IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,657

EDWARD EUGENE RAGSDALE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of Rule 3.850 relief, as well as various rulings made during the course of Mr. Ragsdale's request for postconviction relief.

The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PC-R" -- record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Ragsdale has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Ragsdale, through counsel, accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND OF THE FACTS

On January 16, 1986, the grand jury of Pasco County, Florida, returned an indictment against Mr. Ragsdale in which he and co-defendant Leon Illig were charged with the first-degree murder and armed robbery of Ernest Mace (R. 775). On January 22, 1987, Mr. Ragsdale's appointed counsel, William R. Webb, filed a Motion to Withdraw, which motion was granted on February 2, 1987 (R. 842). The Court appointed A. J. Ivie to represent Mr. Ragsdale. On June 19, 1987, Mr. Ivie filed a Motion to Withdraw as Mr. Ragsdale's counsel, which motion was granted on June 30, 1987 (R. 856). Thereafter, the Court appointed a succession of three attorneys to represent Mr. Ragsdale, all of whom were allowed to withdraw citing conflict of interest (R. 858, 860, 862). On August 21, 1987, the Court appointed Robert Culpepper, III, who eventually represented Mr. Ragsdale at trial (R. 862).

Prior to Mr. Ragsdale's trial, co-defendant Illig entered into a plea agreement whereby he pled guilty to murder and received a life sentence for his involvement in the homicide. Mr. Ragsdale's trial was held on May 2-4, 1988. The jury found Mr. Ragsdale guilty of first-degree murder and armed robbery on May 4, 1988 (R. 632-33). A one-day penalty phase was held on May 5, 1988. Defense counsel presented only the brief testimony of Mr. Ragsdale's brother Terry, who had testified on behalf of the State during the guilt-innocence phase (R. 686). The jury was instructed on the aggravating circumstances of committed by a person under sentence of imprisonment; committed in the commission of armed robbery; pecuniary gain; especially wicked, evil, atrocious, and cruel; and cold, calculated, and premeditated (R. 749-50).

The sentencing jury, during deliberations, delivered several notes to the trial court. First, the jury asked "We would like a legal definition of no contest, nolo contendere" (R. 757).[1] The jury later came back another question: "Is it unjust-just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony heard by the jurors, the jurors believe the defendant may have had a lesser part in the murder?" (R. 762). The court responded by telling them that it was their job (R. 762). By a vote of 8 to 4, the jury recommended the death penalty (R. 765).

Judge Wayne L. Cobb sentenced Mr. Ragsdale to death on May 13, 1988 (R. 663-68). The trial court found all of the aggravating circumstance on which the jury was instructed except for "cold, calculated and premeditated" (R. 665-66). The trial court found no mitigating circumstances.

This Court affirmed Mr. Ragsdale's convictions and sentence of death. Ragsdale v. State, 609 So. 2d 10 (Fla. 1992).

Mr. Ragsdale filed his motion for postconviction relief under Fla. R. Crim. P. 3.850 on March 24, 1994, some eight (8) months before the two-year date under then-existing Rule 3.850 (PC-R. 10-75). In that motion, Mr. Ragsdale included a claim that various state agencies had not complied with his public records requests (PC-R. 16-19). For example, Mr. Ragsdale notified the Court that the Pasco County State Attorney's Office as well as the Pasco County Sheriff's Office had not complied with Chapter 119 (PC-R. 12; 17).

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[1]During the penalty phase, Mr. Ragsdale's counsel offered co-defendant Illig's conviction in mitigation; Illig had pled nolo contendere to his involvement in the killing (R. 697).

On October 17, 1994, Mr. Ragsdale filed a Motion to Compel Disclosure of Documents Pursuant to Chapter 119.01, Fla. Stat. (PC-R. 79-84). On November 16, 1994, Mr. Ragsdale filed an amended Rule 3.850 motion (PC-R. 85-187).

On October 10, 1995, the State Attorney's Office released its files to Mr. Ragsdale's counsel (PC-R. 192; 225). However, the State Attorney's Office claimed numerous statutory exemptions (PC-R. 225-31). On January 31, 1996, Mr. Ragsdale amended his previously-filed motion to compel disclosure of public records pursuant to Chapter 119 (PC-R. 188-91), arguing, inter alia, that the State was obligated to submit the allegedly exempted materials for an in camera inspection, and that an evidentiary hearing was warranted (PC-R. 189).

On March 4, 1996, the State of Florida filed its responsive pleading to Mr. Ragsdale's motion to compel Chapter 119 materials, detailing the various statutory bases on which it was relying in refusing to disclose records to Mr. Ragsdale (PC-R. 225-31).[2] At a hearing on March 4, 1996, Judge Cobb granted Mr. Ragsdale's counsel leave to respond in writing to the detailed list of statutory exemptions claimed by the State Attorney's Office because counsel had just been served in open court (PC-R. 571; 575-77). Thereafter, on March 12, 1996, Mr. Ragsdale filed his written objections to the propriety and applicability of the putative statutory exemptions asserted by the State Attorney's Office (PC-R. 192-220).

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[2]The index to the Record on Appeal erroneously states that the State's responsive pleading was filed on May 10, 1996. The State's pleading contains a certificate of service bearing the date March 4, 1996 (PC-R. 231). Mr. Ragsdale's counsel was personally served with the State's pleading in open court on March 4, 1996 (PC-R. 570-82).

On May 10, 1996, Judge Cobb entered an order denying Mr. Ragsdale's request for production of records under Chapter 119 (PC-R. 279). On May 10, 1996, Mr. Ragsdale filed a Motion to Seal Materials from State Attorney's Office in Court File and Notice of Amendment (PC-R. 280-81). Judge Cobb denied the request to seal the documents that had been provided to him by the State Attorney's Office for an in camera inspection (PC-R. 282).

On July 12, 1996, Mr. Ragsdale filed a Consolidated Motion to Vacate Judgments of Conviction and Sentences with Special Request for Leave to Amend (PC-R. 283-394). On July 19, 1996, Judge Cobb ordered a Huff hearing, which was conducted on September 16, 1996 (PC-R. 584-95). At the commencement of the Huff hearing, Mr. Ragsdale's counsel noted that the State had not filed an answer to Mr. Ragsdale's Rule 3.850 motion and that "at this point the State would have been deemed to have waived any arguments or defenses as to any affirmative defenses regarding any of the claims raised in this motion" (PC-R. 586-87). The State's position was that it had not been ordered by Judge Cobb to file an answer to the 3.850 motion, yet proceeded to argue and raise affirmative defenses to the claims raised by Mr. Ragsdale (PC-R. 590-91).

On September 30, 1996, Judge Cobb denied Mr. Ragsdale's Rule 3.850 motion without an evidentiary hearing (PC-R. 399). Based on the contents of Judge Cobb's order, Mr. Ragsdale filed a Motion to Disqualify Judge and Supporting Memorandum of Law (PC-R. 539-48). On October 18, 1996, Judge Cobb entered an order denying the motion to disqualify as legally insufficient (PC-R. 549).

On October 18, 1996, Mr. Ragsdale sought rehearing from the order denying Rule 3.850 relief (PC-R. 550-57). On October 24, 1996, Judge Cobb entered an order denying rehearing (PC-R. 558). A notice of appeal was thereafter timely filed (PC-R. 559-60).

SUMMARY OF THE ARGUMENTS

1. The lower court erred in its summary disposition of public records issues. The State Attorney's Office claimed numerous exemptions from disclosure not only under Chapter 119, but under other irrelevant statutory provisions. The numerous exemptions claimed by the State Attorney's Office were inapplicable on their face, and lacked any good faith basis. The lower court erred in failing to grant an evidentiary hearing on the applicability of the asserted exemptions, contrary to this Court's ruling in Walton v. Dugger. The lower court also erred in failing to conduct an adequate in camera inspection of the materials withheld from Mr. Ragsdale. By its own admission, the lower court merely "perused" the documents, failing to make any findings with respect to the validity or applicability of the putative exemptions asserted by the State Attorney's Office. By its own admission, the lower court further failed to conduct an in camera inspection of three (3) audio cassette tapes provided by the State Attorney's Office. Because none of the exemptions claimed by the State Attorney's Office were validly claimed, these materials should be disclosed to Mr. Ragsdale immediately. In the alternative, the Court should remand this cause to the lower court for an evidentiary hearing, to conduct a proper in camera inspection of the withheld documents, and disclose those documents for which no exemption was validly claimed. Mr. Ragsdale

should thereafter be given no less than sixth (60) days within which to amend his postconviction motion with any materials disclosed by the lower court.

2. The lower court erred in denying Mr. Ragsdale's motion to disqualify Judge Wayne Cobb. After receiving Judge Cobb's order summarily denying his Rule 3.850 motion, in which Judge Cobb labeled most of Mr. Ragsdale's claims for relief "bogus," a "sham," and "nothing more than abject whining," Mr. Ragsdale timely filed a motion to disqualify Judge Cobb. Because the nature and tenor of Judge Cobb's order raised more than a reasonable fear on Mr. Ragsdale's part that the court harbored bias and prejudice not only against Mr. Ragsdale but also his collateral counsel, Mr. Ragsdale requested that a neutral, impartial tribunal be assigned to hear his case. Judge Cobb's refusal to disqualify himself was erroneous, and this Court should remand with directions that Mr. Ragsdale's claims be considered before a neutral impartial judge.

3. The lower court erred in summarily denying Mr. Ragsdale's claim that he was denied a reliable adversarial testing at the guilt phase of his capital trial. The limited attachments from the record that accompanied the lower court's order do not conclusively demonstrate that Mr. Ragsdale is not entitled to relief; rather, the attachments support Mr. Ragsdale's entitlement to an evidentiary hearing. Mr. Ragsdale's postconviction motion alleged numerous extra-record allegations that cannot be refuted by the record. For example, the State failed to disclose photographs taken by the Pasco County Sheriff's Office, photographs which have since been disclosed pursuant to Chapter 119 and which establish that luminal testing was conducted on the clothing of both Mr. Ragsdale and his co-defendant Leon Illig and revealed the presence of blood on

the clothing of Illig, and none on Mr. Ragsdale. Despite trial counsel's efforts to obtain these photographs, they were never produced and never shown to the jury. The State's failure to disclose these photographs further hampered trial counsel's efforts to defend Mr. Ragsdale, for example, trial counsel never presented any forensic testimony or evidence to support the defense theory that Illig, not Mr. Ragsdale, cut the victim's throat. Mr. Ragsdale also alleged that a key State's witness gave false testimony when he testified that Mr. Ragsdale confessed to him. The State procured this false testimony by threatening the witness. The jury also never heard the testimony of Leon Illig because defense counsel failed to know the law regarding invocation of the Fifth Amendment privilege. Illig was never required to testify because he invoked the Fifth Amendment, yet he had already pled guilty, was sentenced, and never appealed his conviction. Case law at the time established that Illig could not invoke the Fifth Amendment and was therefore obligated to testify. Counsel, however, failed to know the law. Trial counsel also failed to investigate and present available evidence of voluntary intoxication, as well as available evidence that Mr. Ragsdale was incapable of making a knowing, voluntary, and intelligent waiver of his Miranda rights. Due to the State's Brady violations, counsel's ineffective assistance, and/or newly discovered evidence, confidence in the outcome of Mr. Ragsdale's guilt phase is undermined. An evidentiary hearing was and is warranted before a neutral, impartial tribunal.

4. The lower court erred in summarily denying Mr. Ragsdale's claim that he was denied an adversarial testing at the penalty phase of his capital trial. The only witness called by the defense at the penalty phase was Mr. Ragsdale's brother, the very

witness who testified for the prosecution at the guilt phase that Mr. Ragsdale confessed the killing to him. Other family members, including Mr. Ragsdale's mother and other siblings, were available to testify yet counsel, without a tactic or strategy failed to investigate and prepare. Counsel also failed to investigate Mr. Ragsdale's mental health background and seek the appointment of an expert to assist and testify during the penalty phase. Despite knowing that Mr. Ragsdale had a severe head injury suffered during a car accident, counsel failed to seek the services of a neurological or neuropsychological expert. No mental health mitigation was presented at the penalty phase. Mr. Ragsdale has since been evaluated by qualified experts, and it has been determined that Mr. Ragsdale does suffer from frontal lobe organic brain damage, mental retardation, and other psychological deficits. Statutory and nonstatutory mitigating circumstances apply to Mr. Ragsdale, yet no such evidence was presented at the penalty phase due to counsel's failure to investigate and prepare. Here, prejudice is apparent. The jury returned a recommendation of 8 - 4 for the death penalty, and asked several questions which revealed the jurors' concerns about the relative culpability between Mr. Ragsdale and Illig. Had the jurors been made aware of the mitigation that existed, including uncontroverted evidence of organic brain damage, a life recommendation would have been returned. An evidentiary hearing was and is warranted before a neutral and impartial tribunal.

4. The lower court erred in summarily denying Mr. Ragsdale's claim that he failed to receive effective assistance of mental health experts, in violation of Ake v. Oklahoma. No background information was sought about Mr. Ragsdale's history either

from the competency expert or by trial counsel, and the expert relied only on Mr. Ragsdale's self-report. Despite uncontroverted evidence that Mr. Ragsdale suffered a serious head injury during a car accident and a disfiguring accident after being shot through the eye with an arrow, no neuropsychological testing was ever performed on Mr. Ragsdale. Collateral counsel have had Mr. Ragsdale examined by qualified experts, and it has been determined that Mr. Ragsdale suffers from frontal lobe organic brain damage, mental retardation, and other deficits. None of this information was investigated and presented by mental health experts. An evidentiary hearing was and is warranted before a neutral, impartial tribunal.

5. The lower court erred in summarily denying Mr. Ragsdale's claim that he was incompetent to stand trial and that trial counsel and the lower court erred in failing to conduct a competency hearing.

6. The lower court erred in summarily denying Mr. Ragsdale's claim that trial counsel rendered ineffective assistance of counsel in failing to object to the numerous instances of improper and unconstitutional argument advanced by the State during the penalty phase.

7. The lower court erred in summarily denying Mr. Ragsdale's claim that trial counsel rendered ineffective assistance of counsel in failing to argue that evidence in the record was mitigating.

8. The statutory aggravating circumstances and the jury instructions on said aggravating circumstances are impermissibly and unconstitutionally vague.

9. The jury was instructed on the aggravating circumstance of cold, calculated, and premeditated. However, the lower court found that this aggravating factor was not established. Under Archer v. State, an invalid aggravating factor was erroneously injected into the jury's sentencing calculus. Under Archer and Richmond v. Lewis, this error requires a jury resentencing.

10. Mr. Ragsdale's sentencing jury was misled as to its sentencing responsibility, in violation of Caldwell v. Mississippi.

11. Florida' overbroad death penalty statute was applied to Mr. Ragsdale in violation of the Eighth Amendment.

12. The lower court erred in summarily denying Mr. Ragsdale's claim that trial counsel failed to object to Mr. Ragsdale's absence during critical stages of the proceedings.

13. The sentencing court erred in failing to independently weight the aggravating and mitigating circumstances, in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments.

14. The trial court exhibited a bias in favor of the prosecution, and trial counsel failed to object.

15. The prior conviction used to support the "under sentence of imprisonment" aggravating circumstance was unconstitutionally obtained, in violation of Johnson v. Mississippi.

16. Florida's capital sentencing statute is unconstitutional on its face and as applied to Mr. Ragsdale.

17. The lower court erred in summarily denying Mr. Ragsdale's claim that trial counsel failed to object to the shackling and security procedures employed during the trial.

18. Florida's Rules of Professional Responsibility unconstitutionally prohibit collateral counsel from interviewing trial jurors.

19. The effect of cumulative errors during Mr. Ragsdale's trial establishes that Mr. Ragsdale was deprived of a fair trial.

ARGUMENT I

THE PUBLIC RECORDS CLAIM

The Office of the State Attorney for the Sixth Judicial Circuit claimed numerous exemptions from disclosure under Chapter 119 and other statutory provisions. As discussed below, the exemptions claimed by the State Attorney's Office are on their face inapplicable to the instant situation. The lower court therefore erred in its refusal to order the disclosure of the records allegedly exempt under the statutory provisions cited by the State Attorney's Office, The lower court also erred in failing to grant Mr. Ragsdale an evidentiary hearing in order to establish the invalidity of the putative exemptions claimed by the State. Finally, the lower court committed reversible error in the manner in which it conducted the in camera inspection, and in failing to conduct an in camera inspection of all the materials provided to it by the State Attorney's Office. For all these reasons, this Court should remand this cause to the lower court to order disclosure of records, for an evidentiary hearing, and to conduct a proper in camera inspection of all materials sealed by the State Attorney's Office.

A. THE STATUTORY EXEMPTIONS CLAIMED BY THE STATE ATTORNEY'S OFFICE ARE INAPPLICABLE AND/OR INVALID IN THIS CASE.

The Office of the State Attorney refused to provide Mr. Ragsdale with numerous records and materials that it claimed were exempt under Chapter 119 and various other statutory provisions. The lower court, after only "perusing" some of the materials during an in camera inspection, denied without any comment Mr. Ragsdale's request for production of these documents (PC-R. 279).

While the lower court judge improperly and inappropriately labeled Mr. Ragsdale's efforts to obtain public records "bogus and a sham" (PC-R. 399),[3] it is clear from the sundry exemptions asserted by the State that it merely perused the Florida Statutes in order to find any farfetched provision to assert so that Mr. Ragsdale would be thwarted in his efforts to fully investigate his case and prepare and present a proper and complete Rule 3.850 motion. Mr. Ragsdale objected to the applicability of the exemptions claimed by the State, and argued that the exemptions claimed as justification for nondisclosure of this withheld material were legally insufficient (PC-R. 194). As Mr. Ragsdale argued below, most of the claimed exemptions were patently frivolous and therefore the good faith basis for their being claimed was doubtful (PC-R. 194-95). The State's efforts to thwart Mr. Ragsdale from obtaining all information relating to his case should not be condoned by this Court. Cf. In re Amendment to Florida Rules of

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'Judge Cobb's personal opinions as to Mr. Ragsdale's efforts to seek Chapter 119 compliance formed the basis of a motion to disqualify. See Argument II, infra. Contrary to Judge Cobb's opinions, a capital defendant's efforts to seek Chapter 119 compliance are not "bogus" nor do they constitute a "sham." Rather, this Court has imposed on capital litigants a strict diligence requirement in seeking and obtaining public records in the first instance. Porter v. State, 653 So. 2d 374 (Fla. 1995).

Criminal Procedure -- Capital Postconviction Public Records Production, 683 So. 2d 475, 477 (Fla. 1996) (Anstead, J., specially concurring) (noting with disapproval instances where "gamesmanship and partisanship have worked to unreasonably delay the underlying proceedings or to obstruct the release of information").

The State's failure to provide legally sufficient exemptions from disclosure as required by Chapter 119 entitles Mr. Ragsdale to the immediate disclosure of all withheld material. The State, as the agency seeking to avoid disclosure, carries the burden of properly asserting a valid exemption. Fla. Stat. § 119.07(2)(a) (1995)(requiring written claim of exemption with proper statutory citation), and the burden of proving the right to the exemption. Florida Freedom Newspapers, Inc. v. Dempsey, 478 So. 2d 1128 (Fla. 1st DCA 1985); Bludworth v. Palm Beach Newspapers, Inc., 476 So. 2d 775 (Fla. 4th DCA 1985). Section 119.07(2)(a) also requires that when a records custodian contends that a record or part of a record is exempt from inspection and examination, the custodian must state the basis of the exemption which s/he contends is applicable to the record, along with a statement in writing and with particularity of the reasons for the conclusion that the record is exempt, whenever the person seeking access to the records makes a request for that information, The State failed to comply with this provision of Chapter 119, and Mr. Ragsdale is entitled to the immediate disclosure of the withheld material.

Below, Mr. Ragsdale will discuss with specificity the exemptions claimed by the State Attorney's Office:

a. The State withheld a juvenile complaint report and HRS referral history report on Leon Lee Illig, Mr. Ragsdale's co-defendant. As a basis for withholding this information, the State cited Sec. 39.045 (PC-R. 228). This is not a valid exemption from disclosure in this case.

Chapter 39, in addition to the one selected page included in the State's Appendix to its pleading below in which it asserted this "exemption" (PC-R. 256-57), consists in reality of a 100-odd page statutory provision dealing with "proceedings dealing with juveniles" and authorizes the establishment of various agencies, including the Department of Juvenile Justice and the Department of Heath and Rehabilitative Services. See generally Sec. 39.001, Fla. Stat. Section 39.045 falls within the section of Chapter 39 dealing with delinquency cases. The instant case is a capital murder case, not a juvenile delinquency case, and the State is not the custodian of these records. The records are located in Mr. Ragsdale's homicide file and are not subject to the scope of 39.045. Materials gathered by the State in the same fashion as other discovery material should be treated as public record regardless of the source. See Wolfinger v. Sentinel Communications, Co., 538 So. 2d 1276, 1278 (Fla. 5th DCA 1 989).[4]

Further, 39.045 does not refer to "juvenile complaint reports" or "HRS referral histories," whatever those documents are, as being confidential. Whatever confidentiality these records may have had at one point, if any, lapsed because they

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[4]Further, the Office of the Attorney General has cautioned that the exempt status of a record in the possession of the custodian does not, absent statutory authority, continue in all instances when such a record is transferred to another public agency. See Op. Atty. Gen. 90-104; 91-10; 93-32.

were made available to the State from the original custodian. In other words, regardless of whether the documents were originally confidential, the State failed to show how or why it was entitled to claim the confidentiality provided by section 39.045. Statutory exemptions from disclosure do not apply if the information in the records has already been made public or to which the rules of discovery previously required to be disclosed. Stanton v. McMillan, 597 So. 2d 940 (Fla. 1 st DCA 1992).

If the Court determines otherwise, however, Mr. Ragsdale would note, as he did below, that 39.045 does provide for public access to such materials "upon order of the court by persons deemed by the court to have a proper interest therein." Sec. 30.045(4). Mr. Ragsdale has a "proper interest" in all information concerning Illig, as he is the co-defendant. A more appropriate "interest" can hardly be imagined.

Additionally, any information concerning Illig's history must also be disclosed at this time because it is Brady material. Walton v. Dugger; Pennsvlvania v. Ritchie, 107 S. Ct. 989 (1987). Mr. Ragsdale does not know whether the State disclosed the juvenile complaint to trial counsel, whether the State negotiated any favorable resolution to the juvenile proceedings as a result of Illig's assistance in testifying against Mr. Ragsdale, or whether any other exculpatory evidence is contained in that juvenile complaint report. Because the State failed to detail with specificity the nature of the withheld materials, coupled with the fact that such must be disclosed under Brady, this claimed exemption cannot be upheld as a matter of fact or of law.

b. The State claimed an exemption under § 119.07 (3)(y) (1994 Supp.), which provides that identity of the victim of a crime is confidential (PC-R. 228). The name of

the victim in this case is not a secret, and was made public by the State when it prosecuted Mr. Ragsdale. Not only does this exemption therefore not apply, but it was claimed in bad faith. Staton v. McMillan, et. al, 597 So. 2d 940, 941 (Fla. 1st DCA 1992). The exemption in this case simply highlights the frivolity of the process that the State undertook to deny access to important information.

The State claimed an exemption under § 119.072 and 943.053 which, in its opinion, "require confidentiality of NCIC and FCIC criminal justice information of arrest history, commonly known as 'rap sheets"' (PC-R. 228). Neither of these statutory exemptions is applicable its face. § 119.072 regards criminal intelligence or investigative information obtained from out-of-state agencies. However, this section is not an exemption from Chapter 119 disclosure. Rather, the statute states:

> Whenever criminal intelligence information or criminal investigative information held by a non-Florida criminal justice agency is available to a Florida criminal justice agency only on a confidential or similarly restricted basis, the Florida criminal justice agency may obtain and use such information in accordance with the conditions imposed by the providing agency.

Fla. Stat. § 119.072 (1995). The State failed to properly claim an exemption which affords it the right to withhold this material. The State neither asserted nor established that it received any material under a condition of confidentiality or nondisclosure, and failed to indicate from which agencies this alleged "out-of-state" material was obtained. If the materials were generated by the FBI for example, the FBI maintains numerous field offices in Florida which may or may not be "out-of-state" agencies. Moreover, the State has failed to indicate exactly what NCIC or FCIC reports it has withheld from disclosure.

Certainly any records related to Mr. Ragsdale, Mr. Illig, or any witness who testified at trial are subject to disclosure under Chapter 119 because this case is closed for Chapter 119 purposes, State v. Kokal, 560 So. 2d 324 (Fla. 1990), as well as under Brady.

Any assertion that § 943.053 supports the State's withholding of records from Mr. Ragsdale is unsubstantiated. § 943.053 on its face applies to the dissemination of criminal justice information by the Florida Department of Law Enforcement, not by the State Attorney's Office, In fact, § 943 is entitled "Department of Law Enforcement." The State Attorney's Office has no standing to claim this exemption. Contrary to the State's assertion that this section shielded information from disclosure, the express language of subsection (3) provides that criminal history information "shall be available on a priority basis to criminal justice agencies for criminal justice purposes free of charge and, otherwise, to governmental agencies not qualified as criminal justice agencies on an approximate-cost basis." § 943.053 (3). Whether CCR constitutes a "criminal justice agency" or not, it certainly is a governmental agency.

d. The State withheld "hospital patient records" based on a claimed exemption found at Ch. 395.3025. Chapter 395 is entitled "Hospital Licensing and Regulation." The purpose of Chapter 395 is "to provide for the protection of public health and safety in the establishment, construction, maintenance, and operation of hospitals and ambulatory surgical centers by providing for licensure of same and for the development, establishment, and enforcement of minimum standards with respect thereto." Ch. 395.001. Ch. 395.3025 applies to "patient records" and details under

which circumstances a hospital may be required to disclose and/or withhold a patient's medical records.

The State has no standing to withhold records under this statute. The State is not a hospital, nor was the Assistant State Attorney below, acting as custodian of records, a doctor, nurse, or health care worker with any duties under Chapter 395. If whatever hospital from which these records originated disclosed the records to the State Attorney's Office, there is no longer any confidentiality as to those records.[5]

e. The State claimed an exemption based on Sec. 401.30, which, in its opinion, "requires confidentiality of records of emergency calls which contain patient or treatment information" (PC-R. 228). Chapter 401 is entitled "Medical Telecommunications and Transportation" and was enacted so that "a statewide system of regional emergency medical telecommunications be developed." Sec. 401 ,013. provides that "each licensee must maintain accurate records of emergency calls on forms that contain such information as is required by the department." Sec. **401.30 (1). A** "licensee" is defined as "any basic life support service, or air ambulance service licensed pursuant to this part." Sec. **401.23** (13). If some life support or air ambulance service

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[5]Mr. Ragsdale pointed out below that in Trepal v. State, a Polk County capital case in a similar procedural posture as Mr. Ragsdale's case, Circuit Court Judge E. Randolph Bentley ruled that the State's claimed exemption under Chapter 395 failed to support an exemption, and ordered the materials to be disclosed (PC-R. **218).** The same result should obtain in Mr. Ragsdale's case. A statutory exemption cannot be claimed as to one defendant but not another, for such would result in the denial of equal protection, due process, and fairness in these proceedings, See In re Amendment to Rules of Criminal Procedure -- Capital Postconviction Public Records Production, 683 So. 2d 475, 477 (Fla. 1996) (Anstead, J., specially concurring) ("[i]f there is any category of cases where society has an interest in seeing that all available information is disclosed, it is obviously in those cases where the ultimate penalty has been imposed").

provided records to the State (and if they did the State did not so establish below), then any confidentiality as to those records has been waived when the records were provided to the State for the same reason as medical records lose any putative confidentiality when they are transferred to the State. This is yet another example of the frivolity of the State's exemption?

f. The State withheld under § 655.057, which "provides a right of confidentiality in financial records" (PC-R. 228). Chapter 655 is entitled "Financial Institutions Generally" and its purpose is to "[p]rovide general regulatory powers to be exercised by the Department of Banking and Finance in relation to the regulation of financial institutions." Sec. 655.001 (1). The State is not a financial institution, defined as a "state or federal association, bank, trust company, international bank agency, representative office or international administrative office, or credit union." Sec. 655.055 (h). Nor was the Assistant State Attorney below the custodian of any records for a "financial institution" as defined by the statute, or an "affiliated party" as explained in Sec. 655.055 (i) **(1)-(4).** Sec. 655.057 provides that "all records and information relating

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"The frivolity of the numerous alleged "exemptions" claimed by the State Attorney's Office buttresses Mr. Ragsdale's argument below that he was entitled to an evidentiary hearing in order to dispute the applicability of these claimed "exemptions." See Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993). Had be been given the opportunity below, Mr. Ragsdale would have been able to establish that the custodian of the State Attorney's Office had no standing to claim most of the exemptions that were claimed, and that these exemptions were therefore claimed in bad faith. The lower court erred in failing to grant a hearing on this claim. Walton v. Dugger. Moreover, the facial frivolity and inapplicability of the majority of the exemptions claimed by the State Attorney's Office casts substantial doubt on the validity of the lower court's in camera inspection. Of course, the lower court acknowledged that the inspection in reality constituted only a "perusal" of some of the materials (PC-R. 279). Reversal is warranted, and this Court should order that the withheld materials be released to Mr. Ragsdale.

to an investigation by the department are confidential and exempt from provisions of s. 119.07(1) until such investigation is completed or ceases to be active." The "department" which is the subject of this statutory provision is the Department of Banking and Finance. See Sec. 655.005 (e) ("Department" means the Department of Banking and Finance").

The State also claims that Ch. 760.50 (5) provides further basis for withholding these materials (PC-R. 228). Ch. 760 is entitled "Discrimination in the Treatment of Persons; Minority Representation." Sec. 760.50 is entitled "Discrimination on the basis of acquired immune deficiency syndrome, acquired immune deficiency syndrome related complex, and human immunodeficiency virus prohibited" and subsection (5), which is the section relied on by the State, provides that an employer who provides life insurance or other health benefits to its employees shall maintain confidential the medical condition of any person covered by the benefits. This statute is likewise facially inapplicable to this situation and therefore is invalid. Neither the State Attorney's Office nor the Assistant State Attorney below have standing to claim any exemption under these sections.

g. The State claimed that Sec. 945.10 "requires confidentiality of Department of Corrections records for pre and post sentencing investigation reports" (Response at 4-5). This is not a valid exemption and was claimed in bad faith. Sec. 945.10 (2)(c) (1995) expressly provides that "[p]replea, pretrial intervention, presentence or postsentence investigation records" may not be withheld from "an attorney representing an inmate under a sentence of death," These records should have been disclosed.

h. Finally, the State withheld records which are, in its opinion, not public records (PC-R. 229). However, the State failed to meet its burden of proof in support of nondisclosure. In Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980), this Court discussed the definition of "public records." The Court held that public records are "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type." Id. at 640. All such materials, regardless of whether they are in final form, are open for public inspection unless specifically exempted by the Legislature. Wait v. Florida Power & Light Co., 372 So. 2d 420 (Fla. 1979).

Notes, preliminary drafts, working drafts, or any document prepared in connection with the official business of an agency that is to perpetuate, communicate, or formalize knowledge, regardless of whether in final form or the ultimate product of an agency, are subject to disclosure under Chapter 119. Shevin, 379 So. 2d 633; Times Publishing Co. v. Citv of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990).

That a document is considered a personal "note" is immaterial. Notes that are prepared for filing or are otherwise intended as evidence of knowledge obtained in the transaction of agency business are public records. Florida Sugar Cane League v. Florida Department of Environmental Regulation, No, 91-4218 (Fla. 2d Cir. Ct. June 5, 1992). Furthermore, "interoffice and intra-office memoranda may constitute public records even though encompassing trial preparation materials." Coleman v. Austin, 521 So. 2d 247, 248 (Fla. 1st DCA 1988).

The State asserted "attorney's notes for his own use" were withheld (PC-R. 229). For all Mr. Ragsdale knows, these notes could reflect interviews with co-defendant Illig, wherein Illig confessed to the killing. Regardless of whether records of the State Attorney contain "handwritten notes," the requirements of Chapter 119 apply. For the State to sustain its burden of showing that the withheld material fails to rise to the level of public record, it must describe with particularity the specific documents withheld and as requested, state the basis for its conclusion that the materials are lawfully withheld. See § 119.07(2)(a). Because the State failed to make that showing, the materials should be disclosed.

B. THE LOWER COURT ERRED IN FAILING TO AFFORD MR. RAGSDALE AN EVIDENTIARY HEARING ON THE CHAPTER 119 ISSUES.

The lower court summarily denied Mr. Ragsdale's request for production of Chapter 119 materials without affording him the opportunity to establish the inapplicability of the various exemptions claimed by the State Attorney's Office. As established above, the exemptions were inapplicable on their face. An evidentiary hearing is warranted. Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993).

That a hearing is and was warranted in this case is strengthened by the fact that during the March 4, 1996, hearing, the State confessed error as to one of its exemptions and released the full police report that was previously redacted (PC-R. 573-74). In response, Mr. Ragsdale's counsel reiterated his request for an evidentiary hearing (PC-R. 576). The court refused to grant a hearing. Reversal for a full and fair evidentiary hearing on this issue is warranted. Walton v. Dugger.

C. THE LOWER COURT FAILED TO CONDUCT A PROPER IN CAMERA INSPECTION.

The lower court, after only "perusing" some of the materials during an in camera inspection, denied without any comment Mr. Ragsdale's request for production of these documents (PC-R. 279). The lower court was not obligated to "peruse" the withheld files, but conduct a thorough in camera inspection. On its face, the lower court's order reflects a failure to conduct a meaningful inspection of the materials provided by the State Attorney's Office.[7] This Court should order the immediate disclosure of the records, or at a minimum, remand for a proper in camera inspection,

Further, the order on its face establishes that the court failed to conduct an in camera inspection of all the information. The lower court specifically acknowledged that it did not listen to three (3) audio tapes that had been furnished by the State (PC-R. 279). This is reversible error. Walton v. Dugger; Lopez v. Singletary, 634 So. 2d 1054 (Fla. 1994). Further, the State never referred to any audio cassette tapes in its list of alleged exemptions. The Court should remand for a proper in camera inspection of all the information that was allegedly exempt in this case, and require the State Attorney's Office to either list whatever exemptions allegedly apply to the three (3) audio cassette tapes it provided to the lower court, or disclose those tapes to Mr. Ragsdale. Mr.

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[7] In contrast, Mr. Ragsdale would point to the lower court's order in Trepal v. State, a copy of which was attached to Mr. Ragsdale's pleading below (PC-R. 211-219). In Trepal, the lower court entered an eight (8) page order detailing the documents provided for the in camera inspection and explaining how the various exemptions asserted either applied or did not apply. Whether or not the lower court in Trepal correctly determined the applicability of the exemptions in that case (an issue not presented in this case), it is clear that a thorough inspection occurred. Simply "perusing" the documents in Mr. Ragsdale's case cannot equate to a thorough in camera inspection of those documents, particularly in a capital case.

Ragsdale should thereafter be given sixty (60) days to amend his postconviction motion. Ventura v. State, 673 So. 2d 479 (Fla. 1996). Reversal is warranted.

ARGUMENT II

THE JUDICIAL DISQUALIFICATION CLAIM

In the order summarily denying relief, the lower court ruled that many of the constitutional claims raised by Mr. Ragsdale were "bogus" and "a sham." See PC-R. 399; 400; 401; 405. In addition, the court found that the claim of cumulative constitutional error was "nothing but abject whining" (PC-R. 407). After receiving this order, Mr. Ragsdale filed a motion to disqualify Judge Cobb (PC-R, 539-47). The lower court thereafter denied Mr. Ragsdale's motion as legally insufficient (PC-R. 549).

The nature and tenor of the lower court's order establishes that Judge Cobb was so biased and prejudiced against Mr. Ragsdale and against his counsel that the court should have recused itself. Mr. Ragsdale had more than a reasonable fear that, due to the court's patent prejudice against him and his counsel, he could not have and did not receive a fair and impartial postconviction hearing before Judge Cobb. Therefore, Mr. Ragsdale requests that the Court reverse this case and remand for full and fair consideration of the constitutional claims presented in this case before an impartial judiciary.

Mr. Ragsdale's claims were neither "bogus" or "a sham" and counsel's raising them does not constitute "abject whining." Mr. Ragsdale is and was entitled to seek postconviction relief, and his counsel is and was obligated to raise all available claims. A claim that a defendant in a capital case had failed to receive Chapter 119 compliance

is not a "bogus" or "sham" claim, as Judge Cobb found (PC-R. 399), but rather based on longstanding precedent. See, e.g. Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Mendvk v. Dugger, 592 So. 2d 1076 (Fla. 1992); Anderson v. State, 627 So. 2d 1170 (Fla. 1993); Ventura v. State, 673 So. 2d 479 (Fla. 1996). Likewise, a claim that a capital defendant was incompetent to stand trial, and that the court-ordered psychiatric examination was constitutionally inadequate, is not a "bogus" or "sham" claim, as Judge Cobb found (PC-R. 400). Rather, it is a valid constitutional claim for relief, as the Supreme Court of the United States has recognized. Dusky v. United States, 362 U.S. 402 (1960); Pate v. Robinson, 383 U.S. 375 (1966); Ake v. Oklahoma, 470 U.S. 68 (1985). A claim that a defendant received ineffective assistance of counsel at the guilt phase of a capital trial or that the government suppressed exculpatory evidence is not a "sham" or "bogus" claim (PC-R. 401), but a valid claim for relief, as the Supreme Court of the United States has recognized. Strickland v. Washington, 466 U.S. 688 (1984); Brady v. Maryland, 373 U.S. 83 (1963).

A claim that the cumulative effect of errors undermines confidence in the outcome of a trial is not "nothing but abject whining" as judge Cobb found (PC-R. 407); rather, it is a claim for relief, as the Supreme Court of the United States has recognized. Kyles v. Whitlev, 115 S. Ct. 1555 (1995). This Court did not believe that a claim of cumulative error constituted "abject whining" when it recently granted a new trial under Rule 3.850 based on a cumulative error analysis. State v. Gunsby, 670 So. 2d 920 (Fla. 1996). See also Swafford v. State, 679 So. 2d 736 (Fla. 1996).

The aforementioned circumstances are of such a nature that they are "sufficient to warrant fear on [Mr. Ragsdale'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 impartially." Chastine v. Broome, 629 So. 2d 293 (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.

"Judges should be especially vigilant that every litigant gets that to which he or she is entitled: the cold neutrality of an impartial judge." Rose v. State, 601 So. 2d 1181, 1184 (Fla. 1992). Mr. Ragsdale established a legally sufficient basis warranting Judge Cobb's disqualification from this case. In State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977), the Court concluded that "[a] judge must not only be impartial, he must leave the impression of impartiality upon all those who attend court." Id. at 401 (emphasis added) (citation omitted). "The attitude of the judge and the atmosphere of the courtroom should be such that no matter what charge is lodged against a litigant or what cause is before the court, the litigant can approach the bar with every assurance that he is in a forum which is everything a court represents: impartiality and justice." Id. Due to the court's announced attitudes, disqualification was proper in that case, as it is in Mr. Ragsdale's case.

By maligning the claims raised by Mr. Ragsdale through counsel, the lower court demonstrated a bias not only against Mr. Ragsdale, but also to his collateral counsel. "Bias or prejudice against a litigant's attorney is grounds for disqualification where the prejudice is of such a degree that it adversely affects the client." Town Center of Islamorada v. Overby, 592 So. 2d 774, 775 (Fla. 3d DCA 1992). See also Hayslip v. Douglas, 400 So. 2d 553, 557 (Fla. 4th DCA 1981) ("it is understandable that a client would become concerned and fearful upon learning that the trial judge has an antipathy toward his lawyer"). Because the court's ruling "was both derogatory of the attorney[s] and tended to undermine the presentation of a client's case," Lamendola v. Grossman, 439 So. 2d 960, 961 (Fla. 3d DCA 1983), the lower court displayed an obvious prejudice and an inability to provide Mr. Ragsdale with a fair and impartial hearing. Id. See, e.g., Olszewska v. Ferro, 590 So. 2d 11 (Fla. 3d DCA 1991) ("When a trial judge leaves the realm of civility and directs base vernacular towards an attorney or litigant in open court, there are sufficient grounds to require disqualification").

A fair hearing before an impartial tribunal is a basic requirement of due process. Porter v. Singletary, 49 F. 3d 1483 (11 th Cir. 1995). Because the lower court displayed such an obvious bias against him and his counsel, a fair and impartial determination of this case is and was impossible before Judge Cobb. This case should be remanded for a full and fair determination of the issues before a neutral and impartial judge assigned by random selection. Maharai v. State, 684 So. 2d 726 (Fla. 1996). Reversal is warranted.

ARGUMENT III

THE GUILT PHASE ADVERSARIAL TESTING CLAIM

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). 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). 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. Ragsdale's allegations, and the attachments provided by the trial court do not conclusively demonstrate that Mr. Ragsdale 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),

Mr. Ragsdale pled sufficient facts to warrant an evidentiary hearing on his claim that no adversarial testing occurred at the guilt phase of his capital trial, The facts unknown to Mr. Ragsdale's jury, either singularly or cumulatively, deprived Mr. Ragsdale

of the constitutionally-reliable outcome to which he was entitled. The lower court erred in summary denying these claims without evidentiary resolution.

Mr. Ragsdale alleged that he was denied an adversarial testing because the State withheld material, exculpatory information in violation of Bradv v. Maryland, 373 U.S. 83 (1963). See PC-R. 322 et. seq. In its order summarily denying this claim, the lower court failed to address the Brady allegations at all.

A Brady claim does state a basis for post-conviction relief. See, e.g. State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Kyles v. Whitlev, 115 S.Ct. 1555 (1995). Rather than any imagined deficiency in the manner in which Mr. Ragsdale alleged the facts, it is the trial court's refusal to accept those facts as true which constitutes error. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Mr. Ragsdale pled more than sufficient facts alleging Brady violations to warrant an evidentiary hearing. Maharai v. State, 684 So. 2d 726, 728 (Fla. 1996).

A key issue at Mr. Ragsdale's trial and at sentencing was who actually cut the victim's throat. The theory of the defense was that codefendant Leon Illig cut the victim's throat. State witnesses testified that Mr. Ragsdale confessed to them that he cut the victim's throat (R. 310-1 1, 406, 408, 410-11). Physical evidence tending to prove that Mr. Ragsdale did not cut the victim's throat would have been exculpatory as to Mr. Ragsdale and would have impeached the State's witnesses who testified that Mr. Ragsdale confessed to them.

The defense theory was supported by the results of luminal testing performed on Illig's clothes. The luminal test, which reacts in the presence of blood, revealed a strong

reaction on Illig's shoes and jacket, and a very strong reaction on the pants and purple gym bag recovered with Illig's clothes. The State's testing of Mr. Ragsdale's clothes did not cause any chemical reaction.

The luminal testing of Illig's clothes was handled by the Pasco County Sheriff's Office. The testing was performed by Deputy Kenneth Locke and Deputy Bill Ferguson (Deposition of Kenneth Locke at 5-9). According to a Pasco County Sheriff's Office report by Deputy Locke, he performed the luminal test and a phenolphthalein test on Illig's clothes on February 18, 1986. According to Deputy Locke's report, "Det. [Bill] Ferguson used a 35mm camera with 400 ASA black and white film to record the luminescence that seen [sic] in the dark,"

Trial counsel, after learning of the existence of the photographs, filed a Demand for Discovery, requesting:

> Copies of all photographs taken by Detective Furgeson [sic], Pasco County Sheriff's Office on or about February 19, 1986 of the luminescence upon the shoes, pants, jacket and gym bag of Co-Defendant, LEON LEE ILLIG, said luminesence [sic] allegedly as a result of a luminal test performed upon said clothing on February 18, 1986.

(R. 889). Trial counsel next filed a Motion to Compel Discovery, alleging that the State failed to list the black and white photos of the luminal test results as evidence in its Response to Demand for Discovery (R. 891). In a Motion for Continuance filed March 1, 1988, trial counsel alleged that he had contacted Pasco County Sheriff's Office Detective Fay Wilbur to locate the photos, and was told that the status of the photographs was "uncertain" (R. 894-95). On March 15, 1988, the Court granted

defense counsel's Motion for Appointment of Confidential Expert, and ordered that the expert was appointed to examine, inter alia:

> Photographs taken on or about February 19, 1986, by Detective Furgeson [sic] of the luminescence upon the shoes, pants, and jacket of Co-Defendant, LEON LEE ILLIG, as a result of an alleged luminal test, these photographs being in the possession of the Pasco County Sheriff's Office.

(R. 900). Despite the Court's order and counsel's repeated requests, the photos were never disclosed to counsel, presented to the jury, or utilized by a defense expert.

These photos were critical to counsel's preparation for trial. Without the photos, showing the luminescent reaction to the luminal applied to Illig's clothes, counsel was unable to place before the jury this physical evidence that Leon Illig was covered with blood on the night of the murder, while testing revealed no blood on Mr. Ragsdale's clothing. Trial counsel's ability to prepare and present his case was hampered by the State's failure to disclose these photos.

The withholding of these photo was error, such that there is a reasonable probability of a different result had they been disclosed. The photos could "reasonably be taken to put the whole case in such a different light as to undermine confidence in

the verdict." Kyles v. Whitley, 115 S. Ct. 1555, 1566 (1995).[8] An evidentiary hearing is warranted. Way v. State, 630 So. 2d 177 (Fla. 1993).

The failure to disclose these critical photos hampered trial counsel's presentation at the guilt phase. Part of the defense theory of the case was that Illig committed the murder, as evidenced by the fact that Illig's clothes were covered in blood, while Mr. Ragsdale's clothing had no blood. In his penalty phase closing argument, counsel argued that the pattern of the blood spatter on the wall of the victim's trailer indicated that the blood was projected or thrown on the door (R. 743). Defense counsel suggested the spatter pattern on the wall was caused by the cutting of the victim's throat and the spraying of blood on the wall.

Counsel, however, failed to present any forensic testimony to support the defense theory that the person who actually killed the victim would have blood on his clothing. Of course, without the benefit of the photos showing the results of the luminal test, counsel did not have the hard evidence to support his theory. Without expert testimony to guide them, the jury was left with only counsel's argument, which they were told was not evidence. Counsel's failure to present a forensic expert to assist in Mr. Ragsdale's

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[8]Had the jury known of their existence, these photographs would also have affected the outcome of the penalty proceedings in this case. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). The sentencing jury recommended the death penalty by an 8-4 vote. Significantly, however, the jury, during deliberations, delivered a note to the trial court asking, "Is it unjust-just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony heard by the jurors, the jurors believe the defendant may have had a lesser part in the murder?" (R. 762). Clearly the issue of relative culpability was on the minds of the jurors, and these photographs would have significantly impacted the sentencing deliberations, as well as the guilt phase outcome,

defense constitutes ineffective assistance of counsel. Driscoll v. Delo, **71** F. 3d 701 (8th Cir. 1995).

Confidence in the outcome of the trial is similarly undermined based on newly discovered evidence that one of the State's witnesses gave inaccurate testimony. The State procured this witness' false testimony through threats and intimidation, threatening that the witness would be jailed if the witness failed to testify that Mr. Ragsdale confessed to the witness. Mr. Ragsdale further alleged that at an evidentiary hearing, this State witness was prepared to testify that the witness' trial testimony was untrue, and that the State pressured the witness to testify falsely (PC-R. 324-26). These allegations were sufficient to warrant an evidentiary hearing. Maharaj; Scott v. State, 657 So. 2d 1129 (Fla. 1995).

The outcome of Mr. Ragsdale's guilt phase proceedings is further undermined by counsel's lack of preparation, failure to investigate important and available defenses, and failure to know the law. For example, counsel attempted to call co-defendant Illig to testify. Illig invoked the Fifth Amendment in a proffer outside the presence of the jury and refused to answer trial counsel's questions:

> BY MR. CULPEPPER:
>
> Q Would you state your name?
>
> A. My name is Leon Illig.
>
> Q Did you go to the home of Ernest Mace on January the lst, 1986?
>
> A. Before we get going, I want to take the Fifth, I don't want to say nothing.

THE COURT: You don't want to answer that question based on your Fifth Amendment rights?

THE WITNESS: Yes, sir.

THE COURT: Mr. Culpepper?

Q (By Mr. Culpepper) Did you kill Ernest Mace?

THE WITNESS: I want to take the Fifth. I don't want to answer any questions.

THE COURT: Mr. Illig, he may ask you some other questions, and you can state that at each question if you wish to do that. Let's see what he wants to aske you.

Q (By Mr. Culpepper) I'll start from the beginning again.

Did you go to the home of Ernest Mace on January 1, 19861

A. I would like to take the Fifth Amendment on that question.

Q Did you take a knife and cut Mr. Ernest Mace across the throat, causing his death?

A. I would like to take the Fifth Amendment on that.

Q Did you steal money from Mr. Mace by taking his wallet?

A. I would like to take the Fifth Amendment on that question.

Q Did you leave the scene of Mr. Mace's trailer and run to -- nearby -- Lake Zephyr and bury your clothes that night?

A. I would like to take the Fifth Amendment to that question.

MR. CULPEPPER: I would like to take one second, Your Honor.

THE COURT: Yes, sir.

Q (By Mr. Culpepper) Mr. Illig, do you intend to take the Fifth Amendment to any further questions I ask you concerning this case?

A. Yes, sir.

MR. CULPEPPER: I have no further questions of the witness, Your Honor.

(R. 507-08). Trial counsel then requested that Illig be required to take the Fifth Amendment before the jury, but the State objected and the trial court refused counsel's request (R. 508-09). Failing in his effort to question Illig in front of the jury, counsel rested without calling a single witness.

Counsel failed to know the law regarding the Fifth Amendment privilege against self-incrimination. Illig had pled nolo contendere to first degree murder and armed robbery of Mr. Mace, adjudicated guilty, and sentenced to life without possibility of parole for twenty-five years. The plea was taken, and Illig was sentenced, on December 18, 1986, eighteen months before Mr. Ragsdale's trial. Illig did not appeal. A defendant who has pled guilty and been sentenced cannot invoke the privilege against self-incrimination with respect to those same crimes. McCarthy v. United States, 394 U.S. 459, 466 (1969) ("[a] defendant who enters such a [guilty] plea simultaneously waives several constitutional rights, including his privilege against compulsory self-incrimination, his right to trial by jury, and his right to confront his accusers"); Dearing v. State, 388 So. 2d 296, 298 (Fla. 3d DCA 1980) ("[i]t is well-settled, however, that the privilege [against

self-incrimination] no longer exists as to alleged crimes for which the witness could not be subsequently prosecuted, as when he had, as in this case, previously pled guilty and been sentenced for the offense in question"); State v. Harris, 425 So. 2d 118, 122 (Fla. 3d DCA 1983). Illig's right to claim protection under the Fifth Amendment expired when he failed to appeal his conviction; and if he appealed, his Fifth Amendment rights only existed during the pendency of that appeal. Brinson v. State, 382 So. 2d 322, 324 (Fla. 2d DCA 1979); Libertucci v. State, 395 So. 2d 1223 (Fla. 3d DCA 1981); Landenberger v. State, 519 So, 2d 712 (Fla. 1988). Counsel's failure to know the law was deficient performance that prejudiced Mr. Ragsdale. The jury was deprived of the opportunity to hear the testimony of the co-defendant Illig and witness his demeanor.[9]

The lower court failed to address the actual claim raised by Mr. Ragsdale, finding that the claim was refuted by the record: "The court finds that this claim is refuted by the record as defense counsel attempted to question the co-defendant in front of the jury" (PC-R. 401). This is simply incorrect. As the excerpted portion of the record that the lower court attached to the order establishes, Illig only appeared in a proffer outside

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'Again, the jury had clear questions about the relative culpability of Mr. Ragsdale and Illig. During the penalty phase deliberations, the jury asked the following question:

> "Is it unjust-just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony heard by the jurors, the jurors believe the defendant may have had a lesser part in the murder?"

(R. 762). The court responded by telling them that it was their job (R. 762). The testimony of Illig, and his demeanor during his testimony, would "have pushed the jury over the edge into the region of reasonable doubt." Barkauskas v. Lane, 878 F.2d 1031 (7th Cir. 1989). An evidentiary hearing is warranted.

the presence of the jury (PC-R. 507-10). Instead of conclusively refuting Mr. Ragsdale's allegations, the portions of the record attached by the lower court refute the lower court's own findings and conclusions,

Further, the lower court missed the point of Mr. Ragsdale's claim. Had trial counsel known the law, he would have been able to provide the lower court with conclusive legal authority establishing that Illig was not entitled to any Fifth Amendment protection because he had pled guilty, had been sentenced, and had not appealed his conviction or sentence, While trial counsel did attempt to question Illig, when confronted with the State's objection, counsel did not know that Illig could be compelled to testify under controlling precedent, This is deficient performance which prejudiced Mr. Ragsdale. Cf. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Nothing in the record refutes Mr. Ragsdale's claim that counsel failed to know the law. An evidentiary hearing is required.

Counsel also failed to investigate and present available evidence regarding Mr. Ragsdale's mental state at the time of the crime, as well as at the time he made statements to law enforcement without the benefit of counsel. Counsel completely failed to use plentiful and available evidence of Mr. Ragsdale's voluntary intoxication at the time of the offense. Lay and expert testimony were available to defense counsel regarding Mr. Ragsdale's intoxication at the time of the offense, yet trial counsel, without a reasonable tactic or strategy, failed to adequately investigate, prepare, and present such evidence.

The lower court rejected this claim without the benefit of an evidentiary hearing, stating that it “reviewed the entire ten volume court file, including all witness depositions, and trial and sentencing transcripts, and finds no evidence of a possible involuntary [sic] intoxication defense that could have been raised by counsel” (PC-R. 400).[10] This of course is Mr. Ragsdale’s point. Evidence that was not part of this record was available but went uninvestigated and never presented to the jury. The lower court’s position reflects that court’s misapprehension about its role in assessing a Rule 3.850 motion. When faced with such an allegation, the lower court’s sole responsibility was to accept the allegations as true and determine whether the files and records conclusively rebutted these allegations. Lightbourne v. Duggger. This the lower court did not do, and Mr. Ragsdale is entitled to an evidentiary hearing.”

The lower court indicated that the deposition of Cindy LaFlamboy refuted the allegations that counsel failed to adequately investigate and present evidence of intoxication because LaFlamboy “indicated that the co-defendant told her that he and the

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[10]The lower court inaccurately reported that Mr. Ragsdale was claiming an “involuntary intoxication” defense, Mr. Ragsdale’s claim is premised on a voluntary intoxication defense that was never adequately investigated by trial counsel.

“The lower court concluded that the claim had no merit because Mr. Ragsdale did not disclose the names of the witnesses that were available (PC-R. 399). There is no requirement that a Rule 3.850 litigant provide names of witnesses. The lower court failed to explain how the names of witnesses would have transformed Mr. Ragsdale’s factual allegations, which the court concluded were rebutted by the record, into allegations that were suddenly not rebutted by the record simply because names were listed. Further, the State never responded to Mr. Ragsdale’s motion below, and never complained about the lack of witness names. The lower court’s conclusions were based on no legal authority, but rather its own personal views that Mr. Ragsdale was doing nothing more than “abject whining” about his case.

defendant did not stop at a liquor store prior to committing the murder" (PC-R. 400). Whether or not Mr. Ragsdale and Illig stopped at a liquor store before going to the victim's home is not the issue, and in no way conclusively refutes Mr. Ragsdale's allegations that he was intoxicated at the time of the offense.[12]

Counsel could have used evidence of intoxication in a number of ways both at trial and sentencing but instead counsel ignored this area. Without a tactical or strategic reason, counsel failed to develop a defense of voluntary intoxication, failed to request a jury instruction on the issue, and failed to present evidence of intoxication to rebut the aggravating circumstances of "cold, calculated, and premeditated," which requires heightened premeditation, "heinous, atrocious, and cruel," which requires a showing of intent to be cruel, and "pecuniary gain, which has a specific intent element." Evidence of intoxication would also have served to establish statutory and nonstatutory mitigation. See Argument IV, infra.

Florida law on the voluntary intoxication defense is clear and long-standing, dating from the 19th century. See Garner v. State, 28 Fla. 113, 9 So. 35 (Fla. 1891). "Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery." Gardner v. State, 480 So, 2d 91, 92-93 (Fla. 1985)(citations omitted). Voluntary intoxication could have been employed as a defense to Mr. Ragsdale's

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[12]In fact, LaFlamboy's deposition details that Mr. Ragsdale was at LaFlamboy's house before he and Illig left, they were drinking at LaFlamboy's house (PC-R. 430-31), and that Mr. Ragsdale wanted to borrow LaFlamoy's car to go to the liquor store to buy more whiskey (PC-R. 431). Rather than conclusively rebut Mr. Ragsdale's allegations, LaFlamboy's deposition, which the lower court attached to its order, supports Mr. Ragsdale's allegations. An evidentiary hearing is warranted.

first-degree murder charge and could have rebutted the necessary element of premeditation. Voluntary intoxication could also have been employed as a defense to armed robbery, a specific intent crime, However, available evidence of intoxication was never adequately investigated or presented by trial counsel.

Use of intoxication evidence and appropriate mental health evidence would have prevented a verdict of first-degree murder on the premeditated murder theory. Prejudice from counsel's failure is clear because Mr. Ragsdale could not have formed specific intent for premeditated murder. See Bunnev v. State, 603 So. 2d 1270 (Fla. 1992). Without the element of intent, Mr. Ragsdale could have been convicted of nothing greater than second-degree murder. Likewise, Mr. Ragsdale could not have been convicted of armed robbery because he could not have formed the requisite specific intent. See Dillbeck v. State, 643 So. 2d 1027, 1028-29 (Fla. 1994).

Defense counsel also failed to adequately voir dire the jurors regarding mental health or intoxication issues. Not one question was asked about the jurors' feelings about their perceptions of mental health issues as viable defenses in a criminal case. Not one question was asked about the jurors' understanding of the concept that evidence of mental illness and intoxication can negate the specific intent required for a finding of first-degree murder and armed robbery. Not one question was asked about the jurors' understanding or feelings about mental health issues and intoxication relating to mitigating circumstances. No evidence was adduced about the potential jurors' biases and feelings about psychiatrists and psychologists in general, and the importance of forensic mental health testimony. No questions were asked to jurors regarding their

attitudes and biases towards substance abuse and addiction. This is prejudicially deficient performance. The failure to even ask one question in this area falls below reasonably professional standards. Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994).

Counsel also failed to adequately investigate and present evidence to establish that Mr. Ragsdale's alleged statements were obtained in violation of state and federal constitutional requirements. The lower court found that this claim was "bogus and a sham" because "counsel filed a motion to suppress the defendant's statements and the motion was denied" (PC-R. 401).[13] Again, this simply makes Mr. Ragsdale's point – counsel clearly wanted to have the statements suppressed, but failed to present available evidence. Filing a motion to suppress, and not presenting available evidence in support of the motion, is no better than not filing a motion at all.

The claim of ineffective assistance of counsel is neither "bogus" nor a "sham" as the lower court found (PC-R. 401), but rather a constitutional basis for relief, as the Supreme Court of the United States has recognized. Mincey v. Arizona, 437 U.S. 385 (1978); Miranda v. Arizona, 384 U.S. 436 (1966). The inquiry into the validity of a Miranda waiver has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice

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[13]The lower court commented that Mr. Ragsdale was procedurally barred from "arguing in a 3.850 motion that the trial court failed to suppress his confessions" (PC-R. 401). Mr. Ragsdale's argument with respect to this claims is that trial counsel failed to investigate, prepare, and present available evidence that would have established that Mr. Ragsdale's statements were inadmissible. The lower court failed to cite any authority for the proposition that such a claim of ineffective assistance of counsel is procedurally barred in a Rule 3.850 motion because the authority is to the contrary. Ineffective assistance of counsel claims are properly raised in Rule 3.850 motions. Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987).

rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both a free choice and the reauisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Moran v. Burbine, 475 U.S. 412 (1986). See Arizona v. Fulminante, 111 S. Ct. 1246 (1991). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938)(emphasis added); Miranda v. Arizona, 384 U.S. 436, 475 (1966) (applying the Johnson v. Zerbst standard to waiver of Miranda rights). The accused's mental state is the critical factor.

The lower court also found that the claim was refuted by the record because trial counsel did file a motion to suppress (PC-R, 401). The lower court, however, misquoted the postconviction motion, and misapprehended the claim that was raised. According to the lower court, Mr. Ragsdale alleged that counsel failed to "challenge the admission of two statements allegedly made by Mr. Ragsdale without benefit of counsel. See p. 36 of post-conviction motion" (PC-R. 401). However, page 36 of the motion did not allege the quoted passage cited by Judge Cobb, but rather that "Mr. Ragsdale's counsel performed deficiently by failing to challenge effectively the admission of two statements allegedly made by Mr. Ragsdale without benefit of counsel" (PC-R. 318). There is a big difference between alleging that counsel failed to challenge the statements, and that trial counsel

ineffectively failed to use available evidence when challenging those statements. The former is the basis for the lower court's ruling that the claim was refuted by the record. The latter is the claim that was raised by Mr. Ragsdale. This claim warrants an evidentiary hearing.

The court also found that Mr. Ragsdale failed to provide any "specifics" about what evidence and witnesses were available (PC-R. 401). The allegations in Mr. Ragsdale's motion reveal otherwise:

> Mr. Ragsdale has now been examined by a competent mental health expert who has been provided with all the background documents that went undiscovered at the time of trial. Based on a professionally competent neuropsychological examination, as well as a review of background materials, the expert has determined that at the time of the crime, trial, sentencing, and appeal, Mr. Ragsdale was suffering from organic brain damage, as well as mental retardation. Expert testimony can establish that, because of his impairments, Mr. Ragsdale has severe language and listening comprehension difficulties, as well as a substantially impaired ability to concentrate among distractions which may present themselves. Moreover, the neuropsychological testing administered to Mr. Ragsdale reveals that he suffers from organic impairment, with the frontal lobe being the area reflective of the most damage. As a result, Mr. Ragsdale has difficulty with concentration, attention, and mental flexibility. His ability to reason and exhibit appropriate judgment, as well as determine and assess long-term consequences of his actions, is also substantially impaired. All of these factors contribute to Mr. Ragsdale's inability to knowingly, intelligently, and voluntarily waive any constitutional rights. Further, this mental health evidence establishes both statutory and nonstatutory mitigation based on Mr. Ragsdale's mental condition, if only Mr. Ragsdale had been provided with assistance from a competent, confidential mental health expert. Counsel's failure to ensure that Mr. Ragsdale received such mental health assistance was deficient performance. Mr. Ragsdale was prejudiced by such deficient performance in that he was forced to proceed to trial and

> sentencing when he was incompetent to do so; in that he waived important constitutional rights without having the capacity to knowingly, intelligently, and voluntarily do so, and in that the jury and judge never heard evidence of substantial statutory and nonstatutory mitigation relating to Mr. Ragsdale's organic brain damage. This evidence was available, yet counsel unreasonably and without a strategic reason failed to investigate, prepare, and present it.
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> * * *
>
> Mr. Ragsdale's rights were violated when the State exploited his mental disabilities stemming from organic brain damage, his failure to comprehend the legal system and his inability to make a knowing and voluntary waiver of his rights in order to obtain a statement, Because of his mental impairments which went undiscovered prior to trial, Mr. Ragsdale has severe language and listening comprehension difficulties, as well as a substantially impaired ability to concentrate among distractions which may present themselves. Moreover, the neuropsychological testing administered to Mr. Ragsdale reveals that he suffers from organic impairment, with the frontal lobe being the area reflective of the most damage. As a result, Mr. Ragsdale has difficulty with concentration, attention, and mental flexibility. His ability to reason and exhibit appropriate judgment, as well as determine and assess long-term consequences of his actions, is also substantially impaired. All of these factors contribute to Mr. Ragsdale's inability to knowingly, intelligently, and voluntarily waive any constitutional rights. Yet none of this information was presented to the trial judge or jury, to Mr. Ragsdale's substantial prejudice. Had this information been presented, the statements would have to have been suppressed.

(PC-R. 307-08; 310-11).

The Supreme Court has explained that "a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Failure to disclose impeachment evidence also results in a violation of Brady, Giglio v. United States, 405 U.S. 150, 154 (1972), as does the failure to disclose evidence which supported the theory of defense. United States v. Spagnoulo, 960 F.2d 995 (1 1th Cir. 1992). The State is obligated to correct any false testimony. Napue v. Illinois, 360 U.S. 264 (1959). For purposes of finding a due process violation there is no difference between any of these types of evidence; their disclosure is equally important to ensuring a fair trial. See Kyles v. Whitlev, 115 S. Ct. 1555, 1565 (1995). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either the state, the defense, or both fail in their obligations, a new trial or sentencing proceeding is required if the cumulative effect of these errors undermines confidence in the outcome. Smith v. Wainwright, 799 F.2d 1442 (1 1th Cir. 1986); see Kyles; Jones v. State, 591 So. 2d 91 1 (Fla. 1991). See also Scott v. State, 657 So. 2d 1129 (Fla. 1995).

Evidence which supported the theory of defense at trial was exculpatory evidence which the State was obligated to disclose. Aranao v. State, 467 So. 2d 692 (Fla. 1985); United States v. Spagnoulo, 960 F.2d 995 (1 1th Cir. 1992); cf. Mills v. Singletary, 63 F.3d 999, 1019 (11 th Cir. 1993). To the extent that trial counsel should have discovered the exculpatory evidence, counsel's performance was deficient. See Provenzano v. State, 616 So. 2d 428 (Fla. 1993); State v. Gunsbv. The burden of disclosing exculpatory evidence rests with both the prosecution as well as law enforcement. Kvles, 115 S. Ct. at 1565. The state bears the "affirmative duty to disclose evidence favorable to a defendant." Id. The burden of investigating and presenting exculpatory evidence rests with defense counsel. Strickland v. Washington.

As explained in Kvles, a court evaluating a Brady claim must consider the prejudice flowing from the nondisclosures "collectively, not item-by-item." Accord Swafford v. State, 679 So. 2d 736 (Fla. 1996); Jones v. State, 591 So. 2d 911 (Fla. 1991). Since the materiality standard governing Brady claims was borrowed from Strickland (United States v. Bagley, 105 S. Ct. 3375 (1985)), the same cumulative standard must also apply to ineffective assistance claims. The purpose of the prejudice standard is to determine whether the defendant suffered sufficient prejudice to undermine confidence in the reliability of the outcome; the purpose is not to divide the error into compartments and help the State sweep the misconduct under the proverbial rug. See Kyles, 115 S. Ct. at 1565-1567.

Whether the lack of an adversarial testing was the result of ineffective assistance of counsel, the State's suppression of material evidence, or newly-discovered evidence,

or a combination thereof, Mr. Ragsdale is entitled to a new trial. State v. Gunsby, 670 So. 2d 920, 923-924 (Fla. 1996). At a minimum, Mr. Ragsdale is entitled to an evidentiary hearing, as the files and records do not conclusively demonstrate that he is entitled to no relief. Those portions of the record attached by the lower court only serve to refute the lower court's findings, not the allegations contained in Mr. Ragsdale's motion. Reversal with directions to conduct an evidentiary hearing before a neutral and impartial judge, see Argument II, supra, is warranted.

ARGUMENT IV

THE PENALTY PHASE ADVERSARIAL TESTING CLAIM

As with all the other claims raised by Mr. Ragsdale, the lower court summarily denied this claim without the benefit of an evidentiary hearing (PC-R. 402-03). The lower court failed to attach any portions of the record which conclusively established that Mr. Ragsdale was not entitled to relief. The few record attachments discussed by the lower court do not in any fashion serve to refute the allegations made in Mr. Ragsdale's motion, much less conclusively so.

During the penalty phase, counsel put on only one witness, Terry Ragsdale, Mr. Ragsdale's brother who had testified for the state in the guilt phase. Terry Ragsdale had provided very damaging evidence against his brother at the guilt phase,[14] and thus the only mitigation witness the jury heard from was the very individual (and brother of the defendant) who testified for the prosecution, Terry provided only scant information

[14]Among other things, Terry Ragsdale testified during the guilt phase that his brother allegedly told him that he had pulled out a knife and cut the victim "from ear to ear" (R. 310).

about Mr. Ragsdale's background and life history, for example, that he had a scar on his cheek from a car accident and that as a result, his brother's eye wandered (R. 690), and that he shot Eugene with an arrow through his eye, and Eugene was rendered blind in that eye (R. 691).

The marginal information that this sole mitigation witness provided on direct was eviscerated on cross-examination. The State elicited that Mr. Ragsdale has been mean all his life, that he fought a lot, pushed people around, had the reputation of being a bully, and that people were scared of him (R. 692). Terry also testified that it didn't surprise him that his brother committed this murder because "[i]f he was mad enough" he could do anything (R. 695).

Counsel failed to adequately investigate and prepare for the penalty phase. Had counsel investigated, he would have known that other family members were available and willing to testify of Mr. Ragsdale's behalf. Other options were available besides calling in mitigation the very person who told the jury that Mr. Ragsdale had confessed to cutting the victim's throat. Family members, including Mr. Ragsdale's mother and other siblings, were available to testify in detail regarding Mr. Ragsdale's character and background, his early life which was marked by poverty and deprivation, and his history of severe mental deficits and head injuries, yet this evidence was never adequately investigated and never presented to the jury. Although Mr. Ragsdale suffered from a lifetime of drug and alcohol addiction and was intoxicated at the time of the offense, no such evidence was presented to the judge or jury. The jury returned a sentencing recommendation of 8-4, and evinced substantial doubt as to Mr. Ragsdale's relative

culpability in this incident. See (PC-R. 762). Any additional evidence would have made a difference. An evidentiary hearing is clearly warranted.

Counsel also failed to adequately investigate, prepare, and present mental health mitigation at the penalty phase. See also Argument V, infra. Counsel failed to obtain the services of a qualified mental health expert to assist in the preparation of a penalty phase case and to testify regarding mitigating circumstances. The law is clear that a capital defendant is entitled to the effective assistance of a qualified mental health professional. In fact, Florida law provides that "an indigent defendant has a constitutional right to choose a competent psychiatrist of his or her personal choice and is entitled to receive funds to hire such an expert." Morgan v. State, 639 So. 2d 6, 12 (Fla. 1994) (citing Ake v. Oklahoma, 470 U.S. 68 (1985); Burch v. State, 522 So. 2d 810 (Fla. 1988)). It is ineffective assistance when counsel unreasonably fails to investigate mental health issues, Futch v. Dugger, 874 F. 2d 1483 (1 lth Cir. 1989); Agan v. Singletary, 12 F.3d 1012 (11 th Cir. 1994), and to obtain the services of a qualified mental health expert to assist in the defense and evaluate for the presence of mitigating circumstances. See, e.g., Hill v. Lockhart, 28 F.3d 832 (8th Cir. **1994).**

The lower court ruled that this claim was refuted by the record because "[t]he record shows that counsel sought the appointment of a psychiatric expert and that the court granted his request" (PC-R, 403). However, what the record actually reflects is that an expert was appointed only to evaluate Mr. Ragsdale's competency to stand trial (PC-R. 502). No expert was appointed to evaluate Mr. Ragsdale for the purposes of presenting mental health mitigation at the penalty phase, and the expert who was appointed for

competency purposes never testified at all. The differences between competency to stand trial and mental health mitigation are well-known. See Blanco v. Singletary, 943 F.2d 1477, 1503 (11th Cir. 1991) ("[o]ne can be competent to stand trial and yet suffer from mental health problems that the sentencing jury and judge should have had an opportunity to consider"); Perri v. State, 441 So. 2d 606, 609 (Fla. 1983) ("[a] defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state").

The lower court also found that Mr. Ragsdale's allegations that the jury was never presented with available evidence that Mr. Ragsdale suffered from organic brain damage and was mentally retarded to be refuted by the record because "the jury heard during the penalty phase the defendant had been injured in an automobile accident and, as a child, struck in the right eye with an arrow" (PC-R, 403). This testimony in no way refutes Mr. Ragsdale's allegations that he suffers from organic brain damage, mental retardation, and that expert neuropsychological experts were available to testify to these conclusions. In fact, what that the testimony about the car accident and eye injury does establish is that trial counsel was on notice of potential neurological damage, yet, without a tactic or strategy, failed to investigate and present such evidence.[15]

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[15]Moreover, the fact that defense counsel presented some information at the penalty phase does not equate to a reliable adversarial testing. For example, in Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995), this Court was confronted with a case where trial counsel had presented five witnesses at the penalty phase, yet found that the "testimony of these witnesses was quite limited." Id at 110 n.7. The Court went on to conclude that because substantial additional mitigating evidence, including further lay witness testimony and mental health testimony, this omission undermined confidence in the outcome of the

Nowhere in the penalty phase testimony does any witness testify to the allegations set forth by Mr. Ragsdale in his postconviction motion relating to mental health mitigation, both statutory and nonstatutory:

> Mr. Ragsdale has now been examined by a competent mental health expert. The expert has determined that at the time of the crime, trial, sentencing, and appeal, Mr. Ragsdale was suffering from organic brain damage, as well as mental retardation. Expert testimony can establish that, because of his impairments, Mr. Ragsdale has severe language and listening comprehension difficulties, as well as a substantially impaired ability to concentrate among distractions which may present themselves. Moreover, the neuropsychological testing administered to Mr. Ragsdale reveals that he suffers from organic impairment, with the frontal lobe being the area reflective of the most damage. As a result, Mr. Ragsdale has difficulty with concentration, attention, and mental flexibility. His ability to reason and exhibit appropriate judgment, as well as determine and assess long-term consequences of his actions, is also substantially impaired. This mental health evidence establishes both statutory and nonstatutory mitigation based on Mr. Ragsdale's mental condition, if only Mr. Ragsdale had been provided with assistance from a competent, confidential mental health expert. Counsel's failure to ensure that Mr. Ragsdale received such mental health assistance was deficient performance. The jury and judge never heard evidence of substantial statutory and nonstatutory mitigation relating to Mr. Ragsdale's organic brain damage and mental retardation. This evidence was available, yet counsel unreasonably and without a strategic reason failed to investigate, prepare, and present it. At an evidentiary hearing, Mr. Ragsdale will present expert testimony of his mental condition as it related to sentencing issues.
>
> A plethora of compelling mitigating evidence was readily available for counsel to present on Mr. Ragsdale's behalf at his trial -- mitigating evidence without which no individualized consideration could occur. Had counsel

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penalty phase. Id. at **110.**

> adequately prepared and discharged his Sixth Amendment duties, critical evidence would have been available at both phases of his trial. Overwhelming mitigating evidence, which would have precluded a sentence of death in this case, would have been uncovered. Evidence regarding Mr. Ragsdale's character and background, his early life which was marked by poverty and deprivation, brain damage, educational deficits, and mental retardation all were ignored. The humanity of a person about to be sentenced for a capital offense is the critical question at the penalty phase of a capital case. Evidence bearing on who Mr. Ragsdale was and where he came from would have suggested that his personality and motivations could be explained, at least in part, by his personal history. It would have shown that Mr. Ragsdale is worth saving and deserving of mercy. It is precisely this kind of evidence the United States Supreme Court had in mind when it wrote Lockett v. Ohio and Eddings v. Oklahoma. The Lockett Court was concerned that unless the sentencer could consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants will be treated not as unique human beings, but as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is just the kind of humanizing evidence that "may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (1 1th Cir. 1983). It would have made a difference between life and death in this case.

(PC-R. 332-34).

Counsel clearly was on notice of potential mental health issues, yet unreasonably failed to pursue the issue, Such an omission constitutes deficient performance. Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995). The failure of trial counsel to investigate and present available evidence of organic brain damage, mental retardation, and drug and alcohol abuse deprived Mr. Ragsdale of a reliable adversarial testing. Id. See also Rose v. State, 675 So. 2d 567, 573 (Fla. 1996) (citations omitted) ("In evaluating the harmfulness of resentencing counsel's performance, we have consistently recognized that

severe mental disturbance is a mitigating factor of the most weighty order, [] and the failure to present it in the penalty phase may constitute prejudicial ineffectiveness").

Mr. Ragsdale was clearly prejudiced by counsel's failure to present the available mitigation, both lay and mental health evidence, at the penalty phase. The jury recommended death by a slim 8-4 margin, and only after it had several questions which reflected uncertainly over the relative culpability between Mr. Ragsdale and co-defendant Illig. First, the jury asked: "We would like a legal definition of no contest, nolo contendere" (R. 757).[16] The jury later came back another question: "Is it unjust-just to sentence the defendant to a greater sentence (death) than the accomplice, if based on the testimony heard by the jurors, the jurors believe the defendant may have had a lesser part in the murder?" (R. 762). Clearly, the jurors had serious questions about Mr. Ragsdale's relative culpability," and the additional mitigation establishing numerous relevant mitigating factors, including statutory mental health mitigating factors, would have made a difference. At a minimum, an evidentiary hearing as to prejudice is warranted. See Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992).

Evidentiary resolution of this claim is and was proper, for confidence in the outcome is undermined, and the results of the penalty phase are unreliable. Deaton v.

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[16]During the penalty phase, Mr. Ragsdale's counsel offered co-defendant Illig's conviction in mitigation; Illig had pled nolo contendere to his involvement in the killing (R. 697).

"The jurors' question also raises substantial doubt that the jurors found beyond a reasonable doubt that Mr. Ragsdale committed the crime with an intent to torture the victim, since the jurors clearly had questions about whether Mr. Ragsdale or Illig actually committed the murder. A finding of heinous, atrocious, or cruel cannot be made vicariously. Omelus v. State, 584 So. 2d 563 (Fla. 1991).

Dugger, 635 So. 2d 4 (Fla. 1994). An evidentiary hearing must be conducted, and Rule 3.850 relief is proper.

ARGUMENT V

THE AKE V. OKLAHOMA CLAIM

A defendant is entitled to expert psychiatric assistance when the State makes his mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kerns, 758 F.2d 523, 529 (1 lth Cir. 1985). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background, see, e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to assure that the client is not denied a professional and professionallv conducted mental health evaluation. See Mason v. State, 489 So. 2d 734 (Fla. 1986); Mauldin v. Wainwright, 723 F.2d 799 (1 1th Cir. 1984). The mental health expert also must protect the client's rights, and violates those rights when he or she fails to provide professionally adequate assistance. Mason v. State. The expert also has the responsibility to properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

Mr. Ragsdale did not receive a professionally adequate mental health evaluation in that the expert did not have sufficient background information to make a reliable judgment. The mental health expert relied exclusively on self-report, and did not review any school, hospital, or other medical records, or talk to family about Mr. Ragsdale's health and education. Further, the expert failed to conduct any neuropsychological testing, testing which was clearly indicated in Mr. Ragsdale's case, given his serious head

injury inflicted during a car accident. As a result of the expert's failure to adequately evaluate Mr. Ragsdale, critical issues regarding competency, intoxication, and statutory and nonstatutory mitigation were never presented to the judge and jury.

The lower court found that this claim was procedurally barred (PC-R. 401). However, a claim that a capital defendant received inadequate or ineffective mental health assistance is properly raised in a collateral attack, as this Court has long held. State v. Sireci, 536 So. 2d 231 (Fla. 1988); Mason v. State, 489 So. 2d 734 (Fla. 1986). The lower court's finding of a procedural bar was erroneous as a matter of law.

Trial counsel did seek the assistance of an expert to evaluate Mr. Ragsdale's competency to stand trial (PC-R. 502). However, that expert failed to conduct a professionally adequate evaluation. The expert's ability to conduct an adequate evaluation was further limited by trial counsel's failure to provide the proper background materials.

As Mr. Ragsdale alleged below, he has now been examined by a competent mental health expert who has been provided with all the background documents that went undiscovered at the time of trial, Based on a professionally competent neuropsychological examination, as well as a review of background materials, the expert has determined that at the time of the crime, trial, sentencing, and appeal, Mr. Ragsdale was suffering from organic brain damage, as well as mental retardation. Expert testimony can establish that, because of his impairments, Mr. Ragsdale has severe language and listening comprehension difficulties, as well as a substantially impaired ability to concentrate among distractions which may present themselves.

Moreover, the neuropsychological testing administered to Mr. Ragsdale reveals that he suffers from organic impairment, with the frontal lobe being the area reflective of the most damage. As a result, Mr. Ragsdale has difficulty with concentration, attention, and mental flexibility. His ability to reason and exhibit appropriate judgment, as well as determine and assess long-term consequences of his actions, is also substantially impaired.

All of these factors contribute to Mr. Ragsdale's inability to knowingly, intelligently, and voluntarily waive any constitutional rights, Further, this mental health evidence establishes both statutory and nonstatutory mitigation based on Mr. Ragsdale's mental condition, if only Mr. Ragsdale had been provided with assistance from a competent, confidential mental health expert.

Counsel's failure to ensure that Mr. Ragsdale received such mental health assistance was deficient performance. Mr. Ragsdale was prejudiced by such deficient performance in that he was forced to proceed to trial and sentencing when he was incompetent to do so; in that he waived important constitutional rights without having the capacity to knowingly, intelligently, and voluntarily do so, and in that the jury and judge never heard evidence of substantial statutory and nonstatutory mitigation relating to Mr. Ragsdale's organic brain damage. This evidence was available, yet counsel unreasonably and without a strategic reason failed to investigate, prepare, and present it.

The lower court erred as a matter of law in concluding that this claim was procedurally barred. Because the files and records do not conclusively demonstrate that

Mr. Ragsdale is not entitled to relief, an evidentiary hearing was and is required. Reversal is therefore warranted.

ARGUMENT VI

THE COMPETENCY CLAIM

A defendant must be competent at the time of his trial; otherwise, his conviction violates due process. Bishop v. United States, 350 U.S. 961 (1956); Dusky v. United States, 362 U.S. 402 (1960). If doubt exists as to a defendant's competency, the court must hold a hearing. Pate v. Robinson, 383 U.S. 375 (1966); James v. Singletary, 957 F.2d 1562 (11 th Cir. 1992) Similarly, if a question arises during trial as to a defendant's competency, due process requires the court to conduct a hearing. Drope v. Missouri, 420 U.S. 162 (1975). Due process also requires that that hearing comport with constitutional standards. Pate; lames.

A claim that a defendant was incompetent at the time of the trial can be proven by the subsequent presentation of collateral evidence as to actual incompetency. Nathaniel v. Estelle, 493 F.2d 794, 796-97 (5th Cir. 1974). It is insufficient that a defendant is aware of the ongoing legal proceedings at the time of trial; rather, he must also have a "rational understanding" of the proceedings. Laffertv v. Cook, 949 F.2d 1546 (10th Cir. 1991) cert. denied, 112 S. Ct. 1942 (1992).

Where a Rule 3.850 litigant presents a claim contending that he was incompetent to stand trial and proffering extra-record information alleging with specificity the nature of the mental health evidence that went undiscovered, an evidentiary hearing is required. Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986) ("we must remand for a hearing on

whether or not the examining psychiatrists would have reached the same conclusion as to competency had they been fully aware of Mason's history"). Additionally, where a litigant presents properly pled claims demonstrating that the mental health evaluations conducted at the time of trial was professionally inadequate, an evidentiary hearing and Rule 3.850 relief are appropriate. See State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); cf. Mason, 489 So. 2d at 735-37.

It was incumbent upon trial counsel to alert the lower court to the possibility that his client was not competent to be tried. Counsel's duty is continuing, so that if indicia of mental impairment arise during the representation, counsel must bring the matter to the court's attention and request a competency evaluation and a competency hearing. Counsel failed to do either in this case, despite evidence of Mr. Ragsdale's mental impairments.

There were indicia that Mr. Ragsdale was incompetent throughout the two-year period leading up to his trial in May, 1988. These indicia should have alerted all counsel and the Court that competency was an issue. Predecessor counsel Webb filed a Motion to Appoint Confidential Expert on September 4, 1986, requesting the appointment of an expert pursuant to Fla. R. Crim. P. 3.216(a). Counsel alleged that, "[T]he undersigned counsel has reason to believe the Defendant may have been incompetent at the time of the alleged offense and may be incompetent to stand trial" (R. 790). Later, predecessor counsel Webb moved to withdraw from representing Mr. Ragsdale, citing "irreconcilable differences" (R. 840). Mr. Webb's replacement, Alfred J. Ivie, likewise moved to withdraw from representing Mr. Ragsdale, alleging that

"irreconcilable differences exist between attorney and defendant" (R. 855). Mr. Ivie's representation lasted only four months before he withdrew,

Finally, Mr. Ragsdale's appearance should have informed counsel of the need to explore competency. Prior to trial, Mr. Ragsdale suffered two severe head injuries. As a child, he was shot with an arrow and lost an eye. As a teenager, Mr. Ragsdale was in a car accident in which he smashed into the windshield, lost consciousness, and was hospitalized. The physical manifestations of these accidents remain; Mr. Ragsdale is blind in one eye and has a large scar on his face. Reasonably competent counsel should have been put on notice that, as evidenced by his facial scars, Mr. Ragsdale had suffered at least one head injury. The fact that Mr. Ragsdale had head injuries should have put counsel on notice that he may have suffered brain damage, and may not be competent to stand trial.

Mr. Ragsdale's inability to communicate and confer with counsel in any meaningful way should have put the court on notice that competency was an issue. Dusky v. United States, 362 U.S. 402 (1960) *(per curia-n)* (a defendant may not be tried unless he has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding . . . [and] a rational as well as factual understanding of the proceedings against him"). Cf. Fla. R. Crim. P. 3.21 1 (a)(l) (1996). Likewise, predecessor counsel Webb's motion for appointment of a confidential expert specifically alleged that Mr. Ragsdale may have been incompetent to stand trial. As such, the Court was on notice that competency was an issue. Counsel failed in their duty to bring the issue of competency to the Court's attention and to litigate the issue, and the Court failed

in its duty to appoint experts and hold a competency hearing. As a result, Mr. Ragsdale was tried and convicted while incompetent, in violation of the constitutional guarantee of due process.

Once the court was petitioned by defense counsel to appoint a confidential expert to determine defendant's competency, the Court was obligated to determine "whether there is a reasonable ground to believe the defendant may be incompetent." Scott v. State, 420 So. 2d 595, 597 (Fla. 1982) (emphasis in original). The issue of whether the defendant is incompetent should be determined after a hearing. Id. The Court failed to appoint mental health experts or to hold the required competency hearing. This was fundamental error.

Mr. Ragsdale has now been examined by a competent mental health expert who has been provided with all the background documents which went undiscovered at the time of trial. Based on a professionally competent neuropsychological examination, as well as a review of background materials, the expert has determined that at the time of the crime, trial, sentencing, and appeal, Mr. Ragsdale was suffering from organic brain damage, as well as mental retardation. Expert testimony can establish that, because of his impairments, Mr. Ragsdale has severe language and listening comprehension difficulties, as well as a substantially impaired ability to concentrate among distractions. Moreover, the neuropsychological testing administered to Mr. Ragsdale reveals that he suffers from organic impairment, with the frontal lobe being the area reflective of the most damage. As a result, Mr. Ragsdale has difficulty with concentration, attention, and mental flexibility. His ability to reason and exhibit appropriate judgment, as well as

determine and assess long-term consequences of his actions, is also substantially impaired. All of these factors contribute to Mr. Ragsdale's inability to manifest a factual as well as a rational understanding of the proceedings. Counsel's failure to ensure that Mr. Ragsdale received such mental health assistance was deficient performance. Mr. Ragsdale was prejudiced by such deficient performance in that he was forced to proceed to trial and sentencing when he was incompetent to do so, in violation of his constitutional right to due process. To the extent that it is not possible to evaluate Mr. Ragsdale's competency nunc pro tunc to the time of trial "in such a manner as to assure [Mr. Ragsdale] due process of law, the court must so rule and grant a new trial." Mason, 489 So. 2d at 737. Cf. Hill v. State, 473 So. 2d 1253 (Fla. 1985).

The lower court found that "the defendant is procedurally barred from arguing that he was incompetent to stand trial and that the court-ordered psychiatric examination was sufficient" (PC-R, 400). As noted above, the lower court's findings are erroneous as a matter of law. Mason v. State; State v. Sireci.[18] Further, the lower court's

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[18]In support of its finding, the lower court cited Preston v. State, 528 So. 2d 896 (Fla. 1988), and Johnston v. Dugger, 583 So. 2d 657 (Fla. 1991). Preston is completely innaposite to the claim raised by Mr. Ragsdale. In Preston, the defendant's postconviction motion raised a claim based on Estelle v. Smith, 451 U.S. 454 (1981). Preston, 528 So. 2d at 899. This Court found that the Estelle claim was barred because trial counsel failed to raise the issue at trial, even though Estelle was the law at the time of trial. Id. This has nothing to do with the claim raised by Mr. Ragsdale, and express authority exists to support Mr. Ragsdale's entitlement to raise the instant claim in postconviction. Sireci: Mason.

The lower court's citation to Johnston v. Dugger only serves to support Mr. Ragsdale's claim. In Johnston, the trial court had determined that the psychological evaluations conducted on the defendant pre-trial in order to evaluate competency issues were adequate, but made that finding only after taking testimony on the issue at an evidentiary hearing. Johnston, 583 So. 2d at 660. In Mr. Ragsdale's case, the lower court did not grant an evidentiary hearing, so there is no "competent, substantial evidence in the

explanation that it reviewed the trial transcript "and finds no evidence that defendant was incompetent in any way" is not sufficient to deny this claim. The lower court is not a psychiatrist, and conducted no testing of Mr. Ragsdale. The lower court's ruling again demonstrates its refusal to accept the allegations contained in the Rule 3.850 motion as true, as it must. Because the files and records do not conclusively establish that Mr. Ragsdale is not entitled to relief, an evidentiary hearing is required. Reversal is therefore warranted.

ARGUMENT VII

FAILURE TO OBJECT TO IMPROPER ARGUMENT CLAIM

During Mr. Ragsdale's penalty phase, counsel failed to object to wholly impermissible testimony and argument from the State. The focus of the State's case -- particularly its case for death -- was that Mr. Ragsdale should be sentenced to die because the victim was elderly, living alone, of small physical stature, and a friend of Mr. Ragsdale's family. The State also emphasized to the jury in its argument for death that it took 22 minutes for the victim to die: "For twenty-two minutes, drop by drop, heartbeat by heartbeat, he bled to death" (R. 723). The State repeated this improper argument to the judge before sentencing (R. 661). This type of argument is impermissible at a capital sentencing phase, for it injects impermissible emotional factors into the consideration of punishment. Penry v. Lynaugh, 492 U.S. 302 (1989). Bertolotti v. State, 476 So. 2d 130 (Fla. 1985).

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record to support the lower court's finding that the examinations were not inadequate." Id. A hearing is required in Mr. Ragsdale's case, as it was in Johnston.

The prosecutor argued that the fact that Mr. Ragsdale allegedly was a drug dealer and drug user (R. 721, 726), that he allegedly was "always in trouble," (R. 725), that he was allegedly a "violent bully" (R. 726), and that he violated the trust of the state of Alabama by violating parole (R. 721, 725), all should be considered by the jury in arriving at a sentence. These alleged facts should not have been considered by the jury, because they did not tend to prove any statutory aggravating circumstance. Consideration of these factors was improper, prejudicial, and made the jury's sentencing recommendation unreliable and unconstitutional.

Counsel's failure to object to the State's impermissible argument constitutes ineffective assistance of counsel. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir.), cert. denied sub nom Norris v. State, 115 S. Ct. 499 (1994). No tactical or strategic reason appears in this record to explain counsel's failure to object to the patently impermissible information that the State injected into Mr. Ragsdale's penalty phase, Because trial counsel failed to shield Mr. Ragsdale from the impermissible information that the State was heaping on the jury and, by failing to object in essence "assisted the prosecution in making its case," counsel "deprived [Mr. Ragsdale] of adversarial testing of the prosecution's case." Clark v. State, __ Fla. L. Weekly S__ (Fla. March 27, 1997).

The lower court found first found this claim procedurally barred (PC-R. 404). However, the lower court cited no legal authority for this proposition. Claims of ineffective assistance of counsel cannot be raised on direct appeal and are only properly raised in a postconviction motion. Blanco v. Wainwright, 507 So. 2d 1377 (Fla. 1987).

The lower court also found that a claim of failure to object "fails to state a basis for relief" (PC-R. 404). The Supreme Court of the United States has disagreed. Kimmelman v. Morrison, 477 U.S. 365, 377 (1986). Counsel have been found ineffective for failing to object to jury instructions on aggravating factors, Starr v. Lockhart, 23 F.3d 1280, 1284-86 (8th Cir. 1994), for failing to know the law, Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991); Garcia v. State, 622 So. 2d 1325 (Fla. 1993), and for failing to raise proper objections to evidence or argument and argue issues effectively. Atkins v. Attornev General, 932 F.2d 1430 (11 th Cir. 1991); Murshv v. Puckett, 893 F.2d 94 (5th Cir. 1990); Harrison v. Jones, 880 F.2d 1279 (1 1th Cir. 1989); Vela v. Estelle, 708 F.2d 954 (5th Cir. 1983); Turner v. Dugger, 614 So. 2d 1075 (Fla. 1992). Clearly, the lower court's finding that an attorney's failure to object "fails to state a basis for relief" is contrary to overwhelming legal precedent.

Because the files and records do not conclusively demonstrate that Mr. Ragsdale is not entitled to relief, an evidentiary hearing is required. Reversal is therefore warranted.

ARGUMENT VIII

FAILURE TO EFFECTIVELY ARGUE CLAIM

In closing argument of the penalty phase, counsel had his last opportunity to summarize for the jury all the evidence, presented in both the guilt-innocence and penalty phases, that mitigated against imposition of the death penalty. Contrary to his constitutional obligation, counsel failed to argue evidence in the record which would have supported valid mitigating evidence. Given the jury's recommendation of 8-4, and

the obvious concerns that the jury evinced about Mr. Ragsdale's relative culpability as it relates to the co-defendant Illig, counsel's failures prejudiced Mr. Ragsdale.

Defense counsel failed to argue that Mr. Ragsdale's good behavior at trial was a factor the jury should consider in mitigation against the death penalty, in accordance with well-settled Florida law. Mordenti v. State, 630 So. 2d 1080 (Fla. 1994); Marshall v. State, 604 So. 2d 799 (Fla. 1992); Parker v. State, 476 So. 2d 134 (Fla. 1985); Delap v. State, 440 So. 2d 1242 (Fla. 1983). Defense counsel failed to argue that Mr. Ragsdale had suffered a head injury as a child as a result of an automobile accident (R. 690), and that he was blinded in one eye when his brother shot him with an arrow (R. 691). This evidence mitigates against a death sentence. Carter v. State, 560 So. 2d 1166 (Fla. 1990); Sireci v. State, 536 So. 2d 231 (Fla. 1988).

If this evidence had been argued to the jury as factors mitigating against the death penalty, there is a reasonable probability that the jury would have recommended life, particularly given the closeness of the jury vote in this case. Counsel's failures during the penalty phase in failing to urge the mitigating factors effectively "deprived [Mr. Ragsdale] of adversarial testing of the prosecution's case." Clark v. State, __ Fla. L. Weekly S__ (Fla. March 27, 1997).

The lower court summarily rejected this claim because trial counsel argued that Mr. Ragsdale was an accomplice in the murder and that his participation was relatively minor (PC-R. 403). However, nothing in this record demonstrates that trial counsel argued in mitigation the evidence described in this claim. The lower court's finding that this claim is refuted by the record is erroneous. Because the files and record do not

conclusively demonstrate that Mr. Ragsdale is not entitled to relief, an evidentiary hearing is required. Reversal is therefore warranted.

ARGUMENT IX

THE BURDEN-SHIFTING CLAIM

A capital sentencing jury must be "told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . . [S]uch a sentence could be given if the state showed aggravating circumstances outweighed the mitigating circumstances. State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This standard was never applied at the penalty phase. The burden was shifted to Mr. Ragsdale on the question of whether he should live or die (R. 725-32, 748-51). This injected misleading and irrelevant factors into the sentencing determination, violating Hitchcock v. Dugger, 481 U.S. 393 (1987); and Mavnard v. Cartwright, 486 U.S. 356 (1988). To the extent that trial counsel failed to object or argue this issue effectively, his performance was deficient and Mr. Ragsdale was prejudiced. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir.), cert. denied, sub nom. Norris v. State, 115 S. Ct. 499 (1994). An evidentiary hearing and relief are appropriate.

ARGUMENT X

AGGRAVATING FACTORS/JURY INSTRUCTIONS CLAIM

Mr. Ragsdale's jury did not receive complete and accurate instructions defining the aggravating circumstances in a constitutionally narrow fashion. The jury was instructed on five aggravating factors. The jury was not advised on the elements of the aggravating factors which the State had to prove beyond a reasonable doubt. As a result,

the jury was given unbridled discretion to return a death recommendation. Specifically relying upon the tainted death recommendation, the judge sentenced Mr. Ragsdale to death.

A. THE JURY INSTRUCTIONS GIVEN.

The trial court instructed Mr. Ragsdale's jury on five aggravating factors:

> First, the crime for which the defendant is to be sentenced was committed while he was under sentence of imprisonment.
>
> Second, the crime for which the defendant is to be sentenced was committed while he was engaged in the commission of the crime of armed robbery.
>
> Third, the crime for which defendant is to be sentenced was committed for financial gain.
>
> Fourth, the crime for which the defendant is to be sentenced was especially wicked, evil, atrocious or cruel.
>
> And fifth, 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. 749-50). In imposing death, the trial court found three aggravating factors, one of which was a combination of two (R. 664-65). Although the judge considered the second and third aggravators as one in his sentencing order, the jury was never informed that they could not find five separate aggravating factors based on the jury instructions. Further, the jury erroneously considered an aggravating circumstance the trial court did not find established. In sentencing Mr. Ragsdale to death, the judge specifically considered and relied upon the jury's death recommendation.

B. THE AUTOMATIC ACCRAVATOR.

The lower court found that this claim was raised and rejected on direct appeal (PC-R. 404). On that basis, the lower court found the claim procedurally barred (PC-R. 404).

Mr. Ragsdale sought a revisitation of this issue, however, based on law not available or discussed when this claim was previously addressed. In Stringer v. Black, 112 S. Ct. 1130 (1992), the Supreme Court of the United States held that a state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Mr. Ragsdale's sentencer was entitled automatically to return a death sentence upon a finding of first-degree felony murder. This is so because an illusory aggravating circumstance is created, one which does not "genuinely narrow the class of persons eligible for the death penalty," Zant v. Stephens, 462 U.S. 862, 876 (1983), and one which therefore renders the sentencing process unconstitutionally unreliable. Id. "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." Mavnard v. Cartwriaht, 486 U.S. 356, 362 (1988). Because Mr. Ragsdale was convicted of felony murder, he then automatically faced statutory aggravation for felony murder. These aggravating factors were "illusory circumstance[s]" which "infected" the weighing process; these aggravators did not narrow and channel the sentencer's discretion as they simply repeated elements of the offense. Stringer, 112 S. Ct. at 1139. In fact, in Florida the felony murder aggravating factor alone cannot support the death sentence. Rembert v. State, 445 So. 2d 337 (Fla. 1984). Yet the trial court did

not instruct the jury on, and did not apply, this limitation in imposing the death sentence. This is Eighth Amendment error.

In Mr. Ragsdale's case, counsel objected to the use of the underlying felony in order to prove the existence of the corresponding aggravating circumstance. Counsel filed a motion to dismiss the death penalty because the statute allows for the automatic aggravator:

> 3. Section 921 .141, as interpreted in Dixon, unconstitutionally provides for impermissibly mandatory death sentence in every capital homicide case where no mitigating circumstances exist, in that the statute incorporates an automatic aggravating circumstance whether the offense be proved as premeditated murder or as felony murder, to wit:
>
> A. In every case where premeditated murder is proven, aggravating circumstance (i), concerning homicides "committed in a cold, calculated and premeditated manner", would automatically apply.
>
> B. In every case where felony murder is proven relating to one of the enumerated felonies, aggravating circumstances (d) would automatically apply.

(R. 809). The argument was also raised on direct appeal to the Florida Supreme Court. See Initial Brief of Appellant at 41. Fairness dictates that this claim now be addressed and that relief be granted. James v. State, 615 So. 2d 668 (Fla. 1993). On these grounds, Mr. Ragsdale seeks a revisitation of this issue.

C. THE DOUBLING OF AGGRAVATING CIRCUMSTANCES.

Mr. Ragsdale's jury was instructed that it must consider as two separate aggravating factors that the homicide was "committed while he was engaged in . . . the crime of armed robbery" and that "the crime was committed for financial gain" (R. 749). In other words, the jury was told that it could consider both of these aggravators present and "determine whether mitigating circumstances exist that outweigh the aggravating circumstances" (R. 750). Yet, under Florida law, these two aggravating factors merged in Mr. Ragsdale's case. Provence v. State, 337 So, 2d 783, 786 (Fla. 1976); Ropers v. State, 511 So. 2d 526, 533 (Fla. 1987). The trial judge instructed the jury to consider the aggravators separately, yet acknowledged in his sentencing order that he must consider them as only one aggravating circumstance (R. 664). In White v. State, 403 So. 2d 331 (Fla. 1981), the Florida Supreme Court noted "the same circumstance [robbery] cannot also constitute a basis for finding the existence of the aggravating circumstance of , . . pecuniary gain." 403 So. 2d at 337. Cf. Provence, 337 So. 2d at 786.

In Mr. Ragsdale's case, the jury did not receive an instruction regarding this limitation on the consideration of aggravating circumstances. The jury was specifically told to place an extra thumb on the death side of the scale. To the extent that defense counsel failed to object or offer a constitutionally adequate instruction, counsel rendered deficient performance.

D. PECUNIARY CAIN.

The jury was instructed "that the crime for which the defendant is to be sentenced was committed for pecuniary gain" (R. 749). The jury was given no guidance to the elements of this aggravating circumstance in violation of the Eighth Amendment. To the extent that defense counsel failed to object or offer a constitutionally adequate instruction, counsel rendered deficient performance.

E. WICKED, EVIL, ATROCIOUS OR CRUEL.

As to the fourth aggravating factor submitted for the jury's consideration, the jury was told only "the crime . . . was especially wicked, evil, atrocious, or cruel" (R. 749). No additional words were given to the jury to explain what was necessary to establish the presence of this aggravator. In Espinosa v. Florida, 112 S. Ct. 2926 (1992), an identical jury instruction was held to violate the Eighth Amendment.

While Mr. Ragsdale's claim was pending on direct appeal, the Espinosa decision was handed down. This Court, however, found that there was no objection by defense counsel to the constutionality of the standard instruction, and therefore the claim was not adequately preserved for review. Ragsdale v. State, 609 So. 2d at **14.**

Mr. Ragsdale submits that trial counsel did object to the jury being instructed on this aggravating circumstance (R. 700). To the extent that there is any doubt that the objection is sufficient to preserve the error, an evidentiary hearing should be ordered. Trial counsel in capital cases have a duty to know the law and make proper and adequate objections on the aggravating circumstances. Starr v. Lockhart, 23 F. 3d 1280 (8th Cir.), cert. denied sub nom Norris v. State, 115 S. Ct. 499 (1994).

F. UNDER SENTENCE OF IMPRISONMENT.

Mr. Ragsdale's jury was instructed that it could consider that "the crime . . . was committed while the defendant was under sentence of imprisonment" (R. 719, 749). The jury was not told that the weight of this aggravator was less if the defendant had not committed the homicide after escaping from confinement. Songer v. State, 544 So. 2d 1010 (Fla. 1989). In considering this aggravator, the jury needed to be fully instructed. In Mr. Ragsdale's case, the jury did not receive an instruction regarding this limitation on the consideration of aggravating circumstances. To the extent that defense counsel failed to object or offer a constitutionally adequate instruction, counsel rendered deficient performance.

The lower court ruled that "contrary to the defendant's claim, the trial judge declined to instruct the jury on this aggravator and found that it did not apply. This aggravator was never submitted for the jury's consideration" (PC-R. 405). The lower court erred. Mr. Ragsdale's jury was instructed on this aggravating circumstance (R. 749), and the lower court found this aggravator to apply in this case. Ragsdale v. State, 609 So. 2d at 12.

G. COLD, CALCULATED AND PREMEDITATED.

The trial court failed to instruct the jury in Mr. Ragsdale's case as to the limitations on the "cold, calculated and premeditated" aggravator, as required by this Court's jurisprudence. Not only did the trial court fail to give the adequate narrowing instruction, but the State failed to prove the existence of this aggravator beyond a reasonable doubt. There was insufficient evidence to support the finding of this

aggravating circumstance, and the trial court in fact did not find this circumstance (R. 664-65). Because the aggravating circumstance did not apply as a matter of law, it was error to submit it for the jury's consideration. Archer v. State, 613 So. 2d 446 (Fla. 1993).

The Court, in recognizing the vagueness of this aggravator, Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990), has required that it must be narrowed. Jackson v. State, 648 So. 2d 85, 90 (Fla. 1994) ("Florida's standard CCP jury instruction suffers the same constitutional infirmity as the HAC-type instructions which the United States Supreme Court found lacking in Espinosa, Maynard, and Godfrey -- the description of the CCP aggravator is 'so vague as to leave the sentencer without sufficient guidance for determining the presence or absence of the factor.' Espinosa, 112 S. Ct. at 2928"). No narrowing construction was given to Mr. Ragsdale's sentencing jury. To the extent that counsel failed to object and offer a constitutionally adequate instruction, counsel rendered deficient performance.

H. CONCLUSION.

The instructional errors in this case cannot be harmless because mitigation was before the sentencers which could have served as the basis for a life sentence. See Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989); Hitchcock v. State, 614 So. 2d 483 (Fla. 1993); James v. State. Because of the instructional errors in this case, all three aggravating factors found must be stricken, and Mr. Ragsdale must be given a life sentence. Rule 3.850 relief is warranted.

ARGUMENT XI

HARMLESS ERROR ANALYSIS CLAIM

As noted above, Mr. Ragsdale's jury was instructed to consider the cold, calculated and premeditated aggravating factor (R. 749-50), over defense counsel's objection (R. 701). Yet the trial court did not find that aggravating factor to be established (R. 664-65). Because the jury was instructed on an aggravating circumstance which did not apply as a matter of law, an invalid aggravating factor was erroneously entered in the sentencing calculus. Archer v. State, 613 So. 2d 446 (Fla. 1993). Thus, an extra thumb was placed on the death side of the scale. Stringer v. Black, 112 S. Ct. 1130 (1992). As a result, Mr. Ragsdale's sentence of death must be vacated. See Espinosa v. Florida; Sochor v. Florida, 1 12 S. Ct 2114 (1992).

Archer establishes that Mr. Ragsdale is entitled to a new sentencing hearing. Further, Richmond v. Lewis, 113 S. Ct. 528 (1992), establishes Mr. Ragsdale's entitlement to relief. There, the United States Supreme Court indicated that the harmless beyond a reasonable doubt standard for a sentencer's consideration of an invalid aggravator requires consideration of the sentencer's weighing process. Here, this Court failed to address the impact of the error on a sentencing jury which voted for death by a narrow margin. A jury resentencing must be ordered.

ARGUMENT XII

CALDWELL V. MISSISSIPPI CLAIM

Mr. Ragsdale's jury was repeatedly and unconstitutionally instructed by the court that its role was merely "advisory." (See, e.g., R. 29, 75-76, 127, 166, 168, 222-23, 238-

39, 617, 618, 673, 717-18, 730, 731, 732, 748-49, 751-53, 755). Because great weight is given the jury's recommendation, the jury is a sentencer in Florida. Eseinosa v. Florida, 112 S. Ct. 2926 (1992). These comments and instruction violated Caldwell v. Mississippi, 472 U.S. 3209 (1985). The State cannot show that the comments had "no effect." Caldwell, 472 U.S. at 340-41. Trial counsel was ineffective in failing to preserve this issue. Kimmelman. Relief is proper.

ARGUMENT XIII

OVERBROAD DEATH PENALTY STATUTE CLAIM

The United States Supreme Court's opinions in Richmond v. Lewis, 113 S. Ct. 528 (1992) and Espinosa v. Florida, 112 S. Ct. 2926 (1992), establish that this Court erred in its analysis of Mr. Ragsdale's claim raised on direct appeal that the Florida statute, setting forth the aggravating circumstances of "wicked, evil, atrocious or cruel" and "cold, calculated and premeditated," was vague and overbroad under the Eighth Amendment. Richmond requires a resentencing before a jury in Mr. Ragsdale's case.

At issue in Richmond was whether an Arizona aggravating factor, statutorily defined as "especially heinous, atrocious, cruel or depraved," was constitutional as applied in Mr. Richmond's case. In analyzing the issue, the Supreme Court stated:

> The relevant Eighth Amendment law is well defined. First, a statutory aggravating factor is unconstitutionally vague if it fails to furnish principled guidance for the choice between death and a lesser penalty. See e.g., Mavnard v. Cartwright, 486 U.S. 356, 361-364 (1988); Godfrey v. Georgia, 446 U.S. 420, 427-433 (1980). Second, 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. See e.g., Stringer v. Black 503 U.S. ___, ___ (1992) (slip op., at 6-9); Clemons v. Missississi, susra, at 748-752. Third, a state appellate court may rely upon an adequate narrowing construction of the factor in curing this error. See Lewis v. Jeffers, 497 U.S. 764 (1990); Walton v. Arizona, 497 U.S. 639 (1990). Finally, in federal habeas corpus proceedings, the state court's application of the narrowing construction should be reviewed under the "rational factfinder" standard of Jackson v. Virginia, 443 U.S. 307 (1979). See Lewis v. leffers, supra, at 781.

Richmond, 113 S. Ct. at 535.

Reasoning that a majority of the Arizona Supreme Court had found that the trial Court had applied the "heinous, atrocious, cruel or depraved" aggravating circumstance contrary to that court's narrowing construction, but had thereafter failed to apply that narrowing construction through an appellate reweighing or to conduct any meaningful harmless error analysis, the United States Supreme Court vacated Mr. Richmond's sentence of death and remanded for a new sentencing.

The same result is required here. In Mr. Ragsdale's case, the Florida statute defined the two aggravating factors at issue as follows: "[t]he capital felony was especially wicked, evil, atrocious or cruel . . . [t]he capital felony was a homicide and was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification." Fla. Stat. § 921 .141(5)(h), (i)(1987). The statute did not further define these aggravating factors. This statutory language is and was facially vague. Richmond, 113 S. Ct. at 535; Espinosa v. Florida, 112 S. Ct. 2926 (1992)(jury instruction identical to Fla. Stat. § 921 .141(5)(h) unconstitutionally vague). This Court has also held the statutory definition of "cold, calculated and premeditated" to be unconstitutionally vague and overbroad and thus a narrowing construction was

necessary. Jackson v. State, 648 So. 2d 85 (Fla. 1994); Porter v. State, 564 So. 2d 1060 (Fla. 1990).

In Mr. Ragsdale's case, the narrowing constructions were not applied by one of the constituent sentencers. The penalty phase jury was not given "an adequate narrowing construction," but instead was simply instructed on the facially vague statutory language. Following its eight to four death recommendation, the sentencing judge imposed a death sentence. Under Florida law, the judge was required to give great weight to the jury's verdict. As a result, it must be presumed that a sentencing judge in Florida followed the law and gave "great weight" to the jury's recommendation.

Mr. Ragsdale attacked this facially vague and overbroad statutory language both at trial and on direct appeal. The analysis of Richmond, never applied to Mr. Ragsdale's case, demonstrates that Mr. Ragsdale was denied his Eighth Amendment rights, and that this issue should be revisited at this time. Because this claim is premised on case law that was not previously available, and the issue was previously addressed on its merits, its presentation in a Rule 3.850 was neither "bogus" nor "a sham" as the lower court opined (PC-R. 405). Relief is warranted.

ARGUMENT XIV

FAILURE TO ASSURE PRESENCE CLAIM

A criminal defendant's Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Francis v. State, 413 So. 2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v.

Wainwright, 685 F.2d 1227 (11 th Cir. 1982); see also Fla. R. Crim. P. 3.180; Francis v. State, 413 So. 2d 1175 (Fla. 1982).

Mr. Ragsdale was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death. Mr. Ragsdale was not present in a conference where his attorney, Mr. Culpepper, and the Assistant State Attorney argued a critical issue before Judge Cobb in chambers (R. 888). In an even more critical exchange, Mr. Ragsdale was involuntarily absent from a conference between the state, Mr. Culpepper, and Judge Cobb in which Judge Cobb granted the state's motion in limine to prevent Mr. Culpepper from mentioning Illig's conviction and sentence in the guilt phase (R. 906-12).

The denial of Mr. Ragsdale's right to be present violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. Defense counsel should have objected to proceeding in his client's absence but, without a tactic or strategy, did not. This was deficient performance that prejudiced Mr. Ragsdale. Atkins v. Attornev General, 932 F.2d 1430 (1 1th Cir. 1991). An evidentiary hearing is warranted on this issue. Rule 3.850 relief is proper.

ARGUMENT XVI

NO INDEPENDENT WEIGHING CLAIM

The trial court at the sentencing failed in its duty to play an independent role in the sentencing process. Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Nibert v. State, 508 So. 2d 1 (Fla. 1987). The lower court found no mitigating circumstances to exist (R. 666). This was error. The evidence adduced gave rise to at least three nonstatutory

mitigating circumstances. Mr. Ragsdale's good behavior at trial was a factor the Court should have considered in mitigation against the death penalty, in accordance with well-settled Florida law. Mordenti v. State, 630 So. 2d 1080 (Fla. 1994); Marshall v. State, 604 So. 2d 799 (Fla. 1992); Parker v. State, 476 So. 2d 134 (Fla. 1985); Delap v. State, 440 So. 2d 1242 (Fla. 1983). The court should have considered the record evidence that Mr. Ragsdale had suffered a head injury as a child as a result of an automobile accident (R. 690), and that he was blinded in one eye when his brother shot him with an arrow (R. 691). This evidence mitigates against a death sentence. Carter v. State, 560 So. 2d 1166 (Fla. 1990); Sireci v. State, 536 So. 2d 231 (Fla. 1988). The court should have considered the life sentence received by co-defendant Leon Illig as mitigating against the death penalty for Mr. Ragsdale (R. 697). Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

The Court's failure to weigh and consider these nonstatutory mitigating circumstances violated Mr. Ragsdale's rights under the Eighth and Fourteenth Amendments to an individualized sentence imposed by a judge who independently weighed the aggravating and mitigating circumstances. To the extent defense counsel failed to litigate and preserve this issue at trial and on appeal, counsel rendered deficient performance. Rule 3.850 relief should issue.

ARGUMENT XVII

BIASED TRIAL COURT CLAIM

The trial court's blatant bias in favor of the State is evident in the record. The Court refused to sustain a single one of the seventeen objections Mr. Ragsdale's counsel made during the trial (R. 30, 142, 208, 259, 268, 325, 331, 369, 370, 374, 404, 649,

650, 658, 675, 684). Counsel's failure to object to the trial court's obvious bias was deficient performance which prejudiced Mr. Ragsdale.

The judge's bias led Mr. Ragsdale to reasonably question the court's impartiality. "In the case of a first-degree murder trial, where the trial judge will determine whether the defendant is to be sentenced to death, the reviewing court 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." Chastine v. Broome, 629 So. 2d 293, 295 (Fla. 4th DCA 1993)(quoting Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983)). Mr. Ragsdale was prejudiced by the lower court's improper and biased conduct, and by his counsel's failure to object to such conduct. Relief is warranted.

ARGUMENT XVIII

JOHNSON V. MISSISSIPPI CLAIM

The prior conviction introduced to the jury to support the "under sentence of imprisonment" aggravator was obtained in violation of the United States Constitution. The conviction was used to support this aggravating circumstance, and to rebut the mitigating circumstance of no significant prior criminal history, in violation of the Eighth and Fourteenth Amendments to the United States Constitution.

Significant evidence existed at the time of his trial in Florida to show that Mr. Ragsdale did not have the ability to make a knowing and intelligent waiver of any constitutional right. Any plea of guilty to any offense made by Mr. Ragsdale was unconstitutional because, due to his mental condition, he could not make the necessary waiver of his constitutional rights. Bovd v. Dutton, 405 U.S. 1 (1972); Bovkin v.

Alabama, 395 U.S. 238 (1969); Johnson v. Zerbst, 304 U.S. 458 (1938). The United States Supreme Court has recently re-affirmed that any plea of guilty must rest upon a knowing and voluntary waiver of constitutional rights and not the mere apparent competence of the defendant. Godinez v. Moran, 113 S. Ct. 2680 (1993).

In addition, Mr. Ragsdale did not have the effective assistance of counsel during the proceedings surrounding his prior conviction. A conviction obtained in violation of the defendant's right to counsel may not be used to enhance sentence for a subsequent conviction. Burgett v. Texas, 88 S. Ct. 258 (1967); Tucker v. United States, 92 S. Ct. 589 (1972).

This unconstitutional prior conviction cannot be used to support the sentence of death in this matter. Johnson v. Mississippi, 486 U.S. 578 (1988). Trial counsel's failure to investigate Mr. Ragsdale's mental disabilities at the time of the prior conviction is a denial of Mr. Ragsdale's right to effective assistance of counsel under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The failure of trial counsel to investigate and present this issue at trial is also a denial of effective assistance of counsel under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the Constitution of the State of Florida.

This error can never be deemed harmless because the sentence of death rests in large part on this prior conviction. The State emphasized Mr. Ragsdale's parole status in its closing argument before sentencing (R. 721, 725). The State cannot prove beyond a reasonable doubt that the jury's sentence does not rest on this prior conviction.

Chapman v. California, 386 U.S. **18 (1967).** An evidentiary hearing and Rule 3.850 relief are warranted.

ARGUMENT XIX

DEATH PENALTY IS UNCONSTITUTIONAL CLAIM

Florida's capital sentencing scheme denies Mr. Ragsdale his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these rudimentary constitutional guarantees, and therefore violates the Eighth Amendment.

Execution by electrocution imposes physical and psychological torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrev v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty, and thus violate the Eighth Amendment,

Florida's capital sentencing procedure does not ensure the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992).

Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, and can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Because of the arbitrary and capricious application of Florida's death penalty, the statute as it exists and as applied is unconstitutional under the Eighth and Fourteenth Amendments to the United States Constitution. To the extent that trial counsel failed to object and litigate this issue, counsel rendered deficient performance. Mr. Ragsdale's unconstitutional sentence must be vacated.

ARGUMENT XX

THE SHACKLING CLAIM

Mr. Ragsdale was shackled throughout his trial and sentencing. Eight to ten uniformed deputies sat behind Mr. Ragsdale throughout his trial, in full view of the jury. Shackling a defendant before a jury, unless absolutely necessary for security reasons, is strictly forbidden by the United States Constitution. Shackling a defendant is inherently prejudicial and has been condemned by the United States Supreme Court. Holbrook v. Flynn, 475 U.S. 560 (1986); Illinois v. Allen, 397 US. 337 (1970). When shackling occurs, it must be subjected to "close judicial scrutiny," Estelle v. Williams, 425 U.S. 501 (1976). Shackling is inherently prejudicial, but is permissible when "circumstances involving the security and safety of the proceeding warrant it." Czubak v. State, 644 So. 2d 93 (Fla. 2d DCA 1994) (citing Correll v. Dugger, 558 So. 2d 422 (Fla. 1990); Stewart v. State, 549 So. 2d 171 (Fla. 1989), *cert. denied*, 497 U.S. 1032 (1990)).

In Czubak, the Second District Court of Appeals approved the trial court's shackling of Czubak because he was facing retrial after having been once tried and convicted of first degree murder and sentenced to death, Also, Czubak had previously escaped. Under such circumstances, shackling was appropriate. Czubak, 644 So. 2d at 94. The court went on to discuss shackling in Pasco County:

> [T]here was some discussion on the record that shackling may be a "routine policy" in all murder trials in Pasco County. If so, any such "routine policy" is improper without the necessary circumstances present which, on a case-by-case basis, allows the trial judge the discretion to permit shackling and thereby overcome what is otherwise an inherently prejudicial practice.

Id.

Unlike the situation in Czubak, Mr. Ragsdale had never before been convicted of first-degree murder and had never escaped. The trial court did not and could not make the required showing that shackling Mr. Ragsdale was necessary to ensure the security and safety of the proceedings. The trial court's use of, and failure to prohibit, this "inherently prejudicial practice" without any showing of necessity or any hearing entitles Mr. Ragsdale to a new trial before an unbiased jury. Mr. Ragsdale's due process rights were violated. Mr. Ragsdale was shackled without any inquiry or hearing on the necessity of shackling. In fact, the Court gave no reason to shackle Mr. Ragsdale.

The presence of eight to ten uniformed deputies sitting behind Mr. Ragsdale during trial likewise was prejudicial, Such security measures, unlike shackling, are not inherently prejudicial, but still may be constitutionally impermissible if, as here, they pose an "unacceptable risk of prejudice." Holbrook, 475 US. at 571. The issue is whether "the grounds for additional security which existed at the time the security measures were taken justify any prejudice which they created." Hellum v. Warden, U.S. Penitentiarv - Leavenworth, 28 F.3d 903, 907 (8th Cir. 1994). Mr. Ragsdale's trial court never stated on the record the reasons for shackling Mr. Ragsdale and seating uniformed deputies behind him. The record contains no factual basis for the increased security measures imposed at Mr. Ragsdale's trial. Unlike the cases of Czubak and Hellum, Mr. Ragsdale had never escaped. Mr. Ragsdale had not been previously convicted of first degree murder, Czubak, nor was he serving a lengthy prison sentence at the time of his

trial. Hellum. There is no justification for the increased security measures taken during Mr. Ragsdale's trial.

The shackling of Mr. Ragsdale and the presence of numerous uniformed deputies throughout the trial without any hearing or showing of necessity stripped Mr. Ragsdale's trial of any fairness. Mr. Ragsdale's trial and penalty phase were prejudiced, and Mr. Ragsdale is entitled to a new trial.

To the extent Mr. Ragsdale's attorney failed to object, Mr. Ragsdale received ineffective assistance of counsel. Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). An evidentiary hearing was and is required. Rule 3.850 relief is warranted.

ARGUMENT XXI

JUROR INTERVIEW CLAIM

Florida Rule of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial in which that juror participated. This prohibition restricts Mr. Ragsdale's ability to allege and litigate constitutional claims which may very well ensure he is not executed based on an unconstitutional verdict of guilt and/or sentence of death.

Florida has created a rule that denies due process to defendants such as Mr. Ragsdale. "A trial by jury is fundamental to the American scheme of justice and is an essential element of due process." Scruggs v. Williams, 903 F.2d 1430, 1434-35 (11 th Cir. 1990)(citing Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968)). Implicit in the right to a jury trial is the right to an impartial and competent jury. Tanner v. United States, 483 US. 107, 126 (1987). However, a defendant who

tries to prove members of his jury were incompetent to serve has a difficult task. It has been a "near-universal and firmly established common-law rule in the United States" that juror testimony is incompetent to impeach a jury verdict. Tanner, 483 U.S. at 117.

An important exception to the general rule of incompetence allows juror testimony in situations in which an "extraneous influence" was alleged to have affected the jury. Tanner, 483 U.S. at 117 (citing Mattox v. United States, 146 U.S. 140, 149 (1892)). The competency of a juror's testimony hinges on whether it may be characterized as extraneous information or evidence of outside influence. Shillcutt v. Gagnon, 827 F.2d 1155, 1157 (7th Cir. 1987).

Such extraneous information that may be testified to by jurors includes evidence that jurors heard and read prejudicial information not in evidence, Mattox v. United States, 146 U.S. 140 (1892); that the jury was influenced by a bailiff's comments about the defendant, Parker v. Gladden, 385 U.S. 363, 365 (1966); or that a juror had been offered a bribe, Remmer v. United States, 347 U.S. 227, 228-30 (1954).

In order for a defendant to win relief, the extraneous information that infects the jury deliberations must amount to a deprivation of due process. Jeffries v. Blodaett, 5 F.3d 1180, 1190 (9th Cir. 1993); Harley v. Lockhart, 990 F.2d 1070, 1073 (8th Cir. 1993); Shillcutt v. Gagnon, 827 F.2d 1155, 1159 (7th Cir. 1987). Furthermore, prejudice that pervaded the jury room, yet is not attributable to extrinsic influences, may nonetheless be so egregious that "there is a substantial probability that the [juror's comment] made a difference in the outcome of the trial," thus allowing the admission of

juror testimony to prove the abuse. Shillcutt, 827 F.2d at 1159. See generally Powell v. Allstate Insurance Co., 652 So. 2d 354 (Fla. 1995).

Because error can occur in the jury room that amounts to a denial of due process, defendants must be given the opportunity to discover that error. Florida, however, bars defendants from their best source of information of what took place in the jury room -- the jurors themselves. Patrick Jeffries never would have known of the impermissible extrinsic evidence considered by his jury, and never would have been granted habeas relief, if Washington had a rule similar to Florida's prohibiting contact with jurors. See Jeffries v. Blodgett, 5 F.3d at 1189. Mr. Ragsdale cannot allege what, if any, impermissible extrinsic factors, Tanner; Jeffries; or intrinsic prejudices, Shillcutt; affected his jury's deliberations because Florida has erected a bar to his discovery of such due process violations. Florida's rule prohibiting contact with jurors is therefore, in itself, a denial of due process.

In Mr. Ragsdale's case, there is an indication on the records that the jurors may have been exposed to extraneous influences. See (R. 442-44). Defense counsel brought the issue to the Court's attention, but the Court declined to inquire further. Mr. Ragsdale is entitled to talk to the jurors to discover whether they indeed were exposed to extraneous influences that calls their verdict into question.

The Florida rule likewise impinges upon Mr. Ragsdale's right to free association and free speech. This rule is a prior restraint. Mr. Ragsdale's counsel seeks to interview jurors in order to prepare his postconviction pleadings. Any legitimate interest the state has in preventing interference with the administration of justice ends when the trial ends,

at least with regard to jurors, See Wood v. Georgia, 370 U.S. 375 (1978). There is no "clear and present danger" that talking to Mr. Ragsdale's jurors years after his trial would interfere with the administration of justice, See Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978). The Florida rule is overbroad. Whatever interests it seeks to protect are outweighed by the rule's chilling effect on speech.

The Florida rule unconstitutionally limits freedom of association. Litigation is a mode of expression and association protected by the First Amendment. NAACP v. Button, 371 U.S. 415 (1963). In order to enforce the rule, the State must show that the governmental interest being furthered is compelling, and that interest cannot be achieved by means less restrictive to freedom of association. NAACP v. Alabama, 357 U.S. 449 (1958). The State can make neither showing here. Florida's rule constitutes an impermissible restriction on freedom of association.

The prohibition violates equal protection in that a defendant who is not in custody can freely approach jurors to determine if juror misconduct occurred when an incarcerated defendant is precluded from doing so. In addition, death-sentenced inmates in other states are not precluded from communicating with jurors to determine if cause exists to prove juror misconduct and have been granted relief after proving such error existed. See, e.g., Jeffries v. Blodgett, 5 F.3d 1180 (9th Cir. 1993). Florida's rule thus denies Florida inmates equal protection.

Florida's rule prohibiting Mr. Ragsdale's counsel from contacting his jurors violates Mr. Ragsdale's First, Fifth, Sixth, Eighth, and Fourteenth Amendment rights. This

Court should allow Mr. Ragsdale's counsel to interview the jurors who convicted and sentenced him to death.

ARGUMENT XXII

CUMULATIVE ERROR CLAIM

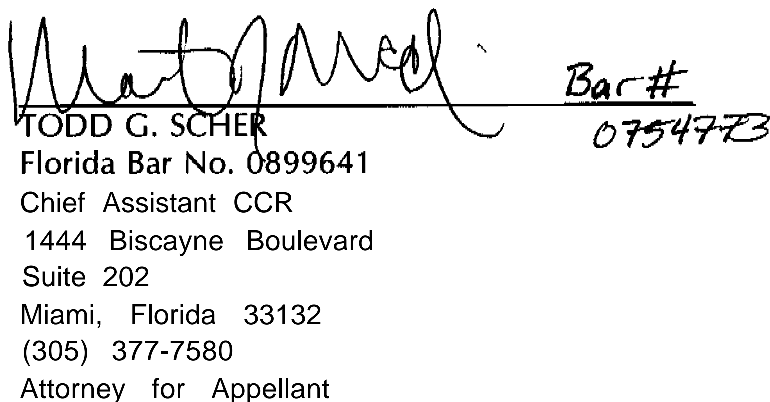
The cumulative effect of the errors which occurred in Mr. Ragsdale's case are of constitutional proportions and require 3.850 relief. Errors which include the failures of defense counsel, the improper rulings of the Court, the improper actions of the State, and the failures of expert witnesses render the conviction and sentence fundamentally reliable. See Health v. Jones, 941 F.2d 1126 (1 1 th Cir. 1991); Taylor v. State, 640 So. 2d 1127 (Fla. 1 st DCA 1994). The combined effect of the errors in this case, including the State's wrongful withholding of exculpatory evidence and ineffective assistance of counsel, combined with newly discovered evidence, warrants a new trial and/or a new penalty phase. See State v. Gunsbv, 670 So. 2d 920 (Fla. 1996); Kvles v. Whitlev, 115 s. ct. 1555 (1995).

The lower court found that this claim constituted "nothing but abject whining" (PC-R. 407). Aside from establishing that the lower court is hopelessly prejudiced against Mr. Ragsdale, this conclusion similarly reflects the court's contempt for this Court's caselaw, see Gunsbv, as well as caselaw from the United States Supreme Court, see Kvles v. Whitley. See also Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). Rule 3.850 relief should issue, after a remand for a full and fair evidentiary hearing before a neutral unbiased judiciary.

CONCLUSION

Based upon the record and the arguments presented herein, Mr. Ragsdale respectfully urges the Court to reverse the lower court, order a full and fair evidentiary hearing, and vacate his unconstitutional convictions and sentences.

I HEREBY CERTIFY that a true copy of the foregoing INITIAL BRIEF has been furnished by United States Mail, first class postage prepaid, to all counsel of record on March 31, 1997.



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