IN THE SUPREME COURT OF FLORIDA

CASE NO. 87,481

WILLIAM L. THOMPSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal after summary denial of Mr. Thompson's motion for post-conviction relief. The motion was brought pursuant to Florida Rule of Criminal Procedure 3.850.

Citations in this brief shall be as follows: the record on appeal concerning the original court proceedings shall be referred to as "R. ___." The record on appeal from the Rule 3.850 proceedings shall be referred to as "PC-R. ___." All other references will be self-explanatory or otherwise explained herein.

REQUEST FOR ORAL ARGUMENT

Mr. Thompson has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. A full opportunity to air the issues through oral argument is more than appropriate in this case given the seriousness of the claims and issues at stake.

STATEMENT OF FONT

Mr. Thompson's Initial Brief is written in Courier Font size twelve (12).

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STATEMENT OF THE CASE

William Thompson and his co-defendant Rocco James Surace were charged by a grand jury of Dade County, Florida, with the first-degree murder, kidnapping, and involuntary sexual assault of Sally Ivestor on April 14, 1976. Mr. Thompson pled guilty to these charges and was sentenced to death on June 24, 1976, for the first-degree murder charge; he was sentenced to life imprisonment on the kidnapping and sexual assault charges, both sentences to run concurrent to his death sentence. In support of the death sentence, the trial court found two aggravating circumstances: (1) the capital felony was committed while Mr. Thompson was involved in involuntary sexual battery and kidnapping; (2) the capital felony was especially heinous, atrocious, or cruel. In mitigation, the trial court found that Mr. Thompson did not have a significant history of criminal activity and his age of twenty-four. On appeal, this Court allowed Mr. Thompson to withdraw his guilty plea and remanded the case for a new trial. Thompson v. State, 351 So. 2d 701 (Fla. 1977), cert. denied, 435 U.S. 998 (1978).

During his second trial, Mr. Thompson again entered a guilty plea. The jury recommended the death penalty, and the trial judge accepted this recommendation. In aggravation, the trial court found that the capital felony was committed during the course of a felony and that the crime was heinous, atrocious, or

cruel. In mitigation, the court found that Mr. Thompson had no significant history of criminal activity and that he was twenty-four at the time of the crime. Mr. Thompson's guilty plea and death sentence were affirmed by this Court on direct appeal. Thompson v. State, 389 So. 2d 197 (Fla. 1980).

Mr. Thompson filed his first Rule 3.850 motion, arguing that he was forced by his co-defendant to claim full responsibility for the crime and that his death sentence is disproportionate because his more culpable co-defendant received a life sentence. The circuit court denied relief, and this Court affirmed. Thompson v. State, 410 So. 2d 500 (Fla. 1982). Mr. Thompson then sought habeas corpus relief in the United States District Court and the Eleventh Circuit Court of Appeals. Relief was denied. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986).

Mr. Thompson filed his second Rule 3.850 motion, asserting that the trial judge failed to allow presentation of nonstatutory mitigating circumstances before the jury. The circuit court denied relief, but this Court reversed under Hitchcock v. Dugger, 481 U.S. 393 (1987), and remanded for resentencing. Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987), cert. denied, 485 U.S. 960 (1988).

At resentencing, the jury recommended a death sentence by a vote of seven to five. The sentencing judge accepted the jury's recommendation and found the following four aggravating

circumstances: (1) the crime was committed during the course of a felony; (2) the crime was committed for financial gain; (3) the crime was especially heinous, atrocious, or cruel; and (4) the crime was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification. Although two other trial judges had found mitigating circumstances, Judge S. Peter Capua failed to find any statutory or nonstatutory mitigation. Mr. Thompson received consecutive life sentences for the remaining counts of the indictment. On direct appeal, this Court affirmed the death sentence but rejected the cold, calculated, and premeditated aggravating factor. Thompson v. State, 619 So. 2d 261 (Fla. 1993), cert. denied, 510 U.S. 966 (1993).

On November 8, 1995, Mr. Thompson filed his third Rule 3.850 motion alleging forty-five claims for relief including ineffective assistance of counsel claims. Mr. Thompson specifically pled that his motion was incomplete due to the State's failure to fully comply with Chapter 119. Without ordering an answer from the State, the circuit court summarily denied relief on December 12, 1995, finding that "the defendant has not raised any issue which is new to the case or was unknown to him at the time of his prior appeals or at the time of filing his prior Rule Three motions." (PC-R. 295-96). While Mr. Thompson's appeal was pending before this Court, the State filed

a Motion to Relinquish Jurisdiction. The State argued that "the balance of the claims in the amended motion for post-conviction relief relate to the second resentencing proceedings and contain allegations such as ineffective assistance of counsel at said proceeding. No prior motions for post-conviction relief with respect to the second resentencing had been filed." (PC-R2. 7). This Court granted the State's motion and relinquished jurisdiction to the circuit court to conduct a hearing in accordance with Huff v. State, 622 So. 2d 982 (Fla. 1993).

On October 16, 1996, the State filed a Preliminary Response to Defendant's Amended Motion to Vacate Judgments of Conviction and Sentence. The State argued that the majority of the claims in Mr. Thompson's Motion to Vacate challenged the 1978 resentencing proceeding and were barred by the two-year time limitation of Rule 3.850. The State argued that the remaining claims were either insufficiently pled or presented no basis for relief. Judge Robbie Barr scheduled a hearing for October 17, 1996, but refused to hear legal argument from counsel on the Motion to Vacate, stating that she was unfamiliar with the case (PC-R2. 870). Judge Barr scheduled another hearing for October 31, 1996.

At the October 31st hearing, counsel for Mr. Thompson told the court that the State had not fully complied with Mr. Thompson's public records requests and that a Chapter 119 hearing

should be held (PC-R2. 42).[1] The State argued that Mr. Thompson had waived his right to public records and that the Motion to Vacate should be summarily denied after a Huff hearing (PC-R2. 42). Judge Barr instructed the State to prepare an order stating that Mr. Thompson had waived his right to public records or had received full compliance (PC-R2. 43). Off the record, Judge Barr asked the State whether she could summarily deny the Motion to Vacate after holding a Huff hearing (PC-R. 43). Judge Barr then scheduled a Huff hearing for November 14, 1996.

On November 8, 1996, counsel for Mr. Thompson filed a Motion to Disqualify the Judge, alleging that Mr. Thompson had a well-grounded fear that he would not receive a fair hearing based on Judge Barr's comments at the October 31st hearing indicating that she had already prejudged the issues in his case and decided to summarily deny the Motion to Vacate before she had heard legal arguments on Mr. Thompson's entitlement to relief. The State filed its Response to Motion to Disqualify on November 22, 1996. The Motion to Disqualify was denied on January 27, 1997.

On February 5, 1997, Mr. Thompson filed a Notice of Filing

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[1]The transcript of the October 31, 1996, status hearing is missing from the record on appeal. Counsel has requested that this hearing be transcribed and provided as soon as possible (see Defendant's Motion to Supplement the Record filed simultaneously with this brief). Counsel has cited Mr. Thompson's Motion to Disqualify Judge which refers to the October 31st proceedings.

Public Records Requests. On February 6, 1997, Judge Barr conducted a Huff hearing and thereafter denied Mr. Thompson's Motion to Vacate on March 6, 1997. On May 7, 1997, Mr. Thompson filed a Motion to Hold in Abeyance or to Relinquish Jurisdiction with this Court, asserting that Judge Barr had erred in denying a Chapter 119 hearing on the grounds that "Chapter 119 violations, if any, may have formed the basis for an abatement, but do not constitute grounds for postconviction relief." (PC-R2. 282). Judge Barr also determined that Mr. Thompson had waived his public records requests (Id.). This Court denied the Motion on June 2, 1997. Mr. Thompson timely filed a notice of appeal.

SUMMARY OF ARGUMENT

1. Mr. Thompson has been denied access to public records in the possession of State agencies. The circuit court erred in denying Mr. Thompson a Chapter 119 hearing at which his counsel could question the State agencies regarding their noncompliance with outstanding public records requests.

2. Mr. Thompson was denied his due process right to a fair tribunal because the circuit court prejudged his entitlement to relief. Circuit Judge Robbie Barr indicated at a status hearing that she had already decided to summarily deny Mr. Thompson's Motion to Vacate before she conducted a Huff hearing at which counsel could present legal argument regarding Mr. Thompson's right to an evidentiary hearing.

3. The circuit court erred in summarily denying Mr. Thompson's Motion to Vacate. This is Mr. Thompson's first Rule 3.850 motion since his 1989 resentencing; he pled detailed claims asserting the ineffective assistance of counsel, prosecutorial misconduct, Hitchcock error, and other violations of his Eighth and Fourteenth Amendment rights. Mr. Thompson is entitled to an evidentiary hearing because the files and records in his case do not conclusively show that he is entitled to no relief. In addition, the attachments to the circuit court order denying relief are insufficient to justify summary denial in this case.

4. Mr. Thompson was denied a proper direct appeal because

no reliable transcript of his capital trial exists.

5. Mr. Thompson's Sixth Amendment rights were violated because his counsel had a conflict of interest.

6. The State withheld material exculpatory evidence and/or presented false testimony in violation of Mr. Thompson's Sixth, Eighth, and Fourteenth Amendment rights. Public records received by post-conviction counsel indicate that the State misrepresented the circumstances surrounding the unavailability of the most important State witness, Barbara Savage. As a result of the State's misconduct, the circuit court allowed the State to read Ms. Savage's 1978 testimony at Mr. Thompson's resentencing in violation of Mr. Thompson's right to a fair trial.

7. The circuit court erred in allowing the State to read Ms. Savage's prior testimony at Mr. Thompson's resentencing. As a result of this ruling, the Hitchcock error that caused this Court to remand Mr. Thompson's case was repeated at his 1989 resentencing.

8. The circuit court erred in excluding mitigating evidence relevant to rebut the State's argument on nonstatutory aggravating factors.

9. Mr. Thompson was denied a fair adversarial testing. He was prejudiced by trial counsel's ineffectiveness and State misconduct and erroneous rulings of the trial court. As a result of cumulative errors, Mr. Thompson was sentenced to death in

violation of his Sixth, Eighth, and Fourteenth Amendment rights.

10 Mr. Thompson's death sentence rests upon an unconstitutional automatic aggravating circumstance in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

11. The jury instructions in this case unconstitutionally shifted the burden of proof to Mr. Thompson to prove that he is entitled to a life sentence in violation of his Sixth, Eighth, and Fourteenth Amendment rights.

12. The jury that sentenced Mr. Thompson to death was inaccurately misled about its role in sentencing by inaccurate jury instructions that diluted its sense of responsibility.

13. The jury that sentenced Mr. Thompson to death was improperly instructed on the cold, calculated, and premeditated aggravating factor. This Court's harmless error analysis on direct appeal was constitutionally deficient.

14. Mr. Thompson was incompetent to make a knowing, voluntary, and intelligent guilty plea. The plea colloquy conducted by the trial court was constitutionally deficient. Trial counsel was ineffective for failing to protect Mr. Thompson's rights.

15. The trial court erred in permitting the introduction of nonstatutory aggravating factors and in considering the same acts to support different aggravating factors.

16. The rule prohibiting Mr. Thompson's lawyers from

interviewing jurors to determine the existence of claims that may entitle him to relief violates Mr. Thompson's First, sixth, Eighth, and Fourteenth Amendment rights.

17. Mr. Thompson is insane to be executed.

18. Execution in Florida's electric chair constitutes cruel and unusual punishment.

ARGUMENT I

ACCESS TO PUBLIC RECORDS PERTAINING TO MR. THOMPSON'S CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAS BEEN DENIED IN VIOLATION OF CHAPTER 119, FLORIDA STATUTES, THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. THE CIRCUIT COURT ERRED IN DENYING MR. THOMPSON'S PUBLIC RECORDS CLAIM WITHOUT PROVIDING HIM THE OPPORTUNITY TO QUESTION PUBLIC RECORDS CUSTODIANS AT A CHAPTER 119 HEARING.

Mr. Thompson has been denied effective legal representation because public records have not been received by his postconviction counsel. On March 6, 1997, Judge Robbie Barr denied Mr. Thompson's Motion to Vacate and denied a hearing on Mr. Thompson's Chapter 119 requests, despite the fact that Mr. Thompson's Rule 3.850 motion listed State agencies that had not fully complied with Chapter 119. The order dismissing Mr. Thompson's public records claim states:

> This Court notes that the public records requests to the various agencies were dated February 5, 1997. The Huff hearing in this matter was held on February 6, 1997. On page 17 of the State's Preliminary Response to Defendant's Amended Motion to Vacate Judgments, etc., the State avers that the Office of the State Attorney previously provided a representative of CCR over 3300 pages of documents and that Metro-Dade Police Records Bureau provided the CCR with over 100 documents. This court previously ruled (orally, but not reduced to writing because that oral ruling resulted in a motion to disqualify) that the State had either complied with its 119 obligations or that Defendant's delay in seeking them constituted a waiver of his rights. Chapter 119

> violations, if any, may have formed the basis for an abatement, but do not constitute grounds for postconviction relief in this case. Lopez v. Singletary, 634 So. 2d 1056 (Fla. 1993).

(PC-R2. 282).

At no time did Mr. Thompson waive his right to receive public records. Under the two-year filing limitation period of Rule 3.850, Mr. Thompson filed his initial Motion to Vacate on May 23, 1995, six months before the filing date as a good-faith effort to initiate post-conviction litigation and compel compliance with Chapter 119. Counsel informed the court that the motion was incomplete due to the State's failure to timely comply with public records requests.[2] Mr. Thompson filed an Amended Motion to Vacate on November 8, 1995, again informing the circuit court that the State had not fully complied with Mr. Thompson's public records requests. Without addressing Mr. Thompson's public records claim, the circuit court summarily denied his Motion to Vacate on December 12, 1995.

Upon the State's motion, this Court remanded the case for a Huff hearing. At the October 31, 1996, status hearing, counsel

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[2]Mr. Thompson listed the following State agencies that had not fully complied with Chapter 119: Dade County Circuit Court Clerk; Dade County State Attorney; Metro-Dade Police Department; Florida Parole Commission; Florida Department of Law Enforcement; North Miami Beach Police Department; Dade County Jail; Florida State Prison; Florida Department of Corrections.

for Mr. Thompson told the court, upon the court's inquiry, of the proper procedure to follow in Mr. Thompson's case. Counsel informed the court that a Chapter 119 hearing was necessary because Mr. Thompson had not received all of the public records to which he is entitled; counsel explained that she must be given the opportunity to question the records custodians of the State agencies to determine what they had done in response to her records requests (PC-R2. 42). The State argued that the State Attorney's Office and the Metro-Dade Police Department had fully complied, and, as proof, the State offered copying receipts from those two agencies.[3] Judge Barr ignored counsel's argument that the State Attorney could not vouch for the Metro-Dade Police Department and that counsel must be given the opportunity to question the records custodians from each agency. Judge Barr ignored counsel's argument about the need for a Chapter 119 hearing and accepted the State's unsupported and contradictory position that Mr. Thompson had waived his right to public records or that the State had fully complied with his requests. Each

[3]Judge Barr revealed her misunderstanding of public records litigation when she assumed that these two State agencies had complied with the records requests because the State Attorney had copying receipts. The fact that an agency has provided some records does not prove that it is in full compliance with Chapter 119. In addition, the State Attorney cannot vouch for compliance by the Metro-Dade Police Department or other agencies who were not represented at the October 31st hearing.

time counsel has appeared before Judge Barr, counsel sought a hearing on Mr. Thompson's public records requests; however, Judge Barr repeatedly ignored counsel's requests. Contrary to the State's argument and Judge Barr's finding, Mr. Thompson did not waive his right to public records and the State has not fully complied with his requests.

On February 5, 1997, Mr. Thompson re-requested public records from the following agencies: Office of the Attorney General; Dade County Jail; Department of Corrections; Clerk of Court; Florida Department of Law Enforcement; Office of the Medical Examiner; Metro-Dade Police Department; Miami Police Department; and the Office of the State Attorney. Contrary to the circuit court order denying relief, these were not Mr. Thompson's first requests for public records but were sent to agencies that had not fully complied with Chapter 119 after Mr. Thompson's initial requests in 1995. The fact that the State Attorney's Office and the Metro-Dade Police Department, according to the State's argument at the October 31st hearing, had already provided records proves that a request had already been made before February 1997. In addition, FDLE, the Attorney General's Office, and the State Attorney, in their written responses to Mr. Thompson's requests, argued that Mr. Thompson had already requested records in April 1995. The State cannot simultaneously argue that Mr. Thompson waived his right to public records and

complain that the 1997 letters repeat requests that were made two years earlier. Rather than initiate civil litigation against each individual agency, Mr. Thompson sought to compel compliance with Chapter 119 by resending his public records requests in 1997. These letters were sent after Mr. Thompson alerted the circuit court that the agencies were in noncompliance by including the public records claim in his May 1995 Motion to Vacate and his November 1995 Amended Motion to Vacate. Mr. Thompson could not file a Motion to Compel Compliance because his Motion to Disqualify Judge was pending from November 8, 1996, until January 27, 1997; Mr. Thompson was forced to wait until that Motion had been resolved before filing any other pleadings with Judge Barr. The State's own admissions in the responses to Mr. Thompson's 1997 letters reveal that Mr. Thompson diligently sought the public records to which he is entitled and prove that he did not waive his right to public records.

On March 28, 1997, the Department of Corrections filed a Notice of Compliance and Objection and Motion for Protective Order. DOC objected that the request letters were not signed by an attorney; claimed exemptions from disclosure; objected to certain of Mr. Thompson's requests as unduly burdensome; and indicated that the records would be available to view after March 31, 1997. DOC failed to state whether it had provided Mr. Thompson with any public records.

On April 3, 1997, the Florida Department of Law Enforcement filed an Objection and Motion for Protective Order. FDLE objected to the fact that the public records requests had not been signed by an attorney. FDLE also objected that Mr. Thompson's first request for records had been made on April 22, 1995. FDLE also objected to some requests as "burdensome and vague" and claimed exemptions.

On April 4, 1997, the Office of the Attorney General filed a Notice of Filing and a letter indicating that the records in its possession had already been reviewed in December 1995. The Attorney General also objected that Rule 3.852 could not be used "as a basis for renewing requests that have been previously initiated."

On April 8, 1997, the Office of the State Attorney filed an Objection to Mr. Thompson's request. The State Attorney argued that it had already complied with Mr. Thompson's 1995 request by providing 3311 pages in May 1995 and that the 1997 request did not comply with Rule 3.852 because it failed to specify the dates of previous requests. The State Attorney also claimed an exemption.

On April 18, 1997, the City of Miami Police Department filed an Objection and Motion for Protective Order, claiming that Mr. Thompson's request was "overbroad and unduly burdensome" and objecting that the letter had not been signed by an attorney.

The Department did not state whether it had provided records to Mr. Thompson.

The following State agencies have not responded to Mr. Thompson's requests: the Dade County Jail; the Clerk of Court; the Office of the Medical Examiner; and the Metro-Dade Police Department.

This Court has repeatedly held that capital postconviction defendants are entitled to Chapter 119 disclosure. See Ventura v. State, 673 So. 2d 479 (Fla. 1996); Muehleman v. Dugger, 634 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (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). Mr. Thompson's collateral counsel has the duty to seek and obtain every public record in existence in his case to determine whether any basis for postconviction relief exists therein, Porter v. State, 653 So. 2d 375 (Fla.), cert. denied, 115 S. Ct. 1816 (1995), and the State has the duty to comply with public records requests. In Mordenti v. State, 711 So. 2d 30 (Fla. 1998), this Court reaffirmed that "public records requests are cognizable in a rule 3.850 motion." (citing Walton v. Dugger). In Mr. Thompson's case, not only has the State shirked its responsibility to facilitate the public records process, it has defied the authority of this Court by failing to provide Mr. Thompson with the records to which he is entitled.

The State's bad faith was exacerbated by its argument that Mr. Thompson had "waived" his right to public records. A similar tactic was soundly criticized by this Court in Ventura: "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act." 673 So. 2d at 481.

In Walton, as in Mr. Thompson's case, the defendant filed a Rule 3.850 motion raising a public records claim and explaining that his other claims could not be fully pled due to the State's noncompliance with Chapter 119. The circuit court in that case similarly ruled that denial of access to public records was not a proper subject for post-conviction litigation. This Court ordered the circuit court to re-examine Walton's public records requests:

> When, as in the instant case, certain statutory exemptions are claimed by the party against whom the public records request has been filed or when doubt exists as to whether a particular document must be disclosed, the proper procedure is to furnish the document to the trial judge for an in camera inspection. At that time, the trial judge can properly determine if the document is, in fact, subject to a public records disclosure. Under the circumstances of this case, the trial judge should have granted an evidentiary hearing to consider whether the exemptions applied or whether the documents requested were public records subject to disclosure.

634 So. 2d at 1061-62 (emphasis added).

Mr. Thompson's argument about the need for a Chapter 119 hearing in his case is even further supported by this Court's opinion in Ventura. In that case, Mr. Ventura's Rule 3.850 motion, which was filed eight months early, included a claim that the State had not complied with public records requests and that he was unable to file a fully pled Rule 3.850 motion. The circuit court denied Mr. Ventura's claims without prejudice because they were insufficiently pled. On appeal, this Court recognized the impossible predicament imposed on defendants who are denied public records and yet are required to file Rule 3.850 motions:

> This case presents a classic example of the problems inherent in our current process for providing public records to capital post-conviction defendants. Ventura argues that he cannot properly file claims in his rule 3.850 motion until the State fully complies with his public records requests. He therefore contends that the trial judge improperly disposed of his claims. The State argues that Ventura did not request those documents in a timely fashion and that, because he did not adequately state his claims in the rule 3.850 motion or otherwise follow the proper procedure for obtaining relief, the trial judge properly dismissed or denied his claims. In reality, both sides are responsible for the delays in this case. Ventura should have requested the records and moved the trial judge to compel compliance at an earlier date. Likewise, the State should have complied with the public records requests in a timely fashion. Clearly, however, Ventura was entitled to receive any requested records for which no legitimate exemptions were filed. This Court has repeatedly found that capital post-conviction defendants are entitled to public

> records disclosure. This Court has further determined that a defendant should be allowed to amend a previously filed rule 3.850 motion after requested public records are finally furnished.

673 So. 2d at 481 (citations omitted). This Court concluded that the circuit court erred in dismissing Mr. Ventura's motion to vacate and in denying the right to amend after receipt of public records.

Ventura and Walton dictate the outcome here. Mr. Thompson timely filed public records requests in 1995 before filing his first Rule 3.850 motion. The State agencies did not fully comply with those requests. Mr. Thompson included a public records claim in his motion to vacate listing the agencies that had not complied with Chapter 119 and requesting a hearing on his outstanding public records requests. Mr. Thompson filed an amended motion which again included a public records claim and request for a hearing. His motion was summarily denied and then remanded by this Court for a Huff hearing. At a status hearing, counsel again requested a hearing on Mr. Thompson's public records requests. Because the State had still not complied with Mr. Thompson's records requests, counsel re-sent the letters requesting the public records to which Mr. Thompson is entitled. Judge Barr denied Mr. Thompson's motion to vacate and his request for a Chapter 119 hearing. She erroneously found that either Mr. Thompson had waived his right to public records or that the State

had fully complied with his requests. Judge Barr's finding is not supported by the record in this case and is based solely on the State's argument at the October 31st status hearing.

A prisoner whose conviction and death sentence have become final on direct review is entitled to criminal investigative public records as provided by Chapter 119. See Anderson v. State, 627 So. 2d 1170 (Fla. 1993); Mordenti; Muehleman; Walton; Kokal; Provenzano; Mendyk. In other cases, this Court has extended the time period for filing Rule 3.850 motions where public records have not been properly disclosed to defense counsel. Jennings; Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Provenzano. Sixty (60) days constitutes a reasonable period of time to fully review Chapter 119 materials. Accordingly, Mr. Thompson should be given an extension of time and permission to amend once the requested records have been received. In light of this Court's precedent, a contrary ruling would violate Mr. Thompson's equal protection rights.

Mr. Thompson continues to seek the public records necessary to determine what postconviction claims he has to present to the circuit court. Because State agencies did not comply with Mr. Thompson's initial requests and because he was forced to file his Motion to Vacate before receiving full compliance with Chapter 119, Mr. Thompson re-requested public records in February 1997. Until the State provides the requested records, Mr. Thompson

cannot determine what claims he may have under Brady v. Maryland, 373 U.S. 83 (1963); Giglio v. United States, 405 U.S. 150 (1970); United States v. Cronic, 466 U.S. 648 (1984); Richardson v. State, 546 So. 2d 1037 (Fla. 1989); Roman v. State, 528 So. 2d 1169 (Fla. 1988); and Strickland v. Washington, 466 U.S. 668 (1984). Mr. Thompson's request for permission to amend upon receipt of public records is integral to his rights in the post-conviction process, and, as this Court has recognized, due process governs post-conviction litigation. Holland v. State, 503 So. 2d 1250 (Fla. 1987). In other cases, this Court has encouraged circuit courts to allow amendment of Rule 3.850 motions. See Brown (Larry) v. State, 596 So. 2d 1026 (Fla. 1992); Woods v. State, 531 So. 2d 79 (Fla. 1988).

Every public record is subject to the examination and inspection provisions of the public records act unless a specific statutory exemption applies. Shevin v. Byron, Harliss, Schaffer, Reid and Associates, Inc., 370 So. 2d 633 (Fla. 1980). Exemptions to disclosure are narrowly construed and limited to their express purpose; information gathered or held while that purpose is not being served is not exempt. Tribune Company v. Cannella, 438 So. 2d 516, 523 (Fla. 2d DCA 1983), rev'd on other grounds, 458 So. 2d 1075 (1984), appeal dismissed, 471 U.S. 1096 (1985)(holding that criminal investigative information exemption does not prevent disclosure of records); see also State v.

Nourse, 340 So. 2d 966 (Fla. 3d DCA 1976)(holding that exceptions to the general law are construed narrowly). Moreover, to the extent that any State agency invokes an exemption, Mr. Thompson is entitled to have the court conduct an in camera inspection to determine the validity of the claimed exemption. See Jennings. In this case, several agencies have claimed exemptions, but the circuit court never conducted an in camera inspection.

The circuit court erroneously found that Mr. Thompson waived his right to public records or that the State has fully complied with his requests. The court ignored counsel's arguments about the State agencies that had not complied with Chapter 119 and merely accepted the State Attorney's unsupported argument that the agencies had complied. Without a proper 119 hearing and the opportunity to question the records custodians, the court cannot accurately determine the truth of the State's position. In regard to the court's finding that Mr. Thompson waived his right to public records, the circuit court ignored that Mr. Thompson filed his Rule 3.850 motion six months before the filing date and that since 1995 he has diligently sought the public records to which he is entitled. The State's failure to provide the requested records has delayed Mr. Thompson's postconviction investigation and precluded him from fully pleading and raising the claims that entitle him to relief. Mr. Thompson was and is entitled to Chapter 119 compliance and a reasonable time

thereafter to review the material and amend his Rule 3.850 motion. The circuit court's action in denying Mr. Thompson a Chapter 119 hearing was arbitrary and inconsistent with the treatment of similarly situated capital defendants. This Court should order the circuit court to conduct a Chapter 119 hearing.

ARGUMENT II

THE CIRCUIT COURT ERRED IN DENYING MR. THOMPSON'S MOTION TO DISQUALIFY JUDGE.

Due process guarantees the right to be tried by a fair and neutral judge. The Supreme Court has explained the importance of determining whether a particular judge can preside over a litigant's case:

> Th[e] requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decisionmaking process. The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. At the same time, it preserves both the appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980)(citations omitted). The Supreme Court has observed that "the floor

established by the Due Process Clause clearly requires a `fair trial in a fair tribunal' before a judge with no actual bias against the defendant or interest in the outcome of his particular case." Bracy v. Gramley, 520 U.S. 899, ___, 117 S. Ct. 1793, 1797 (1997). The procedural due process guarantee of the right to a neutral and detached judiciary "convey[s] to the individual a feeling that the government has dealt with him fairly, [and] . . . minimize[s] the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978).

The focus of inquiry in determining whether a particular judge can preside over a defendant's trial "must be not only whether there was actual bias on respondent's part, but also whether there was `such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused.'" Taylor v. Hayes, 418 U.S. 488, 501 (1974)(citations omitted). See also Porter v. Singletary, 49 F.3d 1483, 1487-88 (1995) (holding that "[t]he law is well-established that a fundamental tenet of due process is a fair and impartial tribunal"). The Supreme Court rejected a standard that would require a party to prove actual bias, noting that "our system of law has always endeavored to prevent even the probability of unfairness." In re Murchison, 349 U.S. 133, 136 (1955). See

also Offut v. United States, 348 U.S. 11, 14 (1954)(noting that "justice must satisfy the appearance of justice.") Judicial bias exists in violation of due process whenever the criminal judicial proceedings at issue "offer a possible temptation to the average man as judge to forget the burden of proof required to convict the defendant, or which might lead him not to `hold the balance nice, clear and true between the state and the accused.'" Marshall, 446 U.S. at 242 (quoting Tumey v. Ohio, 273 U.S. 510, 523 (1927)).

Mr. Thompson demonstrated a well-grounded fear that he would not receive a fair and impartial hearing on his Rule 3.850 motion. At the October 31, 1996, status hearing, Judge Robbie Barr revealed that she had prejudged the issues in Mr. Thompson's case. Counsel for Mr. Thompson informed Judge Barr that Mr. Thompson had outstanding Chapter 119 issues that had not been addressed by any court (PC-R2. 42). In response, the State argued that the State Attorney's Office and the Metro-Dade Police Department had complied with Mr. Thompson's requests, and, as proof, the State offered copying bills from those two offices (PC-R2. 42). Counsel argued that the bills did not prove that those two offices were in full compliance, that the State could not vouch for the compliance of the Metro-Dade Police Department, and that a Chapter 119 hearing was necessary to allow Mr. Thompson to question the public records custodians from each

agency about their compliance with Mr. Thompson's records requests (PC-R2. 42). The State argued that Mr. Thompson had waived his right to public records or that he had received full compliance and that his Motion to Vacate should be summarily denied after a Huff hearing (PC-R2. 43). Judge Barr requested a sidebar off the record (PC-R2. 42-43).

At the sidebar, outside the presence of the court reporter, Judge Barr stated that she was inclined to have the State prepare an order stating that Mr. Thompson had either waived his right to public records or that the State agencies had fully complied with his requests. Judge Barr then asked the State Attorney: "You say there is a way I can summarily deny this?" On the record, counsel objected that Mr. Thompson was entitled to a 119 hearing (PC-R2. 42-43). Judge Barr ignored counsel's argument and requested that the State prepare an order denying Mr. Thompson's public records claims (PC-R2. 43).

Counsel moved to disqualify Judge Barr before the Huff hearing scheduled for November 14, 1996. This motion alleged that Judge Barr's comments at the October 31st hearing revealed that she had prejudged the issues in Mr. Thompson's case. Specifically, Judge Barr enthusiastically responded to the State's suggestion that she should summarily deny Mr. Thompson's motion after a Huff hearing. The State made this argument before the Huff hearing had taken place, and Judge Barr's apparent

agreement with the State demonstrated to Mr. Thompson that she could not provide a fair and impartial tribunal to hear counsel's argument on Mr. Thompson's entitlement to an evidentiary hearing. As this Court explained in Huff v. State, the purpose of a Huff hearing is to "determin[e] whether an evidentiary hearing is required and to hear legal argument relating to the motion." 622 So. 2d 982, 983 (Fla. 1993). Although filing a Rule 3.850 motion does not entitle every defendant to an evidentiary hearing, the determination whether to grant a hearing should not be made before counsel has the opportunity at a Huff hearing to present argument regarding the necessity of conducting an evidentiary hearing.[4]

In Mr. Thompson's case, Judge Barr first denied Mr. Thompson's public records claim without conducting a hearing at which counsel could question the records custodians for the State agencies that had not fully complied with Mr. Thompson's requests. Judge Barr denied the claim solely on the argument of the State Attorney that either Mr. Thompson had waived his right

[4]Paradoxically, the State acknowledged the necessity of conducting a Huff hearing in capital cases before denying a motion to vacate when it moved this Court to relinquish jurisdiction after Judge Shapiro summarily denied Mr. Thompson's motion to vacate without a Huff hearing (PC-R2. 14). Despite its acknowledgment of Huff's requirements, the State apparently wanted Mr. Thompson to receive only a sham hearing before a judge who had already decided to summarily deny his motion to vacate.

to public records or the State had fully complied with his requests.[5] The effect of Judge Barr's willingness to accept the State's argument as the sole basis for her decisions was compounded by her expressed eagerness to summarily deny Mr. Thompson's Motion to Vacate before she had even heard counsel's argument addressing the need for an evidentiary hearing. After these comments, counsel knew that her arguments at the Huff hearing would be an exercise in futility because of Judge Barr's prejudgment of the issues. Mr. Thompson was denied his due process right to a fair and impartial tribunal, and, as a result, his meritorious claims were summarily denied.

Mr. Thompson is entitled to full and fair Rule 3.850 proceedings, see Holland v. State, 503 So. 2d 1354 (Fla. 1987); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994), including the fair determination of the issues by a neutral, detached judge. The circumstances of this case are of such a nature that they were "sufficient to warrant fear on [Mr. Thompson's] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988). The proper focus of this inquiry is on "matters from which a litigant may reasonably question a judge's impartiality rather than the judge's perception of his [or her] ability to act fairly and

[5]Mr. Thompson addresses the State's arguments and Judge Barr's erroneous ruling on the public records issue in Argument I.

impartially." Chastine v. Broome, 629 So. 2d 293, 294 (Fla. 4th DCA 1993). In capital cases, the trial judge "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Id.

Canon 3E, Fla. Code Jud. Conduct, and Rule 2.160, Fla. R. Jud. Admin., mandate that a judge disqualify herself in a proceeding "in which the judge's impartiality might reasonably be questioned," including but not limited to instances where the judge has a personal bias or prejudice concerning a party, has personal knowledge of disputed evidentiary facts concerning the proceeding, or where the judge has been a material witness concerning the matter in controversy. Canon 3E(1)(a) & (b), Rule 2.140(d)(1) & (2). Both situations are applicable here.

The purpose of the rules of disqualification emanates from the directive of the judicial canons that a judge must avoid even the appearance of impropriety, which includes engaging in *ex parte* contact. Canon 3A(4) of Florida's Code of Judicial Conduct provides:

> A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law.

The purpose of the disqualification rules state that a judge must avoid even the appearance of impropriety:

> It is the established law of this State that every litigant, including the State in

> criminal cases, is entitled to nothing less than the cold neutrality of an impartial judge. It is the duty of the court to scrupulously guard this right of the litigant and to refrain from attempting to exercise jurisdiction in any manner where his qualification to do so is seriously brought into question. The exercise of any other policy tends to discredit and place the judiciary in a compromising attitude which is bad for the administration of justice. Crosby v. State, 97 So.2d 181 (Fla. 1957); State ex rel. Davis v. Parks, 141 Fla. 516, 194 So. 613 (1939); Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Mickle v. Rowe, 100 Fla. 1382, 131 So. 3331 (1930).
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> * * * *
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> The prejudice of a judge is a delicate question for a litigant to raise but when raised as a bar to the trial of a cause, if predicated on grounds with a modicum of reason, the judge in question should be prompt to recuse himself. No judge under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned. Dickenson v. Parks, 104 Fla. 577, 140 So. 459 (1932); State ex rel. Aguiar v. Chappell, 344 So.2d 925 (Fla. 3d DCA 1977).

State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977).

In the instant case, Mr. Thompson had a reasonable fear that he would not receive a fair hearing before Judge Barr because of the aforementioned circumstances. The facts alleged in his Motion to Disqualify were "sufficient to warrant fear on [Mr. Thompson's] part that he would not receive a fair hearing by the assigned judge." Suarez, 527 So. 2d at 192. Because of Judge Barr's comments at the October 31, 1996, status hearing, "a shadow [was] cast upon judicial neutrality so that disqualification [was] required." Chastine. The appearance of impropriety created by Judge Barr's prejudgment of Mr. Thompson's claims violated his constitutional rights to due process. In re Murchison, 349 U.S. 133 (1955); State ex rel. Mickle v. Rowe, 131 So. 331, 332 (Fla. 1930)(holding that "[e]very litigant[] is entitled to nothing less than the cold neutrality of an impartial judge"). Absent a fair tribunal, there is no full and fair

hearing. Even the appearance of impartiality is sufficient to warrant reversal, Suarez, 527 So. at 192. Judge Barr erred in denying Mr. Thompson's Motion to Disqualify. Reversal is required.

ARGUMENT III

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

Mr. Thompson filed his first Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend and for Evidentiary Hearing on May 23, 1995. He pled detailed claims relating to ineffective assistance of counsel, issues this Court has held require an evidentiary hearing. On November 8, 1995, Mr. Thompson filed an Amended Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend. This motion included a detailed list of outstanding public records that had not been turned over pursuant to Chapter 119, Florida Statutes. This Rule 3.850 motion is the first and only motion filed since Mr. Thompson was resentenced to death in 1989; never before has Mr. Thompson raised issues pertinent to his 1989 resentencing. While successive motions may be dismissed if they fail to allege new or different grounds for relief, see McCrae v. State, 437 So. 2d 1388 (Fla. 1983), Mr. Thompson's motion is not successive because it raises claims regarding the 1989 proceeding which has not previously been challenged in post-conviction.[6]

[6]The State conceded that "[n]o prior motions for post-conviction relief with respect to the second resentencing had been filed." (PC-R2. 14).

After Judge Barr conducted a Huff hearing on February 6, 1997, pursuant to this Court's remand, she denied a Chapter 119 hearing and an evidentiary hearing.[7]

A Rule 3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). The law strongly favors full evidentiary hearings in capital post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. As this Court observed in Harich v. State: "Under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion and record conclusively show that the movant is not entitled to relief." 484 So. 2d 1239, 1240 (Fla. 1986). When a circuit court denies an evidentiary hearing, this Court's ability to review the defendant's appeal is limited; in Harich, this Court explained that when "an evidentiary hearing has not been held . . . we must treat [the] allegations as true except to the extent

[7]Mr. Thompson's Rule 3.850 motion is incomplete at this time. As he stated throughout the motion, the claims cannot be fully pled until the State complies with Mr. Thompson's public records requests. Mr. Thompson raises his other claims here in an effort to inform this Court of the issues in his case; however, the State's refusal to provide public records precludes Mr. Thompson from fully demonstrating to this Court that he is entitled to an evidentiary hearing. See Argument I.

that they are conclusively rebutted by the record." Id. at 1241. See also Mills v. State, 559 So. 2d 578, 578-79 (Fla. 1990); Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984)("The law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief.").

A trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138 (4th DCA 1992). See also Rodriquez v. State, 592 So. 2d 1261 (Fla. 2nd DCA 1992). A court may not summarily deny without "attach[ing] to its order the portion or portions of the record conclusively showing that relief is not required." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The files and records in this case do not conclusively rebut Mr. Thompson's allegations, and the attachments provided by the trial court do not conclusively demonstrate that Mr. Thompson is not entitled to relief. Because the allegations "involve disputed issues of fact," an evidentiary hearing is necessary. Maharaj v. State, 684 So. 2d 726, 728

(Fla. 1996). See also Way v. State, 630 So. 2d 177 (Fla. 1993) (one of the purposes of an evidentiary hearing is to resolve disputed issues of fact regarding issues that might warrant reversal).

The attachments to Judge Barr's order denying relief, which under the law should conclusively demonstrate that Mr. Thompson is entitled to no relief, consist of orders to pay the six experts who examined Mr. Thompson prior to his 1989 resentencing (PC-R2. 290-97). These attachments are insufficient to conclusively demonstrate that Mr. Thompson is entitled to no relief.[8] Mr. Thompson has raised substantial allegations challenging the fundamental fairness of his conviction and the appropriateness of his death sentence. The claims raised by Mr. Thompson include that he received the ineffective assistance of counsel; that the State violated Brady v. Maryland; that his trial attorney failed to procure and present appropriate mental health mitigation testimony in violation of Ake v. Oklahoma; that Mr. Thompson was prejudiced because his trial counsel had a conflict of interest; that he was sentenced to death on the basis of invalid aggravating circumstances and unconstitutional jury

[8]Drs. Levy, Marina, and Miller were appointed as defense experts. Drs. Haber and Koson were State experts. Dr. Jacobson examined Mr. Thompson for competency only. The inclusion of orders to pay Drs. Haber, Koson, and Jacobson are irrelevant to Mr. Thompson's claims and do not demonstrate that he is entitled to no relief.

instructions. The attachments to Judge Barr's order denying relief, which consist solely of orders to appoint mental health experts, do not even address these claims. Mr. Thompson's due process right to a full and fair evidentiary hearing was abrogated by the circuit court's dismissal which did not afford proper evidentiary resolution.

Mr. Thompson is entitled to an evidentiary hearing on his 3.850 claims and on his outstanding public records requests. As in Ventura v. State, 673 So. 2d 479 (Fla. 1996), and Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993), the circuit court here prematurely dismissed Mr. Thompson's claims before the State complied with his public records requests. In Ventura, this Court recognized that defendants cannot file fully pled motions to vacate before receiving the public records to which they are entitled. Judge Barr ignored Mr. Thompson's explanation that the State's refusal to provide public records prevented him from demonstrating his entitlement to relief. The situation here is the same as that in Ventura and Walton where the State's actions in withholding public records prevented the defendant from filing a fully pled motion to vacate and delayed post-conviction litigation. As in those cases, this Court should remand this case to the circuit court.

ARGUMENT IV

MR. THOMPSON'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED WHEN HE WAS

DENIED A PROPER DIRECT APPEAL BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS. RELIABLE APPELLATE REVIEW IS IMPOSSIBLE BECAUSE THERE IS NO WAY TO ENSURE THAT THAT WHICH OCCURRED AT TRIAL CAN BE REVIEWED ON APPEAL.

Mr. Thompson's counsel on direct appeal rendered ineffective assistance in failing to ensure that a proper record was provided to this Court. A review of the record on appeal reveals that critical resentencing proceedings were either not transcribed or were conducted off the record. Mr. Thompson was remanded for resentencing on September 9, 1987. On April 21, 1988, Mr. Thompson's appellate counsel entered a motion to withdraw before the trial court that conducted Mr. Thompson's resentencing. Thereafter, Mr. Thompson was represented by the Public Defender until special appointed counsel could be appointed. However, the first court appearance transcribed and included in Mr. Thompson's record on appeal begins May 17, 1989. Only one other pre-trial appearance on May 18, 1989, is transcribed and contained in the record on appeal before Mr. Thompson's counsel began voir dire on May 22, 1989. Notably absent from Mr. Thompson's record on appeal is evidence of any court appearances or proceedings prior to May 17, 1989. The transcribed record which does exist of counsel's appearance on May 17, 1989, makes clear that prior proceedings had taken place, motions were filed and argued, and issues were otherwise litigated.

Complete and effective appellate advocacy requires a complete trial record. A trial record should not have missing portions of the voir dire or be so replete with errors that it is incomprehensible. The trial record in Mr. Thompson's case does not reflect any bench conferences. With the record provided, it is impossible to know what actually occurred. The Supreme Court in Griffin v. Illinois, 351 U.S. 212 (1956), recognized that the due process clause guarantees the right to receive trial transcripts for use at the appellate level and that the existence of an accurate trial transcript is crucial for adequate appellate review. See also Evitts v. Lucey, 469 U.S. 387 (1985)(holding that effective appellate review begins with giving an appellant an advocate and the tools necessary to do an effective job); Entsminger v. Iowa, 386 U.S. 748 (1967)(holding that appellants are entitled to a complete and accurate record); Hardy v. United States, 375 U.S. 277, 288 (1964)(To fulfill his advocacy role, appellate counsel must be equipped with "the most basic and

fundamental tool of his profession . . . the complete trial transcript . . . anything short of a complete transcript is incompatible with effective appellate advocacy.")(Goldberg, J., concurring). In Gardner v. Florida, 430 U.S. 349 (1977), where the defendant was not allowed to view a confidential presentence report, the Court held that even if it was proper to withhold the report at trial, it had to be part of the record for appeal because the record must disclose considerations which motivated the imposition of the death sentence: "Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to defects . . . under Furman v. Georgia, 408 U.S. at 361."

Mr. Thompson's record is incomplete, in a way which prevented this Court from conducting meaningful appellate review. A new appeal is constitutionally required. Mr. Thompson should not be made to suffer the ultimate sentence of death where he did not have the benefit of a constitutionally guaranteed review of a bona fide record of the trial proceedings. Fla. Const. art. V, ¶3(b)(1). See Delap v. State, 350 So. 2d 462, 463 (Fla. 1977). The record in this case is incomplete, inaccurate, and unreliable. Confidence in the record is undermined. Mr. Thompson was denied due process, a reliable appellate process, effective assistance of counsel on appeal, and a meaningful and trustworthy review of his conviction and sentence of death. The circuit court erroneously found that this claim was procedurally barred because it could have been raised on direct appeal.

ARGUMENT V

MR. THOMPSON'S SIXTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE HIS COUNSEL HAD A CONFLICT OF INTEREST.

One of the most basic constitutional guarantees of a fair trial is the right of a criminal defendant to the zealous representation by counsel. See Gideon v. Wainwright, 375 U.S. 335 (1963). Mr. Thompson was denied his right to a zealous advocate because his long-time counsel had a conflict of interest. Attorney Michael L. Von Zamft represented Mr. Thompson from February 1982 through 1988. In 1988, the State Attorney notified Mr. Von Zamft that Julio Ojeda, who was the lead detective on this case and who obtained statements and/or confessions from Mr. Thompson and his co-defendant, would be a witness for the State. Mr. Von Zamft had represented Mr. Ojeda on federal racketeering charges. After being informed by the State that Detective Ojeda would be a witness against Mr.

Thompson, Mr. Von Zamft sought to remove himself as Mr. Thompson's attorney; his motion to withdraw as counsel was granted in 1988 (R. 68-69).

On April 1, 1976, Mr. Thompson made an incriminating statement to Homicide Detectives Charles Zatrepalek and Julio Ojeda, who were both active in the investigation of this case (PC-R. 1931-1955). A short time later, both detectives were indicted on federal racketeering charges; their criminal activity included the use and trafficking in illicit narcotics. Detective Zatrepalek pled guilty on January 15, 1982, to narcotics conspiracy and became the lead government witness. On September 23, 1982, Detective Ojeda was found guilty of 11 counts of RICO, conspiracy, cocaine distribution, and tax violations. Mr. Von Zamft represented both Mr. Thompson and Mr. Ojeda at the same time, creating a conflict of interest.

In Strickland v. Washington, the Supreme Court found that "when counsel is burdened by an actual conflict of interest . . . counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties." 466 U.S. at 692. Mr. Thompson was denied his right to a zealous advocate because Mr. Von Zamft, who had represented him and developed a relationship with him for six years, had a conflict. See Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988).

Canon 9 of the Florida Code of Professional Responsibility provides that "[a] lawyer should avoid even the appearance of professional impropriety." Ethical Consideration 9-6 states in part:

> Every lawyer owes a solemn duty to uphold the integrity and honor of his profession . . . to conduct himself so as to reflect credit on the legal profession and to inspire the confidence, respect and trust of his clients and of the public. . . .

Canon 9 addresses two concerns. First, it preserves positive public perception of the bar and judicial system, by preventing the impression that the system operates on influence and improper use of client disclosures. Second, it preserves the attorney-client relationship by preventing conduct that would undermine or

abort the relationship. Conduct like Mr. Von Zamft's undermines the client's trust and erodes public confidence in the integrity of the justice system.

The guarantees of the Sixth Amendment are defeated without the benefit of counsel in a proper attorney-client relationship; the protection of the Sixth Amendment "requires the guiding hand of counsel at every step in the proceedings against [the accused]." Powell v. Alabama, 287 U.S. 45, 50 (1932). "This is one of the safeguards . . . deemed necessary to insure fundamental human rights of life and liberty." Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938). See also Strickland, 466 U.S. at 685 ("The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the `ample opportunity to meet the case of the prosecution' to which they are entitled.").

The Supreme Court has recognized that conflicts of interest or divided loyalties violate the Sixth Amendment right to counsel. In Wheat v. United States, 486 U.S. 153 (1988), the majority said trial courts "have an independent interest in ensuring that criminal trials are conducted within the ethical standards of the profession and that legal proceedings appear fair to all who observe them." 486 U.S. at 160 (emphasis added). The Court stressed that the trial must appear fair to the

defendant and the public and that a possible conflict must often be addressed early in the case, when the actual conflict may be difficult to predict:

> [W]e think the District Court must be allowed substantial latitude in refusing waivers of conflicts of interest not only in those rare cases where an actual conflict may be demonstrated before trial, but in the more common cases where a potential for conflict exists which may or may not burgeon into an actual conflict as the trial progresses.

486 U.S. at 162-63. Trial courts have an "independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment." Id. at 161. A trial court must actively investigate every potential conflict and employ the rule articulated in Glasser v. United States: "to preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights." 315 U.S. 60, 62 (1942).

The Sixth Amendment right to conflict-free counsel is violated when a conflict impairs an attorney's ability to vigorously defend his client. Alvarez v. United States, 580 F.2d 1251 (5th Cir. 1978); Stephens v. United States, 595 F.2d 1066 (5th Cir. 1979). Ineffectiveness is presumed if counsel is burdened by a conflict of interest, United States v. Cronic, 466 U.S. 648, 661 n.28; Cuyler v. Sullivan, 446 U.S. 335, 356 (1980) (Marshall, J., concurring in part and dissenting in part), and a showing of prejudice is not necessary because the prejudice is considered so harmful that the defendant need not show how the conflict adversely affected his lawyer's performance. Id. at 350. See also Castillo v. Estelle, 504 F.2d 1243, 1245 (5th Cir. 1974). An evidentiary hearing is required if a defendant alleges an actual conflict of interest that adversely affected his lawyer's representation. Brown v. State, 596 So. 2d 1026 (Fla. 1992); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). Mr. Thompson's Sixth Amendment rights were violated; the circuit court erred in denying relief on this claim.

ARGUMENT VI

THE STATE WITHHELD MATERIAL EXCULPATORY EVIDENCE AND/OR PRESENTED FALSE TESTIMONY IN VIOLATION OF MR. THOMPSON'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS. THE STATE'S MISCONDUCT RENDERED TRIAL COUNSEL INEFFECTIVE. THE CIRCUIT COURT ERRONEOUSLY FOUND THIS CLAIM PROCEDURALLY BARRED.

At Mr. Thompson's resentencing, the State Attorney claimed that Barbara Savage, the State's key witness, was unavailable to testify. Defense counsel was denied the funds and opportunity necessary to conduct its own search for Ms. Savage. As a result, Ms. Savage's prior testimony was read into the record by the State Attorney (R. 1702-1820). Public records in this case reveal that the State may have frightened Ms. Savage into being "unavailable" in order to gain an advantage over the defense. Counsel has learned that when Ms. Savage did not check in with the State Attorney's Office, Mr. Waksman threatened to call the state police. This occurred three months after Mr. Waksman and Detective Smith had spoken with Ms. Savage in Georgia.

The prejudicial impact of Ms. Savage's testimony cannot be overstated. Ms. Savage was present during the commission of the crimes for which Mr. Thompson was sentenced to death, and her 1978 testimony accused Mr. Thompson of acts which the trial court relied upon in its sentencing order in support of all four aggravating factors (R. 758-62). The State also heavily relied upon Ms. Savage's testimony to support its argument for the death

penalty (R. 1608-09). However, she was not an impartial eyewitness but was biased against Mr. Thompson because his co-defendant, Rocco Surace, was Ms. Savage's boyfriend at the time of the crime. Because of the State's misconduct, Mr. Thompson's counsel at his resentencing was unable to cross-examine Ms. Savage and to elicit facts which would have supported several mitigating circumstances, including Mr. Thompson's intoxication at the time of the crime and his domination by co-defendant Rocco Surace.[9]

The State's suppression of evidence favorable to the defense violates due process. United States v. Bagley, 473 U.S. 667 (1985); Brady v. Maryland, 373 U.S. 83 (1963). The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment and regardless of whether defense counsel requests the specific information. The State unreasonably failed to disclose its involvement in the mysterious unavailability of Ms. Savage. Moreover, the State interfered with trial counsel's ability to provide effective representation and to protect Mr. Thompson's right to a fair adversarial testing. Confidence in the outcome is undermined. Kyles v. Whitley, 514 U.S. 419 (1995). The circuit court found that this

[9]Mr. Thompson is also challenging the admission of Ms. Savage's 1978 testimony at the 1989 proceeding on the grounds that it constituted Hitchcock error. See Argument XI.

claim was procedurally barred because it was raised on direct appeal. However, Mr. Thompson's appellate attorney only raised a claim regarding the trial court's admission of Ms. Savage's testimony and the violation of Mr. Thompson's right to confront witnesses; the evidence showing the State may have intentionally made Ms. Savage unavailable was not known to Mr. Thompson's appellate counsel, and a Brady claim was not raised on direct appeal.

ARGUMENT VII

THE TRIAL COURT ERRED IN ALLOWING THE STATE TO READ BARBARA SAVAGE'S 1979 TESTIMONY INTO THE RECORD. ADMISSION OF MS. SAVAGE'S TESTIMONY REPEATED THE HITCHCOCK ERROR THAT CAUSED THIS COURT TO REMAND MR. THOMPSON'S CASE FOR RESENTENCING IN 1987. THE CIRCUIT COURT ERRED IN DENYING THIS CLAIM.

In 1987, this Court remanded Mr. Thompson's case for a new sentencing proceeding because at the 1978 penalty phase proceeding the trial court restricted defense counsel's presentation of mitigating evidence and the jury instructions unconstitutionally restricted the jury's consideration of nonstatutory mitigating circumstances in violation of Hitchcock v. Dugger, 481 U.S. 393 (1987). This Court explained the constitutional errors at Mr. Thompson's sentencing proceeding that mandated a new sentencing:

> Our review of the trial court record in the instant cause reveals, first, that the state, in its closing arguments to the advisory sentencing jury listed the statutory

> mitigating circumstances as those which the jury could consider in its deliberations. Second, Mr. Thompson's defense counsel, in his closing arguments, attempted to advise the jury that, although the statute limited aggravating circumstances to those explicitly set out, it did not so limit the mitigating circumstances. The state objected to this statement and the trial court sustained the objection. The trial judge instructed the jury as to mitigating circumstances in the same manner as the trial judge did in Hitchcock. . . . we remand this cause for a new sentencing hearing by a new jury at which time Mr. Thompson shall be allowed to present all appropriate nonstatutory mitigating evidence.

Thompson v. Dugger, 515 So. 2d 173, 175-76 (Fla. 1987)(footnote omitted). Contrary to this Court's order, Mr. Thompson was not permitted to present all nonstatutory mitigating evidence at his resentencing because the circuit court allowed the State Attorney to read Barbara Savage's 1978 testimony into the record. Because Ms. Savage was a potential source of substantial nonstatutory mitigation that was not elicited at Mr. Thompson's 1978 penalty phase proceedings, the Hitchcock error that compelled this Court to vacate his death sentence was repeated at his 1989 resentencing.

Mr. Thompson was denied the opportunity to meaningfully cross-examine Ms. Savage at his 1978 trial due to the ineffectiveness of his counsel. Ms. Savage's direct testimony filled more than one hundred (100) pages of trial transcript, while her cross-examination consisted of less than five (5)

pages. Defense counsel failed to elicit facts supporting mitigating circumstances such as Mr. Thompson's intoxication at the time of the offense and his domination by co-defendant Rocco Surace. As this Court recognized in 1987, at the time of her testimony, the trial court, State, and defense believed that Mr. Thompson was limited to statutory mitigation; therefore, Mr. Thompson was never given the opportunity to cross-examine Ms. Savage about the mitigation he is constitutionally entitled to present. In addition, Mr. Thompson's original trial counsel was ineffective during his cross-examination of Ms. Savage which opened the door to additional damaging testimony on redirect. This error was repeated in 1989 when Mr. Thompson's counsel allowed the prosecutor to read the cross-examination and redirect of Ms. Savage. Counsel should have requested that the State only be permitted to read the direct examination because the prior cross-examination was deficient and this error prejudiced Mr. Thompson again in 1989 due to his counsel's ineffectiveness.

The circuit court erred in finding this claim procedurally barred. The court denied this claim because "[t]he issue of the unavailable witness was raised on direct appeal." (PC-R. 285). The circuit court simply misunderstood the focus of this claim. On direct appeal, Mr. Thompson's appellate counsel claimed that his Sixth Amendment right to confront witnesses was violated when the trial court allowed the State to read Ms. Savage's prior

testimony into the record, and this Court found it was harmless error. Appellate counsel did not raise a claim under Hitchcock v. Dugger that reading Ms. Savage's 1978 testimony violated this Court's opinion remanding for a new sentencing at which "Mr. Thompson shall be allowed to present all appropriate nonstatutory mitigating evidence." 515 So. 2d at 176. This Court must consider that Ms. Savage testified at Mr. Thompson's 1978 resentencing, which this Court found constitutionally infirm due to Hitchcock error. The State should not have been permitted to read testimony from that proceeding at Mr. Thompson's 1989 resentencing because it was infected with the same constitutional error that caused this Court to remand this case in 1987 -- specifically that Mr. Thompson was denied his right to present nonstatutory mitigation. This error was compounded when the circuit court erroneously limited defense counsel's right to present mitigating evidence through Ms. Savage's affidavit (R. 2236). Ms. Savage was a potential source of nonstatutory mitigation that was never heard by either jury (in 1978 and in 1989) that sentenced Mr. Thompson to death. The trial court erred in admitting this testimony in violation of Hitchcock, and the circuit court erred in finding this claim procedurally barred.

ARGUMENT VIII

THE TRIAL COURT'S EXCLUSION OF MITIGATING EVIDENCE VIOLATED MR. THOMPSON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. THE CIRCUIT

COURT ERRED IN DENYING THIS CLAIM

At Mr. Thompson's resentencing, defense counsel called former Circuit Court Judge N. Joseph Durant, Jr., who presided over Mr. Thompson's original trial in 1976 and sentenced him to death. The following testimony was proffered:

> QUESTION: Now, at that point in time when you had a sentencing hearing, was there any evidence presented to you or on behalf of Mr. Thompson, either by his attorneys or otherwise, indicating that Mr. Thompson had been an abused child, had suffered numerous problems in the home as a child, had a below normal I.Q., had diffused brain damage and had a number of problems along those lines, both psychiatrically and environmentally? Was any of that presented to you at that point in time?
>
> DURANT: No. I don't think any mitigating evidence was ever heard in that trial.
>
> QUESTION: Since that point in time, have you been advised of or made aware of the fact that those mitigating factors, which I just delineated, did, in fact, apply to Mr. Thompson, even though you weren't aware of them back then?
>
> DURANT: Yes.
>
> QUESTION: And, at this point in time, do you believe that Mr. Thompson would have been sentenced to death by you if you had, in fact, known those mitigating circumstances which I just delineated?
>
> STATE: This is the State's objection, Your Honor . . .
>
> THE COURT: . . . I'm going to sustain the objection, but I'll allow the testimony as a proffer.

> DURANT: No. The sentence could not be the same for a couple of reasons.
>
> I frankly think, if the jury heard mitigating testimony, they would not have unanimously recommended the death penalty, and frankly, having been made aware of some of this mitigating testimony, I could not impose the death penalty.
>
> I'm very much opposed to the death penalty. It's the only case I ever gave it in. I had to in this case because there was no mitigating evidence whatsoever.
>
> DEFENSE: Is it your testimony, if mitigating evidence had been presented that I had delineated, would you not have imposed the death penalty, but would have, in fact, sentenced Mr. Thompson to a life sentence, correct.
>
> DURANT: Correct.

(R. 2429-38). The trial court allowed Judge Durant to testify that no mitigation evidence was presented but excluded his testimony about what sentence he would have imposed had the available mitigation evidence been presented.

The exclusion of this evidence violated Eddings v. Oklahoma, 455 U.S. 104 (1982), and Lockett v. Ohio, 438 U.S. 586 (1978). Evidence offered by a capital defendant during the penalty phase is relevant if it either rebuts an aggravating circumstance or constitutes a mitigating factor. Skipper v. South Carolina, 476 U.S. 1 (1986). A mitigating factor is "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence

less than death." Eddings, 455 U.S. at 110 (quoting Lockett, 438 U.S. at 604). In this case, the State Attorney urged the jury to consider that Mr. Thompson had twice been sentenced to death:

> He pled guilty in 1976. Joe Durant sentenced him to death. Overturned for a new trial, he pled guilt[y] in 1978. Judge Tanksley sentenced him to death.

(R. 3058). The trial court allowed the State to argue nonstatutory aggravation -- prior death sentences -- in urging the jury to recommend a death sentence. However, the court excluded defense evidence rebutting the State's argument about Mr. Thompson's first death sentence, which would not have been imposed if not for the ineffectiveness of Mr. Thompson's trial counsel. Judge Durant's testimony constitutes valuable mitigation evidence that should have been admitted at Mr. Thompson's resentencing. The circuit court erred in denying this claim.

ARGUMENT IX

MR. THOMPSON WAS DENIED A FAIR ADVERSARIAL TESTING. MR. THOMPSON WAS PREJUDICED BY STATE MISCONDUCT AND TRIAL COUNSEL'S INEFFECTIVENESS AND AS A RESULT HE WAS IMPROPERLY SENTENCED TO DEATH. THE CIRCUIT COURT ERRED IN DENYING THIS CLAIM.

Mr. Thompson was entitled to the effective assistance of counsel at both the guilt and penalty phases of his capital trial. Strickland v. Washington, 466 U.S. 668 (1984). This right requires that counsel adequately investigate possible

defenses at both phases of the trial; decisions made with less than adequate investigation are not reasonable. Cunningham v. Zant, 932 F.2d 1006 (11th Cir. 1991). Counsel is also required to bring to bear those skills necessary to insure an adversarial testing, including knowledge of the applicable law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Mr. Thompson's counsel failed to act as a zealous advocate; he did not conduct an adequate investigation and insure that his client received a fair adversarial testing. The actions of the State Attorney and the circuit court also rendered Mr. Thompson's counsel ineffective.[10]

Trial counsel was ineffective when he failed to object to State misconduct which occurred throughout Mr. Thompson's trial. The State inflamed the jury's emotions by making an improper opening statement: "If I asked all of you to imagine the most horrible kind of death that you could imagine, Sally Ivestor suffered." (R. 1602). The State Attorney repeated his characterization of the crime as "horrible" (R. 1605) and further vilified Mr. Thompson during his closing statement:

> He's an anti-social personality, mean, bad, evil. That's all he is. He does what he

[10]Mr. Thompson also raised a claim in his Motion to Vacate that he was denied a fair adversarial testing because newly discovered evidence shows that he is innocent of the crime for which he was sentenced to death. Counsel explained that the claim could not be fully pled at this time due to the State's refusal to provide the public records to which Mr. Thompson is entitled.

> wants, when he wants, how he wants and he just don't care, just don't care.
>
> . . .
>
> But what I suggest to you is that some day, if this nation ever has a great debate as to whether or not to keep capital punishment, this case will be discussed because this is the worst case. You could come down here for 100 years. I don't think you will hear of another case like this.

(R. 3071, 3076). Trial counsel also failed to object when the State Attorney directly attacked Mr. Thompson's credibility and character. The State Attorney called Mr. Thompson a "retarded bump-on-a-log" and accused him of "fooling 13 good Americans" when he lied at co-defendant Rocco Surace's trial (R. 3082-84).[11] Trial counsel also failed to object when the State Attorney urged the jury to consider Mr. Thompson's testimony at Mr. Surace's trial as nonstatutory aggravation (R. 3085).

Counsel did not object when the prosecutor told the jury in his closing statement that they "would have nightmares" about this case (R. 3052). Counsel also did not object when the prosecutor misrepresented the reason why this Court remanded Mr. Thompson's case and mocked the necessity for resentencing (R. 3058). Trial counsel also failed to object when the State urged the jury to sentence Mr. Thompson to death because that sentence

[11]Although the State argued that Mr. Thompson lied at Mr. Surace's trial and presented this as a nonstatutory aggravating factor, the State also presented this admittedly false testimony as substantive evidence against Mr. Thompson.

had been previously imposed (R. 3038).[12] In addition to arguing nonstatutory aggravation, the State Attorney diminished the mitigating evidence presented by the defense: "They want you to consider minuscule, meaningless things." (R. 3087; see also 3059; 3082). The prosecutor also misrepresented the mental health testimony and told the jury that Mr. Thompson is "of average intelligence" (R. 3072). Again, trial counsel failed to object.

Trial counsel also failed to object to victim impact evidence presented through the emotional testimony of the victim's mother (R. 1982). Trial counsel failed to object to improper testimony from one of the State's mental health experts about uncharged crimes that were used by the court to reject the presence of a mitigating factor (R. 2825-26). Trial counsel also failed to object to the prejudicial testimony of the medical examiner that although he had performed over 10,000 autopsies, "This is one of the cases that I'll never forget . . . . I can't compare it with any case I have done." (R. 2055-56). Trial counsel was also ineffective for failing to object when the State asked misleading questions regarding the possibility of Mr. Thompson's release in thirteen years; this error was compounded when Mr. Thompson's counsel then failed to conduct an effective

[12]This error is compounded by the court's exclusion of Judge Durant's testimony that he would not have imposed the death sentence had Mr. Thompson's trial counsel presented the available mitigation. See Argument XII.

redirect examination of the witness to clarify that Mr. Thompson would never be released from prison (R. 2360). Counsel missed an opportunity to allay the jury's concerns about the true length of a life sentence for Mr. Thompson and failed to correct the false impression created by the State's questions. Counsel was also ineffective for failing to ensure that Mr. Thompson's rights under Ake v. Oklahoma, 470 U.S. 68 (1985), were protected. Counsel was also ineffective for mentioning in the jury's presence that he was a court-appointed attorney and that Mr. Thompson is indigent (R. 2987).

Trial counsel also failed to strenuously object to the introduction of cumulative and gory autopsy photographs that impermissibly inflamed the jury.[13] Counsel also failed to object to the State's attempts to discredit Ms. Savage's affidavit, which was presented in mitigation, through the hearsay testimony of Detective Greg Smith (R. 2678).Mr. Thompson's rights to due process and to a fair trial were undermined and violated by the State's improper arguments and by his trial counsel's failure to object. Trial counsel failed to object to any of these improper and highly prejudicial comments.

[13]At Mr. Thompson's 1978 trial, the circuit court admitted only four photographs of the victim and this Court found those pictures relevant to establish the heinousness of the crime. 389 So. 2d at 200. At the 1978 trial, the court specifically excluded photographs taken at the medical examiner's office. However, these same photographs were admitted at Mr. Thompson's 1989 resentencing due to his trial counsel's ineffectiveness.

In addition, trial counsel was ineffective during her own closing argument when she committed Hitchcock error by telling the jury that the all-inclusive mitigating factor ("any other aspect of the defendant's character or record, and any other circumstance of the offense") had been limited by caselaw to a few enumerated examples (R. 3102). Counsel was also ineffective when she conceded that the heinous, atrocious, or cruel aggravating factor applies and admitted that the prosecutor had proved three aggravating factors beyond a reasonable doubt (R. 3093; 3095; 3107). Trial counsel failed to secure Mr. Thompson's presence during critical stages of the proceedings (R. 796, 879, 1665-76, 1824) and to ensure that all proceedings occurred in the presence of a court reporter. As a result, no accurate transcript of Mr. Thompson's sentencing proceedings exists.

Mr. Thompson's trial counsel also failed to object when the court gave erroneous jury instructions regarding expert testimony. The jury was given the following instruction:

> Expert witnesses are like other witnesses, with one exception: The law permits an expert witness to give his opinion.
>
> However, an expert's opinion is only reliable when given on a subject about which you believe him to be an expert.
>
> Like other witnesses, you may believe or disbelieve all or any part of an expert's testimony.

(R. 3121-22)(emphasis added). The court's instruction was an

erroneous statement of law; the decision whether a particular witness is qualified as a expert is to be made by the judge alone. Ramirez v. State, 651 So. 2d 1164, 1167 (Fla. 1995). By permitting the jury to accept or reject an expert's qualification in a field, a question of law reserved exclusively for the court, the instruction at issue here allowed the jury to reject the experts' opinions without a legal basis for doing so. See Strickland v. Francis, 738 F.2d 1542, 1552 (11th Cir. 1984). The court violated Mr. Thompson's Sixth Amendment right to present a defense because the expert testimony was the key evidence presented by the defense to establish the presence of mitigating factors. Because the jury was free to reject this mitigating evidence, the instruction violated Mr. Thompson's Eighth Amendment rights. Counsel also failed to object that the jury instructions failed to define reasonable doubt; this error, combined with other erroneous instructions and the State's improper argument, impeded Mr. Thompson's efforts to persuade the jury to recommend a life sentence. Mr. Thompson's counsel failed to object to these erroneous instructions.

Mr. Thompson's trial counsel also failed to request that the court inform the jury why Mr. Thompson was being resentenced twelve years after the crime; the jury was simply told: "You are not to concern yourself, or yourselves, with the passage of time, since the 1976 arrest and incarceration of the defendant on those

charges." (R. 1004). Mr. Thompson's counsel was also ineffective for failing to present evidence to the jury that Mr. Thompson would not be eligible for parole if sentenced to life in prison.

During voir dire, juror Garson expressed this concern:

> . . . so in other words, he only has to go for twelve?
>
> . . .
>
> . . . is he actually getting twenty-five years or twelve, the thirteen years he's been on the cooker?

(R. 1361). Defense counsel noted that other potential jurors were laughing and expressed his fear that the jury possessed a bias against returning a life recommendation because of the mistaken belief that Mr. Thompson would only serve twelve years. Defense counsel requested individual voir dire on this issue, moved to strike Mr. Garson for cause, and moved to strike the entire panel (R. 1369-75). The court denied all motions and simply instructed the jury that Mr. Garson's question "is irrelevant to your consideration . . . . The parole consequences, if any, are not for your consideration." (R. 1389).

The inadequacy of the court's instruction is revealed in Mr. Garson's repeated expressions of concern. After receiving the instruction, he stated: "I still feel that I'm asked to judge the two scales of justice and I have to know what's on those scales. Now, with all due respect, his answer did not answer my question." (R. 1399). Mr. Garson continued:

> MR. GARSON: Again, I go back to my question, which was never answered, that is: is a twenty-five years from the point retroactive on the point he went in or is it retroactive from when he will be--
>
> STATE: We can't answer that question.
>
> MR. GARSON: In other words, is it conceivable, is it possible he could go in twelve years and be out in twelve years?

(R. 1399-1400). Defense counsel renewed his request for individual voir dire, moved to strike Mr. Garson, and moved to strike the entire panel because "his comments contaminated everybody in this room." (R. 1401-03). The motions were denied (R. 1406). The circuit court denied Mr. Thompson his fundamental right to a fair and impartial trial because his jury was not correctly and accurately instructed on the law. Simmons v. South Carolina, 512 U.S. 154 (1994); California v. Ramos, 463 U.S. 992 (1983); Lockett v. Ohio, 438 U.S. 586 (1978); McClesky v. Kemp, 481 U.S. 279 (1987). Defense counsel was also ineffective for failing to tell the jury that Mr. Thompson pled guilty and was sentenced to two life sentences for kidnapping and sexual battery. The jury should have been instructed or received expert testimony that those sentences, with a life sentence without parole for twenty-five years, would have been considered by the parole commission as life without parole. Because Mr. Thompson's two life sentences are consecutive to each other, the prospect of his release even after twenty-five years is nonexistent. Defense

counsel was ineffective for failing to present this evidence to the jury.

The circuit court rendered Mr. Thompson's counsel ineffective by admitting the prior testimony of Barbara Savage. The defense was denied the means and opportunity to ascertain her whereabouts and the reason for her unavailability when the circuit court denied the defense motion for a continuance. Counsel was also denied the appointment of appellate counsel to file an interlocutory appeal of the circuit court's adverse ruling. Ms. Savage was never competently cross-examined by Mr. Thompson's counsel in 1978; the Hitchcock error that mandated reversal of that sentence was repeated in 1989 due to the circuit court and State's actions. See Argument XI.

The trial court also limited and impeded Mr. Thompson's trial counsel's representation during the 1989 penalty phase. The trial court excluded the testimony of defense witnesses who would have testified that Mr. Thompson should not be sentenced to death, including the judge who sentenced Mr. Thompson to death in 1976 (R. 2153, 2161, 2192, 2211, 2225, 2434, 2616, 2659). The trial court also erred in failing to disqualify Assistant State Attorney David Waksman who was a material witness due to his involvement in the unavailability of Ms. Savage (R. 153-56). The trial court refused to conduct individual voir dire and to strike the jury panel after several jurors expressed concern that Mr.

Thompson could be released on parole in twelve years. The trial court also refused to sequester a material witness, Betty Ivestor, the victim's mother (R. 1663-94). The trial court also failed to control audience members who distracted the jury during the trial (R. 1909). The trial court rendered defense counsel ineffective and denied Mr. Thompson his right to a fair adversarial testing.

The circuit court erroneously dismissed this claim. As Mr. Thompson stated throughout his Rule 3.850 motion, the State's noncompliance with his public records requests has prevented him from demonstrating his entitlement to relief. As in Ventura and Walton, where this Court remanded for a Chapter 119 hearing after the circuit court prematurely dismissed the defendants' Rule 3.850 motions, Mr. Thompson must be afforded the opportunity to seek and obtain public records and thereafter must be given the right to amend his motion to vacate.

ARGUMENT X

MR. THOMPSON'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND TO REQUEST A LIMITING CONSTRUCTION.

The trial court found as an aggravating circumstance that the capital felony was committed during the course of a felony, specifically sexual battery (R. 771). A premeditated homicide

was never proved, and there was insufficient evidence to support the theory that Mr. Thompson's actions were premeditated and deliberate. Nothing in the record supports a determination beyond a reasonable doubt that Mr. Thompson intended the victim to die, and Mr. Thompson testified to the contrary (R. 3254). On direct appeal, this Court agreed that "the evidence in this case does not establish that the defendant planned or prearranged to commit the murder prior to the commencement of the conduct that led to the death of the victim." Thompson v. State, 619 So. 2d at 266.

The consideration and finding of the felony murder aggravating factor rendered the aggravating circumstance illusory and infected the weighing process. Stringer v. Black, 503 U.S. 222 (1992). Although this Court has held that the felony murder aggravating factor alone cannot support a death sentence, Proffitt v. State, 510 So. 2d 896, 898 (Fla. 1987); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984), the trial court neither instructed the jury on nor applied this limitation. The trial court considered and found an automatic statutory aggravating circumstance which merely repeats elements of the offense for which Mr. Thompson had already been found guilty; therefore, Mr. Thompson entered the penalty phase already eligible for the death penalty, whereas other similarly (or worse) situated defendants would not. Porter v. Singletary, 564 So. 2d 1060 (Fla. 1990). A

State cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer, 503 U.S. at 236. As the Supreme Court observed in Maynard v. Cartwright: "Limiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 486 U.S. 356, 362 (1988). Florida's felony murder aggravating circumstance violates the Eighth Amendment because it fails to channel and narrow the sentencer's discretion and the class of persons eligible for the death penalty and because it allows the jury to automatically return a death sentence upon a finding of guilt of first-degree felony murder.

Mr. Thompson did not receive the reliable and individualized sentencing determination required by the Eighth and Fourteenth Amendments. This error cannot be harmless in this case. Stringer, 503 U.S. at 232 (recognizing that "when the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale"). The circuit court erroneously found that this claim was procedurally barred.

ARGUMENT XI

THE JURY INSTRUCTIONS UNCONSTITUTIONALLY SHIFTED THE BURDEN TO MR. THOMPSON TO PROVE THAT DEATH WAS AN INAPPROPRIATE SENTENCE. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND TO REQUEST AN ALTERNATIVE

INSTRUCTION.

Mr. Thompson's sentencing jury was improperly instructed that the mitigating factors must outweigh the aggravating circumstances to justify a life recommendation (R. 3077-78, 3083, 3116, 3119). Both the trial court and the prosecutor shifted to Mr. Thompson the burden of proving whether he should live or die in violation of Mullaney v. Wilbur, 421 U.S. 684 (1975). See also Francis v. Franklin, 471 U.S. 307 (1985); In re Winship, 397 U.S. 358 (1970). The prejudicial effect of this error was compounded by the prosecutor's dismissive attitude toward mitigation which further impeded Mr. Thompson's efforts to persuade the jury to recommend a life sentence. In his opening statement, the prosecutor committed the following errors: he equated mitigation with a plea for mercy (R. 1603); he commented that Mr. Thompson showed no mercy to the victim (R. 1603); he told the jury not to consider the mitigating factors "so heavily" (R. 1604); and he minimized the evidence of mental illness and mental retardation as showing that Mr. Thompson is "not as bright as the average person" (R. 1604). The prosecutor repeated this improper commentary during his closing argument (R. 3059; 3072; 3082; 3087).

The erroneous instructions in this case injected misleading and irrelevant factors into the sentencing determination in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985);

Hitchcock v. Dugger, 481 U.S. 393 (1987); and Maynard v. Cartwright, 486 U.S. 356 (1988). The standard which the State Attorney argued and upon which the jury and judge relied is a distinctly egregious abrogation of Florida law and the Eighth Amendment. See McKoy v. North Carolina, 494 U.S. 433, 454 (1990)(a death sentence based on erroneous instructions "represents imposition of capital punishment through a system that can be described as arbitrary or capricious") (Kennedy, J., concurring). In this case, Mr. Thompson was required to prove that life was the appropriate sentence. As a result, Mr. Thompson's death sentence is unreliable in violation of the Eighth and Fourteenth Amendments. The circuit court erroneously found this claim was procedurally barred.

ARGUMENT XII

MR. THOMPSON'S JURY WAS MISLED BY INSTRUCTIONS THAT INACCURATELY DILUTED ITS SENSE OF SENTENCING RESPONSIBILITY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO OBJECT AND TO REQUEST AN ALTERNATIVE INSTRUCTION.

A capital sentencing jury must be properly instructed as to its role in the sentencing process. Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 489 U.S. 1071 (1989). In Mann, a capital habeas petitioner was awarded relief when he presented a claim involving

prosecutorial and judicial comments and instructions that diminished the jury's sense of responsibility. To deny Mr. Thompson relief on the same claim would result in the arbitrary and capricious imposition of the death penalty in violation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972).

At Mr. Thompson's resentencing, prospective jurors and the jury were told that the ultimate responsibility for sentencing Mr. Thompson rested with the trial court; the jury's sense of responsibility for Mr. Thompson's sentence was diminished (R. 1005, 1071-1073, 1089, 1324, 3115). Juror responsibility was further diminished by the State's opening and closing statements; the record is replete with characterizations of the jury's decision as only "advisory" (R. 1610, 3115, 3116). The State also undermined the jury's sense of responsibility in its closing argument by suggesting the entire resentencing was a mockery of justice because Mr. Thompson had already been sentenced to death on two prior occasions (R. 3038).

The trial court also misled and diminished the jurors' sentencing responsibility. For example, the trial court's instructions charged the jury as follows:

> Ladies and gentlemen of the jury, it is now your duty to advise the Court as to what punishment should be imposed upon the Defendant for his crime of first degree murder.
>
> As you have been told, the final decision as to what punishment shall be imposed is a responsibility of the Judge.

(R. 3115). These statements and instructions were incorrect because under Florida law the jury is a co-sentencer; the jury has primary responsibility for sentencing, and its recommendation is entitled to great weight. Espinosa v. Florida, 505 U.S. 1079 (1992). Thus, suggestions and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence or is free to impose whatever sentence he or she deems appropriate irrespective of the jury's recommendation are inaccurate and a misstatement of Florida law. See Mann, 844 F.2d at 1450-55 (discussing the jury's critical role in Florida's capital sentencing scheme); Espinosa, 505 U.S. at 1082 ("Florida has essentially split the weighing process in two"). The jury's sentencing recommendation may only be overturned by the trial court if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Thompson's jury, however, was led to believe that its determination meant very little and that the trial court was free to ignore its recommendation.

In Caldwell, the Supreme Court held that "it is constitutionally impermissible to rest a death sentence on a determination by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death lies elsewhere" and that prosecutorial arguments that diminish the jury's sense of responsibility violate the Eighth Amendment. 472 U.S. at 328-29. In Caldwell, the Court vacated the defendant's death sentence because the jury's "view of its role in the capital sentencing procedure . . . [was] fundamentally incompatible with the Eighth Amendment's heightened `need for reliability in the determination that death is the appropriate punishment in a specific case.'" Id. at 340. Mr. Thompson is entitled to the same relief.

The Court in Caldwell also recognized the unacceptable risk of bias in favor of the death penalty created by "state-induced suggestions that the sentencing jury may shift its sense of responsibility." Id. at 330. A jury that is not convinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the ultimate sentencer; thus, diminishing the jury's sense of responsibility creates the risk of a death sentence regardless of the presence of circumstances supporting a life sentence. Id. at 331-32. The Caldwell Court also recognized that a jury confronted with the awesome responsibility of sentencing a capital defendant might

find diminution of its role and responsibility attractive. Id. at 332-33 (noting that "the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role.").

Mr. Thompson's death sentence is unreliable in violation of the Eighth and Fourteenth Amendments. The circuit court erroneously found this claim procedurally barred.

ARGUMENT XIII

MR. THOMPSON'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE. THIS COURT'S HARMLESS ERROR ANALYSIS AFTER STRIKING THIS AGGRAVATOR WAS CONSTITUTIONALLY DEFICIENT. THE CIRCUIT COURT ERRONEOUSLY FOUND THESE CLAIMS TO BE PROCEDURALLY BARRED.

Mr. Thompson's jury was given the following instruction:

> The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

(R. 3117). Mr. Thompson's trial counsel argued that the jury should not be instructed on this aggravating factor because it does not apply to the facts of the crime; however, once the court rejected this argument, counsel did not object that the instruction was vague and overbroad. On direct appeal, this Court struck the cold, calculated, and premeditated aggravator but found it was harmless error to instruct the jury on this circumstance. 609 So. 2d at 266.

In Richmond v. Lewis, the Supreme Court held that "in a

`weighing' State, where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain." 506 U.S. 40, 46 (1992). A facially vague aggravating factor may be cured if "an adequate narrowing construction of the factor" is adopted and applied; however, in order for the Eighth Amendment error to be cured, the narrowing construction must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 47-48. In Mr. Thompson's case, the cold, calculated, and premeditated factor was overbroadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988), failed to genuinely narrow the class of persons eligible for the death sentence, Zant v. Stephens, 462 U.S. 862, 876 (1983), and, as this Court found on direct appeal, did not apply to the facts of this case as a matter of law. Thompson, 619 So. 2d at 266. As a result, Mr. Thompson's death sentence was imposed in violation of the Eighth and Fourteenth Amendments. Espinosa v. Florida, 505 U.S. 1079 (1992); Stringer v. Black, 503 U.S. 222 (1992); Socher v. Florida, 504 U.S. 527 (1992); Maynard; Godfrey.

The instruction given to Mr. Thompson's jury was identical to that which this Court condemned in Jackson v. State, 648 So. 2d 85, 87-88 (Fla. 1994). In Jackson, this Court explained:

> This standard instruction simply mirrors the

> words of the statute. Yet, this Court has found it necessary to explain that the CCP statutory aggravator applies to "murders more cold-blooded, more ruthless, and more plotting that the ordinarily reprehensible crime of premeditated first-degree murder" and where the killing involves "calm and cool reflection." This Court has adopted the phrase "heightened premeditation" to distinguish this aggravating circumstance from the premeditation element of first-degree murder.

648 So. 2d at 88 (citations omitted). Mr. Thompson was deprived of his right to an accurately informed jury. Simmons v. South Carolina, 512 U.S. 154 (1994). Despite the substantial mitigation presented in this case, Mr. Thompson was sentenced to death because of the improper instructions on this aggravating circumstance.

Mr. Thompson's jury recommended a death sentence by a narrow vote of seven to five. The effect of the vague instruction on the cold, calculated, and premeditated circumstance cannot be considered harmless where the jury's vote was so close. This Court's harmless error analysis after striking this aggravator was constitutionally deficient. This Court failed to consider the prejudicial effect of this error in conjunction with the effect of the vague instruction on the heinous, atrocious, or cruel aggravator. This Court also failed to consider that the judge and jury relied upon the same facts to support two aggravating circumstances: cold, calculated, and premeditated and heinous, atrocious, or cruel. This not a case where this

Court found that the aggravating circumstance would apply under any definition; the analysis performed by this Court was nothing more than an automatic affirmance of Mr. Thompson's sentence. The circuit court found that the inadequacy of this Court's harmless error analysis should have been raised on direct appeal (PC-R2. 287). Clearly, the circuit court is mistaken; this Court's harmless error analysis was contained in its opinion affirming Mr. Thompson's conviction and sentence. The brief raising claims challenging his sentence could not possibly have included a claim challenging this Court's opinion issued after the brief was written.[14] Mr. Thompson's death sentence is unreliable in violation of the Eighth and Fourteenth Amendments. In addition, because Mr. Thompson's trial counsel did not object to the inadequate instructions on this aggravator, but only to its inapplicability to Mr. Thompson's case, this issue could not have been raised on direct appeal.

ARGUMENT XIV

MR. THOMPSON WAS INCOMPETENT TO MAKE A VOLUNTARY, KNOWING, AND INTELLIGENT GUILTY PLEA. THE PLEA COLLOQUY CONDUCTED BY THE TRIAL COURT WAS CONSTITUTIONALLY INADEQUATE IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. MR. THOMPSON WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL.

[14]The circuit court's illogical explanation of its denial of this claim provides further evidence of the court's bias against Mr. Thompson. The court's rush to deny relief on all claims without proper consideration of Mr. Thompson's entitlement to an evidentiary hearing and relief resulted in this obviously flawed conclusion. See Argument II.

Mr. Thompson's decision to enter a guilty plea was not voluntarily, knowingly, or intelligently made. A guilty plea "must be voluntarily made by one competent to know the consequences of that plea and must not be induced by promises, threats or coercion." Mikenas v. State, 460 So. 2d 259, 361 (Fla. 1984). Mere awareness of the ongoing legal proceedings is insufficient for competency under the Eighth and Fourteenth Amendments; a defendant must have a "rational understanding" of the proceedings. Laferty v. Cook, 949 F.2d 1546 (10th Cir. 1991), cert. denied, 112 S. Ct. 1942 (1992). Mr. Thompson did not understand the terms of the plea agreement, did not comprehend the rights he was foregoing by entering the plea, and was unable to make a rational decision based on his own best interests. Because he was not legally competent, Mr. Thompson was incapable of making "an intentional relinquishment of a known right or privilege." Horace v. Wainwright, 781 F.2d 1558, 1563 (11th Cir.), cert. denied, 107 S. Ct. 235 (1986)(quoting Johnson v. Zerbst, 304 U.S. 458, 464 (1938)). The fact that Mr. Thompson's judgment was impaired by his mental disability renders his guilty plea constitutionally infirm. A claim that a defendant was incompetent at the time of trial can be proven by subsequent presentation of collateral evidence as to actual competency. Nathaniel v. Estelle, 493 F.2d 794, 796-97 (5th Cir. 1974).

Proper investigation and evaluation by counsel and the experts would have revealed that Mr. Thompson's decisions were a product of his mental disability and not the product of rational thought. Mr. Thompson was evaluated for competency in 1976 by four court-appointed mental health experts; no defense expert was retained. The evaluations conducted by the court-appointed experts were inadequate because they failed to obtain a reliable, independent case history but instead relied solely on Mr. Thompson's self-reporting and information supplied by the State Attorney's Office. These same experts acknowledged that Mr. Thompson's memory was poor and that he could not remember the charges against him. The trial court erroneously relied on this inadequate and outdated information in 1978 despite defense efforts to have Mr. Thompson re-evaluated. In addition, the court's inquiry into whether Mr. Thompson was aware of the ramifications of his guilty plea were insufficient. Mr. Thompson was incompetent to make rational decisions about his case. Counsel failed to conduct an adequate investigation to determine whether Mr. Thompson knew of his legal rights and options. Trial counsel was ineffective for withholding information and failing to properly advise Mr. Thompson as to the facts and law of his case. The outcome of Mr. Thompson's plea and sentencing was unreliable and no adversarial testing occurred in violation of Mr. Thompson's rights.

ARGUMENT XV

THE TRIAL COURT ERRED IN PERMITTING THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS AND CONSIDERING THE SAME ACTS TO SUPPORT DIFFERENT AGGRAVATING FACTORS.

The judge and jury who sentenced Mr. Thompson were presented with and considered nonstatutory aggravating circumstances in the form of (1) Mr. Thompson's false testimony at his co-defendant Rocco Surace's trial, (2) the State's argument that Mr. Thompson had already been sentenced to death twice,[15] (3) evidence of uncharged crimes.[16]

Mr. Thompson testified at his co-defendant's trial and falsely claimed that Mr. Surace did not participate and that he alone inflicted all of the victim's injuries. The State Attorney expressed his belief that Mr. Thompson had lied at Mr. Surace's trial when he told the jury that he "fool[ed] 13 good Americans" when he lied at co-defendant Rocco Surace's trial (R. 3082-84). The State Attorney also urged the jury to consider Mr. Thompson's testimony at Mr. Surace's trial as nonstatutory aggravation:

> But to allow Mr. Thompson to benefit by his lying to a jury would be a second tragedy, and that's why he is not entitled to say if Rocco's not on Death row, why should I be on Death row? That's the answer, because he

[15]The State Attorney told the jury: "He pled guilty in 1976. Joe Durant sentenced him to death. Overturned for a new trial, he pled guilt[y] in 1978. Judge Tanksley sentenced him to death." (R. 3058).

[16]Dr. Jaslow testified that Mr. Thompson admitted to committing armed robberies for which he was never charged (R. 2824-26).

lied to the jury.

(R. 3085). The falsity of his testimony at Mr. Surace's trial is also demonstrated by Mr. Thompson's original handwritten confession, his stenographically recorded statement, and the testimony of Barbara Savage which are consistent and describe the active participation of Mr. Surace (R. 257-58; 261-75; 357-463). All of this evidence suggests that Mr. Surace took a leadership role. The State repeatedly took the position that Mr. Thompson lied at Mr. Surace's trial in hopes of obtaining some future relief for himself.[17] However, despite its acknowledgement that this testimony was false, the State also took the inconsistent position that the substance of Mr. Thompson's testimony should be used against him, and Mr. Thompson's false testimony was read into the record (R. 1996-2044). The consideration of nonstatutory aggravating circumstances violated Mr. Thompson's Eighth Amendment rights and prevented the constitutionally required narrowing of the sentencer's discretion. Stringer v. Black, 503 U.S. 222 (1992); Maynard v. Cartwright, 486 U.S. 356 (1988). As a result of these impermissible aggravating factors, Mr. Thompson was sentenced to death on the basis of an unguided emotional response in violation of his constitutional rights.

In addition, Mr. Thompson's jury was instructed to consider

[17]In fact, Mr. Thompson took full blame for this crime because he believed Mr. Surace would have him killed in prison if he did not exonerate him (R. 40).

all of the aggravating factors enumerated in Florida's sentencing statute, including during "the commission of or the attempt to commit the crime of kidnapping and/or sexual battery;" "especially wicked, evil, atrocious or cruel;" and cold, calculated and premeditated (R. 3116-17). Because the jury was never instructed to consider the kidnapping and sexual battery charges as constituting one aggravating factor, it can only be assumed that the jury considered these two underlying felonies as constituting separate aggravating circumstances.

The effect of this error is compounded by the fact that the facts used to justify the imposition of the heinous, atrocious or cruel aggravator are virtually identical to those used to support cold, calculated and premeditated (R. 260-62). This Court has held that "doubling" of aggravating factors is impermissible. Bello v. State, 547 So. 2d 914, 917 (Fla. 1989)(holding that "application of these aggravating factors is error where they are based on the same essential feature of the capital felony."). See also Castro v. State, 597 So. 2d 259, 261 (Fla. 1992); Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783 (Fla. 1976); Clark v. State, 402 So. 2d 1139 (Fla. 1980). The jury was allowed to rely on all of these aggravating factors in reaching its sentencing recommendation. Mr. Thompson's sentencing jury was not instructed by the court that these aggravators were to be merged into one aggravating

circumstance. This type of "doubling" renders a capital sentencing proceeding fundamentally unfair and unreliable and results in an unconstitutionally overbroad application of aggravating factors that fails to genuinely narrow the class of persons eligible for the death penalty. Godfrey v. Georgia, 446 U.S. 420 (1980).

The circuit court erroneously found that these claims should have been raised on direct appeal. Because Mr. Thompson's trial counsel failed to object, these claims were not preserved. Mr. Thompson is entitled to relief because no adversarial testing occurred. These errors cannot be considered harmless because the jury voted so narrowly (seven to five) in favor of a death recommendation.

ARGUMENT XVI

THE RULE PROHIBITING MR. THOMPSON'S LAWYERS FROM INTERVIEWING JURORS TO SEE IF CAUSE EXISTS TO DETERMINE THE APPROPRIATENESS OF RELIEF RELATED TO JUROR MISCONDUCT VIOLATES THE FIRST, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, which prohibits lawyers from communicating with jurors, is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution and under article I, section 21 of the Florida Constitution. Under the Eighth and Fourteenth Amendments Mr. Thompson is entitled to a fair trial. His inability to fully explore possible misconduct and biases of the jury prevents him from fully showing the unfairness of his trial.

Misconduct may have occurred that Mr. Thompson can only discover through juror interviews Cf. Turner v. Louisiana, 379 U.S. 466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).[18]

Mr. Thompson must be permitted to interview the jurors who acted as co-sentencers at his capital trial. The rule prohibiting such contact prevents Mr. Thompson from fully investigating and pleading claims that may entitle him to relief in violation of his right of access to the courts and his due process right to a fair trial.

ARGUMENT XVII

MR. THOMPSON IS INSANE TO BE EXECUTED.

[18]Mr. Thompson raised a juror misconduct claim in his Rule 3.850 motion that was dismissed by the circuit court due to the insufficiency of the facts pled. Mr. Thompson cannot plead any facts because of the rule prohibiting his lawyers from communicating with or causing another to communicate with the jurors.

Mr. Thompson is insane to be executed. In Ford v. Wainwright, 477 U.S. 399 (1986), the United States Supreme Court held that the Eighth Amendment protects individuals from the cruel and unusual punishment of being executed while insane. Mr. Thompson acknowledges that this claim is not ripe for consideration. However, it must be raised to preserve the claim for review in future proceedings and in federal court should that be necessary. See Stewart v. Martinez-Villareal, 118 S.Ct. 1618 (1998). Accordingly Mr. Thompson must raise this issue in the instant pleading.

CLAIM XVIII
NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT EXECUTION BY ELECTROCUTION IS CRUEL AND/OR UNUSUAL PUNISHMENT AND VIOLATES MR. THOMPSON'S EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The four executions conducted in Florida's electric chair in 1998 demonstrate that Florida's use of judicial electrocution constitutes cruel and unusual punishment because it does not result in instantaneous death and inflicts unnecessary pain and torture on the condemned. In re Kemmler, 136 U.S. 436, 443 (1890); Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 474 (1947). Florida officials are deliberately indifferent to the risks inflicted by their electric chair. See Farmer v. Brennan, 511 U.S. 825 (1994); Helling v. McKinney, 509 U.S. 25 (1993).

CONCLUSION[19]

Mr. Thompson submits that relief is warranted. He is entitled to a hearing on his claim that the State has not complied with his public records requests and thereafter must be afforded the opportunity to amend his Rule 3.850 motion.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 25, 1999.

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[19]In his Rule 3.850 motion, Mr. Thompson raised several issues that had been raised on direct appeal. The State argued and the circuit court found these claims were barred because they were raised on direct appeal and could not be relitigated in postconviction. Mr. Thompson accepts the State's position as to these claims, and, in reliance on that position, Mr. Thompson is not raising those issues in this brief, as their presentation on direct appeal preserves them for federal court purposes. To be clear, Mr. Thompson is not waiving these issues but rather is relying on the State's position that they were raised on direct appeal.

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