. Florida,
430 U.S. 394 (1977) 78

Giglio v. United States,
405 U.S. 150 (1972) 14, 41, 84

Gorham v. State,
597 So. 2d 782 (Fla. 1992) 41

Gunsby v. State,
21 Fla. L. Weekly S20 (Fla. Jan. 11, 1996) 12

In re Murchison,
349 U.S. 133 (1955) 80

Inquiry Concerning a Judge re: Perry,
586 So. 2d 1054 (Fla. 1991) 77

Johnson v. Mississippi,
108 S. Ct. 1981 (1988) 46

Johnson V. Mississippi,
486 U.S. 578 (1974) 18, 53, 55

Johnson v. Singletary,
647 So. 2d 106 (Fla. 1994) 12, 85

Jones v. Seaboard Coast Line R.R. Co.,
297 So. 2d 861 (Fla. 2d DCA 1974) 71

Jones v. State,
591 So. 2d 911 (Fla. 1991) 3-5, 21, 23, 85

Lemon v. State,
498 So. 2d 923 (Fla. 1986) 18, 54

Lightbourne v. Dugger,
549 So. 2d 1364 (Fla. 1989) 2, 3, 13, 36,87

Livingston v. State,
441 So. 2d 1083 (1983) 80

Maggard v. State,
399 So. 2d 973 (Fla.),
cert. denied, 454 U.S. 1059 (1981) 53

Marshall v. Jerrico,
446 U.S. 238 (1980) 80

Mendyk v. State,
592 So. 2d 1076 (Fla. 1992) 56

Merck v. State,
664 So. 2d 939 (Fla. 1995) 54

Napue v. Illinois,
360 U.S. 264 (1959) 41, 84

O'Callaghan v. State,
461 So. 2d 1354 (Fla. 1984) 18, 54

Office of the State Attorney v. Roberts,
No. 87,320 (Fla. Feb. 9, 1996) 57

Omelus v. State,
584 So. 2d 563 (Fla. 1991) 87

Porter v. Singletary,
49 F.3d 1483 (11th Cir. 1995) 78, 80

Proffitt v. State,
510 So. 2d 896 (Fla. 1987) 87

Provenzano v. Dugger,
561 So. 2d 541 (Fla. 1990) 56

Rembert v. State,
445 So. 2d 337 (Fla. 1984) 87

Richardson v. State,
546 So. 2d 1037 (Fla. 1989) 12

Rivera v. Dugger,
629 So. 2d 105 (Fla. 1994) 53

Roberts v. Dugger,
568 So. 2d 1255 (Fla. 1990) 19

Roberts v. Dugger,
623 So. 2d 481 (Fla. 1993) 56

Roberts v. Singletary,
29 F.3d 1474 (11th Cir. 1994) 1, 13, 19

Roberts v. State,
510 So. 2d 885 (Fla. 1987) 19

Roberts v. State,
No. 451, September Term, 1975
(Md. Ct. Spec. App. Jan. 7, 1976) 84

Roman v. State,
528 So. 2d 1169 (Fla. 1988) 41

Sawyer v. Whitley,
112 S. Ct. 2514 (1992) 85

Scott (Abron) v. Dugger,
604 So. 2d 465 (Fla. 1992) 85

Scott v. State,
657 So. 2d 1129 (Fla. 1995) 3, 12

Smith v. Gardy,
569 So. 2d 504 (Fla. 4th DCA 1990) 70

Smith v. Murray,
477 U.S. 527 (1986) 53

Spaziano v. State,
660 So. 2d 1363 (Fla. 1995) 2, 13

State ex rel. Mickle v. Rowe,
131 So. 331 (Fla. 1930) 80

State v. Crews,
477 So. 2d 984 (Fla. 1985) 18, 54

State v. Kokal,
562 So. 2d 324 (Fla. 1990) 56

State v. Schaeffer,
467 So. 2d 698 (Fla. 1985) 17, 54

State v. Sireci,
502 So. 2d 1221 (Fla. 1987) 18, 54

Stein v. State,
632 So. 2d 1361 (Fla. 1994) 87

Suarez v. Dugger,
527 So. 2d 191 (Fla. 1988) 81

United States v. Bagley,
473 U.S. 667 (1985) 41

United States v. Tucker,
404 U.S. 443 (1972) 52

Ventura v. State,
21 Fla. L. Weekly S15 (Fla. Jan. 11, 1996) 56

Walton v. Dugger,
621 So. 2d 1357 (Fla. 1993) 56

Woodson v. North Carolina,
428 U.S. 280 (1976) 55

Zant v. Stephens,
462 U.S. 879 (1983) 52

INTRODUCTION

> Ultimately, you have to decide who is lying and what they have to gain or lose by coming in this courtroom and lying.

Assistant State Attorney Glick, Closing Argument (R. 2945).

Assistant State Attorney Glick's argument to Mr. Roberts' jury takes on new significance in light of the newly discovered evidence presented to this Court. Mr. Roberts has presented substantial and compelling evidence that Ms. Rhonda Haines, one of the State's key witnesses, falsely testified at Mr. Roberts' trial about material factual issues. Ms. Haines testified that Mr. Roberts confessed to her -- **he did not**. She testified that prior to the crime she saw a gun, a baseball bat and a knife in Mr. Roberts' car -- **she did not**. Ms. Haines further made clear during her testimony that the State had not threatened or promised her anything in exchange for her testimony -- **they did**.

Ms. Haines' false testimony pushed Mr. Roberts' jury beyond the edge of reasonable doubt. Without Ms. Haines' lies, the State could not have met its burden of establishing Mr. Roberts' guilt beyond a reasonable doubt. Even with Ms. Haines' testimony, Mr. Roberts' jury deliberated for three days before finally convicting Mr. Roberts. The significance of Ms. Haines' testimony has not been lost on the courts that have reviewed his case. See Roberts v. Singletary, 29 F.3d 1474, 1479 (11th Cir.

1994).[1] Ms. Haines' testimony was necessary for a jury verdict of guilt and a sentence of death.

Ms. Haines' sworn affidavit requires this Court to enter a stay of execution and to remand the case for a full and fair evidentiary hearing for two principal reasons. First, Ms. Haines admits that she lied about her testimony that Mr. Roberts confessed to her on several occasion. Ms. Haines' recantation alone requires that this court grant a stay of execution and an evidentiary hearing. Spaziano v. State, 660 So. 2d 1363 (Fla. 1995); Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).[2] Second, Ms. Haines admits that she lied when she said the State had not threatened her and had not promised her anything in exchange for her testimony. This newly discovered evidence was never disclosed by the State in clear violation of the dictates of Brady v. Maryland, 373 U.S. 83, 87 (1963). Mr.

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[1] The court relied upon Ms. Haines' testimony to show that Mr. Roberts could not meet the fundamental miscarriage of justice exception concerning the constitutional violations involving the State's other key witness, Mi[illegible] R[illegible]. In light of Ms. Haines' testimony, the court found that Mr. Roberts could not show that the claims of error probably resulted in a conviction of one who is actually innocent.

[2] The State in fact conceded this very point during the argument before Judge Solomon:

> We're suggesting that the Court may want to direct counsel to have his witness available for a brief evidentiary hearing on that one issue and resolve any factual conflict which exists. Because otherwise, we submit, then, the pleadings cannot justify the denial of the Motion to Vacate Judgment.

(T. [2/21/96] 24).

Roberts is also entitled to a stay of execution on the basis of Ms. Haines' affidavit which establishes a clear case of State misconduct under Brady. Scott v. State, 657 So. 2d 1129 (Fla. 1995); Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

A. THIS CLAIM IS PROPERLY BEFORE THIS COURT ON THE MERITS

The circuit court denied Mr. Robert's Rule 3.850 motion on the merits and made no findings invoking a procedural bar to any of Mr. Roberts' claims. Indeed, the State made no assertions, in its answer or on the record, that Mr. Roberts' claim for relief based upon Ms. Haines' sworn affidavit was procedurally barred. As to each of Mr. Roberts' other claims, the State expressly invoked a procedural bar defense. See Answer, H. 274-77.[3] The State asserted no such procedural arguments as to the claim involving Ms. Haines because Mr. Roberts has satisfied the due diligence prong set forth in Jones v. State, 591 So. 2d 911 (Fla. 1991).[4] The State below expressly contended that Mr. Roberts

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[3] As to Claim III, the State answered that "[l]ack of access to public records is not a basis for granting relief as defendant could have presented those claim (sic) previously." (PR-R. 276). As to Claim IV, the State contends that "[o]bjection to such [communication] at this date does not comply with Rule 2.160(e) Fla. R. Jud. Admin." (PC-R. 277). As to Claims V and VI, the State asserts "such claims are time barred by the provisions of Rule 3.850 Fla. R/ Crim. P. as having not been presented within two years of his convictions." (PC-R. 277).

[4] See Claim I of the Motion to Vacate, (PC-R. 35-40), for a full proffer of the evidence establishing that Mr. Roberts can meet the due diligence requirement under Jones.

cannot meet the prejudice prong of the Jones standard[5] but was silent with respect to the due diligence prong of the Jones standard. The State -- by its silence below -- implicitly conceded that Mr. Roberts has met the due diligence requirement.

The State should be precluded from arguing at this late date that Mr. Roberts cannot meet the due diligence prong of the Jones standard. Mr. Roberts contends that the State has defaulted any claim of a procedural defense by failing to assert such a defense below. This is especially true given this Court's order that "[n]o reply brief will be filed." Under these unique circumstances, Mr. Roberts has no means of defending such an assertion.

Mr. Roberts has proffered significant and substantial evidence which establishes that he can meet the Jones due diligence test. In light of this proffer, any questions concerning due diligence could only be resolved at a full and fair evidentiary hearing. Jones at 916. However, the State did not contest this issue below, and it must be accepted now as having been conceded. On the record before this Court, there can be no serious question that the evidence presented by Ms. Haines was "unknown by the trial court, by the party, or by counsel at

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[5] "The affidavit of Ms. Haines does not meet the test set forth in Jones v. State, 591 So. 2d 911 (Fla. 1991) of 'probably produce an acquittal on retrial.'" Answer, (PC-R. 275). However, during argument before Judge Solomon, the State conceded a hearing on this issue was required (T. [2/21/96] 24).

the time of trial, . . . and could not have been [then known] by the use of due diligence." Id.

B. TALKING OUT OF BOTH SIDES OF ITS MOUTH, THE STATE HAS AGREED THAT AN EVIDENTIARY HEARING IS REQUIRED

> [W]e urge the Court to consider granting of the limited hearing for that one purpose, to determine credibility for that one witness, and as it relates to that credibility, that's all the hearing that needs to be had in this case.

(T. [2/21/96] 39). (Assistant State Attorney Rosenblatt, speaking).

The State of Florida was playing games in the court below. In its written answer, it opposed a hearing, but orally indicated a hearing was required (T. [2/21/96] 24). The last words from the State concerning the claim involving Ms. Haines were to urge the circuit court to grant an evidentiary hearing. When the judge asked if the State had drafted an order denying the 3.850 motion, the State acknowledged it had not because it was expecting a limited evidentiary hearing to be ordered (T. [2/21/96] 64-65).

In its Answer, the State unequivocally urged the circuit court to summarily deny the claim on the merits: "The affidavit of Ms. Haines does not meet the test set forth in Jones v. State, 591 So. 2d 911 (Fla. 1991) of 'probably produce an acquittal on retrial.'" (Answer, PC-R. 275). At the hearing, the State began its argument from that same position: "We have filed our response as to why we believe this claim can be summarily denied." (PC-R. 21).

The State then began urging a limited evidentiary hearing:

> I still think that we can accommodate the petitioner as well as the currently scheduled execution, by resolving this issue at this time in a very limited, focused hearing on that one question; as to whether or not Mr. Rabin did anything or could have done anything, since he was no longer employed.

(PC-R. 24). At this point in the hearing, the State was advocating a limited evidentiary hearing on one specific issue:

> Did Mr. Rabin make a promise or not? We offered to have a limited evidentiary hearing on that issue. . . . I offer it again, to have a limited hearing on that one issue which has some evidentiary question. . . . We're suggesting that the Court may want to direct counsel to have his witness available for a brief evidentiary hearing on that one issue and resolve any factual conflict that exists. Because otherwise, we submit, then, the pleadings cannot justify the denial of the Motion to Vacate Judgment.

(T. [2/21/96] 23-4) (emphasis added).

This position, although conceding that an evidentiary hearing was required, ignored the significant facts that Ms. Haines now said that Mr. Roberts never confessed to her and that she never observed a gun, a baseball bat or a knife in Mr. Roberts car and that the State gave her consideration for her testimony.

During the argument, the State conceded Ms. Haines' affidavit raised an issue which was "simply one of credibility as to whether or not Mr. Rabin offered any kind of deal and two, whether he followed up on it" (T. [2/21/96] 32). By the end of

the arguments concerning Ms. Haines, the State urged the court to grant an evidentiary hearing on:

> the question of whether or not Rhonda Haines did or didn't hear from the defendant a statement to the effect, "I think I may have killed a man." And whether or not he made another statement to her at a later time from jail. That is, we submit, the crux and substance of what the evidentiary hearing has to be. . . . So the only issue is whether or not [Mr. Roberts] made the statement and whether or not Mr. Rabin promised her anything in order to get that statement.

(PC-R. 37-8).

Throughout the hearing, undersigned counsel argued that a full and fair evidentiary hearing was required. Counsel also made clear that if the circuit court ordered an evidentiary hearing during the warrant period, counsel would do what was necessary to get Ms. Haines to Florida[6]:

> If this Court orders an evidentiary hearing and it orders it to start next week, I will do what I can to get [Ms. Haines] here.

(T. [2/21/96] 34).

Mr. Roberts' position below was consistent -- he wanted an evidentiary hearing and was entitled to one. The State of Florida after filing an answer opposing a hearing, shifted its position and argued a hearing was required. The State argued that the scope of the hearing should be narrow.

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[6] Ms. Haines currently resides in California. Undersigned counsel informed the circuit court that Ms. Haines would have to be subpoenaed so that she could take time for her job and make arrangements for child care. (T. [2/21/96] 44). Ms. Haines is a struggling single mother of three year old twins.

Undersigned counsel argued to the circuit court:

> If [the claim] doesn't warrant an evidentiary hearing, why are they saying [the court should conduct one]? It's one or the other. I want an evidentiary hearing.

(T. [2/21/96] 34). The State's final argument to the circuit court urging the court to grant an evidentiary hearing is a clear concession that such a hearing is required.

C. THE ALLEGATIONS TAKEN AT FACE VALUE ARE SUFFICIENT TO REQUIRE AN EVIDENTIARY HEARING

Despite the significant and longstanding precedent of this Court to the contrary, Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989), the State advocated in its written Answer that Ms. Haines' newly sworn evidence be summarily rejected as incredible without the benefit of an evidentiary hearing. The State contends that Ms. Haines' affidavit is:

> repudiated as a matter of record, inasmuch as Sam Rabin, who Haines asserted pressured her and dealt with Broward County after she testified in late 1985, terminated his employment with the State Attorney's Office in early 1985, and did nothing further with the case.

(Answer, PC-R. 276). The State is factually wrong and legally incorrect as its concession during the argument before Judge Solomon acknowledged.

First, the State misrepresents the facts. Ms. Haines now swears that Mr. Rabin did pressure her and promised her that he would "take care of the pending charges like he did with my Dade arrest." Affidavit of Rhonda Williams, (PC-R. 102). Ms. Haines does not know if Mr. Rabin personally dealt with Broward County

before trial, after trial or if someone else at the State Attorney's Office did it in his stead. She only concluded that "Mr. Rabin was good on his word," because "[a]fter I testified, the Broward County charges disappeared." Id. Mr. Rabin's deposition in no way repudiates Ms. Haines' affidavit.

In fact, the record before this Court establishing the progression of Ms. Haines' various statements and the circumstances surrounding each change in her story lends credibility to Ms. Haines' recantation. Ms. Haines' first statement provided Mr. Roberts with an alibi claiming that Mr. Roberts was with her the night of the crime. Ms. Haines was then jailed for three weeks as an accessory. Her second statement came about when she agreed to give Assistant State Attorney Rabin a sworn statement acknowledging that she could not account for Mr. Roberts' whereabouts from 9:00 p.m., June 3rd, until 5:00 a.m. on June 4th, the day of the crime. During this sworn statement, she denied knowledge of any incriminating evidence against Mr. Roberts. Ms. Haines repeated this version to members of Mr. Roberts' defense team which was headed by former United States District Court Judge Thomas E. Scott. Affidavits of Eileen Rooney and Thomas E. Scott, (PC-R. 133-39).

Ms. Haines' third version did not come about until December 1984 -- before Mr. Rabin left the State Attorney's Office. It was then for the first time and despite her previous statements to the contrary that she claimed that Mr. Roberts confessed to her. Upon being told of this sudden change in her story just

three days before trial, Judge Scott filed a Motion to Withdraw as Counsel of Record. In that motion, Judge Scott set forth his reaction to this significant disclosure on the eve of trial:

> This is the first time in the entire history of the case that any type of admission or confession has been even suggested at by the evidence.

(R. 105). Moreover, as the motion indicates, the disclosure given by the State was that Ms. Haines would now say that Mr. Roberts told her "I think I may have killed someone." Id.

By the time of her deposition and trial, Ms. Haines' story had gotten even better:

> [The day after the crime, Mr. Roberts told me] I think I killed somebody and I asked him if it was a man or woman and he said a man and that was it, because I really didn't believe him, so I didn't push it no more.
>
> * * * *
>
> [Mr. Roberts later] told me that he went down to Rickenbacker Causeway and he had seen these two guys and he had asked them if they had any reefer and they says no, so he kept on going.
>
> He went down to the beach a little bit further and run into this Cuban guy and this girl, but he said there was another girl that was sleeping in the back of the car, and he said that him and the guy, they was doing cocaine, that they was sharing the girl and the guy got all-- the Cuban guy had got all mad they were pushing each other in a big argument and he had hit him in the head with a baseball bat.
>
> * * * *
>
> Q. Later on, months later, did you tell anybody, the prosecutor or Louise Vasquez, Bill Howell or myself, that, in

fact, you had seen a gun, a bat, and a knife in Rick's car?

A. Yes.

(R. 1680, 1688 and 1686).

Ms. Haines now provides this Court with the explanation for her sudden change in her story and how it eventually improved:

> I testified the way that I did because Mr. Rabin would not leave me alone and because he said he could take care of the pending charges like he did with my Dade arrests. He wore me down with his constant pressure for a "better" story. I was tired and afraid for myself, and so I lied.

(Affidavit of Rhonda Williams, PC-R. 102). Her mother, Carolyn Haines, has also recently provided an affidavit which corroborates Rhonda Haines' recent disclosure:

> I was also worried about Rhonda. As her mother, I did not want her to go to prison, especially when she was pregnant. The prosecutor made many phone calls, and the pressure on Rhonda was very intense. Rhonda did not know what to do, and she asked me for advice. Because I did not want her to go to prison, I told her she just had to do something to distance herself from Rick. I did not know Rick at all, but I knew Rhonda and I knew she was in trouble. I was so worried about her. So I told Rhonda to just tell the prosecutor something that would get him off her back. I told her to say whatever it took to satisfy him. It didn't matter whether or not what she told him was true. Finally, Rhonda agreed that was the best thing for her. So she said she would tell the prosecutor what he wanted to hear.

Affidavit of Carolyn Haines, App. 3.

Ms. Haines' recent recantation comes as no surprise to Mr. Roberts' trial attorneys. Affidavits of Eileen Rooney Stafford, Thomas E. Scott and Ken Lange, R. 129-39. The record before this

Court in no way repudiates Ms. Haines' affidavit -- it lends credibility to Ms. Haines' recantation.[7]

Second, the State in its written Answer was legally incorrect in asserting that factual discrepancies can be resolved without an evidentiary hearing as the State later conceded during its argument before Judge Solomon. Mr. Roberts' allegations must be accepted as true at this point in the proceedings. Lightbourne v. State, 549 So. 2d 1364, 1365 (Fla. 1989). There is no way that a court can make a credibility determination without an evidentiary hearing -- yet the State conceded below "the issue is simply one of credibility" (T. [2/21/96] 32).

"Accepting the allegations . . . at face value, as [this Court] must for purposes of this appeal, Lightbourne, 549 So. 2d at 1365, the only issue before this Court is whether confidence is undermined in the outcome. Gunsby v. State, 21 Fla. L. Weekly S20 (Fla. Jan. 11, 1996); Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Mr. Roberts' motion establishes an even more substantial claim than the ones upon which the Florida Supreme court mandated a hearing in Scott v. State, 657 So. 2d 1129 (Fla. 1995), Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994), Jones, and Richardson v. State, 546 So. 2d 1037 (Fla. 1989).

Ms. Haines' recantation of her testimony that Mr. Roberts confessed to her on several different occasions and that she

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[7]Ms. Haines' credibility also is enhanced by the State's concession below that there are no Broward County records that contradict Ms. Haines' affidavit wherein she indicates that the charges disappeared (T. [2/21/96] 31).

observed incriminating evidence -- a gun, a baseball bat and a knife -- in Mr. Roberts' car prior to the crime alone requires that this Court grant a stay of execution and an evidentiary hearing. Spaziano v. State, 660 So. 2d 1363 (Fla. 1995); Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989). The State's case against Mr. Roberts was based upon testimony of Ms. Haines and Ms. Rimondi. Without Ms. Haines' testimony, the State's case would depend upon Ms. R 's thoroughly impeached testimony. Even with Ms. Haines' testimony, Mr. Roberts' jury deliberated for three days before finally convicting Mr. Roberts. A review of the State's closing argument reveals the significance the State gave to Ms. Haines' testimony. The State devotes a large portion of its argument to discussing the importance of Ms. Haines' testimony and why the jury should believe her testimony. (R. 2940-96).

As the United States Court of Appeals for the Eleventh Circuit noted in Mr. Roberts' case, Ms. R underwent an effective "tenacious cross-examination" -- so effective that the court found that "further impeachment of R with any inconsistent statements would not have changed the outcome of the trial." Roberts v. Singletary, 29 F.3d 1474, 1478-79 (11th Cir. 1994). In doing so, the Court relied upon Mr. "Roberts' girlfriend [who] testified that Roberts told her he killed a man." Id.

Moreover, the existence of Ms. R 's eyewitness testimony does not preclude relief. In fact, Jones and Johnson

each involved eyewitness testimony and this Court still found that an evidentiary hearing was required. As this Court indicated in Jones, Mr. Jones' cousin, Bobby Hammond, provided eyewitness testimony establishing that:

> on the night of the murder, he saw Jones leave the apartment with a rifle in in his hand. Hammond then heard gunshots and shortly thereafter Jones returned to the apartment still carrying the rifle. This testimony was consistent with the State's theory that Jones fired shots from a downstairs apartment.

Jones, 591 So. 2d at 913. In Johnson, this Court found that:

> The State's case was based almost entirely upon the eyewitness testimony of Gary Summit.

Johnson, 647 So. 2d at 111. Even in light of eyewitness R[illegible]'s testimony, without Ms. Haines' testimony that Mr. Roberts confessed and was in possession of the alleged weapons, confidence is undermined in the outcome.

Moreover, Ms. Haines' recently obtained affidavit alleges more than a mere recantation -- it sets forth clear and convincing evidence of State misconduct involving the wrongful withholding of exculpatory evidence, Brady v. Maryland, 373 U.S. 83, 87 (1963), and the presentation of knowingly false testimony. Giglio v. United States, 405 U.S. 150, 154 (1972).

Ms. Haines' recently presented sworn testimony makes clear the following additional facts involving outrageous State misconduct: 1) that her false testimony came to fruition because

of pressure from the State;[8] 2) that the State promised her assistance with pending charges in exchange for her testimony;[9] 3) that the State knew of the pressure and promises when they asked her at trial if anyone had "threatened you or promised you anything for you to tell what Rick said to you about what happened;"[10] 4) that the State purposely elicited Ms. Haines' false response that she had not been threatened or promised anything in exchange for her testimony;[11] and 5) that the State

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[8]Ms. Haines recently stated:

> I told my mother what Mr. Rabin was calling about and all the pressure he was putting on me. Her advice was to tell him something to get him off my back. I finally just took her advice. I told Mr. Rabin that Rick had told me that he thought he had killed somebody. However, that did not satisfy Mr. Rabin. He kept saying "I know you know more." . . . So over time I would add to the story whenever Mr. Rabin would say "I know you know more." He would suggest things that I would then say I remembered and add to the story.

(PC-R. 102).

[9]

> I testified the way that I did because Mr. Rabin would not leave me alone and because he said he could take care of the pending charges like he did with my Dade arrests. He wore me down with his constant pressure for a "better" story. I was tired and afraid for myself, and so I lied.

(PC-R. 102).

[10] R. 1691-92.

[11]Ms. Haines has sworn:

(continued...)

came through with the promised assistance to Ms. Haines after Mr. Roberts trial and disposed of all pending charges against her.[12] This evidence, like Ms. Haines' recantation, must be accepted as true. Accepting it as true, an evidentiary hearing is required, as the State conceded at the argument before Judge Solomon (T. [2/21/96] 24).

For the reasons summarized above and discussed at length below, Mr. Roberts is entitled to a stay of execution and a full and fair evidentiary hearing. Scott, Johnson, Jones and Lightbourne.

D. MR. ROBERTS IS ENTITLED TO A STAY OF EXECUTION SO THE VALIDITY OF HIS MARYLAND CONVICTION CAN BE RESOLVED

In April 1995, Mr. Roberts filed a postconviction motion in Maryland seeking to vacate the Maryland conviction for rape. The Maryland conviction is the basis for two of the aggravating circumstances supporting Mr. Roberts' sentence of death. An evidentiary hearing was ordered and set for November 20, 1995.

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[11](...continued)

> I knew he would take care of all the prostitution charges, and that I would not have to worry about an accessory charge, and that I would finally be left alone, if I just gave Mr. Rabin what he wanted.

(PC-R. 102).

[12]Ms. Haines has sworn:

> Mr. Rabin was good on his word. After I testified, the Broward County charges disappeared.

(PC-R. 102).

That hearing date was continued in order to try to arrange Mr. Roberts' transportation to Maryland. In December 1995, the Maryland court scheduled a hearing on February 16, 1996, to determine how to obtain Mr. Roberts' presence for a March 22, 1996, evidentiary hearing.

On January 22, 1996, Governor Chiles signed a warrant setting Mr. Roberts' execution for the week of February 22, 1996. The prison then scheduled the execution for 7:00 a.m., February 23, 1996.

On February 16, 1996, the Maryland court refused to allow Mr. Roberts to waive his presence and proceed with an evidentiary hearing and refused to expedite the hearing date. Thereupon, a federal habeas petition was filed in Maryland. The United States District Court for Maryland has also granted Mr. Roberts an evidentiary hearing. (See PC-R. 154-268).

Mr. Roberts' challenge to the Maryland conviction is not procedurally barred under Maryland law. Mr. Roberts is entitled to an evidentiary hearing and a merits ruling on this claim under Maryland law. In fact, the Maryland state court has granted an evidentiary hearing as has the United States District Court. This Court has a long and established precedent that a stay of execution is proper when the defendant presents "enough facts to show . . . that he might be entitled to relief under rule 3.850." State v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985). When the defendant presents such facts, a trial court has "a valid basis for exercising jurisdiction" and granting a stay of execution and

an evidentiary hearing. Id.; see also State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1986).

If an evidentiary hearing is proper -- as is the case here -- then a stay of execution is proper as well. Both are proper here. The Maryland state court has granted an evidentiary hearing. It is powerless, however, to stay a Florida execution. This Court must grant a stay of execution in order for the Maryland courts to fully, judiciously, and fairly hear the evidence concerning the validity of Mr. Roberts' conviction. Should the Maryland courts vacate Mr. Roberts' Maryland conviction, the claim under Johnson V. Mississippi, 486 U.S. 578 (1974), would be properly before this Court on the merits. Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1990). This Court must grant a stay of execution.

STATEMENT OF THE CASE AND OF THE FACTS

On June 21, 1984, a Dade County Grand Jury indicted Mr. Roberts for the first-degree murder of George Napoles, sexual battery of M R . and two counts of robbery and kidnapping of M R .

Mr. Roberts entered a plea of not guilty and was tried before a jury in December of 1985. The jury deliberated for three days before returning a guilty verdict. At the penalty phase, the State presented evidence of a prior rape conviction in Maryland to establish two aggravating circumstances. The jury

returned a 7-5 sentencing recommendation in favor of death. Judge Solomon followed the recommendation and imposed a sentence of death, finding two aggravating factors based on the Maryland conviction.

Mr. Roberts appealed his conviction and sentence of death. This Court affirmed. Roberts v. State, 510 So. 2d 885 (Fla. 1987).

Mr. Roberts sought clemency. On August 29, 1989, clemency was denied when a death warrant was signed by the Governor of the State of Florida.

Mr. Roberts filed a motion to vacate on September 28, 1989. The circuit court denied the motion and Mr. Roberts appealed. This Court stayed the execution and ordered full briefing on the appeal. Subsequently, this Court affirmed the denial of Rule 3.850 relief. Roberts v. Dugger, 568 So. 2d 1255 (Fla. 1990).

Mr. Roberts then filed a federal habeas petition in federal court. Following an evidentiary hearing, the federal district court denied habeas relief. On appeal, the Eleventh Circuit affirmed. Roberts v. Singletary, 29 F.3d 1474 (11th Cir. 1994).

In April 1995, Mr. Roberts filed a postconviction motion in Maryland seeking to vacate the Maryland conviction for rape. An evidentiary hearing was ordered and set for November 20, 1995. That hearing date was continued in order to try to arrange Mr. Roberts' transportation to Maryland. In December 1995, the Maryland court scheduled a hearing on February 16, 1996, to

determine how to obtain Mr. Roberts' presence for a March 22, 1996, evidentiary hearing.

On January 25, 1996, Governor Chiles signed a warrant setting Mr. Roberts' execution for the week of February 22, 1996. The prison then scheduled the execution for 7:00 a.m., February 23, 1996.

On February 16, 1996, the Maryland court refused to allow Mr. Roberts to waive his presence and proceed with an evidentiary hearing and refused to expedite the hearing date. Thereupon, a federal habeas petition was filed in Maryland.

The Maryland federal court heard argument on the petition on February 21 and 22, 1996. On February 22, the Maryland federal court issued an order stating that the court had subject matter jurisdiction over the petition and personal jurisdiction over Respondent Harry K. Singletary (Attachment 1). The court further ordered an evidentiary hearing on Respondent Curran's motion to dismiss and scheduled that hearing for 9:00 a.m., February 29, 1996 (Id.).

On February 20, 1996, Mr. Roberts filed a motion under Fla. R. Crim. P. 3.850, with a request for a stay of execution, in the Circuit Court for the Eleventh Judicial Circuit, Dade County, Florida (PC-R. 4-95). Mr. Roberts' Rule 3.850 motion presented several claims. Claim I was based upon evidence recently discovered regarding Rhonda Haines, who testified at Mr. Roberts' trial that he confessed to her twice and who also testified that she had received no inducements from the state in exchange for

her testimony. According to Ms. Haines' recent affidavit, this testimony was false (Appendix 1). Mr. Roberts' Rule 3.850 also pled that these facts regarding Ms. Haines were not previously available despite diligent efforts to locate Ms. Haines. Claim 1 of Mr. Roberts' Rule 3.850 motion contended that the new evidence regarding Ms. Haines establishes claims under Brady v. Maryland, 373 U.S. 83 (1963), and Jones v. State, 591 So. 2d 911 (Fla. 1991).

Claim V of Mr. Roberts' Rule 3.850 motion contended that Mr. Roberts' death sentence is based upon an unconstitutionally obtained prior conviction, Mr. Roberts' Maryland rape conviction. When the Maryland state court refused to allow an expedited hearing to resolve Mr. Roberts' challenge to the Maryland conviction before his Florida execution was carried out, Mr. Roberts filed a federal habeas petition in Maryland. The Maryland federal court has found the issues raised by that petition sufficiently substantial to require evidentiary development (Attachment 1).

Claim III of Mr. Roberts' Rule 3.850 motion contended that state agencies such as the Office of the State Attorney were improperly withholding records under Chapter 119. The motion explained that Mr. Roberts had filed a civil action seeking disclosure of these records and that Mr. Roberts sought to depose members of the State Attorney's Office to attempt to locate and obtain these records. The State Attorney's Office then sought certiorari review in this Court, and the Court directed that the

depositions should proceed. During the depositions, witnesses refused to answer certain questions, which were then certified for the record. Mr. Roberts' Rule 3.850 motion requested a hearing on his entitlement to answers to these questions and his right to explore the areas covered by these questions.[13]

After Mr. Roberts' Rule 3.850 motion was filed, the case was assigned to Judge Solomon.[14] The State had filed a Motion to Transfer to Judge Solomon on February 16, 1996. Mr. Roberts filed a written objection. Judge Smith held a hearing on the motion on February 20, 1996, and granted the motion saying Mr., Roberts could file his objections in the form of a motion to disqualify. Mr. Roberts filed a Motion to Disqualify Judge (PC-R. 269-73). Judge Solomon scheduled argument on the motions for 5:00 p.m., February 21, 1996.

The State filed an answer to the Rule 3.850 motion, arguing that the motion could be summarily denied (PC-R. 274-78). Regarding Claim I, the answer contended that Ms. Haines'

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[13]This Court had denied the State's petition for certiorari review, thus directing the depositions to proceed. But this Court thus directing the depositions to proceed. But this Court directed the matter transferred to the criminal division before the 3.850 judge. After the depositions on February 15th, Mr. Roberts filed a Motion to Compel because the State directed the deponents not to answer certain questions. This motion to compel could not be called up for hearing because of the State's motion to transfer Judge Solomon which Judge Smith refused to rule upon until the 3.850 was filed.

[14]Before Mr. Roberts filed his Rule 3.850 motion, the State had filed a Motion To Transfer Case To Original Trial Judge (PC-R. 1-3). After Mr. Roberts' Rule 3.850 motion was filed, the administrative judge assigned the case to the trial judge, Harold Solomon (Transcript of February 20, 1996, proceedings).

affidavit did not meet the standard of Jones v. State, 591 So. 2d 911 (Fla. 1991), and that the affidavit was rebutted by Sam Rabin's deposition testimony (in the public records civil action) that he had left the State Attorney's Office in early 1985 (PC-R. 275-76). The answer did not assert any procedural defenses as to Claim I.

At the hearing held on February 21, 1996, counsel for Mr. Roberts first addressed the Motion To Disqualify Judge (T. [2/21/96] 7). The State contended that the motion was not filed within the ten day requirement (Id. at 9). Mr. Roberts' counsel argued that the motion had been filed within ten days of Judge Solomon's assignment to preside over these proceedings (Id.).[15] The court denied the motion (Id. at 10).

Mr. Roberts' counsel then argued Claim I of Mr. Roberts' Rule 3.850 motion. Counsel argued that the claim entitled Mr. Roberts to an evidentiary hearing because the files and records in the case did not conclusively show that Mr. Roberts was entitled to no relief and that therefore a stay of execution was also required (T.[2/21/96] 11-20). The State reaffirmed that its response argued for a summary denial of the Rule 3.850 motion, but orally conceded that various allegations required an evidentiary hearing. The State argued for a "limited" evidentiary hearing regarding "whether or not Mr. Rabin had any inducements" (Id. at 21), "[d]id Mr. Rabin make a promise or

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[15]Judge Solomon was not assigned to hear Mr. Roberts' current motion until after the 3.850 motion was filed the previous day.

not?" (Id. at 23), "whether or not Mr. Rabin did anything or could have done anything" (Id. at 24), and "whether or not Mr. Rabin offered any kind of deal and two, whether he followed up on it" (Id. at 32). Later, however, the State agreed that this "limited" evidentiary hearing would have to encompass "the question of whether or not Rhonda Haines did or didn't hear from the defendant a statement to the effect, 'I think I may have killed a man.' And whether or not he had made another statement to her at a later time from jail" (Id. at 37). Ultimately, the State conceded that the hearing should encompass "whether or not [Mr. Roberts] made the statement and whether or not Mr. Rabin promised [Ms. Haines] anything in order to get that statement" (Id. at 38). Mr. Roberts' counsel argued that Mr. Roberts was entitled to a full and fair evidentiary hearing (Id. at 24-26,33-36, 43-44).

As to Claim III, the public records issue, Mr. Roberts' counsel requested that the court review the depositions and determine whether or not the certified questions were proper and should have been answered (T.[2/21/96] 58). When the court asked the State whether the court should read the depositions, the State responded, "I think it can be rejected without it" (Id. at 63). Judge Solomon ruled upon the 3.850 motion without looking at the depositions or the certified questions.

The court orally denied the Rule 3.850 motion and request for a stay of execution (Id. at 64). Following a discussion regarding when a written order would be signed (Id. at 65-66), it

was determined that the State would bring a proposed order to the judge at 1 p.m. the next day. When Mr. Roberts' counsel asked, "Are we going to reconvene at 1:00 [tomorrow]," the court responded, "That's when I am going to sign the order. We don't have to reconvene" (Id. at 66). The order was signed at about 11:30 a.m., February 22, 1996 (R. 281), in the absence of Mr. Roberts' counsel.

Mr. Roberts filed a notice of appeal. This Court entered a temporary stay of Mr. Roberts' execution until Thursday, February 29, 1996, at 7:00 a.m., and set a schedule for briefing and oral argument.

ARGUMENT I

MR. ROBERTS WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT/INNOCENCE OR PENALTY PHASE OF MR. ROBERTS' TRIAL. AS A RESULT, MR. ROBERTS WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE. MOREOVER, NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT AN INNOCENT MR. ROBERTS WAS ERRONEOUSLY CONVICTED.

At Mr. Roberts' trial, Rhonda Haines was called as a witness by the State. Ms. Haines testified that Mr. Roberts had confessed to her that he committed the murder:

> [The day after the crime, Mr. Roberts told me] I think I killed somebody and I asked him if it was a man or woman and he said a man and that was it, because I really didn't believe him, so I didn't push it no more.

* * * *

> [Mr. Roberts later] told me that he went down to Rickenbacker Causeway and he had seen these two guys and he had asked them if they had any reefer and they says no, so he kept on going.
>
> He went down to the beach a little bit further and run into this Cuban guy and this girl, but he said there was another girl that was sleeping in the back of the car, and he said that him and the guy they was doing cocaine, that they was sharing the girl and the guy got all -- the Cuban guy had got all mad they were pushing each other in a big argument and he had hit him in the head with a baseball bat.

Ms. Rhonda Haines (R. 1680 & 88).

Ms. Haines' testimony was that Mr. Roberts had confessed to her. Ms. Haines' testimony was that Mr. Roberts had told her a different story than the one he told the jury. Ms. Haines was presented by the State as Mr. Roberts' girlfriend who Mr. Roberts had pressured to give him a false alibi. Ms. Haines testified that the State had neither pressured her nor provided her consideration for testimony.

After hearing Ms. Haines' testimony, the jury still had difficulty convicting. The jury deliberated for three days, over twenty-three hours of actual deliberations, before returning a guilty verdict.

Rhonda Haines has recently admitted that her testimony at Mr. Roberts' trial was false. She has stated under oath:

> 1. My name is Rhonda Williams but I used to go by the name Rhonda Haines. In early 1984, I was living in Miami with Less McCullars, who I knew as Rick. In June of that year, Rick was arrested for a murder that happened on the Rickenbacker causeway. I was questioned by the police about his

whereabouts during the time of the crime. I told the police that Rick had been with me throughout the night that the murder happened, but they didn't believe me and so I was arrested. The police charged me with accessory after the fact to murder and put me in jail.

2. After keeping me in jail for about three weeks, I was taken to see Sam Rabin, the lawyer who was prosecuting Rick. Mr. Rabin told me that there was no reason for me to be in jail and that if I just told him what I knew he would let me go. He also made it clear that if I cooperated with him, he could help me with some outstanding charges I had against me for prostitution. In fact, up until my arrest, I had been working as a prostitute to support myself.

3. I then admitted to Mr. Rabin that I did not know whether or not Rick was at home with me through the whole night that the murder happened. I explained to him how Rick was there with me when I went to sleep around 9 p.m. and that he was in bed with me when I woke up about 5:00 am. Mr. Rabin said that I would have to give him a sworn statement with this information in order to be released from jail and I did so. Mr. Rabin also told me that I would have to testify at Rick's trial. He also made it clear that he could and would put me in jail again and prosecute me, too, if I didn't cooperate with him.

4. After Mr. Rabin had me released, I began visiting Rick at the jail. I also met with his defense attorneys and answered all their questions. I told them the truth. On the night of the murder, Rick was at home when I went to sleep at 9 p.m. and he was also there in bed with me when I woke up at 5:00 am. Rick never told me that he killed anyone.

5. I continued to work the streets up until around Thanksgiving 1984. Because I had many pending charges in Broward County, I was only working in Dade. The police knew who I was and my connection to Rick's case. They constantly harassed me. I was arrested many times and then told by Sam Rabin that he

would make things better for me if I would just help him. Mr. Rabin also found out about my outstanding charges in Broward and told me that he could have them taken care of if I would cooperate with him on Rick's case. Mr. Rabin seemed convinced that I knew more about Rick's case than I did. At this time I was also doing way too much cocaine and I was pregnant. By Thanksgiving I was several months along.

6. All of this constant police pressure got to me and I left Florida and went to my mother's in Arizona. Mr. Rabin starting calling my mother's house and pressuring me again. I lied at trial and said Rick had called me in Arizona. In fact, Rick never called me in Arizona. I told my mother what Mr. Rabin was calling about and all the pressure he was putting on me. Her advice was to tell him something to get him off my back. I finally just took her advice. I told Mr. Rabin that Rick had told me that he thought he had killed somebody. However, that did not satisfy Mr. Rabin. He kept saying "I know you know more." I knew he would take care of all the prostitution charges, and that I would not have to worry about an accessory charge, and that I would finally be left alone, if I just gave Mr. Rabin what he wanted. So over time I would add to the story whenever Mr. Rabin would say "I know you know more." He would suggest things that I would then say I remembered and add to the story.

7. <u>In 1985, I testified at a deposition and at Rick's trial</u>. <u>My testimony was false</u>. I testified the way that I did because Mr. Rabin would not leave me alone and because <u>he said he could take care of the pending charges like he did with my Dade arrests</u>. He wore me down with his constant pressure for a "better" story. I was tired and afraid for myself, and so I lied.

8. Mr. Rabin was good on his word. <u>After I testified, the Broward County charges disappeared</u>. However, I was so guilt ridden when I got back to Arizona that I started doing cocaine again big time. I really fell

apart. I just wanted to forget about what I had done. I put Rick out of my mind and avoided all contact with my past in Florida. I even stopped using the name Rhonda Haines.

9. I have recently had the chance to review the sworn statement that I made to Sam Rabin on June 26, 1984 and it is true and correct. I answered all of his questions truthfully in that statement.

Appendix 1 (emphasis added).

On June 26, 1984, Ms. Haines indicated she did not know where Mr. Roberts was between 9:00 p.m., June 3, 1984, and 5:00 a.m., June 4, 1984. She further indicated she had no knowledge of any incriminating evidence:

Q. Did you notice a gun in the car?

A. Hum um, no.

Q. Did you know whether or not Rick had a gun?

A. No.

Q. No, you didn't know?

A. Huh uh. I knew his uncle had one, Jimmy Oliver.

Q. Do you know what type of gun Jimmy had?

A. Huh uh. I didn't know what kind it was. It wa in a brown case, though.

Q. Did you notice a knife in the car in the dash-board?

A. No.

Q. How about a baseball bat. Did you notice a baseball bat in the car?

A. No.

Q. Did you know Rick had a baseball bat?

A. No.

Q. Did you ever see Rick with a baseball bat?

A. No.

Appendix 2, at p. 10. Thus, it is clear that Ms. Haines lied at Mr. Roberts' trial when she said Mr. Roberts confessed. She also lied at Mr. Roberts' trial when she indicated that he had possessed incriminating evidence. She also lied when she testified that he had told her he discarded the baseball bat. She also lied when she testified that no promises had been made to her and no threats had been made by the State.

Ms. Haines' mother, Carolyn Haines, has also given a recent affidavit verifying Rhonda's account of events in December of 1984:

> 2. In November, 1984, right around Thanksgiving, Rhonda moved to Arizona to live with me. She had been living with a man named Rick in Miami. Rick had been arrested for murder some time before Rhonda moved to Arizona. When Rhonda showed up, she was pregnant, had a cocaine addiction, and was an emotional wreck.
>
> 3. Not long after Rhonda moved in with me, she started receiving telephone calls from the prosecutor in Miami. These calls were very upsetting to Rhonda. The prosecutor was putting a lot of pressure on Rhonda to help him prosecute Rick. Rhonda was afraid. She knew she could be put in prison for accessory after the fact. In fact, she had been arrested at one point on that charge. In addition, she had other charges for prostitution and drug-related activity pending in Florida. Rhonda was also concerned about her pregnancy, and what would

happen to her child if she were arrested and put in jail.

4. I was also worried about Rhonda. As her mother, I did not want her to go to prison, especially when she was pregnant. The prosecutor made many phone calls, and the pressure on Rhonda was very intense. Rhonda did not know what to do, and she asked me for advice. Because I did not want her to go to prison, I told her she just had to do something to distance herself from Rick. I did not know Rick at all, but I knew Rhonda and I knew she was in trouble. I was so worried about her. So I told Rhonda to just tell the prosecutor something that would get him off her back. I told her to say whatever it took to satisfy him. It didn't matter whether or not what she told him was true. Finally, Rhonda agreed that was the best thing for her. So she said she would tell the prosecutor what he wanted to hear.

5. When she was pregnant and had first moved to Arizona, she wanted to have a healthy baby and get her life on the right track. In fact, she stopped using drugs. After Rick was put on death row, Rhonda started using drugs again and her life was out of control. She left Arizona, and did not keep in touch with me. Eventually she contacted me, and told me she was in California. Rhonda was using drugs, so I went to California, got her baby, and brought the baby back to Arizona to live with me. I had not been able to keep track of Rhonda's whereabouts since that time, until about a year ago. Rhonda got in touch with me and told me she had pulled herself together, stopped using drugs, and got a good job.

6. From the time I started raising Rhonda's daughter, up until Rhonda recently reinitiated contact with me, I would receive calls from people looking for Rhonda. I would always tell them that I didn't know where she was. I usually did not know where she was, but I would not have given any information out without Rhonda's okay. She is my daughter and I wanted to protect her. Throughout this time, I would hear from

Rhonda occasionally, but I was never sure where she was calling from.

Appendix 3.

Ken Lange, Mr. Roberts' trial attorney, has been provided with a copy of Ms. Haines' new affidavit and the new affidavit of Carolyn Haines. Mr. Lange provided the following sworn affidavit of his own:

> 2. I have now been provided with an affidavit of Rhonda Haines (according to the affidavit she is now Rhonda Williams) dated February 14, 1996, and an affidavit of Ms. Haines' mother dated February 13, 1996. I have reviewed these affidavits.
>
> 3. I long suspected that Ms. Haines was promised benefits for her testimony at Mr. Roberts's trial. I was convinced at the time that Ms. Haines' testimony was false. However, as she indicates in her affidavit, at trial she denied receiving consideration from the State for her testimony that Mr. Roberts had confessed to her. Certainly, the State did not disclose to me that any promises had been made to Ms. Haines or that any pressure had been applied in order to get her to say that Mr. Roberts confessed the homicide to her.
>
> * * * *
>
> 5. Now having seen Ms. Haines' newly executed affidavit, I know that the jury would not have convicted Mr. Roberts without her testimony that Mr. Roberts had confessed the killing to her. Ms. Haines was used by the State to bolster an incredibly shaky case that rested upon an unreliable M F . Ms. Haines now admits that she was pressured by the State. She was promised consideration for her testimony. I did not know that before. It was not disclosed to me.
>
> 6. Because of the State's pressure and promises, Ms. Haines lied at Mr. Roberts' trial, as she now admits in her affidavit.

> This admission is huge. At trial, her false testimony was used to argue that a guilty Mr. Roberts had pressured Ms. Haines to help him get away with murder. In fact, it was the State that was pressuring Ms. Haines. Based on my 18 years of practicing criminal law in Dade County and my experience trying 15 capital cases, I am convinced that this evidence would have resulted in a not guilty verdict. Certainly it also would have tipped the penalty phase verdict in favor of a life recommendation.

Appendix 4.

Former federal judge Thomas E. Scott, who had been Mr. Roberts' attorney up until Sam Rabin's belated disclosure of his intent to present Ms. Haines to say that Mr. Roberts confessed, has been shown Rhonda's new affidavit and the new affidavit of her mother.

Mr. Scott has stated in an affidavit:

> 1. My name is Thomas E. Scott. I am an attorney practicing in Miami, Florida. I was appointed by the Circuit Court of Dade County to represent Rickey Roberts on a first degree murder charge in 1984.
>
> 2. The trial was set for the end of January, 1985. A few days before trial, I received word from Assistant State Attorney, Sam Rabin, that Mr. Roberts's girlfriend would testify that Mr. Roberts told her, "I think I killed someone." Mr. Roberts's girlfriend, Rhonda Haines, had first told the police that Mr. Roberts was with her the entire night of the murder. After spending three weeks in jail, she changed her story to say that she did not know where Mr. Roberts was on the night of the murder from 9:00 p.m. until 5:00 a.m. the next morning. Ms. Haines gave the state attorney a sworn statement to that effect. When my paralegal interviewed Ms. Haines, Ms. Haines repeated that she did not know where Mr. Roberts was on the night of the murder. However, she did not tell my paralegal, nor did she say in her sworn

statement to the state attorney, that Mr. Roberts had confessed to her.

3. I was surprised by the content of Ms. Haines's later version of events, but also because Mr. Rabin revealed the new story to me only three days before trial. I suspected Mr. Rabin had this information at least since December, because the State issued a witness subpoena for Ms. Haines in December.

4. After Mr. Rabin announced that Ms. Haines would implicate Mr. Roberts, I decided I had to withdraw from the case. My paralegal, Eileen Rooney Stafford, could testify to Ms. Haines's prior statement to her in which Ms. Haines did not implicate Mr. Roberts. Ms. Stafford would be a witness to impeach Ms. Haines's credibility with her prior inconsistent statements. Because Ms. Stafford was the paralegal working on the case for me, and because she would likely be a witness, I determined I had to withdraw.

5. I believed then, as I do now, that Ms. Haines's testimony implicating Mr. Roberts was false. Because I withdrew from the case immediately upon learning that Ms. Haines changed her story, I was never able to develop any evidence that she had gotten a deal from the State. Neither San Rabin nor anyone else from the prosecution disclosed to me that Mr. Rabin had offered Ms. Haines any deals or any consideration in exchange for her testimony. Had I been able to stay on the case, I would have expected the State to disclose any consideration given Ms. Haines by the State prior to her changing her story.

Appendix 5.

Ms. Eileen Rooney Stafford, Mr. Scott's paralegal, has reviewed the new affidavits from Rhonda and Carolyn Haines, and provided the following affidavit:

1. I am the legal administration for the law firm of Davis, Scott, Weber and Edwards. In 1984 I worked as a paralegal for the law firm of Kimbrell, Hamann, Jennings,

Womack, Carlson & Kniskern, P.A. I worked directly with attorney Thomas E. Scott.

2. In June, 1984, the Circuit Court for Dade County assigned Mr. Scott as counsel for a defendant in a murder case. The defendant was Rickey Roberts.

3. Mr. Roberts's girlfriend at the time of his arrest was Rhonda Haines. When questioned by the police, Ms. Haines said she was with Mr. Roberts on the night of the murder. After Ms. Haines gave this statement, she was arrested and charged with accessory after the fact to murder. Ms. Haines was released three weeks later, when she gave a recorded statement to the state attorney. In that statement, Ms. Haines recanted her original statement that Mr. Roberts had been with her the entire night of the murder. Ms. Haines indicated she fell asleep at 9:00 p.m., and that Mr. Roberts was with her when she woke up at 5:00 a.m. She could not say where Mr. Roberts was between 9:00 p.m. and 5:00 a.m.

4. I interviewed Ms. Haines in August, 1984, two months after she recanted her statement to the police that gave Mr. Roberts an alibi. Ms. Haines told me the same information she told the state attorney: that she could not say where Mr. Roberts was from 9:00 p.m. until 5:00 a.m. on the night of the murder. Ms. Haines did not tell me anything that implicated Mr. Roberts in the murder.

5. It was clear to me after interviewing Rhonda that she was very anxious and frightened. Her involvement with Mr. Roberts's case appeared to cause her great distress. Ms. Haines told me she had many arrests for prostitution that had not yet been adjudicated. That, coupled with the several weeks she spent in jail on the accessory charge, is what I thought caused Ms. Haines to change her story.

6. Mr. Roberts's trial was set to begin in late January, 1985. A few days before trial, Assistant State Attorney Sam Rabin revealed to Thomas Scott that Ms.

Haines would be a witness for the State, and that she would testify that Mr. Roberts told her, "I think I killed someone."

7. This information caused me and Mr. Scott great concern. In my interview with her in August, 1984, Ms. Haines never implicated Mr. Roberts in the murder. If she testified as Mr. Rabin indicated she would, that testimony would be inconsistent with what she had told me in August.

8. I have reviewed the affidavit signed by Rhonda Haines (now Williams) in February, 1996, in which she admits that she lied when she testified at trial that Mr. Roberts confessed to her.

9. I am confident now, as I was confident in 1984, that Ms. Haines was telling the truth when she told the state attorney in June, 1984, and me in August, 1984, that she could not provide Mr. Roberts with an alibi on the night of the murder, but that she could not implicate Mr. Roberts either. The information contained in her February, 1996, affidavit confirms my belief that Ms. Haines lied when she implicated Mr. Roberts. I was not surprised to learn that the quid pro quo for her testimony against Mr. Roberts was to have her outstanding prostitution charges taken care of. I believe that the information in Ms. Haines's 1996 affidavit is true.

Appendix 6.

Accepting these affidavits as true, an evidentiary hearing is required. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Ms. Haines states under oath that her trial testimony was false. This has to be accepted as true.

Ms. Haines states under oath that Sam Rabin in December of 1984 promised her consideration for any testimony favorable to the State. This has to be taken as true.

Ms. Haines states that after giving her testimony against Mr. Roberts, the eleven pending Broward County charges disappeared. This has to be taken as true.

Ms. Haines states that Mr. Rabin kept telling her "I know you know more" and through this phrase got her to add to and embellish her story. This has to be taken as true.

Mr. Lange and Mr. Scott have both stated under oath that they were not advised by the State that Ms. Haines was receiving consideration for her testimony that Mr. Roberts confessed.

Thus, it is clear that the State violated Brady v. Maryland, 373 U.S. 83 (1963), and Rule 3.220, Florida Rules of Criminal Procedure. Mr. Roberts specifically invoked Brady and Rule 3.220 when he made a request for exculpatory evidence on June 20, 1984:

> Defendant, LESS McCULLERS [Rickey Roberts], pursuant to the Fourth, Fifth, Sixth and Fourteenth Amendments, United States Constitution, Sections 9, 12 and 16 to the Declaration of Rights, Florida Constitution and Florida Rules of Criminal Procedure 3.220, moves the Court to order the State Attorney's Office and all law enforcement agencies who participated in any manner in the investigation which culminated in the instant case to preserve all reports, memoranda, diaries, logs, documentation, correspondence, notes and any other writings, however fragmentary, which relate in any manner to the investigation in question.
>
> As grounds therefore Defendant states that:
>
> 1. The Defendant has invoked reciprocal discovery pursuant to Rule 3.220, Florida Rules of Criminal Procedure. Accordingly, certain writings and other tangible documents are discoverable.

> 2. Such writings may contain Brady material but due to the fact that these proceedings are at an early stage it is not presently possible to fully understand the Brady significance of a particular writing. See Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963); Hernandez v. State, 348 So.2d 1224 (Fla. 3d DCA 1977), cert.den. 355 So.2d 517 (Fla. 1977); Briskin v. State, 341 So.2d 780 (Fla. 3d DCA 1976), cert.den., 348 So.2d 953 (Fla. 1977).
>
> 3. The attorney work product rule does not include favorable and/or exculpatory material. State v. Gillespie, 227 So.2d 550 (Fla. 2d DCA 1969); United States v. Agurs, 427 U.S. 100 (1975).
>
> 4. This Court has the authority to order the preservation of potential evidence. Vancas v. State, 377 So.2d 1000 (Fla. 4th DCA 1979).

(R. 50-51).

Mr. Roberts also specifically requested disclosure of "criminal records of state witnesses." (R. 52). Mr. Roberts asserted that such records were not available to him because "local police agencies, the Florida Bureau of Law Enforcement, and the Federal Bureau of Investigation, as a matter of departmental policy, simply do not divulge such information to the general public." (R. 52).

On July 11, 1984, the motion to produce criminal records of state witnesses and the motion to produce favorable evidence were both granted (R. 59). Yet, Mr. Scott and Mr. Lange both state that exculpatory evidence was not disclosed.[16]

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[16]In fact, the record reveals that the State was playing games in relation to Rhonda Haines. On December 31, 1984, a subpoena was issued for Ms. Haines to appear at Mr. Roberts'

(continued...)

In its Answer filed below, the State asserted that the deposition Sam Rabin gave in the Chapter 119 suit on February 15, 1996, can be considered as rebutting Ms. Haines' affidavit because he testified "he terminated his employment with the State Attorney's Office in early 1985, and did nothing further with the case." Answer at 3.

First, a deposition from a potential witness in a Chapter 119 lawsuit cannot be used to rebut a factual allegation in a Rule 3.850 motion. At most, it raises a credibility issue to be resolved at an evidentiary hearing, as the State conceded in its argument before Judge Solomon ("The issue is simply of credibility." T. [2/21/96] 32). Moreover, the deal according to Ms. Haines was worked out in December, 1984 and January, 1985, while Mr.Rabin still was prosecuting Mr. Roberts' case. Thus, an evidentiary hearing is required, as the State conceded at the oral argument before Judge Solomon.

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[16](...continued)
trial set for January 28, 1985. On January 25, 1985, Mr. Rabin first disclosed to the defense that Ms. Haines would testify as to a statement Mr. Roberts supposedly made to Ms. Haines. However, Rule 3.220(a)(1)(iii) provided in 1985 that the prosecutor was required to disclose within fifteen days of a demand "the substance of any oral statements made by the accused. . . together with the name and address of each witness to the statements." Clearly, Mr. Rabin failed to comply with the time deadlines imposed in the rule, and in fact a continuance was granted. But the record also reveals that: "When defense counsel inquired of the State as to whether the Government could advise where Rhonda Haines was located, the State announced it did not know, that she calls in weekly from an unknown place." (R. 101). However, the truth is that Mr. Rabin had her address and phone number. He had issued a subpoena, and as she states in her affidavit, he was calling her.

In its Answer, the State did not contest that Mr. Roberts could meet the prejudice component. At the argument before Judge Solomon, the State feebly asserted that because it would not call Rhonda Haines at a retrial, Mr. Roberts could not show prejudice. Of course, that is not the relevant inquiry. The relevant fact is that Ms. Haines was called at Mr. Roberts' trial and gave false testimony which the State relied upon to convict Mr. Roberts.

It took the jury three days worth of deliberations to convict. The jury obviously had a rough time deciding guilt.

In the State's closing argument, Rhonda Haines was relied upon to argue for a guilty verdict. (R. 2949, 2960, 2961, 2985, 2989, 2990, 2991, 2992, 2993, 3093, 3094, 3096, 3107, 3108, 3116).

In his closing, the prosecutor argued:

> Ultimately, you have to decide who is lying and what they have to gain or lose by coming in this courtroom and lying.
>
> * * * *
>
> Because if somebody has something to gain, then they may be coloring their testimony.

(R. 2945).

Rhonda Haines' new affidavit establishes that the State possessed exculpatory evidence which according to Ken Lange and Thomas Scott was not disclosed to the defense. The State promised Rhonda Haines consideration for her testimony. The nondisclosure of this evidence violated the Eighth and Fourteenth

Amendments of the United States Constitution and Rule 3.220 of the Florida Rules of Criminal Procedure. Gorham v. State, 597 So. 2d 782 (Fla. 1992); Roman v. State, 528 So. 2d 1169 (Fla. 1988).

Rhonda Haines now indicates that she affirmatively lied when in direct examination by the trial prosecutor, she indicated no promises or threats had been made to secure her testimony. In fact, promises and threats had been made by Sam Rabin, an Assistant State Attorney. Thus, the State knowingly presented false and misleading testimony in order to secure a conviction. This violated the Eighth and Fourteenth Amendments. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). The Florida Supreme Court has held that Rule 3.850 relief is required where new non-record evidence establishes that the State "subvert[ed] the truth-seeking function of the trial by obtaining a conviction or sentence based on deliberate obfuscation of relevant facts." Garcia v. State, 622 So. 2d 1325, 1331 (Fla. 1993). When a prosecutor presents false and misleading evidence, a reversal is required unless the error is harmless beyond a reasonable doubt. United States v. Bagley, 473 U.S. 667, 679 n.9 (1985).

As Mr. Roberts' counsel argued below, the new evidence undermines confidence in the outcome of Mr. Roberts' trial and penalty phase:

> MR. MCCLAIN: Florida Supreme Court, in Jones v. State, said you consider the cumulative effect of the claims. You don't take and dissect it and look at one little

piece and go, "Oh, my confidence is not undermined in the outcome by this one little piece."

You have to look at the whole problem, and in this instance, it's the state who sat on this evidence for 11 years.

I didn't know about this in 1989. I had no way of knowing about it in 1989 and it couldn't be presented in 1989 when everything else was presented. As to the Brady material as to M R , it was denied because of Rhonda Haines' testimony. This is exactly what the U.S. Supreme Court in Kyles v. Whitley said you can't do.

You can't look at one piece of evidence and go, "Oh, well," as to M R . There's Rhonda Haines. So we're not going to reverse because, even though there was a Brady violation as perhaps as to M , it doesn't undermine our confidence in the testimony.

Rhonda's testimony is still there, and we can still consider that. And five years later go well, Rhonda Haines we're clearly not going to reverse because of Rhonda Haines, because M testified and, you know, her testimony is okay. So we're just going to look at Rhonda Haines and it doesn't undermine confidence in the outcome. Kyles v. Whitley, states you can't do that. You have to look at everything together and see if confidence is undermined in the outcome.

The state has just made an interesting comment. They said in retrial they wouldn't even call Ms. Haines because she is so unreliable. M is equally unreliable, and in effect the Eleventh Circuit basically said that. They said the evidence of guilt from Rhonda is sufficient for this claim, as to M , to not warrant relief.

So instead of looking at one plus one equals two, they keep saying well, this is just one. This isn't one plus one. This is just one. You have to consider the cumulative effect. This is not just simply

Rhonda being put on the stand and Your Honor saying well, I don't believe her.

In Spaziano, there was a four day evidentiary hearing held after counsel had 60 days to prepare for it, and Dilisio had gone to the Miami Herald in June, long before all of this came out. So it was known. The Florida Supreme Court said sufficient time to prepare for this hearing is necessary.

I found out about Rhonda 10 days ago. First I knew about this 10 days ago. I'm not even done investigating.

In Spaziano, they were able to present all sorts of witnesses to corroborate Dilisio. The state presented all sorts of witnesses to try to say Dilisio was a liar and it took four days. Actually, it may have been five.

This situation requires the same kind of examination. Ms. Haines lied when she testified, "Mr. Roberts confessed to me." She wasn't telling the truth. She was trying to get better treatment for herself.

The jury, after hearing Ms. R 's testimony and hearing Ms. Haines' testimony, deliberated for three days and then convicted. When it came to the penalty phase, they voted seven/five. There's impact not just at the guilt phase but at the penalty phase because the state's theory at trial was Ms. Haines first gave Rickey an alibi because he was trying to make her help him hide the crime. They tried to turn Ms. Haines' testimony as that. The state -- we're the ones trying to protect Ms. Haines from this bad guy Rickey Roberts, and it was important at the penalty phase. Only one juror who voted for death had to switch the vote for life for the life recommendation to be binding.

The state is saying that both sides can pick Ms. Haines apart. Yet, this conviction and this sentence of death rests upon her testimony. It's unreliable. An evidentiary hearing is warranted, a full and fair evidentiary hearing, and in order to do the

> evidentiary hearing a stay is required by the Florida Supreme Court precedent and Rule 3.851.

(T. [2/21/96] 40-43).

Rhonda Haines' affidavit constitutes new evidence not previously available to Mr. Roberts which establishes that his conviction and sentence of death are unreliable. See Gunsby v. State, 21 Fla. L. Weekly at S21 ("[w]hen we consider the cumulative effect of the testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined.") To the extent that the State argues that trial counsel could have found out about this evidence had he been diligent, then trial counsel was ineffective and relief is required. Gunsby v. State, 21 Fla. L. Weekly at S21.

In analyzing the prejudicial impact of Ms. Haines' false testimony, consideration must be given to the Brady and ineffective assistance of counsel claims previously pled in this Court in 1989. Since Mr. Roberts was denied relief on the basis that the previously pled nondisclosures and deficient performance did not undermine confidence in the outcome because Rhonda Haines had testified that Mr. Roberts confessed to her, those matters must be revisited. The State has hidden exculpatory evidence for eleven years. Mr. Roberts must be put in the position he would have been in had the evidence been disclosed. To do otherwise would reward the State for hiding evidence.

The State in argument before Judge Solomon conceded an evidentiary hearing was required on Claim I:

> Again, I said that is again what I am -- we're offering to do at this time. We're suggesting that the Court may want to direct counsel to have his witness available for a brief evidentiary hearing on that one issue and resolve any factual conflict which exists. Because otherwise, we submit, then, the pleadings cannot justify the denial of the Motion to Vacate Judgment.

(T. [2/21/96] 24) (emphasis added).

Later, the State again conceded a hearing was required:

> The only significant issue -- of significance is the questions of whether or not Rhonda Haines did or didn't hear from the defendant a statement to the effect, "I think I may have killed a man." And whether or not he had made another statement to her at a later time from jail.
>
> That is, we submit, the crux and substance of what the evidentiary hearing has to be.

(T. [2/21/96] 37) (emphasis added).

A stay must be granted and the matter remanded for the evidentiary hearing that the State conceded was necessary to "justify the denial of the Motion to Vacate Judgment."

ARGUMENT II

MR. ROBERTS' SENTENCE OF DEATH IS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The State presented evidence to Mr. Roberts' sentencing jury of a prior conviction in the State of Maryland for rape and assault with intent to murder. The prior conviction became the

centerpiece of the State's case in the penalty phase. The State called as a witness the arresting officer in Maryland who described the crime in detail (R. 3288-3305). The State did not introduce evidence of any other prior convictions. The evidence of the prior felony, and the fact that Mr. Roberts was on parole for that offense when he was arrested in Florida, provided two aggravating circumstances found to exist by the Court.[17] The State did not argue, and the court did not rely upon, Mr. Roberts' contemporaneous convictions for the rape and armed kidnapping of M R , to sustain the prior violent felony aggravating circumstance.

The underlying conviction upon which Mr. Roberts' sentence of death rests was obtained in violation of Mr. Roberts' rights under the Fourth, Fifth, Sixth, and Fourteenth Amendments. His death sentence, founded upon that unconstitutionally obtained prior conviction, thus also violates his constitutional rights. Johnson v. Mississippi, 486 U.S. 578 (1988); Duest v. Singletary, 997 F.2d 1336 (11th Cir. 1993).

Mr. Roberts filed a petition to vacate his conviction in Maryland state court in April, 1995. The State filed an answer on May 16, 1995. The court set an evidentiary hearing on Mr. Roberts' claims for November 20, 1995. When it became clear that Mr. Roberts would not be transported to Maryland in time for the evidentiary hearing, the State and Mr. Roberts filed a joint motion for continuance, which was granted. In December, 1995,

[17] §§ 921.141(5)(a) & (b).

the court re-set the evidentiary hearing for March 22, 1996, and set a hearing on the motion to transport for February 16, 1996.

The Governor of the State of Florida signed Mr. Roberts' death warrant on January 25, 1996. Shortly thereafter, Mr. Roberts filed an emergency request for expedited hearing in the Circuit Court for Wicomico County, Maryland, asking that the evidentiary hearing on Mr. Roberts' postconviction motion be re-set before Mr. Roberts' execution, then scheduled for February 23, 1996. In order to expedite the hearing, Mr. Roberts stated in the emergency request that he would waive his right to be present at the hearing. He also reserved his right to present his testimony through deposition or affidavit, as provided for by Md. Rule 4-406(c). The State of Maryland opposed Mr. Roberts' motion, claiming they could not be ready to proceed on the merits of Mr. Roberts' claims before March 22, and that they need Mr. Roberts to be available for cross-examination.

Mr. Roberts' counsel appeared at the hearing on February 16, 1996, in Salisbury, Maryland, and offered to file an affidavit in which Mr. Roberts waived his presence at the hearing in order to expedite the hearing before he is executed. The State continued to insist it needed Mr. Roberts present. The State further indicated it had spoken to someone in the Florida Governor's office, and that he had been told Florida would not release Mr. Roberts to Maryland for the hearing. Mr. Roberts' counsel offered:

> MR. MCCLAIN: I am willing, and I do have a waiver from Mr. Roberts that I can file

> indicating that he waives his presence to be here given the pending execution date.
>
> THE COURT: That's not a valid -- in this proceedings, number one, he should be present and subject to cross-examination. I don't think a deposition is the answer. There are matters which may arise at the hearing that requires his presence. And when you are talking about a criminal matter, I don't even have a motion for a continuance heard without a Defendant present, because it's vital to them that they are present at every stage.

Transcript of Maryland state court hearing, February 16, 1996 at 10-11. The court also refused to expedite the hearing date:

> THE COURT: The motion to expedite is denied as a practical matter, more than a legal matter, because I don't think you are going to be able to get him here. Okay?
>
> MR. McCLAIN: In other words, you're not accepting the waiver of his presence?
>
> THE COURT: No, sir. The State objects and I'm not going to require him to waive it.

Transcript of Maryland state court hearing at 12.

On February 17, 1996, Mr. Roberts filed a petition for writ of habeas corpus in the United States District Court for the District of Maryland, raising the same claims he raised in his state postconviction motion. The case was assigned to the Honorable Andre M. Davis, who scheduled argument on the petition for February 20, 1996, at 4:00 p.m. Counsel for Mr. Roberts traveled to Maryland for the hearing on February 20, 1996, but due to fog in Baltimore and the closure of Washington's National Airport due to a jet sliding off the runway, counsel were delayed and did not arrive in Baltimore until 10:30 p.m. on February 20.

The Court rescheduled the hearing for 8:00 a.m., February 21, 1996.

Respondent Curran[18] filed an answer to the petition on February 20, 1996. In his answer, Curran raised the affirmative defenses of failure to exhaust state remedies and abuse of the writ. Respondent Singletary filed a motion to dismiss the petition for lack of jurisdiction on February 20, 1996.

At the hearing on Mr. Roberts' petition, counsel for Respondent Curran and Mr. Roberts appeared in person. Counsel for respondent Singletary appeared by telephone. Addressing Respondent Curran's exhaustion argument, Mr. Roberts' counsel asserted that further attempts to exhaust would be futile because the state court has ordered a hearing and refused to allow Mr. Roberts to waive his presence, and refused to proceed without Mr. Roberts. Respondent Curran suggested that she again approach the State's Attorney and ask if his position as to waiver was absolute, and whether he would now waive presence in order to go forward with the case.

Judge Davis, concerned that Respondent Singletary should be represented in person, suggested continuing the hearing until counsel for Mr. Singletary could be present. Judge Davis requested that counsel for Singletary assure the court that the execution would not take place before a full hearing was held in

[18]The respondents to the writ were J. Joseph Curran, Jr., attorney general of Maryland, and Harry K. Singletary, Jr., Secretary, Florida Department of Corrections. <u>See</u> Rule 2(b), Rules Governing Section 2254 Cases in the United States District Courts.

his court. Singletary's counsel said she could not give such assurances.

Counsel for Mr. Roberts informed the court that Mr. Roberts had filed a postconviction motion in the Circuit Court for the Eleventh Judicial Circuit of Florida on February 20, 1996, and that the court had scheduled argument on that motion for 5:00 p.m. on February 21. Judge Davis continued the hearing until 8:00 a.m. on Wednesday, February 22, 1996, to learn whether the Florida circuit court entered a stay of execution. Judge Davis ordered Respondent Singletary's counsel to be present in court on Wednesday if the circuit court of Dade County had not entered a permanent stay.

The Circuit Court for the Eleventh Judicial Circuit, Judge Solomon presiding, held a hearing on Mr. Roberts' postconviction motion at 5:50 p.m. on February 21, 1996 (T.[2/21/96] 1). After hearing argument of counsel, the court denied Mr. Roberts' motion for postconviction relief (T.[2/21/96] 64). The court entered a written order on February 22, 1996, at 11:32 a.m., denying the postconviction motion, request for evidentiary hearing, and request for stay of execution (PC-R. 281).

In Maryland, Judge Davis reconvened the hearing on Mr. Roberts' petition for writ of habeas corpus, and inquired as to the status of the Florida proceedings. Mr. Roberts' counsel informed the court that the Florida circuit court had denied the postconviction motion and denied the request for stay. Judge Davis ordered counsel for Mr. Roberts and respondents Curran and

Singletary to appear at 8:00 a.m. on February 22, 1996, for further argument on Singletary's motion to dismiss and Curran's answer.

At the hearing on February 22, 1996, Respondent Singletary argued the court did not have personal jurisdiction over Singletary or subject matter jurisdiction over a Florida conviction and death sentence. Mr. Roberts argued that Rule 2(b), Rules Governing Section 2254 Cases, mandated that Singletary be named as a respondent so that the court hearing the petition would have jurisdiction over Mr. Roberts' custodian.

The court entered an order on February 22, 1996:

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICKEY BERNARD ROBERTS,
Petitioner

v. CASE NO. AMD-96-478

J. JOSEPH CURRAN, JR.
Attorney General, State of
Maryland, and HARRY K.
SINGLETARY, JR., Secretary,
Florida Department of
Corrections,
Respondents

ORDER

After hearing oral argument in the instant matter, and for the reasons stated on the record, this Court concludes that it has subject matter jurisdiction over the claims presented, and personal jurisdiction over Respondent Singletary. Rule 2(b) of the Rules Governing § 2254 Cases. Furthermore, with respect to Respondent Curran's motion to dismiss, this Court shall conduct an evidentiary hearing on Thursday, February 29, 1996, at 9:00 a.m. For the reasons indicated on the record, the Court need not decide at

this time Petitioner's application for a stay of execution filed under 28 U.S.C. § 2251.

Accordingly, it is this 22nd day of February 1996, by the United States District Court for the District of Maryland, ORDERED that Respondent Harry K. Singletary's Motion to Dismiss for Lack of Jurisdiction BE, and IS, DENIED.

/s/
ANDRE M. DAVIS
United States District Judge

(Attachment 1).

The issues to be addressed at the February 29, 1996, hearing, are the affirmative defenses raised in Respondent Curran's answer, failure to exhaust and abuse of the writ. The court acknowledged that it is Curran's burden to come forward with evidence to establish a particularized prejudice to Curran's ability to defend against the petition, caused by petitioner's alleged delay. Only after the court makes a determination of whether the petition is abusive or should be dismissed for failure to exhaust will the court reach the merits of Mr. Roberts' claims.

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a noncapital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude," such as prior uncounseled convictions that were unconstitutionally imposed. In Zant v. Stephens, 462 U.S. 879 (1983), the Supreme Court made clear that the rule of Tucker applies with equal force in a capital case. Id. at 887-88 and n.23. Accordingly, Stephens and Tucker require that a death

sentence be set aside if the sentencing court relied on a prior unconstitutional conviction as an aggravating circumstance supporting the imposition of a death sentence. Accord Douglas v. Wainwright, 714 F.2d 1532, 1551 n.30 (11th Cir. 1983). In Mr. Roberts' case, materially inaccurate information was presented to and relied upon by the judge and jury who sentenced him to death. Johnson v. Mississippi, 486 U.S. 578 (1988). See also Smith v. Murray, 477 U.S. 527 (1986) (sentence of death constitutionally unreliable when misleading or inaccurate information is presented to the jury); Maggard v. State, 399 So. 2d 973 (Fla.), cert. denied, 454 U.S. 1059 (1981). The fundamental error which occurred at Mr. Roberts' capital proceedings and which resulted in his death sentence must now be evaluated.

The presentation of the unconstitutionally obtained prior conviction deprived Mr. Roberts of a fair and reliable trial and capital sentencing determination. Rivera v. Dugger, 629 So. 2d 105 (Fla. 1994). This error cannot be harmless, as the jury's consideration of materially inaccurate information substantially influenced the jury's guilty verdict and death recommendation.

Mr. Roberts has pled facts which, if true, entitle him to relief from his conviction in Maryland. The circuit court in Maryland granted Mr. Roberts an evidentiary hearing on his claims. Mr. Roberts received ineffective assistance of counsel in Maryland when his trial lawyer failed to move to transfer to juvenile court. Had Mr. Roberts' case been transferred to

juvenile court, the resulting juvenile adjudication, if any, would not have been admissible in the 1985 capital proceedings in Florida. Merck v. State, 664 So. 2d 939 (Fla. 1995).

Mr. Roberts' challenge to the Maryland conviction is not procedurally barred under Maryland law. Mr. Roberts is entitled to an evidentiary hearing and a merits ruling on this claim under Maryland law. In fact, the Maryland state court has granted an evidentiary hearing as has the United States District Court. This Court has a long and established precedent that a stay of execution is proper when the defendant presents "enough facts to show . . . that he might be entitled to relief under rule 3.850." State v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985). When the defendant presents such facts, a trial court has "a valid basis for exercising jurisdiction" and granting a stay of execution and an evidentiary hearing. Id.; see also State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985); State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1986).

If an evidentiary hearing is proper -- as is the case here -- then a stay of execution is proper as well. Both are proper here. The Maryland state court has granted an evidentiary hearing. It is powerless, however, to stay a Florida execution. This Court must grant a stay of execution in order for the Maryland courts to fully, judiciously, and fairly hear the evidence concerning the validity of Mr. Roberts' conviction. Should the Maryland courts vacate Mr. Roberts' Maryland

conviction, the claim under Johnson V. Mississippi, 486 U.S. 578 (1974), would be properly before this Court on the merits. Duest v. Dugger, 555 So. 2d 849, 851 (Fla. 1990).

Even as Mr. Roberts is about to be executed by the State of Florida, there is substantial doubt that the prior conviction used to support two aggravating circumstances in Florida is valid. Counsel for Respondent Singletary conceded in argument before the federal court that if the aggravating factors based on the Maryland convictions are invalid, Florida would not have introduced them in the penalty phase. Federal court hearing transcript, February 22, 1996, at 31. Until an evidentiary hearing in Maryland resolves the validity of that conviction, it must be assumed that the conviction is invalid. The evidentiary hearing on Respondent Curran's affirmative defenses is set for February 29, 1996, at 9:00 a.m. Florida State Prison has set Mr. Roberts' execution for February 29, 1996, at 7:05 a.m. It violates fundamental fairness for this Court to refuse to stay Mr. Roberts' execution while such uncertainty stalks the validity of the convictions supporting two of four aggravating circumstances in support of the Florida death sentence. The United States Supreme Court has often acknowledged that death is different. Woodson v. North Carolina, 428 U.S. 280 (1976). For this reason, given that both state and federal courts in Maryland have ordered evidentiary hearings on Mr. Roberts' claims, this Court should order a stay of Mr. Roberts' execution until the

court in Maryland has made a determination, after the evidentiary hearing, regarding the validity of his claims.[19]

ARGUMENT III

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. ROBERTS' CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Roberts sought public records disclosure pursuant to Fla. Stat. ch. 119. See Ventura v. State, 21 Fla. L. Weekly S15 (Fla. Jan. 11, 1996); Roberts v. Dugger, 623 So. 2d 481 (Fla. 1993); Walton v. Dugger 621 So. 2d 1357 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990), and Fla. R. Civ. P. 1.350. On July 28, 1995, Mr. Roberts filed a complaint for public records against the Office of the State Attorney, Eleventh Judicial Circuit.[20] The complaint resulted from the following events: On June 27, 1995, Mr. Roberts mailed to the Defendants a formal request for disclosure of public records, pursuant to Chapter 119, Florida Statutes

[19]Should the federal court agree with Respondent Curran that Mr. Roberts has not exhausted his claims, the state court in Maryland will be the court to determine the validity of the Maryland convictions. The state court has set an evidentiary hearing on Mr. Roberts's postconviction motion for March 22, 1996. Surely the interests of justice weigh in favor of granting Mr. Roberts a stay so that his claims can be heard.

[20]Mr. Roberts's counsel mailed the complaint on July 28, 1995. Inexplicably, the complaint was not filed with the Dade County clerk until August 3, 1995.

(1994), requesting that the Defendants provide Mr. Roberts with all records in the Defendants' possession regarding Mr. Roberts.

On July 6, 1995, Records Specialist Luis A. Nieves responded to Mr. Roberts' request and wrote that he was unable to locate some of Defendants' files regarding Mr. Roberts' case, and that other files regarding Mr. Roberts' case had at some undisclosed time been "destroyed" pursuant to "office policy." After receiving this letter, Mr. Roberts' counsel filed a civil complaint for disclosure of public records against the Office of the State Attorney.

The procedural history of the case from that point is set forth in the State Attorney's Office petition for writ of common law certiorari, filed with the Third District Court of Appeal on January 16, 1996, and transferred to the Florida Supreme Court by order of the district court of appeal entered January 19, 1996. Oral argument was heard on February 8, 1996, and this Court denied the State Attorney's petition on February 9, 1996. In its order, this Court directed that the civil complaint be transferred to the criminal division of the circuit court where the rule 3.850 motion would be considered and ruled upon. Office of the State Attorney v. Roberts, No. 87,320 (Fla. Feb. 9, 1996). The Court also ordered Plaintiff to proceed forthwith with his depositions.

Plaintiff scheduled depositions for February 15, 1996, of Luis Nieves, Denise Moon, and William Howell, all employees of the State Attorney's office, and Judge Leonard Glick and Samuel

Rabin, former employees of the State Attorney's office. Counsel for the State would not agree to allow deponents Howell, Nieves and Moon to be served at the deposition, so Mr. Roberts' counsel sent an investigator to Miami on February 14, 1996, to serve the deposition subpoenas.

Counsel for the State's unwillingness to cooperate continued through the depositions. The first deposition was of Judge Glick. Judge Glick brought with him records that had not previously been disclosed to Mr. Roberts' counsel, among other things, a grand jury memorandum regarding the prosecutor's strategy for the grand jury hearing. This Court will recall that, in its pleadings and during oral argument, counsel for the State repeatedly asserted that the State Attorney's office had given Mr. Roberts access to everything. Given the history of the Dade County State Attorney's office lack of compliance with Chapter 119, Mr. Roberts' counsel viewed this assertion with a jaundiced eye, and refused to "take their word for it," as counsel for the State suggested during oral argument before this Court. Given that Judge Glick turned over previously undisclosed documents at his deposition, counsel's skepticism was justified.

During the deposition, counsel for the State objected to questions that went beyond "the four corners of the complaint."

> MS. TARG: I think this is beyond any Public Records Request Act. If you can word it in such a way that it comes within the four corners of this complaint, he can answer it, but it you are going to ask things that have nothing to do with the Public Records Act Request complaint, I'm going to suggest the witness not respond.

(PC-R. 308). It is elementary civil procedure that discovery is permissible if it is reasonably calculated to lead to admissible evidence. Mr. Roberts' counsel's questions were all calculated to lead to evidence regarding public records. For instance, the question Ms. Targ objected to at (PC-R. 308) was: "Did you get files on Rhonda's then pending prostitution charge from Broward County?" This question indisputably is calculated to lead to the discovery of admissible evidence regarding public records.[21] If the prosecutor had obtained files on a witness's pending prostitution charges in another county, those files would be public records in the possession of the Dade County State Attorney's office to which Mr. Roberts is entitled access under Chapter 119. Not only was the State's counsel interposing baseless objections, but the witness himself refused to answer questions "Because I don't think it's germane to the issues we are here for" (PC-R. 308). The deponent was supported in his refusal to answer by counsel for the State, Ms. Targ, who said, "I'm going to suggest the witness not respond." Id.

All told, the witness refused to answer six questions, which questions Mr. Roberts' counsel certified for the record. These questions all were reasonably calculated to lead to admissible evidence regarding public records in the possession of the State Attorney's office. The questions Judge Glick refused to answer were:

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[21]In fact, the defense had requested and the trial judge had ordered the State to obtain and disclose "criminal records of state witnesses." (R. 52, 59).

> [MR. MILLS]: Now, you said that you would have checked out the veracity of a witness if you were going to work a deal with that person on pending charges.
>
> [MS. TARG]: I'm going to suggest this is way beyond the scope of anything having to do with the Public Records Act Request and suggest the witness not answer.
>
> [JUDGE GLICK]: I'm not going to be able to answer the question for you.
>
> [MR. MILLS]: Because you don't remember?
>
> A. Because I don't want to.
>
> Q. Why not?
>
> A. Because I don't think it's germane to the issues we are here for.

(PC-R. 307-08). The next question, had Judge Glick answered, would have been, "What if any records did you generate or receive pursuant to your check of the veracity of a witness?" The question was reasonably calculated to lead to evidence about records of the State Attorneys office that, if not exempt, would be public records. The State was not justified in suggesting that the witness not answer, and the witness was not justified in refusing to answer.

The next question that Leonard Glick refused to answer was:

> [MR. MILLS]: Did you receive any files from Broward County regarding Rhonda's then pending prostitution charges?
>
> [MS. TARG]: Same objection, based upon the same grounds. Suggest the witness not answer. Beyond the scope of this complaint.
>
> [WITNESS]: I'm just going to decline to answer.

(PC-R. 308). There is no explanation needed here; if the State Attorney had received files from Broward County regarding Rhonda Haines' pending charges, those would be public records to which Mr. Roberts was entitled access. Counsel for the State was not justified in suggesting that the witness not answer, and the witness was not justified in refusing to answer.

The next question the witness refused to answer was:

> Q. Would it have been standard procedure at the time to receive those files?
>
> [MS. TARG]: Same line, same objection.
>
> A. I decline to answer that, also.

(PC-R. 308-09). Again, this question pertains specifically to records which, if the State Attorney's office had obtained, would be public records subject to disclosure under Chapter 119. The witness was not justified in refusing to answer.

The next question the witness refused to answer also referred to the charges pending against Rhonda Haines at the time she testified against Mr. Roberts:

> Q. Would the defense have been notified in some way about those existing charges?
>
> [MS. TARG]: Same objection.
>
> A. I'm going to decline that answer.

(PC-R. 309-10). Here again, if the witness indicated he did notify the defense in some way, and if the method of notification was in writing, that answer would indicate the existence of a record which, if not exempt, Mr. Roberts would be entitled to

examine. The witness was not justified in refusing to answer this question.

The next question the witness refused to answer was:

> Q. Would information that a witness had relations to the police community have been memorialized in any way?
>
> A. They might. I don't have a recollection of it being memorialized if it actually occurred, but it might.
>
> Q. If they had been, would you have notified the defense of that?
>
> [MS. TARG]: Objection. Again, this is way beyond the scope of the Public Records Act lawsuit.
>
> A. I will decline to answer the question.

(PC-R. 310-11). Here again, the relevancy of this question is apparent. If the answer is yes, the next question would be, "What records are kept of payment of travel expenses?" This question is relevant to public records and the answer may have indicated the existence of a record which, if not exempt, Mr. Roberts would be entitled to examine.[22] The witness was not justified in refusing to answer.

Deponent Denise Moon likewise was advised by counsel for the State not to answer certain questions. Mr. Roberts' counsel certified four questions for the record. Regarding a copy of a job description for a clinical social worker at the Rape

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[22]This question is particularly important here given the phone messages in the State Attorney's file reflecting that Mi [illegible] was demanding money from Assistant State Attorney, Sam Rabin.

Treatment Center, where Ms. Moon had been employed prior to becoming an employee of the State Attorney, counsel for Mr. Roberts asked:

> Q. Looking at page 2, Number 14, maintain current knowledge of social work practice, including specific practice of biopsychosocial issues of children --
>
> [MS. TARG]: I'm going to object. This is way beyond the scope of the Public Records Act Request lawsuit you have filed.
>
> [MR. MILLS]: I would appreciate it if you could hold the objections until I finish the question.
>
> [MS. TARG]: I thought you had. I didn't realize you were going on and on.
>
> Q. Was it part of your job them to be up to date on current social work practice?
>
> [MS. TARG]: Again, objection. It's way beyond the scope of the Public Records Act lawsuit.
>
> Q. Please answer the question.
>
> [MS. TARG]: I'm suggesting you not answer.
>
> Q. Are you going to answer the question or not?
>
> A. I'm not.

Like the questions to Leonard Glick, these questions are reasonably calculated to lead to admissible evidence regarding public records. If Ms. Moon had testified she did keep current on the literature, and she did so by maintaining files regarding these issues, that answer would indicate the existence of records. Counsel for the State was not justified in suggesting

that the witness not answer, and the witness was not justified in refusing to answer.

The next question Ms. Moon refused to answer is:

> Was it you are [sic] duty, at Number 15, to maintain current knowledge of laws, rules, and regulations relating to the provisions of public assistance and medical care programs administered under federal, state and county law?
>
> [MS. TARG]: Again I'm going to say this is way beyond the scope of the lawsuit you have filed and suggest the witness not answer.
>
> Q. Are you going to answer the question?
>
> A. No.

(PC-R. 419-20). Again, this question is reasonably calculated to lead to admissible evidence regarding public records. If Ms. Moon had testified she did keep current on the laws, and she did so by maintaining files regarding these issues, that answer would indicate the existence of records. Counsel for the State was not justified in suggesting that the witness not answer, and the witness was not justified in refusing to answer. There are two similar certified questions at (PC-R. 420) that the witness, at suggestion of counsel for the State, refused to answer. While objecting that any question relating to Ms. Moon's job description was "ridiculous, totally beyond the scope of your lawsuit," (PC-R. 420), counsel for the State nonetheless requested a copy of the job description from Mr. Roberts' counsel (PC-R. 421).

The final question Ms. Moon refused to answer related to payment of travel expenses for witnesses of the State Attorney. Ms. Moon is the director of victim/witness services for the State Attorney's office (PC-R. 413), and according to the State's pleadings, is also in charge of witness transportation.

> Q. Now, the fiscal division, that's within the state attorney's office or is that an office that the county has?
>
> [MS. TARG]: I'm going to object. This is way beyond the scope of the lawsuit. I suggest the witness not answer. She is not the appropriate person, in any event.
>
> Q. Are you going to answer?
>
> A. No.

(PC-R. 426). This question was reasonably calculated to lead to admissible evidence. If Ms. Moon was in charge of witness services, including transportation, then she would know whether there are records generated regarding witness transportation. If such records exist, they are public records subject to Chapter 119. Counsel for the State was not justified in suggesting that the witness not answer, and the witness was not justified in refusing to answer. It is not a coincidence that the questions the State suggested Ms. Moon not answer involved payments to witnesses, which have been an issue in this case since Mr. Roberts began postconviction proceedings.

The next deponent who refused to answer questions was William Howell, an assistant state attorney. Counsel for Mr. Roberts certified two questions that Mr. Howell, on advice of counsel for the State, refused to answer. Thereupon Mr. Howell

left the deposition, and took with him records he had brought to the deposition responsive to the subpoena duces tecum. The questions Mr. Howell refused to answer were reasonably calculated to lead to admissible evidence, and, like the questions Leonard Glick refused to answer, involved Rhonda Haines' prostitution charges that were pending at the time of Mr. Roberts' trial.

> Q. My understanding is that [the charges] came out of Broward. Would you have gotten copies of the charging documents and police reports relating to those charges?
>
> A. Well, I would have. Whether or not I did in this particular case, I don't recall. Today, I would probably do that if I could, if there was such a document. As you know, with misdemeanors there are oftentimes when there are not.
>
> Q. You would want to check the witness' veracity?
>
> [MS. TARG]: Objection. This is clearly beyond the scope of the lawsuit.
>
> Q. Are you going to answer?
>
> A. No.
>
> Q. If you believe there are documents in existence relating to charges on a witness and you were going to work o deal with that witness, would you seek out those documents?
>
> [MS. TARG]: Objection. This is speculative.
>
> Q. Will you answer the question?
>
> A. No.

(PC-R. 364-65). Once again, the State thwarted Mr. Roberts' efforts to discover additional public records regarding critical witnesses in his case.

Finally, Mr. Howell became angry when he answered a question and then indicated he wanted to explain "why." Mr. Roberts' counsel responded that he had not asked "why" and attempted to ask another question. Mr. Howell refused to answer any more questions unless he could answer his own question -- why -- on record. Mr. Howell then left the deposition.

Prior to terminating the deposition, Mr. Howell had turned over an exhibit that Mr. Roberts' counsel entered into evidence. Joel Rosenblatt, who attended the deposition for the State Attorney's Office with Elyse Targ, agreed to make copies of the exhibit but failed to turn it over. On February 15, 1996, Mr. Mills called Mr. Rosenblatt and left a voice mail message. In the message Mr. Mills requested that Mr. Rosenblatt provide the documents that had been entered as an exhibit. On February 16, 1996, Mr. Mills received a message that Mr. Rosenblatt had called. Mr. Mills returned the call and spoke to a woman who represented herself as Mr. Rosenblatt's secretary. Mr. Mills requested that documents be turned over via facsimile as they were important to Mr. Roberts' case. Mr. Roberts has an impending execution. Mr. Rosenblatt's secretary stated the documents would not be sent via facsimile but that she would notify Mr. Rosenblatt of Mr. Mills' call. Mr. Rosenblatt called Mr. Mills later and stated that the documents had been sent via U.S. Mail. Mr. Mills explained that due to the exigent circumstances that would not be acceptable and requested the documents be re-sent via Federal Express. Mr. Rosenblatt stated

he could not guarantee the request would be fulfilled. Mr. Roberts requested a hearing on the questions he certified and on his entitlement to continue the deposition that was abruptly terminated when Mr. Howell and counsel for the State left the deposition, and requested that the State be ordered to turn over copies of Mr. Howell's records.

Mr. Roberts filed a motion to compel on February 16, 1996, stating generally the facts as alleged above. The Circuit Court was closed on Monday, February 19, 1996, for Presidents' Day, so Mr. Roberts was unable to set a hearing on his motion to compel.

On Tuesday, February 20, Mr. Roberts' counsel flew to Miami and filed the motion for postconviction relief. The case was transferred to Judge Solomon, a retired judge sitting in the general jurisdiction division. Judge Solomon scheduled argument on the Rule 3.850 motion for Wednesday, February 20, 1996, at 5:00 p.m. Judge Solomon also had pending before him the motion to compel, because all actions by Mr. Roberts were consolidated before Judge Solomon (T.[2/20/96] 1-17).

At the hearing on February 21, 1996, Mr. Roberts' counsel argued the motion to compel. Mr. Roberts' counsel said, "I'm asking your Honor to rule on those certified questions and order that the deponents on those questions have to answer those questions" (T.[2/21/96] 54). Mr. Roberts' counsel explained:

> Those questions were designed to find out if records were made regarding Rhonda Haines, and if so, where are they? Now, certainly I have heard from the state today indicating those records don't exist. But I didn't hear from the witnesses, when they were under

> oath, saying that. That's what I wanted. And that's what I think I'm entitled to and that's when the issue was in fact in front of the Florida Supreme Court because Assistant State Attorney Penny] Brill was saying that C.C.R., me, Mr. McClain, had to take Ms. Brill's word for it that the records didn't exist.
>
> And the Florida Supreme Court disagreed with her and said I was entitled to have the deponent say that under oath and on the record. And that is what has not occurred in this case. I have not been able to get the deponents to state on the record, under oath, because they were instructed not to answer those questions.

(T.[2/21/96] 54). The State conceded that Mr. Roberts was entitled to have the court review the certified questions, and to order the witnesses to answer (T.[2/21/96] 55). The court inquired:

> Did I hear the state suggesting that before I rule on this emergency motion I should be reading and considering the certified questions that you were discussing. Is it necessary?
>
> MR. ROSENBLATT: As I said, I think it can be rejected without it. I have no problem with the Court looking at the certified questions and determining whether or not they should be answered. That doesn't require any kind of evidentiary hearing just an examination by the court as does the questions asked and whether or not they were within the scope of the public records request as opposed to beyond the scope of that.
>
> That was the objection that was entered during the taking of the deposition for and suggestion to the witness that they may want the client to answer that question? But as I said, the pendency of public records litigation is not itself an independent basis for the granting of a stay of execution. It would be preferable, certainly that the Court rule on the pending litigation in rendering

> its decision to resolve all issues at one time.
>
> But I don't believe it's absolutely essential that the Court do so.

(T. [2/21/96] 62-63). The court did not examine the certified questions, and did not determine whether the objections were proper. The court never ruled on the motion to compel.[23]

The purpose of a discovery deposition is to discover information that is reasonably calculated to lead to admissible evidence. Rule 1.310(c), Fla. R. Civ. P., provides that:

> All objections made at time of the examination to the qualification of the officer taking the deposition, the manner of taking it, the evidence presented, or the conduct of any party, and any other objection to the proceedings shall be noted by the officer upon the deposition. <u>Evidence objected to shall be taken subject to the objections</u>.

(Emphasis added). If counsel for the State objected to questions, the proper procedure was to place the objection on the record, and then permit the witness to answer over objection. There is no provision in the Rules of Civil Procedure for instructing a witness not to answer a deposition question. <u>Smith v. Gardy</u>, 569 So. 2d 504, 507 (Fla. 4th DCA 1990).

Rule 1.280(b), Fla. R. Civ. P. provides that:

> Parties may obtain discovery regarding any matter, not privileged, that his relevant to the subject matter of the pending action, . . . It is not ground for objection that the

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[23]The depositions were sitting on the counter in front of the clerk. The judge did not look at the depositions before answering his intent to deny the motion to vacate in its entirety.

> information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

Read together, these two rules mean that:

> [T]he oral examination of any deponent shall proceed to completion, subject to recorded objections subsequently to be resolved by the court, and all reasonably relevant questions, leading or otherwise, must be answered unless privileged whether or not such answers themselves, or other evidence toward which they may lead, would be admissible at trial.

Jones v. Seaboard Coast Line R.R. Co., 297 So. 2d 861, 864 (Fla. 2d DCA 1974) (emphasis added). Jones points out the many errors below. The deposition of William Howell did not proceed to completion, because Mr. Howell abruptly left the deposition.[24] All reasonably relevant questions were not answered because counsel for the State suggested, and the deponents refused to answer certain questions. Finally, the certified questions were not subsequently resolved by the court. The situation here is similar to that in Smith v. Gardy, where the deponent refused to answer not because of privilege, but because counsel for the State did not want to reveal adverse information. As in Smith, the State's was a "calculated risk (well-calculated, as it turned out) that the rules could be violated with impunity." Id. at 507. At the time of the depositions, Mr. Roberts' execution was

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[24]Fla. R. Civ. P. 1.310(d) provides the mechanism whereby a deponent may terminate a deposition if it is being conducted in bad faith or in such a manner as unreasonably to annoy, embarrass, or oppress the deponent or party. Neither Mr. Howell nor the State filed any motion nor sought review of the conduct of the deposition from any court.

a week away. The State could be confident that, once the postconviction litigation regarding Mr. Roberts' conviction and sentence of death began in earnest, the certified questions would not be ruled upon by the judge hearing the Rule 3.850 motion. That is exactly what happened, despite Mr. Roberts' request for a ruling on each question. Hoping to stall discovery long enough so that Mr. Roberts is executed before the State is forced to comply is an unconscionable tactic. As the Second District Court of Appeal observed:

> This panel had accumulated a combined 62 years of trial practice before becoming judges; we are not newly arrived from another planet, and we are aware of the difficulties inherent in trial practice. Nevertheless, our professional goals are to seek truth and justice. Not only are the courts charged with that responsibility, the lawyers are too. Thwarting those goals diminishes us all.

Smith v. Gardy, 569 So. 2d at 507-08.

Through the State's misconduct, Mr. Roberts had been denied access to information regarding public records, records to which he may be entitled under Chapter 119. This Court should issue a stay of execution, and remand this action to the trial court for a determination of the propriety of the deponents' refusal to comply with discovery.

ARGUMENT IV

MR. ROBERTS WAS DENIED A FAIR HEARING BEFORE AN IMPARTIAL TRIBUNAL BY THE LOWER COURT'S DENIAL OF THE MOTION TO DISQUALIFY.

After Mr. Roberts' Rule 3.850 motion was filed, the administrative judge ruled that the motion would be heard by Mr.

Roberts' trial judge, Harold Solomon. At the time Mr. Roberts' Rule 3.850 motion was filed, Judge Solomon was sitting as a retired judge in the General Jurisdiction Division of the Circuit Court for the Eleventh Judicial Circuit, which is not the division which would hear Mr. Roberts' Rule 3.850 motion. Before Mr. Roberts' Rule 3.850 motion was filed, the State had filed a Motion To Transfer Case To Original Trial Judge (PC-R. 1-3).[25] After the Rule 3.850 motion was filed, the State's motion to transfer was granted over Mr. Roberts' written and oral objection (PC-R. 279-80). Judge Smith, the judge ruling on the transfer motion, indicated Mr. Roberts' objection should be filed as a motion to disqualify (T. [2/22/96] 12-13).

The next day, Mr. Roberts filed a motion to disqualify Judge Solomon based upon the same facts he had presented in his objection to the transfer. The day before Mr. Roberts' penalty phase in 1985, Judge Solomon had contacted a potential witness on an ex parte basis outside the presence of Mr. Roberts or his counsel in order to obtain information which Judge Solomon considered in imposing death (PC-R. 269-73). At the hearing conducted on February 21, 1996, Judge Solomon denied the motion to disqualify (T.[2/21/96] 10). Mr. Roberts proffered his inability to investigate the circumstances of Judge Solomon's

[25]Mr. Roberts had filed a civil suit against the State Attorney's Office regarding public records. After depositions were allowed by the civil judge, the State sought certiorari review before this Court. Even though it denied the petition, this Court ordered the case transferred from the criminal division to the 3.850 court. Despite this order, the Miami courts refused to do anything until the 3.850 was filed.

extrajudicial contact with a material witness. Since Judge Solomon was presiding, Mr. Roberts could not inquire as to why the call was made and exactly what was said.

During the February 21 hearing, both Mr. Roberts' counsel and the State's counsel argued that Mr. Roberts' Rule 3.850 motion required an evidentiary hearing. Indeed, the State argued that without an evidentiary hearing, "the pleadings cannot justify the denial of the Motion to Vacate Judgment" (T. [2/21/96] 24). Despite both parties' agreement that an evidentiary hearing was required, Judge Solomon summarily denied Mr. Roberts' Rule 3.850 motion.

At the conclusion of the February 21 hearing, Judge Solomon indicated that he would sign an order denying the Rule 3.850 motion on February 22 at 1:00 p.m. (T.[2/21/96] 66). However, the order was signed before that time and before Mr. Roberts' counsel arrived at the courthouse. Undersigned counsel received a copy of the draft order at a Miami hotel at 11:15 a.m. No one inquired as to whether he objected to the form, despite his specific request to see the order before it was signed. The clerk's date stamp on the signed order indicates that the order was filed at 11:32 a.m. on February 22 (PC-R. 281), one and one half hours before Mr. Roberts' counsel was told the order would be signed. Counsel showed up at 12:10 p.m. only to discover no Judge Solomon, no State, and no clerk.

Also on February 22, an article regarding Mr. Roberts' case appeared in the Miami Herald. The article's writer had

interviewed Judge Solomon after the in-court proceedings of February 21 and quoted Judge Solomon as saying, "I've been on this case a long time, and the pleadings I heard today were insufficient" (Attachment 2). The article did not reveal what else Judge Solomon said to the reporter.[26]

Judge Solomon's denial of the motion to disqualify was erroneous. Further, his subsequent actions in refusing to grant an evidentiary hearing although both parties agreed such a hearing was necessary, in failing to adhere to the time set for entering an order, in denying undersigned counsel the opportunity to be present, and in giving an interview to the press regarding a pending case reasonably give rise to a fear on Mr. Roberts' part that he cannot receive a fair hearing before Judge Solomon.

A. MR. ROBERTS' MOTION TO DISQUALIFY WAS TIMELY FILED

In the lower court, the State argued that Mr. Roberts' motion to disqualify was not filed within the ten day requirement of Fla. R. Jud. Admin. 2.160(e). However, Mr. Roberts filed the motion one day after the administrative judge assigned the case to Judge Solomon. Before that time, Judge Solomon was not the judge presiding over Mr. Roberts' Rule 3.850 motion. Judge Solomon is a retired judge sitting in the general jurisdiction division. Indeed, the State's own motion to transfer clearly establishes that Judge Solomon was not the judge who would preside over Mr. Roberts' Rule 3.850 proceedings. Mr. Roberts'

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[26]Undersigned counsel unsuccessfully attempted to contact the writer of the article to inquire about what else Judge Solomon had said.

motion to disqualify was filed one day after Judge Solomon was assigned to the case.[27] The motion was timely.

B. JUDGE SOLOMON'S EX PARTE COMMUNICATION WITH A POTENTIAL PENALTY PHASE WITNESS TO OBTAIN EVIDENCE USED IN IMPOSING MR. ROBERTS' DEATH SENTENCE REQUIRES JUDGE'S SOLOMON'S DISQUALIFICATION

Mr. Roberts' jury recommended that he be sentenced to death by the slimmest possible majority -- 7 to 5. One single vote would have swung the balance. The penalty phase defense presented was that Mr. Roberts suffered from organic brain damage and that the brain damage combined with drug and alcohol use caused Mr. Roberts to suffer from diminished capacity. Three eminently qualified experts testified in support of this theory. The trial court in its findings in support of the death penalty rejected out of hand their testimony finding instead that Mr. Roberts has "a anti-social personality disorder and <u>not</u> brain damage."

What is now clear is that before Mr. Roberts presented his penalty phase defense -- a defense based primarily upon mental health evidence -- the trial judge conducted an extra-judicial investigation into Mr. Roberts' mental health. This was done without notice to Mr. Roberts or his counsel and deprived Mr. Roberts of the opportunity to deny, rebut or explain this extra-

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[27] In <u>Spaziano</u>, after this Court remanded for an evidentiary hearing before the original trial judge who had since retired and was not currently assigned, the original judge was reassigned the case. A motion to disqualify was filed based upon previous comments the judge had made to the press. The motion was found to be timely because it was filed within ten days of the judge's reassignment to the case, and granted.

judicial evidence. Judge Solomon's actions violated the Code of Judicial Conduct. Inquiry Concerning a Judge re: Perry, 586 So. 2d 1054 (Fla. 1991).

At Mr. Roberts' penalty phase trial, the State offered some of Mr. Roberts mental health records from the Patuxent Institution. Trial counsel objected to the admission of these documents on the grounds that they were not properly authenticated. In response to this objection the trial court responded:

> They are also authenticated documents of these institutions. They are signed by -- both of them are signed, one of them is signed by the Director of the institution for Patuxent whom I spoke with last evening, and the other one is signed by the assistant superintendent of the institution, Mr. Robert Johns.

R. 3256.

On the record before this Court, the trial judge's extra-judicial communication with a mental health expert does more than raise the "appearance of impropriety." Judge Solomon has received information regarding the case from extra-judicial sources. Canon 3(B)(7) of the Code of Judicial Conduct provides, "A judge shall not. . .consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding."

Judge Solomon's ex parte contact with a potential witness raises serious questions concerning whether the trial court sentenced Mr. Roberts to death, at least in part, on the basis of information which he had no opportunity to deny, rebut or

explain. Gardner v. Florida, 430 U.S. 394 (1977). Mr. Roberts' sentence of death is tainted by judicial misconduct and he is entitled to an evidentiary hearing on this claim. Card v. State, 652 So. 2d 344 (Fla. 1995).

C. JUDGE SOLOMON'S INTERVIEW WITH THE PRESS REQUIRES HIS DISQUALIFICATION

Judge Solomon talked to the press after the February 21 proceedings and before entering his order on February 22. Judge Solomon's comments to the press are contrary to the requirement that a judge "conduct[] himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Canon 3, Code of Judicial Conduct. Under Canon 3B(9) of the Code of Judicial Conduct, "A judge shall not, while a proceeding is pending or impending in any court, make any public comment that might reasonably be expected to affect its outcome or impair its fairness." The commentary to this canon explains, "The requirement that judges abstain from public comment regarding a pending or impending proceeding continues during any appellate process and until final disposition." See also Porter v. Singletary, 49 F.3d 1483, 1489 n.12 (11th Cir. 1995). His comments to the press clearly and reasonably raise the question of Judge Solomon's impartiality and instill in Mr. Roberts the fear that he will be unable to receive a fair hearing on pending and future matters before Judge Solomon.

Additionally, the fact that Judge Solomon has spoken to the press regarding Mr. Roberts' case establishes that Judge Solomon has received information regarding the case from extra-judicial

sources. Judge Solomon clearly talked about the case outside the courtroom, receiving and disseminating information. Canon 3(B)(7) of the Code of Judicial Conduct provides, "A judge shall not. . .consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding." Judge Solomon's discussions with the press regarding Mr. Roberts' case reasonably raise questions regarding Judge Solomon's impartiality and instill in Mr. Roberts the fear that he will be unable to receive a fair hearing on pending and future matters before Judge Solomon.

D. JUDGE SOLOMON'S FAILURE TO ADHERE TO THE TIME HE SET FOR ENTERING AN ORDER AND HIS REFUSAL TO GRANT AN EVIDENTIARY HEARING STIPULATED TO BY BOTH PARTIES REQUIRE HIS DISQUALIFICATION

Judge Solomon's failure to adhere to the time he set for entering an order and his refusal to grant an evidentiary hearing stipulated to by both parties violate Canon 3, Code of Judicial Conduct. Canon 3(B)(2) provides, "A judge shall be faithful to the law and maintain professional competence in it. A judge shall not be swayed by partisan interests, public clamor, or fear of criticism." Canon 3(B)(7) provides, "A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to law. A judge shall not initiate, permit, or consider ex parte communications. . . ."

Judge Solomon entered the order denying Mr. Roberts' Rule 3.850 motion ex parte, with only the State's counsel present. This was after undersigned counsel had requested an "opportunity

to review it first before it gets presented to you" (T. [2/21/96] 66). Counsel was advised that the signing would occur at 1:00 p.m. However, the order was file stamped 11:32 a.m.; and no one was present when counsel showed up at 12:10 p.m. There was no clerk, so that counsel could file a Notice of Appeal.

Judge Solomon's refusal to grant an evidentiary hearing both parties said was required further indicates that Judge Solomon was not acting "faithful[ly] to the law." Judge Solomon's actions reasonably put Mr. Roberts in fear that he would not receive a fair hearing before an impartial tribunal.

E. CONCLUSION

In capital cases, judicial scrutiny must be more stringent than it is in non-capital cases. The impartiality of the judiciary is particularly important in "this first-degree murder case in which [Mr. Roberts'] life is at stake and in which the circuit judge's sentencing decision is so important". Livingston v. State, 441 So. 2d 1083, 1087 (1983).

A fair hearing before an impartial tribunal is a basic requirement of due process. Marshall v. Jerrico, 446 U.S. 238 (1980); In re Murchison, 349 U.S. 133 (1955); Porter v. Singletary, 49 F.3d 1483, 1487-88 (11th Cir. 1995). "Every litigant[] is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930). Absent a fair tribunal there is no full and fair hearing. Suarez teaches that even the appearance of prejudgment is sufficient to warrant reversal.

Judge Solomon's ex parte and extrajudicial contact with a potential witness and the other matters discussed above are certainly "sufficient to warrant fear on [Mr. Roberts'] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988). Even the appearance of partiality or prejudgment is sufficient to warrant disqualification. Id. Judge Solomon should be disqualified from presiding over any further proceedings in Mr. Roberts' case.

ARGUMENT V

MR. ROBERTS' DEATH SENTENCE IS BASED UPON THE STATE'S KNOWING AND PRESENTATION OF FALSE TESTIMONY FROM A LAW ENFORCEMENT OFFICER IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During the penalty phase of Mr. Roberts' capital trial, the State introduced into evidence testimony about his prior conviction. Testimony about the prior offense was presented through the Salisbury, Maryland Chief of Police, Coulbourn Dykes, the officer who initially investigated the crime. His testimony was not limited to observations that he made during his investigation of the crime. Over defense objections, the State presented extensive testimony about the victim's account of the prior offense (R. 3290-94). Beyond the hearsay testimony about the facts of the crime, Chief Dykes presented statements from the victim about her refusal to appear as a witness, her emotional suffering as a result of the crime and her "hysterical" reaction in learning that Mr. Roberts had been released (R. 3303).

Newly obtained evidence now establishes that Chief Dykes lied by telling the sentencing jury that the victim of the prior crime, Brenda Hardy, was hysterical when she found out Mr. Roberts had been released from prison, and refused to come to Florida to testify because "she couldn't face it again." This was untrue. Ms. Hardy was unable to testify in Florida because she couldn't leave her children (PC-R. 152). Moreover, her true feelings are that she does not want to see Mr. Roberts executed and has no objection to Mr. Roberts sentence of death being commuted to life in prison. Id.

In addition, Chief Dykes testified in the penalty phase that Mr. Roberts stabbed Ms. Hardy with a knife he brought for that very purpose. The State asked:

> Q. Did you find any type of knife in that bedroom?
>
> A. Yes I did.
>
> Q. Where was this knife found?
>
> A. The bedroom configuration, there was a small bed in the corner against the wall.
>
> The bed was pulled away from the wall and there was a baseboard head unit and the baseboard was in the middle of the room. On top of that baseboard was a hunting knife blade. The handle had been broken. It was not a hollow handle which had been broken from a butcher-type, long blade.
>
> Q. Was Miss Hardy ever able to identify that particular knife as being her knife?
>
> A. No, she was not.

(R. 3292-93). The implication of this testimony is that the Maryland police recovered the knife that Mr. Roberts allegedly brought with him and used to stab Ms. Hardy. In presenting this testimony, the Florida prosecutor misled the jury. The record of the Maryland trial indicates the knife found in Mrs. Hardy's bedroom had nothing to do with the attack. The transcript from Mr. Roberts' Maryland trial reveals:

> [DEFENSE COUNSEL]: At any time did you find a knife?
>
> [DETECTIVE NIBLETT]: Did I find a knife?
>
> Q. Yes? Did you find a knife?
>
> A. Yes, I found a knife.
>
> Q. Did you take the knife?
>
> A. Yes, I did.
>
> Q. Is the knife in that pile of exhibits over here?
>
> A. No, sir.
>
> Q. What did you do with it?
>
> A. Well, being under the bed, and it was dusty, plenty of dust under the bed, anything will slide on dust, as you know, and will cause a mark, so the knife had been, I would say, in that position, I would say, a month-month and a half, maybe longer, because of the dust on top of the knife and the dust around the knife.
>
> Q. You didn't, in other words --
>
> A. No, sir.
>
> Q. -- find the --
>
> A. That was the only knife that I found.

Q. And the knife you found had dust on it like it had been there for some time?

A. Yes.

Q. Some period of time?

A. Right.

Q. And that was the only knife that --

A. Just the one. Of course, that was a knife -- it was like a kitchen knife. It had a big blade on it.

Q. And that, from your observation, had not had any part to your knowledge in this deal?

A. No.

Q. Nothing to do with it?

A. No, sir.[28]

The knife had nothing to do with Mr. Roberts, yet the State at his penalty phase trial deliberately presented false and misleading evidence that the knife found at the scene of the Maryland crime had some connection with Mr. Roberts. Despite the interjection of false and highly prejudicial testimony, the jury recommended death by a vote of 7-5. If only one other juror had rejected death as an appropriate sentence, Mr. Roberts would have been sentenced to life. Given that margin for error, the false testimony presented before Mr. Roberts' jury cannot be considered "harmless." Giglio v. United States, 405 U.S. 150, 154 (1972); Napue v. Illinois, 360 U.S. 264 (1959).

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[28]Transcript of trial at 59-60. Roberts v. State, No. 451, September Term, 1975 (Md. Ct. Spec. App. Jan. 7, 1976).

ARGUMENT VI

MR. ROBERTS IS INNOCENT OF FIRST DEGREE MURDER AND HE IS INNOCENT OF THE DEATH SENTENCE.

The United States Supreme Court has held that, where a person convicted of first degree murder and sentenced to death can show either innocence of first degree murder or innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992).[29] The Florida Supreme Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994); Jones v. State, 591 So. 2d 911 (Fla. 1991). The Florida Supreme Court has recognized that innocence of the death penalty also constitutes a claim. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992). Mr. Roberts can show both innocence of first degree murder and innocence of the death penalty.

Rhonda Haines' affidavit qualifies as newly discovered evidence of innocence. Jones v. State; Johnson v. Singletary. She now admits that she lied at Mr. Roberts' trial. She admits that she falsely testified that he confessed to her. This evidence was not previously available. The jury, despite hearing her false testimony, convicted only after deliberating for three

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[29] According to Sawyer, where a death sentenced individual establishes innocence of the death penalty, his claims must be considered despite procedural bars.

days. With truthful testimony from Rhonda Haines, there would have been no conviction.

There was additional evidence undisclosed by the State that demonstrates that the State's other witness, M R , was extorting money from the prosecutor, and the State never disclosed that fact. Nor did it disclose that Dr. Rao, who examined Ms. R , did not find her demeanor consistent with having been raped. The State did not disclose its threat to take further action against M R if she did not toe the line. But for the nondisclosures and presentation of false evidence, Mr. Roberts would have been acquitted.

Innocence of the death penalty can be shown by establishing ineligibility for a death sentence. See Scott (Abron) v. Dugger. This can be shown by establishing circumstances which under either state or federal law preclude a death sentence. Innocence of the death penalty is shown by demonstrating insufficient aggravating circumstances so as to render the individual ineligible for death under Florida law.

The sentencing judge relied upon four aggravating circumstances in imposing death. Two of the aggravating circumstances ("prior conviction of a crime of violence" and "under sentence of imprisonment") are dependent upon the validity of the Maryland conviction of rape. However, that conviction is invalid. At no time was Mr. Roberts advised that he could seek a transfer to juvenile court. Mr. Roberts, who was sixteen at the time of the Maryland offense with an IQ of 76, could have

obtained a transfer to juvenile court but for ineffective assistance of counsel. If the Maryland conviction is invalid, the two aggravating circumstances are invalid.

The third aggravating circumstance relied upon by the judge was "heinous, atrocious or cruel." However, Mr. Roberts' jury received an unconstitutional instruction regarding this aggravator. As a result, this aggravating circumstance was invalid in Mr. Roberts' case. Espinosa v. Florida, 112 S. Ct. 2926 (1992). The jury was not advised that this circumstance requires a specific intent to torture. Stein v. State, 632 So. 2d 1361 (Fla. 1994); Omelus v. State, 584 So. 2d 563 (Fla. 1991).

The fourth aggravating circumstance -- "in the course of a felony" -- has been held insufficient standing alone to establish death eligibility. Rembert v. State, 445 So. 2d 337 (Fla. 1984); Proffitt v. State, 510 So. 2d 896 (Fla. 1987). Further, in this case there was evidence undisclosed by the State demonstrating that the homicide was not in the course of the felony.

In Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. Here, the undisclosed evidence, combined with the invalid Maryland conviction and mental health findings regarding Mr. Roberts' mental capacity, render the death sentence disproportionate. One aggravating circumstance is insufficient.

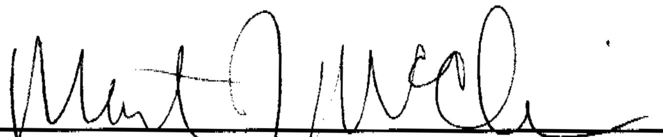
This Court must accept Mr. Roberts' allegations as true at this juncture. Lightbourne v. Dugger, 549 So. 2d 1364, 1365

(Fla. 1989). The allegations show bases for granting relief and require an evidentiary hearing. Lightbourne. This Court must grant an evidentiary hearing.

CONCLUSION

Based upon the foregoing and upon the record, Mr. Roberts urges the Court to grant a stay of execution, order an evidentiary hearing, and grant such other relief as the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by ~~hand delivery~~ fax, to all counsel of record on February 24, 1996.



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

JENNIFER M. COREY
Florida Bar No. 0999717
Assistant CCR

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
Post Office Drawer 5498
Tallahassee, Florida 32314-5498
(904) 487-4376
Attorney for Petitioner-Appellant

Copies to:
Fariba Komeily ~~Wendy Morris~~, Assistant Attorney General
Office of the Attorney General
Department of Legal Affairs
~~The Capitol~~
~~Tallahassee, FL 32399-1050~~
(305) 377-5655

Attachment 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

RICKEY BERNARD ROBERTS, Petitioner	:	
v.	:	CASE NO. AMD-96-478
J. JOSEPH CURRAN, JR., Attorney General, State of Maryland, and HARRY K. SINGLETARY, JR., Secretary, Florida Department of Corrections, Respondents	:	

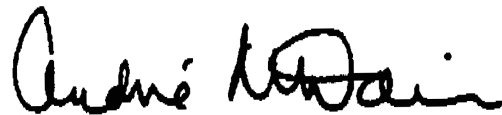
FILED LODGED
FEB 22 1996
U.S. DISTRICT COURT
DISTRICT OF MARYLAND
BY DEPUTY

...oOo...

ORDER

After hearing oral argument in the instant matter, and for the reasons stated on the record, this Court concludes that it has subject matter jurisdiction over the claims presented, and personal jurisdiction over Respondent Singletary. Rule 2(b) of the Rules Governing § 2254 Cases. Furthermore, with respect to Respondent Curran's motion to dismiss, this Court shall conduct an evidentiary hearing on Thursday, February 29, 1996, at 9:00 a.m. For the reasons indicated on the record, the Court need not decide at this time Petitioner's application for a stay of execution filed under 28 U.S.C. § 2251.

Accordingly, it is this 22nd day of February 1996, by the United States District Court for the District of Maryland, ORDERED that Respondent Harry K. Singletary's Motion to Dismiss for Lack of Jurisdiction BE, and hereby IS, DENIED.



ANDRE M. DAVIS
United States District Judge

Attachment 2

Stay of execution refused for causeway killer

By JOHN LANTIGUA
Herald Staff Writer

A Miami judge Wednesday refused to grant a last-minute hearing and a stay of execution for convicted murderer Rickey Roberts who is headed for the electric chair Friday.

Judge Harold Solomon, the original judge in Roberts' Dade Circuit Court trial for a 1984 Key Biscayne murder, took no time in rejecting the request.

"I've been on this case a long time, and the pleadings I heard today were insufficient," he said later.

Roberts' attorneys are battling on two fronts to save his life. They said they would petition the Florida Supreme Court for a stay today. Also scheduled this morning is a hearing in federal District Court in Baltimore regarding a previous crime committed by Roberts that might also result in a delay of execution on the Florida charges.

Roberts was convicted in 1985 in Miami of killing George Napoles, 20, by beating him to death with a baseball bat on the Rickenbacker Causeway where the victim had parked late at night. He then [illegible] a 16-year-old female friend of Napo[illegible].

The young woman later identified Roberts and testified at his trial. Police also found Roberts' hand print on Napoles' car and blood matching Napoles' on clothes owned by Roberts.

Also testifying at the trial was Roberts' girlfriend at the time, Rhonda Haines, who said Roberts had confessed the killing to her. On Wednesday, Roberts' attorney Martin McClain said Haines had recently recanted her testimony and he asked for a hearing where she could be questioned.

McClain compared the case to that of convicted murderer Crazy Joe Spaziano, whose 1976 conviction was overturned last month after a key witness recanted his testimony.

But Assistant State Attorney Joel Rosenblatt argued that Haines' new testimony would not change the guilty verdict.

"Ms. Haines is not an essential witness," he said. "She did not observe the killing and she did not observe the rape." Solomon agreed.

But McClain also argued that Roberts had received the death penalty, in part, because of a prior conviction for rape in Maryland in 1974, a crime committed when Roberts was 16 years old. In that crime, he not only assaulted the woman, but stabbed her multiple times with a pair of scissors. The woman survived and testified against him. Roberts served five years in Maryland and was released.

McClain argued that inadequate defense counsel had led Roberts to be tried as an adult and not as a juvenile. If he had been treated as a minor, the record of his prior crime would have been inadmissible in Florida, and he would not have been sentenced to death here.

Solomon rejected that argument as well. But the federal judge in Baltimore will decide if that Maryland case should be reopened.