IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,669

ROBERT PATTON,

Appellant-Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee-Cross-Appellant.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of postconviction relief pursuant to Fla. R. Crim. P. 3.850 without an evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

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

"RS. ___" -- record on direct appeal (re-sentencing) to this Court;

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

"Supp. PC-R. ___" -- supplemental record on appeal to this Court;

"T. ___" -- transcripts of hearings conducted below.[1]

References to other documents and pleadings will be self-explanatory.

REQUEST FOR ORAL ARGUMENT

Mr. Patton has been sentenced to death. 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. Patton, through counsel, accordingly urges that the Court permit oral argument.

CERTIFICATE OF FONT

This brief is typed in 12 point Courier not proportionately spaced.

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[1]The hearings are contained in two separate volumes of the record labeled "Transcripts of Proceedings" and are consecutively paginated within those two volumes.

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STATEMENT OF THE CASE AND FACTS

A. PROCEDURAL HISTORY -- TRIAL AND RESENTENCING.

Mr. Patton was arrested on September 2, 1981, the day of the offense. On September 25, 1981, the trial court announced it was considering a late November trial date (R. 30). At that time, the court ore tenus ordered that Mr. Patton be evaluated for competency and sanity; four experts were appointed by the court.

A competency hearing was held on October 9, 1981. The State acknowledged that Mr. Patton had been previously declared incompetent as well as not guilty by reason of insanity (R. 47). Following a brief hearing, the court found Mr. Patton competent to stand trial (R. 91-93).

Trial began on February 16, 1982, with a verdict on February 22, 1982 (R. 1528-29). At the penalty phase, the jury returned a life recommendation after indicating that it was deadlocked at 6-6 (R. 1773). The court refused to accept the vote, and gave the jurors an Allen charge, instructing them to deliberate further. The jury then returned with a 7-5 death recommendation, which the court followed. On direct appeal, this Court affirmed Mr. Patton's convictions, but reversed the sentence of death because the court erred in giving the Allen charge to the jury and remanded for a jury resentencing. Patton v. State, 467 So. 2d 975 (Fla. 1985).

Resentencing commenced on April 29, 1989, and on May 4, 1989, the jury returned a death recommendation. The trial court imposed the death penalty, and this Court affirmed. Patten v.

State, 598 So. 2d 60 (Fla. 1992), cert. denied, 113 S. Ct. 1818 (1993).[2]

B. PROCEDURAL HISTORY -- POSTCONVICTION PROCEEDINGS.

A Fla. R. Crim. P. 3.850 motion was filed on June 8, 1994, nearly ten (10) months prior to the two-year deadline (Supp. PC-R. 7-170), alleging, inter alia, the State's failure to comply with Chapter 119 (Supp. PC-R. 13 et. seq.).[3] On June 16, 1994, the State Attorney's Office informed Mr. Patton that it was withholding numerous public records because it allegedly constituted work product (Supp. PC-R. 598). On August 26, 1994, the State filed its response to Mr. Patton's 3.850 motion (Supp. PC-R. 184-358), as well as a motion to compel disclosure of the files of Mr. Patton's trial and resentencing attorneys (Supp. PC-R. 182-83). Mr. Patton thereafter filed a response to the State's motion to produce the trial attorneys' files (Supp. PC-R. 359-62).

The lower court[4] scheduled several status hearings following the filing of the 3.850 motion. A hearing was initially set for November 29, 1994, but was cancelled because the judge was ill (T. 3-4). Another status hearing took place on

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[2]Mr. Patton's name has been spelled both as "Patton" and "Patten." "Patton" is the correct spelling.

[3]A verification to the motion was later filed (Supp. PC-R. 601-03).

[4]The case was heard by Judge Carol Gersten. The original trial judge was Judge Thomas Scott, and the resentencing was presided over by Judge Frederico Moreno, neither of whom were on the circuit bench when Mr. Patton initiated his Rule 3.850 proceedings.

January 6, 1995, at which time the State turned over numerous records for an in camera inspection (T. 5-29). The court and parties also discussed how to resolve the pending public records issues, and the lower court set a hearing as well as suggested the possibility of depositions to resolve some issues of contention (T. 26). On January 25, 1995, Mr. Patton noticed the taking of the depositions of various records custodians (Supp. PC-R. 599). On February 6, 1995, the State moved to quash the subpoenas (Attachment 1),[5] to which Mr. Patton responded in writing on February 15, 1995 (Supp. PC-R. 605). The State therafter filed a reply (Supp. PC-R. 611-13).

In lieu of depositions, a full public records hearing was scheduled for March 3, 1995 (T. 31-115), at which time Mr. Patton called numerous witnesses regarding the production of public records. The court ruled that none of the documents submitted by the State Attorney's Office would be disclosed to Mr. Patton as they constituted work product, and would be sealed for appellate review (T. 35-36). The court acknowledged it had not reviewed the materials for Brady[6] purposes, but that it would do so later (T. 110-12), and set another status for March 15, 1995 (T. 104-05).

In anticipation of the status hearing, Mr. Patton filed a

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[5]This pleading was inexplicably not made part of the record, and is therefore attached to this brief.

[6]Brady v. Maryland, 373 U.S. 83 (1963).

written report[7] detailing what had occurred since the March 3 hearing, including the fact that the City of Miami Police Department had been instructed by the State Attorney's Office not to comply with Mr. Patton's request (Attachment B).[8] At the status hearing on March 15, 1995, Mr. Patton updated the status of the public records process (T. 119-32). The court also ruled that none of the documents withheld by the State Attorney's Office constituted Brady material (T. 119), and scheduled another status hearing for April 7, 1995 (T. 130).

On April 5, 1995, Mr. Patton filed an amended Rule 3.850 motion (PC-R. 32-201), alleging inter alia, additional public records noncompliance. At a status hearing on April 7, the court set another hearing to resolve outstanding public records issues (T. 134-48). On May 8, 1995, Mr. Patton supplemented his amended Rule 3.850 motion with additional allegations of public records noncompliance (Supp. PC-R. 409-16).

On May 19, 1995, additional testimony was taken on the outstanding public records issues (T. 155-243). Most of the issued were resolved with the exception of the City of Miami Police Department and some video tapes that had yet to be disclosed (T. 243). On June 21, 1995, a status was held at which time Mr. Patton informed the court that the City of Miami Police

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[7]This pleading was likewise not contained in the record prepared below, and is attached to this Brief as Attachment 2.

[8]In a later correspondence, the State claimed an apparent "misunderstanding" between the State and the police department (Attachment B).

had located two (2) video tapes not previously disclosed, and that the tapes would be turned over shortly (T. 247-48). The court allowed Mr. Patton to amend his Rule 3.850 motion within thirty (30) days (T. 255). On June 21, 1995, the State also filed a response to Mr. Patton's previous amended Rule 3.850 motion (Supp. PC-R. 422-95).

Another amended Rule 3.850 motion was subsequently filed on July 22, 1995 (PC-R. 202-380); a verification was later filed (R. 457-58). On July 26, 1995, a status hearing was conducted, at which time Mr. Patton informed the court that the recently disclosed documents from the City of Miami Police Department indicated the existence of yet another video tape that had not been disclosed (T. 265-66). The court agreed to hear the issue at the Huff[9] hearing, which was scheduled for August 4, 1995 (T. 267 et. seq). On July 28, 1995, the State filed its response to the July 22 amended Rule 3.850 (Supp. PC-R. 496-588).

At the Huff hearing, Mr. Patton first argued that the State's motion regarding the trial attorney files was still outstanding (T. 277). The State argued that notwithstanding the granting of an evidentiary hearing, it had the right to the trial attorney files in order to "investigate" Mr. Patton's counsel for perjury (T. 278-79). Mr. Patton's counsel argued that the State had no right to the files absent an evidentiary hearing, and if the State wanted to investigate counsel, a conflict would ensue (T. 280-81). The State continued its perjury argument:

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[9]Huff v. State, 622 So. 2d 982 (Fla. 1993).

MS. BRILL: Judge, that is the most ridiculous position I have heard. I mean, they have an obligation, Judge, to file a motion in good faith if they believe that those facts are true. If they have documents in their possession, i.e., the trial counsel's documents, which clearly refute that allegation -- let me give you an example.

They filed a Brady claim saying the state withheld information about the fact when the defendant was arrested --

THE COURT: That was the pack of cigarettes with the powder in them.

MS. BRILL: Exactly. That was given over in discovery and I am assuming --

THE COURT: You need to lower your voice.

MS. BRILL: I am sorry. I assume if I go to see Mr. Lyons' files I will see a copy of that discovery in there along with the police report, and for them to make an allegation that the state withheld information, which in any investigation it is the state's position it will reveal that that allegation is not true and they have a duty -- they have their files -- to make sure those allegations that they put in the court to get a hearing are truthful; that they can prove are truthful. And one has nothing to do with the other.

This is just a blatant attempt to try to delay the proceedings. One has absolutely nothing to do with the other.

Your Honor can rule on the motion right now and when you decide whether or not we should have an evidentiary hearing, if you decide we do, then we are clearly entitled to it and once I get those files I can do and investigate as I please.

Now, there is no -- there is no conflict. There is absolutely no conflict in there and the state has no intention of filing a conflict with the governor on that.

There is absolutely no ground for it and if you find there is no reason to have an evidentiary hearing, then, Your Honor, if you want to reconsider the motion at this point, go ahead.

But I still think we have that right to subpoena

those at the very least.

(T. 281-83) (emphasis added).

The court ruled that the issue of Mr. Patton's entitlement to a hearing and the state's request for the files notwithstanding the Reed decision were not related and saw "no reason why we should not proceed at this time" (T. 285). The court also directed that the City of Miami Police Department search for the additional video tape and provide it to Mr. Patton (T. 312-13); (Supp. PC-R. 625-26).

On August 15, 1995, Mr. Patton filed a motion to stay the postconviction proceedings pending further inquiry into the State's accusations of perjury (Supp. PC-R. 628). The State responded to the motion (PC-R. 397-404), and Mr. Patton filed a reply (PC-R. 405-12). On September 1, 1995, the court conducted a status hearing regarding the City of Miami Police video tape as well as the motion to stay (T. 319 et. seq.). The court orally found that the tape no longer exists and "I am not going to conduct any further inquiry into that matter" (T. 334). Mr. Patton objected, noting that the "uncontradicted evidence is no search was conducted and we are relying on the assumption that the tape may have been destroyed. I am just asking Your Honor to ask the city of Miami to conduct a search for that video tape" (T. 335). The court denied Mr. Pattons' request (Id.). As to the motion for a stay, the court ultimately deferred ruling on the motion until a transcript of the August 4th Huff hearing was prepared (T. 347-48).

On September 7, 1995, Mr. Patton's case appeared on the calendar but no attorneys were present; the court on the record indicated that it had received the transcript of the Huff hearing and reset the case for the following week (T. 354). On September 15, 1995, the case came up on calendar again without counsel present; the court indicated that it had read the transcript and will be ruling in writing on September 22, 1995 (T. 357).

On September 21, 1995, the court contacted the parties by phone and summarily denied the motion for the reasons set forth in the State's response, and requested the State to prepare an order to that effect.[10] On October 2, 1995, the State faxed two proposed orders to Mr. Patton's counsel, and explained that the two versions of the order reflected "different findings concerning the State's motion to compel production of former defense counsel's files, in that we forgot to get a ruling from the Judge on that motion (Supp. PC-R. 636).

On October 11, 1995, Mr. Patton formally objected to the State's proposed orders (Supp. PC-R. 646). The State submitted its proposed orders to Judge Gersten notwithstanding, although noting, Mr. Patton's objections (Supp. PC-R. 647-48)

On November 15, 1995, Mr. Patton's case came up before Judge Alan Gold, at which the State was present, but not Mr. Patton's

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[10]This transcript was not attended by a court reporter; however, in her letter to the judge, Assistant State Attorney Brill referred to this telephonic status as well as the court's request to draft an order indicating that the motion was to be summarily denied for the reasons set forth in the State's response. See PC-R. 637.

counsel. Judge Gold indicated that Mr. Patton's Rule 3.850 motion was pending and that a hearing needed to be set to argue the entitlement to an evidentiary hearing (T. 362). A hearing was then set for December 6, 1995 (T. 363).

On December 6, 1995, the case was called again before Judge Gold. Present in court were Assistant State Attorney Brill and Lee Weissenborn, who represented Mr. Patton in his appeal to this Court from his resentencing (T. 366). Neither Ms. Brill nor Mr. Weissenborn informed the court that Judge Gersten was handling the case or that Mr. Patton was represented by Mr. Patton. Judge Gold reset the case for December 12, 1995, because the file was missing (T. 367).

On December 12, 1995, Ms. Brill and Mr. Weissenborn again appeared in court on Mr. Patton's case, but Judge Gold was not present and the case was reset for December 20 (T. 371). No one informed the court that Judge Gersten was presiding over the case, or that Mr. Patton was represented by CCR.

On December 20, 1995, the case was called before Judge Gold. This time, Assistant State Attorney Brill was present, but no one was present on Mr. Patton's behalf (T. 374).[11] Ms. Brill informed Judge Gold that Mr. Patton had "filed numerous 3.850s through the Capital Collateral Representative in Tallahassee," and that the parties were waiting for an order from Judge

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[11]Mr. Patton's counsel never received notice of any of these hearings nor was he ever informed of these hearings by the State. The first time the undersigned knew of these hearings was when he reviewed the court docket in order to order the transcripts for the record on appeal.

Gersten. Ms. Brill then stated that "I have contacted her. She knows we need the order" (T. 374).

Over 6 months later, on June 26, 1996, Mr. Patton's counsel wrote a letter to Judge Gersten in which he noted that, during a recent hearing in another case, Ms. Brill had informed him that she wanted him to know that she had contacted Judge Gersten's office regarding Mr. Patton's case (PC-R. 589). Ms. Brill also informed Mr. Patton's counsel that "she was told that you thought an order denying Rule 3.850 relief had already been signed" (Id.). Mr. Patton's letter also stated that Brill "sent over to the Court the orders she had previously submitted for the Court's review, and that if I wanted to do the same, I could do so" (Id.). Mr. Patton lodged his objections to Ms. Brill's conduct, and requested that if there was any matters relating to Mr. Patton's case that needed to be discussed, a hearing be ordered (Id).

On July 10, 1996, Assistant State Attorney Brill wrote a letter to Judge Gersten requesting that a hearing be scheduled and asking for the court's assistance in locating the files which had been turned over to the court for an in camera inspection, as they were now missing from the clerk's office (Supp. PC-R. 591).[12]

On August 14, 1996, the State noticed Mr. Patton for a status hearing on September 12, 1996. At the status, Judge

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[12]The status of these records is unknown; by separate motion, Mr. Patton is seeking to have the records transmitted to the Court.

Gersten acknowledged that "I know you folks are waiting for an order" and noted that she had been transferred out of the criminal division, a fact which "has kind of delayed his matter" (T. 378-79). The lower court indicated it would be ruling in several days, and that the order would be faxed to Mr. Patton's counsel in Tallahassee (T. 379). The State then brought up the fact that the filed turned over to the court for the in camera inspection were missing (T. 380), a fact corroborated by the clerk (T. 381). The court indicated she would look into the matter (T. 383).

On September 22, 1995, the case came up on calender, this time before Judge Alan Gold and without counsel present (T. 358b). Judge Gold indicated that Judge Gersten had called him yesterday and asked him to take the case off calendar because "[s]he took care of it yesterday" (T. 358c).

On September 26, 1996, the court signed one of the State's proposed orders summarily denying Mr. Patton's motion with prejudice (PC-R. 459-62). Among the grounds stated for the denial was that Mr. Patton's amended motion allegedly did not contain an oath (PC-R. 459).

On September 27, 1996, the case came up again with no one present, and the court indicated that the "[o]rder has been entered" (T. 389). Also on September 27, 1996, Mr. Patton received via fax from the State Attorney's Office a copy of the order signed by Judge Gersten (PC-R. 463).

In a motion for rehearing, Mr. Patton first complained about

the fact that he had never received a copy of the order from the court, but rather only got a faxed copy from the State with a cover letter stating that Ms. Brill was faxing the order because she "wanted to make sure that you got a copy of the signed order that I received today" (PC-R. 464). Mr. Patton's counsel expressed his uncertainty about how the State obtained the order on September 27 when it was supposed to have been entered on September 16, or why the State knew to fax the order to Mr. Patton's counsel to "make sure" he had received a copy (PC-R. 464). Thus, Mr. Patton argued that service of the order was defective under Fla. R. Crim. P. 3.850(g). Mr. Patton also sought reconsideration of the finding that the motion was denied without prejudice due to lack of verification, as a verification was in fact in the court file and had been filed some eleven (11) months before the court signed the state's proposed order (PC-R. 464-65).

The State filed a written response to the rehearing motion (PC-R. 470), and the lower court, following a hearing (T. 395), entered an order denying rehearing (PC-R. 474). A notice of appeal was timely filed by Mr. Patton (PC-R. 475). The State filed a cross-appeal (PC-R. 477).

SUMMARY OF THE ARGUMENTS

1. The lower court erred in summarily denying Mr. Patton's Rule 3.850 motion because the files and records did not conclusively rebut the allegations. The State made erroneous arguments, such as employing non-record material to refute Mr. Patton's allegations, and urging the court to summarily deny because Mr. Patton allegedly failed to "proffer evidence" to support his factual allegations. Moreover, the lower court failed to attach any records to the order, except the entire trial and resentencing transcripts and the State's responses to Mr. Patton's Rule 3.850 motion. This is flatly improper, and reversal is required for an evidentiary hearing.

2. The lower court erroneously denied Mr. Patton's amended Rule 3.850 motion with prejudice due to an alleged lack of verification. Mr. Patton submitted a verification well before the court entered its written order, even though this Court did not indicate that amended motions also needed to be verified until Mr. Patton's case was already on appeal. The remedy for an alleged defect such as an oath is denial without prejudice; however, Mr. Patton did submit a verification.

3. The lower court failed to disclose to Mr. Patton documents withheld by the State Attorney's Office following an in camera inspection. The withheld notes contituted public records and should have been disclosed. Moreover, the lower court's in camera inspection was insufficient in order to properly determine whether withheld documents are public record or constitute non-

public record material. The lower court also erred in failing to order the City of Miami Police Department to conduct an inspection as to the whereabouts of a missing video tape. Without looking, the Police Department presumed that the tape was destroyed. This cause should be remanded with directions to conduct a search for the missing video tape.

4. Counsel at Mr. Patton's trial rendered ineffective assistance of counsel. Despite overwhelming media attention and prejudicial newspaper accounts, counsel, without a reasonable tactic, failed to seek a venue change. The State's argument that a strategy has to be assumed is contrary to law. Counsel also, without a tactic or strategy, failed to investigate and present a defense of voluntary intoxication. Ample direct evidence was available to establish that Mr. Patton was incapable of forming specific intent, which was the defense theory at trial, yet no evidence on the issue was presented. Moreover, counsel failed to present an insanity defense. Dr. Toomer, at the resentencing, opined that Mr. Patton was insane when he committed the crime, yet counsel failed to adequately investigate and pursue the matter at trial. Numerous other failings of counsel prejudiced Mr. Patton, such as counsel's failure to voir dire potential jurors on mental health issues, failure to act as advocate by conceding significant parts of the State's case, and the failure to adequately cross-examine state witnesses. Moreover, rulings and actions by the trial court rendered counsel's performance deficient. An evidentiary hearing is warranted.

5. Resentencing counsel rendered prejudicially deficient performance. Counsel failed to ensure that Mr. Patton was sentenced by an impartial jury. The jury obtained a newspaper article about Mr. Patton and the prior jury's death recommendation. When asked about this, the jurors provided patently false and inconsistent responses, and counsel failed to seek to have a new jury impaneled. Moreover, counsel failed to seek the disqualification of the judge, whose bias was evident not only in his rulings, but also in his public support for the death penalty and because of his public encounter with the victim's widow, which was reported in the newspaper. Resentencing counsel also failed to seek another competency determination, despite clear indicia of mental illness, and failed to seek appointment of a neuropsychologist. Counsel also failed to present the testimony of the victim's mother, who would have provided powerful mitigation on behalf of Mr. Patton. An evidentiary hearing is warranted.

6. The State failed to disclose to Mr. Patton's counsel a report indicating that when Mr. Patton was arrested he had in his possesison a cigarette pack with white paper and pills inside of it. In urging the lower court to summarily deny this claim, the State relied on extra-record material which, in any event, failed to conclusively rebut Mr. Patton's allegations. Moreover, by arguing that there was no evidence to suggest that Mr. Patton was intoxicated at the time of the offense, the State, in the possession of this police report, presented false argument and

testimony. An evidentiary hearing is required.

7. The competency hearing conducted prior to trial failed to comport with due process. The experts relied solely on Mr. Patton's self-report and admittedly did not have independent materials which would have supported Mr. Patton's assertions of a significant prior history of mental illness and psychiatric hospitalizations. Moreover, the competency hearing took place some four months before trial, and inadequately ensured that Mr. Patton was not tried while competent. An evidentiary hearing is warranted.

8. The mental health experts who testified both at the competency hearing and at the resentencing failed to comport with the requirements of Ake v. Oklahoma and the Eighth Amendment. Neither Mr. Patton's counsel nor the experts themselves ensured that available documentation was provided and reviewed in order to substantiate the conclusions reached about Mr. Patton's mental state both for competency and mitigation purposes. An evidentiary hearing is warranted.

9. Mr. Patton's trial and resentencing proceedings were presided over by a biased judge, in violation of the Mr. Patton's right to be tried by an impartial tribunal.

10. Statements taken from Mr. Patton by law enforcement upon his arrest were illegally obtained and improperly admitted into evidence, contrary to the Supreme Court opinions in McNeil v. Wisconsin and Minnick v. Mississippi. Reversal for a new trial is required.

11. The overwhelming presence of uniformed police officers in the courtroom inflamed the jury and rendered Mr. Patton's trial fundamentally unfair.

12. Double jeapody barred the State from seeking the death penalty after the original jury returned a 6-6 life recommendation. Mr. Patton asks the Court to revisit this issue in light of Wright v. State.

13. Mr. Patton is innocent of the death penalty, as insufficient aggravating circumstances exist under Florida law to make Mr. Patton death-eligible.

14. The resentencing jury improperly doubled aggravating circumstances, thus invalidating the death sentence in this case.

15. The trial court erred in failing to find mitigating circumstances clearly set forth in the record.

16. Prior convictions used by the State in support of aggravating circumstances were obtained in violation of the constitution, and the resulting death sentence must be vacated in light of Johnson v. Mississippi.

17. The State sought the death penalty in Mr. Patton's case based on racial considerations, given the highly-charged racial atmosphere in Miami at the time of this crime.

18. Resentencing counsel failed to object to clear constitutional error, including significant instances of Caldwell error.

19. The death penalty is unconstitutional on its face and as applied to Mr. Patton.

20. The arbitrary acceleration of the time periods of Rule 3.850 violated Mr. Patton's due process rights.

ARGUMENT I -- ERRONEOUS SUMMARY DENIAL

The lower court summarily denied Mr. Patton's amended Rule 3.850 motion in an order prepared by the State Attorney's Office -- the contents of which were objected to by Mr. Patton's counsel. See infra, Section B. The lower court erred in not affording an evidentiary hearing in this case.

A. MISLEADING AND ERRONEOUS ARGUMENT MADE BY THE STATE.

Erroneous and misleading arguments made by the State contributed to the lower court's summary denial of many of Mr. Patton's claims. For example, flatly contrary to Rule 3.850, the State argued that in order to warrant a hearing, Mr. Patton was required to not only allege facts, but also "includ[e] a proffer of evidence which is available to support the specific factual allegations" (Supp. PC-R. 517). In Valle v. State, 705 So. 2d 331 (Fla. 1997), the Court rejected this very argument made by the same assistant state attorney in the same county. As the Court noted, "noting in the rule [3.850] requires the movant to attach an affidavit or authorizes a trial court to deny the motion on the basis of a movant's failure to do so." Id. at 1334. Here, however, the State was arguing that Mr. Patton's motion should be summarily denied to the alleged failure to "proffer evidence." This position is contradictory to Valle and Rule 3.850 itself. An evidentiary hearing is for presenting evidence; a Rule 3.850 motion is for alleging facts.

The State also urged the lower court to rely on information which was not "of record" in denying Mr. Patton's motion. For example, the State argued that the court could use documents not contained in the record on appeal, but rather anything in the court file (T. 304-05); for example, the State argued at length that trial counsel's statement of attorneys fees, which was not part of the record on appeal, constituted "record" material for purposes of refuting Mr. Patton's allegations (T. 305 et. seq.). Mr. Patton argued that the proper standard was "whether the files and records, meaning the record on appeal, the direct appeal record, the trial transcript, things of those nature, conclusively establish that Mr. Patton is not entitled to relief" (T.292).

The Court simply adopted the State's response and the attachments provided by the State, which consisted of the entire trial and resentencing transcripts and the State's responses to Mr. Patton's motion and amendments thereto (PC-R. 459-62). This is flatly erroneous. The order cites nothing in the record that conclusively rebuts Mr. Patton's allegations, and as attachments simply refers to the entire transcript and the State's responses. Attaching the entire trial transcript is insufficient as a matter of law to support a summary denial of a Rule 3.850 motion. Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990) ("greater specificity is required" to summarily deny Rule 3.850 motion than simply attaching trial transcript, which renders rule "meaningless"). Attaching the State's response is likewise

legally insufficient. "The growing practice of incorporating state responses into court orders denying postconviction motions is not [a] substitute for the record attachments necessary in many cases for the trial courts to be affirmed." Flores v. State, 662 So. 2d 1350, 1352 (Fla. 2d DCA 1995). See also Loomis v. State, 691 So. 2d 34 (Fla. 2d DCA 1997) (to support a summary denial under Rule 3.850, "the rule contemplates more than attaching a copy of the state's response which has no supporting record attachments"); Jackson v. State, 566 So. 2d 373 (Fla. 4th DCA 1990) (reversing summary denial of Rule 3.850 motion because "[t]here were no attachments to the court's order other than the state's response to the petition"); Rowe v. State, 588 So. 2d 344 (Fla. 4th DCA 1991) (reversing summary denial of Rule 3.850 motion because "[t]here was no evidentiary hearing and the only attachment to the order of denial was a copy of the state's response"). And not only is it improper for a state's response to be incorporated into an order denying Rule 3.850 relief, it is also "inappropriate for the state to designate which records refute defendant's allegations," which the State did in this case. Smothers v. State, 555 So. 2d 452 (Fla. 5th DCA 1990). For these reasons and those set forth infra, the lower court's summary denial was erroneous.

B. PREPARATION OF ORDER BY THE STATE.

In an untranscribed telephonic hearing, Judge Gersten informed the parties that she was summarily denying Mr. Patton's motion (Supp. PC-R. 647). Ms. Brill then prepared two proposed

orders "as requested by Judge Gersten" (Supp. PC-R. 636). In identical language both orders summarily denied the motion, but the first of the two versions of the proposed order promulgated by the State included language denying the State's motion to compel production of former trial counsel's files as being moot in light of the summary denial. Mr. Patton submitted a written objection to the State's orders, which went beyond the scope of the lower court's directions (Supp. PC-R. 646). Despite Mr. Patton's objection, on September 26, 1996, about one year later, Judge Gersten signed the State's proposed order verbatim, summarily denying any evidentiary hearing (PC-R. 459). In his motion for rehearing, Mr. Patton reiterated his objection to the wholesale adoption of the content of the State's proposed order and the court's delegation of the drafting responsibility to the State (PC-R. 464), but it was denied (PC-R. 474).

The court's adoption of the State's order violated Mr. Patton's right to due process and to an impartial determination of his Rule 3.850 motion. In the postconviction arena, as in trial proceedings, courts make findings which become integral to the remainder of the proceedings in capital cases. However, when the court simply signs an order drafted by the State, it abdicates its judicial responsibility to make an independent determination of the case before it. A judge presiding over Rule 3.850 motions should be more than just a rubber stamp for the State, and should be required to independently review the case and issue an order stating its conclusions.

This Court has repeatedly held that it violates due process for a judge to delegate to the State the task of drafting sentencing orders in capital cases. See Patterson v. State, 513 So. 2d 1257 (Fla. 1987); Nibert v. State, 508 So. 2d 1 (Fla. 1987); Spencer v. State, 615 So. 2d 688 (Fla. 1993).[13] There is no meaningful distinction between the State's drafting of a sentencing order and the drafting of an order denying postconviction relief. Both practices violate due process.

It was the duty of the lower court to adjudicate Mr. Patton's capital 3.850 motion, not delegate that responsibility to the State of Florida, the entity seeking to carry out his execution. The lower court made no independent "findings" nor did it independently determine what portions of the record conclusively rebutted Mr. Patton's factual allegations. Moreover, now this Court is in a position of addressing an order drafted by a party opponent which violates longstanding precedent in Rule 3.850 caselaw. See Section A, supra. This Court should clearly state that this practice should not continue in capital cases, and reverse with directions to conduct these proceedings before another judge in a manner that comports with due process.

C. MR. PATTON IS ENTITLED TO AN EVIDENTIARY HEARING.

A Rule 3.850 movant is entitled to an evidentiary hearing unless the files and records conclusively rebut the allegations,

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[13]The Eleventh Circuit has condemned the practice of one party submitting draft orders on significant issues, as has the Supreme Court. Chudasama v. Mazda Motor Corp., 123 F. 3d 1353, 1373 n.46 (11th Cir. 1997); United States v. El Paso Natural Gas Co., 376 U.S. 651, 657 n.4 (1964).

which must be accepted as true. Valle v. State, 705 So. 2d 331 (Fla. 1997); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Moreover, the trial court is required to attach those portions of the record which conclusively rebut the allegations, not simply the trial transcript or the State's response. Hoffman; Flores; Loomis.

Mr. Patton's motion alleged facts which were not conclusively rebutted by the record. For example, Mr. Patton alleged that trial counsel failed to investigate and present available evidence of Mr. Patton's voluntary intoxication at the time of the offense (PC-R. 212); the motion detailed the type of available information that was never presented (PC-R. 215 et. seq.), such as the fact that, at the time of the crime, expert testimony was available to establish that Mr. Patton suffered from acute and chronic polydrug intoxication (PC-R. 216). The motion further alleged that in the weeks leading up to the offense, he was "on a cocaine, marijuana, heroin, and alcohol binge", and "[o]n the day of the offense, Mr. Patton had been drinking alcohol with his friends and taking 'speedballs' intravenously" (PC-R. 219).[14] The motion also alleged that defense counsel unreasonably failed to present evidence that drugs and drug paraphernalia (including several syringes and a spoon) were found in the car Mr. Patton was driving when he was arrested and belonged to him (PC-R. 219-20). The motion alleged

[14]There was also information which Mr. Patton alleged was withheld by the State that would have further buttresses his intoxication at the time of the offense. See Argument ___, infra.

that there was no reasonable tactical or strategic reason for this failure, as trial counsel never argued that Mr. Patton was not present at the crime; in fact, counsel conceded in opening argument that Mr. Patton shot the victim but that Mr. Patton lacked the ability to form specific intent due to intoxication (PC-R. 214).[15]

Mr. Patton also alleged that trial unreasonably failed to seek a venue change due to extensive pretrial publicity (PC-R. 227). Mr. Patton alleged specific facts that were not conclusively rebutted by the record, including details about the media coverage and the fact that no strategy existed for not requesting a venue change. See PC-R. 227; 238-44.[16] The lower court erroneiously denied a hearing on these unrebutted allegations.[17]

Mr. Patton's motion also alleged constitutional error

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[15]The State conceded below that Mr. Patton's defense at trial was that Mr. Patton "was someone that needed drugs, was strung out on drugs and was trying to buy drugs" (Supp. PC-R. 522), and that at trial, "there was no evidence of the amount of drugs consumed by the defendant preceding the homicide of Officer Broom, and no evidence that at the time the defendant shot Officer Broom, he was intoxicated" (Id.).

[16]That Mr. Patton's case was a high profile and racially charged event was epitomized by the fact that during trial, the court inquired of the jury as to whether it saw a van parked in front of the courthouse with an electric chair on top of it, encouraging the jurors to execute Mr. Patton (PC-R. 228).

[17]Of course, the lower court's order was prepared by the prosecutor, who argued that the change of venue claim could be summarily denied because "sometimes I think we have to -- strategy sometimes has to be assumed" (T. 306). This is not appropriate argument nor is it the appropriate test. See Davis v. State, 648 So. 2d 1249, 1250 (Fla. 4th DCA 1995).

regarding the competency proceedings which took place prior to trial. For example, trial counsel never requested the appointment of a confidential mental health expert to evaluate Mr. Patton. See, e.g. Morgan v. State, 639 So. 2d 6 (Fla. 1994) ("Clearly, an indigent defendant has a constitutional right to choose a competent psychiatrist of his or her own personal choice and is entitled to receive funds to hire such an expert"). Although the experts appointed by the trial court testified that Mr. Patton was competent, the experts did not have adequate information upon which to base their conclusions and based their findings almost exclusively on self-report.[18] For example, the experts were not provided with independent evidence corroborating Mr. Patton's history of schizophrenia and hallucinations. Numerous documentary evidence was available but never provided to the experts, and Mr. Patton's motion alleged the substance of these reports. These allegations -- not conclusively rebutted by the record -- required an evidentiary hearing, and the lower court erred. This information establishes the inadequacy of the competency proceeding that was held in Mr. Patton's case both

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[18]For example, Dr. Jacobson testified that Mr. Patton was not being cooperative because of Mr. Patton's claim that he was unaware of the charges pending against him (R. 61). What Dr. Jacobson apparently was unaware of, and trial counsel did nothing to inform the doctor of, was that when Jacobson evaluated Mr. Patton, Mr. Patton had not yet been indicted for the murder charge. Obviously Mr. Patton would have no awareness of a charge for which he had yet to be indicted.

prior to trial and at the resentencing.[19] Mason v. State, 489 So. 2d 734, 736 (Fla. 1986) ("Because Mason has since proffered significant evidence of an extensive history of mental retardation, drug abuse and psychotic behavior which were not uncovered by defense counsel, and because a possibility exists that this evidence was not considered by the evaluating psychiatrists, however, 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").

Mr. Patton's Rule 3.850 motion also alleged significant constitutional error at his resentencing proceedings. For example, Mr. Patton alleged that trial counsel unreasonably failed to seek a mistrial or even object when overt jury misconduct was discovered, such as jurors lying about whether they had seen a newspaper article that was freely circulated in the jury room about Mr. Patton's ongoing case and the fact that his prior death sentence had been vacated (PC-R. 339-43). Mr. Patton also alleged that trial counsel failed to seek the court's disqualification due to bias; for example, the judge engaged in off-the-record communications with the victim's mother during recess in the proceedings, and these discussions were done so openly that it was reported in the Miami Herald (PC-R. 344). Counsel also failed to move to disqualify the lower court after

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[19]At resentencing, the trial court simply adopted the testimony of the court-appointed experts from the pretrial hearing some seven (7) years earlier.

it made the comment that, as to death penalty, "It's death by electrocution. Most people believe in it. I certainly do. It's a fact of life" (PC-R. 345). These allegations are not conclusively refuted by the record, and require an evidentiary hearing. See, e.g. Valle v. State, 705 So. 2d 331 (Fla. 1997). Reversal is warranted.

ARGUMENT II -- DENIAL WITH PREJUDICE

In an order prepared by the State over Mr. Patton's objection, the lower court denied Mr. Patton's amended Rule 3.850 motion on alternative grounds, one of which was a denial with prejudice due to an alleged lack of verification (PC-R. 462). In his motion for rehearing, Mr. Patton pointed out that a verification to the final amended motion was in the court file, and had been filed some eleven (11) months prior to the entry of the written order denying the 3.850 (PC-R. 465). The court denied the rehearing without altering its ruling on the verification issue (PC-R. 474).

The lower court erred in denying the motion with prejudice--particularly where there was a verification in the file--and the court further erred in failing to correct the error on rehearing. This Court's case law makes clear that the remedy for an alleged lack of verification in an initial Rule 3.850 motion is a dismissal without prejudice. See, e.g. Anderson v. State, 627 So. 2d 1170 (Fla. 1990). It was only in 1997 -- when Mr. Patton was already on appeal to this Court -- that the Court ruled that even amendments to previously filed motions should be verified.

Groover v. State, 703 So. 2d 1035 (Fla. 1997).

Even though Groover did not come out until after Mr. Patton's case was on appeal, the fact remains that Mr. Patton did submit a verification to his motion. Here, before the trial court entered its written order denying Mr. Patton's amended motion, he filed a verification, which cured any technical deficiency. See, e.g., Jewson v. State, 688 So. 2d 968 (Fla. 1st DCA 1997) (trial court denied 3.850 motion for failure to meet a technical requirement of the rule, but before court entered written order, defendant cured deficiency; trial court's denial of motion reversed). Reversal is warranted.

ARGUMENT III -- PUBLIC RECORDS

A. STATE ATTORNEY'S OFFICE.

The lower court erred in failing to disclose to Mr. Patton numerous records withheld by the State Attorney's Office, finding that the records were not "public records" after conducting an in camera inspection (PC-R. 460). The lower court also erred in failing to grant Mr. Patton and evidentiary hearing in order to establish the invalidity of the State's putative claim that the records were not public records. Walton v. Dugger, 634 So. 2d 1059 (Fla. 1990). Moreover, the lower court erred in failing to conduct an in camera inspection of all the materials in the control of the State Attorney's Office for purposes of comparison. For all these reasons, this Court should remand this cause to the lower court to order disclosure of records, for an evidentiary hearing, and/or to conduct a proper in camera

inspection of all materials sealed by the State Attorney's Office.

The bald assertion by the State, without more, that its records are "trial preparation" materials is insufficient to shield them from disclosure. "[I]nteroffice 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). See Orange County v. Florida Land Co., 450 So. 2d 341 (Fla. 5th DCA), review denied, 458 So. 2d 273 (Fla. 1984); Hillsborough County Aviation Authority v. Azzarelli Construction Co., 436 So. 2d 153 (Fla. 2d DCA 1983). Additionally, 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, can be subject to disclosure under Chapter 119. Johnson v. Butterworth, 713 So. 2d 985 (Fla. 1998); Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc., 379 So. 2d 633 (Fla. 1980); Times Publishing Co. v. City of St. Petersburg, 558 So. 2d 487 (Fla. 2d DCA 1990).

The lower court could not conduct a legally sufficient in camera inspection of the records withheld by the State Attorney's Office without comparing the "notes" with the final product and without discussing in detail what each withheld document was and why it was not public record. In Shevin, 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." Shevin, 379 So. 2d at 640. The Court identified materials that were not public records and those which are: "Inter-office memoranda and intra-office memoranda communicating information from one public employee to another or merely prepared for filing, even though not a part of the agency's later, formal public product would nonetheless constitute public records inasmuch as they supply the final evidence of knowledge obtained in connection with the transaction of official business." Id. 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).

If the withheld notes written by the prosecutor were intended as "final evidence of the knowledge to be recorded," State v. Kokal, 562 So. 2d 324, 327 (Fla. 1990), then those notes are public records; if the prosecutor's notes "supply the final evidence of knowledge obtained in connection with the transaction of official business," id., then those notes are public records. A record "merely prepared for filing," is nonetheless a public record because it "suppl[lies] the final evidence of knowledge obtained in connection with the transaction of official business." Orange County v. Florida Land Co., 450 So. 2d 341, 343 (Fla. 5th DCA 1984)(citing Shevin). Even if never circulated as inter-office memoranda, the notes at issue here may fall into this category. The notes at issue were made a part of the State

Attorney's file on Mr. Patton's case. The inclusion of these notes into the State Attorney's files evinces the intent of the attorney preparing them to perpetuate the existence of the knowledge contained therein. Moreover, if the information contained in the "handwritten notes" contains Brady material, the information must be disclosed notwithstanding that the notes may not be public records or are exempt under Chapter 119. Walton, 634 So. 2d at 1062.

If the notes are "mere precursors of governmental 'records' and are not, in themselves, intended as final evidence of the knowledge to be recorded," or "rough drafts," or "notes to be used in preparing some other documentary material," then the notes are not public records. Shevin; Kokal. However, the determination of whether a record is a public record is a factual determination that can be made only when the party withholding the records provides the court with the document claimed to be merely preliminary, and thus not a public record, and the document supplying the final evidence of the knowledge contained in the notes or draft, thus a public record. Only by comparing the draft/notes with the final version can the court make the determination that the draft or notes are not public record. In this case, the State did not provide the lower court with these records, and thus the in camera inspection was but a rubber stamping of the prosecutor's withholding of the notes from Mr. Patton.

B. MIAMI POLICE DEPARTMENT.

After numerous hearings, Mr. Patton received public records from the Miami Police Department. At a hearing on June 21, 1995, Mr. Patton reported that videotapes had been found by the Miami Police and were being provided to Mr. Patton (T. 248). The court advised Mr. Patton that he had until July 21, 1995 to amend and that a Huff hearing would be held on August 4, 1995 (PC-R. 257).

During a subsequent status conference, Mr. Patton advised the court that review of the records provided by City of Miami had revealed the existence of yet another videotape that had not been provided, which consisted of a "booking tape" of Mr. Patton involving Officer Ivan Almaida (T. 265-66). Mr. Patton asked the court to order the Miami police to conduct a search for the additional tape (T. 266). In apparent disbelief at Mr. Patton's allegation, the State demanded that Mr. Patton's counsel "tell me where in the material that you got from the city of Miami it indicates there is a booking tape by Officer Almaida" and the court stated "if Officer Alamaida is a fingerprint tech, how can a booking tape possibly relate to him? I don't understand this" (T. 266). Mr. Patton agreed to provide the record to the court at the upcoming Huff hearing and then have the court decide what to do (T. 267).

At the Huff hearing, Mr. Patton provided the court and the State with the document which revealed the existence of a booking tape by Officer Almaida, and the court agreed to order the City of Miami to produce the tape (T. 312). At a hearing on September 1, 1995, the representative of the Miami Police testified that

upon investigation she learned in hearsay fashion that the booking tape of Mr. Patton's arrest had been destroyed because it "fell within the time period of the tapes that were destroyed pursuant to this disposition request form" (T. 332). However, no one conducted a search for the tape, and Mr. Patton requested that the court order a search since the agency was only relying on assumptions that the tape had been destroyed (T. 334). The lower court denied Mr. Patton's request that the City of Miami police actually conduct a search for the booking tape (T. 334).

The lower court erred in failing to request that a search be conducted of the booking tape that was allegedly destroyed. There was no direct evidence that the tape had actually been destroyed, and based on the Miami Police Department's history of negligence with respect to Mr. Patton's requests for public records, a search should have been ordered. Mr. Patton therefore requests that this cause be remanded for a full inspection of the missing video tape.

ARGUMENT IV -- PRETRIAL AND GUILT PHASE INEFFECTIVENESS

The lower court summarily denied Mr. Patton's numerous allegations of serious deficiencies which singularly and cumulatively undermined confidence in the outcome of the guilt phase of Mr. Patton's capital trial. Strickland v. Washington, 466 U.S. 668 (1984); State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Because these claims were more than sufficiently pled, and because the files and records do not conclusively demonstrate that Mr. Patton is not entitled to relief, reversal for an

evidentiary hearing is warranted.

A. FAILURE TO MOVE FOR CHANGE OF VENUE.

Between Mr. Patton's arrest on September 2, 1981, and trial in February, 1982, dozens of newspaper articles and television and radio broadcasts carried the story of Officer Broom's shooting. Only two or three jurors were completely unfamiliar with the extensive pretrial publicity. Without a tactic or strategy, defense counsel never moved for a change of venue in this highly-publicized case.

Counsel was aware of the extensive pretrial publicity surrounding this case, and filed numerous motions relating to the pretrial publicity citing numerous articles informing the public about different aspects of the case in a prejudicial and unbalanced manner. In these motions, counsel repeatedly asserted that "the shooting and the subsequent arrest of the defendant received extensive media coverage on television, radio and in the newspaper" (R. 209). For example, The Miami Herald ran an extremely detailed report of Broom's shooting on September 3, 1981, setting out statements from numerous eyewitnesses and prejudicial comments from police. The police referred to Mr. Patton as a "career criminal with an extensive arrest record." In addition, the article contained an elaborate diagram of the crime scene with a corresponding detailed account of the events which transpired. One photograph showed Officer Broom's mother, Lucille Broom, weeping and being comforted by her daughter Josephine Broom.

Other local papers also carried the shooting as front page news. The Miami News ran a huge front page story on September 5, 1981, which contained a photograph of Pauline Mathis, Officer Broom's girlfriend, holding her head in grief on the front page. Another photograph from this article showed Mr. Patton handcuffed in police custody with bars behind him. The article contained many details of the incident and several prejudicial comments, including a statement by Mr. Patton's mother that saying that "he had been in trouble most of his life." Mr. Patton's arrest was flamboyantly detailed in the news articles. The article went on to discuss and compare the backgrounds of Mr. Patton and Officer Broom. Broom was described as a model citizen whereas Mr. Patton was described as a woman beating, unemployed drunk.

The television news stations followed the developments in Mr. Patton's case very closely. Television cameras were present at all of the proceedings against Mr. Patton. In addition, local television stations televised Nathaniel Broom's funeral and many of the jurors recalled seeing Officer Broom's mother weeping at the televised services.

Media interest in Mr. Patton's case never waned. For example, the Miami Herald ran another article on September 5, 1981, in which it reported the results of the search warrant executed at Mr. Patton's grandmother's house. On October 10, 1981, the Miami Herald reported all of the details surrounding Mr. Patton's competency hearing and the fact that court appointed psychiatrist described Mr. Patton as faking a mental illness.

In addition to the above mentioned articles, defense counsel submitted numerous other exhibits regarding news coverage which are contained in the exhibits to defense counsel's motions. Despite the obvious high profile nature of the case, however, defense counsel never sought to change the venue from Dade County. Mr. Patton's Rule 3.850 motion also alleged that there was no reasonable strategic or tactical reason for defense counsel's omission in light of the pretrial media coverage in this case which irreparably prejudiced Mr. Patton.

Jury selection began on February 16, 1982, less than six months after the shooting. During voir dire, almost all of the prospective jurors acknowledged that they had some prior knowledge of the case, from television, radio, newspapers, or word of mouth. The twelve jurors which were finally selected all admitted to having some degree of media exposure, from recalling names and faces, to more detailed knowledge of the facts.

Virtually every piece of evidence offered at trial was prematurely released through the media and directly affected the trial. The court realized the prejudicial impact of the intensive pre-trial publicity and attempted to minimize the damage after the fact by conducting individual voir dire on the issue of publicity. Counsel, however, failed to move for a change of venue.

Mr. Patton was denied his right to a fair and impartial jury and to a jury selected according to the requirements of due process and equal protection. Irvin v. Dowd, 366 U.S. 717 (1961).

Mr. Patton' trial did not comport with the mandate or spirit of the constitutional guarantee of a "fair tribunal." To assert that Mr. Patton' jury was "impartial" is to render due process "but a hollow formality." Rideau v. Louisiana, 373 U.S. 723, 726 (1963).

The jurors' knowledge of the case and the inflamed community atmosphere deprived Mr. Patton of a fair trial under both an inherent prejudice and an actual prejudice analysis. See Heath v. Jones, 941 F.2d 1126, 1134 (11th Cir. 1991). The prejudice pervading the community "enter[ed] the jury box," Heath, 941 F.2d at 1134, and created prejudice. In this context, jurors' statements that they would set aside pretrial knowledge of the case and their feelings about the victims or their family are not dispositive. Irvin, 366 U.S. at 728. See also Sheppard v. Maxwell, 384 U.S. 333, 351 (1966); Estelle v. Williams, 425 U.S. 501, 504 (1976); Holbrook v. Flynn, 475 U.S. 560, 570 (1986). Without a reasonable tactic or strategy,[20] trial counsel was ineffective for failing to submit a motion for change of venue, and an evidentiary hearing is warranted.

B. VOLUNTARY INTOXICATION.

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[20]During the Huff hearing, the State argued as to the change of venue claim that a "strategy sometimes has to be assumed" (T. 306). This is flatly improper. Cf. Valle v. State, 705 So. 2d 1331 (Fla. 1997). Here, the record revealed no strategy decision not to seek a change of venue, and a court cannot assume that one was made absent an evidentiary hearing. See, e.g. Thomas v. State, 634 So. 2d 1157 (Fla. 1st DCA 1994) (inappropriate to find that defense counsel's actions were tactical absent an evidentiary hearing); Davis v. State, 608 So. 2d 540 (Fla. 2d DCA 1992) (same).

Without a reasonable tactic or strategy, trial counsel failed to investigate and utilize plentiful and available evidence of Mr. Patton's voluntary intoxication at the time of the offense. Likewise, counsel failed to request the assistance of a mental health expert to assist in the preparation of a voluntary intoxication defense. Under Florida law, "[v]oluntary 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). Furthermore, a defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So. 2d 347 (Fla. 1982); Palmes v. State, 397 So. 2d 648 (Fla.), cert. denied, 454 U.S. 882 (1981).

During the guilt/innocence phase of trial, defense counsel presented no evidence regarding Mr. Patton's intoxication. Counsel failed to call any defense witnesses who could have testified to Mr. Patton's intoxication at the time of the offense and to his extensive history of drug and alcohol abuse. Below, the State argued that the minimal evidence adduced at trial[21] that supported the giving of the voluntary intoxication instruction "was not uncontradicted" (Supp. PC-R. 520), and cited

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[21]This evidence consisted of syringes and drug paraphernalia were found in the car driven by Mr. Patton (R. 1010), the fact that the car's owner denied that the paraphernalia was his (R. 863), that Mr. Patton wanted to sell a gun to buy drugs (R. 1134), and that the BOLO issued for Mr. Patton's arrest indicated that the offender appeared to be extremely high with eyes bulging (R. 1414).

instances of witness testimony from law enforcement and lay witnesses that they did not think Mr. Patton appeared to be under the influence of drugs (Supp. PC-R. 520-21). Notably, however, the State conceded that at trial, "there was no evidence of the amount of drugs consumed by the defendant preceding the homicide of Officer Broom, and no evidence that at the time the defendant shot Officer Broom, he was intoxicated" (Supp. PC-R. 522). The State's position only strengthens Mr. Patton's argument that actual and available direct evidence of Mr. Patton's intoxication at the time of the offense would have made a difference.[22]

Mr. Patton's Rule 3.850 motion alleged that, at the time of the crime, expert testimony was available to establish that Mr. Patton suffered from acute and chronic polydrug intoxication (PC-R. 216). As to intoxication, Mr. Patton's motion further alleged that in the weeks leading up to the offense, he was "on a cocaine, marijuana, heroin, and alcohol binge", and "[o]n the day of the offense, Mr. Patton had been drinking alcohol with his friends and taking 'speedballs' intravenously" (PC-R. 219).[23] The motion also alleged that defense counsel unreasonably failed to present evidence that drugs and drug paraphernalia (including several syringes and a spoon) were found in the car Mr. Patton

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[22]The State also argued below in support of summary denial that none of the experts involved in the case would have supported an intoxication defense or corroborated Mr. Patton's history of drug use (Supp. PC-R. 521-22). A review of this testimony establishes otherwise. See infra n.___.

[23]There was also information which Mr. Patton alleged was withheld by the State that would have further buttresses his intoxication at the time of the offense. See Argument ___, infra.

was driving when he was arrested (PC-R. 219-20); jail records also indicated that Mr. Patton had fresh track marks on his arms when he was arrested.[24] The motion further alleged that there was no reasonable tactical or strategic reason for this failure, as trial counsel never argued that Mr. Patton was not present at the crime; in fact, counsel conceded in opening argument that Mr. Patton shot the victim but that Mr. Patton lacked the ability to form specific intent due to intoxication (PC-R. 214).

A voluntary intoxication defense would not have been inconsistent with the theory of defense, as even the State conceded below: "Counsel argued that the situation involved

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[24]Expert testimony presented at the resentencing also went to establishing intoxication at the offense, but this was never investigated or presented at the guilt phase. For example, Dr. Krop testified at Mr. Patton's resentencing that drugs played a major role in Mr. Patton's behavior, and that he had been addicted to cocaine and heroin injections (which are speedballs) at least one year prior to the shooting, and especially in the three months preceding the shooting (RS. 2501). He explained that the evidence suggested that Mr. Patton was severely intoxicated at the time of the offense, and that drugs were a very big factor in Mr. Patton's actions and personality (RS. 2559). Dr. Krop further discussed a 1978 EEG reports evidencing brain damage, as well as Dr. Mutter's 1978 finding that Mr. Patton suffered from organic brain damage "which may have been caused by drug abuse" (RS. 2509). Mr. Patton's prior adjudication of insanity was also related to the inability to distinguish right from wrong because of drug use (RS. 2519). As to Mr. Patton's state of mind at the time of the instant offense, Dr. Krop found that Mr. Patton was not acting rationally due to drug intoxication (RS. 2525). Dr. Toomer testified at Mr. Patton's resentencing that Mr. Patton was insane at the time of the offense (RS. 2765), and discussed for example a jail report indicating that the day after his arrest, Mr. Patton was "coming down from heroin, cocaine, everything from pot to heroin" (RS. 2812). None of this evidence was presented at Mr. Patton's trial and would clearly have buttressed a voluntary intoxication defense, which was, as the State conceded, the defense strategy at trial.

split-second decisions on the part of the defendant, that he was someone who needed drugs, was strung out on drugs and was trying to buy drugs" (Supp. PC-R. 522). Mr. Patton's counsel never argued that he was not present and did not present a defense of alibi. In fact, counsel conceded in opening statement that Mr. Patton shot officer Broom (R. 848). Moreover, defense counsel conceded all the material elements of the State's case against Mr. Patton except for his ability to form specific intent because she asserted that he was intoxicated. However, defense counsel failed to present any of the amply available evidence to support her assertion. An evidentiary hearing is warranted.

C. INSANITY.

Trial counsel unreasonably failed to investigate and present a defense of insanity. In light of Mr. Patton's prior adjucation of insanity and Dr. Toomer's testimony at Mr. Patton's resentencing,[25] an insanity defense was more than viable, yet counsel failed to even request a confidential mental health expert prior to Mr. Patton's competency hearing. Further, defense counsel failed to investigate, obtain, and present critical mental health records relating to Mr. Patton's state of mind at the time of the offense.

There was clearly indicia that Mr. Patton was insane at the time that these crimes were committed. For example, Dr. Toomer

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[25]In his lengthy deposition prior to resentencing, Dr. Toomer found that, although he was not asked to evaluate Mr. Patton for insanity, based on his evaluation and review of Mr. Patton's history and the facts, Mr. Patton was not sane when he committed these crime.

explained in a deposition prior to Mr. Patton's resentencing that Mr. Patton was insane at the time he committed the crime. Although Dr. Toomer touched on the insanity issue at the resentencing, it was not presented at all at trial, and counsel had no reasonable tactical or strategic decision for not doing so.

There was compelling information about Mr. Patton's mental state at the time of the offense, some of which defense counsel possessed and some of which she failed to discover. Mr. Patton had been on a cocaine, marijuana, heroin, and alcohol binge during the weeks preceding his offense, and had a long and established history of severe mental illness (including a prior adjudication of insanity). This information was never presented to his trial jury, and clearly should have been, particularly Dr. Toomer's opinion.

At Mr. Patton's trial, it was established that drug paraphernalia was found in the green Volkswagen which Mr. Patton was driving. State witness Robert Snarnow, crime scene technician, processed all the evidence found in the green Volkswagen which Mr. Patton was driving. Robert Snarnow testified that he found inside the Volkswagen "an eyeglass holder with a spoon, two hypo syringes, [and] a cotton yellow needle holder" (R. 1010). The following exchange occurred between defense counsel and Michael Snowden, owner of the Volkswagen:

> Q. Mr. Snowden, do you recall the date when you last saw your automobile before it was apparently stolen?

A. Not the specific date, no.

Q. Now, when the police recovered your car and returned it back to you, they had found some things that thy refer to as drug paraphernalia and also some marijuana cigarettes in the car. Were those yours?

A. No. They weren't.

(R. 863).

However, defense counsel presented no evidence establishing that Mr. Patton owned and used this drug paraphernalia. In fact, defense counsel failed to cross examine state witnesses Leroy Williams and Henry Butler, passengers of Mr. Patton in the Volkswagen immediately prior to the offense, regarding ownership of the paraphernalia. Further, defense counsel failed to have the paraphernalia tested for the presence of drugs, fingerprints, or other information which would have assisted Mr. Patton's claim of voluntary intoxication and insanity.[26]

Unreasonably, and without a tactic or strategy, counsel failed to adequately investigate, prepare, and present an insanity defense on Mr. Patton's behalf, thereby rendering ineffective assistance of counsel. Strickland v. Washington. See also United States v. Salava, 978 F.2d 320 (7th Cir. 1992) (error to exclude testimony of defense psychiatrist that defendant had severe mental illness because evidence was relevant to insanity defense); Humanik v. Beyer, 871 F.2d 432, 443 (3d Cir. 1989) ("If the defendant's evidence on mental disease or

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[26] Even if Mr. Patton's severe mental condition was not so acute as to constitute legal insanity, it was, however, serious enough to negate specific intent. Dillbeck v. State, 643 So. 2d 1027 (Fla. 1994); Bunny v. State, 603 So. 2d 1270 (Fla. 1992).

defect is sufficient to raise a reasonable doubt about the existence of the requisite intent, it cannot be constitutionally ignored"). Because the files and records do not conclusively demonstrate that Mr. Patton is not entitled to relief on this issue, an evidentiary hearing is required.

D. FAILURE TO CONDUCT ADEQUATE VOIR DIRE.

In the face of substantial and compelling evidence of mental illness, trial counsel asked not one question of any potential juror regarding mental health issues. Not one question was asked regarding the jurors' feelings about the defense of insanity. 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 can negate the specific intent required for a finding of first-degree murder. Not one question was asked about the jurors' understanding or feelings about mental health issues 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 drug abuse and addiction. This is prejudicially deficient performance. Given defense counsel's awareness of Mr. Patton's obvious mental health problems, the failure to even ask one question in this area falls below reasonably professional standards. Because there was no

reasonable strategy decision on this record,[27] and the files and records did not conclusively demonstate no entitlement to relief, an evidentiary hearing is and was warranted.

E. FAILURE TO ACT AS ADVOCATE.

Defense counsel in Mr. Patton's case failed in her "overarching duty to advocate the defendant's cause." Strickland v. Washington, 488 U.S. 668 (1984). Counsel's actions were "not simply poor strategic choices; [s]he acted with reckless disregard for his client's best interests and, at times, apparently with the intention of weakening his client's case." Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1983). Defense counsel was ineffective when she conceded in her opening statement that Mr. Patton was guilty. After telling the jury that the defense would not be disputing the testimony of most of the witnessess (R. 848), counsel, without a reasonable tactical decision, conceded that Mr. Patton was in the possession of a "dangerous loaded gun" and that "he had been in possession of a stolen vehicle" (Id.), thus relieving the State from meeting its burden to prove guilt beyond a reasonable doubt and abandoning her role as advocate. Francis v. Spraggins, 720 F. 2d 1190 (11th Cir. 1983); Young v. Zant, 667 F. 2d 792 (11th Cir. 1982). See

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[27]Below, the State argued that the claim could be summarily denied because Mr. Patton has not demonstrated that "any of the jurors had any particular biases in those areas" (Supp. PC-R. 528). This of course is Mr. Patton's point; Mr. Patton went to trial alleging mental health issues relating to substance abuse intoxication and severe childhood abuse without his counsel even asking the jurors their feelings on these important issues. This is deficient performance.

also Clark v. State, 690 So. 2d 1280 (Fla. 1997). These allegations are not refuted by the record, and a hearing is warranted.

F. TRIAL COURT RENDERED COUNSEL INEFFECTIVE.

The trial court interfered with defense counsel's ability to render effective assistance of counsel by failing to exclude the media or conduct a hearing to determine the effect the cameras upon Mr. Patton's ability to assist in his own defense. Defense counsel was well aware of the extensive pretrial publicity surrounding this case, and moved to have the electronic media excluded on several occasions because it was interfering with her ability to communicate with Mr. Patton (R. 365). Mr. Patton was distracted by and obsessed with the presence of the cameras (R. 366). Counsel requested a hearing and a defense expert to determine the effect of the cameras upon Mr. Patton's ability to assist counsel in his own defense, but her motions were summarily denied (R. 373). As a result, Mr. Patton was denied a fair trial and the effective assistance of counsel.

Counsel was also rendered ineffective by the trial court's failure to appoint co-counsel to assist her. Counsel brought her dire situation to the court's attention early on in a lengthy argument to the court, but the court refused to appoint co-counsel (R. 128-133; 146, 157). It was patently unreasonable and an abuse of discretion to deny counsel's request for co-counsel, particularly where the offense was a highly publicized and racially-charged killing of a police officer, and the State was

pushing to conduct the trial as soon as possible -- in fact, the trial occurred some six (6) months after the offense, and the witness list continually and regularly grew.

It is a basic due process right and essential to a fair trial that defense counsel in a criminal case be afforded a reasonable opportunity to prepare his case. Coker v. State, 82 Fla. 5, 7, 89 So. 222 (1921). The request for the appointment of co-counsel was wholly reasonable under the circumstances. As counsel pointed out to the trial court, the appointment of two attorneys in capital cases was the policy at the Public Defender's Office. In fact, the American Bar Association guidelines mandate that the appointment of two attorneys in a capital case is necessary to effectively litigate a death penalty case.

Counsel was also rendered ineffective by the ex parte hearings which took place in his case. For example, an ex parte hearing was conducted regarding the confidentiality of psychiatric reports, when rulings adverse to Mr. Patton were made (R. 43). It is unclear whether defense counsel was even apprised of what occurred during this hearing, but it is clear that she was not present. At another hearing, while counsel was present, the transcript of the proceedings was sealed, thereby precluding review (R. 187).[28] Relief is warranted.

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[28]Below, the court indicated that it had ordered that it was going to order this transcript be transcribed for review (T. 300-01). However, it was apparently never done and the court never addressed the issue again.

G. INEFFECTIVE CROSS-EXAMINATION.

Counsel was ineffective in her cross-examination. The State presented forty-three witnesses, but defense only cross examined twenty-three of those witnesses. Thus, the state was able to prosecute their case against Mr. Patton almost unopposed. For example, four state eyewitnesses, Charles Mortimer, Melvin Eaton, Thomas Gallo, and Deidre Curry, provided critical testimony that they saw Mr. Patton either being chased by Officer Broom or running from the scene after hearing shots. Yet, these witnesses were unable to correctly identify Mr. Patton in court. In fact, State witness Charles Mortimer identified Assistant State Attorney-legal intern Mark Seiden as the man he saw being chased by officer Broom (R. 931). However, counsel failed to cross-examine these witnesses regarding their misidentification, and failed to move to exclude this testimony on relevance grounds. Failure to cross examine these witnesses on this issue was prejudicial to Mr. Patton and denied him his right to a fair trial, effective assistance of counsel, and an adversarial testing.

Counsel also failed to adequately cross-examine the witnesses on the ownership of drug paraphernalia found in the car Mr. Patton was driving when he was arrested. Crime scene technician Robert Snarnow, who processed all the evidence found in the green Volkswagen, testified that he found inside "an eyeglass holder with a spoon, two hypo syringes, [and] a cotton yellow needle holder" (R. 1010). The following exchange then

occurred between defense counsel and Michael Snowden, owner of the Volkswagen:

> Q. Mr. Snowden, do you recall the date when you last saw your automobile before it was apparently stolen?
>
> A. Not the specific date, no.
>
> Q. Now, when the police recovered your car and returned it back to you, they had found some things that thy refer to as drug paraphernalia and also some marijuana cigarettes in the car. Were those yours?
>
> A. No. They weren't.

(R. 863). However, counsel presented no evidence establishing that Mr. Patton owned and used this drug paraphernalia. In fact, counsel failed to cross examine state witnesses Leroy Williams and Henry Butler, passengers of Mr. Patton in the Volkswagen immediately prior to the offense, regarding ownership of the paraphernalia. This evidence went to counsel's theory that Mr. Patton was so intoxicated that he could not have the specific intent to commit murder. Defense counsel was thus ineffective and no adversarial testing occurred.

ARGUMENT V -- RESENTENCING INEFFECTIVENESS

Mr. Patton's case was sent back for resentencing because the jury had recommended a life sentence with a 6-6 vote and the trial judge erroneously refused to imposed a life sentence. Resentencing was held on April 24, 1989, before Judge Moreno (RS. 201). Because Mr. Patton had experienced one trial in Miami already, the publicity surrounding the killing of a police officer in 1981, when these occurrences were not as frequent, was massive. Resentencing counsel was therefore charged with an even

higher duty of care to ensure that his client received a fair trial.

A. FAILURE TO ENSURE A FAIR AND IMPARTIAL JURY AND JUDGE.

Prior to resentencing, a defense motion in limine was granted to exclude testimony of the prior jury's recommendation of death (RS. 50), and the jury was instructed that the source of their information was to be restricted to the testimony that they would hear during resentencing (RS. 59, 321, 778).

During voir dire, upon a question from juror Romer as to why a sentencing decision was not brought in before, the court answered in part:

> THE COURT: Let me interrupt you here for a second, okay? The legislature has set up a scheme whereby the jurors who represent the community--you will be the judges of facts. You get to make this recommendation. That is our law. You can agree or disagree with it. What has happened in the past, or the why's are interesting philosophical discussions, but we cannot get into that at the present time. The problem is--not a problem--the question is whether you can do that, whether you can follow the law and be a judge of the facts with that very important role of recommending a sentence.
>
> The typical criminal case is not a first degree murder. There are certain first degree murder cases in which the prosecutor does not ask for the death penalty. There are others in which it does. The history of it is really not important for your role in this case, so it really doesn't matter.
>
> What should have happened or didn't happen--it's really of no concern except philosophically, with you, because you come in here with a clean slate to decide what the law -- whether you can apply the law to these facts as you judge them.
>
> I don't know if that answers your question.

(RS. 305-306). Thereafter, a sidebar was taken by defense

counsel where he objected to the court's comment (RS. 307). The court replied that the only reason he responded was for the jury not to know what the prior jury recommendation had been (RS. 308). Defense counsel moved for a mistrial (RS. 310). The court agreed to start over with a new panel (RS. 310). Defense counsel then, after being firmly convinced that the matter was before the jury, withdrew his motion for mistrial and asked for an instruction on how the jury voted at the prior proceeding (RS. 320). Both the judge and the state attorney agreed that the jury should not be told about any prior jury votes (RS. 334, 335). Defense counsel realized that nagging questions by the jurors would become a major focus in the jury room, but still withdrew his motion for mistrial (R. 338). The court then made the following observation:

> THE COURT: I understand the defense request that I tell them the jury's vote, but I think it is <u>improper to tell a prior jury's vote</u>.

(RS. 346-347)(emphasis added). Thereafter, the defense agreed to the following instruction in part:

> The original jury failed to reach a majority vote in regard to sentence. Incorrectly, the Court ordered the jury that they must reach a majority. Because of this error we have a new sentencing hearing. That is why you are here.

(RS. 346).

After the case in chief began, the jury obtained a newspaper article reporting the prior death sentence. The following article circulated in the jury room (R. 1099-1130), and the court read the article for the record:

THE COURT: Okay. The article says,"Dade Circuit Court. Officer's killer gets sentence review. Robert Patten [sic] was sentenced to die seven years ago for the shooting death of a Miami policeman. Now the case is back in Dade Circuit Court for another sentencing hearing.

"Jurors in Judge Fred Moreno's court will recommend whether Patten [sic] should stay on death row. The final decision is up to the judge. The first jury convicted Patten [sic] of first-degree murder in 1982 for killing patrolman Nathaniel Broom. Jurors were split 6-6 on Patten's [sic] fate. Dade Circuit Judge Thomas Scott sent them back for more deliberations, after which they voted 7-5 to recommend death. The judge agreed. The case came back on appeal after the Florida Supreme Court ruled the judge erred when he did not accept the 6-6 vote. The high court said that should have been a recommendation for life."

(RS. 1102).

The judge individually voir dired each juror as to their knowledge of the article and got conflicting reports as to the extent of their knowledge. Juror Jackson denied reading the article but indicated that Juror Krishner told him about it (RS. 1106). Mr. Krishner denied that he read it or told anyone about it (RS. 1129). Ms. Shaw had the newspaper with her when she went into the courtroom for the individual voir dire. She recited the article including the fact that Mr. Patton had been sentenced to death by a 7-5 vote (RS. 1108-1110). Juror Tommy Stowe admitted reading the article including the sentence:

THE COURT: What did you read? What do you remember, as best as you can? We are not trying to quiz you on it, but that is the best way for me to understand what possible influence that can have.

I forget almost everything I read. I don't know about you.

THE JUROR: Well, the jury came back with a six to six verdict, right?

THE COURT: Okay.

THE JUROR: And the judge sent them back in and made them come back with a unanimous vote, which was seven to five for death, and then they--the Grand Circuit Jury overthrew that. That is why we are here today.

(RS. 1112-13). Mr. Stowe admitted that he had spoken to jurors Jackson and Gong and told them the substance of the article, even though juror Jackson had previously denied knowing the content of the article (RS. 1114). Later, Mr. Gong also denied reading the article or talking to anyone who had read the article (RS. 1124)[29].

It was obvious from the conflicting testimony of the jurors that the word spread throughout the jury room as the individual voir dire was occurring that they were not supposed to have read the newspaper. It was equally clear that some of the jurors were not being truthful about either reading or discussing the article with others. Even after these facts, defense counsel neither objected or moved for a mistrial when it was obvious that the panel had learned that the previous jury had sentenced Mr. Patton to death and that the jurors were not telling the truth. The judge and state had already conceded during voir dire that it was "improper to tell a prior jury's vote" (RS. 346-347). This is deficient performance. There can be no reasonable strategy for failing to object when jurors are clearly providing inaccurate information about such an important issue.

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[29]During voir dire, Gong had revealed that he was a former United States District Attorney in Miami, and had spent 10 years of his practice as counsel for the police pension fund (RS. 216). Clearly, he was aware of the impact of the article on the panel.

Counsel also failed to ensure that Mr. Patton was resentenced by an impartial judge. Mr. Patton's Rule 3.850 alleged that Judge Moreno engaged in off-the-record communications with the victim's mother during recess in the proceedings, an event which was reported by the Miami Herald. This could not have escaped the jury's attention, but even if no jurors saw this, it evinced the bias of the court. Valle v. State, 705 So. 2d 1331 (Fla. 1997). Defense counsel failed to object and move to disqualify the court.

Further, counsel failed to move to disqualify Judge Moreno when he made his feelings known to counsel and Mr. Patton that he was in favor of the death penalty:

> THE COURT: It's the truth. It's death by electrocution. Most people believe in it. I certainly do. It's a fact of life.

(RS. 153) (emphasis added). A judge's public pronouncements on issues such as a belief in the death penalty are inappropriate. Porter v. Singletary, 49 F.3d 1487 (11th Cir. 1995).

The court's bias was further reflected in the rulings from the bench. The inconsistent and adverse rulings interfered with counsel's ability to litigate his case. For example, the court overruled defense objections to prevent the overwhelming presence of uniformed police officers in the courtroom (RS. 1010-26, 1135); he allowed new state's witnesses to be added after opening statements in violation of a specific written agreement among the parties (RS. 1047-1096); he allowed the state's medical examiner and ballistics officer to be called "experts" but would not refer

to defense experts as such because he did not want to lend the "imprimatur of the court as an endorsement" (RS. 2456); he allowed the state to use a letter to Judge Weaver in a 1975 armed robbery case (RS. 2629-2634), and a disciplinary report from after the offense (R. 2613), but would not let the defense use mitigating evidence of family mental health problems by allowing testimony of the suicide of Mr. Patton's step-sister (R. 2653). All of these incidents establish that Mr. Patton did not receive a fair and impartial trial before the court. Yet, defense counsel failed to object or move for mistrial even when it was obvious that the court could not be impartial. A hearing is warranted.

B. FAILURE TO REQUEST A COMPETENCY HEARING

Without a tactical or strategic reason, defense counsel unreasonably failed to request that the court order re-examinations of Mr. Patton to access his competency to proceed. It was unreasonable for both counsel and the trial court to rely on a competency determination made some seven (7) years after the prior examinations, particularly given Mr. Patton's lengthy history of severe mental illness. Despite clear signs that Mr. Patton should have been re-evaluated, no request was ever made. This was prejudicially deficient performance, and an evidentiary hearing is required.

C. FAILURE TO INVESTIGATE AND PRESENT MITIGATION WITNESSES

At resentencing, counsel was in a unique position to know the strenghts and weaknesses of Mr. Patton's case and had a rare

opportunity to re-present Mr. Patton's case, yet he failed to request or present sufficient witnesses to present additional mitigating evidence which was readily available. For instance, counsel failed to investigate the possibility of presenting the victim's mother as a witness in mitigation as to the circumstances of Mr. Patton's life and the nature of the crime, which in her view called for mercy and leniency. Due to Mr. Patton's harsh upbringing and how that affected Mr. Patton's subsequent actions, including the crime, the victim's mother did not want Mr. Patton to be executed, which would have been powerful evidence.

Had counsel adequately investigated Mr. Patton's case, he would have been able to present further evidence in mitigation of his sentence and corroborate the evidence that was alluded to by the experts, but not corroborated by any independent objective data. Minimal background material was presented to the mental health experts charged with assisting him develop mitigating evidence. Without this critical information, the court made credibility findings against Mr. Patton because the mental health experts had no solid basis and reliable family information to substantiate their opinions. Counsel had a duty to present witnesses who would substantiate the assertions made by his mental health experts. Breedlove v. Singletary, 595 SO. 2d 8 (Fla. 1992). Instead, the jury was left with the impression that there were no other corroborative witnesses to relate to the jury the impact of the emotional abandonment of Mr. Patton's

childhood. These witnesses were readily available, yet never presented to the jury due to the failure to investigate. Other witnesses could have been investigated as to Mr. Patton's mental state near the time of the crime and backed up the mental health expert's testimony regarding the severity of his drug habit, and the effect that it had on his ability to function. All of these factors are mitigating and go to support the mental health experts opinions that the judge found lacking as to the weight of their importance. In fact, defense counsel practically abandoned his own mental health experts by failing to object to the state's impeachment regarding who paid their fees,[30] and did not object to the judge questioning the expert outside the hearing the jury.

Counsel also failed to properly prepare and inform Dr. Krop

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[30]For example, defense counsel never objected when the prosecutor, during his cross-examination of Dr. Krop, elicited several times the fact that Dr. Krop had previously done evaluations for CCR clients. Dr. Krop informed the jury, without objection from defense counsel, that CCR "are attorneys who represent inmates on death row after the death warrant is signed" and that he had "done a number of evaluations for them, yes" (RS. 2534). There was no possible relevance to testimony in relation to the issues before the jury, and counsel failed to object. This testimony served only to inflame the jury and remind the jury that Mr. Patton had been previously sentenced to death. During his closing argument, the prosecutor further exacerbated the situation:

> Dr. Krop -- Dr. Krop. Well, he works with death row inmates all the time. He works for the Capital Collateral Representative. As he told you, that is the group in Tallahassee that represents death row inmates, supported by tax dollars and these are people that lawyers, up there in that group, represent and Dr. Krop does a lot of work for them.

(RS. 3200). This argument was inflammatory and served only to impermissibly prejudice Mr. Patton.

regarding the accurate standard attendant to findings statutory mitigating circumstances. Dr. Krop testified that the statutory mitigators were not present in this case because Dr. Krop's own standard -- that Mr. Patton was not actively psychotic or retarded -- was not satisfied (RS. 2532). Counsel did not object to this erroneous statement of the law. See State v. Dixon, 283 So. 2d 1 (Fla. 1973); Duncan v. State, 619 So. 2d 279 (Fla. 1993).

ARGUMENT VI -- THE BRADY AND GIGLIO VIOLATIONS

A. BRADY WAS VIOLATED.

"A fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding." Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occur, a 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); Kyles v. Whitley, 115 S. Ct. 1555 (1995); Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Relief is required if the reviewing court concludes that there is a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. To the extent that counsel rendered ineffective assistance at the guilt phase through actions of the

state, actions which deprived counsel of the opportunity to put the state's case to a fair and adequate adversarial testing, Mr. Patton's trial was constitutionally defective. Kyles; State v. Gunsby, 670 So. 2d 920 (Fla. 1996).

As the State has conceded, see Supp. PC-R. 522, the defense theory at trial was that Mr. Patton could not form specific intent due to drug intoxication; thus, any information in the State's possession that went to that issue was exculpatory. Roman v. State, 528 So. 2d 1169 (Fla. 1988). Mr. Patton's Rule 3.850 alleged that "[t]he State withheld information that upon Mr. Patton's arrest a white paper with powder and yellow pills were confiscated from him in a pack of Winston cigarettes and suspected as narcotics. No indications were noted that these substances were tested to find out what they really were" (PC-R. 246-47).

In response, the State argued that discovery responses filed prior to trial (but not part of the direct appeal record) conclusively rebutted Mr. Patton's specific allegations, and that the evidence was disclosed (Supp. PC-R. 534). Attached to the State's response as Exhibit 8 was a discovery response referring to "Evidence and Property Receipts" -- this document lists generally "Evidence and Property Entry of items taken from Robert Patton" as being disclosed to the defense (Supp. PC-R. 578). The document fails to specifically identify which items were turned over; no mention is made specifically of the cigarette pack with white paper and yellow pills. This documents falls far short of

conclusively rebutting Mr. Patton's specific allegation, and an evidentiary hearing must be ordered. Muhammad v. State, 603 So. 2d 488 (Fla. 1992); Maharaj v. State, 684 So. 2d 726 (Fla. 1996).

B. GIGLIO WAS VIOLATED.

Throughout the course of Mr. Patton's trial and resentencing, the State argued that there was no evidence to support the notion that Mr. Patton was addicted to drugs and was intoxicated during the crime. However, as discussed supra, the State had in its possession evidence which established otherwise. The State's arguments were therefore false and a new trial must be ordered if there is any reasonable likelihood that the State's false argument could have affected the jury's verdict. Giglio v. United States, 405 U.S. 150 (1972); United States v. Bagley, 473 U.S. 667, 679 n.9 (1985). An evidentiary hearing is warranted.

ARGUMENT VII -- COMPETENCY

A claim of incompetence to stand trial can be proven by the subsequent presentation of collateral evidence as to actual competency. Nathaniel v. Estelle, 493 F.2d 794, 796-97 (5th Cir. 1974). Incompetency can also be raised as a denial of due process because of the ineffective assistance of counsel and/or the mental health experts, as well as the trial court's failure to conduct a reliable and adequate competency proceeding. Pate v. Robinson, 383 U.S. 375 (1966); Mason v. State, 489 So. 2d 734,

736 (Fla. 1986). This is what happened in Mr. Patton's case.[31]

Prior to Mr. Patton's indictment and arraignment for murder, the trial court ore tenus ordered that Mr. Patton be evaluated by four (4) experts in order to determine his competency and insanity,[32] based on the court's own observation of Mr. Patton, as well as a request by the State ((R. 30) (emphasis added). At no time did the court ask defense counsel to submit names of proposed experts, nor did counsel request appointment of a confidential defense expert to assist Mr. Patton in his defense. No explanation was provided as to the reason for the appointment of four (4) experts, when the rule provides for a maximum of three (3).[33] Moreover, the record does not reveal that any request was ever made by the State regarding a competency

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[31]The lower court found the claim legally insufficient (PC-R. 460); however, the order referred to nothing in the record that conclusively rebutted the allegations.

[32]At a September 23, 1981, hearing, the court had asked defense counsel if she was going to be raising a competency issue, and whether he needed to appoint psychiatrists (R. 20). Defense counsel indicated that she was "not prepared to advise the Court at this time" (R. 20).

[33]Similarly, no explanation was provided for the court's inclusion of insanity within the competency evaluation. Mr. Patton had not even been indicated or arraigned for the murder charge, much less noticed an intent to raise an insanity defense. Ordering the experts to evaluate for insanity when Mr. Patton had not even been indicted, much less did his counsel notice an intent to rely on an insanity defense, blatantly violated Mr. Patton's constitutional rights. See Fla. R. Crim. P. 3.216 (when notice of intent to rely on insanity defense is filed, "[t]he expert shall report only to the attorney for the defendant and matters related to the expert shall be deemed to fall under the lawyer-client privilege"). Counsel never objected, and an evidentiary hearing is warranted.

evaluation.[34] An evidentiary hearing is clearly warranted in order to determine whether this matter was discussed during an ex parte meeting between the judge and the prosecutor, or at an off-the-record hearing. In either case, Mr. Patton's rights were violated by the unrecorded and/or ex parte contact with respect to the State's request for a competency evaluation.

Four doctors subsequently examined Mr. Patton: Dr. Jacobson evaluated Mr. Patton on September 28, 1981, three days after the court's order. Dr. Herrera examined Mr. Patton on September 29, 1981, four days after the court's order. The record does not reflect the dates of the examinations of Dr. Jaslow and Dr. Mutter, but they were conducted prior to October 9, 1981, the date of the competency hearing before Judge Scott. Dr. Jacobson testified that he evaluated Mr. Patton on September 28, 1981 court's request. At the beginning of his testimony, the prosecutor provided Dr. Jacobson with discovery information, which included a pleading (R. 54-55). Dr. Jacobson testified that, based upon his one-hour interview and "the history", Mr. Patton was competent (R. 55). Dr. Jacobson explained that Mr. Patton "was not able to talk to me about the alleged offense or his recollection of it," (id.), but did "describe in a somewhat vague manner a pattern of drug abuse, a pattern of functioning somewhat over the proceeding [sic] number of months" (R. 55-56).

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[34]The rules of criminal procedure provide that if the State has concerns about a defendant's competency, a written motion is required. Fla. R. Crim. P. 3.210 (b)(2). The State complied with none of the procedural prerequisites in this case.

Mr. Patton "was able to give a history; although I don't know whether it was an accurate one about his earlier life, his education, his school, his family" (Id). Dr. Jacobson characterized Mr. Patton's responses as "evasive" but "atypical," and explained that "I don't say that Mr. Patton is pretending to be mentally ill because I don't know what illness he is pretending to have, so I can't say he is pretending to be mentally ill" (R. 56-57).

On cross-examination, Dr. Jacobson recognized that the only source for the "history" upon which he had based his expert opinion was his interview with Mr. Patton. He had no records of Mr. Patton's prior psychiatric hospitalizations, and was not aware that Mr. Patton was under psychiatric treatement by the State for nearly two years (R. 59-60). He also acknowledged that Mr. Patton did not satisfy at least four (4) of the competency criteria, but based his findings on his overall opinion that Mr. Patton was not making a reasonable effort to be cooperative (R. 60). For example, Dr. Jacobson believed that Mr. Patton's "lack of cooperation" contributed to his finding that Mr. Patton's awareness and ability to appreciate the charge of first-degree murder was "unacceptable" (R. 61).[35] Dr. Jacobson also testified that he "didn't know how he would communicate with [defense counsel] with respect to facts surrounding the alleged

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[35]Apparently, Dr. Jacobson was unaware of the fact that, nor did counsel make him aware of the fact that, at the time of his evaluation, Mr. Patton had yet to be indicted for the murder charge. Obviously Mr. Patton would have no awareness of a charge for which he had yet to be indicted.

offenses, so I would have to say that that is undetermined" (Id.). Dr. Jacobson concluded that "there are areas where I couldn't really give knowledgeable opinions about how much the Defendant does or doesn't know" (R. 62).

Dr. Jaslow also testified that Mr. Patton was competent. Although Mr. Patton "presented a picture to me of one that would suggest incompetence, presented a picture that would suggest of possible psychotic difficulty," because there were so many "discrepancies," Dr. Jaslow "could not accept that picture" (R. 63). However, Dr. Jaslow "couldn't state within reasonable medical probability at that time unless I had additional information that he was truly, willfully distorting" (Id.). As with Dr. Jacobson, Dr. Jaslow confessed that Mr. Patton presented an atypical situation:

> A. He was presenting the picture that would supposedly go along with an acute psychotic disturbance probably of a major mental illness such as schizophrenic reaction, but the psychotic features that he manifested showed at often times did not really fall in line with what we would expect with a true psychotic reaction, a true schizophrenic reaction, and I felt there were a number of discrepancies.
>
> I believe I pointed out in the report, but I also said that under the circumstances I could not state that he was directly falsifying or distorting; although, this is the picture I felt was there.
>
> I wanted additional information if possible that would support or repute [sic] what I believed was happening.

(R. 64). In addition to the scant information provided to him by the prosecutor, Dr. Jaslow recognized that additional information would have been helpful in making a determination in this case;

for example, he did not have information that Mr. Patton had had psychiatric problems from the time he was approximately eight (8) years old (R. 69).

Dr. Herrera conducted his examination of Mr. Patton on September 29, 1981, four days after the court order was entered, and reviewed earlier that morning the discovery documents gathered by the prosecutor (R. 71). Dr. Herrera's testimony consisted mostly of affirmative pro forma responses to questions from the prosecutor regarding the competency criteria, adding that any perceived problems associated with Mr. Patton's meeting of the competency criteria were conscious, voluntary decisions on Mr. Patton's part to exaggerate symptoms (R. 72). Dr. Herrera believed that, because in his opinion Mr. Patton was giving "approximate" or "absurd" answers, Mr. Patton suffered from "a so-called Gancer symptom," which is "simply a fantasy name for fictitious disease order or a fictitious disease of a psychiatric nature" (R. 73). Dr. Herrera decided that Mr. Patton suffered from this "disease" because he is "a person who is obvious or would be obviously interested in self-serving purposes for whatever reason, whether that be a trial like this or something of this nature" (R. 73). Dr. Herrera's diagnosis of "Gancer syndrome" was confirmed by the facts such as the fact that Mr. Patton was friendlier with the correctional officers than he was with Dr. Herrera during his examination, in addition to the fact that Mr. Patton was holding his head down while he was in the courtroom, but "[i]t was not that bad at that time [of the

examination]" (R. 74-75).

Following the testimony of the doctors,[36] defense counsel presented the testimony of Christina Castle, the mother of Mr. Patton's son, as the sole defense witness. She testified that she lived with Mr. Patton for about a year prior to his arrest, and has visited him on a regular basis since his arrest (R. 79-80). She explained that Mr. Patton suffered from memory problems, and would often forget her age as well as the baby's age (R. 80). Mr. Patton also "wrote poems for me and they were about three weeks apart and he said that he wrote them for the first time in each letter" (R. 80-81). She explained that "[h] said people listen to us on the phone and for me not to write anything in the -- in his letters because they were read and that his were being read also" (R. 81). Ms. Castle also recounted an incident where Mr. Patton had been praying, and the pages of his prayer book were moving ahead of where they were supposed to be (R. 82). Mr. Patton did not tell her that he had a history of mental illness (R. 82-83). Ms. Castle did not believe that he understood the seriousness of his position, and following a question from defense counsel, expressed her opinion that Mr. Patton was not competent (R. 83).

On cross-examination, Ms. Castle testified that Mr. Patton

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[36]Dr. Mutter, who also examined Mr. Patton pursuant to the court's order, was unavailable to testify at the hearing. His report was purportedly placed into the record, yet it does not appear that this was done. Defense counsel did, however, without a tactic or strategy, stipulate to Dr. Mutter's report finding Mr. Patton competent.

had once told her that "he would rather go to a hospital than back to prison," and that he told her he had been hospitalized for only one year, not two (R. 83-84). After re-affirming her belief that Mr. Patton was not competent, Ms. Castle was questioned by the prosecutor on the legal competency criteria and admitted that she did not know what the test was for competency (R. 85).

The prosecutor argued that Mr. Patton was competent, "that he is trying to fool the Court, that is he trying to fool the doctors, and even admitted to his female friend that he was, in fact, trying to fool the doctors" (R. 87). Defense counsel argued that the testimony of the experts was inadequate and rife with contradictions about their findings with respect to the competency criteria, and requested that, at a minimum, "further observations should be made of the Defendant under correct psychiatric conditions so that a proper determination can be made to the Court if and when he is competent to proceed to trial" (R. 91).

The court found Mr. Patton competent, generally concluding that Mr. Patton had a rational and factual understanding of the proceedings against him (R. 93). The court noted that Mr. Patton's prior psychiatric history, rather than providing insight as to Mr. Patton's mental problems, made Mr. Patton "aware of symptoms that would be attributable to a psychotic personality"

(R. 92).[37] The court ignored defense counsel's request that Mr. Patton be observed further in order to make a definitive assessment of his condition. But see Manso v. State, 704 So. 2d 516 (Fla. 1998).

The testimony adduced at the competency hearing, in addition to the documentation which was never provided to the experts or the court regarding Mr. Patton's lengthy history of severe mental illness, establish that the trial court ignored the clear signs that pointed to Mr. Patton's incompetence and to the fact that there was a mental illness that could only be determined by hospitalization. Manso v. State, 704 So. 2d 516 (Fla. 1998). The trial court indicated that its determination that Mr. Patton was competent was based on the testimony of the experts, yet the experts' findings, admittedly based wholly on self-report, do not provide competent and substantial evidence to support the court's finding. None of the experts was aware that Mr. Patton suffers from organic brain damage, much less the effects of this condition on his mental state. An evidentiary hearing is clearly warranted. See Mason v. State, 489 So. 2d 734, 736 (Fla. 1986).

Regarding the evidence that Mr. Patton suffered from schizophrenia and hallucinations, none of the experts were provided, or took into consideration, independent evidence which existed at the time of the competency hearing that would have corroborated his claims. For example, in a 1977 psychiatric

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[37]Of course, the trial court had no documentation whatsoever regarding Mr. Patton's past psychiatric history, nor an awareness of the type or severity of his mental condition.

report ordered in a prior case, the psychiatrist appointed by the trial court personally observed the bizarre behavior exhibited by Mr. Patton, in addition to noting that the Dade County Jail had made similar observations:

> The defendant has an extensive drug history to include marijuana, hashish, speed, ups, downers and acid. Apparently on the day of or prior to the alleged offense, he had taken LSD and was "tripping". At first coming to the Dade County Jail, he was noticed to be bizarre, hallucinatory and delusional. He had the feeling that people were coming to his cell and threatening to kill him. He was also hearing voices talking to him. At the time, too, he wrote a number of bizarre notes, stating things his a incoherent fashion.
>
> * * *
>
> Based on the above, it would appear that the defendant, at this point in time is psychotic. In all probability his psychosis is secondary to drug abuse, though there is the possibility that it may be on a more functional level and be due to an underlying schizophrenic process. He is currently being treated with major tranquilizers, the medicine of chose in psychosis. At this point in time it is felt that the defendant is not competent because he cannot adequately assist an attorney in his defense nor understand the nature of the charges against him. In al probability, at the time of his escape from prison, he did maintain substantial capacity to appreciate the wrongfulness of his actions and to conform his conduct to the confines of the law. However, it may be said with reasonable medical certainty that at the time of the alleged offense of receiving stolen property, the defendant was psychotic and did not meet tests of responsibility. Again, it is difficult to determine whether his psychosis is due to the drugs or due to a more functional basis. One gets the feeling that it is more drug induced based on his gradual clearing with time and response to medication. From a psychiatric standpoint, what would be most beneficial to this defendant, would be referral to the Division of Mental Health for subsequent treatment, mainly hospitalization and psychotropic medication.

In another psychiatric report, further evidence of hallucinations was available:

> REASON FOR FURTHER HOSPITALIZATION: This patient has been treated with the full range of hospital programs including psychotherapy and medication, (present medication, Trilafon 8 mgm BID and TRilafon 16 mgm QHS, Vistaril 50 mgm QES, and Cogentin 2 mgm BID). His mood and behavior are very labile and he charged suddenly from a pleasant and cooperative patient to a negativistic one. His attitude is at times infantile, and very superficial, lacking insight into his condition. He shows inappropriate affectivity. He admits auditory hallucinations, but doesn't want to elaborate. His affect is flat. For that reason, we feel that at this point, patient is not in a position to aid in legal counseling.
>
> FURTHER TREATMENT PLANNED: We plan to keep Mr. Patton on psychotropic medication of the type of a major tranquilizer and have him attend well structured activities and individual and group therapy.

Yet another report was available which corroborated the fact that Mr. Patton suffered from a major mental illness:

> In conclusion, it is still the opinion of the undersigned that this defendant suffers from a chronic major psychiatric illness apparently compensated after several months of treatment as an inpatient in a psychiatric facility. If the defendant is going to maintain the improvement that he has reached, he will have to continue to take medication regularly but it is highly unlikely that he will d so one he is released from confinement. He does not feel that he was or is mentally ill and has a need for treatment. Also, the defendant indicated that he is making plans to have the state as soon as he can and it is highly improbably that he will participate in any type of program or will cooperate with a disposition that will require some followup.

These reports represent only a small portion of the types of materials that were available. These facts require an evidentiary hearing and thereafter require that relief be granted. This information clearly establishes the inadequacy of the competency proceeding that was held in Mr. Patton's case. The trial court erred in ignoring the recommendations of the

mental health experts and defense counsel. Had the trial court ordered further observation of Mr. Patton, the required observation would have accurately revealed that Mr. Patton suffered from a major mental illness and was not competent to stand trial. Manso.

Moreover, the experts who found him to be competent conducted their examinations some six (6) months prior to trial; the competency hearing was held approximately four (4) months prior to trial. Given the fact that a wealth of substantial information was not considered by the experts and the trial court, the court ignored the request that Mr. Patton be observed in a psychiatric setting, it is abundantly clear that due process was violated. The "finding" of competency in this case, made some six (6) months prior to trial, did not establish Mr. Patton's competence when he was tried, particularly given his past psychiatric history and hospitalization. Lane v. State, 388 So. 2d 1022, 1025 (Fla. 1980); Bishop v. United States, 223 F.2d 582 (D.C. Cir. 1955), rev'd, 350 U.S. 961 (1956).

ARGUMENT VIII -- AKE VIOLATIONS

A. COMPETENCY HEARING.

Mr. Patton's right to a professionally competent, court-funded evaluation of his competence to stand trial was violated by counsel's failure to ensure that the experts had the necessary and vital information they needed to render an adequate and accurate diagnosis of Mr. Patton's mental condition, and by the experts' reliance solely on Mr. Pattons' self-report an no

independent documentation. Ake v. Oklahoma, 470 U.S. 68 (1985); Strickland v. Washington, 466 U. S. 668 (1984). Counsel also unreasonably failed to request the appointment of a confidential expert to assist the defense regarding competency issues. Morgan v. State, 639 So. 2d 6 (Fla. 1994).

The testimony at competency hearing is rife with references that the experts had insufficient material to either corroborate or refute Mr. Patton's mental illness. For example, Dr. Jacobson recognized that the only source for the "history" upon which he had based his expert opinion was his interview with Mr. Patton, and had no knowledge of Mr. Patton's prior psychiatric hospitalizations or any records from them (R. 59-60). Dr. Jaslow confessed that he had insufficient information to adequately and completely refute or corroborate the fact that Mr. Patton suffered from a mental condition, and that he "wanted additional information if possible that would support or repute [sic] what I believed was happening" (R. 64). Dr. Jaslow recognized that additional information would have been helpful in making a determination in this case; for example, he did not have information that Mr. Patton had had psychiatric problems from the time he was approximately eight (8) years old (R. 69).

Inexplicably, defense counsel never provided the experts with the materials they needed to make an adequate and accurate diagnosis of Mr. Patton's mental condition. None of the experts was aware that Mr. Patton suffered from organic brain damage, much less the effects of this condition on his mental state.

Regarding Mr. Patton's claims of hallucinations, none of the experts were provided, or took into consideration, independent evidence which existed at the time of the competency trial that would have corroborated his claims of mental problems. For example, as noted above, in a 1977 psychiatric report ordered in a prior case, the psychiatrist appointed by the trial court personally observed the bizarre behavior exhibited by Mr. Patton, in addition to noting that the Dade County Jail had made similar observations, nor other reports which were available yet never provided by counsel.

Counsel rendered deficient performance, and these deficiencies prejudiced Mr. Patton. Had the experts been provided the adequate background information, there is more than a reasonable probability that their evaluations would have found Mr. Patton incompetent to stand trial. Futch v. Dugger, 874 F. 2d 1483 (11th Cir. 1989). An evidentiary hearing is warranted.

B. RESENTENCING.

Counsel retained the services of mental health professionals, yet, despite overwhelming evidence of brain damage, did not retain an expert neuropsychologist. The extent of Mr. Patton's mental illness, organic brain disorder, severe alcohol and substance abuse, physical abuse, and diminished capacity at the time of the offense went undiscovered at the time of Mr. Patton's resentencing.

Available evidence of intoxication at the time of the offense and evidence of Mr. Patton's debilitating substance abuse

addiction, could, separately or in combination with his other mental health and addiction problems, have established statutory mitigating factors. Armed with evidence that counsel could have discovered, a mental health expert would have conclusively established statutory mitigation which the sentencers could not have ignored, and would have presented substantial nonstatutory mental health mitigating evidence. Counsel's failure to adequately present evidence of intoxication and narcotic abuse at the time of the offense was deficient performance and clearly prejudicial. See Bunney v. State, 603 So. 2d 1270 (Fla. 1992). This evidence would have made a difference.

Some of the information needed by the expert was at the disposal of the trial attorneys, but yet not provided. Most of the information, however, was never sought out by counsel. Mr. Patton's judge and jury received an incomplete personal portrait of the person they sentenced to death. As a result, Mr. Patton was deprived of the full impact of substantial and compelling statutory and nonstatutory mitigating evidence.

ARGUMENT IX -- BIASED JUDGE AT TRIAL AND RESENTENCING

At trial and resentencing, Mr. Patton was denied an adversarial testing because the bias of the trial court so interfered with the defense's ability to litigate their case that an impartial jury could not be impanelled. Further, the jury, left to their own devices, engaged in misconduct of constitutional magnitude which created a bias so slanted toward the state's case that Mr. Patton could not received a fair trial.

The trial court's bias in favor of the state is evident. For example, at trial during the guilt phase, Judge Thomas Scott rushed Mr. Patton to trial only five months after his arrest, refused defense counsel's request for co-counsel to assist her with the case then refused to grant a continuance before penalty phase when she was unprepared to go forward, called for a competency hearing before Mr. Patton was arraigned or assigned counsel, held ex parte proceedings with the state at which he discussed the merits of the case and where the reports of the mental health experts where divulged to the state without Mr. Patton's counsel present, failed to allow defense counsel an opportunity to present evidence of the effect of the racially-charged mass media in the courtroom on her ability to communicate with her client and the consequences of that publicity on Mr. Patton's mental state, failed to allow extra peremptory challenges when it was clear that pre-trial publicity had tainted

the panel[38], failed to restrict the presence of officers in the courtroom, failed to grant defense motions for additional funds to put on an adequate defense and in fact so interfered with her ability to litigate through withholding funds, engaging in ex parte communications with the state, failing to allow her to present evidence that she could not communicate with her client, that she could not present a defense, and made inflammatory references to Satan and Hitler before the jury (R. 490,492). To the extent that the trial court would allow, counsel's failure to object to the trial court's obvious bias was deficient performance.

At resentencing, not only was the court biased in favor of the state, but the jury engaged in misconduct so egregious that Mr. Patton could not receive a fair and impartial resentencing. For example, the jury read newspaper account of the case during the trial. See Argument V. Further, the judge made his feelings known to counsel that he was in favor of the death penalty (R2. 153), failed to impanel a new jury when it was obvious that they could no longer be impartial (R2. 310, 1099-1129), failed to allow defense counsel to present admissible family mental health history testimony which included the suicide of Mr. Patton's step-sister, conferenced with the victim's mother in public view, conducted sidebars without the presence of the defendant in which he sealed documents, and relieved the jury of their

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[38]It must be remembered that this case involved the racially charged issue of a white man killing a black police officer during the turbulent era of the Miami riots.

responsibility for sentencing by referring to God's duty to say who will live or die. To the extent that the trial court would allow, counsel's failure to object or move for mistrial when the bias and misconduct of the resentencing court and jury was obvious constitutes deficient performance.

The judge's bias led Mr. Patton to reasonably question the court's impartiality. Porter v. Singletary, 49 F. 3d 1457 (11th Cir. 1995). An evidentiary hearing is warranted.

ARGUMENT X -- STATEMENTS CLAIM

Based on new caselaw, Mr. Patton presented below his argument that statements taken by law enforcement were illegally obtained and should have been suppressed. On September 2, 1981, Mr. Patton was arrested by officers from the Miami Police Department. Based upon what occurred during following Mr. Patton's arrest, defense counsel filed a motion to suppress statements, alleging significant Fifth, Sixth, and Fourteenth Amendment violations (R. 65-67). Prior to a suppression hearing, the prosecutor conceded that some of Mr. Patton's statements were inadmissible (R. 197-198). At the suppression hearing, Sergeant Bohan testified to what occurred following Mr. Patton's arrest:

> Q. Did there come a time when a person identified to you as Robert Patten was brought to you under arrest?
>
> A. Yes, sir.
>
> Q. About what time was that?
>
> A. Approximately 5:30 P.M.
>
> THE COURT: What date now is that?

THE WITNESS: Second September, 1981.

Q. [By Mr. Waksman] He was brought to you about 5:00 P.M.?

A. At 5:40.

Q. And about what time was it that the victim in this case, Police Officer Broom -- what time it that you saw the body of Police Office Broom in the vicinity of 3rd Avenue and 11th Street?

A. Approximately 10:00 A.M.

Q. It took about seven - seven and a half hours until Mr. Patten was arrested?

A. Yes, sir.

Q. Will you please tell us where it was you saw him, under what circumstances, Mr. Patten?

A. Robert Patten was brought into the Homicide interview room by two other detectives. After being placed under arrest, myself and Detective Hector Martinez attempted to conduct an interview with the Defendant.

Q. Tell us the first thing you said or Detective Martinez said to Mr. Patten.

A. Detective Martinez read the Defendant his Constitutional Rights from a Constitutional Rights Form.

When Detective Martinez got to the Constitutional Right stating: "Do you want an attorney to be present," the Defendant stated that, "Yes," he wanted an attorney. He was not going to answer any questions without one.

Q. Other than the one matter that Mr. Berger alluded to a moment ago, were any questions asked of Mr. Patten by you or Detective Martinez?

A. No.

After he stated he wanted his attorney present we didn't ask him any questions other than his name, date of birth and information like that for the Arrest Report.

Q. What was the next thing that happened after he said he wanted a lawyer?

A. Detective Martinez, in my presence, still in the same interview room filled out an Arrest Report.

Q. Who was in this interview room?

A. Myself, Detective Martinez, Ernest Vivian, approximately three or four minutes later, and the Defendant.

Q. Nobody else was in the room?

A. No.

Q. Were any threats, promises or coercion used upon the Defendant by you or the other two police officers?

A. No, sir.

Q. Anybody raise their voice and yell at him?

A. No, sir.

Q. How would you characterize your exchange of words between him and yourself and the other officers?

A. Just normal conversation.

Q. When Detective Martinez was preparing the Arrest Report, what, if anything, did Mr. Patten do or say?

A. He asked what the charges were.

Q. At that time I told him he was being arrested for first degree murder, armed robbery and use of a firearm in the commission of a felony.

Q. When you said this to the Defendant, did he make any response?

A. Not right away, but he looked at a wanted bulletin that Detective Martinez was using to fill out the Arrest Report.

Q. Could you tell us what this "Wanted Bulletin" was prepared for?

A. It was prepared for our unit with the picture

of the Defendant, stating that he was wanted for the shooting of Officer Broom, and it gave the case number, the date and time.

Q. Was this one of the leads that you put out to the other police officers to indicate to them who you wanted arrested?

A. Correct.

It was at that time that the Defendant looked at that wanted bulletin and said something like: "Murder of a police officer, that's heavy. I'll fry for this."

Q. Was that statement made in response to any questioning by your or any other police officer?

A. No.

Q. Did the Defendant make any other statement after that one?

A. He said to Detective Martinez as Detective Martinez was writing out the Arrest Report: "That will be the last one you will do on me. I dealt" -- something -- "I dealt my last deal with this one."

Then I asked him what did he mean with "dealt his last deal" and he said something to the effect: "I will go through the bug house or clear through the electric chair, but I won't admit my guilt to you guys."

The witness later provided more detail regarding Mr. Patton's request for an attorney:

Q. Sergeant Bohan, when the Defendant requested the -- when the Defendant told you he wanted a lawyer when he was read his Miranda Rights, did he indicate an attorney by name?

A. Not right away?

Q. Did he subsequently mention the name of an attorney?

A. Yes, he did.

Q. Who was that?

A. Russell Spatz.

Q. You know who that man is?

A. Yes.

Detective Bohan further testified to statements allegedly made by Mr. Patton when the door to the interrogation room was open:

> Q. Did the Defendant ever make any statements when the door was opened on any one of those occasions?
>
> A. One time, I think when Sergeant Vivian either came to the room or was leaving, the Defendant looked out the door. His back was to the door. He turned, looked out the door. At that time I believe a Sergeant and Lieutenant Murphy were standing outside the room. At this point he says, "Oh, sure, everybody wants to look at a cop killer." At that point we closed the door again.

The detective also detailed what occurred when Mr. Patton was brought to the bathroom to urinate:

> Q. Did you ever take the Defendant to the men's room?
>
> A. Yes.
>
> Q. What was the purpose of that?
>
> A. He had to urinate and we also told him that we were going to take the clothes that he had on into evidence and that we were going to give him a change of clothes in the men's room.
>
> Q. Did you take his clothes?
>
> A. Yes.
>
> Q. Did you give him other clothes?
>
> A. Yes.
>
> Q. Did you ask one of the technicians to prepare any physical tests on the Defendant at that time?
>
> A. Yes.

In the men's room we -- I advised the Defendant that we were going to swab his hands.

At that point as I.D. Technician Richard Badili started to swab the Defendant's hands, the Defendant said, "I know what that's for, that's for ballistics, but you won't get anything."

Detective Bohan testified that the statements allegedly made by Mr. Patton were made within the first twenty (20) minutes of his presence (R. 209), yet indicated that Mr. Patton was in his presence a total of two and one half (2 1/2) hours (R. 217). The detective explained to the court that, while the statements were made within the first twenty minutes, it was necessary to keep Mr. Patton in the interrogation room for two hours because he was waiting for Detective Martinez to finish writing the arrest report (R. 211). Detective Bohan also explained that Detective Martinez, during the two hours needed to fill out the arrest report, was using the Wanted Poster which Mr. Patton had noticed because the poster "had the date of birth of the Defendant on it, the height and weight, last known address, things like that" (R. 211).

On cross-examination, Detective Bohan affirmed that Mr. Patton asked for an attorney "[r]ight when we started to read him his Constitutional Rights" (R. 215). It was Detective Martinez who was reading the Miranda form to Mr. Patton, and Mr. Patton did not sign the form waiving his rights (R. 216). The witness acknowledged that five (5) or ten (10) minutes had passed between the first time Mr. Patton asked for his attorney, and the second request when he mentioned attorney Russell Spatz by name (R. 216-

217). Following Mr. Patton's request for Mr. Spatz, "[t]he three of us left to get him [Mr. Patton] cigarettes, to get him coffee, to get him soda, to get him water. I did not leave to call an attorney" (R. 217). During the two and a half hour period of time in which Mr. Patton was in the presence of the officers, the detective testified that they were attempting to ascertain "[j]ust his name, address, date of birth, height, weight" (R. 218), despite the fact that this was the purported reason for having the wanted poster laying on the table in front of Mr. Patton. Following the interrogation, Mr. Patton was transported to the Dade County Jail; contact was made with the booking officer at the jail, but no one ever indicated to the officer that Mr. Patton had invoked his right to an attorney. Detective Bohan did notice "scratches" on Mr. Patton's arms, but testified that he did not know "if they were track marks or not" (R. 221).

Following the testimony of Detective Bohan, no further evidence was adduced. The other law enforcement officers were never called by defense counsel to testify to their involvement in the interrogation of Mr. Patton. The trial court issued the following ruling regarding the suppression of the statements:

> Let's take up first the Motion to Suppress Statements relating to statements made to the police officers.
>
> As to those statements, the Court enters the following factual findings: Basically, I believe that there were three sets of statements made concerning the police officers which was summarized or proffered through Sergeant Bohan's testimony.
>
> Let's first take up the statements relating to the--what I refer to as the informing him he has charges.

In that regard I find the following facts occurred: When the Defendant -- first of all, I find, as correctly stated by Defense Counsel, that when the Defendant was read his Miranda Rights at the time of his apprehension at the City of Miami Homicide office, that he invoked his right to counsel. That is unequivocal by the record and the Court commends the candidness of the police officers in their procedures in advising him of this right.

However subsequently, when the police officers were actually going through the actual booking and arrest procedures, at one point when Sergeant Martinez was preparing an arrest form -- of course, I don't have the transcript. I'm going by my notes. He was asked by the Defendant, "What were the charges for?"

Bohan told him the charges which were basically first degree murder. There was a period of time where he said nothing I think is critical and he did not answer, in Sergeant Bohan's words, right away. He looked at the bulletin which was of him.

Then Patten said, "Murder of a police officer, that's big, I will fry for this."

And there were further comments by him, "That will be my last one. I dealt my last deal with this one."

At which point Sergeant Bohan asked what did he mean by that, then he responded, "I will go through the bug house or the chair, but I won't admit to you anything," or words to that effect.

That's the first statement.

Then, subsequently, there was a second statement made in Lieutenant Murphy's presence, Sergeant Vivian, Sergeant Bohan, with the door open to the Homicide Office he was sitting in. The Defendant looked out the door and the Defendant said, "Oh sure, everyone wants to look at the cop killer. Close the door."

At which point the police officer closed the door.

The first statement, which I will consider like what I will call the swab statement or bathroom statement occurred when he was being swabbed by the police officers during the booking procedure when he was having his clothes taken off because they were trying to get information or evidence from it. At which point he said in Richard Badali's presence, "I

know what that's for and you won't get anything.

So, basically, we are concerned with three sets of statements to the police officers.

My conclusions of law are as follows: Under Miranda versus Arizona, 384 U.S. 474, repeat, 384 U.S. 474, I agree with Defense Counsel when the right to counsel is raised by the accused it is the responsibility of those charged with his custody to see to it that he obtains an attorney and until that obligation is discharged the interrogation must be suspended.

In this case, the testimony shows that Mr. Patten sought to consult with his attorney and expressed his desire not to provide a statement.

Moreover, he did so in a custodial setting. Under these circumstances, the police should not have pursued their interrogation until an attorney was present and, indeed, the police officers did not pursue an interrogation.

Here the police proceeded only to perform routine functions necessary to complete the standard "Arrest and booking procedures," to-wit: advise the Defendant of the charges at his request and fingerprinting him. There was no further interrogation in the meaning of interrogation as defined in Miranda and Innis.

And for the record, I would like to quote first from Innis which I think is critical. I quote from -- strike that -- Rhode Island versus Innis, the following:

> "The term 'Interrogation' under Miranda refers not only to express questioning, but also to any words and actions on the part of the police officers," and underlined it, "other than those normally attended to arrest and custody."

Moreover, in the case of Edwards versus Arizona, the following definition is given:

> "An accused having expressed his desire to deal with the police only through counsel is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused, himself, initiates further communication, exchanges or communications with the police."

> In the present case I make the following factual findings: Number one, the procedures involved herein were those normally intended for arrest and custody procedures.
>
> Number two, except for the one remark made by Bohan and his response, the police would not reasonably expect this statement to be made.
>
> Number three, the Defendant initiated all statements without interrogation by the police.
>
> Number four, that all statements were made freely and voluntarily and spontaneously by the Defendant.
>
> Therefore, as to the statements made by the police officers, with the exception of the statement to in response to Sergeant Bohan, the Motion to Suppress is denied on that ground.
>
> As to the statements made to the lady involved, Carolyn Beaver, Department of Corrections, they are all suppressed as the State has stipulated; however, I find all statements were freely and voluntarily made under Harris versus New York.

(R. 435-40).

The court's ruling stands in stark contrast to the law. Recent decisions from the United States Supreme Court establish that Mr. Patton's statements were inadmissible. In McNeil v. Wisconsin, 111 S. Ct. 2205 (1991), and Minnick v. Mississippi, 111 S. Ct. 486 (1990), the Court clarified its earlier holding in Edwards v. Arizona, 451 U.S. 477 (1981), a case relied upon by the trial judge. "The issue in the case before us is whether Edwards protection ceases once the suspect has consulted with an attorney." Minnick, 111 S. Ct. at 488. In Minnick the Supreme Court's 6-2 majority concluded that:

> Further, an accused who requests an attorney, "having expressed his desire to deal with the police through counsel, is not subject to further interrogation by the authorities until counsel has been made available to

him, unless the accused himself initiates further communication, exchanges, or conversations with the police."

Minnick, 111 S. Ct. at 489. In McNeil, the Court held:

> In Edwards v. Arizona, 451 U.S. 477, 101 S. Ct. 1880, 68 L.Ed.2d 378 (1981), we established a second layer of prophylaxis for the Miranda right to counsel; once a suspect asserts the right, not only must the current interrogation cease, but he may not be approached for further interrogation "until counsel has been made available to him," 451 U.S., at 484-485, 101 S.Ct. at 1884-1885—which means, we have most recently held, that counsel must be present, Minnick v. Mississippi, 498 U.S. ----, 111 S. Ct. 486, 112 L.Ed.2d 489 (1990). If the police do subsequently initiate an encounter in the absence of counsel (assuming there has been no break in custody), the suspect's statements are presumed involuntary and therefore inadmissible as substantive evidence at trial, even where the suspect executes a waiver and his statements would be considered voluntary under traditional standards. This is "designed to prevent police from badgering a defendant into waiving his previously asserted Miranda rights," Michigan v. Harvey, 494 U.S. 344, 350, 110 S.Ct. 1176, ----, 108 L.Ed.2d 293 (1990). The Edwards rule, moreover, is not offense-specific; once a suspect invokes the Miranda right to counsel for interrogation regarding one offense, he may not be reapproached regarding any offense unless counsel is present. Arizona v. Roberson, 486 U.S. 675, 108 S.Ct. 2093, 100 L.Ed.2d 704 (1988).

111 S. Ct. at 2208 (emphasis added).

Under Minnick and McNeil, this Court is required to reverse Mr. Patton's conviction. Mr. Patton's statements must be suppressed. Mr. Patton's statements were illegally obtained. The statements were in violation of Edwards as explained in Minnick and McNeil. Rule 3.850 relief is warranted and Mr. Patton urges this Court to set aside his convictions.

ARGUMENT XI -- POLICE PRESENCE

Beginning with the early stages of the proceedings against

Mr. Patton, the attendance of uniformed police officers has prejudiced Mr. Patton and interfered with his ability to obtain a fair trial. See R. 31. This did not escape the attention of the public. The Miami Herald reported on September 24, 1981, that "Police officers crowded the courtroom friday at a hearing for Robert Patton, accused of slaying Miami Police officer Nathaniel Broom." However, the attendance of uniformed police officers continued to influence and infect the proceedings against Mr. Patton. During voir dire, Mr. Patton's trial counsel noted that a "flock of people" wandered into the court room and that she was concerned about pressure on jury by friends or family of the victim (R. 796). At that time, Judge Scott noted that all fifty seats in the court room were filled (R. 796).

Notwithstanding Judge Scott's desire to be impartial, the record clearly demonstrates that Officer Broom's fellow police officers were overflowing the courtroom and exerting pressure upon Judge Scott as well as intimidating Mr. Patton, defense counsel, and most importantly, the jury. This intimidation prejudiced Mr. Patton and resulted in his conviction of first degree murder and sentence of death.

Mr. Patton's counsel objected to the presence of these uniformed police officers, but neither the State, nor the trial court prevented their presence. Furthermore, to the extent some limit was placed upon the attendance of uniformed police officers at Mr. Patton's resentencing, that limit did not curtail the attendance of numerous uniformed police officers nor did it

consider the effect of the uniformed correctional officers and court liaison officers on Mr. Patton's jury, and failure to continue to object was ineffective assistance of counsel (R2. 52, 1008, 1135, 1162,1163, 1164, 1168, 3513). The presence of these uniformed officers intimidated the jury and the trial court into imposing the sentence of death upon Mr. Patton. Mr. Patton's rights were violated under Holbrook v. Flynn, 106 S.Ct. 1340 (1986).

ARGUMENT XII -- DOUBLE JEAPORDY

During Mr. Patton's original sentencing proceedings, the jury advised the trial judge that they were deadlocked with a 6 to 6 vote, and their note concluded "What now?" Over objection by defense counsel, the trial judge responded by giving an Allen charge, encouraging further deliberations. After continued deliberations pursuant to the express order of the court, the jury returned with a 7-5 death vote. On appeal, this Court affirmed Mr. Patton's conviction but reversed as to sentencing, finding that the trial court erred in instructing the jury on the Allen charge when it returned a 6-6 life recommendation. Patton v. State, 467 So. 2d 975 (Fla. 1985). The Court remanded the case for a new jury sentencing proceeding, rather than instructing the trial judge to determine whether it would be appropriate to enter a death sentence regardless of the jury's action. Both this Court and the trial court erred in not finding that the Double Jeopardy Clause barred a second jury sentencing proceeding when the first jury returned a life recommendation.

While this issue was raised on direct appeal, recent law dictates that the issue be revisited.

In Florida, a judge has the power to override a jury recommendation of life imprisonment, but the Florida Supreme Court has severely limited the judge's power to do so, holding that an override is appropriate only where the "facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910. While the Double Jeopardy Clause has been held not to bar the trial judge's override of a jury life recommendation, see Spaziano v. Florida, 468 U.S. 447 (1984), in Mr. Patton's case, where he was deprived of the benefits of his life recommendation without any subsequent finding by the judge that the recommendation was clearly and convincingly unreasonable, Tedder, there is a double jeopardy bar in this case. Mr. Patton should not have been forced to convince yet another jury that he did not deserve the death penalty. Mr. Patton asks that the Court revisit this issue in light of Wright v. State, 586 So. 2d 1024, 1032 (Fla. 1991).

There is no principled basis upon which to distinguish Wright from Mr. Patton's case. It is clear that the jury was deadlocked 6-6, and that this constituted a life recommendation. With respect to the argument that the trial court could just as easily have overridden the death sentence, this argument is weak given the amount of mitigation in the record. Indeed, by "direct[ing] the trial court's attention" to the United States Supreme Court

decision in Eddings v. Oklahoma, 455 U.S. 104 (1982), "and its possible application to the fact of this case," this Court suggested its concern that the trial judge had failed to consider mitigating evidence in favor of a life sentence. Patton v. State, 467 So. 2d 975, 980 (Fla. 1985).

Mr. Patton should not have been resentenced to death by a jury. Double jeopardy clearly barred this from occurring, and Mr. Patton is entitled to the original jury recommendation of life.

ARGUMENT XIII -- INNOCENCE OF DEATH PENALTY

Where a person convicted of first degree murder and sentenced to death can show either innocence of first degree murder or innocence of the death penalty, he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992).

Innocence of the death penalty can be shown by establishing ineligibility for a death sentence, that is, insufficent aggravating circumstances so as to render the individual ineligible for death under Florida law.

The sentencing judge relied upon three aggravating circumstances in imposing death. Two of the aggravating circumstances ("the murder was committed to disrupt or hinder the exercise of a governmental function or the enforcement of laws" (Fla. Stat. §921.141(5)(g)), and "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody" (Fla. Stat.

§921.141(5)(e)), based upon the state's theory that Mr. Patton killed Officer Broom to prevent his arrest (R2. 3268), were impermissibly doubled by the jury. The Court did not instruct the jury that these two aggravators were to be merged into one. As a result, the jury as co-sentencer was unconstitutionally instructed. This aggravator is invalid in that this doubling renders a capital sentencing proceeding fundamentally unreliable and unfair. See Welty v. State, 402 So. 2d 1139 (Fla. 1981). But for the constitutional error committed in imposing these aggravating circumstances, Mr. Patton would be ineligible for the death penalty under Florida law.

ARGUMENT XIV -- DOUBLING OF AGGRAVATORS

Mr. Patton's jury was instructed on the three aggravating factors of "previously convicted of a felony involving the use or threat of violence to some person" (Fla. Stat. §921.141(5)(b)), "the murder was committed to disrupt or hinder the exercise of a governmental function or the enforcement of laws" (Fla. Stat. §921.141(5)(g)), and "the capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody" (Fla. Stat. §921.141(5)(e))., based upon the state's theory that Mr. Patton killed Officer Broom to prevent his arrest (R. 3268). Despite defense objections to the contrary, the court permitted impermissible doubling by the jury (R. 3018).

This Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State,

437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). The jury in Mr. Patton's case was instructed on all of the aggravating factors listed above. The doubling of aggravating circumstances was improper, as was conceded by the state at resentencing (RS. 3321). The result is an improper capital sentence.

ARGUMENT XV -- EDDINGS/LOCKETT ERROR

The sentencing judge in Mr. Patton's case found no mitigating circumstances. Finding three aggravating circumstances, the court imposed death. The court's conclusion that no mitigating circumstances were present, however, is belied by the record. Significant and compelling testimony by Dyanne Swartz, Mr. Patton's sister, and Colleen Parker, Patten's step sister, established that Mr. Patton endured an extremely neglected and abusive childhood. They testified, inter alia, that Mr. Patton was the product of a violent rape and that his mother resented him even before his birth. Her resentment never abated but manifested itself in what Dr. Toomer described as the worst case of child abuse he had ever encountered during his many years of practice. Testimony established that Mr. Patton's mother never showed any kindness towards him and prohibited any other family members from showing Robert Patton any human kindness. In fact, his mother would become violently enraged at the mere sight of him and these rages often resulted in beatings and verbal abuse. On several occasions his mother threatened his

life with weapons and burned him with cigarettes. Throughout his childhood, Mr. Patton suffered the tyranny of his mother's scorn and at the age of four he began acting out by stealing. Shortly thereafter, Robert Patton began abusing drugs, stealing amphetamines and barbiturates from his mother. At around the age of seven, Robert Patton was placed in a full body cast in excess of one year because of a degenerative bone disease. During this period, Mr. Patton was at the mercy of his mother who would neglect him for extended periods as she would sleep for days at a time induced by her frequent drug binges. On those occasions, Robert could be found in his bedroom with no lights or food and his urinal would be overflowing. And when his mother was awake, she still beat Robert and, during this period when he was in the body case, he would have black and blue marks about his neck. In 1971, Mr. Patton attempted to commit suicide after a violent fight with his mother in which she attempted to choke him to death.

On numerous occasion, Mr. Patton was diagnosed as having organic brain damage. Dr. Toomer testified extensively about the abundance of statutory and nonstatutory mitigation present in Mr. Patton's case. Because Dr. Toomer testified that Mr. Patton was legally insane at the time of the offense because of a combination of drug intoxication and mental illness, he testified that at least two statutory mitigating circumstances existed: (1) Mr. Patton committed the offense under the influence of extreme mental or emotional disturbance; and (2) Mr. Patton's capacity to

appreciate the criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired. In addition, Dr. Toomer established the existence of several non statutory mitigating circumstances: (1) family history of extreme emotional and physical abuse; (2) early drug abuse, beginning at age five, including LSD psychoticism, glue, heroin, cocaine, diet pills, barbiturates and alcohol; and (3) various psychological disorders, including schizophrenia, organic brain syndrome, psychosis, which were based upon historical diagnostic and treatment records. It was further established by the State that Mr. Patton possesses significant artistic ability.

The substantial and compelling evidence of nonstatutory mitigation in this case was not considered by the resentencing judge, in violation of the Eighth Amendment. Lockett v. Ohio, 438 U.S. 586 (1978); Eddings v. Oklahoma, 455 U.S. 104 (1982). Relief is warranted.

ARGUMENT XVI -- JOHNSON V. MISSISSIPPI ERROR

The prior convictions introduced to the jury to support the "under sentence of imprisonment" aggravator were obtained in violation of the United States Constitution. The convictions were used to support this aggravating circumstance 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. Patton's prior convictions were unconstitutionally obtained. Boyd v. Dutton, 405 U.S. 1 (1972); Boykin v. Alabama, 395 U.S. 238 (1969); Johnson v. Zerbst, 304

U.S. 458 (1938). There is no evidence that Mr. Patton had the effective assistance of counsel during the proceedings surrounding his prior convictions. These unconstitutional prior convictions cannot be used to support the sentence of death in this matter. Johnson v. Mississippi, 486 U.S. 578 (1988). The failure to investigate Mr. Patton's mental abilities at the time of the prior convictions is a denial of the Constitution. The state cannot prove beyond a reasonable doubt that the jury's sentence does not rest on these prior convictions, given the mitigation in the record. Chapman v. California, 386 U.S. 18 (1967). Relief is warranted.

ARGUMENT XVII -- RACIAL PROSECUTION

"Selectivity in the enforcement of criminal laws is, of course, subject to constitutional constraints." United States v. Batchelder, 442 U.S. 114, 124-25 (1979). In particular, "prosecutorial discretion cannot be exercised on the basis of race." McCleskey v. Kemp, 481 U.S. 279, 309 n.30 (1987). See also Wayte v. United States, 470 U.S. 598, 608 (1985); Oyler v. Boles, 368 U.S. 448, 456 (1962).

In Mr. Patton's case, the State exercised its discretion to seek the death penalty based upon racial considerations. The State's racially-based decision to seek death in Mr. Patton's case violated equal protection and the eighth amendment. The equal protection violation arises because the racial basis of the State's decision is an arbitrary, unjustifiable classification which has no rational relationship to accomplishing a legitimate

state objective. McCleskey, 481 U.S. at 291, n.8. The State's decision to seek death was based upon purposeful discrimination which had a discriminatory impact upon Mr. Patton. Id. at 292.

The eighth amendment violation arises because the State's selection of Mr. Patton as a candidate for the death penalty was based upon arbitrary factors unrelated to the circumstances of the offense or character of the defendant. The range of discretion in imposing the death penalty is constitutionally circumscribed: "[T]here is a required threshold below which the death penalty cannot be imposed. In this context, the State must establish rational criteria that narrow the decisionmaker's judgment as to whether the circumstances of a particular defendant's case meet the threshold." McCleskey, 481 U.S. at 305. The central tenet of eighth amendment jurisprudence is "to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). Thus, the Supreme Court has required that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977). The State's decision to seek death in Mr. Patton's cases violated equal protection and the eighth amendment, and trial counsel was ineffective in failing to litigate this issue.

ARGUMENT XVIII -- FAILURE TO OBJECT TO CONSTITUTIONAL ERROR

A. BURDEN SHIFTING.

The State must prove that aggravating circumstances outweigh the mitigation. State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert.

denied, 416 U.S. 943 (1974)(emphasis added). This standard was not applied at Mr. Patton's resentencing, and counsel failed to object to the court and prosecutor improperly shifting to Mr. Patton the burden of proving whether he should live or die (RS. 3210-12; 3268). Mullaney v. Wilbur, 421 U.S. 684 (1975). Relief is warranted.

B. CALDWELL ERROR.

Mr. Patton's jury was repeatedly instructed by the court and the prosecutor that its role was "advisory" and just a "recommendation". This infected every aspect of Mr. Patton's resentencing. For example, during voir dire, the State told the jury panel that its decision was only an "advisory verdict . . . [the judge] is the ultimate sentencer" (RS. 304) and that "you are to make a recommendation to the judge, who is the ultimate sentencer" (RS. 395). These comments were not isolated incidents. See RS. 635, 639, 652, 653, 668, 669, 671, 672, 673, 674, 677, 679, 680, 681, 682, 805, 3153, 3159, 3213, 3214, 3215. The court gave its imprimatur on this error; for example, he told the jury that the "final decision as to what punishment shall be imposed rests solely with the judge of this court" and that the jury furnishes only "advisory sentence" (RS. 380)(emphasis added). See also RS. 371-2, 581, 584, 587, 778, 101, 3267-3279.

Other incidents occurred during Mr. Patton's resentencing which served to diminish the jury's sense of responsibility. For example, the jury was tainted by knowledged that the prior jury had recommended death, and had read newspaper articles on the

subject. See Argument V. As a result, the jury's sense of responsibility was diminished. Counsel's failure to object without a tactic or strategy rendered Mr. Patton's resentencing unreliable. An evidentiary hearing is warranted.

C. NON-STATUTORY AGGRAVATION.

The judge who sentenced Mr. Patton was presented with and considered non-statutory aggravating circumstances, in violation of the Eighth Amendment. The focus of the state's case -- particularly its case for death -- was that Mr. Patton should be convicted and sentenced to death because the victim was "a young officer" (RS. 3188). Furthermore, the State argued that the fact that Mr. Patton was a drug dealer (RS. 3159), that he allegedly was always violent even without drugs (RS. 3201), that he killed "the uniform, the authority" (RS. 3209), should all be considered by the jury in arriving at a sentence. These alleged facts did not tend to prove any statutory aggravating circumstance, but served only to inflame the jurors to vote for death, which they did. Counsel's failure to object was unreasonable, and an evidentiary hearing is warranted.

ARGUMENT IX -- DEATH PENALTY IS UNCONSTITUTIONAL

Florida's death penalty scheme is unconstitutional on its face and as applied to Mr. Patton. Execution by electrocution constituted cruel and unusual punishment under the Florida and United States Constitutions. Mr. Patton hereby preserves any arguments as to the constitutionality of the death penalty, given this Court's precedent.

ARGUMENT XX -- RULE 3.850 ARBITRARILY ACCELERATED

Mr. Patton filed his initial Rule 3.850 motion approximately ten (10) months before that date in order to avoid the signing of a death warrant by the Governor and to compel compliance with Chapter 119. Unlike the other inmates sentenced by Florida courts who have two years from final judgment to bring such actions, Mr. Patton has arbitrarily been deprived of the time remaining in which he could timely file under Rule 3.850. This acceleration is unreasonable and furthers no legitimate state interest. To the contrary, it impedes Mr. Patton's right to properly investigate, research, prepare, and present a Rule 3.850 motion. As the Florida Supreme Court has recognized, Rule 3.850 proceedings are governed by due process principles. See Holland v. State, 503 So. 2d 1250 (Fla. 1987). The timing of the litigation of Mr. Patton's post-conviction actions, however, has now been dictated by the Governor, a non-judicial officer and a party opponent. Due process and equal protection do not countenance such a result.

CONCLUSION

Mr. Patton submits that relief is warranted in the form of a new trial and/or a new sentencing proceeding. At a minimum, an evidentiary hearing should be ordered.

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 October 26, 1998.

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