IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-24

LOWER TRIBUNAL CASE NO. 87-8047

RICHARD HAROLD ANDERSON,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE THIRTEENTH JUDICIAL CIRCUIT,
IN AND FOR HILLSBOROUGH COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Richard Harold Anderson's motion for post-conviction relief which was brought pursuant to Florida Rule of Criminal Procedure 3.850.

Citations shall be as follows: The record on appeal concerning the original trial court proceedings shall be referred to as "R ___" followed by the appropriate page numbers. The post-conviction record on appeal will be referred to as "PC-R ____" followed by the appropriate page numbers. The evidentiary hearing transcripts will be referred to as "EH ____" followed by the appropriate page numbers. All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Anderson was deprived of his right to a fair and reliable trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Furthermore, as to the denial of Mr. Anderson's motion for post-conviction relief, there has been an abuse of discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

Because of the seriousness of the claims at issue and the stakes involved, Richard Harold Anderson, a death-sentenced inmate on Death Row at Union Correctional Institution, urges this Court to permit oral argument on the issues raised in his appeal.

STATEMENT OF CASE

On July 15, 1987, a Hillsborough County grand jury indicted Richard Harold Anderson with one count of first-degree murder (R. 2747; PC-R. 55-6). He pled not guilty. Mr. Anderson's trial began February 8, 1988. Mr. Anderson was tried by a jury. On February 17, 1988, the jury rendered a verdict of guilty (R. 2154). On February 18, 1988, the jury recommended a death sentence for the first-degree murder conviction. On February 26, 1988, the trial court imposed a sentence of death on the count of first-degree murder. A sentencing order was entered February 26, 1988 (R. 2285-89).

This Court affirmed Mr. Anderson's convictions and sentences on direct appeal. Anderson v. State, 574 So.2d 87 (Fla. 1991), cert. denied, 502 U.S. 834, 112 S.Ct. 114 116 L.Ed.2d 83 (1991).

On October 12, 1992, Mr. Anderson filed his first Motion to Vacate Judgment of Conviction and Sentence under Fla.R.Crim.P. 3.850. The motion was summarily denied on October 14, 1992. A motion for rehearing was denied on November 4, 1992. Notice of Appeal was timely taken to the Florida Supreme Court on November 20, 1992. On October 28, 1993, the Florida Supreme Court remanded the case back to the trial court for completion of Chapter 119 requests and subsequent amendment to his post-

conviction motion. Anderson v. State, 627 So.2d 1170 (Fla. 1993).

On February 28, 1994, Mr. Anderson filed an Amended Motion to Vacate Judgment of Conviction and Sentence. (PC-R. 64-169). On May 27, 1997, Mr. Anderson filed his Second Amended Motion to Vacate Judgment of Conviction and Sentence under Fla.R.Crim.P. 3.850. (PC-R. 213-324). On January 19, 1999, Mr. Anderson filed his Third Amended Motion to Vacate Judgments of Conviction and Sentence under Fla.R.Crim.P. 3.850. (PC-R. 457-495). A hearing was held on March 9, 1999, pursuant to Fla.R.Crim.P. 3.851(c), for determining which claims would be set for evidentiary hearing. The trial court rendered its order, dated May 7, 1999, pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), on May 10, 1999. (PC-R. 498-502). It granted an evidentiary hearing on what it described as Ground 1.B - Perjured Testimony. The other claims were denied (it is noted here that the Huff order referred to the numbered claims in the Rule 3.850 motion as "grounds" though it utilized the same sequential numbering for identification).

On February 2, 2000, February 28, 2000, and April 27, 2000, the trial court conducted an evidentiary hearing on Ground 1.B - Perjured Testimony. The trial court rendered its order denying the motion on August 25, 2000. (PC-R. 533-38). Notice of Appeal

was timely filed on September 21, 2000. (PC-R. 539-40). Before the record of the case was transmitted to this Court, the trial court conducted a hearing on January 9, 2001, upon Mr. Anderson's motion to correct and supplement the post-conviction record. On January 9, 2001, the trial court entered an order on its own motion maintaining the case assignment to its new division. (PC-R. 555-56). On January 16, 2001, the trial court entered an order correcting certain scrivener's errors that were contained in the August 25, 2000, order (PC-R. 557-59) and supplementing the record with certain clarifications as to post-conviction filings. (PC-R. 560-64). This appeal is properly before this Court.

STATEMENT OF FACTS

A. TRIAL

Robert Grantham lived in Winter Haven, Florida, and owned a roofing business. (R. 661-62; 666; 776). After a 1986 injury, Grantham, who was divorced, asked his ex-wife, Jacqueline O'Hara, to help in the operation of his business. (R. 661; 663). With O'Hara's assistance in purchasing airline tickets, Grantham flew to Las Vegas, Nevada, on May 4, 1987, and was scheduled to return to Orlando, Florida , on May 7, 1987. (R. 668-69; 715-34). O'Hara last saw Grantham on May 3, 1987, and spoke to him by telephone for the last time when Grantham called

her from Las Vegas on May 6, 1987. (R. 669; 672-73). O'Hara testified that Grantham told her he was afraid to leave his hotel room because he had a lot of money with him. (R. 696-97). When Grantham failed to contact O'Hara upon the date of his expected return to Florida, O'Hara contacted the local police. (R. 690).

On May 19, 1987, Florida Department of Law Enforcement (FDLE) agent Manny Pondakos noticed Grantham's car parked in the long-term parking lot at Tampa International Airport. The appearance of blood on the front seat of the car caught agent Pondakos' attention and he reported his finding to the Tampa Airport Police. (R. 336-42; 343-45). The Tampa Airport Police requested the assistance of FDLE; FDLE responded by sending a crime scene analyst to the airport for photographs and for securing the car's towing to the FDLE laboratory. (R. 343-46; 735-40). Processing of the car at the lab included the taking of additional photographs including some that were admitted into evidence, as well as the processing of four .22 caliber shell casings, two blood stained towels, twenty-four latent fingerprints and four latent palm prints. (R. 741-59; 1042-55; 1365; 1379). The blood types were matched to Grantham's as were the identification of thirteen of the prints. The remainder of the prints were not identified. (R. 919-23; 969-1005; 3354-60;

1379).

Connie Beasley (previously known as Connie Gilliard and currently known as Connie Hunt) (EH. 210) was a divorced car salesperson in Bartow, Florida. (R. 450; 549; 550; 442; 447; 563; 569). She met Richard Harold Anderson in February of 1987 and met Robert Grantham in April of 1987. (R. 441-42; 447-49; 451; 550;-51).

Grantham initiated unwelcome sexual advances towards Beasley and offered to pay her $30,000.00 for sex with him. Beasley responded by telling Grantham that she was not interested and to stop calling her. (R. 452-55; 552-53). Beasley did not like Grantham and called him a "scum bag." (R. 562).

Beasley testified that she told Mr. Anderson of Grantham's offer and that Mr. Anderson responded by telling her to accept the offer of providing sexual favors but for the amount of $10,000.00. (R. 456-57; 556-57). She communicated the offer to Grantham during a telephone call from Grantham while he was in Las Vegas. (R. 458; 459). She indicated that a plan was developed whereby Beasley would meet Grantham upon his return to Florida, that Beasley would get Grantham drunk and then Mr. Anderson would rob Grantham of his Las Vegas winnings. (R. 464-67; 558-59).

Beasley testified that she met Grantham at the Orlando airport on May 7, 1987, drove together to Tampa and subsequently went with Grantham to Mr. Anderson's apartment after drinks and dinner. (R. 476-81). Grantham wanted sex from Beasley who refused and instead they watched television together until Mr. Anderson arrived. She said that Mr. Anderson asked Grantham for a ride and that Grantham agreed. (R. 482-86). Beasley sat in the front passenger seat next to Grantham in the driver's seat with Mr. Anderson in the back seat. (R. 486-87).

Some time after leaving the complex, Beasley testified that Mr. Anderson, from the back seat, shot Grantham four times (R. 489-91). Beasley said she stopped the car by shifting the gear into park; that Mr. Anderson got out of the back seat and pushed Grantham to the front passenger seat. Mr. Anderson drove off with Beasley in the rear seat (R. 490-91) to a wooded area where the body of Grantham was removed from the car and left on a sand pile along with Grantham's suitcase. (R. 492-96). Upon returning to Mr. Anderson's apartment, Beasley showered and changed clothes (R. 500-01) and Mr. Anderson went into Grantham's satchel and claimed finding $2,600.00 (R. 501).

Beasley then followed Mr. Anderson to the Tampa International Airport where Grantham's car was left in a parking

lot. (R. 503). Beasley testified that they subsequently returned to the apartment and thereafter drove to the 56th Street bridge in Tampa where Mr. Anderson threw the gun, a box of shells and his gloves into the Hillsborough River. (R. 514). A small caliber .22 pistol was later recovered from the river (R. 910-17; 1033-37) and a FDLE expert testified that the cartridges located in Grantham's car were fired from the same pistol. (R. 1059-67).

At trial, David Barile testified that Mr. Anderson met him at work on May 8, 1987, and made incriminating statements about being in trouble with the police for shooting someone for $2,000.00 to $3,000.00 and dumping the body in a woods. (R. 629-38). Barile's nephew, Larry Moyer, testified that he saw Mr. Anderson on June 2, 1987, and inquired about the statement to Barile. Moyer testified that Mr. Anderson responded by admitting to killing a man for $3,000.00. (R. 1240-41).

B. EVIDENTIARY HEARING

FDLE lead agent Ray Velboom testified that Connie Beasley was first contacted by law enforcement on June 4, 1987, when he and co-case agent Steve Davenport interviewed her in Bartow, Florida. She was informed of the investigation regarding the disappearance of Robert Grantham. Beasley admitted knowing

Grantham through her father, and informed the agents that she had no knowledge of his disappearance, that she last saw Grantham on May 3, 1987, and that Grantham had made a nuisance of himself by making repeated, annoying telephone calls to her at work in an unwelcome effort to date her. (EH. 117; 126-28). Beasley said nothing to agents Velboom and Davenport about Richard Anderson knowing Robert Grantham, said nothing about being involved with the killing of Grantham nor of the disposal of Grantham's body (EH. 128), and lied to the agents about not knowing anything about Grantham's disappearance. (EH. 147).

The FDLE agents realized later, probably that day, that Beasley lied to them on June 4, 1987. (EH. 147). The FDLE agents never informed the prosecutors at the Hillsborough County State Attorney's Office that Beasley lied to them on June 4, 1987, and no prosecutor ever asked FDLE agents if Beasley had lied to them on June 4, 1987. (EH. 147).

Beasley was next contacted by FDLE agents on July 1, 1987, when agents Velboom and Pondakos first called and then drove to Bartow for an interview. In the interim period, Beasley had been arrested on May 27, 1987, and booked on a failure to appear charge regarding a traffic citation. When the agents arrived at the car dealership, Beasley asked a co-worker to sit in with them. (EH. 129-30).

During the July 1, 1987, interview at the car dealership, Beasley was informed that FDLE had identified telephone calls that Grantham had placed from Las Vegas to her home and that Grantham had placed a call from Richard Anderson's residence. Beasley acknowledged that she knew and was dating Mr. Anderson. Beasley did not acknowledge any involvement with Grantham's disappearance nor did she say anything about Mr. Anderson being involved with Grantham's disappearance. With the interview concluded, the agents left the car dealership. (EH. 131-32).

The agents later returned to the dealership on July 1, 1987, and arrested Beasley as an accessory after the fact to first degree murder. The only statement Beasley made at the time of her arrest was to basically say that Mr. Anderson committed the murder and that she knew about it. (EH. 133-34).

A series of interviews with Beasley were later initiated on July 1, 1987, at FDLE headquarters in Tampa. Each of the interview sessions were tape recorded, later transcribed into reports and were subsequently admitted into evidence during the evidentiary hearing as Defense Exhibits 1, 2, 3 and 4. (EH. 134-36). At 10:00 p.m., during the first interview session, FDLE agents attempted to talk to her but she asserted her rights to have her counsel, Jack Edmonds of Bartow, present and the

contact was concluded. (EH. 135-36).

The FDLE agents assisted Beasley in contacting her lawyer by telephone. Beasley later informed the agents that she and her lawyer made the decision that she should talk with the agents. Consequently, a second interview started at 11:35 p.m. on July 1, 1987.

Agent Velboom testified that during this second interview, agent Pondakos had asked Beasley "Are you sure he didn't tell you about any big winnings[?]" in reference to Mr. Grantham's phone call from Las Vegas. (EH. 138). Velboom acknowledged that the interview transcript reflected a comment by himself that he "was confused" by the information that Beasley was giving them. (EH. 138). Velboom indicated that the transcript showed agent Pondakos telling Beasley that he (Pondakos) could not accept Beasley's story (EH. 139) and that Pondakos asked Beasley "[I]f what you are telling us is true?" (EH. 139). Later, Velboom reported that the transcript of the interview had agent Pondakos warning Beasley that telling one untruth often times leads to two more untruths to cover up the first untruth. (EH. 140-41). The transcript revealed, as Velboom testified, that Beasley was "caught lying" at least one time that night about Grantham's disappearance. (EH. 141).

A third interview with Beasley was conducted and taped

beginning at 12:50 a.m. as the night had turned into July 2, 1987. Agent Velboom recognized that this transcript showed agent Pondakos warning Beasley that "[W]e don't want any fairy tales here." (EH. 151). This was part of the interview where Pondakos showed he was having difficulty believing Connie Beasley. (EH. 151-52). Agent Velboom complained to Beasley about not telling them a particular response earlier and about not telling them anything the first time. (EH. 152).

The fourth in this series of interviews began at 4:10 a.m. on July 2, 1987, and was taped and transcribed like the others. There, agent Pondakos asked Beasley to "tell me one more time, Connie" as to a particular response and agent Velboom asked her "[A]re you sure he told you about going back to the bones?" (EH. 153).

The next documented activity in the investigation was not until twelve days later. On July 14, 1987, agent Velboom authored a report in response to instructions from prosecutor Lee Atkinson that FDLE place and seal certain documents into a secure envelope. (EH. 160).

On July 15, 1987, LeRoy Parker, a senior crime lab analyst with FDLE's Orlando Regional Crime Lab, issued a report regarding his analysis and documentation of the blood stains in Grantham's vehicle. (EH. 100-01). Mr. Parker testified that

his conclusions were presented in the report. In particular, Mr. Parker said the reconstruction of the stains tended to indicate that someone in the driver's seat was probably shot in the left side of the head by someone who was most likely outside of the car. Additionally, he felt that the body had slumped over to the passenger side and was then removed to the right side of the rear seat. Then the body was later moved across the seat and then taken out of the vehicle on the left side. (EH. 103-04). Parker recalled that he was subpoenaed by the defense at the trial and felt it was "somewhat strange" to get a defense subpoena instead of one from the State. (EH. 107; 112).

Beasley testified at the grand jury on July 15, 1987. No prosecutor informed FDLE agents about the contents of Beasley's grand jury testimony and none of the agents inquired about it. (EH. 170; 189). There were no law enforcement interviews with Beasley after July 2, 1987, until July 16, 1987. (EH. 158).

It was at the July 16, 2001, interview that Beasley told the agents that Mr. Anderson walked into the apartment while Grantham was trying to rape her. (EH. 163). Agent Velboom could not recall if his agency informed the State Attorney's Office of the change in testimony nor if any prosecutor asked about the July 16, 1987, interview. (EH. 165). On July 23, 1987, agents Velboom and Davenport met Beasley at her attorney's

home in Eagle Lake, Florida. The interview was, at some point, terminated with Mr. Edmonds' request for a meeting with prosecutor Skye. (EH. 166).

On July 24, 1987, Beasley changed the motive of the crime from rape intervention to robbery when she and her lawyer met Skye, Velboom and Davenport at the prosecutor's office. It was at the July 24, 1987, meeting that the State accepted Edmonds' and Beasley's offer to testify against Mr. Anderson in exchange for Beasley's plea to third degree murder with no more than a three year sentence. (EH. 167).

With Beasley's new explanation on July 24, 1987, FDLE agent Davenport recognized that Beasley's statements from June 4, 1987, to July 24, 1987, were not consistent as to the motive for Mr. Anderson to kill Grantham. He testified that "[F]irst she told a story whereby Mr. Anderson entered the apartment -- his apartment and was -- interrupted a rape --an attempted rape by Mr. Grantham on herself, Connie Beasley. And then it subsequently developed that Richard Anderson killed Robert Grantham for money." (EH. 192-93).

Agent Davenport also testified that Beasley was not consistent in how the opportunity for the murder was supposed to have taken place, that is, in terms of any arrangements for getting Mr. Grantham to Mr. Anderson's Tampa apartment. (EH.

194).

Furthermore, agent Davenport's testimony reflected his awareness that Beasley had changed her statements about going back to the sand hill to locate Grantham's body. (EH. 194).

SUMMARY OF ARGUMENT

1. Following an evidentiary hearing, the trial court found that at least one day after the Grand Jury testimony the FDLE knew that Connie Beasley Hunt had committed perjury before the grand jury and that said knowledge was then chargeable to the State Attorney's Office. The testimony from the evidentiary hearing clarified that Beasley Hunt consistently changed her stories regarding the material aspects of the motive and opportunity for the murder as well as numerous details regarding her involvement and that of Anderson's over the time she was questioned by the State. Even after the prosecutor obtained personal awareness of these facts on February 1, 1988, the State went to trial a week later. By continuing to ignore its obligations to so inform the court, parties and grand jury itself of the perjury, this inaction by the State resulted in a corruption of the truth-seeking function of the trial process and violated Mr. Anderson's due process rights. Additionally, the trial court erred in denying an evidentiary hearing for remaining prosecutorial misconduct sub-claims by failing to give

an appropriate rationale or record attachment in its order of denial in violation of Mr. Anderson's Constitutional rights.

2. Mr. Anderson's trial counsel was ineffective for failing to make a complete record regarding mitigation witness testimony. This error was compounded by the trial court's failure to state a sufficient "record supported" rationale in its order. The trial court therefore erred when it denied Mr. Anderson an evidentiary hearing on the claim that trial counsel was ineffective for failing to proffer mitigation evidence. The trial court also erred when it denied an evidentiary hearing without providing a rationale or record attachment on the remaining ineffective assistance of counsel sub-claims of Mr. Anderson's Rule 3.850 motion.

3. The trial erred in denying an evidentiary hearing on Mr. Anderson's cumulative error claim because no rationale or record attachment was provided in the order of denial.

4. The trial court erred when it denied Mr. Anderson's corpus delicti claim because the basis for the provided rationale was incorrect and there was no record attachment that otherwise would comply with the requirements of a proper order of denial.

5. Trial counsel was deficient in its challenge to inadequate and unconstitutional jury instructions. Therefore,

the trial court erred when it denied a hearing on this claim regarding ineffective assistance of counsel.

ARGUMENT I

THE TRIAL COURT'S RULING FOLLOWING THE POST-CONVICTION EVIDENTIARY HEARING WAS ERRONEOUS.

A. Perjured testimony before the grand jury.

The trial court denied what it described as Ground 1 to Richard Harold Anderson's Rule 3.850 motion after the conclusion of the evidentiary hearing. The evidentiary hearing was limited to the issue of whether the State of Florida knowingly presented perjured testimony to the grand jury or should have known and therefore be charged with knowing. (PC-R. 533-38; as modified, PC-R. 557-59; 560-64). This ruling was in error. The ruling deprived Mr. Anderson of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

A key consideration is what the State knew and the timing of that knowledge combined with the State's responsibilities under Florida and federal constitutional law. The trial court's analysis of the events leading up to and including July 15, 1987, reflects that the evidence fell short of proving that the State knowingly presented false and perjured testimony of Connie

Beasley to the grand jury on July 15, 1987.

However, the court found that the State knew of the perjury the very next day. As shown in the August 25, 2000, order, the court found:

> "5. That at least one day after the Grand Jury testimony the FDLE knew that Connie Beasley Hunt had committed perjury before the grand jury and that said knowledge is then chargeable to the State Attorney's Office."
>
> (PC-R. 537; as modified, PC-R. 557-59; 560-64).

Testimony at the evidentiary hearing revealed that prosecutor John Skye realized, possibly by February 1, 1988, that Beasley's post-grand jury statements did not conform with her grand jury testimony. (EH. 15-16). Skye was also aware that Beasley had provided the State with "five or six different type interviews" over the course of time. (EH. 19).

Furthermore, by July 24, 1987, FDLE agent Davenport recognized that Beasley's statements from June 4, 1987, to July 24, 1987, regarding the motive for Mr. Anderson to kill Grantham were inconsistent. He testified that "[F]irst she told a story whereby Mr. Anderson entered the apartment -- his apartment and was -- interrupted a rape --an attempted rape by Mr. Grantham on herself, Connie Beasley. And then it subsequently developed that Richard Anderson killed Robert Grantham for money." (EH.

192-93).

Agent Davenport also testified that Beasley was not consistent in how the opportunity for the murder was supposed to have taken place, that is, in terms of any arrangements for getting Mr. Grantham to Mr. Anderson's Tampa apartment. (EH. 194). Similarly, agent Davenport's testimony reflected his awareness that Beasley had changed her statements about going back to the sand hill to locate Grantham's body. (EH. 194).

Consequently, the testimony from the evidentiary hearing clarified that Beasley consistently changed her stories regarding motive and opportunity for the murder as well as numerous details regarding her involvement and that of Anderson's over the time she was questioned by the State.

These material aspects of the case prove that the trial court at the evidentiary hearing and this Court on direct appeal were in error with portions of their respective holdings. Namely, while the trial court found that "... the better practice would have been [for the State] to return to the Grand Jury and get a new indictment" (PC-R. 537), the trial court further found "[T]hat had the State Attorney gone back in front of the Grand Jury they would again have received a First Degree Murder Indictment against Defendant Anderson." (PC-R. 537).

In a similar vein, this Court previously found that "...

Beasley's grand jury testimony, although false in part, was not false in any material respect that would have changed the indictment." Anderson, 574 So.2d at 92.

This issue turns, then, on what actually would have happened on July 17, 1987, if the State had returned to the grand jury to obtain a new indictment. On July 17, 1987, Beasley's testimony would have been that Mr. Anderson walked into the apartment while Grantham was trying to rape Beasley, that Mr. Anderson pulled Grantham away, told Beasley to get dressed, and forced Grantham into the car at gunpoint.

The answer as to what would happen with a new indictment on July 17, 1987, was provided by this Court in Hoefert v. State, 617 So.2d 1046 (Fla. 1993). There it was held:

> "Premeditation is the essential element which distinguishes first-degree murder from second-degree murder. Wilson v. State, 493 So.2d 1019 (Fla. 1986). Premeditation may be proven by circumstantial evidence. Sireci v. State, 399 So.2d 964 (Fla. 1981), cert. denied 456 U.S. 984, 102 S.Ct. 2257, 72 L.Ed.2d 862 (1982), overruled on other grounds by Pope v. State, 441 So.2d 1073 (Fla. 1983). However, "[w]here the element of premeditation is sought to be established by circumstantial evidence, the evidence relied upon by the state must be consistent with every other reasonable inference." Cochran v. State, 547 So.2d 928, 930 (Fla. 1989). Where the State's proof fails to exclude a reasonable hypothesis that the homicide occurred other than by premeditated design, a verdict of first-degree murder cannot be sustained. Hall v. State, 403

So.2d 1319 (Fla. 1981).

See: Evans v. State, 432 So.2d 584 at 584 (Fla. 2d DCA 1983)("... the natural effect of that type of testimony [regarding an insurance policy] would be to encourage the jury to consider premeditation or motive and thereby envision a greater degree of murder than the degree charged."). The Hoefert court reversed the first-degree murder conviction, in part, because there was no proof of the presence or absence of adequate provocation or previous difficulties between the parties. Hoefert, 617 So.2d at 1048.

Second-degree murder is defined as "unlawful killing of a human being, when perpetrated by any act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual." Sec. 782.04(2), Florida Statutes (1987) as cited in Hoefert, 617 So.2d at 1050.

Consequently, there seems to be no other conclusion but that a grand jury indictment would have been for second-degree murder if based on the July 16, 1987, statements about Mr. Anderson interrupting the rape of Connie Beasley by Robert Grantham. This is consistent with the July 16, 1987, details regarding lack of premeditation and the provocation of interrupting

Grantham's rape of Beasley. The record already reflected that Mr. Anderson was aware, by that date, of Grantham's unwanted sexual advances towards Beasley which had caused Beasley to first seek the intervention of her father and, subsequently, the involvement of Mr. Anderson. (EH. 196).

The seriousness of due process violations incurred by the use of perjured grand jury testimony was discussed at length by this Court in Mr. Anderson's direct appeal:

> "... due process is violated if a prosecutor permits a defendant to be tried upon an indictment which he or she knows is based on perjured, material testimony without informing the court, opposing counsel, and the grand jury. This policy is predicated on the belief that deliberate deception of the court and jury by the presentation of evidence known by the prosecutor to be false 'involve[s] a corruption of the truth-seeking function of the trial process,' United States v. Agurs, 427 U.S. 97, 104, 96 S.Ct. 2392, 2398, 49 L.Ed.2d 342 (1976), and is 'incompatible with rudimentary demands of justice.'" Giglio v. United States, 405 U.S. 150, 153, 92 S.Ct. 763, 765, 31 L.Ed.2d 104 (1972)(citations omitted)."
>
> Anderson, 574 So.2d at 91.

The State of Florida knew on July 16, 1987, that Connie Beasley's grand jury testimony was perjured. Even after prosecutor Skye obtained personal "awareness" of this fact on February 1, 1988, (EH. 15-16), the State continued to ignore its obligations to so inform the court, parties and grand jury

itself. Instead, it went to trial on February 8, 1987, knowing of the perjury and violating its obligations in preventing a corruption of the truth-seeking function of the trial process. Instead of presenting Mr. Anderson with the chance to defend against a second-degree murder charge, the State circumvented the rudimentary demands of justice by going to the Hillsborough County Jail and elsewhere to fill-in the hole it had dug with Beasley's perjury. Instead of "feeling foolish more than anything else" (EH. 15), prosecutor Skye should have felt the need to return to the grand jury to correct this violation of Mr. Anderson's due process rights.

B. Other sub-claims regarding prosecutorial misconduct.

The court also erred in denying an evidentiary hearing on the other or remaining sub-claims presented in Claim I of the Rule 3.850 motion. In fact, the Huff order correctly described only one of the prosecutorial misconduct sub-claims presented in Claim I:

> "1.A PIN REGISTRY AND WIRE TAP:
>
> a. The issue as to whether there was sufficient probable cause to issue a pin register and Wire Tap is an issue that should have been raised on Direct Appeal, and therefore is not cognizable under 3.850.
>
> An Evidentiary Hearing is Denied as to Ground 1.
>
> 1.B. PERJURED TESTIMONY:

> a. Defendant alleges that the State Attorney's Office knowingly presented perjured testimony to a Grand Jury.
>
> b. The record is unable to conclusively refute this allegation.
>
> c. The Defendant is entitled to an Evidentiary Hearing as to this issue."
>
> (PC-R. 498-99).

The claim regarding the perjured testimony issue was covered in paragraphs six through ten of Claim I of the Rule 3.850 motion. (PC-R. 462-63).

The remainder of Claim I presented additional prosecutorial misconduct allegations under Brady v. Maryland, 373 U.S. 83 (1963), in paragraphs two through five as follows:

> "2. The Hillsborough County State Attorney's Office (HCSAO) withheld testimony that Mr. Gallon attempted to suborn perjury by soliciting false incriminating testimony of Mr. Tony House and Mr. Bernard Walker against Mr. Anderson.
>
> 3. At trial, the State called Mr. Kenneth Gallon, a.k.a. "Termite" to testify that Mr. Anderson had given several incriminating statements during his incarceration at the Hillsborough County Jail. The HCSAO withheld the fact from defense counsel that Mr. Gallon had a history of giving perjured testimony in return for lenient treatment by the HCSAO. Neither Mr. Anderson nor his counsel were notified that Mr. Gallon was an informant for the State. (R. 1197-1203, 1217-1237).
>
> 4. The prosecution failed to disclose a previously undisclosed letter dated

September 15, 1987. Daniel M. Hernandez, Mr. Gallon's defense counsel, wrote a letter addressed to Mr. Skye. In this letter, Mr. Hernandez stated:

> This letter is to confirm our telephone conversation last week in which I advised you that Mr. Gallon is in a position to offer additional information regarding **other cases, including an unresolved homicide.** It is my understanding that you will be sending an investigator to the County Jail to obtain a proffer from Mr. Gallon regarding these cases. If my understanding is incorrect, I would appreciate you contacting my office. Furthermore, if you have any questions regarding this matter or any other matter of mutual concern, please do not hesitate to contact me.
>
> Sincerely yours,
>
> Daniel M. Hernandez, Esq.
>
> (emphasis added).

This letter was withheld from defense counsel at the time of the trial. The letter was written after Mr. Gallon had given a statement August 5, 1987, and after he had testified at an August 11, 1987, bond hearing regarding Mr. Anderson's case (R. 1773). Mr. Skye then went further to state that he did not have "actual knowledge" until he re-read the February 5, 1998 deposition which he did not attend (R. 1777).

5. In a pro se motion filed by Mr. Gallon March 4, 1988, Mr. Gallon complains that he was to get 12 years for testifying

in Mr. Anderson's case.

> Because I PLEA for a term of 17 to 22 yrs. or It can be let down to a term of 12 to 17 yrs. If I testify the True to a murder that I hear in 2 South 2 Cell, And I did what I Plea for, I testify the True about Richard Anderson murder that man. Like I told the State Attorney and He say to me you can get 12 yrs. out of this. That was O.K. But I did not Plea for know [sic] 14 ½ yrs. with a 5 yrs. Prob. and That is not in the Plea agreement or on the Record and Richard Anderson get the Death Penalty.
>
> This pro se Motion for Mitigation and Reduction of Sentence was denied by Judge Susan Bucklew April 8, 1988."

(PC-R. 460-62).

The Huff order neither contains a stated rationale nor record attachments for the denial of a hearing on these additional sub-claims. It would appear, in fact, that the trial court inadvertently ignored paragraphs two through five of Claim I because the "Pin Registry and Wire Tap" sub-claim was presented in paragraph 12 of Claim III as an ineffective assistance of counsel sub-claim. (PC-R. 466).

The court, therefore, erred in summarily denying the paragraph two through five sub-claims of Claim I without a hearing because:

> "To support summary denial without a

> hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion." Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), *citing* Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993).

Accord: Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000)("this Court's cases decided since *Hoffman* [571 So.2d 449 (Fla. 1990)] have made clear that an order denying an evidentiary hearing is sufficient if it sets forth a clear rationale explaining why the motion and record conclusively refute each claim..." (citing Diaz, supra)(emphasis added).

ARGUMENT II

> **THE TRIAL COURT ERRED BY FAILING TO GRANT AN EVIDENTIARY HEARING SO MR. ANDERSON COULD ESTABLISH THAT TRIAL COUNSEL WAS INEFFECTIVE AND PREJUDICIALLY DEFICIENT DURING THE PENALTY PHASE OF HIS TRIAL IN VIOLATION OF HIS RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL AND OF HIS RIGHTS TO DUE PROCESS AND A FAIR TRIAL UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.**

A. Denial of evidentiary hearing on counsel's failure to present mitigating evidence.

The trial court erred when it denied Mr. Anderson an evidentiary hearing on the claim that trial counsel was ineffective for failing to proffer mitigation evidence. A Rule

3.850 litigant is entitled to an evidentiary hearing unless "the motion and the files and records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; See also, Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); Gaskin v. State, 737 So.2d 509 (Fla. 1999). This Court has stated, "[t]o uphold the trial court's summary denial of claims raised in a 3.850 motion, the claims must be either facially invalid or conclusively refuted by the record." Peede v. State, 748 So.2d 253 (Fla. 1999). Mr. Anderson's trial counsel was ineffective for failing to make a complete record regarding mitigation witness testimony. This error was compounded by the post-conviction court's failure to state a sufficient "record supported" rationale in its order denying an evidentiary hearing on this claim. The lower court's rationale for denying a hearing was that "a proffer would have been a waste of the Court's time because the Defendant knowingly chose not to present any [mitigation]." (PC-R. 499-500).

The record relied upon by the post-conviction court established that immediately prior to defense counsel's penalty phase presentation, counsel informed the court that his client did not wish to present any witnesses in mitigation. The following exchange occurred between counsel, his client and the

trial judge:

THE COURT: Defense ready to proceed?

MR. OBER: Judge, before we do, and before the jury's brought back in, I would like to put a few matters on the record with Mr. Anderson, and I would request that he be allowed to approach this bench so we can communicate with the Court.

THE COURT: Yes.

MR. OBER: Judge, at this time, I would announce to the Court and certainly allow the Court, for the limited purpose of this inquiry, to address Mr. Anderson, but based on my involvement in this case and also with the assistance of Mr. Ashwell, we have uncovered many witnesses that I feel could testify in Mr. Anderson's behalf, favorably to him, during the second phase.

And I would cite the names of those individuals which we have found. That would be Dr. Robert M. Berland; William Anderson, who is Mr. Anderson's father; Helen Anderson, his mother; David Anderson, his brother; Vickie Barber, his sister; Griffin Simmons, a sister of his; also a Joyce Wilson, a witness; and his son, Kyle Anderson.

In addition to that, we have gone to the correctional institute of individuals that --of individuals in the system who know Mr. Anderson based on his past incarceration, one Chaplain William Hanawalt, Major Sammy Hill, who is a correctional officer at Zephyrhills Correctional Institute and Superintendent Ray Henderson at the Department of Corrections in Lauderhill, Florida.

Additionally, there are other witnesses including employers and employees of Mr.

Anderson, his friends, including Kay Bennett, who I believe could lend some assistance to Mr. Anderson during this portion of the proceeding.

After very great detail with him in the presence of Mr. Fuente, Mr. Ashwell, myself, and Mr. Anderson, over the portion of time that I've been involved in this, he has never wavered in his desire not to have any of these people testify during the course of this second phase proceeding. I have told him that I believe it to be in his best interest, and I'm announcing that for the record.

And he has commanded me not to call these individuals because that is his desire.

THE COURT: You wish to question Mr. Anderson concerning what you just said Mr. Ober?

MR. OBER: Mr. Anderson, you heard my statement to Judge Graybill. Is there anything that you would like to add to that?

Do you concur in the statements I made or do you disagree with them, or do you, at this time, want any individuals, those I mentioned or anyone else that, perhaps, we hadn't discussed, who will assist you in this second phase proceeding?

THE DEFENDANT: I concur with the statements you made.

MR. OBER: And-

THE DEFENDANT: I would rather not have any witnesses testify on my behalf that you mentioned or that could, in fact, be called.

THE COURT: Mr. Anderson, are you on any kind of drugs or medication that would

affect your ability to understand what's going on today?

THE DEFENDANT: No, sir, not at all.

THE COURT: All right. Mr. Ober, you put it in the record. Mr. Anderson has responded.

Will the bailiff please have the jury return to the courtroom?

(R. 2166-69).

On direct appeal, this Court found that Mr. Anderson's "waiver" of the right to present witnesses in mitigation was not subject to the requirements of Faretta v. California, 422 U.S. 806, 95 S.Ct. 2525, 45 L.Ed.2d 562 (1975) and Johnson v. Zerbst, 304 U.S. 458, 58 S.Ct. 1019, 82 L.Ed. 1461 (1938) since Mr. Anderson was represented by counsel. Anderson v. State, 574 So.2d 87, 95 (Fla. 1991). Thus, this Court ruled that the trial court was not compelled to conduct any inquiry on the record under Faretta regarding waiver of counsel nor to determine whether Mr. Anderson made a knowing, intelligent and voluntary waiver of his constitutional right to present mitigating evidence under Johnson. Anderson, 574 So.2d at 95.

However, this Court recently reaffirmed the procedure that must be followed when a defendant waives the presentation of mitigating evidence. In Waterhouse v. State, 2001 WL 578413 (Fla. May 31, 2001), the Court stated:

"In Koon v. Dugger, 619 So.2d 246, 250 (Fla.

> 1993) *quoted with approval in Chandler v. State*, 702 So.2d 186, 199 (Fla. 1997), we outlined the procedure which must be followed when a defendant waives the presentation of mitigating evidence. The procedure was detailed as follows:
>
> Counsel must inform the court on the record of the defendant's decision. Counsel must indicate whether, based on his investigation, he reasonably believes there to be mitigating evidence that could be presented and what the evidence would be. The court should then require the defendant to confirm on the record that his counsel has discussed these matters with him, and despite counsel's recommendation, he wishes to waive presentation of penalty phase evidence. Koon, 619 So.2d at 250." Waterhouse, 2001 WL 578413 at 2. (emphasis added).

The Waterhouse ruling indicated that "[T]he underlying purpose for this framework is to protect against 'the problems inherent in a trial record that does not adequately reflect a defendant's waiver of his right to present any mitigating evidence.' [citing Koon, 619 So.2d at 250]." Waterhouse, 2001 WL 578413 at 3.

In Waterhouse this Court reviewed the record and found the following proffer of evidence sufficient to satisfy counsel's obligation under the Sixth Amendment: a doctor's affidavit detailing his conclusion that Waterhouse may have been under the influence of extreme emotional disturbance which may have

impaired his capacity to conform his conduct to the requirements of law; that arrangements were made for the transportation of Waterhouse's brother for testifying at his proceeding, and that the court had appointed another doctor to examine the possibility that he might suffer from organic brain damage. Waterhouse, 2001 WL 578413 at 3.

This review noted that "... this case demonstrates that the end sought by the Koon decision (i.e., a clear record as to defendant's waiver of the presentation of mitigating factors) was actually accomplished in this case." Waterhouse, 2001 WL 578413, at 3. The review was undertaken even though Koon was "technically" inapplicable to Waterhouse because Allen v. State, 662 So.2d 323, 329 (Fla. 1995) noted that Koon was prospective. Waterhouse, 2001 WL 578414, at 3.

Because the record in Mr. Anderson's case is not "a clear record," he deserves the same review that Waterhouse received. Specifically, Mr. Anderson's claim regarding ineffective assistance of trial counsel in failing to proffer the details of Mr. Anderson's mitigation evidence goes to the fact that there is a complete failure of his record to show "what the evidence would be" as required by Koon, 619 So.2d at 250, Chandler, 702 So.2d at 199, and Waterhouse, 2001 WL 578413 at 3.

The United States Supreme Court requires that a defendant show two elements in establishing a claim of ineffective assistance of trial counsel:

> "First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unreliable."
>
> Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674, (1984), at 687.

Furthermore, establishment of prejudice is controlled by the following requirement:

> "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."
>
> Strickland, 466 U.S. at 694.

As presented in the Rule 3.850 Motion, after the guilt phase of a capital trial, defense counsel must discharge very significant constitutional responsibilities at the sentencing

phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may never have made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). (PC-R. 470). Mr. Anderson's trial counsel listed the names of the potential mitigation witnesses but failed to identify what each would testify to or present to the court. (R. 2167-68). Trial counsel neglected to proffer what the mitigation evidence would be. And the trial court's inquiry to Mr. Anderson concerning his "understanding" of the proceedings due to possible drug or medication usage did nothing as to giving the post-conviction court or this Court a clear record of what the mitigation evidence would be. (R. 2169). Mr. Anderson was thereby prejudiced by trial counsel's lack of functioning as guaranteed by the Sixth Amendment to the United States Constitution because there is no record as to what the mitigation evidence would be. Mr. Anderson is prejudiced because, but for trial counsel's deficiencies, the record would include the details that could or would have shown that the result of the proceeding would have been different. Strickland, 466 U.S. 694.

When describing her view regarding waivers of constitutional

rights, Justice Barkett stated in her separate opinion in the direct appeal:

> "Such an inquiry would leave 'a record adequate for any review that may be later sought and forestalls the spin-off of collateral proceedings that seek to probe murky memories.' Boykin [v. Alabama], 395 U.S. 238, 89 S.Ct. 1709, 23 L.Ed.2d 274 (1969) at 1712-13 (footnote and citations omitted). To require a simple inquiry would have no detrimental effect on the administration of justice. It would require no additional judicial resources to protect the rights of a death-sentenced defendant. In fact, it would facilitate this Court's mandatory review of death penalty appeals."
>
> Anderson, 574 So.2d at 97.

Here, by reason of the failure to make a proffer, the record is devoid of what the mitigation evidence would be if trial counsel had presented testimony from the witnesses he listed for the trial court. The record is devoid of anything that shows Mr. Anderson understood or knew what the mitigation evidence would be. The record is devoid of anything that shows the trial court knew what the mitigation evidence would be. Certainly, the trial record is devoid of anything to show that a proffer "would have been a waste of the Court's time" as the post-conviction court so found. (PC-R. 500).

B. The lower court erred when it denied an evidentiary hearing on the remaining sub-claims regarding ineffective assistance of counsel.

The court erred in denying an evidentiary hearing on the

remaining sub-claims presented in Claim IV of the Rule 3.850 motion. The sub-claim of ineffective assistance of counsel in failing to call mitigation witnesses during the penalty phase was covered in paragraphs one through four of Claim IV of the Rule 3.850 motion (PC-R. 470-71). The remainder of Claim IV presented additional ineffective assistance of counsel claims in paragraphs five through fourteen as follows:

> " 5. Defense counsel failed to render effective assistance of counsel by failing to object to the Cold, Calculated, and Premeditated aggravating factor. The judge charged, "The crime for which the defendant is to be sentenced was committed in a cold, calculated, and premeditated manner without any pretense of moral or legal justification." (R. 2255-56). There was a failure to give the jury any meaningful guidance as to what is necessary to apply this unconstitutionally vague aggravator and was not understandable to the average juror.
>
> 6. Defense counsel failed to render effective assistance of counsel by failing to object to the instruction of "previous conviction of a violent felony" as an aggravator (R. 2255). This instruction was not understandable by the average juror.
>
> 7. Defense counsel failed to render effective assistance of counsel by neglecting to comment in the closing argument about the questionable credibility of the guilt-innocence witnesses; Ms. Beasley and Mr. Gallon. Guilt-innocence witnesses are considered a non-statutory mitigator.
>
> 8. Defense counsel failed to render effective assistance of counsel by failing

to comment in the closing argument on Mr. Anderson's gainful employment since his release from prison as a mitigator. Counsel did mention Mr. Anderson's gainful employment (R. 2249), but did not argue the fact as a mitigator.

9. Defense counsel failed to render effective assistance of counsel by failing to object to the inflammatory and improper argument of the prosecution:

a) The prosecutor's comment in closing argument that, "He'll (Mr. Anderson) still get up every morning, see the sun come up, have friends, read books, get letters, and visits from his family. It's life Something he denied Robert. Something he stole from Robert Grantham." (R. 2232).

b) The prosecutor's comment in closing argument, "...I submit to you, by the course of conduct in things they do, in fact, forfeit their right to live. And the death penalty is appropriate to protect society from them. Enough is enough." (R. 2233).

c) The prosecutor's closing argument that Mr. Anderson posed a future threat to society if not given the death penalty. The prosecutor was suggesting Mr. Anderson would kill again (R. 2230-31).

d) The prosecutor's suggestion that Mr. Grantham would be alive if the death penalty were imposed in other circumstances. (R. 2232-33). In effect, the prosecutor was urging a non-statutory aggravator.

10. Defense counsel was deficient by allowing, without objection, the jury to consider factors outside the scope of evidence and the law.

11. Defense counsel was deficient in not asking for curative instructions.

12. Defense counsel was deficient in closing argument by failing to raise all the mitigators, such as, Mr. Anderson's finding

> religion, good conduct while in prison, his difficult childhood, and his emotional problems.
>
> 13. No tactical motive can be ascribed to an attorney whose omissions are based on ignorance or on the failure to properly investigate or prepare.
>
> 14. Defense counsel was rendered ineffective assistance of counsel by failing to clearly establish the facts of the disproportionality of the death penalty being sought against Mr. Anderson and the punishment that the co-defendant, Connie Beasley, was to receive."
>
> (PC-R. 471-73).

To support summary denial of a Rule 3.850 claim without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), citing Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993). Accord: Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000)("this Court's cases decided since *Hoffman* [571 So.2d 449 (Fla. 1990)] have made clear that an order denying an evidentiary hearing is sufficient if it sets forth a clear rationale explaining why the motion and record conclusively refute each claim...". (emphasis added).

The Huff order contains neither a stated rationale nor

record attachments for the denial of a hearing on the additional sub-claims. The Huff order only addressed the part of claim IV regarding the failure of defense counsel to present mitigation witnesses:

> "4. INEFFECTIVE COUNSEL - PENALTY PHASE
>
> a. The claim is that Defense Counsel was ineffective for failure to present mitigation in Sentencing phase [sic]."
>
> b. The Defendant specifically instructed Trial counsel not to present evidence and also advised the Court that he chose not to present
> evidence and the Defendant was examined by the Court as to this matter.
>
> c. Defense Counsel now alleges that the Defendant should have proffered mitigating testimony [sic] could have presented.
>
> d. A proffer would have been a waste of the Court's time because the Defendant knowingly chose not to present any.
>
> e. An Evidentiary is Denied as to Ground 4."
>
> (PC-R. 499-500).

The presentation of a rationale for its ruling as opposed to an attachment of those specific parts of the record that refute the claim would ordinarily comply with the requirements of Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989

(Fla. 2000). However, the trial court merely gave its own characterization of the substance of the claim. There is no basis or rationale provided as to why the trial court disagreed with or rejected the substance of the claim. The trial court likewise failed to attach any specific parts of the record to refute this claim.

An incomplete or non-existent rationale, in the absence of a record attachment, cannot comply with Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000).

ARGUMENT III

WHEN VIEWED AS A WHOLE, THE COMBINATION OF PROCEDURAL AND SUBSTANTIVE ERRORS DEPRIVED RICHARD HAROLD ANDERSON OF A FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING.

Mr. Anderson did not receive the fundamentally fair trial to which he was entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The errors in Mr. Anderson's guilt and penalty phases, when considered as a

whole, virtually dictated the sentence of death. The errors have been revealed in this brief, in the 3.850 motion and the direct appeal. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards required by the Constitution against an improperly imposed death sentence. Repeated instances of ineffective assistance of counsel and the trial court's numerous errors significantly tainted the trial and penalty phase. These errors cannot be harmless. Under Florida case law, the cumulative effect of these errors denied Mr. Anderson his fundamental rights under the Constitution of the United States and the Florida Constitution. State v. DiGuilio, 491 So.2d 1129 (Fla. 1986); Ray v. State, 403 So.2d 956 (Fla. 1981); Taylor v. State, 640 So.2d 1127 (Fla. 1st DCA 1994); Stewart v.State, 622 So.2d 51 (Fla. 5th DCA 1993); Landry v. State, 620 So.2d 1099 (Fla. 4th DCA 1993).

The rationale for the trial court's denial of an evidentiary hearing for Claim X of the Rule 3.850 motion was presented as follows:

> "10. TOTALITY ARGUMENT
>
> a. This argument basically incorporates the concept that when all things are coupled together the Defendant did not receive a fair trial.
>
> b. An Evidentiary Hearing is Denied as

to Ground 10."

(PC-R. 501).

To support summary denial of a Rule 3.850 claim without a hearing, a trial court must either state its rationale in its decision or attach those specific parts of the record that refute each claim presented in the motion. Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), *citing* Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993). Accord: Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000)("this Court's cases decided since *Hoffman* [571 So.2d 449 (Fla. 1990)] have made clear that an order denying an evidentiary hearing is sufficient if it sets forth a clear rationale explaining why the motion and record conclusively refute each claim...". (emphasis added). A mere restatement of the claim is not a rationale.

ARGUMENT IV

THE TRIAL COURT ERRED WHEN IT DENIED AN EVIDENTIARY HEARING ON THE ISSUE OF FAILURE TO ESTABLISH CORPUS DELICTI OF MURDER IN THE FIRST DEGREE. THIS WAS FUNDAMENTAL ERROR IN VIOLATION OF MR. ANDERSON'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. THIS ARGUMENT IS PRESENTED PURSUANT TO THE DICTATES OF SIRECI V. STATE, 773 SO.2d 34, 41 (FN14) (FLA. 2000), TO PRESERVE THE ISSUE FOR REVIEW.

The rationale for the trial court's denial of an evidentiary hearing for Claim V of the Rule 3.850 motion was presented as follows:

> "5. CORPUS DELICTI:
>
> a. This issue was litigated on Direct Appeal and the Florida Supreme Court has ruled that there was sufficient Corpus Delicti.
>
> b. This issue is not cognizable in a 3.850 hearing.
>
> e. [sic] An Evidentiary Hearing is Denied as to Ground 5."
>
> (PC-R. 500).

The presentation of a rationale for its ruling as opposed to an attachment of those specific parts of the record that refute the claim would ordinarily comply with the requirements of Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000).

However, the trial court made no citation to this Court's direct appeal decision in Anderson v. State, 574 So.2d 87 (Fla. 1991) to show the basis for its rationale. In fact, the trial court is in error in giving this rationale because the issue was not litigated on direct appeal and was not identified as an issue on appeal or in any ruling in that direct appeal opinion

of this Court.

Additionally, the trial court erred when it ruled that the issue "is not cognizable in a 3.850 hearing." (PC-R. 500). A component of the claim was the allegation that trial counsel was ineffective because "defense counsel failed to investigate or discover that Mr. Grantham suffered from a history of mental illness--diagnosed as antisocial personality disorder--and that he had been a convicted felon with a motivation to disappear again. This information would have corroborated testimony that Ms. O'Neil had received a phone call after the date Mr. Grantham was supposedly killed, which inferred that Mr. Grantham may still be alive. However, this information went undiscovered by defense counsel. Therefore, no strategy or tactical reason could be possible for information they did not know existed." (PC-R. 476).

Consequently, the rationale given is in error both as to indications that the issue was presented and covered by the direct appeal and as to the claim not being cognizable in a Rule 3.850 motion. An incorrect rationale, in the absence of a record attachment, cannot comply with Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998), Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993), Brown v. State, 755 So.2d 616, 628 (Fla. 2000) and Asay v. State, 769 So.2d 974, 989 (Fla. 2000).

ARGUMENT V

THE TRIAL COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THE ADVISORY ROLE AND BURDEN SHIFTING ISSUES REGARDING THE PENALTY PHASE JURY INSTRUCTIONS. TO THE EXTENT TRIAL COUNSEL FAILED TO LITIGATE THESE ISSUES, TRIAL COUNSEL WAS INEFFECTIVE. THIS ARGUMENT IS PRESENTED PURSUANT TO THE DICTATES OF SIRECI V. STATE, 773 SO.2d 34, 41 (FN14) (FLA. 2000), TO PRESERVE THE ISSUE FOR REVIEW.

The trial court denied Claims VII and IX of the Rule 3.850 motion with the rationale that the jury instructions were required under Florida law at the time of Mr. Anderson's sentencing. (PC-R. 500-01).

The jury was instructed on three aggravating factors in this case: 1) prior violent felony conviction, 2) the crime was committed for pecuniary gain, and 3) the crime was committed in a cold, calculated and premeditated manner. (R. 2255). The instructions the jury received did not narrow the application of these vague and over broad aggravators, and the jury's verdict of death is therefore, unreliable. Though the jury's verdict in the penalty phase is only advisory, the sentencing judge is required to give "great weight" to the jury's recommendation. Thus, the trial court indirectly weighed the unconstitutional aggravating factors the jury is presumed to have found. Espinosa v. Florida, 505 U.S. 1079, 112 S.Ct. 2926, 120 L.Ed.2d 1854 (1992); Kearse v. State, 662 So.2d 677 (Fla. 1995).

Under Florida law, a capital sentencing jury must be "[T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed ... [S]uch a sentence could be given if the state showed the aggravating circumstances outweighed the mitigating circumstances." State v. Dixon, 283 So.2d 1 (Fla. 1973)(emphasis added). The court instructed Mr. Anderson's Appellant's jury, "Should you find sufficient aggravating circumstances to exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the circumstances." (R. 2256). Defense counsel rendered prejudicially deficient assistance in failing to adequately object to the errors.

The instructions violated Florida law and the Eighth and Fourteenth Amendments in two ways. First, the instructions shifted the burden of proof to Mr. Anderson on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Appellant's Due Process and Eighth Amendment rights. Mullaney v. Wilbur, 421 U.S. 684, 95 S.Ct. 1881, 44 L.Ed.2d 508 (1975). See also Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). The jury was not instructed in conformity with the

standard set forth in Dixon. Second, the instruction essentially told the jury that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 486 U.S. 367, 108 S.Ct. 1860, 100 L.Ed.2d 384 (1988); Hitchcock v. Dugger, 481 U.S. 393, 107 S.Ct. 1821, 95 L.Ed.2d 347 (1987).

The unconstitutional instructions precluded the jurors from evaluating the "totality of the circumstances." State v. Dixon, 283 So.2d at 10. The jurors would reasonably have understood, incorrectly, that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. Mr. Anderson is entitled to relief in the form of a new sentencing hearing in front of a jury because his sentencing was tainted by improper jury instructions.

Mr. Anderson's jury was inadequately guided and channeled in its sentencing discretion. Because counsel deficiently failed to litigate this issue, Richard Harold Anderson was denied a reliable and individualized sentencing determination in violation of the Sixth, Eighth, and Fourteenth Amendments. The error cannot be harmless in this case. Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130, 117 L.Ed.2d 367 (1992).

In light of the weight given the unconstitutional shifting

of the burden of proof and the evidence of mitigation, the consideration of the unconstitutional aggravating factors cannot be held harmless beyond a reasonable doubt. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967). If the unconstitutional instructions had not been given, the jury probably would have recommended life. Richard Harold Anderson is entitled to a new penalty phase hearing.

CONCLUSION AND RELIEF SOUGHT

Based on the forgoing, the lower court improperly denied Rule 3.850 relief to Richard Harold Anderson. This Court should order that his conviction and sentence be vacated and remand the case for such relief as the Court deems proper.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by U.S. Mail, first class postage prepaid, to all counsel of record on this _____ day of August, 2001.

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CERTIFICATE OF COMPLIANCE

We hereby certify that the foregoing Initial Brief of Appellant was generated in Courier New 12-point font pursuant to Fla.R.App.P. 9.210.

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