IN THE SUPREME COURT OF FLORIDA

CASE NUMBER SC05-781
Lower Tribunal Case No. 78-0041-CFA

ROBERT ANTHONY PRESTON, JR.,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT FOR THE EIGHTEENTH JUDICIAL CIRCUIT IN AND FOR SEMINOLE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This is the appeal of the circuit court's denial of Robert Anthony Preston, Jr.'s current motions for post-conviction relief which were brought pursuant to Fla. R.Crim.P. 3.850/3.851.

Citations shall be as follows: The record on appeal concerning the 1981 trial proceedings shall be referred to as R ___ followed by the appropriate volume and page numbers. The 1986 postconviction record on appeal will be referred to as "PC1-R. ___" followed by the appropriate volume and page numbers. The 1991 re-sentencing record on appeal shall be referred to as "RS. ___" followed by the appropriate volume and page numbers. The current post-conviction record on appeal will be referred to as PC2-R or Supp.R. ____ followed by the appropriate volume and page numbers. All other references will be self-explanatory or otherwise explained.

This appeal is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding provisions of the Florida constitution. These claims demonstrate that Mr. Preston was deprived of his right to a fair and reliable trial and that the proceedings resulting in his conviction and death sentence violated fundamental constitutional imperatives. Furthermore, as to the denial of Mr. Preston's motions for post-conviction relief, there has been an abuse of

discretion and a lack of competent evidence to support certain of the trial judge's conclusions.

REQUEST FOR ORAL ARGUMENT

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

STATEMENT OF THE CASE

The Circuit Court for the Eighteenth Judicial Circuit, in and for Seminole County, Florida, entered the judgment of conviction and death sentence at issue.

Mr. Preston was indicted on January 20, 1978, by a grand jury in Seminole County, Florida on first degree murder and other charges. (R. Vol. XII 2188-89). Trial commenced on June 1, 1981. At the close of the first phase of the trial, the jury found Mr. Preston guilty of first degree murder, kidnapping and robbery but found Mr. Preston not guilty of the charge of sexual battery. The jury thereafter rendered an advisory verdict of death by a vote of seven to five (R. Vol. XI 2036).

On November 6, 1981, the Court sentenced Mr. Preston to death (R. Vol. XII 2103-05, Vol. XV 2733). The trial court entered written findings (R. Vol. XV

2813-19). A timely direct appeal was filed and this Court affirmed Mr. Preston's conviction and sentence. Preston v. State, 444 So.2d 939 (Fla. 1984).

On October 9, 1985, Governor Bob Graham denied clemency. A motion for relief pursuant to Fla.R.Crim.P. 3.850 was filed in the Circuit Court for the Eighteenth Judicial Circuit and an evidentiary hearing was held in October, 1986. After the evidentiary hearing, Mr. Preston filed a supplemental pleading setting forth newly discovered evidence in the form of sworn affidavits (PC1-R. Vol. VII 1263-88). This supplemental pleading alleged that Mr. Preston was innocent; that his brother, Scott Preston, had confessed to several people that he was responsible for the murder at issue; that Scott was involved with a Marcus Morales; and that a representative of the State Attorney's Office had this information a year before Mr. Preston's trial. The circuit court denied relief on February 13, 1987, without addressing the newly discovered evidence (PC1-R. Vol. VII 1307-13).

Mr. Preston appealed to this Court from the denial of his 3.850 motion. On May 26, 1988, the Court affirmed the denial of Mr. Preston's Motion to Vacate Judgment and Sentence, indicating that the claims arising from the newly discovered evidence could be presented in a *coram nobis* action. Preston v. State, 528 So.2d 896 (Fla. 1988); cert. denied, 489 U.S. 1072, 109 S.Ct. 1356, 103 L.Ed.2d 824 (1989). Such an action was taken, and relief was denied. Preston v. State, 531 So.2d 154 (Fla. 1988).

On August 25, 1988, a second death warrant was signed. The United States Supreme Court granted a stay of execution pending the disposition of a Petition for a Writ of Certiorari. The United States Supreme Court denied *certiorari* review on March 6, 1989, Preston v. Florida, 489 U.S. 1072, 109 S.Ct. 1356, 103 L.Ed.2d 824 (1989) and a third death warrant was signed on March 30, 1989. Mr. Preston had, before that date, filed a Rule 3.850 motion challenging the constitutionality of a previous conviction that was presented to the jury at the trial and relied upon by this Court to establish aggravation and rebut mitigation. An evidentiary hearing was conducted before Judge Mize who, thereafter, granted Rule 3.850 relief. The State took an appeal from Judge Mize's ruling, oral argument was conducted, the District Court of Appeals affirmed, the State moved for rehearing, rehearing was denied, and the District Court of Appeals issued its mandate on March 8, 1990.

Mr. Preston filed a Petition for Writ of Habeas Corpus with this Court on April 19, 1989, presenting the claim predicated upon Johnson v. Mississippi, 486 U.S. 578 (1988). The Court granted a stay of execution on April 19, 1989, and remanded the claim by denying habeas corpus relief without prejudice to raise the same argument by 3.850 motion in the trial court. Preston v. State, 564 So.2d 120, 121 (1990) quoting Preston v. Dugger, 545 So.2d 1368 (Fla. 1989)(unpublished opinion).

Mr. Preston thereafter filed a Rule 3.850 motion presenting the claim predicated upon Johnson v. Mississippi. The trial court denied relief. An appeal was taken to this Court. The Court reversed the death sentence and ordered a new penalty phase proceeding conditioned upon Mr. Preston not being re-convicted of the vacated felony used in aggravation. Preston v. State, 564 So.2d 120 (Fla. 1990). Mr. Preston was acquitted of the vacated felony at jury trial.

In January, 1991, a new penalty phase jury sentencing was held. The jury recommended death by a vote of nine to three but the court granted a motion for a new penalty phase (amid allegations that one of the jurors had not accurately responded to *voir dire* interrogation) and the jury recommendation was vacated. In April, 1991, another penalty phase jury was impaneled and evidence was presented. The jury unanimously recommended a sentence of death (RS. Vol. VI 1130). In May, 1991, the circuit court sentenced Mr. Preston to death (RS. Vol. IX 1674-78).

An appeal of the re-sentencing was taken to this Court. The Court affirmed the death sentence. Preston v. State, 607 So.2d 404 (Fla. 1992). The United States Supreme Court denied *certiorari* on March 22, 1993. Preston v. Florida, 507 U.S. 999, 113 S. Ct. 1619, 123 L.Ed.2d 178 (1993).

On May 24, 1994, Mr. Preston filed a new Motion to Vacate Judgments of Conviction and Sentences with Special Leave to Amend (PC2-Supp.R. Vol. I 01).

With leave of court, it was amended on March 21, 1995 (PC2-Supp.R. Vol. I 97), and February 25, 2000 (PC2-Supp.R. Vol. VII 1081). A supplement was filed as to Claims 41 and 42 on August 13, 2002 (PC20Supp.R. Vol. X 1709). A hearing was held on September 1, 2000, pursuant to the then existing Fla.R.Crim.P. 3.851(c), for determining which claims would be set for evidentiary hearing. The trial court rendered its order, pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993), on September 19, 2000.[1]

On January 7 and 27, 2004, the trial court conducted an evidentiary hearing for testimony, generally, on Claims 6 and 39 (PC2-R. Vol. I 230).[2] The trial court rendered its order denying the motion on March 31, 2005. (PC2-Supp.R. Vol. XIII 2124). Notice of Appeal was timely filed on April 25, 2005. (PC2-Supp.R. Vol. XIII 2188). This appeal is properly before this Court.

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[1]The court granted an evidentiary hearing on Grounds 1, 4, 6, 17 (encompassed by Claim 4), 18, 23, 27, 28, 29, 30, 31, 32, 33, 35, 36, and 39. Claims 40 and 41 were denied without prejudice. (PC2-Supp.R. Vol. VIII 1380).

[2]Pursuant to the court's order of November 6, 2001 (PC2-Supp.R. Vol. X 1666), the Appellant filed notices with the court on November 26, 2001 (PC2-Supp.R. Vol. X 1668), and December 31, 2003 (PC2-Supp.R. Vol. XI 1869), informing the court that no testimony, evidence or witnesses would be presented by the Appellant at the evidentiary hearing on Claims 4, 17, 18, 19 [sic], 23, 27, 28, 30, 31, 32, 33, and 35. The error on December 31, 2003, in listing Claim 19, rather than Claim 29, was brought to the court's attention by the Appellant's written closing argument (PC2-Supp.R. Vol. XIII 2068).

STATEMENT OF FACTS

A. 1981 Trial/Guilt Phase

At approximately 1:45 p.m. on January 8, 1978, the nude and mutilated body of Earline Walker was discovered by Detective James Martindale of the Altamonte Springs Police Department lying in an open field adjacent to Bear Lake Road and State Road 436 in Seminole County, Florida (R. Vol. III 585-588). Identification of the body as being that of Earline Walker was made at the scene by office George Aldrich of the same police department. He had known her as an employee of a Little Champ convenience store located within the area of his patrol duties. (R. Vol. III 516-17; 526).

Earline Walker's body had sustained multiple stab wounds and lacerations, the most serious of which had resulted in near-decapitation, completely severing the trachea, carotid arteries and jugular veins (R. Vol. V 854-78). Nine of the victim's ribs had been fractured. (R. Vol. V 870-71).

The decedent's abandoned automobile was discovered earlier that day pursuant to an Altamonte Springs BOLO near the field and parked on the wrong side of the road where the body was located. This location was about one and one-half miles from the convenience store where the victim worked. (R. Vol. III 569, 591-Vol. IV 603). When discovered, the auto contained two purses (one of which contained Earline Walker's identification items), some clothing and a plastic

laundry basket. A cigarette pack was found lying on the console area of the front and a set of keys belonging to a Marcus Morales was found in the front ashtray. (R. Vol. IV 604, 667-68, 690-91). The auto was impounded and towed to a garage where the auto and contents were inventoried and processed for latent fingerprints (R. Vol. IV 625-27).

An autopsy was performed on the victim's body on January 10, 1978, by the Seminole County medical examiner who had pronounced death at the scene (R. Vol. V 853-54). Dr. Garay estimated the death occurred between approximately 2:00 a.m. and 6:00 a.m. on January 9, 1978 (R. Vol. V 857-59, 915-17) due to massive internal and external blood loss (R. Vol. V 886-88). He testified that death could have been caused either by the neck wound or by a perforating stab wound of the liver (R. Vol. V 888) but that he believed that the slash wound to the neck was the first to be inflicted (R. Vol. V 892, 922, 932). Dr. Garay further stated that death would have ensued within approximately one minute (R. Vol. V 890, 923) and that all other wounds were inflicted wither post-mortem or when the victim was unconscious (R. 923, 934, 942, 949-50).

During the autopsy, Dr. Garay took a photograph of the victim (R. Vol. V 855) and samples of pubic hair (R. Vol. V 863) and blood (R. Vol. V 880). Tests were performed to determine the presence of acid phosphotase, which was strongly

positive (R. Vol. V 881-82), and of spermatozoa, which was negative (R. Vol. V 883, 938).

The State's witnesses established that on the morning of the death of Earline Walker that she had been employed as a night clerk at the Little Champs convenience store near Spring Oaks Boulevard in Forest City, Florida (R. Vol. IV 496, 506, 552). The victim waited on a customer in the store at approximately 2:45 a.m. on January 9, 1978 (R. Vol. IV 508), but both she and her car were missing when Officer George Aldrich of the Altamonte Springs Police Department made his regular patrol at approximately 3:30 a.m. (R. Vol. IV 519). Officer Aldrich also discovered that the doors to the store were locked (R. Vol. IV 520). The store manager, John DeBoer, was contacted and entered the store with Officer Aldrich and his supervisor sometime after 4:00 a.m. where they found a radio playing and a coffee pot turned on. A cold cup of coffee was on the counter and the clerk's sweater was on a back shelf; the cash register drawer was open and all the bills had been removed from the register and the safe (R. Vol. IV 520-22, 555-56, 579).

According to the manager, the safe should have held money bags containing bills and possibly food stamps (R. Vol. IV 556). Upon performing an inventory, Mr. DeBoer established that the sum of $574.41 was missing from the store (R. Vol. IV 559-62). He testified that store policy prohibited his clerks from

accepting denominations in excess of $20.00 but that occasionally $50.00 bills were negotiated (R. Vol. IV 570-71).

Virginia Vaughn, the afternoon clerk at the store, testified that she had used food stamps to buy several items on January 7 and 8, 1978. She had torn out the coupons from individual booklets with serialized numbers simultaneously with her purchases and placed them either in the store's cash register or floor safe (R. Vol. IV 693-702). She turned the stamp booklets over to the Altamonte Springs Police Department when she realized that her stubs matched the numbers of those being sought by the police (R. Vol. IV 699-700, 703-08).

The food coupons themselves were found in Robert Preston's bedroom trash can pursuant to a consent search authorized by his mother. Robert Preston, along with his younger brothers, Scott and Todd, lived with their mother at the time the offense was committed (R. Vol. VI 1021-29).

Scott Preston and Scott's girlfriend, Donna Maxwell, testified that they spent the evening of January 8, 1978, at his mother's home along with his brothers, Todd and Robert (R. Vol. IV 770, Vol. VII 1389). They passed the early part of the evening watching television and smoking marijuana (R. Vol. IV 771-73, Vol. VII 1391-92) and then Scott and Donna retired at about 11:30 p.m. to his mother's bedroom. The mother had spent the night at the home of her boyfriend (R. Vol. IV 773, Vol. VII 1390). About an hour after retiring to the bedroom, Robert Preston

knocked on the bedroom door in an effort to convince Scott to go with him to the Parliament House "to get some money." (R. Vol. IV 774-75, Vol. V 805, Vol. VIII 1414-15). When Scott declined, Robert Preston asked Scott and Donna to "hold him off" so that he could inject some PCP (R. Vol. V 805, Vol. VII 1399, Vol. VIII 1411). Both Donna and Scott refused (R. Vol. V 805, Vol. V 826-28, Vol. VIII 1411) but each had known Robert Preston to be a user of PCP and other drugs for at least four years prior to that night (R. Vol. V 807-08, Vol. VII 1399-1404). After Scott and Donna declined this invitation, they heard the door slam as Robert Preston left the house (R. Vol. IV 775, Vol. VIII 1414-15).

Both Scott Preston and Donna Maxwell admitted that they had ingested PCP in the past and that they were familiar with its effects on themselves and others while under the influence of the drug (R. Vol. V 820, Vol. VII 1398, Vol. VIII 1406).

Donna Maxwell and Scott Preston heard Robert Preston return to the home some four hours after his departure (R. Vol. IV 775, Vol. VIII 1416). Robert banged on the door to their bedroom and asked Scott to come out to the living room where he was attempting to count some money. Donna described Robert Preston as being nervous, shaky and excited, saying "I did it," and pulled money out of his pocket (R. Vol. IV 777-78, Vol. V 824). Robert was "acting weird," having trouble talking and dropping the money (R. Vol. V 814, 824, Vol. VIII

1418). Donna described Robert's behavior as being consistent with the use of PCP and that he "wasn't acting normal at 4:30…" (R. Vol. V 820). Because Robert was unable to correctly total the money after several attempts (R. Vol. IV 778, Vol. VIII 1419), Donna and Scott counted the money for him. The sum came to $325.00. While they were counting the money, Robert told them that he and a friend, Crazy Kenny, had taken a baseball bat and gone to the bar called the Parliament House where they hit two people on the head and stole the money (R. Vol. IV 779). Robert gave Donna and his brother, Scott, $25.00 each. Donna and Scott then went back to bed (R. Vol. IV 780). Donna Maxwell also recalled seeing some cigarettes in a red and white package in the living room while she was counting the money (R. Vol. IV 781).

When Donna and Scott awoke again at 8:30 a.m., Robert was not at home. Robert arrived about twenty minutes later and said he had gone to get some cigarettes and told them that he had heard that the body of a woman who worked in a store near their home had been discovered in a field (R. Vol. IV 781-83).

The head security guard for the Parliament House testified that he observed no disturbance nor was any reported to him during his shift on the night of January 8-9, 1978 (R. Vol. V 983-91). He stated, however, that his patrol area did not encompass the interior of the bar which included three separate bars in one complex (R. Vol. V 991). Neither the Orlando Police Department nor the Orange

County Sheriff's Department had records revealing any incident reports respecting any disturbances or robberies at the Parliament House on January 9, 1978 (R. Vol. VII 1225-34). Robert Preston had referred to the Parliament House as a gay bar (R. Vol. IV 779).

Arlene Cobb testified that she was employed as the night supervisor at the Forest Lake Academy Laundry (R. Vol. IV 723). At about 2:15 a.m. on January 9, 1978, she left work and returned by car by way of a Jack in the Box restaurant near Bear Lake Road and State Road 436 (R. Vol. IV 729). As she turned into the driveway of this restaurant she saw Robert Preston standing directly in front of her car. It was about 2:20 a.m. Robert Preston was wearing a plaid CPO jacket and stared at her for approximately 15-20 seconds before stepping out of the way (R. Vol. IV 736). Arlene Cobb said that Robert Preston repeatedly took a few steps and turned to look at her car and then turned toward Forest Road and walked in the direction of Altamonte Springs (R. Vol. IV 737-38). After seeing Robert Preston's picture on television the following day, she eventually made a photographic identification of Robert Preston as the man she had seen at the restaurant (R. Vol. IV 741-43).

Robert Preston was arrested on January 10, 1978, on an unrelated charge and taken into custody of the Seminole County Sheriff (R. Vol. VI 1009, Vol. VIII 1468). As a part of the booking process, Appellant's personal effects and his belt

were removed and placed into a property envelope (R. Vol. VI 1011-12) and his fingerprints were taken (R. Vol. IV 852). At approximately 8:30 p.m, Sheriff's Deputy John Fuller obtained Robert Preston's personal effects from the jail (R. Vol. V 837-38). While inspecting Preston's belt, Deputy Martin La Brusciano recovered a light brown pubic hair entangled in the belt buckle (R. Vol. VI 1151). Microscopic analysis of that hair and a second pubic hair discovered on Preston's jacket, were compared with known samples obtained from Earline Walker. The analysis showed that the two unknown hairs could have originated from Earline Walker (R. Vol. VI 1097-1106). No hair samples other than those of Preston and the victim were compared (R. Vol. VI 1119).

Blood samples taken from the victim and Robert Preston were compared with two stains found on Preston's jacket. No blood was found on any of Preston's other clothing or personal effects (R. Vol. VI 1077-78). One stain found on the back of the jacket was about the size of a silver dollar and exhibited no splatter or drip pattern (R. Vol. VI 1079). The second stain, found on the jacket sleeve, was so small that only blood type "O" was determined (type "O" being found in 45 percent of the population)(R. Vol. VI 1081). The only blood samples taken were those of Robert Preston and the victim (R. Vol. VI 1084-85).

The jacket stain were determined to be human blood and of the same blood type as that of the victim. As to the larger stain, analysis of blood enzymes proved

to be the same enzyme group as those of the victim. The statistical probability of the combined occurrence of the factors so analyzed was approximately one percent.

The jacket and several detached food stamps were found in Preston's bedroom the day after his arrest and subsequent to a consent search authorized by Preston's mother (R. Vol. III 468, Vol. VI 1021, Vol. VI 1157). Comparison of the serial numbers of the food stamps recovered from the room's waste basket with those of the food stamps booklet turned over to the police by the afternoon store clerk showed four matching coupons (R. Vol. VI 1030). No latent finger prints were obtained (R. Vol. VI 1030). The four coupons and accompanying booklet were subjected to fracture pattern analysis which, in the opinion of the examiner, confirmed that the coupons in the bedroom had been torn from the booklet used by Virginia Vaughn to make purchases at the Little Champ Store several days before the murder (R. Vol. IV 694-701, Vol. VI 1048-56).

In processing Earline Walker's automobile and its contents for fingerprints, several usable latent lifts were made including one from the cellophane wrapper of a Marlboro cigarette pack found on the front console (R. Vol. IV 647, 659, Vol. VI 1144, 1159). That print was later identified as being the left thumb of Robert Preston (R. Vol. VI 1167) and three other latent fingerprint or palm impressions of

Robert Preston were discovered in or on Earline Walker's auto (R. Vol. VI 1159-89).

The State also introduced a portion of a taped statement made by Robert Preston while in custody and in response to police interrogation on January 10, 1978 (R. Vol. VII 1256-66). Although not told that he was a murder suspect (R. Vol. VII 1271-73), Preston was questioned about his whereabouts on the day of the murder (R. Vol. VII 1258). In the taped interview, which was played to the jury, Preston stated that he had last been on Pine Street (where the victim's auto was found) the Friday night before the murder (R. Vol. VII 1259-60) and that he had not been in the vicinity of the Little Champ Store for about six months (R. Vol. VII 1260-61). He denied having anything to do with the victim's auto or her murder (R. Vol. VII 1262-65). When confronted with the evidence of his fingerprints found in and on the auto, Preston requested a lawyer (R. Vol. VII 1263-65).

After denial of defense motions for judgment of acquittal on Counts I, II, II, V and VI, and reservations of ruling with respect to Counts IV and VII (R. Vol. VII 1334-54) Preston called his mother to the witness stand. Virginia Preston testified that in early January, 1978, she lived in Forest City with her three sons, Scott, Todd and Robert. Robert became age twenty in November of the preceding year and was the eldest of her children (R. Vol. VII 1356-59). Preston's mother stated that after Robert had been arrested but before the police search of his

bedroom that she saw his plaid CPO jacket hanging on the back of a chair by the front door. She examined the jacket, saw that it was dirty but saw no blood stains on it (R. Vol. VII 1362).

Esther Sams, the victim's mother, could not account for the presence of the keys belonging to Marcus A. Morales which were found in her daughter's auto. Sams indicated that she and her daughter lived together and that she had never heard the name, nor washer daughter dating anyone named Marcus Morales prior to her death (R. Vol. VII 1371-76). Similarly, Mrs. Walker's sister and daughter had no knowledge regarding Marcus Morales (R. Vol. VII 1377-80).

Robert Preston took the stand in his own behalf and testified that at the time of Earline Walker's murder he was twenty years old and lived with his mother and brothers. He stated that his parents had divorced when he was seven or eight year's old ad that he had very little contact with his father thereafter (R. Vol. VIII 1447-48). In 1972, Preston sustained an injury to the left side of his head which left him with recurring headaches. In October or November of 1977 he was struck by a baseball bat in the same area of his head which caused the headaches to increase. At the time of his trial in June, 1981, Preston still had a lump on his head from this injury (R. Vol. VIII 1448-51).

Preston testified further that his use of illicit drugs began when he was eleven or twelve years old by smoking marijuana and hashish and taking LSD. By

age thirteen, he was using drugs on a daily basis and had graduated to the use of barbiturates, amphetamines, alcohol hallucinogens and a form of PCP (R. Vol. VIII 1451-58). He began to use PCP on a daily basis in pill and crystal form by age fourteen and was selling drugs to pay for his own (R. Vol. VIII 1458-59). He described the effects of PCP usage as including black-out spells, slurred speech and distorted senses of time (R. Vol. VIII 1459).

By ages fifteen and sixteen, Preston had added Dilaudid to his usage and had begun taking PCP by intravenous injection three to four times a wee. This usage increased the amounts used due to a growing tolerance to the drug (R. Vol. VIII 1461-62). By ages seventeen and eighteen his drug abuse included PCP, methadone, heroin, barbiturates and marijuana with PCP being the most readily available and affordable (R. Vol. VIII 1462-63). At eighteen or nineteen years of age, Preston was using primarily PCP with some barbiturates, methadone and cocaine. His injections of PCP were of one-fourth to one-third gram as often as three times daily for a period of about one and one-half years to the time of his arrest in January, 1978 (R. Vol. VIII 1464-65). He further described the effects of these drugs as impairing his memory. Preston denied the knowing commission of any acts of violence while under the influence of PCP (R. Vol. VIII 1467-68).

Regarding the events of January 8 and 9, 1978, Robert Preston recalled Donna Maxwell's visit to his mother's home. He said that she, along with Scott

Preston and himself had sat around talking and watching television and smoked marijuana (R. Vol. VIII 1470-72) until Donna and Scott retired to their bedroom. He drank a small bottle or wine and later asked Scott and Donna to assist him with injecting PCP. They declined and Preston recalled injecting the PCP and possibly smoking some marijuana by himself. His next clear memory was of trying to count some money and then going to bed (R. Vol. VIII 1472-73). Preston has some recollection of going to Orlando to the Parliament House in a car driven by a person named Crazy Kenny but Preston could not remember this positively (R. Vol. VIII 1476-78). Preston had no memory of the incident at the Jack in the Box restaurant as related by Arlene Cobb or of going to the convenience store where the victim worked (R. Vol. VIII 1483-87).

Preston testified that upon waking up the next morning that he walked to the store to buy some Winston cigarettes (R. Vol. VIII 1482). He remembered being in possession of some money on the morning of January 10, 1978, but he could not account for its source (R. Vol. VIII 1500-01). During the trip for the cigarettes, he stated that he found the food stamp coupons on a path leading behind the Little Champ store (R. Vol. VIII 1490-96). He recalled the conversation with Donna Maxwell regarding the discovery of the store clerk's body but that the conversation had not occurred until about 3:30 or 4:30 p.m. (R. Vol. VIII 1482-83).

On cross-examination, Preston testified that he had reduced his usual amount of PCP ingestion during the months prior to January, 1978, because the drug had been difficult to obtain. He stated that he had almost over-dosed on an equivalent dosage of the same gram from which he administered the injection on January 9, 1978 (R. Vol. VIII 1518-19). He stated that he seriously doubted that while under the influence of that dosage that he could have inflicted the wounds sustained by the victim (R. Vol. VIII 1542) but would have been able to accomplish activities such as walking, talking and smoking a cigarette (R. Vol. VIII 1550-51).

B. 1991 Re-sentencing

Donna Maxwell, now known as Donna Houghtaling, was called as a defense witness at Robert Preston's 1991 re-sentencing. She testified as to being as to being at the Preston home on the evening of the offense (RS. Vol. V 904-05); about smoking marijuana and drinking with the two Preston brothers until about 12:30 in the morning (RS. Vol. V 907); and about Robert Preston coming to the door and asking his brother to hold his arm so Robert could inject drugs (RS. Vol. V 908). She further testified about being awakened at 4:30 a.m. about Robert being in the living room trying to count some money (RS. Vol. V 909-10). Recalling that Robert Preston was having difficulty in counting the money and in controlling his hands, she opined that he was under the influence of PCP at that time (RS. Vol. V 909-10, 912, 915). Houghtaling had never seen anyone get

violent when they were on PCP. (RS. Vol. V 903). She saw Robert Preston take drugs only once before and that was about a year before the murder and after knowing Preston for about four or five years. (RS. Vol. V 915).

Dr. Cliff Levin evaluated Robert Preston on January 21, 1991. (RS. Vol. V 921). Dr. Levin testified that at the time the offense was committed, Robert Preston was suffering from a mental disorder (RS. Vol. V 933). It was his opinion that Preston had difficulty in conforming his behavior to the confines of law (RS. Vol. V 935). He could not answer whether Preston had the ability to appreciate the criminality of the killing. (RS. Vol. V 936, 942). It was also his opinion that although the robbery and kidnapping are very directed and motivated acts that this was consistent with the perception of the PCP user (RS. Vol. V 938). The murder, however, was a rage reaction; that is, a reactive psychosis totally removed from reality (RS. Vol. V 938). Yet, none of the thousands of people Dr. Levin had seen on PCP had committed a murder. (RS. Vol. V 952). Dr. Levin believed that at the time of the offense that Preston's judgment was impaired (RS. Vol. V 941). His ability to reason and to process information was not functioning at a normal level (RS. Vol. V 941). His ability to control behavior was significantly impaired (RS. Vol. V 942). Dr. Levin acknowledged that Preston's early goal directed behavior demonstrated some understanding of the criminality of his behavior. (RS. Vol. V 942). Although Preston was just over twenty years old, Dr. Levin testified that

Preston was quite immature for his age (RS. Vol. V 942-43). Although Preston had above-average intelligence, he dropped out of high school at age 16, never maintained employment on a steady basis and still lived at home (RS. Vol. V 943). These factors were consistent with an immature drug-abusing adolescent (RS. Vol. V 943). Dr. Levin believed that Preston had good rehabilitative qualities (RS. Vol. V 945) and that his good prison record showed that Preston had his impulses under control (RS. Vol. V 945). Dr. Levin noted that Preston had tremendous insight into his drug addiction and that the prognosis was very good (RS. Vol. V 949, 953).

Dr. Rufus Vaughn saw Robert Preston in April, 1981 (RS. Vol. V 960). Dr. Vaughn testified that in his opinion at the time of the offense that Robert Preston's judgment was impaired and was his ability to reason (RS. Vol. V 956). Preston could not appreciate the wrongfulness of his actions and was unable to control his behavior due to lack of reasoning ability (RS. Vol. V 966). Dr. Vaughn's opinion was that Preston's ability to conform his conduct to the requirements of law was significantly impaired. (RS. Vol. V 968).

Dr. Gerald Mussenden saw Robert Preston in April, 1981 and in January, 1991 (RS. Vol. VI 1021). Dr. Mussenden testified that at the time of the offense that Robert Preston had little control over his behavior and was extremely disturbed (RS. Vol. VI 1032-33). It was possible that Preston's capacity to

appreciate the criminal nature of his actions was impaired (RS. Vol. VI 1033) because it seemed like Preston was under the influence of PCP. (RS. Vol. VI 1032). His ability to control his behavior was also impaired (RS. Vol. VI 1034). Dr. Mussenden also believed that Preston could function well in a structured setting such as prison (RS. Vol. VI 1034). It was also his opinion that Preston's potential for rehabilitation was excellent. (RS. Vol. VI 1038).

Dr. Harry Krop saw Robert Preston in April, 1985 and in January, 1991. (RS. Vol. VIII 1372). Dr. Krop testified that in his opinion that Robert Preston's judgment was significantly impaired at the time of the offense. (RS. Vol. VIII 1379). Preston's ability to reason was impaired and he had very poor impulse control. (RS. Vol. VIII 1379). This made it hard for Preston to conform his conduct to that required by society. (RS. Vol. VIII 1380). Although he was not an expert in PCP treatment (RS. Vol. VIII 1381), Dr. Krop believed that Preston's prognosis for rehabilitation was very positive and that Preston could function quite well in prison. (RS. Vol. VIII 1383).

Ted Key, a correctional officer at Florida State Prison, testified that he had known Robert Preston for five to six years. (RS. Vol. V 975, 978). During this time, Mr. Key chaired one disciplinary hearing concerning Preston. (RS. Vol. V 978). It involved a minor offense with which Preston was charged with destruction

of state property by ripping his pants. (RS. Vol. V 979-80). Mr. Key testified that Preston's prison record was exemplary. (RS. Vol. V 980).

Robert Preston's mother and father also testified. (RS. Vol. V 983, Vol. VI 1004). They did not have a good marriage which was a result of Mr. Preston's drinking and employment problems. (RS. Vol. V 984, Vol. VI 1005). When Robert Preston was eight years old, the parents separated. (RS. Vol. V 985, Vol. VI 1006). The father was a poor role model for Robert. (RS. Vol. VI 1006). Robert was a very good person while growing up and was helpful to his mother. (RS. Vol. V 988). Mrs. Preston started to develop a social life when Robert turned eighteen years of age. (RS. Vol. V 988). She started dating seriously in 1976 and often spent two to three nights a week away from the home. (RS. Vol. V 989). Mrs. Preston further testified that Robert suffered a bicycle accident in 1972 after which she observed a change in his personality. (RS. Vol. V 990). She never associated Robert's behavior with using drugs and would leave him in charge of his younger brothers. (RS. Vol. V 988, 993, 996).

Robert Preston testified that he started using drugs at eleven years of age. (RS. Vol. VI 1043). He used all kinds of drugs and started injecting PCP at the age of fifteen. (RS. Vol. VI 1044). During the year and a half prior to the offense, Preston used PCP daily while sometimes using it tow or three times a day. (RS. Vol. VI 1044). Preston testified that his whole life revolved around drugs. (RS.

Vol. VI 1046). Looking back, Preston saw how stupid the drug usage was and the tragedy that it caused. (RS. Vol. VI 1046). Preston recognized that he would probably spend the rest of his life in prison but hoped that he could take advantage of prison programs and to better himself. (RS. Vol. VI 1047).

C. CURRENT POST-CONVICTION PROCEEDING AND 2004 EVIDENTIARY HEARING

As noted above, Mr. Preston filed a post-resentencing Motion to Vacate Judgments of Conviction and Sentences with Special Leave to Amend on May 24, 1994. (PC2-Supp.R. Vol. I 01). It was amended on March 21, 1995, (PC2-Supp.R. Vol. I 97) and February 25, 2000 (PC2-Supp.R. Vol. II 1081). A supplement was filed as to Claims 41 and 42 on August 13, 2002 (PC2-Supp.R. Vol. X 1709).

After the Huff hearing on September 1, 2000[3], the parties filed a number of motions, responses, notices and stipulations as the preparation for the evidentiary hearing proceeded. Among these were (a) the Defendant's Notice Regarding Evidentiary Hearing Witness, dated December 18, 2003 (dealing with the Appellant's re-sentencing counsel assuming a position on the local bench) (PC2-Supp.R. Vol. XI 1799); (b) the Stipulation Regarding Use of LabCorp Written Reports In Lieu of Testimony at Evidentiary Hearing, dated December 29, 2003

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[3]Held pursuant to Huff v. State, 622 So.2d 982 (Fla. 1993) and the then existing Fla.R.Crim.P. 3.851(c).

(dealing with the Claim 39 agreement to use the DNA reports without testimony from the laboratory personnel conducting the tests)(PC2-Supp.R. Vol. XI 1835); (c) Stipulation Regarding Use of Expert's Deposition In Lieu of Testimony at Evidentiary Hearing, dated December 29, 2003, (dealing with the Claim 6 use of the deposition testimony of defense expert Robert Norgard in lieu of hearing testimony)(PC2-Supp.R. Vol. XI 1802) which itself was based on the Stipulation Regarding Use of PCP, dated July 16, 2001 (regarding the Appellant's use of PCP and the availability of tests to confirm such usage)(PC2-Supp.R. Vol. IX 1581); (d) Stipulation Regarding Use of Claim 1 Witness Depositions in Lieu of Testimony at Evidentiary Hearing, dated January 7, 2004 (regarding the search for the misplaced State Attorney's files)(PC2-Supp.R. Vol. XII 1872); and (e) Defendant's Waiver of Presence at Evidentiary Hearing and Notice of Appearance at Evidentiary Hearing by Telephone (PC2-Supp.R. Vol. XII 2046).

The post-conviction court conducted evidentiary hearings on January 7 and 27, 2004. As noted previously, the testimony generally concerned Claims 6 and 39 of the Rule 3.850 motions. Arthur Kutsche was the sole defense attorney at the 1981 trial. He testified that his capital case experience before Preston's trial included one trial as a prosecutor and seven to ten cases as a defense attorney and part-time public defender. (PC2-R. Vol. II, 265). Kutsche described his assignment to the case following the departure of the previously assigned assistant

(PC2-R. Vol. II, 269) as including numerous case reviews with his predecessor. (PC2-R. Vol. II, 269-70).

Mr. Kutsche testified that he did not request or otherwise use an independent hair analyst to counter the State's use of FDLE examiner Diana Bass. In reconstructing that decision, Mr. Kutsche felt that it was probably because he did not feel the State analyst's testimony had much probative value and he thought a defense expert probably would have reached the same results. (PC2-R. Vol. II, 272).

Regarding his examination of Arlene Cobb at the trial, Mr. Kutsche absolutely agreed that Cobb's testimony was, in fact, tending to corroborate Preston's self-reported use of PCP on the night of the murder. (PC 2-R. Vol. II, 274). He further indicated that corroboration of the PCP usage by Preston was important as a mitigating factor. (PC 2-R. Vol. II, 275). Mr. Kutsche recalled that the theory of their case was that Preston's drug abuse rendered him, if guilty, of having no control and no memory, no ability to distinguish between right and wrong and not being able to understand the consequences of his act, a theory rejected by the trial court. (PC 2-R. Vol. II, 276, 278). On cross-examination, Mr. Kutsche said he did not know whether laboratory testing would have been unable to show the time of ingestion or amount of PCP taken by Preston at the time of the murder. (PC 2-R. Vol. II, 281).

James Russo testified as to his role as co-counsel during Mr. Preston's 1991 re-sentencing. Having been elected as Public Defender for the Eighteenth judicial Circuit in 1980 (PCR. Vol. II, 241), Mr. Russo was, in fact, the head of the office representing Mr. Preston by the time of the initial trial in 1981. After assuming his office, he had assigned Arthur Kutsche, a part-time public defender, to the case following the departure of a previously assistant. (PC 2-R. Vol. II, 243). After receiving the mandate for the re-sentencing, Mr. Russo decided that he and Chief Assistant Marlene Alva would handle the case. (PC 2-R. Vol. II, 246). Prior to the 1991 re-sentencing, Mr. Russo's background included prosecuting three to five homicide cases as a state attorney and defending five to eight cases as a public defender. (PC 2-R. Vol. II, 258).

Mr. Russo testified that the thrust of the defense case in mitigation was Mr. Preston's drug usage with a focus on PCP. (PC 2-R. Vol. II, 251-52). He outlined that the re-sentencing evidence of drug usage came from Preston's testimony (PCR. Vol. II 252), Donna Maxwell (Houghaling)'s testimony, the trial references to the seized syringes and other drug paraphernalia (PC 2-R. Vol. II, 253) and that of the mental health experts. (PC 2-R. Vol. II, 254).

Regarding usage of additional corroboration of drug usage from the 1981 witness, Arlene Cobb, Mr. Russo testified that he could not recall whether Cobb was not available in 1991 or that the defense team simply chose not to use her

again. (PC 2-R. Vol. II, 254). Nevertheless, Mr. Russo recalled that Cobb's 1981 testimony seemed to be weaker as inferential evidence of drug usage by Preston than compared with her pre-1981 trial deposition. Not knowing whether the differences were a "backing off", the 1991 defense team decided to use the details of Cobb's 1981 testimony through references to it from the current mental health experts. (PC 2-R. Vol. II, 254, 262-63).

As to the failure of the 1991 re-sentencing team to request and perform laboratory testing on Mr. Preston's clothing and the drug paraphernalia found in his room, Mr. Russo indicated that he was "certainly" aware that the syringes and Preston's clothing could have been tested in 1991 for the presence of PCP in those items in 1978. (PC 2-R. Vol. II, 255, 256). Further, Mr. Russo testified that he was "probably" aware in 1991 that client's hair evidence could have been tested for the presence of PCP in 1978. (PC 2-R. Vol. II, 256). The defense team reasoning for not seeking such testing for the presence of PCP was twofold. First, Mr. Russo explained they felt they had "sufficient" corroboration from the other witnesses and evidence. Secondly, while the drug usage defense was "important to present" the re-sentencing defense team did not think it was "significant evidence that will bring back a life recommendation." (PC 2-R. Vol. II, 256).

The co-counsel for the 1991 re-sentencing, Marlene Alva, also testified at the evidentiary hearing. Before being assigned to Mr. Preston's case, Ms. Alva's

trial experience "probably" included between six and a dozen capital cases. (PC 2-R. Vol. II, 299). She also had substantial defense experience in handling mental health issues in both capital and non-capital case trials. (PC 2-R. Vol. II, 322, 23). Her description of the defense theory of the case was that the "hopes were to present" evidence that Preston was using PCP on the night of the homicide in order to develop the statutory mitigators of "lack of ability to conform his conduct to the requirements of law" and "a substantial mental illness or disturbance." These factors would be supplemented by the statutory mitigator of age, based on Preston being "very youthful," and on his drug usage as non-statutory mitigation. (PC 2-R. Vol. II, 302, 307).

Ms. Alva further explained that decisions were made about retaining experts for the re-sentencing in view of her perception that "the original penalty phase was somewhat sparse." (PC 2-R. Vol. II, 304). In particular, it was determined the defense would benefit from retaining the defense experts used at the original trial due to perceived benefits of having evaluations of Preston closer in point of time to the date of the murder. (PC 2-R. Vol. II, 304).

Regarding the fact that Arlene Cobb was not called to testify at re-sentencing, Ms. Alva believed that the defense team had some difficulty in locating Cobb and that Cobb, when contacted, had expressed a lack of recollection of events and a lack of desire with being involved in the hearing. (PC 2-R. Vol. II,

308). Alva further testified that she knew that Cobb's testimony from the first trial of Preston's behavior on the night of the murder could be brought in as cross-examination free hearsay through the use of their experts. These re-sentencing experts would explain their record reviews about Cobb's trial testimony as showing Preston's behavior being consistent with the behavior of someone on PCP. (PC 2-R. Vol. II, 309). Based on her inability to recollect her work with the experts, Alva assumed that she only had the experts testify about Cobb's observations if the experts were in agreement with the direction Alva wanted the testimony to go. (PC 2-R. Vol. II, 322-23).

As to the issue regarding the lack of laboratory testing of Preston's hair and clothing for the presence of PCP at or near the time of his arrest, Alva was unable to recall or recollect whether she was aware of the possibilities of such testing back in 1990 or 1991. She also was unable to recall or recollect whether she knew if co-counsel Russo had such knowledge in 1990 or 1991. (PC 2-R. Vol. II, 310). When asked why the defense team did not request a laboratory test of the syringe found in Preston's bedroom, Alva explained that Donna Maxwell Houghtaling's testimony was the most "probative" of Preston's drug usage at or around the time of the offense. (PC 2-R. Vol. II, 311-12).

Alva could not recall and could not provide a basis for failing to argue drug usage as non-statutory mitigating factors despite her acknowledgment that

Preston's drug abuse before and at the time of the crime was a major thrust of the defense case at re-sentencing. (PC 2-R. Vol. II, 315).

SUMMARY OF ARGUMENT

1. The lower court erred in denying the impact of the newly discovered DNA evidence which showed that the belt buckle hair was not the victim's hair. The State considered this to be a significant item of evidence linking the appellant to the crimes charged. The State felt that a different laboratory result than that showed by comparison analysis at trial would clear the appellant. The State's trial position should have been accepted by the lower court and a new trial should have been granted.

2. The lower court erred in finding that re-sentencing counsel made a reasonable strategic decision in not recalling trial witness Arlene Cobb. Counsel were aware that corroboration of PCP usage was instrumental in their theory of mitigation and should have used all of the witnesses available.

3. The lower court erred in not recognizing that Florida's rules prohibiting juror interviews, especially at postconviction, violate the appellant's rights to due process and equal protection of the law.

4. The lower court erred in finding that the appellant failed to show exculpatory evidence from missing State Attorney files when neither the court, the State nor the appellant know exactly what was contained in those misplaced records.

5. The lower court erred in denying without an evidentiary hearing the claim that Florida's protocol for lethal injection constitutes cruel and unusual punishment.

6. The lower court erred in denying appellant's *Ring* claim in view of the current status of Florida law.

7. The lower court erred in denying without an evidentiary hearing the appellant's claim regarding deficiencies in the medical examiner's evidence and testimony.

8. The lower court erred in denying the appellant's cumulative error claim by doing so without and evidentiary hearing and without address the factors presented to the court by the appellant.

ARGUMENT I

THE LOWER COURT ERRED IN DENYING THE NEWLY DISCOVERED DNA EVIDENCE CLAIM

This claim, number 39 in the Appellant's Rule 3.850 motions, was granted an evidentiary hearing by the *Huff* order of September 19, 2000. (PC2-Supp.R. Vol. VIII 1380). This claim was also covered by the December 27, 2003 Stipulation Regarding Use of Labcorp Written Reports in Lieu of Testimony at Evidentiary hearing. (PC2-Supp.R. Vol. XI 1835).[4] That stipulation was the ultimate result of the granting of the Appellant's motions for testing trial evidence– motions that were opposed by the State. (PC2-Supp.R. Vol. IX 1490, 1507; (PC2-Supp.R. Vol. X 1702). The DNA tests showed that the belt buckle hair was not the hair of the victim. (PC2-Supp.R. Vol. XI 1835).

The post-conviction court ruled on the claim as follows:

> In his thirty-ninth claim, the Defendant alleges ineffective assistance when his counsel failed to challenge the credentials of the state's expert witness, Diane Bass, who was the crime lab hair analyst. He also alleges that there is newly discovered DNA. In regard to the first sub-issue, the Defendant failed to offer any allegation that if such voir dire was conducted it would have revealed a deficiency in the

[4]The newly discovered evidence regarding the DNA tests on the pubic hairs was considered by the court and parties as part of this claim due to the connection of the hair testing at trial. The appellant did not pursue that portion of the claim regarding the credentials of State expert Diana Bass. (PC2-Supp.R. Vol. XIII 2074-75). She had testified at trial that the belt buckle hair was "consistent in microscopic appearance" with the hair samples of the victim. (R. Vol. VI 1105).

> qualifications of the expert. Nor was there any reason to doubt the accuracy of the expert's testimony. Here, the Defendant's counsel did not fall outside the wide range of competent professional assistance. Although the DNA testing available today shows that the hair from the belt buckle was not the victim's, this does not establish ineffective assistance of counsel as this must be based on what was available at the time of the trial. Finally, in regards to the DNA sub-issue, because the belt buckle hair was not the only item in this case that tied the Defendant to the victim, it should be dismissed. The blood and the fingerprints are sufficient evidence. Post-conviction relief should be denied as to this claim.
>
> (PC2-Supp.R. Vol. XIII 2133).

With this ruling, the lower court avoided any legal or detailed factual analysis. For example, the court did not acknowledge the significance of the belt buckle hair when compared with the other items of circumstantial evidence. The belt buckle hair was prominently used by the State at trial as significant evidence against the appellant. In the opening statement by the prosecution (R. Vol. III 477-95), the following was stated to the jury::

> The body [of the victim] is then removed to the Seminole County Morgue, and an autopsy is performed approximately a day later on this body of Earline Walker with some twenty stab and slash wounds, and the police begin to collect further physical evidence. What you will come to learn are known standards from the victim, Earline Walker, known standards as to blood type, known standards as to hair that came from various portions of the body taken from the head, from the nostrils, from the pubic area. These are to be utilized later on a by a lady by the name of Diana Bass, a microanalyst, a person who does hair comparison for what we call elimination purposes.

A fellow by the name of John Thorpe has occasion, a little while later, to apprehend and place into custody Robert Preston, and he is present when the personal possessions of Robert Anthony Preston are placed in a property envelope. When persons are placed in custody, any physical object that they might have is removed from them. One of the items that is placed in this property envelope is a rather large three-prong belt. It goes into a file cabinet, is filed alphabetically.

Let's jump to about 8:00 or 9:00 o'clock that night. Martin LaBrusciano is sitting in his ID evidence lab and is looking at fingerprints that he has as they relate to the car, and the Marlboro cigarettes, and he passes in front of himself the fingerprint card of Robert Anthony Preston, and you will learn that fingerprint examiners classify fingerprints. There's an actual coding, general class characteristic, and as Lieutenant LaBrusciano is mentally doing his computing, this classification here, this number of swirl, this number of loops, he thinks he sees a familiar pattern, and he begins to look, and he discovers, during the early evening hours, that, in fact, the fingerprint matches Robert Anthony Preston's. he is aware that Robert Anthony Preston is in custody, and that his personal possessions are there in the Seminole County Jail.

A fellow by the name of John Fuller, who's now retired from the Sheriff's Department, goes and pulls the property envelope and brings it to Martin LaBrusciano, who's seated in the office of John E. Polk, the Sheriff of Seminole County. There are several people there. We are up to the very, very late evening, and Mr. LaBrusciano begins to go through the contents in search for scientific evidence that would link Robert Anthony Preston to the murder of Earline Walker, and he discovers embedded in the belt buckle where the leather wraps around it, a hair down in, and he pulls the hair out, preserves it and begins to look at it and think about it.

Mr. Giugliano is not present at this point in time, and the remains of Earline Walker is at Carey Hand in Orlando, Orange county, Florida. He thinks, but he's not absolutely certain, that known standards were taken for elimination or comparison purposes, but is not sure. So, he proceeds to Carey Hand where he personally again takes the scalp, eyebrow, nose and pubic hair of Earline Walker, gets back, decides to

> call a lady by the name of Diana Bass, previously identified to you as a microanalyst at the lab.
>
> We're up to around midnight. She comes down and does a preliminary, or what might be known as a quick and dirty finding indicating that his pubic hair, there maybe something here. She can't tell us because she doesn't have the benefit of all the high-powered microscopic equipment she's got, but she wants to look.
>
> Sometime during the early morning hours, she goes to the Sanford Crime Laboratory with the knowns and compares and forms a tentative opinion that, in fact, the hair from the belt buckle is very similar to those of Earline Walker's pubic hair.
>
> (R. Vol. III, 485-488).

In response to the defense motion for judgment of acquittal, the prosecutor told the court that "[i]n our case, there *was* a pubic hair sample taken off the belt of the Defendant..." (R. Vol. VII 1340)(emphasis added). In closing argument by the State, the jury was told:

> Let's look at the hair on microscientific evidence in this matter. We have a pubic hair, when compared with known standards of Earline Walker's pubic hair region, being discovered in a belt buckle. You recall when Mr. LaBrusciano stood up and he held this sort of pointed instrument and held the belt up and showed you how it was down in the belt, is that consistent with that hair merely coming in contact and being in a property envelope before the belt went in, or is that consistent with some forcible movement of a belt coming against the naked pubic region of Earline Walker because, see, the evidence in the lawsuit shows that she was naked when she was killed, and how does one explain the existence of the hair on the coat? *Those are independently significant.*
>
> We have not one finding that microscopically the hairs are indistinguishable, we have two. They've come off different items,

> separate and apart. *Either one of those could have cleared or served to exculpate Defendant, Preston, but they did not because he is the perpetrator of this vicious homicide.*
>
> (R. Vol IX 1790-91)(emphasis added).

The State later asked the jury "... was it done by Robert A. Preston, Jr.? It was based .. upon not one, but two pubic hairs which are no way different in microscopic appearance based on Arlene Cobb [sic]..." (R. Vol. X 1810). "The hair, to a certain extent, is direct and positive to the extent that it comes off clothing associated with the Defendant. It's circumstantial in the sense that it is not absolutely iron clad conclusive, but it's just, in no way distinguishable, and *don't you think if there was any question in their mind as to whether or not it was in any way distinguishable, that they wouldn't have an expert in here much as they did with the doctor?*" (R. Vol. X 1814-15)(emphasis added).

At rebuttal the State said "[l]et's talk about this planting of evidence theory. ... There's no way they could have anticipated what Donna and Scott were going to say, and the fact that it dovetails with the known scientific evidence in this lawsuit." (R. Vol. X 1886). ... "How do you compare that type of speculation ... against pubic hair on two separate pieces of clothing..." (R. Vol. X 1887).

The following words and notions of the prosecutors at trial have been welcomed and adopted by the appellant. Because the Court and the parties are now faced with a circumstantial evidence case that has absolutely no evidence

linking appellant to the victim, the appellant repeats the prosecutor's words that the belt buckle hair was "significant" evidence. The appellant agrees with the trial prosecutor that a different testing result of either one of the hairs "could have cleared or served to exculpate Defendant." Appellant concurs with the trial prosecutor and did "think if there was any question in their mind as to whether or not it was in any way distinguishable" that having "an expert in here" was worthwhile; hence, the pursuit of releasing the trial evidence for DNA testing.

Because the DNA result, following the Court's proper rulings in releasing the hair evidence for DNA testing, is considered newly discovered evidence, this claim is subject to the following standard of review. In Jones v. State, 709 So.2d 512, 521-22 (Fla. 1998), cert. denied, 523 U.S. 1040, 118 S.Ct. 1350, 140 L.Ed.2d 499 (1998), this Court explained that when a prior evidentiary hearing has been conducted, "the trial court is required to 'consider all newly discovered evidence which would be admissible' at trial and then evaluate the 'weight of both the newly discovered evidence and the evidence which was introduced at the trial' " in determining whether the evidence would probably produce a different result on retrial. This cumulative analysis must be conducted so that the trial court has a "total picture" of the case. Lightbourne v. State, 742 So.2d 238, 247-48 (Fla. 1999). This Court gives deference to the lower court's findings of fact if they are

supported by competent and substantial evidence. Melendez v. State, 718 So.2d 746, 747 (Fla. 1998).

To the extent to which the DNA result is considered as removing the only item of circumstantial evidence tying the defendant to the victim, the Court knows that circumstantial evidence will not sustain a conviction unless it is inconsistent with any reasonable hypothesis of innocence and that in applying the standard, the version of events related by the defense must be believed if the circumstances do not show that version to be false. Peek v. State, 395 So.2d 492, 495 (Fla. 1981)(citations omitted).

This Court further explained the sufficiency of evidence factors and the applicable law as follows:

> In cases in which the evidence of guilt is wholly circumstantial, it is the trial judge's task to review the evidence in the light most favorable to the State to determine the presence of competent evidence from which the jury could infer guilt to the exclusion of all other inferences. See State v. Law, 559 So.2d 187, 189 (Fla.1989). A reviewing court must assess the record evidence for its sufficiency only, not its weight. We explained in Tibbs v. State, 397 So.2d 1120 (Fla.1981), aff'd, 457 U.S. 31, 102 S.Ct. 2211, 72 L.Ed.2d 652 (1982):
>
>> The weight and the sufficiency of evidence are, in theory, two distinct concepts most often relevant at the trial court level. Sufficiency is a test of adequacy. Sufficient evidence is such evidence, in character, weight, or amount, as will legally justify the judicial or official action demanded. In criminal law, a finding that the evidence is legally insufficient means that the prosecution has failed to prove the defendant's guilt

> beyond a reasonable doubt. Weight, at least in theory, is a somewhat more subjective concept. The weight of the evidence is the balance or preponderance of evidence." It is a determination of the trier of fact that a greater amount of credible evidence supports one side of an issue or cause than the other. As a general proposition, an appellate court should not retry a case or reweigh conflicting evidence submitted to a jury or other trier of fact. Rather, the concern on appeal must be whether, after all conflicts in the evidence and all reasonable inferences therefrom have been resolved in favor of the verdict on appeal, there is substantial, competent evidence to support the verdict and judgment. Legal sufficiency alone, as opposed to evidentiary weight, is the appropriate concern of an appellate tribunal.
>
> Id. at 1123 (citations and footnotes omitted) (quoting Black's Law Dictionary 1285, 1429 (5th ed.1979)).

Although the jury is the trier of fact, a conviction of guilt must be reversed on appeal if it is not supported by competent, substantial evidence. See Long v. State, 689 So.2d 1055, 1058 (Fla.1997). In this regard, we have explained:

> A judgment of conviction comes to this Court with a presumption of correctness and a defendant's claim of insufficiency of the evidence cannot prevail where there is substantial competent evidence to support the verdict and judgment. The fact that the evidence is contradictory does not warrant a judgment of acquittal since the weight of the evidence and the witnesses' credibility are questions solely for the jury. It is not this Court's function to retry a case or reweigh conflicting evidence submitted to the trier of fact.
>
> Donaldson v. State, 722 So.2d 177, 182 (Fla.1998) (quotation marks and citations omitted).

> ... In Law, this Court reiterated the standard of review in circumstantial evidence cases: "Where the only proof of guilt is circumstantial, no matter how strongly the evidence may suggest guilt, a conviction cannot be sustained unless the evidence is inconsistent with any reasonable hypothesis of innocence." 559 So.2d at 188 (citing McArthur v. State, 351 So.2d 972 (Fla.1977), and Mayo v. State, 71 So.2d 899 (Fla.1954)).
>
> Crain v. State, 894 So.2d 59, 71-72 (Fla. 2004).

The court below looked at two of the remaining items of circumstantial evidence and found that "the blood and the fingerprints are sufficient evidence." (PC2-Supp.R. Vol. XIII 2133). As to the blood on the jacket, the defense emphasized at trial that the appellant's mother had thoroughly inspected the jacket and saw no blood stains on it: "I looked all over it .. I didn't notice anything, just dirt dirt." (R. Vol. VII 1362). The appellant's mother subsequently explained that her son, Scott, thereafter took the jacket into his room. (R. Vol. VII 1362).

As to the fingerprints on the car and cigarettes, in order to avoid impermissible pyramiding of inferences,

> [W]hen circumstantial evidence is relied upon, the circumstances, when taken together, must be of a conclusive nature and tendency, leading on the whole to a reasonable and moral certainty that the accused, and no one else, committed the offense. If the facts are equally consistent with some other rational conclusion than that of guilt, or if the evidence leaves it indifferent which of several hypotheses is true, or merely establishes some finite probability in favor of one hypotheses is rather than another, such evidence cannot be proof, however great the probability may be. 5 Fla.Jur. Burglary and Housebreaking s 24 (1955). Hubbard v. State, 73 So.2d 850 (Fla. 1954); Rivers v. State, 140 Fla. 487, 192 So.2d 190 (1939); Wright v.

> State, 182 So.2d 273 (Fla. 3d DCA 1966). With respect to fingerprint evidence in particular, it has been held that when a fingerprint is found in a place open to the public a defendant will not be convicted on that alone. See Dixon v. State, 216 So.2d 85 (Fla. 2d DCA 1968). Fingerprint evidence must meet the requirement that the circumstances must be such that the print could only have been made at the time of the crime. Wilkerson v. State, 232 So.2d 217 (Fla. 2d DCA 1970); Rhoden v. State, 227 So.2d 349 (Fla. 1st DCA 1969); Tirko v.s State, 138 So.2d 388 (Fla. 3d DCA 1962).
>
> Knight v. State, 294 So.2d 387 (Fla. 4th DCA 1974).

Following the receipt of the Labcorp test results, on the whole, there is no reasonable and moral certainty that the appellant, and no one else, committed the offense. As the State said in closing to the jury, a different result on the hair test "could have cleared or served to exculpate" the appellant. By either the new evidence standard or the chipping away of circumstantial evidence standard, the DNA tests show that the results of Mr. Preston's trial are unreliable and unfair. The lower court should be reversed and this case remanded for a new trial.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION WHEN COUNSEL FAILED TO PRESENT A CORROBORATING WITNESS

This claim, number 6 in the Appellant's Rule 3.850 motions, was granted an evidentiary hearing by the *Huff* order of September 19, 2000. (PC2-Supp.R. Vol.

VIII 1380). This claim was also covered by the July 16, 2001Stipulation Regarding Use of PCP (PC2-Supp.R. Vol. IX 1581) and the December 29, 2003 Stipulation Regarding Use of Expert's Deposition in Lieu of Testimony at Evidentiary Hearing. (PC2-Supp.R. Vol. XI 1802). The court below found that defense counsel "made a reasonable strategic decision not to call Cobb" and denied the claim. (PC2-Supp.R. Vol. XIII 2125-26). In deciding ineffective assistance of counsel claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000)(citations omitted).

At re-sentencing, despite the fact that defense counsel repeatedly referred to Arlene Cobb's trial testimony, and elicited testimony from their experts based on Ms. Cobb's testimony, defense counsel did not call Ms. Cobb as a witness. The re-sentencing jury did not hear the substance of Ms. Cobb's testimony directly. Re-sentencing counsel were faced with a trial record, as noted in the appellant's motion, that was repeated at the re-sentencing. The State emphasized repeatedly that the only evidence that appellant had used PCP on the night of the murder was appellant's self-report. (RS. Vol. VI 1039-41, 1058-59, Vol. VIII 1385-86). The court, in its sentencing order, likewise emphasized that there was no corroborating evidence of appellant's use of PCP on the night of the murder. (RS Vol. X 1918). As a result the jury was deprived of evidence that corroborated appellant's

testimony that he ingested PCP on the night of the murder and of the evidence that served as a basis for the experts' testimony.

Defense counsels' explanations of whether they had a strategic or tactical reason for not calling Ms. Cobb as a witness fall well short of the acceptable standards. Mr. Russo testified on January 7, 2004, that he did not recall "whether she was unavailable or [whether] we chose not to use her ... we thought it would be just as effective and we thought we could also get it in and I believe we did get [it] in from the mental health experts." (PC2-R. Vol. II 254). While Judge Alva testified on January 27, 2004 that she did not "have any specific recollection of any of the experts' testimony" " (PC2-R. Vol. II 313), she testified that she believed "we had some difficulty in locating Arlene Cobb ... but if I recall correctly, and I'm not a hundred percent certain on this, I spoke with her on the telephone and her position was that she did not want to be involved in this ... [that] she really didn't have any recollection of the events." (PC2-R. Vol. II 308).

Re-sentencing also counsel did not pursue laboratory testing (see the July 16, 2001Stipulation Regarding Use of PCP (PC2-Supp.R. Vol. IX 1581) that could have confirmed that the defendant did inject PCP at or near the time of his arrest and the homicide despite having various degrees of knowledge concerning testing at the time of re-sentencing (PC2-R. Vol. II 275 for Mr. Russo); (PC2-R. Vol. II 312 for Judge Alva).

Defense expert Robert Norgard testified that "[the] bottom line as to my opinion ... was that I don't believe that ... this area of scientific testing was well enough known to defense attorneys that that's something they would have jumped on." (PC2-Supp.R. Vol. XI 1818). However, as to defense counsel Russo's knowledge of such testing, "... it would be my opinion that ... independent of any community standards .. [i]f a particular defense counsel because of his experience was familiar with the testing procedure that may not necessarily have been mainstream that he certainly should have utilized that in terms of trying to develop the relevant factual issues in this case." (PC2-Supp.R. Vol. XI 1820). "If an attorney within the scope of his experience knows of something that he could utilize in his case, even though a lot of defense lawyers may not be familiar with it, certainly that's something that reasonably competent counsel would utilize in their defense in the case. So I think that why that meets the first prong of Strickland. With respect to the second prong of Strickland as to whether or not there is prejudice ... it would be difficult for me to sit here and say what weight the positive testing of the PCP – you know, positive PCP in the clothing and hair, what that would have done with respect to that trial judge's opinion." (PC2-Supp.R. Vol. XI 1821, 1822).

This was a complementary issue that was pursued pre-evidentiary hearing on the failure to develop corroborating evidence of PCP usage. The appellant did not

request leave to amend his Rule 3.850 motions and presented no further evidence other than the referenced stipulations. While there was testimony at the hearing about this matter, the court did not address it in its order. (PC2-Supp.R. Vol. XIII 2125-26).

"Counsel should ensure that *all* reasonably available mitigating and favorable information consistent with the defense sentencing theory is presented to the sentencing entity or entities in the most effective possible way." ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases, February, 1989; Guideline 11.8.2(D), p. 69 (emphasis added). Consequently, counsel's performance in this regard fell below objective standards of reasonableness. Wiggins v. Smith, 539 U.S.510, 123 S.Ct. 2527, 156 L.Ed.2d 471 (2003). As a result, confidence in the outcome is undermined under Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) and relief is proper.

ARGUMENT III

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT FLORIDA'S RULE PROHIBITING APPELLANT'S COUNSEL FROM INTERVIEWING JURORS VIOLATES EQUAL PROTECTION AND DUE PROCESS RIGHTS, AND THE FIRST, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Because this legal claim, number 8 in the appellant's Rule 3.850 motions, required no evidence, it was denied an evidentiary hearing by the *Huff* order of September 19, 2000. The post-conviction court denied the claim and ruled in the alternative as follows:

> The Defendant alleges in his eighth claim that Florida's rule prohibiting defense counsel from interviewing jurors violates equal protection and due process and the First, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This claim is procedurally barred because it could have been raised on direct appeal. (citation omitted). Notwithstanding, the Defendant has failed to present any evidence of juror misconduct in this case and there is no report by a juror or anyone else that the jurors considered extrinsic matters. Therefore, he has not shown that he has been prejudiced by this rule. This is alternative and secondary to the procedural bar holding, which is an adequate and independent basis for the denial of relief. Post-conviction relief should be denied on this claim.
>
> (PC2-Supp.R. Vol. XIII 2126).

The court faulted the appellant for not pleading or presenting any evidence of juror misconduct. However, the court ignored the fact that Florida's rules precluded counsel from investigating jury bias and misconduct that can only be discovered, absent press or academic reports about the jury, through interviews with jurors themselves.

To the extent defendants' counsel are treated differently from academics, journalists and other non-lawyers who are not subject to the Rules Regulating the Florida Bar, there is a violation of defendants' rights to equal protection as the

concept is enunciated in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). See William J. Bowers and Wanda D. Foglia, "Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing." Criminal Law Bulletin 39:51-86 (2003).

The appellant notes that a new procedural rule regarding juror interviews has been established since the time of filing this claim. Effective on January 1, 2005, Fla.R.Crim.P. 3.575 provides as follows:

> A party who has reason to believe that the verdict may be subject to legal challenge may move the court for an order permitting an interview of a juror or jurors to so determine. The motion shall be filed within 10 days after the rendition of the verdict, unless good cause is shown for the failure to make the motion within that time. The motion shall state the name of any juror to be interviewed and the reasons that the party has to believe that the verdict may be subject to challenge. After notice and hearing, the trial judge, upon a finding that the verdict may be subject to challenge, shall enter an order permitting the interview, and setting therein a time and a place for the interview of the juror or jurors, which shall be conducted in the presence of the court and the parties. If no reason is found to believe that the verdict may be subject to challenge, the court shall enter its order denying permission to interview. COURT COMMENTARY: This rule does not abrogate Rule Regulating the Florida Bar 4-3.5(d)(4), which allows an attorney to interview a juror to determine whether the verdict may be subject to legal challenge after filing a notice of intention to interview.

The thrust of the argument is that Florida's restrictions on post-trial juror interviews is an equal protection violation as enunciated in Bush v. Gore, 531 U.S. 98, 121 S.Ct. 525, 148 L.Ed.2d 388 (2000). Criminal defense counsel in Florida

are treated differently, unfairly and unequally compared to academics, journalists and those lawyers not connected with a particular case.

Florida lawyers, including defense trial and postconviction counsel, cannot interview jurors on behalf of their clients outside the constraints created by Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4). Yet, academics are allowed to and, in fact, do interview capital jurors, post-trial, about a wide range of matters, not just those factors which may be "grounds for legal challenge" under the rules. See the Capital Jury Project website at http://www.cjp.neu.edu which discusses, in part, the completed 1,198 interviews with jurors from 353 capital trials in 14 states, including Florida (as of August 15, 2005). The CJP website also lists a number of doctoral dissertations based on Capital Jury Project data including Julie Goetz, "The Decision-Making of Capital Jurors in Florida: The Role of Extralegal Factors." Unpublished dissertation (1995), School of Criminology and Criminal Justice, Florida State University, Tallahassee, Florida.

Additionally, journalists are permitted without restriction to interview jurors post-trial. See, e.g., Chris Tisch, "Defense Fears Comments Affect Verdict;" St. Petersburg Times, Oct. 25, 2004 (available at http://www.sptimes.com/advancedsearch.html), where the jury foreman of a murder trial is interviewed about the jury's deliberations.

Lastly, Fla.R.Crim.P. 3.575 and Rule Regulating the Florida Bar 4-3.5(d)(4) only apply to cases "with which the lawyer is connected." Hence, lawyers not connected with a case are treated differently because the rule does not apply to them.

The point remains that application of justice in this case could well benefit from learning whether the appellant's jurors agree with any of the several arguments of appellant in this proceeding. The answers to any number of hypothetical or direct questions are presently unknown and cannot come from counsel for the appellant because of the "catch-22" nature of the rules. That the answers to juror-posed questions could come from an academic researcher, a journalist or a lawyer not connected with the case infringes upon the appellant's rights to due process, access to the courts, and the equal protection concepts enunciated in Bush v. Gore, supra. The reliability and integrity of appellant's capital sentence is thereby questionable based on these constitutional violations.

ARGUMENT IV

THE LOWER COURT ERRED IN DENYING THE CLAIM REGARDING THE STATE ATTORNEY'S MISPLACED FILES AND RECORDS.

This claim, number 1 in the appellant's rule 3.850 motions, was granted an evidentiary hearing by the *Huff* order of September 19, 2000. (PC2-Supp.R. Vol. VIII 1380). It was also covered by the January 7, 2004, Stipulation Regarding

Use of Claim I Witness Depositions in Lieu of Testimony at Evidentiary Hearing. (PC2-Supp.R. Vol. XII 1872). Consequently, the defendant did not directly present any evidence or witnesses for this claim at the 2004 evidentiary hearing.

Following initial 1996 public records by the appellant (PC2-Supp.R. Vol. II 232), it became clear that some State Attorney files and materials are missing and are likely to remain missing. The lower court knew what the State was able to produce and what postconviction counsel received under Chapter 119 production. (PC2-Supp.R. Vol. II 285); (PC2-Supp.R. Vol. V 937); (PC2-Supp.R. Vol. VI 1042). The record is also and that there is no evidence of intentional action or non-action causing the material to be misplaced or in the failure of the State to locate the missing material. (PC2-Supp.R. Vol. XIII 2124).

The record is also clear that neither party is certain as to the exact nature or identity of the materials that are missing. (PC2-Supp.R. Vol. VI 1042). To the extent that the lower court based its complete ruling on the fact that "the Defendant has failed to show the missing files contain anything exculpatory," (PC2-Supp.R. Vol. XIII 2124), the court is in error. Since neither party knows exactly what is misplaced and missing, neither party can show whether exculpatory materials are involved.

In any event, the lower court did recognize that the State is under a continuing duty to disclose the records to the Court and defendant should they ever

be located in the future. (PC2-Supp.R. Vol. XIII 2124). The court below was also informed that the appellant reserved his rights to full disclosure under Florida law. (PC2-Supp.R. Vol. XIII 2124). State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992). The appellant similarly informed the lower court that upon any such future disclosure and because postconviction litigation is governed by principles of due process, Holland v. State, 503 So. 2d 1250 (Fla. 1987), it was anticipated that appellant would request leave to amend or to supplement his motion or to file a successor motion itself. (PC2-Supp.R. Vol. XIII 2124). Brown v. State, 596 So. 2d 1026 (Fla. 1992); Woods v. State, 531 So. 2d 79 (Fla. 1988).

ARGUMENT V

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT AND WOULD DEPRIVE DEFENDANT OF DUE PROCESS AND EQUAL PROTECTION OF THE LAWS IN VIOLATION OF THE FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This claim, number 37 in the appellant's Rule 3.850 motions, was denied an evidentiary hearing by the *Huff* order of September 19, 2000. (PC2-Supp.R. Vol. VIII 1380). As presented in the court below (PC2-Supp.R. Vol. VII 1215 *et seq*.), the amended execution statute, F.S. 922.10 [January 14, 2000], provided that

death sentences in Florida may, by election, be presumptively carried out by the injection of poison into a condemned person's body. The change in the law appears inspired by the common perception that death by lethal injection is painless and swift. This method of execution can constitute cruel and unusual punishment.

The Eighth Amendment prohibits governmental imposition of "cruel and unusual punishments" and bars "infliction of unnecessary pain in the execution of the death sentence." Louisiana ex rel. Francis v. Resweber, 329 U.S. 459, 464, 91 L. Ed. 422, 67 S. Ct. 374 (1947) (plurality opinion). "Punishments are deemed cruel when they involve torture or a lingering death. . ." In re Kemmler, 136 U.S. 436, 447, 34 L.Ed. 519, 10 S. Ct. 930 (1890). The meaning of "cruel and unusual" must be interpreted in a "flexible and dynamic manner," Gregg v. Georgia, supra, 428 U.S. at 171 (joint opinion), and measured against "evolving standards of decency that mark the progress of a maturing society." Trop v. Dulles, 356 U.S. 86, 101, 2 L.Ed. 2d 630, 78 S. Ct. 590 (1958)(plurality opinion).

Despite the perception that lethal injection is a painless and swift means of inflicting death, it is a method in which negligent or intentional errors may have caused the persons executed intense suffering. Even when persons executed by lethal injection are first paralyzed, it is not clearly demonstrated that they become unconscious of their pain and impending death. It is noted that a number of the

persons executed by lethal injection in other states may have suffered extremely painful and prolonged deaths resulting in wanton and unnecessary infliction of pain. Accounts of botched executions have been reported. See, e.g., the compilation prepared by Professor Michael L. Radelet; http://www.deathpenalty info.org/article.php. For example, the lethal injection of Rickey Ray Rector, was described as follows:

> On January 24, 1992, in Varner, Arkansas, it took the medical staff more than 50 minutes to find a suitable vein in Rickey Rector's arm. Witnesses were not permitted to view this scene, but reported hearing Rector's loud moans throughout the process. During the ordeal, Rector, who suffered serious brain damage from a lobotomy, tried to help the medical personnel find a patent vein. The administrator of the State's Department of Corrections Medical Programs said, paraphrased by a newspaper reporter, "the moans came as a team of two medical people, increased to five, worked on both sides of Rector's body to find a suitable vein." The administrator said that may have contributed to his occasional outbursts. Joe Farmer "Rector, 40 Executed for Officer's Slaying," Arkansas Democrat-Gazette, January 25, 1995; Sonya Clinesmith, "Moans Pierced Silence During Wait," Arkansas Democrat-Gazette, January 26, 1992.

Based on eyewitness accounts of such executions, coupled with available scientific evidence regarding the hazards, lethal injection may be unreliable as a "humane" method for extinguishing life. Accordingly, execution by lethal injection constitutes cruel and unusual punishment. The Florida procedures for execution by lethal injection run the serious risk of causing excruciating pain to the condemned inmate and therefore is unconstitutional and violates the *Eighth* and

Fourteenth Amendments to the United States Constitution and the Florida Constitution prohibition against cruel and unusual punishment.

The State of Florida has failed to establish legally sufficient administrative and procedural standards for the administration of lethal injection as of writing and submission of this motion. To the extent that appellant discerned, when filing his claim in the lower court, what procedures exist to protect his constitutional right to be free from unnecessary or excessive pain during his execution, he alleged that they are inadequate in, at least, the ways enumerated below.

The State of Florida has no coherent set of procedures and fails to designate adequate equipment or trained personnel for the preparation and administration of the injection, thereby raising substantial and unnecessary risks of causing extreme pain and suffering before and during his execution.

The State of Florida does not provide that properly trained personnel (i.e., an individual or individuals trained to, among other things, locate usable veins, distinguish between usable and unusable veins, minimize the risk of injecting the chemicals directly into muscle or other tissue, or take appropriate action in the event of a technical problem) insert the intravenous line or catheter ("IV").

If the catheter is not properly inserted, there is a risk that the chemicals will be inserted into a defendant's muscle and other tissue rather than directly into his bloodstream, causing extreme pain in the form of a severe burning sensation.

Furthermore, a failure to inject the chemicals directly into the bloodstream will cause the chemicals to be absorbed far more slowly and the intended effects will not occur. Improper insertion of the IV catheter could also result in its falling out of the vein, resulting in a failure to inject the intended dose of chemicals.

There is also the risk that the catheter will rupture or leak as pressure builds up during the administration of the chemicals unless the catheter has adequate strength and all the joints and connections are adequately reinforced.

The State of Florida does not provide that properly trained personnel (i.e., an individual or individuals trained to, among other things, deliver the chemicals in the proper sequence and in the proper dosages, and to prevent or treat extreme physical pain and suffering resulting from the injection) administer the lethal injection.

The pre-set dosage amounts may be inadequate to cause the intended sedation in defendant. Because of his physical characteristics and medical history, as well as the fact that he will be in a state of stress during his execution, defendant could retain or recover consciousness and sensation during the administration of the other chemicals used in the execution.

Under such circumstances, defendant could suffer an extremely painful sensation of crushing and suffocation.

The state does not mandate that a physician or other trained medical expert be present to render treatment or assistance to a prisoner in the event of an emergency. Instead, the state mandates only that a physician be present to oversee the cardiac monitor.

The state sets forth no adequate procedures (e.g., separate labeling of the syringes) to prevent the chemicals from being confused prior to or during the execution, and few if any procedures concerning the proper storage and safekeeping of the chemicals.

The appellant relied below upon the following principles of law: Absent comprehensive and coherent procedural safeguards, a prisoner is exposed to, at the very least, a risk of unnecessary or excessive pain. Fierro v. Gomez, supra, 865 F. at 141; Campbell v. Wood, 18 F. 3d 662, 681. As the District Court noted in Fierro v. Gomez, 865 F. Supp 1387, 1410 (N.D.Cal.1994), Campbell "set forth a framework for determining when a particular mode of execution is unconstitutional: objective evidence of pain must be the primary consideration, and evidence of legislative trends may also be considered where the evidence of pain is not dispositive." Id. at 1412. Significantly, the court in Fierro pointed out that the execution must also be considered in terms of the risk of pain. Id, at 1411. In McKenzie v. Day, 57 F.3d 1461, 1469, the Ninth Circuit Court of Appeals held that execution by lethal injection under the procedures which had been defined in

Montana was Constitutional. The Court of Appeal explained that those procedures passed constitutional muster because they were "reasonably" calculated to ensure a swift, painless death...." McKenzie v. Day, 57 F3d at 1469. Such a statement cannot be made about the known procedures in Florida. A swift, painless death cannot be ensured without standards in place to ensure that the lethal chemicals will be administered to defendant in a competent, professional manner by someone adequately trained to do so.

Similarly, in LaGrand v. Lewis, 883 F. Supp. 469 (Ariz..DC 1995) the District Court in Arizona upheld the written Internal Management Procedures prescribing standards for the administration of lethal injection because "they clearly indicated that executions are to be conduction under the direction of the ASPC-Florence Facility Health Administrator, knowledgeable personnel are to used, and...the presence of a physician is required."

Further, the United States Supreme Court's repeated holdings that "[capital proceedings must of course satisfy the dictates of the Due Process clause," Clemons v Mississippi, 494 U.S. 738, 746 (1990) (citing Gardner v. Florida, 430 U.S. 349 (1977) (plurality opinion)), surely must apply to the procedures for actually carrying out an execution, which is the quintessential "capital proceeding." see also Hicks v. Oklahoma, 477 U.S. 343 (1980).

The claim was denied with the following ruling:

> The Defendant asserts in his thirty-seventh claim that execution by lethal injection is cruel and unusual. This should have been raised on direct appeal and as such is procedurally barred. [citing to Medina v. State, 573 So.2d, 573 so.2d 293 (Fla. 1990)]. Additionally, the courts have rejected this claim. See Sims v. Florida, 754 So.2d 657 (Fla. 2000). This is alternative and secondary to the procedural bar holding, which is an adequate and independent basis for the denial of relief. Post-conviction relief should be denied as to this claim. (PC2-Supp.R. Vol. XIII 2132).

The court was in error with the ruling's primary basis of a procedural bar for failure to raise the claim on direct appeal. As noted earlier, the lethal injection amendments to F.S. 922.10 occurred in 2000 – long after the appellant's direct appeals of his 1981 trial and 1991 re-sentencing. Consequently, the appellant could not have challenged lethal injection in the two direct appeals.

In alternatively relying on Sims v. State, supra, the court again declines to analyze any components of the appellant's claim. Neither does the court recognize that the denial of an evidentiary hearing prevented it from establishing a record on the issue, especially as to matters potentially more current since the date of the Sims opinion. Most recently, a federal district judge has noted the following:

> The Eighth Amendment prohibits punishments that are "incompatible with the evolving standards of decency that mark the progress of a maturing society." Estelle v. Gamble, 429 U.S. 97, 102, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976)(internal quotation marks and citations omitted). ... When analyzing a particular method of execution or the implementation thereof, it is appropriate to focus "on the objective evidence of the pain involved." Fierro v. Gomez, 77 F.3d 301, 306

> ((th Cir. 1996)(internal citations omitted). ... In addition, many other courts have reviewed lethal-injection protocols similar to California's. To date, no court has found either lethal injection in general or a specific lethal-injection protocol in particular to be unconstitutional. See, e.g., (citing to Sims, supra, among others) but cf. Rutherford v. Crosby, 546 U.S. —, No. 05-8795 (Jan. 31, 2006)(granting stay of execution pending disposition of cert. pet.); Hill v. Crosby, 546 U.S. —, No. 05-8794 (Jan. 25, 2006)(granting stay of execution and granting cert.); Anderson v. Evans, No. CIV-05-0825-F, 2006 WL 83039, at *3-*4 (W.D.Okla. Jan. 11, 2006)(denying mot. to dismiss 8th amend. challenge to lethal-injection protocol). At the same time, it should be noted that the record now before this Court, which includes both additional expert declarations and detailed logs from multiple executions in California, contains evidence of a kind that was not presented in these earlier cases.
>
> Morales v. Hickman, No. C 06-219 JF, C 06-926 JF RS, 2006 WL 335427 at 1, 4 (N.D.Calif. Feb. 14, 2006)(denying plaintiff's motion for preliminary injunction conditionally on the defendant modifying its injection protocol).

Unlike Sims and Morales, the appellant presents this issue with no evidentiary record. It was wrong to rule in this manner without providing an evidentiary record. Diaz v. Dugger, 719 So.2d 865, 867 (Fla. 1998); Anderson v. State, 627 So.2d 1170, 1171 (Fla. 1993); Brown v. State, 755 So.2d 616, 628 (Fla. 2000); and Asay v. State, 769 So.2d 974, 989 (Fla. 2000). Consequently, relief should issue or the claim remanded for an evidentiary hearing.

ARGUMENT VI

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT, UNDER *APPRENDI AND RING,* THE FLORIDA DEATH SENTENCING STATUTES AS APPLIED ARE UNCONSTITUTIONAL UNDER THE FIFTH, SIXTH, AND

FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION AND CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION

This claim was presented below as number 42 in the appellant's Rule 3.850 motions. The court denied the claim on the basis of rulings such as that in Robinson v. State, 865 So.2d 1259 (Fla. 2004). (PC2-Supp.r. Vol. XIII 2134).

In 2001, this Court held that because Apprendi v. New Jersey, 120 S.Ct. 2348, (2000), did not overrule Walton v. Arizona, the Florida death penalty scheme was not overruled. Mills v. Moore, 786 So.2d 532 (Fla. 2001). Therefore, appellant raises these issues now to preserve the claims for possible federal review. The appellant acknowledges such rulings on this claim as found in Schriro v. Summerlin, 542 U.S. 348, 124 S.Ct. 2519, 159 L.Ed.2d 442 (2004) and Johnson v. State, 904 So.2d 400, 412 (Fla. 2005). However, the appellant also refers to State v. Steele, — So.2d —, 30 Fla.L.Weekly S677 (Fla. Oct. 12, 2005) as supplemental authority to the arguments contained herein. ("The effect of that decision [Ring v. Arizona] on Florida's capital sentencing scheme remains unclear ... in light of developments in other states and at the federal level, the Legislature should revisit the statute to require some unanimity in the jury's recommendations. Florida is now the only state in the country that allows a jury to decide that aggravators exist *and* to recommend a sentence of death by a mere majority vote."). Steele at S677 and S680.

The Florida death penalty scheme is unconstitutional as applied in violation of the Fifth, Sixth, Eighth, and Fourteenth Amendments of the United States Constitution and Florida law. In 1999, the United States Supreme Court held that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt." Jones v. United States, 526 U.S. 227, 243, n.6 (1999). Subsequently, in 2000, the Court held that the Fourteenth Amendment affords citizens the same protections under state law. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000).

In Apprendi, the issue was whether a New Jersey hate crime sentencing enhancement, which increased the punishment beyond the statutory maximum, operated as an element of an offense so as to require a jury determination beyond a reasonable doubt. Apprendi 120 S.Ct. at 2365. "[T]he relevant inquiry here is not one of form, but of effect-does the required finding expose the defendant to a greater punishment than that authorized by the jury's guilty verdict?" Apprendi 120 S.Ct. at 2365. Applying this test, it is clear that aggravators under the Florida death penalty sentencing scheme are elements of the offense which must be noticed, submitted to a jury, and proven beyond a reasonable doubt. The state was obligated to prove at least one aggravating factor in the separate penalty phase

proceeding before appellant was eligible for the death penalty. Fla. Stat. § 775.082 (1995).

> The aggravating circumstances of Fla. Stat. § 921.414(6), F.S.A., actually define those crimes-when read in conjunction with Fla. Stat. § 782.04(1) and 794.01(1), F.S.A.-to which the death penalty is applicable in the absence of mitigating circumstances.

State v. Dixon, 283 So.2d 1, 9 (Fla. 1973); Fla. Stat. § 775.082 (1995); § 921.141 (2)(a), (3)(a) Fla. Stat. (1995). Clearly, Florida capital defendants are not eligible for the death sentence simply upon conviction of first-degree murder. If the court sentenced Mr. Preston immediately after conviction, the court could only have imposed a life sentence. § 775.082 Fla. Stat. (1995). Dixon, 283 So.2d at 9.

Appellant's indictment violated the Sixth and Fourteenth Amendments because it failed to charge the aggravating circumstances as elements of the offense for which the death penalty was a possible punishment. Under the principles of common law, aggravators must be noticed.

> Where a statute annexes a higher degree of punishment to a common-law felony, if committed under particular circumstances, an indictment for the offence, in order to bring the defendant within that higher degree of punishment, must expressly charge it to have been committed under those circumstances, and must state the circumstances with certainty and precision. Apprendi v. New Jersey, 120 S.Ct. 2348, 2355 (2000) quoting Archbold, Pleading and Evidence in Criminal Cases, at 51.

Because aggravators are circumstances of the crime and the defendant's mental state, they are essential elements of a crime for which the death penalty may be imposed and they must be noticed.

Appellant's death recommendation also violates the constitutional because it is impossible to determine whether a unanimous jury found any one aggravating circumstance. Fla.R.Crim.P. 3.440 requires unanimous jury verdicts on criminal charges. "It is therefore settled that '[i]n this state, the verdict of the jury must be unanimous' and that any interference with this right denies the defendant a fair trial." Flanning v. State, 597 So.2d 864, 867 (Fla. 3d DCA 1992), quoting Jones v. State, 92 So.2d 261 (Fla. 1956). However, in capital cases, Florida permits jury recommendations of death based upon a simple majority vote, and does not require jury unanimity as to the existence of specific aggravating factors. See, e.g., Thompson v. State, 648 So.2d 692, 698 (Fla. 1994). Jones v. State, 569 So.2d 1234, 1238 (Fla. 1990). In light of the fact that aggravators are elements of a death penalty offense, the procedure followed in the sentencing phase must receive the protections required under Florida law and require a unanimous verdict. Fla. Stat. § 912.141(1), (2) (1999).

Appellant's death recommendation violated the minimum standards of constitutional common law jurisprudence because it is impossible to know whether the jurors unanimously found any one aggravating circumstance. Implicit in the

state and federal government's requirements that a capital conviction must be obtained through a unanimous twelve person jury, is the idea that "death is qualitatively different from a sentence of imprisonment, however long." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The Sixth, Fourteenth, and Eighth Amendments require more protection as the seriousness of the crime and severity of the sentence increase.

The Supreme Court of the United States held in Ring v. Arizona, 122 S.Ct. 2428, 2431 (2002):

> If a legislature responded to such a decision by adding the element the Court held constitutionally required, surely the Sixth Amendment guarantee would apply to that element. There is no reason to differentiate capital crimes from all others in this regard. Arizona's suggestion that judicial authority over the finding of aggravating factors may be a better way to guarantee against the arbitrary imposition of the death penalty is unpersuasive. Id. at 2431

A new penalty phase is the remedy in this case because it is impossible to know whether the jurors unanimously found any one aggravating circumstance in support of the recommendation of death.

ARGUMENT VII

THE LOWER COURT ERRED IN DENYING THE CLAIM THAT APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BY TRIAL COUNSEL'S FAILURE TO CHALLENGE THE COMPETENCY OF THE MEDICAL EXAMINER.

This claim, number 41 in the Appellant's Rule 3.850 motions, was denied without prejudice by the Court's *Huff* order of September 19, 2000. (PC2-Supp.R. Vol. VIII 1380). The defendant filed a revised Claim 41 on August 13, 2002, (PC2-Supp.R. Vol. X 1709) that was accepted as amending the Rule 3.850 Motion by order dated July 8, 2003. (PC2-Supp.R. Vol. X 1758).

The same order of July 8, 2003, however, denied an evidentiary hearing on the claim:

> [7] There being no acts or omissions of trial counsel identified in the amended claim which are relevant and prejudicial which are not refuted by the record, the Defendant's request to amend Claim 41 is granted, but he will not be allowed to present evidence on these allegations at the evidentiary hearing in this cause.
>
> (PC2-Supp.R. Vol. X 1759-60).

In deciding ineffective assistance of counsel claims, this Court reviews legal questions de novo and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000)(citations omitted).A Rule 3.850 litigant is entitled to an evidentiary hearing "unless the motion, files and records of the case conclusively show that the movant is entitled to no relief." Fla. R.Crim.P. 3.850(d); accord, Fla. R.Crim.P. 3.851(f)(5)(B) but see Fla. R.Crim.P. 3.851(f)(5)(A)(i) ("the trial court shall "schedule an evidentiary hearing ... on claims listed by the defendant as requiring a factual determination"). See also,

Valle v. State, 705 So.2d 1333 (Fla. 1997); Rivera v. State, 717 So.2d 477 (Fla. 1998); and Gaskin v. State, 737 So.2d 509 (Fla. 1999).

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

To the extent that the Court's final order of March 31, 2005, (PC2-Supp.R. Vol. XIII 2133-34) did not incorporate the July 8, 2003, order (PC2-Supp.R. Vol. X 1758), the appellant relies on the above argument. In his closing argument, the appellant requested reconsideration of the 2003 court's denial of a hearing and urged the court the Court to find that the claim was factually based claim requiring a hearing. Finding that the claim should have been raised in the 1985 postconviction proceeding, the claim was denied as being procedurally barred. (PC2-Supp.R. Vol. XIII 2133-34).

ARGUMENT VIII

THE LOWER ERRED IN DENYING THE CLAIM THAT APPELLANT'S TRIAL COURT PROCEEDINGS WERE FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

This claim was granted an evidentiary hearing by the *Huff* order of September 19, 2000. (PC2-Supp.R. vol. VIII 1380). The post-conviction court ruled, simply, that :

> The Defendant's thirty-sixth claim is that procedural and substantive errors denied him a fair trial. Based on the foregoing denials, this claim is insufficient. As such, post-conviction relief should be denied as to this claim.

(PC2-Supp.R. Vol. XIII 2132).

With its ruling, the post-conviction court declined to address the various factors presented in the appellant's motion and closing argument. The court also indicated that the claim denial was based on the "foregoing denials." Presumably, this means the court's ruling was not based on the denials regarding claims thirty-seven through forty-two. In deciding cumulative error claims, this Court reviews legal questions *de novo* and gives deference to the lower court's findings of fact. Reichmann v. State, 777 So.2d 342, 350 (Fla. 2000)(citations omitted).

In any event, because this cumulative claim incorporated all other claims and allegations and in view of the complete case record, the argument was treated as a conclusion to the closing argument. It incorporated, by reference, the Conclusion and Relief Sought section presented in that written closing argument. (PC2-Supp.R. Vol. XIII 2074).

As stated to the post-conviction court, appellant's case has a somewhat unique history of two appeals including a re-sentencing, four death warrants, and petitions for writs of habeas corpus and error coram nobis previously before this Court. Two fully pled and heard 3.850 motions are now completed.

The appellant has been incarcerated since first being arrested on the throwing a deadly missile case – a charge and previous aggravator that has disappeared through his retrial and acquittal.

Two other matters from 1978 remain as significantly different from the time of the first trial. First and no doubt foremost, is the disappearance of the one and only item of circumstantial evidence that linked Mr. Preston to the victim. With the DNA tests showing the belt buckle hair as not the victim's, the State is left with only circumstantial evidence linking the defendant to the related robbery scene. (PC2-Supp.R. Vol. XIII 2074).

As to the penalty phase from the re-sentencing, there is the stipulation that appellant's hairs and clothing could have been tested for PCP consumption and

that one of the re-sentencing counsel believes he knew of such testing but did not pursue it. While the stipulation shows the parties' agreement that such laboratory testing would not have shown the exact quantity or time of consumption, in view of the weight to non-corroborated drug use as given by the re-sentencing judge, it seems clear that the testing to corroborate the drug use would have affected the re-sentencing court's judgment, if not that of the jury.

When the above components are combined with the missing State Attorney files (and the possible effects that even a future disclosure could provide if the files are ever found), the evidence of guilt and death eligibility is drastically different and diminished today than shown in 1981 or 1991. As all these deficiencies relate to showing prejudice, there is no doubt that the trial and re-sentencing did not involve "a reliable adversarial testing." Strickland v. Washington, 466 U.S. 668 at 688 (1984) . As all the matters of "new" information about the homicide show, "confidence in the outcome is undermined." Strickland at 688.

"The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." Strickland at 688.

In this day of post-*Ring* awareness of the importance of the jury's role in criminal cases, the appellant asked the post-conviction court to answer the following questions, among others:

-did a Preston jury know that the defendant was arrested on a felony for which he has been acquitted?

-that this felony was once strongly argued by the State in aggravation?

-did a Preston jury hear that laboratory testing could have confirmed that the defendant did inject PCP at or near the time of his arrest and the homicide?

-did a Preston jury hear that drug usage could be a non-statutory mitigating factor as well as a statutory mitigating factor?

-did a Preston jury hear about the multiple jail house confessions of the homicide by Scott Preston?

-did a Preston jury hear that the belt buckle hair was not the victim's?

(PC2-Supp.R. Vol. XIII 2081-82).

In sum, the answers to these questions are all "no" – yet the lower court addressed none of them. Nevertheless, the results of the trial are unreliable and the death sentence for Robert Preston is unreliable and unfair – under Strickland, its progeny, and any common sense understandings of these terms.

As stated in the claim below, when cumulative errors exist the issue is whether "even though there was competent substantial evidence to support a verdict . . . and even though each of the alleged errors, standing alone, could be considered harmless, the cumulative effect of such errors was such as to deny to

defendant the fair and impartial trial that is the inalienable right of all litigants in this state and this nation." Jackson v. State, 575 So. 2d 181, 189 (Fla. 1991)(citations omitted). See also Ellis v. State, 622 So.2d 991 (Fla. 1993); Zant v. Stephens, 462 U.S. 862, 885, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

CONCLUSION AND RELIEF SOUGHT

Based on the foregoing, the lower court improperly denied Rule 3.850 relief to Robert Anthony Preston, Jr. This Court is respectfully urged to order that his convictions and sentences be vacated and remand the case for such further relief as the Court deems proper.

Respectfully submitted,

____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of the Appellant has been furnished by United States Mail, first class postage prepaid, to Barbara C. Davis, Assistant Attorney General, Office of the Attorney General, 444

Seabreeze Boulevard, 5th Floor, Daytona Beach, Florida 32118-3958 on this

______ day of ________________________, 2006.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY, pursuant to Fla.R.App.P. 9.210, that the foregoing was generated in Times New Roman 14-point font.

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