IN THE SUPREME COURT OF FLORIDA

CASE NO.

PEDRO MEDINA,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURTS
OF THE EIGHTH AND NINTH JUDICIAL CIRCUITS,
IN AND FOR BRADFORD AND ORANGE COUNTIES, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Medina's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850.

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

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

"PC-R" -- record on instant 3.850 appeal to this Court (two volumes numbered pages 1 through 359);

"11/7/89 T." -- transcript of proceedings conducted 11/7/89 (one volume numbered pages 1-41);

"Supp. RI" -- supplemental volume I (one volume numbered pages 1 through 3);

"Supp. RII" -- supplemental volume II (six volumes, all denoted "Supplemental Vol. II," numbered pages 1-1148; 1 volume denoted "Supplemental Vol. VIII," numbered pages 1149-1156);

"Def. Ex." -- exhibits submitted at the evidentiary hearing;

"App." -- appendix to Rule 3.850 motion;

"H." -- Transcript of 1988 evidentiary hearing testimony.

INTRODUCTION

Pedro Medina is both crazy and innocent. This case is reminiscent of the John Purvis case. See Purvis v. Dugger, 932 F.2d 1413 (11th Cir. 1991). There, a schizophrenic and brain damaged John Purvis was convicted of a crime that he did not commit. He spent ten years incarcerated for the murder of Susan Hamwi before his conviction was vacated by Judge Sheldon Shapiro on February 25, 1993. Subsequently, Ms. Hamwi's husband was convicted of the murder. See Hamwi v. State, 681 So. 2d 291 (4th DCA 1996).

A schizophrenic and brain damaged Pedro Medina was convicted of the murder of Dorothy James. However, her daughters have both expressed their reservations regarding the conviction under oath. At the 3.850 evidentiary hearing in 1988, Lindi James testified:

> I have a big conscious [sic] and through the years, I've thought about, you know, people ask me about my mother and I tell them what happened to my mother. And the first reaction is, oh my God. They'll say, did they get who did it? My first response, from the time that it happened, well, they did arrest somebody, they did convict somebody, but I never thought that they [Pedro Medina] did it. They [the police] never asked me what I thought at the time.

(H. 395). In November of 1996, Lindi James reaffirmed this testimony in an affidavit:

> I, LINDI JAMES, having been duly sworn or affirmed, do hereby depose and say:
>
> 1. Dorothy James was my mother. She was killed on April 3 or 4, 1982. I do not believe Pedro Medina killed my mother although he was convicted of doing so and

sent to death row. I have never believed Pedro killed my mother.

2. I believe that the man who killed my mother has never been brought to justice. I informed Detective Nazarchuck that I thought someone else had committed the murder.

Lindi's sister Arnita James stated under oath in 1987:

8. I knew Pedro Medina as a very quiet person. I remember that he used to play chess with my sister. When he talked, it was hard for me to understand him because he did not speak English well at all. My mother seemed to understand. She was quite fond of him and tried to help him.

9. When Pedro was charged with killing my mother I was surprised because in my heart, I really didn't think he could do something like that.

(PC-R. 1382).

The case against Mr. Medina at trial was "not one of the strongest" as his trial prosecutor has stated under oath in explaining why he did not want to try the case:

Q Why didn't you want to try this case?

A Because I wasn't sure I could convict Mr. Medina.

Q Why do you say that?

A The case was dependent in part on a witness who disappeared and whom we issued a material witness warrant for and who was sometime, very shortly before the trial, arrested as I recall in Chicago, Illinois, who as a witness was incarcerated until this trial was over with.

He was, as I recall, the only witness that could even put Mr. Medina in the apartment complex that the victim lived in. And the case, as it turned on Mr. Medina's

presence in the victim's apartment, turned on a hat that was found either on the bed or the floor. And there was no hair evidence that I could connect with Mr. Medina as it was related to that hat, but this witness claimed to have seen Mr. Medina in that apartment complex wearing that hat or a hat like it on the night that Mrs. James was killed. That's what I was skeptical of.

Q As far as other capital cases that you have prosecuted, would it be fair to characterize Mr. Medina as one of the weaker cases?

A It would be fair to characterize Mr. Medina's case as not one of the strongest from a prosecution point.

(H. 367-368).

The defense's theory during the trial was that Orange County Sheriff's Office ("OCSO") investigators ignored their original leads and failed to conduct further investigation into the case. The defense argued that because detectives ignored other leads, the identity of the killer remained unknown (R. 760).

In 1988, Lindi James testified:

A To me it didn't seem like they were really trying to find out who and, in fact, had killed my mother. To me it seemed, and I know that that was years ago and I probably subconsciously formed my own opinion, and that's how I feel now. But thinking back on it, I feel like they weren't really being investigative as to what really happened at the time of the death and that's--

Q Do you remember anything about what kind of questions they were asking you?

A Not really. I don't remember.

Not right now, I can't sit here and say I remember.

(H. 394).

In fact, we now know that Lindi was correct. In November of 1996, the Orange County Sheriff Office's disclosed notes of interviews conducted by Detectives Nazarchuck and Payne in the first forty-eight hours after the discovery of Dorothy James' body. These notes were not previously disclosed to collateral counsel despite public records requests. At the evidentiary hearing in 1988 the entire Sheriff's file, which was produced by the Orange County Sheriff's records custodian, Pam Cavender, was introduced as Exhibit 4. See PC-R 155, 180-81, Evidence Volume V, Defense Exhibit 4. The two hundred eighteen page exhibit does not contain the handwritten notes which were not disclosed until November of 1996. In the notes, first disclosed in November of 1996, the detectives were informed that Ms. James' friends and family suspected two different men with whom Ms. James had recently been involved as the killer. One of the suspects was Billy Andrews who trial counsel knew about; the other Joseph Daniels was not disclosed to trial counsel or prior collateral counsel. Detective Nazarchuck testified on November 27, 1996, that no formal report about Joseph Daniels was prepared because "we were following the evidence, and the evidence led us in the other direction, which, in fact, again, led us to Pedro Medina." (11/27/96 T. at 69).

At Mr. Medina's trial, his attorneys maintained that Mr. Medina was innocent and that someone else committed the murder. In his closing argument defense counsel stated:

> I would ask you to consider an alternative, that being possibly Billy Andrews. And

> consider a third alternative, the person who perpetuated this crime is unknown right now.
>
> The police did not investigate enough, were not thorough enough in their investigation. At this point we don't know who it is. It's Billy Andrews or possibly somebody of Latin American extraction from Miami.

(R. 760).

In response to the defense theory, the Assistant State Attorney told the jury:

> Now, the State called every witness in this case that had any knowledge of information about it. We didn't hide the first thing. Sure, we called experts that had some inconclusive opinions. We didn't hide a thing from you. We let everything come in. You have it all.
>
> And it's always a common practice for the Defense to say the police could have done this, the police could have done that, they could have done something better. But here it is. You have got it all.

(R. 791). This statement was false!

Newly discovered evidence reveals that prosecutors and the OCSO failed to disclose critical information to the defense. They failed to inform the defense that key prosecution witnesses initially told OCSO investigators that a man named Joseph Daniels had been threatening the victim during the weeks before her death, and that Dorothy James was in fear of Joseph Daniels and what he would do. Specifically, the police were told that Dorothy James was "afraid of him" (Joseph Daniels), that "he had threatened her several times," that he had "said if I can't have

he [r] no one will" and that "Daniels made a threat that he would get her (meaning Dorothy)."[1]

But this was not the only exculpatory evidence not disclosed. The prosecution failed to inform counsel for Mr. Medina that the only prosecution witness who could place Mr. Medina at the scene, Reinaldo Dorta, was "a suspect in [] cases" before he was brought to Florida and held in solitary confinement in order to secure his testimony. See Notes of State Attorney Investigator attached to Rule 3.850 motion as Exhibit 1; Letter from Judge Winifred J. Sharp to Assistant Attorney General Shawn L. Briese a true and correct copy of which were attached to Motion to Vacate as Exhibit 2. See Declaration of Tangel-Rodriguez ¶ 2, Appendix to Rule 3.850 motion at App. 15.

The newly disclosed and discovered exculpatory evidence must be evaluated in light of previously presented evidence supporting Brady and ineffective assistance of counsel claims. Under Kyles v. Whitley and State v. Gunsby, cumulative consideration of all exculpatory evidence not presented to Mr. Medina's jury is violation of the constitution. When all the evidence is considered, confidence in the outcome is severely undermined.

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[1]Not only did the prosecutor compound the violation of Brady v. Maryland, 373 U.S. 83 (1963), by telling the jury that everything had been disclosed, see Garcia v. State, 622 So. 2d 1325 (Fla. 1993), but the OCSO detective in charge of the investigation affirmatively withheld this information during his deposition. ROA. 1232 (Transcript of Deposition of Detective Daniel Nazarchuck). When asked whether there was anything the detective had not brought forth about his investigation, Detective Nazarchuck replied, "I think you'll find everything in my report or in the witnesses' statements which you should have." Id.

The State also failed to disclose impeachment evidence that Michael White had not been prosecuted for his own offenses and had a motive for seeking favor from the State. Also not known was that the incident between White and Mr. Medina involved marijuana. The State's analysis that "a stabbing death together with the fact that the car is the focal point of the [White] incident makes it relevant" was simply wrong. White was, at the time of the alleged stabbing, in possession of $127.00 and five bags of marijuana. White submitted a claim for compensation for medical expenses as a result of the "stabbing." That request was denied because White was engaged in an unlawful activity at the time, i.e., possession of marijuana (PC-R.Def. Exh. 14). White was also on probation at the time of the stabbing, and although he was found in possession of marijuana, his probation was never revoked (PC-R.Def. Exh. 5).

Judge Powell's previous conclusion that Mr. Medina's collateral counsel had failed to prove that the police reports were about the same Michael White must be revisited in light of new previously unavailable evidence. On January 22, 1997, undersigned counsel finally located Mr. White. White acknowledged that he was the witness at Mr. Medina's trial, that he had been in possession of five bags of marijuana, and that he was not charged. Mr. Medina's jury heard none of this impeachment evidence regarding Michael White.

What is now known is that the detectives who investigated this case knew not only of Billy Andrews, but of another man,

Joseph Daniels, who was a likely suspect. Joseph Daniels, according to witnesses, was jealous, telling people "if I can't have he[r] no one will." "Daniels made a threat that he would get her (meaning Dorothy)." (App. 4). In fact, Joseph Daniels, the person that first came to mind when detectives questioned the victim's friends and family, was withheld from the defense. Notes recently obtained from OCSO detectives Daniel Nazarchuck and Diane Payne reveal that two of the state's chief witnesses told the officers that Joseph Daniels had threatened Dorothy James several times only three weeks prior to her murder. See App. 4.

Mr. Medina has consistently maintained that he did not kill Dorothy James. By withholding key evidence, the State deprived Mr. Medina of the adversarial testing to which he was entitled and which he needed to prove his innocence. A full and fair evidentiary hearing is required upon Mr. Medina's claim that he did not receive an adequate adversarial testing. Consideration must be given to the cumulative effect of the failure of the State to disclose and the failure of the defense to discover the wealth of available exculpatory evidence which the jury did not hear.

PROCEDURAL HISTORY

1. On June 14, 1982, the Grand Jury for Orange County, Florida, indicted Mr. Medina for the first-degree murder of Dorothy Clarke James (R. 1518). On June 15, 1982, a warrant was

issued for Mr. Medina's arrest on the murder charge and on a charge of grand theft (R. 1520).

2. Mr. Medina waived his personal appearance and arraignment on August 31, 1982 (R. 1596). That same day he entered a written plea of not guilty. Id.

3. Mr. Medina was tried before a jury in Orange County on March 15 through 18, 1983. The jury returned guilty verdicts (R. 1850-1852). The jury recommended a sentence of death and the trial court followed its recommendation (R. 1875, 1877-1879).

4. On direct appeal, the Supreme Court of Florida affirmed the convictions and sentence. Medina v. State, 466 So. 2d 1046 (Fla. 1985).

5. Mr. Medina was considered for clemency in 1987. Clemency was denied.

6. On June 5, 1987, Mr. Medina filed a motion to vacate judgment of conviction and sentence. The trial court held an evidentiary hearing. On February 6, 1989, Judge Powell denied all relief.

7. Mr. Medina appealed the denial of his postconviction motion to the Supreme Court of Florida. The Court affirmed the lower court's decision. State v. Medina, 573 So. 2d 293 (Fla. 1990).

8. The Supreme Court of Florida later denied Mr. Medina's state petition for writ of habeas corpus. Medina v. Dugger, 586 So. 2d 317 (Fla. 1991).

9. Mr. Medina filed a federal petition for writ of habeas corpus which was denied on February 16, 1993. The Eleventh Circuit Court of Appeals affirmed. Medina v. Singletary, 59 F.3d 1095 (11th Cir. 1995), cert. denied, 116 S. Ct. 2505 (1996).

10. On February 17, 1995, Mr. Medina filed a lawsuit pro se against Capital Collateral Representative Michael Minerva, Assistant CCR Gail Anderson, and Assistant CCR Judith Dougherty. The lawsuit was brought pursuant to 42 U.S.C. § 1983.

11. CCR obtained outside counsel to defend against Mr. Medina's lawsuit and it eventually was dismissed on Eleventh Amendment grounds. Medina v. Minerva, 907 F.Supp. 374 (M.D. Fla. 1995).

12. On June 17, 1996, Gail Anderson wrote a letter to Phyllis Hampton, Assistant General Counsel for the Governor, and informed her that due to the pending of Mr. Medina's lawsuit, "the CCR office believes that a conflict of interest still exists and that we cannot represent Mr. Medina." See App. 16.

13. On October 23, 1996, the Florida Supreme Court issued an Administrative Order establishing a procedure for providing capital postconviction litigants with conflict-free counsel. In conformity with the October 23 Administrative Order, a Notice of Conflict was filed in Mr. Medina's case on October 28, 1996. This notice was premised upon the facts outlined in the June 17, 1996, when Gail Anderson informed the Governor that CCR was not acting as Mr. Medina's counsel.

14. On October 30, 1996, the Governor signed a warrant for Mr. Medina's death which was to be carried out the week of December 2 through 9, 1996. The Secretary for the Department of Corrections scheduled the execution for 7:00 a.m., Thursday, December 5, 1996.

15. On November 1, 1996, the lower court held a hearing on the Notice of Conflict.

16. On November 5, 1996, Judge Powell issued an order directing CCR to assign new counsel to Mr. Medina's case and directing a conflicted Gail Anderson and Michael Minerva to not contact Pedro Medina or appear in subsequent proceedings on his behalf. CCR filed a notice of appeal.

17. On November 12, 1996, the Florida Supreme Court affirmed.

18. On November 25, 1996, undersigned counsel filed a motion to disqualify Judge Powell. On November 26, 1996, Judge Powell disqualified himself, and Judge Conrad was assigned to preside over the case.

19. On December 2, 1996, Mr. Medina's counsel informed the Governor that Mr. Medina may be incompetent to be executed. The Governor pursuant to § 922.07, Fla. Stat., appointed three psychiatrists to examine Mr. Medina on December 5, 1996. The psychiatrists subsequently issued a report expressing their conclusion that Mr. Medina was competent to be executed.

20. On December 6, 1996, undersigned counsel filed an unverified motion to vacate the judgment and sentence on behalf

of Mr. Medina. Counsel also filed a motion requesting a determination of Mr. Medina's competency to proceed.

21. On December 10, 1996, Judge Conrad held a status conference. He informed the parties that he would likely be assigned to hear any 3.811 motions in addition to the 3.850. He asked the parties for a discussion of what issues would likely be coming up and the order in which they would need to be addressed. Undersigned counsel advised the judge that as to the competency to proceed issue there were legal issues which needed to be resolved before an evidentiary hearing was held. These included whether there was a right to be competent to proceed in postconviction and if so what was the standard.

22. On January 6, 1997, Governor Chiles reset Mr. Medina's execution for January 29, 1997. Pursuant to Judge Conrad's previous directions, undersigned counsel promptly notified Judge Conrad of the setting of the execution.

23. On January 8, 1997, Judge Conrad called up a status conference on thirty minutes notice. Judge Conrad indicated that he would first hear the parties on the motion for a hearing on competency to proceed at a hearing to be set by an order to be issued later in the day. Subsequently, an order was issued setting the hearing for January 14, 1997. There was no indication that the hearing was an evidentiary hearing.

24. On January 10, 1997, undersigned counsel filed a 3.811 motion to determine Mr. Medina's competency to be executed.

25. On January 14, 1997, the hearing on Mr. Medina's motion for a determination of competency to proceed was held. After hearing argument, Judge Conrad ruled that there was no right in postconviction to be competent to proceed. The judge then indicated that he would nevertheless immediately commence an evidentiary hearing to determine Mr. Medina's competency. The judge indicated that Mr. Medina's counsel should have anticipated that evidence would be heard. He would not give counsel time to obtain the three experts who Mr. Medina's counsel wished to call to say that Mr. Medina was not competent.

26. On January 15, 1997, Judge Conrad issued his order finding that there was no right to be competent to proceed in postconviction. In the alternative, the court held that the State had proved Mr. Medina competent after holding a hearing that Mr. Medina's counsel had received no notice would be evidentiary.

27. On January 16, 1997, Judge Conrad issued an order finding that Mr. Medina's counsel had not issued any reasonable grounds for believing Mr. Medina not competent to be executed.

28. On January 16, 1997, Judge Conrad set Mr. Medina's 3.850 for hearing on January 21, 1997. After the State requested that the setting be for a Huff hearing, Judge Conrad issued an order on January 17, 1997, clarifying that the January 21, 1997, was in fact a Huff hearing at which evidence would not be heard.

29. On January 17, 1997, the State filed an answer to the 3.850 motion filed on December 6, 1996.

30. On January 21, 1997, a Huff hearing was held. In light of the State's request to dismiss for lack of a verification, Judge Conrad ordered undersigned counsel to attempt to obtain a verification from Mr. Medina. Undersigned counsel was unable to obtain a verification from an incoherent Mr. Medina. When the judge indicated that he felt compelled to dismiss the 3.850 without prejudice, the State purported to waive the verification requirement.

31. On January 21, 1997, undersigned counsel filed a motion for rehearing as to the ruling on Mr. Medina's right to a competency proceed determination and a reconsideration as to the ruling on the 3.811 motion.

32. On January 23, 1997, Judge Conrad issued an order denying the 3.850 without an evidentiary. Mr. Medina filed a Motion for Rehearing, which Judge Conrad denied on the same day.

ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. MEDINA'S COMBINED MOTION FOR A STAY OF EXECUTION PENDING JUDICIAL DETERMINATION OF COMPETENCY TO BE EXECUTED. BECAUSE MR. MEDINA MET THE THRESHOLD SHOWING REQUIRED IN FORD V. WAINWRIGHT, AND PRESENTED REASONABLE GROUNDS TO BELIEVE HE IS INSANE TO BE EXECUTED, MR MEDINA WAS ENTITLED TO PRESENT EVIDENCE REGARDING HIS COMPETENCY.

The submissions attached to Mr. Medina's Combined Emergency Motion for a Stay of Execution Pending Judicial Determination of Competency (hereinafter 3.811 motion) exceeded the burden required for a stay under Rule 3.811(e), Florida Rules of

Criminal Procedure.[2] Counsel for Mr. Medina presented the court below with declarations from two psychologists and a forensic psychiatrist, all of whom conducted extensive clinical and psychometric evaluations of Mr. Medina in November and December of 1996. Each of these doctors informed the Circuit Court that he or she concluded Mr. Medina does not understand the fact of his imminent execution or the reasons for it. These expert statements were submitted in addition to affidavits from Mr. Medina's legal team detailing his longstanding delusional behavior.

The lower court's order denying the 3.811 motion was erroneous given the large volume of expert opinions and lay affidavits attesting to Mr. Medina's severely delusional state. Although the only case in which the application of Rule 3.811 has been reviewed by this Court did not address the issue because the circuit court there allowed argument and cross-examination of the state's witness, Martin v. State, 515 So. 2d 189 (Fla. 1987), this Court's decisions on the threshold showing required in pre-trial competency proceedings are instructive.

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[2]Florida Rule of Criminal Procedure 3.811(e) states that

> If the circuit judge, upon review of the motion and submissions, has reasonable grounds to believe that the prisoner is insane to be executed, the judge shall grant a stay of execution and may order further proceedings.

Fla. R. Crim. P. 3.811(e).

The standard a defendant must meet in the context of competency to be executed is whether "there are reasonable grounds to believe that the prisoner is insane to be executed." The 3.811 standard uses language identical to the standard a criminal defendant must meet to cast doubt on his competency to stand trial, pursuant to Fla. R. Crim. P. 3.210(b):

> If, at any material stage of a criminal proceeding, the court of its own motion, or on motion of counsel for the defendant or for the state, has reasonable grounds to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition . . . .

(Emphasis added). The cases interpreting Fla. R. Crim. P. 3.210(b) and its "reasonable grounds" standard are instructive.

Cases interpreting Rule 3.210(b) hold that the standard embodied in the rule is not whether there are reasonable grounds to believe the defendant is incompetent, but whether there are reasonable grounds to believe the defendant may be incompetent. Scott v. State, 420 So. 2d 595, 597 (Fla. 1982). Rule 3.210 mandates that if there are reasonable grounds to believe the defendant may be incompetent, the court "shall" set a hearing on the matter. Rule 3.210(b)(1996).

Rule 3.811 parallels the language of Rule 3.210:

> If the circuit judge, upon review of the motion and submissions, has reasonable grounds to believe that the prisoner is insane to be executed, the judge shall grant a stay of execution and may order further proceedings which may include a hearing pursuant to rule 3.812.

Fla. R. Crim. P. 3.811(e)(emphasis added). Because the rules use identical mandatory language and employ an identical standard, it follows that Rule 3.811 is interpreted to mean that, if the judge, upon review of the motion and submissions, has reasonable grounds to believe the defendant may be insane to be executed, the judge shall grant a stay and may order a hearing or other proceedings.[3]

Cases interpreting Rule 3.210 are instructive in interpreting Rule 3.811. In Scott v. State, 420 So. 2d 595 (Fla. 1982), this Court found the trial judge erred in failing to hold a hearing on defendant's competency to stand trial. Scott's attorney had asked for a competency hearing because he had great difficulty in communicating with Scott and because Scott was unable to assist him in preparing a defense. Id. at 597. Scott then overrode his attorney's recommendation and rejected an offer by the State to waive the death penalty if Scott would agree to a six-person jury, an offer that this Court characterized as "eminently-favorable." Id. Counsel then requested that Scott be sent to a mental health facility for evaluation, which the court refused.

This Court found that, on the above facts, Scott had raised reasonable grounds to believe he may have been incompetent to be

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[3]Even if the standard for 3.811 is higher than 3.210(b), in that Mr. Medina must show that there are reasonable grounds to believe that he is incompetent to be executed, Mr. Medina meets that standard as well.

tried. The Court quoted from the United States Supreme Court in stating that:

> Although we do not, of course, suggest that courts must accept without question a lawyer's representations concerning the competence of his client, an expressed doubt in that regard by one with "the closest contact with the defendant" is unquestionably a factor which should be considered.

Scott, 420 So. 2d at 597 (quoting Drope v. Missouri, 420 U.S. 162, 177-78 n.13 (1975)). This Court found the facts presented by Scott raised "more than reasonable ground to believe appellant may have been incompetent and, accordingly, a hearing should have been granted." Scott, 420 So. 2d at 598. Implicit in the Court's holding is that the Court will review competency issues de novo, and judge for itself based on the record whether there were reasonable grounds to believe the defendant may have been incompetent.[4] The Court's adoption of a de novo standard for determining whether a defendant raised reasonable grounds to believe he was incompetent to proceed finds support in Pate v. Robinson, 383 U.S. 375 (1966), in which the United States Supreme Court first held that a hearing is necessary once a defendant makes a showing that he may be incompetent to proceed. In Pate v. Robinson, the Court determined:

> We believe that the evidence introduced on Robinson's behalf entitled him to a hearing on this issue. The court's failure to make

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[4]Here again the requirement for de novo review is iterated in Florida Rule of Criminal Procedure 3.812(a) which mandates that any hearing "shall not be a review of the governor's determination." Fla. R. Crim. P. 3.812(a).

> such inquiry thus deprived Robinson of his constitutional right to a fair trial.

Id. at 385.

In making its de novo determination that Scott had met his burden under Rule 3.210 to invoke his right to a hearing, this Court relied on its decision in Jones v. State, 362 So. 2d 1334 (Fla. 1978), in which the Court held:

> In deciding whether or not to order an examination, the trial judge must consider all the circumstances, including the representations of counsel, and unless clearly convinced that an examination is unnecessary, order an examination before beginning or proceeding with trial.

Jones, 362 So. 2d at 1336 (emphasis added).[5] The opinion in Jones does not recite any facts supporting counsel's representations that Jones was incompetent, yet this Court reversed and remanded for a new trial following a competency determination.

In Hill v. State, 473 So. 2d 1253 (Fla. 1985), this Court again addressed what defense counsel must present to establish reasonable grounds to believe the defendant may be incompetent. The Court recited the facts regarding Hill's mental state as presented in postconviction proceedings: Five years before Hill's arrest, he was diagnosed as suffering from grand mal epileptic seizures; he was mentally retarded; he had been in special education classes in school; a county jail nurse

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[5]Counsel for Mr. Medina provided the lower court with affidavits from CCR attorneys and investigators regarding Mr. Medina's long history of delusional behavior.

suggested he was retarded and should be evaluated further to determine if Hill was suicidal; the defense investigator stated Hill was unable to assist him in investigation because he was unable to relate facts and, for example, he was unable to distinguish three weeks from three months conceptually; at trial Hill exhibited a lack of appreciation of the nature of the proceedings against him; Hill attempted to walk out of the courtroom and laughed and joked with audience members despite counsel's admonition not to do so. Hill, 473 So. 2d at 1254-55. The Court concluded Hill was entitled to a competency hearing:

> We find that any objective evaluation of the facts in this case establishes beyond question that a hearing on Hill's competency to stand trial was constitutionally required and that the failure to do so deprived him of the right to a fair trial.

Hill, 473 So. 2d at 1259.

Similarly, in Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), this Court found that Nowitzke had raised reasonable grounds to believe he may have been incompetent to proceed: witnesses testified that months before the murder Nowitzke was acting weird and bizarre; there was a history of mental illness in Nowitzke's family; Nowitzke rejected a plea offer because he believed he would be released on Independence Day because of the number of letters in his name, and therefore he could not be executed. The Court found that "In this case, defense counsel presented ample reasonable grounds to believe that Nowitzke might be incompetent." Id. at 1349.

In Tingle v. State, 536 So. 2d 202 (Fla. 1988), this Court remanded for a new trial because Tingle had been denied a competency hearing. The Court found that Tingle had set forth reasonable grounds to believe he may have been incompetent to stand trial based on the following: Tingle had attempted to stab himself with a pen while in counsel's presence; counsel stated she believed Tingle was hallucinating, and that a mental health worker said Tingle suffered from a paranoid schizophrenic process. The trial court rejected counsel's request for a hearing on Tingle's competency to stand trial, and this Court reversed:

> Under the circumstances present in this case, there were reasonable grounds to believe Tingle may have been incompetent.

Tingle, 536 So. 2d at 203. See also Calloway v. State, 651 So. 2d 752 (Fla. 1st DCA 1995); Unruh v. State, 560 So. 2d 266 (Fla. 1st DCA 1990); Shaw v. State, 546 So. 2d 796 (Fla. 1st DCA 1989); Weber v. State, 438 So. 2d 982 (Fla. 3d DCA 1983).

The authority in this State indicates that Mr. Medina has set forth reasonable grounds to believe he is insane to be executed. The Circuit Court's order denying a stay of execution, and by extension any hearing on Mr. Medina's competency to be executed, violated due process. The summary denial by the Circuit Court afforded Mr. Medina no opportunity to be heard on his Rule 3.811 motion. The motion was never noticed for a hearing as the trial court had done with all other motions pending since the new warrant week was established. Mr. Medina

was not given the opportunity to have counsel argue the merits of the motion or the deficiencies in the state's presentation. There was no record of the Commission's evaluation for the court to review or for Mr. Medina to challenge. The denial was summary and completely at odds with the weight of the evidence.

The lower court had before it the declarations of three mental health experts who concluded that Mr. Medina is insane. Each of the two psychologists and the psychiatrist whose declarations were before the court did extensive testing of Mr. Medina. They specifically evaluated him to see if he was malingering and reached conclusions that he was not. Dr. Teich and Dr. Marina conducted their evaluations after the Commission met.

Forensic psychiatrist Stephen S. Teich, M.D., examined Mr. Medina on December 20, 1996, for approximately three hours and ten minutes. Appendix to Motion for Rehearing at Tab 1. On January 9, 1997, Dr. Teich also interviewed through an interpreter Mr. Medina's mother and sister for approximately two and a half hours. Id. Dr. Teich, who also examined Mr. Medina in 1987, obtained "new information concerning issues of parental abandonment and lack of attention, as well as attachments and relationships, including sexual, in his teenage years with women substantially older than himself." Id. Dr. Teich concluded that Mr. Medina's history and the clinical observations "are most consistent with a diagnosis of severe Psychosis, with a differential of Schizophrenia, Dissociative Identity Disorder

(formerly Multiple Personality Disorder), and/or Posttraumatic Stress Disorder, and with the presence of Major Depressive, Anxiety, and Panic components as well." Id. Dr. Teich stated in his declaration that he

> employed a variety of approaches from being supportive and allowing him to talk quite freely about whatever came to his mind, to being confrontive and specific reality focussed, in order to test his functioning and reactions under varying conditions and degrees of stress.
>
> 8. I particularly and directly confronted Mr. Medina on the specifics of his circumstances and the nature of case, repeating many times factual items such as who I was, what my role was, that I had been requested to interview him by his legal counsel, that he was convicted of murder, that he was imprisoned in the State Prison in Florida, and that he was facing execution in the imminent future.

Decl. of Dr. Stephen Teich, Appendix to Motion for Rehearing at Tab 1 (hereinafter Teich Decl.). Dr. Teich stated that "Mr. Medina was, additionally, almost totally unable to relate to the reality items enumerated in Paragraph 8 above, and when he did relate to any of them, it was only for a short period of time with the subsequent reoccurrence of distortion and/or non-recognition the next time specific data was restated." Id.

Dr. Teich addressed the Commission's conclusion that Mr. Medina was malingering:

> 14. In relation to the issue of malingering which I raised in Paragraph 13 of my previous Declaration, and which, as I understand it, is the opinion of the three Psychiatrists on the panel appointed by the Governor, my interview methodology was designed to specifically evaluate this issue as well.

> Though his thoughts and behavior indeed appear unusual, when placed in the context of his individual history and present situation, they are, in my opinion, more consistent with an unconscious response (including the presence of the very primitive unconscious defenses of repression, denial, and avoidance) to the severe anxiety which he experiences, than with a conscious attempt to avoid his overt reality situation. These defenses, too, have become inadequate and overwhelmed, resulting in Mr. Medina's decompensation into a psychotic state manifesting as an alternate reality encompassing all three areas of orientation, i.e., time, place and persons, such that he is not in contact with any aspect of his present reality.

Teich Decl. Dr. Teich's opinion, as stated to the court below, is

> that, to a reasonable degree of medical certainty, Pedro Medina, as a result of mental disorders (not excluding the possibility that these exist in addition to organic deficits) does not have the present capacity to understand the fact of his impending execution and reason for it, and does not have the ability to cooperate with his attorneys in the furtherance of his legal appeals and further proceedings.

Teich Decl. at ¶ 16.

Psychologist Dorita Marina, Ph.D., "performed two comprehensive and extensive psychological evaluations of Pedro Medina at Florida State Prison." Declaration of Dorita Marina, submitted to the lower court in Appendix to Motion for Rehearing at Tab 2 (hereinafter Marina Decl.). The most recent evaluation conducted by Dr. Marina was December 19, 1996, and "took between four and five hours and included a diagnostic clinical interview and a battery of psychological tests." Marina Decl. at ¶ 2. Dr.

Marina concludes "now as before . . . that [Mr. Medina] suffers from Schizophrenia probably secondary to organicity." Id. at ¶ 7. Her conclusions are consistent with those of Dr. Teich and Dr. Ruth Latterner, whose conclusions were set forth in her Declaration attached to the 3.811 motion. Id. at ¶ 3.

Dr. Marina took into account the Commission's Report (Decl. at ¶¶ 4, 9), and informed the lower court of her reasons for disagreeing with its conclusion. Dr. Marina stated that the Commission

> did not have data such as I obtained through the Rorschach instrument, data which is very difficult if not impossible to malinger by a lay person. The likelihood that this test gave a false positive is significantly low.
>
> 10. Pedro Medina is unable to communicate with defense counsel in any meaningful manner. Nothing in the record I have reviewed changes my opinion that Pedro Medina does not understand the fact of his impending execution and the reason for it.

Marina Decl. at ¶¶ 9-10.

These evaluations, based on more extensive examinations under better clinical conditions than were used by the Commission, buttress the December 5, 1996, conclusion of Dr. Latterner that

> Pedro's condition has deteriorated since I evaluated him on November 22, 1996. His recent behavior is consistent with my diagnosis that he has a psychotic disorder caused by brain damage and marked by episodic hallucinations and delusions.
>
> 14. At this time, it is apparent to me that Mr. Medina is unable to consult or communicate with his attorneys in any meaningful way about the facts that must be

> presented to the court. Further, nothing in the records I have reviewed changes my opinion that Mr. Medina does not understand the fact of his impending execution and the reason for it.

Declaration of Ruth Latterner, Ph.D., attached to Defendant's Combined Motion for Stay of Execution Pending Judicial Determination of Competency.

Even without the benefit of argument on the motion, Mr. Medina met and exceeded the threshold showing required under Ford. Ford, 477 U.S. at 426-427; see also, Johnson v. Cabana, 818 F.2d 333 (5th Cir. 1987); Weeks v. Jones, 52 F.3d 1559 (11th Cir. 1995); cf. Martin v. State, 515 So. 2d 189 (Fla. 1987); Martin v. Dugger, 686 F.Supp. 1523, 1559-1572 (S.D.Fla. 1988).

This Court has never approved such cursory and inadequate procedures. This Court has stated that "[t]he essence of due process is that fair notice and an opportunity to be heard must be given to interested parties before judgment is rendered." Scull v. State, 569 So. 2d 1251, 1252 (Fla. 1990), quoted in, Huff v. State, 622 So. 2d 982, 983 (Fla. 1993).

In the context of a capital case, this Court has held that

> [b]ecause of the severity of punishment at issue . . . the judge must allow the attorneys the opportunity to appear before the court and be heard on an initial 3.850 motion . . . . for the purpose of determining whether an evidentiary hearing is required and to hear legal argument relating to the motion.

Huff, 622 So. 2d 983. Since the issuance of the Huff opinion, the Rule 3.850 process has been more orderly, determinate, and fair to the parties. Indeed, Rules 3.811 and 3.812, by their

very terms, contemplate a similar two-stage process in which the initial motion pursuant to Rule 3.811 can be argued, the issues narrowed, and the appropriate future proceedings ordered by the court. See Fla. R. Crim. P. 3.811(d), 3.811(e), and 3.812(c).

The need for an opportunity to be heard is even more compelling and immediate in a case such as this where the defendant's competency to be executed is at issue. Mr. Medina was given no opportunity to argue the merits of his Rule 3.811 motion to the court. Nor was he given an opportunity to rebut the state's submissions. Mr. Medina's counsel did not even receive all the materials on which the state's experts relied until January 14, 1997 at approximately 6:15 p.m. when they were ordered to be served on counsel in open court. Transcript of January 14 hearing at 301-303. The court denied the Rule 3.811 motion on January 16, 1997. Thus Mr. Medina was given no opportunity to challenge the conclusions reached by the Governor's Commission or basis for them.

Mr. Medina's experts were never given an opportunity to rebut the Commission's findings or to address any flaws in its procedures. All of these things would have been addressed at a hearing on the Rule 3.811 motion and at an evidentiary hearing pursuant to Rule 3.812, Florida Rules of Criminal Procedure.

The summary denial of Mr. Medina's Rule 3.811 motion falls far short of the due process requirements set forth in Ford v. Wainwright, 477 U.S. 399 (1986). Even applying the narrowest opinion on the due process question raised by the procedures

Florida used prior to the promulgation of Rule 3.811 (i.e., that of Justice Powell in Ford), the summary denial presented for review here is constitutionally deficient. See Johnson v. Cabana, 818 F.2d 333, 337 (5th Cir. 1987) (cited by this Court in Martin v. State, 515 So. 2d 189, 190 (Fla. 1987)); Martin v. Dugger, 686 F. Supp. 1523, 1559 (S.D.Fla. 1988); see generally, Marks v. United States, 430 U.S. 188, 190 (1977).

In Ford, Justice Powell held that the body deciding whether a condemned man is competent to be executed must at least "receive evidence and argument from the prisoner's counsel." 477 U.S. at 427 (Powell, J., concurring) (emphasis added). An opportunity for counsel to present argument to the body deciding whether a person is to be put to death while mentally ill was considered a "basic requirement[]" by Justice Powell. Id. A majority of the Court in Ford agreed that "one fundamental requisite of due process . . . is an opportunity to be heard." Id. 477 U.S. at 424 (Powell, J. concurring) (agreeing with Justice Marshall and quoting Justice O'Connor) (internal quotation marks and citation omitted).

In a case concerning the vital role of counsel in collateral proceedings, the Eleventh Circuit Court of Appeals stated that

> The Constitution requires that when the fact or timing of an execution is contingent upon the respoution of a disputed issue, then that issue must be determined "with the high regard for truth that befits a decision affecting the life or death of a human being." Ford v. Wainwright, [477] U.S. [399, 411], 106 S.Ct. 2595, 2603 (1986) (plurality opinion).

Zeigler v. Wainwright, 805 F.2d 1422, 1426 (11th Cir. 1986). That court recently lauded the thoroughness of procedures used by an Alabama court concerning a Ford case. See Weeks v. Jones, 52 F.3d 1559, 1562 (11th Cir. 1995). The local court "gave Weeks every opportunity to present all of the witnesses and evidence he desired [before] determin[ing] Weeks's competency to be executed." Id. In contrast, Mr. Medina was not permitted to present any witnesses at all.

It should be noted that the lower court's refusal to permit Mr. Medina to present any live testimony came despite the court's earlier statement that a stay was unnecessary due to the amount of time remaining in the warrant period. Tr. of January 14 Hearing at 58-64, 68. The Assistant Attorney General did not oppose a hearing because of time constraints either. Kenneth Nunnelley stated that

> we're in court way, way early. We're a long time out from the execution, and at this particular time, there is no reason for anybody to think that the issue can't be resolved prior to the opening of the warrant period."

Tr. at 69.

Yet, the opportunity to argue the Rule 3.811 motion to the court before it was summarily denied was just one aspect of due process denied to Mr. Medina.

The facts of Martin v. State, 515 So. 2d 189 (Fla. 1987), the first case to consider an application of Rule 3.811, the defendant was given an opportunity to cross examine the state's experts and an opportunity to argue the motion to the court.

Judge Conrad did not even give Mr. Medina's counsel an opportunity to argue the motion as required under Ford.

In the context of a judicial determination of competency for execution under Ford v. Wainwright, 106 S. Ct. 2595 (1986), due process requires that the movant be granted an evidentiary hearing once he has made a "'threshold showing' that he has become insane after trial." Martin v. Dugger, 686 F. Supp. 1523, 1557 (M.D. Fla. 1988) (applying standard agreed to by a majority of justices in Ford), aff'd on other grounds, 891 F.2d 807 (11th Cir. 1989).

> This procedure allows the [movant] the opportunity to make a showing that some type of doubt exists with respect to his competency. The process provides an opportunity for him to thoroughly challenge the state psychiatrists' viewpoints. The procedure is also in accordance with the viewpoints of Justices Powell and O'Connor, for the process provides a system in which the state's rights of administering punishment and avoiding further delay and expense are protected.

Martin, 686 F. Supp. at 1560.

The Florida standard that governs a court's decision to grant an evidentiary hearing in postconviction is the same as that governing the issuance of a stay and echoes the standard agreed to by a majority of the Court in Ford. See Scott v. State, 657 So. 2d 1129 (Fla. 1995); Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994); Jones v. State, 591 So. 2d 911 (Fla. 1991). If Mr. Medina is able to show that he "might [reasonably] be entitled to relief," he is entitled to an opportunity to be heard. Cf. State v. Schaeffer, 467 So. 2d 698, 699 (Fla. 1985).

The circuit court's determination of Mr. Medina' competency to be executed must be made de novo; it may not be a review of the Governor's determination of competency. Fla. R. Crim. P. 3.812(a). A judicial determination of whether an inmate is competent to be executed under Ford is a mixed question of fact and law, the resolution of which entails, among other things, an evaluation of the credibility of witnesses. Martin, 686 F. Supp. at 1556. In order to "comport with traditional notions of fair play and substantial justice, competency proceeding[s]" must afford the inmate adequate notice and an opportunity to present testimony of expert witnesses to rebut those of the state.[6] Id., 686 F. Supp. at 1557-1558 (noting that a majority of the Ford Court agreed that Florida's pre-3.812 procedures violated due process because they did not afford the movant an opportunity to be heard). Adequate notice means an opportunity to have informed witnesses made available for the hearing. See Id., at 1556.

Mr. Medina has presented much more than the threshold "showing that some type of doubt exists as to his competency." Martin, 686 F. Supp. at 1560. As Judge Powell found at the evidentiary hearing on Mr. Medina's original 3.850 motion, the testimony of Drs. Teich and Marina "showed in essence that the defendant was psychotic." PC-R. 2293. Rule 3.812(b) authorizes

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[6]The Eleventh Circuit Court of Appeals recently praised a state court's procedures that gave an inmate claiming he was incompetent to be executed "every opportunity to present all of the witnesses and evidence that he desired." Weeks v. Jones, 52 F.2d 1559, 1562 (11th Cir. 1995).

a hearing on "whether [Mr. Medina] presently meets the criteria for insanity at time of execution." Fla. R. Crim. P. 3.812(b) (emphasis added); see also, Ford, 106 S. Ct. at 2610. The Due Process Clause of the Fourteenth Amendment requires that Mr. Medina be afforded an opportunity to be heard once he has made the threshold showing. See Martin, 686 F. Supp. at 1560; Ford, 106 S. Ct. at 2603 (plurality opinion of Marshall, J.), at 2610 (Powell, J., concurring), at 2612 (O'Connor, J., concurring).

As argued supra, the two-step process contemplated in Rules 3.811 and 3.812 is analogous to the proceedings on a Rule 3.850 motion since this Court decided Huff v. State. A stay should be granted unless the submissions presently before the Court and the assertions of counsel "conclusively show that the movant is entitled to no relief." Cf. O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984) (citations omitted) (remanding for evidentiary hearing on postconviction motion after entry of stay of execution).

A stay is appropriate in a case such as this where Mr. Medina "might [reasonably] be entitled to relief," State v. Schaeffer, 467 So. 2d 698, 698-699 (Fla. 1985), so that Mr. Medina may be afforded an opportunity to obtain the services of mental health experts to examine him and make current findings concerning his competency to be executed.

Mr. Medina requires a stay of execution in order to be examined by mental health experts who can challenge the executive determination on sanity to be executed. See Fla. R. Crim. P.

3.811(d). Mr. Medina must be afforded a reasonable amount of time to obtain complete and current examinations by mental health experts so that they can update and finalize their previously stated opinions that he is insane. As Justice O'Connor pointed out in her concurring opinion in Ford, the determination of a person's competency to be executed must be made at a point in time close to the execution. Id., 477 U.S. at 429-430.

Whether based on this Court's postconviction jurisprudence as exemplified in Huff and Johnson v. Singletary, or on the Supreme Court's holding in Ford, the summary dismissal meted out by the circuit court violates Mr. Medina's right to due process. The Rule 3.811 motion must be remanded for a stay and further proceedings including a hearing as permitted in Rule 3.812.

Should this Court remand Mr. Medina's case for a hearing on his competency to be executed, a new United States Supreme Court case raises a question about the standard of proof codified in Florida Rule of Criminal Procedure 3.812(d).

> The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.

Cooper v. Oklahoma, ___ U.S. ___, 116 S. Ct. 1372, 1381 (1996) (holding unconstitutional clear and convincing standard for proving pretrial incompetency) (internal quotation marks and citations omitted).

Florida Rule of Criminal Procedure 3.812(e) requires that "the court find, by clear and convincing evidence, that the prisoner is insane to be executed." This standard for proving incompetency is unconstitutional because it imposes too great a burden on the defendant when compared to the interests of the state and the great risk that an incorrect finding of competency would result in Mr. Medina being killed in violation of the Eighth Amendment. See generally, Cooper, 116 S. Ct. at 1383; see also, Martin, supra at 1559-1560.

The question of what burden of proof is appropriate depends, in part, on a comparison between the severity of risk presented by an erroneous determination and the institutional necessity of requiring the movant to meet a higher standard of proof. See Cooper, 116 S. Ct at 1381.

In finding that a prisoner is entitled to a hearing on his competency once he has made a threshold showing of insanity, the court in Martin addressed the relative interests of the inmate and the state. Martin, 686 F. Supp. at 1559. "Of course, the prisoner's interest in avoiding an erroneous determination of when he is to be executed is very great." Id. (citation omitted). The interests of the state are "more varied and detailed," id., and the state is only entitled to a presumption "that the prisoner remains sane at the time sentence is to be carried out." Id., quoting Ford. See also, Medina v. California, 112 S. Ct. 2572, 2579 (1992).

Of course, this Court has already found that Mr. Medina was psychotic in 1989, (PC-R. 2293), making the value of this presumption minimal. Moreover, the United States Supreme Court recently held that the right of a state to presume competency does not entitle states to hold defendants to a clear and convincing standard of proof. Cooper, 116 S. Ct. at 1381.

The interests recognized by the court in Martin were precisely the same as those the Supreme Court found compelling in Cooper. Compare Martin, 686 F. Supp. at 1560 ("The prisoner's interest here [in avoiding an erroneous determination of his competency to be executed] is great, and the potential loss, if an erroneous determination is reached, is grave."), with Cooper, 116 S. Ct. at 1382 ("By comparison to the defendant's interest [in not being tried if incompetent], the injury to the State of the opposite error--a conclusion that the defendant is incompetent when he is in fact malingering--is modest.").[7] The state's interests are protected by requiring Mr. Medina to bear the burden of proof in the first place, Cooper, 116 S. Ct at 1382, and the requirement that he make a threshold showing of incompetency merely to get a hearing. Martin, 686 F. Supp at 1560.

Weighing the "very great" risk to Mr. Medina of being executed while insane against the "modest" interest of the state

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[7]The Cooper Court also found the state's interest in holding defendants to a higher burden of proof was outweighed by the likelihood that judicial proceedings and expert witnesses will easily uncover any malingering. Id., 116 S. Ct. at 1382.

in avoiding an improbable erroneous determination of incompetence, due process forbids making the risk any greater by holding Mr. Medina to prove his insanity by clear and convincing evidence. Mr. Medina need only prove that it is more likely than not that he is insane for purposes of execution.

At this point, a stay must be granted and an evidentiary hearing must be ordered.

ARGUMENT II

THE LOWER COURT ERRED IN DETERMINING THAT MR. MEDINA HAD NO RIGHT TO A JUDICIAL DETERMINATION OF HIS COMPETENCY TO PROCEED, ERRED IN DETERMINING WHAT IS THE STANDARD FOR COMPETENCY IN POSTCONVICTION, AND ERRED IN PERMITTING THE STATE TO PRESENT WITNESSES WITHOUT GIVING MR. MEDINA A FAIR OPPORTUNITY TO DO THE SAME.

When he filed his motion for postconviction relief on December 6, 1996, Mr. Medina filed a Motion for Determination of Competency to Proceed in Postconviction Proceedings. Mr. Medina's counsel expressed their concern that Mr. Medina could not assist them in ascertaining relevant facts and could not verify the Rule 3.850 motion because he was unable to understand the allegations in the motion.

Counsel for Mr. Medina argued to the lower court that Mr. Medina had a right to a judicial determination of his competency to proceed in postconviction proceedings. Without such a determination, counsel feared Mr. Medina would be nothing more than a witless bystander to the proceedings that would determine whether he lives or dies.

The lower court eventually adopted the State's argument in its Response that Mr. Medina had no right to a determination of his competency to proceed, citing this Court's opinion in Jackson v. State, 452 So. 2d 533 (Fla. 1984). Having determined that Mr. Medina had no right to a competency determination, the lower court nevertheless allowed the State to call witnesses, the same three "neutral" experts chosen by the Governor to evaluate Mr. Medina pursuant to Sect. 922.07, Fla. Stat. (1996 Supp.). The lower court determined, after a hearing at which only the State was permitted to present live witnesses, despite defense counsel's assurances that defense mental health experts could be available to testify the following week at the latest, that Mr. Medina was competent to proceed.

The lower court erred when it denied Mr. Medina's Motion for Determination of Competency to Proceed in Postconviction. The court held that: "a defendant is not entitled to a judicial determination of his competency to assist counsel either in preparing a 3.850 motion or a petition for writ of habeas corpus." Order, quoting, Jackson v. State, 452 So. 2d 533, 537 (Fla. 1984) (emphasis added).

Despite finding that Mr. Medina had no right to a competency determination, the lower court gave the State the benefit of a judicial determination that Mr. Medina is competent to proceed in postconviction. Order on Motion for Determination of Competency of Defendant to Proceed in Postconviction Proceedings at 5. This was done after the court permitted the State to present evidence

with no advance notice to Mr. Medina or his counsel that evidence would be heard. The court decided that Mr. Medina was competent to proceed after taking evidence from the State in violation of Mr. Medina's right to due process.

The proceedings below are strikingly similar to those condemned by this Court in Johnson v. Singletary, 647 So. 2d 106, 111 n.3 (Fla. 1994). In Johnson, the court had scheduled argument on Johnson's motion for stay of execution. There was no indication to Johnson's counsel that evidence would be taken. At the hearing, the State requested leave to present witnesses. The trial court allowed the State to call witnesses, but did not permit the defense to do the same. The defense had no notice that evidence would be taken. This Court condemned the procedures utilized in Johnson as violative of due process. Just as in Johnson, the lower court's procedures here violated due process.

Mr. Medina filed his Motion for Determination of Competency to Proceed in Postconviction on December 6, 1996, simultaneous with the filing of Mr. Medina's Rule 3.850 motion in the circuit court. On January 9, 1996, after the Governor rescheduled Mr. Medina's execution, the circuit court had held a telephonic status hearing upon thirty minutes notice. Mr. Medina's lead attorney, Martin McClain, appeared on behalf of Mr. Medina. The court indicated it would schedule a hearing on the competency to proceed motion sometime during the week of January 13, 1997. Counsel understood that the hearing would be an oral argument

akin to a Huff hearing because the State had given no indication that it would agree that an evidentiary hearing was required. See Huff v. State, 622 So. 2d 982, 983 (Fla. 1993)("We find that Huff was denied due process of law because the court did not give him a reasonable opportunity to be heard"). In fact, the State had yet to file a response to the motion for a competency determination. Accordingly, Mr. McClain decided that his co-counsel, Jennifer Corey, was competent and prepared to represent Mr. Medina at an oral argument regarding the competency to proceed issue. However, Ms. Corey had never previously cross-examined a mental health expert and had only the week before conducted her first direct examination of a mental health expert. Mr. Medina's counsel was in no way prepared to cross-examine mental health experts offered by the State.

At the January 14, 1997, hearing on Mr. Medina's motion to Determine Competency to Proceed and two other motions, the lower court, without prior notice to Mr. Medina, announced that evidence would be received regarding Mr. Medina's competency to proceed. Counsel for Mr. Medina stated repeatedly that because the court had not ruled on whether there is a right to a judicial determination of competency, not ruled on what the standard for competency in postconviction is if one exists, not ruled on the burden of proof or who bears it, and not given notice that evidence would be received, counsel was not prepared to call or cross-examine witnesses. Transcript of January 14, 1997, hearing at 73-75, 81, 105-106, 108.

The lower court did not decide whether an evidentiary hearing on the motion to determine competency to proceed would be held until after everyone returned from a lunch break and further argument was heard. Tr. 86, 104. This was the first time counsel for Mr. Medina were informed that an evidentiary hearing would be held; it was not mentioned at the telephone conference the previous week or in the court's Notice of Hearing. Tr. 105-106.

Although Mr. Medina's motion was filed on December 6, 1996, the State did not fax its response to Mr. Medina's counsel until late Monday, January 13, 1997, after counsel for Mr. Medina were on their way to Orlando for the hearing. Despite the more than a month the assistant state attorney had to draft a response, she chose to wait until the last possible minute to inform Mr. Medina and the Court of the State's position (albeit not the position the State would later argue).

Although the State, under the signature of the assistant state attorney, took a position in its response identical to its position before this Court in Carter v. State, Case No. 88,368, at the hearing the following day, the assistant attorney general was permitted to take a contrary position for the very first time. The State, repeating its argument in Carter, maintained that no hearing should be granted because, under Jackson, there is no right to a hearing. Mr. Medina's counsel addressed the State's written Response at the hearing. Tr. 42-43, 91. Despite having presented the Carter argument in his written response, at

the hearing the assistant attorney general stated that the issue in Carter "is really kind of irrelevant to the Court." Tr. 50. This suggests that the State's representation to the court and opposing counsel that the issue was the same and that Jackson was dispositive of it was only to mislead undersigned counsel in violation of due process.

At the hearing on January 14, the assistant attorney general argued for the first time that a hearing should be granted despite there being no right to one. Counsel for Mr. Medina were, in effect, ambushed by a new and contrary position without being afforded any time to contemplate a reply. In contrast, the State took more than a month to devise its strategy, submit one pleading arguing against a hearing, then spring another, novel argument on Mr. Medina orally at the hearing.

It should be noted that counsel for Mr. Medina voiced concern many times that this was a sudden change in position for the State and that there was no notice that the January 14 hearing would involve witnesses. Tr. 57, 63-64, 73-75, 81, 100-102, 105-106, 108, 293. Counsel also repeatedly maintained the position that if there is no right to a competency determination then no hearing could be conducted, and Mr. Medina is entitled to appeal the adverse ruling to the Supreme Court of Florida. Tr. 73-75, 83-84, 100-102, 108, 112. Counsel for Mr. Medina repeatedly asked the Court for a ruling on the motion as to whether a right existed, but at least once the Court declined to

do that and instead asked the State to present its evidence. See, e.g., Tr. 82.

At one point in the proceedings Kenneth Nunnelley, the assistant attorney general, said that there was no need to impose a stay given that the identities of the State's "witnesses have been disclosed...." Tr. 63. At other points Mr. Nunnelley attempted to disavow the former members of the Governor's commission as State's experts. See Tr. 57, lines 10-11; see also Tr. 81 where Mr. Nunnelley said "I brought my witnesses down here on the -- I brought the commission witnesses down here." Yet the Governor dissolved the Commission to Determine the Competency of Pedro Medina by Executive Order on January 6, 1997.[8]

Mr. Nunnelley also took the position at the hearing that a stay should be denied under Rule 3.811 because "we're in court way, way early. We're a long time out from the execution, and at this particular time, there is no reason for anybody to think the issue can't be resolved prior to the opening of the warrant period." Tr. 69. Nevertheless, Mr. Nunnelley insisted that the court hold an evidentiary hearing on the competency to proceed

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[8]The testimony of Dr. Merton Ekwall also showed that the State, in securing the attendance of this witness, misrepresented to him that appearing at the hearing was part of his responsibility as a member of the Governor's commission. Tr. 159. Dr. Ekwall testified that he was not told the commission had been disbanded. Tr. 162. The Executive Order dated January 6, 1997, states "Dr. Merton L. Ekwall, Dr. Johnnie L. Gallemore and Dr. Wade Cooper Myers, III, are hereby relieved of all further duties and responsibilities under Executive Order 96-372." Yet, Mr. Nunnelley represented to this Court that he "brought the commission witnesses down here" on January 14, eight days after the commission no longer existed.

motion without granting a right to such a determination because this case is under warrant and needs to be expedited. Tr. 53, 77.

The lower court's Order erroneously states that counsel for Mr. Medina "stated that it would rest its case upon the[] affidavits [of attorneys and investigators]." In fact, the record reflects that counsel asked repeatedly for an opportunity to put on witnesses. Assistant Capital Collateral Representative Jennifer Corey stated: "I have about a thirty second thing I need to get on the record about why I am not ready to go forward with the evidentiary hearing." . . . "I'm saying at that phone conference there was never an indication to Mr. McClain that we were supposed to have witnesses." Tr. 105. "If we had known we had to have witnesses here, we would have gotten that process rolling." Tr. 105-06. "The Florida Supreme Court in Huff versus State said this is how I want you to do 3.850. Have an argument, figure out what your hearing is going to be on, then have your hearing. We were assuming to proceed the same way. We file a motion, we have an argument, find out what the hearing will be on, then proceed with our hearings. We did not know we needed witnesses today." Tr. 107. "If I had known we were ready to go with witnesses, I would be, but I'm not. . . . I will go forward as best I can. But I don't have any witnesses here. I cannot put on my case today." Tr. 108. Later she informed the court at the close of the State's case that:

> As you know, we don't have any witnesses here. We still would love to call them, if

> your honor would give us the opportunity. I have had my secretary, when we took the lunch break, call any witnesses to find out where they are, and who is available. Dr. Latterner, her husband just had surgery. She will need to make arrangements to get a nurse in with him, but she says she will be able to do that, probably next week. Dr. Teich is in New York testifying. He has two hearings on Friday, but he will be available next week. And our other doctor, Dorita Marina, can make herself available.

Tr. 293. Ms. Corey went on to say:

> Your honor, I also, since the court's not going to let me call witnesses, I would like to proffer the testimony of the attorneys at CCR that I proffered we will have to call.

Tr. 295 (emphasis added). The lower court responded: "I'm giving you more than I really- - . . . . You know. I'm kind of bending over backwards. Because I really agree philosophically with what the State has told me. Its your motion its your hearing, you should have been ready to go." Tr. 296. The State, although earlier emphasizing the great amount of time left before the warrant week would begin, objected to the proffering of testimony or affidavits because it would delay the proceedings.[9] Tr. 295.

Denied the opportunity to call mental health experts and present live testimony, counsel for Mr. Medina stated that the defense would then "rest on all the affidavits that are attached to the motion to determine competency of defendant to proceed."

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[9]This is another example of the assistant attorney general reversing an earlier position. It was Mr. Nunnelley who first suggested that the defense proffer any testimony not contained in the affidavits attached to the Motion for Determination of Competency to Proceed. Tr. 111.

Tr. 297, 301. The lower court also permitted Mr. Medina to file affidavits from Mr. Medina's prior collateral counsel. The lower court's characterization of Mr. Medina's position as: "CCR stated that it would rest its case upon these affidavits," is a gross mischaracterization of Mr. Medina's argument. Denied an opportunity to present live testimony, Mr. Medina offered the only thing the lower court would accept: affidavits from his attorneys stating they had never instructed him to act crazy. The lower court's attempt to manufacture due process from the record of a hearing where none was afforded in fact is misleading at best.

After receiving the court's order denying Mr. Medina's Motion to Determine Competency to Proceed in Postconviction, Mr. Medina filed a Motion for Reconsideration on January 21, 1997. Mr. Medina attached to the motion affidavits from two mental health experts, psychiatrist Dr. Stephen Teich and psychologist Dr. Dorita Marina. These declarations set forth, in general terms, the matters to which these vital witnesses could have testified if given the opportunity. They reflect the conclusions of these doctors based on examinations conducted <u>after</u> the Governor's commission conducted its evaluation and <u>after</u> Mr. Medina filed his motion for determination of competency to proceed in postconviction. Mr. Medina's counsel provided Doctors Teich and Marina with the commission's report. Both doctors disagreed with the Governor's Commission/state expert witnesses' conclusion that Mr. Medina was malingering, and concluded that

Mr. Medina is not malingering and that he is not competent to proceed.[10] The lower court denied Mr. Medina's Motion for Reconsideration on January 23, 1997, summarily and without explanation.

The lower court's determination that Mr. Medina is competent to proceed is entitled to no deference for a myriad of reasons. First, this Court reviews competency determinations de novo. See, e.g., Scott v. State, 420 So. 2d 595 (Fla. 1982); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

Second, the lower court relied on the report of the commission of three psychiatrists appointed by the Governor to examine Mr. Medina. The commission's report explicitly relied on affidavits supplied to the doctors by Assistant State Attorney Paula Coffman on the day the commission evaluated Mr. Medina, affidavits in which correctional officers state they overheard Mr. Medina tell John Mills that his lawyers told him to act crazy. The doctors specifically relied on these affidavits in deciding that Mr. Medina was malingering. Mr. Medina was never afforded an opportunity to explain or deny the information in the affidavits.[11] By relying on the commission's report, the lower

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[10]A three-page affidavit can never substitute for testimony, particularly regarding complex mental health issues.

[11]The affidavits were provided to the commission at Florida State Prison at 9:00 a.m., December 5, 1996. John Mills was scheduled to be executed at 7:00 a.m., December 6, 1996. After learning the allegations in the affidavits. Mr. Medina's counsel filed an emergency motion to perpetuate John Mills' testimony by his deposition. Assistant Attorney General Margene Roper replied

court violated Mr. Medina's due process rights. See Gardner v. Florida, 430 U.S. 349 (Fla. 1977):

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to this Court that, if it found it had jurisdiction over the matter, she would withdraw the affidavits. This Court then denied Mr. Medina's motion. Prison officials permitted Mr. Medina to take Mr. Mills' deposition, which was done less than 12 hours before Mr. Mills was executed. However, the prejudice caused to Mr. Medina by the State providing the suspect affidavits to the Commission was not remedied by taking Mr. Mills' deposition because under § 922.07, all materials must be provided to the Commission at the time of the evaluation. The Commission never learned of John Mills' deposition or the affidavits of Mr. Medina's counsel swearing under oath they had never counseled Mr. Medina to act crazy. In fact, one member of the Commission accepted the allegations in the correctional officers' affidavits as true and testified that,

> "it's our understanding most every attorney would advise their client of that.
>
> MS. COREY: I'm sorry. It's our understanding that what?
>
> DR. EKWALL: Most any attorney would advise their client of the possible measures they could take to defend themselves.
>
> MS. COREY: And is it your testimony one of those measures that you feel most any attorney would advise their client to do is act crazy?
>
> DR. EKWALL: It's not something that's generally accepted, but it's something that we understand does occur.
>
> MS. COREY: When you say we, who do you mean?
>
> DR. EKWALL: Society in general, and psychiatrists in particular. Would just be good legal sense.

Tr. 165-66, January 14, 1997, hearing. Given the attitude of at least one member of the Commission, Mr. Medina was prejudiced by his inability to rebut the State's allegations that were incorporated into the Commission's report, which was in turn relied on by the lower court.

> Our belief that debate between adversaries is often essential to the truth-seeking function of trials requires us also to recognize the importance of giving counsel an opportunity to comment on facts which may influence the sentencing decision in capital cases.

Id. at 360. Although Gardner was decided in the context of a capital sentencing proceeding, due process provides the underpinnings for the Gardner decision. Postconviction proceedings in Florida are governed by the principles of due process no less than trial or sentencing proceedings. See, e.g., Huff v. State, 622 So. 2d 982 (Fla. 1993); Teffeteller v. Dugger, 676 So. 2d 369, 371 (Fla. 1996); Johnson v. Singletary, 647 So. 2d 106, 111 n.3 (Fla. 1994). By relying on the commission's report, which relied on the correctional officers' affidavits, the lower court denied Mr. Medina due process of law. A decision arrived at in violation of a defendant's due process rights is not entitled to deference.

In addition, the commission's finding that Mr. Medina is competent to be executed has little if anything to do with whether he is competent to proceed in postconviction. The commission was appointed for the purpose of determining whether Mr. Medina understands the nature and effect of the death penalty and why it is to be imposed upon him. See Executive Order No. 96-372 (attached as Exhibit 2 to Defendant's Combined Emergency Motion for a Stay of Execution Pending Judicial Determination of Competency). The commission was not told prior to seeing Mr. Medina that they would later be asked to give an expert opinion regarding Mr. Medina's competency to proceed in postconviction.

Moreover, the doctors were never informed what was the legal standard for determining competency to proceed in postconviction. Despite these facts, the State elicited testimony from each doctor in an effort to establish Mr. Medina's competency to proceed. The doctors had not evaluated Mr. Medina for competency to proceed, and their postfactum determinations of competency are entitled to no weight.[12]

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[12]That the commission ever arrived at a unified opinion as to Mr. Medina's mental state is remarkable. Accounts of Commission's meeting with Mr. Medina and the subsequent preparation of the Commission's report are extremely varied. Dr. Ekwall, who testified that he "didn't particularly want to be chosen [for the Commission]" (Tr. of January 14 at 128), stated that "[w]e did not have any guidelines as to what specific standard would be used." Tr. of January 14 at 131.

The Commission spoke to two guards for fifteen to twenty minutes. Tr. 147. Dr. Ekwall testified that he and the other psychiatrists spoke to a psychiatrist from the prison for approximately twenty minutes. Tr. 147. Dr. Gallemore said they spoke to her for twenty to thirty minutes. Tr. 253. Dr. Myers testified they spoke to her for less than ten minutes. Tr. 216. Dr. Gallemore testified that they all spoke to this doctor at the same time. Tr. 253-54. The testimony regarding even the physical environment in which the Commission conducted its evaluation and the number of people in the room was often contradictory. Dr. Ekwall testified that the room was about the same size as the room in which the lower court conducted the postconviction competency hearing. Tr. 152. Dr. Gallemore testified that the room at the prison was "much smaller than this . . . area encompassed by the paneling [bar]." Tr. 272. There were anywhere from ten to twenty people coming and going from the room during the Commission's meeting. Tr. 153, 210, 272. The discrepancies cannot be resolved by referring to a transcript of the proceedings because the Governor's office refused to provide a court reporter to transcribe the evaluations.

With respect to the Commission's report Dr. Ekwall testified that "each [member of the Commission] wrote a section of it, and then we combined them, and then we refined it." Id. at 135. Dr. Ekwall testified that "each doctor submitted a paragraph or two that he felt should be in the final letter to the governor, and then this was faxed to the other two." Tr. 137. But Drs. Myers and Gallemore testified that Dr. Ekwall did not draft any portion of the report. Tr. 196, 268.

The lower court was not justified in relying on the doctors' testimony and report in determining that Mr. Medina was competent to proceed. Even if the commission's report and testimony were credible, the lower court heard only the State's evidence. Mr. Medina requested the opportunity to have his experts present to assist his counsel with cross-examination of the State's experts and to present direct testimony to rebut the State's evidence that Mr. Medina was malingering. The lower court denied Mr. Medina that opportunity and relied only on the State's evidence in determining that Mr. Medina was competent to proceed. If Mr. Medina is entitled to a judicial determination of his competency to proceed, he is entitled to proceedings that comport with due process in which to make that determination.

The question of whether Mr. Medina has a right to a judicial determination of competency was brushed aside by the State's zeal to prove he was competent.[13] The State argued, as it did in

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Although § 922.07, Florida Statutes, and Executive Order 96-372 states that only counsel for Mr. Medina and the State Attorney were permitted to be present while the Commission met with Mr. Medina, the State Attorney also had an investigator there who was later used as a witness against Mr. Medina. Tr. of January 14 Hearing at 179-181. Investigator Fulford testified that she, Assistant Capital Collateral Representative Jennifer Corey and Assistant State Attorney General Paula Coffman were the only women present. Id. at 180. If this testimony is true, Ms. Fulford would have been the woman whom the doctors said reported to them on Mr. Medina's actions while the Commission was out of the room. Tr. 155.

[13]The State candidly admitted they were trying to circumvent the hearing contemplated by Fla. R. Crim. P. 3.812, by asserting that competency to proceed is a higher standard than competency to be executed. See Transcript of January 9, 1997, status conference at 13:

Carter, that Mr. Medina had no right to a judicial determination of competency. See State's Response to Motion to Determine Competency to Proceed in Postconviction. The State rested its argument on this Court's opinion in Jackson v. State. The State in its response argued that this Court had overruled Spalding v. Dugger and invalidated Ch. 27.7001, et. seq., Fla. Stat. in Lambrix v. State, 21 Fla. L. Weekly S365 (Fla. Sept. 12, 1996). The State then seemed to abandon that argument at the January 14

> MS. COFFMAN: I then think that it has been represented here this morning that a 3.811 will be forthcoming. I will not attempt to respond to the motion that is presently pending before this court at this particular time, which is the motion to determine competency to proceed under the 3.850, but I would state that, based on representation made by Mr. McClain before the court, in prior proceedings, I understand CRR's position to be that the standard that this court will be required to determine competency under would be higher, according to CCR, than the standard under 3.811. In other words, Mr. Medina must be even more sane to proceed under the 3.850 than he must be to be executed. I do not vouch for Mr. McClain's position in that regard. I simply point out that if that is going to be CCR's position, then resolving the motion to proceed, which is presently pending before this court, would moot out any 3.811 which is filed at some later date. It seems to me that Mr. McClain needs to file that other motion and have it heard, if he is going to have any chances of having it last very long without this court denying it, in the event that the motion which is presently pending is already denied at the -- at the time the 3.811 is filed.

See also State's Response to Emergency Motion To Vacate Judgment And Sentence at 19 ("Because this Court has found Medina competent to proceed, there is no colorable claim to him that he is incompetent to be executed").

hearing. Ultimately, the State took the position that there was no right, but just to be on the safe side, the court should hold a hearing to hear the State's witnesses testify that Mr. Medina was competent to proceed in postconviction. The lower court adopted the State's Alice in Wonderland analysis[14] and ruled that, although Jackson controlled and Mr. Medina had no right to a competency determination, the Court would hear the State's evidence that Mr. Medina was competent to proceed.

Not only did the court's procedures violate due process, but the standard the court adopted against which to measure Mr. Medina to answer the rhetorical question of whether he was competent to proceed in postconviction was contrary to law. The court adopted the Dusky standard, as announced in Dusky v. United States, 362 U.S. 402 (1960), which is whether the defendant has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding, and whether the defendant has a rational as well as factual understanding of the proceedings against him. Mr. Medina agrees that Dusky controls, but disagrees with how the lower court analyzed Dusky in the context of postconviction proceedings. The lower court relied on the questions raised in Fla. R. Crim. P. 3.211 regarding a defendant's competency to stand trial.

In addition to incorporating the Dusky standard, Florida Rule of Criminal Procedure 3.211 offers various considerations to

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[14]See Lewis Carroll, Alice's Adventures in Wonderland 115 ("No, no!" said the Queen. "Sentence first -- verdict afterwards.").

be appraised when evaluating a defendant's competency to be tried. These considerations include a defendant's capacity to appreciate the charges or allegations against him as well as the range and nature of possible penalties, to understand the adversary nature of the legal process, to disclose to counsel facts pertinent to the proceedings at issue, manifest appropriate courtroom behavior, and testify relevantly. Fla. R. Crim. P. 3.211 (2)(A)(i-vi).

While some of the Rule 3.211 considerations are applicable to postconviction proceedings, some are not, and, as explained further below, the nature of postconviction proceedings necessitates that additional considerations be weighed in evaluating Mr. Medina's competency at this time. However, whatever specific considerations are applicable, Mr. Medina submits that the Eighth and Fourteenth Amendments require, at a minimum, that Mr. Medina have a sufficient present ability to consult with collateral counsel with a reasonable degree of rational understanding and possess a rational and factual understanding of the proceedings against him. See Dusky.

Because Mr. Medina has the right to be competent during his postconviction proceedings, he must have the "capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense." Drope v. Missouri, 420 U.S. 162, 171 (1975), as well as have a "rational, as well as a factual, understanding of the pending proceedings." Dusky, 362 U.S. at 402. What exactly these

concepts mean in relation to postconviction proceedings is a matter of first impression in this State.

The Supreme Court of Wisconsin has recently provided some guidance in this area. In State v. Debra A.E., 188 Wis.2d 111, 523 N.W.2d 727 (1994), the Court addressed this very issue, first noting that "[c]ompetency is a contextualized concept; the meaning of competency in the context of legal proceedings changes according to the purpose for which the competency determination is made." Debra A. E., 188 Wis.2d at 124, 523 N.W.2d at 732. Because a defendant seeking postconviction relief is required to make numerous decisions and undertake various tasks, including "the decision to proceed with or forego relief," "whether to file an appeal and what objectives to pursue, although counsel may decide what issues to raise once an appeal is filed," and "assist[ing] counsel in raising new issues and developing a factual foundation for appellate review," id., the Supreme Court of Wisconsin held that, in accordance with Dusky, "a defendant is incompetent to pursue postconviction relief . . . when he or she is unable to assist counsel or make decisions committed by law to the defendant with a reasonable degree of rational understanding." Id. at 126, 523 N.W.2d at 732.

Mr. Medina submits that the approach undertaken by the Supreme Court of Wisconsin should be adopted by this Court, and that the Court should adopt the Dusky standard to the postconviction setting. As with Wisconsin's postconviction scheme, a postconviction litigant in Florida must undertake a

number of tasks which require rational and factual understanding of the proceedings and an ability to communicate with counsel with a reasonable degree of rational understanding. For example, a Florida defendant has the right to proceed or forego postconviction proceedings altogether. This Court has held that a competent postconviction defendant can waive collateral counsel. Durocher v. Singletary, 623 So. 2d 482, 483-85 (Fla. 1993). If a defendant must possess the requisite mental state to make a knowing, intelligent, and voluntary waiver in order to waive postconviction proceedings, a lesser standard of mental competency should not apply in order for a defendant to initiate and prosecute postconviction proceedings. "Safeguards to ensure that due process is followed," Durocher, 623 So. 2d at 485 (Barkett, C.J., specially concurring), surely apply not only in a Durocher-type scenario, but also when there is a bona fide question of a defendant's competency to proceed with a postconviction motion, as there is in this case.

Florida law also states that a postconviction litigant "must be able to affirmatively say that his allegation [contained in the Rule 3.850 motion] is true and correct." Scott v. State, 464 So. 2d 1171 (Fla. 1985). This verification must be under oath and subjects the litigant to a penalty of perjury. Scott, 464 So. 2d at 1172 (inclusion of "to the best of my knowledge" qualifying language in sworn verification not sufficient because "a defendant could file a motion for postconviction relief based upon a false allegation of fact without fear of conviction for

perjury"). In Gorham v. State, 494 So. 2d 211 (Fla. 1986), this Court emphasized that counsel for collateral defendants "must draft such motions with adequate specificity . . . in order for their client to review the allegations and verify the motion in accordance with the rule 3.987 oath." Gorham, 494 So. 2d at 212. In Anderson v. State, 627 So. 2d 1170 (Fla. 1993), a represented postconviction appellant argued that the oath/verification requirement was unnecessary when collateral litigants were represented by counsel. Id. at 1171. This Court, however, disagreed, and stressed the importance of the oath/verification requirement "to alleviate our concern about the use of false allegations in motions for postconviction relief." Id.

The oath and verification requirements apply to Mr. Medina. The State in its response argued that Mr. Medina's 3.850 motion should be dismissed because it did not contain a verification signed by Mr. Medina.[15] However, Mr. Medina is not competent to swear to the facts contained in the motion. Moreover, even if Mr. Medina had "a present ability to consult and communicate with postconviction counsel," he would still not be competent to swear to the facts in the motion, as he is required to do under Scott, Gorham, and Anderson, without a rational understanding of the proceedings and an ability to consult with counsel with a reasonable degree of rational understanding. Mr. Medina could have a "present ability to communicate with collateral counsel,"

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[15]At the Huff hearing held on January 21, 1997, the State abandoned this position.

yet what he communicates to counsel is simply the product of his hallucination-driven though process. For example, during the Huff hearing, the court suggested that Mr. Medina's counsel attempt to get a verification from Mr. Medina. Counsel met privately with Mr. Medina for 45 minutes, after which counsel reported to the court:

> MR. MCCLAIN: I'm sorry. I do not have a verification, Your Honor.
>
> THE COURT: Okay. Let's do a couple of things here. Court reporter's time is accurate when we took a recess, but I'll say it was somewhere around 10:45. Or 9:45, rather. It's now about 10:32.
>
> Mr. McClain, that really doesn't mean a lot to me, other than you don't have the signature . . . . When you say that you do not have a signature, you know, I know I'm not real bright, but I know what that means. Did Mr. Medina refuse to sign the document?
>
> MR. MCCLAIN: Your Honor, I tried to offer him something, but if I can back up and explain.
>
> THE COURT: Okay. But you don't want to lose sight of my question.
>
> MR. MCCLAIN: Yes, I don't want to lose sight of your question. But in terms of giving him the documents, first I wanted to explain what the document was, and what it said. In terms of trying to use phrases, like 3.850, he though that was a gun with fifty bullets. When I was trying to talk to him about the trial here, he says he has never been to the United States. He currently believes he is in Cuba. When I talked to him about -- you sent us back there to talk to him. He believes you are the farmer who owns the property where he is picking tomatoes. He is concerned that you are not happy that he has only picked one box of tomatoes this morning. When I talked to him about the people involved in the trial, Dorothy James, he said he didn't know who that was. When I talked

> to him about Joseph Daniels, he thought that that was the person who killed Bill Cosby's son.

Tr. 14-15, January 21, 1997 hearing. This quotation highlights the difficulty in requiring only that Mr. Medina be "able" to communicate with counsel. Mr. Medina should not be subjected to the risk of perjury in the absence of a finding that he is competent under the Dusky standard. See Lafferty v. Cook, 949 F. 2d 1546 (10th Cir. 1991) ("the view that factual understanding alone is sufficient . . . is totally contrary to the circumstances of Dusky itself and [] has been rejected by the cases applying the Dusky test").

Because of the significant role of the defendant in postconviction proceedings, the due process safeguards of the Dusky test must apply in the postconviction setting. First and most obvious, a defendant must be able to effectively communicate with his counsel with a reasonable degree of rational understanding. "A defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. . . The defendant must be able to provide needed information to his lawyer, and to participate in the making of decisions on his own behalf." Riggins v. Nevada, 112 S. Ct. 1810, 1820 (1992) (Kennedy, J., concurring in judgment). See also Lafferty v. Cook, 949 F. 2d at 1554-55 (rejecting the notion that "a finding of competency made under the view that a defendant who is unable to accurately perceive reality due to a

paranoid delusional system need only act consistently with his paranoid delusion to be considered competent").

The defendant's participation is essential in order to properly investigate the case and determine what issue may be present. Collateral counsel was not present at the trial, nor privy to any decisionmaking sessions regarding trial strategy, if such occurred. In fact, at the Huff hearing below, Assistant Attorney General Nunnelley argued:

> "Mr. Medina surely knows how many cigarettes Dorta gave him."

(1/21/97 T. at 36). The client's recollection of the trial, the relationship with trial counsel, and any discussions that took place with trial counsel are critical to providing effective assistance in postconviction. If witnesses were available at trial that would have provided helpful testimony and the client wanted that testimony presented at trial, collateral counsel must be able to obtain that information from the client in order to conduct the necessary investigation. If a defendant does not have the capacity to remember the trial, or any witnesses who testified at the trial, or other essential aspects of the trial or the investigation, or provide any information about potential avenues of investigation, then the defendant cannot be said to have the capacity to "consult with counsel with a reasonable degree of rational understanding" and the postconviction proceedings are rendered illusory. Cf. Pridgen v. State, 531 So. 2d 951, 955 (Fla. 1988) ("[i]f Pridgen was incompetent during the penalty phase of the trial, the tactical decisions made by him to

offer no defense to the state's recommendations of death cannot stand")

A postconviction defendant must also possess the capacity "to understand the nature and object of the proceedings against him." Drope, 420 U.S. at 171. Strategies and decisions that are made for postconviction proceedings are different than those for trial, and a defendant must have the capacity, both factual and rational, to at least understand the fundamental nature of the postconviction process in both state and federal court beyond simply knowing he wants a new trial. Cf. Durocher v. Singletary.

Further, a postconviction defendant must have the capacity to be present at and participate in an evidentiary hearing, listen to the testimony, and consult with counsel with a reasonable degree of rational and factual understanding about the testimony being presented. This Court had recognized that a postconviction defendant does not lose his right to fundamental constitutional guarantees during a postconviction evidentiary hearing. Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996). See also Evitts v. Lucey, 469 U.S. 387, 401 (if a state provides a right, even if discretionary, "it must nonetheless act in accord with the dictates of the Constitution -- and, in particular, the Due Process Clause").

In Jackson, Justice Overton observed that "competency of the defendant [in post-conviction] is significant only when there are factual matters in issue that must be determined." Jackson at 537. While undersigned counsel agrees with the basic premise,

they submit that a defendant's competency is also a prerequisite from the inception of the postconviction process, not only if there are "factual matters in issue that must be determined." As noted above, a defendant must sign under oath a sworn affidavit subjecting himself to perjury in order to even initiate a postconviction proceeding. The oath requirement comes into play well before there is a determination that factual matters may be at issue in the motion itself. The issue is not solely Mr. Medina's ability to "aid counsel in a post-conviction relief proceeding," id., as Justice Overton recognized, but must also include competency to proceed in the first instance, implicating by necessity the oath and verification requirement. If Mr. Medina cannot properly verify under Scott, Gorham, and Anderson, his motion will be subject to dismissal.

Further, Jackson was decided prior to the creation of the statutory right to collateral counsel. Following the creation of the Office of the Capital Collateral Representative in 1985, this Court in Spalding v. Dugger, 526 So. 2d 71 (Fla. 1986), held that collateral defendants were entitled to effective representation by CCR. Since Spalding, the Court has consistently affirmed that due process principles apply to a variety of aspects of collateral proceedings. See Maharaj v. State, 21 Fla. L. Weekly S387 (Fla. Sept. 19, 1996); Teffeteller v. Dugger, 676 So. 2d 369 (Fla. 1996); Spaziano v. State, 660 So. 2d 1363 (Fla. 1995); Johnson v. Singletary, 647 So. 2d 106 (Fla. 1995); Huff v. State, 622 So. 2d 982 (Fla. 1993); Rose v. State, 601 So. 2d 1181 (Fla.

1992). Inherent in due process and the right to effective representation is the requisite mental capacity of the defendant to proceed. "A defendant's right to the effective assistance of counsel is impaired when he cannot cooperate in an active manner with his lawyer. . . The defendant must be able to provide needed information to his lawyer, and to participate in the making of decisions on his own behalf." Riggins v. Nevada, 112 S. Ct. 1810, 1820 (1992) (Kennedy, J., concurring in judgment). Given that Mr. Medina has these rights, including the right to counsel, he must not be proceeded against while he is not competent under the United States Constitution.

Undersigned counsel's position regarding competency to proceed remains the same as it was before the lower court: the rule in Jackson has been superseded by changes in law and factual circumstances such that a defendant in postconviction has a right to a judicial competency determination; if this Court finds that such a right exists, Mr. Medina is entitled to fair notice and an opportunity to be heard; if no such right exists, neither the defense nor the State is entitled to a judicial competency determination in postconviction, and Mr. Medina is entitled to have an appealable ruling on his motion. In the proceedings below, Mr. Medina was deprived of "a reasonable opportunity to be heard," Huff v. State, 622 So. 2d at 983, as the State seems to have conceded by requesting a hearing in conformity with Huff on the 3.850 motion itself.

In conclusion, Mr. Medina requests that the lower court's order be quashed, and the case remanded with instructions that the determination of Mr. Medina's competency to proceed in postconviction include an assessment of Mr. Medina's mental condition consistent with the principles set forth above. To allow a postconviction defendant to proceed under a lesser standard of competency than required in the pre-trial setting, for example, is too risky given the "myriad" of decisions a litigant must make during the course of these proceedings. Cooper v. Oklahoma, 116 S. Ct. at 1382. "The importance of these rights and decisions demonstrates that an erroneous determination of competence threatens a 'fundamental component of our criminal justice system' -- the basic fairness of the [proceeding] itself." Id. (footnote omitted).

The lower court erred in determining that Mr. Medina had no right to a competency determination, then allowing the State to present witnesses to prove he is competent without giving Mr. Medina fair notice or opportunity to present his own evidence. The lower court erred further by restricting the Dusky standard to the issues set forth in Fla. R. Crim. P. 3.211 relating to pre-trial competency. Mr. Medina requests that this Court grant the stay, find that Mr. Medina is entitled to a judicial determination of his competency to proceed in postconviction, find that Dusky as modified for postconviction is the proper standard, and order that such determination take place in the

lower court under conditions that protect Mr. Medina's due process rights.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. MEDINA'S MOTION TO WITHDRAW AND FOR APPOINTMENT OF CONFLICT-FREE COUNSEL GIVEN THAT THE FACTUAL PREDICATE OF THIS COURT'S DECEMBER 5, 1996, RULING ON CCR'S EARLIER MOTION TO WITHDRAW NO LONGER OBTAINS.

On December 5, 1996, the Assistant State Attorney presented the Governor's Commission to Determine the Mental Condition of Pedro Luis Medina with affidavits alleging that Mr. Medina's CCR lawyers told him to "play crazy" in order to avoid execution. The Commission relied upon these affidavits in reaching its conclusions. Commission's Report at 1-2. The State also submitted to the Commission Mr. Medina's complaint in Medina v. Minerva, Case No. 95-144-CIV-J-20 at 31-33 (M.D.Fla. February 15, 1995), which contains other allegations that CCR attorneys committed unethical conduct by telling him to "act crazy in front of guards."[16] The State has used these allegations, and the allegations made by Mr. Medina against Michael Minerva, Gail Anderson, and Judith Dougherty, together with misleading affidavits alluding to them to convince its experts and the lower court that Mr. Medina is feigning mental illness. Although the

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[16]Since CCR was not provided with the information given to the Commission until Judge Conrad ordered Assistant State Attorney Paula Coffman to provide it on January 14, 1997, CCR could not have presented this fact in its Second Motion to Withdraw filed in this Court on December 5, 1996, or in its motion in the circuit court which was heard and ruled on before the State revealed what was submitted to the Commission.

Attorney General's Office told this Court that it was withdrawing the allegations and affidavits before the commission, this was not done. Thus, the facts today are different from those before this Court on December 5 and from those before the circuit court on January 14. The lower court's conclusion that "this issue has previously been completely and fully resolved at the appellate level," Order Denying Motion to Withdraw, is erroneous and the order should be reversed.

At the hearing on CCR's motion to withdraw, Assistant State Attorney Paula Coffman stated

> That motivation on the part of CCR is an issue when we look at the history of this case, judge. They did not feel that they were conflicted in any way when they represented their client, John Mills, literally on the eve of his execution. The last night that he spent on this planet, one of their lawyers sat there and asked him questions, and it's real clear, at least to me, by what has been stated this morning, that at least one of the primary motivations on the part of CCR for doing that was to clear their own professional reputation....I think it's fair for this court to look at CCR's motivation at this juncture...It's very clear that they had grounds for this motion back on December 5 when they made the motion to the Florida Supreme Court.[17]

* * * *

[17]Two things should be noted about Ms. Coffman's argument. First, she is not aware of counsel's state of mind at the time of the John Mills deposition. In fact, counsel were deeply troubled by the decision and only proceeded based on Mr. Mills' gracious and courageous offer go ahead. Second, Ms. Coffman is correct that CCR had grounds for its motion on December 5. However, as noted supra, more grounds are known to exist today than were know even at the time she was arguing against counsel's motion to withdraw.

> If I heard her correctly, Ms. Corey stated that they chose Mr. Medina when they decided to depose John Mills on December 5. The way I see it, they chose themselves.

Transcript of January 14, 1997, Hearing before Judge Richard Conrad at 21-22 (emphasis added) (hereinafter Tr. of January 14 Hrg.). Ms. Coffman is wrong in one respect but right in another.[18] CCR chose both Mr. Medina's interests over those of Mr. Mills (although it speaks to Mr. Mills' noble character that he was more than willing to give of what little time he had) and CCR acted out of professional self-interest. What Ms. Coffman and the circuit court failed to recognize is that these actions were violations of the duty of loyalty under Florida law, violations that under federal law raise concerns that Mr. Medina's due process rights are in jeopardy, and violations counsel were forced to make by the State's actions.

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[18]Ms. Corey agreed in large part with what Ms. Coffman had said. Ms Corey told the court below

> And Ms. Coffman says what's important is what, in fact, Mr. Medina said, not whether it's true that we told him to act crazy. So in order to defend ourselves, as attorneys and members of the Bar, we have to say our client is a liar. I think that is the essence of the conflict.

Tr. of January 14 Hrg. at 26. Ms. Corey pointed out that the duty of loyalty implicates Mr. Medina's due process rights in that the failure of his attorneys fully to present his case due to circumspection or concern for their own interest, Mr. Medina is not being a afforded a full and fair hearing. Id. at 29. Ms. Corey also agreed with Ms. Coffman's assertions regarding counsel's self-motivation. Id.

Rule 4-1.7(b), Rules Regulating the Florida Bar, requires that

> A lawyer shall not represent a client if the lawyer's exercise of independent professional judgment in the representation of that client may be materially limited by the lawyer's responsibilities to . . . the lawyer's own interest, unless:
>
> (1) the lawyer reasonably believes the representation will not be adversely affected; and
>
> (2) the client consents after consultation.

R. Regulating Fla. Bar 4-1.7(b). According to the Comments on the Rule, Ms. Coffman was also correct to bring these issues to the lower court's attention. Comments to R. Regulating Fla. Bar 4-1.7 (conflict charged by opposing party in criminal matter). The Comments also state that

> The lawyer's own interest should not be permitted to have adverse effect on representation of a client. . . . If the probity of a lawyer's own conduct in a transaction is in serious question, it may be difficult or impossible for the lawyer to give a client detached advice.

Comments on R. Regulating Fla. Bar 401.7 (lawyer's interests). The allegations leveled against Mr. Medina's counsel, and which continue to be repeated, have made counsel circumspect in their actions to the extent that Mr. Medina's right to "detached," zealous advocacy has been impaired. They have also had an adverse impact on Mr. Medina in so far as the continued representation by CCR would be seen as evidence supporting the Commission's determination that Mr. Medina is malingering.

Merely having the same counsel whom the Commission was told Mr. Medina to "act crazy" prejudices Mr. Medina in the eyes of the Commission and, since the lower court relied on the Commission's report, in the eyes of the court as well.

Due to the circumstances created by the State's allegations, CCR is not even in a position to consult with Mr. Medina about the conflict or any other matter for fear that either they and he will face further allegations.[19] As stated to the lower court, Mr. Medina's counsel had initiated no contact with Mr. Medina since the Commission met on December 5. Mr. Medina, a severely mentally ill human being, was forced to spend more than a month and a half with a death warrant hanging over him without the benefit of communicating with anyone from his legal team, even if just to hear a friendly voice.

Case law interpreting the disqualification of court-appointed counsel where a conflict arises under Rule 4-1.7(b) holds that the proper point of inquiry is whether "counsel's perceived conflict between his own interests and [defendant's] interests" impairs the defendant's right to competent, conflict-free counsel. Williams v. State, 622 So. 2d 490, 492 (Fla. 4th DCA 1993); see also, Roberts v. State, 670 So. 2d 1042 (Fla. 4th DCA 1996). Only if lines of communication are open and

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[19]This fact is not mitigated by the circumstance of Mr. Medina's mental problems which make futile any attempt at meaningful attorney-client communication. On the contrary, it further emphasizes the need for Mr. Medina, who has been under an active death warrant since January 6, to have someone appointed to represent his interests exclusive of all others.

representation is not impaired may counsel with a personal conflict against the client's interests remain on the case. See, e.g., Boudreau v. Carlisle, 549 So. 2d 1073 (Fla. 4th DCA 1989). Here, the lines of communication are not open and any attempt to change that circumstance would be used against Mr. Medina by the State.

The conflict faced by the team appointed to represent Mr. Medina after previous CCR counsel were forbidden to communicate with him--Litigation Director Martin McClain, Assistant CCR Jennifer Corey, and Staff Attorney Tim Schardl--has prevented them from fulfilling their duty of loyalty to Mr. Medina. R. Regulating Fla. Bar. 4-1.7. "The Supreme Court has emphasized that when counsel is burdened with a conflict of interest, she 'breaches the duty of loyalty, perhaps the most basic of counsel's duties' and has therefore failed to provide effective assistance of counsel." Hamilton v. Ford, 969 F.2d 1006, 1011 (11th Cir. 1992), quoting, Strickland v. Washington, 104 S. Ct. 2052, 2067 (1984). Mr. Medina is entitled to effective representation in collateral relief proceedings. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1988).[20]

Although no federal right to effective assistance of collateral counsel has been recognized, the Eleventh Circuit has

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[20]Moreover, this Court's October 23, 1996, administrative Order establishing the procedure for providing conflict-free counsel to capital collateral defendants is premised upon the continued vitality of Spalding. This Court's administrative Order presupposes that CCR must withdraw from those cases in which there is a conflict of interest.

held that problems with representation in postconviction can ultimately implicate a denial of due process. Zeigler v. Wainwright, 805 F.2d 1422, 1425-1426 (11th Cir. 1986). The court fulfilled its "obligation to oversee the efficient administration of justice" and remanded Mr. Zeigler's habeas petition with instructions that the court resolve the problems with counsel and grant Mr. Zeigler additional time to amend his petition. Addressing the issue of counsel's willingness and ability to effectively present Mr. Zeigler's habeas petition the Eleventh Circuit state that

> The Constitution requires that when the fact or timing of an execution is contingent upon the resolution of a disputed issue, then that issue must be determine "with the high regard for truth that befits a decision affecting the life or death of a human being." Ford v. Wainwright, [477] U.S. [412] (1986) (plurality opinion).

Zeigler, 805 F.2d at 1426. The Eleventh Circuit's concern for the administration of justice is echoed in the Comments to Rule 4-1.7 which state that opposing counsel may bring the nature of the conflict to the attention of the court, as Ms. Coffman did below, "[w]here the conflict is such as clearly to call in question the fair or efficient administration of justice."

Where an attorney is forced by an accusation of wrongdoing to assume a position adverse to that of the client, both sides acknowledge the conflict, and lines of communication are closed, there is an actual conflict requiring disqualification. Roberts v. State, 670 So. 2d 1042, 1944 (Fla. 4th DCA 1996) distinguishing Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986)

and Weems v. State, 645 So. 2d 1098 (Fla. 4th DCA 1994), review denied, 654 So. 2d 920 (Fla. 1995) (disqualification requires more than "defendant's dissatisfaction with his counsel's [performance]").[21] All three of these conditions obtain in this case.

This case is most like United States v. Hobson, 672 F.2d 825, 828 (11th Cir. 1982). The Eleventh Circuit held that Hobson could not retain his counsel because "public suspicion" about his attorney's motives outweighed his interest in retaining that attorney. Id. at 828. Hobson's attorney was to be accused by a witness of having knowledge of the drug smuggling operation in connection with which Hobson was charged. The "likelihood of public suspicion" about Hobson's attorney prejudicing Hobson himself required that the attorney be disqualified. So too with Mr. Medina. Although there is no jury at issue here, there has already been a determination by the lower court that Mr. Medina is competent. That determination was based in part on the opinions of experts who stated their belief that Mr. Medina's attorneys told him to act crazy. The prejudice to Mr. Medina and

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[21]Public perception of the fairness of the criminal justice system is one rationale for requiring disqualification in circumstances such those present here. See United States v. Hobson, 672 F.2d 825, (11th Cir. 1982), rehearing denied, 677 F.2d 117, cert. denied, 103 S. Ct. 208 (1982) (public confidence in profession and legal process may be eroded by allowing attorney whose character had been seriously impugned to continue representation). Undersigned counsel appeals to this Court to prevent the corrosive effects on the public's confidence of having counsel who are ruled to have a conflict be appointed to represent a defendant whose execution is imminent.

the suspicion cast on the proceedings as a whole could not be greater.

Another factual issue that distinguishes the existing factual situation from that on December 5 is created by the need for Mr. Medina's counsel to be witnesses in any proceedings pursuant to Mr. Medina's motion for judicial determination of his competency to proceed in postconviction or pursuant to Rule 3.811. Assistant State Attorney Coffman recognized this exigency and stated at the hearing on January 14: "Seems to me it would make sense for Mr. Schardl to not argue this motion on behalf of CCR, so that he is available to be a witness in the case." Tr. of January 14 Hrg. at 19-20. She was quite right. Mr. Schardl was already assisting Ms. Corey in arguing the motion to the lower court, however. Judge Conrad recognized the difficulty that Ms. Corey would have examining herself at the hearing.

It is well-settled that an attorney should be permitted to withdraw where he or she will be a necessary witness in the proceedings. See, e.g., Live and Let Live, Inc. v. Carlsberg Mobile Home Properties, Ltd.-'73, 388 So. 2d 629 (1st DCA 1980) (applying more lenient Disciplinary Rules and Ethical Considerations as opposed to the Model Rules used today); R. Regulating Fla. Bar 4-1.7(b). Because of the State's allegations must be rebutted in order to impeach the Commission's conclusions, and because the Governor's Office refused to allow the Commission's meeting to be transcribed or recorded, Ms. Corey and Mr. Schardl are necessary witnesses in any proceedings

regarding Mr. Medina's competency. As Ms. Coffman argued at the January 14 hearing, Mr. Schardl should have been disqualified at that time, prior to the circuit court's ultra vires proceedings on Mr. Medina's competency to proceed in postconviction.

Lastly, but perhaps most importantly, the facts have changed with respect to the deposition of John Mills taken the night before his execution. In denying both the Motion for Writ of Habeas Corpus as Testificandum and for Stay of Execution, and the Motion to Withdraw as Counsel, this Court could assume that CCR would have no conflict between Mr. Medina and another client. Now, the Assistant State Attorney in this case asserts the existence of CCR's conflicting actions in taking the deposition in a hearing with Mr. Medina present.[22] Tr. of January 14 Hrg. at 22. CCR cannot be put in the position of having attorneys for the State telling their clients that CCR lawyers pick and choose between the interests of clients. This is the essence of a conflict implicating Rule 4-1.7(a) and the imputed disqualification rule. R. Regulating Fla. Bar 4-1.10(a).

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[22]It should be noted that but for Mr. Medina's persistent delusional state at the hearing, he would have had cause again to seek removal of CCR from representing him. Yet again, this does not resolve the issue but rather place it in sharper relief given the fact that Mr. Medina cannot appreciate the adverse consequences of being represented by counsel whose very actions the state uses against him. This is another reason to find that someone in postconviction must be competent to proceed: if there is a conflict, an incompetent client could not possibly assert or waive it. Cf. Larzelere v. State, 676 So. 2d 394, 403 (Fla. 1996), citing United States v. Rodriguez, 982 F. 2d 474 (11th Cir.) cert. denied, 114 S. Ct. 275 (1993).

The comments to the rules state that "[a] client seeking to [discharge appointed counsel] should be given a full explanation of the consequences." Comments to R. Regulating Fla. Bar 4-1.16.

Needing to call other client's as witnesses also puts CCR in danger of violating Rule 4-1.8(b), Rules Regulating Florida Bar. CCR would be put in the position of using information about Mr. Medina but obtained from other clients to Mr. Medina's advantage but the peril of the witness-client. Any CCR clients called to testify to Mr. Medina's prior behavior would be subjected to cross-examination and possible impeachment by the State. The State could then use anything reflecting negatively on the testifying client to impeach that client in later postconviction proceedings.

The current posture of this case presents a situation where Mr. Medina's counsel have already deposed one client to refute allegations against CCR and Mr. Medina. CCR will also need to call as witnesses many other death row inmates who can testify to Mr. Medina's long history of psychotic behavior since going to death row in 1983. For example, the State has used the civil rights complaint filed by Mr. Medina against CCR as evidence of Mr. Medina's sanity. Tr. of January 14 Hrg. at 37. As Ms. Corey informed the court below, another CCR client has informed counsel that he wrote the complaint which Mr. Medina copied in his own hand. Id. at 38. Other CCR clients can testify to Mr. Medina's long-established reputation for throwing and inhaling his feces. Other CCR clients have volunteered their own memories of Mr. Medina's bizarre and delusional behavior including a habit of writing letters to himself, talking to himself, talking to the walls, and talking to imaginary people in his cell.

Again, this set of circumstances is due to the State's continued use of highly suspect affidavits. In response to CCR's December 5, 1996, Motion to Withdraw and Petition for Writ of Habeas Corpus ad Testificandum, the Attorney General represented to this Court that "the respondent withdraws the affidavit hereupon and allegation herewith." This promise was contingent on the Court finding it had jurisdiction. This Court denied rather than dismissed the motion and petition and therefore took jurisdiction. Yet the affidavit and allegations were not withdrawn thereupon and therewith.

The State also dropped its opposition to the deposition after the Court's Order issued. The present situation is the result. CCR, believing the State's representation that the affidavits and allegations were withdrawn, and relying on the State's abandonment of opposition to the deposition proceeded to depose John Mills and continue representation of Mr. Medina. Now the fact that CCR took Mr. Mills' deposition is being used as the basis for a charge of unprofessional conduct and the allegations in the affidavits contributed to the denial of Mr. Medina's 3.811 motion.

The situation is analogous to the facts of Roberts v. State, 670 So. 2d 1042 (Fla. 4th DCA 1996). In Roberts the defendant was permitted to withdraw his guilty plea after he claimed it was coerced by his attorney. The District Court of Appeals held that the attorney should have been permitted to withdraw based on the conflict created between his own interests and those of Roberts,

a conflict based on Roberts's allegations. Id. at 1044. Similarly, Roberts was permitted to withdraw his plea and not to proceed until conflict-free counsel was appointed. Id. at 1044-1045.

Mr. Medina should be permitted to have a new 3.811 and 3.850 competency determination free of the taint and prejudice created by the State's allegations against his attorneys. Due process, if not Mr. Medina's right, recognized by this Court, to conflict-free counsel in postconviction, demands no less.

No CCR attorneys should be permitted to represent Mr. Medina. The State has used the allegations against Mr. Medina's former CCR counsel to taint the integrity of his current representation in the eyes of the courts and expert witnesses. At this point, Michael Minerva, the head of CCR is prohibited from meeting with Mr. Medina by court order. His former attorney, Assistant CCR Gail Anderson is impeded by the same order. Now, the second-highest ranking lawyer in the CCR firm, Litigation Director Martin McClain, as well as Assistant CCR Corey and Staff Attorney Schardl, have been implicated in telling Mr. Medina to "act crazy." As Ms. Corey stated at the January 14 hearing, it is now days before Mr. Medina's scheduled execution and CCR is running out of non-conflicted lawyers to represent Mr. Medina. It should also be noted that at least one investigator, Paul Mann, is also implicated in the conflict because he met with Mr. Medina.

In sum, there are several legal grounds for granting withdrawal at this time. There is an actual and serious conflict between Mr. Medina's interests and the personal interests of his attorneys in contravention of Rule Regulating the Florida Bar 4-1.7(b). There is an actual conflict between Mr. Medina's interests in his attorney's duty of loyalty and duty of confidentiality caused by the necessity of his attorneys being witnesses in any proceedings. There is an actual conflict between Mr. Medina's interests and those of CCR's other clients caused by the need to have other clients rebut the allegations that Mr. Medina wrote the civil rights complaint filed against CCR, and that he only began acting strangely on December 2, 1996. CCR, like a public defender's office is a "firm" for purposes of Rule Regulating the Florida Bar 4-1.10(a). See Judge Powell's Order on CCR's Motion to Withdraw; see also, Kirkland v. State, 617 So. 2d 781 (Fla. 4th DCA 1993). Based on the State's past and current litigation strategy, any outstanding allegations against current or past CCR counsel will be imputed to future CCR counsel.

There can be no alternative but to permit CCR to withdraw from representing Mr. Medina and allow him to present his legitimate constitutional challenges to his conviction and sentence and to the imposition of the death sentence while he is insane, without the prejudice engendered by the allegations against his CCR counsel.

ARGUMENT IV

MR. MEDINA WAS DENIED A FULL ADVERSARIAL TESTING OF CRITICAL EXCULPATORY EVIDENCE DURING THE GUILT/INNOCENCE AND PENALTY PHASES OF HIS TRIAL. MR. MEDINA'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED AND CONFIDENCE IN THE RELIABILITY OF THE VERDICTS IN MR. MEDINA'S CASE WAS UNDERMINED BECAUSE EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY. THE LOWER COURT ERRED IN DENYING MR. MEDINA'S CLAIMS WITHOUT AN EVIDENTIARY HEARING.

When Orange County Sheriff's deputies first began talking to the friends and family of Dorothy James, two names came up as likely suspects. The difference between the two is that the defense knew about the first man, but the state never disclosed the existence of the second. See App. 15.

In November, 1996, pursuant to a public records request by Mr. Medina's counsel, the OCSO released twenty pages of handwritten notes. These notes had not been provided to trial counsel, and were never provided to postconviction counsel before now. See App. 11, 14, and 15. The notes indicate the existence of a suspect the defense knew nothing about. At the 1988 evidentiary hearing, the entirety of the Sheriff's Medina file was introduced as Defense Exhibit 4. These twenty pages of notes were not then disclosed as an examination of the record demonstrates.

The defense did know about Billy Andrews, a/k/a Willie Andrews, who had been the victim's boyfriend and lived with her until a few months prior to her death. He once had a key to her apartment, the locks were never changed, and he had beaten and

threatened the victim. Newly discovered evidence reveals that a man fitting Andrews' description was seen looking for the victim's apartment the night of the murder.[23] Affidavit of Linda Sue Sellers at ¶ 2, attached to Rule 3.850 motion as Exhibit 5. This description also fits Joseph Daniels, but does not fit Pedro Medina. Newly discovered notes of police interviews with witnesses reveal previously undisclosed evidence regarding Billy Andrews: "Boyfriend used to live w/her (Billie Andrews, B/M) dark skinned, 6', 175; some grey in hair, - work at airport - sky cap - has had problems a lot, take her car when he wanted, other women, even after he moved out. he [sic] would drive by apt. Thurs or Fri he has been following her a lot. She was afraid of him. He had hit her a couple of times, take money from her & her daughter. She has been receiving phone calls (hang up)."

The newly-discovered notes reveal a second name that trial counsel never knew, that of Joseph Daniels. Apparently, Daniels was also involved with Ms. James. See App. 4. The notes of Detectives Nazarchuck and Payne indicate that Ruby Pate, who would later become a witness for the State, told the detectives on April 6, 1982, the day after the body was found, that Daniels had taken Ms. James "out of town w[ith] him." Id. Ms. James also told Ms. Pate that Daniels "insisted they be friends - Said he wanted her and never failed to get what he wanted." Id.

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[23]Police reports of Ms. Sellers' statement erroneously report that she saw this man a day before the day of the murder.

These notes indicate the OCSO had a description of Daniels, knew where he worked and where he lived, knew his marital status and the occupations of his "2 wives." Id. The facts about Daniels obtained from Ms. Pate confirmed what the detectives learned a day earlier when they interviewed "girls in [apartment]." Id. The notation that Daniels "insisted" on having some sort of relationship with the victim would also be echoed in the undisclosed statements of other witnesses.[24]

Ms. Pate's initial statement to the investigators implicating Daniels is supported by what Arnita James, one of the victim's daughters, told them a few hours earlier. Arnita James told investigators Daniels's age ("58"), and that he "has a red car w[ith] a lot of glass." App. 4. The most chilling thing Arnita told the detectives, in light of Ms. Pate's statement, was that Daniels "[s]aid if I can't have he[r] no one will." Id.

Yet a third person told Detectives Nazarchuck and Payne about Daniels. The just-disclosed notes refer to Sharon Alexander as a "close friend" of the victim. Id. According to the notes, "Daniels made a threat that He [sic] would get her (meaning Dorothy)." Id. Ms. Alexander's name does not appear in the State's response to the defense's demand for discovery (R. 1531). See also App. 15 at ¶ 3. Collateral counsel have found

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[24]Ruby Pate is unavailable as a witness due to Alzheimer's disease. See App. 12 of Appendix to Rule 3.850 motion. Any prejudice to Mr. Medina's ability to prove up this claim is directly attributable to the State's improper withholding of this exculpatory evidence for fourteen years.

no mention of her in the written reports or statements produced by the OCSO.

Trial counsel Ana Tangel-Rodriguez was never provided with these handwritten notes. The State never disclosed to her that a man named Joseph Daniels was a suspect. See App. 15. As trial counsel currently states:

> I, Ana Tangel-Rodriguez, under penalties of perjury, state the following:
>
> 1. I am an attorney licensed to practice law in the State of Florida. In 1982, I was appointed by Judge Rom W. Powell to serve as co-counsel with Warren Edwards to represent Pedro Medina at his capital trial. Pedro was tried for first-degree murder of Dorothy James. We sought discovery from the State of all exculpatory evidence in its possession.
>
> 2. One of the State's witnesses was Reinaldo Dorta. Dorta testified he saw Pedro near the victim's residence on the night of the murder wearing a hat similar to one found in the victim's residence. I was never told by the prosecutor, Ray Sharpe, or anyone in the Orange County Sheriff's Office, that Dorta was a suspect in cases.
>
> 3. Warren Edwards' and my theory of defense was that the police stopped investigating after they focused on Pedro, and that other viable suspects were ignored. I was never told by the prosecutor or anyone in the Orange County Sheriff's Office that a man named Joseph Daniels was developed as a suspect in the murder of Dorothy James. Had we been aware that the police were told that an individual named Joseph Daniels had threatened Dorothy James shortly before her death, we would have presented such evidence. We did not know that the police were told that the victim "was afraid of him," that "he had threatened her several times," that he had "said if I can't have he [sic] no one will," and that "Daniels made a threat that He would get her (meaning Dorothy)." This

> evidence would have been extremely important as it corroborates our defense at trial. Had we had such evidence, I believe that the outcome of the trial and penalty phase proceedings would have been in doubt.
>
> Under penalties of perjury, I declare that I have read the foregoing Declaration of two pages and declare that the facts stated in it are true.

It would have been very clear to Detective Nazarchuck before the trial that the defense's theory was that someone else with a relationship to the victim committed the murder. See R. 1215-1235 (Transcript of Nazarchuck Deposition). Yet, when asked if there was anything he had not disclosed to the defense about his investigation, Detective Nazarchuck replied, "I think you'll find everything in my report or in the witnesses' statements which you should have" (R. 1232). Collateral counsel are prepared to present evidence and to confront Det. Nazarchuck with all the written reports and statements previously disclosed by him in order to test the veracity of the sworn statement and establishes that defense counsel were never given these notes.

Mr. Nolas, Mr. Medina's previous collateral counsel, has stated as follows:

> 1. My name is Billy Nolas. I am attorney licensed to practice law in the State of Florida. Between 1986 and 1991, I was employed by the Office of the Capital Collateral Representative (CCR) in Tallahassee, Florida. In this capacity, I represented Pedro Medina and pursued on his behalf collateral remedies.
>
> 2. In 1987, CCR filed a Rule 3.850 motion on Mr. Medina's behalf. I assisted in the preparation of that motion.

3. In 1988, I undertook lead counsel responsibilities for on Mr. Medina's case and conducted on his behalf an evidentiary hearing before Judge Powell in the Florida circuit court. During the hearing, I was called away due to other emergencies arising from the pendency of active death warrants.

4. Subsequently, I continued as lead counsel for Mr. Medina during his appeal of the denial of Rule 3.850 relief in the trial court.

5. In conjunction with my duties representing Mr. Medina, I oversaw the collection of public records pursuant to Chapter 119. I reviewed all material that was received from the State Attorney's Office and the Orange County Sheriff's Office. This was necessary for the development of available claims, the presentation of a Rule 3.850 motion and for conducting the evidentiary hearing. I believed that I had received all available public records. I was led to believe this by the representatives of the relevant state agencies such as the Sheriff's and State Attorney's office. The State, through Assistant State Attorney Jeff Ashton and Assistant Attorney General Richard Martell (and Barbara Davis on appeal) never indicated that all public records had not been disclosed. No other state representative (or law enforcement agent) said complete records had not been disclosed. No exemptions were claimed. We were told we had everything and there was no indication that anything was being held back.

6. Shortly before the drafting of this affidavit I was provided documents by Mr. Medina's current collateral counsel. These documents include: (1) handwritten notes clearly made by investigating law enforcement officers on April 5th and 6th, 1982; (2) handwritten notes regarding what a state attorney investigator had to say regarding a witness by the name of Dorta; and (3) two letters from and to Assistant Attorney General Shawn Briese regarding a habeas action filed by Dorta against Judge Rom Powell and Sheriff Lawson Lamar. Having reviewed these documents, I can categorically

state that these documents were not provided to CCR when public records requests were made at the time that I represented Mr. Medina. In fact, I was affirmatively led to believe that documents such as these (which obviously provide information helpful to the defense and very relevant to Mr. Medina's case) did not exist because everything purportedly had been provided.

7. I am certain that these items were not previously disclosed because the new items are of extreme significance. Had I known of these items before, I would have presented claims based upon them. There is no question about this at all. First, the handwritten notes from April of 1982 indicated that the police were immediately given two names of suspects who had recently threatened Dorothy James, the victim in this case. One of the names was Joseph Daniels. This name was not previously disclosed to me. Given that the police were told that the victim was "afraid of him", that "he had threatened her several times", that he had "said if I can't have he [sic] no one will" and that "Daniels made a threat that He would get her (meaning Dorothy)", had I known of these handwritten notes I would have investigated, pursued, and developed with further investigation and presented a claim based on these notes. Clearly, these notes support the defense at trial. They indicate that someone else, not Mr. Medina, did it and that the police failed to investigate once Pedro Medina was arrested. These notes strongly support, further and advance the defense presented at trial. I would have investigated to see if trial counsel were advised about Joseph Daniels. If they were not, then I would have presented a claim under Brady v. Maryland and its progeny, including similar cases such as Troedel v. Wainwright, Arango v. State, and Roman v. State. If counsel had information such as this but failed to pursue it, I would have presented an ineffective assistance of counsel claim given the critical nature of this information and the lack of any conceivable tactical reason for not using it. Indeed, it directly fits with the defense counsel presented in closing argument at the

trial, although defense counsel never used/introduced the evidence directly establishing that the defense was real and Mr. Medina was innocent.

8. Mr. Medina himself consistently indicated to me, through many years of representation, that he was innocent. I certainly would have used the notes described above. I was never provided with them.

(App. 8). Mr. Nolas' co-counsel, Judy Dougherty, has stated:

1. I am an attorney licensed to practice law in the State of Florida. In 1987-88, I was an Assistant Capital Collateral Representative with the Office of the Capital Collateral Representative (CCR). In 1987-88, I represented Pedro Medina in postconviction proceedings before Judge Rom W. Powell in Orange County, Florida. Pedro had been convicted of killing Dorothy James.

2. In investigating Pedro's case, we concentrated on leads the police had but failed to follow up on. Pursuant to my public records request, the Orange County Sheriff's Office had released a police report indicating that a neighbor of Dorothy James, Linda DeLoach, told police she heard banging next door on the night of April 3, 1982. The report reveals that Ms. DeLoach told police she looked out her door, and saw a black male, 5'10, 185 pounds, banging on Dorothy James's door. Because the State placed the time of death between 8:00 p.m on April 3 to 2:00 a.m. on April 4, I felt it was possible that the man Ms. DeLoach had seen was involved in Dorothy James' murder.

3. I instructed my investigator to locate Ms. DeLoach. He was unable to locate her.

4. I have reviewed the twenty-two pages of handwritten notes from Detective Nazarchuk's intelligence file that the Orange County Sheriff's Office released to Pedro's CCR lawyers in November, 1996. Those notes were not provided to me in 1987-88. We were never provided with the name of Joseph Daniels, or the information that witnesses

told police that Daniels had threatened Dorothy James, and that Daniels was a suspect in the murder of Dorothy James.

5. I have also reviewed the two pages of handwritten notes relating to Reinaldo Dorta, the letter to Assistant Attorney General Shawn Briese from District Court of Appeal Judge Winifred Sharp, and the letter from Mr. Briese to Judge Orfinger, released to Pedro's CCR lawyers in November, 1996, by the Attorney General's office. None of these records was ever released to me by any state agency in 1987-88.

(App. 7).

The constitutional sin of omission committed by law enforcement was further compounded by the prosecutor's closing argument. Mr. Medina's attorney argued persuasively that the identity of the killer remained unknown because the OCSO abandoned the investigation of other suspects once Mr. Medina was found in the victim's car. No forensic evidence linked Mr. Medina to the murder scene: none of the fingerprints found matched his, no hair or fiber evidence was analyzed, and no serological evidence tied Mr. Medina to the scene. Mr. Medina admitted leaving his hat there when visiting with the victim before she died. The only evidence presented by the state that Mr. Medina spent any time in the victim's apartment on the night of the murder came by inference from the testimony of Reinaldo Dorta.

The prosecutor told the jury:

Now, the State called every witness in this case that had any knowledge of information about it. We didn't hide the first thing. Sure, we called experts that had some inconclusive opinions. We didn't

> hide a thing from you. We let everything come in. You have it all.
>
> And it's always a common practice for the Defense to say the police could have done this, the police could have done that, they could have done something better. But here it is. You have got it all.

State's Closing Argument at R. 791. He also implied that the victim would never have opened her door for people selling marijuana (R. 799-800), Mr. Medina, however, testified at trial that Dorothy James' murder may have been related to a Cuban drug ring that had a vendetta against Mr. Medina. Mr. Medina received his mail at Ms. James' address, so he testified the drug gang may have retaliated against the victim to strike at Mr. Medina (R. 682-85).

New information undermines the prosecutor's argument, supports Mr. Medina's theory of the case, and shows that the state affirmatively withheld certain information.

Ernest Arnold, another prosecution witness, has given a sworn statement suggesting Detective Nazarchuck attempted to suppress information that would have supported Mr Medina's version of the facts and that is directly contrary to the prosecutor's statements about Dorothy James. In his affidavit, Mr. Arnold that there were two marijuana "joints" in the ashtray in Ms. James's apartment when he and his fiance discovered the body. Affidavit of Ernest Arnold at App. 6. Mr. Arnold goes on to state that "Detective Nazarchuck told us not to say anything about it." Id. at ¶ 4.

Although the prosecutor permitted Mr. Arnold and his fiance, Arnita James, to testify that Dorothy James never let other people drive her car, the newly disclosed notes reveal that these witnesses told law enforcement on the first day of the investigation that Billy Andrews would take the car "when he wanted." App. 4.

Additional new information supporting Mr. Medina's version of events comes from facts learned about Reinaldo Dorta, State witness described by Assistant State Attorney William Sharpe as "the only witness that could even put Mr. Medina in the apartment complex that the victim lived in." (H. 368).

Until the Attorney General's Office released records about Mr. Medina in November of this year, neither collateral counsel nor trial counsel for Mr. Medina were aware that Mr. Dorta sued Judge Rom W. Powell and the Sheriff of Orange County in order to obtain release from custody. See Affidavit of Judith Dougherty at ¶ 5, at App. 7. Mr. Nolas has stated in an affidavit:

> 9. I am also certain I was I not provided with the notes indicating that Dorta was a "suspect in the cases". Certainly, if I had I known that Dorta was considered a "suspect" in any criminal matter I would have investigated why no cross-examination occurred regarding the fact that Dorta was a suspect. Clearly such cross-examination was highly relevant under Davis v. Alaska, yet it did not occur. The fact that Dorta was a "suspect" in criminal cases gave him a motive to curry favor with the State. As with the notes described in the above paragraph, I would have investigated this matter to determine if a Brady violation occurred or if trial counsel was ineffective. I would have done this if I had been provided with the information that Dorta was a "suspect." I

did not receive these notes and I was not provided any information indicating that Dorta was a "suspect."

10. Finally, I did not receive a copy of the letters from and to the Assistant Attorney General, Shawn Briese. These letters indicate that an apparent ex parte process occurred. The letters are not copied to anyone. They concern Shawn Briese's representation of Judge Powell regarding Dorta's suit against Judge Powell. No state representative disclosed these matters to us while I represented Mr. Medina. Neither did Judge Powell advise anyone at CCR of these matters. Had I had these letters or known of the information revealed therein, I would have filed a motion to disqualify Judge Powell. They establish potential bias and certainly would have raised valid fears and concerns sufficient to support a valid recusal motion. These letters also raise a due process claim regarding Judge Powell's actions at trial. They indicated that the court apparently knew information about Dorta that is nonrecord evidence, which trial counsel apparently did not know, and which the state's representatives did not disclose. Judge Powell had placed Dorta in jail until Mr. Medina's trial with Dorta being advised that he, Dorta, was a suspect. Judge Powell was sued along with the Sheriff and was represented by a state's representative. This is an inappropriate apparent alignment against Mr. Medina while the court itself was privy to ex parte information helpful to developing Mr. Medina's defense, and which trial counsel was not told about. I would have presented the due process claims arising from these facts had these letters been disclosed to me. These matters, such as the habeas action/suit, also would have provided valid grounds for a recusal motion in the Rule 3.850 proceeding.

Affidavit of Billy H. Nolas at ¶ 9, at App. 8. The state's response to the defense's discovery request gives as an alternative address for Mr. Dorta at the Sheraton Hotel in Orlando (R. 1531).

These newly discovered files indicate that Mr. Dorta was in fact held in solitary confinement in the Orange County Jail. See Letter of Judge Winifred J. Sharp to Assistant Attorney General Shawn L. Briese at App. 2. Notes entitled "Hearing" indicate Mr. Dorta was also a "suspect in the cases" that were discussed at the hearing. Notes dated December 17, 1982, at Item 11, at App. 1. This information was not disclosed to defense counsel. See App. 15.[25] The transcript of the hearing memorialized in the notes does not appear in Mr. Medina's court record. Trial counsel Ana Tangel-Rodriguez was never informed by the State or Judge Powell that Dorta was a suspect in cases. See App. 15. Mr. Dorta's testimony would have been impeached with information about these other cases. See Davis v. Alaska, 415 U.S. 308 (1974).

Prior to October of 1995, the Attorney General's Office had maintained that its files regarding death sentenced individuals were not public records until the execution was carried out. The Attorney General's Office deviated from that policy only in Spaziano when a warrant for his execution was outstanding in June of 1995. In October of 1995, Richard Martell, Assistant Attorney General, announced a new policy and provided access to Attorney General files on individuals for whom the Governor signed a death warrant. See App. 13 and 14. In October of 1995, Gail Anderson

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[25]Ms. Tangel-Rodriguez states in her Declaration: "I was never told by the prosecutor, Ray Sharpe, or anyone in the Orange County Sheriff's Office, that Dorta was a suspect in cases." App. "15," at ¶ 2.

was the only assigned CCR counsel. At that time, Ms. Anderson had a conflict of interest between herself and Mr. Medina. On June 17, 1996, she gave notice to the Governor's Office that CCR was not representing Mr. Medina due to a conflict. Not until November 12, 1996, was conflict-free counsel assigned.[26]

Mr. Dorta testified that he gave Mr. Medina "a few [Marlboro] cigarettes" (R. 368). The prosecution elicited testimony that a single Marlboro cigarette butt was found in the victim's apartment (R. 288, 586). Mr. Dorta now states that he gave Mr. Medina a single cigarette and Mr. Medina smoked it in his presence, thus Mr. Medina was not the source of the cigarette butt in the victim's apartment. Affidavit of Reinaldo Dorta, attached hereto as Exhibit 9. Mr. Dorta testified that he saw Mr. Medina in the Indies House Apartments between 10:30 and 11:00 p.m. on April 3, 1982. This supports Mr. Medina's contention that he saw Mr. Dorta before Dorothy James arrived home from the softball game.[27] This newly disclosed information, taken

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[26]The phrase conflict-free counsel is used because Judge Powell and this Court assumed the new counsel was conflict-free. Undersigned counsel does not wish to waive any of Mr. Medina's challenges to that conclusion.

[27]In fact, if Mr. Medina was one hour off in the timeline he gave at trial, his testimony is perfectly consistent with that of Mr. Dorta, Barbara Andrews, and Arnita James. (Mr. Medina also testified that he did not have a watch. R. 673) According to Mr. Dorta, he gave Mr. Medina a cigarette between 10:30 p.m. and 11:00 p.m. and Mr. Medina smoked it right then. R. 368-369; Affidavit at Exh. 9. This is consistent with the testimony of Arnita James who said her mother left the softball game around 10:30. R. 138. Mr. Medina testified that he spent approximately forty five minutes with Dorothy James before she allowed him to drive her car to the store. R. 706. Mr. Medina testified that he drove around for approximately another forty five minutes to

together with the information established at the 1988 evidentiary hearing, undermines confidence in the outcome of Mr. Medina's trial and sentencing proceedings.

Judge Conrad's order denying Mr. Medina's Rule 3.850 ignores the significance of the newly-pled information. In addition, the lower court misapprehended what facts are new and what facts were pled so that the court could consider the cumulative effect of all the facts that have come to light since Mr. Medina's trial.

The lower court dismissed allegations that the undisclosed notes contained information about Joseph Daniels provided by Ruby Pate and Arnita James, should have asked them whether they knew of anyone who could have wanted to harm the victim. Order at 6. Mr. Medina agrees. Trial counsel were ineffective for failing to ask this question. However, the basis of Mr. Medina's claim is that he was denied an adversarial testing. Whether through ineffective assistance of counsel or improper withholding of evidence by the State, Mr. Medina's jury never learned about Joseph Daniels. The lower court's dismissal of Sharon Alexander's statement is similarly baseless -- the State violated its discovery obligations by withholding Sharon Alexander's name and denying defense counsel the opportunity to ask her the

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an hour before he returned to the apartment and found the victim dead or dying. R. 673. That would put Mr. Medina back in the apartment shortly after midnight on April 4, 1982. Barbara Andrews testified that she and Dorothy James were talking on the telephone between 10:30 and midnight. Ms. Andrews stated that Ms. James became quiet after someone came into the apartment and they hung up shortly thereafter. R. 175, 180. She stated that the call ended at approximately midnight. Id.

necessary questions. Whether the claim is based on Strickland or Brady, the jury never heard from Sharon Alexander and Mr. Medina was prejudice as a result.

The court's analysis fails similarly when the court concludes the evidence about Joseph Daniels would not have changed the jury's verdict. Order at 7-8. That is not the standard. The standard is whether confidence is the outcome is undermined. No reasonable reading of the State's weak circumstantial case against Mr. Medina supports the conclusion that the jury would have been "confused," Order at 8, by the presentation of Joseph Daniels as a suspect. The lower court is supplying a strategic reason for counsel's failure to discover or present the information about Joseph Daniels. This the court cannot do. Strickland.

The court discounted Ernest Arnold's statement that he saw marijuana joints in the victim's apartment on the day her body was found, and that Detective Nazarchuk told him not to say anything about it, finding the evidence "simply had no relevance whatsoever." Order at 8. The court ignored the fact that Mr. Medina testified at trial that he thought the murder was involved with drug activity. This information from Ernest Arnold would have supported Mr. Medina's otherwise uncorroborated trial testimony. In addition, testimony that the lead detective instructed a witness to conceal relevant information would have undermined the State's already weak circumstantial case. Confidence in the outcome is undermined.

The court failed to grasp the significance of Dorta's statement that he gave Mr. Medina one cigarette, which Mr. Medina smoked while talking to Dorta at the apartment complex. If Mr. Medina finished his cigarette before he returned to Dorothy James' apartment, he was not the source of the Marlboro cigarette butt in the victim's apartment. The source was someone else -- possibly Billy Andrews or Joseph Daniels. Because the jury never heard this evidence, confidence in the outcome is undermined.

Similarly, the court's determination that there is no possibility that the jury would have acquitted Mr. Medina had it heard all the undisclosed information, Order at 10, is unsupported by the record. The prosecutor admitted his case against Mr. Medina was not the strongest. The motive put forward by the State is pure conjecture, and based in large part on the testimony of Michael White, who was never impeached. Finally, the undisclosed evidence supports at least two other reasonable hypotheses consistent with Mr. Medina's innocence: that Joseph Daniels or Billy Andrews killed Dorothy James or that James was an innocent victim in a drug crime. Without hearing this undisclosed evidence, the jury was not presented with other reasonable hypotheses consistent with Mr. Medina's innocence. As such, confidence in the outcome is undermined.

The United States Supreme Court has explained:

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

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Failure to disclose impeachment evidence also results in a violation of Brady, Giglio v. United States, 405 U.S. 150, 154 (1972), as does the failure to disclose evidence which supported the theory of defense. United States v. Spagnoulo, 960 F.2d 995 (11th Cir. 1992). The State is obligated to correct any false testimony. Napue v. Illinois, 360 U.S. 264 (1959). For purposes of finding a due process violation there is no difference between any of these types of evidence; their disclosure is equally important to ensuring a fair trial. See Kyles v. Whitley, 115 S. Ct. 1555, 1565 (1995). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either the state, the defense, or both fail in their obligations, a new trial or sentencing proceeding is required if the cumulative effect of these errors undermines confidence in the outcome. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); see Kyles, Jones v. State, 591 So. 2d 911 (Fla. 1991). See also Scott v. State, 657 So. 2d 1129 (Fla. 1995).

Evidence which supported the theory of defense at trial was exculpatory evidence which the State was obligated to disclose. Arango v. State, 467 So. 2d 692 (Fla. 1985); United States v. Spagnoulo, 960 F.2d 995 (11th Cir. 1992); cf. Mills v. Singletary, 63 F.3d 999, 1019 (11th Cir. 1993). To the extent that trial counsel should have discovered the exculpatory evidence, counsel's performance was deficient. See Provenzano v. State, 616 So. 2d 428 (Fla. 1993). The burden of disclosing exculpatory evidence rests with both the prosecution as well as law enforcement. Kyles, 115 S. Ct. at 1565. The state bears the "affirmative duty to disclose evidence favorable to a defendant." Id. The burden of investigating and presenting exculpatory evidence rests with defense counsel. Strickland v. Washington. As established below, Mr. Medina is prepared to establish that either the State withheld material exculpatory evidence which supported his theory of defense information that was significant in both the guilt and penalty phases of his capital trial, or that trial counsel failed to investigate, discover, and present this evidence. Either way, Mr. Medina was deprived of a constitutionally adequate adversarial testing.

As explained in Kyles v. Whitley, 115 S. Ct. 1555, 1567 (1995), a court evaluating a Brady claim must consider the prejudice flowing from the nondisclosures "collectively, not item-by-item." Accord Swafford v. State, 679 So. 2d 736 (Fla. 1996); Jones v. State, 591 So. 2d 911 (Fla. 1991). Since the materiality standard governing Brady claims was borrowed from

Strickland (United States v. Bagley, 105 S. Ct. 3375 (1985)), the same cumulative standard must also apply to ineffective assistance claims. The purpose of the prejudice standard is to determine whether the defendant suffered sufficient prejudice to undermine confidence in the reliability of the outcome; the purpose is not to divide the error into compartments and help the State sweep the misconduct under the proverbial rug. See, Kyles, 115 S. Ct. at 1565-1567.

The Florida Supreme Court recently explained that a new trial was required in 3.850 proceedings because of the cumulative effects of Brady violations, ineffective assistance, and/or newly discovered evidence of innocence:

> Gunsby raises a number of issues in which he contends that he is entitled to a new trial, two of which we find to be dispositive. First, he argues that the State's erroneous withholding of exculpatory evidence entitles him to a new trial. Second, he asserts that he is entitled to a new trial because new evidence reflects that the State's key witnesses at trial gave false testimony in order to implicate him in a murder he did not commit and to hide the true identity of the murderer.
>
> Regarding the first issue, no question exists that Brady violations occurred when the State failed to disclose the criminal records of two key witnesses. The State argues, however, that the trial judge correctly determined that no reasonable probability existed that the outcome of Gunsby's trial would have been different even had this evidence been presented. If this were the only guilt-phase issue having merit, we would be inclined to agree that the trial judge correctly decided this "close call." There were two eyewitnesses who positively identified Gunsby as the shooter and the Brady violations involved only one of those

eyewitnesses. Additionally, at least three people overheard Gunsby make admissions concerning his commissions of the murder and the Brady violations involved only one of those individuals. When we consider this error in combination with the evidence set forth in the second issue, however, we cannot agree with the State's position.

In his second issue, Gunsby claims that the ineffective assistance of his counsel at trial and the newly discovered testimony of four witnesses at the rule 3.850 evidentiary hearing warrants a new trial. As indicated previously, the evidence presented at trial reflected that the grocery store business where this murder occurred was a legitimate family-run business, that the witnesses who testified against Gunsby were innocent bystanders, and that Gunsby committed this murder to "protect the black community." Gunsby contends that new evidence establishes that the murder was, in reality, drug related and was committed by a rival drug clan that was competing with the victim's brother for drug business. According to Gunsby, the jury was never told that the victim's brother, who was the intended target and the state's principal witness, was a well-known drug dealer in trouble over drug debts rather than a hardworking convenience store owner. Additionally, Gunsby asserts that the jury was never informed that both the victim's brother and the State's only other eyewitness told other witnesses that they did not know who did the shooting and that another alleged eyewitness, who never testified at trial, named two other individuals as the perpetrators of this crime. The State, on the other hand, contends that Gunsby is distorting the evidence presented at the rule 3.850 hearing and that, given the overwhelming evidence against Gunsby, evidence would have made no difference in the outcome of Gunsby's trial. Moreover, the State argues that none of the evidence is newly discovered because Gunsby could have discovered this evidence at the time he was originally tried.

Clearly, the evidence presented at the rule 3.850 hearing undermined the credibility

of several key witnesses who testified at trial. For instance, the husband of one of the eyewitnesses testified she told him she could not see who shot the victim because the shooter was wearing a mask. Further testimony indicated that the eyewitness was romantically involved with one of the original suspects in the case. A third eyewitness, who did not testify at trial, also testified at the rule 3.850 hearing that the assailants were wearing pantyhose masks. A number of other inconsistencies existed between the testimony presented at the rule 3.850 hearing and the testimony presented at trial, which we do not address here.

We do find some merit in the State's argument that much of this evidence does not meet the test for newly discovered evidence. Newly discovered evidence is evidence that must have been unknown by the trial court, by the party, or by counsel at the time of trial, and it must appear that the defendant of his counsel could not have known of the evidence by the use of diligence. Jones v. State, 591 So. 2d 911, 916 (Fla. 1991). For a defendant to obtain relief based on newly discovered evidence, the evidence must be of such a nature that it would probably produce an acquittal on retrial. Id. at 915. In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel as set forth in Strickland v. Washington, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984)(to establish ineffective assistance of counsel, a defendant must show that (1) counsel performed outside the broad range of competent performance and (2) the deficient performance was so serious that the defendant was deprived of a fair trial). The second prong of Strickland poses the more difficult question of whether counsel's deficient performance, standing alone, deprived Gunsby of a fair trial. Nevertheless, when we consider the cumulative effect of the

> testimony presented at the rule 3.850 hearing and the admitted Brady violations on the part of the State, we are compelled to find, under the unique circumstances of this case, that confidence in the outcome of Gunsby's original trial has been undermined and that a reasonable probability exists of a different outcome. Cf. Cherry v. State, 659 So. 2d 1069 (Fla. 1995)(cumulative effect of numerous errors in counsel's performance may constitute prejudice); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995)(same). Consequently, we find that we must reverse the trial judge's order denying Gunsby's motion to vacate his conviction.

State v. Gunsby, 670 So. 2d 920, 923-924 (Fla. 1996).

The materiality of a Brady violation is also enhanced by prosecutorial argument that everything has been disclosed. See Garcia v. State, 622 So. 2d 1325 (Fla. 1993); Arango v. State, 467 So. 2d 692 (Fla. 1985). Where the prosecutor presented a false or misleading argument, relief is required unless the State establishes that the error was harmless beyond a reasonable doubt. See Kyles, 115 S. Ct. at 1565 n.7.

To comprehend the effect Mr. Medina's trial that the previously unknown evidence pled here would have had, this Court must examine the State's case at trial, the evidence proffered by Mr. Medina in his prior Rule 3.850 proceedings, and the previously unknown evidence pled here. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996); State v. Gunsby. By examining all the evidence Mr. Medina has presented through direct evidence, cross-examination and proffer throughout his capital proceedings, this Court will find that the previously unknown evidence, in conjunction with the evidence introduced in Mr. Medina's first

Rule 3.850 motion and the evidence introduced at trial, would probably have produced an acquittal, or at the very least, a sentence of less than death. See Swafford.

The State's argument at trial necessarily focused on the two real facts that the State had: Mr. Medina was arrested in Ms. James' car and a knife was found in the car. The knife was touted as the murder weapon in the State's opening statement (R. 131-32, 132-33, 134). Yet, the testimony presented concerning the laboratory test performed on the knife revealed that the tests were so inconclusive that the State's expert could not even say with certainty that there had ever been blood on it. (R. 584-85). Michael White testified that he had seen Mr. Medina with a knife (R. 646). When defense counsel moved for a directed verdict at the close of the State's case, the knife found in Ms. James' car played a critical part in the Court's denial of the motion (R. 658). In closing arguments, the State again focused on the knife (R. 792). Defense counsel was forced to address the knife in closing argument (R. 773, 776-77).

In 1988, it was discovered that a second knife had been examined by the medical examiner who testified at trial, Dr. Sashi Gore. At the 1988 evidentiary hearing, Dr. Gore testified that in the course of his original investigation he catalogued photographic slides of what was inspected. One of the slides in this case was of a serrated, fixed handle knife (PC-R.736; Def.

Exh. 9).[28] Dr. Gore testified that the serrated knife was brought to him at the end of Ms. James's autopsy (PC-R.743). Dr. Gore further testified that either the serrated knife (PC-R.Def. Exh. 9) or the buck knife found in the car (PC-R.Def. Exh. 11) could have caused the victim's wounds (PC-R.745).

Although it could have been the murder weapon (PC-R.745), the serrated knife had no connection whatsoever to Mr. Medina. The trial prosecutor testified that he did not know about the second, serrated knife (PC-R.315), and that he disclosed parts of the medical examiner's file to the defense (PC-R.312-13). It was also discovered during post-conviction that the serrated knife was apparently taken from the victim's residence:

> There is a note here that says, "Cora seems to think that Nazarchuk brought the knife in from her..." and then it's got a little V apostrophe S, which I assume stands for victim's residence.
>
> At this time I would like to move that document -- have it marked first for identification.

(PC-R. 767-68).

Defense attorney Rodriguez testified that she was unaware of the serrated knife's existence and that if she had been aware of it the second knife would have been investigated further (PC-R. 548-50, 571); (PC-R.Def. Ex. I). Ms. Rodriguez believed that

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[28]The knife that the State had "identified" as the murder weapon was a "locking blade pocket knife . . . similar to a buck knife" (Testimony of Trooper Robert Wilson, PC-R.729). It was not serrated.

"[a]nother suspicious knife not tied to Pedro would have been a critical piece of evidence" (PC-R. Def. Ex. I).

This was a circumstantial evidence case, and the knife presented by the State was quite significant to its theory of prosecution. The State's failure to disclose evidence concerning the second, serrated knife which was not linked to Mr. Medina in any way and which was suspected of being the murder weapon (at least to the extent that it was sent to the medical examiner for examination) undermines confidence in the outcome of the trial. Particularly with what is now known about Joseph Daniels.

The State also failed to disclose impeachment evidence that Michael White had not been prosecuted for his own offenses, and had a motive for seeking favor from the State.[29] What was also not known was that the incident between White and Mr. Medina involved marijuana. The State's analysis that "a stabbing death together with the fact that the car is the focal point of the [White] incident makes it relevant" was simply wrong. At the 1988 evidentiary hearing, it became clear that White was, at the time of the alleged stabbing, in possession of $127.00 and five bags of marijuana. White submitted a claim for compensation for

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[29]In a pretrial motions hearing, the defense moved to exclude White's testimony because it was irrelevant and was going to be used as "bad act" evidence (R.925). The prosecutor argued that the stabbing was relevant (R.923-24). The court took the issue under advisement (R.926-27). Later, and prior to White's testifying, the Court granted defense counsel's motion in limine, ordering the trial prosecutor not to elicit testimony relative to the alleged stabbing incident (R.641). The court's order permitted Mr. White to testify that Mr. Medina had a knife and had the car.

medical expenses as a result of the "stabbing". That request was denied because White was engaged in an unlawful activity at the time, i.e., possession of marijuana (PC-R.Def. Exh. 14). White was also on probation at the time of the "stabbing" but, although he was found in possession of marijuana, his probation was never revoked (PC-R.Def. Exh. 5).

The trial prosecutor testified that he did not know about White's possession of marijuana. However, he did have the Tampa police reports (PC-R.Def. Exh. 16), and he testified that it would have been "customary" to disclose those records to the defense (PC-R.318). Defense counsel filed a motion for the State to disclose White's prior record (R. 1798-99), and even though the trial court was initially inclined to grant the motion, the trial prosecutor then adamantly refused to comply (R. 920-21). The record also reflects that Mr. Edwards made repeated attempts to depose White, but was unable to until the week prior to trial because of White's and the State's recalcitrance (See, e.g., R. 916; 1684; 1757-58). White did not disclose the information herein at issue in his deposition. The defense attorneys' trial files do not include this information.

Judge Powell's previous conclusion as to Michael White must be revisited because of new evidence which requires cumulative consideration under Kyles. On January 22, 1997, collateral counsel finally located Michael White who confirmed he was the same Mr. White who testified against Mr. Medina and was the same Mr. White referred to in the Tampa police report.

Similarly, defense counsel knew that Billy Andrews was significant and argued that the culprit was Billy Andrews. Counsel sought to bring evidence of Andrews' culpability before the jury through the cross-examination of state witnesses (R. 147-48; 252; 253-54; 164; 554-55). A number of rulings by the court (hearsay, etc.) limited this presentation, rendering counsel ineffective in the attempts he did make to elicit information on Andrews' guilt. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). Defense counsel maintained that Billy Andrews should have been investigated by the police as a possible murder suspect, but that for some inexplicable reason he was not. Counsel presented no information other than that attempted through cross-examination.

Judge Powell previously denied an evidentiary hearing on Billy Andrews. Under Kyles and cumulative consideration of all Brady material is required. Had a hearing been held, much would have been disclosed about Billy Andrews' violent and brutal personality and the fact that he was indeed the more likely culprit. Judge Powell denied post-conviction counsel permission to present this evidence at the prior hearing. Counsel were foreclosed from presenting the testimony of Gayle Andrews,[30]

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[30]Gayle Andrews would have testified about Billy's violent temperament toward herself and other women, and about beatings she received from him. Other witnesses would have testified, also. For instance, Juliana Wilson, who dated Billy Andrews, would have testified, and Lindi James and Arnita James could also have provided valuable information about Billy Andrews.

Billy Andrews' ex-wife (PC-R.464 et seq.) and of Ernest Arnold[31] (PC-R.468-69). Proffers were made as to what each of these witnesses would have testified, and their affidavits were proffered (PC-R.466; 468, 1377-79; 1390-95).

Lindi James, the victim's second daughter, was only allowed to testify that Billy used to wear a particular brown bathrobe around her mother's house and that no one else wore it. Evidence at trial showed that a brown belt from that bathrobe was found tied around Dorothy when she was killed (PC-R.373). Much more evidence could have been presented if a full and fair evidentiary hearing had been granted (See PC-R.1141-57). Trial counsel did not reasonably investigate this information. Counsel never asked Deputy Taylor about photographs he took at the victim's apartment depicting the robe and never deposed Lindi James. Thus, counsel never knew the significance of the robe.

Additionally, counsel, because of their lack of investigation, never knew about the hole that Billy Andrews had made in the wall of the victim's apartment. They therefore failed to cross-examine Detective Nazarchuck effectively about his decision not to investigate, or even talk to, Billy Andrews.

Mr. Medina's counsel, the jury, and the court never learned about Billy Andrews' reputation in the community for being

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[31]Ernest Arnold would have testified that he observed both Billy Andrews and the victim, and that he never liked the way Billy treated the victim. On one occasion, the victim called Mr. Arnold, and was hysterical because Billy had done something to her. Ernest always suspected Billy of being the person who killed Dorothy. Ernest also knew Pedro Medina, and he was surprised that Pedro was charged with the crime.

violent, and even psychotic. They never knew he had almost killed many other women with whom he had been involved. They never learned that the victim, just days before she was killed, believed that "Billy" was going to kill her. They did not know that Andrews' robe was on the floor of the apartment when the murder scene was investigated. They did not know that his fist caused the hole in the wall of the victim's apartment. The state knew some of this material information, but failed to disclose it in violation of Brady v. Maryland. Trial counsel's failure to investigate was unreasonable. Again because Judge Powell failed to disclose evidence warranting his disqualification Mr. Medina was denied a full and fair hearing. Moreover, under Kyles and Gunsby, this Court must consider the cumulative effect of these errors.

Because the files and records do not conclusively establish that Mr. Medina is entitled to no relief, this Court must grant an evidentiary hearing. Thereafter, this Court should grant a new trial and/or penalty phase.

ARGUMENT V

MR. MEDINA WAS DENIED HIS CONSTITUTIONAL RIGHT TO TRIAL BEFORE A FAIR AND IMPARTIAL TRIBUNAL AND TO POSTCONVICTION PROCEEDINGS THAT COMPORT WITH DUE PROCESS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THE LOWER COURT ERRED IN REJECTING THIS CLAIM.

Mr. Medina was tried, convicted, and sentenced to death in proceedings presided over by Judge Rom W. Powell. Judge Powell

also presided over Mr. Medina's state postconviction proceedings.[32] Based on newly disclosed evidence from the Attorney General's Office, Mr. Medina filed a motion to recuse Judge Powell on November 25, 1996. Judge Powell found the motion to disqualify legally sufficient and granted Mr. Medina's motion on November 26, 1996. Chief Judge Belvin Perry reassigned Mr. Medina's case to Judge Richard F. Conrad. However, the newly discovered evidence which warranted the disqualification also establishes that Judge Powell should have previously disqualified himself and disclosed important impeachment information to defense counsel. In presiding over Mr. Medina's trial, sentencing, and postconviction proceedings, Judge Powell denied Mr. Medina his right to a trial before a fair and impartial tribunal and to postconviction proceedings that comport with the requirements of due process.

Judge Powell's failure to disclose the matters at the time of the prior 3.850 establish that Mr. Medina did not receive a full and fair hearing. All claims presented in the prior 3.850 are specifically incorporated by reference herein. App. 17. Moreover, the State also possessed materials which when disclosed established a basis for a legally sufficient motion to disqualify. See Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995). Similarly, Mr. Medina was denied due process at his capital trial, during both the guilt/innocence and penalty phases

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[32]Judge Powell granted Mr. Medina's motion to disqualify on November 26, 1996. Chief Judge Belvin Perry reassigned Mr. Medina's case to Judge Richard F. Conrad.

of his trial. Again this was due to Judge Powell's nondisclosure and the State's nondisclosure of facts and documents which, when finally disclosed, established a basis for a legally sufficient motion to disqualify.

One of the State's witnesses who testified against Mr. Medina at his trial was Reinaldo Dorta. Reinaldo Dorta testified against Mr. Medina at the preliminary hearing held on May 6, 1982 (R. 1064-74), then, according to the State, he disappeared. After Mr. Dorta failed to appear for a defense deposition on November 3, 1982 (R. 1683), the State sought the intervention of Judge Powell. In its Petition for Issuance of Arrest Warrant for Material Witness, filed November 17, 1982, the State alleged:

> That the State of Florida has been unable to locate the said DORTA and diligently through its investigators continue [sic] its search for said witness. It is felt by this Assistant State Attorney [William R. Sharpe] that DORTA has fled or is deliberately attempting to avoid service of the witness subpoena on him.
>
> That all reasonable attempts to locate and serve the said DORTA have been exhausted without success.

(R. 1688). Based on the State's representations that Dorta was deliberately avoiding service, Judge Powell issued an arrest warrant for Dorta, finding him to be a necessary and material witness in the State's case against Mr. Medina (R. 1690).

Agents of the Orange County Sheriff's Office located Dorta in Chicago, Illinois, and arrested him on December 3, 1982. The Sheriff's Office transported Dorta to Orlando, where he was detained in the Orange County Jail. Dorta's first appearance was

on December 6, 1982. Judge Powell appointed counsel for Dorta on December 8, 1982. On December 17, 1982, Dorta filed a motion for discharge, seeking his release from custody (R. 1702). Judge Powell denied Dorta's motion on December 22, 1982, ordering Dorta to be held in jail until he testified for the State against Mr. Medina (R. 1706-07). The State called Dorta to the stand on March 16, 1983, stating, "I want to get that out of the way and get him out of jail" (R. 356). Mr. Dorta was released from jail after he testified against Mr. Medina.

The Office of the Attorney General released records to Mr. Medina's counsel on November 18, 1996, which had never been disclosed previously to Mr. Medina or his counsel. See App. 8, 15. Mr. Nolas, prior collateral counsel, was affirmatively led to believe that everything had been disclosed: "We were told we had everything and there was not indication that anything was being held back." However in fact records were not disclosed to Mr. Nolas. In those previously undisclosed records, undersigned counsel discovered information about Dorta and the proceedings to keep him in jail until he testified for the State, information that did not appear in Mr. Medina's court record. The Attorney General disclosed two letters and two pages of handwritten notes regarding Dorta.

The first letter (App. 2), is dated February 15, 1983, addressed to Assistant Attorney General Shawn L. Briese and signed by Winifred J. Sharp, Judge of the District Court of Appeal for the Fifth District. Judge Sharp wrote to Assistant

Attorney General Briese in his capacity as counsel for Judge Powell. The letter was regarding the case of Case No. 83-63. Judge Sharp's letter expressed her concern over the conditions in which Dorta was being housed in the Orange County Jail as raised in his habeas action in the Fifth District Court of Appeal. Judge Sharp inquired as to when the Medina trial would be brought to a conclusion.

The second letter (App. 3) is dated February 24, 1983, and is addressed to The Honorable Melvin Orfinger, Chief Judge of the Fifth District Court of Appeal, and signed by Assistant Attorney General Shawn L. Briese. In his letter, Mr. Briese refers to the letter he received from Judge Sharp regarding In re: State of Florida v. Pedro Luis Medina -- Alberto R. Dorta v. Honorable Lawson Lamar, Sheriff, Orange County, Florida and Honorable Rom W. Powell, Circuit Judge, Ninth Judicial Circuit, Case No. 83-63[33]. Mr. Briese informed Judge Orfinger that Mr. Dorta's petition for writ of habeas corpus was denied by the Fifth District Court of Appeal on February 16, 1983. Mr. Briese expressed concern that Judge Sharp had written to him in

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[33]After receiving a copy of this letter on November 18, 1996, undersigned contacted the Fifth District Court of Appeal and Orange County Circuit Court to ascertain whether a court file exists regarding this case. The Fifth DCA advised that its file was destroyed in 1987. The Orange County Circuit Court does not and has not ever had such a file.

Undersigned counsel also made a supplemental public records request on the Attorney General's office seeking access to any files on Dorta, which would include the case of Dorta v. Lamar and Powell. On November 20, 1996, undersigned counsel was informed by Assistant Attorney General Margene Roper that her office had no additional files regarding Dorta. See Exh. 13.

violation of the Code of Judicial Conduct and that she was seeking to influence proceedings pending before Judge Powell.

In addition to the two letters just described, the Attorney General's Office revealed two pages of handwritten notes (App. 1). The notes bear the heading "DORTA." On Wednesday, November 27, 1996, Assistant Attorney General Margene Roper represented to this Court that the notes were of a hearing involving Dorta at which a State Attorney investigator for the Ninth Judicial Circuit imparted that "Dorta was suspect in the cases."[34] Neither the letters nor the handwritten notes had ever been disclosed to Mr. Medina's trial counsel or postconviction counsel. Billy Nolas, previous postconviction counsel, explained the importance of the undisclosed information:

> 9. I am also certain I was I not provided with the notes indicating that Dorta was a "suspect in the cases". Certainly, if I had I known that Dorta was considered a "suspect" in any criminal matter I would have investigated why no cross-examination occurred regarding the fact that Dorta was a suspect. Clearly such cross-examination was highly relevant under Davis v. Alaska, yet it did not occur. The fact that Dorta was a "suspect" in criminal cases gave him a motive to curry favor with the State. As with the notes described in the above paragraph, I would have investigated this matter to determine if a Brady violation occurred or if trial counsel was ineffective. I would have done this if I had been provided with the information that Dorta was a "suspect". I did not receive these notes and I was not provided any information indicating that Dorta was a "suspect".

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[34]No transcript of this hearing exists in the record on appeal prepared by the Clerk of the Court in Mr. Medina's case.

10. Finally, I did not receive a copy of the letters from and to the Assistant Attorney General, Shawn Briese. These letters indicate that an apparent ex parte process occurred. The letters are not copied to anyone. They concern Shawn Briese's representation of Judge Powell regarding Dorta's suit against Judge Powell. No state representative disclosed these matters to us while I represented Mr. Medina. Neither did Judge Powell advise anyone at CCR of these matters. Had I had these letters or known of the information revealed therein, I would have filed a motion to disqualify Judge Powell. They establish potential bias and certainly would have raised valid fears and concerns sufficient to support a valid recusal motion. These letters also raise a due process claim regarding Judge Powell's actions at trial. They indicated that the court apparently knew information about Dorta that is nonrecord evidence, which trial counsel apparently did not know, and which the state's representatives did not disclose. Judge Powell had placed Dorta in jail until Mr. Medina's trial with Dorta being advised that he, Dorta, was a suspect. Judge Powell was sued along with the Sheriff and was represented by a state's representative. This is an inappropriate apparent alignment against Mr. Medina while the court itself was privy to ex parte information helpful to developing Mr. Medina's defense, and which trial counsel was not told about. I would have presented the due process claims arising from these facts had these letters been disclosed to me.

Affidavit of Billy Nolas (App. 8).

Trial counsel states in her affidavit:

2. One of the State's witnesses was Reinaldo Dorta. Dorta testified he saw Pedro near the victim's residence on the night of the murder wearing a hat similar to one found in the victim's residence. I was never told by the prosecutor, Ray Sharpe, or anyone in the Orange County Sheriff's Office, that Dorta was a suspect in cases.

This previously undisclosed information establishes that Mr. Medina did not receive a fair trial or sentencing from Judge Powell. See Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995). As in Porter, Judge Powell did not disclose salient facts to Mr. Medina or his counsel. Judge Powell failed to disclose to Mr. Medina that Judge Powell and the State discussed Mr. Medina's case without defense counsel's presence at the Dorta hearing memorialized in the notes taken by the State's investigator and released by the Attorney General. The pertinent fact that Judge Powell failed to disclose is that Dorta was a suspect in other cases. Defense counsel never discovered this impeachment evidence. As in Porter, the denial of due process here is two-fold: first, that Judge Powell failed to disclose these facts to Mr. Medina or his counsel, and second, that Judge Powell failed to recognize that these facts might constitute a bias or prejudice that might influence the judge's actions in Mr. Medina's case, and present cause for him to recuse himself.

Judge Powell became a litigant when Dorta filed his habeas petition against Judge Powell. When the Attorney General undertook representation of Judge Powell in the habeas action, an attorney-client relationship was created between Judge Powell and counsel for the State. It would be expected that within that attorney-client relationship confidential communication occurred. Presumably, Judge Powell was advised by his counsel of Judge Sharp's letter "concerning a pending proceeding."

Had he known of the facts which have only now been disclosed, Mr. Medina would have moved to disqualify Judge Powell immediately, as soon as the facts were disclosed. The fact that Mr. Medina was never advised previously of Judge Powell's ex parte conferences with the State regarding Dorta only further demonstrates Mr. Medina's reasonable fear that his case was not heard by a fair tribunal. The fact that Judge Powell never disclosed that the Attorney General was representing him in proceedings relating to Mr. Medina's trial reasonably put Mr. Medina in fear that Judge Powell could not be fair and impartial. Mr. Medina's motion to disqualify, which Judge Powell granted, was legally sufficient.

Moreover, the previously undisclosed information from the Attorney General's files establishes that at the time of his trial, the State and Judge Powell had information about State witness Dorta that Mr. Medina and his counsel did not know: that the State Attorney's Office believed Dorta "was a suspect in cases." Dorta was advised that he "was a suspect in the cases." This gave Dorta, a refugee from Cuba with indeterminate immigration status, a great motive to curry favor with the State. Neither the State nor Judge Powell ever revealed to Mr. Medina, his trial counsel, or his postconviction counsel that Dorta was a suspect in "cases."

At trial, defense counsel did not cross-examine Dorta regarding the fact that he was a suspect in "the cases." The reason this cross-examination did not occur is because neither

Mr. Medina nor his counsel were advised of this fact by either the State or by Judge Powell, who was present when Dorta was told he "was a suspect in the cases." Affidavit of Ana Tangel-Rodriguez at ¶ 2, App. 15. Judge Powell, having heard this disclosure, had just as much of a duty to disclose this information to Mr. Medina as did the State. At no time did Judge Powell disclose to Mr. Medina or his counsel that, in addition to being a material witness, Dorta was a suspect. Clearly, Dorta's status as "a suspect" was part of Judge Powell's reasons for incarcerating Dorta pending Mr. Medina's trial. Judge Powell never disclosed this information regarding Dorta to Mr. Medina or his counsel. The fact that Judge Powell had this information about a critical State witness, yet never disclosed it to Mr. Medina or his counsel, establishes that Mr. Medina did not receive a fair trial from Judge Powell. When the information was disclosed and presented in a motion to disqualify, Judge Powell found it legally sufficient.

As the Eleventh Circuit Court of Appeals explained recently:

> The Commentary to Canon 3E(1) [Code of Judicial Conduct] provides that a judge should disclose on the record information which the judge believes the parties or their lawyers might consider relevant to the question of disqualification. We conclude that both litigants and attorneys should be able to rely upon judges to comply with their own Canons of Ethics. A contrary rule would presume that litigants and counsel cannot rely upon an unbiased judiciary, and that counsel, in discharging their Sixth Amendment obligation to provide their clients effective professional assistance, must investigate the impartiality of the judges before whom they appear. Such investigations, of course,

> would undermine public confidence in the judiciary and hinder, if not disrupt, the judicial process -- all to the detriment of the fair administration of justice.

Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995).

The State and Judge Powell discussed issues relevant to State witness Dorta without defense counsel or Mr. Medina present. It was at this hearing, according to the Attorney General's notes, that the State revealed Dorta was a "suspect in the cases." Neither Judge Powell nor the State ever disclosed this information to Mr. Medina or his counsel. The fact that this information was learned at an ex parte hearing between the State and Judge Powell is per se prejudicial. Judge Powell, by his ex parte contact with that counsel, his ex parte contact with the State regarding witness Dorta, and his knowledge that Dorta "was a suspect," failed to comply with Canon 3E(1), Fla. Code Jud. Conduct, and denied Mr. Medina due process of law.

The lower court denied Mr. Medina an evidentiary hearing on Judge Powell's failure to disclose, finding that the facts could have been previously ascertained, Order at 12-14. The lower court failed to grasp that it was the previously undisclosed notes from the Attorney General's files that Dorta was a suspect gave new significance to the habeas proceedings involving Dorta. the court record, while indicating that habeas proceedings took place, gave no indication that everyone involved except defense counsel knew that Dorta was a suspect.

Once collateral counsel obtained the notes and once the state attorney provided collateral counsel with an actual

transcript of the notes, counsel were able to see the significance of the habeas proceedings. The attorney general's failure to disclose the notes or the hearing transcript to collateral counsel in 1988, despite the attorney general's and state attorney's assurances that all public records had been disclosed, prevented Mr. Medina from discovering this information sooner. At an evidentiary hearing, Mr. Medina will prove due diligence as to this issue. Mr. Medina and defense counsel were entitled to rely on Judge Powell to disclose any information relevant to the question of disqualification; Judge Powell's failure to do so cannot be held against Mr. Medina. Porter v. Singletary.

It is improper for a judge to preside over a case in which attorneys for one of the parties are the same attorneys who represented the judge. Atkinson Dredging Company v. Henning, 631 So. 2d 1129 (Fla. 4th DCA 1994). In Henning, the trial judge was presiding over a case in which the attorneys for one of the parties belonged to the same law firm that represented the judge in an unrelated action. Id. at 1130. The court held that the judge should have recused herself. The court found that, even if the judge felt she could be fair and impartial, "the appearance of justice proscribes the trial judge from continuing." Id. The court noted that, "Justice must satisfy the appearance of justice." Id., quoting Offutt v. United States, 348 U.S. 11, 14 (1954).

The situation here is almost identical to that the court condemned in Henning. Yet here the situation is even more egregious because Judge Powell was represented by the State in proceedings relating to a State witness against Mr. Medina, not in an unrelated and separate matter as in Henning.

Had this been disclosed, a legally sufficient motion to disqualify would have been filed. Judge Powell, when he disqualified himself, obviously found that the motion to disqualify premised upon this new information was legally sufficient. See Rule 2.160(f), Florida Rules of Judicial Administration ("The judge against whom an initial motion to disqualify under subdivision (d)(1) is directed, shall determine only the legal sufficiency of the motion and shall not pass on the truth of the facts alleged. If the motion is legally sufficient, the judge shall immediately enter an order granting the disqualification and proceed no further in the action.").

Mr. Medina was entitled to a fair trial and penalty phase. Necessary to a fair trial is a neutral and detached judge. Due process entitles a defendant to an impartial and disinterested tribunal. Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). "[E]very litigant is entitled to nothing less than the cold neutrality of an impartial judge." State ex rel. Davis v. Parks, 194 So. 613, 614 (Fla. 1939). It is the responsibility of the trial judge to disclose any information to the litigants from which a litigant may reasonably question a judge's impartiality. See Livingston v. State, 441 So. 2d 1083, 1086 (Fla. 1983). See

also Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995)(Commentary to Canon 3E(1) provides that judge should disclose on the record information which judge believes parties might consider relevant to disqualification). Moreover, a judge should recuse himself when he is aware of any bias or prejudice that might influence his actions in the trial, whether or not he is challenged by a litigant. McGregor v. Hammock, 132 So. 815, 815 (Fla. 1931); Anderson v. State, 287 So. 2d 322, 324 (Fla. 1st DCA 1973); Pistorino v. Ferguson, 386 So. 2d 65, 67 (Fla. 3d DCA 1980). See also Porter v. Singletary, 49 F.3d 1483, 1489 (11th Cir. 1995)(Canon 3E(1) requires judge to sua sponte disqualify himself if his impartiality might reasonably be questioned). This is especially true in a death case, where the defendant's life is dependent upon the judge's sentencing decision. Livingston v. State, 441 So. 2d 1083, 1087 (Fla. 1983).

The right to a fair and impartial tribunal is so basic to a fair trial that its absence can never be harmless. Chapman v. California, 386 U.S. 18, 23 n.8 (1967). See also Vasquez v. Hillery, 474 U.S. 254, 264 (1986):

> When constitutional error calls into question the objectivity of those charged with bringing a defendant to judgment, a reviewing court can neither indulge a presumption of regularity nor evaluate the resulting harm. Accordingly, when the trial judge is discovered to have had some basis for rendering a biased judgment, his actual motivations are hidden from review, and we must presume that the process was impaired. See Tumey v. Ohio, 273 U.S. 510, 535, 47 S.Ct. 437, 445, 71 L.Ed. 749 (1927)(reversal required when judge has financial interest in

> conviction, despite lack of indication that bias influenced decisions).

(emphasis added). See also Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992)(prejudice presumed from ex parte communication); Anderson v. State, 287 So. 2d 322, 325 (Fla. 1st DCA 1973) (sentence vacated even though there was no evidence on the record that the judge lacked objectivity); State v. Steele, 348 So. 2d 398, 403 (Fla. 3d DCA 1977)(any error based on lack of impartiality of trial judge is a denial of due process and per se reversible error).[35] Judge Powell had information relevant to the trial that he did not disclose. Judge Powell had knowledge of circumstances which would reasonably cause fear in Mr. Medina that he would not get a fair trial before Judge Powell nor a fair 3.850 proceeding. Nonetheless, Judge Powell failed to disclose those circumstances to Mr. Medina and failed to recuse himself from Mr. Medina's trial and first 3.850 motion. Had he disclosed these facts, a motion to disqualify would have been filed, and Judge Powell would have granted the motion, as he did once such a motion was filed in 1996. Mr. Medina did not get the fair trial by a neutral and detached judge to which he was entitled, nor did he receive a fair 3.850 hearing in 1988. This violated of his

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[35]Even though Mr. Medina is not required to show prejudice to establish a denial of his constitutional rights, the prejudice suffered by Mr. Medina in being tried and sentenced to death by a judge who was not fair and impartial is manifest. For example, one explanation for Judge Powell's actions in allowing jury strikes to be made outside of Mr. Medina's presence is that, because he was not fair and impartial, Judge Powell failed to protect Mr. Medina's right to a fair trial.

rights under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Judge Powell's failures have been compounded through the years by his failure to disclose the above-mentioned information to Mr. Medina or to recuse himself from Mr. Medina's proceedings in postconviction. Despite the foregoing, Judge Powell presided over Mr. Medina's postconviction proceedings in state court while Mr. Medina and his counsel remained unaware of legitimate grounds for his recusal. Mr. Medina is entitled to full and fair Rule 3.850 proceedings, see Holland v. State, 503 So. 2d 1354 (Fla. 1987); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994), including the fair determination of the issues by a neutral, detached judge.[36]

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[36]Mr. Medina raised in his initial brief to the Florida Supreme Court appealing the denial of his Rule 3.850 motion by Judge Powell that Judge Powell had denied Mr. Medina the full and fair evidentiary hearing to which he was entitled. Mr. Medina argued that Judge Powell so severely limited the presentation of evidence that the hearing was far from full and fair. Judge Powell injected his own objections during the proceedings, supplied the grounds for objections made by the State, dictated the order of proof, continuously interrupted postconviction counsel during their presentation, advised the State on how to proceed, and disallowed the presentation of evidence by the defense. Mr. Medina acknowledged that a trial judge has control over his courtroom and that judges are human, and like all human beings can be irritable. Judge Powell's persistent interference with the proof at the evidentiary hearing made it unreasonably difficult for Mr. Medina to be heard fairly. Mr. Medina suggested that Judge Powell was disinclined to hear this case, having sentenced Mr. Medina originally. Whatever the reason, Mr. Medina was not fully and fairly heard at the evidentiary hearing. The limitations imposed by Judge Powell -- both as to the issues that would be heard and as to the actual presentation -- adversely affected counsel's efforts at the evidentiary hearing. Had Judge Powell disclosed the information alleged in this claim to postconviction counsel, postconviction counsel would have moved to recuse Judge Powell, and the evidentiary

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

The United States Supreme Court also has recognized the basic constitutional precept of a neutral, detached judiciary:

> The Due Process Clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. This requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and the promotion of participation and dialogue by affected individuals in the decision making process. See Carey v. Piphus, 435 U.S. 247, 259-262, 266-267, 98 S.Ct. 1042, 1043, 1050-1052, 1053, 1054, 55 L.Ed.2d 252, (1978). The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. See Mathews v. Eldridge, 424 U.S. 319, 344, 96 S.Ct. 893, 907, 47 L.Ed.2d 18 (1976). At the same time, it preserves both the

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hearing would have been heard by a fair and impartial judge. See Affidavit of Billy H. Nolas, Exh. 8.

> appearance and reality of fairness, "generating the feeling, so important to a popular government, that justice has been done," Joint Anti-Fascist Committee v. McGrath, 341 U.S. 123, 172, 71 S.Ct. 624, 649, 95 L.Ed. 817 (1951)(Frankfurter, J., concurring), by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him.

Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980). See also Porter v. Singletary, 49 F.3d 1483, 1487-88 ("The law is well-established that a fundamental tenet of due process is a fair and impartial tribunal").

Due process guarantees the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978). The United States Supreme Court has explained that, in deciding whether a particular judge cannot preside over a litigant's trial,

> the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." Ungar v. Sarafite, 376 U.S. 575, 588, 84 S.Ct. 841, 849, 11 L.Ed.2d 921 (1964). "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less. In re Murchison, 349 U.S. 133, 136, 75 S.Ct. 623, 625, 99 L.Ed. 942 (1955).

Taylor v. Hayes, 418 U.S. 488, 501 (1974).

By failing to recuse himself and failing to disclose to Mr. Medina or his counsel the grounds for recusal and the information he discovered through his ex parte contact with the Attorney General regarding Mr. Medina's case, Judge Powell denied Mr. Medina due process.

The fact that Judge Powell had information relevant to Mr. Medina's case, which he did not disclose to Mr. Medina or to defense counsel, raises another issue of constitutional dimension. Judge Powell had access to information that Mr. Medina had no opportunity to explain or deny. When the trier of fact and a co-sentencer in a death penalty case has information relevant to the circumstances of the case that the defendant has no opportunity to explain or deny, the defendant is denied due process of law. Gardner v. Florida, 430 U.S. 349 (1977).

The information revealed in the Attorney General's files is not the only information Judge Powell had which Mr. Medina had no opportunity to explain or deny. In Department of Corrections records recently viewed by the undersigned there appears a letter to Judge Powell from an officer at the Orange County Jail. The letter describes the officer's impressions of Mr. Medina in a light most unflattering to Mr. Medina. The officer describes his own disparaging opinions of Mr. Medina. The officer also opines that Mr. Medina comprehends the English language quite well when it is to his advantage. This assertion apparently refers to an issue contested at the trial and in Mr. Medina's first 3.850 motion: whether Mr. Medina understands English well enough to

make a knowing, intelligent and voluntary waiver of his Fifth Amendment rights.

The letter to Judge Powell was not copied to defense counsel. Thus Judge Powell had even more information that was damaging to Mr. Medina. Because the letter was never disclosed to defense counsel, Mr. Medina had no opportunity to explain or deny the allegations about him. Consideration of this information by Judge Powell denied Mr. Medina the due process of law.

The lower court rejected this claim in part because the letter was not appended to Mr. Medina's Rule 3.850 motion. Order at 15. There is no requirement that supporting documents be attached to a motion for postconviction relief. See Fla. R. Crim. P. 3.850(c)(6) (the motion shall contain "a brief statement of the facts (and other conditions) relied on in support of the motion"). Because the files and records do not conclusively establish that Mr. Medina is entitled to no relief, this Court must grant an evidentiary hearing, reopen the 1988 evidentiary hearing and rehearing all matters therein for consideration by a neutral and impartial judge, and thereafter, a new trial. Porter v. Singletary.

ARGUMENT VI

FLORIDA'S STATUTE LIMITING MR. MEDINA'S RIGHT TO PURSUE EXECUTIVE CLEMENCY CONSTITUTES A LEGISLATIVE INTRUSION INTO THE EXECUTIVE FUNCTION IN VIOLATION OF THE CONSTITUTION OF THE STATE OF FLORIDA.

Mr. Medina has facts available to present to the Governor in arguing for executive clemency. For example, the victim's daughter, Lindi James, believes Mr. Medina is innocent and should not be executed. Also, Mr. Medina's mental condition has deteriorated significantly since the Governor considered clemency for Mr. Medina in 1987. Significantly, Pope John Paul II has interceded on Mr. Medina's behalf, but the Governor of Florida rejected the Pope's plea for mercy on behalf of Mr. Medina. Mr. Medina should have a forum in which to present issues that are not appropriate for postconviction relief but are appropriate considerations for clemency. See Herrera v. Collins, 113 S. Ct. 853 (1993). However, recent enactments by the Legislature have impeded Mr. Medina's ability to seek executive clemency.[37]

In its 1996 legislative session, the Florida Legislature enacted Ch. 96-290, codified as § 940.03, Fla. Stat. (Supp. 1996), which mandates that:

> An application for executive clemency for a person who is sentenced to death must be filed within 1 year after the date the Supreme Court issues a mandate on a direct appeal or the United States Supreme Court

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[37]By statute, undersigned counsel may not represent Mr. Medina in clemency proceedings. Counsel petitioned the circuit court for appointment of clemency counsel. The lower court denied the motion.

> denies a petition for certiorari, whichever is later.

Prior to the 1996 amendments, § 940.03 did not place time limits on capital defendants within which they may file for executive clemency. Mr. Medina is well past the time limits established by the Legislature in § 940.03 as amended. The statute, as amended, violates the Florida Constitution.

Prior to the 1996 amendments, a capital defendant could petition the Governor for clemency at any time before his sentence was carried out.

> Notwithstanding any provision to the contrary in the Rules of Executive Clemency, in any case in which the death sentence has been imposed, the Governor may at any time place the case on the agenda and set a hearing for the next scheduled meeting or at a specially called meeting of the Clemency Board.

Fla. Admin. Code R. 15(C), Title 27 Appen. (emphasis added).[38] In enacting Ch. 96-290, the Legislature has attempted to limit the Governor's inherent authority to consider cases for executive clemency. This the Legislature cannot do.

Clemency is a power vested in the Governor by the Florida Constitution, Article IV, Section 8(a). "Clemency is an act of grace proceeding from the power entrusted with the execution of the laws . . . ." Fla. Admin. Code R. 1, Title 27 Appen. The executive's authority over clemency is exclusive under the Florida Constitution. See Asay v. Florida Parole Commission, 649 So. 2d 859, 860 (Fla. 1994).

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[38]The Rules of Executive Clemency are adopted by the Governor and the Cabinet.

The Florida Supreme Court addressed the executive's sole and exclusive authority over clemency proceedings in Parole Commission v. Lockett, 620 So. 2d 153, (Fla. 1993). The Court addressed the question whether "a legislative act can take precedence over a rule of the Governor and Cabinet adopted to implement their constitutional executive clemency powers." Id. at 154. The Court found:

> [T]he clemency process is derived solely from the constitution and is strictly an executive branch function, and that, consequently, the Legislature, by statute, may neither preempt nor overrule the clemency rules without violating the separation of powers doctrine expressly set forth in article II, section 3, of the Florida Constitution.

Parole Commission v. Lockett, 620 So. 2d at 154-55.

The Legislature, in adopting Ch. 96-290, sought to preempt and/or overrule the clemency rule that authorizes the Governor to consider clemency for a death-sentenced individual at any time. The Legislature's action violates the separation of powers clause of the Florida Constitution.

The Florida Supreme Court, in deciding that the Legislature cannot encroach on the executive clemency authority, explained its reasoning in Lockett:

> [O]ur constitution expressly vests the power to grant pardons and clemency solely with the executive branch. See Sullivan v. Askew, 348 So.2d 312 (Fla.), cert. denied, 434 U.S. 878, 98 S. Ct. 232, 54 L.Ed.2d 159 (1977); Singleton v. State, 38 Fla. 297, 21 So. 21 (1896). This Court has been very clear in construing the Governor's clemency powers and holding that this power is independent of both the Legislature and the judiciary. see Sullivan; In re Advisory Opinion to the

> Governor, 334 So.2d 561 (Fla. 1976); Turner v. Wainwright, 379 So.2d 148 (Fla. 1st DCA), aff'd, 389 So.2d 1181 (Fla. 1980). In In re Advisory Opinion to the Governor, we stated that the legislatively enacted Administrative Procedure Act, chapter 120, Florida Statutes (1975), would not apply to the exercise of the executive branch's clemency power, stating:
>
> > No aspect of clemency powers exist by virtue of a legislative enactment, and none could. These powers are "derived" solely form the Constitution. The exclusivity of the exercise of clemency powers by the executive branch is further buttressed in the areas under consideration by the procedural requirements of the Constitution itself. Where that document sufficiently prescribes rules for the manner of exercise, legislative intervention into the manner of exercise is unwarranted.
>
> 334 So.2d at 562 (footnote omitted). In Sullivan, 348 So.2d at 316, we stated that we would not "intrude on the proper execution of the executive [clemency] power."

Lockett, 620 So. 2d at 157. The same result is required in Mr. Medina's case. Section 940.03, as amended by Ch. 96-290, is a legislative encroachment upon executive powers expressly granted by the Florida Constitution to the Governor and the Cabinet. Lockett, 620 So. 2d at 158. As such, the legislative limitation on the Governor's clemency powers is unconstitutional. The unconstitutional action of the Legislature prevents Mr. Medina from presenting potentially meritorious arguments for mercy to the Governor.

This Court must find that the Legislature's amendment of § 940.03, Fla. Stat. (Supp. 1996), violates separation of powers

and is unconstitutional. Precedent admits of no alternative result. Thereafter, this Court should grant a stay of execution to permit Mr. Medina to prepare and file an application for executive clemency once the unconstitutional prohibition on his doing so has been lifted.

ARGUMENT VII

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

The United States Supreme Court has held that where a person convicted of first degree murder and sentenced to death can show either innocence of first degree murder or innocence of the death penalty he is entitled to relief for constitutional errors which resulted in the conviction or sentence of death. Sawyer v. Whitley, 112 S. Ct. 2514 (1992).[39] The Florida Supreme Court also has recognized that innocence of the death penalty constitutes a valid claim for relief. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992). Mr. Medina is innocent of the death penalty.

The lower court disposed of this claim by construing it as a sufficiency of the evidence claim. Order at 16-19. This claim is not a sufficiency of the evidence claim; rather it is a claim that Mr. Medina's death sentence should not stand because he is not eligible for the death penalty under Florida and United States Supreme Court law.

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[39]According to Sawyer, where a death sentenced individual establishes innocence of the death penalty, his claims must be considered despite procedural bars. Sawyer, 112 S. Ct. at 2518-2519.

Innocence of the death penalty can be shown by establishing ineligibility for a death sentence. See Scott (Abron) v. Dugger. This can be shown by establishing circumstances which under either state or federal law preclude a death sentence. The Eighth Amendment permits states to employ any procedures in determining death eligibility so long as these procedures "genuinely narrow the class of persons eligible for the death penalty." Zant v Stephens, 462 U.S. 862 (1982). However, once a state elects to use certain procedures to determine death eligibility, the state commits Eighth Amendment error when it fails to assure the "measured and consistent application of the death penalty." Zant; Maynard v. Cartwright, 486 U.S. 356 (1988); Godfrey v. Georgia, 446 U.S. 420 (1980). Failure of a state to consistently apply its own eligibility standards results in a death sentence that is arbitrary and capricious.

Under Florida law, a person is eligible for the death penalty if he is convicted of first degree murder, § 921.141, Fla. Stat. (1996); and if the cosentencers find at least one aggravating factor sufficient to justify a death sentence, id.; and if the Florida Supreme Court determines that death is proportional, Tillman v. State, 591 So. 2d 167 (Fla. 1991); and if the defendant is not insane. § 922.07, Fla. Stat. (1995). In Florida, innocence of the death penalty is shown in a number of ways. First, Mr. Medina may show that there are insufficient aggravating circumstances in his case to render him eligible for death under Florida law. Second, Mr. Medina may show innocence

of the death penalty by demonstrating that a death sentence in his case would be disproportionate to similar cases. Even if there are sufficient aggravating circumstances to render Mr. Medina death-eligible, he nonetheless is innocent of the death penalty if the death sentence is disproportionate in his case. Finally, Mr. Medina is not eligible for the death sentence if he is insane.[40]

To show that he is ineligible for death because no reasonable juror would find sufficient aggravating circumstances, Mr. Medina must show that but for constitutional error there were insufficient aggravating circumstances to justify a death sentence. Mr. Medina can make this showing.

Mr. Medina's sentencing judge relied upon two aggravating circumstances in sentencing Mr. Medina to death (R. 1877-78). The first aggravating circumstance relied upon by the judge was "heinous, atrocious or cruel." However, Mr. Medina's jury

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[40]The lower court wrote that:

> Defense counsel also includes a claim that Defendant is ineligible for the death sentence because Defendant is insane. This issue was recently extensively litigated and resulted in a finding that Defendant is competent to be executed.

Order at 18 n.5. The lower court is in error. The question of Mr. Medina's competency to be executed was not "extensively litigated;" the lower court denied Mr. Medina's Rule 3.811 motion without hearing argument of counsel or evidence. The issue of competency to be executed is different than the issue of competency to proceed in postconviction, as the lower court was quick to point out in admonishing undersigned counsel. See Order Denying Motion for Rehearing of Order Denying Rule 3.811 Motion at 1. The latter competency question was extensively litigated, albeit in violation of Mr. Medina's due process rights.

received an unconstitutional instruction regarding this aggravator. As a result, this aggravating circumstance was invalid in Mr. Medina's case. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Godfrey v. Georgia, 446 U.S. 420 (1980). The statutory aggravating circumstance itself is unconstitutionally vague and overbroad. See Richmond v. Lewis, 113 S. Ct. 528 (1992).

The sentencing court did not advise Mr. Medina's jury that, to establish the heinous, atrocious or cruel aggravating circumstance, the State must prove beyond a reasonable doubt that Mr. Medina had a specific intent to torture the victim. Stein v. State, 632 So. 2d 1361 (Fla. 1994); Omelus v. State, 584 So. 2d 563 (Fla. 1991). In order for the judge properly to instruct the jury, and for the judge to find that the State's evidence established the heinous, atrocious or cruel aggravating factor, the State must prove beyond a reasonable doubt that the defendant intended to inflict a high degree of pain, or that the defendant was indifferent to or enjoyed the suffering of the victim. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973). See Hamilton v. State, 678 So. 2d 1228, 1231 (Fla. 1996); Kearse v. State, 662 So. 2d 677, 686 (Fla. 1995); Robertson v. State, 611 So. 2d 1228, 1233 (Fla. 1993); Santos v. State, 591 So. 2d 160, 163 (Fla. 1991); Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). In fact, the Florida Supreme Court has considered relevant to the finding of the heinous, atrocious or cruel aggravating circumstance that the

State failed to show that the motive of the crime encompassed the required torturous intent.[41] Hamilton, 678 So. 2d at 1232.

In order to cure the facially vague and overbroad statutory language, the jury must receive the constitutionally adequate narrowing construction. Espinosa, 112 S. Ct. at 2928. Because the jury was not advised, and because the State failed to prove beyond a reasonable doubt that Mr. Medina had a specific intent to torture Dorothy James, the jury should not have been instructed to consider the heinous, atrocious or cruel aggravating circumstance. Similarly, because the jury was not advised that the State was required to prove beyond a reasonable doubt that the motive for the crime was consistent with torturous intent, the jury should not have been instructed to consider the heinous, atrocious, or cruel aggravating circumstance. Hamilton. Without having been given these limiting instructions, Mr. Medina's jury was unable to consider the proffered aggravating circumstances in a manner that comported with the guided discretion standard required under the Eighth and Fourteenth Amendments.

The sentencing court also failed to provide Mr. Medina's jury with the proper limiting instruction for the pecuniary gain aggravating circumstance. As with the heinous, atrocious or

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[41]The prosecutor conceded at the 3.850 evidentiary hearing that he could not even establish guilt for first degree murder without the testimony of Reinaldo Dorta placing Mr. Medina at the scene. It follows that no evidence existed to prove a torturous motive or intent because there was no evidence of Mr. Medina's state of mind or even that he was present when the victim was stabbed.

cruel aggravating circumstance, the instruction given to Mr. Medina's sentencing jury regarding this aggravating circumstance was not a constitutionally adequate instruction because it did not contain the narrowing construction adopted by the Florida Supreme Court. See Richmond v. Lewis, 113 S. Ct. 528 (1992).

The Florida Supreme Court has held that the pecuniary gain aggravating factor applies only where pecuniary gain is shown beyond a reasonable doubt to be the primary motive for the murder. Peek v. State, 395 So. 2d 492, 499 (Fla. 1981); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988).[42] See also Chaky v. State, 651 So. 2d 1169, 1172 (Fla. 1995); Peterka v. State, 640 So. 2d 59, 71 (Fla. 1994); Clark v. State, 609 So. 2d 513, 515 (Fla. 1992); Hill v. State, 549 So. 2d 179, 183 (Fla. 1989); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982); Hardwick v. State, 521 So. 2d 1071, 1076 (Fla. 1988); Rogers v. State, 511 So. 2d 526, 533 (Fla. 1987).

Further, the sentencing court did not instruct Mr. Medina's jury that, in order to find the pecuniary gain aggravating circumstance, the proof that the defendant's dominant motive in committing the murder was for pecuniary gain "cannot be supplied by inference from circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." Chaky v. State, 651

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[42]Peek and Scull both involved defendants who took the victim's car after the murder. "[I]t is possible that the car was taken to facilitate escape rather than as a means of improving his financial worth." Scull, 533 So. 2d at 1142.

So. 2d at 1172 (quoting Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982).[43]

Without these limitations, the instruction given to Mr. Medina's jury regarding the pecuniary gain aggravating factor failed to adequately inform the sentencer what must be found for the aggravator to be established. The sentencing judge failed to instruct Mr. Medina's sentencing jury in a constitutionally adequate manner regarding the only two aggravating circumstances found to exist in this case.

Given the sentencing judge's failure to provide the jury with constitutionally adequate instructions regarding the only two aggravating circumstances found to exist, there is sufficient doubt established that, had the jury been properly instructed, it would have recommended death.

The second aspect of death-eligibility in Florida is that the sentence must be proportional when compared to similar cases. In Florida, a death sentenced individual is rendered ineligible

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[43]The sentencing judge found:

> The crime for which defendant is to be sentenced was committed for pecuniary gain. The only motive reasonably inferrable [sic] from the evidence is that defendant had a tremendous desire to own a car; that when the victim refused to let him have her car he killed her for it . . . " (R. 1877-78).

By its very terms, the sentencing order establishes that the sentencing judge did not apply the appropriate limiting definition of this aggravating circumstance, as explained in Simmons and Chaky. The jury instruction error cannot be harmless if the judge, who is presumed to know and apply limiting instructions, used the wrong standard in evaluating the pecuniary gain aggravating circumstance.

for a death sentence where the record establishes that the death sentence is disproportionate. The proportionality determination is made by the Florida Supreme Court.

Mr. Medina's sentencing judge instructed the jury on, and found established, the statutory mitigating circumstance that Mr. Medina had no significant history of prior criminal activity (R. 1878). The sentencing judge also considered as nonstatutory mitigating circumstances that Mr. Medina was under stress because of his limited ability to speak English and his difficulty in adjusting to American culture, that Mr. Medina was suspicious of police, that Mr. Medina received bad advice from older associates, that Mr. Medina had the capacity for hard work and other fine qualities, that Mr. Medina believed in God, that Mr. Medina had changed for the better in jail, and that his friends opined that Mr. Medina could be rehabilitated (R. 1879). The sentencing judge gave these nonstatutory mitigating circumstances "little weight." Id. In addition to the nonstatutory mitigating evidence found by the sentencing judge, the Florida Supreme Court determined from the record that Mr. Medina "has a behavioral problem," that he had been hospitalized for mental problems in Cuba, and that his actions appear to be impulsive at times. Medina v. State, 466 So. 2d 1046, 1050 (Fla. 1985).

Thus Mr. Medina is left with two aggravating circumstances that are invalid because the jury was not provided the proper limiting construction, one statutory mitigating circumstance, and many nonstatutory mitigating circumstances. Mr. Medina's case is

similar to other cases in which the Florida Supreme Court found the death penalty to be disproportionate. See Chaky v. State, 651 So. 2d 1169, 1173 (Fla. 1995)(Florida Supreme Court struck pecuniary gain, leaving only prior violent felony aggravating circumstance; trial judge had found two nonstatutory mitigating circumstances; Florida Supreme Court found death penalty disproportionate); Clark v. State, 609 So. 2d 513, 515-16 (Fla. 1992)(Florida Supreme Court struck three aggravating circumstances, leaving only pecuniary gain; trial judge had found four nonstatutory aggravating circumstances; Florida Supreme Court found death penalty disproportionate); Lloyd v. State, 524 So. 2d 396, 401-03 (Fla. 1988)(Florida Supreme Court struck two aggravating circumstances, leaving only the felony murder circumstance; trial judge had found statutory mitigating circumstance of no significant criminal history and no nonstatutory mitigating circumstances; Florida Supreme Court found death penalty disproportionate); Caruthers v. State, 465 So. 2d 496, 498-99 (Fla. 1985)(Florida Supreme Court struck two aggravating circumstances found as alternatives, leaving only the felony murder aggravating circumstance; trial judge had found statutory mitigating circumstance of no significant criminal history and several nonstatutory mitigating circumstances; Florida Supreme Court found death penalty disproportionate); Rembert v. State, 445 So. 2d 337, 340 (Fla. 1984)(Florida Supreme Court struck three aggravating circumstances, leaving only the felony murder aggravating circumstance; trial court had found no

mitigating circumstances, but Florida Supreme Court noted "Rembert introduced a considerable amount of nonstatutory mitigating evidence"; Florida Supreme Court found death penalty disproportionate). Given that the two aggravating circumstances found are invalid plus the finding of the statutory mitigating circumstance of no significant criminal history and numerous nonstatutory mitigating circumstances, the death penalty would be disproportionate in Mr. Medina's case.

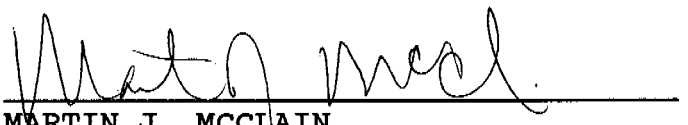
Because Mr. Medina does not meet the eligibility requirement of proportionality under Florida law, Mr. Medina is innocent of the death penalty. Likewise, because no valid aggravating circumstances remain, Mr. Medina does not meet the Eighth Amendment eligibility requirement of sufficient aggravating circumstances to warrant the death penalty. Under Florida's system of determining eligibility for the death penalty, Mr. Medina is ineligible. As such, he is innocent of the death penalty.

In addition to the foregoing reasons for Mr. Medina's innocence of the death penalty, Mr. Medina is ineligible for death because he is insane. Florida forbids the execution of one who is insane. § 922.07, Fla. Stat. (Supp. 1996). Because Mr. Medina is insane, he is ineligible for the death penalty. Because Mr. Medina is innocent of the death penalty, this Court should vacate his death sentence and remand for imposition of a life sentence.

CONCLUSION

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

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by facsimile transmission and United States Mail, first class postage prepaid, to all counsel of record on January 24, 1997.



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