IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

THOMAS JAMES MOORE,

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

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PRELIMINARY STATEMENT

This proceeding involves an appeal from the orders of Fourth Circuit Senior Judge John D. Southwood striking Mr. Moore's amended motion for postconviction relief filed pursuant to Fla. R. Crim. P. 3.850; summarily denying Mr. Moore's motion for postconviction relief; and, denying Mr. Moore access to public records in violation of his state and federal constitutional rights.

Citations in this brief shall be as follows:

"R.___" --volumes four (IV) through fifteen (XV) of the record on direct appeal to this Court;

"Vol.___, p.___" -- citations to the first three volumes of the record on direct appeal to this Court[1];

"PCR.___" -- record on 3.850 appeal to this Court;

"Supp. ___" -- supplemental record on 3.850 appeal to this Court.

All other references will be self-explanatory or otherwise explained herein.

CERTIFICATE OF TYPE SIZE AND STYLE

This Initial Brief has been reproduced in Courier, 12 point type.

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[1] This is to avoid confusion because after the first three volumes end, the page numbering begins again at page 1 in Volume IV.

REQUEST FOR ORAL ARGUMENT

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

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PROCEDURAL HISTORY

The Circuit Court of the Fourth Judicial Circuit, Duval County, Florida, entered the judgments and sentences. On February 18, 1993, a Grand Jury indicted Mr. Moore for first degree murder, attempted armed robbery, conspiracy to commit robbery, armed burglary, arson, and possession of a firearm by a convicted felon (Vol.I, p.3). Mr. Moore, "standing mute" to the allegations in the indictment, the trial court entered a plea of not guilty for him as to each of the six counts (R. 9).

On October 25, 1993, Mr. Moore's trial commenced before the Honorable John D. Southwood. On October 29, 1993, the jury found Mr. Moore guilty on all counts (R. 1381-82), except for possession of a firearm by a convicted felon which was severed prior to trial (Vol.II, p.327). On November 3, 1993, the jury recommended the death penalty by a vote of nine (9) to three (3) (R. 1553).

The trial court followed the recommendation of the jury and imposed the sentence of death upon Mr. Moore on December 2, 1993 (R. 1580-87). The trial court entered its sentencing order on the same day (Vol.III, p.501). On direct appeal, Mr. Moore's convictions and sentences were affirmed. Moore v. State, 701 So.2d 545 (Fla. 1997), cert. denied, 523 U.S. 1083 (1998).

Postconviction counsel was designated for Mr. Moore on July 22, 1998. On March 26, 1999, Mr. Moore filed a "shell" motion pursuant to Rule 3.850, Fla. R. Crim. P., in order to toll the time in which Mr. Moore's Petition for Writ of Habeas Corpus must

be filed in federal court (Supp. 202). Mr. Moore subsequently filed an incomplete amended motion on June 22, 1999 (Supp. 300). This amendment was filed in order to protect Mr. Moore's right to obtain and utilize public records[2].

On September 20, 1999, despite a continued lack of public records compliance by state agencies and insufficient time to investigate his case, Mr. Moore filed an incomplete amendment in order to comply with the Judge Southwood's order (PCR. 1). Lastly, on April 6, 2000, Mr. Moore filed a third amendment to his postconviction motion. (PCR. 308). On April 20, 2000, the postconviction court struck Mr. Moore's entire April 6, 2000 amendment and held a hearing, pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), on Mr. Moore's incomplete amendment from September 20, 1999. The postconviction court summarily denied all claims in this incomplete amendment (PCR. 529-45). The postconviction court denied Mr. Moore's motion for rehearing on September 8, 2000 (Supp. 541). Mr. Moore timely filed his Notice of Appeal on October 6, 2000.

STATEMENT OF THE CASE

Mr. Moore was provided postconviction counsel on July 22, 1998. On August 19, 1998, in accordance with the requirements of Florida Rule of Criminal Procedure 3.852 (1996) (hereinafter "old 3.852"), Mr. Moore requested public records from the Department

[2]Up to this point, several agencies had refused to comply with Mr. Moore's public records requests, including the agency that investigated the murder Mr. Moore was convicted of (Jacksonville Sheriff's Office) and the agency the prosecuted him (Duval State Attorney's Office).

of Corrections, the Duval State Attorney's Office, the Attorney General's Office, the Duval County Sheriff, and the Medical Examiner's Office of Jacksonville (Supp. 1-20). Each agency responded with the exception of the Sheriff and the Medical Examiner.

On October 1, 1998, a newly amended Florida Rule of Criminal Procedure 3.852 (1998) (hereinafter "new 3.852") took effect. On December 28, 1998, based on the requirements of section (h)(2) of the new 3.852, Mr. Moore requested additional public records from several agencies (Supp. 87-163). The following agencies filed objections to the demands for additional records: the Florida Department of Law Enforcement (Supp. 164, 186); the Department of Corrections (Supp. 188); the Jacksonville Division of Human Resources (Supp. 193); the Duval County Sheriff (Supp. 195); and, the Duval State Attorney (Supp. 199).

On March 26, 1999, Mr. Moore filed a "shell" 3.850 motion (Supp. 202). On March 29, 1999, Senior Judge John D. Southwood was assigned to handle Mr. Moore's postconviction matters. On April 21, 1999, Judge Southwood entered an order scheduling a hearing on Mr. Moore's public records requests for April 29, 1999 (Supp. 265-67). Said order only called up for hearing Mr. Moore's December 28, 1998 requests filed pursuant to the new 3.852, ignoring the initial public records requests Mr. Moore filed pursuant to the old 3.852. Furthermore, said order stated that the hearing would be held pursuant to Fla.R.Crim.P.

3.852(g)(3), a section of the rule that clearly did not apply to Mr. Moore's case.

On April 29, 1999, the hearing took place (PCR. 560-738). On May 12 and 15[3], 1999, Judge Southwood entered orders on Mr. Moore's public records demands and the corresponding objections. Regarding Mr. Moore's initial request to the State Attorney, Judge Southwood denied the request for all records the agency had in their possession regarding Mr. Moore, and further ordered that the State Attorney need not provide him with any materials that were previously provided to trial counsel during discovery (Supp. 272). Regarding Mr. Moore's request for additional records filed pursuant to 3.852(h)(2), Judge Southwood struck said requests and instructed Mr. Moore to refile them after reviewing the records the State Attorney was willing to make available from the original demand. (Supp. 273). Judge Southwood further ordered that when refiling these requests, Mr. Moore "shall follow the requirements of the new rule Fla.R.Crim.P. 3.852 (h) **and** (I)" (Supp. 273) (emphasis added).

Regarding Mr. Moore's 3.852(h)(2) request for additional records to the Department of Corrections, Judge Southwood struck this request because "[T]he defendant has not complied **with the requirements of Fla.R.Crim.P. 3.852 (I)**." (Supp. 276-77) (emphasis added). Judge Southwood also struck Mr. Moore's

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[3]The orders filed May 15th, regarding the Florida Department of Law Enforcement, the Jacksonville Division of Human Resources and the Duval Sheriff's Office, were not provided to Mr. Moore's counsel.

3.852(h)(2) request for additional records to the Florida Department of Law Enforcement because it did not comply with 3.852(I) (Supp. 280-81).

Due to the confusing nature of these orders, Mr. Moore filed a Motion for Reconsideration and/or Clarification on May 24, 1999 (Supp. 284). Among other things, Mr. Moore pointed out that his requests for additional records were made pursuant to 3.852(h)(2), not 3.852(g)(3), and that the requirements of 3.852(h)(2) should apply to him. Mr. Moore also pointed out that applying 3.852(I) to any of these demands was erroneous when none of the demands had been made pursuant to 3.852(I), and 3.852(I) was not applicable to Mr. Moore at this stage of his public records production. On July 12, 1999, Mr. Moore supplemented his Motion for Reconsideration and/or Clarification with the July 1, 1999 Amendment to Florida Rules of Criminal Procedure 3.852 (Supp. 407). Judge Southwood denied Mr. Moore's Motion for Reconsideration and/or Clarification on July 9, 1999[4], stating simply that he "did not overlook any points of law or fact" in rendering his previous orders (Supp. 407).

On June 22, 1999, Mr. Moore filed an incomplete amended 3.850 motion in order to meet the 1-year deadline requirement of Rule 3.851 (Supp. 300). In said motion, Mr. Moore explained that he still had not been provided public records he was entitled to,

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[4]Mr. Moore's Supplement to Motion for Reconsideration and/or Clarification was filed almost simultaneously with Judge Southwood's Order Denying Defendant's Motion for Reconsideration and/or Clarification. The two documents crossed in the mail.

including the records initially requested from the Duval State Attorney[5] and the Duval County Sheriff[6]. Mr. Moore also informed Judge Southwood that the Office of the Capital Collateral Counsel for the Northern Region had run out of funds in January of 1999, preventing undersigned from investigating Mr. Moore's case for several months. Mr. Moore also requested leave to amend once the public records process in his case was complete.

In response to Mr. Moore's 3.850 amendment, on July 14, 1999, Judge Southwood entered an order granting Mr. Moore 30 days to file a **final** amended 3.850 motion (Supp. 453). In said order, Judge Southwood did not address the lack of public records compliance by the Duval State Attorney and Duval Sheriff, nor did Judge Southwood address the funding problems that had prevented the proper investigation of Mr. Moore's 3.850 motion. On July 21, 1999, Mr. Moore filed a Motion for Reconsideration and Request for Hearing[7] in response to Judge Southwood's July 14th Order (Supp. 456). In this Motion, Mr. Moore again informed Judge Southwood that he had not received any records from the Duval State Attorney, that he had not received any records regarding Mr. Moore's case from the Duval Sheriff, and that other

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[5]The Duval State Attorney had informed undersigned counsel that they were suspending public records compliance pending the outcome of the Motion for Rehearing and/or Clarification filed on June 21, 1999.

[6]Most importantly, the unprovided records included the actual investigation and prosecution files from this case.

[7]Mr. Moore supplemented the Motion for Reconsideration and Request for Hearing on August 10, 1999 (Supp. 468).

public records issues remain unaddressed. Mr. Moore also requested that Judge Southwood hold a hearing on these matters.

On August 19, 1999, without holding a hearing, Judge Southwood entered an Order on Defendant's Motion for Reconsideration and Request for Hearing, and the Defendant's Supplement to that Motion (Supp. 475). In said order, Judge Southwood grants Mr. Moore (approximately) 32 more days to file his final amended 3.850 motion. At no point does Judge Southwood address the public records problems Mr. Moore specified in his motions. At no point does Judge Southwood address Mr. Moore's request for a hearing into these matters. Most importantly, Judge Southwood **twice** states in said order that he will not entertain any further motions for rehearing or time extension "**no matter how entitled**" Mr. Moore is to have the motions heard. Based on these two statements, as well as Judge Southwood's refusal to address other matters brought to its attention, Mr. Moore moved to disqualify Judge Southwood (Supp. 479-96). Judge Southwood denied Mr. Moore's Motion to Disqualify on September 8, 1999, finding that the motion was "facially insufficient as a matter of law." (Supp. 498).

On September 20, 1999, in compliance with Judge Southwood's August 19th order, Mr. Moore filed a second (wholly incomplete) amended 3.850 motion (PCR. 1-135). In said motion, Mr. Moore again informed Judge Southwood of the lack of public records compliance and how it had prevented his counsel from effectively representing him in postconviction. Mr. Moore also repeated his

request that Judge Southwood hold a hearing on the several outstanding public records issues. Instead of holding the hearing, on October 15, 1999, Judge Southwood ordered the State to respond to Mr. Moore's second amended 3.850 motion (PCR. 149). The State responded to the motion on December 16, 1999 (PCR 160).

During this time, Mr. Moore continued seeking public records from various agencies. After receiving partial compliance from the Duval State Attorney, pursuant to 3.852(h)(2) and Judge Southwood's May 12, 1999 orders, Mr. Moore sent requests for additional public records to the Duval State Attorney, the Duval Sheriff, and the Florida Department of Law Enforcement (Supp. 501-515; PCR. 134-145). The agencies responded and/or objected to most of the requests (Supp. 524; PCR 146, 153, 158), and none of the agencies provided any records. Mr. Moore also filed motions to compel the Duval Sheriff to turn over public records they had agreed to turn over several months before, including but not limited to the actual files from Mr. Moore's case (Supp. 516-523).

Based on the outstanding public records issues detailed above, on December 20, 1999, Mr. Moore filed a Motion for Hearing on Public Records Demands (PCR. 229). On February 9, 2000, Judge Southwood entered an Order Setting Huff Hearing and Hearing on Defendant's Demands for Additional Public Records[8] (PCR. 234). The hearing was held on March 8, 2000 (PCR. 739-806). Judge

[8]The order was silent on Mr. Moore's outstanding motions to compel.

Southwood granted Mr. Moore's motions to compel, ordering the Duval Sheriff[9] to provide the actual files from Mr. Moore's case within nine (9) days, or by March 17, 2000[10]. Judge Southwood also granted Mr. Moore's request for additional records from the Duval Sheriff and Duval State Attorney, also ordering them to provide the records by March 17th. Judge Southwood denied Mr. Moore's request for additional records from the Florida Department of Law Enforcement.

Also at the March 8th hearing, over defense counsel's objection, Judge Southwood granted Mr. Moore only 20 days "to serve proposed amendments" to his 3.850 motion from the date the agencies were to turn over the missing records[11]. Judge Southwood also rescheduled Mr. Moore's Huff hearing for April 20, 2000. On March 16, 2000, Mr. Moore filed an Emergency Motion asking Judge Southwood for more time to investigate the contents of the missing records, and asking for more time to file additional records requests[12] based on the contents of the Duval

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[9]At said hearing, the Duval Sheriff acknowledged the fact that they had not provided the investigative records regarding the murder for which Mr. Moore was convicted (PCR. 759, 762).

[10]The Duval Sheriff was seven (7) days late turning the file over, and the file was incomplete.

[11]Counsel for Mr. Moore explained to Judge Southwood that this was an insufficient amount of time to complete Mr. Moore's postconviction investigation, especially considering that Mr. Moore had never been provided with the Duval Sheriff file regarding the murder for which Mr. Moore was convicted.

[12]Mr. Moore filed several requests for additional records after the March 8th hearing (PCR. 236, 244, 299, 453, 474, 479). Mr. Moore also filed Motions to Compel regarding records not provided by the Duval State Attorney and the Duval Sheriff, as

Sheriff's investigative file and other newly provided records, something Mr. Moore would have been entitled to do had the records been provided when requested (PCR. 250). Mr. Moore updated the Emergency Motion on three occasions (PCR. 258, 275, 284). On March 27, 2000, Judge Southwood denied the Emergency Motion (PCR. 288).

On April 6, 2000, Mr. Moore filed his third amended 3.850 motion (PCR. 308-452). In said motion, Mr. Moore again informed Judge Southwood regarding lack of public records compliance, again asked Judge Southwood to hold a separate hearing on public records, again informed Judge Southwood that the investigation was incomplete, and again asked for leave to amend the motion. On April 20, 2000, Judge Southwood held a Huff hearing and a hearing on the outstanding public records requests (PCR. 807-979). At said hearing, Judge Southwood refused Mr. Moore a hearing on his pending motions to compel, choosing instead to just deny them. Judge Southwood also denied some of Mr. Moore's requests for additional records, and refused to hear argument on the remaining requests. Judge Southwood also struck Mr. Moore's third amended 3.850 motion, calling it untimely and unauthorized (PCR. 530). Lastly, Judge Southwood then held a Huff hearing on Mr. Moore's second amended 3.850 motion and denied all of the claims without an evidentiary hearing. This appeal follows.

SUMMARY OF ARGUMENT

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well as the incomplete investigative file provided by the Duval Sheriff (PCR. 267, 271).

1. Mr. Moore was prevented from effectively investigating and pleading his Motion to Vacate Judgement of Conviction and Sentence because of the actions of state agencies, as well as the lower court. Several state agencies failed to comply with Mr. Moore's public records requests. Furthermore, the lower court, in refusing to order the agencies to comply and refusing to grant public records hearings, rendered Mr. Moore's counsel ineffective, prevented Mr. Moore from filing a fully plead motion, and otherwise denied Mr. Moore due process.

2. The lower court erred in summarily denying Mr. Moore's Second Amended Motion to Vacate Judgement of Conviction and Sentence. Nothing in the record conclusively showed that Mr. Moore was not entitled to an evidentiary hearing on his claims of ineffective assistance of counsel, his newly discovered evidence claim, or his claim made pursuant to Ake v. Oklahoma. Furthermore, any legal insufficiency regarding the claims in Mr. Moore's Second Amended Motion was absent in the Third Amended Motion struck by the lower court. The lower court violated the law by substituting its own opinions, and making broad assumptions, in place of testimony from Mr. Moore's trial counsel or other witnesses.

3. The lower court erred by refusing to accept and consider Mr. Moore's Third Amended Motion to Vacate Judgement of Conviction and Sentence. The lower court failed to follow established law. Florida Rule of Criminal Procedure 3.851 (b)(3) is clear that amendments to timely filed 3.850 motions are

allowed and must be accepted. Florida Supreme Court precedent, as well as other caselaw, also allows amendments to properly filed 3.850 motions. The lower court's actions denied Mr. Moore due process, equal protection, and his right to full and fair proceedings.

4. The lower court judge erred by not disqualifying himself from Mr. Moore's postconviction proceedings. The lower court twice stated that he would not entertain motions filed by Mr. Moore "no matter how entitled" he was to the relief requested in the motions. These statements, along with other actions of the lower court, created a justifiable fear in Mr. Moore that he would not receive due process from this Judge.

5. Mr. Moore has been denied proper appeals from his conviction and sentence of death in violation of his constitutional and statutory rights due to omissions in the record.

6. Mr. Moore was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death, in violation of his Fifth, Sixth, Eighth and Fourteenth Amendment rights, as well as the requirements of Florida Rule of Criminal Procedure 3.180(a)(3).

7. Mr. Moore's constitutional right to competent expert assistance (under Ake v. Oklahoma) was violated in both phases of his trial. Trial counsel was ineffective for not ensuring that Mr. Moore got the expert assistance he was entitled to. The

lower court erred in refusing to consider this claim, as well as refusing to grant Mr. Moore an evidentiary hearing.

8. Florida Statute 922.105(1) and (2), providing for "election" of execution by the electric chair, or waiver by inaction and subsequent execution by lethal injection, is an unconstitutional overrule of established caselaw. The statute meets none of the procedural requirements for a valid waiver of a fundamental right.

9. Mr. Moore was denied a fair trial and reliable sentencing due to the prosecutor's inflammatory and improper arguments. The prosecutor's arguments were so egregious and so violative of notions of due process and fundamental fairness as to rise to the level of fundamental error. Defense counsel was ineffective for failing to raise proper objections.

10. Execution by electricution is cruel and unusual punishment under the Eighth and Fourteenth Amendments to the United States Constitution as well as the corresponding provisions of the Florida Constitution.

11. Mr. Moore's jury did not receive complete and accurate instructions defining the aggravating circumstances in a constitutionally narrow fashion. The jury was not advised on the elements of the aggravating factors which the State had to prove beyond a reasonable doubt. Because of this, the jury recommendation is tainted, as is the lower court's death sentence which relied on the recommendation. Trial counsel was ineffective for not properly objecting.

ARGUMENT I

THE LOWER COURT ERRED BY NOT GRANTING MR. MOORE A PROPER HEARING ON THE LACK OF PUBLIC RECORDS COMPLIANCE BY STATE AGENCIES OR OTHERWISE ENSURING THAT MR. MOORE WAS PROVIDED WITH THE PUBLIC RECORDS TO WHICH HE WAS ENTITLED IN ORDER TO INVESTIGATE AND PRESENT HIS POSTCONVICTION CLAIMS, DENYING MR. MOORE DUE PROCESS AND RENDERING POSTCONVICTION COUNSEL INEFFECTIVE.

Mr. Moore was unable to effectively plead his Motion to Vacate Judgment of Conviction and Sentence because of the existence of circumstances which prevented the full investigation and presentation of his postconviction claims. Specifically, Mr. Moore was unable to fully investigate and plead a postconviction motion because certain state agencies failed to comply with Mr. Moore's public records requests. Furthermore, the actions of the lower court, in refusing to order the agencies to comply and refusing to grant requested hearings, rendered Mr. Moore's counsel ineffective and prevented Mr. Moore from filing a fully plead motion.

Mr. Moore was provided postconviction counsel in July of 1998. On or about August 19, 1998, Mr. Moore began requesting public records from state agencies pursuant to Florida Rule of Criminal Procedure 3.852 (1996) (Supp. 1-20). Several agencies objected to the requests and most failed to provide Mr. Moore with public records. On October 1, 1998, the new 3.852 took effect. The language in section 3.852 (h)(2) made it clear that this new rule would apply to Mr. Moore's case. Based on the language in section 3.852 (h)(2), undersigned counsel made

several requests for additional public records from various agencies (Supp. 87-163). The requests were based on information contained in the few files and records Mr. Moore already had in his possession. Several agencies filed objections to these requests, and most failed to provide any records to Mr. Moore.

The requests and corresponding objections were not addressed by the lower court for several months, eating up much of the time allotted to Mr. Moore to file his 3.850 motion. On April 29, 1999, more than eight (8) months after public records were initially requested, the lower court held a hearing. The order setting the hearing stated that the hearing would be held pursuant to Fla.R.Crim.P. 3.852(g)(3), a section of the rule that clearly did not apply to Mr. Moore's case (Supp 267-67).

On May 12 and 15[13], 1999, the lower court entered orders on Mr. Moore's public records demands and the corresponding objections. Regarding Mr. Moore's initial request to the State Attorney, the lower court denied the request for all records the agency had in their possession regarding Mr. Moore, and further ordered that the State Attorney need not provide him with any materials that were previously provided to trial counsel during discovery (Supp. 272). Regarding Mr. Moore's request for additional records filed purusuant to 3.852(h)(2), the lower court struck said requests (calling them premature) and

[13]The orders filed May 15th, regarding the Florida Department of Law Enforcement, the Jacksonville Division of Human Resources and the Duval Sheriff's Office, were not provided to Mr. Moore's counsel for almost a year despite the many times that counsel brought this to the Court's attention.

instructed Mr. Moore to refile them after reviewing the records the State Attorney was willing to make available from the initial demand. (Supp. 273). The lower court further ordered that when refiling these requests, Mr. Moore "shall follow the requirements of the new rule Fla.R.Crim.P. 3.852 (h) **and** (I)" (Supp. 273) (emphasis added).

Regarding Mr. Moore's 3.852(h)(2) request for additional records to the Department of Corrections, the lower court struck this request because "[T]he defendant has not complied **with the requirements of Fla.R.Crim.P. 3.852 (I)**." (Supp. 276-77) (emphasis added). The lower court also struck Mr. Moore's 3.852(h)(2) request for additional records to the Florida Department of Law Enforcement because it did not comply with 3.852(I) (Supp. 280-81).

Mr. Moore filed a Motion for Reconsideration and/or Clarification on May 24, 1999, due to the confusing nature of the lower court's orders, as well as the fact that the orders failed to address several issues (Supp. 284). Among other things, Mr. Moore pointed out in the motion that his requests for additional records were made pursuant to 3.852(h)(2), not 3.852(g)(3), and that the requirements of 3.852(h)(2) should apply to him. Mr. Moore also pointed out that applying 3.852(I) to any of these demands was erroneous when the demands had not been made pursuant to 3.852(I), and 3.852(I) was not applicable to Mr. Moore at this

stage of his public records production[14]. The lower court denied Mr. Moore's Motion for Reconsideration and/or Clarification on July 9, 1999, stating simply that he "did not overlook any points of law or fact" in rendering his previous orders (Supp. 407).

On June 22, 1999, Mr. Moore filed an incomplete amended 3.850 motion in order to meet the 1-year deadline requirement of Rule 3.851, as well as to protect his rights to public records (Supp. 300). In said motion, Mr. Moore explained that he still had not been provided public records he was entitled to, including the records initially requested from the Duval State Attorney[15] and the Duval County Sheriff[16]. Mr. Moore also requested leave to amend once the public records process in his case was complete. In response to Mr. Moore's 3.850 amendment, on July 14, 1999, the lower court entered an order granting Mr. Moore 30 days to file a **final** amended 3.850 motion (Supp. 453). The lower court did not address the lack of public records compliance by various agencies in the order.

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[14]On July 12, 1999, Mr. Moore supplemented his Motion for Reconsideration and/or Clarification with the July 1, 1999 Amendment to Florida Rules of Criminal Procedure 3.852 (Supp. 407).

[15]The Duval State Attorney had informed undersigned counsel that they were suspending public records compliance pending the outcome of the Motion for Rehearing and/or Clarification filed on June 21, 1999.

[16]Most importantly, the unprovided records included the actual investigation and prosecution files from this case.

On July 21, 1999, Mr. Moore filed a Motion for Reconsideration and Request for Hearing[17] in response to the lower court's July 14th Order (Supp. 456). In this Motion, Mr. Moore again informed the lower court that he had not received any records from the Duval State Attorney, that he had not recived any records regarding Mr. Moore's case from the Duval Sheriff, and that other public records issues remain unaddressed. Mr. Moore also requested that the lower court hold a hearing on these matters. On August 19, 1999, without holding a hearing, the lower court entered an Order on Defendant's Motion for Reconsideration and Request for Hearing, and the Defendant's Supplement to that Motion (Supp. 475). In said order, the lower court grants Mr. Moore (approximately) 32 more days to file his final amended 3.850 motion. At no point does the lower court address the outstanding public records issues Mr. Moore alerted him to. Furthermore, the lower court failed to acknowledge Mr. Moore's request for a hearing into these matters.

During this time, Mr. Moore continued seeking public records from various agencies. After finally receiving partial compliance from the Duval State Attorney on July 28, 1999[18], pursuant to 3.852(h)(2) and the lower court's May 12, 1999 orders, Mr. Moore sent requests for additional public records to the Duval State Attorney, the Duval Sheriff, and the Florida

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[17]Mr. Moore supplemented the Motion for Reconsideration and Request for Hearing on August 10, 1999 (Supp. 468).

[18]The State Attorney's partial compliance came over a month after Mr. Moore's 1-year 3.850 date.

Department of Law Enforcement (Supp. 501-515; PCR. 134-145). These record requests, filed on September 14, 1999, were based on information contained in the records the Duval State Attorney had finally supplied to Mr. Moore. The agencies responded and/or objected to most of the requests (Supp. 524; PCR 146, 153, 158), and none of the agencies provided any records. Mr. Moore also filed motions to compel the Duval Sheriff to turn over public records they had agreed to turn over several months before, including but not limitted to the actual investigative files from Mr. Moore's case (Supp. 516-523).

On September 20, 1999, in compliance with the lower court's August 19th order, Mr. Moore filed a second (wholly incomplete) amended 3.850 motion (PCR. 1-135). In said motion, Mr. Moore again informed the lower court of the lack of public records compliance and how it had prevented his counsel from effectively representing him in postconviction. Mr. Moore also repeated his request that the lower court hold a hearing on the several outstanding public records issues. Several months went by and no hearing was scheduled by the lower court.

Based on the outstanding public records issues detailed above, as well as the fact that Mr. Moore was still being denied a public records hearing, on December 20, 1999, Mr. Moore filed a Motion for Hearing on Public Records Demands (PCR. 229). On February 9, 2000, the lower court entered an Order Setting Huff Hearing and Hearing on Defendant'a Demands for Additional Public

Records[19] (PCR. 234). The hearing was held on March 8, 2000 (PCR. 739-806). The lower court granted Mr. Moore's motions to compel, ordering the Duval Sheriff[20] to provide the actual files from Mr. Moore's case within nine (9) days, or by March 17, 2000[21]. The lower court also granted Mr. Moore's request for additional records from the Duval Sheriff and Duval State Attorney, also ordering them to provide the records by March 17th. The lower court denied Mr. Moore's request for additional records from the Florida Department of Law Enforcement.

Also at the March 8th hearing, over defense counsel's objection, the lower court granted Mr. Moore only 20 days to amend his 3.850 motion from the date the agencies were to turn over the missing records. Counsel for Mr. Moore explained to the lower court that this was an insufficient amount of time to complete Mr. Moore's postconviction investigation, especially considering that Mr. Moore had never been provided with the Duval Sheriff file regarding the murder Mr. Moore was convicted of and had only recently been provided incomplete records from the Duval State Attorney.

On March 16, 2000, Mr. Moore filed an Emergency Motion asking the lower court for more time to investigate the contents

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[19]The order was silent on Mr. Moore's outstanding motions to compel.

[20]At said hearing, the Duval Sheriff acknowledged the fact that they had not provided the investigative records regarding the murder Mr. Moore was convicted of (PCR. 759, 762).

[21]The Duval Sheriff was seven (7) days late turning the file over, and the file was incomplete.

of the missing records, and asking for more time to file additional records requests[22] based on the contents of the Duval Sheriff's investigative file and other newly provided records, something Mr. Moore would have done over a year earlier had the records been provided when asked for (PCR. 250). Mr. Moore updated the Emergency Motion on three occasions (PCR. 258, 275, 284). On March 27, 2000, the lower court denied the Emergency Motion (PCR. 288).

On April 6, 2000, without receiving the public records he had requested (and was entitled to), Mr. Moore was forced to file his third amended 3.850 motion (PCR. 308-452). In said motion, Mr. Moore again informed the lower court regarding lack of public records compliance, again asked the lower court to hold a seperate hearing on public records, again informed the lower court that the investigation was incomplete, and again asked for leave to amend the motion.

On April 20, 2000, the lower court held a Huff hearing and a hearing on the outstanding public records requests (PCR. 807-979). At said hearing, the lower court refused Mr. Moore a hearing on one pending motion to compel, choosing instead to just deny it:

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[22]Mr. Moore filed several requests for additional records after the March 8th hearing based on the contents of the incomplete file that Mr. Moore received from the Duval Sheriff (PCR. 236, 244, 299, 453, 474, 479). Mr. Moore also filed a Motion to Compel regarding records not provided by the Duval State Attorney and the Duval Sheriff, as well as a Motion to Compel regarding the incomplete investigative file provided by the Duval Sheriff (PCR. 267, 271).

> The Court: Well, I will not sit here and have some kind of evidentiary hearing on did she give you the whole file. I mean, you know, she says that she did. What kind of evidentiary hearing am I going to have to determine well, no she didn't?
>
> You know, you say that she did. She says she didn't. You know, what am I supposed to do?

(PCR. 829). The lower court also failed to fully address the other motion to compel, and never ruled on it. Finally, the lower court also denied some of Mr. Moore's requests for additional records, and refused to hear argument on the remaining requests.

The legislature of the State of Florida has created a right to review and obtain public records. Art. I, § 24, Fla. Const.; Ch. 119, Fla. Stat. (Supp. 1996). "This Court has repeatedly found that capital postconviction defendants [such as Mr. Moore] are entitled to public records disclosure." Ventura, 673 So. 2d at 481; Muehleman, 623 So. 2d at 481 (well settled that capital postconviction defendants are "entitled" to chapter 119 public records disclosure); Anderson v. State, 623 So. 2d 1170 (Fla. 1993); see also In re Amendments to Fla. Rules of Crim., 683 So. 2d at 477 (Anstead, J., concurring).

This Court, through its rules and precedent, has created a right for capital postconviction defendants to obtain public records for purposes of discovering grounds for postconviction relief (Florida Rule of Criminal Procedure 3.852, Ventura, Walton, Anderson), and has even required collateral counsel to ensure that all such records are obtained *prior* to finalizing

collateral relief motions lest a procedural bar be asserted against their clients. Porter v. State, 653 So. 2d 375 (Fla. 1995).

Numerous other capital postconviction litigants similarly situated to Mr. Moore have benefitted from the right to obtain and use public records as Mr. Moore attempted to do in the court below. The actions of the lower court denied Mr. Moore the benefits conferred on other similarly situated capital collateral litigants. See generally Reed v. State, 640 So. 2d 1094, 1098 (Fla. 1994)("Reed should be allowed a reasonable time to obtain any records to which he is entitled and allowed a reasonable time to amend his petition under rule 3.850 to include any pertinent information obtained from the documents"); Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993)("Should the trial court determine that Walton is entitled to disclosure of the records at issue, we direct that Walton be granted an additional thirty days from the rendition of that ruling in which to amend his rule 3.850 motion to permit additional claims or facts discovered as a result of the disclosure to be raised before the trial court"). See also, Anderson v. Sate, 627 So. 2d 1170, 1172 (Fla. 1993); Lopez v. Singletary, 634 So. 2d 1054, 1058 (Fla. 1994); Provenzano v. Dugger, 561 So. 2d 541, 547 (Fla. 1990); Mendyk v. State, 592 So. 2d 1076, 1082 (Fla. 1991); Engle v. Dugger, 576 So. 2d 696 (Fla. 1991).

Along with Mr. Moore's constitutional right to public records exists a right to challenge a state agency's assertion

that is has fully complied with a public records request, as well as a right to a hearing to resolve the challenge. See Florida Rule of Criminal Procedure 3.852 (l)(2). The lower court's failure to hold a hearing on Mr. Moore's motions to compel, as well as the other pending public records requests, violated this and other provisions of the rule, and violated Mr. Moore's due process rights.

The lower court's actions also rendered postconviction counsel ineffective, preventing counsel from fully investigating Mr. Moore's case for possible postconviction claims. This clearly prejudiced Mr. Moore. For example, Mr. Moore's case was investigated by the Duval County Sheriff's Office, and Mr. Moore was prosecuted by the Duval State Attorney. These agencies failed to turn over, among other things, the following: investigator notes; all statements made by the two co-defendants; documentation regarding plea bargains for the co-defendants; a complete set of investigative and homicide reports; crime lab reports; and, all witness statements taken during the investigation of this case.

Complete compliance with public record requests from the main investigative agencies is essential for any postconviction investigation. In fact, this necessity was envisioned by both this Court and the Florida Legislature when the public records law was amended specifically for postconviction defendants. See Florida Rule of Criminal Procedure 3.852 (d)(2)(A) (1996); Florida Rule of Criminal Procedure 3.852 (d)(1), (e)(1) (as

amended July 1, 1999). Without full compliance from these (and other) agencies, it is impossible for Mr. Moore to investigate possible violations of Brady v. Maryland, fully investigate possible ineffectiveness on the part of trial counsel, to determine if additional records are needed from these agencies for use in postconviction (as envisioned by Fla.R.Crim.P. 3.852, sections g, h, and i), and/or investigate other possible sources of postconviction relief.

This Court must reverse the orders of the lower court, return Mr. Moore's case to the Fourth Judicial Circuit, order that the lower court hold the public records hearings Mr. Moore is entitled to, order that the lower court allow Mr. Moore to request additional records based on the records he receives, and order the lower court to allow Mr. Moore to amend his postconviction motion. This is the only way to ensure that Mr. Moore is provided the same rights as other similarly situated postconviction defendants, as well as ensure that Mr. Moore is provided the due process he is entitled to.

ARGUMENT II

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MOORE'S MERITORIOUS CLAIMS WITHOUT THE BENEFIT OF AN EVIDENTIARY HEARING.

The trial court erroneously denied all of Mr. Moore's 3.850 claims without ordering an evidentiary hearing. "Under rule 3.850, a postconviction defendant is entitled to an evidentiary hearing unless the motion and record conclusively show that the defendant is entitled to no relief. Thus, the court must treat

the allegations as true except to the extent they are rebutted conclusively by the record." Arbelaez v. State, 775 So.2d 909, 913 (Fla.2000); Gaskin v. State, 737 So.2d 509 (Fla. 1999); Rivera v. State, 717 So.2d 477 (Fla. 1998); Valle v. State, 705 So.2d 1331 (Fla. 1997); Roberts v. State, 568 So.2d 1255 (Fla. 1990).

The Florida Supreme Court has made its preference for granting evidentiary hearings on potentially meritorious claims of ineffective assistance of counsel abundantly clear. In *Gaskin*, the court stated, "It is especially important that initial motions in capital cases predicated upon a claim of ineffective assistance of counsel be carefully reviewed to determine the need for a hearing." *Gaskin*, 737 So.2d at 516. More explicitly, in footnote 17, the Court advises,

> We agree with that portion of Justice Wells' concurring opinion [from Mordenti v. State, 711 So.2d 30, 33 (Fla.1998)] calling for a presumption in favor of evidentiary hearings in initial 3.850 motions asserting claims for **ineffective assistance of counsel, *Brady*, and other newly discovered evidence claims** in capital cases and more stringent review of subsequent motions. Based on the important policy concerns in creating a simplified yet complete rule of procedure in postconviction proceedings and the emphasis within the rule favoring evidentiary hearings unless conclusively demonstrated otherwise, **we strongly urge trial courts to err on the side of granting evidentiary hearings in cases involving initial claims for ineffective assistance of counsel in capital cases.** *Ibid*, at 516, 517 (emphasis added).

A. THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MOORE'S CLAIM[23] THAT HIS CONVICTION IS CONSTITUTIONALLY UNRELIABLE AS ESTABLISHED BY NEWLY DISCOVERED EVIDENCE.

Postconviction counsel recently discovered evidence that Mr. Moore was exposed to harmful and potentially deadly hazardous waste during his childhood.[24] This exposure adversely affected Mr. Moore's learning ability, damaged his nervous system and caused serious metabolic problems.[25] The evidence of toxic exposure impacts both the guilt/innocence phase of Mr. Moore's trial and the sentencing phase. The effects of toxic exposure implicate not only statutory and nonstatutory mitigating factors, but also Mr. Moore's ability to act in a premeditated manner.

Determining whether newly discovered evidence warrants a new trial requires application of a two-prong test. First, the evidence must have been unknown and unable to be discovered at the time of trial through the exercise of due diligence. Second, the court must find that the evidence probably would produce an

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[23]**Claim III in the Second Amended Motion to Vacate. This claim was pled with more specificity in the Third Amended Motion to Vacate. Counsel fully incorporates his argument stated in other claims that the trial court's striking of the Third Amended was an abuse of discretion that has greatly prejudiced Mr. Moore.**

[24]In the Third Amended Motion, counsel details that he first became aware of this evidence after reading a July 27, 1999, Florida Times-Union article reporting that several Jacksonville neighborhoods were built on incinerator ash containing arsenic, lead, and cancer-causing dioxin. Upon further investigation, counsel determined that one of these sites is less than a mile from the house where Mr. Moore was raised.

[25]In the Third Amended Motion, counsel states that while growing up, Mr. Moore suffered from repeated migraine headaches and month-long bouts of vomiting, conditions symptomatic of chronic exposure to lead.

acquittal (or life sentence) on retrial. Robinson v. State, 770 So.2d 1167 (Fla.2000); Jones v. State, 591 So.2d 911 (Fla. 1991) (Jones I). The standard for relief is indeed a strict one, but it becomes a nearly impossible standard even for a meritorious claim when the trial court fails to grant an evidentiary hearing.

The trial court's order denying relief states that this information was discoverable at the time of the defendant's trial using due diligence. Without conducting an evidentiary hearing, the trial court had no basis for this conclusion. Counsel's allegations are presumed to be true unless conclusively rebutted by the record. Arbelaez v. State, 775 So.2d 909, 913 (Fla.2000); Gaskin v. State, 737 So.2d 509 (Fla. 1999); Rivera v. State, 717 So.2d 477 (Fla. 1998); Valle v. State, 705 So.2d 1331 (Fla. 1997); Roberts v. State, 568 So.2d 1255 (Fla. 1990). There is no evidence in the record that defense counsel or defendant should have or could have known at trial in October of 1993 that in July of 1999 Environmental Protection Agency officials would consider naming defendant's neighborhood a federal Superfund site.[26] Under Florida law, the evidence of toxic exposure is newly discovered evidence.

Although the trial court found that the toxic exposure allegations did not pass the newly discovered threshold, nonetheless the trial court went on to evaluate the second prong,

[26]According to the Florida Times-Union article, a Superfund site is one that is ranked "among the country's most urgent environmental hazards."

whether the evidence probably would produce a different result on retrial. The trial court found that, as to the guilt phase, a claim that the defendant was "mentally incapacitated" would have been contrary to the trial strategy that defendant was innocent of the crime, and that trial counsel could not have ethically presented the testimony of impairment. The trial court further found "there is no reasonable probability that had the jury been presented with evidence of the defendant's occasional exposure to hazardous waste and his asserted reduction in mental function that the jury would have recommended a life sentence."[27]

In evaluating the second prong of the Jones test, the trial court must consider all newly discovered evidence which would be admissible at trial in conjunction with the evidence actually introduced at trial. Robinson v. State, 770 So.2d 1167 (Fla.2000); Jones v. State, 709 So.2d 512 (Fla.1998) (Jones II); Jones v. State, 591 So.2d 911 (Fla. 1991) (Jones I). The trial court here is explicitly refusing to do so. Moreover, how can the court make an informed evaluation of a jury's reaction to evidence that he himself has not heard?

Mr. Moore requested more time to prepare this claim[28] precisely because it is such a complex claim to investigate and to communicate to the judge or jury. It requires, for example,

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[27]Trial court's Order Denying Defendant's Motion for Post-Conviction Relief, filed August 4, 2000, at p. 5.

[28]Second Amended Motion to Vacate at p. 22; Third Amended Motion to Vacate at p. 27.

discovery and analysis of EPA documents and expert testimony as to the effect of present toxins on human development generally, and on Mr. Moore specifically, in addition to lay testimony establishing Mr. Moore's actual rate of exposure[29] and the observable effects it had on Mr. Moore even as a child. The trial court concluded, with no expert testimony or testimony of any kind, that Mr. Moore's ability to testify on his own behalf belies a claim of "mental deficiency" as a substantial mitigating factor, essentially that because Mr. Moore appeared to speak in complete sentences there can't be very much wrong with him. Such a view is inconsistent with the most rudimentary understanding of human physiology and psychology, as well constitutionally mandated notions of mitigation and individualized sentencing. Mr. Moore should be given the opportunity to present competent evidence on this issue.

B. THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MOORE'S CLAIM[30] THAT COUNSEL WAS INEFFECTIVE PRETRIAL AND AT THE GUILT/INNOCENCE PHASE FOR FAILING TO PROPERLY INVESTIGATE AND PREPARE THE CASE, INVESTIGATE THE AVAILABILITY OF A VOLUNTARY INTOXICATION DEFENSE, AND PROCURE ADEQUATE ASSISTANCE FROM MENTAL HEALTH EXPERTS.

The trial court relied on his own assessment of defense counsel's probable trial strategy in denying Mr. Moore's claim.

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[29]The Court makes a finding in his order, based on no evidence whatsoever, that Mr. Moore's exposure to hazardous waster was "occasional," but it was more likely on an almost daily basis during his formative years.

[30]**Claim VII of the Second Amended Motion to Vacate. Counsel fully incorporates his argument stated in other claims that the trial court's striking of the Third Amended was an abuse of discretion that has greatly prejudiced Mr. Moore.**

> I don't know see how you can claim that you weren't there and then you should have said well, if I was there I was intoxicated. So, you know, that's contradictory trial strategy based upon the defense counsel's probable unwillingness, I would suggest, to do that. So, I'm going to deny count seven. (Huff transcript at p. 122).

At the outset, Mr. Moore asserts that it was improper for the trial court to substitute his own past experience as trial counsel for the facts that must be determined at an evidentiary hearing:

> Well, trial counsel—and I've been faced with it on numerous occasions as trial counsel, you want to argue to the jury that, one, the defendant isn't guilty, but if you do find him guilty of something, then find him—you now let me suggest to you it should be something less. You try to be both ways. (Huff transcript at p. 122).

Further, defense counsel's failure to investigate cannot constitute trial strategy on its face. It is well established that, "One of the primary duties defense counsel owes to his client is the duty to prepare himself adequately prior to trial." Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). See also, House v. Balkcom, 725 F.2d 608 (11th Cir. 1984); Weidner v. Wainwright, 708 F.2d 614 (11th Cir. 1983); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982). Any decision not to investigate must be reasonable. Armstrong v. Dugger, 833 F.2d 1430, 1432 (11th Cir. 1987), citing Strickland v. Washington, 466 U.S. 668 (1984); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987); Tafero v. Wainwright, 796 F.2d 1314 (11th Cir. 1986); Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985); Magill v. Dugger, 824 F.2d 879 (11th

Cir. 1987). Trial counsel's decision not to investigate or present a voluntary intoxication defense was not reasonable, and cannot be considered in isolation as the trial court does.[31] It was not a simple either/or proposition, where either the defendant testifies to his innocence or he puts on a voluntary intoxication defense. Defense counsel needed to do an adequate investigation of evidence of Mr. Moore's intoxication and procure adequate expert mental health assistance in order to evaluate the viability of an intoxication defense, and also to evaluate the defendant's potential credibility should he take the stand. Defense counsel did not do so. Defense counsel needed but did not have this information to effectively voir dire the jury and aid in jury selection. Defense counsel needed but did not have this information to argue his case to the jury, regardless of whether an intoxication defense was used. As set out in a subsequent claim, defense counsel needed but did not have this information to argue mitigation at the sentencing phase. Defense counsel's failure to investigate undermines confidence in the outcome of this trial at every stage of the proceedings.

C. THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MOORE'S CLAIM[32] UNDER AKE V. OKLAHOMA THAT TRIAL COUNSEL FAILED TO

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[31]Note that Mr. Moore's claim for relief was a broad one, encompassing trial counsel's general failure to investigate and prepare the case and failure to acquire adequate assistance from mental health experts, not just the intoxication defense. However, the court's order fails to address any of these issues except the intoxication defense.

[32]**Claim IIX of the Second Amended Motion to Vacate. Counsel fully incorporates his argument stated in other claims that the**

OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANT.

This claim was pled as a "shell" in the Second Amended Motion to Vacate, and the trial court denied the claim on that basis. However, it was pled with specificity in the Third Amended Motion. Further, as counsel represented to the trial court at the Huff hearing, this claim was pled with more specificity in the Third Amended Motion based on records and information postconviction counsel received subsequent to filing the Second Amended Motion.[33] Mr. Moore's claim in the Third Amended Motion was facially sufficient and an evidentiary hearing should be held.

D. THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. MOORE'S CLAIM[34] THAT HIS TRIAL COUNSEL WAS INEFFECTIVE IN FAILING TO ADEQUATELY INVESTIGATE AND PRESENT AVAILABLE MITIGATING EVIDENCE AT SENTENCING.

Mr. Moore alleges that trial counsel failed to investigate and present mitigating evidence of Mr. Moore's history of substance abuse, extreme level of intoxication at the time of the

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trial court's striking of the Third Amended was an abuse of discretion that has greatly prejudiced Mr. Moore.

[33]See the Transcript of April 20, 2000, *Huff* hearing, beginning at p. 123. As counsel says, "It's a shell [in the Second Amended Motion] because I didn't have the file to do it with."

[34]**Claim IX of Mr. Moore's Second Amended Motion to Vacate. Note that this claim was more fully pled in the Third Amended Motion that was struck by the trial court. Counsel fully incorporates his argument stated in other claims that the trial court's striking of the Third Amended was an abuse of discretion that has greatly prejudiced Mr. Moore.**

crime, and the effect his substance abuse had on his mental state prior to and on the day of the crime. In the trial court's Order Denying Post-Conviction Relief, the trial court lumps this claim together with the previous Ake shell claim and summarily disposes of both claims as "facially insufficient as a matter of law."[35] The actual Huff hearing transcript is perhaps more informative.

At the Huff hearing, the trial court envisioned an evidentiary hearing on this claim as first, addressing whether or not the defendant was actually intoxicated, and second, once intoxication was established, possibly presenting expert testimony on the effect of this intoxication.[36] Then the court went on to evaluate the merits of Mr. Moore's ineffectiveness claim as if an evidentiary hearing with testimony on these issues had actually already occurred. The court assessed trial counsel's tactics as follows:

> So, to say then that defense counsel elected to have the defendant testify he wasn't even there, I'm going to have to assume that the defense counsel wasn't even aware of any intoxication on the part of the defendant who was not even there. So I don't know how that—any evidentiary hearing could help that whatsoever. Now, that's nine. Is that nine? Yes. I'm going to deny number nine. (Huff hearing transcript at p. 128-129)

There are three particularly disturbing aspects of this assessment and subsequent summary denial. First, the trial court

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[35]Order Denying Post-Conviction Relief, August 4, 2000, at p. 8.

[36]Transcript of April 20, 2000, *Huff* hearing, beginning at p. 125.

does not have to and should not assume any of these facts, especially the trial counsel's state of mind. Rule 3.850(d) provides for an evidentiary hearing to develop the disputed factual issues, "If an evidentiary hearing is required, the court shall grant a prompt hearing thereon and shall cause notice thereof to be served on the state attorney, determine the issues, and make findings of fact and conclusions of law with respect thereto."

Second, the trial court's assumption that defense counsel was not aware of any intoxication on the part of the defendant is a blatantly false one contradicted by the record. At the guilt phase of the trial, both Mr. Moore's testimony and that of one of the state's star witnesses, Chris Shorter, confirm that Mr. Moore smoked marijuana that day. Further, the state's theory of the case, supported by the majority if not all of the state's witnesses, hinged on Mr. Moore drinking moonshine with the victim.[37]

Finally, this specific claim dealt with defense counsel's failure to put on mitigating evidence at the penalty phase. The court's cursory evaluation of trial tactics at the Huff hearing concerns defense counsel's decision to have Mr. Moore testify at the guilt phase. Mr. Moore asserts that the trial court's evaluation of tactics is flawed even as to guilt phase, but

[37]Despite the fact that the trial court was the original presiding trial judge, at transcript p. 125, he remarks, "I don't know that—I don't know where any evidence would come from at a hearing, if we had one, to first show that the defendant was intoxicated…."

regardless of this court's determination on that issue, the trial court's reasoning does not explicitly or implicitly address Mr. Moore's penalty phase claim. There is no reason, tactical or otherwise, to preclude a defendant from presenting mitigation evidence at sentencing because he chose to take the stand and testify on his own behalf at trial. Further, trial counsel has a duty to conduct a reasonable investigation, a duty which extends to investigation of possible mitigating evidence in the defendant's background. Porter v. Singletary, 14 F.3d 554 (11th Cir. 1994); Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). Mr. Moore should have the opportunity to put on evidence that his trial counsel fell below this standard. To rule otherwise would be violative of Mr. Moore's rights to due process and equal protection, and a denial of a full and fair hearing on the merits as guaranteed by Article I, Sections 2, 9 and 16 of the Florida Constitution and the Fifth and Fourteenth Amendments of the United States Constitution.

ARGUMENT III

THE LOWER COURT ERRED IN REFUSING TO CONSIDER MR. MOORE'S THIRD AMENDED MOTION TO VACATE JUDGEMENT OF CONVICTION AND SENTENCE. THE LOWER COURT ERRONEOUSLY FOUND THE THIRD AMENDED MOTION TO BE UNTIMELY AND UNAUTHORIZED.

The lower court erred by not considering Mr. Moore's Third Amended Motion to Vacate Judgement of Conviction and Sentence. The actions of the lower court were contrary to law, contrary to principles of fundamental fairness, and not supported by the postconviction record.

On March 26, 1999, Mr. Moore filed a "shell" postconviction motion in order to toll the time in which Mr. Moore's Petition for Writ of Habeas Corpus must be filed in federal court (Supp. 202). Mr. Moore subsequently filed an incomplete amended motion on June 22, 1999, in order to comply with the 1-year deadline of Fla.R.Crim.P. 3851 (Supp. 300). This amendment was also filed to protect Mr. Moore's right to obtain and utilize public records because, up to that point, several agencies had failed to comply with Mr. Moore's public records requests. Mr. Moore requested that the lower court allow him to further amend the motion once he received the public records requested several months previously[38].

In response to this amendment, on July 14, 1999, the lower court entered an order granting Mr. Moore 30 days to file a **final** amended 3.850 motion (Supp. 453). The order did not address the lack of public records compliance or the funding problems. In response to the order, Mr. Moore filed a Motion for Reconsideration and Request for Hearing[39] (Supp. 456). On August 19, 1999, without holding a hearing, the lower court entered its Order on Defendant's Motion for Reconsideration and Request for Hearing, and the Defendant's Supplement to that Motion (Supp.

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[38]Mr. Moore also requested leave to amend due to a funding crisis at the Office of the Capital Collateral Counsel for the Northern Region which occurred in January of 1999 and continued for several months, preventing Mr. Moore's counsel from effectively investigating his case.

[39]Mr. Moore supplemented the Motion for Reconsideration and Request for Hearing on August 10, 1999 (Supp. 468).

475). In said order, the lower court granted Mr. Moore (approximately) 32 more days to file his final amended 3.850 motion but did not address public records or funding problems.

On September 20, 1999, in compliance with the lower court's order, Mr. Moore filed another incomplete amendment to his 3.850 motion requesting leave to amend and (again) requesting a hearing on outstanding public records (PCR. 1-135). Without holding a public records hearing, the lower court ordered the State to respond to the amended motion (PCR. 149), and the State responded (PCR 160).

Throughout this time, Mr. Moore continued to seek public records compliance and, on December 20, 1999, Mr. Moore again asked the lower court to hold a public records hearing. On February 9, 2000, the lower court scheduled a Huff[40] hearing and a public records hearing for the same day (PCR. 234). At that hearing, the lower court (for the first time) ordered agencies to turn over records Mr. Moore had been seeking since his case first entered postconviction, as well as records requested on later dates.

At the same hearing, over undersigned counsel's objection, the lower court granted Mr. Moore 20 days (from the date the agencies were to provide the records) "to file proposed amendments" to his amended 3.850 motion. The amendments were to be based on new information in these records or information

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

derived therefrom[41] (PCR. 770). On April 6, 2000, Mr. Moore, believing he was acting in compliance with what the lower court had ordered, filed his third amended 3.850 motion[42] (PCR. 308-452).

On April 19, 2000, the State informed undersigned counsel by letter that it would be moving to strike Mr. Moore's third amended 3.850 motion[43] (PCR. 488). On April 20, 2000, the lower court held a Huff hearing and a hearing on the outstanding public records requests (PCR. 807-979). At said hearing, the lower court struck Mr. Moore's third amended 3.850 motion, finding it to be untimely and unauthorized:

> At a hearing held by this Court on March 8, 2000, this Court ordered the State to provide the defendant with the investigative file of the Jacksonville Sheriff's Office by March 17, 2000, and further ordered that the defendant could file *proposed amendments* (if any arose) to his existing motion, that were

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[41]On March 16, 2000, Mr. Moore filed an Emergency Motion asking the lower court for more time to investigate the contents of the missing records, and asking for more time to file additional records requests based on the contents of the Duval Sheriff's investigative file and other newly provided records (PCR. 250). In fact, Mr. Moore was able to determine from the newly provided records that additional records were needed and that previously provided records were not complete (PCR. 236, 244, 267, 271, 299, 453, 474, 479), and updated the Emergency Motion based on this information (PCR. 258, 275, 284). The lower court denied the Emergency Motion (PCR. 288).

[42]In the amendment, Mr. Moore again informed the lower court regarding lack of public records compliance, again asked the lower court to hold a separate hearing on public records, again informed the lower court that the investigation was incomplete, and again asked for leave to amend the motion.

[43]The State filed their Motion to Strike Mr. Moore's 3rd amended motion the next day (April 20, 2000), the same day as the scheduled Huff hearing (PCR. 490).

> based on information derived from the Jacksonville Sheriff's Office investigative file, within twenty (20) days of March 17, 2000. Instead of following this direction, the defendant filed a Third Amended Motion (with yet another request for leave to amend) on April 6, 2000. The State filed a Motion to Strike the defendant's third amended motion on April 20, 2000. Given that the defendant not only failed to follow this Court's explicit instructions, but his Third Amended Motion contains amendments not authorized by this Court, this Court will not consider the defendant's untimely and unauthorized Third Amended Motion.

(PCR. 530, Order Denying Defendant's Motion for Post-Conviction Relief)

In refusing to consider Mr. Moore's 3rd amended motion, the lower court failed to follow established law, and denied Mr. Moore fundamental fairness and due process.

Amendments are allowed by the rules when a defendant has properly filed a motion for postconviction relief. In fact, the rules contemplate amendments. Florida Rule of Criminal Procedure 3.851 (1997) governed the filing deadline for Mr. Moore's postconviction motion. Rule 3.851 (b)(1) required Mr. Moore to file his motion to vacate judgement of conviction and sentence within one year of his conviction becoming final. Mr. Moore met this deadline on June 22, 1999, when he filed his amended motion[44] for postconviction relief (Supp. 300).

[44]This was Mr. Moore's amendment to the "shell" 3.850 motion he filed on March 26, 1999.

Rule 3.851 also makes it clear that once a defendant has filed a timely postconviction motion, amendments are allowed and must be accepted:

> Further, this time limitation shall not preclude the **right to amend or to supplement pending pleadings** pursuant to these rules.

Fla.R.Crim.P. 3.851 (b)(3) (1997).

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

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

603 So. 2d 120, 121. The court noted that "[a]mendments and supplements to rule 3.850 motions are commonplace."

This Court's precedent also allows for amendments to 3.850 motions. In Brown v. State, 596 So. 2d 1026 (Fla. 1992), this Court held that "the two-year limitation does not preclude the enlargement of issues raised in a timely-filed [sic] first motion for post-conviction relief." 596 So. 2d 1026. In Rogers v. State, 26 Fla.L.Weekly S75, footnote 7 (Fla. 2001), this Court, citing Brown v. State, held that the two-year time limitation of

Fla.R.Crim.P. 3.850 did not preclude the enlargement of issues raised in Rogers' initial motion for postconviction relief.

In Brown, this Court declined to reach the question of whether claims not contained in the original motion could be raised for the first time by amendment after the limitation period had run. This Court's use of the term "enlargement" refers to the revision of issues already pled, rather than to the introduction of new issues. The term "amendment", however, encompasses both enlargement of issues already pled, as was the situation in Brown, and the introduction of new issues concerning matters which existed at the time the original pleading was filed but were omitted from the pleading because they were overlooked or unknown. See Florida Power & Light Company v. System Council U--4 of the International Brotherhood of Electrical Workers, AFL-CIO, 307 So. 2d 189, 192 (1st DCA 1975) (quoting the author's comment following Rule 1.190(d) of the Florida Rules of Civil Procedure: 'Matters existing at the time of filing the pleading and omitted therefrom because overlooked or unknown should be brought in by amendment').

At the very least, the lower court should have accepted Mr. Moore's amendment because it had not yet abjudicated the original motion or the amendments to it. See Shaw v. State, 654 So.2d 608, 609 (4th DCA 1995), where the court, citing as an example the case of Jones v. State, 450 So. 2d 325 (4th DCA 1984), pointed out that "[t]he cases discussing successive motions....generally involve situations in which the second motion is filed after the

first motion has been denied." Due to the fact that Mr. Moore had filed a timely 3.850 motion on June 22, 1999, and due to the fact that the lower court had not abjudicated any of Mr. Moore's postconviction claims, the lower court should have accepted his April 20th amendment in accordance with Fla.R.Crim.P. 3.851 (b)(3).

The lower court's order striking the amendment also deprived Mr. Moore the benefit of this Court's precedent allowing amendment of Rule 3.850 motions after public records have been provided to capital postconviction defendants. See Ventura v. State, 673 So. 2d 479 (Fla. 1996); Muehleman v. Dugger, 623 So. 2d 480, 481 (Fla. 1993); Walton v. Dugger, 621 So. 2d 1357 (Fla. 1993). In the June 22nd 3.850 amended motion, Mr. Moore explained that he still had not been provided public records he needed to investigate his case, and that funding problems were preventing his counsel from effectively representing him. The lower court granted Mr. Moore leave to amend this motion, although it forced him to do so without addressing any of the public records problems brought to its attention several times previously. Mr. Moore filed another incomplete amendment, again requesting assistance at resolving the same outstanding public records issues and again requesting leave to amend (PCR. 1-135). The lower court finally addressed **some** of the outstanding public records issues at the Huff hearing held on March 8th, and gave Mr. Moore only twenty days to file "proposed amendments" once records were turned over to him.

Believing he was acting in compliance with the lower court's order, Mr. Moore again amended his 3.850 motion on April 20, 2000. The lower court had previously allowed Mr. Moore to amend. However, because the lower court failed to address several pending public records matters before ordering Mr. Moore to file, that amendment contained little more than the pleading filed before it. On the other hand, the amendment struck by the lower court was drafted with the benefit of **better** (but incomplete) public records compliance on the part of state agencies[45]. The lower court erred in not accepting Mr. Moore's amendment.

At the March 8th hearing, the lower court had orally ordered that Mr. Moore could file proposed amendments based on new information in the (yet to be turned over) records, or information derived therefrom (PCR. 770). Mr. Moore followed the order when he filed his amended motion. The lower court struck the motion at the April 20, 2000 hearing, erroneously believing that Mr. Moore had not followed its oral pronouncements:

> Based on my perusal of the proposed third amended 3.850, there is nothing in that motion that arises from the information...purported or represented to be that it arose from the investigative file that is not contained in the second amended motion to which the state has reponed in writing.
>
> * * *

[45]Furthermore, this amendment was hastily drafted due to Mr. Moore having insufficient time to investigate and utilize what records the agencies chose to provide.

> But based on my prior rulings I'm going to find that there are no proposed amendments that met the criteria that I set forth on March 8th.
>
> Consequently, we are going to proceed on the second amended 3.850.

(PCR. 908).

This was fundamentally unfair to Mr. Moore and denied him due process. The lower court came to this conclusion without allowing Mr. Moore's counsel an opportunity to point out where in the amendments the new information was located (PCR. 910-912). As one example, Claim I (119 claim[46]) in the motion struck by the lower court clearly amends the same claim from the previous motion with updated public records information.

Limiting Mr. Moore to amending only with information contained in files provided 20 days or less from the amendment deadline was also fundamentally unfair. This was an insufficient and unreasonably short amount of time, especially considering that Mr. Moore had been diligently attempting to get these files for nearly two years. See generally Reed v. State, 640 So. 2d 1094, 1098 (Fla. 1994)("Reed should be allowed a reasonable time to obtain any records to which he is entitled and allowed a reasonable time to amend his petition under rule 3.850 to include any pertinent information obtained from the documents"); Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1993)("Hoffman may seek the relevant public records . . . and within a reasonable time shall

[46]Walton v. Duggar, 634 So.2d 1059, 1061 (Fla. 1993), makes it clear that public records claims are cognizable in 3.850 motions.

be permitted to amend his petition under rule 3.850, raising any new ground brought to light by the disclosure of the public records"). Furthermore, this limitation also prevented Mr. Moore from amending with information obtained through means other than public records.

The failure of the lower court to accept and consider the third amended 3.850 motion deprived Mr. Moore due process of law, equal protection under the law, and a full and fair hearing on the merits of these claims, as guaranteed under Article I, Sections Two, Nine and Sixteen of the Florida Constitution, and under the Fifth and Fourteenth Amendments to the United States Constitution. This Court must order the lower court to accept the amended 3.850 motion, and/or order the lower court to hold a hearing on Mr. Moore's outstanding public records issues and allow Mr. Moore a reasonable time to amend once the public records issues are resolved.

ARGUMENT IV

THE LOWER COURT JUDGE ERRED BY NOT DISQUALIFYING HIMSELF FROM MR. MOORE'S POSTCONVICTION PROCEEDINGS.

Every postconviction defendant is entitled to full and fair Rule 3.850 proceedings. See Holland v. State, 503 So. 2d 1354 (Fla. 1987); Easter v. Endell, 37 F.3d 1343 (8th Cir. 1994). Due process also guarantees every postconviction defendant the right to a neutral, detached judiciary in order "to convey to the individual a feeling that the government has dealt with him fairly, as well as to minimize the risk of mistaken deprivations

of protected interests." Carey v. Piphus, 425 U.S. 247, 262 (1978). The actions of the lower court, however, created a justifiable fear in Mr. Moore that he was not receiving fair and unbiased treatment in postconviction.

Mr. Moore was provided postconviction counsel in July of 1998. On or about August 19, 1998, counsel for Mr. Moore began requesting public records from various agencies pursuant to Florida Rule of Criminal Procedure 3.852 (1996), and pursuant to Chapter 119 of the Florida Statutes. Several agencies objected to the requests and most failed to provide Mr. Moore with any public records. On October 1, 1998, a new Florida Rule of Criminal Procedure 3.852 took affect. The language in section 3.852 (h)(2) made it clear that this new rule would apply to Mr. Moore's case. Based on the language in section 3.852 (h)(2), undersigned counsel made several new requests for public records from various agencies. The requests were based on information contained in the few files and records Mr. Moore already had in his possession. Again, several agencies filed objections to these requests and, again, most failed to provide any records to Mr. Moore.

On April 15, 1999, the lower court issued an order scheduling a hearing on the various objections (Supp. 265). In the scheduling order, the lower court stated that the hearing was being held pursuant to 3.852 (g)(3), a section clearly inapplicable to Mr. Moore's case. The hearing was held on April 29, 1999 (PCR. 560-738). On May 12, 1999, the lower court

entered its orders from the April 29th hearing (Supp. 268-83). On May 21, 1999, Mr. Moore filed a Motion for Reconsideration and\or Clarification with the lower court (Supp. 284). On July 7, 1999, the lower court ruled on Mr. Moore's Motion for Reconsideration and\or Clarification (nearly a month and a half later), ignoring this Court's amendment to Fla.R.Crim.P. 3.852 issued on July 1, 1999[47] (Supp. 407).

On June 22, 1999, while Mr. Moore's Motion for Reconsideration and\or Clarification was pending, Mr. Moore filed an amended Motion for Postconviction Relief (Supp. 300). Mr. Moore filed the incomplete motion merely to preserve his right to receive public records in postconviction, see Walton v. Duggar, 634 So.2d 1059 (Fla. 1993), and to preserve his right to effective representation in postconviction. Mr. Moore requested 60 days to further amend the postconviction motion **once he had received the public records he was entitled to**. On July 14, 1999, the lower court entered an order granting Mr. Moore's request to amend the postconviction motion, but only allowed Mr. Moore **30 days to file a final amendment from the date of the order** (Supp. 453). Nothing in the lower court's order addressed the public records issues Mr. Moore had brought to its attention in the amended 3.850 motion.

[47]Mr. Moore had supplemented his May 21st Motion for Reconsideration and\or Clarification with this Court's amendment to 3.852 (Supp. 409).

On July 19, 1999, Mr. Moore filed another Motion for Reconsideration and Request for Hearing in response to this order (Supp. 456). In said motion, Mr. Moore again pointed out, among other things, the difficulties he was having with public records compliance. On August 9, 1999, Mr. Moore filed a supplement to this motion and again requested a hearing on these matters (Supp. 468).

On August 17, 1999, the lower court entered an order setting a new date for Mr. Moore's final amended motion (Supp. 475). The new date ordered was September 20, 1999. Nothing in the order explained how or why this particular date was determined by the lower court. Nothing in the order explained why Mr. Moore was being ordered to file his final amended motion without a final public records determination. Nothing in the order mentioned Mr. Moore's two requests for a hearing on these matters. The most chilling aspect of the order, however, involve the following statements contained in the order made by the lower court:

> This Court will not entertain any further motions for extension of time, nor will this Court entertain any further motions for rehearing as to this deadline, **no matter how entitled**.

(emphasis added). The Court repeated this statement a second time in the same Order:

> No further extensions of time will be entertained, nor will any motions for rehearing as to this order (**no matter how entitled**) be entertained.

(emphasis added).

These statements instilled in Mr. Moore a clearly justifiable fear that the lower court was unable or unwilling to fairly preside over any hearings which may ultimately determine whether Mr. Moore will live or die. By telling Mr. Moore that he will be denied relief no matter how entitled he is to that relief, the lower court was telling Mr. Moore that he would not receive the due process to which he is unquestionably entitled in postconviction.

Alone, these statements create a justifiable fear. However, taken together with other actions of the lower court (denying Mr. Moore public records to investigate and litigate his case in postconviction; denying Mr. Moore the opportunity to amend his postconviction motion with information gleaned from public records; refusing to issue orders to certain agencies to turn over public records to Mr. Moore; and, most importantly, **refusing to grant Mr. Moore hearings on these and other matters**), it creates a justifiable fear in Mr. Moore that the lower court never intended to provide him with due process in the first place.

To establish a basis for relief a movant:

> need only show "a well grounded fear that he will not receive a fair trial at the hands of the judge. It is not a question of how the judge feels; it is a question of what feeling resides in the affiant's mind and the basis for such feeling." State ex rel. Brown v. Dewell, 131 Fla. 566, 573, 179 So. 695, 697-98 (1938). See also Hayslip v. Douglas, 400 So. 2d 553 (Fla. 4th DCA 1981). The question of disqualification focuses on those matters from which a litigant may reasonably question

> a judge's impartiality rather than the judge's perception of his ability to act fairly and impartially.

Livingston, 441 So. 2d 1083, 1086 (Fla. 1983) (emphasis added). Because of the actions of the lower court detailed above, Mr. Moore had a well grounded fear that he was not being afforded fair and unbiased proceedings in postconviction from an impartial judge. By refusing to disqualify himself, the lower court denied Mr. Moore's state and federal due process rights. See In re Murchison, 349 U.S. 133 (1955); Taylor v. Hayes, 418 U.S. 488, 501 (1974); Carey v. Piphus, 425 U.S. 247, 262 (1978).

This Court should reverse the rulings of the lower court, return Mr. Moore's case to circuit court for further postconviction proceedings, and order the Chief Judge of the Fourth Judicial Circuit to reassign Mr. Moore's case to a different judge by random selection.

ARGUMENT V

APPELLANT IS BEING DENIED A PROPER APPEAL FROM HIS CONVICTION AND SENTENCE DUE TO OMMISSIONS IN THE RECORD. THE OMMISSIONS HAVE RENDERED POSTCONVICTION COUNSEL INEFFECTIVE.

Mr. Moore was denied a proper direct appeal from his conviction and sentence of death in violation of the Sixth, Eighth and Fourteenth Amendments to the United States Constitution, Art. 5, section 3(b)(1) of the Florida Constitution and Florida Statutes Annotated, Sec. 921.141(4), because a critical pretrial hearing was never placed in the record on appeal.

During a June 23, 1993, pretrial conference in this case (See Volume V, p.24, of the record on appeal), the trial court mentions "some discussions on the record yesterday with counsel" regarding an agreement to continue Mr. Moore's case:

> THE COURT: Thomas Moore is Case-No.93-1659. It's currently set for trial on July 12th. We had some discussions on the record yesterday with Counsel -- the defendant wasn't present. -- about the inability because of discovery to be ready for trial by July 12th. We seemingly, I guess agreed to some type of continuance.

Id. Mr. Moore's absence from this critical stage of his trial proceedings violated his Fifth, Sixth, Eighth and Fourteenth Amendment rights (see Argument VI, infra), but Mr. Moore is prevented from sufficiently pleading this claim because what actually transpired at the proceeding is omitted from the record on appeal.

The circuit court is required to certify the record on appeal in capital cases, Fla. Stat. Ann. sec. 921.141(4), Fla. Const. art. 5, sec. 3(b)(1), and when errors or omissions appear, re-examination of the complete record in the lower tribunal is required. Delap v. State, 350 So. 2d 462 (Fla. 1977). Because the circuit court erred when it certified an incomplete record, this Court should relinquish juridiction to the circuit court to discover what transpired at this critical stage of Mr. Moore's trial.

Mr. Moore also asserts that his trial counsel rendered ineffective assistance in failing to assure that a proper record of the June 22nd proceedings was made, and that Mr. Moore's

direct appeal counsel rendered ineffective assistance of counsel for failure to discover this omission in the record.

These errors prejudiced Mr. Moore. The incomplete record prevented a proper direct appeal to the Florida Supreme Court. The incomplete record is also preventing Mr. Moore from fully presenting his postconviction claims to this Court, and will also prevent a proper review of Mr. Moore's conviction and sentence by this Court. Lastly, the missing record prevents undersigned counsel from rendering effective assistance in postconviction. Relief is required.

ARGUMENT VI

APPELLANT'S ABSENCE FROM CRITICAL STAGES OF HIS TRIAL VIOLATED HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AS WELL AS FLORIDA RULE OF CRIMINAL PROCEDURE 3.180.

Mr. Moore was involuntarily absent from critical stages of the proceedings which resulted in his conviction and sentence of death. A criminal defendant's Sixth and Fourteenth Amendment right to be present at all critical stages of the proceedings against him is a settled question. See, e.g., Francis v. State, 413 So.2d 493 (Fla. 1982); Illinois v. Allen, 397 U.S. 337, 338 (1970); Hopt v. Utah, 110 U.S. 574, 579 (1884); Diaz v. United States, 223 U.S. 442 (1912); Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982); see also Fla. R. Crim. P. 3.180. The standard announced in Hall v. Wainwright, 805 F.2d 945, 947 (11th Cir. 1986), is that "[w]here there is any reasonable possibility of prejudice from the defendant's absence at any stage of the

proceedings, a conviction cannot stand. Estes v. United States, 335 F.2d 609, 618 (5th Cir. 1964), cert. denied, 379 U.S. 964 (1965); Proffitt, 685 F.2d at 1260."

During a June 23, 1993, pretrial conference in this case (See Volume V, p.24, of the record on appeal), the trial court mentions "some discussions on the record yesterday with counsel" regarding an agreement to continue Mr. Moore's case:

> THE COURT: Thomas Moore is Case-No.93-1659. It's currently set for trial on July 12th. We had some discussions on the record yesterday with Counsel -- the defendant wasn't present. -- about the inability because of discovery to be ready for trial by July 12th. We seemingly, I guess agreed to some type of continuance.

Id. Clearly, Mr. Moore was absent from this critical stage of the trial. Mr. Moore's absence during this critical stage violated his Fifth, Sixth, Eighth, and Fourteenth Amendment rights, as well as the requirements of Florida Rule of Criminal Procedure 3.180(a)(3).

Had Mr. Moore been present and fully advised of the reasons his attorney wanted to continue his trial, he would have withdrawn his waiver of the right to a speedy trial. Mr. Moore had signed a form waiving his right to a speedy trial. However, he signed the form on May 11, 1993, based on advice from defense counsel unrelated to the "discovery" problems ostensibly alleged to the trial court at the June 22nd hearing. For unknown reasons, and without Mr. Moore's knowledge, defense counsel chose

not to file the waiver until after the June 22nd **unreported** hearing.

Defense counsel should have objected to the proceeding in his client's absence but ineffectively failed to do so. Regardless, defense counsel failed to advise his client of the reasons he waived at the **unreported** hearing held on the 22nd, in violation of his duty to involve an accused in any decision to waive speedy trial rights. See, Gutierrez v. Baker, 276 So.2d 470 (Fla. 1973). Worse still, defense counsel failed to advise Mr. Moore of the consequences of waiving his right to a speedy trial before filing it with the court.

This was deficient performance that prejudiced Mr. Moore. This unnecessary delay put Mr. Moore's trial on hold for over four months. During this time, the state managed to "discover" several witnesses, or "discover" additional testimony from witnesses previously spoken to. The new testimony discovered by the state also included details of confessions Mr. Moore can establish were false. The prejudice to Mr. Moore is a conviction and sentence based upon unreliable and false testimony.

Mr. Moore was also not present when the jurors were sworn in. Mr. Moore never validly waived his right to be present during this critical stage of the trial.

Mr. Moore's involuntary absence during these critical stages of his trial violated his established rights[48]. The lower court

[48]Unfortunately, Mr. Moore is prevented from sufficiently pleading this claim due to the fact that the relevant proceedings

erred in denying relief without an evidentiary hearing. This Court should reverse and send the case back to the circuit court for an evidentiary hearing to determine all of the circumstances surrounding Mr. Moore's absence from this proceeding, as well as to determine the facts surrounding trial counsel's actions (or lack thereof) regarding this matter.

ARGUMENT VII

MR. MOORE WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT THE GUILT AND PENALTY PHASES OF HIS CAPITAL TRIAL WHEN COUNSEL INEFFECTIVELY FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO MR. MOORE'S MENTAL HEALTH CONSULTANT, AND FAILED TO OBTAIN OTHER NECESSARY EXPERT ASSISTANCE. THE LOWER COURT ERRED IN REFUSING TO CONSIDER THIS CLAIM[49].

Mr. Moore's was entitled to competent expert assistance at both phases of his capital trial. See Ake v. Oklahoma, 470 U.S. 68 (1985). Specifically, Mr. Moore was entitled to a professionally competent, court-funded evaluation to determine his mental status at the time of the offense, to determine his mental status at trial, and to determine whether mitigating circumstances existed in his case. Trial counsel had a duty to ensure Mr. Moore received competent assistance.

Dr. Harry Krop was appointed by the Court to conduct a confidential evaluation of Mr. Moore in connection with this

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are omitted from the record (see Claim V, supra).

[49]**This Claim was sufficiently pled in Mr. Moore's Third Amended Motion to Vacate Judgment of Conviction and Sentence (PCR. 340). However, the lower court erroneously refused to consider Mr. Moore's Third Amended Motion (**See Claim III, supra).

case. Prior to the examination, Dr. Krop was provided with the homicide continuation report of this case as well as some of Mr. Moore's criminal records, for consideration in evaluating Mr. Moore. Dr. Krop was also provided a **paragraph length** summary of Mr. Moore's "social history" written by Mr. Moore's trial counsel. The purpose of the evaluation, according to Mr. Moore's trial counsel, was "primarily for . . . a penalty phase assessment."

Dr. Krop conducted a psychological evaluation of Mr. Moore on August 19, 1993. The purpose of the evaluation, as Dr. Krop understood it, was "to determine possible mitigating factors related to allegations that he [Mr. Moore] committed First Degree Murder." Dr. Krop concluded that Mr. Moore's history of alcohol and drug abuse "appear to be mitigating factors." Dr. Krop requested that he be able to review all of Mr. Moore's prior criminal records and prison records, including PSI's, as well as current jail records and any available school records to explore additional mitigating factors. Dr. Krop also wanted to review records pertaining to Mr. Moore's father's murder and to interview family members to obtain additional background information to further supplement and have a complete and accurate evaluation. Apparently, Dr. Krop was never provided these things, and no further evaluation was performed.

The evaluation performed by Dr. Krop on Mr. Moore was incomplete and wholly unreliable and failed to comport with due process in several ways: 1) the evaluation was based on a

reported social history that was incomplete and unreliable; 2) the evaluation failed to take into account Mr. Moore's medical history, which would have revealed that Mr. Moore suffered symptoms consistent with toxic chemical exposure; 3) the evaluation failed to take into account Mr. Moore's medical history, which would have revealed that Mr. Moore suffered various types of head trauma; and 4) the evaluation was performed for purposes of mitigation only, when a competent evaluation would have revealed issues related to the guilt phase of trial.

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

Independent of the requirements of the due process clause itself, Florida has created a state law entitlement to the valid evaluation of mental status that is protected by the due process clause. In Florida, a criminal defendant is entitled to evaluation of his or her mental status upon request unless the trial judge is "clearly convinced that an examination is unnecessary . . . ." Jones v. State, 362 So.2d 1334, 1336 (Fla.

1978); Mason v. State, 489 So.2d 734 (Fla. 1986). Florida law, therefore, mandates evaluation of mental status upon the existence of specified factual predicates. When such an interest is created by state law, it is protected by the due process clause. See Hewitt v. Helms, 459 U.S. at 47 ("use of explicitly mandatory language in connection with requiring specific substantive predicates demands a conclusion that the state has created a protected liberty interest"); Greenholtz v. Inmates of Nebraska Penal and Correctional Complex, 422 U.S. 1, 10 (1979) (due process is required when there is a "set of facts which, if shown, mandate a decision favorable to the individual"). Because the function of the due process clause in this context is "to insure that the state-created right is not arbitrarily abrogated," Wolfe v. McDonnell, 418 U.S. 539, 557 (1974), it protects a Florida defendant against professionally incompetent and invalid evaluation of his or her mental status. Because such evaluations would be the functional equivalent of no evaluation at all, the State must be required to provide professionally competent and valid evaluation in order to effectuate the right it has created.

The mental health expert must protect the client's rights, and the expert violates these rights when he or she fails to provide adequate assistance. State v. Sireci, 502 So. 2d 1221, 1224 (Fla. 1987); Mason v. State. The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

The United States Supreme Court has recognized the pivotal role that the mental health expert plays in criminal cases:

> [W]hen the State has made the defendant's mental condition relevant to his criminal culpability and to the punishment he might suffer, the assistance of a psychiatrist may well be crucial to the defendant's ability to marshal his defense. In this role, psychiatrists gather facts, through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they might believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, and tell the jury why their observations are relevant.

Ake, 105 S. Ct. at 1095 (citation omitted).

Generally accepted mental health principles require that an accurate medical and social history be obtained "because it is often only from the details in the history" that organic disease or major mental illness may be differentiated from a personality disorder. R. Strub & F. Black, Organic Brain Syndrome, 42 (1981). This historical data must be obtained not only from the patient but from sources independent of the patient. Patients are frequently unreliable sources of their own history, particularly when they suffer from head injury, drug addiction, alcoholism, mental retardation, and other serious mental illness

such as schizophrenia. Consequently, a patient's knowledge may be distorted by knowledge obtained from family and his own organic or mental disturbance, and a patient's self-report is thus suspect:

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information in the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie & Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case of Informed Speculation, 66 Va. L. Rev. 727 (1980) (cited in Mason, 489 So. 2d at 737).

Mr. Moore was denied competent mental health assistance in violation of Ake. Dr. Krop did not possess any significant independent background data because counsel failed to investigate, prepare the material, and/or have the necessary funds to retain the expert for further evaluation. The prejudice to Mr. Moore resulting from the incompetent mental health assistance is clear. Confidence in the outcome of the entire trial is undermined, and the results of both phases are unreliable.

The holding in Ake applies not only to mental health experts but to other experts as well. The rationale underlying the

holding of Ake compels such a conclusion, in that it is based upon the due process requirement that fact-finding must be reliable in criminal proceedings. Ake, at 77-83. Mr. Moore was denied his rights under Ake, denied his right to effective assistance of counsel, and denied a fair adversarial testing because his trial counsel failed to obtain the assistance of other experts necessary to ensure a reliable fact-finding process.

During Mr. Moore's trial, the state presented a fire expert to testify regarding the fire that had occurred in the victim's house presumably set after the murder had occurred. However, evidence and records in the defense attorney's possession contradicted much of this expert's testimony. Trial counsel did not effectively expose these inconsistencies to the jury. More importantly, trial counsel failed to retain a fire expert to review these inconsistencies and present testimony to rebut the state's fire expert. Mr. Moore was prejudiced by this deficiency because the inconsistencies were relevant to many aspects of the state's case: 1) the times testified to by several state witnesses; 2) the inconsistent testimony of codefendant Clemons; and, 3) other witness testimony. Because of trial counsel's deficiency, the jury was unable to make reliable findings of fact.

During Mr. Moore's trial, the state presented the testimony of medical examiner Dr. Bonifacio Floro. Dr. Floro testified regarding, among other things, bullet trajectories and the manner

in which the victim died. However, evidence and records in the defense attorney's possession contradicted much of this expert's testimony. Trial counsel was ineffective in failing to expose these contradictions during Dr. Floro's testimony, contradictions which cast serious doubt on the factual story presented to the jury by the state. Furthermore, trial counsel was ineffective for not retaining an independent medical examiner who could provide a professionally trained opinion to the jury regarding the relevance of these contradictions to Mr. Moore's defense. Again, because of trial counsel's deficiency, the jury was unable to make reliable findings of fact.

Mr. Moore's trial counsel also had in his possession evidence and records which indicated Mr. Moore, on the day of the incident, was functioning with serious mental deficiencies due to the consumption of various drugs. Trial counsel was deficient for not retaining the services of a pharmacologist or other qualified expert to testify to the effects of these various drugs, especially after the one expert retained by the defense informed counsel of the mitigating value of this information. Furthermore, had counsel sufficiently investigated, he would have discovered that Mr. Moore was using large amounts of cocaine on the day in question right up to the time of the incident. Undersigned has located witnesses who can testify to this, some of whom were known to defense counsel at the time of the trial. This fact further compounds trial counsel's ineffectiveness for not obtaining a qualified drug-use expert.

As a result of the foregoing, Mr. Moore's constitutional right to competent expert assistance was violated. The lower court erred in refusing to consider this claim, as well as refusing to grant Mr. Moore an evidentiary hearing. Mr. Moore is entitled to relief.

ARGUMENT VIII

THE FLORIDA LEGISLATURE HAS UNLAWFULLY OVERRULED CONSTITUTIONAL CASELAW REGARDING KNOWING AND VOLUNTARY WAIVER OF FUNDAMENTAL RIGHTS IN VIOLATION OF THE FIFTH AND SIXTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

In Fla. Stat. §§ 922.105(1) and (2), the Legislature purports to create a situation whereby Mr. Moore was to have "elected" to be executed and disfigured in the electric chair within 30 days of the sections being signed into law or else be considered to have, by statute, waived such an "election" and be given a potentially lethal injection administered by an untrained, unskilled, unknown DOC death squad who has no written procedures to follow.

As recently noted in an opinion from this Court, "A change to lethal injection for inmates **may be** legally attainable based upon an **express waiver** by the prisoner of **any contest** to the method of execution." Provenzano v. Moore, 744 So.2d 413, 419 (Fla. 1999) (Wells, J., concurring). Mr. Moore has made no such waiver.

To presume that a person has waived one thing and elected another by being silent is, at best, intellectual dishonesty. Mr. Moore did not, and still does not, know his options and he has never acted in such a way that would legally allow a valid choice or waiver to be found. If, contrary to Mr. Moore's position, the new legislation applies to him, he had only 48 hours from sometime on January 26, 2000, to make an "election." However, DOC had no lethal injection procedures whatsoever in effect until after that 48-hour period had passed.[50]

Furthermore, by relying on the instant unconstitutional statute, the State cannot meet its burden of establishing a valid waiver because **none** of the procedural requirements for waiving a fundamental right is included in §§ 922.105(1) and (2). A waiver of a fundamental constitutional right **must** comport with stringent procedural requirements--a fact that the Legislature is not at liberty to change. Such a right may **only** be deemed waived after a court has determined that the decision to waive the right is knowing and voluntary. See, e.g., Godinez v. Moran, 509 U.S. 389, 400 (1993). Courts are obligated to embark upon this "serious and weighty responsibility" precisely because of the import of the constitutional rights involved. Johnson v. Zerbst, 304 U.S. 458, 465 (1938); see also Schneckloth v. Bustamente, 412

[50]It should be noted here that these first "procedures" released by DOC gave Mr. Moore absolutely no useful information from which to make any "election." Furthermore, what DOC has revealed to date to Mr. Moore would still fall far short of the quantum of information required for him to make any informed choice.

U.S. 218, 237-38 (1973) (fundamental rights include rights to counsel, both at trial and upon a guilty plea; right to confrontation; right to a jury trial; right to a speedy trial; and right to be free from double jeopardy). The waiver **must** appear on the record. Johnson v. Zerbst, 304 U.S. at 465; see also, United States v. Christensen, 18 F.3d 822, 824 (9th Cir. 1994). A waiver can be accepted **only** after the person has had the opportunity to consult with counsel. See, e.g., Brady v. United States, 397 U.S. 742, 748 n.6 (1970).

Mr. Moore is entitled to relief. The lower court refused to consider this claim when it struck Mr. Moore's Third Amended Motion to Vacate Judgement of Conviction and Sentence (See Claim III, supra). This Court should rule that Fla. Stat. §§ 922.105(1) and (2) are unconstitutional.

ARGUMENT IX

MR. MOORE WAS DENIED A FAIR TRIAL AND A FAIR, RELIABLE AND INDIVIDUALIZED CAPITAL SENTENCING DETERMINATION IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, BECAUSE THE PROSECUTOR'S ARGUMENTS AT THE GUILT/INNOCENCE AND PENALTY PHASES MISSTATED THE LAW AND FACTS, AND WERE INFLAMMATORY AND IMPROPER. DEFENSE COUNSEL'S FAILURE TO RAISE PROPER OBJECTIONS WAS DEFICIENT PERFORMANCE WHICH DENIED MR. MOORE EFFECTIVE ASSISTANCE OF COUNSEL.[51]

The trial court erred in denying Mr. Moore's claim that the prosecutors' acts of misconduct, both individually and

[51]Claim XIII of the Second Amended Motion to Vacate.

cumulatively, deprived Mr. Moore of his rights under the Sixth, Eighth, and Fourteenth Amendments.

Unchallenged prosecutorial argument during Mr. Moore's trial and sentencing proceedings violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. The prosecutor's arguments were fraught with improper comments and comments which relied on facts not in evidence. Defense counsel's failure to object to these blatantly improper comments constituted ineffective assistance of counsel. No reasonable tactic exists for this failure.

During the State's guilt-phase rebuttal argument, the prosecutor improperly and prejudicially referred to Mr. Moore as "the devil." (R. 1262). The exact statement was as follows:

> Crime conceived in hell will not have any angels as witnesses. And, ladies and gentleman, as true as that statement is, Grand Park is hell. **And that man right there is the devil**.

(R. 1262) (emphasis added). The prosecutor went on to make a similar reference during the penalty-phase argument. (R. 1520). At no time did defense counsel object to these improper arguments.

During the State's penalty-phase argument, the prosecutor also improperly argued that the mitigation testimony and evidence presented by the Defense should be considered as aggravation by the jury. (R. 1527). In doing so, the State was urging the jury to consider non-statutory aggravating factors in violation of Florida Statute 921.141(5), which limits the aggravating factors

to be considered to the fourteen provided by the legislature. In Miller v. White, the Florida Supreme Court confirmed, "The aggravating circumstances specified in the statute are exclusive, and no others may be used for that purpose." 373 So.2d 882, 885.

During voir dire, the prosecutor also attempted to improperly shift to Mr. Moore the burden of proving whether he should live or die (R. 199). The prosecutor did this despite the fact that it is improper to shift the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances. See Mullaney v. Wilbur, 421 U.S. 684 (1975).[52]

Although a decision to impose the death penalty must "be, and appear to be, based on reason rather than caprice or emotion," Gardner v. Florida, 430 U.S. 349, 358 (1977) (opinion of Stevens, J.), here, because of the prosecutor's inflammatory argument, death was imposed based on emotion, passion, and prejudice. See Cunningham v. Zant, 928 F.2d 1006, 1019-20 (11th Cir. 1991).

Arguments such as those presented in Mr. Moore's case have been long-condemned as violative of due process and the Eighth Amendment. See Drake v. Kemp, 762 F.2d 1449, 1458-61 (11th Cir. 1985)(en banc). Such arguments render a sentence of death fundamentally unreliable and unfair. Drake, 762 F.2d at 1460

[52]Mr. Moore also asserts that the trial court's instructions improperly shifted the burden to Mr. Moore to prove that death was an inappropriate sentence, and that the court employed a presumption of death in sentencing Mr. Moore. (See Claim XIII of the Second Amended Motion to Vacate.) The trial court ruled that the issue was procedurally barred and "facially insufficient as a matter of law." (PCR. 539).

("[T]he remark's prejudice exceeded even its factually misleading and legally incorrect character ...."); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984)(because of improper prosecutorial argument, the jury may have "failed to give its decision the independent and unprejudiced consideration the law requires"). See also Wilson v. Kemp, 777 F.2d 621 (11th Cir. 1985); Newlon v. Armontrout, 885 F.2d 1328, 1338 (8th Cir. 1989), quoting Coleman v. Brown, 802 F.2d 1227, 1239 (10th Cir. 1986)("'[a] decision on the propriety of a closing argument must look to the Eighth Amendment's command that a death sentence be based on a complete assessment of the defendant's individual circumstances ... and the Fourteenth Amendment's guarantee that no one be deprived of life without due process of law'") (citations omitted).

The Florida Supreme Court has held that when improper conduct by a prosecutor "permeates" a case, as it has here, relief is proper. Nowitzke v. State, 572 So.2d 1346 (Fla. 1990). Mr. Moore's jury returned a death recommendation. Mr. Moore's sentence of death violates the eighth and fourteenth amendments. See Elledge v. State, 346 So. 2d 998, 1002-03 (Fla. 1977); Barclay v. Florida, 463 U.S. 939, 955 (Fla. 1983).

Further, the prosecutor's closing argument "improperly appeal[ed] to the jury's passions and prejudices." Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). Such remarks prejudicially affect the substantial rights of the defendant when they "so infect the trial with unfairness as to make the resulting conviction a denial of due process." Donnelly v.

DeChristoforo, 416 U.S. 647 (1974). The Florida courts have held that "a prosecutor's concern 'in a criminal prosecution is not that it shall win a case, but that justice shall be done.' While a prosecutor 'may strike hard blows, he is not at liberty to strike foul ones.'" Rosso, 505 So. 2d at 614. The Florida Supreme Court has called such improper prosecutorial commentary "troublesome," Bertolotti v. State, 476 So. 2d 130, 132 (Fla. 1985), and when improper conduct by the prosecutor "permeates" a case, as it did here, relief is proper. Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990).

Defense counsel's unreasonable failure to object to any of the prosecution's improper acts prejudiced Mr. Moore. Counsel could have no tactical or strategic reason for consistently failing to object and was ineffective.

The trial court denied relief because the claim was not raised on direct appeal and thus was procedurally barred. Mr. Moore responds that the prosecutor's conduct was so egregious and so violative of notions of due process and fundamental fairness as to rise to the level of fundamental error. Where fundamental error is present, as is the case here, the procedural bar does not apply and the claim should be heard on the merits. See Rogers v. State, 2001 WL 197014 (Fla.); Urbin v. State, 714 So.2d 411 (Fla. 1998); Kilgore v. State, 688 So.2d 895 (Fla. 1996).

The trial court also denied relief on the ineffective assistance of counsel aspect of the claim, saying that, "The defendant may not seek to avoid this procedural bar by couching

his claim in terms of ineffective assistance of counsel." (PCR p. 534) Ineffective assistance of counsel is a proper postconviction claim. Moreoever, any ineffective assistance of counsel claim is derived from an act or omission by counsel which may be a cognizable claim in its own right. In this case, trial counsel's failure to object to numerous instances of prosecutorial misconduct was so unreasonable as to provide grounds for relief independent of any relief sought for the prosecutorial misconduct. Trial counsel's ineffectiveness prejudiced Mr. Moore, and Mr. Moore should be granted an evidentiary hearing on this issue.

ARGUMENT X

EXECUTION BY ELECTRICUTION IS CRUEL AND UNUSUAL PUNISHMENT.

Executing Mr. Moore by electricution violates his rights under the Eighth and Fourteenth Amendments of the United States Constitution, as well as the corresponding provisions of the Florida Constitution, because the punishment is cruel and/or unusual. (This Claim was fully briefed in Mr. Moore's Second Amended Motion to Vacate, as well as Mr. Moore's Third Amended Motion to Vacate which was erroneously struck by the lower court) This is a valid issue so long as the possibility remains that this form of execution can be carried out by the State. In fact, problems with executions in recent years indicate the State's inability to humanely carry out a death sentence by electricution. Just as chilling as the history of mutilations and botched executions is the State's consistent reluctance to

accept responsibility for its actions. The State has denied the existence of a problem, covered it up, and when it could hide the truth no longer employed stop-gap measures that caused more harm than good. Judicial intervention is required, and an evidentiary hearing is warranted.

ARGUMENT XI

MR. MOORE'S DEATH SENTENCE WAS PREMISED UPON FUNDAMENTAL ERROR BECAUSE THE JURY RECEIVED INADEQUATE GUIDANCE CONCERNING THE AGGRAVATING CIRCUMSTANCES. FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Moore's jury did not receive complete and accurate instructions defining the aggravating circumstances in a constitutionally narrow fashion. The jury was instructed on three aggravating factors. The jury was not advised on the elements of the aggravating factors which the State had to prove beyond a reasonable doubt. As a result, the jury was given unbridled discretion to return a death recommendation. Specifically relying upon the tainted death recommendation, the trial court sentenced Mr. Moore to death.

At the conclusion of the penalty phase, the trial court instructed Mr. Moore's jury on three (3) aggravating factors. Those instructions were:

> 1. The defendant has previously been convicted of another capital offense or of a felony involving the use or threat of violence to some person. For the purposes of this case the crimes of aggravated battery and armed robbery are felonies involving the use or threat of violence to another person.

> 2. The crime for which the defendant is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.
>
> 3. The crime for which the defendant is to be sentenced was committed for financial gain.

(r. 1544). In imposing a death sentence the trial court found the presence of all three aggravating factors (R. 1583-4).

Under Espinosa v. Florida, 112 S. Ct. 2926 (1992), the United States Supreme Court held that a Florida penalty phase jury is a co-sentencer under Florida law and therefore must receive constitutionally adequate instructions on aggravating circumstances. In so holding, the United States Supreme Court determined that the Florida Supreme Court had previously failed to correctly apply Maynard and Godfrey v. Georgia, 446 U.S. 420 (1980). Espinosa, at 2928. Instructions regarding all aggravating circumstances have to comport with the Eighth Amendment. Walton v. Arizona, 110 S. Ct. 3047 (1990).

The jury was also instructed "that the crime for which the defendant is to be sentenced was committed for financial gain" (T. 1505). The jury was given no guidance to the elements of this aggravating circumstance in violation of the Eighth Amendment. The law is clear that the aggravator of "pecuniary gain" is not applicable unless it is the primary or sole motive for the crime. The Florida Supreme Court has held that this factor does not apply as a matter of law unless there is "sufficient evidence to prove a pecuniary motivation for the murder itself beyond a reasonable doubt." Peek v. State, 395 So.

2d 492 (Fla 1980); Simmons v. State, 419 So. 2d 316, 318 (Fla. 1982) (followed in Rogers v. State, 511 So. 2d 526 (Fla. 1987)); Scull v. State, 533 So. 2d 1137, 1142 (Fla. 1988)("[I]t has not been shown beyond a reasonable doubt that the primary motive for this killing was pecuniary gain.").

Mr. Moore's jury failed to receive any limiting instructions on the aggravator of "pecuniary gain." As a result, the instruction on this aggravator "fail[ed] adequately to inform [Mr. Moore's] jur[y] what [it] must find to impose the death penalty." Maynard v. Cartwright, 486 U.S. at 361-62. Mr. Moore's jury must be presumed to have relied on this vague jury instruction. Stringer v. Black 112 S. Ct. 1130 (1992). This was Eighth Amendment error and it was not harmless beyond a reasonable doubt, especially considering that the jury was instructed on, and the Court found, that the murder was committed for the purpose of avoiding arrest. Furthermore, it was improper doubling of aggravating circumstances for the jury to be instructed on, and the Court to find, both the pecuniary gain aggravator and the avoid arrest aggravator. See Richardson v. State, 437 So. 2d 1091 (Fla. 1983); Provence v. State, 337 So. 2d 783, 786 (Fla. 1976); Clark v. State, 379 So. 2d 97, 104 (Fla. 1980); Welty v. State, 402 So. 2d 1139 (Fla. 1981).

The instructional errors in this case cannot be harmless because mitigation was before the sentencers which could have served as the basis for a life sentence. See Hall v. State, 541 So. 2d 1125, 1128 (Fla. 1989); Hitchcock v. State, 614 So. 2d

483 (Fla. 1993); James v. State. Because of the instructional errors in this case, all three aggravating factors found must be stricken, and Mr. Moore must be given a life sentence. To the extent that counsel did not properly object to these errors, such failures constitute ineffective assistance of counsel. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Starr v. Lockhart. Relief is proper.

CONCLUSION

On the basis of the argument presented herein, and on the basis of what was submitted to the lower court, Mr. Moore respectfully submits that he is entitled to relief from his unconstitutional conviction and sentence, that he is entitled to have his Third Amended Motion (struck by the lower court) considered by an appropriate court, that he is entitled to an evidentiary hearing on his postconviction claims, and to all other relief that the Court deems just and proper.

I HEREBY CERTIFY that a true copy of the foregoing Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on April 2, 2001.

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