IN THE SUPREME COURT OF FLORIDA

CASE NO. 94,072

BARRY HOFFMAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

GREGORY C. SMITH
Capital Collateral Counsel
Florida Bar No. 279080

LINDA McDERMOTT
Assistant CCC-NR
Florida Bar No. 0102857

JOHN A. TOMASINO
Assistant CCC-NR
Florida Bar No. 106021

OFFICE OF THE CAPITAL COLLATERAL COUNSEL
Northern Region of Florida
Post Office Drawer 5498
Tallahassee, FL 32314-5498

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Hoffman's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court denied several of Mr. Hoffman's claims without an evidentiary hearing. The circuit court held a limited evidentiary hearing on Mr. Hoffman's Brady claim and parts of his ineffective assistance of counsel claims.

The following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

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

"T." -- transcript of trial proceedings;

"PC-R." -- record on appeal from initial denial of postconviction relief;

"PC-R2." -- record on appeal from the second denial of postconviction relief;

"PC-R3." -- record on appeal from the third denial of postconviction relief;

"PC-T." -- transcript of evidentiary hearing held on July 15-16, 1997;

"Supp. R." -- supplemental record on appeal materials.

CERTIFICATION OF TYPE SIZE AND STYLE

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REQUEST FOR ORAL ARGUMENT

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

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STATEMENT OF THE CASE

On October 28, 1981, Barry Hoffman was indicted by a Duval County Grand Jury for the first degree murders of Frank Ihlenfeld and Linda Sue Parrish (R. 1). On March 25, 1982, Mr. Hoffman was charged by information with conspiracy to commit murder in the first degree (R. 21). Pursuant to the State's motion, the trial court consolidated the cases on June 25, 1982 (R. 37).

On June 28, 1982, Mr. Hoffman pleaded guilty to two counts of first degree murder (T. 76-82). In exchange for his plea Mr. Hoffman would receive two concurrent life sentences and the State agreed to *nolle prosse* the conspiracy charge (T. 78). Without counsel, Mr. Hoffman was allowed to withdraw his plea on September 24, 1982 (T. 118).

Mr. Hoffman's capital trial began on January 10, 1983 (T. 170). On January 14, 1983, Mr. Hoffman was found guilty of first degree murder of Mr. Ihlenfeld; guilty of second degree murder of Ms. Parrish; and guilty of conspiracy (R. 120-121).

The trial court held a penalty phase on January 20, 1983. Other than Mr. Hoffman's brief statement, (T. 1179-1181), no evidence was presented to the jury. The jury recommended an advisory sentence of death, by a vote of nine to three, for the first degree murder conviction (R. 122).

The trial court sentenced Mr. Hoffman to death for the first degree murder conviction on February 11, 1983 (R. 131). The trial court found four aggravating circumstances: previously

convicted of a violent felony, (the simultaneous conviction); the murder was committed for pecuniary gain; cold, calculated and premeditated; and heinous atrocious and cruel (R. 131-136). The trial court found that the murder was heinous, atrocious and cruel, despite the State's concession that the aggravator did not apply (T. 1162-1163), and without allowing Mr. Hoffman the opportunity to rebut this aggravator. The court also sentenced Mr. Hoffman to one hundred years imprisonment for the second degree murder conviction (R. 128), and thirty years imprisonment for the conspiracy to commit murder conviction (R. 140).

On direct appeal this Court affirmed the conviction and sentences. Hoffman v. State, 474 So. 2d 1178 (Fla. 1985).

On October 2, 1987, Mr. Hoffman timely filed a motion to vacate his conviction and sentence pursuant to Fla. R. Crim. P. 3.850 (PC-R1. 6-68). The motion was summarily denied in a one line order on October 7, 1987 (PC-R. 290). Mr. Hoffman's motion for rehearing was pending for over a year before it was denied.

Mr. Hoffman appealed and this Court reversed and remanded. Hoffman v. State, 571 So. 2d 449 (Fla. 1990). This Court held:

> In the case below, Mr. Hoffman came forward with allegations based on affidavits and other information clearly establishing colorable claims under rule 3.850. **For example, he has alleged that the state withheld the names of other persons who purportedly confessed to the murders of which Hoffman was convicted. At argument, the state conceded that such a claim, if valid, would require relief under Brady v. Maryland, 373 U.S. 83 (1963).** Hoffman has also alleged claims of ineffective assistance of counsel and the failure of counsel to be present when

> Hoffman testified in the separate trial of his co-conspirator.

571 So. 2d at 450 (emphasis added).

Also, this Court ordered the State to honor Mr. Hoffman's public records request for access to the state attorney records. Id. Moreover, the circuit court was ordered to permit Mr. Hoffman to amend his Rule 3.850 motion once he received all of the public records to which he was entitled. Id.

In June, 1991, Mr. Hoffman filed an amended 3.850 (PC-R2. 1-118). On August 26, 1991, the circuit court summarily denied Mr. Hoffman's amended motion in a one page, form order (PC-R2. 119).

Mr. Hoffman appealed and on December 10, 1992, this Court again reversed and remanded Mr. Hoffman's case with instructions to the circuit court that Mr. Hoffman be permitted to amend his motion after receipt of public records and that a hearing should be held. Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992).

After once again returning to the circuit court, on April 20, 1993, a hearing regarding public records compliance was held (Supp. R. 21-78). As a result of the hearing, Mr. Hoffman received substantial additional public records (Supp. R. 28).

On June 18, 1993, Mr. Hoffman filed a supplement to his 3.850 (PC-R3. 38-44). After further records litigation, on January 3, 1997, Mr. Hoffman filed an amended 3.850 (PC-R3. 99-219). The State responded on February 21, 1997 (PC-R3. 223-262).

On April 11, 1997, the lower court held a Huff[1] hearing.

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[1] Huff v. State, 622 So. 2d 982 (Fla. 1993).

That same day, Mr. Hoffman filed a motion to reset the date of the evidentiary hearing because Mr. Hoffman's second chair attorney and investigator were unable to prepare for the evidentiary hearing due to their involvement in the active death warrant litigation of another client (PC-R3. 269-270).

On April 15, 1997, just two weeks before the scheduled evidentiary hearing, the lower court entered an order, dated the same day as the Huff hearing, granting Mr. Hoffman a limited evidentiary hearing and summarily denying the remainder of his claims (PC-R3. 275-777). The lower court denied Mr. Hoffman's motion to reset the dates of the evidentiary hearing (PC-R3. 278-279).

On April 17, 1997, Mr. Hoffman filed an Amended Motion to Reset the Evidentiary Hearing, further detailing postconviction counsel's inability to properly prepare for the hearing (PC-R3. 283-288). On April 18, 1997, the motion was denied (PC-R3. 282).

On April 28, 1997, Mr. Hoffman filed a motion requesting that Duval County pay for the costs associated with the evidentiary hearing or that the hearing be continued (PC-R3. 308-319). The lower court denied the motion (PC-R3. 303).

Mr. Hoffman petitioned this Court for a writ of prohibition to prevent the lower court from holding the scheduled evidentiary hearing due to the lack of funds and the budget crisis the Office of the Capital Collateral Representative was experiencing. This Court granted Mr. Hoffman a stay until July 15, 1997. Hoffman v. Haddock, 695 So. 2d 682 (Fla. 1997).

The evidentiary hearing was set for July 15, 1997 (PC-R3. 324). Mr. Hoffman filed a Motion to Reset the Evidentiary Hearing because of his designated counsel's conflict with another hearing (PC-R3. 329-332). Judge Haddock contacted Thirteenth Judicial Circuit Court Judge Padgett and Judge Padgett agreed to reschedule the hearing before him to the week before Mr. Hoffman's (PC-T. 23). Mr. Hoffman's designated counsel, Mr. Kissinger, prepared for two evidentiary hearings simultaneously and was forced to conduct hearings back-to-back.

An evidentiary hearing was held on July 15-16, 1997.

On June 29, 1998, the lower court entered an order denying Mr. Hoffman's Rule 3.850 motion (PC-R3. 351-357). Notice of appeal was timely filed (PC-R3. 366-367).

STATEMENT OF FACTS

A. INTRODUCTION

On September 7, 1980, Frank Ihlenfeld, a fifty-four year old narcotics trafficker, and Linda Sue Parrish, a twenty year old prostitute, were murdered in their hotel room at the Ramada Inn in Jacksonville Beach, Florida. An intensive investigation that included wiretaps and undercover operatives was undertaken, and the investigation focused on James Provost, who was suspected of having procured the murders. The investigation ultimately resulted in the arrest of Barry Hoffman, a heroin addict, entangled in the drug world so that he could support his habit. Mr. Hoffman was under the influence of narcotics when apprehended

and questioned, and without counsel present gave statements that purported to be incriminating.

After entering a guilty plea and securing a life sentence, Mr. Hoffman, without counsel, was allowed to withdraw his plea. The trial proceeded in January, 1983. Mr. Hoffman was convicted of the first degree murder of Frank Ihlenfeld (R. 120-121). He was also convicted of the second degree murder of Linda Sue Parrish and conspiracy to commit murder (R. 120-121).

At trial, the State presented evidence that Mr. Hoffman had confessed to the FBI agents who arrested Mr. Hoffman, Jacksonville Beach Police Department detectives and George "Rocco" Marshall, an alleged co-conspirator who received complete immunity and other benefits for his testimony (T. 683). The only other evidence presented at his trial that connected Mr. Hoffman to the murders was a fingerprint on a cigarette pack found at the scene (T. 893).

During his postconviction proceedings, Mr. Hoffman discovered that several individuals confessed to committing the murders, threatened the victim and possessed intimate knowledge regarding the details of the crime. The State knew of these individuals and failed to inform Mr. Hoffman's trial counsel of their existence. In addition, the physical evidence collected from the scene, but withheld from trial counsel, suggests that Mr. Hoffman's alleged confessions cannot be credible and exculpates Mr. Hoffman.

The State withheld material exculpatory evidence regarding the investigation of this crime. Had trial counsel had this information, it would have enabled the defense to demonstrate that Mr. Hoffman's "confessions" were inaccurate and untrue. As a result of the State's misconduct, the jury that convicted Mr. Hoffman and sentenced him to death was misled by false testimony and deprived relevant exculpatory evidence.

B. THE TRIAL RECORD

After the Public Defender withdrew from his case one day after the indictment was returned, the lower court appointed Richard Nichols to represent Mr. Hoffman (R. 7). Three days later, on November 2, 1981, the State filed a motion to compel Mr. Hoffman's hair specimens (R. 10). The State averred:

> 2) The deceased, Linda Sue Parrish, was found to have male caucasian hair beneath her fingernails at the time of an autopsy was performed by the Medical Examiner of the Fourth Judicial Circuit.

(R. 10). The lower court granted the motion (R. 11).

Also, on November 3, 1981, the State filed a motion to compel a blood sample from Mr. Hoffman, citing the fact that blood had been found at the scene that did not match either of the victims' (R. 8). Inexplicably, in an order dated one day before the motion and one day before the hearing on this issue, the lower court granted the motion (R. 9).

On November 5, 1981, Mr. Nichols filed a Demand for Discovery (R. 12). Simultaneously, Mr. Nichols filed a motion to

compel the existence of any deals or promises that the State had made with any witnesses (R. 17).

In June, 1982, Mr. Nichols filed a motion to suppress Mr. Hoffman's statements, premised on the fact that Mr. Hoffman was under the influence of drugs at the time of the interrogations (R. 38-39). A "hearing" was held in which Mr. Hoffman testified that he had ingested large quantities of drugs before and during the interrogations (T. 48-67). Mr. Hoffman testified that he requested to speak to an attorney (T. 48-67). Mr. Nichols and the State agreed, that rather than call any witnesses to rebut Mr. Hoffman's testimony, the State could proffer the testimony and the court could rule based on the proffer (T. 48-67). Not surprisingly, the court denied the motion (R. 40).

Shortly thereafter, Mr. Hoffman filed a pro se motion to dismiss Mr. Nichols (R. 41-44), and a motion regarding his conflict with Mr. Nichols. In his motion to dismiss, Mr. Hoffman stated that he believed Mr. Nichols had failed to adequately represent him because:

> A) Defendant gave counsel important defense witnesses to depose or interview to prepare for trial. None were interviewed.
>
> B) Defendant requested all State witnesses be deposed and all evidenced (sic) examined . . .
>
> C) Defendant believes the following motions need be made prior to trial which have not been made:
>
> 1) Suppression motion
> 2) Motion for investigator
> 3) Motion for expert witness

(R. 41-42). Mr. Nichols also requested to withdraw (T. 41-42). On June 25, 1982, the motions were denied (R. 47).

Three days after Mr. Hoffman's pro se motions were denied he pleaded guilty to two counts of first degree murder (R. 73-79). The court accepted Mr. Hoffman's pleas and agreed to sentence him to two concurrent life sentences and the conspiracy charge would be *nolle prossed* (R. 73-79). As part of his plea agreement, Mr. Hoffman was to testify against his alleged co-conspirator, Leonard Mazzara (R. 73-79).

Mr. Hoffman was interviewed several times, without counsel present, by Michael Obringer, who also continued to prosecute Mr. Hoffman after Mr. Hoffman withdrew his plea (T. 147-149). Mr. Hoffman testified at Mr. Mazzara's trial to his innocence (T. 88-112).[2] Mr. Hoffman, uncounseled and unrepresented also orally requested that he be allowed to withdraw his plea (T. 96).

On September 24, 1982 Mr. Hoffman filed a pro se motion to withdraw his guilty pleas. That same day a hearing was held wherein Mr. Nichols orally moved to withdraw from representing Mr. Hoffman (T. 115). The trial court allowed Mr. Nichols to withdraw (T. 116). **After** Mr. Nichols was discharged as counsel,

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[2] Mr. Nichols failed to appear with Mr. Hoffman when he was called as a critical witness against co-conspirator, Leonard Mazzara. However, when Mr. Mazzara was subpoenaed for Mr. Hoffman's trial, Mr. Mazzara appeared with counsel. In fact, the trial court went to great lengths to assure Mr. Mazzara that he would be represented during his testimony. The trial court erred in not allowing Mr. Hoffman to develop the record as to why Nichols failed to appear at this critical stage of Mr. Hoffman's proceedings.

the court considered and granted Mr. Hoffman's motion to withdraw his pleas (T. 118). Therefore, Mr. Hoffman was without counsel at yet another critical stage in his capital trial proceedings.

On October 1, 1982, the court appointed Jack Harris to represent Mr. Hoffman (T. 123).

On November 15, 1982, Mr. Harris filed a Demand for Penalty Phase Discovery, in which he requested "[r]eports of statements of experts . . . including results of physical or mental examinations and scientific tests, experiments or comparisons" (R. 83-84). The lower court denied this motion (R. 101). However, at a hearing on December 21, 1982, the State agreed to provide discovery:

> THE COURT: Let's get additional discovery first. Any objection to that one?
>
> MR. OBRINGER: Let me see that, Your Honor, to make sure I'm talking about the same one.
>
> * * *
>
> THE COURT: In other words would you comply with that one?
>
> MR. OBRINGER: Yes, sir.

(T. 142-144).

At that same hearing, the trial court granted Mr. Hoffman's motion for rehearing on the motion to suppress (T. 145). On the first day of trial, the lower court held a second hearing on Mr. Hoffman's Motion to Suppress (T. 170-251). Mr. Harris relied on the previous written motion (T. 145). Mr. Hoffman again testified that he was under the influence of drugs when he was

interrogated by the FBI and later by the Jacksonville Beach Police Department detectives (T. 234-236). At this hearing, the State presented the testimony of Detective Dorn and FBI Agent Lupekas (T. 192-217, 219-249). Agent Lupekas testified that he was present when Mr. Hoffman called Mr. Provost (T. 207). He also admitted that when Mr. Hoffman called Mr. Provost, Mr. Hoffman asked Mr. Provost if there was anything he could do to help and that Agent Lupekas believed that "meant legally, an attorney" (T. 208). Once again, the trial court denied the motion (T. 251).

The trial began shortly after the conclusion of the Motion to Suppress hearing. During his opening statement, Mr. Harris told the jury:

> I think that the evidence and the lack of the evidence will also show that Barry Hoffman's so called confession given in Jackson, Michigan, which he denies making, was obtained from him while he was addicted to narcotics and while he was under the influence of drugs. He will testify that in fact when he returned to Jacksonville he had to undergo a process called detoxification, a special regimen of medical treatment administered in the Duval County Jail.
>
> I think the evidence will also show that the so-called confession didn't contain any information that had not already been published in the newspapers within days of the killings back in September of 1980.
>
> I think the evidence will also show that this so-called confession was the only statement taken by Detective Dorn and Maxwell in this case. It was not reduced to writing. In other words, written down on paper and then signed by the person making the statement. So, the confession exists only in the minds of the people who claim to have heard it.

(T. 476). Mr. Harris' theory of the case was clear: Mr. Hoffman did not make the inculpatory statements attributed to him. And without the statements, the state could not meet it's burden of proof.

In furtherance of attacking the State's case and showing that the alleged confessions were inconsistent with the evidence, Mr. Harris cross examined Florida Department of Law Enforcement (FDLE) serologist, Agent Steve Platt, about the blood evidence found at the crime scene (T. 576-582). Agent Platt admitted that blood evidence was found at the scene that did not match the victims, Mr. Hoffman or co-defendant White (T. 576-582). See also Exhibits 12-16. Agent Platt testified that type "O" blood was found at the scene (T. 578-579). Furthermore, Agent Platt testified that Mr. Hoffman was a secretor, yet none of the cigarette butts found in the room and tested matched Mr. Hoffman's "ABO" blood type which would be found in Mr. Hoffman's saliva (T. 578-580). Finally, Agent Platt testified that he did not have any information about hair analysis conducted in this case (T. 581). As to the hair evidence, during the cross examination of the medical examiner, Dr. Lipkovic, the following exchange occurred:

> Q: Did Miss Parrish have any hair or skin clutchings when you examined her?
>
> A: I did not detect anything with the naked eye, and that's the only way I examined it.

(T. 632). This testimony contradicted the State's motion to compel hair samples from Mr. Hoffman in which the State claimed

that the medical examiner identified male caucasian hair under Ms. Parrish's fingernails (R. 10).

Mr. Harris also pursued a similar line of questioning with FDLE Agent Ernest Hamm (T. 898-899). Agent Hamm testified that he did not recover any hair samples or "skin clutchings" from the victim's body (T. 898-899).

The State did not ask any of it's witnesses a single question about hair collection, analysis or results. The State's case was largely if not entirely based on Mr. Hoffman's "confessions".

During the State's closing argument the prosecutor argued that the physical evidence matched "perfectly" with Mr. Hoffman's confession (T. 1063). The jury was led to believe that the physical evidence was consistent with Mr. Hoffman's statements and therefore the statements were voluntary and reliable.

During the defense's closing argument, Mr. Harris told the jury that the "confessions" were "a big part of the evidence" (T. 1090). Therefore, Mr. Harris attempted to illustrate that the physical evidence did not match the "confessions" and they were therefore unreliable.

The jury found Mr. Hoffman guilty of first degree murder of Mr. Ihlenfeld, guilty of second degree murder of Ms. Parrish, and guilty of conspiracy to commit murder (R. 120-121, T. 1138-1139).

A week later, on January 20, 1983, the trial court conducted the penalty phase. During the charge conference, the State stipulated to the statutory mitigator of no significant criminal

record and to the fact that Mr. Hoffman's co-conspirators, Lennie Mazzara and James White, received life sentences (T. 1150-1151). As to the aggravators, the State agreed that the heinous, atrocious and cruel aggravator was inapplicable to the case and the trial judge agreed not to give it (T. 1162-1163).

Mr. Harris also requested that the court read the instruction regarding the inability of Mr. Hoffman to appreciate the criminality of his conduct because of Mr. Hoffman's drug addiction, but the court denied his request (T. 1164-1167).

After a brief statement by Mr. Hoffman defense counsel told the court that he had nothing further to present (T. 1179-1181).

In the State's closing argument, the prosecutor told the jury that the murder had been committed for pecuniary gain and that there were no excuses for Mr. Hoffman (T. 1186).

Mr. Harris' closing argument consisted of four and a half transcript pages and focused on the sentences Mr. Hoffman's co-conspirators received (T. 1194).

After hearing no information about Mr. Hoffman, the jury returned an advisory verdict for death, by a vote of nine to three (R. 122).

On February 11, 1983, the trial court sentenced Mr. Hoffman to death by electrocution (R. 131). The trial court found that Mr. Hoffman had previously been convicted of a violent felony (Ms. Parrish's murder), the crime was committed for pecuniary gain, the crime was cold, calculated and premeditated and heinous atrocious and cruel (HAC)(R. 132-136). The trial court found the

HAC aggravator despite the State's earlier agreement that this was not a HAC case. There was no notice to Mr. Hoffman or opportunity to rebut this finding.

As to the mitigators, the trial court determined:

> The Court finds that Mr. Hoffman has no significant history of conviction of prior criminal activity. However, the Court has to balance this finding against the fact that Mr. Hoffman took the witness stand in this case and under oath admitted to making his living part-time or full-time before and after this murder by the selling of drugs in this city. So, while I find he has no significant history of conviction, I cannot picture him as a person who prior to this killing did not commit any other crimes because by his own admission he did. However, I do find no significant history of conviction of prior criminal activity.
>
> * * *
>
> The Court does find as a mitigating circumstance that the two co-conspirators, Leonard Mazzara and James White, were convicted separately of first degree murder with regard to the same killings, and they both received sentences of life imprisonment.
>
> * * *
>
> While the Court finds that mitigating circumstances do exist in the two areas that I have mentioned here today, I find that they are far outweighed in quality and substance by the aggravating circumstances found in the record.

(T. 1232-1235).

C. THE 3.850 PROCEEDINGS

As noted previously Mr. Hoffman's postconviction proceedings have been hampered by the State's failure comply with and lower court's refusal to enforce the public records laws. Twice Mr.

Hoffman properly filed Rule 3.850 motions and amendments in accordance with the schedules set by this Court, Rules of Criminal Procedure and the case law and twice he was summarily denied by the lower court with little or no consideration of this Court's previous opinions in Mr. Hoffman's case as well as other postconviction precedent.

Mr. Hoffman's third foray into his initial attempt for postconviction relief appeared to be the charm as the lower court finally granted him a limited evidentiary hearing on his Brady claim and parts of his ineffective assistance of counsel claims (PC-R3. 275-277). However, even Mr. Hoffman's third attempt to receive a full and fair hearing on his initial postconviction motion proved to be plagued by ineffective postconviction counsel and unreasonable behavior by the lower court and State agencies.

Mr. Hoffman's evidentiary hearing was held on July 15-16, 1997. As Mr. Hoffman's evidentiary hearing began, his designated counsel informed the lower court:

> MR. KISSINGER: Your Honor, there are a couple of preliminary matters which I wanted to clear up.
>
> THE COURT: Okay.
>
> MR. KISSINGER: One stems from the Florida Supreme Court's recent opinion in this case indicating that during oral argument I had stated that I should prepare for the hearing, I believe it was the -- they had me down to two weeks.
>
> I want the record to reflect that when I made the statement in terms of preparation for the hearing, that was in terms of my personal preparation, how long it would take me to get myself ready, get evidence in order and those type of things.

> It was not referring to the investigation, the final investigation which had yet to be done in this case or any other matters.
>
> * * *
>
> Mr. Smith on July 7th of this year came to my office and terminated my employment with the office of the capital collateral representative.
>
> * * *
>
> I consider myself professional. I would hope that it would not affect my performance in front of this court. I have always tried to adhere to professional responsibility.
>
> THE COURT: Yes.
>
> MR KISSINGER: But I do want the court to be aware that I do operate under a certain aura of emotional stress while conducting this hearing.

(PC-T. 15). The lower court refused to delay the hearing any further (PC-T. 22-28).

At the evidentiary hearing, Jack Harris, Mr. Hoffman's trial attorney testified (PC-T. 232-266). Mr. Harris recalled that he had made requests for discovery and exculpatory evidence (PC-T. 235). However, when asked if he was aware of the statements from other suspects, he didn't recall being given that information (PC-T. 238). Postconviction counsel inquired:

> Q: In response to your discovery requests or even on their own volition did either Ms. Starrett or Mr. Obringer ever inform you that . . . a Bubba, James Bubba Jackson, had confessed to committing these homicides?
>
> A: I don't recall knowing that or being aware of that until I read through your motion, I believe.

Q: Did the state inform you that Mr. Jackson had -- that Mr. Jackson had allegedly told a friend of his, a Mr. David Jack, that not only did he commit those homicides, but that he had broken the knife, broken a knife off in the back of Mr. Ihlenfeld?

A: No, sir. **I don't recall having heard that before.**

* * *

Q: Would information that another person had confessed to committing these murders and had known a detail regarding the murders, for example, the breaking off of the knife, would that have been information that you would have liked to have known in the course of your representation of Mr. Hoffman?

A: Yes, sir.

Q: **How would you have used that information?**

A: **Well, I think that I certainly would have attempted to introduce the substance of that statement at trial either through the -- either through the speaker or through the witness' statement.**
I think I certainly would have liked to have argued that point to the jury.

(PC-T. 238-239).

Det. Dorn testified that he had authored several reports regarding Mr. "Bubba" Jackson's confessions of murder to various witnesses (PC-T. 201-203). See Exhibits 34-35.

In addition, Detective Maxwell testified that he was aware that James "Bubba" Jackson, a known drug dealer, had confessed to the murders (PC-T. 219).

Mr. Harris was also unaware that Mr. Merrill had made statements about being involved in the crime (PC-T. 248).

Mr. Hoffman introduced several exhibits at the evidentiary hearing which evidenced his Brady allegations. See Exhibits 3-49. Those exhibits included a memorandum located in the State Attorney's prosecution file which indicated that an individual named Sprinkle had threatened to kill the victim[3] (Exhibit 49). The state attorney who authored the memorandum stated: "These cases were filed due to police observation of offense, defendant's prior records, and threats made to victim by defendant Sprinkle after arrest. Victim wanted to prosecute strongly"[4] (Exhibit 49).

Det. Dorn also authored a report regarding Sprinkle (Exhibit 47). Det. Dorn was provided information days after the murder that Sprinkle had threatened to kill an individual in a bar "like [he] killed some people in Jacksonville" (Exhibit 47).

In addition to the information regarding other suspects, Mr. Harris acknowledged that the State had not informed him of the full extent of the deal Mr. Marshall received for testifying against Mr. Hoffman (PC-T. 249).

Mr. Hoffman introduced several FDLE reports into evidence at the hearing (PC-T. 177). These records included additional records that postconviction counsel had never seen before which were produced the morning of the hearing by FDLE (PC-T. 178).

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[3] During 119 litigation, the State withheld this memo and after an *in camera* review of the State's file the lower court turned the memo over to Mr. Hoffman because it was "possibly something exculpatory" (Supp-R. 48).

[4] The memo was turned over to Mr. Hoffman without the attached cases indicated in the memorandum.

Det. Dorn testified at the evidentiary hearing that he took a major role in the investigation of Mr. Hoffman's case (PC-T. 191). Det. Dorn admitted that in the course of his investigation he submitted an affidavit in support of a search warrant (PC-T. 195). In that affidavit Det. Dorn swore:

> **Also recovered from the murder scene, specifically the hands of the female decedent, were several hairs.**
> **These exhibits have been examined by the Florida Department of Law Enforcement.**
> **That examination revealed that these exhibits from the hand of the female deceased, Linda Sue Parrish, were male Caucasian head hair and male Caucasian pubic hair.**
> **The expert states the head hair is not the head hair of the male deceased, Frank Ihlenfeld.**

(PC-T. 196, Exhibit 33). Det. Dorn also conceded that a state attorney from the Jacksonville State Attorney's Office would have been involved in procuring the search warrant (PC-T. 199). In fact, Mr. Obringer believed that he participated in obtaining that warrant (PC-T. 279).

Mr. Harris testified that he was not aware that a report existed that indicated Caucasian hairs were removed from the female victim's hands (PC-T. 240). Mr. Harris stated:

> **[T]he existence of Caucasian hair under one of the victim's fingernails that was not Barry Hoffman's would have been a highly exculpatory fact. I'm sure it's one that I would not have overlooked.**

(PC-T. 240)(emphasis added). In addition Mr. Harris stated: "I think I can state categorically that I was never aware of the

results of any scientific tests involving [the hair evidence]" (PC-T. 265-266).

Mr. Harris agreed that the physical evidence revealed to him in postconviction fit into his theory of the defense: that the physical evidence was not consistent with Mr. Hoffman's purported statements (PC-T. 241-242).

Michael Obringer, the lead prosecutor in Mr. Hoffman's case, testified at the evidentiary hearing that he was aware that hair analysis was conducted in Mr. Hoffman's case and he was aware that the hair found in Ms. Parrish's hands was neither Mr. Hoffman's nor Mr. White's nor Mr. Ihlenfeld's (PC-T. 271, 277-278). Mr. Obringer could not recall if he revealed this evidence to the defense (PC-T. 281-282), despite the fact that he characterized the evidence as "significant" (PC-T. 295).

Also, at the evidentiary hearing, in order to prove his ineffective assistance of counsel at the penalty phase claim, Mr. Hoffman presented testimony regarding his childhood, background and his debilitating drug addiction which started as a child.

Mr. Hoffman presented testimony from friends and family that knew him when he was an adolescent drinking cough syrup with codeine (PC-T. 125, 141-142, 149, 156, 161). These witnesses were aware of Mr. Hoffman's drug overdoses, struggle with drugs and requests for help (PC-T. 142, 149, 150, 156, 162).

Fred Sirodi, Mr. Hoffman's friend, told the court that when he and Mr. Hoffman were eighteen or nineteen they would socialize three or four times a week (PC-T. 124). On these evenings, Mr.

Sirodi observed Mr. Hoffman take various drugs including codeine, antihistamines, flourodene, drugs similar to quaaludes, heroin and cocaine (PC-T. 124-126). Mr. Hoffman would take these drugs in various combinations so that he could "boost" or increase the effects they would have on him (PC-T. 126). As early as his late teens, Mr. Hoffman had a one-hundred dollar a day drug habit (PC-T. 127). Mr. Sirodi testified that this amount of money secured a large quantity of drugs at this time (PC-T. 127).

Mr. Sirodi also testified that he entered the treatment facility in Lexington, Kentucky, while Mr. Hoffman was also a patient (PC-T. 128). Mr. Sirodi told the lower court that Mr. Hoffman left the program and he saw him after that using drugs again (PC-T. 131).

In addition to the testimony about Mr. Hoffman's childhood, Mr. Hoffman presented significant testimony regarding his mental health and the effects of his severe longstanding drug addiction.

Mr. Hoffman presented the testimony of Dr. Robert Fox, a psychiatrist (PC-T. 32-120). At the time of the hearing, Dr. Fox was the chief of psychiatry at a hospital that primarily treated patients with drug and alcohol addictions (PC-T. 34-35).

Dr. Fox testified that he had conducted a detailed evaluation of Mr. Hoffman (PC-T. 37). That evaluation consisted of an interview, "a review of an extensive file of both medical, school and legal records regarding Mr. Hoffman, as well as affidavits . . . of individuals" (PC-T. 37), a review of courtroom documents, a neurological examination and a mental

status examination (PC-T. 37-40). See also Exhibit 1. Dr. Fox testified that the information he reviewed along with the interview and neurological testing corroborated each other and supported his conclusions (PC-T. 60-90).

In his review of the records Dr. Fox pointed out that Mr. Hoffman had participated in several methadone treatment programs (PC-T. 60-67). The doses of methadone Mr. Hoffman received were a significant amount and "relatively unusual", leading Dr. Fox to conclude that "the extent of Mr. Hoffman's addiction to opiate narcotics was quite high, and, therefore, he was prescribed methadone in this kind of dosage range" (PC-T. 61). Dr. Fox also testified that the records indicated Mr. Hoffman did not complete the treatment most likely because of the severity of his drug addiction and desire to get back to the drugs (PC-T. 62).

Dr. Fox told the lower court that despite treatment "the number of individuals who would become clean from drugs is very, very low . . . it only occurs when the individual is incarcerated or placed in some other circumstances where they are unable to obtain drugs (PC-T. 66-67).

Dr. Fox also noted that Mr. Hoffman's military records confirmed that he was a heavy substance abuser and that was why the Air Force terminated his service in 1966 (PC-T. 76-77).

In addition to reviewing records, Dr. Fox conducted neurological testing because "[i]ndividuals with a long history of substance abuse often have signs of neurologic impairment (PC-T. 79-80).

Dr. Fox diagnoses of Mr. Hoffman included "mixed substance, as well as substance induced organic mental disorder, both of an acute and chronic type" (PC-T. 42). Dr. Fox told the lower court that he had discovered that Mr. Hoffman had used opiates, various sleep medications, marijuana, hallucinogens and other substances since he was a teenager until his arrest in 1980 -- over twenty-five years (PC-T. 43). Dr. Fox concluded:

> [W]hen a person is a chronic and habitual drug user, as Mr. Hoffman has been, that their life in essence is centered solely around the obtaining and using of substances. And that becomes the primary motivating factor in their life.
>
> In terms of other diagnoses, substance induced organic mental disorder, both of the acute and chronic type, what that refers to is in the acute phase the direct effect of the substances themselves on the individual's functioning, both their psychological functioning and their intellectual functioning, and their behavior.

(PC-T. 44-45).

Dr. Fox told the lower court that Mr. Hoffman's condition meant that he experienced "difficulties in thinking, reasoning and remembering" (PC-T. 81).

Dr. Fox testified that Mr. Hoffman's condition met the criteria of two statutory mitigating circumstances. Firstly, he testified that Mr. Hoffman's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired (PC-T. 55). Dr. Fox testified that this mitigator existed because:

> the longstanding substance abuse both in terms of the compulsive behavior that chronic substance abuse generates in an individual .

> . . as well as the direct effect of the substances themselves.
>
> They both diminish the individual's capacity to comprehend the full nature of their behavior, their statements, their situations.

(PC-T. 55-56).

Secondly, Dr. Fox testified that Mr. Hoffman was under extreme duress or under the substantial domination of another (PC-T. 56). Mr. Hoffman's addiction made him vulnerable to those who were supporting it, i.e. his co-conspirators (PC-T. 57).

Mr. Hoffman also presented the testimony of Dr. Michael Gelbort, a clinical psychologist practicing in the area of neuropsychology (PC-T. 303). Dr. Gelbort testified that he conducted an interview with Mr. Hoffman, reviewed historical information and conducted psychological testing (PC-T. 313).

Dr. Gelbort stated that Dr. Fox's findings "linked up very well with the other materials that I had reviewed, as well as with my own findings " (PC-T. 314). Dr. Gelbort concluded that Mr. Hoffman had a long and significant history of drug abuse" and that some of the drugs Mr. Hoffman abused produce psychoactive changes in a person, i.e. brain damage (PC-T. 316-317).

Dr. Gelbort informed the lower court that psychological testing was necessary in order to determine how the different parts of the brain are functioning (PC-T. 319). The results of Mr. Hoffman's tests indicated that his brain was "abnormal" (PC-T. 322). Based on his testing Dr. Gelbort concluded that Mr. Hoffman suffered from "cognitive dysfunction or brain dysfunction", i.e. organic brain syndrome (PC-T. 324-325).

Mr. Harris testified at the hearing that he concentrated more on the guilt phase than the penalty phase (PC-T. 242). Mr. Harris admitted that all he did in preparation for the penalty phase was speak to his client, Mr. Hoffman's ex-wife and Mr. Hoffman's girlfriend (PC-T. 244). Mr. Harris conceded that he did not speak to Mr. Hoffman's family in Maryland or retain a mental health expert (PC-T. 245-246). In fact, Mr. Harris agreed that it would have been beneficial to present mental health testimony (PC-T. 247).

Mr. Hoffman also presented evidence that trial counsel was ineffective at the guilt phase for failing to properly challenge the alleged statements Mr. Hoffman made to the FBI agents and Jacksonville Beach police officers. Mr. Hoffman again presented the testimony of Dr. Fox who had determined that Mr. Hoffman suffered from a drug induced mental disorder on the day that he was arrested and questioned by law enforcement officers (PC-T. 47). Dr. Fox informed the lower court:

> On that day and for many months prior to that day Mr. Hoffman had been using the drug Dilaudid on a daily basis. Dilaudid is a pharmaceutically produced opiate that is the most potent of all the opiate analgesics. . . It is the pharmacologic substance that most closely resembles what is commonly known as heroin ...

(PC-T. 47). Dr. Fox believed that Mr. Hoffman was addicted to Dilaudid (PC-T. 52).

Dr. Fox also described the withdrawal stage from opiate narcotics as being characterized by "emotionality, irritability, mental disassociation" (PC-T. 53). Dr. Fox concluded that

because of the withdrawal symptoms and the other drugs Mr. Hoffman ingested on the day of his arrest he was "significantly impaired" (PC-T. 54).

Dr. Fox affirmed the conclusions made in his written report:

> . . . If a legal question exists regarding voluntariness of a confession, a mental health expert could provide probative evidence regarding the effect of substance use disorder and substance use organic mental disorder on voluntariness. It is, for example, highly plausible that Mr. Hoffman was not at the time of the confession fully able to comprehend the nature of the questions being asked him by the arresting officers, nor to comprehend the seriousness of his situation. Because of his life-long dependence and intoxication it is likely that he could have made statements at that time to satisfy the needs of the moment without an ability to comprehend their long range impact on his situation.

(Exhibit 2).

In addition, in order to prove that when Mr. Hoffman was interrogated he was under the influence of drugs, Robert Golden testified. Mr. Golden testified that he was incarcerated in the same cell as Mr. Hoffman when he was brought to Jacksonville (PC-T. 167). Mr. Golden told the court that he and Mr. Hoffman were located on the medical floor, where inmates who were suffering from drug withdrawal were located (PC-T. 167-168).

While incarcerated together Mr. Golden observed Mr. Hoffman experience the symptoms associated from drug withdrawal (PC-T. 172). Mr. Golden recognized these symptoms because he had previously suffered from heroin withdrawal (PC-T. 175). At one point he even believed that Mr. Hoffman's medication was not

strong enough for him and he requested that jail personnel reevaluate Mr. Hoffman's condition (PC-T. 170, 172).

Mr. Harris testified that had he had expert testimony regarding the circumstances of Mr. Hoffman's alleged statements to the police, he would have presented it (PC-T. 243).

On June 29, 1998, the lower court entered an order denying Mr. Hoffman's Rule 3.850 motion (PC-R3. 351-357). The lower court's order was only six pages in length and failed to cite to the record in denying Mr. Hoffman's claims (PC-R3. 351-357). Furthermore, the order failed to address several of Mr. Hoffman's claims and the various testimony and exhibits supporting his claims (PC-R3. 351-357).

SUMMARY OF ARGUMENT

Mr. Hoffman was denied an adversarial testing at his capital trial. The State withheld favorable evidence which had it been revealed would have changed the outcome. In addition, Mr. Hoffman was denied the effective assistance of counsel during his capital proceedings.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING MR. HOFFMAN'S CLAIM THAT CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED IN VIOLATION OF BRADY V. MARYLAND, 373 U.S. 83 (1963).

A. INTRODUCTION

There was much more to the Ihlenfeld-Parrish murders than was ever revealed to the jury at Mr. Hoffman's trial. Indeed, there was much more than was ever revealed to Mr. Hoffman's trial attorney. The exhibits admitted during the course of the

evidentiary hearing and the testimony presented reveals much of the undisclosed information which was exculpatory and/or impeachment evidence. All of it was "material". This case is especially suspect since the claim involves some nineteen hours of wiretaps, undercover surveillance, and countless suspects. Mr. Hoffman's trial attorney was never permitted access to any of this information.

This evidence, uncovered since the time of Mr. Hoffman's capital trial establishes that valuable information regarding physical evidence and other suspects was not disclosed to the defense in violation of Brady v. Maryland, 373 U.S. 83 (1963).

During his public records litigation, Mr. Hoffman learned that physical evidence was found at the crime scene, tested and concluded that it matched none of the people allegedly in the hotel room at the time of the murder. In addition, Mr. Hoffman learned that individuals had confessed to the crime for which he had been convicted and the victim, Mr. Ihlenfeld, had been previously threatened and the State knew of these threats. He also learned the extent of a deal that a key State witness received in exchange for his testimony against Mr. Hoffman.

A Brady claim requires proof that: 1) the State possessed evidence favorable to the defense; 2) the defense did not possess the evidence in question; 3) the State did not disclose the evidence; and 4) the evidence was material, i.e., its nondisclosure undermines confidence in the outcome. See Duest v. Singletary, 967 F.2d 472 (11th Cir. 1992), rev. and remanded on

other grounds, 113 S. Ct. 1940 (1993), adhered to on remand, 997 F.2d 1336.

When a defendant establishes that the State withheld material exculpatory evidence, the court must order a new trial if there is "a reasonable probability that . . . the result of the proceeding would have been different". United States v. Bagley, 473 U.S. 667, 682 (1985). And if the State knowingly used false evidence, the court must order a new trial if "there is any reasonable likelihood that the false testimony could have affected the judgment of the jury". United States v. Agurs, 478 U.S. 97, 103 (1976).

During Mr. Hoffman's evidentiary hearing he proved that the information withheld by the State violated Brady.

B. THE LOWER COURT'S FINDINGS WERE NOT SUPPORTED BY COMPETENT SUBSTANTIAL EVIDENCE

1. Hair Evidence

The lower court ignored the testimony and exhibits that were introduced during the evidentiary hearing regarding the exculpatory hair evidence found at the scene. In denying Mr. Hoffman's claim the lower court stated:

> With regard to the issues raised in Claim II, the evidence is clear and convincing, both from the record of trial and the evidence presented in this hearing, that no Brady violation occurred. The evidence is equally clear and convincing that the test of United States v. Bagley, 473 U.S. 667 (1985) was not met by the evidence presented during this hearing. The evidence is clear that the State did not suppress any favorable evidence in its possession. The State filed a motion to compel production of a sample of the defendant's hair, which was granted by this

> Court, and obtained hair samples from the defendant himself as part of the pretrial discovery. The reason cited for the motion was comparison to the hair specimen found at the scene. Further, there is no reasonable probability that any evidence mentioned in the petition would have changed the outcome of the trial or the sentencing hearing, had it been brought before the jury. **In fact, the hair complained of so vigorously in the petition was not from the hand of the victim as set forth in the petition, but, on the contrary, was an unidentified hair found on the hotel room floor, and its existence in the room proves nothing other than the fact that someone other than the defendant, James White, and the two victims at some point deposited a hair on the floor of a hotel room at Jacksonville Beach, Florida. The presence of this hair in the room has very little or no meaning in regard to this case, and there is absolutely no reasonable probability that its existence, had it been made known to the jury, would have changed the outcome of the trial or the sentencing hearing in any way.** By the very physical nature of hair comparison evidence, a hair sample can never identify a person. The most it can ever do is to eliminate a person from consideration, or to put the person within a group of many people who could be included. Therefore, the existence of this unknown hair on the floor of a hotel room in Jacksonville Beach, Florida on a holiday weekend could have little or no impact on the jury in this case.

(PC-R3. 351-352)(emphasis added).

The lower court's finding that the hair was not found in Ms. Parrish's hands is patently false. Documents introduced during the evidentiary hearing show that at the time of the original investigation of the crime the medical examiner recovered:

> **specifically from the hands of the female deceased, Linda Sue Parrish, . . . several hairs.** These exhibits have been examined by a hair and fabrics comparison expert from the Florida Department of Law Enforcement. That

> examination revealed that these exhibits, **from the hands of the female deceased, Linda Sue Parrish**, were male caucasian head hair and male caucasian pubic hair. The expert states that the male caucasian head hair is not the head hair of the male deceased, Frank Ihlenfeld.

(Exhibit 33)(emphasis added). In fact, several other exhibits admitted at the evidentiary hearing also conclusively state that the hair was found in Ms. Parrish's hands, including the original handwritten notes taken while FDLE Agent Miller collected evidence from the crime scene (Exhibits 3, 4, 31, 33).

The evidence list compiled by FDLE indicates that hair was found in both of Ms. Parrish's hands and describes the hair in her left hand as: "Hair from clutch of left hand of Body #1 (Parrish)" (Exhibit 4, 31). Thus the records not only contradict the lower court's finding but also negates any possibility that this hair was deposited from anything other than a struggle with the real killer.

The lower court also denied Mr. Hoffman relief by stating that the State had filed a motion to obtain hair samples from Mr. Hoffman in order to make a comparison to hairs found at the crime scene. Apparently the lower court believed that this motion defeated the third prong of the Brady standard -- that the State did not disclose evidence. However, the lower court ignores the fact that Mr. Harris did not represent Mr. Hoffman at the time this motion was filed. In any event, it is the results of the hair analysis and not the existence of the hair that the State withheld from Mr. Hoffman even though the results were

exculpatory. At the time the motion was filed the hair evidence was not exculpatory because it had not been examined.

The evidence at trial was that Barry Hoffman and James White, a black man, were the only two who actually went into the room. The male victim's head hair was not consistent with that found in Ms. Parrish's hand, ruling out the possibility that it was simply his hair found on her (Exhibit 33, 48). The undisclosed test results established the hair was not Mr. Hoffman's (Exhibit 8). James White is African-American, thus it was not his hair. Since it did not match Mr. Hoffman, Mr. White, or the male victim, this undermined the State's theory. The head hair was a vital piece of evidence that was never turned over to the defense.

At the evidentiary hearing, Mr. Harris testified that the State never disclosed that this hair was tested or the results (PC-T. 240, 265-266). Mr. Harris testified that this evidence would have been significant to his defense (PC-T. 238-239). Certainly this evidence undermines the confidence of Mr. Hoffman's conviction and sentence.

2. George "Rocco" Marshall's Undisclosed Deal

The law has long recognized that in criminal cases there is a "particular need for full cross-examination of the State's star witness." McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982). Here, the State's "star witness" was a cooperating accomplice about whom critical information was withheld from the defense, court and jury. During trial, the jury was told that

Marshall was offered immunity for simply "telling the truth." The prosecutor, himself, elicited that testimony (T. 683-684). An undisclosed police report belies this contention (Exhibit 45). The agreement was for specifically described testimony and not for truthful testimony. The report indicates that the deal was conditional: "Marshall will testify that Lenny Mazzara asked him to find two person to burn, kill, victims" (Exhibit 45).

As to Mr. Hoffman's allegations regarding Rocco Marshall's undisclosed deal, the lower court found:

> The identity of Rocco Marshall and the extent of his knowledge about this case were well known to the defense throughout the discovery and pretrial stages of the case. The defendant's trial counsel vigorously cross-examined Mr. Marshall at trial and established a number of effective points which might damage his credibility with a jury. These facts could only have been known to defense counsel at trial as the result of adequate, and indeed thorough, pretrial discovery. The specific circumstances of his incentives to testify were well known to the defense, and were talked about at trial.

(PC-R3. 352-353).

Once again the lower court ignored the facts presented at the evidentiary hearing. The admitted exhibits prove that the State failed to disclose the extent of the deal with Marshall in which Marshall agreed to tell "all he knew" of the drug operation and in exchange Marshall's debt to Provost was cancelled and Marshall was allowed to keep the band equipment given to him by Mazzara (Exhibit 45). Marshall also agreed to provide the state with "all knowledge of the Provost organization he ha[d] prior to and after the homicides" (Exhibit 45). The prosecutor's benefit

by deliberately withholding this information is obvious. If Marshall were shown at trial to be an important member of the Provost organization, the jury would have given his testimony little, if any, weight. More importantly, however, the terms of the agreement between Marshall and the State demonstrate the nexus between the investigation of the narcotics dealers and the murders. Mr. Hoffman's attorneys would then have been alerted to the dovetailing of these investigations, and this would have opened up a floodgate of challenges to this testimony as well as an exploration of this dual investigation. Marshall's incomplete and misleading testimony on these issues was not corrected by the trial prosecutor.

At the evidentiary hearing, Mr. Harris confirmed that the State had not informed him of the full extent of the deal Marshall received (PC-T. 249). Mr. Harris' strategy was to attack the statements Mr. Hoffman had allegedly made. In order to effectively impeach Marshall, it was critical that Mr. Harris be informed of the full extent of the deal.

Mr. Hoffman has established that the nondisclosure of the information regarding the extent of Marshall's deal with the State and the lenient treatment in exchange for testimony undermines confidence in the outcome of the guilt phase. Marshall was critical to the State's case, and the withholding of this information denied Mr. Hoffman his constitutional right to confront the witnesses against him, his right to the effective assistance of counsel, and his right to a fair trial.

3. Other Suspects

James Maurice "Bubba" Jackson was suspected of the Ihlenfeld\Parrish murders early on in the investigation when the police received tips from a confidential informant and Vickie Jack that Jackson had confessed to the murders (Exhibit 34-35). As late as July 27, 1981, state investigators still suspected that "Bubba" Jackson was involved in the murders (Exhibit 36). The affidavit accompanying the search warrant for Jackson stated:

> David Jack is a personal acquaintance of James Maurice Jackson, Jr., aka Bubba Jackson, who is the subject individual of this affidavit and search warrant.
>
> The following information was personally given to your affiant by the said David Jack:
>
> Approximately a week to ten days after the homicides referred to in this affidavit occurred, James Maurice Jackson, Jr., aka Bubba Jackson, came to the residence of David Jack and engaged David Jack in a conversation. **James Maurice Jackson, Jr., aka Bubba Jackson stated that a very bad thing had gone down at the Ramada-Inn and that it was something that he had had to do. James Maurice Jackson, Jr., aka Bubba Jackson stated that he was talking about the two people that had been killed at the Ramada-Inn in Jacksonville Beach, Florida. James Maurice Jackson, Jr., aka Bubba Jackson further explained that one of the persons he had killed was named Frank and that it was a shame that a person so young had to be involved in something like that and that this person was a girl (Linda Sue Parrish, the female deceased was twenty (20) years old). When asked by David Jack why he did it, James Maurice**

> **Jackson, Jr., aka Bubba Jackson responded that his people (the deceased Ihlenfeld) were blackmailing his (Jackson's) people.**
>
> **James Maurice Jackson, Jr., aka Bubba Jackson further stated that the handle of the knife he had used had broken from the blade during the killing. He also stated that he had attempted to clean up the room after the murders.**

* * *

The body of the deceased male, Frank Ihlenfeld, was found to contain a knife blade which had become detached from the blade handle and the blade was located in the back of Frank Ihlenfeld when found by investigators in Room #205 of the Ramada-Inn, Jacksonville Beach, Florida. **Your affiant as investigating officer and the Jacksonville Beach Police Department and the Florida Department of Law Enforcement have not released any information concerning the broken knife blade found the deceased back [sic] to any media or news service. This information has been confined solely to law enforcement officials.**

* * *

Your affiant also personally interviewed the wife of David Jack, Mrs. David Jack:

> Mrs. David Jack stated that she was at her home with her husband, David Jack on the evening in which James Maurice Jackson, Jr., aka Bubba Jackson came to the home as referred to by David Jack in this affidavit. . . . She was able to overhear a portion of his conversation with her husband, David Jack. **She stated she overheard James Maurice Jackson, Jr., aka Bubba Jackson state that he had to kill those two people at the request of his people in order**

> **to repay a debt.** Mrs. David Jack is a long time resident of Duval County, Florida, is the mother of one child and had no criminal record.

(Exhibit 33)(emphasis added). Jackson possessed information that only someone with intimate knowledge of the crimes could have. Defense counsel was never provided this or any other information regarding Bubba Jackson (PC-T. 238-9). Certainly had he known, he would have investigated and presented this evidence.

Another of the suspects was Wayne ("Bones") Merrill who, according to his wife, admitted to being the "look-out" man for the two men that killed Ihlenfeld and Parrish (Exhibits 37-39). In July, 1981, Dets. Dorn and Maxwell met with Merrill (Exhibit 37). In his report, Det. Dorn detailed the meeting:

> Merrill says that he did in fact tell his wife (Kathy) that he acted as a lookout while the murders were being committed at the Ramada Inn . . . Merrill denies that he did act as a lookout, and claims that he was in Melbourne Florida on a job with Bubba Jackson when the murders took place.

(Exhibit 37).[5] A subsequent meeting occurred five days later, which Det. Maxwell documented (Exhibit 36). During that meeting, Merrill entered into an agreement with the Jacksonville Beach Police Department:

> **After the meeting, Merrill and officers named above came to this agreement: Merrill would assist JBPD in making a case against**

---

[5] Interestingly, Merrill claimed that Jackson, another prominent suspect, could provide an alibi for his whereabouts at the time of the murder. It would appear to be convenient for two primary suspects to provide alibis for each other.

> **Jimmy Provost and associates concerning drug-related activities and inform us of any information concerning the double homicide at the Ramada Inn. In return for this information, Merrill's living expenses for this period of time would be paid and monies given to him to leave town. Assistance in paying these monies would be given by FDCLE, the State Attorney, and DEA.**
>
> As a result of information given to JBPD by Wayne Merrill, the following has been accomplished:
>
> A wiretap on the telephone of Jimmy Provost. Through this wiretap approx. fifteen to twenty persons will be arrested or interviewed for conspiracy to distribute controlled substance.
>
> * * *
>
> Lenny Mazzara was arrested for homicide.
>
> **A case for conspiracy to commit homicide will be made against Bubba Jackson and Jimmy Provost. . . .**

(Exhibit 36)(emphasis added). This report was never disclosed to Mr. Hoffman. Fla. R. Crim. 3.220(b)(1)(iii) requires the prosecutor to disclose "any statements contained in police reports or report summaries" and any addresses of witnesses to the statements. Merrill and his wife were not disclosed to Mr. Hoffman's trial attorneys nor their address.

Mr. Harris was unaware that Merrill had made statements about being involved in the crime or that any deal had been struck between the police and Merrill (PC-T. 248).

Merrill was a key player in the Provost organization which included Jackson. Certainly Merrill's link to Bubba Jackson and to the murder itself was critical information for the Defense to know. Had counsel known, evidence could have been presented at

trial to show that Mr. Hoffman was not involved in the murder; it was in fact committed by Jackson and Merrill.

Merrill and Jackson were not the only suspects the State suppressed. In several investigative reports suspects' fingerprints were submitted for latent fingerprint examinations with the evidence collected from the crime scene (Exhibit 20-30).[6] Interestingly, Rocco Marshall was one of the original suspects in the crime. However, Mr. Harris was never given this information (PC-T. 238).

Clarence Robinson, another suspect never disclosed to Mr. Hoffman, became a suspect when a confidential informant in Georgia reported that he was involved with Ms. Parrish in a plan to help two Florida death row inmates escape (Exhibit 40). At the time Robinson was already wanted for murder (Exhibit 40). From Det. Dorn's report, dated October 7, 1980, Robinson was never fully investigated because Georgia law enforcement was unwilling to use their confidential informant to pursue the Jacksonville Beach homicides for fear that "it might possibly hurt an ongoing investigation" (Exhibit 40-41).

Another suspect was Meade Haskins (Exhibit 42). Det. Dorn received information from a Ramada Inn employee that Haskins was in the room at the time of the crime (Exhibit 42). Det. Dorn was aware that Haskins was associated with Mr. Ihlenfeld in the drug

[6] Mr. Hoffman's name was not listed as an initial suspect.

business (Exhibit 42). The report with this information was never disclosed to Mr. Hoffman (PC-T. 238).

Certainly when a murder investigation involves more than one suspect, particularly a suspect who admits complicity, the defense is entitled to such information. See Sellers v. Estelle, 651 F.2d 1074, 1075 (4th Cir. 1981)(holding that it constituted a Brady violation if it was determined that petitioner never received police reports regarding another suspect). Had counsel had this information it could have been investigated and presented to the jury in order to establish Mr. Hoffman did not commit the murder. Trial counsel was never informed about any of these suspects or inculpatory statements (PC-T. 238).

In addition, Defense counsel would assess the voluntariness of each of Barry Hoffman's statements. None of this information was provided, and none of it was uncovered by defense counsel, whose investigation was inadequate. However, the information was critical and would have been used and presented at trial if counsel had known this information.

The circuit court completely disregarded the evidence and testimony regarding the other suspects. Clearly, the circuit court did not consider the presented evidence individually or as a whole.

4. Blood Analysis

The State never disclosed the blood type of the other suspects. See Exhibit 17. Type 'O' blood was found on the male victim's pants. Neither victims had type 'O' blood (Exhibits

12). Neither Mr. White nor Mr. Hoffman had type 'O' blood (Exhibit 13, 15). Obviously, evidence that the other suspects had type 'O' blood would have been critical since Mr. Harris testified at the evidentiary hearing that he used the fact that Mr. Hoffman's blood type did not match the type found at the scene as an integral part of his defense.

Again, the lower court failed to even address these facts in his order denying Mr. Hoffman relief.

5. Mr. Hoffman's Statements to the Prosecutor

Mr. Hoffman met with Mr. Obringer on numerous occasions, all of them without counsel. Fla. R. Crim. 3.220 (b)(1)(iii) requires the prosecutor to disclose:

> (iii) Any written or recorded statements **and the substance of any oral statements made by the accused,** including a copy of any statements contained in police reports or report summaries, **together with the name and address of each witness to the statements.**

(emphasis added). The substance of Mr. Hoffman's many statements to Mr. Obringer were not disclosed. This information is material because Mr. Hoffman was being threatened with the death sentence if he did not testify in a co-defendant's trial. Thus, the information seized by Mr. Obringer was directly related to the case later made against Mr. Hoffman. The substance of Mr. Hoffman's statements could have revealed that he in fact denied guilt, gave contradictory or incorrect statements or simply that Mr. Hoffman was in fear of the Provost organization or the death sentence. Any of these statements if withheld would be a Brady violation, and the substance of any and all statements

not disclosed violated Rule 3.220 (b)(1)(iii). In addition, if any of these statements were recorded, then they should have been disclosed. The prosecutor also has a duty to:

> (c) Make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal.

Fla. R. of Prof. Conduct 4-3.8(c). Thus, Mr. Hoffman's statements to Mr. Obringer that he was a lesser participant, that he was under the domination of the Provost organization or others, that he was a drug addict and anything about Mr. Hoffman's character or mental health should have been disclosed. This information was improperly withheld from Mr. Hoffman, and was certainly material to Mr. Hoffman's defense.

C. LEGAL ANALYSIS

In Kyles v. Whitley, 115 S.Ct 1555 (1995), the United States Supreme Court clearly set out the law regarding Brady and its progeny. Kyles was granted relief due to the state's withholding of favorable information from the defense, which taken as a whole raised a reasonable probability that disclosure would have produced a different result. The cumulative effect of the withheld information undermined the confidence in the verdict.

The Court in Kyles discussed the interrelationship of Brady, Agurs, and Bagley. In so doing, the Court recited the law of Brady stating ". . . the suppression by the prosecution of

evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment. Kyles at 1558. The Court further explained ". . . a showing of materiality does not require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted ultimately in the defendant's acquittal. . ." Kyles, at 1566 (citations omitted). The Court also stated: "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence". Kyles, at 1566. The Court emphasized that materiality was not a sufficiency of the evidence test. "A defendant need not demonstrate that after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough to convict". Kyles at 1566. The Court then stated that once Bagley materiality is shown, "there is no need for further harmless-error review." Kyles, at 1567. Regarding the state's obligation the Court stated ". . . the prosecution's responsibility for failing to disclose known, favorable evidence rising to a material level of importance is inescapable." Kyles at 1567-1568.

Kyles also requires a cumulative evaluation of the evidence. Kyles, at 1569. A cumulative evaluation of the evidence withheld in Mr. Hoffman's case clearly demonstrates that it had an impact upon effectiveness of trial preparation, investigation, strategy, cross-examination and development of the defense case.

The first requirement of Brady was satisfied at the evidentiary hearing. Through the testimony of Mr. Harris and Mr. Obringer as well as the exhibits introduced at the hearing, Mr. Hoffman demonstrated that the results of the hair analysis, statements by other suspects, deal with Marshall and other evidence was exculpatory. All of this evidence is favorable in that it supports the defense theory regarding the unreliability of Mr. Hoffman's alleged statements.

The second and third requirements of Brady were satisfied by Jack Harris, Mr. Hoffman's trial attorney who testified that he was never provided with any of these statements or reports.

The fourth, and final, requirement of Brady, that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different, requires a cumulative analysis of all evidence adduced to date in Mr. Hoffman's case. However, even individually each of the State's Brady violations meet this standard.

In fact, the State conceded the prejudice prong of the Brady standard if Mr. Hoffman was able to prove that the "state withheld the names of other persons who purportedly confessed to the murders." Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). Therefore, since Mr. Hoffman proved that trial counsel had never been provided these statements and reports, he is entitled to a new trial.

In addition, specifically, as to Marshall's deal, the truth of a witness' testimony and a witness' motive for testifying are

material questions of fact for the jury, thus, the improper withholding of information regarding a witness' credibility is just as violative of the dictates of Brady as the withholding of information regarding a defendant's innocence. Bagley, 473 U.S. 667; Ouimette v. Moran, 942 F.2d 1 (1st Cir. 1991). Impeachment evidence of an important State witness is material evidence that must be disclosed by the prosecution. United States v. Arnold, 117 F.3d 1308 (11th Cir. 1997); Jean v. Rice, 945 F.2d 82 (4th Cir. 1991). As a result of the State's misconduct in this case, Mr. Hoffman was precluded from effectively cross-examining a key State witness and from effectively presenting a defense, and the jury was deprived of relevant evidence with which to evaluate the State's witness' credibility.

The State's failure to disclose promises of leniency made to Mr. Marshall, in exchange for favorable testimony clearly constituted a violation of Brady v. Maryland, 373 U.S. 83 (1963); see also Strickler v. Greene, 119 S. Ct. 1936 (1999).

This case involves more than the prosecution failing to fully disclose any deals it made with its witnesses, United States v. Bagley, 473 U.S. 667 (1985); Giglio v. United States, 405 U.S. 150 (1972), it also involves the State failing to alert the defense that one of its witnesses provided false or misleading testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, 294 U.S. 103 (1935) and involves the State failing to correct such testimony. Alcorta v. Texas, 355 U.S. 28 (1957). A lower standard applies where the State knowingly used

false testimony, as occurred here. In such a case, the falsehood is deemed to be material "if there is **any reasonable likelihood** that the false testimony could have affected the judgment of the jury". Agurs, 427 U.S. at 103 (emphasis added). Accord Giglio, 405 U.S. at 154. The lower standard applies because such cases involve prosecutorial misconduct and the corruption of the truth-seeking function at trial. Agurs, 427 U.S. at 104; Bagley, 473 U.S. at 680. The Supreme Court has indicated that this lower standard of materiality is equivalent to the Chapman v. California, 386 U.S. 18 (1967), "harmless beyond a reasonable doubt" standard, Bagley, 473 U.S. at 679 n. 9, which requires "the beneficiary of a constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained". 386 U.S. at 24 (quoting Fahy v. Connecticut, 375 U.S. 85, 86-7 (1963)).

This withheld evidence is material to Mr. Hoffman's defense because it impeaches a key State witness whose testimony resulted in Mr. Hoffman's conviction and death sentence. The undisclosed evidence reveals that Mr. Marshall received benefits from the State in exchange for his cooperation. See Smith v. Wainwright, 799 F.2d 1442, 1444 (11th Cir. 1986).

D. CONCLUSION

Mr. Hoffman was denied a reliable adversarial testing. The jury did not hear this exculpatory evidence. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S.

at 675, it was essential for the jury to hear the evidence. Confidence is undermined in the outcome since the jury did not hear the evidence.

The State's misconduct in this case resulted in a failure of the adversarial process. Confidence in the outcome of Mr. Hoffman's trial is undermined because the unpresented evidence was relevant and material to Mr. Hoffman's guilt of first-degree murder and to whether a death sentence was warranted. Here, exculpatory evidence did not reach the jury.[7] Either the State unreasonably failed to disclose its existence, or defense counsel unreasonably failed to discover it. The prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no constitutionally adequate adversarial testing occurred. Mr. Hoffman's conviction and sentence must be vacated and a new trial and/or new penalty phase ordered.

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[7] Workman v. Tate, 957 F.2d 1339, 1346 (6th Cir. 1992)(reasonable probability found where uncalled witnesses would have provided corroboration of defense witnesses and contradicted testimony of police officers); Barkauskas v. Lane, 878 F.2d 1031, 1034 (7th Cir. 1989)(the undisclosed impeachment evidence, in conjunction with that already presented to the jury, may have "pushed the jury over the edge into the region of reasonable doubt that would have required it to acquit"); Ouimette v. Moran, 942 F.2d 1, 10 (1st Cir. 1991)(confidence undermined in the outcome because suppressed evidence "might have affected the outcome of the trial"); Chambers v. Armontrout, 907 F.2d 825, 832 (8th Cir. 1990)(en banc)(reasonable probability exists where "jury might have acquitted"). See also Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991); Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991).

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. HOFFMAN'S INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE CLAIM. MR. HOFFMAN HAS BEEN DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." Gregg v. Georgia, 428 U.S. 153, 190 (1976). In Gregg, the Court emphasized the importance of focusing attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

> Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989)(citation omitted).

Courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate

avenues of mitigation which can be presented for the sentencers' consideration. O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Michael, 530 So. 2d 929 (Fla. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988). Reasonably effective counsel must look into the available facts before deciding what to do.

The decision as to what, if any, evidence to present in mitigation "must flow from an informed judgment." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). Mr. Hoffman's trial counsel did not meet these constitutional standards. He did not conduct a sufficient investigation on which to base any "informed judgment."

Before Mr. Hoffman's case trial counsel, Mr. Harris, had never presented a penalty phase to a jury (PC-R3. 234). At Mr. Hoffman's penalty phase, trial counsel presented no testimony. Mr. Hoffman made a brief statement, which his counsel advised against (T. 1179-1181).

Mr. Harris made his strategy at the penalty phase clear during the charge conference when he told the court:

> **Judge, I will be arguing by extension that he was a normal guy up until the time he got involved with these conspirators and that his drug use began and drug dependence began about that time. He had been using drugs and selling drugs since earlier that year.**

(T. 1166)(emphasis added).

Clearly, trial counsel had no idea about the severity or length of Mr. Hoffman's crippling drug addiction. Trial counsel

did not hire an investigator to speak to Mr. Hoffman's family or friends (PC-T. 244). At the evidentiary hearing, each witness testified that they had not been contacted by Mr. Harris at the time of the trial (PC-T. 133, 143, 151, 162).

If Mr. Harris had contacted Mr. Hoffman's family and friends or conducted a competent investigation he would have been able to prove the extent and affects of Mr. Hoffman's drug addiction. Mr. Harris could have presented evidence of the tender age at which Mr. Hoffman's battle with drugs began when he started drinking cough syrup to achieve a codeine high (PC-T. 142, 156, 149). And although this may have seemed unusual to Mr. Hoffman's family, no one prevented him from abusing this drug (PC-T. 149).

The jury would have also heard that Mr. Hoffman was married and had a child at a very young age (PC-T. 123-124). At this point Mr. Hoffman began a slow decline into more serious drug use in which he would combine drugs so that he could achieve greater highs (PC-T. 126). At various points in Mr. Hoffman's life his drug use was so extreme that he overdosed and nearly died.

The jury also never heard that Mr. Hoffman sought help to overcome his addiction (PC-T. 128, 149), however, despite repeated attempts, his addiction was so severe that he was unable to kick his habit (PC-T. 131, 132). Counsel never obtained Mr. Hoffman's records from these treatment facilities (PC-T. 244).

Trial counsel never informed the jury of Mr. Hoffman's military service which was cut short due to his overwhelming drug addiction (PC-T. 244).

In its order denying penalty phase relief, the lower court indicated that because only one of the witnesses actually saw Mr. Hoffman use drugs their testimony was not helpful. At the evidentiary hearing the court also indicated that it wasn't sure if hearsay was admissible at the penalty phase. The lower court failed to know the law. Hearsay evidence is certainly admissible in the penalty phase. Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Therefore, to give Ms. Richman, Mr. Mindel and Ms. Mindel's testimony less weight because much of it was based on hearsay was in error.

Furthermore, the court's determination that there was no testimony about Mr. Hoffman drinking cough syrup with codeine was contradicted by Mr. Sirodi's testimony in which he stated that Mr. Hoffman used cough syrup in order to get high from the codeine.

The Sixth Amendment right to counsel is also inextricably related to the right to expert mental health assistance. There is a critical interdependency between the right to effective assistance of counsel and the right to competent mental health assistance for a criminal defendant. Mental health experts are essential for the preparation of a defense and for sentencing whenever the State makes mental health relevant to those issues. Ake v. Oklahoma, 105 S. Ct. 1087 (1905). This independent due process right is necessarily enforceable through the right to effective counsel -- what is required is a competent mental health evaluation, and it is counsel's duty to obtain it. Blake

v. Kemp, 758 F.2d at 523. Mental health and mental status issues permeate the law, and careful investigation and assessment of the client's mental health (e.g., as regards mitigating factors) is necessary before any decisions as to what to present are made by counsel. In such instances, as in Mr. Hoffman's, ineffective assistance is demonstrated.

All participants knew that this case involved drugs. The State in its opening argument at the guilt-innocence phase presented the motivation for the conspiracy and murder as a drug partnership gone bad (T. 470), and references to the drug world and Mr. Hoffman's purported role in it continued throughout. What the jury never learned is that Barry Hoffman's true role in the drug world was that of a serious narcotics addict, a victim of that very drug world, and that his drug abuse and drug addiction resulted in the mental, emotional and behavioral dysfunction that serious and prolonged drug use engenders.

Counsel failed to obtain school records, hospital records, military records, all documenting Mr. Hoffman's life (PC-T. 244). Mr. Hoffman was consumed with drugs throughout his life and up until the time of his arrest on these charges. The drugs affected (and damaged) this drug addict's brain. Defense counsel did not investigate this. This was not as a result of strategy or tactic.

Defense counsel called both Mr. Hoffman's ex-wife, Lillian Hoffman, and his present girlfriend, Kathy Taylor, as witnesses at trial. Though both of these witnesses had lived with

Mr. Hoffman and were in a position to observe Mr. Hoffman in his daily life, neither were asked anything about his drug addiction and the effect it had on him. In fact, neither of these witnesses were even called during penalty phase though both clearly knew much about Mr. Hoffman's background.[8]

Counsel failed to investigate and as a result, the jury decided Barry Hoffman's fate without sufficient information.

Defense counsel should have known that addiction to opiates and their long-term use have serious consequences on an individual's mental functioning, behavior, and behavioral controls. The dysfunction caused by drugs is real, severe, and debilitating.

Investigation in a case in which a defense attorney represents a serious drug addict requires the assistance of a mental health professional in order for counsel to ascertain the effects of the drugs on his client's functioning. Counsel, however, sought no mental health assistance. As a result, available mitigation was not presented to the jury.

During his evidentiary hearing, Mr. Hoffman presented the testimony of Dr. Robert Fox, M.D., a highly qualified psychiatrist and neurologist, and Dr. Michael Gelbort, a highly qualified neuropsychologist. These experts were provided with

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[8] The lower court, in its order denying 3.850 relief relied on the fact that Ms. Taylor was called as a witness in the penalty phase. The court's finding is inaccurate. Ms. Taylor was not called as a penalty phase witness. Mr. Harris presented no testimony at the penalty phase.

historical evidence concerning Mr. Hoffman and conducted extensive neurological examinations of Mr. Hoffman.

Dr. Fox's diagnosis reveals that Mr. Hoffman has suffered from one of the most crippling diseases recognized in the medical profession. Dr. Fox diagnosed Hoffman with "mixed substance, as well as substance induced organic mental disorder, both of an acute and chronic type" (PC-T. 42). See also Exhibit 2. Dr. Fox told the lower court that he had discovered that Mr. Hoffman had used opiates, various sleep medications, marijuana, hallucinogens and other substances since he was a teenager until his arrest in 1980 -- over twenty-five years (PC-T. 43). Dr. Fox concluded:

> [W]hen a person is a chronic and habitual drug user, as Mr. Hoffman has been, that their life in essence is centered solely around the obtaining and using of substances. And that becomes the primary motivating factor in their life.
>
> In terms of other diagnoses, substance induced organic mental disorder, both of the acute and chronic type, what that refers to is in the acute phase the direct effect of the substances themselves on the individual's functioning, both their psychological functioning and their intellectual functioning, and their behavior.

(PC-T. 44-45).

Dr. Fox told the lower court that Mr. Hoffman's condition meant that he experienced "difficulties in thinking, reasoning and remembering" (PC-T. 81).

Dr. Fox testified that Mr. Hoffman's condition met the criteria of two statutory mitigating circumstances. Firstly, he testified that Mr. Hoffman's capacity to appreciate the criminality of his conduct or to conform his conduct to the

requirements of the law was substantially impaired (PC-T. 55). Dr. Fox testified that this mitigator existed because:

> the longstanding substance abuse both in terms of the compulsive behavior that chronic substance abuse generates in an individual . . . as well as the direct effect of the substances themselves.
>
> They both diminish the individual's capacity to comprehend the full nature of their behavior, their statements, their situations.

(PC-T. 55-56).

Secondly, Dr. Fox testified that the Mr. Hoffman was under extreme duress or under the substantial domination of another (PC-T. 56). Mr. Hoffman's addiction made him vulnerable to those who were supporting it, i.e. his co-conspirators (PC-T. 57). Mr. Hoffman admitted Dr. Fox's report into evidence. See Exhibit 2.

In its order, the lower court indicated that it discounted Dr. Fox's testimony because: Dr. Fox had previously testified for the Office of the Capital Collateral Representative (CCR); Dr. Fox's testimony "depends in whole cloth upon complete reliance upon the statements of the defendant to Dr. Fox, and the affidavit of Robert Golden" (PC-R3. 353). The lower court erroneously concluded that "Dr. Fox's opinions are based upon factual assumptions and beliefs that the Court finds to be untrue or not credible" (PC-R3. 354). The lower court's finding is not supported by the record.[9]

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[9] Even though the lower court's conclusions are not supported by the record on appeal, the lower court's complaints about Dr. Fox bear on the weight of his testimony. The question before the lower court is not what difference Dr. Fox's unrebutted testimony had on the judge, but what difference Dr.

Firstly, Dr. Fox did not rely on Mr. Golden's affidavit to discuss Mr. Hoffman's mental health at the time of the crime. Mr. Golden did not meet Mr. Hoffman until after Mr. Hoffman was arrested, therefore he was not relying on him to form the basis of his opinion regarding Mr. Hoffman's mental state at the time of the crime.

Secondly, the lower court ignored the fact that although Dr. Fox may have previously testified for CCR in a defense capacity he also testified for the State and the court in as many if not more cases (PC-T. 33-34).

Thirdly, the lower court was under the misunderstanding that Mr. Hoffman testified at his capital trial that he was not under the influence of any drugs at the time of the crimes (PC-T. 353). Thus, the lower court believed that Dr. Fox was not fully informed. However, a review of the original trial record indicates that Mr. Hoffman testified he was not combining dilaudid and cocaine at the time of the crime, his testimony does not indicate that he was not using drugs at the time of the crime. Therefore Dr. Fox's testimony was valid and credible.

Finally, Dr. Fox did not rely on the information Mr. Hoffman provided, in and of itself, to form his opinions. Instead Dr. Fox testified that he had conducted a detailed evaluation of Mr. Hoffman (PC-T. 37). That evaluation consisted of an interview, "a review of an extensive file of both medical, school and legal records regarding Mr. Hoffman, as well as affidavits . . . of

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Fox's testimony would have had on the jury.

individuals" (PC-T. 37), a review of courtroom documents, a neurological examination and a mental status examination (PC-T. 37-40). See also Exhibit 1. Dr. Fox testified that the information he reviewed along with the interview and neurological testing corroborated each other and supported his conclusions (PC-T. 60-90). Therefore, the lower court's order ignores much of the objective data and records that Dr. Fox reviewed to form his opinions.

In addition to reviewing records, Dr. Fox conducted neurological testing because "[i]ndividuals with a long history of substance abuse often have signs of neurologic impairment (PC-T. 79-80). Thus, Dr. Fox's opinion was based on several factors, all of which are regularly relied upon by mental health experts and all of which in this case corroborated each other.

Furthermore, the lower court failed to even address or acknowledge the testimony of Dr. Gelbort which also supported Dr. Fox's conclusions. Dr. Gelbort provided valuable testimony about the effects of Mr. Hoffman's long term drug use.

The lower court also erred when it stated:

> [Mr. Harris] testified that he felt with a local jury in a conservative community, the testimony about the defendant's addiction would have been aggravated rather than mitigating the facts. This is a reasonable tactical decision by a competent attorney based upon his knowledge of the local community.

(PC-R3. 356). In fact, at one point Mr. Harris conceded that he could have used the lay witness and expert witness testimony

regarding Mr. Hoffman's addiction to drugs in the **penalty phase** (PC-T. 252).

Mr. Harris was inconsistent about the use of this testimony; however, he had already told the jury that Mr. Hoffman was a drug addict. Therefore, providing the jury with a complete picture of Mr. Hoffman's debilitating addiction was certainly in error, as was the lower court's reliance on this inconsistent statement.

In addition to this information, Mr. Hoffman's trial counsel had other information in his file which, had he used it, would have provided the sentencing jury with a better understanding of Mr. Hoffman's alleged participation in the crimes for which he was convicted. During the sentencing phase charge conference, Mr. Harris mentioned to the judge that he would like a jury instruction which would reflect the fact that Mr. Hoffman acted under the substantial domination of his alleged co-conspirator, Leonard Mazzara (T. 1155). Later, for no apparent reason whatsoever, he declined to argue for the instruction (T. 1164).

Mr. Hoffman's trial attorney had the deposition of Det. Maxwell, taken on February 11, 1982, in his files. Det. Maxwell had played a prominent role, *in absentia*, in the guilt-innocence proceedings as Det. Dorn's partner. When Det. Maxwell's deposition was taken, he testified that his notes reflected that during his alleged confession Mr. Hoffman stated that he had performed for alleged co-conspirator Mazzara as he was requested because he lived in terror of Mazzara and James Provost:

> Q (by Mr. Westling): What did he [Barry Hoffman] say, to your knowledge?
>
> * * *
>
> A . . . These are just notes. He had stated that he had killed the people in the room. He said that it was either them or me, which he was -- seemed to be -- he stated he was afraid of Provost and Mazzara, and Lennie wanted these people killed. And he said, you know, he just felt like either I kill them or they're going to kill me.

(Deposition of Thomas Maxwell, Feb. 11, 1982).

Because facts concerning Mr. Hoffman's "confession" were presented by the State and already in evidence, there was no explanation for counsel's failure to present this probative information to the jury. Such evidence, from the government's own witnesses, would have necessarily had a dramatic impact on the jury's determination of whether Mr. Hoffman lived or died.

The jury never learned the truth about Barry Hoffman. The truth is that he suffered from a serious and crippling disease -- drug addiction. The jury had no way of knowing that Barry's addiction began when he was little more than a child, and that his heavy and prolonged drug intake which continued up to the time of his arrest caused neurological dysfunctions, impaired judgment, impaired capacity, and extreme emotional disturbance. The jury knew nothing of Mr. Hoffman's background and history or how the factors in his life made him vulnerable to long-term drug dependency. The fact that Det. Maxwell had recorded Mr. Hoffman's fear of and domination by Leonard Mazzara was not presented. Mr. Hoffman's jury needed to know who he was.

Because of counsel's failure to investigate and present this crucial and readily available evidence in mitigation, confidence in the outcome of the penalty proceedings is undermined. Michael, 530 So. 2d at 930.

The lower court's order denying Mr. Hoffman relief on his ineffective assistance of counsel claim is not supported by the record and is in error.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING MR. HOFFMAN'S CLAIM THAT HE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL IN THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL.

In Strickland v. Washington, 466 U.S. 668, 688 (1984) the Supreme Court held that counsel has a "duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland requires a defendant to plead and show: 1) unreasonable attorney performance, and 2) prejudice. Courts have repeatedly ruled that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v.Beto,

421 F.2d 636, 637 (5th Cir. 1970). An attorney is responsible for presenting legal argument consistent with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

Mr. Hoffman was denied the effective assistance of counsel at the guilt-innocence phase of his capital proceedings.[10]

Counsel ineffectively failed to investigate, secure, and present for the suppression hearing expert and lay testimony regarding Mr. Hoffman's long-term drug addiction, and the influence of drugs on his mental state at the time of his interrogation, and thus failed to present evidence that would have supported Mr. Hoffman's testimony that at the time of his interrogation he was highly intoxicated and mentally impaired.

At the evidentiary hearing, Mr. Hoffman presented the testimony of Dr. Robert Fox. Dr. Fox determined that on the day he was arrested Mr. Hoffman suffered from a drug induced mental disorder (PC-T. 47).

Mr. Harris testified that had he had expert testimony regarding the circumstances of Mr. Hoffman's alleged statements to the police, he would have presented it (PC-T. 243).

The lower court erroneously denied this portion of Mr. Hoffman's claim for many of the reasons addressed in the previous argument. See Argument II, pages 54-59. In addition, the lower court found that Robert Golden was not credible.

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[10] The lower court only allowed Mr. Hoffman to present evidence regarding Mr. Harris' representation of him.

Mr. Golden recalled being incarcerated with Mr. Hoffman at the time Mr. Hoffman was arrested (PC-T. 167). Mr. Golden told the court that they were being held in a medical area of the jail and that Mr. Hoffman appeared to suffer from severe withdrawal symptoms (PC-T. 167-168, 172). In fact, Mr. Golden attempted to obtain medical assistance for Mr. Hoffman when the treatment he was on did not seem to be helping (PC-T. 170, 172).

In discussing Mr. Golden's testimony the lower court chooses fragments of his testimony and then groups it all together to make it appear that Mr. Golden was a rambling fool. However, a review of the record shows that Mr. Golden appropriately responded to counsel's questions. In addition, the court ignores the fact that at the time of Mr. Hoffman's trial, had Mr. Harris investigated, he could have secured evidence of Mr. Hoffman's treatment at the jail through jail records and personnel, thus making Mr. Golden's testimony unnecessary. However, since Mr. Harris failed to perform any investigation he could not even assess the strength of any particular testimony or evidence.

The lower court also ignores the evidence presented at trial that a bag of marijuana was found on Mr. Hoffman at arrest (T. 792-793). Certainly, it was reasonable for Dr. Fox to conclude that Mr. Hoffman was using drugs up until the time of his arrest since he was relying on testimony by police officers that Mr. Hoffman had been found with drugs.

As to counsel's performance during the trial, counsel failed to conduct any effective investigation pretrial. As discussed

previously, there were numerous suspects in the case. Confessions were made. Counsel's failure to investigate these other suspects and the other information surrounding law enforcement's investigation was prejudicially deficient.[11] Exculpatory evidence as well as information which could have been used to impeach the State's key witness was not uncovered.

The defense attorney's failure to conduct pretrial investigation resulted in his inability to conduct a proper cross-examination of the State's witnesses, particularly Rocco Marshall. Marshall received great benefits from his testimony, including the fact that he walked free after having been indicted on two first degree murder charges. But Marshall had also agreed to tell the State "all he knew" of the drug operation and "testify that Lenny Mazzara asked him to find two person to burn, kill victims." (Exhibit 45). The agreement was not dependent upon truthful testimony. Counsel did not investigate, relying on the State's discovery. Defense counsel denied Mr. Hoffman the right to confront the State's witness. See Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). Counsel failed to present the available impeachment.

Counsel also failed to investigate the information on "Bubba" Jackson. Investigation would have uncovered that Bubba Jackson was involved in the drug organization run by Jimmy

[11] Mr. Hoffman's main contention is that the State failed to disclose this information. To the extent that the State may argue disclosure occurred, then counsel should have investigated and presented this evidence.

Provost. According to a police affidavit, Jackson had confessed to this crime and had given specific details that only the culprit would know. Jackson was never even mentioned at Mr. Hoffman's trial though this evidence would clearly have been crucial evidence for the judge and jury to consider. Similarly, counsel failed to present evidence that Merrill acted as lookout.

Counsel mentioned in opening argument that Mr. Hoffman's hair was not found at the scene of the homicide. What counsel failed to ever argue or produce was evidence that the victim Linda Parrish had male caucasian hair clutched in both hands and this did not match Mr. Hoffman's hair. According to the State's case the only other person present at the homicide was James White, a black man. Certainly, this was another critical piece of exculpatory evidence that should have been used by the defense. The failure to produce critical exculpatory evidence fell below an objective standard of reasonableness. Moffett v. Kolb, 930 F.2d 1156, 1161 (7th Cir. 1991).

Mr. Nichols failed to be present during the many hours when Mr. Hoffman was interviewed by the State, and failed to appear to advise, counsel, and assist Mr. Hoffman when he was called to testify at the Mazzara trial.[12] See Argument V, subpart B. This was part of Mr. Hoffman's plea agreement. Neither did counsel show up during the interrogations and de-briefings between Mr. Hoffman and the prosecuting attorney prior to the Mazzara

[12] Mr. Hoffman was not granted an evidentiary hearing regarding Mr. Nichols' representation of him (PC-T. 343).

trial. Mr. Hoffman was thus unrepresented and unadvised by counsel -- counsel's absence resulted in Mr. Hoffman's death sentence. Mazzara, who according to the State was the instrumental procurer of these murders, was not sentenced to death. Mr. Hoffman, who appeared unrepresented at critical stages of the proceedings, was sentenced to death. The lower court improperly denied Mr. Hoffman an evidentiary hearing on Mr. Nichols' ineffective assistance.

ARGUMENT IV

THE CONTINUING FAILURE OF THE STATE TO DISCLOSE PUBLIC RECORDS VIOLATES CHAPTER 119, FLA. STAT. AND THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT.

On December 17, 1990, Mr. Hoffman made a formal request to the Office of the State Attorney of the Fourth Judicial Circuit for all public records pertaining to Mr. Hoffman. The State informed Mr. Hoffman that some of the materials he had requested were destroyed, however, they could not produce destruction forms. In addition, the State withheld a file of records it claimed were exempt. The lower court refused to provide an index of these materials so that Mr. Hoffman could argue the exemptions (Supp. R. 32-33, 95-96).

The State produced several files on Mr. Hoffman's co-conspirators, but these files appeared to be incomplete. The lower court also commented that they appeared to be incomplete Supp. R. 44).

Pursuant to section 119, Fla. Stat., Mr. Hoffman requested the Jacksonville State Attorney's Office to disclose their wire intercept file. The State Attorney Office refused because they felt that the file did "not fall under the Public Records Act." The lower court reviewed the file *in camera*, but refused to indicate what documents were included in the file. **The State never claimed an exemption for these files.**

Public records exemptions cannot be assumed -- they must be expressly stated in the statutes. Miami Herald Pub. Co. v. City of North Miami, 452 So. 2d 572 (Fla. 3d DCA 1984), cause remanded and approved, 468 So. 2d 218 (Fla. 1985).

Mr. Hoffman is unable to assess the legality of the application and the orders granting the wiretaps, because of the State's improper withholding of these documents.

The State submitted an intercept file and another file to the lower court for an *in camera* inspection. The lower court refused to index the files or inform Mr. Hoffman's counsel of the content so that he could properly argue the claimed exemptions. Mr. Hoffman is entitled to these files.

Furthermore, the State Attorney denied Mr. Hoffman any and all access to files on Robert Lee Alton, Keith William Hodge, James Maurice ("Bubba") Jackson, George ("Rocco") Marshall, III Leon McCumbers, Wayne ("Bones") Merrill and James Provost. The State's withholding of these files violates Mr. Hoffman's due process and equal protection rights and State v. Kokal. If the

State Attorney desires to claim any exemptions, then an *in camera* inspection is requested.

Mr. Hoffman requested all files and records (including investigative notes) relating to all codefendants, suspects and those critical to Mr. Hoffman's defense. However, Mr. Hoffman only received arrest and booking reports on a few individuals.

Mr. Hoffman is entitled to all public records detailed above. "The basic premise of the Public Records Act is that all state, county and municipal records in Florida are open to public inspection and examination unless specifically exempted by statute." Tribune Co. v. Public Records, 493 So. 2d 480, 483 (Fla. 2nd DCA 1986), review denied, 503 So. 2d 327 (Fla. 1987). See Kokal, 562 So. 2d at 326. Mr. Hoffman is entitled to these records.

ARGUMENT V

THE LOWER COURT ERRED IN DENYING MR. HOFFMAN AN EVIDENTIARY HEARING ON SEVERAL OF HIS CLAIMS.

The lower court erred when it dismissed several of Mr. Hoffman's claims (Supp. R. 308). Mr. Hoffman was entitled to an evidentiary hearing unless "the motion and files and records in the case conclusively show that the prisoner is entitled to no relief". Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986). Further a court must "attach to its order the portion or portions of the record conclusively showing that a hearing is not required" Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). The files and records in this case do not

conclusively rebut Mr. Hoffman's allegations and the lower court failed to attach anything from the record or files demonstrating that Mr. Hoffman is entitled to no relief.

A. THERE WAS NO KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS IN MR. HOFFMAN'S CASE.

While FBI Agent Lupekas had Mr. Hoffman in custody, Mr. Hoffman called Jimmy Provost. During the conversation, Mr. Hoffman made a statement that invoked his right to counsel. However, Agent Lupekas had no notes of the conversation and did not inquire into whether Mr. Hoffman was requesting counsel, even though he believed that Mr. Hoffman was requesting counsel from Provost (T. 208). This conversation would be included in the evidence seized by the wiretaps; however, Mr. Hoffman has been denied access to these public records. See Argument IV.

Mr. Hoffman was in custody for thirteen to fourteen hours prior to a coerced statement being obtained. While in custody, Mr. Hoffman continued to take drugs he possessed at the time of his arrest. The FBI seized his marijuana and flushed it down the toilet, but they did not search Mr. Hoffman for additional drugs. Mr. Hoffman was taking quaaludes and doing cocaine, while in the holding cell. When Mr. Hoffman was taken to Jacksonville, Mr. Hoffman suffered withdrawal symptoms and was placed in Duval County Jail's detoxification program. Mr. Hoffman was under the influence of drugs at the time of his interrogation by the police. His state of mental impairment made it impossible for him to understand the "rights" to which he was entitled under the

Constitution, or to in any way knowingly, intelligently and voluntarily waive what he could not comprehend.

The inquiry into the validity of a waiver has two distinct dimensions. First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both a free choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Moran v. Burbine, 475 U.S. 412, 106 S.Ct. 1135, 1141 (1986). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464, 58 S. Ct. 1019, 1023 (1938); Miranda v. Arizona, 384 U.S. 436, 475 (1966). The accused's mental state is the critical factor.

Evidence is available to support the fact that Mr. Hoffman was not coherent and rational at the time of the interrogation. Because of his long term drug dependence, his emotional makeup and his intoxication on the night involved, Mr. Hoffman did not possess the mental state by which he could have rationally understood the consequences of "waiving" his Miranda rights. In

fact, he stated that he believed that by signing the "form" he was **asserting** his right to silence (R. 241). Like the involuntary statement taken in Arizona v. Fulminante, 111 S. Ct. 1246 (1991), Mr. Hoffman's statements were involuntary under "the totality of the circumstances" test. Moreover, where as here the police seized some drugs off Mr. Hoffman's person, they clearly had to know of his drug addiction.

Claims such as the instant are precisely the type necessitating an evidentiary hearing for proper resolution. See Squires v. State, 513 So. 2d 138 (Fla. 1987). Mr. Hoffman is entitled to relief on this issue.

B. MR. HOFFMAN WAS DENIED HIS RIGHT TO COUNSEL, AND TO THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHEN CRITICAL STAGES OF THE PROCEEDINGS WERE CONDUCTED WITHOUT COUNSEL.

The Sixth Amendment guarantee of the right to the assistance of counsel is beyond dispute:

> The Sixth Amendment stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not "still be done." It embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel.

Johnson v. Zerbst, 304 U.S. 458, 462-63 (1938)(footnotes omitted). See also Powell v. Alabama, 287 U.S. 45, 68-69 (1932); Gideon v. Wainwright, 372 U.S. 335, 344-45 (1963). The constitutional right to the assistance of counsel during critical

stages, i.e., when the defendant must deal with the government or the court, is carved in constitutional stone. "The adversarial process protected by the Sixth Amendment requires that the accused have `counsel acting in the role of an advocate,'" United States v. Cronic, 466 U.S. 648, 656 (1984), quoting Anders v. California, 386 U.S. 738, 743 (1967), and the proceedings are rendered fundamentally unreliable and unfair if a criminal defendant is deprived of the right to counsel at a "critical stage" of the proceedings. Cronic, 466 U.S. at 659. Prejudice is presumed from this fundamental deprivation.

A critical stage has been defined in United States v. Wade, 388 U.S. 218 (1967), to include "any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial." 388 U.S. at 226. The question to be answered is "whether potential substantial prejudice to defendant's rights inheres in the particular confrontation and the ability to counsel to help avoid that prejudice." 388 U.S. at 227. Critical stages are those steps "in the criminal justice process `where the results might well settle the accused's fate.'" Maine v. Moulton, 474 U.S. 159, 170 (1985), quoting Wade, 388 U.S. at 224.

Mr. Hoffman, however, stood by himself at critical stages of the proceedings at which he was entitled to counsel, and for which there was no waiver of counsel. This is a *per se* violation of the Sixth Amendment. While specific prejudice need not be proven, the prejudice resulting from this fundamental error is

apparent: proceeding alone, but without having waived counsel, Mr. Hoffman did things and made statements which placed him in the electric chair. When he appeared with counsel, he was guaranteed a twenty-five year prison sentence. When he appeared without counsel, he set in motion his death sentence.

Mr. Hoffman was arrested in October of 1981, and Mr. Nichols was appointed to represent him on October 29, 1981. On June 25, 1982, Mr. Hoffman filed a pro se pleading entitled "Dismiss Ineffective Counsel" (R. 40). The motion recited that counsel had not performed properly, had not done what Mr. Hoffman requested, and had not been interested and concerned about the case. A hearing was held on the motion that same day.

At that hearing, counsel requested permission to withdraw. After inquiry, the Court learned that the differences between Mr. Hoffman and Mr. Nichols concerned what the attorney was and was not doing in the case (T. 46), that Mr. Hoffman did not wish to represent himself, and that he simply wanted other counsel (T. 42, 46-47). The Court found:

> THE COURT: I don't think it's proper you should represent yourself when you are playing with your own life. I think you are adequately represented by Mr. Nichols. I will not allow him to withdraw or allow you to "fire him." You don't have that luxury. It just isn't available to you. If I thought for one moment that he was not representing you properly, I would discharge him. But I don't feel that way.

(T. 47).

Three days later, Mr. Hoffman pleaded guilty.

> THE COURT: . . . . I will pass it for sentencing until August 20th with the understanding, Mr. Hoffman, so you won't have any misunderstanding, that you will get a one lifetime sentence on each count, with 25 years minimum mandatory, to run concurrently. That means you will only serve one lifetime sentence. The State would then nol pros the conspiracy case. But in order to accomplish this you must testify candidly and truthfully at the trial of Mr. Mazzara.

(T. 77-81).

Approximately three months later, Mr. Hoffman was indeed called as a witness in the trial of a co-defendant. **Mr. Hoffman's attorney was not present.** He was also not present during various discussions between Mr. Hoffman and the state. The record does not contain an express waiver of counsel as required in Faretta v. California, 422 U.S. 806 (1975).

Mr. Hoffman made decisions, answered questions from the Court and the State, and performed acts which required counsel's input, advice, and assistance, all without the assistance of counsel, which critically prejudiced him. (T. 220-236).

Two days after his testimony at Mazzara's trial, Mr. Hoffman filed a pro se Motion to Withdraw Plea. A hearing was held a week later. Mr. Hoffman's attorney appeared at this hearing, to move to withdraw. No motion by Mr. Hoffman was filed requesting that Mr. Hoffman be allowed to proceed pro se, no record inquiry occurred regarding whether Mr. Hoffman wished to proceed pro se and, in fact, ultimately new counsel was appointed. A summary of the proceeding: a) counsel was allowed to withdraw; b) Mr. Hoffman alone (without an attorney, without an attorney's

advice and input, and without an express waiver of counsel), was allowed to withdraw his guilty plea; and c) preparations began to obtain new counsel for Mr. Hoffman. The plea was withdrawn without benefit of counsel (T. 115-16).

Without counsel Mr. Hoffman withdrew his plea:

> Mr. OBRINGER: Your Honor, there is also a pro se motion by Mr. Hoffman to withdraw any and all guilty pleas that have been entered.
>
> The State would urge the Court to grant it. The State, as it announced at trial, does not feel bound by any plea negotiations.
>
> THE COURT: Yes. At the Mazzara trial he wished to withdraw the pleas. I told him at that time it wasn't the proper time to do it. **This is a good time for the Motion to Withdraw.**
>
> * * *
>
> THE COURT: I will allow you to withdraw your guilty plea on the murder charges, two counts, in 81-9299.
>
> I will enter the not guilty plea on his behalf.

(T. 117-19).

Of course, a criminal defendant has a constitutional right to represent himself, however:

> When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must "knowingly and intelligently" forgo those relinquished benefits. Johnson v. Zerbst, 304 U.S., at 464-465, 58 S.Ct., at 1023. Cf. Von Moltke v. Gillies, 332 U.S. 708, 723-724, 68 S.Ct. 316, 323, 92 L.Ed. 309 (plurality opinion of Black, J.). Although a

> defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, he should be made aware of the dangers and disadvantages of self-representation, so that the record will establish that "he knows what he is doing and his choice is made with eyes open." Adams v. United States ex rel. McCann, 317 U.S., at 279, 63 S.Ct., at 242.

Faretta v. California, 422 U.S. 806, 95 S. Ct. 2525, 2541 (1975). No "knowing and intelligent" waiver of the right to counsel was ever made by Mr. Hoffman. To the contrary, he had indicated previously to the court that he did not want to proceed without counsel, cf. Hardwick v. State, 521 So. 2d 1071, 1074 (Fla. 1988), and the court specifically found that Mr. Hoffman did not "have the qualifications to make a judgment call on a trial" (T. 47).

It is thus plain that Mr. Hoffman was without counsel, although he never waived the right to counsel. It is similarly clear that Mr. Hoffman did not have the assistance of counsel at critical stages of his capital prosecution. Harding v. Davis, 878 F.2d 1341 (11th 1989). Moreover, there were at least twenty hours of depositions, and many meetings between Mr. Obringer, the State Attorney, and Mr. Hoffman, the defendant, which took place in counsel's absence. During post-plea conferences, Mr. Hoffman was left unguided in answering the State's questions, and thus a weary Mr. Hoffman could have fallen prey to the State's traps. In addition, Mr. Hoffman knew to say what the State wanted to hear or face the electric chair. Certainly, Mr. Hoffman's statements were coerced.

Our system is inquisitorial, not accusatorial, and the police are not allowed to reinterrogate a suspect once counsel has been appointed, unless suspect's counsel is present. Although the prosector later agreed not to use any of the unrecorded post-plea statements at Mr. Hoffman's trial, the prosecutor had access to an uncounseled Barry Hoffman. Mr. Hoffman was, not unlike the defendant in Minnick v. Mississippi, 111 S. Ct. 486 (1990), advised that what he said could be used against him, but this did not satisfy the requirement of counsel being present. Mr. Hoffman cannot be expected to know when his United States and Florida constitutional rights as well as statutory and caselaw privileges are being violated. Mr. Hoffman should not be given less protection because he agreed to work with the State on another case. At the very least, Mr. Obringer should not have been allowed to continue to prosecute Mr. Hoffman after he had worked so closely with him.

In this context, there can be no showing of harmless error. While holding that some constitutional violations may be subjected to a harmless error analysis, the United States Supreme Court has noted that "there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error," and cited the rule established in Gideon v. Wainwright, (the right to counsel) as one such right. Chapman v. California, 386 U.S. 18, 23-24 (1967). Mr. Hoffman's entitlement to relief is clear, for his Sixth Amendment rights were denied. This error is quite troubling in a capital case, particularly

where the decisions made by the defendant without counsel literally resulted in a sentence of death. At the least, an evidentiary hearing is required. See Lemon v. State, 498 So. 2d 923 (Fla. 1986). Counsel's failure to attend the meetings between the prosecutor and Mr. Hoffman was ineffective assistance. Counsel's failure to be present when Mr. Hoffman failed to honor his guilty plea and then in fact withdrew it was ineffective assistance. It is only cognizable in 3.850 proceedings. Nixon v. State, 572 So. 2d 1336 (Fla. 1991).

An evidentiary hearing is also required on Mr. Hoffman's related claim of prosecutorial vindictiveness -- a claim involving facts which are not "of record" and which are not rebutted by the "files and records" in the case. The due process clause of the Fourteenth Amendment protects against prosecutorial vindictiveness, see Blackledge v. Perry, 417 U.S. 21, 27 (1974), particularly in the context of a capital prosecution. See United States v. Jackson, 390 U.S. 570 (1968); see also Corbitt v. New Jersey, 439 U.S. 212, 217 (1978); United States v. Stockwell, 472 F.2d 1186, 1187-88 (9th Cir. 1977); Hess v. United States, 496 F.2d 936, 938 (8th Cir. 1974).

Mr. Hoffman has been severely punished as a result of exercising his constitutional rights. Mr. Obringer was on Mr. Hoffman's case for the plea agreement and the subsequent trial. Not only was he sentenced to death on Count I of the Indictment, he was also more severely punished on Count II than he would have been under the plea agreement. By pleading to first degree

murder under Count II, Mr. Hoffman was to receive life imprisonment with a minimum mandatory twenty five years, to run concurrently with the same sentence on Count I. After being convicted of second degree murder, Mr. Hoffman was sentenced to one hundred years imprisonment, with the trial court retaining jurisdiction for a third of that term [after being informed by the State that he could not retain jurisdiction for half of the term] (T. 1236-38). Mr. Hoffman was also sentenced to a term of thirty years imprisonment on the conspiracy conviction, to run consecutive to the other sentences (T. 1236-37). In addition to the increased sentence, Mr. Obringer could have altered his trial strategy in accord with information improperly seized from Barry Hoffman. Mr. Hoffman could not have been contacted without the presence or consent of his counsel. Fla. R. of Prof. Conduct 4-4.2. If Barry Hoffman is considered a client of the State because his working relationship with the State as a State witness in another case, then there are conflict of interest concerns. Fla. R. of Prof. Conduct 4-1.7(b) and 4-1.9. Of course, judicial vindictiveness is also forbidden. North Carolina v. Pearce, 395 U.S. 711, 723-26 (1969).

Although prejudice need not be shown under these facts, Mr. Hoffman was prejudiced by making critical decisions regarding his case without benefit of counsel. The vindictiveness then shown by the prosecution and the court further emphasize the disastrous results accomplished by Mr. Hoffman's inadequate and, at certain critical stages, nonexistent representation.

Mr. Hoffman is entitled to relief.

C. THE PROSECUTOR'S CLOSING ARGUMENTS SO INFECTED THE PROCEEDINGS WITH UNFAIRNESS AS TO RENDER THE RESULTING DEATH SENTENCE FUNDAMENTALLY UNRELIABLE AND UNFAIR, IN DEROGATION OF MR. HOFFMAN'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

During his closing arguments at the guilt-innocence and penalty phases, the prosecutor intentionally misstated facts, testified, manipulated evidence, and bolstered the veracity of the State's witnesses. His statements so infected the proceedings with unfairness as to make the ultimate sentence of death unconstitutional.

At the time of the penalty proceedings, the jury had already convicted Mr. Hoffman of the second degree murder of Linda Sue Parrish. In fact, the prosecutor had essentially argued at the conclusion of the guilt-innocence proceedings that Mr. Hoffman's alleged co-conspirator, James White, actually killed the second victim (T. 1060-1061).

At the penalty phase, however, the prosecutor changed his mind. In order to elicit a recommendation of death from the jury, the prosecutor, in the penalty phase, had to alter the strategy he had used in his closing argument during the guilt-innocence proceeding. He argued that Mr. Hoffman, not Mr. White, killed the second victim:

> **. . . I would submit to you from the evidence that you saw what kind of person he is; the way he butchered Frank Ihlenfeld. I would submit to you it's more likely that he was the man who actually killed Linda Sue Parrish by cutting her throat.**

(T. 1184-1185)(emphasis added).

Once the prosecutor had "established" with the jury that the degree of Mr. Hoffman's involvement in the death of the second victim was again an issue for their consideration, he could focus the rest of his sentencing argument on aggravating factors (statutory and nonstatutory) related to her death, not the death of the victim for which Mr. Hoffman was subject to a capital sentencing proceeding. He therefore made repeated references to the manner by which she died, why she died and how scared she was when she died. In fact, the prosecutor referred to the second victim twenty-four times during his sentencing argument (T. 1181-1191).

In addition to the prosecutor's impermissible references to the second victim, he also argued "facts" to the jury which were not in evidence from Mr. Hoffman's trial, and which were intended to undermine mitigation. In his comments, he mentioned Mr. Hoffman's alleged co-conspirator, James White. About White, the prosecutor stated the following:

> James Robert White, was a fairly immature, relatively uneducated 18-year-old black kid who fell under the domination of two would-be bigshots, Leonard Mazzara and Barry Hoffman.

(T. 1188).

Except for the fact that White, Mr. Hoffman's alleged co-conspirator was black, none of the information that the prosecutor provided about White is in the record. Indeed, much of it had no factual basis at all. The prosecutor argued "facts"

which were outside the record and never subjected to defense cross-examination. Counsel's failure to object was deficient performance which prejudiced Mr. Hoffman.

During the pretrial conference, the judge and counsel had agreed that certain aggravating circumstances did not apply to this sentencing proceeding (T. 1162-1163). The prosecutor, however, did a complete turnabout, and disavowed the agreement once he appeared before the sentencing jury.

Pretrial, all agreed that the aggravating factor, Fla. Stat. sec. 921.141 (5)(e), did not apply to Mr. Hoffman. The judge had interpreted that provision as meaning that "witness-elimination" constituted an aggravating factor, but that it was inapplicable here because it was the second victim whom was murdered to eliminate a witness, not the first. The jury had returned a verdict of second degree murder for the second victim, and thus the death penalty was not available for that offense (T. 1161). The prosecutor argued it anyway (T. 1185). The prosecutor stated:

> That woman's life was snuffed out for the mere simple purpose to keep her mouth shut so she couldn't go to the police. She couldn't identify Hoffman and White. As the old story of the late show goes, dead pigeons don't talk.

(T. 1189).

Similarly, the prosecution disregarded what he himself had represented pretrial (T. 1163), and argued another aggravating circumstance that the parties and the court had all agreed was

not applicable, that the murder was heinous, atrocious and cruel (T. 1190).

During his guilt phase closing, the prosecutor also improperly vouched for the truthfulness of his witnesses (T. 1098-1099, 1109).

It is certainly improper for the prosecutor to bolster the credibility of his own witnesses as was done in this case. But the prosecutor's improper argument also included his own testimony as to why the State offered immunity to one witness:

> Let's first of all talk about Rocco Marshall. I told you on Monday that immunity is a very sensitive subject. Believe me, it gives the State of Florida no enjoyment whatsoever to give someone immunity, to let someone involved in crime go free. In fact, it makes me sick to my stomach. . . . Well, do you want us to give immunity to Lennie Mazzara, the man who conjured up this plot to assassinate two people? Do you want James Robert White to get immunity, a backup murderer, at least the backup murderer who kicked Frank Ihlenfeld and who probably cut the throat, if not assisted in cutting the throat of Linda Sue Parrish? Or do you want Barry Louis Hoffman to walk out of his courtroom?
>
> Rocco Marshall is no angel. Ladies and gentlemen, the State of Florida would gladly trade Rocco Marshall and a hundred more like him for two actual murderers and the man who hatched the plot. It's not a nice decision to make. But this is sometimes not a nice business. And consider and evaluate the State's actions, what our alternative were. Is that what you want on the street of your city with immunity?

(T. 1095-1097). This was not argument based on the evidence presented: it was the State's testimony of why it purportedly made certain decisions. This was clearly improper closing

argument. However, counsel failed to object to the improper argument.

In United States v. Young, 470 U.S. 1, 18-19 (1985), the United States Supreme Court noted that a prosecutor breaches the constitutional guarantee of due process when he implies that he has more information than what is presented to the jury.

In the penalty phase argument the prosecutor added his own personal recommendation to the jury:

> **I recommend to you**, ladies and gentlemen, and I will submit to you **that this crime is far and away above your ordinary murder . . . This case is special**. This case demands the ultimate penalty.
>
> **I would humbly request of you as the attorney for the State to recommend to Judge Haddock that this defendant receive the ultimate penalty. The law and the evidence justify it.**

(T. 1191)(emphasis added).

These comments impermissibly injected the prosecutor's personal opinions and testimony into the entire process. See Drake v. Kemp, 762 F.2d 1449 (11th Cir. 1985)(en banc). These improper comments certainly were intended to lead the jury to believe that the prosecutor had access to information undisclosed to the jury and thus that he was in a better position to determine whether Mr. Hoffman deserved the death penalty.

Such comments also tend to diminish the jurors' sense of responsibility by signalling them that a higher, more knowledgeable authority -- their State Attorney -- had already decided that Mr. Hoffman deserved death. See Caldwell v.

Mississippi, 105 S. Ct. 2633 (1985); Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985). Arguments such as that described above are also flatly improper because it urges the jury to rely on impermissible victim impact. See South Carolina v. Gathers, 109 S. Ct. 2207 (1989).

Simply put, the prosecutor's arguments at the guilt-innocence and sentencing phases so infected the proceedings as to render the convictions and death sentence fundamentally unfair and unreliable.

Defense counsel failed to do anything about any of this. He allowed this presentation to go unchecked, interposing no objections. Whether because of ignorance of the law, see Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979), or indifference, see Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988), counsel's non-performance was deficient. See Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). His failures to object at all, or to ever ask for a mistrial was not the result of any conceivable reasonable tactic or strategy. Mr. Hoffman is entitled to relief on his claim.

D. THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. HOFFMAN'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

During Mr. Hoffman's direct appeal this Court did not then have the benefit of Maynard v. Cartwright, 108 S. Ct. 1853 (1988). In Maynard v. Cartwright, the United States Supreme Court held that state courts had failed to comply with Godfrey v. Georgia, 446 U.S. 420 (1980), when they did not require adequate

jury instructions which guided and channelled the jury's sentencing discretion. The same channelling and guiding of the sentencer's discretion is required for the "cold, calculated and premeditated" (CCP), aggravating circumstance as was required regarding the aggravating factor at issue in Cartwright.

The aggravating circumstance "CCP", is unconstitutionally vague, overbroad, arbitrary, and capricious on its face, and as applied here. This circumstance is to be applied when:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification.

921.141(5)(i), Florida Statutes.

The Eighth Amendment requires that any discretion in imposing the death penalty be narrowly limited. Gregg, 428 U.S. at 188-89; Furman v. Georgia, 408 U.S. 238 (1972). The Court in Gregg interpreted the Eighth Amendment as requiring that severe limits be imposed due to the uniqueness of the death penalty. Gregg, 428 U.S. at 189.

The United States Supreme Court has set standards governing the function of aggravating circumstances:

> Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition, they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733 (1983).

It is well established that, although a state's death penalty statute may pass constitutional muster, a particular aggravating circumstance may be so vague, arbitrary, or overbroad

as to be unconstitutional. Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

CCP on its face fails in a number of respects to "genuinely narrow the class of persons eligible for the death penalty." This aggravating circumstance has become a global or "catch-all" aggravating circumstance. Even where the Florida Supreme Court has developed principles for applying the (5)(i) circumstance, those principles have not been applied with any consistency whatsoever.

This Court has discussed this aggravating factor and implicitly held that more is required than simply the words in the statute. See Jent v. State, 408 So. 2d 1024, 1032 (Fla. 1982); McCray v. State, 416 So. 2d 804, 807 (Fla. 1982); Combs v. State, 403 So. 2d 418 (Fla. 1981). In Jent, this Court stated:

> the level of premeditation needed to convict in the penalty phase of a first degree murder trial does not necessarily rise to the level of premeditation in subsection (5)(i). Thus, in the sentencing hearing the state will have to prove beyond a reasonable doubt the elements of the premeditation aggravating factor -- "cold, calculated...and without any pretense of moral or legal justification".

Jent, 408 So. 2d at 1032. Although the Florida Supreme Court has held that more than simply premeditation is required, the jury was not told in Mr. Hoffman's case what more was required, and the trial court did not employ a limiting construction.

This Court's decisions have plainly recognized that cold, calculated and premeditated requires proof beyond a reasonable doubt of a "careful plan or prearranged design." See Mitchell v.

State, 527 So. 2d 179, 182 (Fla. 1988)("the cold, calculated and premeditated factor [] requir[es] a careful plan or prearranged design."); Jackson v. State, 530 So. 2d 269, 273 (Fla. 1988)(application of aggravating circumstance "error under the principles we recently enunciated in Rogers."). Counsel's failure to know this law and object was deficient performance under Harrison v. Jones, which prejudiced Mr. Hoffman.

The jury was not told in Mr. Hoffman's case what was required to establish this aggravator. In fact, the prosecutor told the jury that no more than the premeditation required to convict. The judge similarly failed to apply any narrowing or limiting construction.

Because Mr. Hoffman was sentenced to death based on a finding that his crime was "cold, calculated and premeditated," but neither the jury nor trial judge had the benefit of the narrowing definition set forth in Rogers, or the standard set forth in Cartwright, petitioner's sentence of death violates the Eighth and Fourteenth amendments.

Of utmost importance however, is the fact that the Court gave no guidance in its final instructions to the jury.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Mr. Hoffman's jury was so instructed. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a

reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Florida law also provides that it is for the jury to decide whether an aggravating factor has ben proven. Hallman v. State, 560 So. 2d 223 (Fla. 1990). Unfortunately, Mr. Hoffman's jury received no instructions regarding the elements of the "cold, calculated and premeditated" aggravating circumstance submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwright.

Because of the weight attached to the jury's sentencing recommendation in Florida, instructional error is not harmless unless the reviewing court can "conclude beyond a reasonable doubt that an override would have been authorized." Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988).

Similar conclusions have been reached in other cases where the jury was erroneously instructed. Meeks v. Dugger, 548 So. 2d 184 (Fla. 1989); Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989); Floyd v. State, 497 So. 2d 1211, 1216 (Fla. 1986). In Mr. Hoffman's case the jury received no guidance as to the "elements" of the aggravating circumstances against which the evidence in mitigation was balanced.

In Mr. Hoffman's case, the jury was not instructed as to the limiting constructions placed upon the "cold, calculated and premeditated" aggravating circumstance. The failure to instruct on the elements of this aggravating circumstance in this case left the jury free to ignore those elements, and left no principled way to distinguish Mr. Hoffman's case from one in

which the state-approved and required elements were applied and death was not imposed. The jury was left with open-ended discretion found to be invalid in Furman and Cartwright. Mr. Hoffman is entitled to relief.

E. TRIAL COUNSEL WAS INEFFECTIVE DURING THE PENALTY PHASE PROCEEDINGS FOR FAILING TO OBJECT TO THE JUDGE'S IMPROPER INSTRUCTION CONCERNING THE PRE-TRIAL STIPULATIONS OF DEFENSE COUNSEL AND THE PROSECUTOR; THE JUDGE IMPROPERLY EXHIBITED BIAS CONCERNING THE MITIGATING FACTORS APPLICABLE TO MR. HOFFMAN; AND THE PROSECUTOR FAILED TO HONOR THE TWO STIPULATIONS HE ENTERED INTO, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Prior to the charge conference concerning penalty phase jury instructions, defense counsel and the prosecutor had agreed and stipulated to two mitigating circumstances -- that Mr. Hoffman had no significant criminal record and that Mr. Hoffman's co-conspirators, Leonard Mazzara and James Robert White, had been sentenced to consecutive life sentences (T. 1150).

The stipulations agreed to by defense counsel and the prosecutor constituted facts in evidence. They were not facts which can be rebutted or altered.

Despite the nature of the stipulated-to mitigating circumstances, Mr. Hoffman's defense counsel unreasonably failed to object to the inaccurate and misleading instructions that the judge provided to Mr. Hoffman's sentencing jury and the improper argument given by the prosecutor.

After the judge reconvened the jury for the penalty trial, but before evidence was submitted, oral argument heard and jury instructions issued, the judge simply apprised the jury of some

"agreements" between counsel and gave a description of their content:

> There is a practice in the law which is called stipulation. A stipulation is where both sides in the case agree on certain facts or factors or issues and rather than go through the more formal process of presenting those factors to you through testimony, **they have agreed by stipulation that those factors will just be told to you and you can accept them as having been presented to you as if they came from the witness stand with the agreement of both parties that those factors may be considered by you.**
>
> There is a stipulation in this case that goes to your advisory verdict.
>
> The first of these is that the defendant, Barry Hoffman, has no significant criminal history.
>
> The second stipulated item that the co-conspirators, Leonard Mazzara and James Robert White, were each sentenced to two consecutive life sentences for the murder of Frank Ihlenfeld -- for the murders of Frank Ihlenfeld and Linda Sue Parrish.
>
> **Those two items have been stipulated into evidence by Counsel for both sides. You may consider them just as if they had come from the witness stand.**

(T. 1178-1179)(emphasis added).

Firstly, by making the announcement when he did in the proceedings and failing to repeat it prior to deliberation, the judge virtually ensured that the jury would not understand, even remotely, the impact of the defense/prosecutor agreements. Defense counsel did nothing about this. Secondly, the judge compounded the error when he issued the final sentencing

instructions because he failed to direct that the two mitigating circumstances constituted facts that the jury must, not may, consider in their sentencing deliberation (T. 1197).

Defense counsel's omissions -- his failures to insist that the jury be properly instructed concerning the effect of the agreed-to mitigating circumstances and his failures to interpose any objection or instruction request -- denied Mr. Hoffman a constitutionally adequate capital sentencing proceeding. The judge failed to instruct the jury that two mitigating circumstances existed when everyone stipulated that they did exist. Counsel's failure to know the law and to object to the jury instructions constituted ineffective assistance of counsel. See Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). The prejudice is obvious. Mr. Hoffman's death sentence was imposed in violation of the Sixth, Eighth and Fourteenth amendments.

It was also obvious that even the judge did not accept those two mitigating factors, even though they had been stipulated to by the prosecution. First, the judge questioned, at the charge conference, whether Mr. Hoffman really lacked any significant criminal history. He had to be reassured by the prosecutor that criminal history involved convictions (T. 1150-52). Then, when the judge pronounced the sentence of death, he indicated that Mr. Hoffman did testify to using and dealing drugs (T. 1232-1233).

The judge's departure from his role as an impartial, unbiased reviewer of the evidence, as presented, was

constitutionally impermissible. See Zeigler v. State, 452 So. 2d 537 (Fla. 1984).

Where counsel for the parties have entered into a stipulation for purposes of establishing the existence of certain facts during the sentencing proceeding, it is fundamentally unfair and a violation of the Sixth, Eighth and Fourteenth Amendments for the judge to refuse to honor that stipulation by neglecting to instruct the jury properly and by refusing to fully consider it himself.

The prosecutor introduced no evidence during the penalty proceeding. In conference, however, he had stipulated to disparate treatment as a mitigating factor (T. 1152-53).

Just minutes after entering into this agreement during this conference, however, the prosecutor reneged. He urged the jury to find only one mitigating factor:

> We have stipulated or agree that Mr. Hoffman has no significant criminal history. That is one mitigating circumstance. I believe I will show you in the next few minutes there are at least three aggravating circumstances, which I would submit to you outweigh that one mitigating circumstance.

(T. 1182).

> Let's talk about the mitigating circumstances. You are going to hear from Judge Haddock that the defendant has no significant history of prior criminal activity. That's one.
>
> **I would submit to you will find no other mitigating circumstance.**

> Judge Haddock is going to tell you that you can consider as a mitigating circumstance the sentences imposed on the other persons, that is, the backup man, James Robert White, and Leonard Mazzara, the man who paid the money. Ladies and gentlemen, I would submit to you that the aggravating circumstances fit Barry Hoffman . . .

(T. 1187)(emphasis added).

Had these facts not been agreed to in advance, presumably counsel would have prepared and advanced arguments that addressed the circumstances. Notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure. Lack of adequate notice creates an impermissible risk that the adversary process may have malfunctioned. Lankford v. Idaho, 500 U.S. 110 (1991).

Thus, by the time that defense counsel began his closing argument to the sentencing jury, the judge had already provided misleading instructions to the jury about the effect of both stipulations (T. 1178-79). Defense counsel never once raised an objection, never asked for a mistrial and never sought to enforce the stipulation. Counsel's inaction was deficient performance.

The prosecutor's argument deprived defense counsel of the benefit of the stipulation concerning the status of the co-conspirators. This stipulated instruction was critical to the issue of whether Mr. Hoffman lives or dies. A life sentence may be based on disparate treatment of the co-perpetrators. Fuente v. State, 549 So. 2d 625, 658 (Fla. 1989); O'Callaghan v. Dugger, 542 So. 2d 1324, 1326 (Fla. 1989); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

Also, counsel unreasonably failed to investigate this issue adequately which, because of closing argument by the prosecutor, became critical to the determination of whether Mr. Hoffman would live or die.

The prosecutor argued that Mr. Hoffman deserved death, in spite of the status of co-conspirator James White (T. 1188).

However, the jury never knew, because trial counsel never presented it, that alleged co-conspirator White was convicted and adjudged guilty of capital murder in the first degree for both victims as well as conspiracy to commit murder in the first degree. By contrast, Mr. Hoffman's jury had only found him guilty of one count of first degree murder and one count of second degree murder (T. 1191-1195).

Defense counsel's unreasonable omission was highly prejudicial because his own argument to the jury was that the ultimate issue for their consideration was the fairness of sentencing Mr. Hoffman to death when his alleged co-conspirators had received life (T. 1194-1195). Mr. Hoffman is entitled to relief.

F. THE SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING, CONTRARY TO CALDWELL V. MISSISSIPPI AND MANN V. DUGGER IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeas corpus petitioner presenting a Caldwell v. Mississippi claim involving prosecutorial and judicial comments and instructions which

diminished the jury's sense of responsibility and violated the Eighth Amendment in the identical way in which the comments and instructions discussed in the motion to vacate violated Mr. Hoffman's Eighth Amendment rights.

Caldwell v. Mississippi, 472 U.S. 320 (1985), involved prosecutorial/judicial reduction of a capital jury's sense of responsibility. The jury-diminishing statements made during Mr. Hoffman's trial surpass those discussed in Caldwell. The en banc Eleventh Circuit in Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988)(en banc), determined that Caldwell does apply to a Florida capital sentencing proceeding. When either judicial instructions or prosecutorial comments minimize the jury's role relief is warranted. See Mann.

In Florida, the jury's sentencing recommendation is entitled to great weight in the ultimate sentencing decision. A judge may override a jury recommendation of life imprisonment only if "the facts suggesting a sentence of death [are] so clear that virtually no reasonable person could differ." Tedder v. State, 322 So.2d 908, 910 (Fla. 1975). Mr. Hoffman's trial judge and prosecutor improperly and inaccurately characterized the role, responsibility and critical function of the jury with regard to sentencing.

At the very outset of the trial, during voir dire, the judge clearly and unequivocally instructed the members of the venire that their role in the sentencing process had little, if any,

effect on the sentence that Mr. Hoffman would ultimately receive:

> **The judge is not required to follow the advisory sentence of the jury. Thus, the jury does not impose punishment if a verdict of guilty is rendered. The imposition of sentence is the function of the Judge of this Court and not the function of the jury.**

(T. 294-295)(emphasis added).

As voir dire continued on the second day of trial, Judge Haddock reminded the members of the venire of the instructions he had given the previous day, and then repeated his unconstitutional instructions several more times (T. 396, 404, 411). All jurors and potential jurors heard these (T. 383).

The prosecutor, following the judge's lead, assured the jurors from the very outset that their sentencing decision would be of little import (307-308). The manner in which the prosecutor, conducted his questioning during voir dire reinforced the unconstitutional instructions that the judge gave.

The directions imposed by the judge during voir dire were reiterated and emphasized during the instructions that the Court gave at the termination of Mr. Hoffman's guilt phase:

> [Y]our duty is to determine if the defendant is guilty or not guilty in accord with the law. **It is the Judge's job to determine what a proper sentence would be if the defendant is guilty.**

(T. 1124)(emphasis added).

* * *

> **The penalty is for the Court to decide. You are not responsible for the penalty in anyway because of your verdict.**

(T. 1125)(emphasis added).

At the beginning of the penalty proceedings, the judge repeated his constitutionally defective view of the jurors' role at sentencing (T. 1177).

After oral argument at the penalty trial, and just before the jury recessed to deliberate, Judge Haddock, one last time, emphasized to the jurors that the sentencing determination was truly not their responsibility -- it was his (T. 1195).

The unconstitutional characterizations of juror sentencing responsibility made by the judge and reinforced by the prosecutor were sufficient to mandate a reversal under the dictates of the Caldwell decision. To the extent that Mr. Hoffman's own lawyer acquiesced in or agreed with this unconstitutional characterization of the jurors role, he was ineffective.

The comments and instructions the jury heard were not isolated, as were those in Caldwell, but as in Mann were heard by the jurors at each stage of the proceedings. These cases teach that, when comments such as those provided to Mr. Hoffman's capital jury are made, the State must demonstrate that the statements at issue had "no effect" on the jury's sentencing verdict. Id. at 2646. This the State cannot do. Here the significance of the jury's role was minimized, and the comments and instructions created a danger of bias in favor of the death penalty. Mr. Hoffman is entitled to relief.

G. MR. HOFFMAN'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. HOFFMAN TO PROVE THAT DEATH WAS INAPPROPRIATE.

The burden to prove that he should not receive the death penalty was shifted to Mr. Hoffman in the penalty phase of his trial. The jury was unconstitutionally instructed, as the record makes abundantly clear:

> The State and the defendant may now present evidence relative to the nature of the crime and the character of the defendant. You are instructed that this evidence when considered with the evidence that you have already heard is presented in order that you might determine first whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty, and, second, **whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.**

(T. 1178)(emphasis added). In addition, the charge of the court only served to compound this error (T. 1195-96).

Such argument and instructions violate the Eighth and Fourteenth Amendments. The instructions were contrary to state law. See State v. Dixon, 283 So. 2d 1 (Fla. 1973).

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating

Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Maynard v. Cartwright, 108 S. Ct. 1853 (1988).

The instructions, and the standard upon which the sentencing court based its own determination, violated the Eighth and Fourteenth Amendments. The burden of proof was shifted to Mr. Hoffman on the issue of whether he should live or die.

This error cannot be deemed harmless. In Mills v. Maryland, 108 S. Ct. 1860 (1988), the court concluded that, in the capital sentencing context, the Constitution requires resentencing unless a reviewing court can rule out the possibility that the jury's verdict rested on an improper ground. Id. at 1866-67.

The effects feared in Mills are precisely the effects resulting from the burden-shifting instruction given in Mr. Hoffman's case. In being instructed that mitigating circumstances must outweigh aggravating circumstances before it could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances outweighed the aggravating circumstances. This jury was thus constrained in its consideration of mitigating evidence, Hitchcock, 107 S. Ct. 1821 (1987), and from evaluating the "totality of the circumstances," Dixon v. State, 283 So. 2d 1, 10 (Fla. 1973), in determining the appropriate penalty. There is a "substantial possibility" that this understanding of the jury

instructions resulted in a death recommendation despite factors calling for life. Mills, 108 S. Ct. at 1860.

H. THE TRIAL JUDGE'S POST-PENALTY PHASE APPLICATION WITHOUT NOTICE OF THE AGGRAVATING FACTOR OF HEINOUS, ATROCIOUS AND CRUEL DENIED MR. HOFFMAN HIS RIGHT TO A FAIR TRIAL AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

During penalty phase charge conference, the prosecutor clearly stated that he believed the aggravating circumstance of heinous, atrocious and cruel (HAC) did not apply (T. 1161-63).

Due to lack of adequate notice, Mr. Hoffman was unable to advance argument to create a reasonable doubt that this was not an appropriate aggravator. No notice was given by the judge that he would find HAC despite the State's agreement the facts did not establish this aggravator. This lack of notice created "an impermissible risk that the adversary process may have malfunctioned in this case." Lankford v. Idaho, 500 U.S. 110 (1991).

The sentencing process in this case violated Mr. Hoffman's rights including the Sixth and Eighth Amendments and the Due Process Clause of the Fourteenth Amendment. Mr. Hoffman is entitled to relief.

CONCLUSION

Based upon the foregoing argument, reasoning, citation to legal authority and the record on appeal, appellant, BARRY HOFFMAN, urges this Court to reverse the lower court's order denying postconviction relief and grant him a new trial.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 10, 1999.

GREGORY C. SMITH
Capital Collateral Counsel
Florida Bar No. 279080

LINDA McDERMOTT
Assistant CCC-NR
Florida Bar No. 0102857

JOHN A. TOMASINO
Assistant CCC-NR
Florida Bar No. 106021
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 487-4376
Attorneys for Appellant

Copies furnished to:

Barbara Yates
Assistant Attorney General
Office of the Attorney General
The Capital
PL-01
Tallahassee, FL 32399-0001