IN THE SUPREME COURT OF FLORIDA

CASE NO. 90,207

DAVID YOUNG,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIFTEENTH JUDICIAL CIRCUIT,
IN AND FOR PALM BEACH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

TODD G. SCHER
CHIEF ASSISTANT CCRC
Fla. Bar No. 0899641
OFFICE OF THE CAPITAL
COLLATERAL REGIONAL COUNSEL
1444 Biscayne Blvd. Suite 202
Miami, FL 33132
(305) 377-7580

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This proceeding involves an appeal of the denial of postconviction relief pursuant to Fla. R. Crim. P. 3.850 after a limited evidentiary hearing. The following symbols will be used to designate references to the record in this appeal:

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

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

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

"H. __ -- Hearings conducted in postconviction proceedings.

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

REQUEST FOR ORAL ARGUMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF THE CASE AND FACTS

Mr. Young was convicted of first-degree murder in the circuit court of the Fifteenth Judicial Circuit, Palm Beach County (R. 3871), and was sentenced to death (R. 4249). This Court affirmed on direct appeal. Young v. State, 579 So. 2d 721 (Fla. 1991). The United States Supreme Court denied certiorari. Young v. Florida, 502 U.S. 1105 (1992).

A. TRIAL PROCEEDINGS.

Mr. Young was convicted and sentenced to death for the August 31, 1986, shooting of Clarence John Bell. The State's theory was that Mr. Young and three teenaged friends -- Gerald Saffold, Gerald Harris, and Tony Holmes -- drove from Riviera Beach to Jupiter with the intent of stealing a car (R. 2244). They drove to Jupiter Plantation Condominiums where they saw a Trans-Am; the State's witnesses provided conflicting testimony about who approached the car: Saffold testified that Mr. Young and Harris approached the car (R. 3353), while Holmes testified that Harris and Saffold approached the car (R. 3445). The boys returned to Mr. Young's car when they heard noise inside an apartment (R. 2246). Mr. Bell, the owner of the Trans-Am, came outside armed with a revolver (R. 2247). He approached Mr. Young's car, put his gun to the windshield, and ordered the boys to get out of the car and lie on their stomachs in the parking lot (R. 2248). Bell repeatedly threatened to shoot Mr. Young in the head if any of the boys moved (Id.).

Bell and Mr. Young both fired their weapons (R. 2251). The State alleged that Mr. Young shot first, while the defense argued that Bell shot first (Id.). At some point, Bell shot into the ground toward Harris after the boy turned his head slightly (R. 2262). Harris then ran from the scene, and Bell fired two more shots toward him (Id.). Mr. Young fired once

from the ground, hitting Bell (Id.). With his gun pointed at Mr. Young, Bell ordered him to move around from behind the car where he had run after firing the first shot (Id.). Mr. Young fired a second shot, hitting Bell again. Mr. Young got back in his car with Saffold and Holmes; Harris had already fled the scene on foot (Id.). As Mr. Young drove away, he threw the shotgun from the car (R. 3377).

Mr. Young was arrested that night at Riviera Beach and taken into custody. He was initially questioned at the Riviera Beach Police Department by Detective Murray, of the Palm Beach County Sheriff's Office, where he denied shooting Mr. Bell (R. 3196). This interview was not taped, and Detective Murray did not take notes (R. 3209). Mr. Young was then taken to the Palm Beach County Sheriff's Office by Detective Murray and Detective Martin, of the Jupiter Police Department, where the questioning continued and was taped (R. 3211). At this time, Detective Murray already had statements from Harris and Saffold implicating Mr. Young as the shooter but also indicating that Bell shot first (R. 3206, 3218). At the Sheriff's Office, Mr. Young continued to deny shooting Bell. Mr. Young was told that if he cooperated, his parents could get him out on bond, that the police would not forget about him and let him sit in jail, and that the police would talk to the State Attorney on his behalf (R. 3219-20, 3240, 3253). At some point, the tape was turned off and a conversation was held among Mr. Young, his mother, and the police. The tape was turned back on, and Mr. Young made a statement confirming Harris' statement that Mr. Bell shot first and that Mr. Young shot in self-defense (R. 3281). He was then charged with second-degree murder (R. 3217).

Mr. Young testified at a suppression hearing that while the tape was turned off he

was promised by both detectives that if he cooperated, he would be charged with second-degree murder (R. 3253). His mother, Olivia Young, confirmed that a detective told Mr. Young that if he told the truth, he would only be charged with second-degree murder (R. 3225). Mrs. Young also testified that she received a phone call that evening informing her that Mr. Young had been charged with second-degree murder (R. 3235). Detectives Murray and Martin claimed that they made no promises and that Mr. Young cooperated because the police already had a statement from Harris implicating Mr. Young in Bell's death (R. 3239, 3274). Detective Martin testified that while the tape was turned off he spoke to Mr. Young about religion and "about how [his mother] would feel about the difference between being truthful and honest, and lying" (R. 3275). Immediately after the tape was turned back on, Assistant State Attorney Paul Moyle's name was mentioned for the first time, implying that the untaped conversation was not limited to religion (R. 3310). Detective Murray, who was not present in the room when the tape was turned off, testified that after Mr. Young confessed, he told him he would be charged with second-degree murder (R. 3210). Detective Martin did not remember second-degree murder ever being mentioned (R. 3289). Detective Murray wrote the probable cause affidavit charging Mr. Young with second-degree murder; he explained that this was the result of a "misunderstanding" between himself, his supervisor, and State Attorney Moyle (R. 3243-44). The charge was later changed to first-degree murder.

At trial, the State presented the testimony of three witnesses who stated that Mr. Young shot first and two witnesses who stated that Bell shot first. Two state witnesses were unsure of the order of shots they heard. Michael L. Brinker, a Florida Highway Patrol

officer moonlighting as a security guard at Jupiter Plantation, testified that at 2:00 a.m. on August 31, 1986, he heard "a loud bang" that sounded to him like a sawed-off shotgun (R. 2769-70). A few seconds later, he heard "two rapid-fired, lot quieter, shorter[,] snappier rounds which sound like a pistol" (R. 2770). After the quick, quiet shots, Brinker heard "the fourth and last loud banging of what sounded like a shotgun" which was similar to or the same as the first shot (R. 2773). Brinker testified that he had no doubt that the quieter shots sounded like a .38 caliber revolver and that the first and fourth shots sounded like a shotgun (R. 2771, 2774). On cross-examination, Brinker acknowledged that he was approximately 400 yards from the crime scene when he heard the shots (R. 2794).

The State also presented the testimony of two neighbors who testified that the shotgun had been fired first. Robert Melhorn testified that his wife woke him on the night of August 31, 1986 (R. 2814). He first went to the sliding glass door in their bedroom and heard "commotion out in the parking lot;" he decided to call 911 because he "determined that John [Bell] was out in the parking lot and he needed some help" (Id.). Melhorn then went out into a courtyard that was enclosed by a fence through which he could not see the parking lot (R. 2815). Melhorn heard what he described as "a loud boom," which the State Attorney rephrased as "a loud blast" (R. 2816-17). According to Melhorn, this first shot was more consistent with a shotgun than a pistol (R. 2819). After the first shot, Melhorn heard "some scuffling" and "mumbling" followed by "two clicks" and then "another click or a faint pop" (Id.). He described the faint pop as "a pistol that was misfiring." (R. 2820). Melhorn summarized everything he heard that night:

> I heard the blast, and I am thinking to myself -- of course I am behind the fence, it is dark, I cannot see anything. And I am thinking in my mind

> that somebody is shooting a warning shot saying that "this gun is loaded, I am firing a warning shot." I do not like what is happening. Then I hear these two clicks and I am thinking, "Why is somebody pulling the trigger on a pistol and you just hear the hammer snap?"
>
> And I could have heard -- I did hear -- I am not -- this is difficult for me to remember, but I heard another pop which I thought could have been something else misfiring, another type of thing.
>
> Then I heard the loud boom. But of course I am behind a fence, it is dark and it is happening very, very fast. . . .

(R. 2820).

On cross-examination, Melhorn explained that he was between eighty and ninety feet away when he heard the shots (R. 2831). He was also questioned about the clicks and pop that he remembered hearing between the two louder shots, and he admitted his uncertainty: "I -- as best that I can remember, I heard two -- two clicks, then a pop, and it possibly could have been a second pop. I cannot swear to that. But I know I heard two clicks and a faint pop, or a faint -- a faint shot. That is less -- less than the first boom. Then another boom" (R. 2840).

The State also presented Dana Thomas,[1] who testified that when she heard arguing outside, she went to the balcony on the second-floor of her apartment where she had a clear view of the parking lot (R. 2965). Thomas testified that she had no doubt that the first sound she heard was a shotgun (R. 2974). She also testified that simultaneous with the first shot, she saw a four to six-inch diameter flash that was nowhere near where she saw the white man standing (R. 2975). After the first shot, Thomas heard three "small" shots that sounded "[l]ike a cap gun" and were accompanied by "small sparks;" she then heard a final

---

[1]Thomas was thirteen years old at the time.

shot that originated from the same location as the first shot (R. 2979-80, 2782). The final shot "sounded like a small cannon, with a large spark of light, a large flash of light" (R. 2982-83). Thomas testified that the three quieter shots came in quick succession and that they originated from where the white man was standing (R. 2984).

On cross-examination, Thomas was questioned about the inconsistencies between her testimony and the statement she gave to police. For example, in her statement to the police, she stated that the white man had the shotgun (R. 3000). She testified that she meant to say "gun" rather than "shotgun" (R. 3002). She also explained that she told the police there were no lights from the small caliber shots because she did not remember seeing any flashes at that time (R. 3008). She explained that she "got confused on that part because the way they asked me I really didn't understand it to begin with" (R. 3009). Thomas could not explain when she remembered seeing flashes of light from the small caliber gun or why her trial testimony differed from her initial statements.

Dr. Frederick Hobin, the medical examiner, speculated about the order of shots fired based on his examination of Bell's injuries. He testified that Bell had an injury on the left side of his face in the eye area that is referred to as a "gunshot tattoo injury" (R. 2929). He explained that this type of injury is "produced by grains of gunpowder that have not been burned but rather strike the skin and produce a little tiny bruise" and that "these injuries are produced by the presence of a firearm being discharged in close proximity with the skin surface, whether or not it is fired by yourself or another person" (Id.). Dr. Hobin testified that a revolver discharges unburned gunpowder from the sides of the cylinder as well as from the barrel but not from behind the gun (R. 2930-31). Based on this evidence, Dr. Hobin

speculated that in this case, Bell had been shot and had fallen to the ground before shooting his revolver. He explained:

> If I believe that these injuries were received in this way, that is a scenario which, in my view is reasonable, and it could have been that he was injured, fallen to the ground, and then attempted to defend himself by discharging that firearm. But he discharged it in a very abnormal way, and the reason he may have discharged in an abnormal way was because he was disabled.

(R. 2935). Dr. Hobin warned the State Attorney that his suggestion about the manner in which Mr. Bell fired his revolver was only a "fair" or "reasonable" explanation of what happened; he emphasized the lack of certainty in his testimony: "I'm not able to say exactly what happened" (R. 2936).

On cross-examination, Dr. Hobin admitted that he could not determine within a reasonable degree of medical certainty Bell's position when he shot the revolver (R. 2938). He also admitted that he could not determine the position of Bell's body when he was wounded and that he could have been pointing his revolver at someone when he was shot (R. 2940). The State had no other evidence to support its theory that Mr. Bell was disabled before shooting his revolver.

Two of the State's witnesses testified in direct contradiction to this testimony. Gerald Saffold and Tony Holmes, who were closer to Bell and Mr. Young when the shots were fired than any other witness, both testified that Bell fired first. Saffold testified that Bell came over to Mr. Young's car, pointed his revolver at Mr. Young, and ordered everyone out of the car (R. 3356-57). Bell "told us anyone one of us move he was going to shoot us" (R. 3361). He also threatened to blow Mr. Young's head off if the three other boys did not get out of the car (R. 3403). Saffold testified that Mr. Young picked up his weapon only after

Bell pointed his revolver at Mr. Young's face and threatened to shoot him if any of them did not obey his orders; Mr. Young did not point his weapon at Bell through the windshield (R. 3357). After everyone was out of the car and lying on the ground in the parking lot, Bell again threatened to shoot if anyone moved (R. 3361). After Gerald Harris moved slightly, Bell fired once into the ground near where the four boys were lying (R. 3403). Harris then ran from the scene and Bell shot in Harris' direction (R. 3404). After Bell fired into the ground, Mr. Young shot once from the ground (R. 3405). The second time that Mr. Young fired, he was standing near the front of the car; Bell was still standing and aiming his revolver at Mr. Young (Id.).

Tony Holmes testified for the State that he remained in Mr. Young's car and did not approach Bell's car (R. 3424). He saw Bell coming toward Mr. Young's car with a gun (R. 3427). Holmes explained what happened when Bell reached Mr. Young's car: "He put the gun on David. He had told us if he were going to shoot he would shoot David" (R. 3429). As Mr. Young got out of the car, Bell "grabbed David and put [his gun] to his head and he said, 'If any one of you niggers run, I'm going to kill David. I am going to shoot him in the head'" (R. 3447-48). Holmes cooperated because he believed Bell's threats:

Q He had that shiny gun to David's head?

A Yes.

Q And he said, "If any of you niggers run -- "

A He was going to shoot.

Q Did you think you were --

A I didn't run because I thought he was going to shoot him. Didn't nobody of us run.

(R. 3448).

Holmes explained that throughout the encounter, Bell never stopped threatening them (R. 3456). After the boys were lying on the ground, Bell shot into the ground near Holmes, Saffold, and Harris (R. 3433, 3454). After Bell shot once, "Jerry [Harris] jumped and ran, and then he shot at Jerry two times -- Harris" (R. 3434). After the first shot, Holmes ran back into Mr. Young's car (R. 3435, 3437, 3455). Mr. Young was still lying on the ground when he fired the first shot (R. 3436). After Bell was hit the first time, "[h]e got up and started pointing the gun at David, saying, 'Come from around the car,' and he said , 'I'm going to come from around the car.' When he came around, the man kept pointing the gun, so he ran back around the other side of the car" (R. 3437). Mr. Young then fired the second shot (Id.). The State also presented two witnesses who were unable to determine the order of shots fired. Mr. Bell's son Michael testified that when the shots were fired he was in the courtyard near his apartment about two or three feet from the gate (R. 2307). He heard "two, maybe three shots, and then the sounds of clicking. When I heard the shots I stopped, and I heard the clicking, I didn't know what the clicking was. I thought it was empty chambers . . . and about midway through the parking lot I heard another shot" (R. 2308). Michael Bell testified that his father yelled, "Michael, come here," after the first two or three shots were fired (R. 2309). Although he testified that the clicking sound was "similar to that of someone reloading a shotgun" (R. 2309), at the time of the incident, he thought the clicking sound was caused by empty chambers in his father's gun (R. 2417). He testified that he could not differentiate between any of the shots and that the final shot was not distinguishable from the other four he heard (R. 2310, 2419).

Christopher Griffiths, Mr. Bell's neighbor, was calling 911 when he heard the shots fired. He heard a total of five shots, fired in three separate groups (R. 2624). Although at Mr. Young's trial Mr. Griffiths claimed to be certain about the order of shots and that "the first and last were louder than the three in the middle" (R. 2628), at his deposition he stated that the shots could have come from either a pistol or a shotgun (R. 2655). Griffiths also told the police that the shots occurred while he was on the phone with the operator and that the first shot was "the least detailed" because his attention was focused on the telephone call (R. 2646).[2]

The State's other witnesses confirmed Holmes' and Saffold's testimony that Bell was yelling and threatening Mr. Young and the three other boys. Michael Bell testified that when he and his father got to Mr. Young's car, his father ordered the occupants to get out (R. 2298). The driver (Mr. Young) wanted to leave, but Bell pointed his gun at him and made him get out of the car (Id.). Michael Bell explained what happened next: "The passenger hesitated on getting out of the car and my dad kind of leaned down and aimed the gun at the defendant, and said, 'Get out of the car now or I will shoot your friend'" (R. 2299). Mr. Young, who was already out of the car, told his friends to obey: "The person that was laying on the ground said, 'Get out of the car, man. Listen to it. Just get out of the car'" (R. 2400). Michael Bell testified that his "father's voice was elevated and he was screaming and gave me the impression that he was very nervous" (Id.). Michael Bell went inside to call the police; he then returned to the parking lot with a hammer (R. 2303). At that time, his father

[2]The portion of the tape containing the relevant conversation was somehow erased from the original tape (R. 4324). The trial court ruled that copies of the tape could not be admitted and prohibited any witness from referring to the tape (R. 4424-25).

"was just covering the general vicinity" with his gun (Id.). His father issued a general warning: "my dad said, 'Watch out, in case one of these guys try something, I have to shoot them, I don't want anything to ricochet and hit anyone else that might be in the line of fire'" (R. 2306).

Griffiths confirmed that Mr. Bell was yelling and threatening Mr. Young and his friends. He testified that he heard a "commotion" in the parking lot: "I heard what I took to be an irrational man, obviously raising his voice as loud as he could, for whatever reason, be it scare tactics, enough to get me out of bed and to the window so that I could hear better" (R. 2523). Griffiths testified to what he heard:

> Q Did you hear the mention of a .357 pistol and threat to kill?
>
> A Yes, I did.
>
> Q Did you hear, and I must use these words in court, did you hear the words regarding "Motherfucker, I will blow your head off"?
>
> A "If you move I will blow your head off," and "Motherfucker," amongst other expletives that I really can't recall, but that was not the only one. It was a whole conversation of them.
>
> Q Did you hear somebody say, "Stay face-down on the ground and don't move"?
>
> A Yes, I did.

(R. 2623-24).

Robert Melhorn also confirmed that Bell was yelling and threatening to shoot: "He said something to the fact that, 'You are trying to steal my car. Don't move or I will shoot you'" (R. 2816). He testified that Bell sounded like he was trying to scare and intimidate someone and that "he seemed like he was excited, seemed like he was in trouble" (Id.).

Melhorn heard Bell say "Don't move, mother fucker, or I will shoot you" three or four times (R. 2837). At his deposition, Melhorn was also questioned about Mr. Bell's threats and he commented: "I am thinking to myself, you know, you only say so much to somebody, somebody is going to drastically break loose in a minute, you know" (R. 2840).

Dana Thomas testified that she heard Bell say "I have been watching you for about twenty minutes fooling around in the car" (R. 2968). In her initial statement to the police, Thomas used the words "stealing my car" rather than "fooling around in the car" because the police told her that Mr. Young and his friends were trying to steal Mr. Bell's car (R. 2992). She heard arguing for about ten to fifteen minutes and heard one voice say, "If you blink or move I will blow your head off" (R. 2968-69). At her deposition, Thomas stated that "he kept using that one term, that 'I am going to blow your head off,' and used thirty-five minutes, and all that time he could have called the police, or had his son call the police" (R. 2995-A). Thomas also heard Bell say, "Mike, how could you do this to me?" (R. 3004). After "a whole lot of yelling," she heard the gunshots (R. 2970).

At the penalty phase, the State presented no additional evidence. The defense presented three witnesses before the jury. Catherine Wilbon and Johnny Carlisle testified briefly about Mr. Young's involvement in church activities, his ability to obey instructions, and his involvement with children (R. 4000-5; 4008-15). Johnny Carlisle also testified about a letter Mr. Young had written to the young people at his church warning them to stay out of trouble (R. 4012). John Hoffstot, a corrections officer with the Palm Beach County Sheriff's Department, testified that in his opinion, Mr. Young would be able to conform to prison rules if given a life sentence (R. 4030). The jury recommended the death penalty by a vote

of ten to two (R. 4094).

The defense presented additional witnesses at the sentencing hearing before Judge Cohen. Carol Bickerstaff, the public defender who represented Gerald Saffold when he was being held in contempt, testified that Mr. Saffold's reluctance to testify was not caused by threats or intimidation from Mr. Young (R. 4123).[3] Dr. Barry Crown, a neuropsychologist, testified briefly that Mr. Young could conform his conduct to social norms if he were paroled from prison after twenty-five years (R. 4198). He determined that "the significant elements in David's personality were three-pronged: immaturity; some impulsive behavior related to immaturity and what can be categorized as a learning disability or minimal brain dysfunction" (Id.). Dr. Crown also testified that Mr. Young scored below the thirtieth percentile on intelligence tests (R. 4199). Dr. Crown was never asked about the existence of statutory mitigating circumstances.

The defense also presented Mr. Young's mother who told the court that Mr. Young had changed since his arrest and that if he had another chance he would not get in trouble again (R. 4192). Mrs. Young also testified that David had written to the church on his own initiative (R. 4193).

Finally, Mr. Young himself read a statement to the court indicating that he acted in self-defense and never would have taken the shotgun out of the car if Mr. Bell had not been threatening to kill him (R. 4190-91).

Judge Cohen found the following aggravating factors: during the commission of a

---

[3]The trial judge allowed the defense to present this testimony because the State Attorney had represented to the court that Mr. Saffold was reluctant to testify because he feared retaliation from Mr. Young (R. 3314, 3322-23).

burglary; avoiding arrest; pecuniary gain; and cold, calculated, and premeditated (R. 4238-42). The court indicated that pecuniary gain and during commission of a burglary were merged as one aggravating factor. On direct appeal, this Court struck the CCP, leaving two remaining aggravators. Young, 579 So. 2d at 724. The trial court rejected the evidence presented by the defense in mitigation, adopted the jury recommendation and sentenced Mr. Young to death (R. 4249).

B. POSTCONVICTION PROCEEDINGS.

Mr. Young filed a Rule 3.850 motion on May 10, 1993, nearly eight (8) months prior to the two-year deadline then required by Fla. R. Crim. P. 3.850 (PC-R. 374-450). The motion included a claim regarding noncompliance with Mr. Young's requests for public records pursuant to Chapter 119 (PC-R. 378-81). Judge Hubert Lindsey ordered the State to respond to the motion within ninety (90) days (PC-R. 452).[4] The State thereafter moved for a sixty (60) day extension of time (PC-R. 453-54), which was granted (PC-R. 455).

On December 1, 1993, a status hearing was conducted before Judge Lindsey regarding the public records issues, at which time Assistant State Attorney Paul Zacks requested that Mr. Young's counsel file a motion to compel and "point out with specificity the records that they're not [sic] seeking, as that will enable me to try and help it along" (H. 34). Mr. Young's counsel agreed to file such a motion, and another status hearing was set for January 14, 1994.

On January 14, 1994, Mr. Young's counsel appeared for the status hearing to find

---

[4]Judge Lindsey was not the trial judge, but was assigned to the criminal division vacated by Judge Cohen, who had been assigned to the civil division.

that Judge Lindsey had been replaced by Judge Virginia Gay Broome (H. 36). Mr. Young's counsel informed Judge Broome that because Judge Broome was a member of the State Attorney's Office at the time Mr. Young was prosecuted, there was a disqualification matter that needed to be resolved (H. 37). Mr. Young's counsel argued that a motion to disqualify required a written pleading, and Judge Broome could not understand why the motion could not be filed that day (H. 39). When she was informed that Mr. Young's counsel's office was in Tallahassee, Judge Broome then wanted to know why they couldn't use a typewriter from the Public Defender's Office (H. 40). The matter remained unresolved when the case was then passed.

Within the time periods provided by law, Mr. Young filed a written motion to disqualify Judge Broome based on her employment at the State Attorney's Office during the prosecution of Mr. Young, as well as the fact that Mr. Young's counsel had just recently presented evidence that Judge Broome, as the prosecutor in the Haliburton case,[5] committed Brady violations (PC-R. 456-70). The State sought additional time within which to respond to Mr. Young's motion due to the Assistant Attorney General's case load (PC-R. 473). The State thereafter filed its response (PC-R. 475-78). The matter was noticed for a hearing for February 22, 1994 (Supp. PC-R. 9).[6] Judge Broome entered an order of recusal (PC-R. 479).

In the interim, Mr. Young had filed a twenty-six (26) page motion to compel

---

[5]See Haliburton v. Singletary, 691 So. 2d 466 (Fla. 1997).

[6]The transcript of this hearing could not be located by the court reporter, and is therefore not included in this record (Supp. PC-R. 113).

disclosure of public records, outlining with as much specificity as possible the items that had not been disclosed as per the request of Assistant State Attorney Zacks (PC-R. 481-507). For example, as to the State Attorney's Office, Mr. Young alleged that some seventy (70) cases on various individuals, including prior cases involving Mr. Young, his codefendants, and individuals identified by police as "associates" of the codefendants, had not been turned over (PC-R. 488-90). These cases were listed by case number (Id.).[7] The motion to compel was set for a hearing on August 17, 1994, before Judge Marvin Mounts, who had been assigned the case after Judge Broome's recusal (Supp. PC-R. 11), and thereafter rescheduled for September 9, 1994 (Supp. PC-R. 13).

At the public records hearing, Mr. Young subpoenaed various agencies that had not fully complied with his requests for records (H. 42-241). Although many issues were resolved, there was insufficient time to complete the hearing, and the matter was set for a completion of the hearing on November 30, 1994 (Supp. PC-R. 41).

Prior to the resumption of the hearing, Mr. Young filed a status report on what had occurred since the September hearing, and informed the Court of the information he had received as a result of and since the earlier hearing (PC-R. 523-25). For example, Mr. Young had received some three-hundred (300) pages of documents from the Riviera Beach Police Department and seven-hundred and fifty (750) documents from the Palm Beach Sheriff's Office since the September hearing (PC-R. 524). After responding that "since the records have been supplied, we should move forward rather than backwards and establish what is going on about their characterization of the records" (H. 249), Mr. Young presented

---

[7]The State never filed a response to the motion to compel.

additional testimony at the November hearing as to his public records requests. See generally H. 242 *et. seq.*.

Among the witnesses who testified was Assistant State Attorney Zacks, who was questioned about the list of seventy (70) cases identified by case number in the motion to compel. Zacks testified that he did not "offhand" remember being served with a motion to compel, but that he did not believe that the State filed a response (H. 356).[8] Zacks testified that he believed that all of the files on Mr. Young himself had been provided; however, when asked specifically about case number 85-1712, Mr. Zacks responded that "I don't have the case numbers memorized. I have given you every file that we have. That is going to be my answer for every one of them" (H. 357). When questioned about the fact that this case number was mentioned in the motion to compel as not having been produced, however, Zacks stated "I am not required to respond to a Motion to Compel" (H. 361). When asked whether he brought all the files with him pursuant to the subpoena he was issued by Mr. Young, Zacks testified that he did not (H. 362). Mr. Young's counsel then argued to the Court:

> MS. DOUGHERTY: Your Honor, I need some guidance from you. I have a list here of probably almost 50 -- more than that -- cases which I have identified in the Motion to Compel which is what we are having a hearing on today, and I am being stonewalled here by saying, "Well, I just don't know. I don't have them memorized."
>
> I have done many of these hearings. What is usually the procedure is that the custodian of the State Attorney's Office comes over here with her computer printouts and everything and says, "That's what I got. I got my computer printouts. That one has been destroyed or lost or whatever."

---

[8]The motion indicated that it was served on Mr. Zacks, as well on the Assistant Attorney General (PC-R. 507).

> I have never confronted this situation before where the prosecutor simply says I don't know. I believe I have a right to ask them and get a response from them as to where these files are and why they haven't been provided.

(H. 362-63).

In response, the State argued that Mr. Young received all the records that had been requested (H. 364). The Court then permitted Mr. Young's counsel to voir dire Zacks as to the extent of his search for records (H. 364-65). Zacks explained that some 6,900 pages of documents had been turned over to Mr. Young (H. 366). Mr. Zacks was then questioned specifically as to the other files mentioned in the Motion to Compel:

> Q Now, after you received this Motion to Compel six months later saying we have come up with these [cases] from other sources, we came up with these case numbers. Did you ever make a subsequent search specifically for these cases?
>
> A No.

(H. 367).

Following this testimony, Mr. Young's counsel asked Judge Mounts to have Zacks conduct a search for the records specifically identified in the motion to compel (H. 367). The court proposed that Mr. Young provide in written form whether the 6,900 pages included all of the cases listed in the motion to compel (H. 368). Mr. Young's counsel agreed to do so, noting however that Mr. Young had already determined, as evidenced by the motion to compel, that the 6,900 pages did not include the listed files (H. 373). Zacks responded that "[w]e are in an imperfect world and that means I didn't make myself another copy of all of the stuff" (H. 373). He stated that "when I got the Motion to Compel, I said that's good. If the court compels me to do something, by God I will do it. To my

knowledge and as I sit here, I turned over everything" (H. 374-75) (emphasis added). Zacks added that "I cannot say beyond a shadow of a doubt because computers are imperfect as are the people who create them. I might have missed one" (H. 375).

Mr. Young's counsel then argued that "we can prepare an index of what we have in those 6,900 pages and maybe he can go back and check again on those other ones that are listed in the motion. I think that is the solution here. I don't see that we are at an impasse in any way" (H. 377). Counsel also stated that such could be accomplished within two or three weeks (Id.). Judge Mounts then made the following statement:

> I call upon the State. I can deny that request and deny them further litigation on this point, if the State Attorney General and the State Attorney want to live with that ruling and let it go up on appeal later on.
>
> I will give you that opportunity to say, "Yes, Judge, deny it and we will live with the appeal."
>
> The ball is in your court. I don't want to play games but I don't want to get reversed. My job is not to be reversed.
>
> * * *
>
> If I should deny them further litigation on this point, is the Attorney General and the State Attorney who you are sort of representing now, will you live with that and face the Supreme Court on appeal?
>
> Do you want to take a break and talk about it?

(H. 378-79) (emphasis added). In response, the State argued that "there has got to be a waiver at a certain period of time" (H. 379). The Court then stated:

> If the State wants to say, "Judge, deny them that," I am letting you. I cannot say with a great deal of clarity of conviction that I know the answer to this. But I am sort of indicating to you that I might just deny them further litigation on this point.
>
> I just want you to accept part of the responsibility. It is my

responsibility, I am the ruler, I know that the person making the ruling, but we will take five minutes or so and see what happens when I come back.

(H. 379-80) (emphasis added).

Following the recess, the Assistant Attorney General told the court that "the State would stand by the decision to deny them any further relief on this particular claim in their Motion to Compel" (H. 381). The following discussion then ensued:

MS. DOUGHERTY: Your Honor, I think I'm entitled to the case law that I have cited in my Motion to Compel that I am even entitled to receive these files in the State Attorney's Office.

If the Court wants to rule that I am not entitled, there is nothing I can do about it.

THE COURT: I am not ruling that you are not entitled, I am just denying your motion. You can put into that whatever you want to and we will let the Appellate Court do the same.

(H. 382) (emphasis added). When asked to specify the grounds on which it was denying Mr. Young's motion, the lower court responded that the original request to the State Attorney's Office did not include case numbers and birth dates and "[t]hat was a year-and-a-half ago" (H. 382). Mr. Young's counsel argued that this characterization was inaccurate, and that he had provided specific case numbers when the State requested them. Counsel also argued that "the source of the case numbers comes from the ongoing receipt of records from other agencies throughout the time period" and thus counsel could not have provided the case numbers at an earlier time (H. 382-89). Mr. Young's counsel then alerted the court to the possibility of an interlocutory appeal.[9]

---

[9]An interlocutory appeal was perfected to this Court (PC-R. 563). See Young v. State, 84,959. The State sought to dismiss the appeal, arguing that "Mr. Young has a remedy. Following the disposition of his motion to vacate, he may challenge the trial court's denial of

The parties then discussed when Mr. Young would file his amended Rule 3.850 motion. Judge Mounts wanted to allow Mr. Young only two weeks within which to amend, to which Mr. Young's counsel responded would not be sufficient time (H. 393). Only after the State interposed its concern that "given the complexity of the issues in this type of litigation . . . [t]wo weeks is kind of short" did Judge Mounts agree to provide Mr. Young with sixty (60) days, which was the number suggested by Mr. Zacks (H. 394-95).

Judge Mounts then asked counsel "[i]f there is any reason to disqualify me"; Mr. Young's counsel inquired as to whether there was anything the court wished to disclose, to which Judge Mounts responded that he did not know (H. 396). He then stated that "I am sort of suggesting, if there is some motion to disqualify, it ought to demonstrate the information, knowledge of what was not available until the time of the filing, if you get my drift" (H. 397).

Judge Mounts then made the following statement:

---

his motion to compel. If the trial court erred, then the case will be remanded, and Mr. Young's motion to compel will be granted" (State's Motion to Dismiss Appeal at 3). In response, Mr. Young argued that "[g]iven the fact that the trial court's actions constitute reversible error, it would be a remarkable waste of judicial time and resources to force Mr. Young to litigate his postconviction motion and, assuming the court denies the motion, appeal the denial of the motion to compel along with the 3.850 motion, only to have this Court reverse and remand for disclosure of the withheld documents" (Response to Motion to Dismiss Appeal at 6). This Court eventually dismissed the appeal. Young v. State, 657 So. 2d 1163 (Fla. 1995).

Following the dismissal of the appeal, Mr. Young filed a civil suit against the Office of the State Attorney. On a motion by the State Attorney, the suit was dismissed because the matter had been allegedly litigated already before Judge Mounts. Mr. Young appealed, and the Fourth District Court of Appeals affirmed the dismissal of the complaint due to a putative lack of a sufficient record . Young v. Office of the State Attorney, 685 So. 2d 1042 (Fla. 4th DCA 1997). Mr. Young has done all that he can do to compel compliance with his records requests, and now the issue is before this Court. See Argument III, infra.

> The next thing is, I would like both sides if they choose, I don't require anyone to submit on this, but if maybe the State would want to, in which case [the defense] might feel obliged to respond, do you understand it is an invitation and not an order directed to either side.
>
> Couched in that limited and cautionary language, I am interested in any review in a fairly brief fashion of the doctrine of delay in capital cases.
>
> In other words, one reads about that in the popular literature and one reads of so-called public dissatisfaction about that. I don't know that our Appellate Courts have enunciated any distinct area or language or body of the law. They may have talked about it.
>
> Mr. Zacks earlier this morning cited a case where apparently the judge sustained a lot of objections as irrelevant and that is the court addressing or skirting the subject, but it seems to me if it has not already emerged, that there will be developed and I think it may already be there, a body of law having to do with the perception of delay.
>
> I am sure the defense, the attorneys for the petitioner, would not want to characterize it as delay, they would want some other, more appropriate appellation, and I am at a loss as to what that might be.
>
> Let's not say it has to be called delay; that it can be called something else. But when the petitioners are saying, "we need more information," and the State is saying they already have it, and they are simply doing this to put the matter off, the only word that comes to mind is delay.
>
> If there is another fairer, more neutral description of the phenomenon, I will gladly adopt it. But this is a phenomenon that has go[ne] on for, so far, one day and now approaching the end of a second day.
>
> This is an invitation for anyone who wishes to respond in writing by memo, and you may both respond if you wish to now and to what I have just said.

(H. 397-99) (emphasis added).

After Mr. Young's counsel objected to the court's comments, Judge Mounts simply stated that "I would characterize my request as a request for a scholarly submission, if that can be done. Should the State respond, then the State will have understood perhaps what my

inquiry was" (H. 404).

Mr. Young thereafter filed a motion to disqualify Judge Mounts based on his comments during the November 30 hearing (PC-R. 539-54). The State filed a response (PC-R. 560-62), and Judge Mounts thereafter denied the motion with the following order:

> On December 15, 1994, this office, meaning chambers and thereafter Rm 412, received State's Response to Defendant's Motion to Disqualify Judge filed by A.A.G. S. Baggett. No copy or original of said motion was received in Rm 412 until the Judicial Assistant secured a FAX from the A.A.G. on December 19, 1994. According to the J.A., Mr. Scher, A.C.C.R., advised he assumed the clerk would supply Rm. 412 with a copy of the motion. Clerk Trish Kindred advises no such instruction was received, the only copy enclosed was file stamped and returned and the original is not provided to the judge unless a notice of hearing is received.
>
> I have reviewed the Motion, Response, and Rule 2.160 of the Rules of Judicial Administration.
>
> An original of the excerpt of the hearing of November 30, 1994 accompanies this Order, copies are furnished to the attorneys.

(PC-R. 569-82).

After receiving this Order, from which it was apparent on its face that Judge Mounts had discussions with court personnel as well as his judicial assistant, Mr. Young's counsel wrote a letter to Judge Mounts objecting to the order (Supp. PC-R. 45-46).[10] In response to this letter, Judge Mounts issued an Addendum to his order, stating simply that "this document is a pleading inasmuch as it is a part of the process performed by the parties in alternately presenting written statements of their contention. Without inviting submissions, the parties are free to contribute pleadings unless directed otherwise" (PC-R. 582).

---

[10]Mr. Young sought a writ of prohibition in this Court, which was denied without comment. Young v. Mounts, 657 So. 2d 1163 (Fla. 1995).

Mr. Young thereafter sought a stay of the circuit court proceedings pending the disposition of his interlocutory appeal (PC-R. 583). See supra n.9. In the alternative, Mr. Young sought an extension of time within which to file his amended Rule 3.850, noting for example the resignation of lead counsel Judith Dougherty and his heavy caseload (PC-R. 585-87). After a telephonic hearing (H. 408 et. seq.), Judge Mounts simply denied the motion without comment (H. 426). A written order was subsequently entered (PC-R. 745).

Mr. Young thereafter filed an amended Rule 3.850 motion on February 6, 1995 (PC-R. 594 et. seq.). On February 17, 1995, Judge Mounts issued an order requesting the parties "to advise, in writing, the amount of time necessary to hear the Amended Motion. The attorneys for the State are requested to respond on Petitioner's Request to Amend" (PC-R. 746). The State filed its Response to Order of February 17, 1995, in which it contested Mr. Young's request for leave to amend, and also sought an additional sixty (60) days to file its Answer (PC-R. 751). Mr. Young filed a response to this pleading (PC-R. 765-71). The State also filed a motion to dismiss the amended 3.850 motion because it did not contain a verification (PC-R. 757). Mr. Young thereafter filed his verification (PC-R. 776-78).

The State next sought an extension of time to file its response, citing, inter alia, pressing workload demands (PC-R. 773). In its motion, the State indicated that Mr. Young's counsel "stated that he will respond in writing to this motion" (Id.). On April 20, 1995, Mr. Young filed a written objection to the extension request, arguing that the State had waived its right to answer the 3.850 (and waived any procedural defenses) because the State's request for further time was filed after its response was due to be filed (PC-R. 827). Mr. Young also outlined the various extensions of time already received by the State in this case (PC-R.

828). On April 26, 1995, Judge Mounts granted the State's motion, writing that no response had been received from Mr. Young (PC-R. 832).

On May 2, 1995, Mr. Young sought reconsideration of the court's ruling granting the extension of time, writing that Mr. Young had filed his response on April 20, 1995, a fact which he verified by telephone with the Clerk's Office (PC-R. 780). Mr. Young also pointed out that the State falsely asserted the due date for its Answer in order to avoid it being filed late (Id.). A hearing was conducted on May 5, 1995 (H. 428 et. seq.), at which time Mr. Young argued that the State's answer should be stricken due to untimeliness (H. 434). Mr. Young also argued that all procedural defenses asserted by the State should be waived (H. 441). Judge Mounts denied Mr. Young's motions (H. 446). Mr. Young's counsel then asked for the grounds for the denial, to which the court stated "judicial discretion" (H. 446). Mr. Young's counsel then requested that the court impose sanctions on the State, to which Judge Mounts responded "I am not going to sanction them. Thank you" (H. 447). The State then filed its response to Mr. Young's amended motion (PC-R. 885-1024).

The case was then set for a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993), to take place on August 31, 1995 (Supp. PC-R. 55). Mr. Young filed a motion to be transported (PC-R. 796), which was granted (PC-R. 798). However, due to an error in the Clerk's Office, which failed to forward the transport order to the prison, Mr. Young was not transported, and the hearing was cancelled (Supp. PC-R. 74-76).

Mr. Young then filed a motion to disqualify Judge Mounts based on events which occurred while Mr. Young's counsel was appearing on behalf of Mr. Young in the civil

lawsuit against the State Attorney's Office, over which Judge Moses Baker presided (PC-R. 800). Prior to that hearing, Mr. Young's counsel had been approached by a bailiff, who informed him that Judge Mounts arranged tours of death row for local attorneys and judges (PC-R. 801). Judge Mounts' actions were corroborated by documents which had been discovered by representatives of CCR in a secret storage facility at Florida State Prison, which included letters from Judge Mounts to former DOC Secretary Wainwright about the pleasant conditions at Florida State Prison (PC-R. 801-02). Shortly after filing his motion, Mr. Young's counsel received a memorandum from Judge Mounts to Judge Baker, in which he wrote:

> I enclose a copy of the first 5 pages of a Motion to Disqualify. I send it only to advise you and your bailiff of the references to you; no criticism or other commentary is intended.

(PC-R. 819). Mr. Young thereafter filed a supplement to his motion to disqualify alleging that Judge Mounts' continuing practice of contacting potential witnesses warranted his disqualification (PC-R. 820). The State responded (PC-R. 816), and on October 16, 1995, Judge Mounts denied the motion (PC-R. 825).

Judge Mounts set a status hearing for February 22, 1996 (Supp. PC-R. 78). When counsel appeared for the hearing, Judge Mounts was not there, and Judge Mary Lupo was hearing his calendar (H. 452). At that time, Assistant Attorney General Baggett announced that she had discovered several audio tapes relating to Mr. Young's case that had not been previously disclosed to Mr. Young's counsel by her office (H. 455).

Mr. Young thereafter filed a Motion to Reset Status Hearing to have the matter of the newly-discovered tapes heard before Judge Mounts (Supp. PC-R. 80). A hearing was

conducted on April 18, 1996, at which time Judge Mounts provided Mr. Young thirty (30) days to review the files and tapes in the possession of the Attorney General (H.466-67). Ms. Baggett then requested that the court establish a time frame for Mr. Young to amend his 3.850 motion as "case law allows them a certain time period within which they can amend their 3.850 motion" (H. 468).

On April 30, 1996, Judge Mounts signed the order regarding the Attorney General's Office files (PC-R. 1108); however, it was not received by Mr. Young's counsel until May 13, 1996, because of a clerical error in the post office (PC-R. 1103; 1110). Upon receipt of the order (which Mr. Young had not seen until May 13), Mr. Young's counsel contacted Ms. Baggett's office to inquire as to whether she would object to the time period commencing on May 13, as he had lost thirteen (13) days due to a postal error (PC-R. 1104). The State objected to the thirteen (13) day objection, and Mr. Young filed a motion for a thirteen day extension to inspect the files (PC-R. 1103). Mr. Young's counsel attempted to arrange a telephonic hearing on his motion to save time and money (counsel was at that time still located in Tallahassee); however, counsel was informed that Judge Mounts refused to afford a telephone hearing (PC-R. 1104).

Mr. Young's counsel then flew to West Palm Beach for a hearing on May 16, 1996 (H. 472). Judge Mounts acknowledged that his office "did missend the order" (H. 474), and asked if this matter could not have been handled telephonically "because I don't see that's very productive to fly a lawyer in from Tallahassee" (H. 474). Mr. Young's counsel agreed, noting that the court's assistant had refused to set up a telephone hearing (H. 475). Judge Mounts then granted Mr. Young's motion, noting however "what could be perceived or

described as dilatory tactics" on Mr. Young's behalf (H. 475).

After reviewing the files and having been notified that the Attorney General's Office claimed exemptions, Mr. Young filed a memorandum of law and requested permission to depose Assistant Attorney General Baggett (PC-R. 1087). The State opposed the deposition (PC-R. 1095-1100). Judge Mounts thereafter upheld the exemptions without any comment (PC-R. 1111), and denied the deposition (PC-R. 1112). An order was then entered allowing an amended Rule 3.850 motion to be filed on or before August 30, 1996 (PC-R. 1113).

Mr. Young timely filed his amended motion (PC-R. 1114-1247B). On October 3, 1996, the State notified the court that it would be relying on its previous response to address Mr. Young's amended motion (PC-R. 1248-51), and argued that all proceedings in the case were to be concluded within ninety (90) days, pursuant to the recently-enacted Ch. 96-290, § 8, Laws of Florida (PC-R. 1249).

A Huff hearing was scheduled for October 24, 1996 (Supp. PC-R. 96). Due to a scheduling conflict, the hearing was reset for November 12, 1996 (Supp. PC-R. 96A), and Judge Mounts ordered Mr. Young to be present (Supp. PC-R. 100). At the hearing, Judge Mounts asked whether the case needed to be transferred to the original trial judge in light of the recent amendment to the rules of judicial administration (H. 482). Mr. Young's counsel took the position that the rule was mandatory (H. 495), while the State argued to the contrary (H. 491-92). Judge Mounts then indicated that he would do what the State wanted him to do:

> I don't know, I just throw those thoughts out if the State wants to say, Judge, don't proceed, then I am not going to proceed, and I am going to leave the case alone and just say, Pontius Pilot [sic].

> If the State wants me to continue and noting a good faith objection and a meaningful and, I think, significant objection, then, you know -- so I think the ball is in the State's court.

(H. 502-03) (emphasis added). After taking a recess, the State announced that the language in the rule was mandatory and thus required the case to be transferred (H. 505-06). Judge Mounts, after stating that "I clearly am going to defer to the State" (H. 506), stated:

> I would invite attention of the Attorney General and of the State Attorney to the other case that is assigned to me, that Judge, the original Judge is deceased and it went to another Judge, just to make sure that I realize I already ruled and that's on appeal and that case is okay with me.

(H. 506-07). Mr. Young's counsel argued that he was "generally" aware of that other case, but stated it was not "appropriate to direct or refer to another case without the attorneys from that other case, both sides present" (H. 507).[11] Judge Mounts commented "That's wonderful of you to point that out and I certainly commend you for that," but stated "I am asking people to look at it [the other case] and if that is in contravention of the search for justice and improper, then at some later time a Court of higher authority is going to explain that to me and I will leave to that position and follow it, I hope, faithfully" (H. 507).

Judge Mounts entered an order transferring the case to Judge Harold Cohen (PC-R. 1271), who set a Huff hearing for December 2, 1996 (Supp. PC-R. 103D). Judge Cohen also indicated that an evidentiary hearing would be set for December 13, 1996, should a hearing be necessary (PC-R. 104). Mr. Young sought clarification of the order, noting that no hearing had yet been ordered and even if one were to be ordered, a portion of an

---

[11]The case to which Judge Mounts was referring was the Paul Scott case, which was presided over by Judge Mounts. Mr. Scott's case is also on appeal before this Court. See Scott v. State, No. 88,551.

afternoon would not be sufficient (PC-R. 1274). Mr. Young also argued that, to the extent the court was relying on § 924.055, Fla. Stat. (1995), which established time frames for postconviction proceedings, the statute was unconstitutional (PC-R. 1275 et. seq.).

The Huff hearing was conducted on December 2, 1996 (H. 512-56). The parties agreed that the 90-day time frame set forth in § 924.055 were not applicable given that Judge Cohen had received the case well into that time period (H. 521-25). After Mr. Young and the State presented their arguments, the State then raised the issue of proposed orders:

> MS. BAGGETT: Could I ask you a question? I don't know what your usual procedure is. Would you like proposed orders?
>
> THE COURT: Sure, that will be helpful. If you want to send the proposed orders, I can take a look at them. . . .

(H. 553-54).

Mr. Young thereafter submitted a one-page proposed order granting an evidentiary hearing on all of the claims (Supp. PC-R. 107). The State submitted a twenty-three page proposed order (Attachment A).[12] By letter dated December 26, 1996, Mr. Young objected to the State's order "as it contains findings of fact and conclusions of law which reflect the opinions of the counsel representing the State, not findings and conclusions made by the Court" (Attachment B).[13] Despite Mr. Young's objection, Judge Cohen signed the State's proposed order verbatim, with the exception of the passage addressing two witnesses, and ordered an evidentiary hearing limited to trial counsel's ineffectiveness in failing to present

---

[12]The State's proposed order was inexplicably not made part of the record, although the cover letter accompanying the order was (Supp. R. 106). Therefore Mr. Young is attaching a copy to his brief, as this is an issue being raised in these proceedings. See Argument I, infra.

[13]This letter was likewise not included in the record on appeal and is attached to the brief.

Elizabeth Painter and Larry Hessmer at trial (PC-R. 1314).[14]

The limited hearing was conducted on January 22, 1997. Larry Hessemer testified that he was a witness to the events in Jupiter on the night that Mr. Bell died (H. 636). Hessemer gave a statement to the police on August 31, 1986, and his deposition was taken by trial counsel, Craig Wilson, on November 21, 1986 (H. 637-38). Hessemer was not subpoenaed to testify at Mr. Young's trial (H. 639). He stated that he would have been willing to testify and that his testimony would have been consistent with his statement and deposition (H. 640).

In his deposition, Hessemer had explained that he was asleep when he heard shouting, woke up, and went to the door and looked out (Deposition of Larry Hessemer, November 21, 1986, at 9).[15] He could not see anything from that vantage point, so he got dressed and went out into the parking lot (Id.). He walked out into the parking lot and saw the car as well as John Bell; he also saw two men lying on the ground (Id. at 10). Hessemer asked Bell if he wanted him to call the police, and Bell said yes (Id. at 11). After going inside to call the police, Hessemer returned to the parking lot and was about five feet away (Id. at 11-12). He "again saw the two men lying beside the right-hand side of the vehicle, and Mr. Bell was moving from the position of the right side to the left side, telling them, not to move" (Id. at 12). Bell "called them niggers . . . [and] he was shouting, screaming at them, don't move, and I believe he, it was abusive, obscene" (Id. at 12-13). Hessemer then said

---

[14]Judge Cohen's order is in the same font as the State's proposed order, presumably because in addition to the order, the State also forwarded a diskette (Supp. PC-R. 106).

[15]Hessemer's deposition was introduced into evidence at the hearing as Exhibit 4 (H. 591).

that Bell "told his son to get his car and put the, turn the lights on so that he could see" (Id. at 14). At that point, Hessemer "decided to go back to get a flashlight, in my kitchen, turned around and proceeded back and was halfway between the two points that I have been previously when the shooting began" (Id. at 15). He explained that he "couldn't tell the difference" between the shots (Id.). After the incident was over, Hessemer gave a statement to the police (Id. at 23), but never testified before a grand jury because "I didn't even know there was a grand jury" (Id.).

In Hessemer's statement to the police on that night,[16] he related that after he heard the "wrestling noise and I heard John tell him again 'Don't move' than I heard the report. And at first I said, I didn't know what it was, it was just a (slap sound), like that" (Id. at 6). Hessemer had heard gunfire during his time in the service, and explained that the first shot he heard "sounded like a 22 gunshot, it's really what it sounded like" (Id. at 7). After he heard the first shot, "I took 1 or more steps and I turned and I thought what was that and then I heard another pop and I heard a louder shot" (Id.). He summed up that "I heard an immediate report, sounded like a very light weapon, like a 22, then I heard another report, louder, then I heard another light report then I heard a large blast" (Id. at 11).

Under questioning by Judge Cohen, Hessemer explained that "if anybody had me on the ground and screaming at the top of his lungs as the man was doing, I would have to say I would be forced to shoot him" (H. 641). Hessemer told the court that he had been awakened by noise, and when he looked outside, he observed "movement and screaming" in the

---

[16]This statement was introduced into evidence at the evidentiary hearing as Exhibit 3 (H. 591).

parking lot (Id.). He went outside to the parking lot and then returned to his apartment to call 911 (H. 642). After making the call, he returned to the parking lot:

> I got as far as the passenger side right corner of the car and that's when I heard the shooting. . . . I heard quite clearly there were two light shots and it sounded like a .22 to me. I'm not real familiar with weapons but I have been around them and I immediately started back going for cover and I heard a loud blast and that's about everything I heard.

(H. 642-43). Hessemer reaffirmed the order of the shots he heard: "I wasn't close enough to see the actual shooting. I believe I can only state that I heard two quick reports. It sounded like a .22, then I heard the blast" (H. 644). He had never stated that the loud blast was the first shot he heard, and was certain he heard first the small gun fire twice and that the loud blast came after the small caliber shots (H. 645).

Elizabeth Painter Napolitano also testified at the evidentiary hearing that she witnessed the events on the night that Mr. Bell was shot (H. 647). She also gave a formal statement to the police and was deposed (H. 648-49); however, she was not called to testify at Mr. Young's trial (H. 651). If she had been called as a witness, her testimony would have been consistent with her statement and deposition (Id.).

In her deposition,[17] Painter explained that she was "sound asleep and I woke up to hear an argument" (Deposition of Elizabeth Painter, December 18, 1986, at 4). She testified that "it sounded like [John Bell] was talking to somebody named Mike. And I heard, 'Don't fuck with me, Mike. I'm really mad.' Mike was not as strong in the argument, but the other man was very strong" (Id. at 5). Painter explained that her window faced the parking lot "directly across looking at their lot" (Id. at 5-6). She testified that

---

[17]Ms. Painter's deposition was introduced as Exhibit 1 during the hearing (H. 587).

"they were maybe arguing over the victim possibly shooting the suspect" (Id. at 7). She went downstairs and turned on a light, thinking maybe that would stop the argument, and went back upstairs (Id. at 8). She then went downstairs again "because the argument was continuing. I really thought somebody was going to get it" (Id.). Painter then explained that she heard "several small caliber shots fired. And then I went outside. As I was opening the door and going outside . . . I heard one big boom gun shot blast" (Id. at 8-9). The last sound she heard was that of a shotgun, while the other reports were consistent with a handgun (Id. at 16). On cross-examination by the prosecutor, Painter reiterated that "to the best of my knowledge, I recall hearing the small caliber shots first, and then the gun blast" (Id. at 18).[18]

Mr. Young also presented the testimony of his trial attorney Craig Wilson, who testified that his theory of the case was that Mr. Young had shot the victim in self-defense and that it was important to present witnesses who could corroborate this theory (H. 570). He had also argued at Mr. Young's trial that the shooting was justifiable homicide, a theory that could have been supported by the testimony of Ms. Painter and Mr. Hessemer (H. 626; 631). Mr. Wilson explained that their testimony regarding the order of the shots fired could have been considered with other information, such as the testimony that Mr. Bell was screaming obscenities and threatening to kill Mr. Young, to place Mr. Young's actions in context in terms of self-defense (H. 631). He explained that the depositions of Ms. Painter and Mr. Hessemer were consistent with his trial strategy (H. 576).

---

[18]In Painter's statement to police, admitted as evidence during the hearing (H. 587), she also described hearing about 5 gunshots, including one or two loud blasts; however, the first loud shot came after the softer shots.

Wilson provided several examples of the way in which Painter could have assisted the defense. First, her deposition testimony that she heard a voice say, "Don't fuck with me Mike, I'm really mad," as well as her testimony that the man speaking was "very strong," would have helped the defense by demonstrating Mr. Young's state of mind and explaining his actions (H. 578-79). Painter's deposition testimony that she thought Mike was going to be the victim was also relevant to the defense theory that Mr. Young acted in self-defense (H. 581). Painter also testified at her deposition that she "really thought somebody was going to get it" (H. 579), and that "the argument was building, it was loud, it was getting very, he was really mad" (PC-R. 580). Finally, Painter's deposition testimony was consistent with the defense theory that Mr. Bell shot first, as she indicated that she heard "several small caliber shots fired" and then she "heard one big boom gunshot blast" (H. 580). Wilson testified that Painter's official statement to the police was consistent with her deposition testimony and with the defense theory at trial (PC-R. 585, 587). He explained on cross-examination that her testimony would have helped him refute the State's witnesses who testified that Mr. Young fired first (PC-R. 615). Mr. Wilson had no tactical reason for not calling Painter to testify (H. 590).

In regard to Hessemer, Wilson testified that his police statement and deposition were also consistent with the defense theory at trial. Hessemer told the police that he heard a rustling noise and then Bell said, "Don't move, you son of a bitch," and then he heard a shot that sounded like a .22 caliber pistol (H. 600). Hessemer's statement to the police that he did not hear the shotgun blast first was consistent with the defense theory that Mr. Young acted in self-defense (H. 605). Mr. Wilson testified that one of his goals at Mr. Young's

trial was to present the jury with a complete picture of the activity that took place on the night of Bell's death and there was no strategic reason why he did not call Hessemer to assist in his defense of Mr. Young (H. 607).

Following the close of the evidence, Mr. Young reasserted that the court should order a hearing and take into consideration all the evidence alleged in Mr. Young's 3.850 motion, not just the limited testimony on which a hearing had been ordered (H. 652). Both parties gave closing statements, and the court inquired about proposed orders (H. 665). Mr. Young objected to the submission of proposed orders, and the court indicated it would write its own order after taking the case under advisement (Id.).

On January 27, 1997, Judge Cohen entered an order denying relief (Supp. PC-R. 110). Mr. Young filed a motion for rehearing (PC-R. 1321). On March 5, 1997, Judge Cohen entered an order denying the rehearing motion, writing that the motion "was brought to the Court's attention through an inquiry by the Attorney General's Office" (PC-R. 1328). A timely notice of appeal was filed (PC-R. 1329).

SUMMARY OF THE ARGUMENTS

1. With the exception of a limited issue on which an evidentiary hearing was granted, the trial court, over Mr. Young's objections, adopted the State's proposed order denying relief in toto. The State's order contained findings of fact, findings regarding prejudice, materiality, and harmless error, and contained caselaw favorable only to the State's position. The lower court's adoption of the State's order violated due process and Mr. Young's right to a judicial determination of his postconviction motion. Reversal with directions to conduct an evidentiary hearing before another judge is now required.

2. The Assistant Attorney General initiated an ex parte contact with the lower court judge regarding Mr. Young's motion for rehearing. As a result of this impermissible ex parte contact, Mr. Young's motion for rehearing was denied, and the court did not afford Mr. Young an opportunity for any argument. The ex parte contact violated due process, and the Assistant Attorney General's conduct violated the Rules of Professional Conduct. Reversal with directions to conduct an evidentiary hearing before another judge is now required.

3. Issues regarding Mr. Young's entitlement to public records were erroneously denied below. The Palm Beach County Sheriff's Office destroyed evidence relating to Mr. Young's case. Furthermore, at the request of the State, Mr. Young filed a motion to compel disclosure of records from the State Attorney's Office, listing some seventy (70) cases by case number that had not been turned over. These cases included cases relating to Mr. Young, as well as the codefendants. The State failed to search for these records, and the lower court ruled that although Mr. Young was entitled to the records, he would not compel the State to disclose them to Mr. Young. The lower court judge evidenced his clear bias against Mr. Young and in favor of the State, and his ruling was based on this patent bias. The lower court also erroneously denied Mr. Young's request to depose the Assistant Attorney General regarding claimed exemptions under Chapter 119. The lower court also erred in failing to disclose documents. The lower court's order does not indicate whether an in camera inspection was conducted. Even if it was, the judge's clear bias precluded a fair and impartial assessment of the exemptions. Mr. Young should be given an opportunity to amend with the erroneously withheld State Attorney records and the Attorney General

records.

4. The lower court erred in failing to strike the procedural defenses raised by the State in its response to Mr. Young's Rule 3.850 motion. The State waited until after its response was due to request an extension of time, misrepresenting the due date of its pleading in order to assert that its request was timely. Further, the trial court, due to its blatant bias, failed to consider Mr. Young's objection even though it had been properly filed. The State's answer should have been stricken, and all procedural defenses waived.

5. The lower court failed to afford Mr. Young an evidentiary hearing on his claim regarding the guilt phase of his capital trial, with the exception of one limited issue. Because the court's order was written by the State, the court made numerous errors in its legal and factual analysis of Mr. Young's claims. The court failed to conduct an adequate materiality analysis under Kyles v. Whitley and United States v. Bagley. Further the court failed to assess the cumulative effect of all the error, in violation of Kyles and State v. Gunsby. The court erred in finding that the suppressed notes about Trooper Brinker were not Brady material, and erred in not granting an evidentiary hearing. The court further erred in not granting a hearing on, and considering the cumulative effect of, the issue of Dr. Roth and the suppressed information that the State's witnesses had been taken to a "range." The court also erred in failing to grant a hearing on, and considering the cumulative effect of, the newly-discovered information regarding the character of the victim. Evidence of a violent and aggressive character trait is admissible when the defendant claims self-defense. Moreover, the court erred in denying relief following the limited evidentiary hearing on witnesses Hessemer and Painter. The court employed a sufficiency-of-the-evidence claim,

rather than the appropriate prejudice analysis under Strickand v. Washington. The evidence not presented undermined the jury's guilt and sentencing verdicts. Mr. Young is entitled to a plenary evidentiary hearing in order to establish his entitlement to relief under Kyles and Gunsby.

6. The lower court failed to afford an evidentiary hearing on the penalty phase adversarial testing claim. The court adopted the State's order wholesale, which contained findings of fact about tactical strategies, deficient performance, and prejudice; however, no hearing was conducted. The lower court failed to accept Mr. Young's allegations as true regarding trial counsel's failure to investigate, his lack of a reasonable strategy, and the testimony that Dr. Crown would have been able to provide had he been allowed to testify before the jury. Trial counsel also failed to object to numerous objectionable comments during the State's closing argument, and failed to object to numerous issues relating to the constitutionality of the aggravating factors. A plenary evidentiary hearing is warranted to allow Mr. Young to establish his entitlement to relief.

7. The lower court failed to afford an evidentiary hearing regarding trial counsel's failure to object to the petit jury pool and the methods by which it was selected.

8. The lower court erred in shifting the burden to Mr. Young to establish that the mitigating circumstances outweighed the aggravating circumstances.

9. Mr. Young is innocent of first-degree murder. The cumulative effect of the trial evidence and evidence presented in postconviction establishes that the State failed to prove beyond a reasonable doubt that Mr. Young committed either first-degree premeditated murder or felony-murder.

10. Mr. Young is innocent of the death penalty. The cumulative effect of the trial evidence and evidence presented in postconviction establishes that the State failed to prove beyond a reasonable doubt the aggravating factors necessary to support a death sentence.

11. The ethical rule prohibiting Mr. Young's counsel from interviewing jurors unconstitutionally inhibits Mr. Young from investigating potential areas of relief under Rule 3.850 and impinges on his right to access to the courts. The rule should be declared unconstitutional, and Mr. Young should be permitted to interview the jurors to determine if any bases for relief can be ascertained.

12. This Court conducted a constitutionally inadequate harmless error analysis on appeal after striking the cold, calculated, and premeditated aggravating circumstance.

ARGUMENT I

MR. YOUNG'S RIGHT TO DUE PROCESS WAS VIOLATED BY THE LOWER COURT'S SIGNING OF THE ORDER WRITTEN BY THE STATE DENYING RELIEF TO ALL BUT ONE CLAIM FOR RELIEF.

During the Huff hearing before Judge Cohen, the Assistant Attorney General inquired:

> MS. BAGGETT: Could I ask you a question? I don't know what your usual procedure is. Would you like proposed orders?
>
> THE COURT: Sure, that will be helpful. If you want to send the proposed orders, I can take a look at them. . . .

(H. 553-54). The State submitted a twenty-three page proposed order (Attachment A).[19] Mr. Young submitted a one-page proposed order granting an evidentiary hearing on all of the

---

[19]The State's proposed order not made part of the record, although the cover letter accompanying the order was (Supp. P. 106). Therefore Mr. Young is attaching a copy to his brief.

claims, containing no facts or law (Supp. PC-R. 107). By letter dated December 26, 1996, Mr. Young objected to the State's order "as it contains findings of fact and conclusions of law which reflect the opinions of the counsel representing the State, not findings and conclusions made by the Court" (Attachment B).[20] Mr. Young also objected that the State's proposed order violated the holdings in Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), and Hoffman v. State, 571 So. 2d 449 (Fla. 1990). Despite Mr. Young's objection, Judge Cohen signed the State's proposed order verbatim, with the exception of the passage addressing two witnesses, and ordered an evidentiary hearing limited to trial counsel's ineffectiveness in failing to present Elizabeth Painter and Larry Hessemer at trial (PC-R. 1314). In his motion for rehearing, Mr. Young reiterated his objection to the wholesale adoption of the State's proposed order (PC-R. 1326).

The court's adoption of the order drafted by the State violated Mr. Young's right to due process and to an impartial determination of his Rule 3.850 motion. In the postconviction arena, as in trial proceedings, lower courts make findings of fact which become integral to the remainder of the proceedings in capital cases. However, when the lower court simply signs an order drafted by the State, the lower court abdicates its judicial responsibility to make a determination of the case before it, thereby violating the defendant's right to due process.[21]

This Court has repeatedly held that it violates due process for a judge to delegate to

---

[20]This letter was likewise not included in the record on appeal and is attached to the brief.

[21]A review of the State's order reveals that it essentially parrots verbatim the State's response to Mr. Young's Rule 3.850 motion.

the State the task of drafting sentencing orders in capital cases. In Patterson v. State, 513 So. 2d 1257 (Fla. 1987), the Court addressed a situation where the responsibility for drafting the sentencing order was delegated to the state attorney:

> [W]e find that the trial judge improperly delegated to the state attorney the responsibility to prepare the sentencing order, because the judge did not, before directing preparation of the order, independently determine the specific aggravating and mitigating circumstances that applied in the case. Section 921.141, Florida Statutes (1985), requires a trial judge to independently weigh the aggravating and mitigating circumstances to determine whether the death penalty or a sentence of life imprisonment should be imposed upon a defendant.

Patterson, 513 So. 2d at 1261.

The Patterson Court observed that in Nibert v. State, 508 So. 2d 1 (Fla. 1987), it had held that the judge's failure to write his own findings did not constitute reversible error "so long as the record reflects that the trial judge made the requisite findings at the sentencing hearing." Patterson, 513 So. 2d at 1262, quoting Nibert, 508 So. 2d at 4. Indeed, in Nibert, the judge made his findings orally and then directed the State to reduce his findings to writing. Nibert, 508 So. 2d at 4. The record in Patterson demonstrated that there the trial judge "delegat[ed] to the state attorney the responsibility to identify and explain the appropriate aggravating and mitigating factors." Patterson, 513 So. 2d at 1262. This Court found that this constituted reversible error.[22] There is no meaningful distinction between

---

[22]The Eleventh Circuit Court of Appeals recently wrote that "[w]e have consistently frowned upon the practice of delegating the task of drafting important opinions to litigants." Chudasama v. Mazda Motor Corp., 123 F. 3d 1353, 1373 n.46 (11th Cir. 1997). The Court observed that "[t]his practice harms the quality of the district court's deliberative process" and "impedes [the reviewing court's] ability to review the district court's decisions." Id. Further, this practice creates "'the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact.'" Id. (citation omitted). See also United States v. El Paso Natural Gas Co., 376 U.S. 651, 657 n.4 (1964) (observing that adversarial parties that draft orders "in their zeal

the State's drafting of a sentencing order and the drafting of an order denying postconviction relief. Both practices violate due process. Patterson; Huff v. State, 622 So. 2d 982 (Fla. 1993); Spencer v. State, 615 So. 2d 688 (Fla. 1993).

In Mr. Young's case, the error was particularly egregious. The proposed order recited "findings" by the lower court which, because it was drafted by the State, were never at all "found" by anyone but the Assistant Attorney General, the adversarial party to this litigation. There was no evidentiary hearing on these claims, making the "factfindings" even more erroneous and the error more blatant. For example, as to Mr. Young's claim that the Sheriff's Office had willfully destroyed evidence, the order stated that Mr. Young "has failed to make a prima facie showing of willfulness or prejudice such as would warrant an evidentiary hearing or relief" (Attachment A at 1-2). As to Mr. Young's claim that his penalty phase was constitutionally unreliable, the State's order, signed by the judge, begins with a lengthy discussion of the law and includes cases favorable only to the State's position (Id. at 2-3). The order then states that "this Court finds that Defendant has failed to prove prejudice under the Strickland standard" (Id. at 4), offers "findings" about why trial counsel did not present the information alleged in the 3.850 motion (Id. at 4-5), and then concludes with the "finding" that "there is no reasonable probability that the jury's recommendation or this Court's ultimate sentence would have been different had defense counsel presented the additional evidence to the jury (Id. at 6) (emphasis in original). The order goes on to state

---

and advocacy and their enthusiasm are going to state the case for their side . . . as strongly as they possibly can. When these [orders] get to the courts of appeals they won't be worth the paper they are written on as far as assisting the court of appeals in determining why the judge decided the case").

that "[i]t is obvious to this Court that Dr. Crown did not find any evidence to support the existence of either mental mitigator, or else he would have testified to their existence at the allocution hearing" (Id. at 7). None of these findings were made by the trial court after an evidentiary hearing, but rather were made by the Assistant Attorney General. As to Claim VII, regarding the constitutional unreliability of the guilt phase, the State's order includes a "finding" that the information alleged in Mr. Young's 3.850 motion to be exculpatory evidence "does not constitute the type of evidence envisioned by Brady" (Id. at 11). Moreover the order employs the wrong materiality standard for determining whether a Brady violation exists -- the test is not a sufficiency-of-the-evidence test as the State led the court to find. The proper test was enunciated by the Supreme Court in United States v. Bagley, 473 U.S. 667 (1985), and was cited in Mr. Young's 3.850 motion (PC-R. 1182; 1185).[23] Because the court simply signed whatever the State gave it, the court found exactly what the State wanted it to find, notwithstanding binding precedent from the Supreme Court.

What occurred in Mr. Young's case is grossly improper. It was the duty of the lower court to adjudicate Mr. Young's capital 3.850 motion, not delegate that responsibility to the State of Florida, the entity seeking to carry out his execution.[24] The lower court made no independent "findings" except those that are contained in his order denying the one aspect of Claim VII on which a hearing was granted, nor did it independently determine what portions

---

[23]Mr. Young also filed as supplemental authority the decision in Kyles v. Whitley, 514 U.S. 419 (1995). See PC-R. 833.

[24]Moreover, the State's draft order also violated Lightbourne and Hoffman; as it failed to accept the allegations in Mr. Young's motion as true and also failed to attach portions of the record which conclusively demonstrated that Mr. Young was entitled to no relief. See Argument II, infra.

of the record conclusively rebutted Mr. Young's factual allegations. "[I]t is inappropriate for the state to designate which records refute defendant's allegations." Smothers v. State, 555 So. 2d 452 (Fla. 5th DCA 1990); Oehling v. State, 659 So. 2d 1226, 1228 (Fla. 5th DCA 1995). This was not simply a ministerial order, nor did Judge Cohen announce his rulings on these issues on the record and ask the State to memorialize them in written form. The court's order reflects "findings" about deficient performance, prejudice, materiality, harmless error, and other matters which are within the exclusive province of the trier of fact to make, not the adversary's attorney. This Court should clearly state that this practice should not continue in capital cases. The lower court's order should be reversed with directions to conduct these proceedings before another judge in a manner that comports with due process.

ARGUMENT II

AN EX PARTE COMMUNICATION OCCURRED

In his order denying Mr. Young's motion for rehearing, the lower court wrote:

> THIS CAUSE was brought to the Court's attention through an inquiry by the Attorney General's Office regarding Defendant's Motion for Rehearing filed with the Clerk of Court February 17, 1997 but not received by this Court until today, March 5, 1997.
>
> Having reviewed said motion it is
>
> ORDERED AND ADJUDGED that Defendant's Motion for rehearing be and the same is hereby DENIED.

(PC-R. 1328) (emphasis added).

From the face of the order there was an impermissible ex parte communication initiated in this case by the Attorney General's Office. This ex parte communication violated Mr. Young's right to due process and to an impartial tribunal. Smith v. State, 23 Fla. L.

Weekly S49 (Fla. Jan. 22, 1998). There is nothing "more dangerous and destructive of the impartiality of the judiciary than a one-sided communication between a judge and a litigant." Rose v. State, 601 So. 2d 1181, 1183 (Fla. 1992). Here, Assistant Attorney General Sara Baggett contacted the presiding judge about Mr. Young's pending motion for rehearing. Her conduct violated the Rules of Professional Conduct. Rule 4-3.5 of the Rules of Professional Conduct state:

> **(b) Communication with Judge or Official.** In an adversary proceeding a lawyer shall not communicate or cause another to communicate as to the merits of the cause with a judge or an official before whom the proceeding is pending except:
>
> (1) in the course of the official proceeding in the cause:
>
> (2) in writing if the lawyer promptly delivers a copy of the writing to the opposing counsel or to the adverse party if not represented by a lawyer;
>
> (3) orally upon notice to opposing counsel or to the adverse party if not represented by a lawyer;
>
> (4) as otherwise authorized by law.

None of these exceptions applies here. Neither Mr. Young nor his collateral counsel knew that the Attorney General's Office had made an "inquiry" to the lower court about Mr. Young's motion for rehearing. This "inquiry" constituted an impermissible ex parte communication in violation of Mr. Young's right to due process and a violation of the Rules of Professional Conduct.[25]

---

[25]Mr. Young's counsel can only speculate as to why, despite the clear language of the Rules of Professional Conduct and the holdings by this Court in cases such as Rose, as further evidenced by the Court's recent decision in Smith v. State, 23 Fla. L. Weekly S49 (Fla. 1998), the Assistant Attorney General felt it was appropriate to initiate an ex parte contact with the court. Such conduct is sanctionable.

The lower court was also required to abstain from receiving any ex parte communication from the Attorney General's Office. A judge should "neither initiate nor consider ex parte or other communications concerning a pending or impending proceeding." Canon 3(A)(4), Code of Judicial Conduct. Here, the lower court received an "inquiry" from the State's counsel and then denied Mr. Young's motion for rehearing as a result of that inquiry. The lower court neither disclosed this communication to Mr. Young's counsel nor afforded him the opportunity to be heard on his rehearing motion; the court simply denied the motion after receiving an "inquiry" from the Attorney General's Office. Mr. Young's counsel has no idea what this inquiry consisted of or the nature of the "inquiry." Due process was violated, and a new hearing before another judge is required.

ARGUMENT III

THE PUBLIC RECORDS ARGUMENT

A. THE SHERIFF'S OFFICE DESTROYED EVIDENCE.

On April 1, 1993, Mr. Young made public records requests to, inter alia, the Palm Beach County Sheriff's Office, seeking all photographs, tapes, and any other sound or video recordings relating to Mr. Young's case. Numerous entries on the documents initially received by Mr. Young referred to tapes and photographs that had not been disclosed; therefore, Mr. Young renewed his public records request on April 19, 1993, specifically requesting access to all records including the tapes and photographs. On April 29, 1993, counsel for Mr. Young received a letter from the Sheriff's Office indicating that all physical evidence had been destroyed on April 2, 1993, a date subsequent to Mr. Young's initial

request for records.

At the public records hearing, William Hess, the property supervisor for the Palm Beach County Sheriff's Office, initially testified that he personally destroyed all the evidence in Mr. Young's case (H. 198). He later clarified that any evidence that had been checked out by someone working on the case would have escaped destruction, but that he stamped the property receipts for all the evidence in this case, regardless of whether it was actually destroyed (H. 338). He emphasized that no evidence from this case remained at the Sheriff's Office. Hess repeatedly professed unfamiliarity with Chapter 119 and justified his actions by referring to Chapter 705.105, Florida Statutes, which permits the destruction of unclaimed evidence after sixty days (H. 207; 211-12).[26] Hess read a list of the evidence he destroyed which included diagrams drawn by witnesses, taped statements of Mr. Young and his co-defendants, and statements of witnesses (Id. at 199-203). Hess believed that tapes and other physical evidence were not public records (Id. at 207).

The Sheriff's Office clearly and willfully violated Chapter 119 by destroying every piece of evidence in its possession after receiving notice that counsel for Mr. Young would be requesting public records and other physical evidence regarding this case. Chapter 119

---

[26]Even a cursory review of Chapter 705.105 reveals its inapplicability in this situation. Chapter 705 is titled "lost or abandoned property," and section 705.105 sets forth the procedures governing the disposition of "unclaimed evidence" which is defined as "any tangible personal property, including cash, not included within the definition of 'contraband article' as provided in s. 932.701(2), which was seized by a law enforcement agency, was intended to use in a criminal or quasi-criminal proceeding, and is retained by the law enforcement agency or the clerk of the county or circuit court for 60 days after the final disposition of the proceeding and to which no claim of ownership has been made." §705.101(6). The evidence at issue in this case is not lost, abandoned, or unclaimed. Mr. Young requested access to extensive physical evidence, including original cassette tapes of interviews with critical witnesses.

defines "public record" as

> all documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, [or] characteristics.

§119.011(1), Fla. Stat. This Court has interpreted this to include all materials made or received by an agency in connection with official business which are used to perpetuate, communicate, or formalize knowledge. Shevin v. Byron, Harless, Reid, and Assoc., Inc., 379 So. 2d 633, 640 (Fla. 1980). Hess' ignorance of the requirements of Chapter 119, particularly the responsibility of State agencies to preserve public records, and his citation to an obviously irrelevant statute cannot excuse the blatant violation of Chapter 119 in this case. According to the express provisions of Chapter 119, the Palm Beach County Sheriff's Office was not relieved of its duty to maintain all physical evidence in Mr. Young's case. The unauthorized and illegal destruction of public records also violated Mr. Young's constitutional rights to due process, to confront State witnesses, to counsel, and to present witnesses in his defense. Mr. Young must be given a new trial and sentencing.

B. THE STATE ATTORNEY'S OFFICE WILLFULLY REFUSED TO COMPLY WITH CHAPTER 119.

Mr. Young filed a "Motion to Compel Disclosure of Documents Pursuant to Chapter 119.01 Et Seq., Fla. Statutes; And for Sanctions And Request For Order To Show Cause Pursuant to Fla. R. Crim. P. 3.840," specifically identifying the requested documents that had not been disclosed by the State in its initial production of documents. Mr. Young filed the motion at the request of the Assistant State Attorney to facilitate his search for the undisclosed documents. The State did not file a response to the motion to compel. Judge Mounts, who had yet to transfer the case to Judge Cohen, held two hearings on September 7

and November 30, 1994. With the exception of the State Attorney's Office, all the agencies subpoenaed to the hearing provided Mr. Young with the documents previously withheld. However, the Palm Beach County State Attorney's Office refused to comply with Chapter 119 and failed to produce any records at the hearing. The court refused to order the State Attorney's Office to provide Mr. Young with the requested records.

Paul Zacks, the public records custodian on all capital cases for the State Attorney's Office, testified that he received public records requests from counsel for Mr. Young on April 1 and 13, 1993 (H. 355). Zacks personally supervised the copying of 6,990 pages that were provided to counsel for Mr. Young (Id. at 358). However, he testified that he did not bring any documents to the hearing in accordance with a duly-issued subpoena, respond to the motion to compel, or search for any documents listed in the motion to compel (Id. at 362, 367). Despite the fact that Mr. Young had listed by case number and defendant the undisclosed files in his motion to compel (at Zack's specific request), Judge Mounts assumed that because the State Attorney's Office had already provided a large number of pages, it had fully complied with Mr. Young's public records request. However, the files listed by case number in the motion to compel remain outstanding and were not disclosed by the State Attorney's Office.

Judge Mounts revealed his inclination to deny Mr. Young's request but expressed concern about being reversed on appeal. He then permitted the State, particularly Mr. Zacks who was acting in the dual role of both an advocate and a witness, to guide his decision; Judge Mounts addressed the attorneys for the State: "I will give you that opportunity to say, 'Yes, Judge, deny it and we will live with the appeal.' The ball is in your court. I don't

want to play games but I don't want to get reversed. My job is not to be reversed" (Id. at 378). Zacks then suggested that Judge Mounts deny Mr. Young's request because "there has got to be a waiver at a certain period of time" (Id. at 379). Judge Mounts then denied Mr. Young's request based on the fact that the State Attorney's Office had already provided 6,990 pages and his assumption that the defense had engaged in dilatory tactics (Id. at 382).

Judge Mounts concluded the hearing by issuing an "invitation" to both sides to submit a review of "the doctrine of delay in capital cases" (Id. at 397). He explained that he believed the public is dissatisfied with the delay in the resolution of capital cases and directed his accusation of delay at the defense. In response to Judge Mounts' accusations that counsel engaged in delay, counsel for Mr. Young reviewed the chronology of Mr. Young's post-conviction proceedings, demonstrating that none of the time that elapsed since Mr. Young filed his initial motion to vacate was attributable to Mr. Young.[27] Rather, this "delay" was caused by the State's refusal to comply with Mr. Young's public records requests, as well as the court's busy docket.

This Court has repeatedly held that capital post-conviction defendants are entitled to Chapter 119 disclosure from the State Attorney's Office. See Anderson v. State, 627 So. 2d 1170 (Fla. 1993); Muehleman v. Dugger, 623 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1990). In Mr. Young's case, not only has the State shirked its responsibility to facilitate the public records process, it flagrantly flaunted the authority of this Court by failing to provide Mr. Young with the records to which he is entitled. To

---

[27]Judge Mounts also refused to acknowledge that Mr. Young filed his motion to vacate ten months early.

further exacerbate its bad faith, the State then argued that Mr. Young was responsible for the alleged "delay" it perceived to have occurred in this case, a perception adopted wholesale by Judge Mounts. The same actions by State agencies were condemned by this Court in Ventura v. State, where it explained: "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, 673 So. 479, 481 (Fla. 1996).

Judge Mounts revealed his misunderstanding of public records litigation when he assumed that the State Attorney had complied with the records requests because it had provided counsel for Mr. Young with a large number of pages. The fact that an agency has turned over documents, consisting in this case of 6,990 pages, does not prove that it has disclosed everything. The court ignored that Mr. Young had listed in the motion to compel the case numbers of files that were still not disclosed by the State Attorney's Office after the 6,990 pages were disclosed. Mr. Young submits that this Court should order the Palm Beach County State Attorney's Office to comply with Mr. Young's records requests.[28] In accordance with this Court's precedent, Mr. Young requests that he be given sixty days to amend his motion once public records have been received. Ventura v. State.

C. MR. YOUNG WAS DENIED A FULL AND FAIR HEARING BEFORE AN IMPARTIAL JUDGE.

Following the public records hearing, Mr. Young moved to disqualify Judge Mounts based on his request to the State that it provide a scholarly memorandum on the "doctrine of

---

[28]The records outstanding are cited by case number in Mr. Young's Rule 3.850 motion. See PC-R. 1120-1123.

delay" in capital cases. Judge Mounts' unsupported accusations against counsel for Mr. Young were the basis for his refusal to order the State Attorney to comply with Chapter 119, despite the State Attorney's testimony that he had made no effort to comply with the motion to compel. In accusing counsel for Mr. Young of delaying the litigation of his postconviction motion, Judge Mounts ignored the chronology of Mr. Young's postconviction proceedings, which revealed no delay caused by the defense, as well as the facts of this case, including the State's refusal to comply with Chapter 119. Finally, Judge Mounts issued a ruling that he acknowledged was contrary to the law, see H. 382 ("I am not ruling that you are not entitled, I am just denying your motion"), and then deferred to the State to tell him what to do notwithstanding the state of this Court's jurisprudence.

Judge Mounts' assumption that the defense had caused whatever perceived delay occurred in this case ignores that State agencies turned over records at the 1994 hearings that should have been disclosed when Mr. Young's initial requests were made in 1993. As a result of the September 7th hearing, Mr. Young received some fifteen hundred (1500) pages of documents, as well as nine (9) cassette tapes that were found in the Attorney General's Office two (2) years later and a copy of the 911 tape, the original of which had been erased prior to Mr. Young's trial. At the November 30th hearing, Mr. Young received additional material not previously provided, including 190 crime scene and autopsy photographs. Despite this, Judge Mounts accused counsel for Mr. Young of engaging in dilatory tactics and denied Mr. Young's request for an order requiring the State Attorney's Office to comply with Chapter 119 based on this unsupported accusation.

Judge Mounts' undisguised prejudice against Mr. Young and his counsel prevented

the fair litigation of Mr. Young's public records requests. A more obvious display of actual prejudice to Mr. Young, as well as to his counsel, can hardly be imagined. Based on the court's actions and remarks, Mr. Young has more than a reasonable fear that he did not receive a full and fair hearing.

The State attempted to defend Judge Mounts' comments by arguing that "there was nothing accusatory, nothing implicating anything" in the Court's statement about delay (H. 403). However, when Judge Mounts requested a memorandum on the doctrine of delay, his unfounded accusations were clearly and unambiguously directed to Mr. Young and his counsel. After explaining his request and noting his personal perception of the public's "dissatisfaction" with "delay" in capital cases, Judge Mounts commented:

> I am sure the defense, the attorneys for the petitioner, would not want to characterize it as delay, they would want some other, more appropriate appellation, and I am at a loss as to what that might be.
>
> Let's not say it has to be called delay; that it can be called something else. But when the petitioners are saying, "We need more information," and the State is saying they already have it, and they are simply doing this to put the matter off, the only word that occurs to me is delay.
>
> If there is another fairer, more natural description of the phenomenon, I will gladly adopt it. But this is a phenomenon that has go[ne] on for, so far, one day and now approaching the end of a second day.

(Id. at 398) (emphasis added). These words were clearly accusatory toward Mr. Young's counsel. In addition, Judge Mounts' assumption that the State truthfully told the Court that counsel for Mr. Young had already received the records[29] but that counsel for Mr. Young

[29]This despite the fact that Assistant State Attorney Zacks testified that he refused to conduct a search after receiving Mr. Young's motion to compel and that he might have missed something when he conducted his initial search.

were not telling the truth when denying that the records were received is further evidence of his prejudice against Mr. Young. Judge Mounts' prejudice against Mr. Young clearly infected his ruling in this case which was not based on the law but on Judge Mounts' personal beliefs about defense counsel's alleged unethical conduct.

Mr. Young is entitled to the fair determination of the issues in his Rule 3.850 proceedings before a neutral, detached judge. The circumstances of this case are "sufficient to warrant fear on [Mr. Young's] part that he [did] not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988). In Suarez, this Court considered a similar situation, where the trial judge made public statements revealing his personal views that attorneys defending capital defendants do nothing but "file appeals and petitions to postpone the execution." Id. at 92 n. 1. The trial judge noted that "there's a point where enough is enough . . . [b]ut no one ever seems to know when that point is." Id. This Court found that the statements "established that the judge was prejudiced against Suarez." Id. at 92. Mr. Young has likewise established that Judge Mounts' bias and prejudice precluded a fair determination of the public records issues, and reversal is warranted.[30]

When Mr. Young raised the disqualification issue again in his amended Rule 3.850,

---

[30]Judge Mounts' comments also reveal his prejudice against Mr. Young's counsel which is grounds for disqualification "where the prejudice is of such a degree that it adversely affects the client." Town Center of Islamorada v. Overby, 592 So. 2d 774, 775 (Fla. 3d DCA 1992). Clearly, that standard was met here where the judge who presided over Mr. Young's public records hearing believed that his attorney engaged in dilatory tactics and filed meritless pleadings to delay the litigation of Mr. Young's post-conviction motion. See Deauville Realty Co. v. Tobin, 120 So. 2d 188, 202 (Fla. 3d DCA 1960)("A statement by a trial judge that he feels a party has lied in the case is generally regarded as indicating a bias against such party.").

Judge Cohen "found"[31] the issue moot because Judge Mounts was no longer presiding over Mr. Young's case. This issue is not moot because Judge Mounts denied Mr. Young's motion to compel based on his blatant prejudice and lack of impartiality. Reversal is warranted with directions that Mr. Young's motion to compel be litigated before a fair and impartial tribunal.

D. THE LOWER COURT ERRED IN FAILING TO ORDER DEPOSITION.

After Judge Mounts erroneously failed to order the State Attorney's Office to comply with Chapter 119, the Attorney General's Office discovered that it had not turned over some audio tapes to Mr. Young's counsel, and also provided records to Judge Mounts for an in camera inspection. Mr. Young sought to depose Assistant Attorney General Sara Baggett to establish the necessary factual predicate for the exemptions claimed by her office (PC-R. 1088). After the State opposed Mr. Young's request (PC-R. 1097-99), Judge Mounts denied the motion (PC-R. 1112).

Judge Mounts erred. In Roberts v. State, 678 So. 2d 1232 (Fla. 1996), this Court permitted depositions of records custodians in order to permit the defendant to establish the propriety of the Chapter 119 exemptions claimed in that case. There is no difference between the situation in Roberts and Mr. Young's situation. Moreover, Judge Mounts, due to his lack of impartiality, ruled in favor of the State notwithstanding any of Mr. Young's arguments. Throughout the proceedings over which he presided, Judge Mounts repeatedly expressed his desire to rule for the State while recognizing that Mr. Young's position was the

---

[31]Again, Judge Cohen himself "found" nothing; it was the Attorney General who drafted the order who made any "findings" with respect to this issue. See Argument I.

correct one under the law. See supra Section C. Reversal is warranted.

E. THE ATTORNEY GENERAL RECORDS SHOULD BE DISCLOSED.

Judge Mounts refused to disclose any of the records provided to him in camera by the Attorney General's Office (PC-R. 1111). Judge Mounts made no findings regarding the alleged exemptions, nor addressed any of the legal issues presented by Mr. Young in his legal memorandum (PC-R. 1087-1101). Moreover, due to Judge Mounts' blatant partiality toward the State, the results of the alleged in camera inspection are unreliable. In fact, there is no indication that Judge Mounts even conducted an in camera inspection. Rather, Judge Mounts simply entered an order indicating that he reviewed Mr. Young's memorandum and the court file and the relief requested is denied (PC-R. 1111).

Assuming arguendo that Judge Mounts did conduct an in camera inspection, he erred in failing to release the documents to Mr. Young. To the extent that the Attorney General's Office exempted "notes," such an exemption is not a valid one under Chapter 119. "Notes" are not automatically exempt under Chapter 119 (for example, the State Attorney's Office disclosed numerous notes to Mr. Young, notes which have formed the basis of claims for relief). Notes are subject to disclosure under Chapter 119. Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc, 379 So. 2d 633 (Fla. 1980); Orange County v. Florida Land Co., 450 So. 2d 341 (Fla. 5th DCA 1984). Moreover, there is no indication in the lower court's order that it reviewed the sealed materials for Brady materials. Lopez v. State, 696 So. 2d 725 (Fla. 1997); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993).

Because of the insufficiency of the lower court's order and/or failure to review the materials in camera, reversal is warranted.

ARGUMENT IV

THE LOWER COURT ERRED IN FAILING TO STRIKE THE STATE'S ANSWER AND PROCEDURAL DEFENSES

On December 6, 1994, Judge Mounts ordered Mr. Young to file an amended Rule 3.850 motion within sixty (60) days, and ordered that the State "shall file any and all responses to the Motion to Vacate and/or amendments thereto within sixty (60) days from the filing of said amendments by the defendant" (PC-R. 538). Pursuant to the order, Mr. Young filed an amended Rule 3.850 motion on February 6, 1995 (PC-R. 594 et. seq.). On February 17, 1995, Judge Mounts issued an order requesting the parties "to advise, in writing, the amount of time necessary to hear the Amended Motion. The attorneys for the State are requested to respond on Petitioner's Request to Amend" (PC-R. 746). The State filed its Response to Order of February 17, 1995, in which it contested Mr. Young's request for leave to amend. The State's pleading noted that it had received Mr. Young's motion on February 8, 1995, thereby making its Answer due on or before April 10, 1995 (PC-R. 747).

On April 12, 1995, two (2) days after its Answer was due for filing, the State sought an extension of time to file its response, citing, inter alia, pressing workload demands (PC-R. 773). The State's motion asserted (falsely) that its Answer was due on April 12, 1995 (PC-R. 773). The State indicated that Mr. Young's counsel "stated that he will respond in writing to this motion" (Id.). On April 20, 1995, Mr. Young filed a written objection to the extension request, arguing that the State had waived its right to answer the 3.850 (and waived any procedural defenses) because the State's request for further time was filed after its response was due to be filed (PC-R. 826). Mr. Young also outlined the various

extensions of time already received by the State in this case (PC-R. 828), and noted that "any confusion on part of the State regarding the clarity of the order would be nonsensical since the Assistant State Attorney himself drafted the order for the Court's signature" (PC-R. 827). Mr. Young further noted that the State was represented by both Assistant Attorney General Baggett and Assistant State Attorney Zacks, and that "[t]here is no reason why Mr. Zacks could not have completed the State's response in a timely fashion, given the fact that he has known that it was due to be filed since February" (PC-R. 829). On April 26, 1995, Judge Mounts granted the State's motion, writing that no response had been received from Mr. Young (PC-R. 832).

On May 2, 1995, Mr. Young sought reconsideration of the court's ruling granting the extension of time, writing that Mr. Young had filed his response on April 20, 1995, a fact which he verified with the Clerk's Office (PC-R. 780). Mr. Young also pointed out that the State falsely asserted the due date for its Answer in order to avoid it being filed late (Id.). A hearing was conducted on May 5, 1995 (H. 428 et. seq.), at which time Mr. Young argued that the State's answer should be stricken due to untimeliness (H. 434). Mr. Young also argued that all procedural defenses asserted by the State should be waived (H. 441). Judge Mounts denied Mr. Young's motions (H. 446). Mr. Young's counsel then asked for the grounds for the denial:

> MR. SCHER: If I may request, ask, Your Honor, what the grounds are for the denial of the motion for reconsideration, as well as the objections that I had?
>
> THE COURT: Yes, indeed you may ask. It's judicial discretion.

(H. 446) (emphasis added). Mr. Young's counsel then requested that the court impose

sanctions on the State, to which Judge Mounts responded "I am not going to sanction them. Thank you" (H. 447). The State was then permitted to file its Answer (PC-R. 885-1024).

The lower court erred in failing to strike the State's answer and in failing to order that all defenses raised by the State were waived. In open violation of the lower court's order, the State sought an extension of time after its pleading was due, exacerbating the situation by asserting a false deadline in order to make its extension request timely. Deadlines and procedural defaults apply to the State as well as defendants. Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993).

Judge Mounts's actions constituted an abuse of discretion, given his blatant bias in favor of the State during these proceedings. See supra Argument III C. In addition to his blatant pro-prosecution bias, Judge Mounts granted the State's motion despite the fact that the motion indicated that Mr. Young would be responding in writing, which he did. However, Judge Mounts ignored Mr. Young's objections, and indeed ignored the fact that Mr. Young had responded at all, writing instead (without verifying with the clerk's office) that no response had been received (PC-R. 832). Due to its untimeliness, the State's response and all defenses raised therein was due to be stricken. Relief is warranted.

ARGUMENT V

THE GUILT PHASE ADVERSARIAL TESTING ARGUMENT

The circuit court granted a limited evidentiary hearing on Mr. Young's claim that his trial attorney was ineffective for failing to call two witnesses regarding the order of shots fired. The circuit court erroneously limited the scope of this hearing, thereby precluding Mr. Young from demonstrating his right to relief. First, the court failed to consider the

cumulative effect of Mr. Young's ineffective assistance of counsel claim and his Brady claim; such analysis is crucial in this case where the evidence the jury did not hear as a result of trial counsel's ineffectiveness and the State's misconduct concerned the central issue in this case -- whether Mr. Young acted in self-defense. The circuit court's second error was further limiting the scope of the hearing regarding witnesses Hessemer and Painter to exclude evidence that the State withheld Brady material in regard to Hessemer. Finally, the circuit court erred in denying relief on Mr. Young's ineffective assistance of counsel claim following the evidentiary hearing. Consideration of the cumulative effect of this evidence demonstrates that Mr. Young is entitled to a full evidentiary hearing on both his trial attorney's ineffectiveness and the State's misconduct.

A. INTRODUCTION.

The circuit court failed to consider the cumulative effect of all the evidence not presented at Mr. Young's trial as required by Kyles v. Whitley, 514 U.S. 419 (1995). (1995), and this Court's precedent. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996); Gunsby v. State, 670 So. 2d 920 (Fla. 1996).[32] In Kyles, the Supreme Court established that "[t]he fourth and final aspect of Bagley materiality to be stressed here is its definition in terms of suppressed evidence considered collectively, not item-by-item." Kyles, 115 S. Ct. at 1567. In Gunsby, this Court ordered a new trial in Rule 3.850 proceedings because of the cumulative effect of Brady violations, ineffective assistance of counsel, and/or newly

[32]That Kyles v. Whitley is not limited to Brady claims is evidenced by its application to sufficiency of the evidence claims, United States v. Burgos, 94 F.3d 849 (4th Cir. 1996); United States v. Rivenbark, 81 F.3d 152 (4th Cir. 1996); ineffective assistance of counsel claims, Middleton v. Evatt, 77 F.3d 469 (4th Cir. 1996); and newly discovered evidence claims, Battle v. Delo, 64 F.3d 347 (8th Cir. 1995).

discovered evidence of innocence. This Court noted that while it agreed with the circuit court that Mr. Gunsby had failed to demonstrate a reasonable probability of a different result if not for the State's Brady violations, it criticized the circuit court's consideration of this claim in isolation: "When we consider this error in combination with the evidence set forth in the second issue [the ineffective assistance of counsel and newly discovered evidence], however, we cannot agree with the State's position." Gunsby, 670 So. 2d at 923. This Court has clearly established that circuit courts cannot consider the effect of unpresented evidence item-by-item but must evaluate the collective impact of such evidence. The circuit court in this case ignored this Court's directive in Gunsby; as a result, the court failed to evaluate the cumulative effect of all the evidence that was not presented to Mr. Young's jury, and Mr. Young was improperly denied relief on his Brady and ineffective assistance of counsel claims. In addition, the circuit court limited Mr. Young's ability to prove the cumulative effect of the evidence not presented at his trial when it denied a hearing on his Brady claim.

In its order granting a limited evidentiary hearing on the ineffective assistance of counsel claim, the circuit court committed two errors in violation of Gunsby: first, the court failed to consider the cumulative effect of all the evidence that was withheld by the State; second, the court separately considered the effect of evidence not presented due to the ineffective assistance of trial counsel and because of the State's Brady violations. While a cumulative analysis of the evidence not presented because of trial counsel's ineffectiveness and the State's Brady violations is always mandated by this Court's decision in Gunsby, such an analysis is particularly important here where all the evidence not presented to the jury

concerned the central issue at Mr. Young's trial -- the order of shots fired and the defense theory that Mr. Young had acted in self-defense. The State withheld evidence that could have been used by the defense to impeach the State's witnesses concerning their ability to distinguish the order of shots fired as well as evidence regarding witnesses favorable to the defense such as the notes from interviews with Dr. Roth and Mr. Hessemer. The court also separately considered character evidence about Mr. Bell that would have further supported the defense theory that Mr. Young acted in self-defense. All of this evidence withheld by the State, as well as the witnesses not called by the defense, is consistent with the defense strategy at trial and would have assisted the defense in discrediting the State's witnesses and in presenting evidence favorable to the defense. The circuit court erred in failing to consider the cumulative effect of this evidence.[33]

The circuit court also erred when it found that the witnesses presented at the evidentiary hearing would not have had an effect on the sentencing hearing because this conclusion was made without considering the other errors that occurred at Mr. Young's sentencing proceedings. The circuit court denied a hearing on all penalty phase issues, thereby limiting Mr. Young's ability to establish that confidence in the outcome of his sentencing phase was undermined. Because one of the issues at the penalty phase was whether Mr. Young acted in self-defense or in a cold, calculated, and premeditated manner, this evidence that was not presented to the jury was relevant to the sentencing

---

[33]It is important to again note that, with the exception of the limited issue regarding Painter and Hessemer, the Attorney General wrote the order signed by the judge. This highlights the problem associated with this practice, for the State has only itself to blame for this error. Mr. Young's counsel cited and argued the proper law and standards, but the State wrote the order and the court signed it despite Mr. Young's reference to the proper law.

recommendation.[34] In addition, the jury was deprived of additional information at the penalty phase that must be assessed in conjunction with the evidence presented at the evidentiary hearing. See Argument V, infra. The circuit court erred in limiting the scope of the evidentiary hearing so that Mr. Young was prevented from demonstrating the cumulative effect on the penalty phase of all the evidence not presented to the jury.

The order of the shots fired on the night of Mr. Bell's death was a central issue at Mr. Young's trial, relevant to the defense argument that Mr. Young acted in self-defense, to the sufficiency of the evidence to support a first-degree murder conviction, and to the penalty phase issues. The State repeatedly argued that Mr. Young had shot first, while the defense argued that he shot in self-defense after Mr. Bell acted on his threats to shoot Mr. Young if Mr. Young or the three other boys moved. Although the circuit court is correct in noting that the State presented four witnesses who testified that they heard a shotgun blast first, two of the State's witnesses testified that Mr. Bell shot first. Gerald Saffold and Tony Holmes, who were closer to Mr. Bell and Mr. Young than the other witnesses, both testified that Mr. Young fired only after Mr. Bell shot into the ground near where the four boys were lying. The evidence presented at the evidentiary hearing, as well as evidence that was pled in Mr. Young's motion to vacate, confirms that Mr. Saffold and Mr. Holmes accurately recalled the events on the night in question.

---

[34]The State repeatedly argued that the crime was cold, calculated, and premeditated (R. 4035; 4037; 4039; 4040; 4042; 4043). This aggravating circumstance was found by the circuit court but struck by this Court on direct appeal. Young v. State, 579 So. 2d at 724 (holding that "the evidence does not rise to the level needed to support the aggravating factor of cold, calculated, and premeditated"). Evidence proving that Mr. Young did not shoot first would not only have been mitigating, but it also would have rebutted the State's case for establishing the cold, calculated, and premeditated aggravating circumstance.

In addition to presenting evidence confirming the defense theory at trial, Mr. Young has demonstrated that the State withheld evidence that would have undermined the credibility of its witnesses on this very same issue -- the order of shots fired. In particular, Trooper Brinker, whom the State described as "unshakable," was initially unsure whether he heard gunshots at all. In addition, the State knowingly presented false testimony when the State Attorney repeatedly asked Trooper Brinker whether he was "100 percent certain" and whether he had "any doubt" about the order of shots. Despite his awareness of Trooper Brinker's initial doubts, the State Attorney emphasized the certainty of this witness's testimony, thereby misleading the jury about the strength of the State's case. The other evidence withheld by the State, including notes indicating that witnesses providing information favorable to the State would be taken to the range for interviews, further undermines the State's evidence regarding the order of shots fired. Because the State knew that a first-degree murder conviction hinged on its ability to prove that Mr. Young fired first, the State Attorney suppressed evidence that contradicted this theory. The jury was deprived of essential evidence with which to evaluate the credibility of the State's witnesses, and Mr. Young was deprived of his right to a fair trial.

Clearly, the presentation of this evidence at Mr. Young's trial, in addition to the evidence at the trial in support of the defense theory of self-defense, is sufficient to raise a reasonable doubt and would have resulted in Mr. Young's acquittal on the first-degree murder charge. The evidence strongly suggests that Mr. Young acted in self-defense and should not have been convicted of first-degree murder and sentenced to death. The evidence that was not presented to his jury because of trial counsel's ineffectiveness and the State's

misconduct, when viewed cumulatively, demonstrates that confidence in the outcome of Mr. Young's trial is undermined and that he is entitled to a new trial.

B. THE CIRCUIT COURT ERRED WHEN IT FOUND THAT THE STATE ATTORNEY'S NOTES REGARDING TROOPER BRINKER'S INITIAL INTERVIEW AND THE INTERVIEWS WITH STATE WITNESSES AT THE RANGE WERE NOT BRADY MATERIAL.

Information regarding the reliability and veracity of State witnesses was never presented to Mr. Young's jury. This information concerned the ability of key State witnesses to identify the order of shots fired on the night in question. Because the defense argued that Mr. Young fired in self-defense, the order of shots was a central issue in this case at both the guilt and penalty phases. The circuit court erroneously found that this information regarding the credibility of key State witnesses "does not constitute the type of evidence envisioned by Brady" (PC-R. 1305).[35]

The court's understanding of Brady, evinced in the order written by the Attorney General, was incorrect. In fact, in Kyles, notes from the prosecutor's interviews with the key state witness were suppressed and found to be material Brady information requiring reversal. Id. at 429. The withheld notes in Kyles not only provided inconsistent versions of important facts, they also gave rise to "a substantial implication that the prosecution had coached [the witness] to give it." Id. at 443. The Court went on to conclude: "Since the evolution over time of a given eyewitness's description can be fatal to its reliability, . . . the [State's witness'] identification would have been severely undermined by use of their suppressed statements." Id. at 444.

---

[35]This "finding" was made up by the Attorney General in the proposed order, not "found" by the trial court. See Argument I.

The notes suppressed by the State in Mr. Young's case cast serious doubt on the strength of the State's case, as well as the tactics employed by the State to obtain a conviction. See Kyles, 514 U.S. at 445 (suppressed notes "would have raised opportunities to attack not only the probative value of critical physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well"). Trooper Michael Brinker, an off-duty Florida Highway Patrol officer moonlighting as a security guard in the apartment complex where the events occurred, testified at trial that he was in the vicinity of Bell's apartment when he heard "a loud bang." The State Attorney's examination of Trooper Brinker emphasized the witness's certainty about the order of the shots he heard:

> Q How would you make a comparison towards a .38 revolver or a sawed-off shotgun with the sound you heard?
>
> A It would be a sawed-off shotgun.
>
> Q Is there any doubt in your mind whatsoever?
>
> A No, sir. No comparison at all to the two.
>
> Q After you heard the shotgun, or the sound you believed to be a shotgun, what next did you hear?
>
> A I put my book down, it was a few seconds. And I heard two rapid-fired, a lot quieter, shorter snappier rounds which would sound like a pistol.
>
> Q Pistol or .38 revolver?
>
> A Yes, sir.
>
> . . .
>
> Q Are you 100 percent certain?

. . .

Q Is there any doubt in your mind as to the sound of that .38?

A No, sir.

(R. 2769-74) (emphasis added). Mr. Young was unable to impeach Brinker's credibility on cross-examination and only established that he was approximately 400 yards from Mr. Bell's apartment when he heard the shots (R. 2794).

The State relied on Brinker's "unshakable" memory of the events in closing argument (R. 3740). The trial court also relied on Brinker in the sentencing order to deny the defense argument that Mr. Young had acted in self-defense:

> A highway patrol officer working a second job that night as a security officer for the townhouse/quadraplex development heard the volley of shots fired. Being very experienced in the handling of weapons and firearms and having been quite familiar with the sound emitted by various weapons, this witness was sure that the first shot fired was that of the blast of the short barrelled shotgun.

(R. 4239). This Court also relied on Brinker's testimony when it affirmed Mr. Young's conviction on direct appeal. Young, 579 So. 2d at 723 (noting that "[a]n off-duty state trooper working nearby as a security guard also testified that shotgun blasts preceded and followed pistol shots").

In his 3.850 motion, Mr. Young alleged that Brinker's testimony was false and misleading and that the prosecution was aware of this. The motion quoted notes from the State Attorney's file disclosed in postconviction as a result of a Chapter 119 request that revealed that Brinker was less certain about what he heard and that he was coached by the State. These notes, which were of a meeting between the prosecutor and Brinker, revealed:

Bolster Trooper Brinker

arms expert
when he heard the noises, he was 1 block away + detached,
because he didn't know if it was gunshots or fireworks.

Neither the jury nor trial counsel were aware that Brinker's testimony had to be bolstered because he believed that he heard fireworks, not shotgun blasts, and because he was "detached." Significantly, the jury was never informed of this damaging impeachment evidence regarding Brinker's memory, nor was defense counsel aware that Brinker's memory and testimony had been "bolstered" by the prosecution. See Kyles, 514 U.S. at 443 ("implication of coaching . . . would have fueled a withering cross-examination, destroying confidence in [the witness's] story"). Due to this surreptitious "bolstering," Brinker, who told the prosecutor that he initially could not determine whether the sounds he heard were gunshots at all, miraculously was able to testify at trial -- post-bolstering -- that he was "100 percent" certain that he could determine the order of shots and distinguish the sound of a pistol from that of a shotgun. These changes in Brinker's testimony concern the central issue at Mr. Young's trial about which conflicting testimony was presented. Due to the State's misconduct, the jury was deprived of significant impeachment evidence with which to evaluate this witness's credibility, particularly given the fact that the other State witnesses who testified that Mr. Young shot first were impeached, and even other State witnesses testified that the victim shot first.[36]

Further information regarding the credibility of the State's witnesses was withheld by the State. Notes from the State Attorney's files reveal that the law enforcement officers

---

[36]However, the Kyles Court observed that "the effective impeachment of one eyewitness can call for a new trial even though the attack does not extend directly to others." Kyles, 514 U.S. at 445.

and/or prosecutors in this case brought witnesses to a "range" or that these witnesses were to be brought to the "range." The purpose of these interviews at the "range" is unclear -- whether they were to test fire weapons or to hear weapons test fired in order to show that they knew the difference between shotgun and revolver shots. What is clear, however, is that these "range" interviews were conducted with the key prosecution witnesses -- including Dana Thomas, Christopher Griffiths, and Trooper Brinker -- all of whom testified about the order of shots and professed their ability to distinguish the sounds made by different types of weapons. Most significantly, the State Attorney's notes specifically indicate that those witnesses who would have testified favorably for the defense were not to be taken to the range. This information was not presented to Mr. Young's jury because it was withheld by the prosecution.

Finally, the State withheld notes regarding an interview between the State Attorney's Office and Larry Hessemer. These notes indicate that Hessemer provided the following description of the events at issue: "tone + what V said, W could understand that the kids would be scared to death." The notes also indicate that Hessemer told the police that "John Bell initiated it." This information supporting the defense theory that Mr. Young acted in self-defense was never presented to the jury because of State misconduct. Although the circuit court granted a hearing on trial counsel's ineffectiveness for failing to call Mr. Hessemer as a witness, the Court did not grant a hearing on these allegations. By limiting the hearing, the court prevented Mr. Young from demonstrating the cumulative effect of the State's misconduct and his trial attorney's ineffectiveness, as well as the consistency of Hessemer's recollection of what he saw and heard.

The circuit court found (in the order drafted by the State) that the notes about Brinker and the other State witnesses were not Brady material; this finding contradicts clearly established law defining the scope of the State's responsibility under Brady. Kyles v. Whitley. The prosecution is required to disclose to defense counsel evidence, including impeachment evidence, "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985)(quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). Because the jury is responsible for evaluating a witness's credibility, the withholding of impeachment evidence is just as violative of Brady as the withholding of evidence regarding innocence. Bagley.

In addition, the State knowingly presented false evidence when it encouraged Brinker to repeatedly testify to his certainty about the order of shots knowing that he was not even sure whether he heard gunshots and had to be coached in pre-trial sessions with the prosecutor. A conviction obtained through the presentation of false evidence violates due process. Napue v. Illinois, 360 U.S. 264, 269 (1959). There can be little doubt that evidence impeaching crucial State witnesses would have been critically important to a full and fair jury resolution at Mr. Young's trial. The circuit court's erroneous denial of a hearing on this claim reveals its misunderstanding of the State's duty under Brady and ignores the value of this impeachment evidence to the defense strategy at trial. An evidentiary hearing is warranted.

C. THE CIRCUIT COURT ERRED IN DENYING A HEARING ON THE ISSUE OF DR. ROTH.

Conflicting testimony on the order of the shots was presented at Mr. Young's trial, and additional witnesses were available whose testimony was favorable to the defense. State

Attorney notes reveal a witness who was either not disclosed to the defense or was unreasonably not called to testify by defense counsel. A Dr. Roth was interviewed by the State Attorney's Office, and the notes from this interview reveal:

> Dr. Roth - don't need.
>
> heard firecrackers, then 2 more bangs.
> thought all the shots were firecrackers.
> not a good W.

The exculpatory nature of this information is self-evident, yet the jury was never made aware of its existence because either the prosecution failed to disclose it or defense counsel failed to present it. Either way, the jury was deprived of truthful, important, and critical information. State v. Gunsby; Kyles v. Whitley.

The circuit court denied a hearing on this claim, finding (in an order written by the State) that "Defendant has failed to prove prejudice under Strickland, and nondisclosure and materiality under Brady" (PC-R. 1304). In support of this conclusion, the circuit court noted that four witnesses testified for the State that they heard a shotgun blast first, then pistol shots, then another shotgun blast. While the court acknowledged that the testimony of Ms. Painter and Mr. Hessemer "could have influenced the jury's verdict in the case on the issue of self-defense" (PC-R. 1305), the court ignored that Roth's testimony could have been similarly helpful. Notably, the court's order refers to the four State witnesses who testified that they heard the shotgun first but ignores the other State witnesses who testified that Mr. Bell shot first. The court ignored that the order of shots was a debatable issue and that Dr. Roth's testimony, in conjunction with that of other witnesses whose testimony was favorable to the defense, could have made the difference to the jury. In addition, the circuit court

failed to consider the cumulative effect of all the evidence not presented to Mr. Young's jury, whether due to trial counsel's ineffectiveness or the State's misconduct as required under State v. Gunsby and Kyles v. Whitley. An evidentiary hearing is warranted.

D. THE CIRCUIT COURT ERRED IN DENYING A HEARING ON COUNSEL'S FAILURE TO PRESENT CHARACTER EVIDENCE ABOUT THE VICTIM.

The jury never heard significant admissible character evidence about the victim that was relevant to the defense theory that the victim was the aggressor and that Mr. Young shot in self-defense. This critical information was not presented to the jury because it was withheld by the State and/or it is newly discovered evidence.

In a statement made subsequent to the trial in this case,[37] Michael Bell, the victim's son, stated that his father believed that someone had previously tried to break into the car prior to the incident involving Mr. Young, and therefore his father was especially sensitive to this issue. Michael Bell explained: "He had told me earlier that Saturday or Friday that somebody had tried to break into the car before." This information is relevant to showing Mr. Bell's state of mind when he went out to the parking lot on the night in question; in addition, when considered in conjunction with the other evidence about Mr. Bell's character, this information supports the defense theory that Mr. Young acted in self-defense.

The State also failed to disclose a letter written to the prosecutor by the victim's sister several months before Mr. Young's trial. This letter reveals additional relevant information

---

[37]This statement was made in a deposition during a civil lawsuit commenced by the victim's family against the Jupiter Plantation Condominium complex. It is unclear whether the State knew about this information before the trial. This information may also constitute newly discovered evidence since the statements were made after trial. Jones v. State, 591 So. 2d 911 (Fla. 1991). Either way a hearing is warranted under Gunsby.

about Mr. Bell's character:

> He [John Bell] may have fired the first shot into the ground but this was a person who had bleeding ulcers of the stomach in Korea. Because of having to fire over the heads of Koreans for eating garbage. (This is in his army records).
>
> He received a citizens award from the town of Jupiter. He chased by foot for 3 miles a 18th year old thief who stole a senior citizen purse with her check in it. (Town of Jupiter records).
>
> Also the week before his death, he chased a thief from K-Mart and caught him.

This information was clearly pertinent to the facts of this case. Furthermore, in documents disclosed in postconviction to Mr. Young from the civil lawsuit, Mike Bell confirmed that his father had a history of "arresting" people, and he discussed two incidents in which his father chased a shoplifter and a mugger in order to effect a citizens arrest.

A statement of Trooper Danny Jowers, a witness in this case and another Florida Highway Patrol officer who moonlights at the apartment complex with Trooper Brinker, confirmed Bell's reputation:

> Q Did you ever have any discussions with Mr. Bell concerning the issue of security?
>
> . . .
>
> A His exact words one day down at the dock talking to a gentleman that, I was standing over by the pool gate, was what do we need these goddamn cops in here for? I can take care of this place. Exact one hundred percent words that he said.
>
> Q When did he say that?
>
> A We had a problem with some boats being vandalized during, sometime during the night and they were down toward the dock speaking about it, and I believe that was about a month, month and a half before Mr. Bell was shot up there.

This sworn testimony was also given during the discovery in the civil litigation involving Jupiter Plantation.

The jury that sentenced Mr. Young did not hear this compelling evidence about the victim's character that fully supports the defense argument that Mr. Bell shot first and Mr. Young acted in self-defense. Evidence of the victim's propensity for violence or aggression is admissible if that character trait is placed at issue by a defendant's argument that he acted in self-defense. Lusk v. State, 531 So. 2d 1377, 1382 (Fla. 2d DCA 1988); Hunter v. State, 378 So. 2d 845, 846 (Fla. 1st DCA 1979). The court in Hunter explained:

> We hold that evidence of the victim's character should have been introduced, in part because appellant did claim self-defense. That the self-defense claim may have been tenuous should not have barred introduction of character and reputation evidence. Evidence of deceased's violent and dangerous character is admissible if "it explains, or will give meaning, significance, or point to, the conduct of the deceased at the time of the killing . . . "

378 So. 2d at 846 (quoting Garner v. State, 28 Fla. 113, 9 So. 835 (1891)).

The character evidence in this case would have been admissible at Mr. Young's trial. Fla. Stat. §90.405(1) & (2). Mr. Young attempted to argue that he acted in self-defense but lacked the evidence necessary to persuade the jury that Bell shot first. The jury was never given the opportunity to consider crucial evidence that the victim possessed a character trait for violence and evidence that supported the defense theory that the victim was the first aggressor. Because the jury rendered its verdict and recommendation of death without ever hearing this crucial evidence, the conviction and sentence are unreliable.

The circuit court denied a hearing on this claim, finding (in an order written by the Attorney General) that Mr. Young did not show prejudice because "[t]he record is replete

with testimony that the victim had a firearm, screamed obscenities at the four suspects in the car, appeared very agitated and nervous, threatened to shoot Defendant and his companions, and acted aggressively in his attempt to control the situation and hold the suspects until the police arrived" (PC-R. 1306-07). The court also noted that "[s]uch descriptions were used extensively by defense counsel to support his defense of self-defense" (R. 1307). The circuit court ignores the obviously different effect that this information would have on a jury if presented through the testimony of witnesses who knew the victim rather than consisting of the argument of a defense attorney advocating for his client. Moreover, the fact that the victim had a propensity toward violence, was already agitated about a prior attempt to steal his car, and expressed publicly that he did not need "the goddamn cops" to solve security problems is qualitatively different information than what was presented at trial and would have strengthened Mr. Young's claim of self-defense. Cf. Porter v. Singletary, 49 F.3d 1483 (11th Cir. 1995) (although claim of judge bias raised in prior proceedings, new evidence of bias qualitatively different than prior evidence, and thus evidentiary hearing was warranted).

The court also noted that because the evidence supported a conviction for felony murder, evidence about Mr. Bell's aggressive nature would not have negated Mr. Young's guilt.[38] This analysis is not accurate. Self-defense is a perfect defense to murder. Had the jury believed that Mr. Young acted in self-defense, he would have been acquitted of the charges, as trial counsel argued and the jury was instructed (R. 3822-23). Mr. Young also argued and the jury was instructed on lesser-included offenses such as second-degree murder,

---

[38]Again, this "finding" was made by the Attorney General, not the Court.

manslaughter, and third-degree felony murder (R. 3828; 3829; 3831-32). The court's analysis also ignores that evidence of the victim's propensity for violence could have been used at the penalty phase to provide a context in which the jury could understand Mr. Young's actions and to rebut aggravating circumstances such as CCP. The circuit court's conclusion that this additional evidence of Mr. Bell's character would not have resulted in a different verdict is not supported by the nature of the evidence now known or by the reality of what occurred at Mr. Young's trial.

E. THE CIRCUIT COURT APPLIED THE WRONG MATERIALITY STANDARD IN DENYING A HEARING ON MR. YOUNG'S BRADY CLAIM.

In Kyles v. Whitley, the Supreme Court explained the proper materiality test to be applied to a Brady claim:

> The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A "reasonable probability" of a different result is accordingly shown when the Government's evidentiary suppression "undermines confidence in the outcome of the trial."

514 U.S. at 434 (quoting United States v. Bagley, 473 U.S. at 678). The Court explained that the Bagley test is not a sufficiency of the evidence test:

> A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict . . . One does not show a Brady violation by demonstrating that some of the inculpatory evidence should have been excluded, but by showing that the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict.

Id.[39] See also Gunsby, 670 So. 2d 920, 923 (Fla. 1996) (considering the effect of newly presented evidence on the credibility of the State's trial evidence).

In this case, the circuit court denied a hearing on Mr. Young's Brady claim, finding that he had not satisfied the materiality prong. However, the court improperly applied a sufficiency of the evidence test:

> Four witnesses -- Christopher Griffiths, Trooper Brinker, Robert Melhorn, and Dana Thomas -- testified for the State that they heard a shotgun blast first, then several pistol shots, and another shotgun blast. This and other evidence was sufficient to support a guilty verdict for premeditated murder. More importantly, the supreme court found sufficient evidence to support a guilty verdict under a felony murder theory based on the burglary of the victim's car.

(PC-R. 1304) (citations omitted). Not surprisingly, the order does not cite to either Bagley or Kyles.

Because it applied the wrong standard to Mr. Young's Brady claim,[40] the circuit court failed to consider the effect of the withheld evidence on Mr. Young's trial, such as the notes about Brinker, notes about taking the State witnesses to the range, and notes from its interview with Hessemer. This withheld evidence concerned the credibility of the State

---

[39]In explaining the materiality standard in Kyles, the Supreme Court criticized the dissenting opinions that committed the same mistake as the circuit court in this case: "The rule is clear, and none of the Brady cases has ever suggested that sufficiency of evidence (or insufficiency) is the touchstone. And yet the dissent appears to assume that Kyles must lose because there would still have been adequate evidence to convict even if the favorable evidence had been disclosed." Id. at 435 n.8.

[40]One likely reason for the use of a legally incorrect standard is that the order was written by the State. See Argument I. Mr. Young's motion cited the correct materiality standard from Bagley and other cases (PC-R. 1185), and Mr. Young also filed Kyles as supplemental authority (PC-R. 833). However, the State's response and order did not cite any caselaw for the proper materiality standard, and thus the court "found" what the State wanted it to find notwithstanding the United States Supreme Court's opinions.

witnesses cited by the circuit court in support of its conclusion that the evidence against Mr. Young was sufficient to support the conviction. The circuit court relied only on the State's evidence presented at trial without considering whether the State's withholding of evidence that could have been used to impeach its witnesses denied Mr. Young his right to a fair trial. Obviously this is not the standard, or no defendant could ever meet the materiality test as all defendants raising Brady claims have been convicted at trial. For example, in Roman v. State, 528 So. 2d 1169 (Fla. 1988), and Gorham v. State, 597 So. 2d 782 (Fla. 1992), this Court found sufficient evidence on direct appeal to sustain the convictions, yet found that Brady violations discovered in postconviction warranted new trials. Obviously the lower court's "finding" -- in the words of the Attorney General -- that there was no Brady violation because this Court found the evidence sufficient to support a premeditated murder verdict is wrong.

A sufficiency of the evidence test is not appropriate to deny an evidentiary hearing on a Brady claim. Here, the files and records did not conclusively rebut the allegations and thus a hearing is warranted. Maharaj v. State, 684 So. 2d 726 (Fla. 1996); Muhammad v. State, 603 So. 2d 488 (Fla. 1992).

F. THE CIRCUIT COURT ERRED IN DENYING RELIEF AFTER THE LIMITED EVIDENTIARY HEARING.

This Court recognized on direct appeal that self-defense was the key issue at trial:

> Young's theory of defense at trial was self-defense, but trial testimony conflicted about whether Young or the victim shot first. Three of the victim's neighbors testified that they were familiar with firearms and that the first and last shots came from a shotgun with pistol shots in between. An off-duty state trooper working nearby as a security guard also testified that shotgun blasts preceded and followed the pistol shots. Two of Young's companions testified that the victim shot first.

Young v. State, 579 So. 2d at 723. Despite the importance of this issue to the defense, Mr. Wilson, Mr. Young's trial attorney, inexplicably failed to call any witnesses to corroborate the defense theory of self-defense. Witnesses were available who could have testified in a manner completely consistent with the theory of defense, yet trial counsel, without a tactic or strategy, failed to call them.

At the evidentiary hearing, Larry Hessemer, who witnessed the events, told the court his feelings about the events he witnessed: "if anybody had me on the ground and screaming at the top of his lungs as the man was doing, I would have to say I would be forced to shoot him" (PC-R. 641). Hessemer testified that he heard small gun fire followed by a shotgun blast: "I heard two quick reports. It sounded like a .22, then I heard the blast" (PC-R. 644). Elizabeth Painter also testified at the evidentiary hearing that if she had been called to testify at Mr. Young's trial, her testimony would have been consistent with her deposition and statement to the police (PC-R. 651). In her deposition, Painter stated that she awoke to the sound of "two men shouting. One was really verbally abusive, cursing, very, very mad" (Painter Depo., p. 4). She explained that she "really thought somebody was going to get it" because "it was building, it was loud. It was getting very -- he was really mad" (Id. at 8). She heard several small caliber shots followed by "one big boom gun shot blast" (Id. at 9). She owns a .22 caliber pistol and has heard a shotgun fired before (Id. at 15-16).

Trial counsel Wilson testified that his theory of the case was that Mr. Young shot in self-defense and that it was important to present witnesses who could corroborate this theory (PC-R. 570). Wilson explained that the testimony of Hessemer and Painter, along with other testimony about Bell screaming threats and obscenities, would have provided a context in

which the jury could understand Mr. Young's actions (PC-R. 631). These witnesses would also have helped to explain Mr. Young's state of mind on the night of his death because they provide a compelling picture of Bell's threatening behavior (PC-R. 578-79). Wilson provided no strategic reason for his failure to present these two witnesses (PC-R. 590, 607).

The circuit court denied relief, finding that the depositions and written statements of Painter and Hessemer were "equivocal" and that Hessemer's testimony was contradicted by the scientific evidence because he only heard one gunshot blast (Supp. PC-R. 112). The circuit court also found that "the order of shots and the entire issue of self-defense is irrelevant" because the evidence was sufficient to support a conviction for felony murder (Supp. PC-R. 111-12). The court concluded that the testimony presented at the evidentiary hearing would not have made any difference to either the verdict or sentencing recommendation (Supp. PC-R. 112).

The circuit court erred because it failed to consider the cumulative effect of all the errors committed at Mr. Young's trial. In limiting the scope of the evidentiary hearing, the circuit court prevented Mr. Young from proving that he is entitled to relief. The circuit court denied Mr. Young a hearing on his Brady claim (without an evidentiary hearing) which concerned evidence related to the same issue about which Mr. Hessemer and Ms. Painter would have testified -- the order of shots fired. The circuit court also denied Mr. Young a hearing on any penalty phase issues. Therefore, the court's conclusion that the testimony presented at the evidentiary hearing would not have made any difference to Mr. Young's trial is invalid in light of this Court's directive in Gunsby that circuit courts consider the cumulative effect of all evidence not presented to a jury.

Due to this failure to consider the cumulative effect of all the evidence pled in Mr. Young's motion to vacate, the court minimized the impact that Mr. Hessemer and Ms. Painter would have had on Mr. Young's jury. The issue of who fired first was a central question at Mr. Young's trial, and the witnesses presented by the State offered conflicting versions of what occurred.[41] Despite this conflicting testimony, the State argued in closing that "everybody heard the shotgun go off first. That is what occurred in this case. That is undisputed" and that "[t]here is no doubt about the shotgun blast being the very first shot and very last" (R. 3726; 3742-43). Although two of the State's witnesses testified that Mr. Bell shot first, the presentation of two additional witnesses by the defense could have tipped the balance in favor of the jury's acceptance of the defense argument that Mr. Young acted in self-defense after Mr. Bell threatened and then shot at him and the three other boys, or at a minimum supported a lesser-included offense such as second-degree murder, third-degree murder, or manslaughter, all charges on which the jury was instructed.

In addition, the circuit court erroneously concluded that the issue of who shot first was irrelevant. As the defense closing argument emphasized, conflicting testimony about who fired first amounts to reasonable doubt about Mr. Young's guilt.[42] If the jury had evidence to support Mr. Young's theory of self-defense, the killing would have constituted justifiable homicide and Mr. Young would have to have been acquitted. The additional

---

[41]Thus, the lower court's finding that the testimony of Painter and Hessemer would not have made a difference is meaningless, as the entire State's case was riddled with flatly inconsistent versions of what occurred. Painter and Hessemer's testimony would have clearly strengthened the defense claims and pushed the jury over the edge into reasonable doubt.

[42]This Court on direct appeal also acknowledged that "trial testimony conflicted about whether Young or the victim shot first." Young, 579 So. 2d at 723.

witnesses corroborating the defense theory could have persuaded the jury to acquit Mr. Young of the first-degree murder charge. At the penalty phase, where the State urged the jury to sentence Mr. Young to death because the crime had been committed in a cold, calculated, and premeditated manner, evidence that Mr. Young acted in self-defense could have been used by the defense to argue against the applicability of the death penalty.[43] Evidence that Mr. Young acted in self-defense could also have been presented as a mitigating circumstance in favor of a life sentence. Hallman v. State, 560 So. 2d 223, 227 (Fla. 1990)(jury's life recommendation was supported by the fact that the defendant fired in reaction to the victim's shots). The circuit court erred in denying Mr. Young relief on this claim.

G. CONCLUSION.

Mr. Young is entitled to establish at an evidentiary hearing that he is entitled to a new trial. Due to the cumulative effect of Brady violations, ineffective assistance of counsel, and newly discovered information about the victim's character, confidence in the outcome of Mr. Young's trial is undermined. This Court should remand for a full evidentiary hearing with directions that the lower court address these matters in accordance with Gunsby and Kyles.

ARGUMENT VI

NO EVIDENTIARY HEARING ON PENALTY PHASE ISSUES

The lower court erroneously denied this claim without an evidentiary hearing. The law is clear that a Rule 3.850 movant is entitled to an evidentiary hearing unless the files and records conclusively rebut the allegations, which must be accepted as true. Valle v. State,

---

[43]This argument is even more compelling in light of the striking of CCP on direct appeal.

22 Fla. L. Weekly S751 (Fla. Dec. 11, 1997); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Moreover, a trial court is required to attach those portions of the record which conclusively rebut the allegations. Hoffman v. State, 571 So. 2d 449 (Fla. 1990). This was not done in Mr. Young's case. To the extent that the circuit court's order cites to the record, those cites were made by the Attorney General who wrote the order, not by the lower court. This is improper. Oehling v. State, 659 So. 2d 1226, 1228 (Fla. 5th DCA 1995) ("the state cannot cure the trial court's oversight by designating portions of the record to refute a defendant's allegations").

Mr. Young's Rule 3.850 motion alleged that substantial mitigation evidence, both statutory and nonstatutory, was undiscovered and thus was not presented for consideration by both the judge and jury. He further alleged that significant mitigation was presented to the judge at sentencing but unreasonably was never presented to the jury. As a result, the jury that returned a death recommendation knew very little about Mr. Young and lacked a context in which to understand the charges against him. Relief is appropriate because confidence in the outcome of the sentencing proceedings is undermined. Strickland v. Washington, 466 U.S. 668 (1984). At a minimum, an evidentiary hearing is warranted.

A. FAILURE TO ACCEPT MR. YOUNG'S ALLEGATIONS AS TRUE.

The circuit court, in an order written by the Attorney General, found that trial counsel made a strategic decision to not present substantial mitigation evidence to the jury. However, **no evidentiary hearing was conducted in this case.** There was no testimony from anyone that trial counsel had a strategic reason for not presenting available mitigation to the jury. Mr. Young's 3.850 motion specifically alleged that trial counsel had made no

reasonable tactical decision (PC-R. 1152), yet the State argued during the Huff hearing that "[c]ounsel obviously had a reason not to bring the evidence to the jury" and that "counsel had to be very, very careful about what he presented" (H. 534). Mr. Young's counsel argued that "[m]aking up strategy and assuming that counsel had a strategy and to go on so far to assume that there is a specific strategy when this information is not in the record, does not rebut the factual allegations of the claimant and, therefore, a hearing is required" (H. 546). Mr. Young's counsel also argued that the State's position "presupposes there has already been a hearing" (H. 546). However, the court, in an order written by the same Attorney General who argued at the Huff hearing, found that trial counsel had a tactical reason for not presenting mitigation evidence before the jury (PC-R. 1300). The lower court and the State failed to accept Mr. Young's allegations as true. See, e.g. Thomas v. State, 634 So. 2d 1157 (Fla. 1st DCA 1994) (inappropriate to find that defense counsel's actions were tactical absent an evidentiary hearing); Davis v. State, 608 So. 2d 540 (Fla. 2d DCA 1992) (same).

The total failure of the lower court and the State to comply with this Court's well-established rules is epitomized by the treatment of Mr. Young's allegations regarding Dr. Crown. In his Rule 3.850 motion, Mr. Young alleged that Dr. Crown, although briefly called to testify before the judge, was unreasonably not called to testify before the jury:

> Because of counsel's prejudicially deficient performance, Dr. Crown only testified to a minute portion of the mitigation which was available had he been asked to conduct a complete examination of Mr. Young's case. Had he been asked to so, Dr. Crown would have been able to testify before the jury to the existence of compelling mental health mitigation, both statutory and nonstatutory. Because of the diagnosis of brain damage, which would have explained his findings of immaturity as well as impaired judgment and impulsivity, Dr. Crown would have been able to testify that, at the time of the

> crime, Mr. Young was suffering from an extreme mental or emotional disturbance, as well as to the fact that his ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the law was substantially impaired. See Fla. Stat. § 921.141 (5)(g) (1995). Dr. Crown would also have been able to fully explain to the jury the significance of the mental age mitigating factor.

(PC-R. 1160). Instead of conceding an evidentiary hearing, the State took issue with Mr. Young's allegations about Dr. Crown, arguing at the Huff hearing that Dr. Crown did not find that Mr. Young suffered from brain damage (H. 536), and went so far as to include this in its proposed order signed verbatim by Judge Cohen (PC-R. 1301-02) ("Dr. Crown did not, as Defendant asserts, diagnose him has having 'brain damage'"). The State failed to accept Mr. Young's allegations as true. Valle v. State, 22 Fla. L. Weekly S751 (Fla. 1998).

To exacerbate the situation, in response to Mr. Young's allegation that Dr. Crown would have testified to statutory and nonstatutory mitigation had he been called before the jury, the State-written order signed by Judge Cohen flatly fails to accept this allegation, stating instead that "[i]t is obvious to this Court that Dr. Crown did not find any evidence to support the existence of either mental mitigator, or else he would have testified to their existence at the allocution hearing" (PC-R. 1302). An evidentiary hearing is clearly warranted.

The court "found" that counsel did not present mitigation evidence to the jury because doing so would have allowed the State to introduce evidence of Mr. Young's prior felony convictions as impeachment of any witness who characterized Mr. Young as a "good person" (PC-R. 1300). Again, this is a tactical reason that was made up by the Assistant Attorney General who wrote the order as she argued at the Huff hearing:

> Trial counsel had to be very, very careful about what he presented,

> both during the trial or more specifically at the penalty phase to the jury. It could have been less prejudicial to present the evidence to Your Honor as opposed to the jury because of the fact that Mr. Young has been convicted six prior times, it would not obviously have weighed or arguably would not have weighed as much on Your Honor as it would have on the jury.

(H. 535). Because there was no testimony that trial counsel made any such decision, an evidentiary hearing is warranted.

The State's hypothetical tactical reason also is also illogical. The State argued at the Huff hearing (H. 535) and the trial court found in the State-prepared order that had Mr. Young's mother or Dr. Crown testified, "the State was prepared to introduce, and conceivably could have introduced, evidence of Defendant's six prior felony convictions as impeachment" (PC-R. 1300). However, both the State and the lower court ignored the fact that the trial court had ruled that those priors were inadmissible at the penalty phase because they were not violent felonies and Mr. Young had waived the mitigating factor of no prior history (R. 3910).[44] The State's argument that it conceivably could have presented this information is contrary to the court's ruling at trial. See also Maggard v. State, 399 So. 2d 973 (Fla. 1981). Further, the State fails to explain why its failure to present these priors to impeach the mitigation that was presented to the jury which demonstrated that Mr. Young

---

[44]Defense counsel had filed a motion in limine to prevent the State from bringing up any prior criminal activity (Mr. Young had no prior violent felonies, and only had prior juvenile criminal priors) (R. 4505-06). During the charge conference, the trial court ruled that the State could not bring up these juvenile priors (R. 3910). Although the State attempted to reassert its right to bring up these priors during the penalty phase itself, the trial court repeatedly rejected the State's arguments (R. 4006-07; 4023). The State did not cross-appeal the trial court's ruling on the issue. Thus the issue has been waived, and for the State to now argue that it would have been allowed to present these priors that were subject to the order in limine is incorrect. Most significant, and a point lost on the State and the lower court, is that there was no evidentiary hearing on this issue.

was a good person somehow makes juvenile priors admissible now when they were not at trial. The State was making up the record as it went along to subvert an evidentiary hearing and deny Mr. Young a new sentencing hearing.

In rejecting a hearing, the circuit court also "found" that the jury heard other evidence in mitigation but still chose to recommend a death sentence so therefore there is no prejudice (PC-R. 1300-01). Again, this is not the test for determining either whether an evidentiary hearing is warranted or whether prejudice is established under Strickland. The mitigation evidence presented before the jury consisted only of two character witnesses who testified that Mr. Young attended church and participated in church activities and was cooperative and obedient (R. 4000-05; 4008-14). One witness testified that Mr. Young could conform to prison rules and regulations if given a life sentence (R. 4028-30). This evidence cannot be compared to the effect of hearing from a neuropsychologist who could explain Mr. Young's behavior and mental processes, factors which were completely consistent with self-defense. Mr. Young's trial attorney inexplicably failed to present the most important mitigation evidence to the jury, and the circuit court minimized the impact of Dr. Crown's potential testimony in denying a hearing on this claim. The fact that the jury recommended a death sentence after hearing scant evidence from some character witnesses cannot support the conclusion that Dr. Crown's substantial mitigation testimony would not have made a difference to the sentencing jury. Confidence in the death recommendation is undermined because the jury did not hear Dr. Crown's testimony. An evidentiary hearing is warranted.

The circuit court also noted that mitigation presented to him did not prevent the

imposition of a death sentence so there was no prejudice (PC-R. 1301).[45] Once again this is not the test for determining whether a hearing is required or whether prejudice is established under Strickland. Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989). The conclusion that Mr. Young failed to prove prejudice on this basis erroneously substitutes the court's judgment for that of the jury. The trial court also ignores that its sentencing decision was affected by the lack of evidence presented to the jury because of the requirement that a sentencing court give great weight to a jury recommendation regardless of the evidence presented at the allocution hearing. As a result, the circuit court failed to consider that the presentation of this evidence to the jury would have a much greater effect on the ultimate sentence imposed than presenting it solely to the judge after the balance had already been weighted in favor of a death sentence. This situation is analogous to that in which a jury, as co-sentencer, is instructed on an invalid aggravating factor, and the sentence is reversed on appeal because the trial court's consideration of the jury recommendation taints the judge's imposition of a death sentence. Espinosa v. Florida, 505 U.S. 1079, 1082 (1992). In this case, the jury was deprived of substantial mitigation evidence that would have tipped the balance in favor of a life sentence, and the trial court's deference to the jury's recommendation resulted in an invalid death sentence that would not have been imposed if Mr. Young's trial attorney had presented available mitigation to the jury. The circuit court

---

[45]It is again critical to note that this finding was made by the Assistant Attorney General, not the trial judge himself. See Argument I. The trial judge's findings in his sentencing order contradict the "finding" made in postconviction that additional mitigation would not have made a difference. For example, in his sentencing order that he wrote, Judge Cohen stated that the decision to sentence Mr. Young to death "has been the most difficult judicial decision this Court has ever had to make since the undersigned Judge was elected to the bench in 1976" (R. 4562).

erroneously denied a hearing on this claim. Mr. Young must be granted a new sentencing hearing.

B. THE MENTAL HEALTH ISSUE.

The circuit court erroneously found that Dr. Crown did not testify to the existence of mental health mitigation because his examination of Mr. Young yielded no evidence in support of those mitigators and that it therefore would have been futile to request an instruction on those mitigating circumstances. First, this conclusion fails to accept Mr. Young's allegations as true. See Section A, supra. The circuit court ignored that Dr. Crown only testified to a minute portion of the mitigation that was available and erroneously concluded that because Dr. Crown's testimony was limited in scope, there was no other mental health mitigation available, while Mr. Young specifically alleged in his Rule 3.850 motion that his trial attorney was ineffective for failing to present the available mitigation evidence.

Dr. Crown's testimony about mental health mitigation was limited only because of trial counsel's ineffectiveness, not because evidence in support of mitigation did not exist. Had he been asked to do so, Dr. Crown would have been able to testify before the jury to the existence of compelling mental health mitigation, both statutory and nonstatutory. Based on his finding of brain dysfunction, which would have explained his findings of immaturity as well as impaired judgment and impulsivity, Dr. Crown would have been able to testify that, at the time of the crime, Mr. Young was suffering from an extreme mental or emotional disturbance. In addition, Dr. Crown could have testified that Mr. Young's ability to appreciate the criminality of his conduct or conform his conduct to the requirements of the

law was substantially impaired. Dr. Crown would also have testified about Mr. Young's intellectual development and the fact that his scores on intelligence tests indicate that he is in the bottom thirtieth percentile and that his mental age lags behind his chronological age by three or four years. This testimony would have supported three statutory mitigating factors -- under the influence of extreme mental or emotional disturbance, capacity to conform his conduct to the requirements of law was substantially impaired, and mental age -- as well as nonstatutory mitigation.

This evidence is consistent with the defense theory at trial that Mr. Young acted in self-defense. Dr. Crown's testimony about Mr. Young's mental health, particularly his impaired judgment and the probability that he reacted impulsively to an extremely stressful situation, would have resulted in a different outcome at the penalty phase. If this evidence had been presented, the jury would have understood that Mr. Young acted in self-defense and that he shot only out of fear for his life in an impulsive reaction to the stressful situation he faced. Testimony that Mr. Young suffered from brain damage would have provided the jury with concrete and objective evidence to put Mr. Young's actions into context, which is in essence the purpose of mitigation. Dr. Crown would have explained to the jury why Mr. Young acted as he did, and he would have provided a neuropsychological explanation for his actions. Mr. Young's trial counsel unreasonably failed to call Dr. Crown to testify before the jury. The circuit court erroneously denied a hearing on this claim because it misunderstood the nature of Mr. Young's claim and therefore believed that the limited testimony presented at the allocution hearing was all that was available. Had the jury heard the full mitigation evidence available through Dr. Crown, the outcome of Mr. Young's

sentencing proceedings would have been different.

When counsel is aware of a client's mental health problems, reasonably effective representation requires investigation and presentation of independent expert mental health mitigation testimony at the penalty phase. See, e.g., Rose v. State, 675 So. 2d 567, 572 (Fla. 1996)(finding deficient performance for failing to investigate client's mental health background); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988)(once counsel is on notice of a client's mental health problems, failure to investigate by obtaining independent experts' opinions on applicability of statutory mental health mitigating factors is "so unreasonable as to constitute substandard representation, the first prong of the Strickland test"); O'Callaghan v. State, 461 So. 2d 1354, 1355-56 (Fla. 1984)(failure to conduct proper investigation into client's mental health background when mental health is at issue is relevant to claim of ineffective assistance of counsel); Perri v. State, 441 So. 2d 606, 609 (Fla. 1983)(notice of mental problems "should be enough to trigger an investigation as to whether the mental health condition of the defendant was less than insanity but more than the emotions of an average man, whether he suffered from a mental disturbance which interfered with, but did not obviate, his knowledge of right and wrong" such that "he may still deserve some mitigation of his sentence").[46] There could be no tactical reason for failing to develop and present mental health mitigation which would have been consistent with counsel's trial strategy of proving that Mr. Young acted in self-defense and seeking a life sentence on those

[46]The Eleventh Circuit Court of Appeals has also held that failure to investigate and present mental health mitigation constitutes the ineffective assistance of counsel. Baxter v. Thomas, 45 F.3d 1501, 1513 (11th Cir. 1995); Cunningham v. Zant, 928 F.2d 1006, 1018 (11th Cir. 1991); Stephens v. Kemp, 846 F.2d 642, 653 (11th Cir. 1988); Thompson v. Wainwright, 787 F.2d 1447, 1450-51 (11th Cir. 1986).

grounds.

Mr. Young's trial attorney was also ineffective for failing to even request that the jury be instructed on the statutory mental health mitigating circumstances. Given his awareness of his client's substantial mental problems and of his client's mental state at the time of the offense, there can be no tactical or strategic reason for failing to even request these instructions. Under Florida law, it is the jury that decides whether mitigating factors apply. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976). There was no tactical or strategic reason for this failure which resulted in grave prejudice to Mr. Young. The circuit court erred in denying a hearing on this claim.

C. THE ADOPTION ISSUE.

The circuit court also rejected Mr. Young's claim that trial counsel was ineffective for failing to inform the jury that Mr. Young discovered at age fifteen that he had been adopted and to demonstrate the effect of this late discovery on his behavior. The circuit court misunderstood the import of this claim. Mr. Young does not argue simply that his jury should have been told that he was adopted because this fact was inadvertently referred to by a defense witness (R. 4002). Mr. Young's claim is that his attorney should have told the jury that Mr. Young was not told of his adoption until he was fifteen years old and that following this discovery he underwent significant changes. Psychological evidence was available which could have explained the devastating impact that this discovery had on Mr. Young and its effect on his subsequent behavior, as Mr. Young's Rule 3.850 motion alleged (PC-R. 1161). It was only after Mr. Young found out that he was adopted that he began having behavioral problems and got involved with a group of people that led to his criminal

activity. None of this significant evidence, which would have assisted the defense in putting Mr. Young's actions in an understandable context, was developed by counsel or presented to the jury.

D. THE FAILURE TO OBJECT.

During closing argument, the State Attorney urged the jury to sentence Mr. Young to death on the basis of impermissible and improper factors. In an attempt to dissuade the jury from recommending a life sentence, the State Attorney made the following argument:

> I'm not here to get religious, maybe to ask for God's forgiveness, for anyone's forgiveness for what he did, but no, he's just concerned about his family and friends. What he's put them through, but what about forgiveness from somebody else, from somebody higher up?
>
> It's not in this letter.
>
> There's no mention of an apology.

(R. 4037) (emphasis added). This impermissible argument continued:

> As we mentioned once before, what are John Bell's rights? What right did he have that day?
>
> The right to protect his property? The man works hard for his earnings, buys cars that he wants. He has a right to protect them.
>
> What right did he have for the defendant to invade his neighborhood, break into his car, come up there with a sawed-off shotgun and put John Bell in that position and take John Bell's life?
>
> What were John Bell's rights?
>
> Like I said a long time ago, hindsight is a beautiful thing.
>
> If John Bell never went outside, we wouldn't be here today, but he has every right to go outside and defend that property.

(R. 4041)(emphasis added). The State Attorney continued:

> As I have stated, also before, and it's important in America, you can't just show up with a loaded shotgun in someone else's neighborhood, burglarize a car, shoot a man in cold blood while his son's visiting from college and is out in the parking lot observing what happened to his father, take the life of a human being, a senseless killing over a car, where do we have that right?

(R. 4043)(emphasis added). These comments went without objection by defense counsel.

In Bertolotti v. State, 476 So. 2d 130, 134 (Fla. 1985), this Court established the parameters of proper closing argument. See also Jackson v. State, 522 So. 2d 802, 809 (Fla. 1988). Because trial counsel failed to object, Mr. Young was prejudiced by the State's grossly improper arguments. The State-prepared order signed by the lower court found that Mr. Young "could have challenged the State's comments on direct appeal" (PC-R. 1303), yet ignores the fact that no objection was made by trial counsel, thereby failing to preserve the error for appeal.

Trial counsel also failed to object and preserve numerous issues relating to the penalty phase jury instructions. Trial counsel failed to object to the fact that the jury was instructed that mitigating factors must outweigh aggravating factors (R. 4073), that the felony murder aggravator constituted an impermissible automatic aggravator (R. 4071),[47] that the jury could consider both the felony murder and pecuniary gain factors (R. 1071), that the aggravators of pecuniary gain, avoiding arrest, and cold, calculated, and premeditated, were insufficiently defined and therefore unconstitutionally vague, and that the comments of both the court and prosecutor impermissibly diluted the jury's sense of responsibility for sentencing Mr. Young to death in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985).

---

[47]See Blanco v. State, 22 Fla. L. Weekly S575 (Fla. 1997) (Anstead, J., concurring specially, in which Kogan, C.J., concurred).

Given the mitigation in the record, and the fact that the CCP aggravator was struck on appeal by this Court, Mr. Young was clearly prejudiced by counsel's unreasonable omissions. An evidentiary hearing is warranted.

ARGUMENT VII

THE PETIT JURY CLAIM

Mr. Young's jury pool was a direct result of random selection of persons from voter registration lists. Mr. Young's jury pool was selected from the voter registration list in Palm Beach County. This underepresentation of non-whites as registered voters as compared to the percentage of non-whites in the total population was reflected in Mr. Young's jury pool. Mr. Young's trial attorney stated on the record that only four blacks were brought up as prospective jurors (R. 638). However, without a tactic or strategy, counsel unreasonably failed to challenge the method of jury pool selection, and the lower court erred in failing to afford an evidentiary hearing.

The Sixth Amendment prohibits discrimination, whether intentional or not, in the overall jury selection process. Duren v. Missouri, 439 U.S. 357 (1979); Taylor v. Louisiana, 419 U.S. 522 (1975). If the jury selection system resulted in a representative cross-section of the community, it would be anticipated that the composition of any one jury pool would reflect the constitution of the eligible community. In assessing whether a jury selection system accomplishes the constitutional mandate of obtaining a representative sample of the community, courts focus on a cognizable group within the community, and compare the percentage of those groups appearing in the jury pool to the percentage of the group in the general population. The goal of a representative jury may be compromised at various stages

of the selection process. Specifically, if the list from which prospective jurors are selected does not represent a fair cross-section of the community, then the jury selection process is constitutionally defective ab initio.

"[I]f the use of voter registration lists as the origin for jury venires were to result in a sizable underrepresentation of a particular class or group on the jury venires, then this could constitute a violation of a defendant's 'fair cross section' rights under the Sixth Amendment. Bryant v. Wainwright, 686 F.2d 1373, 1378 n. 4 (11th Cir. 1982), cert. denied, 461 U.S. 932. Accordingly, the Sixth and Fourteenth Amendments mandate that Mr. Young be granted relief. Bass v. State, 368 So. 2d 447 (Fla. 1st DCA 1979); Williams v. Florida, 399 U.S. 78 (1970); Holland v. Illinois, 110 S. Ct. 803 (1990).

ARGUMENT VIII

THE TRIAL COURT ERRED IN ITS INSTRUCTIONS TO THE JURY

The circuit court's order denying relief on Mr. Young's penalty phase claims reflects that it applied an incorrect standard, effectively shifting the burden to Mr. Young to prove that he should receive a life sentence (PC-R. 1301). This summary analysis of the penalty phase evidence repeats the mistake made at Mr. Young's trial when the jury instructions similarly shifted to Mr. Young the burden of proving that he should receive a life sentence (R. 4073).

Shifting the burden to the defendant to prove that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), for such an instruction injects misleading and irrelevant factors into the sentencing determination in violation of Caldwell v. Mississippi, 472 U.S. 320 (1985), Hitchcock v.

Dugger, 481 U.S. 393 (1987), and Maynard v. Cartwright, 486 U.S. 356 (1988).

The circuit court denied relief finding both that it was procedurally barred and that this Court's precedent establishes that the standard instructions do not impermissibly shift the burden to the defendant (PC-R. 1306). To the extent that trial counsel failed to object, Mr. Young received ineffective assistance of counsel. An evidentiary hearing is required. Relief is warranted.

ARGUMENT IX

MR. YOUNG IS INNOCENT OF FIRST DEGREE MURDER.

Mr. Young was initially charged with premeditated murder. This Court has defined premeditation as:

> more than a mere intent to kill; it is a fully formed conscious purpose to kill. This purpose to kill may be formed a moment before the act but must exist for a sufficient length of time to permit reflection as to the nature of the act to be committed and the probable result of that act.

Wilson v. State, 493 So. 2d 1019, 1021 (Fla. 1986). If the State relies only on circumstantial evidence to prove premeditation, the evidence must be inconsistent with every other reasonable inference. Hoefert v. State, 617 So. 2d 1046 (Fla. 1993); McArthur v. State, 351 So. 2d 972 (Fla. 1977). If the State's evidence fails to exclude a reasonable hypothesis that the murder occurred other than by premeditated design, a verdict of premeditated murder cannot be sustained. Hall v. State, 403 So. 2d 1319 (Fla. 1981).

In Coolen v. State, 696 So. 2d 738, 742 (Fla. 1997), this Court found the evidence insufficient to sustain a premeditated murder conviction because the eyewitness testimony was contradictory and there was a possibility that the crime was committed in "an escalating attack" or as a "'preemptive' attack in the paranoid belief that the victim was going to attack

first." In that case, this Court reversed the first-degree murder conviction and vacated the death sentence. The facts in this case are remarkably similar to those in Coolen where the eyewitnesses disagreed about whether the victim or the defendant initiated the attack. The State in that case presented some witnesses who testified that the defendant attacked the victim without warning or provocation and that he had threatened the victim earlier in the day. One witness testified that the two men had not been fighting, while another described an "ongoing pattern of hostility that culminated in a fight." Id. at 741. In this case, the State's trial witnesses disagreed about who shot first, and Mr. Young has now presented his own witnesses who testified at the evidentiary hearing that Mr. Bell initiated the shooting. Mr. Young's claim that he acted in self-defense is further supported by Michael Bell's trial testimony. He testified that as he was returning to the parking lot after getting his car keys, he heard two shots and a clicking sound (R. 2307). As Michael reached the parking lot, he heard his father yell "Michael, come here. Michael, come here," followed by one more shot (R. 2308). Mr. Bell never spoke after the last shot (R. 2312). When his father called to him, Michael Bell did not know that his father had been shot (R. 2310). It was not until he was in his car chasing Mr. Young out of the parking lot that he saw his father and knew that he had been hit (R. 2313). Michael Bell's testimony indicates that Mr. Bell was able to yell in a normal voice after the first two shots and that there was no indication in his voice that he was suffering the effects of a gunshot wound. This testimony further supports the defense argument that Mr. Bell shot first -- once into the ground and once at Mr. Harris as he fled the scene -- before Mr. Young fired the shotgun. Clearly, Mr. Young was reacting to a situation in which he perceived his life to be in danger when Mr. Bell threatened to shoot if

anyone moved, Mr. Harris disregarded the warning, and Mr. Bell shot in reaction. As in Coolen, Mr. Young acted not only as a "'preemptive' attack" but in self-defense after Mr. Bell fired the first shot into the ground. Two State witnesses, Saffold and Holmes, testified that they believed that Bell was going to shoot Mr. Young. It cannot be said that the evidence in this case conclusively establishes that Mr. Young committed premeditated murder, and the evidence is not inconsistent with any other reasonable inference, namely that Mr. Young acted in self-defense.

The State proceeded at trial primarily on a felony murder theory, arguing repeatedly that it was irrelevant who shot first because Mr. Young was guilty of first-degree felony murder even if Mr. Bell initiated the shooting. The State failed to prove beyond a reasonable doubt that Mr. Young is guilty of felony murder because the only felony the State could have attempted to prove, grand theft auto, is a third-degree felony and is not an enumerated felony under the first-degree felony murder statute. The State attempted to prove that Mr. Young was guilty of burglary through Michael Bell who testified that he saw his sneakers in Mr. Young's car. Mr. Young's attorney was never told of the sneakers during discovery, they were not produced at trial, and the detective who inventoried Mr. Young's car had no knowledge of any sneakers ever being found in the car. Michael Bell's testimony on its own is insufficient to prove that Mr. Young is guilty of burglary; therefore, Mr. Young should not have been charged or convicted of first-degree felony murder.

During closing statements, the state attorney informed the jury that it did not have to agree unanimously about which theory had been proved in order to convict Mr. Young (R. 3703). However, Supreme Court caselaw dictates that if a jury is instructed that it can rely

on two or more independent grounds to support a single count, and one of those grounds was improper, a general guilty verdict must be set aside. Yates v. United States, 354 U.S. 298, 311-12 (1957); Stromberg v. California, 283 U.S. 359, 369-70 (1931). See also Mungin v. State, 689 So. 2d 1026, 1032-36 (Fla. 1995)(Anstead, J., dissenting). In Griffin v. United States, 502 U.S. 46 (1991), the Supreme Court distinguished between a general verdict where the conviction may rest on an unconstitutional ground or a legally inadequate theory from a general verdict based on a theory with insufficient evidentiary support when there is sufficient evidence to support an alternative theory. The Court held that in the latter situation, the verdict need not be set aside or reversed because jurors are capable of evaluating the evidence and would not convict a defendant if the State presented insufficient evidence to support any theory of guilt. In Mr. Young's case, however, the State failed to sufficiently prove either theory of first degree murder. This error cannot be harmless. Mr. Young must be given a new trial.

ARGUMENT X

MR. YOUNG IS INNOCENT OF THE DEATH PENALTY.

In support of the death sentence, the trial court found the following aggravating circumstances: commission during a burglary; avoiding arrest; pecuniary gain; and cold, calculated, and premeditated (R. 4238-42). The sentencing order specifically states that pecuniary gain and commission during a burglary were merged as one aggravating circumstance (R. 4241). On direct appeal, this Court struck the cold, calculated, and premeditated factor, leaving two aggravating circumstances: avoiding arrest and pecuniary gain/during commission of a burglary. Mr. Young is innocent of the death penalty because

neither of these aggravating circumstances was proved beyond a reasonable doubt.

The trial court failed to apply this Court's limiting construction of the avoiding arrest aggravating circumstance. As a result, this aggravating factor was overbroadly applied, see Godfrey v. Georgia, 446 U.S. 420 (1980); Maynard v. Cartwright, 486 U.S. 356 (1988), and failed to genuinely narrow the class of persons eligible for the death penalty. Zant v. Stephens, 462 U.S. 862, 876 (1983). Florida's capital sentencing statute provides that this aggravating circumstance applies when "[t]he capital felony was committed for the purpose of avoiding or preventing a lawful arrest or effectuating an escape from custody." Fla. Stat., §921.141(5)(e). The plain language of the statute clearly contemplates that the factor applies when the motive for murder is to avoid arrest. This Court's decisions imposing a limiting construction on this aggravating circumstance demonstrate the impropriety of its application in this case. In Riley v. State, 366 So. 2d 19, 22 (Fla. 1978), this Court established that in cases where the victim is not a law enforcement agent, "the mere fact of a death is not enough to invoke this factor. . . . Proof of the requisite intent to avoid arrest and detection must be very strong." Accord Robertson v. State, 611 So. 2d 1228, 1232 (Fla. 1993); Jackson v. State, 599 So. 2d 103, 109 (Fla. 1992); Jackson v. State, 575 So. 2d 181, 190 (Fla. 1991). In Consalvo v. State, 697 So. 2d 805 (Fla. 1996), this Court clarified that "the evidence must prove that the sole or dominant motive for the killing was to eliminate a witness" and that "[m]ere speculation on the part of the state that witness elimination was the dominant motive behind a murder cannot support the avoid arrest aggravator."

In Menendez v. State, 368 So. 2d 1278 (Fla. 1979), appeal after remand, 419 So. 2d 312 (Fla. 1982), this Court, in vacating a death sentence, held that where the facts fail to

establish that the dominant or only motive for the crime was the elimination of a witness, application of the avoiding arrest aggravator is improper. Id. at 1282 (citing Riley v. State, 366 So. 2d 19 (Fla. 1978)). Accord Clark v. State, 443 So. 2d 973, 977 (Fla. 1983); Pope v. State, 441 So. 2d 1073, 1076 (Fla. 1983); Herzog v. State, 439 So. 2d 1372, 1378-79 (Fla. 1983); White v. State, 403 So. 2d 331 (Fla. 1981). As in Jackson v. State, 599 So. 2d at 109, in which this Court reversed the death sentence because the aggravating factors had not been proved beyond a reasonable doubt, there is no direct evidence here of Mr. Young's motive for shooting Mr. Bell, and the circumstantial evidence was insufficient to prove that he shot Mr. Bell to eliminate him as a witness. The trial court explained the evidence that it believed supported this aggravator:

> The uncontroverted evidence shows that the defendant was interrupted in the commission of the aforementioned burglary by the victim and his son who attempted to keep the defendant from fleeing while the police were summoned to the scene. The victim ordered his son to "call 911" in order to get the police on the scene to make a lawful arrest. The defendant killed the victim in order to escape and prevent the lawful arrest from occurring.

(R. 4239). In light of the evidence demonstrating that Mr. Young's life was in danger, the evidence cited by the trial court is insufficient to prove beyond a reasonable doubt that the dominant motive for the killing was to prevent a lawful arrest. The trial court rejected the defense argument that Mr. Young acted in self-defense, relying on Trooper Brinker's testimony that he was "sure that the first shot fired was the blast of the short barreled shotgun." (R. 4239). The notes withheld by the State Attorney's Office in violation of Brady v. Maryland cast doubt on the certainty of Trooper Brinker's testimony and further undermine the court's application of this aggravator. See Argument III. This case is similar to Cook v. State, in which this Court rejected the avoiding arrest aggravator, finding that the

defendant's statement that he killed the victim "to keep her quiet because she was yelling and screaming" was insufficient to support this aggravator. This Court explained that "the facts of the case indicate that Cook shot instinctively, not with a calculated plan to eliminate [the victim] as a witness." Cook, 542 So. 2d 964, 970 (Fla. 1989). See also Garron v. State, 528 So. 2d 353 (Fla. 1988)(rejecting avoid arrest aggravator because only evidence presented in support was fact that victim was shot while she was on the phone about to speak to the police).

In this case, the State offered no evidence to prove Mr. Young's motive in shooting Mr. Bell. The defense argued that he shot in self-defense after Bell threatened and then shot at Mr. Young and his three companions. In finding the avoid arrest aggravator, the trial court overlooked the fact that the victim's son was also a witness who could identify Mr. Young but that he was not shot. The court also ignored that Mr. Young believed his life was at stake and that this belief is supported by the testimony of Bell's neighbors who described the confrontation. Bell threatened that if any of the boys moved, he would blow Mr. Young's head off; when Harris ignored this warning and ran from the scene, Bell fired his gun into the ground. Clearly, Mr. Young's fear for his life was the dominant motivation in shooting Bell. As in Cook, Mr. Young reacted instinctively to a situation in which his life was threatened. He did not act with a calculated plan to eliminate a witness that is required to support this aggravator. Under the facts of this case, it cannot be said that the dominant or sole motive for the homicide was the elimination of witnesses, and the trial court did not base its finding of this aggravating circumstance on such facts. Because the trial court did not apply this Court's limiting construction of this aggravating circumstance, its application

in this case violates the Eighth Amendment and renders Mr. Young's death sentence unreliable and arbitrary. Stringer v. Black, 505 U.S. 222 (1992). This aggravating circumstance was applied overbroadly and in direct contradiction of this Court's standards.

The jury that sentenced Mr. Young to death did not receive a limiting instruction regarding the avoiding arrest aggravator. There is no way to know whether the jury relied on this factor when it recommended a death sentence for Mr. Young. In Maynard, the Supreme Court held that jury instructions must "adequately inform juries what they must find to impose the death penalty." Maynard, 486 U.S. at 461-62. And in Espinosa v. Florida, 505 U.S. 1079 (1992), the Court explained that the Eighth Amendment requires that Florida sentencing juries be accurately and correctly instructed regarding aggravating circumstances. See also Richmond v. Lewis, 506 U.S. 40, 46 (1992)(holding that "it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors obtain.").

The evidence in this case is also insufficient to support the commission during a burglary aggravator. The evidence demonstrates that Mr. Young's companions attempted to steal Mr. Bell's car, but that they abandoned this plan when they heard Mr. Bell approaching the parking lot. The State attempted to prove the burglary charge through Michael Bell's testimony that when he saw Mr. Young's car at the police station, he saw his sneakers that were previously in the car that was broken into (R. 2354-56; 2371-72). Michael Bell did not mention the sneakers at his deposition (R. 2364). In addition, Detective Friedman did not list sneakers on the inventory of the contents of Mr. Young's car, and he testified that to his knowledge no sneakers were found in Mr. Young's car (R. 2604). Despite the insufficiency

of Michael Bell's testimony to prove that the sneakers he allegedly saw in Mr. Young's car actually belonged to him, the trial court relied on this evidence to support this aggravator (R. 4238). This testimony is insufficient to support the commission of a burglary aggravator as well as the felony murder conviction.

The State also failed to prove the existence beyond a reasonable doubt of the pecuniary gain aggravating factor as required by this Court's precedent. In Scull v. State, this Court explained that this aggravator applies only if the State can prove beyond a reasonable doubt "that the primary motive for [the] killing was pecuniary gain." 533 So. 2d 1137, 1148 (Fla. 1988). In Simmons v. State, this Court further clarified that the aggravator cannot be supported by "inference from the circumstances unless the evidence is inconsistent with any reasonable hypothesis other than the existence of the aggravating circumstance." 419 So. 2d 316, 318 (Fla. 1982). See also Rogers v. State, 511 So. 2d 526, 534 (Fla. 1987); Peek v. State, 395 So. 2d 492, 499 (Fla. 1980). This aggravating factor does not apply to the facts of this case because the crime was not committed in furtherance of the sought-after gain but was the result of an exchange of gunfire after Mr. Young's companions had abandoned their attempt to steal Mr. Bell's car. As Justice Anstead explained in his dissenting opinion in Mendoza v. State, No. 84,370 (Fla. Oct. 16, 1997), this aggravating circumstance does not apply unless "the killing was actually done to facilitate the taking of money or other thing of value." In that case, as in this one, the victim and the defendant exchanged gunfire when the victim attempted to protect his property. Justice Anstead explained why the pecuniary gain aggravator did not apply:

> It is apparent that the shooting of the victim here was in response to the victim's own attempts to shoot the appellant and his codefendant, and not to

> facilitate the taking of the victim's money or property. . . . In short, the victim was not shot in order to allow the appellant to seize the victim's money or property, rather, the victim was shot in immediate retaliation for trying to lawfully defend himself by firing at appellant and his codefendant.

The facts of this case do not support the pecuniary gain aggravator because Mr. Young did not shoot Mr. Bell to "facilitate the taking of money or other thing of value." Rather, he acted in self-defense during an exchange of gunfire to protect his own life.

The death penalty is disproportionate in this case. This Court has explained that the death penalty must be reserved for "the most aggravated, the most indefensible of crimes." State v. Dixon, 283 So. 2d 1 (Fla. 1973). Proportionality review requires analysis of the facts, not a mere tabulation of aggravating and mitigating circumstances. Francis v. Dugger, 908 F.2d 696, 705 (11th Cir. 1990), cert. denied, 500 U.S. 910 (1991)(noting that the Florida capital sentencing scheme "relies instead on the weight of the underlying facts"). This Court has specifically held that murders that occur in the course of a "robbery gone bad" do not deserve the death penalty. See Terry v. State, 668 So. 2d 954 (Fla. 1996); Sinclair v. State, 657 So. 2d 1138 (Fla. 1995); Thompson v. State, 647 So. 2d 824 (Fla. 1994); Livingston v. State, 565 So. 2d 1288, 1292 (Fla. 1988); Caruthers v. State, 465 So. 2d 496 (Fla. 1985). See also Sager v. State, No. 84,539 (Fla. June 26, 1997)(death penalty disproportionate where murder occurred after drunken fight between victim and defendant); Kramer v. State, 619 So. 2d 274, 277 (Fla. 1993)(finding insufficient evidence to support the death sentence when murder resulted from a fight between the victim and the defendant); Hallman v. State, 560 So. 2d 223, 226 (Fla. 1990)(reversing trial judge's override of life recommendation because the fact that the victim shot first could support a life recommendation). The death penalty is disproportionate in this case because the crime is not

among "the most aggravated, the most indefensible."

In light of the mitigation evidence in the record, the State's failure to prove either of the two aggravating factors that remain after this Court's decision on direct appeal is not harmless error. The facts of this case do not support either aggravating factor. Mr. Young is innocent of the death penalty, and his case should be remanded for a new sentencing.

ARGUMENT XI

THE JUROR INTERVIEW ARGUMENT

The ethical rule prohibiting Mr. Young from interviewing jurors unconstitutionally prevents Mr. Young from investigating any claims of jury misconduct or racial bias that may be inherent in the jury's verdict. Florida Rule of Professional Conduct 4-3.5 (d)(4). This unconstitutional ethical rule chills Mr. Young's ability to investigate. The Eighth and Fourteenth Amendments require that Mr. Young be given a fair trial. His inability to fully explore possible misconduct and biases of the jury prevents Mr. Young from fully detailing the unfairness of the trial. The failure of the jurors to truthfully answer voir dire questions has been the basis for relief in other jurisdictions. United States v. Scott, 854 F.2d 697 (5th Cir. 1988); United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984); Freeman v. State, 605 So. 2d 1258 (Ala. Cr. App. 1992). Mr. Young requests that this Court declare this ethical rule invalid as being in conflict with the Eighth and Fourteenth Amendments to the United States Constitution and to allow Mr. Young to interview the jurors in this case.

ARGUMENT XII

INADEQUATE HARMLESS ERROR ANALYSIS

On direct appeal, this Court determined that the cold, calculated and premeditated

aggravator was not applicable to the murder for which Mr. Young was sentenced to death. Young v. State, 579 So. 2d 721, 724 (Fla. 1991). Without this aggravating factor, the Court found that two valid aggravators remained. Id.[48] The Supreme Court determined that the sentence would remain the same without these two aggravators. Id. The Court did not consider the effect of this error on the jury. Such an analysis failed to conform with the Eighth Amendment. See Sochor v. Florida, 504 U.S. 527, 538 (1992) ("a jury is unlikely to disregard a theory flawed in law"); Clemons v. Mississippi, 494 U.S. 738 (1990); Johnson v. Mississippi, 486 U.S. 578 (1988).

The weight the jury accorded these aggravating factors would have been lessened had it received accurate instructions. Thus, extra thumbs were placed on the death's side of the scale. Even with these erroneous jury instructions, the jury vote for death was not unanimous (R. 4094). The jury's consideration of an aggravating circumstance later invalidated requires a resentencing at this time. When an aggravating factor does not legally apply, the jury should not be instructed on the factor. See Archer v. State, 613 So. 2d 446, 448 (Fla. 1993) ("[a]t the penalty-phase charge conference Archer argued that the jury should not be instructed on the heinous, atrocious or cruel aggravator because that aggravator could not be applied vicariously to him"). Resentencing was ordered because "[o]n the facts of this case we are unable to say that the error in instructing on and finding this aggravator is harmless." (Id.). This is the identical situation as Mr. Young's case, and a resentencing is

---

[48]The Court apparently found that the finding of "in the course of a burglary" and "committed for pecuniary gain" constituted impermissible doubling, although this is not clear from the Court's opinion. The Court's modified opinion changes the number of remaining aggravating factors from three to two. Young v. State, 579 So. 2d 721 (Fla. 1991).

required.

CONCLUSION[49]

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

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 20, 1998.

TODD G. SCHER
Florida Bar No. 0899641
Chief Assistant CCR
1444 Biscayne Blvd.
Suite 202
Miami, FL 33132-1422
(305) 377-7580
Attorney for Appellant

[49]In his Rule 3.850 motion, Mr. Young re-raised several issues that had been raised on direct appeal. The State argued, and the lower court found, that these claims were barred as they were raised on direct appeal and could not therefore be relitigated in postconviction. See PC-R. 1312. Mr. Young accepts the State's position as to these claims, and thus in reliance on that position Mr. Young is not raising those issues in this brief, as their presentation on direct appeal preserves them for federal court purposes. To be clear, Mr. Young is not waiving these issues but rather relying on the State's position that they were raised on direct appeal.

Copies furnished to:

Sara Baggett
Assistant Attorney General
1655 Palm Beach Lakes Boulevard
Suite 300
West Palm Beach, FL 33401-2299

ATTACHMENT 1

OFFICE OF THE ATTORNEY GENERAL

DEPARTMENT OF LEGAL AFFAIRS

THE CAPITOL

TALLAHASSEE, FLORIDA 32399-1050

ROBERT A. BUTTERWORTH
Attorney General
State of Florida

Criminal Appeals
1655 Palm Beach Lakes Blvd., Suite 300
West Palm Beach, FL 33401-2299
(407) 688-7759; FAX (407) 688-7771

December 17, 1996

The Honorable Harold J. Cohen
Circuit Judge
Fifteenth Judicial Circuit
County Courthouse
West Palm Beach, Florida 33401

Re: State v. David Young,
case no. 86-8682 CF

Dear Judge Cohen:

Pursuant to your ruling at the allocution hearing held on December 2, 1996, enclosed is a proposed order relating to the Defendant's motion for postconviction relief. For your convenience, I have enclosed a diskette, formatted for WordPerfect 6.0, which contains nothing but this proposed order. A hardcopy of the proposed order has been sent by U.S. mail on this date, along with this letter, to Assistant CCR Todd Scher, counsel for David Young.

Sincerely,

Sara D. Baggett

Sara D. Baggett
Assistant Attorney General

SB/

Enclosures

cc: Todd Scher, Assistant CCR
Paul Zacks, Chief Assistant State Attorney

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT
IN AND FOR PALM BEACH COUNTY, FLORIDA

STATE OF FLORIDA,

Plaintiff,

vs. Case No. 86-8682-CF A02

DAVID YOUNG,

Defendant.
_____/

ORDER

THIS COURT having reviewed the record in this case, the Defendant's motion for postconviction relief, the State's response thereto, and all relevant pleadings, and having heard argument of counsel on the motion, the Court makes the following findings of fact and law:

1. Claim I, relating to Defendant's allegations of nondisclosure of public records, has been previously resolved by written order of this Court, and is hereby denied.

2. Claim II, relating to Defendant's allegations of willful destruction of evidence by the sheriff's department, is not a claim cognizable by Rule 3.850, and is hereby denied. Even were it a valid claim for relief, Defendant has failed to make a prima facie

showing of willfulness or prejudice such as would warrant an evidentiary hearing or relief.

3. Claim III, relating to Defendant's motion to disqualify the Honorable Marvin Mounts from presiding over this postconviction proceeding, is moot.

4. Claim IV, relating to Defendant's allegation of innocence, is legally insufficient on its face, as it lacks sufficient factual and legal support, and is hereby denied.

5. In Claim V, Defendant alleges that his privately retained trial attorney, Craig Wilson, rendered him ineffective assistance of counsel in the penalty phase of his trial. Alternatively, Defendant alleges that the State failed to disclose material, exculpatory information to defense counsel in violation of Brady v. Maryland, 373 U.S. 83 (1963). In order to establish a claim of ineffective assistance of counsel, Defendant must show that counsel's performance was deficient and that absent the deficient performance there is a reasonable probability that the outcome of the proceeding would have been different. Strickland v. Washington, 466 U.S. 668 (1984). An evidentiary hearing is not warranted unless the Defendant has made a prima facie showing of both deficient performance and prejudice. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). If Defendant has failed to make a

prima facie showing of prejudice, this Court need not determine whether counsel's performance was deficient. Id.

Alternatively, in order to establish a Brady claim, Defendant must show:

> (1) that the Government possessed evidence favorable to the defendant (including impeachment evidence); (2) that the defendant does not possess the evidence nor could he obtain it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different.

Hegwood v. State, 575 So. 2d 170, 172 (Fla. 1991). See also Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993).

Initially, Defendant alleges that trial counsel failed to present to the jury the following witnesses and evidence that he presented to the trial court: (1) his mother's testimony that Defendant would not do the same thing if he had it to do over again, that neither she nor trial counsel told Defendant to write letters to his church's congregation, and that Defendant "would be a different boy" if given a life sentence, (2) Dr. Crown's testimony that Defendant would function well in a structured environment and then lead a law-abiding life after parole; that Defendant is immature, has impulsive behavior, and has a learning

disability; that Defendant would mature after spending 25 years in prison; that Defendant's IQ is in the 30 percentile range; and that the school system rated Defendant's mental age three or four years below his chronological age, and (3) Deputy Bergman's testimony that Defendant could conform to prison rules.

Regarding this allegation, this Court finds that Defendant has failed to prove prejudice under the Strickland standard. During the guilt phase, Defendant's defense was one of self-defense. Defense counsel consistently portrayed the victim as the aggressor who forced Defendant to take defensive action. At the penalty phase, defense counsel sought to portray Defendant as a well-behaved and dedicated church member with a talent for music, and as a well-behaved inmate who did and would conform to prison rules and regulations if given a life sentence. However, the State was poised for any witness who characterized Defendant as a "good person." (R 3989-91, 4006-07, 4022-24). Had defense counsel presented to the jury the testimony of Defendant's mother and/or Dr. Crown, the State was prepared to introduce, and conceivably could have introduced, evidence of Defendant's six prior felony convictions as impeachment. In fact, when faced with such a possibility in deciding whether to testify on his own behalf, Defendant waived his right to testify. (R 4064-69). Given

Defendant's significant prior criminal history, including numerous juvenile offenses, presenting the testimony of Defendant, his mother, Dr. Crown, and Deputy Bergman to the jury would have prejudiced him far more than presenting them only at the sentencing hearing. Since this Court was already aware of Defendant's criminal history, such information had minimal impeachment effect on this Court, but would have had, in all probability, a significantly greater impact on the jury.

Moreover, the jury heard evidence in mitigation that Defendant was adopted, that he attended church and Sunday School regularly as a child/adolescent, that he played piano with the choir, that he taught songs to the other choir members, and that he followed directions well. (R 4001-05, 4009-12). The jury was also given Defendant's letter to the church wherein he acknowledged his guilt and counseled the congregation's youth to stay out of trouble. (R 4012). Finally, the jury heard evidence that Defendant had behaved well in jail while awaiting trial, that he would take advantage of remedial education programs while in prison, and that he would conform to prison rules and regulations if given a life sentence. (R 4012, 4029-30). Despite this evidence, the jury recommended a sentence of death by a vote of ten to two. (R 4538). Having heard the additional evidence presented by Defendant at the sentencing

hearing, this Court sentenced Defendant to death, finding that Defendant's mitigating evidence did not outweigh the three aggravating factors. Although the supreme court struck the CCP aggravating factor on direct appeal, this Court finds that there is no reasonable probability that the jury's recommendation or this Court's ultimate sentence would have been different had defense counsel presented the additional evidence to the jury. Therefore, these allegations of ineffective assistance of counsel are hereby denied. Cf. Engle v. Dugger, 576 So. 2d 696 (Fla. 1991); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992).

Defendant next alleges that trial counsel was ineffective for (1) failing to ask Dr. Crown to evaluate him for the purposes of presenting statutory and nonstatutory mental mitigating evidence, (2) failing to present Dr. Crown's testimony to the jury as to the existence of both statutory mental mitigators and the significance of mental age which could have been based on Dr. Crown's "diagnosis of brain damage," and (3) failing to request instructions relating to the two statutory mental mitigators. The record reveals, however, through Dr. Crown's testimony at the allocution hearing, that he (Dr. Crown) interviewed Defendant for two hours and performed two mental status tests on him, one of which is used by neurological surgeons to pinpoint lesions on the brain. (R 4200-

01). In relating evidence of mental mitigation, the most Dr. Crown could say about Defendant was that he was immature, had impulsive behavior related to his immaturity, and had "what could be categorized as a learning disability or minimal brain dysfunction." (R 4198). Dr. Crown did not, as Defendant asserts, diagnose him as having "brain damage." It is obvious to this Court that Dr. Crown did not find any evidence to support the existence of either mental mitigator, or else he would have testified to their existence at the allocution hearing. In turn, since no evidence was presented to support the giving of instructions on either mental mitigator, defense counsel cannot be considered deficient for failing to seek instructions on them. See Stewart v. State, 549 So. 2d 171, 174 (Fla. 1989) ("Florida Standard Jury Instructions state that the jury be instructed only on those factors for which evidence has been presented."); Nixon v. State, 572 So. 2d 1336, 1344 (Fla. 1990). Defense counsel did, however, seek and obtain an instruction on age--although the trial court ultimately rejected it as a mitigating circumstance: "He was a street wise twenty year old who acted with a purpose and after reflection." (R 4070-77, 4567). In sum, the record conclusively shows that Defendant is not entitled to relief.

Next, Defendant alleges that trial counsel was ineffective for failing to present evidence of Defendant's discovery at age 15 that he was adopted, and evidence which would have explained the impact of this discovery on him. First, the record reveals that both Ms. Wilbon and Mr. Carlisle testified before the jury that Defendant was brought to church by his adoptive parents. (R 4002, 4010). Thus, the jury was aware that Defendant had been adopted, and that Defendant was aware of his own adoption. Second, and more importantly, Defendant has failed to show how evidence of his own discovery of his adoption would have, within a reasonable probability, changed the jury's ten-to-two death recommendation and this Court's ultimate sentence of death. Thus, Defendant having failed to establish prejudice, this allegation is hereby denied.

Finally, Defendant alleges that trial counsel was ineffective for failing to object to numerous comments during the State's penalty-phase closing argument which allegedly prejudiced his right to a fair trial. This Court finds this allegation procedurally barred. Defendant could have challenged the State's comments on direct appeal, and may not escape the bar by restyling the issue as one of ineffective assistance of counsel. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

Regardless, Defendant has failed to show prejudice. In Jackson v. State, 522 So. 2d 802, 808-09 (Fla. 1988), upon which Defendant relies, the supreme court found similar, though not identical, comments improper, but it did not find the comments sufficiently egregious to taint the jury's recommendation. "'In the penalty phase of a murder trial, resulting in a recommendation which is advisory only, prosecutorial misconduct must be egregious indeed to warrant our vacating the sentence and remanding for a new penalty-phase trial.'" Id. at 809 (quoting Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985)). Although the supreme court later vacated a death sentence in Taylor v. State, 583 So. 2d 323, 329-30 (Fla. 1991), based on similar comments by the State, it did so because the State consistently ignored the court's Jackson opinion, and because it could not say that the offending argument was harmless under the facts of that case. Both Jackson and Taylor issued after Defendant's trial. Regardless, as in Jackson, the State's comments in Defendant's case were not so egregious as to warrant a new sentencing proceeding. Therefore, this allegation is hereby denied.

6. Claim VI, relating to the propriety of the Florida Supreme Court's harmless error analysis, is not a cognizable claim

for relief, and is hereby denied. Hardwick v. Dugger, 648 So. 2d 100 (Fla. 1994).

7. In Claim VII, Defendant alleges defense counsel rendered him ineffective assistance of counsel in the guilt phase of his trial. Alternatively, Defendant alleges that the State failed to disclose material, exculpatory information to defense counsel in violation of Brady v. Maryland, 373 U.S. 83 (1963). Initially, Defendant alleges that trial counsel failed to present the testimony of Elizabeth Painter and Larry Hessmer as to his defense of self-defense. Defendant also alleges that either defense counsel failed to discover or the State failed to disclose the existence of Dr. Roth, who he claims would have also supported his self-defense theory. Regarding these allegations, this Court finds that Defendant has failed to prove prejudice under Strickland, and nondisclosure and materiality under Brady. Four witnesses--Christopher Griffiths, Trooper Bricker, Robert Melhorn, and Dana Thomas--testified for the State that they heard a shotgun blast first, then several pistol shots, and another shotgun blast. (R 2628-31, 2769-74, 2815-22, 2974-81). This and other evidence convinced the Florida Supreme Court that the evidence was sufficient to support a guilty verdict for premeditated murder. Young v. State, 579 So. 2d 721 (Fla. 1991). More importantly, the

supreme court found sufficient evidence to support a guilty verdict under a felony murder theory based on the burglary of the victim's car. Id. Thus, even if defense counsel had called Patricia Painter to say that she heard pistol shots first, followed by a shotgun blast; and Robert Hessmer to say that he "couldn't tell the difference" as to who shot first; and Dr. Roth, who was listed in the State's discovery answer (R 4299), to say that he "thought all the shots were firecrackers," there is no reasonable probability that the verdict would have been different. Therefore, these allegations are denied. Cf. Cherry v. State, 659 So. 2d 1069 (Fla. 1995).

Next, Defendant alleges that the State failed to disclose its impression of Trooper Brinker's strength as a witness as reflected in the prosecutor's personal interview notes, and the prosecutor's specific preparations for trial, including its purpose for interviewing witnesses at the "range." This Court finds, however, that such information does not constitute the type of evidence envisioned by Brady. Even if it does, Defendant has failed to show that, even had such information been disclosed to the defense, the verdict would have, within a reasonable probability, been different. Therefore, these allegations are hereby denied.

Finally, Defendant alleges that either defense counsel failed to discover or the State failed to disclose that the victim "was especially sensitive" because he believed that someone had previously tried to break into his car, that the State failed to disclose to defense counsel a letter written by the victim's sister to the State prior to trial, and that defense counsel failed to present evidence "that the victim possessed a character trait for violence and evidence that the victim was the first aggressor." This Court finds that Defendant has failed to make a prima facie showing of prejudice. The record is replete with testimony that the victim had a firearm, screamed obscenities at the four suspects in the car, appeared very agitated and nervous, threatened to shoot Defendant and his companions, and acted aggressively in his attempt to control the situation and hold the suspects until the police arrived. (R 2293-2307, 2623, 2814-17, 2966, 3356-61, 3403, 3428-31). Such descriptions were used extensively by defense counsel to support his defense of self-defense. (R 2681-90, 3695-96). Thus, any other evidence that the victim was an aggressive person who was "sensitive" to criminal conduct and who had previously made citizen arrests would not have, within a reasonable probability, changed the jury's verdict.

Moreover, the evidence sufficiently supported a conviction for felony murder. Any additional evidence relating to the victim's character and demeanor would not have negated Defendant's guilt under this theory of prosecution. Thus, these allegations are hereby denied.

8. Claim VIII, relating to Defendant's allegation that the jury instructions improperly shifted the burden to him to prove that the mitigating factors outweighed the aggravating factors, is procedurally barred, since it could have been raised on direct appeal. See Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Defendant may not escape the bar by merely claiming that his trial attorney was ineffective for failing to raise a proper objection. Id. In any event, Defendant has failed to prove deficient conduct or prejudice since this claim has been previously raised and rejected in other cases. E.g., Brown v. State, 565 So. 2d 304, 308 (Fla. 1990) ("[T]he standard instructions [do not] impermissibly put any particular burden of proof on capital defendants."), cert. denied, 498 U.S. 992 (1991).

9. Claim IX, relating to Defendant's allegation that the "felony murder" aggravating factor constitutes an impermissible "automatic" aggravator, is procedurally barred, since it could have been raised on direct appeal. See Medina v. State, 573 So. 2d 293,

295 (Fla. 1990). Regardless, this claim has been previously raised and rejected in other cases. Taylor v. State, 638 So. 2d 30 (Fla. 1993).

10. Claim X, relating to Defendant's allegation that his penalty-phase jury was improperly instructed on both the "felony murder" and "pecuniary gain" aggravating factors when they were based on the same underlying facts, is procedurally barred, as it could have been and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Regardless, it is clearly refuted by the record since the jury was given a doubling instruction (R 4072), and this Court specifically merged those two aggravating factors (R 4565).

11. Claim XI, relating to Defendant's allegation that the aggravating factors listed in section 921.141(5) of the Florida Statutes are unconstitutionally vague and overbroad, and that his jury received inadequate instructions regarding the elements of the aggravating factors relied upon, is procedurally barred, as it could have been and should have been raised on direct appeal. James v. State, 615 So. 2d 668, 669 & n.3 (Fla. 1993); Walls v. State, 641 So. 2d 381, 387 (Fla. 1994). To the extent Defendant claims that the allegedly improper instructions constitute fundamental error, this Court notes that the Florida Supreme Court

has applied a harmless error analysis to this issue. Walls, 641 So. 2d at 387-88. Thus, such a claim could hardly constitute fundamental error. As a result, this claim is hereby denied.

12. Claim XII, relating to Defendant's allegation that the State "urged the jury to apply the[] aggravating factors in a vague and overbroad fashion," has not been sufficiently pled and fails to state a claim for relief. Moreover, this issue could have and should have been raised on direct appeal, and is thus procedurally barred. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Defendant may not escape the bar by merely claiming that his trial attorney was ineffective for failing to raise a proper objection. Id. In any event, Defendant has failed to prove that the outcome of his trial would have been different had trial counsel successfully challenged the comments. Therefore, this claim is hereby denied.

13. Claim XIII, relating to Defendant's allegation that this Court misunderstood the nature of his mitigating evidence and ignored the same, is procedurally barred, as it could have been and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

14. Claim XIV, relating to Defendant's allegation that numerous comments by the State during its guilt and penalty phase

closing arguments deprived him of a fundamentally fair trial, is procedurally barred, as it could have been and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Defendant may not escape the bar by merely claiming that his trial attorney was ineffective for failing to raise a proper objection. Id. In any event, Defendant has failed to prove that the outcome of his trial would have been different had trial counsel successfully challenged the comments. Therefore, this claim is hereby denied.

15. Claim XV, relating to Defendant's allegation that "[p]ortions of the record were missing from both of [his] appeals," and that "his former counsels rendered ineffective assistance in failing to assure that a proper record was provided to the court," has not been sufficiently pled and fails to state a claim for relief. Ferguson v. Singletary, 632 So. 2d 53, 58 (Fla. 1993) ("Ferguson points to no specific error which occurred during these [unreported portions of the trial]. Under these circumstances, we reject this claim."); Hardwick v. Dugger, 19 Fla. L. Weekly S433, 434 (Fla. Sept. 8, 1994); Turner v. Dugger, 614 So. 2d 1075, 1079-80 (Fla. 1992). Moreover, this issue could have and should have been raised on direct appeal, and is thus procedurally barred. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Defendant may

not escape the bar by merely claiming that his attorneys were ineffective for failing to raise the issue. Id.

16. In Claim XVI, Defendant alleges that his trial counsel rendered ineffective assistance of counsel for (1) failing to provide him with a competent mental health expert to assist in evaluating, preparing, and presenting mental mitigating evidence, (2) failing to investigate adequately his background and social history, and (3) failing to present "a wealth of compelling mitigation" to the jury. Defendant completely fails, however, to allege any facts upon which to support this claim despite several opportunities to amend his motion. Thus, it is hereby denied as legally insufficient on its face. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

17. Claim XVII, relating to Defendant's allegation that this Court failed to order a competency evaluation on its own initiative, fails to relate sufficiently specific facts to state a claim for relief. Cf. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Moreover, this claim could have and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Therefore, it is hereby denied.

18. Claim XVIII, relating to Defendant's allegation that he was incompetent to stand trial, fails to relate sufficiently

specific facts to state a claim for relief. Cf. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Moreover, this claim could have and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Therefore, it is hereby denied.

19. Claim XIX, relating to Defendant's allegation that the State argued and the jury considered nonstatutory aggravation, fails to relate sufficiently specific facts to state a claim for relief. Cf. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Moreover, this claim could have and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Therefore, it is hereby denied.

20. Claim XX, relating to Defendant's allegation that newly discovered evidence renders his conviction and sentence unreliable, fails to relate sufficiently specific facts to state a claim for relief. Cf. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989).

21. Claim XXI, relating to Defendant's allegation that he was denied a fair trial because his petit jury was chosen from a voter registration list which under-represented nonwhites, and thus his jury did not contain a fair cross-section of the community, fails to relate sufficiently specific facts to state a claim for relief. Cf. Kennedy v. State, 547 So. 2d 912, 913 (Fla. 1989). Moreover, this issue could have and should have been raised on direct appeal.

Thus, it is procedurally barred. Chandler v. Dugger, 634 So. 2d 1066, 1067 (Fla. 1994). Regardless, the State's method of selecting juries from voter registration lists has repeatedly been upheld. E.g., Chandler, 634 So. 2d at 1068 n.3; Hendrix v. State, 637 So. 2d 916, 920 (Fla. 1994) ("[T]his Court has previously ruled that voter registration lists are a permissible means of selecting venirepersons, even where minor variations between the number of residents and registered voters exist. Bryant v. State, 386 So. 2d 237 (Fla. 1980)."). Therefore, this claim is hereby denied.

22. Claim XXII, relating to Defendant's allegation that the "pecuniary gain" aggravating factor was not supported by the evidence, is procedurally barred, as it could have been and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990).

23. Claim XXIII, relating to Defendant's allegation that his jury "was repeatedly instructed by the court and the prosecutor that it's [sic] role was merely 'advisory,' in violation of law," is procedurally barred, as it could have been and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Regardless, this issue has been repeatedly rejected in other cases. E.g., Combs v. State, 525 So. 2d 853, 854-58 (Fla.

1988); Sochor v. State, 619 So. 2d 285, 291-92 (Fla. 1993). Therefore, this claim is hereby denied.

24. Claim XXIV, relating to Defendant's allegation that this Court improperly rejected his proposed instruction that the jury could grant mercy to him and recommend a life sentence regardless of the aggravating and mitigating circumstances, is procedurally barred, as it could have been and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Regardless, this issue has been repeatedly rejected in other cases. E.g., Smith v. Dugger, 565 So. 2d 1293, 1297 n.7 (Fla. 1990). Therefore, this claim is hereby denied.

25. Claim XXV, relating to Defendant's allegation that this Court improperly instructed the jury on the "avoid arrest" aggravating factor, failed to apply the supreme court's limiting construction of this aggravating factor, and imputed the intent of the other participants to Defendant in finding this factor, is procedurally barred, as it could have been and should have been raised on direct appeal. Medina v. State, 573 So. 2d 293, 295 (Fla. 1990). Regardless, this issue has been rejected in other cases. E.g., Whitton v. State, 649 So. 2d 861, 867 & n.10 (Fla. 1994). Therefore, this claim is hereby denied.

26. Claim XXVI, relating to Defendant's allegation that this Court improperly excused or failed to excuse certain prospective jurors, is procedurally barred, as it was raised on direct appeal. Young v. State, 579 So. 2d 721, 725 (Fla. 1991). Therefore, this claim is hereby denied.

27. Claim XXVII, relating to Defendant's allegation that the cumulative effect of the errors committed at his trial rendered his conviction and sentence fundamentally unfair, is legally insufficient on its face. See Zeigler v. State, 452 So. 2d 537, 539 (Fla. 1984), sentence vacated on other grounds, 524 So. 2d 419 (Fla. 1988). Therefore, this claim is hereby denied.

28. Claim XXVIII, relating to Defendant's allegation that Florida's death penalty statute is unconstitutional on its face and as applied, is procedurally barred, as it was raised on direct appeal. Young v. State, 579 So. 2d 721, 725 (Fla. 1991). Therefore, this claim is hereby denied.

29. In Claim XXIX, Defendant claims that Florida Rule of Professional Conduct 4-3.5(d)(4) restricted his collateral counsel's ability to investigate and raise claims which prove his conviction and sentence invalid, and sought this Court to declare this ethical rule invalid and to allow him unfettered discretion to interview the jurors in this case. This Court finds that the

Defendant has failed to plead a claim for relief under Rule 3.850. The Rules are promulgated by the Florida Supreme Court to regulate members of the Florida Bar. The Defendant is not a member of the Bar. Therefore, the Defendant does not have standing to challenge the applicability of a rule that does not govern him directly. Moreover, the law allows juror interviews under certain circumstances. See Fla. R. Civ. P. 1.431(h). The Defendant's inability to meet the requirements of this rule does not render his attorney exempt from the rules of professional conduct, nor does it render his conviction and sentence constitutionally infirm. Therefore, this claim is hereby denied.

30. Given that Defendant's claims are either procedurally barred, or insufficiently pled, or legally insufficient on their face, no evidentiary hearing is warranted in this case, and this Court hereby denies his 3.850 motion in its entirety.

31. The Defendant has thirty days from the date of this Order to appeal the denial of his motion for postconviction relief to the Florida Supreme Court.

DONE AND ORDERED in West Palm Beach, Palm Beach County, Florida this ____ day of January, 1996.

Harold J. Cohen
Circuit Judge

cc: Paul Zacks, Assistant State Attorney
Sara Baggett, Assistant Attorney General
Todd Scher, Assistant CCR

ATTACHMENT 2

OFFICE OF THE
CAPITAL COLLATERAL REPRESENTATIVE

State of Florida

1444 Biscayne Blvd., Suite 202
Miami, FL 33132-1422
(305) 377-7580
(SC) 452-7580
FAX (305) 377-7585
FAX (SC) 452-7585

Michael J. Minerva
Capital Collateral Representative

Martin J. McClain
Litigation Director

Todd G. Scher
Chief Assistant CCR

December 26, 1996

The Honorable Harold J. Cohen
Circuit Court Judge
Palm Beach County Courthouse
Room 11,1216
West Palm Beach, FL 33401

Re: State v. Young, Case No. 86-8682 CF A02

Via Facsimile Transmission

Dear Judge Cohen:

I am in receipt of the proposed order filed by the State of Florida in Mr. Young's case. On behalf of Mr. Young, I hereby object to the State's order in its entirety, as it contains findings of fact and conclusions of law which reflect the opinions of the counsel representing the State, not findings and conclusions made by the Court. The State's proposed order further contradicts the holdings in Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989), and Hoffman v. State, 571 So. 2d 449 (Fla. 1990).

Thank you for your consideration in this matter.

Sincerely,

Todd G. Scher
Chief Assistant CCR

cc: Sara Baggett, Assistant Attorney General
Paul Zacks, Assistant State Attorney