IN THE SUPREME COURT OF FLORIDA

CASE NO. SC04-345
Lower Tribunal: 16-1977-CF-2874

ERNEST CHARLES DOWNS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is an appeal to the Florida Supreme Court of the trial court's denial of Downs' pro se motion to vacate judgment of conviction and sentence, pursuant to Fla.R.Crim.P. 3.850/3.851. Downs' claims were denied without an evidentiary hearing.

In actuality, Downs can be heard and the following issues addressed because this Court did not mandate his conviction, *i.e.* direct appeal in 1980, as required by Rule 9.340(a).*

This Court is prayed to take *Judicial Notice* of this fact, pursuant to *§90.201(2), 90.202(A)(7)(12) and 90.203(1).*

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* *"Under Florida law, a judgment against a criminal defendant becomes final upon issuance of the mandate on his direct appeal."* Tinker v. Moore, 255 F.3rd 1331, 1333 (11th Cir. 2001). And it is only upon issuance of the mandate that *"finality and legality attaches to the conviction."* Brecht v. Abrahamson, 507 U.S. 619, 633 (1993). Also, *"[t]his Court has the power to reconsider and correct erroneous rulings in exceptional circumstances and when reliance on the previous decision would result in manifest injust, notwithstanding that such rulings have become law of the case."* Marshall v. Crosby, 911 So.2d 1129, 1141(Fla. 2005). Furthermore, this Court recognizes that the United States Supreme Court has repeatedly emphasized that the Eight Amendment requires a heighten degree of reliability in capital cases. Allen v. Butterworth, 756 So.2d 52, 59 (Fla. 2000). So this Court demands of itself *"a responsibility to ensure that society's ultimate penalty is not imposed except in appropriate cases and that the sentence is not arbitrary or the result of a mistake. This second responsibility does not end when an inmate's appeals are completed; it continues until the moment that the death sentence is imposed."* Dorocher v. Singletary, 623 So.2d 422, 486 (Fla. 1993) Barkett, Chief Justice, specially concurring).

REQUEST FOR ORAL ARGUMENT

By way of a "separate document" pursuant to Rule 9.320, oral argument is requested.

RECORD CITATIONS

Citations shall be as follows:

Reference to Downs' 1977-78 trial will be "J.T." for jury selection transcript; "T.T." for trial transcript; "P.T." for penalty phase transcript; and "S.T." for sentencing transcript.

Reference to Downs' 1982-83, 3.850 hearing will be "H.T." for evidentiary hearing transcript.

Reference to Downs' 1988-89 resentencing will be "R.T." for resentencing transcript.

All references will be followed by the appropriate page number and parenthesized. Other references will be self-explanatory or otherwise explained. And note that all *emphasis* is added unless otherwise indicated.

FOOTNOTES

For an easier and more comprehensive read, footnotes follow the relevant paragraphs.

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STATEMENT OF THE CASE

On August 4, 1977, Downs was indicted for first degree murder. (T.T.785-86). The indictment was amended on August 11, 1977, charging Downs and three others with conspiracy to commit first degree murder, and one of the conspirators charged with first degree murder. Downs pled not guilty.

Downs' trial began on December 12, 1977. On December 16, 1977, the jury rendered a guilty verdict on both counts (T.T. 837). On December 20, 1977, a majority of the jury recommended a death sentence (P.T. 87). On January 27, 1978, the trial court *ore tenus* imposed a sentence of death on the count of first degree murder and a concurrent sentence of thirty (30) years on the count of conspiracy to commit first degree murder (S.T. 37-40). No findings of fact were entered, except the judge found for a "*fact*" that Downs "*fire[d] the fatal shots and [] was the active participant in the murder.*" (S.T. 34).

This Court affirmed Downs' convictions and sentences on direct appeal. Downs v. State, 386 So. 2d 788 (Fla.1980). In June 1982, Downs filed a 3.850 motion for a new trial (from Case No. 59.865, which was denied without prejudice to file a 3.850 motion). On October 12-13, 1982, and January 11-12, 1983, the trial court held an evidentiary hearing. On August 12, 1983, the court denied Downs' motion to vacate. This Court affirmed the denial. Downs v. State, 453 So.2d 1102

(Fla.1984). Downs petitioned for habeas corpus relief, which this court denied. Downs v. Wainwright, 476 So.2d 654 (Fla. 1985).

On August 18, 1987, Governor Martinez signed a death warrant and Downs' execution was scheduled for September 17, 1987. Downs filed a petition for extraordinary relief, for a writ of habeas corpus and request for stay of execution dated September 8, 1987. On September 9, 1987, this Court granted Downs' writ, and vacated Downs' sentence, and remanded for a new sentencing in light of Hitchcock v. Dugger, 481 U.S. 393 (1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

After a new sentencing proceeding, the jury recommended death by an eight (8) to four (4) vote. The trial court re-sentenced Downs to death on February 17, 1989. This Court affirmed the death sentence on appeal. Downs v. State, 572 So. 2d 865 (Fla. 1990), cert. denied, 112 S. Ct. 101 (1991).

In November 1992, Downs filed a 3.850 motion to vacate judgments of conviction and sentence with special request for leave to amend. The motion was amended in October 1993, and again in September 1994. On March 3, 1997, the trial court denied the motion and this Court affirmed. Downs v. State, 740 So.2d 506 (Fla.1999). Downs petitioned for habeas corpus relief, which this Court denied. Downs v. Moore, 801 So.2d 906 (Fla.2001)

In December 2001, CCRC filed Downs' *§2254* petition. In October 2004, the district court dismissed the petition as time-barred because CCRC failed to meet the AEDPA's one year time limitation. This is presently under appeal in the 11th Circuit. Before dismissing the petition as untimely, the district court dismissed CCRC, and allowing Downs to proceed *pro se*, stayed the case, and in August 2002, ordered Downs back to state court to argue Ring and exhaust his IAC claim.

In September 2002, Downs initiated action in the trial court which led to a 3.850/3.851 motion and this appeal.

SUMMARY OF THE ARGUMENTS

The errors presented begin with an unconstitutional response to a jury question in mid deliberation that constructively amended Downs' murder indictment and altered the verdict form. The latter of which resulted in Downs not being acquitted (or convicted) of the firearm charge of which he stood accused. Furthermore, counsel's failure to object to the trial court's erroneous handling of the jury question highlights additional claims of the ineffective assistance of counsel (that ultimately extended into Downs' direct appeal).

The hallmark of the IAC claims are that counsel's failure to subject the state's case to meaningful adversarial testing was more than a deficient performance due to incompetence. It was an egregious representation due to an untraditional third person conflict of interest that prevented Downs from testifying. Moreover his ample defense being abandoned at the last second without consultation, or inquiry by the court.

Downs also presents *inter alia*, a Brady/Giglio claim; an *anomalous* culpability/disproportionality claim; and an unprecedented Ring claim. All of which can be heard because *inter alia* Downs' direct appeal is not mandated.

The claims that follow require that Downs' 1977 conviction and sentence be set aside.

ARGUMENT I

DOWNS' MURDER CONVICTION AND DEATH SENTENCE MUST BE OVERTURNED BECAUSE THE TRIAL JUDGE IN MID JURY DELIBERATION CONSTRUCTIVELY AMENDED THE MURDER INDICTMENT AND ALTERED THE VERDICT FORM IN VIOLATION OF DOWNS' FIFTH, SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO THE CONSTITUTION OF THE UNITED STATES AND THE CORRESPONDING PROVISIONS OF FLORIDA'S CONSTITUTION.

Due process requires that an indictment be drafted clearly and with specificity, so that the accused knows precisely the charge and is able to intelligently prepare a defense. Stang v. State, 421 So.2d 147, 150 (Fla. 1982). The indictment charged Downs with "*unlawfully and from a premeditated design to effect the death of Forrest J. Harris, Jr., . . . by shooting him to death with a pistol, ..., contrary to Sections 782.04 and 775.087, Florida Statutes.*" (T.T. 785-86).[1] *Exibit 1*

[1] While Section 775.087 is usually thought of as a sentencing enhancement. In Downs' indictment, Section 775.087 and Section 782.04 are a statute creating and defining a criminal offense. Acknowledged by this Court in Downs v. Dugger, 514 So.2d 1069, 1072 (Fla.1987). ("*a firearm charge of which Downs stood accused.*"). The elements of the offense were a factual finding to be left to the jury. Taylor v. State, 785 So.2d 1179, 1180-81 (Fla. 2000).

No one else was named in the murder indictment read to the jury. The State did not contend that anyone other than Downs shot and killed Harris (T.T. 14-21). There was no evidence that Downs aided or abetted (other than that he participated in a conspiracy) only Johnson's immunized absurd testimony that Downs killed Harris (T.T. 119-21).[2]

[2] In addition to the constructively amended indictment argument, the judge erred in giving over objection, the 2.05 principal instruction under the facts of this case (T.T. 654-55). Especially given defense counsel's opening statement that "*[o]ur defense is this case is a very simple one. We admit that Jerry Harris was killed . . ., that it was a homicide, that is, it was a death by the hand of another person. We deny that [ ] Downs was that person. He was not that person*" (T.T. 22-23). For a case on point see Lucas v. O'Dea, 179 F.3d, 412, 417 (6th Cir. 1999).

Since the State's case was that Downs killed Harris, the law required that it be proven beyond a reasonable doubt that it was Downs who killed Harris as charged. Specifically, the judge told the jury:

> Before the presumption of innocence leaves the defendant, every material allegation of the indictment must be proved by the evidence to the exclusion of and beyond every reasonable doubt. The presumption accompanies and abides with the defendant as to each and every material allegation of the indictment through each stage of the trial until it has been overcome by the evidence to the exclusion of and beyond every reasonable doubt. If any of the material allegations of the indictment is not proved to the exclusion of and beyond every reasonable doubt, you must give the defendant the benefit of the doubt and find him not guilty (T.T. 788-89).

The judge explained that the essential elements which must be proved beyond a reasonable doubt before there can be a murder conviction are:

> One. Forrest J. Harris, Jr. is in fact dead.
> Two. The death was caused by the act of the defendant.
> Three. The killing was wrongful and by the means stated in the indictment and
> Four. The killing was neither justifiable nor excusable homicide, . . . (T.T. 815).

And the judge made clear that "*[t]he defendant is not on trial for any act or conduct not charged in the indictment*" (T.T. 818-19).

The judge also gave Jury Instruction 2.17, a specific instruction regarding the use of a firearm in the commission of the crime, which says:

> The punishment provided by law for the crime of murder is greater if, as charged in this case, the defendant, during the commission of such crime, carries a firearm. Should you find the defendant guilty of murder of any degree, it will be necessary for you to find in your verdict whether it has been proved beyond a reasonable doubt that the defendant, during the commission of the crime, did use a firearm (T.T. 814).

The "*Charge of the Court*" concluded with the verdict form being explained to the jury, which included their marking did or did not use a firearm, and they were given a copy of the indictment (T.T. 820). [3]

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[3] When a defendant is charged with the use of a firearm, and the verdict form includes whether or not the defendant used a firearm, then the jury must make such a finding. State v. Hargrove, 694 So.2d 729 (1997).

The jury retired to deliberate at 6:41 p.m. At 9:20 p.m., the jury buzzed and presented the following question:

> In regard to the question as to whether the defendant did or did not use a firearm, must the defendant be guilty of actually pulling the trigger, or is he guilty of using the firearm through association of being an accomplice in a murder of which a firearm was used (T.T. 827-28). *Exibit 2*

After brief questioning by the judge, the jury confirmed that their question related specifically to the use of a firearm *Instruction 2.17* (at T.T. 814) (T.T. 833-34). Since the question pertained to the verdict form and the finding of whether or not

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Downs "*actually*" used a firearm, the correct answer to the question was "no." [4]

[4] The importance of addressing such a question correctly cannot be emphasized enough, especially in a capital case. E.g. Lebron v State, 894 So.2d 849 (Fla. 2005) "the [ ] jury effectively acquitted him of the possession or use of a gun during the commission of those felonies." *Id.* 853

After conferring with the prosecution and defense counsel in chambers without Downs (T.T. 831), the judge, instead of answering the jurors' question, ordered the jury to "*delete*" from their verdict form whether or not Downs used a firearm, and instructed the jury to "*[j]ust totally disregard that from [their] consideration at this point*" (T.T. 836), which amounted to being instructed to totally disregard from their consideration whether or not Downs shot and killed Harris as charged in the indictment. [5 & 6]

[5] If the Court had given an "appropriate response" to the jurors' question, Downs' absence from the proceeding would be a harmless error, but since the court response was unconstitutional, Downs' absence was an error, since he could have pointed out that since the question pertained to the verdict form and use of a firearm Instruction 2.17, the "*appropriate response*" was to answer their question with "*no*." Because under Florida law, Downs' verdict form had to reflect whether or not he used a firearm (T.T.814). Vining v. State, 827 So.2d 201, 217-18 (Fla. 2002). See also Fla. R.Crim. P. 3.180 (a).

[6] Brown's failure to raise an objection based on both due process and Florida law highlights his ineffectiveness. Everett v. Beard, 209 F.3d 500 (3d Cir. 2002). Brown's ineffectiveness omitted a "*dead-bang*" winner from Downs' initial direct appeal, and gives rise to "*cause and prejudice*." United States v. Cook, 45 F.3d 388, 392-95 (10th Cir. 1995), *e.g.* Matire v. Wainwright, 811 F.2d 1430, 1438 (11th Cir. 1983). (Counsel's failure to raise issue which 'was obvious on the record, and must have leaped out upon even a casual reading of [the] transcript' was deficient performance).

The jury returned to their deliberation at 10:18 p.m. and just two minutes later at 10:20 p.m., with several jurors actually weeping (S.T.4, 5 & 8), Downs was found guilty of murder and conspiracy to commit murder (T.T. 837). [7] *Exibit 3*

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[7] In sentencing Downs to death, the judge said "*I would find that [Downs] did in fact fire the fatal shots*" as charged in the indictment (S.T. 34). This Court holds that "[t]o allow a judge to find that an accused actually possessed a firearm when committing a felony . . . would be an invasion of the jury's historical function and could lead to a miscarriage of justice . . ." State v. Overfelt, 457 So.2d, 1385, 1387 (Fla. 1984).

The foregoing instructions was a "*fatal variance*" that amounted to a constructive amendment of Downs' murder indictment. The variance from the indictment to the jury instruction constituted a constructive amendment that deprived him of his Fourteenth Amendment right to due process. Lucas v. O'Dea, 179 F.3d at 417 (6th Cir. 1983); U. S. v. Weissman, 899 F.2d 1111, 1114 (11th Cir. 1990).

The constructive amendment relieved the State of its duty of proving all the elements of the offense and relieved the jury of its initial instruction to find Downs guilty beyond a reasonable doubt of all the essential elements charged in the indictment. In re Winship, 397 U.S. 358 (1970); Apprendi v. New Jersey, 530 U.S. 466, 477 (2000); U. S. v. Alvarez, 755 F.2d 830 (11th Cir. 1985). The judge invaded the province of the jury and effectively plead Downs guilty of using the firearm, which, *a fortiori* implied that Downs shot and killed Harris as charged. The burden

of having to prove or disprove a material allegation of the indictment was shifted to Downs. Sandstrom v. Montana, 99 S.Ct. 2450, 2484 (1979); Weissman, *supra*; U. S. v. Keller, 916 F.2d 628 (11th Cir. 1990). In short, the "*fatal variance*" was a due process violation that resulted in Downs being convicted and sentenced to death on grounds not alleged in the indictment. Stirone v. U. S., 361 U.S. 212, 217-18 (1960). A conviction obtained under such circumstances can not stand. Jackson v. Virginia, 443 U.S. 307 (1979); Alvarez, *supra*.

It is generally presumed that jurors follow their instructions. Perry v. Johnson, 21 S.Ct. 1910, 1922 (2001). In Downs' case, it would have been both logically and ethically impossible for a juror to follow both sets of instructions, *i.e.* initial instruction and supplement instruction. Therefore there can be no good faith debate that would discount the possibility that Downs' jury may have interpreted the judge's response to their question in an unconstitutional manner. The Due Process clause prohibits the State from making use of jury instructions that have the effect of relieving the State of the burden of proof enunciated in Winship. Francis v. Franklin, 105 S.Ct. 1965, 1977 (1985). The Supreme Court mandates that "*[i]n returning a conviction the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt.*" Barclay v. Florida, 103 S.Ct. 3418, 3425 (1983). This Court has noted the difference a single juror can make when

it comes to finding reasonable doubt. Floyd v. State, 902 So.2d 775, 785 (Fla. 2005). This Court has also held that a "*miscarriage of justice*" arises where instructions are "*reasonably calculated to confuse or mislead*" the jury. Goldschmidt v. Holman, 571 So.2d 423, 425 (Fla. 1990). The judge suspected Downs' jury was "*confused*" (T.T. 833-34).

The question asked by the jury (that went unanswered), establishes that whether or not Downs killed Harris, was in serious doubt. Therefore there is a reasonable likelihood that the jury understood the supplemental instruction to disregard whether or not Downs used a firearm, and to delete it from the verdict form, in a manner that violated due process, and erroneously lead the jury to believe that Downs carried the burden of introducing evidence. This violates Downs' constitutional privilege against compelled self-incrimination. Jackson v. State, 575 So.2d 181, 188, n.4 (Fla. 1991).

The supplemental instruction to "*just totally disregard... at this point*" whether or not Downs used a firearm, invaded the province of the jury and effectively pled Downs guilty of murder as charged in the indictment, was a plain fundamental per se reversible error. Weissman, *supra*. The order to "*delete*" from the verdict form whether or not Downs used a firearm as charged, was a clear structural error that defies analysis by the harmless - error standards. Johnson v. United States, 117 S.Ct. 1455, 1549-50 (1997). If there was ever a case in which the requisite quantum of

cumulative effect is present, it is the case at hand. To escape the force of this logic, would be to turn a blind eye to justice, instead of justice being blind. [8-9]

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[8] The question asked by the jury (without any defense whatsoever) indicates it believed that Harris was killed by the State's star immunized witness, Johnson. Downs v. Dugger, 514 So.2d 1069, 1072 (Fla. 1987). Therefore the judge's unconstitutional handling of the jurors' question could have effectively prohibited them from giving Downs a "*jury pardon*," based upon their reasoning that Johnson was going unpunished because he had lied to get immunity, coupled with the lenient treatment of others involved (*Post* pp. 57, 58), that Downs should just be convicted of conspiracy. This is a concept often recognized by this Court. *E.g.* Bailey v. State, 224 So.2d 796 (Fla. 1969). *Cf.* Adams v. State, 341 So.2d 765, 769 (Fla. 1977). Disallowing the jury to find that Downs did not use a firearm could well have foreclosed a vote against the imposition of the death penalty due to the existence of "*whimsical doubt.*" See Smith v. Wainwright, 741 F2d 1248, 1255 (11th Cir. 1984). Neither the possibility of a "*jury pardon*" or the existence of "*whimsical doubt*" could be corrected through a resentencing before a different jury. *Post* Argument IV. Down v. Dugger, *supra*. *CF.* Oregon v. Guzek, 126 S.Ct. 1226, 1232 (2006).

[9] Downs respectfully submits that the foregoing "*plain fundamental per se reversible error*" and the "*clear structural error that defies analysis by the harmless-error standards*" are errors that are subject to this Court's review *ex mero motu*. Streeter v. State, 416 So.2d 1203 (Fla. 3d DCA 1982).

This Court is prayed to take *Judicial Notice* of the question asked by the jury in mid deliberation (T.T. 827-28), the trial judge's unconstitutional response and alteration of the verdict form (T.T. 836), which resulted in Downs not being convicted of the "*firearm charge of which [he] stood accused*", *ante*, f.1. Wherefore, Downs' judgment of conviction and sentence should be vacated.

ARGUMENT II

DOWNS WAS DENIED EFFECTIVE ASSISTANCE OF TRIAL (AND APPELLATE) COUNSEL, DUE PROCESS OF LAW, AND EQUAL PROTECTION UNDER THE LAW, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND THE CORRESPONDING PROVISIONS OF FLORIDA'S CONSTITUTION

Richard Brown's representation of Downs at trial (and on direct appeal) was rife with conflict and marred by a gross malfeasance. The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result. It must be shown that counsel's representation fell below an objective standard of reasonableness while overcoming the presumption that, under the circumstances, the challenged action might be considered sound trial strategy. Secondly, prejudice must be shown, except in rare cases. Strickland v. Washington, 104 S.Ct. 2052, 2064-65, 2067 (1984).

Downs not only meets the usual Strickland standard, but the Cronic Standard, United States v. Cronic, 104 S.Ct. 2039 (1984), where prejudice is presumed. This is a case where Brown's performance was not only ineffective, but he abandoned his required duty of loyalty to Downs; counsel did not simply make poor strategic or tactical choices; he acted with reckless disregard for his client's best interest, and

apparently with the intention to weaken his client's case. Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). Evident by the following:

For a comprehensive understanding of Downs' Ineffective Assistance of Counsel claims, a synopsis of the State's case is warranted;

Beginning in April 1976, John Barfield, Ricky Barfield, Gerry Sapp and Huey Palmer conspired to kill Harris so Ronald Garelick could collect insurance. They made three attempts on his life. On April 18, 1977, John Barfield approached Downs to solicit the help of Larry Johnson to kill Harris. On April 23, 1977, while Johnson waited at a predetermined location, Downs picked up Harris and bringing him to where Johnson was, Downs killed Harris with a pistol (T.T. 14-21).

The State called fifteen (15) witnesses. None testified that Harris was killed for insurance, and only four (4) testified as to the events of April 23, 1977;

Harris' widow, Elaine Harris, testified that at approximately 7:30 p.m., a Joseph Green called asking for Harris who was not there, but was expected back in about fifteen (15) minutes. Harris returned and when she answered the phone again and recognized the caller from earlier, she gave Harris the phone. After a brief conversation, Harris left for a meeting with Green at the Foxfire Inn (five minutes away) that Barfield had arranged. She suspected that it pertained to something illegal (T.T. 92-97).

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Henry Coleman Jackson III, who knew Harris, testified that shortly before 9 p.m., he saw Harris standing in front of the Foxfire talking to someone in a dark colored 4x4 vehicle. He could not see to whom Harris was talking (T.T. 236-239).

Elizabeth Ann Jerrel, who also knew Harris, testified that at around 9 p.m., she saw Harris park his Mercedes Benz behind Jax Liquors across the road from the Foxfire, and get into a big dark colored truck. She described the driver as clean shaven with short dark hair and about Harris' age. She could not identify Downs who had long blond hair and a full beard and mustache as the person who picked up Harris. While Johnson was clean shaven with short dark hair, and around Harris' age (T.T. 242-246).

Larry Johnson, the State's star immunized witness who went into the Federal Protection Program, testified (over objection with the aid of a diagram he prepared before coming to court (121-130, 147-51)) that John Barfield had given him Harris' private number, and Harris (who was a pilot) would be expecting a call from a Joseph Green to set up a meeting to discuss flying drugs. At the last minute he wanted to back out of killing Harris, but that Downs made him call from a phone booth by Jax Liquors. The first time he called, Harris was not there, but when he called back, Harris answered and they agreed to meet at the Foxfire in a few minutes (T.T. 108, 159-61).

Johnson testified that Downs made him get back into the truck and drive to the end of a dirt road down from the Foxfire. He was left there with a machine gun, while Downs went to get Harris, returning with him a few minutes later, and when Harris got out to talk, Downs shot Harris several times in the head with a .25 automatic pistol. They dragged the body across a ditch into the bushes, and Downs got a bullet from him and shot Harris again in the chest (T.T. 114-17, 174-76).

Johnson further testified that he had bought the murder weapon and the reason it could not be produced was because the night Harris was killed, he threw it in the St. John's River (188). When asked why Harris was killed, he testified it was because Harris had messed over a lot of people (172).

Johnson's testimony of the shooting was far-fetched at best (T.T. 119-21), and his testimony at trial changed drastically from his Sworn Statement of August 8, 1977, that was inconsistent with his Sworn Statement of August 3, 1977. [1]

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[1] The State objected to efforts to impeach Johnson (168-69). In sustaining the objections, the court not only vouched for Johnson's credibility (169-70), but actually told the jury " *ladies and gentlemen, I would rule . . . that [what] was just read is not inconsistent with what [Johnson] has said here today in court.*" (T.T. 222-23). Downs objected and moved for a mistrial, which the court denied (T.T. 232-33). In Florida, the Evidence Code expressly prohibits a judge from commenting on the credibility of witnesses. Gorby v. State, 630 So.2d 544, 547 (Fla. 1993). This was especially damaging in Downs' case because the outcome of the case depended primarily on Johnson's credibility.

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1. A CONTINGENT FEE ARRANGEMENT CREATED AN IRREVOCABLE CONFLICT OF INTEREST THAT DEPRIVED DOWNS OF EFFECTIVE ASSISTANCE OF COUNSEL

After having Downs declared indigent (pre-trial proceeding of August 10, 1977, pp 3-6), Brown executed a "*Retainer Agreement*" in which he would receive a $10,000 contingent fee if Downs was acquitted of both murder and conspiracy to murder.

There is little authority on the issue of contingent fee agreements in criminal cases, and what little there is stems from cases like Downs v. State, 453 So.2d 1102 (Fla. 1984). *Cf.* Winkler v. Keane, 812 F.Supp. 426, 429 (S.D.N.Y. 1993). But the prosecription against such arrangements in criminal matters is universally recognized. *E.g.* Florida Bar Rule 4-1.5(f)(3)(B). Indeed, in this case, Brown's unethical conduct resulted in one of three reprimands. The obvious reason for the prohibition on such arrangements in criminal cases are that it places the lawyer in a position of putting his own interests ahead of those of his client. The lawyer's advice is tainted with self-interest, such that counsel stands to benefit personally from the adoption of a one course of action to the exclusion of another. While such is not a *per se* Sixth Amendment violation, relief will be given when warranted. *E.g.* Winkler, *supra*, n. 2[2]

[2] This issue was rejected in Downs v. State, 453 So.2d 1102 (Fla. 1984). It is presented again in light of Brown's admitted third person conflict, *infra*, as an additional "*factor to be considered... under the totality of the circumstances in determining whether [Downs] has been deprived effective assistance*

of counsel." *Id.*, 1109.

Brown gave a dramatic opening statement to the jury about how, since the State was only going to present just the "*tip of the iceberg*," all the evidence and witnesses the jury could expect from the defense (T.T. 21-25). Then Brown waived Downs' right to be present during proceedings, to the extent that the judge became concerned (T.T. 82-84), and his representation was such that the prosecutor had to object to him giving the jury the "*appearance... that he wants to help the State put on its case*" (T.T. 294-295). Instead of living up to his opening statement, the following happened;

> The Court: Good morning again, Mr. Austin, would you call your next witness, please.
> Mr. Austin: Your Honor, the State at this time would announce close of the case in chief.
> The Court: Thank you, Sir. Mr. Brown, are you ready to proceed on behalf of the defendant?
> Mr. Brown: Yes, your Honor. Yes. Just a moment, Your Honor.
> The Court: Certainly
> (Brief pause.)
> The Court: Mr. Brown?
> Mr. Brown: Defense rests. (T.T. 648)

Brown rested even though all parties had just come from chambers where the Order of calling defense witnesses was discussed (T.T. 589-90, 618-20). During the "*Brief pause*" (T.T. 648) Brown told Downs the jury could not find him guilty of murder - the jury knows "*that you didn't kill Harris*" (H.T. 842), and that the only hope to win

on the conspiracy charge was to be silent and put on no witnesses (H.T. 842-43). Brown admits that the decision to put on no defense, was made at the last minute and without meaningful consultation or discussion (or inquiry by the Court) (H.T. 280-85).

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[3] Brown's repeated lending support to the State's version of events, to the point that the State had to object, was virtually tantamount to a concession of guilt. It not only weakened Downs' case but constituted a failure to oppose the State's case with reasonable diligence and therefore violated his duty of loyalty to Downs. Osborn, *supra*, 861 F.2d at 629. United States v. Swanson, 943 F.2d 1070, 1075 (9th Cir. 1991).

Downs wanted to testify and had furnished Brown with a list of defense witnesses who had been deposed and were waiting to testify (H.T. 835). Downs would have testified and presented witnesses, that while involved in the conspiracy, he had withdrawn from the murder and was elsewhere when Johnson killed Harris (H.T. 837-38). Downs would have further testified and presented witnesses, that the principal conspirator was not Garelick, so Garelick would collect on insurance (*the theory upon which the State relied* (T.T. 468-492)). Rather, the principal conspirator was Harold Buddy Haimowitz, Esq., who feared that Harris had made a deal with U. S. Attorney, Ernst Mueller, to testify regarding the involvement of certain persons, including Haimowitz, in illegal banking transactions, and in retaliation for Harris' romantic involvement with Haimowitz's wife (J.T. 396-403, T.T. 24, 615-21). Downs would have shown the jury who killed Harris and why, and that his involvement was

limited to the conspiracy.

In this case, Brown's independent decision to forgo Downs' defense, in hopes of an acquittal on both counts, was an actual, as opposed to a potential, conflict of interest because during the course of the representation, Brown's and Downs' interest diverged with respect to a course of action. Winkler v. Keane, 7F.3d 304, 307 (2d Cir. 1993). By not putting on a defense, there was no evidentiary basis for Brown's closing arguments that the motive was not insurance (T.T. 718-20), that Harris was a womanizing "*dope smuggler*" (T.T. 721), and an alibi witness could have testified that Downs was elsewhere when Harris was killed (P.T. 63). [4]

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[4] Brown's dramatic opening statement about all the evidence and witnesses the jury could expect, primed them to hear a different version of the incident. Brown's failure to produce the expected witnesses was a "*speaking silence*" that is prejudicial as a matter of law. Harris v. Reed, 894 F.2d 871, 879 (7th Cir. 1990).

In sum, there can be no valid strategic reason for not presenting Downs' defense, and failure to do so, was ineffective assistance of counsel.

2. AN UNTRADITIONAL THIRD PERSON CONFLICT OF INTEREST CAUSED BROWN TO ABANDON DOWNS' DEFENSE AND NOT SUBJECT THE STATE'S CASE TO MEANINGFUL ADVERSARIAL TESTING IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS.

Brown's deficient performance was due to an untraditional third person conflict of interest that involved women in a hotel room and unindicted co-conspirator Harold Haimowitz, Esq., who pressured Brown to abandon Downs' defense to avoid being implicated in the crime.

A brief precis of events is presented for a better understanding of this issue. The Court is also asked to take *Judicial Notice* of Downs' "*Certificate of Conflict...*" motion for "*Appointment of Independent Prosecutor*," filed March 14, 2006.

> On July 29, 1977, Downs was stopped by an Alabama State Trooper on the Old Causeway between Bay Minette and Mobile, Alabama, and arrested for having a stolen 1976 Corvette. Mr. Downs request the trooper called the F.B.I. in Mobile, and two Special Agents came and talked with Downs. Downs told them that Jerry Harris, the missing former Vice President of the American National Bank in Jacksonville, Florida was dead, and that Harold Haimowitz was behind it (T.T.558, 562-63). Downs was told they would check and get back to him. (R.T. 965). (Later that day, two other agents interviewed Downs in the Bay Minette jail. But in regards to a recent bank robbery in north Florida, that Downs knew nothing about). On July 30, 1977, while attempting to escape from the Bay Minette jail, Downs was beaten with a pistol and received severe head injuries. (Pretrial proceedings of August 12, 1977, pp 1-10, 13-14).
>
> On July 31, 1977, Johnson contacted Detective Jim Spaulding in Jacksonville, Florida and said he would solve Harris'

disappearance for complete immunity and placement in the Federal Protection Program. Detective Spaulding told Johnson to wait, and he would get back to him. When Johnson wasn't taken into custody right away, on August 1, 1977, he went to the F.B.I. in Jacksonville, who sent him back to Detective Spaulding. The State told Johnson that if someone else killed Harris, he could get immunity and put into the Federal Protection Program. Johnson said Downs killed Harris, and he knew of on one else who was involved (Sworn Statement of August 3, 1977, T.T. 143, 161-62).

On August 3, 1977, Jacksonville Detectives Spaulding and Starling interviewed Downs in Alabama. Downs admitted knowing about the murder, but denied killing Harris, and requested a polygraph test. Downs waived extradition, asked for protection and said when back in Jacksonville, he would name the kingpin behind Harris' death (Downs' Interview of August 3, 1977).

Upon Downs' consented extradition to Jacksonville on August 5, 1977, he made the authorities aware that Haimowitz was the principal behind Harris' murder (Detective Fred Williams' deposition of November 30, 1977, p. 29). That same day Brown showed up at the jail and told Downs that he had been contacted by someone in the Society of Magicians (of which Downs belonged), and was there to help. Brown expressly stated that he did not want to know what had actually happened - just who were involved (H.T. 817-18). As Brown himself admitted; he never asked Downs if he killed Harris, or even if he was present (H.T. 303, 487, 571-72, 592). Brown's attorney logs show that after questioning Downs, he went to see Haimowitz. *Exhibit 4*

Even though Brown admits not asking, because he did not want to know who

killed Harris, or even if Downs was present or had withdrawn from the conspiracy (H.T. 301, 303, 487, 571-72, 592). From the beginning, Downs told Brown that Johnson killed Harris and Downs was not there (H.T. 491, 836). Downs told Brown he wanted to testify, and furnished Brown with a list of defense witnesses (H.T. 835-36). Brown had an investigator (H.T. 310), and before trial thirty-nine (39) sworn statements or depositions were taken and filed with the Court (H.T. 288). Twenty-seven (27) were defense witnesses.

The State's case was that Harris was killed so Garelick could collect insurance. Yet no one testified that Harris was killed for insurance. There was only the testimony from Worth Washbourn of Great Southern Life Insurance Company in Houston, Texas, who testified that there had been policies that were cancelled before Harris' body was found, i.e., before it was known he was dead (T.T. 473, 475, 484). The State itself, in its Opening Statement said Harris was killed " *for business and personal reasons*" (T.T. 16). Through Downs' witnesses, Brown's investigation revealed the following:

> Shortly before his death, Harris entered into a plea agreement with federal authorities regarding charges that he had engaged in certain illegal banking transactions during his tenure as vice-president of the American National Bank. Such charges were the result of an almost four year investigation by the United States Attorney's Office for the Middle District of Florida and the Federal Bureau of Investigation into illegal transactions at the American National Bank (T.T. 615-622, and the following depositions: Robert Browning, 12-

5-77, pp 14-16, 26-27, 45-46; Elsie Harris, 12-5-77, pp.11-13, 41, 46, and 12-8-77, pp 4-6, 9-11; Fred Dawood, 12-6-77, p.18; Robert Gregory, 12-6-77, pp. 13-16; Elaine Harris, 12-8-77, pp. 37-41; Jack Courtnay, 12-9-77, pp. 7-8, 13-14, 27-30, 35-37). Additional witnesses as to Harris and the F.B.I.'s investigation included bank employees Ethel Downes, Frank Mumby and Frank Sherman who would have testified that Harris felt he was being made an escapegoat.)

At the time of his death, Harris had agreed to cooperate in the investigation. And it was feared that Harris would reveal to federal authorities that a number of other persons at or associated with, American National Bank, including, but not limited to, Harold Haimowitz, were also involved in violations of federal banking law. On top of which, Harris was having an affair with Carol Haimowitz (Haimowitz's wife).

Mark Lodinger, an insurance executive with Employee Fringe Benefits, Inc., would have testified as an expert witness and contradicted the State's insurance motive, by first pointing out that the policies had been cancelled, and that if they had not been cancelled, how difficult it would have been to collect because of contestability due to foul play. He would have also testified as to his belief that Garelick's plane crash on August 4, 1977, was not a suicide (T.T. 638-40).

While not disclosed to Downs before trial, the State's own investigative file shows that following Harris' disappearance on April 23, 1977, that Harris' attorney Walter Arnold, when questioned on May 6, 1977, said Harris was trying "*to make a deal with the F.B.I.*" regarding illegal activity of others. Notes show that a Bill Skutt said there was a "*bounty on Harris because he talked to the F.B.I.*" about the

Interstate Securities Corp. in the Bahamas and counterfeit securities and currency being held by Florida banks for land deals. Notes show that on May 17, 1977, a detective met with U. S. Attorney Ernst Mueller and F.B.I. agent Bob Cook. That on May 24, 1977, a detective *"talked to Sill Simmons picked up a tape in regards to conversations with Jerry Harris."* *Exhibit 5*. The State's failure to discloses the foregoing was without question a Brady violation, especially given Downs' proposed defense as to motive. [5]

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[5] The foregoing material was obtained by C. C. R. during Downs' second 3.850 proceeding that was summarily denied without a hearing as a successive motion, even though it followed a re-sentencing that produced newly discovered evidence. Evidence that C.C.R. not only did not use, but failed to make a part of the record, *post*, f.23. So in affirming the trial court's denial of Downs' 3.850 Motion, this court pointed out that the "*supposedly withheld*" material was not included in the appellate record. The Court emphasized that "*Downs and his attorney were aware of Harris' alleged banking activities and of Haimowitz' possible involvement in the murder...*" The Court concluded that even if it accepts Downs' assertion as true, *i.e.* that Haimowitz, and not Garelick, ordered the murder of Harris. It would not have changed the outcome of the trial, because "Downs fails to explain how this evidence proves Johnson and not Downs was the '*triggerman*'." Downs v. State, 740 So.2d 506, 513 (Fla. 1999).

In denying relief in Downs v. State, 740 So.2d 506 (Fla. 1999), the Court correctly reasoned that Downs and his attorney, Brown, knew that Haimowitz was involved. The Court even accepts *arguendo* Downs assertion "*that Haimowitz, and not Garelick, ordered the murder of Harris*." But in finding that " *Downs fails to explain how this evidence proves Johnson and not Downs was the triggerman.*" It is clear that the Court overlooked that Brown's abandonment of Downs' defense as to

motive, so as to not implicate Haimowitz, also stifled Downs' defense as to who killed Harris. It is respectfully submitted that but for Brown's last minute abandonment of Downs' defense, to protect Haimowitz, Downs would have not only refuted the State's case as to motive, but would have also shown the jury that Johnson killed Harris, and that Downs' involvement was limited to the conspiracy charge. Downs' intended testimony as to who killed Harris and his being elsewhere, would have been supported by two key witnesses; Ms. Darlene Perry (Johnson's girlfriend and Downs' sister) and Ms. Bobbie Michael (Downs' grandmother). And but for a Brady violation (*post*, Argument III), by informant Harry Marray.

Sharon Perry would have testified that just before going to the authorities, Johnson confessed to her that he killed Harris, and was going to lie and say Downs did it (Perry's deposition of 12-5-77, pp. 8-17, 21-23. H.T. 731-35, 737-41, R.T. 738-40). She would have also testified that while Johnson was being kept in a hotel waiting to testify, he arranged to call her at Ms. Michael's house, and again confessed to killing Harris (Perry's deposition, pp. 27-28. See also deposition of Jacqueline Peters, December 5, 1977, pp. 22-23). [6]

[6] Brown assured Perry that she would be called as a defense witness, and she was outside the courtroom (with the rest of Downs' witnesses) all week waiting to testify. Right up to the moment Brown rested unexpectedly (H.T. 745-49, 751).

Bobbie Michael would have testified that at the time of the murder, Downs was at her house from around 8:30 p.m., until Johnson showed up around 10:40 p.m., nervous and excited, and wanting Downs to go with him (Michael's death bed perpetuated testimony of October 28, 1982, pp.11, 15-16, 19-20, H.T. 588). She would have also testified to listening in on the phone from Johnson when he admitted to Perry that he had killed Harris (Perpetuated testimony pp. 39-40). [7]

[7] Brown told Michael to keep Downs' whereabouts to herself and "*not say nothing*" before trial, because he wanted to "*spring it on them in court.*" (Michael's perpetuated testimony, pp. 19-21, H.T. 589, 837-38). When she was deposed before trial, and asked by the Sate if she knew where Downs was, she said no. (Michael's deposition of December 6, 1977, p.7). Brown did not disclose her to the State's demands for Notice of an Alibi (H.T. 314-15). Brown assured Michael that she would be called to testify as to Downs' whereabouts, and she waited outside the courtroom all week, expecting to be called (Perpetuated testimony, pp. 23-28, H.T. 268-72). Clearly this is an instance where Brown did not simply make poor strategic or tactical choices, but he acted with reckless disregard for Downs' best interest, and apparently with the intention to weaken Downs' case. Conduct that in and of itself warrants relief. Osborn v. Shillinger, 861 F.2d 612, (10th Cir. 1988). Also "*since [Downs] had an alibi witness that was not called at trial (especially in a capital case), he is entitled to relief.*" Wade v. Armontrout, 798 F.2d 304, 307 (8th Cir. 1986).

William Downs would have testified that he sold Johnson the 25 caliber pistol that Johnson used to kill Harris (William Downs' deposition of December 7, 1977, R.T. 720-21). Jacqueline Peters, Edwin Peters and Glenda Smith would have testified as to Johnson's boasting that he had killed a man, his obsession with guns, and being an alcoholic (record respectively: deposition of December 5, 1977, pp. 15-16, 19 & H.T. 653-55; deposition of December 6, 1977, pp. 7-12, 145, and H.T. 695-98). All

three expected to testify (H.T. 664-67), until Brown came out and said "*well, it's all over*" (H.T. 668, 681).[8]

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[8] When court recessed for the day on December 15, 1977 (T.T. 567), because the State was expected to rest when trial resumed, Brown asked some of Downs' defense witnesses to be at his office that night at nine, so he could go over their testimony. The witnesses were at his office at 9 p.m., but he did not arrive until after ten. Brown talked with Ms. Michael for about 15 minutes, until he got a phone call and spoke in a low voice for a few minutes, and then sent everyone home (H.T. 665-67 and Ms. Michael's perpetuated testimony, pp. 23-26).

When Ms. Peters got home, an anonymous phone caller told her that Brown has "*sold [Downs] out.*" When Brown was asked about the call - first by Ms. Peters, then by Downs - he said "*a lot of strange things had been happening,*" but that everything was okay (T.T. 568. R.T. 761-62).

Brown did not disclose Haimowitz until four days before trial. And when Downs insisted that he be subpoenaed, Haimowitz, through counsel, in an *in camera* proceeding (in the middle of the trial), told the judge, even "*assuming all the facts were true*" and Haimowitz had "*a motive to conspire to become involved in the murder,*" because Downs " *is not alleged to be a conspirator, but actually the triggerman,*" Haimowitz should not have to testify because to do so "*would subject him to personal, professional and public annoyance, embarrassment and harassment*" which as a "*prominent lawyer in the community,*" he should not be subjected to. Even though Downs was in fact charged with conspiracy, the judge issued a Protective Order prohibiting Downs from calling Haimowitz as a witness. Brown moved for the proceeding to be sealed to protect Haimowitz. *Exhibit 6* (Sealed *in camera* proceeding of December 14, 1977.) [9]

[9] Following Downs' trial, the Federal Government orchestrated an elaborate FBI sting in Jacksonville code named "*Operation Red Lobster*" that between 1979 and 1981, resulted in four (4) indictments against Harold Haimowitz, Esq. and one indictment or the other included Senator Dan Scarborough, President Pro Tempore of the Florida Senate; Louis H. Ritter, former mayor of Jacksonville and a governmental relations consultant in Tallahassee; Fredrick Bacon, Senior Vice President of the American National Bank; Charles Jones, Director of State's Health Department; Harold Bloom, President of Blosom Contractors, Inc.; George Onett, Esq., a member of the Florida Bar and a Tallahassee lobbyist; and businessmen, Sam Silbertstein, Irvin Bowen, Jr. and Frederick Bower. The core of these indictments were illegal transactions at the American National Bank. The U. S. Attorney referred to Haimowitz as "*the Jewish Godfather of Jacksonville*" who was known as " *the magician of City Hall.*" And the government's key witness testified that Haimowitz described Jacksonville as " *his town*" in which he could "*manipulate bankers, state judges and other public officials.*" A subsequent investigation resulted in the indictment of Chief Assistant State Attorney Ralph Greene, for misrepresenting facts in criminal cases, and Judge Jesse Leigh, for extortion. Downs' prosecutor, Ed Austin, was mentioned in Greene's indictment.

The Judge also squashed Downs' subpoena of Robert Browning who when initially questioned by Brown, as to who would want Harris dead, and why, implicated Haimowitz and then pled the 5th (Browning's depositions of December 5, 1977 and December 8, 1977, T.T. 568-87), and squashed Robert Gregory's subpoena who knew the Haimowitzs and Harris and Harris' obsession with sexual activity and that Harris and Carol Haimowitz were going off together (Gregory's deposition of December 6, 1977 and T.T. 635-38). [10]

[10] In squashing Browning's subpoena, the Judge in chambers without putting Browning under oath, asked him if he "*had any information of any kind that would tie into the present charge of murder as to Mr. Downs.*" Browning answered "*no*" and then over objection, his subpoena was squashed (T.T. 585-87. See also T.T. 631-33).

In squashing Gregory's subpoena, the Judge acknowledged for the record, that if Gregory testified that when Harris and Carol Haimowitz went off together, Harris "*would probably have sex with her.*" To which the State agreed (T.T. 637).

The squashing of Haimowitz's, Browning's and Gregory's subpoena deprived Downs of his compulsory right under the Fifth, Sixth and Fourteenth Amendments, to call witnesses in his own

behalf which has "*long been recognized as a essential to due process.*" Chambers v. Mississippi, 93 S.Ct. 1038, 1043-44 (1973). Acknowledged by Downs' prosecutor when he said, "*I would be apprehensive that it appears that the State – or the Court is trying to unduly restrict this defendant*" (T.T. 641).

All of Downs' witnesses were contacted by Brown, disclosed to the State, and almost all gave a deposition, and were present and except for Haimowitz and Browning (who got their subpoena squashed), expected to testify. But none did because Haimowitz pressured Brown into abandoning Downs' defense (R.T. 763). A defense that would have altered significantly the evidentiary posture of the case, and not just to who killed Harris but "*that Haimowitz, and not Garelick, ordered the murder of Harris.*" This Court accepted the latter, *arguendo* in Downs v. State, 740 So.2d at 513.

Downs was convicted on both counts - murder and conspiracy (T.T. 837). At Downs' penalty proceeding, Brown called three witnesses for a total of 7 pages of transcript (P.T., 13-20), telling Downs that he would be better off with a sentence of death because that way he would have a direct appeal to the Florida Supreme Court and Brown could do something for him (H.T., 845). [11]

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[11] A sentence of death was recommended by "*a majority of the jury*" (P.T. 87).. The exact vote is not known because the court asked the clerk "*to poll the members of the jury panel*" telling the jurors, "*it is not necessary that you report how you voted, simply you will be asked if that is the majority opinion of the jury panel*" (P.T. 87). Yet at Downs' sentencing, the State repeatedly emphasized that Downs' jury had recommended death by a unanimous vote (S.T. 8, 18, 25). Then without objection from Brown, in an effort to rehabilitate Johnson's truthfulness (in light of the jurors' question that went unanswered, *ante*, page 7) and foreclose any mitigation as to who killed Harris, the State assured the court that Johnson had passed a polygraph test (S.T. 19-20). Then finding no mitigation and for a "*fact*" that Downs used the gun and killed Harris (S.T. 34), and applying two aggravators, the Court sentenced Downs to death (S.T. 39-40) and appointed Brown to represent Downs on appeal (S.T. 39).

In February 1978, Brown filed a "Notice of Appeal" followed by "Directions to Clerk," directing that the thirty-nine statements or depositions that were taken and filed with the trial court and the transcript of all proceedings be a part of the Appellate record. After unprecedented delays without contestation from the State , in October 1978, Brown filed Downs' Initial Brief. In the brief, Brown made reference to Ms. Perry's deposition and said, "*[a]ccording to [ ] Perry's discovery deposition, Johnson told her that he was the one who shot and killed Harris.*"

The State in its response brief, objected to Brown's reference to Perry's deposition. The State's position was that since Perry had not testified and her deposition is not a part of the record, it is "*highly inappropriate and down right shocking that [Brown] attempts to present evidence before this Court in this manner, bypassing the trier of facts* ," and wondered what Downs would say if the State attempted to do it. Filed with the State's brief was a "*Motion to Strike*" from Downs' Direct Appeal, reference to and Perry's deposition, which this Court granted on October 3, 1979 (a day after oral argument). [12]

[12] The lower court clerk confirms that all thirty-nine (39) statements or depositions were filed in the trial court (H.T. 297). The State Attorney conceeds that the depositions " *are a part of the record of this particular case, and any reference can be made to those particular documents* " and are reviewable by this Court (H.T. 288). The Attorney General admits "*all depositions that were filed in the cause, became a part of the Supreme Court record on appeal.*" But claims that none of the statements

or depositions were a part of Downs' Direct Appeal because "*[t]hey weren't .....germane*" (H.T. 291).

Contrary to the State's assertion that no statements or depositions were a part of Downs' Direct Appeal (H.T. 291). In actuality, of the thirty-nine statements or depositions that were directed to be a part of the record on appeal. The Appellate record consisted of just eleven (11) depositions and one (1) statement. All were of persons disclosed by the State, of which, six (6) did not testify. (See " *Index of the Record*," Case No. 53,524.) So the State got to benefit from what it objected to and characterized as "*highly inappropriate and down right shocking*" action on Downs part, by itself putting depositions before this Court of persons who did not testify, thus "*bypassing the trier of fact.*" While all of Downs' defense depositions were either excluded or stricken. Also excluded were Downs' statement/interview of August 3, 1977, that was ordered included (T.T. 540), and Haimowitz's *in camera* proceeding of December 14, 1977, that this Court wanted included. [13]

[13] This Court in denying Downs' Direct Appeal said, "*[t]he record in the present case establishes that Johnson and Downs were not equally situated and reveals that Downs ... shot the victim.*" Downs v. State, 386 So.2d, 788, 796 (Fla. 1980). The Court rejected Downs' claim that the "*appellate review was based on an improper record,*" saying it had "*no merit.*" Downs v. Wainwright, 476 So.2d 654 (Fla. 1985). But when the Court ordered a resentencing based upon a more complete record, it recognized that "*Johnson may have been of equal or greater guilt*" than Downs. Downs v. Dugger, 514, So.2d 1069, 1072 (Fla. 1987).

On August 17, 1979, Brown arranged to see Downs in a classification office at

Florida State Prison with a guard stationed outside the door. Brown told Downs that before trial, he anonymously told the F.B.I. that Harris had information in his possession about the illegal banking activities of certain people, including Haimowitz, but which he could not discuss with Downs because some things were going on. Brown did tell Downs that, in fact, a lot of strange things had happened to him during the trial, including an incident involving women in a hotel room, and being pressured by Haimowitz to abandon Downs' defense (an attempt to obtain FBI records revealed that following Brown's demise in October 1990, two files indexed under Brown were destroyed).

When Brown did not do as promised (H.T. 307-08), Downs filed in September 1979, to dismiss Brown and stop his oral argument scheduled for October 2, 1979, which this Court denied. Downs also filed a Complaint with the Florida Bar, wrote the Governor, and filed a malpractice suit (H.T. 135). When Brown listened to the so called "Harris Tape" in Downs' stead in December 1979, in the State's possession, and refused to divulge its contents to Downs, Downs filed again to dismiss Brown. When the Court again refused to dismiss Brown, Downs appealed the denial to the United States Supreme Court. [14]

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[14] Because of Downs' repeated efforts to dismiss Brown, when Downs' Direct Appeal, Case No. 53,524, was denied, the Court *sua sponte* appointed *ad hoc* counsel to look into Downs' case and filed a Petition for Rehearing. In the Petition for Rehearing counsel said " *leave to file ... an extraordinary*

motion for ... a writ of error coram nobis" was warranted "*[b]ecause [Downs] did not testify at trial or call any witnesses" because "the interest of some third party may have interfered with [Brown's] ability at trial [ ] to be the devoted advocate that was required... that perhaps [Brown's] ability at trial was not as effective as might at first glance appear.*" The Petition for rehearing was denied, but the Court did not mandate Down's appeal conviction. Therefore no writ of certiorari was taken to the Supreme Court. The "*cert.denied*" in Downs v. State, 386 So.2d 788 (Fla. 1980) is Downs' appeal of this Court's denial of his Motion to Dismiss Brown.

Also because of Downs' actions, his Direct Appeal splintered into three additional *pro se* actions;' Case No. 58,471, a writ of mandamus asking this Court to listen to the "Harris tape," denied 4 to 3; Case No. 59,301, a second mandamus, denied without prejudice so *ad hoc* counsel could listen to "Tape" prior to filing a Petition for Rehearing in Case No. 53,524, Downs' Direct Appeal; and Case No. 59,865, a "*Motion for Emergency Relief*" filed in Case 53,524, that the Court treated as a writ of habeas corpus and denied without prejudice to file a 3.850 Motion.

When the Florida Bar investigated Downs' complaint, Brown said nothing strange had happened during his representation of Downs. Brown denied that he told Downs there had been an incident involving women in a hotel room or that Haimowitz had pressured him, and he had not been confronted by Ms. Peters or Downs about an anonymous caller saying Brown had *sold Downs out.* Brown also told the Florida Bar that he was unaware of the fact that the "Harris Tape" was in the State's possession until after Downs' trial. [15]

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[15] The grievance committee found three technical violations that warranted discipline. 1) Brown failed to supplement Downs' Direct Appeal; 2) Brown had Downs sign a fee contract (dated August 6, 1977) that contained a $10,000 contingent fee arrangement; and 3) Brown did not give Downs a polygraph test when Downs' mother gave him the money for one. The Florida Bar staff investigator said "*based on his interviews the only real question raised by the complaint is how Richard Brown became attorney for Downs.*" (Memorandum dated March 10, 1980, from James A. Bledsoe, Jr., Chairman, 4th Circuit Grievance Committee, to Florida Bar). The investigator noted in his report that Downs' court file "*reveals that on August 8, 1977, the Public Defender moved the Court to withdraw as counsel for Downs...*" (Florida Bar, Confidential Report of Investigation, dated March 18, 1980, p. 5, ¶8). *Exhibit 7*

Brown said he came to see Downs on August 5, 1977 after he received a call " *from a fellow saying that a friend of his was in jail, would [he] go see him*?" (Brown's deposition of October 7, 1982,

p.48) Brown later had Downs sign a retainer agreement dated August 6, 1977, saying he would get $5,000 in regular fees and a possible $10,000 contingent fee. The Public Defender moved to withdraw on August 8, 1977. Then, even though Downs was clearly indigent, Brown asked that Downs be declared indigent except for attorney fees. When the Court asked Downs "*How did you hire an attorney*?" Brown did not let Downs answer! (Proceedings of August 10, 1977, pp. 3-5). Brown clearly sought to avoid a court inquiry into how he came to be Downs' attorney. Since Downs argues that but for Brown's unprofessional performance due to a conflict of interest, the result of Downs' trial would have been different. Prejudice must be presumed. United States v. Stitt, 2006 U.2006 U.S. App. LEXIS 732 (4th Cir. 3-24-06).

During Downs' 3.850 hearing in 1982-83, Brown admitted that he lied to the Florida Bar about the "Harris Tape" (H.T. 327-30).

When deposed for Downs' 3.850 proceeding in 1982 - 83, Brown said (as noted *supra*), that after receiving a phone call "from a fellow" saying Downs was in trouble and needed help, he went to the jail and questioned Downs and then went to see Haimowitz about what Downs had told him. But Brown could not " *recall the specifics*" of what he said to Haimowitz (Brown's deposition of October 7, 1982, pp.48-50). When Downs' *pro bono* attorney asked Brown if he had been confronted about an anonymous call during Downs' trial, saying he had "*sold [Downs] out*," Brown denied it. Brown also denied Downs' allegations that he had admitted to an incident involving women in a hotel room and bring pressured by Haimowitz, *post*, f.23. Brown assured Downs' attorney that the allegations were absurd, emphasizing that the Florida Bar had found no merit in Downs' claims. Then believing Brown, instead of pursuing Downs' claim that Haimowitz had pressured Brown into abandoning his defense, counsel did just the opposite and argued that Brown's ineffectiveness was because he focused on an "unreal defense" that the motive was not

insurance and someone other than Garelick was the principal conspirator. Counsel's failure to believe Downs let to this Court noting in Downs v. State, 513, n.10 (Fla. 1999) ("We also note that in his first 3.850 motion, Downs alleged a claim for ineffective assistance of counsel based on trial counsel's focus on an '*unreal defense*' (*i.e. that others possessed a motive to kill Harris*)). [16]

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[16] Before testifying at Downs' 3.850 hearing, Brown spoke with Sid White, Clerk of the Florida Supreme Court, and tried to talk with a justice of the Court. Then conferred with Harris' former attorney, Walter Arnold, Esq., as to "*what [they] have to do*" (H.T. 154).

During the hearing, even though ordered to do so, Brown refused to respond to questioning about conversations between he and Downs. Brown was held in contempt of court and taken into custody (H.T. 445). After consultation, it was agreed that Brown would not be questioned about conversations between he and Downs concerning Haimowitz (R.T. 764-65). Since Bill White's office had moved to withdraw from representing Downs because it would have been a conflict of interest to represent both Downs and co-defendant Gerry Sapp. It was clearly a conflict of interest for Bill White to represent Brown!

While Brown did not admit to Downs' allegations until Downs' re-sentencing in 1989 (R.T. 761-62, 763). Brown did admit during Downs' 3.850 hearing in 1982-83, that he discussed how to " *handle*" Downs' case with co-defendant Barfield's attorney Lacy Mahon, Esquire, (who was also Haimowitz's personal lawyer). (H.T. 249). Therefore Brown admitted that on the same day that Downs was extradited back to Florida and told Detective Williams that Haimowitz was behind Harris murder (Detective Fred Williams' deposition of November 30, 1977, p. 29), he (Brown) got a phone call "*from a fellow*" and questions Downs as to who is involved in Harris murder, and immediately afterwards Brown conferences with Haimowitz, but cannot

"*recall the specifics*" (Brown's deposition of October 7, 1982, pp.48-50). Brown also admitted he discussed how to "handle" Downs' case with Lacy Mahon, whose client was plotting to have Downs killed in jail (R.T. 776,1217), because he implicated Haimowitz. [17]

[17] In late September or early October 1977, Lacy Mahon's client, Barfield, who is Downs' co-defendant who has given statements against Downs, sees Downs in a holding cell for court, and tells Downs to stop implicating Haimowitz, and threatens Downs with death (H.T., 845-46) unless he gives Brown a statement saying (the now deceased) Garelick was the principal conspirator (H.T. 776, 888-89, 1217). Fearing for his family and self, Downs gives Brown a partially errant statement dated October 21, 1977, that said "on the night of April 23, 1977, at approximately 9:30 P.M., Larry Dee Johnson fired the shots that killed Jerry Harris. ¶ The whole thing was supposed to be a meeting to pay Harris $5,000.00 to fly some drugs from Jacksonville to Arizona. Johnson called twice that night using the name Joe Green. ¶ When Harris walked up to Johnson at the meeting, Johnson gave his real name. At which time, Harris pulled a gun wanting to know what the hell was going on. Shooting started and Harris was killed. Johnson threw both guns in the St. Johns River. ¶ Johnson was very upset over what had happened. He was given a 1965 Corvette and several hundred dollars. Johnson sold the car to Lloyd Corvette. ¶ The whole plan was set up by Ron Garelick. Ron was putting up the money for the drug flight. He knew Harris needed money. Ron Garelick was worried Harris was going to leave the country. ¶ When Ernest Charles Downs was told of the murder he freely waived extradition and asked to be brought back to Jacksonville. He also asked to be given a lie detector test, but was refused by the State." *Exhibit 8*

After Downs gave Brown the foregoing statement, Barfield called off wanting Downs killed (H.T. 889, 891). Barfield's dangerness is evident by the fact that he tried to have a gun slipped into the jail, so an inmate could escape and kidnap a busload of kids in order to get Barfield released from jail (H.T. 776-77, 846).

Downs submits that even without Brown's forthcoming admission to an incident involving women in a hotel room and being pressured by Haimowitz. Brown's admission represented conflicting interests, beginning with his showing up out of nowhere, and questioning Downs, and afterwards conferencing with Haimowitz about what Downs knew, and then "representing" Downs and discussing how to "*handle*"

Downs' case with Lacy Mahon. Clearly from day one, Brown compromised his "*ethical obligation to avoid conflicts of interest.*" Barclay v. Wainwright, 444 So.2d 956, 958 (Fla. 1984). As observed by the Supreme Court in Holloway v. Arkansas, 98 S.Ct. 1173, 1181 (1978), a conflict of interest has constitutionally detrimental effects before trial, just as during trial, "*because of what it tends to prevent the attorney from doing.*"

Brown did a thorough investigation (H.T. 310-13) and could have presented a sound defense that would not only have shown that Downs was elsewhere when Johnson killed Harris, but that the principal conspirator was Haimowitz, not Garelick (Brown's deposition, p. 38). Brown testified that when Downs' trial commenced in chambers on the morning of December 16, 1977 (before the State rested in open court), he still intended to put on Downs' defense. Especially since Ms. Perry, who had "*stood up*" when deposed (H.T. 573-74), was a "*crucial witness*" as to who killed Harris (Brown's deposition, p. 87). But after "*most ... not all but most*" of Downs' defense witnesses "*were precluded*" from testifying (H.T. 411), followed by about a five minute discussion with Sam Jacobson, Esq. (*an associate of Haimowitz*), that took place while going from chambers, where the order of calling Downs' defense witnesses had just been discussed (T.T. 589-90, 617-20), to open court, Brown decided to forgo Downs' defense, to obtain opening and closing arguments (H.T. 254-

55, Brown's deposition, pp.115-16). [18]

[18] In rare instances, testimony during a 3.850 hearing can *"constitute[] a fraud on the court."* State v. Crews, 477 So.2d 984 (Fla.1985). Contrary to Brown's testimony that *"most"* of Downs' defense witnesses "were precluded" from testifying. In actuality only five of the twenty-seven witnesses waiting to testify were precluded. Three of the five; Haimowitz, Browning and Gregory are discussed *ante*, pages 28, 29. The other two were Harris' first wife, Elsie Harris, and ex-father-in-law Fred Dawood. The latter testimony (T.T. 622-34) would have been insubstantial at best. Downs does not know why Brown subpoenaed them. Brown perpetrated this fraud, rather than confess to abandoning Downs' defense becuase he had been, *inter alia*, pressured by Haimowitz (R.T. 759-67).

Brown testified that he also discussed not putting on a defense with Downs *"prior to announcing that we rested"* (H.T. 594). Browns' consultation on whether or not to put on a defense consisted of leaning down during the " *[b]rief pause"* between when the State rested and Brown saying " *[d]efense rests"* (T.T. 648), and telling Downs *"the jury knows you didn't kill Harris"* (H.T. 842), and the only hope to win on the conspiracy charge is to call no witnesses (H.T. 843). Brown admitted that his decision to rest without putting on a defense was made at the last minute without meaningful consultation or discussion (H.T. 282-83), and without inquiry by the court (T.T. 648).[19]

[19] *"Few rights are more fundamental than that of an accused to present witnesses at his own defense."* Callahan v. Campbell, 427 F.3d 897, 931 (11th Cir.2005). And counsel and the court are both charged with protecting this right. United States Ex Rel. Wilson, *infra*. Not putting on a defense must be a conscious and informed decision made after full consultation. Browns' supposedly out-of-hand decision to forego putting on a defense, to get opening and closing arguments, was made without appropriate consultation with Downs and falls below the minimum standards of professional competence. Strickland, *supra*.

Downs wanted to testify and expected to testify in his own defense (H.T. 835-36), to the point of arguing with Brown about it on more than one occasion (H.T. 512-13). But, unbeknownst to Downs, Brown had decided early on not to let Downs testify (Browns' deposition, p.47).[20]

[20] In September 1977, the State gave Brown a copy of Harris' autopsy report. *Exhibit 9*. The report listed five gunshot wounds. Wounds 1, 2 & 5 showed a *".25 calibre"* projectile. *"No projectile"* was recovered for wound number 4, and wound number 3 said a *".22 calibre"* projectile. The *".22 calibre"* was clearly a typographical error. When Downs read the report he told Brown that wound number 3 had a typographical error (H.T. 885-86), which the Chief Medical Examiner caught a few days later and amended the report with a "Correction" that read, *"Due to a typographical error on Page 3 of the Autopsy Report..., under Gunshot Wound No.3, a .22 calibre instead of a .25 calibre has been typed. The actual calibre of the bullet was a .25." Exhibit 10*

When Brown was questioned about Downs could have testified and he would still had opening and closing arguments, Brown said that there were two reasons for not letting him testify. The jury would have known Downs was lying, which would have hurt the case (H.T. 507), and he knew Downs *"was going to perjure"* himself if he took the stand (H.T. 418-19). Brown later testified he was convinced of the latter because of the written statement that Downs gave him before trial. *Ante*, footnote 17. Brown said it *"indicated that [Downs] must have been at the scene of the crime as well"* (H.T. 498, 501-06). But what *"confirmed [his] belief"* that Downs was guilty (H.T. 575-77, 581), was Downs pointing out the error in Harris' autopsy report (H.T. 885-86). *Ante*, footnote 20. Brown believed Downs was at least with Johnson (H.T.

588) even though he never asked Downs if he killed Harris (H.T. 303-04), or if he was with Johnson (H.T. 487), or even if Downs had withdrawn from the conspiracy or murder (H.T. 571-72, 592, 817-18, 835).

The most important witness for the defense in many criminal cases is the defendant himself. Especially in a case such as Downs' where the question was not whether a crime was committed, but whether Downs was the person who committed the crime and who did what, and why. So Downs' testimony takes on an even greater importance. *"Indeed, where the very point of a trial is to determine whether an individual was involved in criminal activity, the testimony of the individual himself must be considered of prime importance."* Nichols v. Butler, 953 F.2d 1550, 1553-54 (11th Cir.1992). And there is an *"obligation on the part of both the court and trial counsel to inform the accused of his right to testify if he so desires. Further, it is the duty of both to assure that the exercise of this basic right by the accused is a free and meaningful decision."* United States Ex Rel. Wilcox v. Johnson, 555 F.2d 115, 118-19 (1977).

Brown admitted that Downs *"always insisted"* that Johnson killed Harris (H.T. 491, 509-10), and that he was at Ms. Michael's house when Harris was killed (H.T. 837-38). Brown also admitted that Downs wanted a polygraph test and Downs gave him the money for a test (H.T. 303-04). Brown said he kept putting off having Downs

tested because he feared Downs would fail (H.T. 402-03). While at the same time, testifying that he was already convinced of Downs' guilt (H.T. 418-19, 498, 501-06, 575-77, 581). Brown supposedly came to these conjectures, and kept Downs from testifying, without asking him what happened or what his testimony would be (H.T. 509-13). Then, Brown justified not letting Downs testify by saying Downs *"acquiesced"* in his last minute decision not to put him on the witness stand (H.T. 282-83, 512-13). Brown thwarted Downs' constitutional right to testify, and the trial court failed to inquire and protect that right (T.T. 648). A decision to not testify in ones own defense must be knowingly and voluntarily after full consultation with counsel. *Not a last minute acquiescence.*

Furthermore, there was no evidence that Downs would have committed perjury if he had been permitted to testify. While Brown supposedly had a dual role as a *'zealous advocate'* and as an *'officer of the court'*, neither role permitted him to assume Downs' guilt based upon the conjectures from the statement Downs executed under duress, *ante* footnote 17, *(especially since it did not implicate Downs)*, or upon the fact that Downs pointed out an obvious *"typographical error"* in Harris' autopsy report, *ante* footnote 20. It was the role of the judge or jury to determine the facts, not that of Brown. United States Ex Rel. Wilcox, *supra*, 555 F.2d at 122.

Downs submits that Browns' testimony as to his justification for not letting

Downs testify was, in actuality, fraud upon the court, *ante* footnote 18, rather than confess to thwarting Downs right to testify, because of an incident involving women in a hotel room and being pressured by Haimowitz (R.T. 759-67).

It was not until Downs' resentencing in 1989, when being proffered by Downs, (*who was representing himself*), that Brown finally admitted publicly to being asked about an anonymous caller telling Ms. Peters that he had "*sold [Downs] out*" (R.T. 761-63). Brown admitted to strange happenings that included "*women in a motel room*" (R.T. 763). When asked if he was "*pressured*" by anyone, Brown answered with the name "*Buddy Haimowitz*" (R.T. 763). And when asked if being pressured or the strange happenings "*affected [his] judgment in the defense of [Downs'] case?*", Brown answered, "*I would hope that it didn't, but I – you know,*" (R.T. 763).

The State objected to the jury hearing any of Browns' proffered testimony (R.T. 758, 761, 764), saying it "*is not cognizable in a penalty phase proceeding*" since Downs' "*[g]uilt has been affirmed*" and whether or not Brown's judgment had been "*clouded*" during his representation of Downs was addressed during Downs' 3.850 proceeding back in 1982-'83 (R.T. 764). To which Downs responded:

> "*I can most certainly understand the state's objection, but back in 1982 and '83 when I placed Mr. Brown on the witness stand during the course of a 3.850 proceeding my – I was in fact limited to what we could say, and in fact, Mr. Browns was held in contempt of court and, in fact, placed under arrest and led from the courtroom and you had to call the Public Defender's Office to defend him, and it wasn't until Mr. Brown and I met in jury's*

chambers and I told Mr. Brown in advance what I would ask him before he ever agreed to come in the courtroom and testify. Only thing I want to do, Your Honor, is get this on the record any way possible." (R.T. 764-65).,

The Judge sustained the State's objection (R.T. 765), then had a discussion with the State on how to handle Brown's appearance before the jury but their not hearing his testimony, (R.T. 758-59, 765-66). [21]

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[21] Downs submits that in light of what Brown's proffer revealed (R.T. 758-766) the trial judge had a duty to *sua sponte* seek answers. Friedman v. United States, 588 F.2d 1010 (5th Cir.1979). Because given Browns' earlier contemptuous action during Downs' 3.850 hearing, *ante*, p.36, 43, coupled with his now revealing testimony was evidence sufficient to raise a substantial doubt that his representation at trial was not as effective as it might have seemed (See Downs v. State, 386 So.2d 788, 791-92 (Fla.1980)) and the Judge was "*obligated to delve behind the scenes and ascertain whether [Brown], either by inaction or through ill taken action, failed to meet the standards of a reasonably competent and devoted advocate to the ultimate prejudice of his client.*" Friedman, *Id.* At 1011.

Browns' testimony made evident that not only had he failed in his " *ethical obligation to avoid conflicts of interest*," *ante*, p. 36 & 37, but had concealed what happened (when it happened) from Downs and failed to "*advise the court when [it] arose*," Barclay, *supra*, 444 So.2d at 958. (Brown's actions violated *Florida Bar Rules of Professional Conduct, 4-1.0(a); 4-1.3; & 4-1.4(b).*). Brown's testimony also revealed that he had lied to the Florida Bar and to Downs' earlier *pro bono* counsel, *post*, f.23. The frustrations of Tantalus pale in comparison to the exasperations Downs must have felt as, time and again, his Sisyphean pleas fell on unhearing (or at least unlistening) if not disbelieving ears, a result of Brown confessing to Downs in 1979,

ante, p. 33, then denying Downs' allegations, *ante*, p. 35.

Because of Downs' allegations about Brown to Chief Justice England in 1980, when Downs' direct appeal was denied (and Downs and Brown each filed a petition for rehearing), the Court appointed *ad hoc* counsel to look into Downs' case and file another petition for rehearing. In which ad hoc counsel said, " *leave to file... an extraordinary motion for... a writ of error coram nobis* " was warranted "*[b]ecause [Downs] did not testify at the trial or call any witnesses*" because "*the interest of some third party may have interfered with [Brown's] ability at trial [] to be the devoted advocate that was required... that perhaps [Brown's ability at trial was not as effective as might at first glance appear*," *ante*, f.14. *Ad hoc* counsel's assessment of Brown's representation was in direct conflict with the Court's opinion that Brown "diligently tried to find weak points in the State's case and to raise doubts as to the credibility of the State's witnesses" and "Downs received the full due process of the law and a fair trial free of any reversible error." Downs v. States, 386 So.2d at 792. Brown's testimony at Downs' resentencing in 1989, confirmed *ad hoc* counsel's suspicion in 1980 that " *the interest of some third party may have interfered with [Brown's] ability at trial to put on Downs' defense.* [22]

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[22] A writ of *coram nobis* was and is still appropriate because "*[i]t's function is to bring attention of court to, and obtain relief from, error of fact, such as valid defense existing in facts of case, but which without negligence on defendant's part, was not made, either through duress or fraud or exausable mistake, where facts did not appear on face of record.*" For definition and function of *coram nobis*, see Black's Law

Dictionary, Abridged Sixth Edition (1891-1991).

The United States Supreme Court holds that the Sixth Amendment right to effective assistance of counsel encompasses a correlative "*right to the assistance of an attorney unhindered by a conflict of interest.*" Holloway v. Arkansas, 98 S.Ct. 1173, 1178, n.5 (1978). And the right to counsel free from conflicts of interest *is not limited to cases involving joint representation of co-defendants... but extends to any situation in which a defendant's counsel owes conflicting duties to that defendant and some other third person .*" *Cf.* United States v. Cook, 45 F.3d 388 (10th Cir.1995). Downs' case concerns not the divergent interests of co-defendants, but the divergence of Downs' interests and those of Brown. Which presents the same core problem as multiple representation cases, *i.e.* Brown's fealty to Downs was compromised. Burnside v. State, 656 So,2d 241 (Fla.App. 5th Dist. 1995). "*Therefore, courts have held that the presumption of prejudice set forth in Cuyler* [v. Sullivan, 100 S. Ct. 1708 (1980)] *applies as well to situations where the personal interests of the attorney and the interests of the client are in actual conflict.*" And while "*prejudice is presumed in conflict of interest cases, it is presumed upon a showing by the defendant that the conflict had an adverse effect on representation.*" Burnside, at 243-44.

The main theme of Downs' defense was to show who killed Harris and why. The latter meant showing "*that Haimowitz, and not Garelick, ordered the murder of*

Harris." Which this Court "*accepts arguendo*," *ante*, p.25. But since that would have implicate Haimowitz, (*who, in a closed in camera proceeding to get his subpoena quashed, conceded to being involved, ante,* p. 28), and Haimowitz was pressuring Brown to not implicate him publicly. It was an actual conflict any time consideration was given to the question whether Downs' defense should be presented, which included Brown's ability to advise Downs whether he should testify. Because putting on Downs' defense, or even allowing him to testify would have did more than show that Johnson killed Harris, it would have implicated Haimowitz as well. Therefore, putting on Downs' defense or even allowing Downs to testify would have resulted in an inherent conflict involving Brown's own personal interest, *i.e.* his marriage and professional reputation, given the incident involving women in a motel room and being pressured by Haimowitz. [23]

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[23] The fact that Brown was pressured by Haimowitz to abandon Downs' defense, and then lied and concealed it until Downs' resentencing is substantiated by two (2) sworn affidavits; The affidavit of Ms. Norma A. Brown, dated 10-20-93, who was married to Brown during Downs' trial, *Exhibit 11* and the affidavit of Mr. Maurice N. Nessen, Esquire, dated 10-4-93, *pro bono* counsel during Downs' 3.850 proceeding in 1982-83. *Exhibit 12*. (Not only did CCR fail to use their affidavits, but Downs was unaware of Ms. Brown's affidavit until CCRC found it in Downs' files in December 2001).

Downs has established that Brown was actively representing conflicting interests where his own personal interest would be compromised if he pursued " *a particular defense theory*," (i.e. Downs' defense). See United States v. Pegg, 49

F.Supp.2d 1322, 1330-31 (M.D. Fla.1999). Downs has also identified Brown's acts and omissions that were clearly outside the wide range of professional competent assistance. Strickland at 2067. Which when judged on the facts of Downs' case and viewed as of the time of Browns conduct, reveals that he not only failed in his duty of loyalty to avoid conflicts of interest, he actually committed a fraud upon the court. In sum, "*no objectively competent lawyer would have taken the action that [Brown] did.*" Chandler v. United States, 218 F.3d 1305, 1315 (11th Cir.2000).

Downs' untraditional third person conflict of interest claim shows an actual conflict where prejudice is presumed, entitling Downs to relief. See Strickland at 2067, and Cronic at 2046-47, & n.25. Furthermore, the cumulative effect of Browns' deficient performance, *ante*, Argument I's f.6, and Argument II's ff. 3, 4, 7, 8, 15, 16, 18, 19, and pp.20, 24-25, & 28-36 deprived Downs of a fair trial. See Downs' IAC sub claims a through k, *ante*, pp. iv and v. [24]

[24] "*While isolated incidents of [error] may or may not warrant a [reversal], in this case the cumulative effect of one impropriety after another was so overwhelming as to deprive*" the defendant a fair trial. Nowitzke v. State, 572 So.2d 1346, 1350 (Fla.1990).

ARGUMENT III

DOWNS WAS DENIED FIFTH AND FOURTEENTH AMENDMENTS DUE PROCESS BECAUSE THE STATE WITHHELD EXCULPATORY EVIDENCE AND USED FALSE TESTIMONY

In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court enunciated the now well-established principle that " *the suppression by the prosecution of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or punishment, irrespective of the good faith or bad faith of the prosecution.*" *Id.* at 87-88. To establish a Brady violation, Downs must prove: (1) the State possessed favorable, including impeachment evidence; (2) the evidence was suppressed; and (3) there is reasonable probability that, had the evidence been disclosed, the outcome would have been different. Hoffman v. State, 800 So.2d 174, 180 (Fla. 2001). A reasonable probability is a probability sufficient to undermine confidence in the outcome. Strickler v. Greene, 527 U.S. 263, 281 (1999). Kyles v. Whitly, 514 U.S. 419, 434 (1995).

Under Giglio v. United States, 405 U.S. 150 (1972), the false, or uncorrected, evidence is material if there is any reasonable likelihood that the evidence could have affected the judgment of the jury. To establish a Giglio violation, it must be shown

that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material. *Id.* at 153-54. And the State as the beneficiary of the Giglio violation, bears the burden to prove that the presentation of false testimony at trial was harmless beyond a reasonable doubt.

In this case, the State never disclosed to Downs that his co-defendant, John Barfield, told a government informant – in a tape recorded conversation – that the State's immunized star witness, Johnson, would perjure himself at Downs' upcoming trial. The recorded conversation between Barfield and the informant, Harry Murray, was in the State's possession at the time of Downs' trial but were not disclosed (H.T. 772-80, 787-88, 1189, 1202-06, 1208-11).

After Downs' conviction, Murray testified under oath that (1) Barfield told him of his involvement in the murder of Harris, and that Johnson, not Downs, shot Harris; (2) Barfield told him that Downs was not present at the scene of the murder; and (3) that Johnson was lying on Downs (H.T. 772-80, 1226-27). Murray also testified that he relayed the information from his conversations with Barfield to Detective Jim Spaulding as early as October 1977 and, in all events, well before Downs' trial (H.T.772-777). Murray further testified that the State " *advised*" him to lie at Barfield's trial, and testify Barfield told him that Downs killed Harris if Murray wanted a deal (H.T, 783). [1] *Exhibit 13*

[1] The Supreme Court has long recognized that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty ... whose interest ... in a criminal prosecution is not that it shall win a case, but that justice shall be done." Strickler, *supra*, at 280, citing Berger v. United Sates, 295 U.S. 78, 88 (1935).

Detective Spaulding admits he had the information from Murray and relayed it to the State before Downs' trial (H.T. 1192-94, 1199-1200, 1211), but did not disclose Murray when deposed by Downs before Downs' trial (H.T. 1200-03. See Detective Spaulding's deposition of November 30, 1977, p. 34). For a detective Brady case on point, see Freeman v. State of Georgia, 599 F.2d 65, 68-70 (5th Cir. 1979). The State erroneously asserted that it was not obligated to disclose Murray or the taped conversations between Murray and Barfield because Murray was an informant that the State initially was not going to use, and when it did, Murray only testified at Barfield's trial (H.T. 1218). Banks v. Dretke, 1245 S.Ct. 1256, 1276 (2004). (Prosecution is obligated to disclose informant's identity even if informant is not called as a witness), relying on Roviaro v. United States, 77 S.Ct. 023 (1957).

Adding insult to injury, when the State finally turned over three tapes to Downs' post-conviction counsel, it provided only inaudible copies (H.T. 1206-1207). The State opposed counsel's motion for an expert to enhance the tapes, but represented that the State also could not decipher them (H.T. 468-69). The State did not inform Downs that Detective Spaulding not only had the original tapes (H.T. 1209), but had been able

to understand significant parts of the originals and had made a partial transcript that exculpated Downs (H.T. 1219). The transcript includes several exculpatory statements by Barfield, including him saying "*Harris jumped back, said what the hell is going on then Johnson shot him*" (H.T. 1224-26), and Barfield saying, "Johnson, f--- him, he's lying on everybody" (H.T. 1227). Detective Spaulding admitted he "destroyed" at least two tapes (H.T. 1212). [2]

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[2] Downs' Brady violation includes Giglio because the State was alerted to the fact that Johnson was lying by informant Murray, co-defendant Barfield, expected defense witness Perry (whose testimony would have been supported by Ms. Michael's) and Johnson's own four polygraph tests. Downs v. Austin, 522 So.2d 931 (Fla. 1st DCA 1988). See American Bar Association, Project on Standards for Criminal Justice, Prosecution Function and the Defense Function *§3.11(a)*. When the *'reliability of a given witness may well be determinative of guilt or innocence,'* nondisclosure of evidence affecting credibility falls within this general rule... A new trial is required if *'the false testimony could ... in any reasonable likelihood have affected the judgment of the jury...*" Giglio, *supra*, at 154.

When Detective Spaulding revealed that he had the original tapes and his partial transcript on him when testifying, Downs' request to listen to the audible tapes and question Detective Spaulding further was denied (H.T. 1232-33). The court stopped additional questioning (H.T. 1236-37), and denied Downs' request and motion for a continuance on the Brady issue, so Barfield could testify, in light of Murray's and Detective Spaulding's revealing admissions (H.T. 1240).

The State's case against Downs depended almost entirely on Johnson's immunized testimony. Many key facts in the case were in dispute; from the principal

conspirator and motive, to who killed Harris and whether or not Downs was there. The jury, without any defensive evidence, believed Downs was with Johnson, but disbelieved Johnson's testimony that Downs killed Harris. Evident by their question:

> "In regard to the question as to whether the defendant did or did not use a firearm, must the defendant be guilty of actually pulling the trigger, or is he guilty of using the firearm through association of being an accomplice in a murder of which a firearm was used" (T.T. 827-28).

So as a practical matter, the jurors question is a way to determine whether there exists a reasonable probability that disclosure of Murray would have yielded a different outcome. Especially when coupled with but for the amendment of Downs' indictment and the abandonment of Downs' defense. But the clear violation of Brady is, standing alone, sufficient to warrant a new trial. [3]

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[3] This issue was rejected in Downs v. State, 453 So.2d 1102 (Fla. 1984) without explanation, other than the claim had "*no merit.*" *Id.* at 1104. It is presented again because Downs' conviction was not mandated on direct appeal, and in light of Brown's admitted third person conflict of interest, *supra.*

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1. IN ADDITION TO THE FOREGOING BRADY VIOLATION, WHEN THE VICTIM'S WIFE ELAINE HARRIS WAS DEPOSED, A BRADY WITNESS WAS STRICKEN FROM THE RECORD AND HAS NEVER BEEN DISCLOSED. AND THE STATE IMPEDED ADDITIONAL DISCOVERY.

Elaine Harris, who had been married to Harris for about a month, was deposed on December 8, 1977. She was deposed by Downs' attorney Richard L. Brown, Esquire. Also present were her attorney Barry L. Zisser, Esquire, and Assistant State Attorney Dennis E. Guidi.

When Ms. Harris was asked who she had been seeing before she married Harris, first her attorney and then the State objected to her answering on the grounds that he "*may be married.*" But Ms. Harris, who had not problem with the question, answered and gave the name. When she did, her attorney said, "*God damn it, what did you do that for?*" The State said "*I didn't know we were going to have that sort of problem*" and her attorney responded "*I didn't expect to have it either.*" The State moved "*that that answer be stricken from the record*" before it is typed, and instructed Ms. Harris "*not to answer that matter.*" The State further instructed Ms. Harris:

> "*If that's going to arise again, where you feel you're going to get somebody in trouble... refuse to answer the question.*"

And then, even with the name stricken, the State instructed the court reporter:

"*Before you file that, let me know and we will have it sealed in the file. Okay? You follow me?*" And after an "off-the-record discussion," Brown said:

> "When it comes to the name of the person that she was dating, I hereby request and stipulate that the particular name be omitted from the transcribing of the deposition and not revealed to anyone."

See Elaine Harris' deposition, pp. 24-28.

Later in the deposition when Ms. Harris was asked if she knew Harold Haimowitz and who introduced her to him, the State stopped the questioning and instructed her "*not to answer the question .*" Brown said, " *Even if we strike the name?*" The State responded "*I'm just going to tell her not to answer.*" See pp.43-44.

Even though Ms. Harris was a defense witness for Downs as to Harris' illegal activities and information on others involved and his affair with Haimowitz's wife, it was the State's position that since Ms. Harris was also "a state's witness," it had the authority to instruct her as to what questions to answer. See pp. 45-48.

Downs submits that a comprehensive reading of Elaine Harris' deposition taken on December 8th, 1977, (four days before Downs' trial), clearly shows that Assistant State Attorney Guidi not only struck a Brady witness, but willfully impeded Downs' investigation in violation of *Fla.R. Crim. P. 3.220(i)* . Ms. Harris was willing to answer questions but the State stopped her to protect certain persons from being disclosed.

Downs prays the Court to take *Judicial Notice* of his "*untraditional third person conflict of interest*" claim, *i.e.* Argument II, *supra*, and to take *Judicial Notice* of his "*Certificate of Conflict*" with the "*State Attorney's Office*" and for "*Appointment of Independent Prosecutor*," filed March 14, 2006. (Downs' conflict motion was denied, but not stricken, on July 17, 2006.)[4]

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[4] When the trial court denied Downs' motion to obtain the name that was stricken, Downs appealed, Case No. SC 04-595. See "*Initial Petition*" filed February 13, 2004, which this Court dismissed on October 24, 2005, "*as Duplicate of a Pending Appeal and as a Nullity*." The record shows that Downs wanted the name before proceeding with his "*untraditional third person conflict of interest*" claim, *ante*, Argument II, (2), pp. 21-48. See State v. Lewis, 656 So.2d 1248, 1250 (Fla.1994), ("On a motion which sets forth good reason... the Court may allow limited discovery into matters which are *relevant and material*").

ARGUMENT IV

SINCE DOWNS IS NOT CONVICTED OF THE FIREARM CHARGE OF WHICH HE STOOD ACCUSED, HIS SENTENCE OF DEATH IS DISPROPORTIONATE AND VIOLATES THE EIGHTH AMENDMENT.

The death penalty is only constitutional when it is not applied in an arbitrary and capricious manner; and the Eighth Amendment's direction against cruel and unusual punishment is violated unless sentencing is guided to ensure "proportionality" of result. Proffitt v. Florida, 428 U.S. 242 (1976). Therefore, Downs' sentence of death must be read against the culpability and fates of all who participated in the Harris murder conspiracy:

Ron Garelick, whom the State contended was the principal conspirator for insurance, died as the result of a mysterious plane crash. Downs v. State, 572 So.2d 895, 897 (Fla.1990).

John Barfield who was tried after Downs, was convicted of conspiracy and murder and sentenced to 30 years and death. On direct appeal his sentence was changed to life. Barfield v. State, 402 So.2d 377 (Fla.1981). Barfield is eligible for parole and has a release date.

Gerry Sapp, who admitted to conspiring with John Barfield, Ricky Barfield and Huey Palmer for a year to kill Harris and was involved in three (3) attempts on his life, plead guilty to conspiracy for a sentence of five (5) years. (T.T. 368, 408-15, 420). (While on work release, Sapp has been convicted of five rapes; in1980, twice in 1985, in 1986, and again in 1992).

Huey Palmer, who also admitted to conspiring with John Barfield, Ricky Barfield and Gerry Sapp to kill Harris and was involved in three attempts on his life, had all charges dropped in exchange for his testimony. (T.T. 259, 263-66).

Ricky Barfield, who Sapp and Palmer testified attempted to kill Harris with an explosive device that exploded prematurely, was not charged or even questioned. (T.T. 420).

Larry Johnson, received total immunity and placed in the federal protection program, testified that it was Downs who killed Harris. The jury questioned that it was Downs who shot Harris, but without any defensive evidence believed that Downs was with Johnson. *Ante*, Argument I. This meant Johnson shot Harris and then lied to get immunity.

Harold Haimowitz, Esquire, whom Downs said was the principal conspirator, was never questioned by the authorities and avoided Downs' subpoena by saying that because it was Downs and not he who was charged with the actual murder, and because Downs was not charged with conspiracy (though he was), he should not have to testify. In Downs v. State, 740 So,2d 506, 513 (Fla.1999), this Court accepted *arguendo "that Haimowitz, and not Garelick, ordered the murder of Harris."* Which meant that by the Court's own admission Haimowitz, the principal conspirator, went unpunished.

During Downs' trial the judge constructively amended Downs' indictment and altered the verdict form, *ante*, Argument I. Which prevented the jury from marking on the verdict form that Downs "*did not use a firearm*" (T.T. 836), which would have "*effectively acquitted*" Downs of the possession or use of a firearm. Lebron, *supra*, at 853.

At Downs' sentencing, the State erroneously and improperly assured the judge that Johnson had passed a polygraph test as to who shot Harris (S.T. 20). *Cf.* Downs

v. Austin, *supra*, at 932. Then in sentencing Downs to death, the judge found two aggravators, no mitigation, and for a "*fact*" that Downs used the firearm (S.T. 34).

In effect, Downs was made more culpable than Johnson and all the rest because the jury was prevented from marking on the verdict form that he "*did not use a firearm.*" Then acting procrustean the judge invaded the province of the jury and erroneously found for a "*fact*" that Downs used a forearm as charged in the indictment, *ante*, Argument I, and *post*, Argument V. A culpability error that, as will be shown, simply could not be corrected through a resentencing.[1]

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[1] While under a death warrant in 1987, this Court vacated Downs sentence of death, Downs v. Dugger, *supra*, and remanded for a new sentencing proceeding before a jury that complies with Hitchcock, *supra*. In ordering a resentencing the Court said:

> "[T]he jury in this case clearly was troubled by potential mitigating evidence, as reflected in a question posed to the judge regarding a firearm charge of which Downs stood accused...* This Court previously has recognized as mitigating the fact that an accomplice in the crime in question, who was of equal or greater culpability, received a lesser sentence than the accused. *E.g.*, Gafford v. State , 387 So,2d 333 (Fla.1980); Slater v. State, 316 So.2d 539, 542 (Fla.1975). The question posed by the jury plainly shows that they considered that Downs' accomplice, Johnson, may have been of equal or greater guilt." *Id.* At 1072.
>
> * The Court acknowledges that "*Downs stood accused*" of a "*firearms charge.*" Please take Judicial Notice of the fact that that charge was "*delete[d]*" from the verdict form, *ante*, Argument I.

In preparation for a sentencing proceeding before a new jury, Downs filed several motions. Among them were: 1.) a notice of intent to use the Perpetuated Testimony of Bobbie Jo Michael, who died of cancer (R.T. 728-36, 920-23); 2.) a

request for the court to take *Judicial Notice* of the fact that the State failed to produce, as ordered, the results of Johnson's four *polygraph tests (R.T. 89-93); 3.) a motion to incur cost of a polygraph test for Downs to "balance* the scales of justice," since the court had been told that Johnson passed a polygraph test, and to settle once and for all who killed Harris. Downs even stipulated the results could be used regardless of outcome; 4.) For the Court to take *Judicial Notice* of the question asked by Downs' original jury that went unanswered, (T.T. 836), and moved for instructing the jury on judicial notice pursuant to *Fla. Stat. 90.206* (R.T. 198-201); and requested the jury be instructed that: i) They may consider as mitigation that Downs did not use a firearm and ii) They may also consider as mitigation Johnson's immunity and the deals given to all the others (R.T. 1049). All motions were denied. [2]

[2] Following Downs resentencing to death, this Court found that Ms. Michael's testimony should have been allowed because it "*would have been valid mitigating evidence, which Downs was constitutionally entitled to present,*" Downs v. State, 572 So,2d 895, 899 (Fla.1990). But the Court found the error to be *harmless* because "*Downs was the triggerman.*" Id. At 901. And in a subsequent opinion Downs v. Moore, 801 So.2d 906, 918 (Fla.2001), Justice Anstead wrote relating to the trial court's denial of Downs' motions for additional jury instructions on mitigation, to express his concern with the adequacy of the " *catch-all*" provision of the jury instruction for mitigating evidence in Downs' case, *i.e.*, resentencing. Justice Anstead was particularly concerned as to whether that brief instruction provides sufficient guidance as to what non-statutory mitigation the jury may properly consider during it's deliberations. Because the overly brief "*catch-all*" jury instruction neither mentions nor defines the various categories of nonspecific mitigation a Florida jury may consider, it may well be inadequate to provide for the type of individualized assessment of mitigation that the United States Supreme Court has mandated. The brief " *catch-all*" provision given at Downs' resentencing by it's very brevity and general nature may have actually diminished the jury's consideration of particular mitigation. Justice Pariente concurred. But again, any error was harmless because Downs was the triggerman.

Downs called sixteen (16) witnesses, (R.T. 681-988), that included the

Secretary of the Department of Corrections, who wanted Downs to get a life sentence, (R.T. 681-86). John Barfield (R.T. 700-718), Gerry Sapp (R.T. 431-460) testified to Johnson confessing that he killed Harris and Downs not being there. Darlene Scheffer, *f.k.a.* Perry (R.T. 736-757) testified to Johnson confessing to killing Harris. Downs testified to having withdrawn from the murder and being at Ms. Michael's, (*whose testimony would have collaborated Downs'*)(R.T. 924-988). Doctor Harry Krop, (R.T. 767-782) testified as to Downs' state of mind when he got involved in the conspiracy, at having been made aware of pornographic photos of his wife with women.

The State, in it's summation to the jury, emphasized that Downs was convicted of murder as charged. Therefore, he "*squeezed the trigger*" and "*Johnson was not the triggerman,*" which is why Downs "*is not going to get any benefit, any mitigating circumstances for the treatment of co-defendants,*" because "*the treatment of co-defendants under the facts and circumstances of this case are that they are not mitigating circumstances in any way, shape, or form .*" So the jury recommended death by an eight (8) to four (4) vote. The State then argued to the Court that even if Johnson was the triggerman, death was still warranted for Downs (R.T. 1161-62).[3]

[3] The State's summation that Downs was convicted of murder as charged, though erroneous, was "*delivered [] wrapped in the cloak of State authority*" which has "*a heightened impact on the jury.*" Drake v. Kemp, 762 F.2d 1449, 1459 (11 th Cir.1985). Which also holds that a " *prosecutor cannot argue one*

triggerman at trial, and then another at sentencing."

The trial court found three aggravators; previous conviction involving the threat of violence, then merged pecuniary gain with cold, calculated and premeditated to apply just two (2) aggravators. The "Sentence" order addressed the two aggravators, but in violation of Fla.Stat. 921.141, see Campbell v. State, 571 So.2d 415, 419 (Fla.1990), addressed no mitigation whatsoever. In re-sentencing Downs to death, the judge said that she "*does not accept*" that he was not the triggerman, (R.T. 1206-09). Therefore, the basis for being sentenced to death was the judge's erroneous finding that Downs used a firearm.[4]

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[4]. Downs' previous conviction involving the threat of violence was attempted robbery and robbery with a toy gun, in Kansas, as a juvenile. Initially given 3 years probation (R.T. 1119). The constitutionality of said conviction is presently before the Kansas Supreme Court; Kansas v. Downs, Case No. 04-91921-A.

On appeal, this Court recognized that Downs' sentencing order failed to address any mitigation, and the Court "*emphasize[d]*" how it is required in "every capital" case. Downs v. State, 572 So.2d 895, 901, n.6 (Fla.1990). Then, contrary to the Court's own holding that "*the culling process must be done by the trial court*" to guarantee the imposition of the death penalty, becomes a matter of reasoned judgment rather than unbridled discretion (Mikenas v. State, 367 So.2d 606, 610 (Fla.1979)). The Court culled Downs resentencing and "*acknowledge[d] that Downs*

did present substantial valid mitigating evidence," but found the trial court's failure to find any mitigation harmless because of "*the trial court's conclusion that Downs was the triggerman.*" *Id.* At 901. [5]

[5] Downs v. State, 572 So.2d 895 (Fla.1990), is in direct conflict with Downs v. Dugger, *supra*, and goes against Slater, *supra*, Campbell, *supra*, Hudson v. State, 538 So.2d 829, 831 (Fla.1989) and Parker v. Dugger, 498 U.S. 308 (1991).

The Eighth Amendment requires that the death penalty only be applied to the worse offenders. To comply with this, Florida adopted Statute 921.141 as a means of distinguishing between death-penalty-eligible and non-death-penalty-eligible murder. State v. Dixon, 283 So.2d 1, 10 (Fla.1973). Florida chose to distinguish those for whom sufficient aggravating circumstances do not outweigh the mitigating circumstances. *Id.* at 8. Because the former are more culpable, they are subject to the most severe punishment: death. By drawing this distinction, while refusing to accept that Downs' jury was prohibited from finding that he was not the triggerman, and allowing the trial judge to find for a " *fact*" that he was, is a clear constitutional violation. *Ante,* Argument V.

Wherefore, Downs' death sentence is disproportionate and must be vacated.[6]

[6] One Strickland principle is particularly pertinent to Arguments IV & V sub judice: Downs submits "there is a reasonable probability that absent [Brown's (and the court's) errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." Id. At 104 S.Ct. 2069.

ARGUMENT V

UNDER RING v. ARIZONA, DOWNS' CONVICTION AND SENTENCE ARE BOTH UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

In Ring v. Arizona, 536 U.S. 584 (2002), the Supreme Court held that the Sixth Amendment to the Constitution requires that when aggravating factors are statutorily necessary for imposition of the death penalty, they must be found beyond a reasonable doubt by a jury. Ring, 536 U.S. at 609. The Court's ruling was in conformity with it's earlier ruling in Apprendi v. New Jersey, 530 U.S. 466 (2000), where the Supreme Court held, *"If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt."* 530 U.S. at 482-83. Ring applied Apprendi to the category of capital murder cases and concluded any fact rendering a person eligible for a death sentence is an element of the offense. 536 U.S. at 604, quoting Apprendi, 530 U.S. at 494 ("In effect, 'the required finding [*of an aggravating circumstance*] expose[d] [Ring] to a greater punishment than that authorized by the jury's guilty verdict'").

Since Ring, this Court has been inundated with claims that Florida's capital sentencing scheme violates the Constitution. Downs' claim is unprecedented because

it encompasses his trial and sentencing.[1]

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[1] See "Motion To Vacate Judgment Of Conviction And Sentence..." and "Motion To Correct [Downs'] Death Sentence To Life, If Not To Just 30 Years For Conspiracy", denied by the trial court. In Transcript of Record, Volume I, pp.1-104.

The *gravamen* of Downs' Ring issue is that his conviction violates the Sixth and Fourteenth Amendments because in response to a jury question in mid deliberation the judge gave an unconstitutional instruction, *ante*, Argument I, that resulted in the jury not finding beyond a reasonable doubt that Downs used a firearm and shot and killed Harris as charged in the indictment. In actuality, the erroneous response precluded the jury from finding and marking on the verdict form that Downs did not use a firearm. (T.T. 827-28, 836). Ring further reveals that the judge's erroneous response violated the *Due Process Clause* of the Fifth Amendment, the jury trial right guaranteed by the Sixth Amendment and in this case constituted a distinctly egregious abrogation of Eighth Amendment principles, because it relieved the State of it's burden of proving and the jury from having to find beyond a reasonable doubt that Downs used a firearm. Moreover, it put Downs in the unconstitutional and impossible position of disproving he used a firearm after being convicted of shooting and killing the victim.

Downs' death sentence is illegal or unlawful because after the jury was

precluded from finding whether or not he used a firearm as charged, *ante*, Argument I, f.1, the judge in sentencing him to death, found for a "*fact*" that he used the firearm (S.T. 34, 39, 40). Which not only violated Ring's holding that if a judge increases the punishment to death on the finding of a "fact", that fact must be found by the jury beyond a reasonable doubt. It also violated this Court's recognition that "*judge may not make fact-findings on matters associated with the criminal episode because it would be an invasion of the jury's historical function.*" State v. Overfelt, 457 So.2d 1385, 1387 (Fla.1984).

Wherefore, Downs' conviction and death sentence must be overturned. Furthermore, Ring's none retroactivity (See Johnson v. State, 904 So.2d 400 (Fla.2005).) is of no consequence since Downs' conviction was not mandated. *Ante*, Preliminary Statement, p.i. [2]

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[2] Downs' Ring argument also includes his jury decided that aggravators existed and recommended a sentence of death by a mere majority vote. See footnote 1, *supra*. This Honorable Court as the court of last resort charged with implementing Florida's capital sentencing scheme has recognized the need for Legislative Action. See State v. Steele, 921 So.2d 538, 550 (Fla. 2005). ("The bottom line is that Florida is now the only state in the country that allows the death penalty to be imposed even though the penalty-phase jury may determine by a mere majority vote both whether aggravators exist and whether to recommend the death penalty.")

CONCLUSION

As Judge Wyzanski has written: "*While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators*," Cronic, *supra*, at 2046. Downs entered the trial arena armed with the truth, only to be sacrificed by his own attorney, Brown, whose representation and supposed tactical decisions founders on the rocks of deceit and constitutes an embarrassment to the legal profession.

Therefore, since truth is critical to the operation of the judicial system, (The Florida Bar v. Feinberg, 760 So.2d 933, 939 (Fla.2000)), this Court should exercise its power to reconsider and correct its earlier rulings and vacate Downs' conviction and death sentence to prevent a manifest injustice in a capital case.

CERTIFICATE OF FONT SIZE AND SERVICE

I hereby certify that a true copy of the foregoing Initial Brief was generated in Times New Roman 14-point font, and has been furnished by U.S. Mail to Cassandra K. Dolgin, Esq., Office of the Attorney General, The Capitol. Tallahassee, Florida 32399, on this 12 day of September, 2006.

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