

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC03-631

ASKARI ABDULLAH MUHAMMAD
(F/K/A THOMAS KNIGHT)
Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE ELEVENTH JUDICIAL CIRCUIT,
IN AND FOR DADE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves an appeal of the circuit court's summary denial of Rule 3.850 relief, as well as various rulings made during the course of Mr. Muhammad's request for post conviction relief. The following symbols will be used to designate references to the record in this appeal:¹

"OT."-- original trial record on appeal.

"R" -- record on direct appeal from Mr. Muhammad's Re-Sentencing Proceeding to this Court;

"PCR." -- record on post conviction appeal;

"PCT." (date)" -- post conviction transcripts.

¹At the time of this filing, the Clerk of Court, Dade County has yet to supplement the record. Because Petitioner desires to limit any further delay, he files his initial brief at this time. Any citations to items that are to be included in the supplemental record will be referred to by document name and page number.

REQUEST FOR ORAL ARGUMENT

Mr. Muhammad 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 posture as Mr. Muhammad. Accordingly counsel urges that the Court permit oral argument.

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STATEMENT OF THE CASE AND OF THE FACTS

A. TRIAL & RE-SENTENCING PROCEEDINGS.

The Circuit Court in and for the Eleventh Judicial Circuit, Dade County Florida entered the judgments and sentences under consideration. On August 28, 1974, the grand jury indicted Mr. Muhammad for the First Degree Murders of Lillian and Sidney Gans (OT. 3700-3702). Mr. Muhammad's trial was held April 2, 1975. He entered pleas of Not Guilty and Not Guilty by Reason of Insanity (OT. 3761-3162).

On April 19, 1975, the jury returned a verdict of guilty on the charges of First Degree Murder (OT. 3799-3800) and the jury recommended a sentence of death. The trial court sentenced Mr. Muhammad on April 21, 1975 (O.T. 3803-3806).

On direct appeal, this Court affirmed Mr. Muhammad's convictions and sentences. Knight v. State, 338 So. 2d 201 (Fla. 1976).

On January 22, 1980, Mr. Muhammad filed a Petition for Writ of Habeas Corpus which was dismissed by the trial court. This Court rejected Mr. Muhammad's habeas claims. Knight v. State, 394 So. 2d 997 (Fla. 1981).²

²In a separate case, Mr. Muhammad was convicted and sentenced to death for murder of a prison guard. On direct appeal, this Court affirmed. Muhammad v. State, 494 So. 2d 969 (Fla. 1986). Mr. Muhammad filed a Motion for Postconviction Relief which the trial court summarily denied. On appeal from the summary denial, this Court

On January 29, 1981, the Governor signed a death warrant in the instant case. Mr. Muhammad filed a Petition for Writ of Habeas Corpus and Stay of Execution in the United States District Court, Southern District of Florida, Miami Division. The district court granted Mr. Muhammad's motion, retained jurisdiction and ordered Mr. Muhammad to exhaust his remaining state law claims. Mr. Muhammad filed a Post Conviction Motion pursuant to Fla. Rule Crim. P. 3.850. The trial court summarily denied the motion and this Court affirmed the denial. Muhammad v. State, 426 So. 2d 533 (Fla. 1982).

The federal proceedings resumed in District Court where Mr. Muhammad's petition was dismissed. The Eleventh Circuit Court of Appeals however, reversed the district court's order and remanded Mr. Muhammad's case for a re-sentencing due to error based upon Hitchcock v. Dugger, 863 F.2d 705 (11th Cir. 1988).

Mr. Muhammad's re-sentencing began January 23, 1996. On February 8, 1996, the re-sentencing jury recommended sentences

reversed and remanded the matter to the trial court for an evidentiary hearing regarding Mr. Muhammad's Brady v. Maryland, 373 U.S. 83 (1963) claim. Muhammad v. State, 603 So. 2d 488 (Fla. 1992). In May, 2001, the Bradford County circuit court granted Mr. Muhammad relief in the form of new penalty phase. The State and Mr. Muhammad both filed appeals. This Court reversed the relief granted to Mr. Muhammad by the trial court and denied rehearing. A petition for Writ of Certiorari was filed in the United States Supreme Court and denied.

of death by a vote of 9-3 (R. 3935-3935) which the trial court imposed on February 20, 1996 (R. 5-43).

This Court denied Mr. Muhammad's direct appeal from the re-sentencing. Knight v. State, 746 So.2d 43 (1998).³

A timely Petition for a Writ of Certiorari to the United States Supreme Court was filed and subsequently denied on November 8, 1999. Knight v. Florida, 528 U.S. 990, 120 S. Ct. 459 (1999).

B. POSTCONVICTION PROCEEDINGS.

³The following issues were raised: 1) trial court erred in allowing Det. Smith's hearsay testimony (procedurally barred); 2) error to allow Det. Smith to remain in courtroom throughout proceedings (no abuse of discretion, exception to the rule of sequestration appropriate under facts of case); 3) prosecutor's reliance on future dangerousness (procedurally barred, did not rise to fundamental error); 4) trial court failure to instruct jury that life sentences would run consecutively (no abuse of discretion); 5) trial court error in instructing jury that Mr. Muhammad's absence was caused by his misconduct (no abuse of discretion); 6) that the trial court erred in allowing Dr. Miller's testimony (sub-claims regarding confidentiality and Fifth and Sixth Amendment issues procedurally barred, defense opened door to remainder); 7) error in denying defense peremptory challenge to juror Rivero-Saiz (procedurally barred); 8) error in excluding jurors Weldon, Zaribaf, and Cunningham (no abuse of discretion); 9) improper prosecutorial argument; 10) trial court failure to instructed the jury on merged aggravators; 11) error to instruct on prior violent felony aggravator; 12) error to instruct on the cold, calculated, premeditated aggravator; 13) error in instructing on heinous, atrocious, or cruel (without merit); 14) error in failing to instruct on defense requested instruction on statutory mental mitigators (standard instructions repeatedly upheld); 15) error in sentencing Mr. Muhammad to death (sentencing judge considered relevant aggravators and mitigators, harmless error in finding HAC; 16) Florida death penalty statute is unconstitutional, (consistently rejected by the court); and 17) executing Mr. Muhammad after long incarceration on death row amounts to cruel and unusual punishment (lacks merit).

On November 7, 2000, Mr. Muhammad filed his initial post-conviction motion relative to his re-sentencing.

On January 24, 2001, conflict free counsel was appointed. Mr. Muhammad timely made his public Records Demands on January 29, and 30, 2001 which were litigated. Mr. Muhammad also filed a Motion for an In Camera inspection of records claimed to be exempt. The lower court denied counsel access to some of the records which were sealed and transmitted to this Court by the Clerk or Court. Mr. Muhammad filed his Amended Post Conviction Motion on March 23, 2002 (See PCR 170-324) and on June 28, 2002, filed a Notice of Supplemental Authority in light of Ring v. Arizona. On December 13, 2002. the lower court held a hearing pursuant to Huff v. State, 622 So. 2d 982 (Fla. 1993). On January 16, 2003 the court entered an order summarily denying Mr. Muhammad's Amended Motion To Vacate (PCR 435-474). On February 13, 2003, Mr. Muhammad filed his Motion for Rehearing⁴ which was denied on February 25, 2003. Mr. Muhammad timely filed his Notice of Appeal. The instant appeal follows.

SUMMARY OF ARGUMENTS

The lower court erred in summarily denying Mr. Muhammad's 3.850 motion which contained extensive factual allegations

⁴This item is to be included in the supplemental record on appeal.

requiring evidentiary development. The lower court employed the wrong standard in denying an evidentiary hearing. The individual claims as pled in the amended motion demonstrate facts sufficient for such a hearing.

Florida's sentencing procedure allowing a less than unanimous verdict is unconstitutional under Ring v. Arizona.

The introduction of non statutory aggravating factors rendered Mr. Muhammad's re-sentencing unconstitutional.

Mr. Muhammad's re-sentencing jury was improperly instructed regarding aggravating factors.

Mr. Muhammad's jury was misled by instructions which improperly diminished the sentencing jury's role.

The burden of proof was unconstitutionally shifted to Mr. Muhammad to prove that a life sentence was warranted.

Florida statute setting forth aggravating factors a is unconstitutionally vague.

The prosecutor impermissibly suggested to the jury that death was required.

Florida sentencing statute fails to prevent the arbitrary and capricious imposition of the death penalty and violates the constitutional guarantee against cruel and unusual punishment.

Mr. Muhammad may be incompetent at the time of execution.

Finally, Mr. Muhammad requests this Court independently

review the documents submitted under seal and determined by the lower court to be either exempt from disclosure and/or containing no Brady material.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. MUHAMMAD'S CLAIMS AND IN FAILING TO ORDER THAT AN EVIDENTIARY HEARING BE HELD.

A. IMPROPER SUMMARY DENIAL.

The lower court summarily denied significant claims raised by Mr. Muhammad, including allegations of ineffective assistance of counsel. The lower court's ruling was generally premised on the erroneous belief that allegations pled in a Rule 3.850 motion must be "proved". The lower court committed reversible error.

While this case falls within the rules established before the 2001 amendments to Fla. R. Crim. P. 3.850, evidentiary hearings on initial motions for post conviction relief regarding claims wherein facts are in dispute are still required. A defendant is entitled to an evidentiary hearing, "unless the motion and record conclusively show that the defendant is entitled to no relief." Fla. R. Crim. P. 3.850(d). When ineffective assistance of counsel is argued, a defendant is entitled to an evidentiary hearing upon a showing of, "specific facts which are not conclusively rebutted by the record and which demonstrate a deficiency in performance that prejudiced the defendant." Gaskin v. State, 737 So.2d 509, 516

(Fla. 1999)(But see Nelson v. State, 2004 Fla. LEXIS 890; 29 Fla. L. Weekly S277 (Fla. June 3, 2004) (receding in part from Gaskin). For example:

While the post conviction defendant has the burden of pleading a sufficient factual basis for relief, an evidentiary hearing is **presumed necessary** (emphasis added)absent a *conclusive* (emphasis original) demonstration that the defendant is entitled to no relief. In essence, the burden is upon the State to demonstrate that the motion is legally flawed or that the record conclusively demonstrates no entitlement to relief.

Gaskin at 516.

* * *

The rule was never intended to become a hindrance to obtaining a hearing or to permit the trial court to resolve disputed issues in a summary fashion.

Gaskin at 516. This is exactly what the lower court did in Mr. Muhammad's case.

Under the new rule, evidentiary hearings are now required on factually based claims. See Fla. R. 3.581, Court Commentary, 2001 Amendment ([evidentiary hearing required] "on claims listed in an initial motion as requiring a factual determination. The Court has identified the failure to hold evidentiary hearings on initial motions as a major cause of delay in the capital post conviction process and has determined that, in most cases, requiring an evidentiary hearing on initial motions presenting factually based claims will avoid this cause of delay." See Amendments to Florida Rules of

Criminal Procedure 3.851, 3.852 and 3.993, 772 So. 2d 488, 491 (Fla. 2000).) (Citation in original). Had Mr. Muhammad filed his motion after the new rule went into effect, there would be no question that an evidentiary hearing would have been granted. Mere timing of the rule should not supersede what is otherwise the intent of the rule.

Moreover, Mr. Muhammad's Amended Motion To Vacate presented factually based claims, which are not **conclusively refuted** by the files and records in this case, and which are in dispute. Under either rule, the lower court erred as a matter of law and fact in denying Mr. Muhammad an evidentiary hearing on his claims, precluding him from proving at an evidentiary hearing, what he alleged in his post conviction motion.

The lower court stated in its order:

The burden of persuasion is on a defendant to prove, by a preponderance of competent evidence, that counsel's performance was unreasonable. *Strickland v. Washington, 104 S. Ct 2052, 2064 (1984)*. The standard for counsel's performance is "reasonableness under prevailing professional norms." *Strickland v. Washington, 104 S. Ct 2052, 2065*. "The test for ineffectiveness is not whether counsel could have done more; perfection is not required. Nor is the test whether the best criminal defense attorneys might have done more. Instead the test is...whether what they did was within the wide range of reasonable professional assistance," *Waters v. Thomas 46 F. 3d 1506, 1518 (11th Cir. 1995)*((citations omitted)

In order to prevail on an ineffective assistance of counsel claim, the defendant must demonstrate counsel's performance was deficient. This requires

showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by 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 the defendant makes such showing it cannot be said that the conviction or death sentence resulted in a bread down in the adversary process that renders the result unreliable. *Strickland v. Washington*, 466 U.S. at 687.

To establish prejudice during the penalty phase the defendant must show that there is a reasonable probability that, absent trial counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. *Cherry v. State*, 781 So. 2d. 1040 (Fla. 200) quoting *Strickland* 466 U.S. At 695.

(PC-R. 436-437). The lower court applied a more strict standard than required in assessing whether an evidentiary hearing was warranted, *i.e.*, requiring Mr. Muhammad to prove his claims in the motion alone without hearing the evidence that would have proved the claims. At an evidentiary hearing Mr. Muhammad would have the burden to prove his claims, however he is not required to meet that same burden in his pleadings alone. If this were the case, there would never be a need to have evidentiary hearings.

This Court has specifically rejected similar rulings on the sufficiency of the pleadings. See e.g. *Ventura v. State*, 673 So. 2d 479 (Fla. 1996); *Mills v. Dugger*, 559 So. 2d 578,

578-579 (Fla. 1990) ("Mills claimed that his counsel rendered ineffective assistance by not developing and presenting evidence of his mental impairment and deficiency in an attempt to mitigate his sentence. He now argues that the trial court erred in not holding an evidentiary hearing on this claim. Treating the allegations as true except to the extent rebutted by the record, *Harrich v. State*, 484 So. 2d 1239 (Fla.), cert. denied, 476 U.S. 1178, 106 S.Ct. 2908, 90 L.Ed.2d 993 (1986), we find that a hearing on this issue is needed. Therefore, we direct the trial court to hold an evidentiary hearing in regards to counsel's failure to develop and present evidence that **would tend to establish** statutory or non statutory mental mitigating circumstances. See *Gorham v. State*, 521 So. 2d 1067 (Fla. 1988); *Jones v. State*, 446 So. 2d 1059 (Fla. 1984)."); *Harvey v. Dugger*, 656 So. 2d 1253, 1257 (Fla. 1995) ("A number of Harvey's other penalty phase claims relating to ineffectiveness of counsel to do not appear to be such as would warrant relief under the prejudice prong of *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L.Ed.2d 674 (1984). However, the cumulative effect of such claims, if proven, might bear on the ultimate determination of the effectiveness of Harvey's counsel.") (emphasis added); *Thompson v. State*, 731 So. 2d 1235, 1256 (Fla. 1999)(Thompson's initial

3.850 motion and motion for rehearing allege that counsel was ineffective during the penalty phase for failing to develop adequate mitigating evidence that would have demonstrated Thompson's impaired mental condition and substantiated the testimony of the psychologist who testified in the sentencing proceedings.")(emphasis added).

Mr. Muhammad's amended post conviction motion met the required threshold of "tending to establish" the claims alleged. Likewise, Rule 3.850 states that:

...(c) Contents of Motion. The motion shall be under oath and include:

* * *

(6) a brief statement of the facts (and other conditions) relied on in support of the motion.

Fla. R. Crim P. 3.850 (c)(6) [emphasis added]. At the end of the Florida Rules of Criminal Procedure, the Court illustrates the intent of the rule by providing a form motion for filing a Rule 3.850 motion. See Fla. R. Crim. P. 3.987. In that form the following instructions are given:

14. State **concisely** every ground on which you claim that the judgment or sentence is unlawful. Summarize **briefly** the **facts** supporting each ground.

Fla. R. Crim. P. 3.987 (Florida Rules of Court, 2202 edition at page 352). The Court outlines a list of grounds that a movant

may choose from that are properly raised in a Rule 3.850 motion. A form is offered for use:

A. Ground
1: _____

Supporting FACTS (tell your story **briefly** without citing cases or law): _____

_____.

Fla. R. Crim. P. 3.987 at page 354. In each instance, the rule highlights brevity in pleading the facts at every juncture.

Even if the intent of the rule were not so clear, the lower court necessarily found that the files and records did not conclusively show that Mr. Muhammad was not entitled to relief

because the lower court specifically ordered the State to respond.⁵

Under Lemon v. State, 498 So. 2d 923 (Fla. 1986), the facts and allegations contained in Mr. Muhammad's Rule 3.850

⁵(d) **Procedure; Evidentiary hearing; Disposition.** ...Unless the motion, files, and records of the case conclusively show that the prisoner is entitled to no relief, the court shall order the state attorney to file an answer or other pleading within the period of time fixed by the court or take such other action as the judge deems appropriate. Fla. R. Crim. P. 3.850.

post conviction motion must be taken as true unless conclusively rebutted by the record.

The rule does not require Mr. Muhammad to plead all of the proof he would offer in support of the facts pled in his Rule 3.850 motion. This Court does not make such a requirement because counsel is entitled to develop a post conviction defense strategy without revealing his witnesses to the State. There is no requirement that counsel reveal its case to the State by submitting affidavits of witnesses or attaching the specific pieces of evidence which support the facts. Under Lemon, those facts must be taken as true. It is at an evidentiary hearing that Mr. Muhammad would be required to prove the facts alleged and carry his burden of proof. If the requirement were that a defendant must plead facts and his proof, it would obviate the need for an evidentiary hearing.

Mr. Muhammad need only show a *prima facie* basis for relief. See Brown v. State, 596 So. 2d 1026 (Fla. 1992). *Prima facie* is defined in the following fashion:

At first sight; on the first appearance; on the face of it; so far as can be judged from the first disclosure; presumably; a fact presumed to be true unless disproved by some evidence to the contrary.

Black's Law Dictionary, Fifth Edition, 1979.

Mr. Muhammad has met this definition and the pleading

requirements of Fla. R. Crim. P. 3.850/3.851. Accordingly, the lower court erred in summarily denying Mr. Muhammad's claims. This Court should Order that the case be remanded for a full evidentiary hearing.

B. INDIVIDUAL CLAIMS

Petitioner herein presents the individual claims to which the standard discussed in section A above should have been applied. Due to page limitations, Petitioner highlights areas pled in Mr. Muhammad's Amended Post Conviction Motion.

Petitioner relies upon the entire Amended Motion to Vacate which is incorporated herein and attached as the Appendix to support his argument that the Motion was sufficiently pled to warrant an evidentiary hearing.

1. CLAIM II: THE STATE'S EIGHT YEAR DELAY IN RE-SENTENCING MR. MUHAMMAD AND SEEKING THE DEATH PENALTY VIOLATED MR. MUHAMMAD'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS. THE STATE'S DELAY AND VIOLATION OF MR. MUHAMMAD'S DUE PROCESS RIGHTS DIS-ENTITLED THE STATE FROM SEEKING A SENTENCE OF DEATH.

In denying an evidentiary hearing on this claim, the lower court stated that the claim was procedurally barred because of the issue raised on direct appeal in Knight v. State, 746 So. 2d 437 (Fla. 1998)(See PC-R. 439). The issue raised in the direct appeal however is a distinct issue, *i.e.*, that it was cruel and unusual punishment to execute an individual who had

been on death row for 20 years, See Knight v. State, 746 So. 2d at 437 ("Knight claims that to execute him after he has already endured **more than two decades on death row is unconstitutionally cruel and unusual punishment**. He also argues that Florida has forfeited its right to execute Knight under binding norms of **international law.**")(emphasis added). In his Amended Motion to Vacate however, Mr. Muhammad raised an entirely different issue both legally and factually. Mr. Muhammad's motion asserted that the State violated Mr. Muhammad's constitutional rights to due process and the mandate of the Eleventh Circuit Court of Appeals and stated:

After instituting post conviction proceedings and litigating his appeals under an active death warrant, the Eleventh Circuit granted Mr. Muhammad sentencing relief in 1988 based on Hitchcock error.⁶ The error which caused Mr. Muhammad to receive relief was entirely based upon the trial court's refusal to allow Mr. Muhammad to present mitigating evidence at his original sentencing proceeding. In it's order reversing Mr. Muhammad's death sentence the Eleventh Circuit stated:

We therefore remand this case to the district court with instructions to enter an order granting the application for writ of habeas corpus, unless the State within a reasonable period of time either resentences Muhammad in a proceeding that comports with Lockett or vacates the death sentences and imposes a lesser sentence

⁶Hitchcock v. Dugger, 481 U.S. 393 (1987).

consistent with law.

Knight v. Dugger, 863 F.2d 705, 710 (11th Cir.

1989)(emphasis added).

Mr. Muhammad pled that:

The State's delay in prosecuting Mr. Muhammad caused eight years to pass before Mr. Muhammad's re-sentencing proceeding was conducted. After that proceeding Mr. Muhammad was re-sentenced to death. The State's delay violated the federal court's mandate, Mr. Muhammad's due process rights and Mr. Muhammad suffered immeasurable prejudice due to the State's delay.

The Florida Supreme Court has recognized that a defendant's due process rights may be impacted by delay. Jones v. State, 740 So. 2d 520, 524 (Fla. 1999); see also Peede v. State, 748 So. 2d 253 (Fla. 1999)(recognizing the need for timely proceedings and stressing that "the State is the party especially charged with the burden to see that [capital] cases are disposed of in a timely manner . . . "); Scott v. State, 581 So. 2d 887 (Fla. 1991); Bogue v. Fennelly, 705 So. 2d 575 (Fla. 4th DCA 1997)(holding that the defendant is entitled to raise whether the delay in sentencing violated his constitutional rights and/or due process of law).

In Jones, the Florida Supreme Court addressed a twelve year delay in holding a competency hearing. 740 So. 2d 520 (Fla. 1999). The Court held: "[the defendant's] due process rights were impacted by the twelve year delay in holding the competency measured from this Court's remand order for [the competency] hearing." Id. at 523. The Court noted that: 1) the defendant was entitled to a timely competency proceeding, 2) the State was unable to explain the delay and 3) the defendant was prejudiced by the delay. Id. at 524. The Court vacated Mr. Jones's conviction and sentence. Id. at 525.

(Appendix at 186-188).

Mr. Muhammad's amended post conviction motion further alleged the following:

Similarly, Mr. Muhammad was entitled to a timely re-sentencing proceeding. Due to the State's failure to timely re-prosecute Mr. Muhammad at his re-sentencing Mr. Muhammad was prejudiced.

In Scott, the Florida Supreme Court characterized delay in a criminal proceeding as "a due process claim under the fourteenth amendment". 581 So. 2d 887, 891 (1991). In that case, the State caused a seven year and seven month delay in prosecuting the defendant. Likewise, in waiting eight years to hold a re-sentencing proceeding in Mr. Muhammad's case, the State's actions unduly prejudiced Mr. Muhammad.

At an evidentiary hearing, Mr. Muhammad will present non record evidence of the State's delay, the practical affect of the delay at Mr. Muhammad's re-sentencing and the prejudice to Mr. Muhammad as a result.

Mr. Muhammad suffered actual prejudice due to the State's delay because critical material evidence became stale, and witnesses have either died or are otherwise unavailable. For example, Dr. Corwin's notes were destroyed (R. 2680). This action prevented Mr. Muhammad's counsel from effectively challenging the State's case for death. These circumstances were not due to the actions of Mr. Muhammad. (See e.g., defense opposition to motion to continue 11/1/91 hearing (R. 1675) and Mr. Muhammad 's repeated distrust of re-sentencing counsel. The prejudice is clear. In sentencing Mr. Muhammad to death the trial court relied upon the fact that Mr. Muhammad's experts had not seen or evaluated Mr. Muhammad on or near the date of the offense (July 17, 1974) and thus their opinions were rejected. The trial court stated:

The court begins its analysis of the defendant's experts' testimony by acknowledging the enormous challenge presented to a mental health professional when he or she is retained to evaluate a person's state of mind on a particular, distant, day in his life. In the present case Dr. Wells evaluated the defendant in 1971, three (3) years before the murders, and was asked to express his opinion about the defendant's state of mind on July 17, 1974 during a court proceeding that took place in 1996. Dr. Fisher saw the defendant for the first time in 1979, five (5) years after the murders, and then again in 1989. Dr. McClaine

examined the defendant in October of 1991, seventeen (17) years after the murders. Dr. Carbonell evaluated the defendant in 1989, fifteen (15) years after the murders. Dr. Toomer evaluated the defendant in October 1994, twenty (20) years after the murders.

* * *

. . . the court notes not only the passage of time between the day of the crimes and the day of the evaluations, but also the effect that time must have had on the defendant's state of mind. When Dr. Fisher first saw the defendant in 1979 the defendant had been in the relative isolation of death row for five (5) years. It is difficult to imagine what living under such circumstances must be like. But it would be unreasonable to believe that such austere conditions as exist there would not have a significant impact on a man's mind. By the time Dr. Fisher and Dr. Carbonell saw him in 1989 the defendant had been in what has been referred to as "Q-Wing", i.e. punitive solitary confinement, for nine (9) years. By the time Dr. McClaine examined him, he had been in "Q-Wing" for eleven (11) years, and by the time Dr. Toomer saw him he had been there for sixteen (16) years. The impact on the human mind that nine (9) to sixteen (16) years in solitary confinement, in a is (6) by nine (8) foot cell, without any companionship but for the occasional check by a corrections officer, must be devastating. **The court considers the passage of time in assessing the reliability of the opinions of the doctors who examined the defendant.**

(R. 28-31). (emphasis added). The forgoing ruling by the court demonstrates prejudice.

Also demonstrating the prejudice to Mr. Muhammad, the State used the passage of time against Mr. Muhammad to its advantage during cross examination of the defense experts and during its case in chief as well in argument (See e.g., R. 2573; 2780; 2902; 3063; 3071; 3242; 3814; 3824; 3839); and the court's sentencing order which states:

. . . Arthur Wells [defense expert], who I can only describe as the crown jewel of the presentation.

He has a skill, an ability that mere mortals don't have. He can meet with a person in group therapy for 60 minutes in 1971 and predict exactly how he is going to be feeling on Wednesday in the afternoon of July 17th 1974.

He has missed his calling. He really has a good opportunity to answer one of those phone lines on the Psychic Friends Network. He can predict the future, and I'm sure there are a lot of people who are willing to pay for that skill. But that is not reality.

* * *

He made a guess and his guess is when he testified here today, that he seen patients in that same hospital for 26 years and that he remembers one guy that he saw for an hour 24 years ago.

(R. 3846). The prejudice is manifest.

The delay also prevented Mr. Muhammad from a reliable competency determination. The delay in Mr. Muhammad's case provided the State with a tactical advantage and violated Mr. Muhammad's due process rights. See Scott, 581 So. 2d at 893.

Furthermore, the equitable doctrine of laches has repeatedly been asserted by the State in post conviction proceedings to bar claims of defendants. See Vaught v. State, 442 So. 2d 217 (Fla. 1983); Bartz v. State, 740 So. 2d 1243, 1245 (Fla. 3d DCA, 1999)("[T]he policy rationale for allowing a laches defense is important -- to acknowledge the finality of convictions at some point which, in turn, will foster confidence in the judicial system."); Wright v. State, 711 So. 2d 66 (Fla. 3d DCA, 1998). The doctrine must apply equally to defendants. In cases where a party relies on the doctrine of laches to defeat a claim an evidentiary hearing is warranted. See Perry v. State, 786 So. 2d 583(Fla. 1st DCA, Feb. 28, 2000).

The State violated Mr. Muhammad's due process rights in delaying his re-sentencing for eight years. The State did not "within a reasonable amount of time" re-sentence Mr. Muhammad. The actions of the State rendered re-

sentencing counsel ineffective. See also Claim III. A hearing is required so that Mr. Muhammad may set forth evidence to prove his claim. After which his death sentence should be vacated and Mr. Muhammad granted a life sentence.

(Appendix at 188-192).

Thus Mr. Muhammad presented a distinct legal issue in amended post conviction motion **not premised on the amount of time Mr. Muhammad has been on death row.** In it's summary denial, the lower court also ruled that this Court (again relying upon Knight v. State) found that the delay was partially caused by defendant. As stated above, the issue presented on direct appeal was whether it was cruel and unusual to execute someone who spent over two decades on death row. Thus on direct appeal this Court considered time frames and circumstances of delay that are not relevant to the issue presented in Mr. Muhammad's post conviction motion. Consequently, the lower court erred in finding that the issue was addressed in Knight v. State, 746 So. 2d 423(Fla. 1998).

Additionally the lower court stated that the fact that new re-sentencing counsel had been appointed, sought continuances and a competency hearing, that Mr. Muhammad failed to cooperate with appointed experts, litigated payments of an expert bill, and failed to provide discovery that

"defendant contributed to the delay." (PC-R. 440). First, the lower court failed to attach portions of the record that refute the allegation. Second, an evidentiary hearing is required regarding the specific allegations, relevant time frames, and instances of prejudice cited above, regardless of the lower court's conclusion that Mr. Muhammad "contributed to the delay".⁷

2. CLAIM III: MR. MUHAMMAD WAS DENIED THE EFFECTIVE

ASSISTANCE OF COUNSEL AT ALL STAGES OF HIS RE-SENTENCING IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS DUE TO THE ACTIONS OF THE STATE IN FAILING TO RE-SENTENCE MR. MUHAMMAD WITHIN A REASONABLE AMOUNT OF TIME. ADDITIONALLY, COUNSEL FAILED TO ADEQUATELY INVESTIGATE AND PREPARE MR. MUHAMMAD'S CASE, TO CHALLENGE TO THE STATE'S CASE, AND FAILED TO ZEALOUSLY ADVOCATE ON BEHALF OF HIS CLIENT. COUNSEL FAILED TO OBJECT TO OBVIOUS INADMISSIBLE EVIDENCE. COUNSEL FAILED TO EFFECTIVELY CROSS EXAMINE THE STATE'S WITNESSES. COUNSEL FAILED TO ADEQUATELY OBJECT TO EIGHTH AMENDMENT ERROR. A FULL ADVERSARIAL TESTING DID NOT OCCUR. THE COURT AND STATE RENDERED COUNSEL INEFFECTIVE. COUNSEL'S PERFORMANCE WAS DEFICIENT, AND AS A RESULT, MR. MUHAMMAD'S DEATH SENTENCE IS UNRELIABLE.

In addressing the State's failure to conduct a re-sentencing within a reasonable amount of time, the lower court again improperly relied upon this Court's ruling in Knight v. State, 746 So. 2d at 437 (Fla. 1998). (See PC-R. 439). For the same reasons addressed above

⁷The lower court's reliance upon Mr. Muhammad's failure to cooperate with experts ignores Mr. Muhammad's allegations presented in his Amended Motion to Vacate that Mr. Muhammad's inability to cooperate was due to his mental illness. The issue should not be decided without evidentiary hearing.

relating to Claim II, this ruling is erroneous.

Mr. Muhammad raised the issue that the State's failure to ensure a timely re-sentencing rendered Mr. Muhammad's re-sentencing counsel ineffective and that Mr. Muhammad was prejudiced as a result. Mr. Muhammad pled in his motion:

Because of the State's failure to conduct a re-sentencing within a reasonable time, evidence became stale, and witnesses have either died or otherwise unavailable. For example, Dr. Corwin's notes were destroyed (R. 2680). This action prevented Mr. Muhammad's counsel from effectively challenging the State's case for death. These circumstances were not due to the actions of Mr. Muhammad. (See e.g., defense opposition to motion to continue 11/1/91 hearing at R. 1675 and Mr. Muhammad's repeated distrust of re-sentencing counsel. The prejudice is clear. In sentencing Mr. Muhammad to death the trial court relied upon the fact that Mr. Muhammad's experts had not seen or evaluated Mr. Muhammad on or near the date of the offense (July 17, 1974) and thus their opinions were rejected.

(Appendix at 193).

The motion further alleged:

Re-sentencing counsel exacerbated the errors and was ineffective for failing to file a Motion in Limine to preclude this type of argument, for failing to object, request curative instructions and a mistrial. Moreover re-sentencing counsel was ineffective for failing to adequately preserve this issue for direct appeal.

The disadvantage caused by the State's failure to timely resentence Mr. Muhammad in and of itself rendered re-sentencing counsel ineffective. For example, although the state the time lapse between 1974 and 1996 to Mr. Muhammad's disadvantage, re-sentencing counsel unreasonably failed to challenge the State's experts including Dr. Fennell (who evaluated Mr. Muhammad in 1991) testimony that Mr. Muhammad was malingering when assessing his competency to proceed -- an issue not relevant to the mental health mitigators at the time of the offense and far removed from the date of the offense (R.

3074). Dr. Fennell's testimony also was irrelevant and improper as it constituted an aggravating factor not recognized by statute. Re-sentencing counsel's performance at the re-sentencing proceeding only served to further prejudice Mr. Muhammad. Consideration of such matters by the sentencers only served to improperly tip the scales toward death. Stringer v. Black, 503 U.S. 222, 112 S.Ct. 1130 (1992).

(Appendix at 196-197).

Mr. Muhammad also pled that re-sentencing counsel rendered ineffective assistance of counsel in failing to provide critical and relevant materials to the experts. The motion asserted:

Materials that were provided were not given to the experts in a timely fashion in order to allow an adequate review. For example, during a hearing held November 1, 1991, Dr. McClaine was not given records from the Florida State Prison (R. 1708), did not review trial transcripts (R. 1724), saw Dr. Miller's report for the first time the same day he testified (R. 1755) was unaware of Mr. Muhammad's family history of mental illness, did not review many of the records because he did not have time (R. 1708) and performed an "inadequate survey of the records" (R. 1709). The sentencing court also acknowledged that Dr. Wells did not analyze the facts.

The failure to provide records to the experts however, was not limited to the competency hearing. At the re-sentencing, the State's theory against Mr. Muhammad was that he premeditated the deaths of Sidney and Lillian Gans and had no mental disturbance or infirmity whatsoever. Re-sentencing counsel's theory was that Mr. Muhammad suffered from a severe mental illness, suffered from an extreme mental or emotional disturbance on the day of the offense, and that his capacity to appreciate the criminality of his actions and/or to conform his conduct to the requirements of the law was substantially impaired on the date of the offense. As stated above, the passage of time severely

hindered, if not made it impossible, re-sentencing counsel's ability to present a mental health defense to the state's case for death given the fact the re-sentencing defense experts did not evaluate Mr. Muhammad near the time of the offense. In addition to this however, re-sentencing counsel was ineffective for failing to provide the experts with the necessary materials in order to allow them to conduct professional, competent and credible opinions and failed to ensure that the experts were prepared. For example Dr. Fisher was provided with only 1/10th of Mr. Muhammad's prison history (R. 2566), never reviewed the 1981 transcripts and was not familiar with the facts of the 1974 case (R. 2580, 2583). Other experts were also not properly prepared, failed to be familiar with other reports, did not read the trial testimony or were unaware of the facts (See e.g., R. 2807; 2879). In fact, Dr. Carbonnell was not contacted by re-sentencing counsel until 2 weeks before her testimony at the re-sentencing (R. 2883) and did not review her records since 7 years prior to the proceeding (2893). Dr. McClaine testified that his evaluation was "grossly inadequate" (R. 2980) and that he was further hindered in his efforts because the jail was uncooperative about getting records (R. 2984) and that he did not read all the records (R. 2987; 2997). Re-sentencing counsel also failed to provide critical documentation to Dr. Toomer (R. 3035; 3066; 3087).

Had re-sentencing counsel provided the necessary background information to mental health experts, trial counsel would have learned and presented evidence that Mr. Muhammad's actions were a product of his mental illness. The evidence supporting this includes evidence that Mr. Muhammad's actions at the time of the offense were not the product of logical thought but rather indicate a fragmented, psychotic thought process, experiencing hallucinations, and thus his mental illness played a significant role in his actions. This evidence would have supported a finding that Mr. Muhammad was suffering from an acute or active psychotic episode and provided credible evidence to support statutory mitigating factors as well as non statutory mitigation.

(Appendix at 201 -203)(emphasis added).

In his post conviction motion, Mr. Muhammad also presented other factual instances of ineffective assistance of counsel. The motion alleged:

At the re-sentencing, Mr. Muhammad's counsel posed a very lengthy hypothetical to the defense experts to rely upon to establish that Mr. Muhammad was under the severe stress of police presence during the Gans' episode. The experts were asked to **assume** that Mr. Muhammad was aware of the police presence and to then determine if that fact was a sufficient stressor to propel schizophrenic Askari Muhammad into a psychotic episode such that he was under an extreme mental or emotional disturbance and that his capacity to appreciate the consequences of his actions or conform his conduct to the requirements of the law was substantially impaired. Re-sentencing counsel rendered prejudicial ineffective assistance of counsel to Mr. Muhammad in using this hypothetical, failing to use factual evidence to support it and requesting that the finders of fact merely **assume** its existence. The State challenged the hypothetical (although possessing evidence that actually supported the hypothetical), presenting evidence that Mr. Muhammad was unaware of the police presence. The state capitalized on re-sentencing counsel's ignorance of the facts and evidence in the case:

The defense attorney, especially with the experts, was asking what is called a hypothetical question. A hypothetical question is basically a version that they would like to be true according to the facts.

You have to decide whether or not it is true or accurate before it makes any sense, and I tried to write down some of the things that were in the hypothetical as it went along and it changed a little bit.

At one point, we had a claim that police officers in uniform were involved in the chase; that they were plainly marked police cars in the chase; that other cars may have been marked but the planes and the helicopters were overhead.

Well, those are not the facts.

* * *

Let's talk about these three separate false issues that had nothing to do with this case.

(R. 3781) and the sentencing court relied upon this fact in its sentencing order. First, evidence exists that the state possessed evidence of the overwhelming and obvious police presence. The State's argument to the contrary violates Giglio and failure to disclose this evidence violates Brady. Secondly however, to the extent re-sentencing counsel knew of this evidence and failed to present it, re-sentencing counsel was ineffective in failing to correct the state's assertion that Mr. Muhammad was not aware of the police presence. Re-sentencing counsel's entire theory hinged upon this hypothetical and counsel unreasonably relied upon it and failed to develop it fully. Re-sentencing counsel was also unaware of other facts of the case. Evidence exists that went un-presented at the re-sentencing that actually supported the hypothetical that re-sentencing counsel relied upon. Additionally, counsel rendered deficient performance in failing to attack the state's case with inconsistent evidence that came out during the trial held in 1975. Such performance was deficient and prejudiced Mr. Muhammad. To the extent the state failed to disclose this evidence Mr. Muhammad's rights were violated. Brady v. Maryland, 373 U.S. 83(1963). The state committed a Giglio violation in presenting false and misleading argument. United States v. Giglio, 405 U.S. 150, 154 (1972)

(Appendix at 203-205).

In it's summary denial of this claim, the lower court also ruled that re-sentencing counsel's failure to present evidence regarding Mr. Muhammad's behavior at the time of the offense was essentially harmless because "having presented evidence concerning mental issues to the jury" counsel cannot be deemed ineffective for failing to do so. The lower court relied upon this Court's decision on direct appeal. However,

the evidence presented at trial is no substitute for the evidence Mr. Muhammad plead in his 3.850. Mr. Muhammad pled:

For example, the jury did not know that Mr. Muhammad presented very bizarre behavior, suffered from hallucinations, abused drugs, and suffered the devastating abandonment of his wife - behavior and events witnessed by other individuals near the time of the offense. Had defense counsel utilized this information he could have presented this information to the mental health experts and defeated the aggravating factors and provided reliable evidence of statutory and non statutory mitigating factors. The jury also did not know the circumstances and conditions of the Okeechobee Boy's School where Mr. Muhammad was sent when he was only 9 years old. Had re-sentencing counsel investigated, a wealth of information would have been available to show the jury the horrific conditions and treatment meted out at the school.

* * *

Evidence also reveals that during the 1975 proceedings Mr. Muhammad's behavior was strange and distant and stress had an impact upon his behavior and ability to communicate. Additionally, evidence shows that Mr. Muhammad also had an uncle treated for mental illness. Expert testimony would have revealed the inappropriate setting of the boy's school as a treatment plan for 9 year old Thomas. Re-sentencing counsel also failed to present the testimony of Dr. David Reichenberg who evaluated Mr. Muhammad in 1974. Defense counsel failed to utilize compelling admissible sworn testimony of Mr. Muhammad's mother. The testimony of his mother would have been very compelling. Former teachers could have testified that Mr. Muhammad's behavior drastically changed after the rape of Mary Ann, and that as a boy Mr. Muhammad was not a disciplinary problem in school. Additional evidence was available to demonstrate that the rural farm worker community in which Mr. Muhammad grew up was among the poorest, most hopeless in the nation, without health facilities or juvenile programs, where the

life expectancy was 48 years of age, and where many people died of hunger and tuberculosis.

(Appendix at 206-208).

Another instance of ineffective assistance of counsel pled by Mr. Muhammad related to pre-trial publicity. The motion assert:

Mr. Muhammad was prejudiced as a result because the record reflects that the news coverage in fact reached Mr. Muhammad's jury (R. 2817; 2823-2838). At an evidentiary hearing Mr. Muhammad will present non record evidence of the pervasive news coverage and the affect it had upon Mr. Muhammad's re-sentencing proceedings. Trial counsel was ineffective for failing to adequately litigate this issue. Defense counsel merely requested that the media be excluded (R. 2817) and abandoned the issue after the trial court stated that the issue was more involved and would necessitate bringing in the media. Re-sentencing counsel failed to effectively litigate the issue of jury sequestration. Trial counsel had no strategic reason for his failures.

(Appendix at 209-210).

Further, Mr. Muhammad alleged a conflict of interest that was sufficiently plead. Mr. Muhammad pled:

Defense counsel rendered prejudicially ineffective assistance of counsel because counsel was laboring under an actual conflict of interest and failed to move to withdraw from the case. Throughout the proceedings re-sentencing counsel (husband and wife team) stated on the record the conflict and the inability to represent Mr. Muhammad but did nothing to cure the conflict. Re-sentencing counsel was actually afraid of Mr. Muhammad's mental illness and told the court that he did not want his wife, co-counsel, in the same room with Mr. Muhammad (11/4/91 hearing at R. 1986, and re-sentencing counsel stating that it will take him a month to get the courage back up to see Mr. Muhammad R. 1998; "I couldn't deal with

the guy at 1991) Defense counsel went so far as to ask the trial court for advice (R. 3105) and requested in open court that Mr. Muhammad be handcuffed when counsel talked to him (R. 3121).

(Appendix at 210).

Other examples of ineffective assistance of counsel were also specifically pled:

Re-sentencing counsel failed to raise appropriate objections, move to strike and seek limiting instructions to prevent the admission of inadmissible testimony and evidence. For example the state repeatedly referred to escapes, uncharged misconduct and Mr. Muhammad's juvenile record. The state went so far as to allege before the jury (without substantiation) that his prior attorney, Susan Cary, while a law student, held her skirt up for Mr. Muhammad and that she and Mr. Muhammad were involved in inappropriate acts at the prison (R. 2917). This appalling and irrelevant allegation went without objection. The State again referred to Mr. Muhammad and Susan Cary's "personal relationship" (R. 2986). Here, the defense did object however no curative instruction or motion for mistrial was requested or given. Despite the sustained objection, the state again however inquired of a witness about Susan Cary (R. 3011), wherein the trial court merely asked the state why such a tactic was necessary. The state was also allowed, without proper objection, to re-present the entire guilt phase of the case without challenge.

(Appendix at 211).

Mr. Muhammad's motion also asserted:

In its opinion affirming Mr. Muhammad's death sentence, the Florida Supreme Court noted several issues that could not be addressed on direct appeal because re-sentencing counsel failed to preserve the issues. Re-sentencing counsel failed to effectively voir dire the panel and exercise challenges. For example, re-sentencing counsel exercised a peremptory challenge to juror Rivero-Saiz, however re-sentencing counsel failed to renew the objection before the jury was sworn. See Knight v. State,

746 So. 2d 423 at 429, fn. 7. Accordingly, this meritorious issue was lost on direct appeal and Mr. Muhammad was prejudiced as a result. The trial court erred in denying the challenge and re-sentencing counsel had no strategic reason for failing to renew this objection.

The Florida Supreme Court also noted that re-sentencing counsel "never specifically objected to [Detective] Smith's testifying as to the contents of the pilot's statement" and thus the claim was procedurally barred from review on direct appeal. Knight v. State, 746 So. 2d 423, 430 (Fla. 1996). Re-sentencing counsel also failed to object to the statements by the STOL pilot and Detective Ojeda being introduced into evidence through the testimony of Smith. Knight at 430 fn 9. Counsel was ineffective for failing to agree to the court's offer to have the testimony read to the jury as an alternative to Smith's testimony. Furthermore, re-sentencing counsel failed to object to the prosecutor's comments on future dangerousness and thus the issue was procedurally barred on direct appeal. Knight at 431. Counsel's failure to know the law, properly object, request curative instructions and preserve this issue constitutes ineffective assistance of counsel. Mr. Muhammad was prejudiced as result. The Florida Supreme Court also recognized that the prosecutor's comments approached the border of impropriety subject to a valid objection but was not sufficient to rise to fundamental error. Knight 431, fn 10. Re-sentencing counsel's failure to object, request curative instructions and/or a mistrial and failure to preserve this issue constitutes deficient performance and Mr. Muhammad was prejudiced as a result. Counsel also failed to raise issues of the violation of confidentiality and fifth and sixth amendment violations due to Dr. Miller's testimony in rebuttal, (Knight at 433) and rendered ineffective assistance of counsel for opening the door in rebuttal and thus permitting Dr. Miller's testimony. Knight at 431.

(Appendix at 212-213).

The amended motion continued to detail facts demonstrating instances of deficient performance and prejudice to Mr. Muhammad:

Re-sentencing counsel also failed to object to improper comments and questions posed to defense experts

by the state and irrelevant and inflammatory comments and argument resulting in prejudice to Mr. Muhammad. Knight 746 at 433. Counsel also rendered ineffective assistance of counsel for failing to request an instruction on merging the aggravators (kidnaping with HAC and avoiding arrest with pecuniary gain). Knight at 434.

Re-sentencing counsel also unreasonably failed to object and move to strike the testimony of Dr. Mutter because did not know the proper standards for statutory mitigation and failed to effectively challenge the applicability of the aggravating factors and vagueness of the jury instructions.

Re-sentencing counsel was also ineffective for failing to object, request curative instructions and/or move for a mistrial when the state inquired of defense witnesses whether they had been previously hired in Mr. Muhammad's case by "CCR, an agency that works "to overturn death sentences" (See, e.g. 2540; 2877; 3058). Defense counsel failed to object to the state's improper argument.

Defense counsel was ineffective for failing to ensure that a competent, reliable and timely competency evaluation was performed. Experts testified that Mr. Muhammad was shackled during evaluations rendering them invalid. Moreover the competency hearing occurred in 1991 and the re-sentencing did not occur until January 1996. Mr. Muhammad's suicide attempt and inability to conduct himself appropriately in the courtroom during the re-sentencing are all indicative that a timely competency hearing in 1996 should have been held. To the extent that the trial court refused to grant re-sentencing counsel's requests, counsel was rendered ineffective.

(Appendix213-214).

The motion detailed deficient performance and prejudice regarding resentencing counsel's failure to use evidence relevant to the aggravating factor based upon the Bradford conviction:

Re-sentencing counsel was also ineffective for failing to effectively challenge the state's use of the Bradford County case in the re-sentencing. In 1992, the Florida Supreme Court remanded Mr. Muhammad's Bradford County case to the trial court due to the fact that the state failed to disclose exculpatory material relating to

Mr. Muhammad's state of mind at the time of Officer Burke's death. For example, evidence existed regarding Mr. Muhammad's mental state at the time of Mr. Burke's death came to light via the withheld documents, e.g., that Mr. Muhammad "had a different look than he did before", that Mr. Muhammad looked noticeably different than when observed before such that his eyes were big, large and scary, Mr. Muhammad's "whole person, he was just changed . . . [h]e just wasn't the same person he be [sic] every day. Additionally, evidence existed that Mr. Muhammad received treatment from the guards on death row sufficient to propel a mentally disturbed person into a rage, evidence that the guards would give Mr. Muhammad "a hard time whenever they could...unplugging his TV, writing him frivolous DRs, beating him, going in his cell, forcibly pulling him out, sometimes using excessive force." Evidence reveals that Mr. Muhammad's behavior leading up to the time that Mr. Burke was killed, that "he was in his cell pacing back and forth and talking to himself" from about 10:30 a.m. until about 6:00 p.m. and that this was not how Mr. Muhammad normally acted, that, "[n]ormally he was very quiet, did his law work, said his prayers, and he would--if somebody talked to him he would talk back to them." As for the events immediately following Mr. Burke's death, "he looked like he was in left field someplace, and he just didn't seem to know where he was at, know who--know what was going on." This evidence paints a far more vivid picture of the true circumstances of the Burke killing than what the state presented at Mr. Muhammad's re-sentencing. "[He looked] all wild and crazy, you know. He looked like he was having a seizure or something. I don't think he was pretty much all there"

This evidence established the precipitating stresses upon Mr. Muhammad, events of significant psychological import that lead to other, ultimate psychological events. Mr. Muhammad had a visit scheduled with his mother, a person who was very important to him and who had traveled a long distance to see him. Correctional Officer Padgett approached Mr. Muhammad and ordered him to shave. Mr. Muhammad asked for clippers since, for two reasons, he couldn't shave with a blade: 1) he had a skin condition and 2) religious doctrine. Mr. Muhammad had a medical pass that allowed him to use clippers instead of a blade, but he was informed that it had expired and, furthermore, that there were no clippers available for him to use at that time. Mr. Muhammad was ordered to shave with a blade

and refused, for the reasons stated above. He was then informed that he was receiving a disciplinary report, that he would not be allowed to see his mother, and that he was being sent to Q Wing. These precipitating stressors, i.e., having to shave with a blade, being denied a visit with his mother, receiving a disciplinary report, and being sent to Q Wing (solitary confinement) where Mr. Muhammad had been in the past--as far back as when he was fifteen),

provided critical insight to understanding the events later in the day culminating with the death of Mr. Burke. Q Wing - the area Mr. Muhammad was told he going to was the squalid, airless, lightless, "tomb"-like living area from which Mr. Muhammad was released only three times a week for a fifteen-minute shower. Re-sentencing counsel unreasonably failed to present all of this evidence. Trial counsel was also ineffective for failing to present this evidence in relation to the effect it had upon Mr. Muhammad's competency in 1996. For ten-plus consecutive years Mr. Muhammad was housed on Q-Wing. He had only a twenty-watt light bulb--not enough to read by--and could only request two law books at a time while preparing for trial. Re-sentencing counsel was ineffective for presenting this evidence and relevant psychiatric studies regarding the impact of such a tortured and prolonged incarceration in solitary confinement upon an individual's mental state.

The descriptions of Mr. Muhammad regarding the Burke case contained in the documents withheld in the Bradford county case (and not presented by re-sentencing counsel)--descriptions of behavior that was unlike that of a sane person who had just killed someone--along with the other material re-sentencing counsel failed to develop and provide to the mental health experts and the jury, allowed experts to conclude within a reasonable degree of clinical forensic psychological certainty that Mr. Muhammad suffered paranoid delusions frequently centering upon the Department of Corrections and attorneys and further that Mr. Muhammad suffered from a mental infirmity, disease or defect and that he did not know what he was doing was wrong on October 12, 1980; that he was under the influence of an extreme mental or emotional disturbance and that he was under extreme duress at the time; that his family background was "chaotic and difficult". All of this evidence, should have been presented at the re-sentencing to defeat the state's portrayal of the Burke killing and

use as an aggravating factor.

Re-sentencing counsel had no reason and no strategy in failing to use and investigate the Bradford Brady material that was available at the time of Mr. Muhammad's re-sentencing in order to challenge the state's reliance upon the Burke homicide as an aggravating factor. The Florida Supreme Court's remand was 1992 and Mr. Muhammad's re-sentencing occurred in 1996. Moreover re-sentencing counsel was ineffective for failing to file a Motion in Limine to preclude any reference to the Burke homicide. With the Florida Supreme Court's remand based upon Brady evidence directly relevant to Mr. Muhammad's state of mind, re-sentencing counsel could have successfully moved to preclude any evidence regarding the Bradford county case or used it to challenge the state's case for death. Instead the state was allowed to present the incorrect and un-rebutted evidence at great length to the Dade re-sentencing jury. Mr. Muhammad was prejudiced as a result as demonstrated by juror Weldon's question to the judge regarding the Burke homicide (R. 2415).

(Appendix at 214).

Mr. Muhammad demonstrated facts clearly in dispute which are not conclusively refuted by the record. An evidentiary hearing is necessary. Gaskin.

3. CLAIM IV: MR. MUHAMMAD WAS DENIED HIS RIGHTS UNDER AKE V. OKLAHOMA AT HIS RE-SENTENCING, WHEN COUNSEL FAILED TO OBTAIN AN ADEQUATE MENTAL HEALTH EVALUATION AND FAILED TO PROVIDE THE NECESSARY BACKGROUND INFORMATION TO THE MENTAL HEALTH CONSULTANTS, ALL IN VIOLATION OF MR. MUHAMMAD'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

In its summary denial the lower court ruled, that "Defendant does not allege what necessary background information was not provided to what expert." See PC-R. 450. However Mr. Muhammad pled:

In Mr. Muhammad's case, it is clear the experts had a lack of information which left them open to devastating impeachment by the state. This affected the credibility of their expert opinion and testimony. See also Claims II & III. The jury was left with the impression that Mr. Muhammad did not have a legitimate mental disorder.

Re-sentencing counsel **failed to present the experts with evidence that would have verified the obvious police presence and the affect it had upon mentally ill Askari Muhammad. Additionally, in Mr. Muhammad's case, evidence regarding his demeanor and actions near the time of the offense could and should have been presented to the judge and jury charged with the responsibility of whether he should live or die.** [] however, Mr. Muhammad has also been denied an opportunity to present that evidence due to the states failure to re-sentence Mr. Muhammad within a reasonable amount of time.

Regarding the evidence that was available however, defense counsel, without a tactic or strategy, failed to investigate its existence and present it. The jury did not know critical and important evidence when they rendered their sentencing recommendation. **For example, the jury did not know that Mr. Muhammad presented very bizarre behavior, drug use and devastating abandonment by his wife just days before the offense, events witnessed by other individuals near the time of the offense. Had defense counsel utilized this information he could have presented this information to the mental health experts and defeated the aggravating factors and provided reliable evidence of statutory mitigating factors. The jury also did not know the circumstances and conditions of the Okeechobee Boy's School where Mr. Muhammad was sent when he was only 9 years old. Had re-sentencing counsel investigated, a wealth of information would have been available to show the jury the horrific conditions and treatment meted out at the school. Instead, the state was allowed to argue in closing without objection:**

He was into something before that happened, and then at nine, the youngest person ever to get to state school. I don't know what he had to do to get there, all of the things he had to do to convince the judge that there was no other alternative, but that was his opportunity. . . .

(R. 3788).

Investigation would also have revealed that despite these conditions, 9 year old Thomas Knight (Mr. Muhammad) was well behaved and liked.

* * *

Evidence also reveals that during the 1975 proceedings Mr. Muhammad's behavior was strange and distant and stress had an impact upon his behavior and ability to communicate. Additionally evidence shows that Mr. Muhammad also had an uncle treated for mental illness. Expert testimony would have revealed the inappropriate setting of the boy's school as a treatment plan. Re-sentencing counsel also failed to present the testimony of Dr. David Reichenberg who evaluated Mr. Muhammad in 1974. Defense counsel also failed to utilize compelling admissible sworn testimony of Mr. Muhammad's mother and former teachers who would testify that Mr. Muhammad's behavior drastically changed after the rape of Mary Ann, and that as a boy Mr. Muhammad was not a disciplinary problem in school. Additional evidence was available to demonstrate that the town in which Mr. Muhammad grew up was among the poorest, most hopeless in the nation, without health facilities or juvenile programs, where the life expectancy was 48 years of age, and where many people died of hunger and Tuberculosis.

Trial counsel and the mental health experts utilized at trial failed to adequately investigate this matter. The jury never heard this information. Trial counsel was ineffective for failing to fully investigate and provide the mental health experts with the necessary information and for failing to have the necessary neuropsychological testing performed.

Had the mental health experts been provided with adequate materials with which to professionally assess this case, they could have reliably testified to the existence of mitigating circumstances, including but not limited to the existence of the mental health mitigating circumstances as listed in Florida statutes. The mental health professionals could also have provided the jury with myriad non-statutory mitigating circumstances that went untouched at the re-sentencing. The mental health professionals however, were not provided with adequate materials to make this assessment. Without a reasonable tactic or strategy, defense counsel never provided the mental health professionals with the materials needed to make an adequate and accurate and reliable diagnosis of

Mr. Muhammad's mental condition. The mental health professionals could have been in the position to testify that this information and the true circumstances surrounding the Bradford county case was critical to their evaluations. Additionally, the mental health professionals could have been able to testify that Mr. Muhammad's background, including his family history of mental illness constituted valid non statutory mitigating factors.

Incredibly, none of this evidence was presented to Mr. Muhammad's sentencing jury. The prejudice resulting from counsel's failure to present this evidence is clear - - Mr. Muhammad was sentenced to die. Had the jurors known this information, a binding life recommendation could have been returned. Counsel, however, without a tactic or strategy, did not present this evidence.

Had the information been provided to the jury, Mr. Muhammad's actions and behavior could certainly have been placed in context. The jury and judge with this evidence could confidently conclude that Mr. Muhammad was suffering from an extreme mental or emotional disturbance at the time of the offense, that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired, and that he was operating under extreme duress at the time of the offense. The jury, however, was completely unaware of this evidence.

In addition to the existence of statutory and non-statutory mitigating circumstances, the aforementioned mental health experts could have rebutted the mental state requirements and weight of the aggravating circumstances presented by the prosecution. Expert testimony could have been presented to lessen the weight of these aggravating factors, as Mr. Muhammad is prepared to establish at an evidentiary hearing.

* * *

Witnesses were available and willing to testify as to non-statutory mitigating factors which alone would have provided the jury with a reasonable basis to recommend a life sentence. In conjunction with properly prepared mental health experts, the judge and jury could have been given a true picture of Mr. Muhammad's family background and social history.

* * *

In Mr. Muhammad's case, Mr. Muhammad was seen by mental health professionals who did not have all of the necessary background information from which to perform an adequate

and constitutionally sound evaluation. In Mr. Muhammad's case issues concerning whether the state would in fact pay for this assistance arose (See 10/1/93 hearing at 2409) and the failure of the state or county to pay timely pay for these experts to the detriment of Mr. Muhammad. This action also rendered re-sentencing counsel ineffective. See Claim III. To the extent that defense counsel failed to adequately litigate this issue, Mr. Muhammad was denied effective assistance of counsel.

(Appendix at 226-236).

Mr. Muhammad is entitled to an evidentiary hearing. The lower court committed reversible error in failing to hold one.

4. CLAIM VI: THE STATE'S USE OF MISLEADING TESTIMONY AND IMPROPER ARGUMENT AND FAILURE TO DISCLOSE MATERIAL EXCULPATORY INFORMATION TO MR. MUHAMMAD VIOLATED BRADY V. MARYLAND, U.S. V. GIGLIO AND THE CONSTITUTIONAL RIGHTS OF MR. MUHAMMAD UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS. MR. MUHAMMAD'S COUNSEL WAS INEFFECTIVE FOR NOT OBJECTING TO THE IMPROPER CONDUCT BY THE STATE AND RENDERED INEFFECTIVE BY THE STATE'S ACTIONS. MR. MUHAMMAD WAS DENIED A PROPER ADVERSARIAL TESTING.

The lower court denied this claim upon the basis that the fact that a Brady violation in the Bradford County case was known at the time of re-sentencing there could be no Brady violation in this case. However, such a fact does not relieve the state of its obligation to disclose the exculpatory material. Moreover, Mr. Muhammad pled this claim alternatively with ineffective assistance of counsel, and thus is entitled to a hearing on the issue of whether re-sentencing counsel should have presented this "available" evidence.

Mr. Muhammad also specifically pled a Brady violation regarding the issue of whether Mr. Muhammad was aware of the police presence. (Appendix at 240-243).

Mr. Muhammad is entitled to an evidentiary hearing to prove his claim. The lower court erred in summarily denying this claim.

5. CLAIM VII: THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS RENDERED MR. MUHAMMAD'S DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. TRIAL COUNSEL RENDERED INEFFECTIVE ASSISTANCE OF COUNSEL FOR FAILING TO OBJECT, THEREBY DENYING MR. MUHAMMAD HIS RIGHTS UNDER THE SIXTH AMENDMENT AND HIS RIGHT TO A RELIABLE DIRECT APPEAL.

In addressing this claim, the lower court relied again upon the direct appeal opinion in Knight v. State, 746 So. 2d at 433. PC-R. 454. Indeed, this Court noted that one of the arguments regarding the value of Mr. Muhammad's life compared to the victim's life was improper, but found it harmless. However, in his motion Mr. Muhammad recited several additional improper arguments not presented in the direct appeal. As noted by the Florida Supreme Court, re-sentencing counsel failed to object. Knight v. State, 746 So. 2d at 433. Mr. Muhammad's Amended Motion asserted:

A sampling of the prosecutor's comments demonstrates the improper argument that went uncorrected in Mr. Muhammad's case:

. . . You are the people who are going to

have to decide, I do find aggravating circumstances.

You are going to have to decide, after you decide that first question, **do I find mitigating circumstances to overcome or outweigh how strongly I feel about the aggravating circumstances**, and to do this, you need only one thing, plain common sense.

(R. 3770-3771) (emphasis added).

We make decisions every day and Thomas Knight, on a certain day, made a decision.

Part of his decision was, "I don't believe in the **moral law**. . . .

(R. 3772)(emphasis added).

Back in 1970, the only time in his life he was sent to a hospital and the report says, Homicidal, wants to kill to see the blood.

That is Thomas Knight. That is what he is all about, and on July 17, 1974, that was what he did. He was like that in 1970. He was like that in 1974. He was like that in 1980 when he killed Officer Burke.

You have heard all the defense doctors and all the state doctors and whatever experts you want to listen to. They say that is all him, today, yesterday, **tomorrow, forever**.

(R. 3773)(emphasis added).

What is the proper recommendation for a person like that? How do we punish somebody who has no conscience, **who can act and act again, kill, and kill and kill again** but does not have a conscience about it? Somebody who won't control himself.

(R. 3773-3774)(emphasis added).

"Trouble," and he brought trouble with him

on July 17, 1974. **That is what he is all about, has always been about, will always be about.**

(R. 3775)(emphasis added).

What he was making at that time averaged out for the two days -- we have full day records -- to \$42.85 a day. He was making \$11, 142 a year in 1974. He was able perhaps to live not necessarily comfortably, but clearly that is more than an average living wage 22 years ago, \$11,142 a year. But that was not enough for him. He needed more, and he knew how to get more.

(R. 3779).

You might be saying to yourself why does he start running forward? Well, I don't have an answer because I wasn't there. But I think logic would tell us

(R. 3783).

[About Mr. Muhammad upon apprehension]
There is no more fight. I'm surrounded by guys with guns. I don't want to get hurt. "Please don't shoot me." And at least [officer] Kubrik listened.

Kubrik was not at all like the defendant some six years later when he killed again.

(R. 3786).

. . .in addition he was involved in a third murder, a murder of Officer Richard James Burke on October 12, 1980.

Now, why is that important when you are sitting here today in 1996, and thinking about a crime that happened 22 years ago?

The reason it is important is because

the issue of the defendant's character is what you really decide on when you decide this question, this issue, this aggravator.

If they had, for example, been able to come forward to you and say, you know, he committed these crimes in 1974, but he is a changed man;

It is something you would have been allowed to consider to decide whether the person sentenced today is the same person who committed the crimes back then and deserves that type of punishment.

But this person's character, Thomas Knight's character, was not just one terribly wrong day in his whole life from which he has shown remorse and he has been rehabilitated. That is not what it is about.

(R. 3788).

By the time he is out, for the third time, he is perhaps 21, 22 years old, well on his way to what happened in July of 1974. At 23, he kills and he kills, and at 29 he kills again.

While he is in prison, he manages to get 543 disciplinary reports. Has he changed? Has he been rehabilitated? Is there anything about this person, other than that Thomas Knight will always be, regardless of the name he chooses for himself, the same person on the inside.

He is what he always was. He is angry, hostile, belligerent, suspicious, just like every doctor said, and when he gets angry he does what he wants without a conscience.

* * *

Beasts and animals don't kill their own species. They don't kill because it feels good or they like the idea. They may kill in self-defense. They may kill for

food but they don't go hunting their own species . . .

(R. 3789).

That is why you need to know about what Thomas Knight did on October 12, 1980. He has taken three lives, been convicted for three murders, and you have to balance that against how you feel about making a recommendation concerning his life.

(R. 3790).

* * *

In his mind, that is okay. After all, we are dealing with somebody who has no conscience, **no moral values**.

(R. 3791).

That is the difference between him and Sergeant Kubrick. When sergeant Kubrick gets him out of the ground and the defendant says, "Please don't shoot me," of course Kubrick has a conscience. He knows what the rules are. He knows what moral values are. He doesn't shoot him.

(R. 3793).

We are here as lawyers, arguing about the value, the importance of his life because we believe that even the worst of the worst should be entitled to this type of proceeding where we evaluate the quality of their life before we make a decision.

But the big decision really is, does his life have more value than Lillian Gans', more value than Richard Burkes's?

How do we value these lives? There were no hearings with jurors to evaluate aggravating and mitigating factors for these three innocent victims.

(R. 3795). The prosecutor also conducted a counting game of aggravators (R. 3797)("and that makes three")(R. 3812)("There are six factors in aggravation")(R. 3813)("...or you can add up all six of them and say there is no other answer") and misstated the law:

The judge is going to explain what premeditated means, but it is not that difficult a concept. It could happen in no special period of time, 30 seconds, a minute. There are no rules.

(R. 3800), clearly contrary to the heightened premeditation required by laws to establish the aggravating factor of cold, calculated and premeditated. The prosecutor also requested the jurors to speculate and pandered to their fears:

This deals with the effect on those victims. We don't know a single word that they said when they were in that car, but we all know what they thought, how they felt, what that day had to have been like.

(R. 3806).

Let us think about those seconds and minutes and hours for those people that day with Thomas Knight holding on to that weapon and making demands on them.

What goes through everybody's mind? Why me? Who is this Man? Will he shoot me? Will he hurt me? What does he want from me? Why is he making me drive home?

* * *

Those words may never have been said, but there is no question in anybody's mind those thoughts were going through their minds that day.

(R. 3807).

The prosecutor's improper argument continued to mislead the jury and inject improper argument:

You could decide that the torture that these people felt for those hours is so important and so powerful it outweighs

everything else.
(R. 3813).

Every single day this defendant has an opportunity before the judge to conduct himself in the proper fashion. That is not an aggravator.

(R. 3815).
Regarding Mr. Muhammad's Islamic religion and the juror's religion the prosecutor told them: That is not a factor either, but we are dealing with legal laws and moral laws and there is no faith. There is no religion. There is no concept of morality that says it is okay to kidnap people, to rob people, to murder people. None of that is approved by religious law, moral law or society's laws, and frankly this defendant didn't care. Bless you.

(R. 3817). Reference to improper non-statutory aggravation permeated the state's closing argument:
. . . there were 14 children in that home, only one of them turned out to be Thomas Knight.

* * *

. . . only one of them turned out to be a killer.

(R. 3818).

Poor people are moral.

* * *

One poor person chose to become a killer. We need only go back perhaps at the far reaches of our own lifetimes or maybe our parent's lifetimes or that generations' lifetimes of the depression, Jews in Europe during World War II, poverty, awful poverty, terrible times.

Were there gangs or bands of murderers who came out after the depression? I grew up in poverty and would it excuse them?

(R. 3819-3820).

The prosecutor also impermissibly compared Mr. Muhammad to his sister Mary Ann (R. 3820-3821) who "turned out ok" and became a missionary.

* * *

. . .the reality of it is that Thomas Knight was the bad seed, the bad kid from day one. A kid you knew in school who got in fights every day, who sasses back to the teacher, the parents came in and the parents promised that the child would be good, and a week later the child was bad again.

(R. 3822-3823).

It just worked out that way and Thomas Knight was the worst of the worst. He always was and according to the doctors **he always will be.**

(R. 3823). The prosecutor improperly referred to future dangerousness and "lying in wait" (R. 3864) and repeatedly interjected his personal opinions.

This is Thomas Knight, right on the button; lack of moral sense, no conscience, does not learn from punishment and we know he did not learn from punishment. Does not care about others. Knows it is wrong to commit crimes, can't control his will, but he has no remorse.

How do you punish a person who kills three people with no conscience and no remorse?

Whenever people talk to me about my feelings on this issue, you know, how do you feel? Pro death, anti death penalty, every once in a while somebody says can you just lock him in a room and keep him away forever, forever and ever. Wouldn't that be good enough?

I can only ask you was it good enough

for Richard James Burke or maybe are there some people for whom there is no prison safe enough?

If the death penalty is not for a person like Thomas Knight, it has no purpose. An awful person who commits awful crimes **beyond hope of rehabilitation and then does it again and again. . . .**

(R. 3865).

. . .but his choices were that instead of learning form rehabilitation, instead of saying after the first time as some people perhaps do, "I have learned my lesson; I got in trouble; I'm going to go the straight and narrow; I'm not going to get in trouble again," that is not the choice he makes.

(R. 3866).

You can't vote to recommend life in prison and expect the judge to fix it later on and take the easy way out. You have got to vote your conscience. You have got to vote what you feel deep down is right. You need some courage when you go back there to deliberate.

(R. 3867).

The issue is between 8:20 in the morning and four o'clock that afternoon, did he commit normal crimes like a normal criminal and, if he did all of that, mitigation of all those doctors just go off to the side. Because you do not have to listen to them and you do not have to follow them and you do not have to agree with a single one of them.

(R. 3872).

Somehow, and we will never know how, a

certain type of -- I can only call it --a certain type of evil became Thomas Knight. A certain type of person was created who has no morality, no feelings for others, no conscience whatsoever.

(R. 3872).

The motion continued to assert:

Re-sentencing counsel rendered ineffective assistance by failing to object to the vast majority of the improprieties and failing to present effective argument. Under the sixth amendment, defense counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688 (1984). In this case, counsel's failure to object to the State's highly improper arguments, comments, and actions was well "outside the wide range of professionally competent assistance." Id. at 690. Defense counsel is responsible for knowing the applicable law and making objections based upon that law. See Atkins v. Attorney General, 932 F.2d 1430, 1432 (11th Cir. 1991)(failure to object to admission of evidence which was inadmissible under state law constituted ineffective assistance); Harrison v. Jones, 880 F.2d 1279, 1282 (11th Cir. 1989)(failure to challenge use of inadmissible prior conviction to enhance sentence constituted ineffective assistance); Murphy v. Puckett, 893 F.2d 94, 95 (5th Cir. 1990)(failure to raise valid double jeopardy argument constituted ineffective assistance). Here, defense counsel failed to raise substantial meritorious objections. Defense counsel's inaction undermines confidence in the outcome of Mr. Muhammad's re-sentencing. There was mitigating evidence in the record upon which the jury could reasonably have based a life recommendation, but no reasoned assessment of the appropriate penalty could occur. The proceedings were contaminated with irrelevant, inflammatory, and prejudicial considerations. As a result Mr. Muhammad's death sentence is neither fair, reliable nor individualized. Mr. Muhammad's death sentence

should be set aside.

Mr. Muhammad was prejudiced by counsel's deficient performance. Relief is proper. See Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

(Appendix at 243-260).

Mr. Muhammad is entitled to an evidentiary hearing on these allegations and the lower court erred in failing to hold one.

6. CLAIM XVII: JUROR MISCONDUCT OCCURRED IN MR. MUHAMMAD'S RESENTENCING IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

Mr. Muhammad pled in his post conviction motion that during the resentencing, juror misconduct was revealed. (Appendix at 292-293). Evidence was revealed that in fact jurors had seen newspaper articles regarding Mr. Muhammad's proceedings. The prosecutor believed a juror was not being candid to the court regarding the extent to which she was subject to extrajudicial material. Additionally, although apparently due to no fault of their own, three jurors were engaged in a conversation regarding Mr. Muhammad with a court-house employee. This conversation was also not part of Mr. Muhammad's proceedings and the jurors were tainted.

The juror misconduct that occurred in Mr. Muhammad's case violated his Sixth, Eighth and Fourteenth amendment rights and corresponding provisions of the Florida Constitution. Mr. Muhammad was entitled to an evidentiary hearing on this claim.

The unconstitutional prohibition against a lawyer communicating with a juror or causing another to communicate with a juror prevents Mr. Muhammad from fully developing his claim. See Florida Rules of Professional Responsibility Rule 4-5.5(d)(4). **7. CLAIM XX: JUDICIAL BIAS THROUGHOUT MR. MUHAMMAD'S RE-SENTENCING CONSTITUTES FUNDAMENTAL ERROR AND DENIED MR. MUHAMMAD'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. MR. MUHAMMAD WAS DENIED A FAIR ADVERSARIAL TESTING.**

Mr. Muhammad's motion alleged that the re-sentencing judge was biased against Mr. Muhammad. (Appendix at 304-305). Due to Mr. Muhammad's mental illness, he was unable to conduct himself appropriately in the courtroom. Consequently the judge had Mr. Muhammad removed from all of the re-sentencing proceedings. The re-sentencing judge predetermined that Mr. Muhammad's actions were the product of his will rather than mental illness and failed to conduct an adequate and reliable competency hearing. The sentencing judge also clearly expressed bias against defense expert Dr. Rothenberg (R. 2821) (wherein trial court refers to Dr. Rothenberg as a "pain in the neck") and elsewhere in the record (See, e.g. 2497).

The lower court erred in failing to grant an evidentiary hearing.

8. CLAIM XXI: MR. MUHAMMAD WAS ABSENT FROM CRITICAL STAGES OF HIS RE-SENTENCING PROCEEDING. AS A RESULT MR. MUHAMMAD'S RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH

AMENDMENTS WERE VIOLATED.

Mr. Muhammad alleged that his absence from the courtroom was due to his mental illness and that given the opportunity he could have presented evidence to support his claim. This claim involved issues of disputed fact and was not conclusively rebutted by the record. The lower court erred in denying an evidentiary hearing on this claim.

9. CLAIM XXII: MR. MUHAMMAD'S RE-SENTENCING COUNSEL WAS LABORING UNDER AN ACTUAL CONFLICT OF INTEREST RESULTING IN PREJUDICE TO MR. MUHAMMAD AND IN VIOLATION OF HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND CORRESPONDING FLORIDA LAW.

Full and fair evidentiary resolution of this claim is proper, as the files and records in this case by no means show that Mr. Muhammad is "conclusively" entitled to "no relief" on this and related claims. See Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986)(emphasis added); O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984); Maharaj v. State, 684 So. 2d 726 (Fla. 1996).

In Cuyler v. Sullivan, the United States Supreme Court held that the Sixth Amendment right to effective assistance of counsel was violated when an attorney had a conflict of interest. 446 U.S. 335, 344 (1980). In Mr. Muhammad's case, defense counsel labored under an actual conflict while

representing Mr. Muhammad. Defense counsel was in the untenable situation of having to balance their own fears of Mr. Muhammad's mental illness against the ethical obligation to zealously and loyally represent his client. In Mr. Muhammad's case however, throughout the proceedings re-sentencing counsel (husband and wife team) stated on the record the conflict and the inability to represent MrMuhammad

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counsel was actually afraid of Mr. Muhammad's mental illness and told the court that he did not want his wife, co-counsel

in the same room with Mr. Muhammad (11/4/91 hearing at R. 1986, and re-sentencing counsel stating that it will take him a month to get the courage back up to see Mr. Muhammad R. 1998; "I couldn't deal with the guy at 1991) Defense counsel went so far as to ask the trial court for advice (R. 3105) and requested in open court that Mr. Muhammad be handcuffed when counsel talked to him (R. 3121). Under Cuyler, a defendant who proves his attorney acted while under a conflict which actually affected the adequacy of his representation **need not demonstrate prejudice**. *Id* at 349-350. (Emphasis added). Defense counsel's failure to file a motion to withdraw illustrates the prejudice Mr. Muhammad suffered due to counsel's conflict.

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

In denying this claim, the lower court relied upon the fact that it found no individual error to have occurred (PCR. 473). However for the reasons demonstrated above regarding the court's erroneous findings regarding the individual claims, an evidentiary hearing is necessary regarding this claim as well. In his Amended Motion to Vacate, Mr.

Muhammad detailed this Court's observations on direct appeal:

... the Florida Supreme Court recognized many errors that occurred in Mr. Muhammad's re-sentencing: 1) the trial court's reliance upon the heinous, atrocious or cruel aggravating factor was error due the fact that it was based upon speculation. Knight v. State, 746 So.2d 43 (1998); 2) the avoiding arrest aggravating circumstance "may be contestable" but found sufficient evidence to establish it. Id.; 3) defense counsel failed to challenge the aggravating factor of "in the commission of a kidnaping" in the sentencing memorandum to the court. Id. Thus this aggravating factor was not preserved for appeal. Id.; 4) defense counsel failed to renew its objection before the jury was sworn regarding the trial court's denial of the defense peremptory challenge of juror Rivero-Saiz. Id.; 5) defense counsel did not specifically object to Detective Smith's testifying to the contents of the pilots' statement. Id.; 6) defense counsel never objected to Smith testifying about statements by the STOL pilot and Detective Ojeda Id.; 7) defense counsel failed to object or argue to the trial court issues surrounding the imposition by the state of nonstatutory aggravating factor "future dangerousness through expert testimony, Mr. Muhammad's mental illness and improper argument. Id. ("Although the comment approaches the border of impropriety, and was probably subject a valid objection, we conclude that the State did not impermissibly inject Knight's "future dangerousness" into the proceeding as an unlawful nonstatutory aggravating circumstance sufficiently to constitute fundamental error. Id.; 8) defense counsel never raised the confidentiality provision, Fifth Amendment or Sixth Amendment issues in the trial court regarding Dr. Miller's testimony and defense counsel opened the door to Dr. Miller's rebuttal testimony by addressing the issue of Mr. Muhammad's competence and referring to Dr. Miller's competency examination report. Id.; 9) defense counsel failed to raise issue of improper prosecutorial comments in the trial court. Id.; 10) defense counsel failed to

preserve the issue of the necessity of a jury instruction on the merging of aggravating circumstances. *Id.*

(Appendix at 318-322).

Mr. Muhammad is entitled to an evidentiary hearing on this claim.

ARGUMENT II

FLORIDA'S SENTENCING PROCEDURE REQUIRING ONLY A BARE MAJORITY OF JURORS TO RECOMMEND DEATH VIOLATES 921.141, FLORIDA STATUTES, ARTICLE I, SECTION 17 OF THE FLORIDA CONSTITUTION AND AMENDMENTS SIX, EIGHT AND FOURTEEN OF THE UNITED STATES CONSTITUTION. RING V. ARIZONA. MR. MUHAMMAD'S COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THIS ISSUE.

In Apprendi v. New Jersey, 120 S. Ct. 2348 (2000), the Supreme Court held, "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Id.* at 2362-63. In Ring v. Arizona, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002), this principle was extended to capital cases. Thus, aggravating factors are essential elements of capital murder.

Under the analysis set forth in Ring and Apprendi, the trial court erred in accepting a recommendation of anything less than a unanimous vote. Verdicts of guilty in criminal charges must be unanimous. Since jury unanimity has long been the practice in Florida, "It is therefore settled that '[i]n

this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So. 2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So. 2d 261 (Fla. 1956). However in Florida capital cases, the jury is allowed to recommend a death sentence based upon a simple majority vote. See, e.g., Thompson v. State, 648 So. 2d 692, 698 (Fla. 1994). Jury unanimity as to the existence of specific aggravating factors has not been required. Jones v. State, 569 So. 2d 1234, 1238 (Fla. 1990). This is contrary to the principles set forth in Ring.

Mr. Muhammad's right to jury unanimity was violated. Deprivation of this right violates due process. Flanning; Hicks v. Oklahoma, 447 U.S. 343 (1980). This Court should order a jury re-sentencing.

ARGUMENT III

THE INTRODUCTION OF NON STATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. MUHAMMAD'S TRIAL THAT IT RESULTED IN THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In considering whether the death penalty constitutes cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments, Justice Brennan wrote:

In determining whether a punishment comports

with human dignity, we are aided also by a second principle inherent in the Clause -- that the State must not arbitrarily inflict a severe punishment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very words "cruel and unusual punishments" imply condemnation of the arbitrary infliction of severe punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establishment of a safeguard against arbitrary punishments. See Granucci, "Nor Cruel and Unusual Punishments Inflicted": The Original Meaning, 57 Calif.L.Rev. 839, 857-60 (1969).

Furman, 408 U.S. at 274, 92 S. Ct. at 2744 (Brennan, J., concurring)(footnote omitted).

The Supreme Court has also held:

While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.

The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 2969 (1976).

Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979); Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977); See also Riley v. State, 366 So. 2d 19 (Fla. 1979); Robinson v. State, 520 So. 2d 1 (Fla. 1988).

Mr. Muhammad's re-sentencing did not comport with these essential principles. Rather, the State introduced evidence which was not relevant to any statutory aggravating factors and argued this evidence and other impermissible matters as a basis for imposing death. The trial court relied upon several impermissible factors in sentencing Mr. Muhammad to death including speculation.

The State impermissibly argued that Mr. Muhammad was an evil man, with no "moral values", impermissibly argued future dangerousness and virtually begged the re-sentencing jury to impose the death sentence not only for the Gans', but for the Bradford offense as well --an offense for which Mr. Muhammad has already been sentenced. This violated Mr. Muhammad's constitutional right against being placed twice in jeopardy for the same offense and constituted improper non statutory

aggravation. None of this was relevant to any statutory aggravating factor. It was "of such a nature as to evoke the sympathy of the jury" and thus violated the rule intended "to assure the defendant as dispassionate a trial as possible." Welty v. State, 402 So. 2d 1159, 1162 (Fla. 1981). See Routly v. State, 440 So. 2d 1257 (Fla. 1983); Knight v. State, 338 So. 2d 201 (Fla. 1976).

In addition, the prosecutor elevated other irrelevant aspects of the case to non-statutory aggravating circumstances by emphasizing them repeatedly. Implying that these things had some role as aggravating factors. It is clear that the State encouraged the consideration of non-statutory aggravating circumstances during closing argument in determining Mr. Muhammad's sentence. In addition, Mr. Muhammad's own defense counsel failed to understand that non-statutory aggravating factors are impermissible. We must presume that the jury weighed these non-statutory aggravating circumstances when sentencing Mr. Muhammad. See Espinosa v. Florida, 112 S. Ct. 2926 (1992). This violated Mr. Muhammad's constitutional guarantees under the Eighth and Fourteenth Amendments by placing an extra thumb on the death side of the scale, thus, skewing the weighing process. See Stringer v. Black, 112 S. Ct. 1130 (1992).

The Court improperly sentenced Mr. Muhammad to death by weighing non-statutory aggravating circumstances during the court's sentencing. The Court also improperly relied on the already infirm jury recommendation.

The prosecutor's presentation of wholly improper and unconstitutional non-statutory aggravating factors starkly violated the Eighth Amendment, and the sentencer's consideration and reliance upon non-statutory aggravating circumstances prevented the constitutionally required narrowing of the sentencer's discretion. See Maynard v. Cartwright, 108 S. Ct. 1853, 1858 (1988); Lowenfield v. Phelps, 108 S. Ct. 546 (1988); Stringer v. Black; Sochor v. Florida, 112 S. Ct. 2114 (1992); Espinosa v. Florida. Thus, introduction of these factors permitted the jury to base its death verdict on non-elements of capital murder violating the principles of Ring. Mr. Muhammad'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), and should not be allowed to stand. For each of the reasons discussed above the Court should vacate Mr. Muhammad's unconstitutional sentence of death and impose a life sentence.

ARGUMENT IV

MR. MUHAMMAD'S SENTENCING JURY WAS IMPROPERLY INSTRUCTED ON AGGRAVATING FACTORS DUE TO THE VAGUENESS OF INSTRUCTIONS AND THE FACT THAT THE AGGRAVATING FACTORS DID NOT APPLY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The re-sentencing court instructed Mr. Muhammad's sentencing jury on the cold, calculated, and premeditated aggravating factor (R. 3918-3919). When an aggravating factor is legally inapplicable, the Florida sentencing jury should not be instructed on the factor. In Archer v. State, 613 So. 2d 446 (Fla. 1993), "[a]t the penalty-phase charge conference Archer argued that the jury should not be instructed on the heinous, atrocious or cruel aggravator because that aggravator could not be applied vicariously to him." Id. at 448. Re-sentencing was ordered because "[o]n the facts of this case we are unable to say that the error in instructing on and finding this aggravator is harmless." (Id.). See also Kearse v. State, 662 So. 2d 677 (Fla. 1995). This Court has ordered re-sentencings in cases because the jury was instructed upon inapplicable aggravators. Lawrence v. State, 614 So. 2d 1092 (Fla. 1993) ("we cannot find the error in instructing the jury on and finding these inapplicable aggravators to be harmless"); White v. State, 616 So. 2d 21 (Fla. 1993) ("We agree with White that the trial judge erred in instructing the jury on and finding that this murder was committed in a cold,

calculated and premeditated manner"); Padilla v. State, 618 So. 2d 165 (re-sentencing ordered where jury instructed to consider inapplicable aggravator). Re-sentencing counsel was ineffective for failing to present evidence that would have defeated the applicability of this factor and adequately challenge the vagueness of the instruction.

The sentencing court also erred in instructing Mr. Muhammad's jury regarding the aggravating factor of heinous, atrocious, and cruel when, as a matter of law, this factor did not apply (R. 3918). The State failed to prove the existence of this aggravator beyond a reasonable doubt. There was insufficient evidence to support the finding of this aggravating circumstance. On direct appeal this Court struck this aggravating factor because the trial court's reliance upon it was based upon speculation. Because the aggravating circumstance did not apply as a matter of law, it was error to submit it for the jury's consideration. Archer v. State, 613 So. 2d 446 (Fla. 1993); Kearse v. State, 662 So 2d 677 (Fla. 1995). It was also error for the state to argue it in its closing argument. Re-sentencing counsel was also ineffective for failing to adequately litigate the language of the instruction.

Because the jury was instructed on an aggravating

circumstance which did not apply as a matter of law, an invalid aggravating factor was erroneously entered in the sentencing calculus. The jury is presumed to have considered an aggravating circumstance that, as a matter of law, did not apply here. Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). The sentencing court was in turn required to give weight to the jury's recommendation. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975); Walton v. Arizona, 497 U.S. 639, 653 (1990). Thus, an extra thumb was placed on the death side of the scale. Stringer v. Black, 112 S. Ct. 1130 (1992). As a result, Mr. Muhammad's sentence of death must be vacated. See Espinosa v. Florida; Sochor v. Florida, 112 S. Ct 2114 (1992).

The sentencing court also erred when it allowed the jury to consider the Bradford County case in aggravation. The State impermissibly argued for death in part, based upon the facts of the Bradford County case. The facts presented during the re-sentencing regarding the Bradford offense were incorrect and went unchallenged.

The sentencing court gave the following instruction:

The crime for which Thomas Knight, now known as Askari Abdullah Muhammad, is to be sentenced was committed for financial gain.

(R. 3918). This instruction is unconstitutionally vague, does

not guide the jury and fails to properly channel the jury. In order for this aggravating factor to apply, the financial motive must be the primary motive for the homicide, the jury was not instructed as to this requirement. No narrowing instruction was given. Moreover, this aggravating factor is inconsistent with the instruction on the homicides being committed for the purpose of avoiding arrest.

The sentencing court also gave the following instruction:

The crime for which Thomas Knight, now known as Askari Muhammad, is to be sentenced was committed while he was engaged in or an attempt to commit or flight after committing or attempting to commit the crime of kidnaping.

(R. 3917).

The sentencing court allowed the state to present evidence of this aggravating factor based upon the premise that the Gans' deaths occurred during the course of a kidnaping. Mr. Muhammad was never charged, indicted or convicted of kidnaping. The state's motive for seeking this aggravating factor instead of in the course of a robbery was to avoid the improper doubling that occurred in the prior sentencing between pecuniary gain and robbery. Moreover in light of Apprendi and Ring, and the fact that in Florida there is no sentencing verdict form to indicate whether in fact the jury found a kidnaping beyond a reasonable doubt, or a

unanimous verdict, instruction on this aggravating factor and presentation of the evidence supporting it was error.

Additionally, the instruction as read, actually forms two aggravating circumstances, *i.e.*, flight and kidnaping, whereas only one aggravating factor should be considered. This was improper. The sentencing court further instructed the jury:

The crime for which Thomas Knight, now known as Askari Abdullah Muhammad, is to be sentenced was committed for the purpose of avoiding or preventing a lawful arrest.

(R. 3918).

Instruction on this aggravator was improper because it constituted impermissible doubling with the instruction that refers to flight.

Richmond v. Lewis, 113 S. Ct. 528 (1992), requires not only that states adopt a narrowing construction of an otherwise vague aggravating factor, but also that the narrowing construction actually be applied during a "sentencing calculus." Richmond, 113 S. Ct. at 535. See Johnson v. Singletary, 612 So. 2d 575, 577 (Fla. 1993). The only way for a penalty phase jury to apply a narrowing construction of an aggravating factor is for the jury to be told what that narrowing construction is. Walton v. Arizona, 497 U.S. 639, 653 (1990). Moreover, the death penalty in this

case was predicated upon an unreliable automatic finding by the judge of a statutory aggravating circumstance.

ARGUMENT V

MR. MUHAMMAD'S SENTENCING JURY WAS MISLED BY COMMENTS, QUESTIONS, AND INSTRUCTIONS THAT UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY TOWARDS SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A capital sentencing jury must be properly instructed as to its role in the sentencing process. Espinosa v. Florida, 112 S. Ct. 2926 (1992); Hitchcock v. Dugger, 481 U.S. 393 (1987); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert denied, 109 S.Ct. 1353 (1989). Therefore, even instructional error not accompanied by a contemporaneous objection warrants reversal. Meeks v. Dugger, 576 So. 2d 713 (Fla. 1991); Hall v. State, 541 So. 2d 1125 (Fla. 1989).

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), a capital habeas corpus petitioner was awarded relief when he presented a claim involving prosecutorial and judicial comments and instructions that diminished the jury's sense of responsibility. Mr. Muhammad is entitled to the same relief. A contrary result would result in an arbitrary imposition of the death penalty in violation of the Eighth Amendment. Furman v. Georgia, 408 U.S. 238 (1972).

Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc) and Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988), have determined that Caldwell applies to Florida capital sentencing proceedings and when either judicial instructions or prosecutorial comments minimize the jury's sentencing role, relief is warranted. The purpose of Caldwell is that capital sentences be individualized and reliable. Caldwell, 472 U.S. at 340-41.

Throughout the proceedings in Mr. Muhammad's case, the statements were made about their non-responsibility at the sentencing phase. The jury was told it merely recommended a sentence to the judge, their recommendation was only advisory, and that the judge alone had the responsibility to determine the sentence to be imposed for first-degree murder. The State and the court repeatedly informed the jurors that the court had the final decision for deciding whether Mr. Muhammad would be sentenced to death. The Court failed to instruct the jury that its recommendation would only be overridden in circumstances where no reasonable person could agree with it. Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). The judge merely told the jury that in rare circumstances would the recommendation be overridden. The court also failed to instruct the jury that a 6-6 vote was a life sentence. The

jury's decision is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Espinosa v. Florida, 112 S. Ct. 2926 (1992). Thus, suggestions and instructions that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is free to impose whatever sentence he or she deems appropriate irrespective of the sentencing jury's decision, is inaccurate and is a misstatement of Florida law. See Mann, 844 F.2d at 1450-55 (discussing critical role of jury in Florida capital sentencing scheme); Espinosa v. Florida, 112 S. Ct. 2926 (1992). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. Espinosa, 112 S. Ct. at 2928 ("Florida has essentially split the weighing process in two"). The jury's sentencing verdict can be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Muhammad's jury, however, was led to believe, that the judge was the "ultimate" sentencer contrary to Ring.

ARGUMENT VI

MR. MUHAMMAD'S SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION BECAUSE THE LAW SHIFTED THE BURDEN TO MR. MUHAMMAD TO PROVE THAT DEATH WAS INAPPROPRIATE AND BECAUSE THE TRIAL COURT EMPLOYED A PRESUMPTION OF DEATH IN SENTENCING MR.

MUHAMMAD.

It is well-established that:

the state must establish the existence of one or more aggravating circumstances before the death penalty [can] 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), cert. denied, 416 U.S. 943 (1974) (emphasis added). This standard was not applied at Mr. Muhammad's re-sentencing proceeding. Instead, the court and prosecutor shifted to Mr. Muhammad the burden of proving whether he should live or die.

It is improper to shift the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances. Mullaney v. Wilbur, 421 U.S. 684 (1975). It also runs afoul of the requirement in Ring that the state prove beyond a reasonable doubt the elements of capital murder. Thus, the Court injected misleading and irrelevant factors into the sentencing determination. Caldwell v. Mississippi, 472 U.S. 320 (1985); Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright, 486 U.S. 356 (1988). Prosecutorial argument during Mr. Muhammad's re-sentencing demanded imposition of the death sentence unless Mr. Muhammad not only produced mitigation, but also established that the

mitigation outweighed the aggravating circumstances. The trial court then employed the same standard in sentencing Mr. Muhammad to death. See Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988), cert. denied, 112 S. Ct. 390 (1991)(trial court is presumed to apply the law in accord with manner in which jury was instructed). It is clear the burden was on Mr. Muhammad to show that life imprisonment was the appropriate sentence because consideration of mitigating evidence was limited to only those factors proven sufficient to outweigh the aggravation.

Mr. Muhammad is entitled to relief in the form of a new sentencing hearing.

ARGUMENT VII

FLORIDA'S STATUTE SETTING FORTH THE AGGRAVATING CIRCUMSTANCES TO BE CONSIDERED IN A CAPITAL CASE IS FACIALLY VAGUE AND OVERBROAD IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. THE FACIAL INVALIDITY OF THE STATUTE WAS NOT CURED IN MR. MUHAMMAD'S CASE BECAUSE THE JURY DID NOT RECEIVE ADEQUATE GUIDANCE. AS A RESULT, MR. MUHAMMAD'S SENTENCE OF DEATH IS PREMISED UPON FUNDAMENTAL ERROR THAT NOW MUST BE CORRECTED.

"[I]n a `weighing' State [such as Florida], where the aggravating and mitigating factors are balanced against each other, it is constitutional error for the sentencer to give weight to an unconstitutionally vague aggravating factor, even if other, valid aggravating factors [exist]." Richmond v.

Lewis, 113 S. Ct. 528, 534 (1992). A facially vague and overbroad aggravating factor may be cured where "an adequate narrowing construction of the factor" is adopted and applied. Id. However, in order for the violation of the Eighth and Fourteenth Amendments to be cured, "the narrowing construction" must be applied during a "sentencing calculus" free from the taint of the facially vague and overbroad factor. Id. at 535. In addition, "[N]ot just any limiting construction will do; a constitutionally sufficient one is required." Turner v. Williams, 35 F.3d 872, 880 (4th Cir. 1994)(emphasis in original).

"By giving `great weight' to the jury recommendation, the trial court indirectly weighed the invalid aggravating factor this court must presume the jury found." Espinosa v. Florida, 112 S. Ct. 2926, 2928 (1992). The indirect weighing of the facially vague and overbroad aggravators violates the Eighth and Fourteenth Amendment. Richmond, 113 S. Ct. at 534. Therefore, the jury's sentencing calculus must be free from facially vague and overbroad aggravating factors. Espinosa, 112 S. Ct. at 2929. Thus, in order to cure the facially vague and overbroad statutory language, the jury must receive the constitutionally adequate narrowing construction. Id. at 2928.

The failure to instruct on the necessary elements a jury must find constitutes fundamental error. State v. Jones, 377 So. 2d 1163 (Fla. 1979); See also Ring. Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). The State, however, failed to prove these aggravating circumstances beyond a reasonable doubt. Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). The statute is facially vague and overbroad in violation of the Eighth and Fourteenth Amendments and it impinges upon a liberty interest. Richmond v. Lewis. Thus, the application of the statute violated Mr. Muhammad's right to due process.

ARGUMENT VIII

MR. MUHAMMAD WAS DENIED HIS RIGHTS UNDER THE FOURTH, FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION, WHEN THE PROSECUTOR IMPERMISSIBLY SUGGESTED TO THE JURY THE LAW REQUIRED THAT IT RECOMMEND A SENTENCE OF DEATH.

During voir dire, the prosecutor repeatedly asked prospective jurors if they could vote for a sentence of death

if the aggravating circumstances required or called for that sentence. First, in no instance does the law require that a death sentence be imposed. Second, in a capital sentencing proceeding, the law does not require or call for the jury to recommend a sentence of death over life imprisonment, or vice versa; rather, the law requires the jury to determine the existence of aggravating and mitigating circumstances, and thereafter, weigh them against each other. In other words, the law requires the jury to consider the evidence introduced in both the guilt and sentencing phases of the trial, and after having done so, recommend an appropriate sentence. See also Ring; Apprendi.

The comments of the prosecutor misguided the jury into thinking that the law required one sentence over the other, when in fact, the proper question is whether, based upon the evidence regarding aggravating and mitigating circumstances, a juror would consider the appropriateness of a death recommendation.

The prosecutor mislead the jury into believing the recommendation of the jury was a simple counting process. The prosecutor implied that the jury should merely compare the number of aggravating circumstances in relation to the number of mitigating circumstances. If the number of aggravating

circumstances exceeded the number of mitigating circumstances, the prosecutor suggested to the jury the law required or called for a recommendation of death.

This misconduct is even more compelling because it was the State Attorney asking the questions: "Arguments delivered while wrapped in the cloak of state authority have a heightened impact on the jury." Id. at 1459. Prosecutorial commentary as evidenced in Mr. Muhammad's case has been held to render a sentence of death fundamentally unreliable and unfair. Id. at 1460 ("[T]he remarks' prejudice exceeded even its factually misleading and legally incorrect character"). See also 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"); Potts v. Zant, 734 F.2d 526, 536 (11th Cir. 1984) ("When core Eighth Amendment concerns are substantially impinged upon[,] . . . it is understandable that confidence in the jury's decision will be undermined. . . . We conclude that the sentencing phase was fundamentally unfair."); 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 questions of the prosecutor also diminished the jury's sense of responsibility for its life or death determination. The prosecutor's bottom line was that the only verdict the jury could return was death because the legislature intended that a death verdict be rendered against Mr. Muhammad. This type of improper questioning in effect tells the jury that a higher authority -- the Florida legislature -- has already determined that death is the only proper penalty.

Because proper objection and motion for mistrial should have been made by Mr. Muhammad's counsel and was not, defense counsel failed to properly preserve this issue for appellate review. Mr. Muhammad was denied his right to effective representation of counsel as guaranteed by the United States Constitution. See Strickland v. Washington, 466 U.S. 668 (1984).

At a minimum, an evidentiary hearing is required, because the files and records do not conclusively demonstrate that Mr. Muhammad is not entitled to relief.

ARGUMENT IX

FLORIDA'S CAPITAL SENTENCING STATUTE IS UNCONSTITUTIONAL ON ITS FACE AND AS APPLIED IN THIS CASE BECAUSE IT FAILS TO PREVENT THE ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY, AND IT VIOLATES THE CONSTITUTIONAL GUARANTEES OF DUE PROCESS AND PROHIBITING CRUEL AND UNUSUAL PUNISHMENT.

Florida's capital sentencing scheme denies Mr. Muhammad his right to due process of law, and constitutes cruel and unusual punishment on its face and as applied in this case. Florida's death penalty statute is constitutional only to the extent that it prevents arbitrary imposition of the death penalty and narrows application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution.

The capital sentencing statute in Florida fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." Further, the statute does not sufficiently define for the consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). These deficiencies lead to the arbitrary and capricious imposition of the death penalty

and violate the Eighth Amendment to the United States Constitution. Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances required by Proffitt v. Florida, 428 U.S. 242 (1976). The aggravating circumstances in the Florida capital sentencing statute have been applied in a vague and inconsistent manner, and juries receive unconstitutionally vague instructions on the aggravating circumstances. See Godfrey v. Georgia; Espinosa v. Florida, 112 S. Ct. 2926 (1992). Florida law creates a presumption of death if a single aggravating circumstance is found. This creates a presumption of death in every felony murder case, and in nearly every premeditated murder case. Once an aggravating factor is found, Florida law provides that death is presumed to be the appropriate punishment, which can only be overcome by mitigating evidence so strong as to outweigh the aggravating factor. This systematic presumption of death does not satisfy the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. See Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Richmond v. Lewis, 113 S. Ct. 528 (1992). See also Ring. Additionally, execution by electrocution and/or lethal injection imposes physical and psychological

torture without commensurate justification, and therefore constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution.

ARGUMENT X

MR. MUHAMMAD'S EIGHTH AMENDMENT RIGHT AGAINST CRUEL AND UNUSUAL PUNISHMENT WILL BE VIOLATED AS MR. MUHAMMAD MAY BE INCOMPETENT AT THE TIME OF EXECUTION.

In accordance with Florida Rules of Criminal Procedure 3.811 and 3.812, a prisoner cannot be executed if "the person lacks the mental capacity to understand the fact of the impending death and the reason for it." This rule was enacted in response to Ford v. Wainwright, 477 U.S. 399, 106 S.Ct. 2595 (1986).

The undersigned acknowledges that under Florida law, a claim of incompetency to be executed cannot be asserted until a death warrant has been issued. Further, the undersigned acknowledges that before judicial review may be held in Florida, Mr. Muhammad must first submit his claim in accordance with Florida Statutes. The only time a prisoner can legally raise the issue of his sanity to be executed is after the Governor issues a death warrant. Until the death warrant is signed the issue is not ripe. This is established under Florida law pursuant to Section 922.07, Florida Statutes (1985) and Martin v. Wainwright, 497 So. 2d 872 (1986). The

same holding exists under federal law. Martinez-Villareal v. Stewart, 118 S. Ct. 1618, 523 U. S. 637, 140 L.Ed.2d 849(1998). In order to raise an issue in a federal habeas petition, the issue must be raised and exhausted in state court. Consequently, Mr. Muhammad raises this claim at the present time for preservation purposes.

Mr. Muhammad has been incarcerated since 1974. Statistics have shown that an individual incarcerated over a long period of time will suffer diminished mental capacity. Inasmuch as Mr. Muhammad may well be incompetent at the time of execution, his Eighth Amendment right against cruel and unusual punishment will be violated.

REQUEST FOR INDEPENDENT REVIEW OF SEALED RECORDS.

Finally, Mr. Muhammad requests that this Court conduct an independent review of the materials submitted to this Court under seal that were held by the lower court to be either exempt from disclosure and/or not containing Brady evidence.

CONCLUSION

Mr. Muhammad submits that relief is warranted in the form of an Order vacating the death sentence and imposing a life sentence or in the alternative, an Order remanding the matter to the lower court to hold a new sentencing proceeding. At a minimum, an Order remanding the case for an evidentiary hearing is warranted.

CERTIFICATE OF FONT

This brief is typed in Courier 12 point not proportionately spaced.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on June 21, 2004.

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