IN THE SUPREME COURT OF FLORIDA

CASE NO.

LOUIS B. GASKIN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SEVENTH JUDICIAL CIRCUIT,
IN AND FOR FLAGLER COUNTY, 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. Gaskin's Fla. R. Crim. P. 3.850 motion for post-conviction relief. This proceeding challenges both Mr. Gaskin's conviction and his death sentence. References in this brief are as follows:

"R. at ___." The record on direct appeal to this Court.

"PC-R. at ___." The postconviction record on appeal.

REQUEST FOR ORAL ARGUMENT

The resolution of the issues in this action will determine whether Mr. Gaskin lives or dies. This Court has allowed oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be appropriate in this case, given the seriousness of the claims involved and the fact that a life is a stake. Mr. Gaskin accordingly requests that this Court permit oral argument.

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STATEMENT OF THE CASE

On March 27, 1990, the grand jury of Flagler County, Florida, returned an indictment against Mr. Gaskin in which he was charged with two counts of first degree murder in the death of Robert Sturmfels (premeditated and felony murder), two counts of first degree murder in the death of Georgette Sturmfels (premeditated and felony), one count of armed robbery of the Sturmfels, one count of burglary of the Sturmfels' home, two counts of attempted first degree murder of Joseph and Mary Rector, one count of armed robbery of the Rectors, and one count of burglary of the Rectors' home. He pled not guilty.

Mr. Gaskin's case proceeded to jury trial on June 11, 1990, despite repeated motions by defense counsel for a change of venue due to excessive pre-trial publicity (R. 1074). A jury returned guilty verdicts on nine counts (R. 1285-1294). The jury found Mr. Gaskin not guilty of the attempted murder of Mary Rector. The jury recommended death sentences for both murders by a vote of eight to four (R. 1301-1302). The trial court imposed two death sentences on each victim.

On direct appeal, the Florida Supreme Court affirmed in part but remanded to the trial court to vacate one count of first-degree murder for each victim. This was necessary because the trial court had erroneously imposed two counts of first-degree murder (premeditated and felony-murder) for each victim. Gaskin v. State, 591 So. 2d 917 (Fla. 1991).

Thereafter, the United States Supreme Court granted certiorari, vacated and remanded the case again in light of the

Court's decision in Espinosa v. Florida. See Gaskin v. State, 112 S. Ct. 3022 (1992), reh'g denied, 113 S. Ct. 22 (1992).

On remand from the United States Supreme Court, the Florida Supreme Court affirmed the death sentences. Gaskin v. State, 615 So. 2d 679 (Fla. 1993), cert. denied, 114 S. Ct. 328 (1993).

Mr. Gaskin filed his motion for postconviction relief under Fla. R. Crim. P. 3.850 on March 23, 1995, seven months before the two-year date under the pre-existing Rule 3.850 (PC-R. 1-44). In that motion, Mr. Gaskin included a claim that various state agencies had not complied with his public records requests (PC-R. 1-44). Mr. Gaskin notified the Court that the Flagler County State Attorney's Office and the Flagler County Sheriff's Office had not complied with Chapter 119 (PC-R. 397-404).

The state filed its answer to the motion to vacate judgments of convictions and sentences, and an appendix to the answer on May 19, 1995 (PC-R. 53-87, 88-252). Subsequently, a hearing was held before Judge Kim Hammond. The state contested the indigency motion filed by undersigned counsel regarding Mr. Gaskin's indigent status (PC-R. 47-49). The motion was granted (PC-R. 255-257).

After Mr. Gaskin filed a motion to disqualify the judge, Judge Hammond recused himself pursuant to Rule of Judicial Administration 2.160 on August 22, 1995 (PC-R. 297). On September 5, 1995, the case was re-assigned to Judge James S. Foxman in Daytona Beach. The case was given a Volusia County case number (PC-R. 396). A motion to compel disclosure pursuant to Chapter 119 was filed on February 1, 1995 (PC-R. 397-404). An amended

motion for post-conviction relief was filed on the two-year deadline under Rule 3.850 on October 12, 1995 (PC-R. 299-395). This motion also included a public records claim alleging that Mr. Gaskin had not received full compliance with his public records requests. The state filed no response to this motion.

Simultaneously with the litigation of the Rule 3.850 motion, Mr. Gaskin was litigating public records issues with the Florida Department of Law Enforcement (FDLE) and the Department of Corrections (DOC), agencies outside the jurisdiction of the Seventh Judicial Circuit. The litigation in those cases was in Leon County pursuant to Hoffman v. State, 613 So. 2d 405 (Fla. 1992).

The 3.850 postconviction motion was held in abeyance pending the resolution of the DOC civil suit. After counsel inadvertently failed to give the 3.850 court a status report of the DOC civil suit, the 3.850 court dismissed the remaining public records issue regarding DOC even though the Court had no jurisdiction over the matter (PC-R. 435). Jurisdiction over the DOC suit remained in Leon County with Judge Steinmeyer. The DOC suit was subsequently dismissed by Judge Steinmeyer. The appeal of the DOC suit is now pending before the First District Court of Appeals and has not been consolidated with the 3.850 case. See, Gaskin v. Singletary, First District Court of Appeals Case No. 96-03966.[1]

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[1]The issue in the First District Court of Appeals case is whether the lower court erred in ruling that collateral counsel could not represent Mr. Gaskin in a civil proceeding against the Department of Corrections. By determining that collateral counsel could not represent her client in civil court under Fla. Stat. (continued...)

On November 7, 1996, Judge Foxman held a hearing on the 3.850 postconviction motion where he heard oral argument on the motion (PC-R. 438). Judge Foxman summarily denied Mr. Gaskin's Rule 3.850 postconviction motion on January 19, 1997 (PC-R. 439-527).

Mr. Gaskin sought rehearing and offered a written proffer of facts on February 4, 1997 (PC-R. 528-597). Judge Foxman denied the motion seven days later (PC-R. 598). Notice of appeal was timely filed by Mr. Gaskin on March 12, 1997 (PC-R. 599-600).

SUMMARY OF ARGUMENT

1. The lower court erred in summarily denying Mr. Gaskin's postconviction motion filed within the two-year date under then-existing Rule 3.850. After the filing of Mr. Gaskin's original 3.850 motion seven months before to the two-year date, the lower court only granted leave to amend claims originally asserted in the initial 3.850 and did not give Mr. Gaskin leave to assert new claims not originally raised in that motion. The lower court erroneously believed that any amendment of the original motion, no matter how prematurely it had been filed, was to include only those facts which could have been obtained through compliance with Chapter 119 requests. The lower court applied the incorrect

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[1](...continued)
27.7001 (Supp. 1996), the lower court decided that the court of competent jurisdiction was the trial court where Mr. Gaskin was convicted and sentenced. At the time of the lower court's decision, the Department of Corrections was not within the jurisdiction of the Circuit Court of Volusia County according to the Florida Supreme Court and Hoffman v. State, 613 So. 2d 405 (Fla. 1992). Mr. Gaskin could not seek redress in any other court. Mr. Gaskin was denied access to courts and due process of law. The relief he is requesting is that the case be remanded back to the lower court to allow him to address his public records issues against the DOC.

newly-discovered evidence standard to all new claims and facts which were presented in Mr. Gaskin's amended motion filed on the two-year date. The lower court should have considered all facts and claims raised within the two-year period under the Lemon standard.

2. The lower court erred in its summary disposition of Mr. Gaskin's Rule 3.850 postconviction motion as being legally insufficient. Mr. Gaskin pled sufficient facts under Rule 3.850 to require an evidentiary hearing. The court misconstrued the law regarding sufficiency of the pleading and failed to consider the proper standard in evaluating the facts pled. Remand is appropriate.

3. The trial court erred in its decision that Mr. Gaskin had waived the right to disclosure of notes in the possession of the State Attorney's Office. The State failed to disclose portions of its file even after it specifically stated that it did not consider the material exempt. The lower court erred in failing to recognize that counsel was not obligated to re-request the state's notes at the Chapter 119 evidentiary hearing when the state was not claiming them as exempt and should have disclosed them with the rest of the file. Because the State Attorney's Office did not validly claim an exemption, these materials should have been disclosed to Mr. Gaskin immediately at the hearing or its original disclosure. In the alternative, the Court should remand this cause to the lower court for disclosure of those documents for which no exemption was validly claimed. Mr. Gaskin should be given no less than sixty (60) days to amend his

postconviction motion with any facts or claims arising from the disclosed materials.

4. The lower court erred in summarily denying Mr. Gaskin's claim that he was denied an adversarial testing at the penalty phase of his capital trial. The lower court adopted the state's position that Mr. Gaskin was barred from raising new claims in his amended postconviction motion filed on the two-year deadline because they were not raised in the original 3.850 which had been filed seven months early to initiate Chapter 119 litigation. The lower court also erroneously agreed with the state that the claim itself was facially insufficient and conclusory because no witness affidavits were attached to the motion and because counsel had not pled all of the specific facts that she intended to prove at an evidentiary hearing. This interpretation of Rule 3.850 was in error. Under Lemon v. State, 498 So. 2d 923 (Fla. 1986), "the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850. A trial court has only two options when presented with a Rule 3.850 motion: "either grant appellant an evidentiary hearing, or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138 (4th DCA 1992). Even though the court did attach portions of the record to its order, the records attached do not conclusively rebut Mr. Gaskin's allegations, and the attachments provided by the trial court do not conclusively demonstrate that Mr. Gaskin is not entitled to relief. Because the allegations

"involve disputed issues of fact," an evidentiary hearing is necessary. Maharaj v. State, 684 So. 2d 726, 728 (Fla. 1996). See also Way v. State, 630 So. 2d 177 (Fla. 1993) (one of the purposes of an evidentiary hearing is to resolve disputed issues of fact regarding issues that might warrant reversal).

5. The lower court erred in summarily denying Mr. Gaskin's claim that he was denied a reliable adversarial testing at the guilt phase of his capital trial. The limited attachments from the record that accompanied the lower court's order do not conclusively demonstrate that Mr. Gaskin is not entitled to relief; rather, the attachments support Mr. Gaskin's entitlement to an evidentiary hearing. Mr. Gaskin's postconviction motion alleged numerous extra-record allegations that cannot be refuted by the record.

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

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

8. Mr. Gaskin alleged that trial counsel was ineffective for failing to object to the state's use of nonstatutory aggravating factors in his capital trial. The law was clear regarding the use of such factors.

9. Defense counsel failed to challenge effectively for a change of venue due to the intense publicity the case had received in the media. Counsel failed to discover and use the wealth of information available regarding the surrounding coverage of Mr. Gaskin's trial. The facts alleged provide a basis for relief.

10. Florida's overbroad death penalty statute was applied to Mr. Gaskin in violation of the Eighth Amendment. Florida's capital sentencing statute is unconstitutional on its face and as applied to Mr. Gaskin.

11. Appellate counsel was ineffective for failing to ensure that an accurate and complete record on appeal was filed and available to present Mr. Gaskin's claims before this Court. Mr. Gaskin was denied a meaningful direct appeal because this Court considered his claims without the benefit of the complete record on appeal. Due to omissions in the record, no adversarial testing occurred because counsel could not raise issues based on bench conferences during jury instructions, trial, and voir dire which were not transcribed or made a part of the record. Remand for a complete record is necessary.

12. The statutory aggravating circumstances and the jury instructions on them are impermissibly and unconstitutionally vague or overbroad.

13. Juror misconduct occurred in Mr. Gaskin's trial when all but one of the jurors were familiar with the inflammatory media coverage surrounding the trial. As a result of this misconduct, Mr. Gaskin was denied a fair and impartial jury as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States

Constitution.

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

15. Trial counsel failed to object to the systematic racial discrimination that occurred in the jury selection of Mr. Gaskin's trial. During voir dire, crucial bench conferences were held off the record or were not transcribed. Mr. Gaskin was ultimately tried by an all-white jury which took only forty minutes to deliberate at penalty phase. The omissions in the record have prevented Mr. Gaskin from determining to what extent black jurors were excluded from the jury venire. An evidentiary hearing is required on this issue.

16. The lower court erred in summarily denying Mr. Gaskin's claim that he failed to receive effective assistance of mental health experts, in violation of Ake v. Oklahoma. No background information was provided to a mental health expert by trial counsel, and the expert was forced to rely only on Mr. Gaskin's self-report.

17. Defense counsel failed to effectively argue against the admission of irrelevant evidence that had no probative value and prejudiced Mr. Gaskin's ability to present a viable defense. Mr. Gaskin pled sufficient facts to warrant a hearing on this issue under Lemon.

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

19. Mr. Gaskin's death sentence rests upon an

unconstitutional automatic aggravating circumstance and jury instructions in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

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

21. The court shifted to Mr. Gaskin the burden of proving whether he should live or die. Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with established caselaw. The instructions violated the Eighth Amendment.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING SUMMARILY MR. GASKIN'S AMENDED MOTION TO VACATE ON THE GROUNDS THAT THE CLAIMS WERE PROCEDURALLY BARRED. THE COURT MISTREATED THE AMENDED MOTION AS A SUCCESSIVE MOTION.

The trial court summarily denied Mr. Gaskin's postconviction motion on the erroneous assumption that the amended motion filed on the two-year date was a successive motion under Rule 3.850. In mistreating the amended motion as a successive motion the trial court also used an incorrect "newly-discovered evidence" standard by which to determine whether Mr. Gaskin was entitled to an evidentiary hearing on his claims (PC-R. 441-456).

Mr. Gaskin filed an initial 3.850 motion on March 23, 1995, well in advance of the two-year deadline, partly to invoke the jurisdiction of the trial court to compel certain Florida state

agencies to comply with his requests for public records pertaining to his case pursuant to Florida Statutes Chapter 119. At that time, Rule 3.852 of the Florida Rules of Criminal Procedure had yet to be enacted. There was no other, more efficient mechanism for compelling these state agencies to comply with his requests, or to seek discovery prior to filing his 3.850 motion. In fact, even with the assistance of the court, the State Attorney did not provide the requested public records from its files until six days before the two-year limitation period was to expire. This prevented Mr. Gaskin from investigating any claims that arose out of those files prior to the two-year deadline. Nonetheless, Mr. Gaskin timely filed his Rule 3.850 motion on the two year date, i.e., October 12, 1995.

Had the State fully complied in a timely manner with Mr. Gaskin's requests for public records, the premature filing of his first 3.850 motion could have been avoided entirely, and the necessity of even filing an amended motion. Although the State effectively contributed to bringing about the foregoing circumstances, it managed to argue successfully to Judge Foxman that Mr. Gaskin was somehow at fault for failing to present the additional issues raised in the amended motion in his first motion, and that he should be procedurally barred from raising those additional issues.

The trial court's decison is contrary to the law and to principles of fundamental fairness. An amended motion is not a multiple or successive motion proscribed by Rule 3.850(f) of the Florida Rules of Criminal Procedure. See Shaw v. State, 654 So.

2d 608 (4th DCA 1995). There is no reason a trial court should not entertain on the merits additional issues raised in an amended 3.850 motion filed within the applicable limitation period and prior to adjudication of the initial 3.850 motion. Even assuming, *arguendo*, that the additional issues raised in the amended motion were untimely and therefore subject to a possible procedural bar, Mr. Gaskin cannot be held responsible for having prematurely filed his 3.850 motion when that event was precipitated, in part, by the failure of the State to comply in a timely manner with his lawful requests for public records. "The State cannot fail to furnish relevant information and then argue that the claim need not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act." Ventura v. State, 673 So. 2d 479, 481 (Fla. 1996). Regardless of whether the additional claims raised by Mr. Gaskin in his amended 3.850 motion related directly to the public records procured subsequent to the intervention of the court, the additional claims are not procedurally barred. It was the misfeasance of the State that led Mr. Gaskin to file his initial 3.850 motion prematurely, and the State contributed to the omission of the additional issues in the initial motion.

Florida courts have long recognized a distinction between new claims raised as amendments to timely first-time pleadings sought prior to a final hearing on the merits, and new claims raised in successive motions after a claimant has received an adjudication in conjunction with a full and fair opportunity to present any claims he may have had.

Allowing amendments to pleadings, when timely sought, has been observed repeatedly by the courts to be a proper policy." Bryant v. Small, 271 So. 2d 808, 809 (3d DCA 1973). Rule 1.190(e) of the Florida Rules of Civil Procedure.

In Rozier v. State, 603 So. 2d 120 (5th DCA 1992), the court recognized the policy set forth in Rule 1.190(e) to motions filed pursuant to Rule 3.850 of the Florida Rules of Criminal Procedure:

> The civil rule is pertinent because post-conviction collateral remedies such as those initiated under rule 3.850 are in the nature of independent collateral civil actions. See State v. White, 470 So.2d 1377, 1378 (Fla. 1985). In State v. Lasley, 507 So.2d 711 (Fla. 2d DCA 1987), the court noted that, "[l]ike a habeas corpus proceeding an action under rule 3.850 is considered civil in nature and collateral to the criminal prosecution which resulted in the judgment of conviction, notwithstanding the inclusion of rule 3.850 within the criminal rules.

603 So. 2d 120, 121. The court noted that "[a]mendments and supplements to rule 3.850 motions are commonplace." The court held that the trial court had departed from the essential requirements of the law by unjustly refusing to permit the defendant to supplement his timely filed motion for post-conviction relief. 603 So. 2d 120, 121.

In Brown v. State, 596 So. 2d 1026 (Fla. 1992), this Court held that "the two-year limitation does not preclude the enlargement of issues raised in a timely-filed [sic] first motion for post-conviction relief." 596 So. 2d 1026. The court declined to reach the question of whether claims not contained in the original motion could be raised for the first time by amendment after the limitation period had run. The court's use of the term

'enlargement' refers to revision of issues already pled, rather than to the introduction of new issues. The court also implied that while the right of a defendant to introduce new issues after the limitation period remains unclear, the right of a defendant to introduce new issues within the limitation period presents no such problem. The term 'amendment' encompasses both enlargement of issues already pled, as was the situation in Brown, and the introduction of new issues concerning matters which existed at the time the original pleading was filed but were omitted from the pleading because they were overlooked or unknown. See Florida Power & Light Company v. System Council U--4 of the International Brotherhood of Electrical Workers, AFL-CIO, 307 So. 2d 189, 192 (1st DCA 1975) (quoting the author's comment following Rule 1.190(d) of the Florida Rules of Civil Procedure: "'Matters existing at the time of filing the pleading and omitted therefrom because overlooked or unknown should be brought in by amendment'" [as opposed to a supplemental pleading]).

In Shaw v. State, 654 So. 2d 608 (4th DCA 1995), the court remanded the case to the trial court for consideration of additional issues raised by the defendants in a timely amended 3.850 motion which had not been raised in their original 3.850 motion. The court said the introduction of additional issues in the amended 3.850 motion did not violate the prohibition against multiple or successive motions established by Rule 3.850(f) of the Florida Rules of Criminal Procedure, since the original motion had not yet been adjudicated. Citing as an example the case of Jones v. State, 450 So. 2d 325 (4th DCA 1984), the court pointed out

that "[t]he cases discussing successive motions....generally involve situations in which the second motion is filed after the first motion has been denied." 654 So. 2d 608, 609. Since the amendment and supplement to the 3.850 motion had been filed within the two-year limitation period, and before the trial court had ruled on the initial motion, the court found that "[u]nder these circumstances, there is no reason why the trial court should not consider the merits of them." 654 So. 2d 608, 609.

The failure of the court to address the additional issues as an original motion instead of a successor motion deprived Mr. Gaskin of the due process of law, equal protection of the law, and to a full and fair hearing on the merits of these claims, as guaranteed under Article One, Sections Two, Nine, and Sixteen of the Florida Constitution, and under the Fifth and Fourteenth Amendments to the United States Constitution. An evidentiary hearing is necessary.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. GASKIN'S AMENDED MOTION ON LACK OF SUFFICIENCY.

The lower court denied Mr. Gaskin's amendment to his motion to vacate for three reasons: it was legally insufficient, the claims were procedurally barred, and it was conclusively rebutted by the record (PC-R. 455-456). Adopting the State's position, the lower court erred in suggesting that Mr. Gaskin was required to plead witness names, attach affidavits and plead in his postconviction motion all of the facts he would prove at an evidentiary hearing (PC-R. 442, 445, 455). There is no such

requirement in Fla. R. Crim. P. 3.850.

The Court adopted the State's argument that Mr. Gaskin has raised "no specific allegations" in his assertion that trial counsel was ineffective for failure to adequately investigate and prepare mitigation evidence at penalty phase. (PC-R. 441). The Court also adopted the State's argument that the amended motion filed on the two-year deadline was procedurally barred because Mr. Gaskin has filed an initial 3.850 seven months early and that the pleading was facially insufficient because it "fails to specifically name witnesses who would have provided additional mitigating evidence and if those alleged witnesses were available to testify." Further, the Court adopted the State's argument that Mr. Gaskin "failed to demonstrate that the alleged witnesses could not have been discovered within the last two years and therefore this claim is now untimely." (PC-R. 442). These findings are contrary to the law and are factually wrong.

This Court has specifically rejected the trial court's position on the sufficiency of the pleadings. In Ventura v. State, 673 So. 2d 479 (Fla. 1996), this Court remanded the case based on the attached pleading, which is a recitation of the issues in the case. Likewise, Rule 3.850 states that:

> ...**(c) Contents of Motion.** The motion shall be under oath and include:
>
> * * *
>
> (6) a brief statement of the facts (and other conditions) relied on in support of the motion.

Fla. R. Crim P. 3.850 (c)(6) [emphasis added]. At the end of the Florida Rules of Criminal Procedure, the Court illustrates the

intent of the rule by providing a form motion for filing a Rule 3.850 motion. See, Fla. R. Crim. P. 3.987. In that form the following instructions are given:

> 14. State **concisely** every ground on which you claim that the judgment or sentence is unlawful. Summarize **briefly** the **facts** supporting each ground.

Fla. R. Crim. P. 3.987 at page 321. The Court outlines a list of grounds that a movant may choose from that are properly raised in a Rule 3.850 motion. A form is offered for use:

> A. Ground 1:_____
>
> Supporting FACTS (tell your story **briefly** without citing cases or law):_____

Fla. R. Crim. P. 3.987 at page 321. In each instance, the rule highlights brevity in pleading the facts at every juncture.

Even if the intent of the rule were not so clear, Judge Hammond, before he recused himself, found that the files and records did not conclusively show that Mr. Gaskin was not entitled to relief because he specifically ordered the State to respond.[2]

[2] **(d) Procedure; Evidentiary hearing: Disposition.** ...Unless the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the court shall order the state attorney to file an answer or other pleading within the period of time fixed by the court or take such other action as the judge deems appropriate. Fla. R. Crim. P. 3.850.

The State did not assert that there were insufficient facts to respond. The State responded on May 18, 1995. Under Lemon v. State, 498 So. 2d 923 (Fla. 1986), the facts and allegations contained in Mr. Gaskin's Rule 3.850 postconviction motion must be taken as true unless conclusively rebutted by the record.

The rule does not require Mr. Gaskin to plead all of the proof he would offer in support of the facts plead in his Rule 3.850 motion. The Court does not make this requirement because counsel is entitled to develop a postconviction defense strategy without revealing his witnesses to the State. There is no requirement that counsel reveal its case to the State by submitting affidavits of witnesses or attaching the specific pieces of evidence which support the facts. Under Lemon, those facts must be taken as true. It is at an evidentiary hearing that Mr. Gaskin would be required to prove the facts alleged and carry his burden of proof. If the requirement were that a defendant must plead facts and his proof, it would obviate the need for an evidentiary hearing. The State cannot require Mr. Gaskin to do its investigation. With the investigatory resources of the Sheriff's Department and FDLE, the State has a distinct advantage in investigating the allegations raised in any situation. Now, under the trial court's order it is unnecessary for the State to even make a phone call because the entire postconviction defense case would be placed in their hands.

The State did not say it could not answer the 3.850 motion. Sufficient facts were pled in the initial March 23, 1995 Rule 3.850 motion so that the State could write a thirty-four (34) page

motion with an extensive appendix. At page 10 of the State's answer, the State concedes that Mr. Gaskin had until October 12, 1995 to file his full Rule 3.850 motion. The State also misquotes Brown v. State, 596 So. 2d 1026 (Fla. 1992). Assistant State Attorney Daly argued, and the Court adopted, that Mr. Gaskin could only enlarge the claims presented in the original March 23, 1995 motion. Mr. Daly argued that Mr. Gaskin could not add new claims when he amended his original motion on his two-year date. This is not what Brown says. Mr. Daly failed to reveal the contrary distinction in Brown:

> ...the two-year limitation does not preclude the enlargement of issues raised in a timely-filed first motion for postconviction relief. However, we need not reach the issue of whether claims not contained in the original motion may be raised for the first time by amendment filed **after** the limitation period has run.

See, Brown v. State, 596 So. 2d at 1028.

Brown deals with an amendment filed after the two year period had expired. This is not the case here. Mr. Gaskin timely filed his amended motion before the two year deadline. Thus, all of Mr. Gaskin's claims were properly and timely before the trial court. The trial court erroneously believed that because Mr. Gaskin initiated his postconviction motion early, he is restricted only to those claims. Mr. Gaskin is entitled to consideration of all of his claims.

Mr. Gaskin pled sufficient facts in his amended Rule 3.850 motion to warrant an evidentiary hearing. For example, in Claim III, the trial court ignored the deficiencies in Dr. Krop's

examination and the materials that he said he needed. At page 22 of the amended motion, Mr. Gaskin argued that trial counsel tried to cover up his failure to provide adequate background materials to Dr. Krop by telling the Court that Dr. Krop did not have anything with which to mitigate. Mr. Gaskin stated specifically, "Mr. Gaskin's counsel has learned that Dr. Harry Krop had repeatedly requested that Mr. Cass [sic] to provide him background material so he could [sic] performed a competent evaluation of Mr. Gaskin." See, Oct. 12, 1995 Rule 3.850 motion at page 22.

On page 23 of the amended motion, counsel stated specifically what materials Dr. Krop needed. "Mr. Cass never provided Dr. Krop with the requested background materials such as Mr. Gaskin's school records, medical records, the several depositions taken in the case, and other background materials." Counsel then says what Dr. Krop would testify to if called to an evidentiary hearing. See, id. at paragraph 7, page 23.[3]

Counsel specifically stated the facts that were not presented to the judge or jury, starting at paragraph 10 on page 23. These facts, if taken as true, entitle Mr. Gaskin to an evidentiary hearing and are not rebutted conclusively by the record. The availability of these facts at the time of trial is an issue in dispute to be resolved at an evidentiary hearing. Mr. Gaskin is not required to plead his witnesses names, addresses, phone numbers and schedules of availability. These issues arise only if an evidentiary hearing is granted. Even then, the State must

[3]Further discussion of the legal sufficiency of each claim is referenced in the individual arguments elsewhere in this brief.

request discovery of these facts and the issue is to be decided by the trial court.

Further, Mr. Gaskin filed a motion for rehearing and written proffer of facts on February 4, 1997, which revealed the names of the witnesses (PC-R. 528-597). The trial court denied the motion for rehearing seven days later, suggesting that even if counsel would have pled the names of witnesses, the court still would have considered the motion legally insufficient. If this were the result anticipated by Rule 3.850, then no pleading could meet such a standard of legal sufficiency unless the entire postconviction defense were laid into the hands of the State. Remand is appropriate.

ARGUMENT III

THE LOWER COURT ERRED IN NOT ORDERING THE STATE TO PROVIDE NOTES FOR WHICH IT HAD NOT CLAIMED AS AN EXEMPTION UNDER CHAPTER 119.

The trial court erred in its decision that Mr. Gaskin had waived the right to disclosure of notes in the possession of the State Attorney's Office. The State failed to disclose portions of its file even after it specifically stated that it did not consider the material exempt. The lower court erred in failing to recognize that counsel was not obligated to re-request the state's notes at the Chapter 119 evidentiary hearing when the state was not claiming them as exempt and should have disclosed them with the rest of the file.

The lower court erroneously stated at the April 29, 1996 pubic records hearing that Mr. Gaskin had "waived" his entitlement to the complete State Attorney's files from Mr. Daly and Mr.

Nelson (PC-R. 465). The trial court refers to the transcript of the hearing where Mr. Daly corrected his previous argument that he had turned over all documents to Mr. Gaskin. He admitted on the record that Mr. Nelson had removed his notes. Mr. Nelson told undersigned counsel that he would provide his notes (PC-R. 465). Mr. Daly did not claim an exemption. He simply misrepresented on the record that counsel did not want the documents when it was clear that counsel had made the request in writing and in person after a hearing with Judge Kim Hammond at which Mr. Daly was not present. These notes still have not been provided to counsel. The State has claimed no exemption. The notes should have been turned over with the original release of the State Attorney files, but were erroneously withheld. The trial court has stated no statutory or legal basis for its finding that Mr. Gaskin waived his entitlement to the State Attorney notes, which are not exempt and which were requested years before the April 29, 1996 hearing. If Mr. Gaskin had been subject to the new Rule 3.852, the State would be required to turn over those documents regardless of whether it claimed an exemption because it had illegally withheld the documents after receiving Mr. Gaskin's initial Chapter 119 request.

Because the State Attorney's Office did not validly claim an exemption, these materials should have been disclosed to Mr. Gaskin immediately at the hearing or its original disclosure. In the alternative, this Court should remand this cause to the lower court for disclosure of those documents for which no exemption was validly claimed.

ARGUMENT IV

MR. GASKIN WAS ENTITLED TO AN EVIDENTIARY HEARING ON WHETHER HE WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS TRIAL.

The trial court adopted the State's argument that Mr. Gaskin has raised "no specific allegations" in his assertion that trial counsel was ineffective for failure to adequately investigate and prepare mitigation evidence at penalty phase. The trial court also adopted the State's argument that the amended motion filed on the two-year deadline was procedurally barred because Mr. Gaskin had filed an initial 3.850 seven months early and that the pleading was facially insufficient because it "fails to specifically name witnesses who would have provided additional mitigating evidence and if those alleged witnesses were available to testify." Further, the trial court adopted the State's argument that Mr. Gaskin "failed to demonstrate that the alleged witnesses could not have been discovered within the last two years and therefore this claim is now untimely" (PC-R. 442). These findings are contrary to the law and are factually wrong. Mr. Gaskin pled sufficient facts in his amended Rule 3.850 motion to warrant an evidentiary hearing.

A. TRIAL COUNSEL'S FAILURE TO PRESENT MENTAL HEALTH MITIGATION.

In its order, the lower court stated that Mr. Gaskin pled "no specific allegations" (PC-R. 442). However, the lower court made no such finding concerning the Ake v. Oklahoma claim which is pled in the same manner as this claim. Likewise, the lower court ignored significant factual allegations that were contained in the

motion and in the motion for rehearing. For example, the lower court failed to address the deficiencies in Dr. Krop's examination and the materials that he said he needed. At page 22 of the amended motion, Mr. Gaskin argued that trial counsel tried to cover up his failure to provide adequate background materials to Dr. Krop by telling the Court that Dr. Krop did not have anything with which to mitigate. Mr. Gaskin specifically stated, "Mr. Gaskin's counsel has learned that Dr. Harry Krop had repeatedly requested that Mr. Cass [sic] to provide him background material so he could [sic] performed a competent evaluation of Mr. Gaskin." See, Oct. 12, 1995 Rule 3.850 motion at page 22.

On page 23 of the amended motion, counsel specifically stated what materials Dr. Krop needed. "Mr. Cass never provided Dr. Krop with the requested background materials such as Mr. Gaskin's school records, medical records, the several depositions taken in the case, and other background materials." Counsel then said what Dr. Krop would testify to if called to an evidentiary hearing. See, id. at paragraph 7, page 23.

Counsel specifically outlined the facts that were not presented to the judge or jury, starting at paragraph 10 on page 23. These facts, if taken as true, entitle Mr. Gaskin to an evidentiary hearing and are not rebutted conclusively by the record. The availability of these facts at the time of trial is an issue in dispute to be resolved at an evidentiary hearing. Mr. Gaskin is not required to plead his witnesses names, addresses, phone numbers and schedules of availability. These issues arise only if an evidentiary hearing is granted. Even then, the State

must request discovery of these facts to be decided by the Court.

Had Mr. Gaskin been granted an evidentiary hearing, he would have proffered witnesses and supporting evidence to prove his factual allegations as he did in his motion for rehearing and written proffer of facts filed on February 4, 1997 (PC-R. 528). Had Mr. Gaskin been granted an evidentiary hearing, the judge would have learned that Louis Gaskin's life was characterized by neglect and the constant seeking of attention and love. Dr. Krop did not know of these facts because trial counsel had failed to provide the adequate background materials Dr. Krop had requested.

In its order, the trial court erroneously adopted the State's argument that the deposition of Dr. Krop rebuts Mr. Gaskin's allegation that Mr. Cass was ineffective for failing to provide adequate mental health mitigation or adequate background material to his mental health expert. The court stated that the deposition of Dr. Krop, "does reveal that he was given the background information, from the Defendant as well as a three hour interview with two family members (Virginia Brown and Janet Morris), that is alleged to have been unknown to Dr. Krop at the time of the evaluation." See (PC-R. 443). The trial court's position that anything given to Dr. Krop was adequate for a competent evaluation is wrong.

Dr. Krop testified at deposition at page 8 that he had not done any testing other than an MMPI. He testified that subsequent to his evaluation he was provided some information that indicated neuropsychological testing may be necessary but he couldn't say "until I get some additional records." See, deposition of Dr.

Krop at page 8. Dr. Krop interviewed Ms. Brown and Ms. Morris, who "indicated that there may be some evidence of brain injuries." Dr. Krop testified as to the documents he had reviewed. These included police reports, witness statements and a polygraph examination report (i.e. the State's discovery). He specifically said "I have not reviewed -- in fact, I don't know if there are any depositions that have been taken in this case or any other information that I would need to look at to perhaps corroborate some of the information that I got from the family members and Mr. Gaskins." Id, at page 9.

When asked about what type of schizophrenia Mr. Gaskin had, Dr. Krop testified, " No, I don't have a real good handle at this point on a diagnosis. That's why when I wrote the letter to Mr. Cass on March 14th I indicated a need -- and I believe I also sent a letter to your office somewhat later asking for additional information because I don't feel that I have a good handle on a diagnosis right now." See, Id. at page 12. Later, Dr. Krop specifically stated that the family members he interviewed could not give him the information he needed to make a diagnosis. Trial counsel never provided him the materials he requested. Dr. Krop testified he had not been given enough independent corroborative information to make a diagnosis or draw a conclusion with a reasonable degree of medical certainty. During cross-examination by the Assistant State Attorney, Dr. Krop again testified:

> Q. (STATE) Do you find that disorder with a reasonable degree of medical certainty?
>
> A. (KROP) Not at this point. I feel like I need more information.

Deposition of Dr. Krop at page 29.

> ...I would like to see school records. Again, I have not reviewed those. I don't know whether there are any available, but that would be helpful to see whether there were any notices of any kind of unusual behavior by teachers, for example.

Id, at page 15. In Mr. Gaskin's 3.850 motion, counsel specifically pled that school records should have been provided, but were not. See, October 12, 1995 3.850 motion at page 23.

Even without the necessary background material, Dr. Krop was able to opine that Mr. Gaskin was one of the "most disturbed individuals I've ever worked with." See, Id. at page 29. No further information was provided to Dr. Krop. No further testing was done on Mr. Gaskin. Instead, Mr. Cass advised his seriously "disturbed" client that Dr. Krop could not offer any mitigation on his behalf. It is clear these facts are in dispute and not conclusively rebutted by the record. Counsel specifically pled the background materials that should have been provided and that Dr. Krop would testify that he needed more background material to make a medically-adequate diagnosis. The fact that Dr. Krop refused to make a diagnosis based on the little information he had proves that Mr. Gaskin was not provided effective assistance of counsel or an adequate mental health evaluation under Ake v. Oklahoma, 470 U.S. 68 (1985). It is obvious that Dr. Krop, who had been deposed one week before trial, was available at the time of trial and could have reached a favorable diagnosis had he been provided adequate background material. The prejudice in counsel's deficient performance was pled at page 30 the October 12, 1995,

3.850. The prejudice is that the jury, which voted 8-4 for death, never heard Dr. Krop's testimony or any mental health mitigation. In fact, the jury was not instructed that it could consider mental health mitigation because trial counsel failed to investigate evidence to support it. The State introduced Dr. Rotstein's report at the sentencing hearing, which was not held before the jury. Dr. Rotstein was the state-hired mental health expert. The jury never heard Dr. Rotstein's report. Dr. Rotstein's report had nothing to do with trial counsel's background investigation. The court confused this issue.

There is no question that Dr. Krop requested more background material and suggested neuropsychological testing. See page 14 of court's order. There is no dispute that Dr. Krop spent three (3) hours talking to the two (2) family members who testified. Dr. Krop stated he relied on their information as "typical" evidence. However, he could not reach a diagnosis because the information he was given was inadequate and incomplete. The family members could not tell him the information he needed. Dr. Krop had some information. That did not relieve defense counsel of his responsibility to finish the job.

Dr. Krop could not make a diagnosis. His preliminary findings were speculative as was brought out by the State in cross-examination at the deposition. The trial court has interjected its own reasoning as to why Dr. Krop wanted additional information. No evidence has been presented as to why he wanted additional information. Thus, there is a need for an evidentiary hearing as there is a factual dispute.

Dr. Krop had no background information that did not come from a disinterested party. The self-report of a mentally ill client and family witnesses could not provide independent evidence. Dr. Krop needed more than corroboration for the "details of the reported information." He needed the primary information. Mr. Gaskin, his aunt and cousin are not trained to detect learning disabilities and behavioral problems. His aunt and cousin are not qualified to administer neuropsychological testing. They are not medical doctors who can document a medical history. The information Dr. Krop was provided was simply inadequate by his own admission.

Under Ake v. Oklahoma, more is required of counsel than simply retaining a mental health expert, talking to a couple of family members and calling the evaluation adequate. Trial counsel knew that his preparation was inadequate. That is why he did not place Dr. Krop on the stand.

The trial court relied on Dr. Rotstein's report to support its conclusion that counsel provided adequate background material to his expert. At the outset, it is important to note that Dr. Rotstein was retained by the State not the defense. He reported directly to Assistant State Attorney Nelson. In fact, Dr. Rotstein Mirandized Mr. Gaskin because his exam was not going to be confidential. He was not there to assist the defense. In fact, Dr. Rotstein was provided with more information than Dr. Krop, the supposed defense expert. He found one statutory mental health mitigator. His evaluation focused on competency and not mental health mitigation for the defense. He did no testing of

any kind because he is a psychiatrist and not qualified to conduct neuropsychological testing. He found no evidence of organic brain syndrome but found a severe deficit in concrete thinking.

Dr. Rothstein found that Mr. Gaskin was of "average or better than average intelligence," had "no abnormal motor behavior and his speech was well-controlled." Of course, Mr. Gaskin was on anti-depressant medication at the time of Dr. Rotstein's evaluation but there are no indications as to how this affected his conclusions except his finding that "at no time did he seem depressed or anxious."

Finally, Dr. Rotstein concluded that Mr. Gaskin had a Schizotypal Personality Disorder and that Mr. Gaskin became delusional when he put on a Ninja suit and was unable to conform his conduct to normal human behavior at the time of the crimes.

The trial court said that Dr. Rotstein was well aware of Mr. Gaskin's background information. See Court's order at page 15. This is so because he was the State's expert. That is why he was able to reach a diagnosis when Dr. Krop, the defense expert, could not. The State had provided more background information to its expert than defense counsel had given to Dr. Krop. Mr. Cass had no responsibility to provide background material to the State's witness. The trial court cannot transfer Dr. Rotstein's knowledge to a defense witness and relieve Mr. Cass of his duty to investigate and prepare his defense expert.

Moreover, the trial court erroneously found that "Dr. Rotstein diagnosed the Defendant with the same disorder that the Defendant is now claiming was not known by the mental health

experts." See Court's order at page 15. The court confused Dr. Rotstein as a defense expert. He was not. He did not testify at trial before the jury. In fact, he never appeared in person. His report was offered by the State at sentencing before the judge only. He was paid by the State. His diagnosis is not the same as Dr. Toomer, the expert hired in postconviction. We do not know what Dr. Krop's final diagnosis would have been.

Contrary to the court's opinion, Dr. Krop did not make a diagnosis. Dr. Krop did not review the same background material as Dr. Rotstein. Therefore, the focus of their evaluations were completely different.

More importantly, the jury never heard the State's mental health expert's report. Dr. Rotstein's report was admitted without objection at sentencing. Most certainly, the jury never heard Dr. Krop's information. This is the prejudice in the case.

Mr. Cass had no tactic or strategy for failing to provide Dr. Krop with the independent background information he requested to make a psychologically-sound diagnosis. The trial court cannot now interject a strategy for defense counsel. These facts are obviously in dispute, therefore an evidentiary hearing is necessary to resolve these matters. The records cannot conclusively rebut that counsel unreasonably failed to provide adequate material to his defense expert.

Mr. Cass failed to make an opening argument or put on a single witness on Mr. Gaskin's behalf during the guilt/innocence phase. This was done despite the fact that there was ample evidence that Mr. Gaskin suffered from severe mental disorders

that call into question his sanity and his ability to form specific intent to commit first degree murder, robbery, and burglary.

Equally disappointing was Mr. Cass performance during the penalty phase. Mr. Cass failed to put on a case of mitigation. In fact, the first order of business for Mr. Cass was to put on the record an excuse as to why he would not be providing Mr. Gaskin a defense against the death penalty:

> MR. CASS: Your Honor, may Mr. Tanner and I see you in Chambers?
>
> THE COURT: Yes, I will see you in Chambers.
>
> Whereupon, at 1:00 o'clock p.m., Mr. Cass met with Mr. Downey, the Court Reporter and the Defendant, Louis Bernard Gaskin in the holding cell of the Flagler County Courthouse.
>
> MR. CASS: You know Mr. Downey?
>
> MR. GASKIN: Yes, sir.
>
> MR. CASS: Louis, you remember I had you re-examined by Dr. Krop.
>
> He didn't come up with anything that would help. I am getting a letter from him to that effect, that he didn't have anything that he could mitigate with.

(CITE).

This was a charade perpetuated by Mr. Cass. Mr. Cass was attempting to cover-up his failure to provide adequate representation for Mr. Gaskin. Mr. Gaskin's counsel has learned that Dr. Harry Krop had repeatedly requested that Mr. Cass to provide him background material so that he could perform a competent evaluation of Mr. Gaskin. These background materials

also were critical in Dr. Krop's determination of whether certain statutory and nonstatutory mitigation was applicable in Mr. Gaskin's case. Mr. Cass never provided Dr. Krop with the requested background materials such as Mr. Gaskin's school records, medical records, the several depositions taken in the case and other background materials.

When Mr. Cass called Dr. Krop to testify during the course of the trial, Dr. Krop told him he could not because ethically and professionally he could not provide an expert opinion to whether mitigation was applicable in Mr. Gaskin's case due to Mr. Cass' failure to provide the requested background materials. In an effort to conceal his ineffectiveness, Mr. Cass requested a letter from Dr. Krop stating that he did not find any mitigation. The reason Dr. Krop was unable to render an expert opinion as to mitigation in Mr. Gaskin's case was due to Mr. Cass' ineffectiveness.

Because of sheer neglect, Louis was sentenced to die by a jury who never knew the true extent of the appalling conditions he grew up under and that he suffered a lifetime of mental illness, abuse, rejection and abandonment. Post-conviction counsel has uncovered the following readily available mitigation that the jury never heard, including that Louis suffers from longstanding and severe mental health disorders. The jury never knew that Louis has organic brain damage. Because he was involved in several accidents as a child, including head injuries, he suffered brain damage. As a result of these injuries, Louis suffers from Schizotypal Personality Disorder and Schizophrenia. These

disorders cause him to experience auditory hallucinations and episodes of derealization and depersonalization. Had counsel conducted adequate mental health evaluations and provided background material, he would have discovered this relevant mitigation.

At the time of the offenses, Louis's mental disorders caused him to be under the influence of extreme mental and emotion disturbance. These disorders substantially impaired his capacity to appreciate the criminality of his conduct and to conform his conduct to the requirement of law.

The judge and jury never knew Louis' complete family history because counsel had failed to thoroughly investigate his social background. If he had, he would have learned that Louis was the product of a unmarried teenage mother and absentee father. After Louis was born, his mother abandoned him for hours, often leaving him home alone. This abuse and neglect went undiscovered by other family members until one day when they discovered a three-month old Louis alone and eating off the floor. Louis was taken away from his biological mother.

At that time, Louis was given to the custody of his great grandparents, who despite their willingness to help were just too old to be raising an infant. They were ill-equipped to handle a mentally and emotionally disturbed child. Again, Louis was abused and forced to eat off of the floor. Even at the age of twelve or thirteen, Louis would hide under the bed and have to be physically pulled out. After finally getting him out from under the bed, Louis was foaming at the month.

Louis was introduced to abusive sexual activity at a very early age. By the age of four, Louis was exposed to incestuous sexual activity. He engaged in sexual activity with his siblings and first cousin when he was just a child. This type of behavior was a sign of a deeply disturbed child, yet Louis' disorders went undiagnosed.

As a teenager, Louis evolved into a suicidal teenager. He played with dangerous snakes and played Russian roulette with a loaded revolver. Not surprisingly, Louis was incarcerated at a young age. At twelve years old, he was placed in the Volusia County Juvenile Detention Hall for stealing a bicycle.

Because of his severe mental problems, Louis could not learn at the same rate as other children his age. He completely failed the third and sixth grades. By the age of fifteen, Louis had only completed the eighth grade. Inevitably, he dropped-out of school and started working.

The jury never heard this mitigation because counsel did not thoroughly investigate readily available background information. The jury was never made aware of the true nature of Louis' upbringing and life as an adult. It is precisely the kind evidence presented at the sentencing hearing before the trial court the United States Supreme court had in mind when it wrote Lockett v. Ohio, 438 U.S. 586 (1978), and Eddings v. Oklahoma, 455 U.S. 104 (1982). Lockett was concerned that unless the sentencer could consider "Compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendants will be treated not as unique human beings, but as a "faceless,

undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The evidence would have made a difference between life and death in this case.

Counsel's highest duty is to investigate and prepare. Where, as here, counsel unreasonably fails to investigate and prepare, the defendant is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g., Kimmelman v. Morrison, 477 U.S. 365, 384-88 (1986) (failure to request discovery based on mistaken belief state obliged to hand over evidence); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991)(failure to conduct pretrial investigation was deficient performance); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc) (failure to interview potential self-defense witness was ineffective assistance); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(failure to have obtained transcript witness's testimony at co-defendant's trial was ineffective assistance); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses).

"In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227 (11th Cir. 1986). Mr. Gaskin's court-appointed counsel failed in this duty. Counsel operated through neglect. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989), or on the failure to properly investigate and prepare. See Kimmelman v. Morrison, Chambers v. Armontrout, Nixon

v. Newsome. Mr. Gaskin's capital conviction and sentence of death are the resulting prejudice. But for counsel's errors, there is a reasonable probability of a different outcome.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 626 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington; Kimmelman v. Morrison.

The eighth amendment recognizes the need for increased scrutiny in the review of capital verdicts and sentences. Beck v. Alabama, 477 U.S. 625 (1980). The United States Supreme Court noted, in the context of ineffective assistance of counsel, that the correct focus is on the fundamental fairness of the proceeding:

> A number of practical considerations are important for the application of the standards we have outlined. Most important, in adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles

> should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged. In every case the court should be concerned with whether, despite the strong presumption of reliability, the result of the particular proceeding is unreliable because of a breakdown in the adversarial process that our system counts on to produce just results.

Strickland v. Washington, 466 U.S. 668, 696 (1984) (emphasis added). The evidence presented in this claim demonstrates that the result of Mr. Gaskin's trial is unreliable.

"Counsel's ineffectiveness caused actual and substantial disadvantage to the conduct of [the defendant's] defense." Spraggins at 1195, citing in part Washington v. Strickland, 693 F.2d 1243 at 1250. Furthermore, in U.S. v. Swanson, 943 F.2d 1070 (9th Cir. 1991) the Court held that defense counsel's concession during closing argument, that no reasonable doubt existed regarding the only factual issues in dispute, constituted ineffective assistance and was prejudicial per se. Mr. Gaskin was effectively deprived of an adversarial testing at the penalty phase by these concessions.

Because of counsel's failure to properly investigate and prepare for the penalty phase, his "minimal preparation is plainly evident." Cunningham v. Zant, 928 F.2d 1006, 1017 (11th Cir. 1991). Here, as in Cunningham, "trial counsel's minimal questioning . . . [of mitigation witnesses] . . . resulted in the jury's being deprived of substantial mitigating evidence regarding . . . [Mr. Gaskin]." Id. The resulting prejudice is clear -- "[b]y failing to provide such evidence to the jury, though readily

available, trial counsel's deficient performance prejudiced . . . [Mr. Gaskin's] ability to receive an individualized sentence." Id. at 1019 (citations omitted).

At the penalty phase before the jury, trial counsel put on two family witnesses to testify that Louis Gaskin was raised by his great grandparents who were very strict with Louis and that Louis was a good person. The mitigation testimony was only fourteen (14) pages of trial transcript. (R. 970-84).

B. TRIAL COUNSEL'S FAILURE TO CHALLENGE STATE'S CASE.

Mr. Cass' closing argument consists of six (6) pages of trial transcript in which Mr. Cass completely failed to specifically address aggravating and mitigating circumstances. Trial counsel vaguely argued that the jury should spare Louis' life because the world has changed for the worse since World War II (R. 993-98). Not surprisingly, the jury recommended a sentence of death for both victims in this case.

Defense counsel was ineffective for failing to request the instruction that the jury in the weighing process must consider aggravating factors (5) (d) "in the course of a felony" and (5) (f) "pecuniary gain" as a single aggravating circumstance. Without this instruction, the jury must likely engage in improper doubling of aggravating factors. The mere fact that trial court merged these two aggravating factors does not cure the problem of improper doubling.

"Doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d

97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981).

The jury, a co-sentencer, was allowed to rely upon the above-referenced aggravating factors in reaching a recommendation for death. The jury is a co-sentencer in Florida, and must be given adequate jury instructions. Johnson v. Singletary, No. 81,121, slip op. at 2 (Fla. Jan. 29, 1993); Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992).

This type of "doubling" renders a capital sentencing proceeding fundamentally unreliable and unfair. See Welty; Clark. It also results in an unconstitutionally overbroad application of aggravating circumstances, Godfrey v. Georgia, 446 U.S. 420 (1980), and fails to genuinely narrow the class of persons eligible for death. The result is an improper capital sentence.

Here, counsel failed to investigate and prepare for the penalty phase proceedings. He failed to know the law. He failed to object to erroneous jury instructions as set forth in his motion to vacate. Counsel's ignorance of the law was deficient performance which prejudiced Mr. Gaskin. Mr. Gaskin was deprived of a reliable and meaningful penalty phase proceeding before the sentencing jury, "a co-sentencer." Johnson v. Singletary, 612 So. 2d at 576.

Under Strickland, is ineffective when trial counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. Where an adversarial testing does not occur and confidence is undermined in the outcome, relief is appropriate. Given a full and fair evidentiary hearing, Mr. Gaskin can show the

result of his trial was unreliable because of counsel's deficient performance. Mr. Gaskin is entitled, at a minimum, to a full and fair evidentiary hearing on these claims.

This Court can also take into consideration that counsel's errors were cumulative. Mr. Gaskin did not receive the fundamentally fair trial to which he was entitled under the eighth and fourteenth amendments. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991); Blanco v. Singletary, 941 F.2d 1477 (11th Cir. 1991). The sheer number and types of errors involved in his trial, when considered as a whole, resulted in the unreliable conviction and sentence that he received.

The entire trial was tainted because of trial counsel's ineffectiveness. Counsel's performance was unreasonable and was prejudicial. Rule 3.850 relief is appropriate. Mr. Gaskin is entitled to a hearing on the issues raised.

ARGUMENT V

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. GASKIN'S INEFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE CLAIM ON THE GROUNDS THAT IT WAS PROCEDURALLY BARRED AS A SUCCESSIVE MOTION.

In its order, the lower court analyzed Mr. Gaskin's allegations of ineffective assistance of counsel at guilt phase as a successive motion under Rule 3.850 even though the amended motion was timely filed on the two-year date. See, Argument I. In considering this claims as successive, the lower court used the "newly discovered evidence" standard in analyzing the merits of this claim. This was clearly the wrong analysis. Mr. Gaskin's allegations should have been reviewed under the Lemon standard.

The files and records do not refute Mr. Gaskin's claims for relief. For example, Mr. Gaskin raised allegations that Mr. Cass, his trial counsel, had a conflict of interest in not revealing to him that he had been a "special deputy sheriff." He also claimed that this conflict resulted in counsel's failure to effectively cross-examine or challenge the state's witnesses who were primarily law enforcement officers (PC-R. _____). Unbeknownst to Mr. Gaskin at the time of his capital proceedings, his defense counsel was also an active law enforcement officer. He was unaware of Mr. Cass' status as an active law enforcement officer until it was disclosed in an unrelated postconviction hearing. This Court has held that the conflict of interest regarding trial counsel's dual role as defense counsel and a special deputy sheriff was an issue that merits an evidentiary hearing to determine the extent and effect of that conflict of interest. See, Teffeteller v. State, Case No. 77,646; Quince v. State, Case No. 81,730; Randolph v. State, 81,950; Herring v. State, Case No. 81,649. Mr. Gaskin specifically alleged that this conflict of interest resulted in trial counsel's ineffective cross-examination of the state's key prosecution witnesses, who were law enforcement officers. Trial counsel failed to challenge the state's crime scene preservation and analysis, as well as the state's ballistics expert. This Court has continually recognized this claim as one that merits an evidentiary hearing, in that no file or record can conclusively rebut this claim.

The limited attachments from the record that accompanied the lower court's order do not conclusively demonstrate that Mr.

Gaskin is not entitled to relief; rather, the attachments support Mr. Gaskin's entitlement to an evidentiary hearing. Mr. Gaskin's postconviction motion alleged numerous extra-record allegations that cannot be refuted by the record.

In addition, Mr. Gaskin argued that trial counsel ineffectively failed to retain or utilize mental health experts to assist in formulating and presenting a defense. Had counsel adequately investigated the case, he could have explored the possibility of presenting mental health testimony to refute specific intent or other possible mental defenses. Trial counsel inexplicably failed to investigate, prepare or inquire as to the assistance of a mental health expert for guilt phase issues. Mr. Gaskin pled sufficient facts to warrant an evidentiary hearing.

In its order, the lower court stated this portion of Mr. Gaskin's claim was legally insufficient for failure to name witnesses who would have testified. Once again, Mr. Gaskin is not required to turn over the names and addresses of his witnesses nor is he required to provide affidavits. If taken as true, the facts alleged require an evidentiary hearing.

At page 36 of the Oct. 12, 1995 3.850 motion, Mr. Gaskin specifically stated the prejudice that he suffered due to trial counsel's deficient performance. Mr. Gaskin relied on the advice of Mr. Cass, who had a conflict of interest. Mr. Cass' status as a special deputy sheriff should have been communicated to his client. The conflict affected trial counsel's judgment with regard to what evidence should be presented to the jury. The prejudice is that the jury never knew significant aspects that

were mitigating and exculpatory regarding Mr. Gaskin's life because counsel failed to investigate the case.[4] The jury never knew that Mr. Gaskin was suffering from organic brain damage, schizophrenia, and severe mental problems at the time of the offense which affected his ability to form specific intent, and his ability to voluntarily give statements. At page 38 of the October 12th 3.850 motion, Mr. Gaskin specifically pled the prejudice he had suffered. He was convicted based on an involuntary confession. Adequate mental health assistance would have assisted trial counsel in putting on an adequate defense. Mr. Gaskin pled these facts, which if taken as true, are not rebutted by the record.

Counsel specifically stated the deficiencies in trial counsel's performance at guilt phase. At an evidentiary hearing, counsel would call trial counsel and question him on the reasonableness of his failure to present or investigate this case. For example, trial counsel attempted to impeach the State's forensic gathering of evidence at the crime scene in Flagler County.[5] Trial counsel could not effectively cross-examine the State's technicians because he failed to consult any experts who

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[4]The jury was not instructed that it could consider or find the "extreme mental and emotional disturbance" mitigating factor because counsel had presented no evidence to support the factor. This is particularly important here, where the jury vote was 8 to 4 for death.

[5]The crime scene was analyzed one day after the crime occurred because FDLE technicians had to travel from another location. There was evidence that the crime scene had been tainted by not being secured and with officers and other personnel trampling through the crime scene.

could challenge the State's scientific evidence. Had he consulted these experts he would have learned that the crime scene had been contaminated by a number of people walking through the area. Instead of impeaching these officers with the sloppy crime scene analysis, trial counsel complimented them on a job well done. See, Claim V at page 40-41. Mr. Gaskin suggests that counsel's failure to present evidence or effectively challenge the State's case was unreasonable and without tactic or strategy. Confidence in the outcome of the trial is undermined by this deficient performance and the subsequent prejudice. Mr. Gaskin was entitled to have the court consider this issue in its entirety. This claim was sufficiently pled and not procedurally barred as argued by the State. An evidentiary hearing is necessary.

ARGUMENT VI

THE JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR.

The jury was given the following instruction regarding the cold, calculated, and premeditated aggravating factor:

> Five, the capital offense was a homicide, was committed in a cold, calculated, premeditated manner without any pretense of moral or legal justification or methodical intent.

(R. 999). In a pre-trial motion, Mr. Gaskin objected to the vagueness of this instruction (R. 1193-1217). The trial court denied the motion (R. 1074-76).

The trial court failed to instruct the jury, in every count, as to the limitations of the "cold, calculated" aggravator required by the Florida Supreme Court. Not only did the trial

court fail to give the adequate narrowing instruction, but the state failed to prove the existence of this aggravator beyond a reasonable doubt, on every count. There was insufficient evidence to support the finding of this aggravating circumstance.

Such instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments to the United States Constitution. Defense counsel was ineffective for failing object. Relief should be granted to Mr. Gaskin and a new sentencing trial ordered.

ARGUMENT VII

THE CALDWELL V. MISSISSIPPI CLAIM.

The trial court and the prosecutor misled the jury about the significance of its sentencing verdict under the laws of the State of Florida. In Florida's capital sentencing scheme, a jury's sentencing recommendation is to be accorded great deference. Mann v. Dugger, 844 F.2d 1446, 1453 (11th Cir. 1988); Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). However, during Mr. Gaskin's sentencing procedure, the prosecutor improperly minimized the jury's "sense of responsibility for determining the appropriateness of death" in violation of the Eighth Amendment to the United States Constitution (R. 152, 892, 916, 2539). See, Caldwell v. Mississippi, 472 U.S. at 320, 341, 105 S.Ct. 2633, 2646 (1985); Mann, supra at 1456.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeas corpus petitioner

presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions that diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions here violated Mr. Gaskin's eighth amendment rights. Mr. Gaskin is entitled to relief under Mann. Mr. Gaskin's counsel's failure to object at trial and to raise this issue on direct appeal is ineffective assistance of counsel under the Sixth, Eighth and Fourteenth Amendment to the United States Constitution. Relief under 3.850 must be granted.

ARGUMENT VIII

THE NONSTATUTORY AGGRAVATOR CLAIM.

The judge and jury that sentenced Mr. Gaskin were presented with and considered nonstatutory aggravating circumstances. For example, Mr. Gaskin was convicted of four counts of first degree murder -- two counts of premeditated murder and two counts of felony murder. The Florida Supreme Court struck two of the four first degree murder convictions on direct appeal. Gaskin v. State, 591 So. 2d 917, 920 (Fla. 1991). This is one example of the many non-statutory aggravating factors presented at trial.

The sentencer's consideration of improper and unconstitutional nonstatutory aggravating factors starkly violated the Eighth Amendment, and prevented the constitutionally required narrowing of the sentencer's discretion. See Stringer v. Black, 112 S.Ct. 1130 (1992); Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988). As a result, these impermissible aggravating factors evoked a sentence that was based on an "unguided emotional

response," a clear violation of Mr. Gaskin's constitutional rights. Penry v. Lynaugh, 108 S.Ct. 2934 (1989). Relief is proper.

ARGUMENT IX

MR. GASKIN WAS DENIED A FAIR AND IMPARTIAL JURY WHEN THE TRIAL COURT REFUSED TO CHANGE VENUE.

Of the twelve jurors chosen for the jury, all but one were already familiar with the outrageous and inflammatory media reporting surrounding Mr. Gaskin's case (R. 180). Mr. Gaskin's counsel presented the court with a motion for change of venue (R. 1068-1074, 1188-1192). Counsel also renewed the motion throughout the trial (R. 289, 400, 857-59). The court denied Mr. Gaskin's motion (R. 858). Before ever going to trial in a courtroom, Mr. Gaskin was tried and convicted in the press.

In Mr. Gaskin's case, the jurors' knowledge of the case and the inflamed community atmosphere deprived Mr. Gaskin of a fair trial under an inherent prejudice and an actual prejudice analysis. See Heath v. Jones, 941 F.2d 1126, 1134 (11th Cir. 1991). Inherent prejudice occurs when pretrial publicity "is sufficiently prejudicial and inflammatory and the prejudicial pretrial publicity saturated the community where the trials were held." Coleman v. Kemp, 778 F.2d 1487, 1490 (11th Cir. 1985). Actual prejudice occurs when "the prejudice actually enters the jury box and affects the jurors." Heath, 941 F.2d at 1134. In determining whether a jury was fair and impartial, the reviewing court "must examine the totality of the circumstances surrounding the petitioner's trial." Coleman, 778 F.2d at 1538. "[N]o single

fact is dispositive." Id.

Juror Nooles read many articles about the murders, and was affected enough to look on a map to find where the murderer had struck. Juror Nooles did this out of fear for the safety of friends who lived in the area (R. 111-116). Juror Mitchell was on duty as a security guard the night of the murders and was told to help secure the town while the police investigated (R. 223-24, 250-52). Juror Valentine admitted to being frightened by the incident, and admitted fearing for the safety of his family (R. 247). The inflammatory nature of the pretrial publicity which saturated the community up to and including the time of Mr. Gaskin's trial clearly required a change of venue. Here, as in Coleman, presumed prejudice has been established.

Mr. Gaskin's trial was infected from the very beginning, so much so that defense counsel repeatedly asked the trial court to change the venue. Due to the extensive nature of the prejudicial pretrial publicity the judge could have and should have moved for a change of venue *sua sponte* but failed to. Thus, Mr. Gaskin was convicted and sentenced to death in a proceeding so fundamentally and irreparably tainted by the all-pervasive pretrial media coverage as to deny him the fair trial and sentencing proceeding guaranteed by the Sixth, Eighth, and Fourteenth Amendments. His sentence must therefore fail. An evidentiary hearing and Rule 3.850 relief are warranted.

ARGUMENT X

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE.

Florida's capital sentencing scheme denied Mr. Gaskin his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. It did not prevent the arbitrary imposition of the death penalty and narrow the application of the death penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976).

The capital sentencing statute in Florida fails to provide any standard of proof for insuring that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty and violate the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S. Ct. 528 (1992).

The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992). To the extent trial counsel did not properly preserve this claim, Mr. Gaskin received ineffective assistance of counsel.

ARGUMENT XI

MR. GASKIN WAS DENIED A PROPER DIRECT APPEAL DUE TO OMISSIONS IN THE RECORD. MR. GASKIN DID NOT RECEIVE EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

Mr. Gaskin has a constitutional right to a complete transcript on appeal. Griffin v. Illinois, 351 U.S. 12 (1956); Entsminger v. Iowa, 386 U.S. 748 (1967); Mayer v. Chicago, 404 U.S. 189 (1971). In a capital case, the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution demand a verbatim, reliable transcript of all proceedings in the trial court. Parker v. Dugger, 111 S. Ct. 731 (1991).

During Mr. Gaskin's trial, crucial bench conferences were held off the record, or were not properly transcribed (R. 20, 23-4, 128, 134, 139-40, 195-6, 303-4, 305-6, 308, 310, 436, 590, 640, 851, 856, 920, 923, 986, 1010, 1023).

Appellate counsel had a duty to ensure that an accurate and complete record on appeal was filed. Without a complete record, no adversarial testing or appeal can be taken. Counsel was ineffective for failing to raise this issue before the Florida Supreme Court; an evidentiary hearing is required. Furthermore, trial counsel was inadequate and ineffective for not objecting to the omissions in the record.

ARGUMENT XII

THE VAGUE AND OVERBROAD AGGRAVATORS CLAIM.

During closing argument, the State proffered arguments that urged the jury to apply aggravating circumstances in a manner inconsistent with the Florida Supreme Court's narrowed

interpretation of those circumstances. Specifically, the prosecutor argued for application of (1) prior violent felony; (2) the capital felony was committed while the defendant was engaged in a burglary; (3) capital felonies were committed for pecuniary gain; (4) murders were committed in a cold, calculated and premeditated manner; and (5) murders were especially heinous, atrocious or cruel (R. 987-993).

The State did not argue to the jury the limiting construction applied to the heinous, atrocious, or cruel aggravator by the Florida Supreme Court. The state focused upon the number of times the victims were shot, and speculated on what each victim was possibly thinking. Such evidence was irrelevant. Bonifay v. State, 626 So. 1310 (Fla. 1993)(Multiple gunshot wounds and victim begging for life insufficient to support finding of heinous, atrocious or cruel aggravator). The state's argument was misleading and denied Mr. Gaskin a fair hearing and due process.

The State improperly argued the applicability of the cold, calculated, and premeditated aggravator to the jury even though it did not apply. The state speculated, among other things, that the bullets used in the killings were specifically chosen to make the least noise when fired. There was no evidence in the record to support this theory. The state's argument was misleading and denied Mr. Gaskin a fair hearing and due process of law.

The state improperly instructed the jury on the aggravators of pecuniary gain aggravator, and committed while the defendant was engaged in a burglary aggravator. The state failed to inform the jury that if it finds these two aggravators, it must merge

them into one aggravator. Furthermore, the trial court failed to correct this mistake in it's penalty phase instructions (R. 998-1003). The state's argument was misleading and denied Mr. Gaskin a fair hearing and due process of law. To the extent Mr. Gaskin's trial counsel did not properly preserve this claim, Mr. Gaskin received ineffective assistance of counsel.

ARGUMENT XIII

THE JUROR MISCONDUCT CLAIM.

Juror misconduct occurred in Mr. Gaskin's trial. All but one of Mr. Gaskin's jurors were familiar with the inflammatory media reporting surrounding his trial (R. 180). The reporting of the crime also directly impacted on the lives of some of the jurors (R. 111-16, 223-24, 247, 250-252).

Mr. Gaskin was entitled to a fair and impartial jury, selected according to the requirements of due process and equal protection. See Irvin v. Dowd, 366 U.S. 717 (1961). The jurors' assertions that they could remain impartial are not dispositive and in Mr. Gaskin's case, considering how many of the jurors' lives were disrupted by the crime, it is unlikely they were honest when they stated they could remain impartial.

Further evidence of the jurors impartiality appeared in the penalty phase. When the jury retired to consider its sentencing recommendation, it returned with multiple death recommendations after only forty minutes of deliberations (R. 1003-1006). The jurors in Mr. Gaskin's case are guilty of misconduct. Mr. Gaskin's death sentence violates the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the corresponding

provisions of the Florida Constitution. Relief is proper.

ARGUMENT XIV

THE INABILITY TO INTERVIEW JURORS CLAIM.

Florida Rules of Professional Responsibility 4-3.5(d)(4) provides that a lawyer shall not initiate communications or cause another to initiate communication with any juror regarding the trial. This ethical rule unconstitutionally prevents Mr. Gaskin from investigating any claims of jury misconduct that may be inherent in the jury's verdict. This rule is prior restraint.

In Mr. Gaskin's case, the record supports the need to interview jurors for possible claims of jury misconduct. Mr. Gaskin requests that this Court declare this ethical rule invalid as conflicting with the Eighth and Fourteenth Amendments to the United States Constitution, and to allow Mr. Gaskin discretion to interview the jurors in this case. The failure to allow Mr. Gaskin the ability to freely interview jurors is a denial of access to the courts of this state under Article I, Section 21 of the Florida Constitution and deprives him of due process. Rule 3.850 relief is warranted.

ARGUMENT XV

THE DISCRIMINATORY JURY SELECTION CLAIM.

Purposeful discrimination in the selection of a jury is unconstitutional. It also is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Holland v. Illinois, 110 S. Ct. 2301 (1991); Swain v. Alabama, 85 S. Ct. 824 (1965). Mr. Gaskin was denied equal protection under the law because the state tried him before an all

white jury from which citizens had been purposely excluded based on race. Batson v. Kentucky, 106 S. Ct. 1712 (1986). Mr. Gaskin was entitled to a fair cross section of the population of the county in which he was tried. Batson.

Mr. Gaskin's counsel did not object to the systematic discrimination that occurred in this case. Counsel's failure to object constituted ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984). Furthermore, during voir dire, crucial bench conferences were held off the record, or were not properly transcribed, after which proceedings were conducted (R. 20, 23-4, 128, 134, 139-40, 195-96, 303-4, 305-6, 308, 310). During these conferences, crucial were made, but the record fails to tell what they were. However, because they occurred during voir dire, and because Mr. Gaskin's jury ultimately turned out to be all white, the bench conferences that were never recorded during voir dire become important in determining to what extent black jurors were systematically eliminated from Mr. Gaskin's jury. Counsel's failure to ensure that the conferences were put on the record also constitutes ineffective assistance of counsel. At a minimum, an evidentiary hearing is required as the files and records do not conclusively demonstrate that Mr. Gaskin is not entitled to relief.

ARGUMENT XVI

THE AKE V. OKLAHOMA CLAIM.

A. INTRODUCTION.

Mr. Gaskin had the right to competent mental health assistance and effective counsel pre-trial, at trial, and at sentencing. See Ake v. Oklahoma, 470 U.S. 68 (1985). Mr. Gaskin is entitled to the due process rights to a professionally competent, court-funded evaluation of his mental status at the time of the offense, his mental status at trial, and whether mitigating circumstances existed. Mr. Gaskin was entitled to court-funded evaluations that were professionally competent, reliable, and valid. The evaluations made of his mental status prior to trial, however, failed to take into account Mr. Gaskin's substantial history of mental illness.

The due process clause requires protection of the right to competent mental health assistance as a matter of fundamental fairness to the defendant and in order to assure reliability in the truth-determining process. Ake. The provision of competent psychiatric expertise to a defendant assures the defendant "a fair opportunity to present his defense," Id. at 77, and "enable[s] the jury to make its most accurate determination of the truth on the issue before them." See also Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990); Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991).

Independent of the requirements of the due process clause itself, Florida has created a state law entitlement to the valid evaluation of mental status that is protected by the due process

clause. In Florida, a criminal defendant is entitled to evaluation of his or her mental status upon request unless the trial judge is "clearly convinced that an examination is unnecessary. . . ." Jones v. State, 362 So. 2d 1334, 1336 (Fla. 1978); Mason v. State, 489 So. 2d 734 (Fla. 1986).

Accordingly, the due process clause requires that appointed mental health experts render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Fla. Stat. § 768.45(1) (1983). In psychiatry, as in other medical specialties, the standard of care is the national standard of care recognized among similar specialists rather than a local, community-based standard.

A criminal defendant aldo is entitled to competent expert mental health assistance whenever the state has made his mental condition relevant to guilt or punishment. Ake v. Oklahoma, 470 U.S. 68 (1985); Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990). A defendant is entitled to a "competent psychiatrist who will conduct an appropriate examination." Ake, 470 U.S. at 83. Here, the appointed mental health experts failed to conduct an adequate evaluation.

B. MENTAL HEALTH MITIGATION.

Sufficient facts were pled in Mr. Gaskin's Amended Rule 3.850 motion to warrant an evidentiary hearing. In its order, the Court ignores the deficiencies in Dr. Krop's examination and the materials that he said he needed. At page 22 of the Amended motion, Mr. Gaskin argued that trial counsel tried to cover up his failure to provide adequate background materials to Dr. Krop by telling the Court that Dr. Krop did not have anything with which to mitigate. Mr. Gaskin said, "Mr. Gaskin's counsel has learned that Dr. Harry Krop had repeatedly requested that Mr. Cass [sic] to provide him background material so he could [sic] performed a competent evaluation of Mr. Gaskin." See, Oct. 12, 1995 Rule 3.850 motion at page 22.

On page 23 of the amended motion, counsel states specifically what materials Dr. Krop needed. "Mr. Cass never provided Dr. Krop with the requested background materials such as Mr. Gaskin's school records, medical records, the several depositions taken in the case, and other background materials." Counsel then says what Dr. Krop would testify to if called to an evidentiary hearing. See, id. at paragraph 7, page 23.

Counsel outlined the facts that were not presented to the judge or jury, starting at paragraph 10 on page 23. These facts, if taken as true, entitle Mr. Gaskin to an evidentiary hearing and are not rebutted conclusively by the record. The availability of these facts at the time of trial is a disputed issue to be resolved at an evidentiary hearing.

Had Mr. Gaskin been granted an evidentiary hearing, he would

have proffered the following witnesses and supporting evidence to prove his factual allegations as he did in his February 4, 1997 motion for rehearing and written proffer of facts.

Louis was born in Greencove Springs, Florida to a 16-year-old unwed mother, Ginnie Gaskin, and a father whom he never knew. Louis' father, Billie Brazell, would have nothing to do with him or his mother after Ginnie became pregnant.

Ginnie attempted to raise Louis on her own, but was unable to. She lived in a house with fifteen other people, all of whom drank alcohol and smoked marijuana. Ginnie Gaskin said Louis was watched by "whoever was not drinking" at the time. Louis would be left alone for hours on end. When he was three-months old, some family members found Louis alone and eating off the floor.

When Louis was 15-months old, his great-grandmother, Lily Gaskin, took Louis away from his mother to live with her and her husband, Louis Gaskin, Sr. in Bunnell, Florida. Lily and her husband were elderly and had difficulty raising an infant.

Ginnie Gaskin was a high school drop out. By her own admission, she never stayed in one place for any length of time and traveled from place to place working as a farm worker. She occasionally would stop by and see Louis, but never for very long. Before Louis was born, Ginnie Gaskin had three other children with two different fathers. Louis only learned of his step brothers and sisters, Pamela Williams, Andre Williams, and Oliver Allen when he became a teenager. Louis's step brothers and sisters were placed in foster homes because their mother, Ginnie, had live-in boyfriends who would beat them. Ginnie also was beaten by these

men, according to Lessie Holton, Ginnie's sister. Lessie would have testified that Ginnie did not know how to be a mother. She neglected her children and often surrounded herself with men who would abuse her children.

Louis never knew his father, Billie Brazell. Billie came from a large family with six brothers. His family had a long history of mental illness. Billie and his siblings would often do daring and crazy things. Billie once catapulted a younger brother from a tree. One brother, Leslie, hung himself. Another brother, Lorenzo, had a nervous breakdown. Ernest Brazell, another brother, shot a woman in the back, paralyzing her. Billie would often go out into the woods for hours on end. He would drink moonshine and would anger easily, according to Janey Patricia Nichols, one of Billy's cousins.

As a child growing up, Louis was unlike other children. Like his father, he would spend hours in the woods by himself. His great grandparents were very strict and did not allow other children into their house or yard, and Louis was not allowed to leave the house or yard unless Lily was with him. Louis was told to pick up soda cans from the streets and dumpsters to help out the family. Louis was required to turn over any money he earned to Lily.

When Louis was four-years-old, he was fondled by a young girl who came to help his great grandmother in the home. When he was 10, Louis was sleeping in the same bed with his cousin and having sex with her. When Louis was 15, he ran away from his great-grandparents home because he wanted to live with his mother. His

mother could not keep him and sent him back.

Louis often kept to himself, was quiet and did not have any friends. Averly Brown, a former assistant principal at Bunnell Elementary School, would testify that Louis missed a lot of school. He also recalls that Louis would stay by himself and would not play with other children.

In school, Louis had difficulty concentrating. Louis' school records reflect that Louis had a short attention span. In 1977, when Louis was in the fourth grade at Bunnell Elementary School, school records note that Louis had a learning disability, was at a second grade reading level and was erratic. In 1978, at the age of 12, Louis' school records indicate he was withdrawn, overly worried, confused, had auditory problems and was emotionally unstable. He also was described by his teachers as uncoordinated, easily distracted, and having a short attention span. His school records described him as "often can't figure out what is wanted or needed or what is going on." Louis' records also show that he was impulsive, easily distracted, unable to concentrate on one thing and withdrew from reality and problem situations.

School records would show that Louis was kept back in the third grade. Despite his low reading and learning disabilities, Louis was promoted to the fifth grade. In the fifth grade, he was kept back again. In August, 1983, Louis was officially withdrawn from Flagler-Palm Coast High School due to lack of attendance. By the age of 15, Louis had only completed the eighth grade. He eventually dropped out and began working odd jobs.

Dr. Frank Giddens, a pastor at Saint Paul Missionary Baptist

Church, who knew Louis and his great grandmother, would have testified that Louis was a loner and always kept to himself. He recalls Louis coming to the gymnasium where he worked and sitting in one spot and staring at nothing for hours on end. Dr. Giddens would have testified at an evidentiary hearing that he told Louis' great-grandmother of Louis' odd behavior, but that nothing was ever done to help Louis. Dr. Giddens also would have testified that he believed that Louis was mentally retarded and that Louis was unable to distinguish between reality and fantasy.

When Louis was 18, his great grandmother died. Louis became even more withdrawn after her death. After two years in the Job Corps in Kentucky, Louis returned to Florida and began living with his Aunt Virginia. When his money ran out, however, his Aunt Virginia threw him out of the house. Louis then became involved with his girlfriend, Janice.

Dr. Jethro Toomer, a psychologist, would have testified at an evidentiary hearing that he evaluated Louis on October 10, 1995. His testing and evaluation revealed that Louis is a paranoid schizophrenic and that this illness is long-standing. Characteristics of schizophrenia include delusions and hallucinations. Dr. Toomer would have testified that Louis exhibited mental illness and emotional disturbances, and his ability to appreciate the criminality of his action was impaired. Dr. Toomer found clear indications of brain damage.

Dr. Toomer also would have testified at an evidentiary hearing that Louis' disassociative responses may indicate a possibility of multiple personality disorder. This is consistent

with schizophrenia. Dr. Toomer said Louis should have been medicated with psychotropic drugs. Dr. Toomer would have been available in 1990 to make this same diagnosis and would have been willing to testify. He would have testified that Louis was under the influence of extreme mental or emotional disturbance and that the capacity of Louis to appreciate the criminality of his conduct or to conform his conduct to the requirement of law was substantially impaired. These facts were readily available at the time of trial, but counsel inexplicably failed to investigate this information.

In its order, the Court erroneously adopted the State's argument that the deposition of Dr. Krop rebuts Mr. Gaskin's allegation that Mr. Cass was ineffective for failing to provide adequate mental health mitigation or adequate background material to his mental health expert. The Court states that the deposition of Dr. Krop, "does reveal that he was given the background information, from the Defendant as well as a three hour interview with two family members (Virginia Brown and Janet Morris), that is alleged to have been unknown to Dr. Krop at the time of the evaluation." See, Court's Order at page 5. The Court's position that anything given to Dr. Krop was adequate for a competent evaluation is wrong.

Dr. Krop testified at deposition at page 8 that he had not done any testing other than an MMPI. He testified that subsequent to his evaluation he was provided some information that indicated neuropsychological testing may be necessary but he couldn't say "until I get some additional records." See, deposition of Dr.

Krop at page 8. Dr. Krop interviewed Ms. Brown and Ms. Morris, who "indicated that there may be some evidence of brain injuries." Dr. Krop testified as to the documents he had reviewed. These included police reports, witness statements and a polygraph examination report (i.e. the State's discovery). He specifically stated that "I have not reviewed -- in fact, I don't know if there are any depositions that have been taken in this case or any other information that I would need to look at to perhaps corroborate some of the information that I got from the family members and Mr. Gaskins." Id, at page 9.

When asked about what type of schizophrenia Mr. Gaskin had, Dr. Krop testified, " No, I don't have a real good handle at this point on a diagnosis. That's why when I wrote the letter to Mr. Cass on March 14th I indicated a need -- and I believe I also sent a letter to your office somewhat later asking for additional information because I don't feel that I have a good handle on a diagnosis right now." See, Id. at page 12. Later, he specifically stated that the family members he interviewed could not give him the information he needed to make a diagnosis. Trial counsel never provided him the materials he requested. Dr. Krop testified he had not been given enough independent corroborative information to make a diagnosis or draw a conclusion with a reasonable degree of medical certainty. During cross-examination by the Assistant State Attorney, Dr. Krop again testified:

> Q. (STATE) Do you find that disorder with a reasonable degree of medical certainty?
>
> A. (KROP) Not at this point. I feel like I need more information.

Deposition of Dr. Krop at page 29.

> ...I would like to see school records. Again, I have not reviewed those. I don't know whether there are any available, but that would be helpful to see whether there were any notices of any kind of unusual behavior by teachers, for example.

Id, at page 15. In Mr. Gaskin's 3.850 motion, counsel specifically pled that school records should have been provided, but were not. See, October 12, 1995 3.850 motion at page 23.

Even without the necessary background material, Dr. Krop was able to opine that Mr. Gaskin was one of the "most disturbed individuals I've ever worked with." See, Id. at page 29. No further information was provided to Dr. Krop. No further testing was done on Mr. Gaskin. Instead, Mr. Cass advised his seriously "disturbed" client that Dr. Krop could not offer any mitigation on his behalf. It is clear these facts are in dispute and not conclusively rebutted by the record. Counsel specifically pled the background materials which should have been provided and that Dr. Krop would testify that he needed more background material to make a medically adequate diagnosis. The fact that Dr. Krop refused to make a diagnosis based on the little information he had proves that Mr. Gaskin was not provided effective assistance of counsel or an adequate mental health evaluation under Ake v. Oklahoma, 470 U.S. 68 (1985). The prejudice in counsel's deficient performance was pled at page 30 at the October 12, 1995, 3.850. The prejudice is that the jury, which voted 8-4 for death, never heard Dr. Krop's testimony or any mental health mitigation. In fact, the jury was not instructed that it could consider mental

health mitigation because trial counsel failed to investigate evidence to support it. The State introduced Dr. Rotstein's report at the sentencing hearing which was only before the judge. Dr. Rotstein was the state-hired mental health expert. The jury never heard Dr. Rotstein's report. Dr. Rotstein's report had nothing to do with trial counsel's background investigation. The court confuses this issue.

The Court specifically cross references Claims XVII and XIX, which allege that the mental heath examiner failed to render adequate mental health assistance under Ake and that counsel was ineffective for failing to provide available information so that the mental health examiner could provide adequate evaluations.

The Court first lists the facts with particularity that the Court previously found in Claim III were legally insufficient. In fact, there is no challenge to the legal sufficiency of this claim whatsoever.[6]

The lower court misunderstands counsel's argument. There is no question that Dr. Krop requested more background material and suggested neuropsychological testing. See page 14 Court's order. There also is no dispute that Dr. Krop spent three (3) hours talking to the two (2) family members who testified. Dr. Krop stated he relied on their information as "typical" evidence. However, he could not reach a diagnosis because the information he was given was inadequate and incomplete.

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[6]Both Claims III and XVIII contain an recitation of the family social history discovered by counsel. Either they are both legally sufficient or they are not.

Dr. Krop could not make a diagnosis. His preliminary findings were speculative, as was brought out by the State in cross-examination at the deposition. The lower court has interjected its own reasoning as to why Dr. Krop wanted additional information. No evidence has been presented as to why he wanted additional information. Thus there is a need for an evidentiary hearing as there is a factual dispute.

The lower court turns to Dr. Rotstein's report to support its conclusion that counsel provided adequate background material to his expert. At the outset, it is important to note that Dr. Rotstein was retained by the State, not defense counsel. He reported directly to Assistant State Attorney Nelson. In fact, Dr. Rotstein Mirandized Mr. Gaskin because his exam was not going to be confidential. He was not there to assist the defense. In fact, Dr. Rotstein was provided with more information than Dr. Krop, the supposed defense expert. He found one of the statutory mental health mitigators. His evaluation focused on competency, and not mental health mitigation for the defense. He did no testing of any kind because he is a psychiatrist and not qualified to conduct neuropsychological testing. He found no evidence of organic brain syndrome but found a severe deficit in concrete thinking.

He found that Mr. Gaskin was of "average or better than average intelligence," had "no abnormal motor behavior and his speech was well-controlled." Mr. Gaskin was on anti-depressant medication at the time of Dr. Rotstein's evaluation but there are no indications as to how this affected his conclusions except his

finding that "at no time did he seem depressed or anxious."

The lower court said that Dr. Rotstein was well aware of Mr. Gaskin's background information. See Court's order at page 15. This is so because he was the State's expert. That is why he was able to reach a diagnosis when Dr. Krop, the defense expert, could not. The State provided more background information to its expert than defense counsel had given to Dr. Krop. Mr. Cass had no responsibility to provide background material to the State's witness. The Court cannot transfer Dr. Rotstein's knowledge to a defense witness and somehow relieve Mr. Cass of his duty to investigate and prepare his defense expert.

Contrary to the Court's opinion, Dr. Krop did not make a diagnosis. Dr. Krop did not review the same background material as Dr. Rotstein. Therefore, the focus of their evaluations were completely different.

More importantly, the jury never heard the State's mental health expert's report. Dr. Rotstein's report was admitted without objection at sentencing. Most certainly, the jury never heard Dr. Krop's information. This is the prejudice in this case.

Mr. Cass had no tactic or strategy for failing to provide Dr. Krop with the independent background information he requested so that he could make a psychologically sound diagnosis. The Court cannot now interject a strategy for defense counsel. These facts are obviously in dispute, therefore an evidentiary hearing is necessary to resolve these matters. The records cannot conclusively rebut that counsel unreasonably failed to provide adequate material to his defense expert.

C. THE LAW.

An accurate medical and social history must be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder." R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they suffer from head injury, drug addiction, alcoholism, mental retardation, and other serious mental illness such as schizophrenia. Consequently, a patient's knowledge may be distorted by knowledge obtained from family and his own organic or mental disturbance, and a patient's self-report is thus suspect. Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980) (cited in Mason, 489 So. 2d at 737). As a result of the foregoing failings, Mr. Gaskin's constitutional right to the effective assistance of the appointed mental health experts was clearly violated. Ake v. Oklahoma.

ARGUMENT XVII

THE IRRELEVANT EVIDENCE CLAIM.

During the guilt phase of Mr. Gaskin's trial, the trial court allowed the state to introduce several items of evidence over defense counsel's timely and specific objections. The items admitted into evidence were a camera seized from Mr. Gaskin's home (R. 830-1), a partially smoked cigar found outside the home of the Rector victims(R. 487), and a pair of Mr. Gaskin's boots (R. 703-

4).

These items failed to prove or disprove any material facts, as required by section 90.401, Florida Statutes (1989). The cigar was never linked to Mr. Gaskin, although one state witness testified that Mr. Gaskin had been known to smoke that type (R. 787-789). The state failed to prove the camera was the same camera taken from the home of the Sturmfels. One of the victim's neighbors was only able to say the camera "looked identical" to the one that the victims owned (R. 825-830). The prosecutor said this was the best he could prove with regards to the camera, and the trial court overruled the defense objection and allowed the camera into evidence (R. 830-31).

Mr. Gaskin's boots were compared to footprints found at the scene. The state witnesses admitted the boots did not match the footprints (R. 702). The states witness could only speculate that the boots were about the same size as the shoes that left the prints, but the witness admitted that, due to manufacturers' differences, the tracks could vary several sizes (R. 699-702). Defense counsel argued that the evidence was too speculative to benefit the jury at all, but the trial court overruled the objection and allowed the state to introduce this evidence (R. 703-4). The prejudicial effect of these items permeated the case.

ARGUMENT XVIII

THE CUMULATIVE ERROR CLAIM.

Mr. Gaskin did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Ray v. State, 403 So. 2d 956 (Fla. 1981); Heath v. Thomas, 941

F.2d 1126 (11th Cir. 1991). The process itself failed Mr. Gaskin. It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added).

The flaws in the system that sentenced Mr. Gaskin to death are many. They have been pointed out throughout this pleading, but also in Mr. Gaskin's direct appeal. There has been no adequate harmless error analysis. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution. Repeated instances of ineffective assistance of counsel and error by the trial court in both phases of Mr. Gaskin's trial significantly tainted the process. These errors cannot be harmless. See Gunsby v. State, 574 So. 2d 1085 (Fla. 1991).

ARGUMENT XIX

THE AUTOMATIC AGGRAVATOR CLAIM.

Mr. Gaskin was convicted of several offenses, including robbery and murders in the first degree, on June 15, 1990 (R. 940-950). The jury was instructed on the "felony murder" aggravating circumstance:

Two, the capital felony was committed while

> the defendant was engaged in the commission of or attempt to commit or flight after committing or attempting to commit any robbery or burglary.

(R. 999). Counsel for Mr. Gaskin failed to object to this instruction. The trial court found the existence of the "felony murder" aggravating factor (R. 1026, 1032).

The jury's deliberation was obviously tainted by the unconstitutional and vague instruction. See Sochor v. Florida, 112 S. Ct. 2114 (1992). The use of the underlying felonies as an aggravating factor rendered the aggravator "illusory" in violation of Stringer v. Black, 112 S. Ct. 1130 (1992). The jury was instructed regarding an automatic statutory aggravating circumstance, and Mr. Gaskin thus entered the penalty phase already eligible for the death penalty, whereas other similarly situated petitioners would not. The death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis for conviction.

This claim is cognizable in these proceedings because Espinosa is a change in law holding that juries must be treated as co-sentencers. Mr. Gaskin was denied a reliable and individualized capital sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments. His jury was told to consider an illusory aggravating circumstance. Relief is proper at this time.

ARGUMENT XX

THE PROSECUTORIAL MISCONDUCT CLAIM.

The prosecutors' acts of misconduct deprived Mr. Gaskin of his rights under the Sixth, Eighth, and Fourteenth Amendments. Defense counsel rendered prejudicially deficient performance in failing to object to the prosecutor's inflammatory and prejudicial closing argument. The prosecutor exceeded the boundaries of proper argument. During his penalty phase closing argument the prosecutor, while asking the jury to recommend death, gave the jury a sermon on the preciousness of life:

> Human life, you know, life itself is the greatest gift short of eternal life that is available to us.
>
> I was driving home yesterday and on the side of the road was a kitten about this big (indicating), eyes this big. Blood on its nose.
>
> My daughter jumped out and picked up the kitten.
>
> Its eye was bloody. Thought it had been poked out, turned out that it hadn't. Appeared that somebody had thrown the kitten out of a window.
>
> Now, I don't understand that. You don't understand that. We don't understand that and that is just a cat.
>
> There is no more precious commodity, there is no more precious gift that we have than life and yet I am asking you....,that you recommend that the penalty for Louis Gaskin for the murders of the Sturmfels be death.
>
> **There is no other just verdict** under these circumstances.

(R. 992-3)(emphasis added).

Donnelly v. DeChristoforo, 416 U.S. 647 (1974). The Florida

courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So. 2d at 614. The Florida Supreme Court has called such improper prosecutorial commentary "troublesome," Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985), and when improper conduct by the prosecutor "permeates" a case, as it did here, relief is proper. Campbell v. State, 679 So. 2d 720 (Fla. 1996). Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990). Relief is proper.

ARGUMENT XXI

THE MULLANEY V. WILBUR CLAIM.

Under Florida law, a capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed . . .
>
> [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). The court shifted to Mr. Gaskin the burden of proving whether he should live or die by instructing the jury that it was their duty to render an opinion on life or death by deciding "whether mitigating circumstances exist[ed] that outweigh the aggravating circumstances" (R. 1000). Hamblen v. Dugger, 546 So. 2d 1039 (Fla. 1989). In Hamblen v. Dugger, this Court said these claims should be addressed on a case-by-case basis in capital post-conviction actions. Defense counsel rendered prejudicially

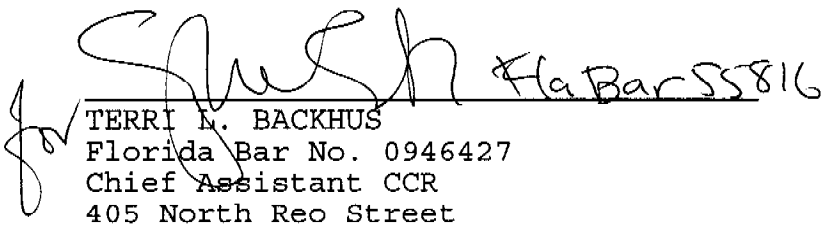
deficient assistance in failing to object to the errors. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon. Such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. Counsel's failure to object to the clearly erroneous instructions was deficient performance under the principles of Harrison v. Jones, 880 F.2d 1277 (11th Cir. 1989) and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the Rule 3.850 trial court, Appellant respectfully submits that he is entitled to relief from his unconstitutional death sentences, to an evidentiary hearing, and to all other relief that the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Ms. Judy Rush, Assistant Attorney General, 444 Seabreeze Boulevard, 5th Floor, Daytona Beach, FL 32118 on September 16, 1997.



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