IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,2874

ERNEST CHARLES DOWNS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT,
IN AND FOR DUVAL COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

STEPHEN M. KISSINGER
Assistant CCR
Florida Bar No. 0979295
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376
Attorney for Appellant

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Downs' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied Mr. Downs' claims without an evidentiary hearing.

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

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

"R2."-- record on appeal from the resentencing;

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

"PC-R.2" -- record on the second 3.850 appeal to this Court;

"App." -- indicates that record omissions still exist.

REQUEST FOR ORAL ARGUMENT

Mr. Downs 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. Downs, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

Page

PRELIMINARY STATEMENT i

REQUEST FOR ORAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES v

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT I

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. DOWNS' CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION. 7

A. The Trial Court Erred In Denying Mr. Downs An Evidentiary Hearing On His Public Records Claim. 7

B. The Trial Court's Reliance On Statements Submitted By One Party In Lieu Of An Evidentiary Hearing Violated Mr. Downs' Rights To Procedural And Substantive Due Process. 11

ARGUMENT II

MR. DOWNS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING. 13

A. The Evidence Concerning Harold Haimowitz's Connection To Forrest Jerry Harris Was Material, Exculpatory Evidence. 13

B. Defense Counsel's Representation Was Rendered Ineffective 15

ARGUMENT III

THE JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY PRESERVING THIS CLAIM. . . . 17

ARGUMENT IV

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED MR. DOWNS' JURY ON THE PREVIOUS CONVICTION OF A VIOLENT FELONY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, **MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.** 18

ARGUMENT V

THE JURY WAS IMPROPERLY INSTRUCTED ON THE PECUNIARY GAIN AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. 20

ARGUMENT VI

MR. DOWNS WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED TWO SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. 21

ARGUMENT VII

MR. DOWNS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERT WHO EVALUATED HIM FOR THE NEW SENTENCING FAILED TO CONDUCT PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS RESULTING IN THE DEPRIVATION OF MR. DOWNS' RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION. 24

ARGUMENT VIII

MR. DOWNS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE DEFENSE CASE AND CHALLENGE

TO THE STATE'S CASE. A FULL ADVERSARIAL TESTING DID NOT OCCUR. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. DOWNS' CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE. 26

ARGUMENT IX

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. DOWNS' CONVICTION AND DEATH SENTENCE ARE UNRELIABLE AND THAT HE IS THEREFORE ENTITLED TO A NEW TRIAL AND RESENTENCING. 32

ARGUMENT X

MR. DOWNS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT THE DEATH SENTENCE IS UNRELIABLE. . 34

ARGUMENT XI

MR. DOWNS WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE AND THE FLORIDA SUPREME COURT FAILED TO ADDRESS THE EXISTENCE OF STATUTORY AND NONSTATUTORY MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO PARKER V.DUGGER, 111 S. CT. 731 (1991),THE EIGHTH AND FOURTEENTH AMENDMENTS. 63

ARGUMENT XII

THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. DOWNS OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE. 65

ARGUMENT XIII

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ADEQUATE FARETTA INQUIRY AS TO WHETHER MR. DOWNS MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS 66

ARGUMENT XIV

MR. DOWNS' TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. 74

CONCLUSION 75

TABLE OF AUTHORITIES

Page

Ake v. Oklahoma,
470 U.S. 68 (1985) 24, 38

Barfield v. State,
402 So. 2d 377 (Fla. 1981) 18, 19, 21, 23

Bassett v. State,
541 So. 2d 596 (Fla. 1989) 35

Bello v. State,
547 So. 2d 914, 917 (1989) 22

Blake v. Kemp,
758 F.2d 523 (11th Cir. 1985) 35

Blake v. Kemp,
758 F.2d 523, 529 (11th Cir. 1985) 24, 39

Brewer v. Aiken,
935 F.2d 850 (7th Cir. 1991) 36, 37

Brooks v. Kemp,
762 F.2d 1383 (11th Cir. 1985) 72

Brown v. Wainwright,
665 F.2d 607 (5th Cir. 1982) 68

California v. Brown,
479 U.S. 538, 545 (1987) 41

Chapman v. United States,
553 F.2d 886, 893 (5th Cir. 1977) 68

Cheshire v. State,
568 So. 2d 908 (Fla. 1990) 63

Clark v. State,
379 So. 2d 97, 104 (Fla. 1980) 21

Clemons v. Mississippi,
110 S. Ct. 1441 (1990) 23

Code v. Montgomery,
799 F.2d 1481 (11th Cir. 1986) 37

Derden v. McNeel,
938 F.2d 605 (5th Cir. 1991) 74

Douglas v. Wainwright,
714 F.2d 1532 (11th Cir. 1983) 35

Downs v. Dugger,
453 So. 2d 1102 (Fla. 1984) 2

Downs v. Dugger,
476 So. 2d 654 (Fla. 1985) 2

Downs v. Dugger,
514 So. 2d 1069 (Fla. 1987) 2

Downs v. State,
572 So. 2d 895 (Fla. 1990) 3

Dusky v. United States,
362 U.S. 402 (1960) 69

Eddings v. Oklahoma,
102 S. Ct. 869 (1982) 64

Eldridge v. Atkins,
665 F.2d 228 (8th Cir. 1981) 36

Espinosa v. Florida,
112 S. Ct. 2926 (1992) 17-20, 22, 38

Espinosa v. Florida,
112 S.Ct. 2926, 2928 (1992) 22

Eutzy v. Dugger,
746 F. Supp. 1492 (N.D. Fla. 1989) 35

Faretta v. California,
422 U.S. 806 (1975) 66

Fitzpatrick v. Wainwright,
800 F.2d 1057 (11th Cir. 1986) 67, 68, 72, 73

Fitzpatrick v. Wainwright, 800 F.2d at 1066 70

Gaines v. Hopper,
575 F.2d 1147 (5th Cir. 1978) 37

Garron v. Bergstrom,
453 So. 2d 405 (Fla. 1984) 25, 39

Gideon v. Wainwright,
372 U.S. 335 (1963) 66, 68

Godfrey v. Georgia,
446 U.S. 420 (1980) 22

Gomez v. Beto,
462 F.2d 596 (5th Cir. 1972) 37

Gorham v. State,
521 So. 2d 1067 (Fla. 1988) 10

Gregg v. Georgia,
428 U.S. 153 (1976) 38

Gregg v. Georgia,
428 U.S. 153, 190 (1976) 35

Hall v. Haddock,
573 So. 2d 149 (Fla. 1 DCA 1991) 25, 39

Hallman v. State,
371 So. 2d 482, 485 (Fla. 1979) 33

Hance v. Zant,
696 F.2d 940, 949 (11th Cir.),
cert. denied 463 U.S. 1210, 103 S. Ct. 3544, 77 L.Ed.2d
1393 (1983) 72

Harrich v. State,
484 So. 2d 1239 (Fla. 1986) 10

Harris v. Dugger,
874 F. 2d 756 (11th Cir. 1989) 35

Harris v. Dugger,
874 F.2d 756, 763 (11th Cir. 1989) 40

Heath v. Jones,
941 F.2d 1126 (11th Cir. 1991) 74

Heiney v. State,
558 So. 2d 398 (Fla. 1990) 10

Hill v. State,
473 So. 2d 1253 (Fla. 1985) 69

Hitchcock v. Dugger,
481 U.S. 393 (1987) 2, 64, 65

Holland v. State,
503 So. 2d 1250 (Fla. 1987) 10

Jackson (Andrea) v. State,
19 Fla. L. Weekly S215 (1994) 17

Johnson v. Singletary,
647 So. 2d 106 (Fla. 1994) 11

Johnson v. Singletary,
No. 81, 121, Slip Op. at 2 (Fla. Jan. 29, 1993) 22

Johnson v. Zerbst,
304 U.S. 458, 464-465 (1938) 67

Johnston v. State,
497 So. 2d 863, 868 (Fla. 1986) 67

Jones v. State,
591 So. 2d 911 (Fla. 1991) 32

Kenley v. Armontrout,
937 F.2d 1298 (8th Cir. 1991) 36,37

Kimmelman v. Morrison,
106 S.Ct 2588-89 (1986) 37

Kimmelman v. Morrison,
477 U.S. 365 (1986) 37

King v. Strickland,
714 F.2d 1481 (11th Cir. 1983) 35

King v. Strickland,
748 F.2d 1462, 1464 (11th Cir. 1984) 37

Kubat v. Thieret,
867 F.2d 351, 369 (7th Cir. 1989) 36

LeDuc v. State,
415 So. 2d 721 (Fla. 1982) 10

Lemon v. State,
498 So. 2d 923 (Fla. 1986) 34

Lightbourne v. Dugger,
549 So. 2d 1364 (Fla. 1989) 11

Lockett v. Ohio,
438 U.S. 586, 605 (1978) 41

Maynard v. Cartwright,
108 S. Ct. 1853 (1988) 17, 18, 20

Maynard v. Cartwright,
486 U.S. 356 (1988) 65

Mendyk v. State,
592 So.2d 1076 (Fla. 1992) 8

Middleton v. Dugger,
849 F.2d 491 (11th Cir. 1988) 35

Mills v. State,
559 So. 2d 578 (Fla. 1990) 10

Moran v. Godinez,
972 F.2d 263 (9th Cir. 1992) 71

Muehleman v. Dugger,
623 So. 2d 480 (Fla.1993) 8

Nealy v. Cabana,
764 F.2d 1173, 1178 (5th Cir. 1985) 37

O'Callaghan v. State,
461 So. 2d 1154 (Fla. 1984) 35

O'Callaghan v. State,
461 So. 2d 1354 (Fla. 1984) 10

O'Callaghan v. State,
461 So. 2d 1354, 1355 (Fla. 1984) 34

Parker v. Dugger,
111 S. CT. 731 (1991) 63

Pate v. Robinson,
383 U.S. 375 (1966) 69

Penry v. Lynaugh,
109 S. Ct. 2934, 2946 (1989) 42

Penry v. Lynaugh,
488 U.S. 74 (1989) 38

Phillips v. State,
17 FLW S595 (Fla., Sept. 24, 1992) 35

Powell v. Alabama,
287 U.S. 45 (1932) 68

Provence v. State,
337 So. 2d 783, 786 (Fla. 1976) 21

Provenzano v. Dugger,
561 So.2d 541 (Fla.1990) 7

Raulerson v. Wainwright,
732 F.2d 803 (11th Cir. 1984) 68, 72

Richardson v. State,
437 So. 2d 1091 (Fla. 1983) 21

Roberts v. Louisiana,
428 U.S. 325 (1976) 35

Scott v. Dugger,
604 So. 2d 465 (Fla. 1992) 30, 61, 62

Smith v. McCormick,
914 F.2d 1153, 1157 (9th Cir. 1990) 25, 39

Sochor v. Florida,
112 S. Ct. 2114 (1992) 17, 18, 20

State v. Crews,
477 So. 2d 984 (Fla. 1985) 10

State v. Dixon,
283 So. 2d 1 (Fla. 1973) 65

State v. Downs,
386 So. 2d 788 (Fla.) 1

State v. Kokal,
562 So.2d 324 (Fla.1990) 7

State v. Lara,
581 So. 2d 1288 (Fla. 1991) 35

State v. Michael,
530 So. 2d 929 (Fla. 1988) 35, 24, 39

Stevens v. State,
552 So. 2d 1082 (Fla. 1989) 35

Stevens v. State,
552 So. 2d 1082 (Fla. 1989) 40

Strickland v. Washington,
466 U.S. 668 (1984) 34

Stringer v. Black,
112 S. Ct. 1130 (1992) 17, 18, 20

Teffeteller v. Dugger,
676 So. 2d 369 (Fla. 1996) 12

Thomas v. Kemp,
796 F.2d 1322, 1324 (11th Cir. 1986) 37

Tyler v. Kemp,
755 F.2d 741 (11th Cir. 1985) 35, 36

United States v. Billings,
568 F.2d 1307, 1309 (9th Cir. 1978) 73

United States v. Brown,
591 F.2d 307 (5th Cir.) 68

United States v. Chancey,
662 F.2d 1148, (5th Cir. 1981) 72

United States v. Cronic,
446 U.S. 648 (1984) 69

United States v. Curcio,
680 F.2d 881 (2nd Cir. 1982) 73

United States v. Edwards,
488 F.2d 1154 (5th Cir. 1974) 24, 39

United States v. Fant,
890 F.2d 408 (11th Cir. 1989) 67

United States v. Fessel,
531 F.2d 1278 (5th Cir. 1976) 24, 39

United States v. Jones,
580 F.2d 785 (5th Cir. 1978) 68

Ventura v. State,
673 So.2d 479 (Fla. 1996) 7

Walton v. Dugger,
634 So. 2d 1059 (Fla. 1993) 7, 9

Welty v. State,
402 So. 2d 1139 (Fla. 1981) 21

Westbrook v. Arizona,
384 U.S. 150 (1966) 69

Witt v. State,
387 So. 2d 922 (Fla.),
cert. denied 101 S.Ct. 796 (1980) 17, 19, 20, 22

Woodson v. North Carolina,
428 U.S. 280 (1976) 35

Zant v. Stephens,
103 S. Ct. 2733, 2744 (1983) 64

STATEMENT OF THE CASE

The Circuit Court of the Fourth Judicial Circuit, Duval County, entered the judgments of conviction and sentence, including a resentencing, under consideration. Mr. Downs was charged originally by an indictment dated August 4, 1977, with one count of first degree murder (R. 1). However, an amended indictment was dated August 11, 1977, with one count of first degree murder and one count of conspiracy to commit first degree murder (R. 3-4). He pled not guilty.

Mr. Downs' jury trial began on December 12, 1977. On December 14, 1977, the jury rendered a verdict of guilty on both counts (R. 837). On December 20, 1977, the jury recommended a death sentence (R. 87). On January 27, 1977 the trial court ore tenus imposed a sentence of death on the count of first degree murder and a sentence of thirty (30) years on the count of conspiracy to commit first degree murder.[1] No findings of fact were entered.

The Florida Supreme Court affirmed Mr. Downs' convictions and sentences on direct appeal. State v. Downs, 386 So. 2d 788 (Fla.). On June 21, 1982, Mr. Downs filed a motion to vacate, to set aside or correct convictions and sentences, and to order a new trial. In addition, on April 11, 1983, Mr. Downs filed a second supplemental motion to vacate, to set aside, or to correct convictions and sentences and order a new trial.

---

[1]As noted in the judgment and sentence for the conspiracy conviction, the conspiracy conviction was to run concurrent with the first degree murder conviction (R. 264).

On October 12-13, 1982, and January 11-12, 1983, the circuit court held an evidentiary hearing. On August 12, 1983, the circuit court denied Mr. Downs' motions to vacate (PC-R. 1915-21). The Florida Supreme Court affirmed the circuit court's denial of Mr. Downs' motions to vacate. Downs v. Dugger, 453 So. 2d 1102 (Fla. 1984). Mr. Downs petitioned for habeas corpus relief. The Florida Supreme Court denied Mr. Downs' petition for writ of habeas corpus. Downs v. Dugger, 476 So. 2d 654 (Fla. 1985).

On August 18, 1987, Governor Martinez signed a death warrant on Mr. Downs. Mr. Downs execution was scheduled for September 17, 1987. Mr. Downs filed a petition for extraordinary relief, for a writ of habeas corpus and request for stay of execution dated September 8, 1987. The Florida Supreme Court granted Mr. Downs' writ, stayed the governor's warrant, vacated Mr. Downs' sentence, and remanded Mr. Downs' case for a new sentencing before a jury in light of Hitchcock v. Dugger, 481 U.S. 393 (1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

Mr. Downs new sentencing proceeding began on January 30, 1989. On February 3, 1989, Mr. Downs' jury recommended the death sentence by a vote of eight (8) to four (4) for the first degree murder conviction (R2. 1151). On February 17, 1989, the resentencing court ore tenus imposed a sentence of death on the count of first degree murder (R2. 1205-06). A sentencing order was entered on February 17, 1987 (R2. 312-13).

The Florida Supreme Court affirmed Mr. Downs' resentencing to death on appeal. Downs v. State, 572 So. 2d 895 (Fla. 1990), cert. denied, 112 S. Ct. 101 (Oct. 7, 1991).

On November 30, 1992, Mr. Downs filed a motion to vacate judgments of conviction and sentence with special request for leave to amend. Thereafter, Mr. Downs amended this motion, initially on October 7, 1993, and subsequently on September 6, 1994 (PC-R.2 001-094). On March 3, 1997, the circuit court denied the motion to vacate (PC-R.2 175-222). A notice of appeal was timely filed on April 15, 1997.

SUMMARY OF ARGUMENT

1. Mr. Downs is entitled to a full evidentiary hearing on all claims raised in his Rule 3.850 motion. Mr. Downs pled specific, detailed claims for relief which are not conclusively refuted by this record.

2. Mr. Downs has been denied access to the files and records in the possession of certain state agencies which pertain to his case. Such materials have been withheld in violation of Chapter 119, Fla. Stat., the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution, the Eighth Amendment, and the corresponding provisions of the Florida Constitution.

3. Mr. Downs has been wrongfully denied access to his own trial file. Without access to this file, counsel cannot provide effective assistance of counsel.

4. Mr. Downs was deprived his due process rights because the state withheld exculpatory evidence. As a result, defense counsel's representation was rendered ineffective and thus prevented a full adversarial testing.

5. Mr. Downs' death sentence was tainted by unconstitutionally vague and overbroad instructions to the jury and by improper application of the statutory aggravators of "cold, calculated and premeditated", "prior violent felony", and "pecuniary gain" contrary to the holdings in Espinosa v. Florida and Stringer v. Black, and in violation of the Eighth and Fourteenth Amendments.

6. Mr. Downs was denied a reliable sentencing when his jury was improperly instructed that one single act supported two separate aggravating factors in violation of Espinosa v. Florida and Stringer v. Black, and in violation of the Eighth and Fourteenth Amendments.

7. Mr. Downs was denied his due process rights because the mental health expert who evaluated him for his resentencing failed to conduct professionally competent and appropriate evaluations.

8. At the guilt/innocence phase of his trial, and at pretrial, Mr. Downs was denied effective assistance of counsel. Counsel failed to adequately investigate and prepare a defense, and to challenge the state's case. Counsel was also rendered ineffective by the actions of the state and the trial court.

9. Newly discovered evidence establishes that Mr. Downs' conviction and death sentence are unreliable. Mr. Downs is entitled to a new trial and resentencing.

10. At the resentencing, Mr. Downs was denied effective assistance of counsel. Trial counsel was also rendered ineffective by the actions of the state and the trial court which prevented him from adequately investigating and preparing mitigating evidence. Further, counsel failed to adequately challenge the state's case either through ineffectiveness or court interference. As a result, counsel's performance was deficient and Mr. Downs' death sentence is unreliable.

11. The judge and the Florida Supreme Court failed to consider mitigating factors which are clearly set out in the record in violation of the Eighth and Fourteenth Amendments.

12. The penalty phase jury instructions were incorrect under Florida law because they unconstitutionally shifted the burden to Mr. Downs to prove that death was inappropriate. The trial court used this presumption of death to sentence Mr. Downs to die. Defense counsel was ineffective for failing to object or argue this issue. The resulting prejudice to Mr. Downs is manifest.

13. The trial court erroneously failed to conduct an adequate and thorough <u>Faretta</u> hearing to ensure that Mr. Downs was competent to make a knowing and intelligent waiver of his right to counsel. Even if Mr. Downs were competent to stand trial, he was still not competent to waive his right to counsel.

14. Mr. Downs' trial court proceedings were fraught with procedural and substantive errors. Such errors, when viewed as a whole, deprived Mr. Downs of the fundamentally fair trial guaranteed under the Sixth, Eighth, and Fourteenth Amendments.

ARGUMENT I

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. DOWNS' CASE IN THE POSSESSION OF CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

A. The Trial Court Erred In Denying Mr. Downs An Evidentiary Hearing On His Public Records Claim.

The trial court refused to grant Mr. Downs an evidentiary hearing on the public records claim presented in his Second Amended Motion to Vacate Judgement and Sentence (PC-R.2 175-222). Mr. Downs asserted in that claim that certain state agencies had still failed to disclose public records to which he was entitled, in violation of the mandate of this Court, Chapter 119, Fla. Stat., the due process and equal protection clauses of the Fourteenth Amendment, the Eighth Amendment of the U.S. Constitution, and the corresponding provisions of the Florida Constitution. Mr. Downs identified both the public agencies which had withheld public records and the nature of the records withheld.

This Court has repeatedly found that capital post-conviction defendants are entitled to public records disclosure. Ventura v. State, 673 So.2d 479 (Fla. 1996); Walton v. Dugger, 634 So.2d 1059 (Fla.1993); State v. Kokal, 562 So.2d 324 (Fla.1990); Provenzano v. Dugger, 561 So.2d 541 (Fla.1990). Where a defendant's prior request for disclosure of public records has been denied, such a request may properly be made as part of a motion for post-conviction relief. Mendyk v. State, 592 So.2d 1076 (Fla. 1992). An evidentiary hearing is required. Walton. Furthermore, this Court has determined that a defendant should be allowed to amend a previously filed rule 3.850 motion after requested public records are finally furnished. Ventura; Muehleman v. Dugger, 623 So. 2d 480 (Fla.1993).

Here, the circuit court's error in summarily denying Mr. Downs' public records claim is particularly egregious. The court denied Mr. Downs such an evidentiary hearing because, "[t]he court finds the evidence uncontroverted that all records of JSO have been provided defense (sic). Mere suspicion that there is more does not warrant an evidentiary hearing for discovery on this 3.850 proceeding" (August 4, 1994 Order on Defendant's Motion to Compel at p. 1) (hereinafter August 4, 1994 Order).

In addition to being the product of a fundamentally unfair proceeding, see, Johnson, supra, the initial finding is both clearly erroneous and against the manifest weight of the evidence presented to the Court. Mr. Hicks, the custodian of records for the Jacksonville Sheriff's Department, stated unequivocally that

he had no knowledge of whether the Jacksonville Sheriff's Department had provided Mr. Downs with all materials he had requested pursuant to Chapter 119 (July 18, 1994 Hearing at p. 60). His role was to forward the materials provided to him by other departments within the Jacksonville Sheriff's Department (July 18, 1994 Hearing at p. 59). Mr. Hicks had no knowledge whatsoever as to what was contained within the records of those departments.

In contrast, Mr. Downs pointed out a number of specific items which had not been provided as well as circumstantial evidence, i.e. the very paucity of material which had been provided, that any further public records had been wrongfully withheld.[2] The Court denied Mr. Downs an evidentiary hearing regarding whether files presently being withheld by the Duval County State Attorney's Office were subject to disclosure pursuant to Chapter 119 of the Florida Statutes as mandated by Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993). Such a determination clearly could not have been made from the record before the Court.

Here, counsel for the State admitted that she could not state whether requested materials had ever been incorporated into produced documents, or even under what circumstances such

---

[2] In any event, the Florida Supreme Court has not conditioned the requirement that a capital defendant be afforded an evidentiary Chapter 119 hearing upon the defendant describing what materials have been withheld. Indeed, such a condition would be patently improper as it would require a defendant to describe materials which, because of the very fact that they are being concealed, the defendant would have no way of describing.

documents were created (July 18, 1994 Hearing at p. 94-5). Without an evidentiary hearing (where persons with personal knowledge would be required to testify regarding the purpose of such materials, whether such materials were later incorporated into final documents, and similar matters) it was simply impossible for the Court to have determined whether these records were exempt from Chapter 119 disclosure. The Court's ruling is thus clearly contrary to both the holding and the reasoning of the Florida Supreme Court's decision in Walton.

The law strongly favors full evidentiary hearings in death row post-conviction cases, especially where a claim is grounded in factual as opposed to legal matters. "Because the trial court denied the motion without an evidentiary hearing . . . our review is limited to determining whether the motion conclusively shows on its face that [the defendant] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721 (Fla. 1982); See also Harrich v. State, 484 So. 2d 1239 (Fla. 1986); See also Mills v. State, 559 So. 2d 578 (Fla. 1990); See also O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

Some fact-based post-conviction claims by their nature can only be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. When a determination has been made that a defendant is entitled to such

an evidentiary hearing (as it should be in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So. 2d 1250, 1252-53 (Fla. 1987). "The movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." State v. Crews, 477 So. 2d 984, 984-985 (Fla. 1985). "Accepting the allegations. . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

B. The Trial Court's Reliance On Statements Submitted By One Party In Lieu Of An Evidentiary Hearing Violated Mr. Downs' Rights To Procedural And Substantive Due Process.

The Court denied Mr. Downs the opportunity to present evidence regarding the Jacksonville Sheriff's Office's failure to comply with Chapter 119. The Court, however, allowed the Jacksonville County Sheriff's Office to present evidence on the same matter (July 18, 1994 Hearing at p. 53-8). For example, Mr. Hicks identified a letter sent by his office to CCR on November 19, 1992, attesting that the documents being provided are a true and correct copy (July 18, 1994 Hearing at p. 53-4). The Court then specifically relied upon that evidence in denying Mr. Downs the evidentiary Chapter 119 hearing (August 4, 1994 Order at p. 1).

This Court specifically addressed this very issue in Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994). There this Court observed:

> While Johnson's motion was _purportedly_ denied as a matter of law, the trial judge permitted the State to introduce evidence from a rap sheet showing that Pruitt was much shorter and lighter than the description given by Summitt. _Under these circumstances, it is difficult to see why Johnson should have been precluded from also putting on evidence._

Johnson, 647 So.2d at 111, footnote 3.

At the July 18, 1994 hearing, the State was allowed to present evidence in this matter to dispute factual allegations made by Mr. Downs (July 18, 1994 Hearing at p. 53-9). It was error for the trial court to refuse to allow post-conviction counsel to present evidence supporting Mr. Downs' allegations, or even challenge the credibility of the State's witness. _Teffeteller v. Dugger_, 676 So. 2d 369 (Fla. 1996). At the urging of the State, the court below ignored over ten years of decisions from this Court. As in _Hoffman_, this Court should remand this matter with specific instructions that it has no choice but to conduct an evidentiary hearing on Mr. Downs' public records claim and, if that hearing results in the production of records which give rise to a claim, or claims, cognizable in post-conviction proceedings, that Mr. Downs be allowed to amend his Rule 3.850 motion to include the same.

ARGUMENT II

MR. DOWNS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING.

A. The Evidence Concerning Harold Haimowitz's Connection To Forrest Jerry Harris Was Material, Exculpatory Evidence.

The facts and circumstances surrounding Mr. Downs' conviction and sentence of death demonstrate that the State withheld, and continues to withhold, material exculpatory evidence.

Shortly before his death, Forrest Jerry Harris entered into a plea agreement with federal authorities regarding charges that he had engaged in certain illegal banking transactions during his tenure as a vice-president of the American National Bank. Such charges were the result of an almost four year investigation by the United States Attorney's Office for the Middle District of Florida and the Federal Bureau of Investigation into illegal transactions at the American National Bank.

At the time of his death, Mr. Harris was cooperating in this investigation. Mr. Harris revealed to federal authorities that a number of other persons at, or associated with, American National Bank, including, but not limited to, Harold Haimowitz, were also involved in violations of federal banking law.

A handwritten memorandum heretofore withheld by the State reveals that, in the more than four months which elapsed between the time of Mr. Harris' disappearance and the time Mr. Johnson came forward with his story that Mr. Downs had killed Mr. Harris, the Duval County Sheriff's Office and/or the Duval County State Attorney's Office had focused their investigation on the connection between Mr. Harris disappearance and his cooperation with federal authorities.

During the course of their investigation, the Duval County Sheriff's Office and/or the Duval County State Attorney's Office obtained information from federal authorities regarding the latter's investigation of illegal activities at the American National Bank and Mr. Harris' cooperation in that investigation.

At the time the State prosecuted Mr. Downs, the Duval County Sheriff's Office and/or the Duval County State Attorney's Office knew that, at the time he was murdered, Mr. Harris had agreed to implicate Harold Haimowitz and/or other prominent officers, employees, or associates of the American National Bank, in violations of federal law. Even after Mr. Downs was convicted, the State has continued to investigate the connection between activities at American National Bank and Mr. Harris' murder, yet none of that information had been provided to Mr. Downs.

The State argued at trial, post-conviction, and resentencing, that Mr. Downs was deserving of death while Mr. Johnson was deserving of complete immunity because Mr. Johnson had told the truth when he testified that Mr. Garelick had

ordered Mr. Harris' murder to collect insurance proceeds and that Mr. Downs was the actual "trigger man". Mr. Downs' theory at trial was that Mr. Johnson's story was not true.

Mr. Downs proffered testimony which he contended would show that other people, including Harold Haimowitz, had reasons to seek Mr. Harris' death. Finding the proffered evidence so weak as to lack a nexus to Mr. Harris' murder and the possibility that it would unnecessarily impugn Mr. Haimowitz and/ or his wife, the Court refused to allow this testimony, which went to alleged infidelities between Mr. Harris and Mr. Haimowitz' wife, to go before the jury.

Notwithstanding the fact that it knew of admissible evidence tending to show a connection between illegal activities at the American National Bank and Mr. Harris' death and the fact that the State's belief that such evidence was of sufficient strength to merit investigation even after Mr. Downs' conviction, the State failed to reveal such evidence to either Mr. Downs, his trial attorney, his initial post-conviction attorney, or his resentencing attorney. The State continues to withhold this information from collateral counsel.

B. Defense Counsel's Representation Was Rendered Ineffective

Prejudice is clear. From the time he was arrested through the time of his trial, Mr. Downs' attempted to tell authorities, then the jury, the true facts and circumstances surrounding the death of Forrest Jerry Harris. Mr. Downs expressed his desire to

testify to his trial attorney, Richard Lovett Brown. If indeed Mr. Brown's failure to introduce evidence of the true circumstances of Mr. Harris' death was not due to his own ineffectiveness, as outlined in Argument IX, but his inability to discover such evidence, such inability was a direct result of the State's wrongful withholding of that very evidence.

Had the information held by the State been provided to Mr. Downs, he would have introduced this evidence at trial as well as evidence that he was involved in the conspiracy to murder Mr. Harris, but that he was not present at the time of the murder. He would have testified that Larry Dee Johnson actually murdered Mr. Harris. Mr. Downs would have further testified that Mr. Harris' murder was not ordered by Mr. Garelick in order to obtain the proceeds of a life insurance policy (the theory upon which the state relied), but was, rather, ordered by Harold Haimowitz in order to prevent Mr. Harris from testifying regarding the involvement of certain persons, including Mr. Haimowitz, in illegal transactions and in retaliation for Mr. Harris' romantic involvement with Mr. Haimowitz' wife.

Had the State permitted Mr. Brown to properly present Mr. Downs' case he would have shown to the jury that the State's case had not been proven beyond a reasonable doubt and was, in fact, inaccurate. He would have shown to the jury that Mr. Johnson was the actual shooter and that Mr. Downs' involvement was limited to the conspiracy.

ARGUMENT III

THE JURY WAS IMPROPERLY INSTRUCTED ON THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS INEFFECTIVE FOR NOT PROPERLY PRESERVING THIS CLAIM.

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

> 3. The crime for which the defendant is to be sentenced was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.

(R2. 1136). This instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments. The jury instruction failed to give the jury meaningful guidance as to what was necessary to find this aggravating factor present. Jackson (Andrea) v. State, 19 Fla. L. Weekly S215 (1994).

In James the Florida Supreme Court held: (1) Espinosa v. Florida, 112 S. Ct. 2926 (1992), constituted new law under Witt v. State, 387 So. 2d 922 (Fla.), cert. denied 101 S.Ct. 796 (1980); and, (2) where a capital defendant has objected to overly broad or misleading jury instructions and has pursued those objections upon appeal, it "would not be fair to deprive him of the Espinosa ruling." Here, Mr. Downs was represented by Mr. Roberto Arias at the time this instruction was proposed by the State. Counsel failed to object. Counsel had no strategic

reason for his failure to object. He was ineffective for not doing so. To the extent the issue could have been presented on direct appeal, appellate counsel was ineffective for not raising the issue on direct appeal.

Mr. Downs was prejudiced by this error. The jury recommended death by only a slim 8-4 margin. The swing of only two votes would have resulted in the recommendation of a life sentence which the trial judge would have been required to follow due the presence of mitigation in the record. Barfield v. State, 402 So. 2d 377 (Fla. 1981).

ARGUMENT IV

THE TRIAL COURT OVERBROADLY AND VAGUELY INSTRUCTED MR. DOWNS' JURY ON THE PREVIOUS CONVICTION OF A VIOLENT FELONY AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Downs' penalty phase jury was given the following instruction regarding the "previous conviction of a violent felony" aggravating circumstance:

> 1. The defendant has been previously convicted of another felony involving the use or threat of violence to some person.
>
> The crime of robbery is a felony involving the use or threat of violence to another person.

(R2. 1135). This instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments.

It fails to define the elements of the aggravating factor which the jury must find beyond a reasonable doubt.

In James the Florida Supreme Court held: (1) Espinosa v. Florida, 112 S. Ct. 2926 (1992), constituted new law under Witt v. State, 387 So. 2d 922 (Fla.), cert. denied 101 S.Ct. 796 (1980); and, (2) where a capital defendant has objected to overly broad or misleading jury instructions and has pursued those objections upon appeal, it "would not be fair to deprive him of the Espinosa ruling." Trial counsel failed to properly object to this instruction. Trial counsel had no strategic reason for his failure to object. He was ineffective for not doing so. To the extent the issue could have been presented on direct appeal, appellate counsel was ineffective for not raising the issue on direct appeal.

Mr. Downs was prejudiced by this error. The jury recommended death by only a slim 8-4 margin. The swing of only two votes would have resulted in the recommendation of a life sentence which the trial judge would have been required to follow due the presence of mitigation in the record. Barfield v. State, 402 So. 2d 377 (Fla. 1981).

ARGUMENT V

THE JURY WAS IMPROPERLY INSTRUCTED ON THE PECUNIARY GAIN AGGRAVATING FACTOR, IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury was given the following instruction regarding the pecuniary gain aggravating factor:

> 2. The crime for which the defendant is to be sentenced was committed for financial gain.

(R2. 1135).

This instruction violates Espinosa v. Florida, 112 S. Ct. 2926 (1992); Stringer v. Black, 112 S. Ct. 1130 (1992); Sochor v. Florida, 112 S. Ct. 2114 (1992); Maynard v. Cartwright, 108 S. Ct. 1853 (1988), and the Eighth and Fourteenth Amendments. The jury instruction failed to give the jury meaningful guidance as to what was necessary to find this aggravating factor present. Mr. Downs is entitled to Rule 3.850 relief.

In James the Florida Supreme Court held: (1) Espinosa v. Florida, 112 S. Ct. 2926 (1992), constituted new law under Witt v. State, 387 So. 2d 922 (Fla.), cert. denied 101 S.Ct. 796 (1980); and, (2) where a capital defendant has objected to overly broad or misleading jury instructions and has pursued those objections upon appeal, it "would not be fair to deprive him of the Espinosa ruling." Once again, counsel failed to properly object. Counsel had no strategic reason for his failure to object. He was ineffective for not doing so. To the extent the issue could have been presented on direct appeal, appellate

counsel was ineffective for not raising the issue on direct appeal.

Mr. Downs was prejudiced by this error. The jury recommended death by only a slim 8-4 margin. The swing of only two votes would have resulted in the recommendation of a life sentence which the trial judge would have been required to follow due the presence of mitigation in the record. Barfield v. State, 402 So. 2d 377 (Fla. 1981).

ARGUMENT VI

MR. DOWNS WAS DENIED A RELIABLE SENTENCING WHEN HIS JURY WAS IMPROPERLY INSTRUCTED THAT ONE SINGLE ACT SUPPORTED TWO SEPARATE AGGRAVATING FACTORS IN VIOLATION OF ESPINOSA V. FLORIDA, STRINGER V. BLACK, MAYNARD V. CARTWRIGHT, HITCHCOCK V. DUGGER, AND THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Downs' jury was instructed on both the aggravating factors of cold, calculated and premeditated and pecuniary gain. As the trial court properly observed, both factors were supported by the fact that the murder was a contract murder. This permitted impermissible "doubling" by the jury.

The Florida Supreme Court has consistently held that "doubling" of aggravating circumstances is improper. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981). The jury in Mr. Downs' case was instructed on both of the aggravating factors listed above. The "doubling" of aggravating circumstances was flatly improper. The Florida Supreme Court has

"repeatedly held that application of both of these aggravating factors is error where they are based on the same essential feature of the capital felony." Bello v. State, 547 So. 2d 914, 917 (1989). These aggravating circumstances therefore were improperly doubled in this case.

The jury, a co-sentencer, relied upon both of these aggravating factors in reaching a recommendation for death. Mr. Downs' sentencing jury still voted for death by a narrow margin. The jury is a co-sentencer in Florida, and must be given adequate jury instructions. Johnson v. Singletary, No. 81, 121, Slip Op. at 2 (Fla. Jan. 29, 1993); Espinosa v. Florida, 112 S.Ct. 2926, 2928 (1992).

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

In James the Florida Supreme Court held: (1) Espinosa v. Florida, 112 S. Ct. 2926 (1992), constituted new law under Witt v. State, 387 So. 2d 922 (Fla.), cert. denied 101 S.Ct. 796 (1980); and, (2) where a capital defendant has objected to overly broad or misleading jury instructions and has pursued those objections upon appeal, it "would not be fair to deprive him of the Espinosa ruling." Counsel failed to properly object.

Counsel had no strategic reason for his failure to do so. He was ineffective for not doing so. To the extent the issue could have been presented on direct appeal, appellate counsel was ineffective for not raising the issue on direct appeal.

Mr. Downs was prejudiced by this error. The jury recommended death by only a slim 8-4 margin. The swing of only two votes would have resulted in the recommendation of a life sentence which the trial judge would have been required to follow due the presence of mitigation in the record. Barfield v. State, 402 So. 2d 377 (Fla. 1981).

The State adamantly argued these two aggravating factors during the sentencing phase. The State argued that the jury should consider each of these factors individually even though it knew that this was contrary to Florida law. Under these circumstances, the State simply cannot demonstrate that this gross Eighth Amendment error was harmless beyond a reasonable doubt. Clemons v. Mississippi, 110 S. Ct. 1441 (1990).

ARGUMENT VII

MR. DOWNS WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERT WHO EVALUATED HIM FOR THE NEW SENTENCING FAILED TO CONDUCT PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATIONS RESULTING IN THE DEPRIVATION OF MR. DOWNS' RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION.

A criminal defendant is entitled to expert psychiatric assistance when the state makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). Florida law made Mr. Downs' mental condition relevant to both guilt/innocence and sentencing: (a) specific intent; (b) statutory mitigating factors; (c) aggravating factors; and (d) myriad nonstatutory mitigating factors. What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1976)(quoting United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974)). When mental health is at issue, as it is here, there is a duty to conduct proper investigation into the defendant's mental health background, and to assure that the defendant is not denied a professional and professionally conducted mental health evaluation. See State v. Michael, 530 So. 2d 929 (Fla. 1988). A mental health

professional cannot set their own standards for mitigation, but they must be guided by the law and professional norms.

When asked on cross-examination if Mr. Downs suffered from "extreme emotional distress," Dr. Krop responded, "that I reserve the use of extreme for individuals who are psychotic or organically impaired, or mentally retarded" (R2. 889). This is not the legal standard.

A qualified mental health expert serves to assist the defense "consistent with the adversarial nature of the fact-finding process." Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990). Under Florida law, an indigent defendant is entitled to an appointed mental health expert to assist in the preparation of a defense. Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla. 1 DCA 1991).

Here, a wealth of mental health mitigation was readily available. A competent mental health expert who evaluated Mr. Downs has found both statutory and non-statutory mitigating mental health factors. Had an adequate examination and evaluation occurred at the time of the sentencing, the jury would have heard this overwhelming and available mitigation. A life recommendation would have resulted.

Mr. Downs was deprived of his constitutional right, a right afforded capital defendants in order to insure a reliable result. Accordingly, Mr. Downs is entitled to relief.

ARGUMENT VIII

MR. DOWNS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL PRETRIAL AND AT THE GUILT/INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE THE DEFENSE CASE AND CHALLENGE TO THE STATE'S CASE. A FULL ADVERSARIAL TESTING DID NOT OCCUR. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. DOWNS' CONVICTIONS AND DEATH SENTENCE ARE UNRELIABLE.

Newly discovered evidence reveals that Mr. Downs' trial counsel, Richard Lovett Brown, failed to present any meaningful evidence in support of his client's case or effectively challenge the State's case. Newly discovered evidence also reveals that, to the extent such evidence was available through the exercise of due diligence, Mr. Brown unreasonably failed to discover evidence which would have shown that Mr. Harris' death was connected to his cooperation with federal authorities' investigation of American National Bank. Mr. Brown failed to reasonably investigate Mr. Downs' case. Had he done so, evidence would have been presented to the jury which would have resulted in a different outcome.

Mr. Brown approached Mr. Downs after his arrest. The first time Mr. Downs met Mr. Brown, Mr. Brown asked the defendant to identify any persons involved in the alleged conspiracy to commit murder. Mr. Downs told Mr. Brown of a number of individuals, then informed Mr. Brown that the person behind the conspiracy was Harold Haimowitz. Upon hearing Mr. Haimowitz' name, Mr. Brown

immediately left. No arrangements were made for Mr. Brown to representant Mr. Downs. Mr. Brown did not see or speak to Mr. Downs again until Mr. Downs appeared at in Court at a hearing at which his indictment was amended to include one count of conspiracy to commit murder.

Prior to that hearing, however, Mr. Downs appeared in Court regarding the appointment of counsel. At that time, the presiding judge asked Mr. Downs if he was represented by counsel. Mr. Downs responded in the negative. The court then inquired whether Mr. Downs had adequate resources with which to retain counsel, to which Mr. Downs again replied in the negative. At this point, an assistant state attorney informed the Court that arrangements had been made to have Mr. Brown represent Mr. Downs.

Mr. Downs told Mr. Brown of these events. Mr. Downs also told Mr. Brown that Harold Haimowitz was behind the murder of Mr. Harris and the reasons Mr. Haimowitz had Mr. Harris murdered. Mr. Brown then retained an investigator to investigate Mr. Downs' allegations. Mr. Brown also undertook an independent investigation of Mr. Downs' statements and discovered a letter from Mr. Harris to Mr. Haimowitz' wife corroborating Mr. Downs' story regarding Mr. Harris' relationship with Mr. Haimowitz' wife. That letter subsequently disappeared.

Mr. Brown also discovered a witness who would have testified that Mr. Harris had been seen with Mrs. Haimowitz on a number of occasions. Mr. Brown developed a number of witnesses through

whom he could have corroborated Mr. Downs' version of the events. These witnesses were listed for trial.

Mr. Downs also informed Mr. Brown about the details of the conspiracy to murder Mr. Harris. Mr. Downs told Mr. Brown that Harold Haimowitz had ordered the murder of Mr. Harris and that Mr. Harris had information regarding illegal banking activities.

During voir dire, Mr. Brown moved to remove all persons from the jury who had professional or social contact with Mr. Haimowitz. Further, during his opening statement, Mr. Brown emphasized that he would present the entire story of Mr. Harris' death. The story which he described to the jury was the story which he had developed from the information he had received from Mr. Downs, but excluded the involvement of Mr. Haimowitz.

Also during voir dire, Harold Haimowitz, together with counsel, appeared at the courthouse and demanded an in camera hearing before the trial judge. At that hearing, counsel for Mr. Haimowitz argued to the court that Mr. Haimowitz should not be required to testify in Mr. Downs' trial because Mr. Haimowitz was not alleged to be the actual trigger person (notwithstanding the fact that Mr. Downs was also charged with conspiracy and Mr. Haimowitz was alleged by Mr. Downs to be a co-conspirator). Amazingly, the trial judge granted Mr. Haimowitz' request. Mr. Brown then asked for the record to be sealed.

The night before the State rested its case, Mr. Brown gathered a number of Mr. Downs' witnesses, including Mr. Downs' mother, in his office. While these witnesses were present, Mr.

Brown received a phone call. After receiving the phone call, Mr. Brown told the witnesses that they could leave, but that he would see them at trial and that "everything was taken care of." When Mr. Downs' mother returned home, she received an anonymous phone call telling her that Mr. Brown had "sold [her] son out". Mr. Downs' mother relayed this information to Mr. Downs. Mr. Downs then confronted Mr. Brown who told him that someone had tried to set him up in a motel room with some women, some people had tried to get to him and a lot of strange things had happened.

Following this conversation Mr. Brown walked into the courtroom and, notwithstanding his prior promise to the jury and his client's expressed wishes to testify, rested Mr. Downs' case without calling a single witness.

During the course of their investigation, the Duval County Sheriff's Office and/or the Duval County State Attorney's Office obtained information from federal authorities regarding the latter's investigation of illegal activities at the American National Bank and Mr. Harris' cooperation in that investigation.

At the time the State prosecuted Mr. Downs, the Duval County Sheriff's Office and/or the Duval County State Attorney's Office knew that, at the time he was murdered, Mr. Harris had agreed to implicate Harold Haimowitz and/or other prominent officers, employees, or associates of the American National Bank, in violations of federal law. Even after Mr. Downs was convicted, the State has continued to investigate the connection between activities at American National Bank and Mr. Harris' murder.

The State argued at trial, post-conviction, and resentencing, that Mr. Downs was deserving of death while Mr. Johnson was deserving of complete immunity because Mr. Johnson had told the truth when he testified that Mr. Garelick had ordered Mr. Harris' murder to collect insurance proceeds and that Mr. Downs was the actual "trigger man". Downs' theory at trial was that Mr. Johnson's story was not true. See, Scott v. Dugger,604 So. 2d 465 (Fla. 1992).

Mr. Brown unreasonably failed to discover the evidence developed during the investigation of Mr. Harris' connection to American National Bank.[3]

Prejudice is clear. From the time he was arrested through the time of his trial, Mr. Downs' attempted to tell authorities, then the jury, the true facts and circumstances surrounding the death of Forrest Jerry Harris. Mr Downs' expressed his desire to introduce this evidence to Mr. Brown. Mr. Brown refused to allow Mr. Downs to exercise do so, thereby compounding Mr. Brown's unreasonable decision not to present any evidence to support Mr. Downs' defense. This refusal was motivated by either by Mr. Brown's contingency fee arrangement, through which Mr. Downs would have paid Mr. Brown only if he was acquitted, therefore not if Mr. Downs was convicted of conspiracy, or because Mr. Brown had been intimidated or coerced into abandoning, and actually obstructing, Mr. Downs' defense.

---

[3]To the extent such information was withheld by State and could not have been discovered, Mr. Downs is entitled to relief under Brady.

Mr. Downs would have introduced evidence that he was involved in the conspiracy to murder Mr. Harris, but that he was not present at the time of the murder. He would have introduced evidence that Larry Dee Johnson actually murdered Mr. Harris. Mr. Downs would have further testified that Mr. Harris murder was not ordered by Mr. Garelick in order to obtain the proceeds of a life insurance policy (the theory upon which the state relied), but was, rather, ordered by Harold Haimowitz in order to prevent Mr. Harris from testifying regarding the involvement of organized crime figures, including Mr. Haimowitz, in illegal transactions and in retaliation for Mr. Harris' romantic involvement with Mr. Haimowitz' wife.

Following Mr. Downs' conviction, but prior to the time Mr. Downs' direct appeal was argued, Mr. Brown admitted to Mr. Downs that he wished he had never met Mr. Downs or become involved in his case, that it had ended his career, and that he had been pressured to, and did, abandon Mr. Downs' defense. Mr. Downs pursued these matters through a civil suit against Mr. Brown, a grievance proceeding against Mr. Brown,[4] and letters to the governor of the State of Florida. Until 1989, each time Mr. Brown was confronted with the allegation that someone had tried to intimidate or coerce him into dropping Mr. Downs' defense, he denied them.

---

[4]Mr. Brown received a reprimand for entering into a contingency fee arrangement in a criminal case.

Had Mr. Brown properly presented Mr. Downs' case he would have shown to the jury that the State's case had not been proven beyond a reasonable doubt and was, in fact, inaccurate. He would have shown to the jury that Mr. Johnson was the actual shooter and that Mr. Downs' involvement was limited to the conspiracy.

Mr. Downs told all of this information to his original post-conviction counsel. Said counsel confronted Mr. Brown, who again denied the allegations (Mr. Brown, in fact, refused to testify regarding these matters). Because of this denial, these matters could not have reasonably been investigated or presented at an earlier time.[5]

ARGUMENT IX

NEWLY DISCOVERED EVIDENCE ESTABLISHES THAT MR. DOWNS' CONVICTION AND DEATH SENTENCE ARE UNRELIABLE AND THAT HE IS THEREFORE ENTITLED TO A NEW TRIAL AND RESENTENCING.

In Jones v. State, 591 So. 2d 911 (Fla. 1991), the Florida Supreme Court ordered the circuit court "to have an evidentiary hearing on the claims that are based upon newly discovered evidence." Jones, 591 So. 2d at 916. The Court's opinion set out the standard for analyzing claims of actual innocence once the evidence was heard:

> At the hearing, the trial judge should consider all newly discovered evidence which would be admissible and determine whether such evidence, had it been introduced at the

[5]In the event the Court determines that such allegations could reasonably have been presented in Mr. Downs' prior post-conviction motion, prior counsel's decision not to investigate and present the same was unreasonable and Mr. Downs' was deprived of effective representation in that post-conviction proceeding.

> trial, would have probably resulted in an acquittal. In reaching this conclusion, the judge will necessarily have to evaluate the weight of both the newly discovered evidence and the evidence which was introduced at the trial.

Jones, 591 So. 2d at 916.

In Jones, this Court adopted a new standard for evaluating claims of newly discovered evidence, receding from the "conclusiveness test" of Hallman v. State, 371 So. 2d 482, 485 (Fla. 1979). The Court pointed out that the circuit court's initial ruling on Mr. Jones' newly discovered evidence claim was "clearly correct under the Hallman standard" because "[i]n light of Jones' confession as well as the other evidence introduced at the trial, it could not be said that newly discovered evidence would have conclusively prevented Jones' conviction." Jones, 591 So. 2d at 916. The Court ordered an evidentiary hearing under the new standard, a recognition that if Mr. Jones' allegations were true, Mr. Jones would be entitled to relief under the new standard. Mr. Downs is entitled to have his claim reviewed under the Jones standard.

Newly discovered evidence, as already covered in Arguments II and VIII, reveals that Mr. Downs is innocent of both the crime of which he was convicted and the sentence he received. This evidence would have shown that Mr. Harris' death was connected to his cooperation with federal authorities' investigation of American National Bank. That evidence, together with grounds upon which to challenge the State's case, existed. Had this

evidence been presented it probably would have would have resulted in a different outcome.

ARGUMENT X

MR. DOWNS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE TRIAL COURT'S AND STATE'S ACTIONS. TRIAL COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MITIGATING EVIDENCE AND FAILED TO ADEQUATELY CHALLENGE THE STATE'S CASE. COUNSEL'S PERFORMANCE WAS DEFICIENT AND AS A RESULT THE DEATH SENTENCE IS UNRELIABLE.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland requires a defendant to plead and demonstrate (1) unreasonable attorney performance, and (2) prejudice. In this motion, Mr. Downs pleads each. Given a full and fair evidentiary hearing, he can prove each.

Evidentiary resolution of this claim is proper, as the files and records in this case by no means show that Mr. Downs is "conclusively" entitled to "no relief" on this and related claims. See Lemon v. State, 498 So. 2d 923 (Fla. 1986) (emphasis added); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984).

Beyond the guilt-innocence stage, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned

determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

State and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. See Phillips v. State, 17 FLW S595 (Fla., Sept. 24, 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929, 930 (Fla. 1988); O'Callaghan v. State, 461 So. 2d 1154, 1155-56 (Fla. 1984). See also Eutzy v. Dugger, 746 F. Supp. 1492 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Harris v. Dugger, 874 F. 2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded for reconsideration, 104 S.Ct 3575, adhered to on remand, 739 F.2d 531 (11th Cir. 1984); King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 104 S.Ct 3575 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert.

denied, 471 U.S. 1016 (1985). See also Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991)) (counsel's performance may be found ineffective is s/he performs little or no investigation); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991) (an attorney is charged with knowing the law and what constitutes mitigation); Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989) (at a capital penalty phase, "[d]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and focus the jury on any mitigating factors"); Eldridge v. Atkins, 665 F.2d 228, 232 (8th Cir. 1981) ("[i]t is the duty of the lawyer to conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to guilt and degree of guilt or penalty"). As explained in Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985):

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the [sentencer] receiving accurate information regarding the defendant. Without that information, a [sentencer] cannot make the life/death decision in a rational and individualized manner. Here the [sentencer] was given no information to aid [him] in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to confidence in that decision.

Id. at 743 (citations omitted).

Counsel's highest duty is the duty to investigate and prepare. Where counsel does not fulfill that duty, the defendant

is denied a fair adversarial testing process and the proceedings' results are rendered unreliable. See, e.g, Kimmelman v. Morrison, 106 S.Ct at 2588-89 (1986) (failure to request discovery based on mistaken belief that the state was obliged to hand over evidence); Harris v. Dugger; Middleton v. Dugger; Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986) (little effort to obtain mitigating evidence), cert. denied, 107 S.Ct 602 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972) (refusal to interview alibi witnesses). See also Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate").

No tactical motive can be ascribed to an attorney whose omissions are based on ignorance, see Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), or on the failure to properly investigate or prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Downs' sentence of death, resting as it does on a jury vote of eight (8) to four (4), is the resulting prejudice. It cannot be said that

there is no reasonable probability that the results of the sentencing phase of the trial would have been different if the evidence discussed below had been presented to the sentencer. Strickland, 466 U.S. at 694. The key aspect of the penalty phase is that the sentence be individualized, focused on the particularized characteristics of the individual defendant. Penry v. Lynaugh, 488 U.S. 74 (1989); Gregg v. Georgia, 428 U.S. 153 (1976). This did not occur in Mr. Downs' case.

In Mr. Downs' capital penalty proceedings, substantial mitigation, both statutory and nonstatutory, never reached the judge or jury, both of whom are sentencers in Florida. See Espinosa v. Florida, 112 S. Ct. 2926 (1992). Mr. Downs was sentenced to die by a judge and jury who knew very little about him. Though Mr. Downs temporarily represented himself at the time of his resentencing for the limited purpose of proffering newly discovered evidence to demonstrate that he had been deprived of effective assistance of counsel at his original trial, his court-appointed attorney presented and argued the penalty phase itself. Counsel failed to adequately investigate and present the plethora of available mitigation. Because available mitigation was not presented to the sentencers, the resulting death sentence is rendered unreliable.

Crucial evidence regarding mental health mitigation never reached Mr. Downs' sentencers. Mr. Downs was entitled to competent expert psychiatric assistance when the state made his mental state relevant to guilt-innocence or sentencing. Ake v.

Oklahoma, 470 U.S. 68 (1985). Florida law made Mr. Downs' mental condition relevant to both guilt/innocence and sentencing in the following areas: (a) specific intent; (b) statutory mitigating factors; (c) aggravating factors; and (d) myriad nonstatutory mitigating factors. What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1976)(quoting United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974)). When mental health is at issue, as it is here, there is a duty to conduct proper investigation into the defendant's mental health background, and to assure that the defendant is not denied a professional and professionally conducted mental health evaluation. See State v. Michael, 530 So. 2d 929 (Fla. 1988).

A qualified mental health expert serves to assist the defense "consistent with the adversarial nature of the fact-finding process." Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990). Under Florida law, an indigent defendant is entitled to an appointed mental health expert to assist in the preparation of a defense. Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla. 1 DCA 1991).

Defense counsel failed to adequately investigate this avenue of mental health mitigation; this failure cannot be tactical,

because it was based upon ignorance. When trial counsel's failure to present mitigating evidence "result[s] not from an informed judgment, but from neglect," trial counsel has rendered constitutionally ineffective assistance. Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989); Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989).

Had counsel investigated, he would have found statutory and nonstatutory mitigation. Regarding mental health mitigation, an adequate investigation into Mr. Downs' past would have provided a defense expert with critical and necessary information in order to render a professionally adequate assessment of Mr. Downs' mental condition. Mr. Downs' confidential mental expert would have found the presence of mitigating factors and would have been available to testify and explain to Mr. Downs' jury the wealth of compelling mental health mitigation.

Both statutory and nonstatutory mitigating factors were readily supportable, yet they were not argued during the penalty phase because the information had never been gathered. Had defense counsel adequately investigated, a wealth of mitigation would have been discovered, and a mental health expert would have been able to testify to these conclusions. Without their testimony the jury was not permitted to view Mr. Downs as the individual he was.

Expert testimony is now available, based upon these materials, of substantial and compelling mitigation, both statutory and nonstatutory. Expert testimony can now explain how

the relevant mental health mitigating circumstances apply to Mr. Downs. This expert testimony will be able to substantiate and corroborate the findings of mitigation with information that went undiscovered at the time of Mr. Downs' resentencing.

All of the information upon which expert testimony can be presented was available at the time of Mr. Downs' resentencing. Without a tactic or strategic reason, defense counsel failed to adequately investigate Mr. Downs' background and life history. Had this been done, statutory and nonstatutory mitigation could have been presented to the jury from which the jury could have returned a life recommendation.

Although counsel presented extremely brief family member testimony during penalty phase, this testimony in no way forms a coherent picture of Mr. Downs' background. "The need for the respect due the uniqueness of the individual" is required by the Eighth and Fourteenth Amendments. Lockett v. Ohio, 438 U.S. 586, 605 (1978). "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987)(concurring opinion).

The Supreme Court of the United States has defined mitigation as "evidence relevant to the defendant's background or character or to the circumstances of the offense that mitigates

against imposing the death penalty." Penry v. Lynaugh, 109 S. Ct. 2934, 2946 (1989). Earlier, the Court had mandated that mitigation was to include "any aspect" of such evidence. Lockett, 438 U.S. at 604.

Counsel failed to adequately investigate and prepare for the penalty phase of the capital proceedings. Counsel failed to discover and use the wealth of mitigation available in Mr. Downs' background -- mitigating evidence which establishes compelling reasons for sympathizing with Mr. Downs -- mitigating evidence without which no individualized sentencing could occur. Any of the available material and relevant evidence discussed herein which counsel could have presented would have made a difference. Yet, ample mitigating evidence was easily accessible, trial counsel failed to present this evidence at the penalty phase of Mr. Downs' trial. Counsel's failure resulted from inadequate investigation and preparation.

Ernest Downs was sentenced to die by a judge and jury who never knew the true extent of the appalling conditions he grew up under and that he suffered a lifetime of abuse, rejection and abandonment. His father was an alcoholic who was constantly absent from the home and grossly neglected him emotionally and abused him physically. Ernest's mother was unable to provide him with any type of affection, love, support, or guidance thus leaving Ernest to virtually raise himself. Consequently Ernest was left wandering around struggling to be an adult while still a child.

Ernest Charles Downs was born August 11, 1948 to two economically, socially and emotionally impoverished parents who were unable to provide him even the most basic skills needed to cope with life or to develop healthy meaningful relationships. Ernest's chances in life were immediately impaired due to the negligent and often violent behavior of his father. William C. Downs (Bill) was a chronic alcoholic who, when in the household, displayed an uncontrollable temper which resulted in brutal beating for both Jackie and the children. Ernest's mother, Jacqueline C. Peters (Jackie), a submissive, passive and often fatalistic person was unable to protect her children from the ugly violence that engulfed them on a day to day basis. It was under these horrible conditions that Ernest was provided with the role models that would forever shape his understanding of the world around him. Throughout his life Ernest struggled to create some semblance of social normalcy and stability yet without the proper social tools and fostering he was emotionally crippled and unable to succeed. Since Bill and Jackie failed to provide Ernest with emotional support, positive reinforcement, admiration or genuine love he was literally tossed into the world without the luxury of parental guidance.

There is a cyclical pattern of physical, emotional, and alcohol abuse in this family which can be traced across three generations thus offering an explanation as to why Jackie was unable to properly parent Ernest. Ernest's grandmother, Bobby Jo Michaels (Nanny), married when she was just thirteen years of

age. Within the first five years of her marriage Nanny gave birth to a boy and three girls. Nanny's son was still born and her second daughter, Betty Jo, died asleep in her crib. To this day no one is able to provide an explanation for these mysterious deaths. When Jackie was five years of age her father was killed and before she reached sixteen Nanny would marry three more times. Each of Jackie's step-fathers were alcoholics who beat and abused Nanny. In order to escape the madness, Jackie dropped out of school and married Bill Downs at the young age of sixteen. Bill, like Jackie's step-fathers, was a violent and unpredictable alcoholic who brutally beat her and Ernest.

Less than a year after their marriage, Jackie gave birth to Ernest. Thus Jackie was never provided the opportunity to develop much beyond that of a child herself. When she was thrown into the demanding life of parenthood her perceptions of what a parent should be were greatly distorted. Jackie had a myriad of personal problems including mental instability. She herself was the victim of a marriage riddled with extensive neglect and poverty.

Bill was unable to provide his family with a stable environment. He continuously uprooted the family moving them from city to city and state to state. The constant moving fed into the family's instability and further impaired Ernest's already sub-par development. Throughout Ernest's childhood the family never lived in one place for more than a few months at a time. In addition, Bill was unable to support his family

financially. He worked as a construction worker and followed the company wherever there was work. When the construction jobs were completed, he drove trucks or taxi cabs to make ends meet. Although Bill was able to draw a paycheck he refused to provide Jackie with money to buy the bare necessities for herself or Ernest. Instead he took what little money he was able to earn and spent it on other women and liquor.

Bill was a hard core alcoholic who had violent outbursts at the least provocation. He was known to react fiercely to sudden gestures or comments. Jackie and Ernest could never predict what would set him off. When drunk, Bill brutally beat Jackie leaving bumps and bruises all over her body. It was common place for Bill, while in a drunken rage, to go absolutely berserk. In an attempt to protect Ernest, Jackie hid him in his bedroom when Bill was home. Every night the beatings would begin and Ernest would crawl under the bed and cry while waiting for the mind wrenching violence to cease. Leaving Ernest under his bed, alone and frightened, was Jackie's only way of drawing her husbands savage assaults away from Ernest. The walls of the house, however, would be riddled with holes resulting from Bill's wild punches which left Ernest with a permanent reminder of the dreadful violence that would soon return.

Bill also brutally beat and abused Ernest despite Jackie's efforts to protect him. Ernest was never certain when his father would blow up in a rage. On one occasion, Ernest was sent to the grocery store to buy a dozen lemons. To his great misfortune the

produce clerk miscounted and placed thirteen lemons in his bag. When he returned home, Bill saw the extra lemon and became so enraged that he slapped Ernest with such force that he knocked him up and across the kitchen table.

On another occasion, Ernest parked his bicycle in the wrong place. When Bill returned home in a drunken state, he grabbed Ernest by both wrists with one hand and with the other he brutally whipped Ernest with a leather strap. These torturous beatings left Ernest with welts on his face, arms, bottom and legs.

The ruthless beatings and emotional chaos manifested itself in the form a of bed wetting disorder which Ernest suffered from through the age of fourteen. Of course, the bed wetting added to the already devastating humiliation Ernest suffered every day of his life. To add to his embarrassment and shame, Ernest was taunted and teased by his family because he "pee-peed the bed." Jackie, too emotionally and intellectually immature to consider an alternative, rubbed Ernest's face in his urine saturated bed sheets. Jackie also forced Ernest to wear his urine stained clothing to school. She also tried other methods to modify his behavior, such as, verbal humiliation and spankings. Finally, Jackie took Ernest to see a doctor. After exploring all other possibilities, the doctor concluded and explained to Jackie that the dysfunctional conditions of Ernest's home life were the root of his bed wetting problems.

Ernest also suffered from severe headaches. As a child he was forced to endure from excruciatingly painful headaches which plagued Ernest throughout his life. Tortured by the constant beatings, emotional upheavals, and continual moving Jackie also spiraled down into depression and alcohol abuse. The result was predictable -- Jackie further neglected her children. She would rarely go home to care for Ernest's needs. Instead, she spent her time at a friends house or out drinking. Consequently, Ernest found himself totally alone and without guidance or love. In order to raise money for food and clothing he built a shoe shine box and stool which he would take to a local cafeteria. Ernest would spend his nights along the beach or in the streets in order to avoid the alcohol and violence riddled home life. Ernest was totally abandoned by both his parents and was, while still a child, left to his own devices to survive.

Bill thrived on humiliating and belittling the family. He constantly made them feel stupid. He also overtly involved himself with other women. At one point Bill moved his mistress, Henrietta, directly across the street from his home with Jackie. Together Jackie and Henrietta's children played together out in the street. Jackie never uttered a single objection nor did she attempt to take control of her life. It never even occurred to her that she was capable of obtaining employment or thinking for herself. In Jackie's mind she was born to suffer through the humiliation and disgrace in quiet submission.

As a child, Ernest became completely obsessed with winning the love, attention and devotion of his father. When Bill was in the home Ernest would try to follow him around and when Bill would leave the family, for one of his many week long absences, Ernest would be devastated. Throughout his childhood Ernest talked about how one day his father was going to care for him. Tragically, Bill's lifestyle relegated Ernest to little more than an irritating burden.

As Ernest's desperate attempts to get his father's attention persisted, Bill would respond by chastising and humiliating him. Instead of offering Ernest hugs, kisses, security and other symbols of authentic parental love, Bill only paid attention to Ernest when he would become violent. Meanwhile it was becoming clear to those who truly knew Ernest that he was a boy who had been deeply hurt by father's abandonment. He loved his father dearly, despite his rejection, and would dream of the day when he love him in return.

Bill eventually decided to completely abandon Ernest, his younger sister Darlene and Jackie who was now pregnant with their third child. Bill and Henrietta picked up and left Jackie and her children without any financial support and with hardly a moments remorse. Jackie, stripped of her self worth, was helpless to change the circumstances that she now faced. She was so impoverished that her neighbors took food to her home so the she could feed her family. The Red Cross was called in to intercede on her behalf and they called Jackie's mother. It was

then that Nanny drove from Kansas to save her daughter from the despair, hunger, poverty and abandonment. Nanny collected Jackie and her children so that they could live with her in Salina, Kansas.

Being uprooted from his home in Titusville could not have come at a more inopportune time for Ernest. He had just begun to show signs that he might be able to overcome the devastating side affects of his bizarre and perverse home life. His work with the staff members of the Titusville newspaper was the first and only positive form of social interaction Ernest ever knew. Just when he was beginning to develop his self esteem and an understanding of society's norms he was ripped away and once again thrown into a confusing world of alcohol and savagery.

Once in Kansas, Ernest was unable to rise above the crisis that again permeated his life. Nanny's last husband, Oliver Paul Michaels (O.P.), was also a violent alcoholic who would pelt and pummel Nanny. O. P. Michaels was an angry individual described by family and friends as a "sleazy perverted little man who should have been institutionalized." Jackie tried her best to never leave her children alone with O.P. because she knew of his past attempts to molest her children. The move to Kansas was such a severe blow to Ernest that he was never able to fully recover.

While in Kansas, Ernest's anger had become so intense that he was no longer able to sit back and ignore the furious drinking and fighting. He intervened when O.P. beat Nanny and Jackie. As

a result, O.P. held Ernest in contempt. In addition, Ernest had to separate Jackie and Nanny from time to time when they were drunk and fighting. In sum, Nanny's home was another in a long line of nightmarish experiences for Ernest.

The emotional abuse, coupled with his history of neglect and physical abuse, sent Ernest tumbling downward in a spiral of doom. As before, Ernest's mother was unable to recognize her son's, now deep seated, emotional distress and only hoped that Ernest would be caught by a safety net. However, Ernest was left to mature independently without any positive guidance or understanding of right and wrong. This combination left Ernest in a world of confusion without being able to understand what was happening to him.

At this point Ernest had become a seriously disturbed child. Ernest was unable to conform to the strict rules of the Salina public school system and within the first month he was absent a total of eight days. Without any parental input or concern Ernest decided to quit school. After leaving school, Ernest ran away, returned to Florida, and began searching for his father. Desperate for money he took a job with a traveling circus instead and spent several months on the road. Frustrated, tired, and hungry, Ernest was forced to return to Jackie and the horrible situation in Kansas. Ernest wanted terribly to find someone or someplace that could provide him with acceptance, stability, and love. Ernest wanted, more than anything in the world, everyone to stop torturing and rejecting him.

Ernest immediately sought an escape from the riotous family life he was once again subjected to when he returned to Salina, Kansas. Feeling desperate, Ernest enlisted in the United States Army. He lied about his age when he completed the application stating that he was eighteen years old when in fact he was only sixteen. Unable to cope with the rigidity of the army, however, Ernest went AWOL on several occasions. Ernest was eventually arrested by the Daytona police for vagrancy. While incarcerated he attempted to commit suicide. This was the first of many suicide attempts. Ernest was unable to understand why he could not fit in with "normal" society. He was angry, confused, lonely, sad, frustrated and at the time his only coping skill was to run away.

Ernest went AWOL for the last time in 1965. While hungry and without money Ernest attempted to make his way back to his mother. Ernest ended up robbing a store clerk with a toy gun. He was sentenced to serve time at the Kansas State Industrial reformatory (KSIR). However, since the victim testified that Downs did not intend to harm her, Ernest was eventually given three years probation. Since the court realized that Ernest's home was dysfunctional he was ordered to serve his probation in a foster home.

Ernest remained committed to his most important desire--persuading his family to love him, accept him, and to care for him. When coupling Ernest's intense focus on this goal with the naivety of the foster parents the result once again was

disastrous. The foster parents were unaware of Ernest's inhumane background and the extraordinary and intensive intervention needed to overcome the deeply ingrained damage done to Ernest.

The foster home was unaware that Ernest had lived his life without a true father figure, sincere demonstrations of love from his mother, guidance from a patient and caring adult, an accurate understanding of right and wrong, or examples of healthy and open relationships between emotionally stable people. The erroneous understanding the foster home created severely crippled any hopes of constructive communication between the foster parents and Ernest. Furthermore, the foster parent's prescription for social conformity was based solely on a fabricated understanding of Ernest Downs.

During his stay at KSIR Ernest tried to improve himself. He earned his high school equivalency certificate and completed courses in welding, drafting and blueprint reading. He entered chess and tennis tournaments winning trophies in each. Ernest was such a model prisoner that he was transferred to honor camp. Ernest was an emotional child at the time he entered the Kansas prison system. He was never provided with the proper and acceptable definition of social interaction and right and wrong. His life experience was contaminated with violence, hate, deceit, rejection, abandonment, abuse, and emotional anguish.

It was in prison that Ernest formed his only long term relationship. He was befriended by Larry Dee Johnson (Larry) an individual he thought he could trust for the rest of his life.

In an attempt to gain the admiration of a father figure, Ernest began running with Larry. Because Ernest never had a father figure to provide him with the love, affection, attention, guidance, and quality time every boy needs, he developed an uncontrollable urge to gain the respect and attention of his peers as a substitute for emotional shortcomings. As Ernest was admired by Larry and looked up to, his craving for respect and acceptance ballooned out of control. Consequently, Ernest consumed the notion of belonging with an infinite appetite. As the satisfaction and emotional comfort he achieved through the respect and what he thought to be genuine love from his friend completely conquered his thinking pattern, Ernest's naivety got the best of him and he unknowingly found himself under the control of Larry.

With only a few months left to finish his prison term, Ernest and Larry escaped from honor camp. The were later arrested in Oklahoma and were charged for driving a stolen car across state lines and Ernest was sentenced to serve time in federal prison. After 18 months, Ernest was paroled from the federal penitentiary because he helped save a guard's life during a prison riot. He was then transferred to a Kansas prison to complete his sentence for the robbery in Wichita. In early 1970 Ernest was paroled.

Ernest returned to Jacksonville where his mother was now living with her second husband Edwin Peters. He successfully completed his parole, receiving both state and federal

certificates. Bill Downs was also, at the time, living and working in Jacksonville. Ernest saw this as a perfect opportunity to fulfill his life long desire -- gain acceptance from his father.

Ernest hired on as a laborer with the construction company that employed his father. Instead of catching up on a life time of missed opportunities, Bill again rejected Ernest. Bill made no effort to hide his lack of enthusiasm for Ernest's arrival and offered him no support in his efforts to adapt to his new environment. Ernest was eager to become a member of his father's family and make the most of the opportunity to spend time with him, yet Bill proceeded to treat Ernest as unfairly as he had done while Ernest was a little boy. Instead of assisting Ernest's adjustment and accepting him as his own flesh and blood, Bill continued to chastise and emotionally batter Ernest without justification. Ernest became frightened and confused. He had waited so very long for the opportunity to finally have a loving and stable relationship with his father and now he was once again rejecting him.

Ernest left the company and painfully realized that he would have to seek acceptance elsewhere. In August 1970, Ernest married Dorothy Smith. Ernest somehow maintained his focus on his lifelong goal -- to be involved in a loving family. Only now Ernest would have to achieve this dream with Dorothy. Not long after the marriage Ernest and Dorothy became parents when Kimberly Downs was born in 1972.

Ernest was trying to create that stability he longed for and this was reflected in his actions as a husband, provider and friend. This, Ernest perceived, was the perfect opportunity to participate in the type of family he never had. Ernest hoped to provide Dorothy and Kimberly with the stable father figure that he never had. However, his world once again came crashing down when he was rejected by his wife. He learned that Dorothy was not really interested in Ernest but only in having a child. Once the child was born Dorothy had no desire for Ernest to be a part of her life. The loss of his wife was a terrible blow that left Ernest once again staggering through life in search of happiness and acceptance.

The latest in a life-long series of setbacks dealt to Ernest was coupled with the return of Larry Johnson. Larry was given a job by the same construction company where Ernest worked. Consequently, Ernest found himself spending more and more time with Larry and less time concentrating on his never ending struggle to overcome all of the setbacks.

Larry influenced Ernest in such a way that it shattered the foundation he had spent years trying to nurture and maintain. Ernest's grandmother and mother both strongly disliked Larry because he carried guns about the house. Once after Edwin beat Jackie, Larry offered to kill him for her. Both Nanny and Jackie sensed that Larry was nothing but trouble and asked Ernest to stop spending time with Larry. Again, Ernest would find himself in chaos and upheaval.

Ernest clung to his dream of a stable life. He attempted to build a second marriage with Robin Christian, which would prove disastrous. Robin was an unstable woman who had romantic affairs with men and women, while married to Ernest. Ernest and Larry were spending more and more time together and Ernest began to neglect Robin. When Ernest did return home, many times Robin was not home. Consequently, Ernest spend an ordinate amount of time trying to find his wife. Finally, when his marriage was at the edge of the precipice, Ernest was to sustain the final blow which would bring him crashing down. His landlord found pictures of Ernest's wife Robin, engaged with her lesbian lovers. Ernest's ego, fragile since childhood could not bear the brutal news. For Ernest it meant that he was not man enough for Robin and this deceit tormented his soul.

Ernest continued his struggle to establish stability. All of his fruitful attempts fell short due to his inability to comprehend and digest the lifelong rejection and abandonment. This left Ernest to wander around in a seriously confused and troubled state. He honorably continued his efforts to raise himself above his past and conquer the many evil forces ripping at his efforts. The loss of his wife continued to linger and weigh heavy on his now bent and twisted mind. Unfortunately, the combination of the grief he felt toward his wife and the demented forces rising from his childhood took a wrenching grip and totally destroyed Ernest -- never to set him free.

Ernest's dysfunctional family situation was a major contributing factor to the serious problems he faced in his later life. The plethora of mitigating evidence that was unavailable for their consideration surely would have tipped the scales in favor of a life recommendation and provided a sound basis for the judge to find that many valid mitigating circumstances existed in this case. Had defense counsel properly and adequately investigated and presented this evidence to the judge and jury at the penalty phase of Mr. Downs' resentencing, it would have resulted in a life sentence.

Trial counsel also failed to present substantial evidence regarding Mr. Johnson's role as "trigger man". Mr. Brown approached Mr. Downs after his arrest. The first time Mr. Downs met Mr. Brown, Mr. Brown asked the defendant to identify any persons involved in the alleged conspiracy to commit murder. Mr. Downs told Mr. Brown of a number of individuals, then informed Mr. Brown that the person behind the conspiracy was Harold Haimowitz. Upon hearing Mr. Haimowitz' name, Mr. Brown immediately left. No arrangements were made for Mr. Brown to represent Mr. Downs. Mr. Brown did not see or speak to Mr. Downs again until Mr. Downs appeared at in Court at a hearing at which his indictment was amended to include one count of conspiracy to commit murder.

Prior to that hearing, however, Mr. Downs appeared in Court regarding the appointment of counsel. At that time, the presiding judge ask Mr. Downs if he was represented by counsel.

Mr. Downs responded in the negative. The court then inquired whether Mr. Downs had adequate resources with which to retain counsel, to which Mr. Downs again replied in the negative. At this point, an assistant state attorney informed the Court that arrangements had been made to have Mr. Brown represent Mr. Downs.

Mr. Downs told Mr. Brown of these events. Mr. Downs also told Mr. Brown that Harold Haimowitz was behind the murder of Mr. Harris and the reasons Mr. Haimowitz had Mr. Harris murdered. Mr. Brown then retained an investigator to investigate Mr. Downs' allegations. Mr. Brown also undertook an independent investigation of Mr. Downs' statements and discovered a letter from Mr. Harris to Mr. Haimowitz' wife corroborating Mr. Downs' story regarding Mr. Harris relationship with Mr. Haimowitz' wife. That letter subsequently disappeared. He also discovered a witness who would have testified that Mr. Harris had been seen with Mrs. Haimowitz on a number of occasions. Mr. Brown developed a number of witnesses through whom he could have corroborated Mr. Downs' version of the events. These witnesses were listed for trial.

Mr. Downs also informed Mr. Brown about the details of the conspiracy to murder, Mr. Harris. Mr. Downs told Mr. Brown that Harold Haimowitz had ordered the murder of Mr. Harris and that Mr. Harris had information regarding illegal banking activities.

During voir dire, Mr. Brown moved to remove all persons from the jury who had professional or social contact with Mr. Haimowitz. Further, during opening argument, Mr. Brown

emphasized that he would present the entire story of Mr. Harris death. The story which he described to the jury was the story which he had developed from the information he had received from Mr. Downs, but excluded the involvement of Mr. Haimowitz.

Also during voir dire, Harold Haimowitz, together with counsel, appeared at courthouse and demanded an in camera hearing before the trial judge. At that hearing, counsel for Mr. Haimowitz argued to the court that Mr. Haimowitz should not be required to testify in Mr. Downs' trial because Mr. Haimowitz was not alleged to be the actual trigger person (notwithstanding the fact that Mr. Downs was also charged with conspiracy and Mr. Haimowitz was alleged by Mr. Downs to be a co-conspirator). Amazingly, the trial judge granted Mr. Haimowitz' request. Mr. Brown then asked for the asked for the record to be sealed.

The night before the State rested its case, Mr. Brown gathered a number of Mr. Downs' witnesses, including Mr. Downs' mother, in his office. While these witnesses were present, Mr. Brown received a phone call. After receiving the phone call, Mr. Brown told the witnesses that they could leave, but that he would see them at trial and that "everything was taken care of." When Mr. Downs' mother returned home, she received an anonymous phone call telling her that Mr. Brown had "sold [her] son out".

Mr. Downs' mother relayed this information to Mr. Downs. Mr. Downs then confronted Mr. Brown who told him that someone had tried to set him up in a motel room with some women, some people

had tried to get to him, and a lot of strange things had happened.

Following this conversation Mr. Brown walked into the courtroom and, notwithstanding his prior promise to the jury and his client's expressed wishes to testify, rested Mr. Downs' case without calling a single witness.

During the course of their investigation, the Duval County Sheriff's Office and/or the Duval County State Attorney's Office obtained information from federal authorities regarding the latter's investigation of illegal activities at the American National Bank and Mr. Harris' cooperation in that investigation.

At the time the State prosecuted Mr. Downs, the Duval County Sheriff's Office and/or the Duval County State Attorney's Office knew that, at the time he was murdered, Mr. Harris had agreed to implicate Harold Haimowitz and/or other prominent officers, employees, or associates of the American National Bank, in violations of federal law.

Even after Mr. Downs was convicted, the State has continued to investigate the connection between activities at American National Bank and Mr. Harris' murder. The State argued at trial, post-conviction, and resentencing, that Mr. Downs was deserving of death while Mr. Johnson was deserving of complete immunity because Mr. Johnson had told the truth when he testified that Mr. Garelick had ordered Mr. Harris' murder to collect insurance proceeds and that Mr. Downs was the actual "trigger man". Mr.

Downs' theory at trial was that Mr. Johnson's story was not true. See, Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

It is probable that this evidence would have led to a different result. From the time he was arrested through the time of his trial, Mr. Downs' attempted to tell authorities, then the jury, the true facts and circumstances surrounding the death of Forrest Jerry Harris. Mr Downs' expressed his desire to introduce this evidence to Mr. Brown. Mr. Brown refused to allow Mr. Downs to exercise do so, thereby compounding Mr. Brown's unreasonable decision not to present any evidence to support Mr. Downs' defense. This refusal was motivated by either by Mr. Brown's contingency fee arrangement, through which Mr. Downs would have paid Mr. Brown only if he was acquitted, therefore not if Mr. Downs was convicted of conspiracy, or because Mr. Brown had been intimidated or coerced into abandoning, and actually obstructing, Mr. Downs' defense. This evidence was not discovered until after Mr. Downs' prior Rule 3.850 motion. Accordingly, it is properly raised herein.

Mr. Downs would have introduced evidence that he was involved in the conspiracy to murder Mr. Harris, but that he was not present at the time of the murder. He would have introduced evidence that Larry Dee Johnson actually murdered Mr. Harris. Mr. Downs would have further testified that Mr. Harris murder was not ordered by Mr. Garelick in order to obtain the proceeds of a life insurance policy (the theory upon which the state relied), but was, rather, ordered by Harold Haimowitz in order to prevent

Mr. Harris from testifying regarding the involvement of organized crime figures, including Mr. Haimowitz, in illegal transactions and in retaliation for Mr. Harris' romantic involvement with Mr. Haimowitz' wife.

Following Mr. Downs' conviction, but prior to the time Mr. Downs' direct appeal was argued, Mr. Brown admitted to Mr. Downs that he wished he had never met Mr. Downs or became involved in his case, that it had ended his career, and that he had been pressured to, and did, abandon Mr. Downs' defense. Mr. Downs pursued these matters through a civil suit against Mr. Brown, a grievance proceeding against Mr. Brown,[6] and letters to the governor of the State of Florida. Until 1989, each time Mr. Brown was confronted with the allegation that someone had tried to intimidate or coerce him into dropping Mr. Downs' defense, he denied them.

Had counsel effectively represented Mr. Downs, he would have shown to the jury that Mr. Downs' role as "trigger man" had not been proven beyond a reasonable doubt and was, in fact, inaccurate. He would have shown to the jury that Mr. Johnson was the actual shooter and that Mr. Downs' involvement was limited to the conspiracy. Even had his unjust conviction stood, Mr. Downs would have been entitled to a sentence other than death. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

---

[6]Mr. Brown received a reprimand for entering into a contingency fee arrangement in a criminal case.

ARGUMENT XI

MR. DOWNS WAS DENIED A RELIABLE SENTENCING IN HIS CAPITAL TRIAL BECAUSE THE SENTENCING JUDGE AND THE FLORIDA SUPREME COURT FAILED TO ADDRESS THE EXISTENCE OF STATUTORY AND NONSTATUTORY MITIGATION ESTABLISHED BY THE EVIDENCE IN THE RECORD, CONTRARY TO PARKER V.DUGGER, 111 S. CT. 731 (1991), THE EIGHTH AND FOURTEENTH AMENDMENTS.

During his resentencing, Mr. Downs presented evidence that he acted under the influence of emotional distress brought on by seeing his wife in pornographic pictures, (R2. 778, 837-38, 870, 873); that he was honorably discharged from the Army, (R2. 868, 904); that he had a difficult childhood (R2. 751, 768, 780, 867, 870, 900, 902, 926); that he was a model prisoner (R2. 682-84, 780, 820, 853-54, 872), that he had "a lot of strengths as far as rehabilitation" (R2. 872), that he was and remains a good father (R2. 897-98), that he was artistic (R2. 901, 926-27), that he was a magician (R2. 770), that he helped support his mother and siblings (R2. 751, 903, 927), that he cares about his family (R2. 780, 841-42, 912), that he was a good person (R2. 780, 842), that he was a good worker (R2. 788-89, 792), that he was not the triggerman (R2. 705, 708, 716, 739, 750, 957-58); and that he protected an officer during a prison riot (R2. 938-40). The evidence was uncontradicted and unimpeached.

This evidence constitutes mitigation. Cheshire v. State, 568 So. 2d 908 (Fla. 1990). The jury and judge were required to weigh these mitigating factors against the aggravating circumstances. The circuit court judge did not address this mitigation (R2. 312-13). The judge failed to understand what

constitutes mitigation, and thus erred as a matter of law in not discussing and weighing the unrefuted mitigation.

The circuit court refused Mr. Downs' request to instruct the jury on the mitigating factor of "immunity and deals with the other defendants" (R2. 1049). According to the trial judge, Mr. Downs could argue it, but that it was not a proper instruction. Id. However, closing argument is not the law and it is not a chance to present evidence. The court's refusal to instruct the jury on this mitigating factor was erroneous. The judge considered and rejected the mitigating factor as a matter of law, and precluded the jury from the opportunity to determine whether this mitigating circumstance should be weighed in returning a verdict.

Moreover, the jury was precluded from weighing this mitigator; this violated Hitchcock v. Dugger, 481 U.S. 393 (1987). Mr. Downs was deprived of the individualized sentencing required by the Eighth and Fourteenth Amendments and is entitled to a new sentencing hearing. Zant v. Stephens, 103 S. Ct. 2733, 2744 (1983); Eddings v. Oklahoma, 102 S. Ct. 869, 874-875 (1982); Lockett v. Ohio. Rule 3.850 relief should issue.

ARGUMENT XII

THE SHIFTING OF THE BURDEN OF PROOF IN THE JURY INSTRUCTIONS AT SENTENCING DEPRIVED MR. DOWNS OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS. COUNSEL'S FAILURE TO OBJECT WAS INEFFECTIVE ASSISTANCE.

A capital sentencing jury must be:

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

<u>State v. Dixon</u>, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Downs' capital proceedings. Mr. Downs' resentencing attorney requested the proper standard in a proposed jury instruction (R2. 280); however, the resentencing court denied Mr. Downs' request (R2. 1046). To the contrary, the burden was shifted to Mr. Downs on the question of whether he should live or die. Mr. Downs' jury was instructed to give Mr. Downs death unless Mr. Downs showed "sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist" (R. 1135, 1136). In so instructing a capital sentencing jury, the court injected misleading and irrelevant factors into the sentencing determination, thus violating <u>Hitchcock v. Dugger</u>, 481 U.S. 393 (1987); <u>Maynard v. Cartwright</u>, 486 U.S. 356 (1988). The court even sentenced to death Mr. Downs because the court "did not find the mitigating circumstances to overcome those

[aggravating circumstances]" (R. 1206). Mr. Downs had the burden of proving that life was the appropriate sentence. Mr. Downs' sentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury and the judge from assessing the full panoply of mitigation presented by Mr. Downs. For each of the reasons discussed above, the Court must vacate Mr. Downs' unconstitutional sentence of death.

Trial counsel did not object to this instruction. Trial counsel had no strategic reason for his failure to object. He was ineffective for not doing so. Appellate counsel was ineffective for not raising the issue on appeal.

ARGUMENT XIII

THE TRIAL COURT ERRED BY FAILING TO CONDUCT AN ADEQUATE FARETTA INQUIRY AS TO WHETHER MR. DOWNS MADE A VOLUNTARY, KNOWING AND INTELLIGENT WAIVER OF THE RIGHT TO COUNSEL, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The constitutional right of a defendant in a criminal proceeding to the effective assistance of counsel is required. Gideon v. Wainwright, 372 U.S. 335 (1963). It has also been established that a criminal defendant may waive the right to counsel and has the constitutional right to represent himself. Faretta v. California, 422 U.S. 806 (1975). However, in order to represent himself, the defendant must "knowingly and intelligently" relinquish the right to counsel:

> Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-

> representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.' Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct. at 242.

Faretta, 422 U.S. at 835. See also Johnson v. Zerbst, 304 U.S. 458, 464-465 (1938); Johnston v. State, 497 So. 2d 863, 868 (Fla. 1986).

The trial court should consider the following factors in determining whether a criminal defendant is aware of the dangers of proceeding pro se:

> (1) the background, experience and conduct of the defendant including his age, educational background, and his physical and mental health; (2) the extent to which the defendant had contact with lawyers prior to trial; (3) the defendant's knowledge of the nature of the charges, and the possible defenses, and the possible penalty; (4) the defendant's understanding of the rules of procedure, evidence and courtroom decorum; (5) the defendant's experience in criminal trials; (6) whether standby counsel was appointed, and the extent to which he aided the defendant; (7) whether the waiver of counsel was the result of mistreatment or coercion; or (8) whether the defendant was trying to manipulate the events of the trial.

United States v. Fant, 890 F.2d 408, 409-10 (11th Cir. 1989)(per curiam). "The ultimate test is not the trial court's express advice, but rather the defendant's understanding." Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986).

"While the right to counsel is in force until waived, the right of self-representation does not attach until asserted. In order for a defendant to represent himself, he must 'knowingly

and intelligently' forego counsel, and the request must be 'clear and unequivocal.'" Brown v. Wainwright, 665 F.2d 607, 610 (5th Cir. 1982)(emphasis in original).[7] Because the demand must be clear and unequivocal, the waiver must be equally clear and unequivocal.

A waiver of counsel requires that the accused know, and the court ensures that he knows, the full ramifications of such a waiver. See Faretta, 422 U.S. at 836; Johnson v. Zerbst; Fitzpatrick v. Wainwright, 800 F.2d at 1065-67; United States v. Fant, 890 F.2d at 409-10.

In a Faretta hearing, the trial judge has an affirmative duty to protect the essential rights of a defendant. As the Court explained in Holloway v. Arkansas, "'[u]pon the trial judge rests the duty of seeing that the trial is conducted with solicitude for the essential rights of the accused.'" 435 U.S. 475, 484 (1978).

The trial court committed fundamental constitutional error. Mr. Downs' waiver of counsel was an involuntary, and uninformed waiver of his right to counsel which had attached under the sixth and fourteenth amendments. Such error is presumed to be prejudicial per se, and not subject to a harmless error analysis. Powell v. Alabama, 287 U.S. 45 (1932); Gideon v. Wainwright, 372

---

[7] See also Faretta, 422 U.S. at 835; United States v. Brown, 591 F.2d 307 (5th Cir.), cert. denied, 442 U.S. 913 (1979); United States v. Jones, 580 F.2d 785 (5th Cir. 1978); Chapman v. United States, 553 F.2d 886, 893 (5th Cir. 1977); Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984); Fitzpatrick v. Wainwright, 800 F.2d 1057 (11th Cir. 1986).

U.S. 335 (1963); United States v. Cronic, 446 U.S. 648 (1984). Mr. Downs' subsequent sentence of death violated his rights to counsel and due process as guaranteed by the sixth and fourteenth amendments. Only by conducting a full and fair evidentiary hearing can these issues be elucidated for the Court.

A defendant competent to stand trial, may, nonetheless, be incompetent to waive counsel and to represent himself. Compare ABA Standard 7-4.1 with ABA Standard 7-5.3(d)(iii)[8]; see Westbrook v. Arizona, 384 U.S. 150 (1966); Pate v. Robinson, 383 U.S. 375 (1966). The Court failed to make an adequate Faretta inquiry, the need for which was clearly indicated by the record then before the Court thus depriving Mr. Downs of his constitutional right to a fair trial.

The test for competency to stand trial is "whether . . . [the defendant] has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding -- and whether he has a rational as well as factual understanding of the proceedings against him." Dusky v. United States, 362 U.S. 402 (1960)(emphasis supplied); Hill v. State, 473 So. 2d 1253 (Fla. 1985).[9] However, the mental competency required to waive counsel and for self-representation is greater and of a different kind than that required to stand trial. See ABA Standard 7-

---

[8]Standing Committee on Association Standards for Criminal Justice, Proposed Mental Health Standards (1984).

[9]Mr. Porter did not meet even this lower standard in that his mental illness made it impossible for him to communicate with counsel and make rational decisions regarding his defense.

5.3(d)(iii)[10]; Fitzpatrick v. Wainwright, 800 F.2d at 1066;

---

[10] Standard 7-5.3. Competence to Waive Counsel and to Proceed Without Assistance of Counsel

(a) A defendant who is mentally incompetent to waive counsel or to defend himself or herself at trial without the assistance of counsel should not be permitted to stand trial without the assistance of counsel.

(b) The test for determining the competence to waive counsel and to represent oneself at trial should be whether the defendant has the present ability to knowingly, voluntarily and intelligently waive the constitutional right to counsel, to appreciate the consequences of the decision to proceed without representation by counsel, to comprehend the nature of the charge and proceedings, the range of applicable punishments, and any additional matters essential to a general understanding of the case.

(c) If, after explaining the availability of a lawyer and making sufficient inquiry of a defendant professing a desire to waive counsel and represent himself or herself, the trial judge has a good faith doubt of the mental competence of the defendant to waive counsel or to represent himself or herself the judge should order a pretrial mental evaluation of the defendant according to the procedures set forth in Part IV of this Chapter.

(d) After obtaining the report of the evaluators, the court should hold a hearing on the issues raised according to the procedures set forth in Part IV of this Chapter.

(i) If, after hearing, the court determines that the defendant is competent to waive counsel and to represent himself or herself, the court should proceed with the cause. The court in any such case should consider the appointment of standby counsel in accordance with Standard 6-3.7 to assist the defendant or, if it should prove necessary, to assume representation of the defendant.

(ii) If, after hearing, the court should determine that the defendant is incompetent to waive counsel and is incompetent to stand trial or to plead, the court should proceed to issues of treatment and habilitation in accordance with Part IV of this

(continued...)

Moran v. Godinez, 972 F.2d 263 (9th Cir. 1992). The court failed to adequately determine Mr. Downs' competency in this context.

For an accused to waive counsel, a higher mental state is required than what is required merely for a finding of competency to proceed with counsel. The record here does not disclose that Mr. Downs ever "knowingly and intelligently" waived his right to be represented by counsel.

Precedent is replete with criteria for determining whether an accused has waived his right to counsel. In Faretta, supra, there existed no evidence that the defendant was mentally ill before the Court. Even so, a heightened level of understanding and cognition was required. Footnote 3 of the Faretta opinion quotes the exchange between the court and the defendant. Mr. Faretta was questioned, inter alia, on his understanding of the hearsay rule, how peremptory challenges and challenges for cause are used, and how to conduct voir dire. Mr. Faretta responded in narrative fashion to many of the questions, and indicated that he had been doing his own legal research to prepare for his trial. Id., 95 S. Ct. at 2528.

---

[10](...continued)
Chapter.

(iii) If, after hearing, the court should determine that the defendant is competent to stand trial but is incompetent to waive counsel and to proceed without assistance of counsel, the court should appoint counsel to represent the defendant and should proceed to trial of the case.

Standing Committee on Association Standards for Criminal Justice, Proposed Criminal Justice Mental Health Standards (1984)(emphasis added).

Likewise, the Eleventh Circuit discussed the various criteria for a valid waiver of the right to counsel in Fitzpatrick v. Wainwright, 800 F.2d 1057, 1065 (11th Cir. 1986)(emphasis added)(footnote omitted):

> Faretta and its progeny suggest that in addition to the presence of a clear and unequivocal assertion of the right of self-representation, other safeguards are required. Because a defendant who exercises the right to conduct his own defense relinquishes many of the important benefits associated with the right to an attorney, a trial judge should normally conduct a waiver hearing to insure that the defendant understands the disadvantages of self-representation, including, inter alia, the defendant's understanding of the risks and complexities of his particular case. See Faretta, 422 U.S. at 835, 95 S. Ct. at 2541; Raulerson v. Wainwright, 732 F.2d 803, 808 (11th Cir. 1984); Hance v. Zant, 696 F.2d 940, 949 (11th Cir.), cert. denied 463 U.S. 1210, 103 S. Ct. 3544, 77 L.Ed.2d 1393 (1983), overruled on other grounds, Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985); United States v. Chancey, 662 F.2d 1148, 11522 (5th Cir. 1981)(Unit B).

Some of the factors discussed in Fitzpatrick for analyzing the validity of a purported waiver include the background, experience and conduct of the accused; whether the defendant was represented by counsel prior to trial; whether the defendant knows the nature of the charges and the possible penalties; whether he understands that he will be required to comply with the rules of procedure at trial; whether the waiver is a result of coercion or mistreatment; whether he has knowledge of some legal challenges that might be raised in his case; and whether the waiver is for the purpose of delay or manipulation.

The Court in Fitzpatrick held that the defendant had made a valid waiver, while recognizing "that only rarely will the Faretta standards be satisfied absent a hearing at which the defendant is expressly advised of the risks and disadvantages of self-representation." Fitzpatrick v. Wainwright, 800 F.2d 1057, 1068 (11th Cir. 1986).

In the dissenting opinion to Fitzpatrick, Senior District Judge Atkins wrote:

> I would prefer to articulate the content of the Faretta colloquy so trial judges would be better guided in the future. For example, the court should inform a defendant that motions may be presented before, during, and after trial. Then the judge should ask the defendant to name one example of a pretrial motion, etc. Next, the court should warn a defendant that he will be required to adhere to the court's rules of evidence and procedure, and quiz the defendant briefly on a couple of rules, as the trial judge in Faretta did. See id. at 808 n. 3, 95 S. Ct. at 2528 n. 3. Then, the court should inquire as to whether the defendant is familiar with each element of the offense charged. Further, the court should inquire as to whether a defendant is aware of any possible defense for each offense. Finally, the court should suggest that counsel could assist the defendant in all areas of defense.

Fitzpatrick, supra, 800 F.2d at 1072, n.12 (Atkins, J., dissenting).

Finally, courts have noted that it is preferable for the court to ask questions designed to elicit from the accused a narrative statement of his understanding rather than "pro forma answers to pro forma questions." United States v. Billings, 568 F.2d 1307, 1309 (9th Cir. 1978); cf. United States v. Curcio, 680

F.2d 881 (2nd Cir. 1982). In Mr. Downs' case, all that was elicited were pro forma answers to pro forma questions.

In Mr. Downs case, the record does not contain any appropriate Farretta inquiry or other evidence of a voluntary and knowing waiver of counsel.

ARGUMENT XIV

MR. DOWNS' TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Downs contends that he did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). It is Mr. Downs' contention that the process itself failed him. It failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

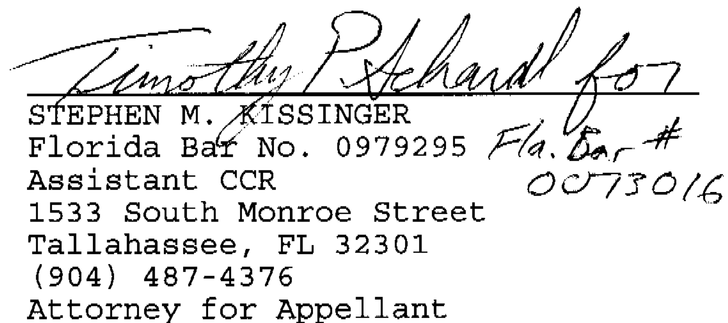
The flaws in the system which sentenced Mr. Downs to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Downs' direct appeal of his initial trial and resentencing, his two petitions for state habeas, his prior post-conviction motion and appeal thereof; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death

sentence -- safeguards which are required by the Constitution. These errors cannot be harmless. The results of the trial and sentencing are not reliable. Rule 3.850 relief must issue.

CONCLUSION

The circuit court improperly dismissed Mr. Downs's Amended Rule 3.850 motion. It's decision must be reversed and this matter remanded for an evidentiary hearing.

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



STEPHEN M. KISSINGER
Florida Bar No. 0979295
Assistant CCR
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487-4376
Attorney for Appellant

Copies furnished to:

Richard B. Martell
Assistant Attorney General
Office of the Attorney General
The Capitol
Tallahassee, FL 32399-1050

Angela Corey
Assistant State Attorney
Office of the State Attorney
600 Duval County Courthouse
330 East Bay Street
Jacksonville, FL 32202