IN THE SUPREME COURT OF FLORIDA

No. _____

STATE OF FLORIDA,

Plaintiff

v.

GERALD EUGENE STANO,

Defendant

BRIEF OF APPELLANT

On Appeal from Summary
Denial of Rule 3.850 Relief

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INTRODUCTION

It would be wrong, and unconstitutional, to allow Mr. Stano to be executed based upon the record before this Court, the controlling law, and the legitimate doubt about whether Mr. Stano is guilty of anything. Other than Mr. Stano's real or purported utterances, there is no evidence that he killed ***anyone.*** The challenge for the State is to show one strand, one thread, one drop, one iota of evidence against Mr. Stano, other than what has (allegedly) come out of his own mouth. The State cannot. That, alone, gives pause.

But there is much, much more to pause over. For while the State can do nothing to show guilt, Mr. Stano has met his challenge to show innocence, and violations of his constitutional rights. The claims presented in his Rule 3.850 Motion would, if true, entitle him to relief, the files and records of the case do not show that Mr. Stano is not entitled to relief, and the lower court's summary denial was error.

This the only case against Mr. Stano that ever went to trial. It took two trials to convict him. The evidence at the first trial was testimony from police officer Paul Crow that Mr. Stan0 confessed to him to the murder of Ms. Scharf in March, 1981, and testimony from police officer Johnny Manis that Mr. Stano confessed to him in August 1982. That was the proof, the whole proof, and there **was** nothing to the proof. There was no known cause of death; there **was no physical evidence;** and there was **no** corroboration. The jury could not reach a verdict.

On re-trial, the only additional evidence came from Clarence Zacke, himself an accomplished killer and an opportunistic jailhouse snitch. Zacke, surfacing after the mis-trial, said Mr. Stano also confessed to him. Zacke was rewarded, and Mr. Stano was convicted.

The reasons Mr. Stano ought to live are really all pretty simple. First, Zacke, has said, on tape, that all of his previous testimony was *false*.[1] Zacke is caught saying that the truth is that he was solicited by prosecutors Dean Moxley and Chris White to testify at re-trial, untruthfully, that Mr. Stano had confessed to him. These allegations, if true, demonstrate a flagrant and prejudicial constitutional violation, the evidence could not have been discovered earlier, and the lower court erred by summarily denying the claim. See Argument I, infra.

Second, Mr. Stano wishes to present testimony that one does not often see. Paul Crow, the architect of the incredible "Stano is a mass murderer" story, is, we have now learned, *known* by his fellow law enforcement officers to be a liar, and is ***a policeman who would lie under oath to protect his reputation or his cases.*** This remarkable proffer--from six law enforcement officers who, between them, have over **eighty years** of law enforcement experience--is unparalleled in undersigned counsel's experience. These officers have sworn to the nightmare--a lying police officer who

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[1]The State and the lower court rely on trial testimony and the testimony in federal habeas corpus proceedings to refute Mr. Stano's claims. However, the evidence that Mr. Stano wishes to present shows that all the previous testimony was false.

seeks the execution of an innocent person, for personal gain.[2] Until Mr. Crow was unseated by a grand jury Presentment, he had power over police officers.? He does not today, and they have slowly come forward. The lower court erred by summarily denying this Claim for relief. See Argument II, infra.[4]

Third, what Crow has said about himself and about Mr. Stano in court, under oath, is contradicted by Crow's own words, on tape, from 1986. The tapes reveal that Crow hid extremely exculpatory evidence about the Stano cases he single-handedly pursued. Absent a door to door, world-wide, search, no attorney could have

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[2]See Affidavit of Officer Robert Walker: "I do not believe that Gerald Stano is a serial killer. Many police officers believe that Crow simply set Stano up. . . . The idea that someone is going to be electrocuted based on the testimony of Paul Crow is a scary thought." Appendix 7, Rule 3.850 Motion (fourteen years with DBPD); see also Appendices 8 (retired Officer Shumaker, officer for 20 years with Crow); 9 (Sergeant Wisneski, 22 1/2 years as a police officer, known Crow forever); 10 (Officer Candage, 18 years with DBPD); and affidavit of Officer Middleman, submitted below (8 years with DBPD).

[3]Undersigned counsel has requested Crow's personnel files, but they either do not exist or they are being withheld. Counsel has also requested the Daytona Beach Police Department files on Mr. Stano. However, Crow checked them out in 1981, and apparently never returned them. A public records act lawsuit is pending in Volusia County before Judge Foxman regarding these and other materials that are being withheld from counsel. A photocopy of the Public Records Act suit has been provided to the Court.

[4]As with the Zacke Claim, the State may not comfortably seek refuge from Crow's former colleagues by pointing to the record of the federal evidentiary hearing. Crow's testimony in federal habeas corpus proceedings was the centerpiece of the federal decision denying relief. The evidence Petitioner wishes to present is that Crow will, see Argument II, and did (in federal court), see Argument III, infra, lie under oath. The State's argument is that Crow has testified under oath and that should be the end of the matter; Petitioner's argument is that Crow has testified under oath and that is *what* is the matter.

discovered these tapes any earlier than they were discovered. A fortuitous call from a concerned citizen revealed their existence, and counsel for Mr. Stano has presented the evidence from the tapes of Crow as quickly as possible. See Argument III, infra.[5]

Fourth, Crow testified at trial that Mr. Stano was promised nothing for confessions; he testified in federal court that Mr. Stano was promised life imprisonment to confess, and there would have been no confessions without the promise. The lower court expressed dismay, not with Crow, but with counsel for petitioner for taking too long to get back to state court and present this claim. When law enforcement conduct "fails either to be fair or honest . . . due process is implicated and the courts are required to conduct an intensive scrutiny of the ***police*** conduct in question." Walls v. State, 580 So.2d 131, 133 (Fla. 1991)(emphasis added). "Gross deception used as a means of evading constitutional rights has no place in such a system," id., 580 So.2d at 134, except, under the lower court's decision, when the messenger is determined to be late. Leaving aside the wisdom or correctness of such a "kill the late messenger" rule, it should not apply in this case. See Argument IV, infra.[6]

Fifth, Mr. Stano's cases are infected with the "Howard Pearl" issue, and Mr. Stano ought to be provided the opportunity fully to litigate those issues before the judgment in this case is fully

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[5]Counsel requested funds to obtain, review, and transcribe these tapes last year, but the circuit court denied the request.

[6]Petitioner also discusses in Argument IV the testimony of Johnny Manis, relied upon by the state below.

final. See Argument V, infra.

Finally, the lower court ruled that because CCR and/or undersigned counsel did not file pleadings as required by various orders of this Court, Petitioner's claims were barred. If Petitioner is barred from relief due to the absence of counsel, then Petitioner's right to due process of law has been violated. The lower court found that this Court's ruling in Stano v. Florida, No. 64,607, precluded any analysis of or concern over whether Petitioner was unconstitutionally harmed by being deprived of counsel during post-conviction proceedings. Petitioner disagrees. See Argument VI, infra.

II. PROCEDURAL HISTORY

1. In 1980, Petitioner was arrested in Daytona Beach, which is in Volusia County, Florida, in 1980. Afterwards, for over a year and a half, Mr. Stano was interrogated by Paul Crow, who was then a detective in the Daytona Beach Police Department. Crow was attempting to obtain from petitioner confessions to unsolved homicides.

2. In March, 1981, Crow obtained several confessions to homicides that had occurred in Brevard County. He also obtained a confession to the killing of Cathy Scharf, who was a Brevard County resident who had been killed eight years earlier and whose body had been found on or near the Brevard County border with Volusia County.

3. In September, 1981, Mr. Stano pled guilty to the Volusia County cases to which he had confessed, and he received a life

sentence pursuant to a plea agreement. Mr. Stano went to prison.

4. On March 3, 1983, Mr. Stano was indicted in Brevard County for the murder of Ms. Scharf. Petitioner was convicted of murder and sentenced to death in Brevard County, Florida, in 1983. "When the jury could not reach a unanimous verdict, the court declared a mistrial. On retrial the jury convicted Stano as charged and recommended the death penalty, which the trial court imposed." Stano v. State, 473 So. 2d 1282, 1285 (Fla. 1985).[7]

5. No physical evidence, contraband, eyewitness testimony, or forensic evidence of any kind connects Petitioner to this or any other homicide. The only evidence against Petitioner in the trial that ended in a hung jury was his confessions to Paul Crow from March 1981 in Volusia County, and to another officer whom Paul Crow had Petitioner speak with later. The jurors could not convict. The only additional evidence against Petitioner in his second Brevard trial was the testimony of an inmate, Clarence Zacke, who testified that after the mistrial he decided to come forward and report that Petitioner had confessed to him as well.

6. With respect to this Brevard County judgment, Petitioner sought state post-conviction relief that was summarily denied. Stan0 v. Florida, 497 So. 2d 1185 (Fla. 1987). Petitioner filed a

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[7]The evidence introduced at sentencing involved prior convictions and confessions obtained by Paul Crow. During five of the prior convictions, and many of the prior confessions, Howard Pearl was Petitioner's attorney. In Argument IV, infra, Petitioner presents the claim that this representation by Pearl--who was a law enforcement officer at the time of the representation--requires resentencing. Petitioner also contends that Pearl's representation of him at the time of the March, 1981, Scharf confessions, requires that the conviction herein be set aside.

petition for writ of habeas corpus in the United States District Court for the Middle District of Florida. He alleged: a.) that the State used Clarence Zacke as a state agent to elicit statements from Petitioner, in violation of United States v. Henry, 447 U.S. 273 (1980); and b.) that Paul Crow had in 1980, 1981, and 1982 colluded with Don Jacobson and Howard Pearl, Petitioner's then defense attorneys in Volusia County, to convict Petitioner, and that their unrevealed collusion violated the principles embodied in Brady v. Maryland, 373 U.S. 83 (1963).[8]

7. The federal district court summarily denied relief on these claims. The circuit court reversed the district court and ordered an evidentiary hearing, Stano v. Dugger, 901 F.2d 898 (11th Cir. 1990).

8. On remand, Respondent filed a motion for summary judgment. Respondent's motion was accompanied by the affidavit of Don Jacobson, one of the attorneys who represented Petitioner in March, 1981, before the later 1983 trial.[9] Jacobson's affidavit said that Petitioner's confessions in 1981 were in return for a state promise of life imprisonment.[10]

'Jacobson and Crow did not represent Petitioner at the Brevard County 1983 mistrial or second trial. Public defenders Russo and Friedland conducted the Brevard defense.

[9]Petitioner's first confession in this case occurred in 1981, while he was represented by Don Jacobson and Howard Pearl.

[10]When he signed the affidavit Jacobson did not know that Petitioner had allegedly confessed in 1981 to a murder for which Petitioner later received the death penalty--this, the Scharf killing.

Jacobson and Crow represented Petitioner in Volusia County,

9. Because in it's Jacobson affidavit the State conceded--after twelve years--that Petitioner's Scharf confession was the result of promises, Petitioner filed a Motion for the Court to Recognize, or for the State to Stipulate, that the March 6, 1981 Confession Introduced Against Petitioner Was Unconstitutionally Obtained. The State then disavowed its Jacobson affidavit. District Court Record, R7-108. Petitioner then filed Petitioner's Motion and Offer to Stipulate that the State is Correct that Petitioner's March 6, 1981, Confession Resulted from Promise of Benefit or Reward. R7-115. The district court denied the Motion for the Court to Recognize. R7-120.

10. An evidentiary hearing followed. Current and former law

Florida, in 1981, and during this time period Petitioner confessed to several murders. We now know, but did not know at the time of the Scharf trial, that these confessions were in return for bargained-for life sentences. We also now know that one of the confessions involved the killing of the victim in this case, but the crime in this case occurred in contiguous Brevard County. Petitioner pled guilty to the Volusia County cases and went to prison.

Many months later, Petitioner was indicted in Brevard County. Other counsel was appointed to represent him, and the new counsel did not know that Petitioner's 1981 confession to the Brevard County murder occurred in the midst of a confession-fest induced by life promises. Jacobson testified in federal court that he was not told in 1981 that Petitioner had confessed to the Brevard case and when Petitioner was later prosecuted Jacobson assumed that Petitioner had confessed to the Brevard crime after he went to prison.

Jacobson further testified that had he known that Petitioner had confessed in 1981 to the Brevard crime, no death penalty would have been possible in the Brevard prosecution. He did not know until the district court hearing was conducted, and he **was** "amazed."

The legal effect of the "promise of life imprisonment" on the Scharf confession was not addressed in federal court.

enforcement officers testified about the Petitioner's confessions. All, including **Paul** Crow, testified that Petitioner had been promised life imprisonment for **any case** to which he confessed **and** that his 1981 confessions were the result of these promises.[11] Tape recordings of interrogation sessions revealed the promises, countless letters from Petitioner to Jacobson recited the promises, **and no one denied that Petitioner was promised life for confessions in 1981.**

11. After this hearing, the district court made extensive fact-findings on the Brady and the Henrv claims. ***The district court made no fact-findings or conclusions of law with respect to whether Petitioner's confession in 3983, resulting from a promise that he would not receive the death penalty, was involuntary.*** The district court denied relief, R8-160, but granted a certificate of probable cause to appeal because "of the disputed issues of fact." Petitioner appealed.

12. On appeal, ***the circuit court did not address the issue of involuntariness vis-a-vis promises, and did not conduct plenary review of the involuntariness issue.***

13. Thereafter, Petitioner sought certiorari review. Respondent contended in response that there had been no ruling on the involuntariness of confessions issues. Certiorari was denied.

14. In March 1997, **a** death warrant was signed. Until very

[11]The problem is that Paul Crow had testified at trial in 1983 in Brevard County that no promises had been made to the Petitioner to induce him to confess. Crow testified in federal court that without promises, there would have been no confession.

recently, Petitioner received no meaningful legal representation with respect to his pending execution date.

III. ARGUMENT

ARGUMENT I

THE LOWER COURT ERRED BY SUMMARILY DENYING RELIEF ON PETITIONER'S CLAIM THAT THE STATE ATTORNEY'S OFFICE FOR BREVARD COUNTY KNOWINGLY CREATED AND PRESENTED FALSE EVIDENCE AT PETITIONER'S RE-TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, AND FLORIDA LAW

With respect to Claim I, the lower Court wrote that **because** undersigned counsel, Mark E. Olive, learned about the Zacke recantation in May 1997, **but did** not include any claim about that recantation in a **Rule** 3.850 Motion until this week, the claim was barred. The lower court also refused to so much as ***consider,*** much less address, the Petitioner's motion to allow him to introduce evidence contained in a tape recording, see Motion to Determine Admissibility of Evidence (filed below, and provided to this Court), evidence that would both prove the claim for relief ***and*** explain why the claim had not been earlier raised. In these decisions the lower court erred, and this case should be returned to the lower court for an evidentiary hearing on Claim I.[12]

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[12]Mr. Stano cannot be penalized based upon when the Claim was raised. Undersigned counsel **was** not Mr. Stano's attorney in this action in May, 1997. Someone called undersigned counsel in April, sent undersigned counsel **a** tape, and counsel delivered it to the FDLE. The FDLE records reflect that undersigned counsel **was** not counsel in this action. See Attachment 1, hereto. The tape then went on to the Brevard County State Attorney, who, we now know, claims to have begun a criminal investigation on the **tape.**

Thus, undersigned counsel (who did not represent Mr. Stano herein until he received funds to do so in February 1998), the FDLE, and the Brevard County State Attorney all have known about this taping evidence ***because*** undersigned counsel delivered it to the state in 1997.

As was shown in the Rule 3.850 Motion, and as will be shown herein, Zacke has recanted and his recantation implicates now-Judge (then prosecutor) Dean Moxley and assistant state attorney Chris White in soliciting false testimony from Zacke at Petitioner's re-trial. Petitioner will also show that Mr. Stano's attorney here, Mr. Olive, has acted completely properly in a difficult situation and that he ought to be thanked, not blamed, for delivering pertinent information to the FDLE and thereby to the Brevard State Attorney's office and, ultimately, to this Court.

Finally, counsel has asked both this Court and the lower court for guidance on whether counsel may use an audiotape in support of this Claim for relief. Counsel has to this point filed under seal those matters which it seemed prudent to seal. No Court has seen fit to allow the use of the sealed material. Consequently, counsel must unseal the materials here, and present them, rather than risk irreparable harm to Mr. Stano.

A. Clarence Zacke Recanted, His Recantation Was Tape-recorded. and the Only Reason this is Known is Because Undersisned Counsel Told the Florida Department of Law Enforcement

On May 2, 1997, undersigned counsel met with, and delivered materials to, an agent with the Florida Department of Law Enforcement in Tallahassee, FL. In response to a later Chapter 119 request filed February 17, 1998, by undersigned counsel,[13] the FDLE released to undersigned counsel the materials counsel had delivered earlier, and FDLE internal documents regarding what had been

[13]Undersigned counsel received funds to begin representation of Mr. Stano on February 4, 1998.

delivered.

The materials released to undersigned counsel tell the story of how the tape came to be obtained, what it says, and why counsel has not been able to use it. Those materials are attached hereto as Attachment 1. They relate the following:

> 1. On April 15, 1997, I[14] received an emergency call from Tom Dunn.[15] He stated that Gerry Stano had received an anonymous letter which appeared to be an article from Kathy Kelly[16] stating that Clarence Zacke had recanted his 1983 testimony.
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> 2. I called Gerry Stano. He stated that he had received an envelope with one piece of typing paper in it on which was typed what appeared to be a story that was being published about Clarence Zacke.[17] It said that Zacke was admitting that he lied about Gerry Stano confessing to him that he had committed the murder of Cathy Scharf.
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> 3. I asked Gerry Stano if the there was any indication who the letter came from. He said there was an address on the back. He believed that it was from "Art."
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> 4. Around 6:30 p.m. on April 15, 1997, I telephoned Art and asked him about the letter. He stated that he had written it and sent it to Gerry Stano. He said that he had personally spoken with Clarence Zacke and that Zacke had said the things that were in his letter. He said that he had sent the letter to Kathy Kelly, but that the newspaper did not want to publish the story for some reason.
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> 5. I asked where he had talked to Zacke, and

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[14]Undersigned counseldeliveredthis information, in this form, to the FDLE. See Attachment 1.

[15]Mr. Dunn is an attorney.

[16]Kathy Kelly is a reporter for a Daytona Beach newspaper.

[17]This "letter" is included in Attachment 1, hereto.

he said that he had talked to him over the telephone. He then stated that he had recorded their conversation or conversations. I asked if he had permission to do that, and he indicated that because Zacke was in a prison he knew that his **calls** could be tape recorded, and that he had **asked Zacke if he** knew that his calls could be recorded and Zacke said yes. However, he did not **tell** Zacke that he **was** recording their telephone calls. I told him that I would telephone him the next day.

6. On April 16, 1997, at 7:30 **a.m.** I telephoned Art and asked if he would send **me a** copy of his tape recording. He agreed to do so.

7. The next morning, April 17, 1997, I received an overnight package[18] containing a cassette tape with handwriting on it. I listened to the tape, and it appeared to contain the voices of Clarence Zacke[19] and Art.

8. Upon listening to the tape I had reservations about whether it was legal for Art to have made the **recording.** That day I sought legal counsel with respect to this issue.

9. **That** night, April 17, 1997, Art telephoned **me** and **asked whether I had received** the tape. I told him that I had. **I then told him that it was my completely unsolicited advice that he not record Zacke any more.** I told him that I could not talk then, but that I would talk with him later.

10. On April 20, 1997, Art called **me** again. I told him that I could not speak with him, as I was busy. On April 21, 1997, I called Art. I told him again **that he should not record** telephone calls. I also told him **that I** wanted to speak with him in person. We have

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"Undersigned counsel delivered the overnight package to the FDLE. See Attachment 1.

[19]Undersigned counsel has heard Zacke's voice during testimony.

not talked in person yet.[20]

11. On April 28, 1997, I obtained the original of the letter that Gerry Stano had received [from Art].

12. On April 28, 1997, at around 9:00 a.m., I telephoned Ken Morrison [an FDLE agent undersigned counsel knows] at FDLE and left a voice mail message. I also left a message for Ronnie Cornelius [another FDLE agent known to undersigned counsel]. Around 2:00 p.m., Ken Morrison called me back, and I gave him the outline of what had happened. He said he wanted to get a local agent involved, and that he would call me back with a time. Around 4:40 p.m. he called and left a message that Mike Ellis would call me on the 29th of April to set up a time for an interview.

13. Art R. called several times on April 28, 1997, but did not leave message. He paged me around 8:00 p.m., and I called him. He asked whether there would be any reason that Zacke would be calling him, and I said I did not know of anything that I had done that would have caused that.

14. On 4/29/97, at about 3:30 p.m., I called Ken Morrison and got his phone mail. I left a message that I had not heard from Mike Ellis, and I needed to know what was up.

15. On **Friday, May 2,** 1997, after several **calls back anh** forth with Mike Ellis, I met with Mike Ellis and gave him the notes I have made here, the tape, the fed ex package, and the letter to Gerry from Art. I returned later and gave him the tape I had dubbed,[21]

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[20]Undersigned counsel **has never talked** face to face with "Art."

[21]The **FDLE agent** told undersigned counsel to give him the tape that undersigned counsel had received, and any "dubbed" tape. **Thus, counsel was left without <u>any</u> tape to present to anyone, after visiting with the** FDLE--the FDLE **requested, and received, everything.** The lower court was clearly wrong, then, to suggest that undersigned counsel had withheld anything, delayed anything, etc. The **FDLE** had it, and the Brevard State Attorney's Office had it, but not undersigned counsel,

and initialed everything that I had left.[22]

In August, 1997, undersigned counsel contacted FDLE Agent Ellis and asked what had become of the tapes. He stated that he had forwarded all the material to the Melbourne office of the FDLE, and to the Brevard County State Attorney's Office.

B. The Brevard State Attorney's Response to a Public Records Request Created the Problem

On January 27, 1998, undersigned counsel contracted with CCRC to represent Mr. Stano. On February 4, a partial payment of funds to begin the representation was made to undersigned counsel. On February 17, 1998, undersigned counsel filed a Public Records Act request with FDLE regarding the very tape counsel had earlier turned over. An investigator working on counsel's behalf filed a Public Records Act Request with the Brevard County State Attorneys Office on February 16, 1998. Because the FDLE and the State Attorneys Office responded in different ways to the Chapter 119 requests, undersigned counsel did not know whether he was entitled under Florida law to use the tape recording referred to above.

In response to its Chapter 119 request, the FDLE turned over everything that it possessed regarding this matter, including the tape and other documentation. See Attachment 1, hereto. The material reveals just what is pled above.[23] The FDLE copied the

[22]This entire recitation of facts was provided by the FDLE to the Brevard State Attorney, as Attachment 1 reveals. It was also provided, under seal, to this Court, to the Attorney General's Office, and to the lower court.

[23]The materials reveal that at the time the tape **was** given to the FDLE, "Mr. Olive *previously* had represented Gerald Stano in the appeals process," and "had been an attorney for Gerald Stano."

tapes that undersigned counsel had earlier provided to the FDLE, and gave the copies to undersigned counsel. Counsel received the tapes from the FDLE on February 11, 1998.

However, the 119 response from Robert Wayne Holmes--an Assistant State Attorney to whom the FDLE had forwarded copies of the materials provided by undersigned counsel--was:

> [N]ot subject to public **records inspection** are a tape recording and related documentation provided by the Defendant's Attorney, Mark Olive, to the Tallahassee office of the FDLE in May 1997, and related telephone records subpoenaed by this office. These documents are **exempt** from public records pursuant to Sections 119.07(3)(b) and 934.08, Florida Statutes.

Section 119.07(3)(b) exempts from disclosure any "[a]ctive criminal intelligence information and active criminal investigative information." Florida statutes 934.08 deals with how and when a law enforcement officer may use or disclose illegally recorded conversations.

Thus, one law enforcement agency saw no crime, and another law enforcement agency said that it was investigating **a** crime, with respect to the same material. Notably, it is the agency which, itself, has been accused in this Claim of wrongdoing at trial--the Brevard County State Attorney's Office--that said it had an ongoing criminal investigation.

C. What Was Undersigned Counsel to Do?

The FDLE files designate what undersigned counsel turned over to be "evidence" and "newly developed information that pertained to Mr. Gerald Stano." Attachment 1.

Undersigned counsel provided to the FDLE evidence of several possible crimes. First, it may have been a crime for Art to record the Zacke call. Second, it may have been a crime for Chris White and Dean Moxley to tell Zacke to lie. Third, it may have been a crime for Clarence Zacke to lie.

But the worst thing for Petitioner's counsel was that if it was a crime for Art to record Zacke's call, it would also be a crime for undersigned counsel to disclose what was on the tape.[24] Thus, undersigned counsel charted a course that would protect the Petitioner and not harm counsel--undersigned counsel filed the FDLE materials (without the tapes) under seal in this Court. This Court then directed the matter to the lower court.

But the lower court did not resolve the issue. The lower court would not even ***consider*** the issue of the materials that were placed under seal here, and would not even ***consider*** whether the sealed materials were in any way relevant to the questions before the lower court.[25] Thus, when the lower court denied relief on

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[24]Under Florida statute, it may be illegal for a private citizen to tape record a telephone call between that person and a person who is serving a prison sentence when the prisoner is unaware of the taping. Florida Statutes, Section 934.03 (1) (b). Furthermore, a person who had nothing to do with recording a telephone conversation may be guilty of a crime if he or she "intentionally discloses" the contents of the intercepted call. Id., Section 934.03 (1) (c).

[25]When undersigned counsel attempted to have the lower court address the motion, the lower court refused. See Transcript of 3/19/98 hearing, near the end of the hearing (transcript not yet provided).

Counsel had asked this Court to appoint a judge outside of the circuit to hear these matters because Dean Moxley is now the Chief Judge of the Circuit. This Court denied the request, without

this Claim by writing that undersigned counsel had known about the tapes since May of 1987 and so should have raised the issue, the court missed the point that undersigned counsel did not have the tapes, the FDLE and the State Attorney had the tapes, because undersigned counsel had given them the tapes--undersigned counsel did not have them, the law enforcement community did.[26]

D. What Zacke Says

The state could not convict Petitioner at the first trial because, as prosecutor Moxley told the trial court, the jurors had trouble with the only proof in the case--confessions to Paul Crow and Johnny Manis.[27] On re-trial, the State presented the

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prejudice. Recusal was again sought in the lower court, the recusal motion was facially sufficient for recusal, and the lower court erred by denying it. The lower court also erred by writing that the information in the motion to recuse was known to counsel for over four years, When counsel attempted to be heard on the issue, the court explained that it had ruled. Petitioner renews his request here in this Corut that this case be remanded and heard before another judge from outside the Eighteenth Judicial Circuit.

[26]The Court also missed the point that undersigned counsel was not representing Petitioner in this case in 1997.

[27]See Claim IV, A, Rule 3.850 Motion. According to Dean Moxley, the jurors had difficulty with the petitioner's confessions. The jurors, during deliberations, asked for transcripts of testimony. The prosecutor, Dean Moxley, argued that the jurors should be provided the requested transcripts. It was his view that, inasmuch as the jurors had already heard the tape recorded "confession" from the petitioner, obviously the jurors "want[ed] to hear the oral [non-recorded confessions. [i.e., the one to Paul Crow]." Id. at 1601-02. Specifically,

> In this case the jury had an unenviable task of number one, hearing the taped confession; and, number two, now they're talking about the oral confession[s]. They didn't have notes. There are actually three separate incidencea [i.e., confessions] and I think what--they've now heard the tape and now

additional testimony of Clarence Zacke. Zacke said that Mr. Stano told him that he had killed the victim, and had tortured her first. The prosecutor relied heavily on this evidence from Zacke. See State v. Stano, 473 So.2d 1282, 1289 (Fla. 1985) (referring to "Stano's confession to a fellow inmate [Zacke] that he alternatively choked and revived the victim"); see also testimony (R. 887-928), and prosecutor argument (R. 1064-1066, 1072-1073, 1075, 1076-1080, 1268, 1273-1274).[28]

> they are trying to reconstruct the oral conversations in their minds and keep them separate from the taped recorded conversation and then at the same time I think they are trying to see whether or not they are validated by the external facts.

Id. at 1602 (comments of Dean Moxley).

[28]At the time, Zacke had five felony convictions. The first of Zacke's five felony convictions stemmed from his attempts to frustrate an ongoing investigation of his suspected drug activities--when it became obvious that the investigative net was tightening, Zacke solicited two of his associates to murder a man whom he had learned was planning to testify against them in relation to their drug smuggling activities. One of the parties to the agreement to murder, Richard Lee Hunt, agreed to cooperate with law enforcement in exchange for immunity. Hunt's subsequent surreptitious taping of negotiations with Zacke led to Zacke's arrest and ultimate conviction on charges of soliciting to commit first degree murder and conspiring to commit first degree murder.

Zacke was shortly thereafter arrested again on similar charges relating to the same intended victim when he solicited two other men to effect the murder. Again, his arrest was procured by a grant of immunity to one of his hired hitmen, whom he had paid $2,500.

Zacke's next conviction was for soliciting. This occurred while Zacke was out on bail on his previous charges. He solicited William Clarke to kill Richard Hunt, the incriminating witness in his first felony arrest. Clarke informed Hunt of Zacke's intentions, and was ultimately a key witness at the trial that resulted in Zacke's fourth felony conviction. While Hunt's body was never found, Zacke pled guilty to second degree murder in

When undersigned counsel was uncertain regarding whether he could use the Zacke tape recording, counsel instead obtained an affidavit from the person to whom Zacke recanted--Nash Rosenblatt. According to that affidavit:

> 1. My name is Nash S. Rosenblatt. I am over the age of 18 and competent to execute this affidavit. I live in Atlanta, Georgia, but during part of 1997 I lived in Florida.
>
> 2. I am a free-lance writer. I am interested in the case of Gerald Stano. I have been investigating various aspects of Mr. Stano's case.
>
> 3. I contacted Clarence Zacke in prison in 1997. I identified myself as Arthur Rosenblatt and advised Zacke that I was doing research for a book. Zacke discussed various things with me, including his testimony in Mr. Stano's case.
>
> 4. Zacke told me that what he testified to at Stano's trial was not true. Zacke said that Zacke's attorney came to him after the mistrial in Mr. Stano's case and said that the state wanted Zacke to testify for them because they were having trouble obtaining a conviction of Mr. Stano. Zacke agreed to do so, in return for favors from the state.
>
> 5. After that, according to Zacke, two persons from the prosecutor's office told him what to say at trial. These two people were Dean **Moxley** and Chris

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connection with his disappearance.

While incarcerated at the Brevard County Jail, Robert Dinkins, a fellow inmate, informed his attorneys that he had been solicited by Zacke to kill various people including Hunt, State Attorney Douglas Cheshire, and several other potential witnesses in his upcoming trial. Dinkins surreptitiously recorded subsequent conversations with Zacke, and as a result Dinkins's own sentence was reduced.

In exchange for his cooperation with State Attorney Dean Moxley regarding his codefendants in the murder of Richard Hunt, Zacke's accumulated consecutive sentences totaling 180 years were changed to run concurrently and thereby reduced to sixty years. Shortly after this reduction, he "remembered" a conversation he had had with Gerald Stano.

White.

6. According to Zacke, he got his trial testimony from these prosecutors. Zacke said he was programmed by these prosecutors to say what he said at trial, and that what he testified to at trial was untrue. According to Zacke, his trial testimony against Mr. Stano was what the prosecutors wanted him to say, and the prosecutors knew that the testimony was not true. Zacke said that Mr. Stano never said anything to him about any murder.

7. Zacke said he was reluctant now to testify to the truth because he feared that the prosecutors would prosecute him. He said that all hell would break loose if he told what had really happened.

8. I told Zacke that I thought a publisher would be interested in what had happened and might be interested in doing a story about Zacke. Zacke agreed to talk to a publisher or an agent, and said that he would have to be paid to tell this information to a publisher. He said that he would not testify to what he had told me until he received money from the publisher.

9. After learning these things from Zacke, I sent a stamped envelope to Gerald Stano in April of 1997. I put a copy of an article I had drafted in that envelope, A copy of that draft article is attached to this affidavit, and what is said in the article is true. The article was not published.

10. A few days after sending the envelope in the mail to Mr. Stano, I received a telephone call from a person identifying himself as Mark Olive. This was in April 1997. Mr. Olive asked me how I got the information that was in the article I had sent Mr. Stano, and I told Mr. Olive about my conversations with Mr. Zacke. Before this conversation with Mr. Olive, Mr. Olive had no way of knowing that I had had any conversations with Clarence Zacke or that Mr. Zacke had recanted his testimony.

Appendix 5, Rule 3.850 Motion.

Thus, Clarence Zacke said to Art that he testified falsely at trial and that the prosecutors knew of, indeed, solicited, the

perjury. Under such circumstances, a new trial is required.[29]

The State, through Ken Nunnelley, Esq., argued in the lower court that there had been no recantation by Zacke. Robert Holmes, the assistant state attorney who withheld the tape after 119 requests, sat, silently, and listened as Ken Nunnelley said that Zacke had not recanted.

Mr. Holmes has conversations on tape, and will not release them. In a portion of those conversations the following is said:

> Zacke: Basically, the gist of it is, me and Gerry talked about cars out in that exercise yard.
>
> Art: Cars? What kind of cars?
>
> Zacke: His Trans Am and my Trans Am.
>
> Art: Trans Am?
>
> Zacke: Yeah.
>
> Art: He had a Trans Am.
>
> Zacke: Uh, hum.
>
> Art: That's what he told you.
>
> Zacke: Uh, huh. That's what he told me.
>
> Art: Uh, huh.
>
> Zacke: Anyway, that's the gist of it. And, uh, . . .
>
> Art: Well, let's just, let's just, let's talk about this

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[29]The State argued below that previous federal habeas corpus proceedings had addressed issue about Zacke and Moxley, so nothing new could be brought up about them. That is not the law, because it makes no sense. Zacke's and Moxley's credibility are placed directly in doubt by this tape recorded conversation, a conversation that Zacke had just last year, long after the federal hearing relied upon by the State.

Thus, this is newly discovered evidence vis-a-vis the federal hearing, as well as newly discovered evidence vis-a-vis the trial.

for a little while.

Zacke: Huh?

Art: Let's talk about this for a little while. And um, you know, so you guys talked about cars.

Zacke: Uh, hum.

Art: And this is at which exercise yard? At...

Zacke: The jail there, yeah.

Art: In Volusia?

Zacke: No. Brevard.

Art: Oh. In Brevard County Jail. This is...

Zacke: Uh, huh.

Art: Naturally. I'm still asleep I guess.

Zacke: Yeah.

Art: And, uh . . .

Zacke: And, basically, let's see. He **didn't give me no information. Basically, let's just say I got it through, from the State Attorney, of names and what went on and stuff like that. I was programmed in other words.**

Art: What was the State Attorney's name?

Zacke: Huh?

Art: What **was** the State Attorney's name?

Zacke: **Chris White and Dean Moxley.**

Art: Dean Moxley?

Zacke: Uh, hum.

Art: And...

Zacke: He's a judge now.

Art: He... Dean Moxley's a judge now.

Zacke: Uh, hum.

Art: And, at what point did, uh, did either of these gentlemen approach you?

Zacke: No. It was through my attorney.

Art: Okay. And your attorney's name was...

Zacke: Joe Mitchell.

Art: Joe Mitchell. Okay. And did Joe Mitchell advise you that this was a good idea?

Zacke: Uh, huh. Yeah. In fact, a very good one.

Art: Okay. And, uh, because you were facing, what?

Zacke: Oh, I was done with that stuff there. This was just so I could get my other stuff back. And curry some favor for stuff down the road which they failed to do.

Art: Uh, huh. So, he, so, uh...

Zacke: So they didn't live up to everything they were supposed to do.

Art: Right. So your attorney advised you that this was probably your best bet . . .

Zacke: Right.

Art: ... at that time.

Zacke: Uh, huh.

See Attachment 2 (tape, one copy filed under seal with original brief).[30]

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[30]Undersigned counsel asked the Governor to appoint a different state attorney--any state attorney who had no interest in this case--to investigate the Claim made here and to defend the Rule 3.850 Motion. The Governor declined "at this time." Counsel asked the lower court to recuse the local state attorney's office from participating in this action, and the lower court denied the motion as "moot." Petitioner contends that the lower court erred by not recusing the local state attorney's office.

Because the local prosecutor refused to release the tapes, refused to be recused, and sat silently at a court hearing when what was on the tapes was discussed, undersigned counsel has no option but to quote this small portion of the tapes now. To do

E. What Zacke Savs Is Evidence of Prosecutorial Misconduct Which Could Not Have Been Earlier Discovered or Presented

These facts show that the State knowingly presented materially false evidence at trial and sentencing and that there is a reasonable likelihood that the jurors considered this evidence. Under Florida law, deception by law enforcement officials is forbidden by the State due process clause. Walls v. State, 580 So.2d 131 (Fla. 1991). Furthermore, these allegations, if true, state Sixth, Eighth and Fourteenth Amendment violations. United States v. Agurs, 427 U.S. 97, 103 (1976) (relief is compelled when the false impressions are "material," which means when "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury."); Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 394 U.S. 103 (1935); Routlv v. Singletary, 33 F.3d 1279 (11th Cir. 1994); Campbell v. Reed, 594 F.2d 4 (4th Cir. 1979); Boone v. Paderick, 541 F.2d 441 (4th Cir. 1976).[31]

These allegations also show that the State suppressed material exculpatory evidence and that there is a reasonable likelihood that without the suppression the result in the case would have been

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otherwise under these circumstances could be considered obstruction of justice.

[31] The record must suggest a reasonable likelihood that during deliberations the jurors could have considered the false evidence or argument. This does not entail an inquiry into whether the evidence might have made a difference in the outcome if it had not been considered--reversal is "virtually automatic" under such circumstances. United States v. Stofskv, 527 F.2d 237, 243 (2d Cir. 1975).

different. These allegations, if true, also state Sixth, Eighth, and Fourteenth Amendment violations. United States v. Baslev, 473 U.S. 667, 682 (1985); Brady v. Marvland, 372 U.S. 83 (1963).[32]

Finally, these facts of recantation are "of such a nature as to make an acquittal probable on retrial." State v. Spaziano, 692 So.2d 174, 176 (Fla. 1997); Jones v. State, 591 So.2d 911 (Fla. 1991). With only Crow-confessions, the State could not obtain a conviction. That's why they solicited Zacke.

ARGUMENT II

NEWLY-DISCOVERED EVIDENCE REGARDING **PAUL CROW'S LACK OF CREDIBILITY UNDER OATH REQUIRES THAT PETITIONER** RECEIVE A NEW TRIAL

Paul Crow put Mr. Stano on death row. What he has to say about Gerry Stano under oath is the linchpin of the State's case against Petitioner. If Paul Crow is a liar, especially if he is a law enforcement officer who will lie under oath, then this Court may not countenance Petitioner's execution.

The Grand Jurors, the State Attorney for the Tenth Judicial Circuit, and *Crow's fellow law enforcement officers* say that Crow is a liar who will lie under oath -- especially to protect his cases or his reputation. This is newly-discovered evidence that must now be considered and that forecloses the death penalty, and

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[32]The facts pled in the petition demonstrate a manner of state action which, if disclosed, would "[have] 'carried within it the potential ... for the . . . discrediting . . . of the police methods employed in assembling the case.'" Kvles v. Whitley, 115 S. Ct. 1555, 1572 (1995) (ellipses in original) (citations omitted).

even the conviction, in this case.[33]

The State says that this is too remote. That Crow's testimony in 1983 at trial, and his legal woes in 1995, are not related. However, the State repeatedly pushes Crow's testimony from 1992 in federal district court as a basis for denying relief in this action. If the State wants Crow to be credible in 1992, then the State must face the lying Crow of the 1990s.

A. Over Eishtv Years of Police Officer Experience Says Crow Will Lie Under Oath

Paul Crow had to resign, ultimately, in the aftermath of a Presentment brought on by his bad, heavy-handed, and dishonest police work. See sub-section B, infra. Before his resignation, Paul Crow was a vindictive boss. Petitioner pled in the lower court that the reason he had not previously submitted evidence of Crow's bad reputation for truth and veracity in the community was that police officers were afraid to come forward to tell the truth. The presentment itself verifies this fact.[34]

Slowly the truth emerges. Crow's fellow officers now say, under oath, the most remarkable and damning things about Paul Crow--that he is a liar, that he will lie under oath to protect himself or his cases, and that the Petitioner ought not to be executed

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[33]Furthermore, we know now that Crow will lie under oath because we have tapes of him talking in 1986, and his words do not match his words from a witness stand in 1992. See Argument III, infra,

[34]See Appendix 6, Rule 3.850 Motion (persons who testified about Crow "expressed a fear for their employment security" and "all appeared only under subpoena."). Some officers still will not publicly say what they know about Crow because they fear that their retirement or other benefits could be adversely affected.

based upon Crow's testimony. **This is police officer testimony.** This newly-discovered evidence is admissible,[35] and it would prevent a conviction and death sentence upon re-trial. See Jones, supra; Ssaziano, susra.

Detective Robert Walker swears that Crow is a liar and that Mr. Stano ought not to be executed on Crow's word:

> 1. My name is Robert Walker. I am a police officer with the Daytona Beach Police Department. I have been with the department for fourteen years. I am presently a detective with the robbery task force.
>
> 2. I have been asked to address the question of whether Paul Crow has a reputation in the community for being an honest person. I know Paul Crow and have known him for **years.** I know his reputation in the community for honesty or dishonesty, and I know from personal experience whether he is honest or dishonest.
>
> 3. **Paul Crow is dishonest and will do anything for self-promotion.** He has said to me, "We don't have to do our jobs, we only have to give the public the perception that we're doing our jobs." **Paul Crow would lie in a minute to make himself look good or to protect himself. It was and is common knowledge throughout the department that Paul Crow would lie, even under oath.**
>
> 4. **From my own professional experience, I know that Paul Crow will cover up evidence and will change evidence.**
>
> . . . . .
>
> 12. **I** know Paul Crow. **It would be wrong for the State to execute a person who was convicted on the testimony of Paul Crow. Crow cannot be trusted. He is**

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[35] See [35]tchcock v. State, 413 So.2d 741, 744 (Fla.), cert. denied, 459 U.S. 960, 103 S.Ct. 274, 74 L.Ed.2d 213 (1985)(reputation for truth and veracity is the only proper inquiry into a witness' character); Alvarado v. State, 521 So.2d 180, 181 (Fla. 3d DCA 1988) (evidence presented by defense that a state's witness' reputation for truthfulness in the community was bad was properly admitted by trial court.); Stripling v. State, 349 So.2d 187, 192 (3rd DCA 1977) (defense counsel may call qualified people in the community to elicit testimony regarding witness' reputation for truth and veracity.).

selfish and egotistical. Paul Crow would lie under oath to inflate his value, even if it meant killing an innocent man.

13. I do not believe that Gerald Stano is a serial killer, Many police officers believe that Crow simply set Stan0 up.

.....

14. But Paul Crow very much wanted Stano to be known as the most prolific serial killer ever to live. Crow loves the notoriety.

.....

16. Simply put, Paul Crow cannot be trusted to tell the truth. A police officer without integrity is like **a carpenter without a hammer. It's a basic tool you have to have. The idea that someone ie going to be electrocuted based on the testimony of Paul Crow is a scary thought.**

Appendix 7, Rule 3.850 Motion.

Former Officer Edward Shumaker says the same, and more:

1. My name is Edward Shumaker. I am a retired police officer. I served as a police officer with the Daytona Beach Police Department for twenty years. I retired in 1991.

2. I **was a** police officer when Paul Crow was a member of the department and while he was chief of police.

3. **I know Crow's reputation in the community for honesty and dishonesty.** I also know from personal experience whether Crow is honest or dishonest.

4. **Paul Crow is dishonest. Paul Crow cannot be trusted. He would lie under oath to protect himself or to advance his political career.**

....

7. **Paul** Crow's **approach** to law enforcement was influenced by **a** person's standing in the community.

Appendix 8, Rule 3.850 Motion.

Sergeant Wisneski has similar information:

1. My name is Marion A. Wisneski. I am a Sergeant

with the Daytona Beach Police Department. I have been a police officer for 22 1/2 years.

....

6. *I have known Paul Crow a long time. We used to lift* weights *together. I know what his reputation is for honesty and dishonesty in the community. Based on* everything *I know about Paul* Crow *and his actions, there is no doubt in my mind that he would lie under oath to protect himself. Paul Crow would lie if he thought it was to his advantage to do so.*

7. Paul Crow lied under oath during the Coble investigation. That is clear from reading the Grand Jury Presentment.

Appendix 9, Rule 3.850 Motion.

Officer Jeffrey Candage agrees:

1. My name is Jeffery Candage. I am a police officer with the Daytona Beach Police Department. I have been with the Department for eighteen (18) years.

2. I have known Paul Crow for many years and am **familiar with his reputation in the community for honesty and dishonesty.** My personal experiences with Crow allow me to evaluate his honesty or dishonesty, and I am also able to report his reputation.

3. **Paul Crow has shown himself to be dishonest** and I believe he would go to great lengths to protect himself and to advance himself.

4. Crow ran his office with fear and intimidation.

5. **There is no question about whether or not Crow would lie under oath. He would. If nothing else, the Coble case shows this. The Grand Jury Presentment was so compelling, I am surprised that Crow was not indicted.**

Appendix 10, Rule 3.850 Motion.

Finally, Officer Mittleman show both that Crow is not to be believed, and why Officers have not come forward before:

1. My name is Michael Mittleman. I am a police officer with the Daytona Beach Police Department. I have been a police officer for eight (8) years,

2. I was with the Daytona Beach Police Department when Paul Crow was Chief of Police. He ruled the department as a dictator, using fear and intimidation to control people and situations. **It was common knowledge throughout the Department that Paul Crow was corrupt and dishonest. He would not hesitate to lie to protect himself or advance his own cause. There is no doubt that Paul Crow would lie under oath.**

....

Paul Crow went after me, because he suspected me of leaking the Coble story to the press.

4. This type of management and intimidation was common while Crow was Chief of Police. The most important thing to Paul Crow was having a good reputation in the community. It was important to Crow, even though his reputation was built on lies.

5. Those of us in the department and working under Crow knew he **was** dishonest and would be quick to lie, even under oath, to promote his personal agenda.

Affidavit, submitted below and provided earlier to this Court.

These affidavits were provided in the last few days, after Petitioner was finally able to obtain the services of an investigator. See Argument VI, infra. Crow's testimony at trial cannot be believed. His testimony in the federal evidentiary hearing also cannot be believed.

B. Grand Jurors and Prosecutors

Jerry Hill is the state attorney in the Tenth Judicial Circuit. By order of Governor Chiles, Mr. Hill was appointed to investigate Paul Crow's actions with respect to allegations that Crow had obstructed justice. Mr. Hill's investigation included convening a grand jury. Mr. Hill and his grand jury came to various conclusions about Paul Crow, none of them good.

The most important conclusion Governor Chiles' prosecutor came

to was that Crow is not a credible witness under oath, especially when Crow is trying to defend his own law enforcement actions. This conclusion is newly discovered evidence vis-a-vis Mr. Stano: Crow's credibility under oath was critical in Mr. Stano's trial. Crow testified to many, many confessions, and he testified that they were voluntarily obtained.

This is what prosecutor Hill and the grand jury says about ***Crow :***

> One of the ideals upon which this country is founded is that we are a nation of laws and not of men. It is sad to say that this is not always the case in Daytona Beach, Florida.[36]
>
> [J]ustice was subverted . . . .
>
> [T]he evidence lays the blame squarely on the shoulders of Director Paul Crow . . . .
>
> [O]ur quarrel is with the order giver, Paul Crow.
>
> Crow's ... [action] was deplorable . . . .
>
> ***In*** his ***testimony*** before us, Director Crow sought to lay blame ... by suggesting that Mercer also did not follow his directions . . . . ***Our view of the evidence is, however,*** that Lieutenant Mercer followed the Director's instructions to the letter and kept him fully informed of his actions and decisions.
>
> [Crow's actions] have been a severe embarrassment to the entire Daytona Beach Police Department.
>
> [P]olice officers have a hard enough job without having to deal with interference from those who are supposed to be on their side.

---

[36]The evidence was that Crow had "unarrested" a person who another officer had lawfully arrested, had attempted to cover up the arrest, and had attempted to lie about the cover-up.

> *The final victim of Director Crow's actions is public confidence in our criminal justice system. The Coble* case *is a perfect example of why many people believe that your treatment by the system depends more on your race or class or position in society than on your guilt or innocence.*
>
> [W]e are equally troubled by [Crow's] **reaction** to public scrutiny of the case. In September, prior to this Grand Jury being impaneled, he [Crow] began an internal affairs investigation into the actions of his officers. Yet since he has known what his officers did since April and in most instances directed those actions we can see no reason for an Internal Affairs investigation except as *a blatant attempt to deflect public ire from himself and spread blame to his subordinates.*

Appendix 6, Rule 3.850 Motion.

ARGUMENT III

THE CAMPANARO TAPES CONTAIN EXCULPATORY EVIDENCE, THEY DEMONSTRATE THAT CROW DID NOT PERFORM HIS DUTIES HONESTLY AND FAIRLY, AND THEY REVEAL THAT HE LIED IN STATE AND FEDERAL COURT UNDER OATH

In 1997, undersigned counsel was contacted by Andy Campanaro, a person who stated that he had audio tapes of Crow from 1986. Campanaro stated that he was a free-lance writer and that he had to come forward because he could not let Gerald Stano be executed without revealing what he knew. Campanaro stated that he had collaborated with Crow on a book for profit in 1986, that he had recorded many of his conversations with Crow, with Crow's permission, and that, based upon his conversations with Crow, he did not believe that Mr. Stano had killed anyone.

Counsel asked that the Circuit Court for Volusia County

provide funds for an investigation into the tapes. Counsel filed a motion under seal. The trial court ordered the motion unsealed, the state responded to the motion, and the court denied funds to obtain and review the tapes. See Appendix 12, Rule 3.850 Motion. That decision is on appeal to this Court.[37]

After undersigned counsel received funds from the CCRC, see Argument VI, infra, the Campanaro tapes were reviewed.

[37]As discussed in Argument IV, infra, the denial of Petitioner's "Howard Pearl" claim in Volusia County is on appeal to this Court.

A. Crow Stated in 1986 That He Knew That Petitioner was A False Confessor, He Knew it When he Testified at Trial, and He Intentionally Kewt the Information from Defense Counsel and the Courts

> If this gets picked up by Olive and he goes along this line, they're going to bring something like that up.
>
> .....
>
> If you tell that to a judge, you tell that to a public defender, he'll use that.[38]

For real.[39]

Crow says on the Campanaro tapes that Stano lied to police officers about whether he was guilty of murders. Crow says that in cases where other agencies were involved and Crow was not in control, Stano's confessions would not match the facts at all. On the Campanaro tapes, Crow described his feelings when this--Gerry relating false "confessions" in front of other officers--happened: it was like "watching the ice-cream melt in my hands" or "watching everything that he's saying going to hell, because I know the son-of-a-bitch didn't do" the crime to which he was falsely confessing.

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[38]The first quote is Campanaro speaking, to which Crow responds "sure." The second quote is Crow speaking. Campanaro Tape, 1986.

[39]Here's another, said by Crow to Mr. Stano after Mr. Stano falsely confessed to a case:

> ***You probably heard us talking about it [a homicide] or some thing, but you didn't do that one.***

See Campanaro tapes.

Crow did not tell ***trial*** defense lawyers this information,[40] much less post-conviction counsel. When Crow commented about Stano on the tapes in 1986 "I'm watching the son-of-a-bitch [Stanol melt in front of my hands," Campanaro said, "If this gets picked up by Olive and he goes along this line, they're going to bring something like that up." "Sure," Crow responds.

This requires some explanation. Crow described on the Campanaro tapes driving around in St. Petersburg with other investigators. According to Crow, Stano would point out a spot where Stano said a body was left. Stano was wrong, and Crow's response to himself--as recorded on the tape--was: "I'm going, 'Jesus.'" Crow said: "And we leave and come back to Daytona, and **I lay** some **facts on him** [Stanol. I [Crow] said, 'I don't think you did that one, Gerry.' Stan0 goes: 'It looks so familiar.' I [Crow] said, 'Familiar my ass.' I [Crow] said *'You **probably heard us talking about it or something, but you didn't do that** one.'*"[41] Crow said he told Stano that Stano was acting "goddamn binockers." Crow said he advised Stano: "You know they got a suspect in that case," and Stano said "They do?" Crow said "yeah."

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[40]Trial counsel's theory in the Scharf case was that Mr. Stano would falsely confess. This information from Crow "would have been enthusiastically exploited by defense counsel, Stano v Dugger, 901 F.2d 898, 903 (11th Cir. 1990), whose announced "principal theory of defense was that Stano tended to confess falsely." Id., at 899. Crow knew that this was critical to the defense, but he unconstitutionally kept it from trial counsel, post-conviction counsel, and the courts.

[41]Thus, Crow confesses on the Campanaro tapes in 1986 that if Mr. Stano ***heard*** Crow talking about **a case,** Stano would try to confess to it, whether Stano committed the crime or not. Crow ***knew*** this, every time he testified.

Crow said on the Campanaro tapes "I don't think Stano's all there personally. I think we got him 20% of **make** believe, but if **you tell that to a judge, you tell that to a public defender, he'll use that.**" See Brady v. Maryland, 373 U.S. 83 (1963) (you should tell that to a public defender or a judge [its in the constitutionl) .

This information was kept from the federal as well as the state courts before now. Unless defense counsel had gone door to door, world-wide, he would never **have** found Andy Campanaro. based upon that to which paul Crow testified in federal court, no-one existed who would have such tapes of Crow.

The tapes reveal that Crow dealt dishonestly and unfairly with the Petitioner, this case, and the courts. In Walls v. State, 580 So.2d 131 (Fla. 1991), this Court held that the Due Process Clause of the Florida Constitution provides special safeguards against law enforcement misconduct:

> The term "due process" embodies a fundamental conception of fairness that derives ultimately from the natural rights of all individuals. "Fairness" is nearly the equivalent of the concept of "good faith," which imposes a standard of conduct requiring both fairness and honesty. "' [D]ue process requires fairness, integrity, and honor in the operation of the criminal justice system, and in its treatment of the citizen's cardinal constitutional protections.'"

Walls, supra, 580 So.2d **at 133** (citations omitted). When **law** enforcement conduct "fails either to be fair or honest . . . due process is implicated and the court are required to conduct an intensive scrutiny of the police conduct in question." Id. "Gross

deception used as a means of evading constitutional rights has no place in such a system." Id., 580 So.2d at 134.[42]

The lower court **was** required to closely examine the State's conduct and to hold the State accountable for any dishonesty, under Walls. The record in this case shows beyond cavil that Crow was neither honest nor fair in his testimony under oath.

B. To The Extent that the State Relies Upon Federal Proceedings, Crow Lied in Federal Court

1. The Movie Rishts Lies

In 1992, Crow testified in federal district court regarding his involvement in Petitioner's case. Whether Crow intended to write a book about Petitioner was central to the district court's later findings. Law enforcement officers testified that Crow did intend to write a book, that he intended to make a lot of money from the book, and that his objective in working with Mr. Stano was to "solve" as many homicides as possible to make the book more interesting and more marketable. See Appendix 11, pp. 65-68, Rule 3.850 Motion.

The district court heard Crow's testimony, which contradicted the other officers' testimony. Nevertheless, the Court relied upon Crow's testimony. The district court judge found that, from Crow's testimony, Crow had at one point entertained the notion of writing

[42]Furthermore, the facts pled demonstrate a manner of state action which, if disclosed, would "[have] 'carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case.'" Kyles v. Whitley, 115 S. Ct. 1555, 1572 (1995) (ellipses in original) (citations omitted); see also United States v. Bagley, 473 U.S. 667, 682 (1985); Bradv v. Marvland, 372 U.S. 83 (1963).

a purely educational book, but that he never had had any interest in being famous and had made no efforts to land a deal. At most, Crow wanted a "treatise . . . to explain to law enforcement agencies how to deal with conflicts among jurisdictions investigating cases ...." R8, 160, 36. Crow, was, according to his testimony, "a person who finds himself, because of unique historical events, in a position to make a scholarly contribution to law enforcement ...." Id. I at 38. Balderdash! From the Campanaro tapes plainly Paul Crow had, contrary to his district court testimony, fully intended to make a mint off the Stano story from day one. In federal district court, Crow swore under oath to the following about his intentions to write a book:

> Judge Fawsett: As far as your efforts to produce a work of art, whether history or film or other, did you take any steps to accomplish that other then just conceding the idea of a possibility?
>
> Paul Crow: No, ma'am.

(P. 229, Jan. 24, 1992).

This was very, very, false. Crow then testified that he had talked with one person, Terry Ecker, about collaborating on a book, but that Ecker's style was too graphic, and magazine-like, for Detective Crow, who was only interested in educating people.[43] (P. 210, Jan. 24, 1992). Crow testified that he did not personally

[43]Yet, when Crow's true-detective type book Blind Furv came out, he ran around autographing it for people. See Appendix 7, p. 4, Rule 3.850 Motion. For a description of Blind Fury, see Appendix 11, pp. 68-70, Rule 3.850 Motion.

speak to any literary agents, and that the only contract negotiations he ever had were with Terry Ecker.

Mark Olive: Did, other than Mr. Ecker, Terre11 Ecker, did you pursue your aspirations of publishing a work of art or education by -- did you pursue it by speaking with persons other than Terre11 Ecker?

Paul Crow: No, sir. I have had people approach me about this many times, and I have not pursued it. I constantly get letters, I get phone calls, we are either going to do this book, do this project with or without your help. I have elected to leave it alone.

(p. 230, Jan. 24, 1992).

This was untrue. The tapes reveal that Crow lied in federal court in 1992 when he said that he had not pursued deals with respect to a Gerald Stano story. On the tapes he pursues deals in 1986, and reports the pursuit of deals from years earlier.

The tapes reveal that Crow was marketing the Stano story and trying to sell it to the highest bidder. Campanaro was bidding against other authors and publishers for Crow's story. Crow told Campanaro that Crow had solicited advice on how to market his Stano information from a writer or publisher by the name of Beach as early as 1983 or 1984. Crow said Beach was one of the big "muckity mucks" from Reader's Digest. According to Crow, Beach read every fiction and non-fiction police type story that authors were trying

to sell and then Beach would offer advice to would-be authors regarding "what's going to go and what's not going to go." According to Crow, Beach told Crow how best to market the information Crow had. Crow said that Beach told Crow "the story has the chemistry of being one of the better ones he's seen coming down that road in a long time."

On the tapes, Crow told Campanaro about various agreements he had or that he was negotiating about Stano. He said that he had an agreement with a writer, and that under that agreement Crow said he would receive fifty percent of the profits. Crow said the book would most likely be written by that author but that the story would be in the form "as told to the author by Paul Crow" book. Paul Crow said the author was very accomplished and had published a lot, including two screenplays. Crow was negotiating with Campanaro by using the fact that other authors were bidding on his story.

In his negotiations, and on tape, Crow offered "exclusive" material. For example, Campanaro wanted to speak with Mr. Stano, but could not arrange that. Crow told Campanaro that he had a stack of letters from Stano six inches high, and he showed the stack to Campanaro. Campanaro told Crow that if he could get ahold of that stack of letters he would not need to speak with Stano. Crow laughed and said, "I've got alot of aces. You know, I've got a lot of aces in the hole. You can go to any county you want, try to look up anything you want to. But what you really need, I've got. That's what I'm saying. I've got all the letters; I've got

all the tapes."

The Campanaro tapes reveal that Medallion Books has offered Crow $8,000.00 flat as a collaborators's fee. Campanaro says on tape that Crow says that Crow wants from Campanaro ten percent of all rights to the Stano story: international, hard-cover, screen, anything like that.

The Campanaro tape shows that Crow's testimony in federal court regarding his motivation and interest in writing a book and receiving profits from a Stano story was one big lie.[44]

2. Officer Jim Gadberry

Jim Gadberry was the officer who first arrested Gerry Stano. In 1986, Officer Gadberry came forward and said that he did not believe Gerry Stano committed any murders. Gadberry described how Stano was told all the facts of the crimes before he confessed, that Stano did not independently know the facts of any of the cases, and that Stano simply did whatever he was told by Crow to do.

In his testimony in federal court, Crow attempted to discredit Gadberry by averring that Gadberry's concerns regarding Petitioner's arrest and conviction was of a recent vintage. One way in which he did so was by testifying that Gadberry had never voiced any concerns to Crow about Stano's confessions:

MS. ROPER: After Mr. Stano's confession, did Detective Gadberry ever indicate to you that he had any

[44]When counsel asked for funds to obtain and review the Campanaro tapes, counsel predicted that the tapes would reveal perjury. Appendix 12, Rule 3.850 Motion. Nevertheless, the motion to incur costs was denied.

concerns that Mr. Stano did not independently know the facts of the crime?

CROW: No, ma'am.

(Jan. 29, 1992, Vol. 19, p. 78)

MS. ROPER: After the results came back from Sanford Crime Lab, did Detective Gadberry ever come to you and tell you that he had felt Stano had not committed the crime?

CROW: No, ma'am.

(Jan. 29, 1992, Vol. 19, p. 103)

MR. OLIVE: Now, you testified that Officer Gadberry never advised you that he had doubts about the Brevard case, is that **an accurate** recitation of your testimony?

CROW: That's correct.

(Jan. 29, 1992, Vol. 19, p. 220).

On the Campanaro tapes, six years earlier, Crow says otherwise. Crow reviews the Stano case in great detail with Campanaro. Crow says on the tape that Jim Gadberry had always had concerns about the Stano case, from the very beginning. Crow said that Gadberry's concerns all **along** had been that Stano was just a serial confessor, not **a** mass murderer, and that the judges and lawyers had **shafted** Stano and sent him up the river.

The evidence that Paul Crow lied and will do so under oath is inescapable. His fellow officers say under oath that a person cannot be executed on Crow's sworn word, because his sworn word is **a lie. Crow's** sworn word is contradicted by his taped conversations. His taped conversations reveal that Crow intentionally kept exculpatory information **away** from judges, public defenders, and post-conviction counsel for Mr. Stano.

ARGUMENT IV

THE DEFENSE LAWYERS, THE TRIAL COURT, THE JURORS, AND THIS COURT WERE DECEIVED BY PAUL CROW'S TESTIMONY, AND A NEW TRIAL IS REQUIRED

The evidence at Mr. Stano's first trial was confessions to Paul Crow. At the retrial, the testimony of Clarence Zacke was added. The first jurors were unable to reach a verdict based on confessions alone. Had there been evidence to attack the confessions, this case would not have gone beyond a first trial. There would have been an acquittal.

Evidence was available, but Paul Crow lied under oath and has continued to lie under oath about how the confessions were obtained.

Paul Crow was a detective in the Daytona Beach Police Department at the time he met Gerry Stano in 1980. Daytona Beach is in Volusia County. Over a period of many, many months, Crow interrogated Petitioner in Volusia County about unsolved homicides.

The trial in the Brevard County case in which Ms. Scarf was the victim, occurred in 1983. The confession to Crow about the Scharf case occurred in March, 1981, in Volusia County, while Crow was obtaining confessions about other Volusia County cases.

In Brevard County, Crow testified about the March, 1982, confessions. He swore:

> Q. Now, during the time that you were talking to Gerald Eugene Stano, did you make him any promises in order to get him to talk to you?
>
> A. No, sir.
>
> Q. Did you offer him any benefit or hope

of reward?

A. No, sir.

Q. Did you force or coerce him in any way?

A. No, sir.

Id. at *2068-69.*

Q. Did you make any promises or offer any inducements **or** hope of reward to Mr. Stano in order to get him to talk to you about these *homicides?*

A. No, sir.

Id. at 1427.

Q. Did you or did anyone in your presence make any promises to the defendant, Gerald Eugene Stano, in order to get him to talk to you?

A. No, sir.

Q. Did you offer him any inducement whatsoever?

A. No, sir.

Q. Did you threaten, coerce or force him in any manner in order to get him to talk to you?

A. No, sir.

Id. at 868.

This was all completely untrue, as was later proven. In federal court Crow admitted under oath that the very reason Petitioner provided statements to him--the statements to which he **was** referring in the above-excerpted quotes in state court--was because Crow and others *had* offered Petitioner "benefit or hope of reward," "promises or . . . inducements or hope of reward," **and** "inducements whatsoever." Id. Crow had offered, nay, promised, a

life sentence for all confessions, at the time that Stano "confessed" to Crow regarding this Brevard County Scharf case.

This **is new evidence** of **fraud before this Court and obstruction of justice.**[45] This is evidence of fraud that **was** not addressed by the federal courts. The federal district court in the federal proceedings did not determine whether Crow had told the truth at Petitioner's trial with respect to how the confessions were obtained. The federal court did not address whether the Petitioner had been promised life imprisonment in return for confessions, and whether that rendered his confessions unreliable[46] and involuntary because induced by promises.[47]

However, Paul Crow and others did *testify* about these matters in federal court, and, for the first time, admitted that Petitioner had been promised life imprisonment in return for confessions. If Crow and others told the truth in federal court, then the conviction and sentence in this **case** must be set aside.[48]

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[45]There should be no time bar on raising police officer fraus on the Court.

[46]See Crane v. Kentucky, 476 U.S. 683 (1986).

[47]See Hutto v. Ross, 429 U.S. 202 (1976) (promises of leniency void confessions); Bram v. United States, 168 U.S. 532 (1897) (promises of leniency void confession).

[48]There was uncontradicted testimony in federal court that Petitioner repeatedly recanted his confessions, refused to provide confessions, did not know the facts of the crimes he supposedly committed, and did not finally agree to provide confessions, specifically the confession to the Scharf case (and almost **all** of the cases introduced at sentencing) until he had been promised life imprisonment. See Appendix 11, Rule 3.850 Motion, pp. 17-41. The district court did not discount this evidence, and did not draw any legal conclusions from it.

Until Paul Crow and others testified under oath in federal court, Petitioner could not prove that his confessions had been obtained by promises of life imprisonment. These matters are cognizable now. The federal court did not address or resolve these matters. Under Florida and United States Constitutional law, Mr. Stano is entitled to relief.[49]

In sub-section A, infra, Petitioner places the lies by Crow in context. The jurors in Petitioner's first trial were concerned

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Appendix 11 is a recitation of the evidence and testimony presented in federal court. It contains Crow and other persons testimony under oath, and it contains excerpts from the actual evidence introduced. The information contained in the proffer is incorporated into this Claim by specific reference.

[49]These issues are cognizable now. Had Crow told the truth pre-trial, there would have been no trial. The confessions would have been suppressed.

These facts demonstrate a manner of state action which, if disclosed, would "[have] 'carried within it the potential . . . for the . . . discrediting . . . of the police methods employed in assembling the case.'" Kyles v. Whitley, 115 S. Ct. 1555, 1572 (1995) (ellipses in original) (citations omitted). If the truth had been known, defense counsel could have shown the fraud in the prior convictions, id. 1572, n. 15, could have shown that the police "'set [Petitioner] up,'" id. at 1573, and attacked "the good faith of the investigation," id. at 1571, "the reliability of the investigation . .." id, and "the process by which the police gathered evidence and assembled the case..." Id. at 1573, n. 19. The credibility of the Crow confessions was one key to the prosecution case. See Napue v. Illinois, 360 U.S. 264, 269 (1959) (" [t]he jury's estimate of the truthfulness and reliability of a given witness may well be determine of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.") ; Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986) ("The conviction rested upon the testimony of [police], [Their] credibility was the central issue in the case. Available evidence would have had great weight in asserting that [the police] testimony was not true. There is a reasonable probability that, had [the impeachment] been used at trial, the result would have been different.").

about the confessions. Had Crow told the truth about how he obtained confessions, there is a very real probability that the confessions would have been suppressed and/or Mr. Stano would have been acquitted at his first trial.[50] In sub-section B, infra, Petitioner presents the, we now know, false testimony from pre-trial, mistrial, re-trial, and sentencing proceedings. In sub-section C, infra, Petitioner presents the evidence from the later federal proceedings, which shows that the trial testimony was false. In sub-section D, infra, Petitioner shows that the decision in federal court does not affect Petitioner's right to relief now in this Court. In sub-section E, infra, Petitioner shows that he is entitled to relief based upon the sworn testimony that was actually given in federal court, or that he is entitled to an evidentiary hearing in this court.

A. The Jurors at Petitioner's First Trial Were Concerned About Whether Petitioner's Confessions Were Reliable

Petitioner's first trial in the Scharf case ended in a mistrial. The only evidence against the Petitioner at this trial was his confession in March, 1981, and his confession in August, 1982. After asking to listen again to the testimony regarding these confessions, the jury hung.

After deliberations began, the jury wrote a note to the court asking for a tape player. Trial Transcript, at 1583 (jurors note at p. 2365--"We need tape player for playing tape."). Dean Moxley

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[50]Since the first trial only involved confessions, suppression or explanation of confessions would have made a difference.

mentioned, correctly, to the Court: "It looks like they are focusing in right on the issue right now." Id. at 1585 (Volume IX). The jury was allowed to hear the tape from August 12, 1982. Id at 1587.

Three minutes later the jurors delivered another note to the court. The jurors asked for scotch tape, which was provided. Id. at 1588. Fourteen minutes later, the jurors sent in another note asking "[d]o we have a transcript of the trial testimony available to us or a tape of testimony?" Id. The judge wrote the jurors back: "Do you wish an entire transcript or just specific portions--if just portions, please specify." Id. at 2365.

Shortly thereafter, the jurors sent out another note. It read: "An entire transcript would eliminate the need to ponder further points of testimony in question." Id. at 1591. The judge brought the jurors into the courtroom and told them that an entire transcript was not available. Id. at 1593. The jurors retired to deliberate more.

Around two hours later, the jurors returned with another written question: "We find we require the transcript of Manis, Crow, Hudson, Sylvia, and Naida Loudon." Id. at 1595. It was 9:00 p.m. The jurors were excused for the evening without the requested transcripts. Id at 1596.

When court convened the next morning, the prosecutor, Dean Moxley, argued that the jurors should be provided the requested transcripts. It was his view that, inasmuch as the jurors had already heard the tape recorded "confession" from the petitioner,

obviously the jurors "want[ed] to hear the oral [non-recorded confessions. [i.e., the one to Paul Crow]." Id. at 1601-02. Specifically,

> In this case the jury had an unenviable task of number one, hearing the taped confession; and, number two, now they're talking about the oral confession[s]. They didn't have notes. There are actually three separate incidences [i.e., confessions] and I think what--they've now heard the tape and now they are trying to reconstruct the oral conversations in their minds and keep them separate from the taped recorded conversation and then at the same time I think they are trying to see whether or not they are validated by the external facts.

Id. at 1602 (comments of Dean Moxley).

The judge declined the jurors' request and instructed them to rely upon their collective memories. Id. at 1606. Six hours later the jurors returned and said: "We have not come to a unanimous decision after voting several times. It does not seem like this decision will change to the contrary." Id at 1607. An Allen charge was given.

Twenty-four minutes later, the jurors returned with a note asking what the Allen charge meant. Id. at 1611. The Court declined to give the jurors any further instructions.

An hour and a half later, the jurors returned with a note that said: "After perusing the facts, again, we have failed to reach a unanimous decision." Id. at 1612. The Court declared a mistrial.

B. Pre-trial. Mistrial, Re-trial, and Sentencing Falsehoods

1. Pre-trial

Before the mistrial, Paul Crow was deposed on July 21, 1983, and discussed the cases against Petitioner. He swore that as to the March, 1981, Scharf statement to Crow, he and the Petitioner were simply discussing "a series of different things he had done," and

> we would have a body and the subject would have been a missing person, so I went along that dialogue, if she had been missing, this is where she was last seen and if he had picked up a girl in that area. And he said he had and gave this description and what he had done with her.

Id. at 25.

Crow testified at this deposition that when Petitioner told him about the Scharf case in 1981, Petitioner had no reason to expect that he would not get the death penalty:

> Q. Did you get the impression that he was going to plead guilty to it or going to plead guilty to all the things he was confessing to; what was his attitude when he was giving you these confessions?
>
> A. That was so early into the investigation that I really didn't have an opinion. You know, you were dealing, I think at that time, with six murders. I didn't know where we were going. Nobody could have speculated where we are right now.[51]
>
> Q. Well, did he appear to realize that here he's confessing to a law enforcement officer about a murder that he could and, obviously, he'll either go to prison for life or get the death penalty on?
>
> A. He's aware of that.

[51]This was a lie. Crow had already offered Gerry life imprisonment for confessions, the very confessions Crow said he was eliciting.

> Q. Well, what was his attitude when he was confessing, was his attitude that he was going to confess and admit it to the world and plead guilty or --
>
> A. I don't know.

Id. at 28.[52]

On May 9, 1983, Crow gave another sworn deposition. He swore that on March 6, 1981, he and the Petitioner were in the Daytona Beach Police Department Library with Officer Dave Hudson. Crow swore that the Petitioner was discussing several cases and simply confessed to Scharf, discussing the facts for "fifteen to twenty minutes." Id. at 6.

Paul Crow testified at the Jackson v. Denno hearing. Dean Moxley elicited the state's testimony at this hearing. Crow testified that on March 6, 1981, he was interviewing the Petitioner "in regards to other homicide cases." Trial Transcript, Volume VIII, p. 1422. He testified that Petitioner was being interviewed in the law library regarding murder victims Neal, Bickrest, Heard, and Hamilton.

Crow specifically denied that Petitioner had been promised anything in return for confessions:

> Q. Did you make any promises or offer any inducements or hope of reward to Mr. Stano in order to get him to talk to you about *these homicides?*
>
> A. No, sir.

---

[52]Crow swore that Petitioner never told him why he was confessing. Crow did know why Petitioner was confessing -- he had been promised life imprisonment, by Crow.

Id. at 1427.[53]

Crow then testified that Petitioner told him about the Scharf murder. Id. at 1429-1433, 1435, 1440.

The trial judge found the March 6, 1981, statement to have been made voluntarily. Id. at 1441.

Johnny Manis also testified at the Jackson v. Denno hearing. He stated that on August 11, 1982, he went to the Daytona Beach Police Department and the first person he saw was Paul Crow. Trial Transcript, Volume VIII, p. 1380. He testified that he had interviewed Petitioner before at Florida State Prison on January 20, 1982. Id. at 1381. On August 11, 1981, he interviewed the Petitioner in Crow's presence in an office adjacent to Crow's office. Id.

They then talked about a lot of things, and got around to the Scharf case. They talked for an hour to an hour and a half, and Crow was present "forty or fifty percent of the time." Id. at 1385. Manis stated that after discussing the Scharf case he asked the Petitioner if he could return the next day and tape record a confession, and Petitioner agreed. Id. at 1391.

Manis said he went back the next day and Crow was present at the beginning of the interview. Manis testified that he tape recorded a confession regarding the Scharf case. He also testified that when he earlier interviewed the Petitioner, without Crow, on January 20, 1981, for two hours, the Petitioner did not admit to the crime. Id. at 1402. Stano told him he did not know about the

[53]This was an out-and-out lie.

offense.

On cross-examination, Mania said that on August 12, 1981, he did not advise the Petitioner of his Miranda rights before he interviewed him. Id. at 1405. Manis testified that when he came in the interview room on August 11, 1981, Petitioner and Crow were already there. Manis stated that he did not know what Crow and Petitioner had been discussing before Manis' arrival. Id. at 1405-06.

The trial judge found the August 11, and 12, 1982, statements to have been voluntary. Id. at 1415.

2. Trial testimony at Mistrial

Paul Crow testified before the jury at the trial that ended in mistrial. Crow testified that on March 6, 1981, he saw the Petitioner and questioned him in the presence of Dave Hudson. Trial Transcript, Volume XII, p. 2067. Crow testified that he advised the Petitioner about and the Petitioner waived each of his Miranda rights. Crow then testified as follows:

> Q. Now, during the time that you were talking to Gerald Eugene Stano, did you make him any promises in order to get him to talk to you?
>
> A. No, sir.
>
> Q. Did you offer him any benefit or hope of reward?
>
> A. No, sir.
>
> Q. Did you force or coerce him in any way?
>
> A. No, sir.

Id. at 2068-69. Crow testified that upon hearing the confession,

he telephoned the Titusville Sheriff's office, and then wrote a letter to the Titusville Sheriff's office. Id. at 2070. Crow outlined Mr. Stano's March, 1981 confession.

On cross-examination, **Crow** testified that when Mr. Stano gave this statement, he was aware that it could be used against him and that he volunteered the information anyway because he was "very cooperative." Id. at 2074. Crow said that the Petitioner did not know how the victim had been killed, either shot or stabbed. Id. at 2077-78.

Also on cross-examination, Crow testified that Manis talked to Mr. Stano in August, 1982, a year and a half after the March, 1981, Scharf statement. Id. at 2073. Crow testified that when Manis interviewed the Petitioner, the personnel in the jail were under orders not to allow Petitioner to have contact with anyone at all unless it was cleared through Crow. Id. at 2080.

Dave Hudson then testified. He swore that he was with Crow and Petitioner on March 6, 1981, in the legal advisor's office at the Daytona Beach Police Department. He testified that Petitioner waived his rights and made a statement regarding Scharf. Id. at 2085.

Johnny Manis testified that he interviewed the Petitioner on August 11, 1981, in the Detective Division of the Daytona Beach Police Department. Trial Transcript, Volume XI, p. 2004. Paul Crow was present. Mania repeated the testimony that he **gave** at the Jackson v. Denno hearing. He then testified to what the Petitioner supposedly said regarding Scharf, and testified that he did not

have a tape recorder so he asked for and received permission to return the next day. Id. at 2015-16. He testified that he returned on August 12, 1982, and recorded the Petitioner's statement. The tape was played for the jurors. Id. at 2019-2035.

On cross-examination, Manis admitted that on January 20, 1982, when he first interviewed the Petitioner, the Petitioner said that he "wished he could help us with our case, but ***he didn't know anything about*** *it*." Id. **at 2037** He testified that on August 11, 1982, when he entered the interrogation room, Crow and Petitioner were already there together. Id. at 2038. He testified that Crow "arrange[d] the meeting." Id.

3. Testimony at Re-trial

The state tried Petitioner a second time. In opening statement, the State explained its primary evidence:

> Years, months, more years go by [after the body is discovered]. A fellow by the name of Gerald Eugene Stano, this defendant, was interviewed by a fellow by the name of Dave Hudson and a **fellow** by **the name of Paul Crow,** who are in law enforcement in Volusia County, Florida. Mr. ***Stano begins*** describing to them details of this incident . . . ***a rather detailed explanation.*** ..[a]nd, in fact, he talked about--and a tape recording was made by law enforcement during this period of time wherein Gerald Stano, in his own words, puts [a body] in the vehicle on the fatal night in question.

Trial Transcript, Volume IV, p. 609. The prosecutor conceded that "there will be other witnesses, but those [Crow, Hudson, and Mannisl are the main ones." Id. at 610.

Moxley called Paul Crow to testify. Crow testified that he interviewed the Petitioner on March 6, 1981, at the Daytona Beach Police Department in the legal library. Trial Transcript, Volume

v, at 066. Moxley elicited the following:

> Q. Did he agree to talk to you sir?
>
> A. Yes, sir.
>
> Q. Did you or did anyone in your presence make any promises to the defendant, Gerald Eugene Stano, in order to get him to talk to you?
>
> A. No, sir.
>
> Q. Did you offer him any inducement whatsoever?
>
> A. No, sir.
>
> Q. Did you threaten, coerce or force him in any manner in order to get him to talk to you?
>
> A. No, sir.

Id. at 868. Crow said that Hudson was present, and that the Petitioner confessed to the Scharf case. Id. at 869.

Crow then testified to what Petitioner purportedly said at that time with respect to Scharf.

Manis testified under Moxley's questioning that on August 11, 1981, he went to the Daytona Beach Police Department and met with Crow. Id. at 968. He said that Crow took him across the hall into a vacant office and Petitioner was sitting there. Id. He testified that he interviewed the Petitioner without turning the tape recorder on, and then asked if he could return that next day and record a statement. Id. at 971 Manis testified to what Petitioner purportedly said about the Scharf case **on** August 11, 1981. Manis then testified regarding the taking of a tape recorded statement on August 12, 1981, and the tape was played to the jurors. Id. at 983.

On cross-examination, Manis testified that on January 20, 1981, he interviewed the Petitioner, who told him "he wished he could help me with my case, but he didn't remember anything about that." Id. at 1000.

In closing argument, the state stressed that the Petitioner had confessed on "three separate occasions." Trial transcript, Volume VI, p. 1074. In explaining why Petitioner had not talked to Manis about Scharf in January, 1981, the state argued:

> Stano began talking to Crow and Hudson and telling them about the details of this homicide, because in his own mind he believed it occurred in Volusia County, Florida, not Brevard, because it was so close to the line.

Id. at 1084.

The Petitioner was convicted.

4. Sentencing

Before sentencing began, Moxley argued that he should be allowed to introduce details of prior offenses, including confessions, photographs, and autopsy protocols. Trial Transcript, Volume VII, p. 1151. The court agreed.

Eight prior convictions -- all guilty pleas, and all based solely on confessions -- were introduced at the Scharf sentencing proceeding. In each of the cases used in aggravation by the state, confessions, and only confessions, provided the basis for convictions.

In closing argument, the state stressed that all of the confessions and convictions, in aggregate, justified the death penalty.

The jurors recommended a sentence of death by a vote of 10 to 2.

C. The Federal Court Proceedings Revealed that Crow Lied in State Court

The state conceded in federal court--after ten years--that confessions obtained from Petitioner in 1981 and 1982, the confessions in this case, were the result of promises of life imprisonment. Further, the State conceded in federal court that the effect of promises of life imprisonment--i.e., that resulting confessions are involuntary and unconstitutional--had not yet been litigated in state or federal court. This is Petitioner's first opportunity to present the lies from trial after the state admitted the lies in federal court.

In federal court, the State submitted the affidavits of Don Jacobson and Paul Crow, stating that Petitioner was offered life to confess to cases in Volusia County in 1980, 1981, and 1982. Federal Court Docket No. 7, at 2-3. The State's witnesses in federal court--Crow, Jacobson and Nixon--all testified in the district court that Petitioner was offered life imprisonment to confess.[54] Petitioner's witness, Steven Lehman, a former Volusia County deputy, testified the same.[55]

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[54] See Appendix 11, p. 18, Rule 3.850 Motion.

[55] Lehman testified that before he interrogated Petitioner, Lehman spoke directly to defense counsel and Nixon and was advised that Petitioner would receive a life sentence for unsolved murders to which he confessed. Lehman said he was present in a meeting with Nixon and Crow and the "[s]ubject matter of the meeting was the method in which we were going. The method which we would use to get Mr. Stano to confess to other homicides that we were not aware of that he was involved in yet." R15-141. He said he "had

This testimony, in sum, led the state to write in its federal court briefs the following:

* "A deal was struck in May of 1980." State's Answer Brief at 13.

* Pursuant to the deal, "*Stano* ***would not receive*** the ***death penalty fox any murder of victims whose bodies were found in the Seventh Judicial Circuit***[56] ***to which he confessed prior to entry of his guilty plea before Judge*** *Foxman*." Id. at 12.[57]

* Crow participated in tape recorded interviews with the Petitioner in May **and** June of 1980, during which he discussed what the Petitioner would receive in return for confessions, id. at 22, and he and another officer made it clear that "they were aware of Stano's deal ... 'We are trying to keep you out of the chair ...." Id. at 42.

* The offer of life imprisonment for confessions was in effect when Petitioner confessed to the Scharf case to Crow. The offer was open

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direct conversations with Jacobson and Nixon about [the agreement]." Id. at 150. In response to the district court judge's questions, **Lehman testified that the meeting and its subject matter "will be ingrained with me forever."** See Appendix 11, at 18, Rule 3.850 Motion. He testified that before he interrogated the Petitioner both he and the Petitioner knew there was a deal. Id. See also Exhibit 63 from federal court (Lehman Affidavit) ("Don Jacobson, Paul Crow, the state attorney and I met and agreed that Gerald Stano would receive a life sentence for anv case in which he confessed. Gerald Stano was made aware of this agreement before I interrogated him." (emphasis added)).

[56]As discussed in text, infra, the state's theory at the re-trial was that Petitioner believed he **was** confessing to a Volusia County, that is, a Seventh Judicial Circuit, **case,** when he first confessed to the Scharf case.

[57]Mr. Stano never led any law enforcement officer to any dead bodies. He confessed only to cases **in** which a body had already been found and police knew and had reported on the body's location.

for "seventeen months." Id. at 14.

Thus, it is beyond dispute today that everything Paul Crow said at trial regarding the 1980, 1981, and 1982 confessions--including the Scharf confession--was false. It is false that when Crow was obtaining these confessions he did not know what would come of them.[58] It is false that these confessions were not prompted by promises of life imprisonment.

The Respondent now admits that promises were made, but contended in federal court that the promises did not reach as far as the Scharf case because Petitioner had only been promised life imprisonment for Volusia County cases, not Brevard County cases like Scharf. This argument is irrelevant, inconsistent with the State's position at trial regarding why Petitioner confessed, and factually inaccurate.

First, the argument is irrelevant. The Respondent now agrees that Petitioner was not confessing out of a spirit of blind cooperation, as was sworn to at trial, but out of motivated self-interest. According to Respondent today, when Petitioner supposedly confessed to the Scharf case in March, 1981, he did so

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[58] Q. Did you get the impression that he was going to plead guilty to it or going to plead guilty to all the things he was confessing to; what was his attitude when he was giving you these confessions?

A. That was so early into the investigation that I really didn't have an opinion.

This answer was a lie.

because he "wanted to reap the benefit of the plea bargain but got his facts confused." Respondent's federal court brief at 47 (emphasis added).

Under this scenario, contrary to what the jurors, judge, and lawyers were told in 1983, Petitioner was with Crow confessing to murders because he had been told that he would receive life imprisonment for the confessions. In the midst of these confessions, which were made in the hope, and with the guarantee of reward, Petitioner, "wanted to reap the benefit of the plea bargain but got his facts confused," Respondent's Brief at 47, or "became confused" and "volunteered information" regarding the Scharf murder that was not, under the Respondent's current scenario, covered by the "deal." Id. at 24. Thus, while trying to obtain a promised benefit, the Petitioner, coached to please, became confused and confessed. See also District Court opinion at 39-40 **(Scharf confession occurred "[d]uring Stano's confessions on March 12, 1981, as part of his plea agreement .....").**[59] It is not relevant under a totality of the circumstances analysis that Petitioner was confused about whether what he was saying was what the state wanted to hear. What is relevant is why he **was** saying it.

Second, the Respondent's current theory is inconsistent with the theory presented at trial. According to the state's trial

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[59]These findings by the district court judge make the Scharf **confession,** induced by promises but later introduced against Petitioner, involuntary, not because of coercion, but because of promises. Hutto v. Ross, 429 U.S. 202 (1976) (promises of leniency void confessions); Bram v. United States, 168 U.S. 532 (1897) (promises of leniency void confession).

argument, when the Petitioner confessed to the Scharf case in 1981 he did so "because in his own mind he believed it occurred in Volusia County, Florida, not Brevard, because it was so close to the [county] line." Trial transcript at 1084 (state's closing argument). Under this theory, Petitioner was not confused, he was just wrong, but he nevertheless had relinquished his right to silence for only one reason--he had been promised a sizeable benefit or reward.

Finally, the person interrogating the Petitioner did not believe that there was any territorial limit on the deal. One of the very things that Crow wanted was confessions to any case in which the victim was picked up in Volusia County and was killed or left somewhere else. R17-138. According to the State's theory, Ms. Scharf **was** picked up in Volusia County and left just over the county line in Brevard County.

D. The State Has Conceded that the Federal Courts Have not Resolved this Involuntariness Issue

According to counsel for Respondent, while evidence was clearly presented in federal court showing that Petitioner's confessions were not voluntary, the issue of the involuntariness of Petitioner's confessions based upon the promises of life imprisonment was not decided by the federal courts. And, indeed, it ***is*** true that the federal courts did not address whether the confessions involved in this case were involuntary because prompted

by promises.[60]

E. Relief is Reauired

1. Law Enforcement Officers Mav Not Lie in Court--The Florida Constitution

Crow lied in Court, and Petitioner is on death row. This is unconscionable.

In Walls, supra, this Court held that the Due Process Clause of the Florida Constitution provides special safeguards against law enforcement misconduct. When law enforcement conduct "fails either to be fair or honest ... due process is implicated and the court are required to conduct an intensive scrutiny of the police conduct in question." Id. "Gross deception used as a means of evading constitutional rights has no place in such a system." Id., 580 So.2d at 134.

Florida Courts are required to closely examine the State's conduct and to hold the State accountable for any dishonesty, under Walls. The record in this case shows beyond cavil that Crow was neither honest nor fair in his testimony under oath.

2. Unconstitutionally Obtained Statements

To determine whether a confession was involuntary, a court must examine the entire record:

> Under this [due process] approach, we [have] examined the totality of the circumstances to determine whether a

---

[60]When Petitioner sought certiorarionthe voluntariness issue, Respondent's position was that no federal court findings had been made, and no law had been applied, on the "promises" issue, because, according to Respondent, "the newly-contrived claim that [Petitioner's] confession was 'extracted through promises' has never been squarely presented to any lower court." Brief in Opposition. See Appendix 13, Rule 3.850 Motion.

> confession had been 'made freely, voluntarily and without compulsion or inducement of any sort.' . . . We continue to employ the totality of the circumstances approach when addressing a claim that the introduction of an involuntary confession has violated due process.

Withrowv. Williams, 113 S.Ct 1745, 1751 (1993) (citations omitted). See also id. ("Under the due process approach . . . Courts look to the totality of the circumstances to determine whether a confession was voluntary.... Each claim . . . present[s] a legal question requiring an 'independent federal determination' on habeas.") (citation omitted).[61]

According to Paul Crow's testimony at the mistrial and re-trial, the Petitioner had been made no promises "in order to get [Petitioner] to talk to [him] about these homicides," ROA, Vol. 8, 1427, and he confessed to the Scharf murder simply because he was "very cooperative." Id. at 2074. The jurors could not reach a verdict. At the re-trial, Crow again testified that Petitioner had been promised nothing to confess.

We now know that the Petitioner's confessions to Crow in 1981 occurred after months of non-cooperation and in return for a promise of life imprisonment. This is, belatedly, uncontested. See State's Answer Brief filed in the federal circuit court, pp. 12 - 14.

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[61]The federal district court found that there was no collusion between Jacobson, Crow, and McMillan to coerce confessions from Petitioner, That is all that was found vis-a-vie the confession issue. The district court did not look to the entire record to determine whether under the totality of the circumstances the Petitioner's confessions were involuntary for reasons other than collusion, i.e., **promises**. Neither did the panel on appeal. See Appendix 13, State's Brief in Opposition, Rule 3.850 Motion.

The totality of the circumstances provides a dramatic snapshot of the "pressures and circumstances swirling around" the defendant at the time of his confession, see Jurek v. Estelle, 623 F.2d 929, 937 (5th Cir. 1980), and the voluntariness issue requires but has not received plenary, de novo consideration. Miller v. Fenton, 474 U.S. 104 (1985).

F. Johnny Manis' Testimony Does Not Save the Case for the State

With only Paul Crow's and Johnny Manis' testimony, the first trial ended in a mis-trial. Had Crow told the truth, his confession from Petitioner would have been suppressed, and the first trial either would not have happened at all, or it would have ended in an acquittal.[62]

Manis does not change the mix. Assuming that the state could have proceeded without the Crow "confession," Manis would lead the case right back to Crow and his methods. The following testimony from Crow in federal court proves the point:

> Q. The petitioner would not talk to Manis, was that your information?
>
> A. That's correct.
>
> Q. Manis wanted a statement?

---

[62]The prosecutor in closing argument stressed how important Crow's testimony was. The confession to Crow was important, said the state, because it came as a surprise to Crow. As described by the prosecutor in closing argument, such evidence leads persons to exclaim: "Holy mackerel!" R. 1062. Furthermore, the State argued that the Petitioner offered Crow not a sketchy but a "rather detailed explanation" about the murder, argued that because there were three confessions the State's case was strong, id. at 1074, and heralded Crow as one of the most important witnesses: there will be other witnesses, but those [Crow, Hudson, and Mannis] are the main ones."

A. **Yes.**

Q. He wasn't getting one?

A. That's correct.

Q. You helped him? Did you help him?

A. Yes, sir.

Q. Was that at his request?

A. Yes.

Q. The reason you helped him was because they feared, and justifiably so, expressed it to you, that they couldn't get a statement from the Petitioner in the Scharf case unless you asked?

A. That's correct.

R21-26.

G. This Claim Could Not Have Been Raised Earlier

Counsel attempted to litigate this claim in federal court, but Respondent's counsel successfully argued that the claim was not presented in the pleadings. This was the Respondent's argument in opposition to the petition from writ of certiorari to the Eleventh Circuit, and the certiorari petition was denied on April 16, 1996.

Thereafter, the Claim could have been presented to State court. The failure to present the claim earlier cannot be blamed on Petitioner. See Argument VI.

ARGUMENT V

CRITICAL EVIDENCE INTRODUCED AT TRIAL, AND EXTENSIVE EVIDENCE INTRODUCED AGAINST PETITIONER AT CAPITAL SENTENCING, WAS DERIVED FROM CONFESSIONS AND CASES WHEN PETITIONER WAS REPRESENTED BY PUBLIC DEFENDER/LAW ENFORCEMENT OFFICER HOWARD PEARL, THE FLORIDA SUPREME COURT AND THE FIFTH CIRCUIT COURT OF APPEAL ARE REVIEWING APPEALS FROM THE SUMMARY DENIAL

OF RELIEF IN THOSE CASES, AND THIS CASE MUST BE STAYED UNTIL SUCH TIME AS THERE IS A FINAL RESOLUTION OF THE HOWARD PEARL ISSUE IN PETITIONER'S CASES

Mr. Stano was represented by Howard Pearl and Don Jacobson when he confessed to the Scharf case in March 1981, and when he pled guilty to three homicides in Volusia County in 1981. Mr. Stano was represented by Howard Pearl when he confessed to multiple cases in 1982, and when he pled guilty to two homicides and was sentenced to death in Volusia County in 1983.

At trial in the Scharf case, the March 1981 Scharf confession was introduced. At capital sentencing in this Brevard County case, the State introduced all of the Volusia County convictions against Petitioner mentioned above. After the Petitioner's trial, direct appeal, and initial post-conviction proceedings, it was learned that Howard Pearl was a deputized law enforcement officer during the period of time that he represented Petitioner and other persons charged with crime.

This Court has required that all persons sentenced to death when represented by Howard Pearl be provided consideration of the claim that Mr. Pearl's dual status as a law enforcement officer and a defense counsel violated the Constitution. See Teffetellar v. State, 676 So.2d 369 (Fla. 1996); Wright v. State, 581 So.2d 882 (Fla. 1991).

Howard Pearl represented Mr. Stano in 1981 when he pled guilty in three cases and was sentenced to life by Judge Foxman. Mr. Stano was represented by Howard Pearl in 1983 when he pled guilty in two cases and was sentenced to death by Judge Foxman. All of

these cases and convictions were introduced and stressed at sentencing in Brevard County.[63]

In 1992, Petitioner filed Rule 3.850 Motions raising the Howard Pearl issue in all cases in Volusia County. The trial court took no action on either the initial or the amended motion for more than three years. On December 1, 1995, the trial court ordered the state to respond. The state filed a response on April 2, 1996.

Judge Foxman summarily denied relief without an evidentiary hearing. Judge Foxman, who sits in the county where Pearl practiced most, has been repeatedly reversed by the Florida Supreme Court for denying evidentiary hearings on the Howard Pearl issue. See Quince v. State, 592 So.2d 669 (Fla. 1992); Herring v. State, 580 S.W.2d 135 (Fla. 1991); Harich v. State, 573 So.2d 303 (Fla. 1990).

An appeal is pending in this Court with respect to the denial of relief in the two Pearl death penalty cases. Petitioner's brief is due in June, 1998. An appeal is pending in the District Court of Appeal for the Fifth District with respect to the three Pearl life cases. Petitioner filed his brief on February 27, 1998.[64] Respondent's counsel chose not to file a reply brief, and instead requested an extension of time to file a brief until after (Respondent hoped) Petitioner would be executed. See Appendix 3,

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[63]See Stan0 v. State, supra, 473 So.2d 1282, 1289 ("One person with eight prior convictions of first-degree murder presents an unusual situation. . . . The State's argument about these other crimes approached the outermost limits of propriety . . ..").

[64]See Appendix 2, Rule 3.850 Motion.

Rule 3.850 Motion.

Petitioner's conviction and his death sentence in this case were predicated upon repeated violations of his Sixth Amendment right to counsel. His attorney at the time of his first Scharf confession, and during the time of confessions and guilty pleas introduced in aggravation, was a law enforcement officer, and that status affected the lawyer's desire and ability to cross-examine, among others, Paul Crow.

If the prior convictions are found to be unconstitutional, then Petitioner will be entitled to a new sentencing proceeding and a new trial. In Johnson v. Mississippi, 108 S.Ct. 1981 (1988), the Supreme Court vacated a death sentence because a prior conviction introduced at Mr. Johnson's capital sentencing proceeding had been subsequently vacated for constitutional error. Notwithstanding the absence of any challenge "to the other aggravating circumstances found to be present," id., at 1989 (opinion of White, J., and Rehnquist, C.J., concurring), the Court unanimously reversed the death sentence: "there would be a possibility that the jury's belief that petitioner had been convicted of a prior felony would be 'decisive' in the 'choice between a life sentence and a death sentence.'" Id., 108 S.Ct. at 1987) (majority opinion) (citations omitted).[65]

[65]The allegations against Mr. Pearl in the Volusia County cases, reflected in the Rule 3.850 motions filed in Volusia County, were submitted below as Appendix 4 and Appendix 5 to the Rule 3.860 Motion. Based upon those allegations, Petitioner's convictions and sentences in the Volusia County cases were unconstitutionally obtained, their introduction at sentencing in this case was constitutional error, and Petitioner is entitled to a new trial.

> two other killings in the Brevard-Seminole judicial circuit to which he has confessed.
>
> Barring that, Moxley said he cannot gamble on what may occur on the Volusia cases.
>
> "There must be one extremely valid death penalty conviction for backup," he said.

Orlando Sentinel, October 18, 1983, p. B1 (emphasis added) .[66]

Once the trial started, Moxley continued to focus on Howard Pearl. A trial exhibit (not shown to the jury) recited the reasons why Zacke's testimony, see Claim I, supra, was so necessary. The exhibit is a letter to the State of Florida Department of Corrections, and Moxley explains in it how desperately he needs the new snitch's testimony. If one reads between the lines, the letter reveals his complete embarrassment at having lost the trial the first time:

> As there may be some question of why we would try Gerald Eugene Stano and therefore why we would need Mr. Zacke's testimony, I think I should delineate our reasoning in this regard. It is now true that Mr. Stano has six life terms and two death penalties for eight first degree murders. ***We have serious doubt about the validity of*** the ***two Stano death penalties. We do believe Stano should receive one valid***

---

[66]In the local ***Today,*** similar comments were reported:

> Stano, who pleaded guilty to eight murders, already has received the death penalty and six life sentences.
>
> But because the death penalty is "automatically appealable and carries no guarantees," Moxley said he wanted Stano to have as many death penalties stacked against him as possible.

Today, October 18, 1983, 1B.

This possibility is very real in Petitioner's case. The prosecutor stressed that Howard Pearl's participation in prior cases was the reason to give the death penalty in *this* case. See infra, para 12, p. 16-17. This case fueled an incredible amount of pre-re-trial publicity and fever. Mr. Stano had several convictions and two death sentences (from Judge Foxman) before prosecutor Moxley decided to test a **case** with a jury. When he failed to obtain a guilty verdict, Mr. Moxley received, as he tried to tell the next jury in closing argument, a "considerable amount of criticism . . , , for taking this case to trial" (R. 1279).

Almost all of the jurors were exposed to pre-re-trial publicity, and admitted it. Moxley believed that the Pearl convictions were infirm, and publicly said so:

> Moxley said anyone who questions the state's decision to bring Stano to trial [a second time] either does not understand the legal appeals that could overturn the other death penalties or is simply against capital punishment.
>
> He said there is no guarantee that the death penalties from Volusia County will hold up under appeal. Moxley expects "substantial attack" on those cases because Stano pleaded guilty to murdering two Volusia women without any promises from prosecutors that he would get life in prison,
>
> Although Stano's public defender in those **cases, Howard Pearl,** said his client ordered him to enter the guilty pleas, Moxley predicted that questions of whether Stano was "competently represented" will be raised on appeal.
>
> The prosecutor said if Stano would waive his right to appeal the Volusia death penalties he would halt the upcoming trial proceedings and offer Stano life on the Scharf case **as** well as

> *appeal proof death penalty. Our case may well be the means to that end.* The reason we doubt the validity of the two death penalties is that *Stano's lawyer's [Howard Pearl's] competency may be seriously questioned.*

Ex. A2, ROA. Despite the prosecutor's professed reticence about the validity of the prior death penalty cases, he unabashedly used the previous conviction as statutory aggravation at sentencing.

The prosecutor later informed the jurors about Mr. Stano's purported intentions regarding his previous cases, and his intent to avail himself of post-conviction proceedings provided by law. First, Mr. Stan0 testified for two-and-one-half pages in mitigation. Then the cross-examination began:

> Q Now, you heard Mr. Clarence Albert Zacke testify as to what he said that you said concerning Cathy Scharf. *Did you do that, did you do those things to that girl?*
>
> A *No, sir, I did not.*
>
> Q Do you acknowledge your guilt in the case of Cathy Lee Scharf; *are you guilty* of killing that girl?
>
> A *No, sir, I am not.*
>
> Q You contend today that you are not guilty of killing Cathy Lee Scharf:
>
> A That's right.
>
> Q Despite your confession played before this jury?
>
> A Yes, sir.
>
> . . . . .
>
> Q And you still deny that you killed Cathy Scharf?
>
> A Yes, sir.
>
> Q *You have been to the Bar of Justice eight times before, haven't you sir?*

A Yes, sir.

Q *In September of 1981 you pled guilty to three murders, that is, up-in Volusia County, correct?*

A Yes, sir.

. , . .

Q *But not Cathy Scharf, you didn't do Cathy Scharf?*

A *No, sir.*

Q *Now, the first time you went* to *court was before Judge Foxman up in Volusia County, you* received three life terms.

A Yes, sir.

Q *Was that a plea bargain; did you plea bargain those murders for life?*

A Yes, we did.

. . . .

Q And then you came back down to Volusia County on the cases involving Susan Bickrest and Miss Muldoon, correct?

A Yes, sir.

Q *Before the* same *Judge, Judge Foxman,* that *sentenced you on the three earlier cases of Von Haddock, Nancy Heard and Mary Carol Maher. This is in 1983, you came before the same Judge.*

A *That's right.*

Q *Do you remember in court that Judge Foxman said, when you originally pled, he wanted* to *give you the death penalty?*

A I believe that was the exact words.

Q Okay. And you went back before the same Judge in 1983, after having pled to three more murders; to wit, Janine Ligotino, Ann Arceneaux, and Barbara Bower, *went before the same Judge, but you pled guilty, didn't you?*

A Yes, sir.

Q ***And you had no guarantees*** whether or not you would-get life or death, right?

A Yes, sir.

Q And you waived a jury, right?

A Yes, sir.

Q ***Now, what did your lawyer*** say ***to you that would cause you to do those things before Judge Foxtnan?***

MR. FRIEDLAND: I'm going to object, Your Honor.

MR. MOXLEY: I'll ask it a different way, I'll withdraw it.

Q (BY MR. MOXLEY) ***What reasonable expectation did you have -- did you believe you were going to be sentenced to death up in Vol*** usia ***County?***

A I really can't say. I could have been and I couldn't have been.

Q Did you believe there was a possibility that you would not receive death in Volusia County?

A Yes.

Q why?

A You're pertaining to the -- you're directing your question in reference to the first three --

Q No.

A -- from Volusia or from all of them?

Q From Muldoon and Bickrest.

A From the last two ***now?***

Q Yes, sir. ***Why did you think you weren't going to receive the death penalty by the same Judge, Judge*** *Foxman*?

A Due to the fact that I have already -- that I had already received three mandatory quarters running consecutive from the Honorable Judge Foxman.

Q Who at the same time said he would like to give you death. Okay. *Do you plan to collaterally attack the competency of your lawyer; do you plan to attack the competency of your lawyer on appeal ---*

MR. FRIEDLAND: I'm going to object, this is irrelevant.

THE COURT: Overruled.

Q (BY MR. MOXELY) ***Do you plan to attack the competency of your lawyer -- who was your*** **lawyer?** ***Howard Pearl, right?***

A Yes.

Q **He was your lawyer.** *You have an automatic appeal from those two death penalties you received by Judge Foxman, don't you?*

A Yes, I have.

Q *Are you going to appeal?*

A Yes, *I am.*

Q *Are you going to raise any and all errors that you can possibly see as a result of those two* death *penalties that Judge Foxman* ***gave you?*** *Are you?*

A Yes, sir.

Q ***Are you going to attack the competency of your lawyer, Howard Pearl?***

A I haven't had a chance to consult with my **appeal** attorney at this time.

Q But **it's not the same person as Howard Pearl,** is it?

A No, sir, it's not. That's the Seventh Judicial, is what Howard Pearl works for. My

appeals are in the fifth.

In closing argument, the prosecutor repeated the Pearl theme:

> ... ***Still, the defendant denies complicity in this murder. The reason he does is because he does not*** want ***to be placed in real jeopardy for what he has done.***
>
> Your task is this: If you want to hold him fully accountable for what he had done, your verdict is death. If not, it's easy, it's life.
>
> . . . .
>
> ***You are the first jury that has had to pass on guilt or innocence of the defendant. You*** are the first jury that can speak with regard to his culpability. We ask the verdict of each and every one of you to recommend death.
>
> . . . .
>
> I think we should begin with the first aggravating circumstance. Has the defendant been convicted of prior violent felonies? Yes. How many times? Eight first degree murders.[67]
>
> . . . .
>
> ***And if these are reversed, I submit there is a good possibility of Bickerest and Muldoon, given just what you know of the case, why -- what earthly reason was there for the defendant to enter a plea. What happened?*** What was said to him?
>
> . . . .
>
> This case, the evidence shows, was tried once before. It resulted in a mistrial. And after that there was considerable criticism of this office for taking this case to trial.
>
> MR. FRIEDLAND: I'm going to object, Your Honor. I think that's improper.
>
> THE COURT: I'm inclined to agree, Mr. Moxley. Sustain the question.
>
> MR. MOXLEY: ***The reason we are here is because***

[67]These were all mostly Pearl's doing,

> ***we believe there is a need for one valid appeal proof death penalty, given the amount of time and effort that must be expended in court --***
>
> MR. FRIEDLAND: ***Same objection, Your Honor.***
>
> THE COURT: ***Overruled.***
>
> MR. MOXLEY: ***-- hereafter.*** *And* ***so it will be quite clear.*** For these aggravating circumstances, which are not extenuated or mitigated in any fashion, in any reasonable manner explained or excused, the State would ask each and every one of you to vote for a recommendation of death. To ***hold the defendant fully accountable for this*** treachery and ***savagery that he has brought to this State and especially on Cathy Scharf. To finally put to rest Cathy Scharf.*** Thank you.

(R. 1267-1280).

Thus, the prosecutor demanded the death penalty because Mr. Stano had, while represented by Mr. Pearl, pled guilty to murders and received the death penalty in what the prosecutor suggested was a clever ploy to obtain a reversal! If the defendant had known that Howard Pearl was a law enforcement officer--and had this jury known--then the entire force of the prosecutor's argument would have been blunted.

The petitioner's execution ought to be stayed until such time as the Howard Pearl issues have been resolved by the appropriate state courts. If Petitioner receives an evidentiary hearing on the Howard Pearl issues, and if his previous convictions are vacated, he will be entitled to a new sentencing proceeding herein.

Even without vacating the Volusia Pearl cases, the prosecutor's repeated references to Howard Pearl, and his use of Howard Pearl's representation as a basis for imposing death in the

Scarf case, requires a Howard Pearl hearing in this case.

ARGUMENT VI

ANY CLAIM PERCEIVED TO BE TIME BARRED MUST BE EXAMINED TO DETERMINE WHETHER ANY SUCH BAR AROSE DURING A PERIOD OF TIME DURING WHICH MR. STAN0 WAS BEING DENIED THE RIGHT TO COUNSEL IN POST-CONVICTION PROCEEDINGS; THE LOWER COURT DID NOT EVALUATE ANY CLAIM IN THIS MANNER

Undersigned counsel represented Mr. Stano during his first state and federal post-conviction proceedings. However, undersigned counsel was not in a position ethically to undertake Petitioner's representation in a successor warrant setting, and so advised the lower court last year. In response, the lower court recognized that undersigned counsel did not represent Petitioner, that CCR did, and that CCR was required by the lower court (and later by this Court) to file papers and pleadings in a timely manner on behalf of Mr. Stano.

CCR refused to do so. As a consequence, filing deadlines were missed, according to the lower court. These missed deadlines the lower court assigned to Mr. Stano as an added (or, indeed, a main) basis for denying relief.

For more than a year, he did not have an attorney to assist him on the case for which he is scheduled for execution. On January 27, 1998, undersigned counsel agreed to represent the Petitioner. On February 4, 1998, undersigned counsel received a partial installment of funds from the State to ***begin*** the

representation.[68]

Florida positive law guarantees Petitioner more before he is put to death. Under Florida statute, Petitioner was entitled to counsel each and every second of each and every day that he was in jeopardy. By violating Florida law and withholding counsel from Mr. Stano, the State arbitrarily, unconstitutionally, and prejudicially harmed him, in violation of his right to due process, his right of access to the courts, his right to be treated equally, and his right to be free from cruel and/or unusual punishment, under the Eighth and Fourteenth Amendments, and under the Florida Constitution.

For Mr. Stano, this state action was especially callous and the constitutional deprivation singularly harmful. Mr. Stano's predicament is that he is *innocent* of the crime in this case, and innocent in the scores of cases that the State touts as his record of serial killing. The only evidence of his guilt is what he supposedly told other people. His confessions are remarkably suspect. Vigorous, continuous, zealous, uninterrupted assistance is his need and his right. Under such circumstances, more, not less, process is due, before state-guaranteed counsel can be withheld.

"Undersigned counsel, with CCR as co-counsel, represented Mr. Stano on this case during his first post-conviction and federal habeas corpus proceedings. However, undersigned counsel determined under the circumstances that existed in 1997 that he could not provide the representation to which Mr. Stano was entitled in a successor warrant setting. Thereafter, because ultimately, no-one was representing Mr. Stano, undersigned counsel agreed to step in again.

If the lower court's opinion on time bars is upheld, Petitioner has been injured by the State's violation of his constitutional rights.

Florida statute provides that the Capital Collateral Representative (CCR or CCRC) "shall" provide legal representation to every person convicted and sentenced to death in Florida.[69] See § 27.702, Florida Statutes (1987) and (1997). This is an obligation for CCR and the CCRC's, and a mandatory state-created right for death-sentenced inmates. Spalding v. Dugger, 526 So.2d 71, 72 (Fla. 1988) ("each defendant under sentence of death is entitled, as a statutory right, to effective legal representation by the capital collateral representative in all collateral relief proceedings.... The legislature established this statutory right ....").[70]

CCR clients are entitled to CCR representation in first,

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[69]The CCR "shall" (a) represent each death-sentenced person, (b) file a notice of appearance, and (c) assign each case to personnel in the CCR office. See Section 27.702, Florida Statutes (1987) and (1997); Fla. R. Crim. P. 3.851(b).

[70]The Supreme Court's "cases leave no doubt that where a [state] statute indicates with 'language of an unmistakable mandatory character,' that state conduct injurious to an individual will not occur 'absent specified substantive predicates,' the statute creates an expectation protected by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 427 (1986)(O'Connor, J., concurring in part and dissenting in part) (citing Hewitt v. Helms, 459 U.S. 460, 471-72 (1983). Mr. Stano expected that he would be represented by CCR, or that he would be provided otherwise CCR-like representation, as required by state statute. The statute has an unmistakable mandatory character, and the state injured Mr. Stano, by summarily, i.e., absent any of the accoutrements of due process, withholding the assistance of counsel from him. See sub-section b, infra.

second and subsequent post-conviction proceedings. The type of representation provided by CCR in successor post-conviction proceedings is illustrated by the successor case of Judy Buenoano. In that case,

> [i]n order to fulfill its ethical and legal obligation to Ms. Buenoano, the CCC-NR has assigned four (4) attorneys to her case including all three (3) lead attorneys. These four (4) attorneys must work almost exclusively between now and March 30, 1998 representing Ms. Buenoano. Two (2) investigators have been assigned to the case and because neither has warrant litigation experience, the lead investigator must also dedicate time to the case. These investigators will have to work on this case nearly exclusively. Under these circumstances, the CCR-NR hopes it can provide Ms. Buenoano with a professional level of representation.[71]

Similar work was performed in CCR's other successor cases,[72] with positive results for clients. See State v. Spaziano, 692 So.2d 174 (Fla. 1997)(affirming grant of post-conviction relief); Spaziano v. State, 660 So.2d 1363, 1368 (Fla. 1995) (remand for evidentiary hearing); see also Swafford v. State, 679 So.2d 736 (Fla. 1996);

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[71]In re Amendments to Florida Rules of Criminal Procedure--Capital Postconviction Public Records Production (Time Tolling), No. 92,026 (Fla. January 15, 1998) (Wells, J., dissenting); see also Spaziano v. State, 660 So.2d 1363, 1368 (Fla. 1995) (CCR "must provide volunteer counsel with the usual resources that would be available in a typical case handled, by that Agency") (Kogan, [then]J., [now C.J], joined by Shaw, J., and Anstead, J, concurring in part and dissenting in part).

[72]See, e.g., Jones v. State, 678 So.2d 309 (Fla. 1996); Jones v. State, 591 So.2d 911 (Fla. 1992); Jones v. State, 701 So.2d 76 (Fla. 1997) (electric chair operates constitutionally); Jones v. Butterworth, 695 So.2d 679 (Fla. 1997)(remand for hearing on operation of electric chair); Jones v. Butterworth, 691 So.2d 481 (Fla. 1997) (same); see also Scott (Paul W.) v. Singletary, 657 So.2d 1129 (Fla. 1995)

Roberts v. State, 678 So.2d 1232 (Fla. 1996); Porter v. State, 653 So.2d 374 (Fla. 1995); Smith v. State, 656 So.2d 1248 (Fla. 1995); Card v. State, 652 So.2d 344 (Fla. 1995); Provenzano v. State, 616 So.2d 42 (Fla. 1993); James v. State, 615 So.2d 668 (Fla. 1993); Breedlove v. Sinsletarv, 595 So.2d 8 (Fla. 1992); Jones v. State, 591 So.2d 911 (Fla. 1991); Preston v. State, 564 So.2d 120 (Fla. 1990); Riley v. Wainwright, 517 So.2d 656 (Fla. 1988); State v. Sireci, 502 So.2d 1221 (Fla. 1987); see also Porter v. Sinsletarv, 49 F.3d 1483 (11th Cir. 1995); Johnson (Larry Joe) v. Singletary, 991 F.2d 663 (11th Cir. 1993); Jackson v. Dugger, 931 F.2d 712 (11th Cir. 1991) (first federal habeas after two state **postconviction** denials); Johnson (Marvin) v. Sinsletarv, 938 F.2d 1166 (11th Cir. 1991); Johnson (Marvin) v. Dusser, 911 F.2d 440 (11th Cir. 1990); Smith v. Dugger, 758 F.Supp. 688 (N.D. Fla. 1990).

Before Mr. Stano's warrant was signed in 1997, the Governor was informed that undersigned counsel could not provide the type of representation to Mr. Stano that is required by state statute, at least not under a "death warrant." A warrant was signed anyway. After the warrant was signed, the trial court was advised that undersigned counsel could not provide the type of representation that is required by state statute.[73]

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[73]It is not uncommon for CCR to represent a person in second or subsequent post-conviction proceedings when prior private counsel cannot continue, for whatever reason, with the representation. Judy Buenoano's case is just such a case.

In Mr. Stano's case, undersigned counsel was not in a position to provide the representation that was required, and so could not

The trial court recognized that undersigned counsel did not represent Mr. Stano, and that Mr. Stano was entitled under state statute to be represented by CCR. CCR notified the Florida Supreme Court that it was unable to provide representation to Mr. Stano. See Stano v. Florida, No. 90,230. The Florida Supreme Court ruled that CCR did, and was required to, represent Mr. Stano.

Notwithstanding the Florida Supreme Court's directive that CCR provide representation to Mr. Stano, CCR never did so.[74] This was tantamount to a withdrawal by CCR as counsel for Mr. Stano.[75] This withdrawal was not allowed by state law and over which Mr. Stano had no control. The Florida Supreme Court was kept informed by the CCR, and later by the CCRC-M, that CCR was not providing any representation to Mr. Stano. The legislature and the Governor also were aware that CCR had assigned no lawyers, investigators, paralegals, or other employees to represent Mr. Stano.[76]

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attempt to do so, in 1997. See Florida Rules of Professional Conduct, Rule 4-6.2, 4-1.16, 4-1.1.

[74]The CCR resigned. See letter attached as Appendix 19.

[75]See State v. Spaziano, 660 So.2d 1363 (Fla. 1995) (refusal to represent post-conviction inmate treated as a withdrawal as counsel of record).

[76]After the Capital Collateral Representative, Mr. Minerva's resignation, CCR was beset with daily changes and upheaval. The one office was officially divided into three; staff was transferred and people resigned and others were hired; money woes were constant.

The CCRC-M noted in his contract with the undersigned that "CCRC-M has recently begun operations, is faced with administrative and other start-up difficulties, and would benefit greatly from Mr. Olive undertaking on its behalf the representation of Mr. Stano." Appendix 20, p. 1. The CCRC-M also noted, in a section designated "Support for Stay of Execution," that Mr. Stano ought to be

On February 4, 1998, undersigned counsel received an installment of funds to attempt to provide the type of representation to which Mr. Stano was, and had been, entitled under state law. Undersigned counsel has begun the task of representing Mr. Stano. However, the prolonged and continuing violation of Mr. Stano's state and federal statutory and constitutional rights has prejudiced Mr. Stano to such a degree that he cannot in the time remaining before his scheduled execution receive the type of representation to which he is entitled.

Liberty interests protected by the Fourteenth Amendment arise from two sources -- the Due Process Clause itself, and the laws of the states. Hewitt v. Helms, 459 U.S. 460, 466 (1983). While a person may not have a federal constitutional right to have the state perform certain functions or provide certain services, a state that nevertheless chooses to perform the functions or provide the services cannot do so in a way that violates the federal constitution. If the state laws provide that a person receive benefits from the state, those benefits may not be arbitrarily withdrawn.

For example, a person is not constitutionally entitled to welfare, but a state that chooses to provide welfare must adhere to Fourteenth Amendment Due Process requirements in any termination of welfare benefits process. Goldbers v. Kelly, 397 U.S. 259, 261 (1970). A person is not constitutionally entitled to an appeal of

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entitled to an extension of time, i.e., a stay of execution, notwithstanding (indeed, because of) the necessity of the contract. Id., at 3.

a state criminal conviction, but if a state provides for an appeal as of right, the state must comport with the Due Process Clause before withdrawing that right. Evitts v. Lucev, 469 U.S. 387, 400-403 (1985). And, while a person does not have a federal constitutional right to a public education, once that right is provided by the state, it may not be extinguished without adherence to the Due Process Clause. Goss v. Lopez, 419 U.S. 565 (1975).[77]

The State of Florida requires by statute that CCR represent death-sentenced inmates. Without representation, Mr. Stano would surely be executed. With representation, he stands a very good chance of living. Because "[t]he extent to which procedural due process must be afforded the recipient is influenced by the extent to which he may be 'condemned to suffer grievous loss,'" Goldberg v. Kelly, 397 U.S. at 1017-18 (quoting Joint Anti-Fascist Refusee Committee v. McGrath, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring), the process due Mr. Stano before he was left without counsel was great. He, however, received no process before he was grievously harmed.

On February 4, 1998, undersigned counsel received a partial payment of funds with which to begin the representation of Mr. Stano, and began the task of undertaking the representation.

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[77] In short, when a State opts to act in a field where its action has significant discretionary elements, it must nonetheless act in accord with the dictates of the Constitution--and, in particular, in accord with the Due Process Clause.

Evitts v. Lucev, 469 U.S. at 401 (1985).

To provide even the semblance of what CCR would be able to provide for Petitioner, undersigned counsel was required to:

1. obtain investigative assistance;"

2. obtain the assistance of other counsel;[79]

3. locate and begin review of the records in this case;[80]

4. begin investigation;

5. request Chapter 119 materials from many different agencies;[81] and

6. consult with experts regarding various aspects of Petitioner's case.

Mr. Stano does not have, and with the resources provided so far, cannot obtain, the team defense provided by CCR to their, in all material respects, identically situated clients. Others face execution with full-blown, not nascent, representation.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court enter an order staying his execution and granting other appropriate relief.

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[78]Petitioner has retained one investigator.

[79]Other than undersigned counsel, Petitioner has one other, part-time, attorney. Another attorney who had agreed to assist in the representation has since been unable to do so.

[80]CCR had transferred 44 bankers boxes and four vertical file drawers full of materials to the Tampa office. Undersigned counsel traveled to Tampa to review these and other materials.

"Chapter 119 litigation is ongoing today in Volusia County.

I HEREBY CERTIFY that a true and correct copy of the foregoing Motion has been furnished via facsimile transmission, copy to follow by United States Mail, first class postage prepaid, to all counsel of record on March 20, 1998.

Respectfully submitted:

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Contract Counsel for
Mr. Stan0

Bar No. 058533

March 20, 1998

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