IN THE SUPREME COURT OF FLORIDA

Case No. SC 07-611

KAYLE BARRINGTON BATES,
Appellant,

v.

STATE OF FLORIDA,
Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTEENTH JUDICIAL CIRCUIT,
IN AND FOR BAY COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Bates's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.851. The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"PC-R" -- record on instant 3.850 appeal to this Court

"Supp. PC-R." -- supplemental record on instant 3.850 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Bates has been sentenced to death. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Bates, through counsel, accordingly urges that the Court permit oral argument.

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INTRODUCTION

This case is before the Court for the fifth time. It has troubled this Court each time it has been reviewed. Mr. Bates, an African-American, was convicted of first-degree murder, kidnapping, robbery and attempted sexual battery of a Caucasian woman by an all-white jury in Bay County, Florida in 1983. Former Sheriff Lavelle Pitts, former police investigators Guy Tunnell and Frank McKeithen were involved the investigation and in obtaining statements from Mr. Bates.

A motion for change of venue due to excessive pre-trial publicity in the Panama City/Bay County area was denied (R. 164-67). Mr. Bates's motion to suppress statements was denied, even though he alleged that his statements were coerced by police. Medical Examiner, Dr. Joseph Sapala, complained about the inadequate facilities and funding for his office during the time he conducted the forensic examination in the Bates case. He was quoted in the Panama City News-Herald as saying "This is like a living soap opera. Who's going to get Panama-ed next?" (PC-R2 533).

Judge W. Fred Turner presided over Mr. Bates's trial and allowed a minister from the victim's church to pray over the jury. The victim's white minister from the First Baptist Church prayed to God that the all-white jury would appreciate the seriousness of the situation with which they were confronted, and asked for

"wisdom and guidance." The minister also prayed for Judge Turner to have "special wisdom." (R. 1211). Mr. Bates was convicted and sentenced to death by a jury vote of 11 to 1.

This Court reversed on appeal and remanded for a resentencing because the trial court impermissibly found two inapplicable aggravating factors. Bates v. State, 465 So. 2d 490 (Fla. 1985). On remand, Judge Turner was asked for a continuance by the defense to prepare for the resentencing and he complained about the pressure he personally felt in the racially charged community:

> You see, there is something that you [the defense attorneys] don't feel that I have to feel and that is **the pressure of the public to get these things over with.** There must be an end to this litigation. We are the most visible people on earth. Even the Supreme Court Justices can walk with impunity through the streets of Panama City and nobody would say a word to them; but **I am Fred Turner and they know I am a Circuit Judge, and of course, that goes with the territory that I am criticized; but we are the ones that get all of the flack from the local citizens about when will there be an end to these appeals and murder cases. Would you be surprised if I told you that I don't visit first class restaurants in this town; I don't go to civic club meetings unless I am specifically invited as a special guest. I resigned from all of the civic clubs because they grab a hold of you like a dog, a hungry dog on a bone and we're the ones that get the criticism about what is happening to the slow progress of the courts up here and it's a constant thing.** As I said, Justice Erlich [*sic*] or any of the Justices can walk through Panama City with absolute impunity but me, Judge Bower, or Judge Sirmon can't do that. **There's so many things that you can't imagine that we get into and**

> **after all they are the public. They are paying the bills for these prosecutions. . .**
>
> * * *
>
> I don't have any efforts to be frustrated. **I am telling you that the public is getting pretty heated out there about–particularly in death cases and they tell me about it in no uncertain terms. They don't use diplomatic language; they come right out. I'm just saying that's something you're isolated from; you don't hear that and see that.**

(R. S. 171-181)(emphasis added).

Despite the fact that more and different mitigation witnesses were called, Judge Turner re-sentenced Mr. Bates to death reading the same sentencing order he had previously read at the first trial but without the impermissible aggravators.

On appeal, Mr. Bates argued that Judge Turner had not considered the new mitigation evidence presented at the resentencing. By a bare majority, this Court upheld the death sentence with Justice McDonald dissenting that he could not tell if the trial judge properly weighed the new evidence or whether he ignored it. Bates v. State, 506 So. 2d 1033 (Fla. 1987)(McDonald, Overton and Barkett dissenting).

It was not known until the post-conviction proceedings in 1990, that there were other problems with Judge Turner. Judge Turner's sentencing order was not his, but had been written by the prosecution. Judge Turner testified that the state attorneys were the "right arm of the court" and that it was customary for assistant

state attorneys in his division to furnish secretarial and clerical help. It was normal practice for assistant state attorneys in his division to draft sentencing orders in capital cases and the judge failed to see that his *ex parte* relationship with the prosecutors was a problem (PC-R. 271-272).

The post-conviction judge granted a new sentencing proceeding. Bates v. Dugger, 604 So. 2d 457 (Fla. 1992)(court abdicated sentencing fact-finding to assistant state attorney).

Even though much time had passed since the original trial, the racial undercurrents of this case continued to overshadow due process. At the 1995 resentencing before a new judge, Mr. Bates was confronted with the same discriminatory jury selection process that infected the original trial. By 1995, Mr. Bates had served over half of his minimum-mandatory sentence. Mr. Bates feared that the jury would sentence him to death –not because he was deserving of death—but because the jury believed they had no reasonable alternative. Mr. Bates explicitly waived any *ex post facto* rights he may have had and elected to be subject to the new statutory provision of life without the possibility of parole. His request was denied.

On January 30, 1995, the resentencing trial went forward, but on fourth day of trial, a juror disclosed to several other jurors that his ex-wife had been raped and that she never fully recovered from the trauma. He admitted that he had not

disclosed this information during voir dire. Several jurors admitted hearing this information but felt there was no need to inform the court. A mistrial was declared.

On May 15-25, 1995, another attempt at a resentencing occurred. This time, the trial was scheduled to begin on the same day one of trial counsel's other clients was to be executed in Georgia. The trial court refused to grant a continuance. Mr. Bates was forced to file a writ of prohibition with this Court. The writ was granted. Trial counsel was given a 24-hour continuance.

Thus, it was agreed upon in a telephone conference between the trial judge, Mr. Bates's lead counsel, and the prosecution that jury selection was to be delayed for 24 hours until lead counsel could arrive in Panama City. The agreement was that the jury venire would be sent home and told to return the next day unless there were other trials, besides Mr. Bates, that needed to be selected from the pool (R. IV 660-2). Mr. Bates's trial, however, was the only trial that was to go forward that day.

Contrary to the agreement, without the presence of lead counsel or Mr. Bates, the prosecutor excused some jurors from the panel for hardship reasons. Lead counsel proffered that the excusals were granted in a discriminatory manner which resulted in African-American jurors being improperly excused from the panel of jurors to be used to select Mr. Bates's jury (R. IV 661).

Thus, twelve years after Mr. Bates's original trial, the African-American

population was still grossly under-represented in the jury pool. Those few who were in the pool were stricken by prosecutors. As a result, only two African-American jurors served on Mr. Bates's jury at his 1995 resentencing. Of the 116 people called for jury duty, only 6 were African Americans. Prosecutors excused some of those jurors without giving Mr. Bates a chance to respond.

When lead counsel arrived the next day, he objected to the jurors having been excused. His objection was overruled and the resentencing began.

After all the evidence had been heard and submitted to the jury, Mr. Bates's worst fears were realized. After three hours of deliberation, the jurors sent a question to the judge asking if they could recommend life without the possibility of parole. When they were told no, the jury returned a verdict of death.

In 2006 during post-conviction, Mr. Bates filed a motion for DNA testing under the new Fla. R. Crim. P. 3.853 to definitively identify the perpetrator of the crime. The trial court denied the motion.

In an effort to prove his ineffective assistance of counsel claim, Mr. Bates moved to reconstruct the record of the telephone conference in which trial counsel was told that no jury selection would begin until he was present. The trial court denied that request.

Mr. Bates moved to disqualify the judge and the state attorney's office in Bay County based on the fact that they would be witnesses at the evidentiary

hearing and in reconstructing the record. Those motions also were denied.

It was not until the post-conviction proceedings on the instant appeal, that Mr. Bates learned through public records disclosures that Dr. Harry McClaren, the state's expert, had been contributing to the campaigns of the state attorney who prosecuted Mr. Bates. This Brady information was not disclosed to the defense.

Mr. Bates also learned that the victim's family members and friends also had contributed heavily to the prosecutor's campaign during the time of Mr. Bates's resentencing. They gave statements to probation officials on Mr. Bates's pre-sentencing investigation report even though they are not normally considered. They attempted to influence the jury panel by their presence during voir dire.

Mr. Bates also learned of police and prosecutorial misconduct and investigations of prosecutor Jim Appleman, and ex-Sheriff Lavelle Pitts. Mr. Bates pled each of these claims in his post-conviction motion and alleged that the files and records did not conclusively show that he was not entitled to relief. Yet, Mr. Bates was granted an evidentiary hearing on only a fraction of the ineffective assistance of counsel claim. By parsing Mr. Bates's post-conviction motion paragraph by paragraph, his claims were virtually eliminated from any meaningful consideration by the trial court.

Though Mr. Bates pled sufficient evidence of systematic racial discrimination in the Bay County jury selection process under Miller-El v.

Cockrell, 537 U.S. 322 (2003), his claim was summarily denied.

Mr. Bates has repeatedly argued to this Court that he has been "Panama-ed" either through racial and religious bias or by ignoring the rule of law. This Court has been troubled by the failure of the trial court to ensure that a fair and impartial fact finding occurred in this racially-sensitive case. Mr. Bates is entitled to a new trial and/or a complete evidentiary hearing before a fair and impartial tribunal outside Bay County, Florida.

STATEMENT OF THE CASE AND FACTS

The Circuit Court for the Fourteenth Judicial Circuit, in and for Bay County, Florida, entered the judgments of conviction and sentence of death at issue in this case.

On July 6, 1982, Mr. Bates was charged by indictment with first-degree murder, kidnapping, sexual battery and armed robbery. On January 20, 1983, the jury returned a verdict finding Mr. Bates guilty of first-degree murder, kidnapping, attempted sexual battery and armed robbery.

On January 21, 1983, the jury voted in favor of death. On March 11, 1983, the court followed the jury's recommendation and sentenced Mr. Bates to death.

On direct appeal, this Court affirmed the conviction, but vacated the death sentence and remanded to the circuit court for reconsideration. Bates v. State, 465 So. 2d 490 (Fla. 1985).

Following remand for reconsideration of the sentence for first-degree murder, the trial court reimposed the death sentence. This Court affirmed. Bates v. State, 506 So. 2d 1033 (Fla. 1987). Mr. Bates sought a writ of certiorari from the United States Supreme Court, which was denied. Bates v. Florida, 108 S. Ct. 213 (1987).

On September 7, 1989, a death warrant was signed on Mr. Bates. On October 6, 1989, Mr. Bates timely filed a motion for postconviction relief. On November 3, 1989, Mr. Bates also filed a Writ of Habeas Corpus. The trial court granted a new sentencing based on Mr. Bates's claim of ineffective assistance of counsel at the penalty phase. This Court affirmed the granting of a new sentencing proceeding and remanded to the circuit court, but denied Mr. Bates's petition for writ of habeas corpus. Bates v. Dugger, 604 So. 2d 457 (Fla. 1992).

Initially, the resentencing was held on January 30 and 31, 1995 and February 1 and 2, 1995, but ended in a mistrial. On May 15-25, 1995, another resentencing was held. On May 25, 1995, the jury returned a recommendation for death. On July 25, 1995, the trial court followed the jury's recommendation and sentenced Mr. Bates to death. This Court affirmed. Bates v. State, 750 So. 2d 6 (Fla. 1999). Mr. Bates timely petitioned the United States Supreme Court for certiorari, and was denied on October 1, 2000.

After certiorari was denied, Mr. Bates was originally represented by Capital

Collateral Counsel for the Northern Region (CCRC-N). However, on March 28, 2001, that office certified a conflict of interest and requested conflict-free counsel. On March 29, 2001, Judge Sirmons signed an order released CCRC-N and appointed Capital Collateral Regional Counsel-South (CCRC-S) to represent Mr. Bates. Undersigned counsel filed an entry of appearance on July 12, 2001.

On September 10, 2001, Mr. Bates filed his initial motion for postconviction relief pursuant to Fla. R. Crim. P. 3.851.

On October 30, 2001, pursuant to Fla. R. Crim P. 3.852, counsel for Mr. Bates timely filed numerous Demands for Public Records from various state agencies involved in this case.

Mr. Bates filed an Amended Motion to Vacate on September 24, 2004. After a Huff hearing on March 4, 2005, Mr. Bates was denied an evidentiary hearing on all but a fraction of one ineffective assistance of counsel claim presented in his Rule 3.851 post-conviction motion (PC-R2. 688-97). An evidentiary hearing was held on October 16-17, 2006.

On February 28, 2007, the circuit court denied relief (PC-R2. 889-900). This appeal timely follows.

THE FACTS - Harold Richmond was appointed by the trial court to represent Mr. Bates as a special public defender at his resentencing (PC-R2. 17). On January 25, 1994, his motion for an investigator was filed and granted. He

hired ex-FBI agent, Don Baldwin, to investigate the case (PC-R2 19). He instructed Mr. Baldwin to find mitigation (PC-R2. 20). In October, 1994, Mr. Richmond requested additional funds for Mr. Baldwin's investigation (PC-R2. 20). Because Mr. Bates had a good relationship with his former post-conviction counsel, Tom Dunn, who had represented Mr. Bates in 1989, Mr. Richmond contacted him about assisting with the case.

At this time, Mr. Dunn was working in a not-for-profit law firm in Georgia which provided representation to everyone on Georgia's death row (PC-R2. 85). Mr. Dunn "reluctantly" agreed to assist with the case pro bono (PC-R2. 85). He requested permission from the Georgia Board of Directors to assist and was allowed to take vacation time to represent Mr. Bates (PC-R2. 85).

The first resentencing occurred in February, 1995. Mr. Richmond testified that he had "some" participation in that resentencing, but was not the lead attorney (PC-R2. 18). During the February 1995 resentencing, Drs. James Larson and Elizabeth McMahon testified that Mr. Bates would become "unwrapped" in stressful situations (R. 565), and that under stress, his emotional controls broke down (R. 620). They said he reacted impulsively without evaluating alternatives or consequences (R. 622).

Dr. Larson believed Mr. Bates suffered from organic brain damage and had conducted neuropsychological testing. He was not, however, an expert in that area.

Dr. Larson had to bring in an associate to interpret data on Mr. Bates's organic brain damage. He testified nonetheless that Mr. Bates suffered from organic brain damage and that those deficits made him prone to overreact in stressful situations (PC-R2. 93). During cross examination, the State was able to show that neither Dr. Larson nor Dr. McMahon knew of **any** other incidents before this crime where Mr. Bates lost control in a stressful situation.

While the State's expert, Dr. McLaren was testifying, a mistrial was declared (PC-R2. 93). A new sentencing proceeding was scheduled for May, 1995.

After the mistrial, Mr. Dunn testified that he was not "totally happy" with what had happened at the February resentencing with regard to his co-counsel Richmond (PC-R2. 82). Mr. Richmond had conducted a deposition of the State's pathologist and failed to learn of new information that was then presented in his testimony at trial (PC-R2. 82-83). Mr. Dunn was surprised by the new information at trial and unhappy it had not been discovered by Mr. Richmond at the deposition. As a result, Mr. Dunn took a more active role in the May, 1995 resentencing.

Mr. Dunn again was required to ask for vacation from the Board of Directors in Georgia to participate in Mr. Bates's case (PC-R2. 85). It put an "enormous amount of pressure on [him] and [his] office." (PC-R2. 86).

Mr. Richmond said he "basically had no participation" in the May 1995 resentencing (PC-R2. 18). Even though defense counsel "discussed things," Mr.

Richmond eventually asked to withdraw as co-counsel because it "seemed like an unnecessary expense for the county" to have him on the case (PC-R2. 21). He had never talked to Drs. Larson or McMahon. Mr. Dunn had dealt with the case longer and his office did "all of the investigation." (PC-R2. 28-29).

Three weeks before the May 1995 resentencing, a warrant was signed on one of Mr. Dunn's Georgia clients. Mr. Dunn was "pretty overwhelmed and it only got worse." (PC-R2. 85). He did no new investigation into Mr. Bates's case other than what had been done when he represented Mr. Bates in his 1989 post-conviction proceedings (PC-R2. 91). He did not have time to do any further investigation. The investigator, Mr. Baldwin, had only done fact investigation about the crime and had dealt with Mr. Richmond, not Mr. Dunn for direction (PC-R2. 92).

Five days before Mr. Bates's resentencing on May 10, 1995, Mr. Dunn requested funds to retain Dr. Barry Crown, a forensic neuropsychologist, to testify about organic brain deficits (PC-R2. 94). He asked Dr. Crown to review the neuropsychological testing done by Dr. Larson and do additional testing in terms of organic brain damage (PC-R2. 95). Mr. Dunn, however, forgot to list Dr. Crown on a supplemental witness list (PC-R2. 96). Mr. Dunn was "just overwhelmed" (PC-R2. 96) as he tried to litigate the death warrant in Georgia and prepare for Mr. Bates's resentencing at the same time.

On May 12, 1995, Mr. Dunn requested a continuance in a telephone hearing

when it was clear that the trial court was going forward with voir dire on May 15, 1995, the same date Mr. Dunn's Georgia client was to be executed.[1] The trial court denied the continuance, and Mr. Dunn filed a writ of prohibition with the Florida Supreme Court. This Court granted a 24 hour continuance so that Mr. Dunn could be present when voir dire began.

Despite this agreement, on May 15, 1995 some veniremen for Mr. Bates's panel were excused by the State and Judge Glenn L. Hess in Mr. Dunn's absence. Co-counsel Richmond was present but did not object.

Mr. Dunn described his situation at the beginning of the May, 1995 resentencing.

> I had another full time job, I had a client who, in fact was executed the day the trial was supposed to start. In fact, I litigated that case up into the early morning hours, got in the car and drove down here to start the trial. And my client was actually executed while I was driving down here.

(PC-R2. 101).

On May 16, 1995, the first day Mr. Dunn was present, he learned of what had happened the previous day in his absence and immediately objected.

In opening statements to the jury, Mr. Dunn told the jury that the defense

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[1] Mr. Dunn failed to ensure that a court reporter was present for the continuance motion hearing or the discussion when voir dire was to begin in Mr. Bates's case. Mr. Bates renewed his request to reconstruct the record of that hearing but the request was denied (PC-R2. 4-5).

would present evidence that Mr. Bates suffered from organic brain deficits through Dr. Barry Crown, a forensic neuropsychologist (R2. 99). The State objected to Dr. Crown and claimed it had no notice since he was not listed on a supplemental witness list. As a result, Dr. Crown, who was already present in the courthouse, was deposed during the State's case (PC-R2. 96-97). On the following Monday, Assistant State Attorney Steve Meadows requested that Mr. Bates undergo an MRI test at a local hospital (PC-R2. 97).

Mr. Dunn was "totally surprised" and had not anticipated that in the middle of trial he would be facing a new mental health issue (PC-R2. 96-97). Mr. Dunn was noticed of the State's motion five minutes before it was filed in court and the testing occurred the next morning. By the time the results were provided to Mr. Dunn, the State had presented nearly all of its case (PC-R2. 97). Mr. Dunn did not feel comfortable going against a neurologist who was going to be called as a "court expert." (PC-R2. 97-98). He was not prepared to rebut the MRI that showed no brain damage and as a result, did not present Dr. Crown's testimony to the jury even though he was present to do so (PC-R2. 98).

Mr. Dunn requested funds for a neurologist to rebut the State's new MRI evidence, but was denied (RS 2. 506-508). Additionally, the defense requested additional medical tests be conducted (RS 2. 506-7). The trial court denied all these motions (RS 2. 508-9). Later that same day, defense counsel renewed his motions

for additional testing and experts and informed the court that he would be abandoning the mental health defense of organic brain impairment (RS 2. 531).

Mr. Dunn did not know how to rebut the State's MRI without a neurologist. He spoke to Dr. Crown but felt he was not an expert in imaging and radiology (PC-R2. 99). He did not call Dr. Crown to discuss organic brain deficits nor did Mr. Dunn question Drs. Larson or McMahon about their previous testimony in which they gave their opinions about Mr. Bates's organic brain deficits.

Mr. Dunn did not factor into his decision that he had already told the jury he was presenting evidence of organic brain damage through Dr. Crown (PC-R2. 99). Even though he believed organic brain damage was an important and significant mental health mitigator, Mr. Dunn said he had no tactical or strategic reason for not calling Dr. Crown.

> Q. Had you had information that showed organic brain damage that you were able to rebut the [court] neurologist would you have presented that?
>
> MR. DUNN: Well, I think today I know I had it. I just didn't realize that I had it at the time and, yeah, I would have presented it.

(PC-R2. 102).

Mr. Dunn also testified that he did not ask Drs. Larson or McMahon to speak with mitigation witnesses--Ranita Bates or any family member witnesses about Mr. Bates's past stress responses (PC-R2. 102).

> MR. DUNN: No, in fact, I mean, I don't think I encouraged him [Dr. Larson] to talk to any witnesses. I think I did provide him with some background materials but I don't recall asking him to speak to Ranita or any other witnesses.
>
> Q. Do you recall if you had Ms. Harris or Mr. Baldwin speak with Ranita Bates back then?
>
> MR. DUNN: I know that we spoke with Ms. Bates. I can say we never spoke with her about that.
>
> Q. What about Jackie Bates, Mr. Bate's father, do you recall asking him any questions about that?
>
> MR. DUNN: No. And again, I think that goes back to most of the information that we presented from the traditional mitigation witnesses were based upon the theory that we had in front of Judge Costello which really didn't focus on so much on the specifics of Kayle's reaction of the crime. I mean, I think that part of the case really evolved as I got ready for the January rehearing. But in terms of reinvestigation, no, I mean, my focus changed. . .
>
> . . .So I think in terms of the new investigation, that clearly was my focus was on the crime itself and trying to explain the crime in a mitigating fashion. And we really didn't do much in terms of reinvestigation with mitigation.

(PC-R2. 102-103).

Mr. Dunn had no tactical or strategic explanation for why he did not discover or present mitigation evidence relating to Mr. Bates' previous reactions to stress and their underlying causes.

On cross examination, the State questioned Mr. Dunn about his decision not

to call Dr. Crown. Mr. Dunn admitted that the court did not prevent him from calling Dr. Crown, but he felt he could not respond to the normal MRI (PC-R2. 104, 112).

At the October, 2006 evidentiary hearing, Mr. Bates presented the testimony of Dr. Crown. Dr. Crown testified that he is a licensed, board certified psychologist in Florida and limits his practice to clinical and forensic psychology and neuropsychology. Dr. Crown was a National Institute of Mental Health post-doctoral fellow in clinical psychology at Harvard Medical School in Massachusetts General Hospital (PC-R2. 120). He is qualified in forensic neuropsychology, child and adult neuropsychology, neuroimaging and developmental disabilities (PC-R2. 121). He was qualified as an expert in neuropsychology.

Dr. Crown testified that neuropsychology studies the relationship between brain function and behavior. Organic brain damage means some kind of deviation or impairment to the brain which can occur at any of three levels, anatomic, electrical or metabolic (PC-R2. 124).

In May, 1995, Dr. Crown was asked by Mr. Dunn to see Mr. Bates and determine whether he had any neuropsychological impairments or organic brain damage. He was looking for deviations in the test protocols (PC-R2. 126). Based on his tests, Dr. Crown concluded that:

> He had impairments in problem solving, particularly related to language based critical thinking, understanding

> if-then relationships. He had difficulties with memory and retrieval of information and then the retrieval of that information. And he had some specific problems with auditory selective attention, meaning that when there were distractions in the background of-- in the environment he had difficulty focusing in and listening to what the important aspects of something were.

(PC-R2. 126).

His findings were consistent with the background materials he reviewed and said that Mr. Bates's behavior was consistent with the deficits he found (PC-R2. 127). Mr. Bates had a lower stress threshold. He had difficulty processing information, like a faulty computer. Information could be correctly typed into the computer, but it would be "gobbly-gook" on the screen. In 1982, at the time of the crime, Mr. Bates would have had a low stress threshold and was distracted due to auditory selective attention deficits (PC-R2. 128).

The spraying of mace at the time of the crime was significant to Dr. Crown to the extent that "chemicals have a different effect on a person who has a lower brain threshold it might have created disinhibition, meaning that rather than backing off he moved forward." (PC-R2. 128).

At the time of the May resentencing, Mr. Dunn told Dr. Crown his testimony was not "necessary." (PC-R2. 128). Dr. Crown was aware that an MRI had been done and that the result was normal, but he did not find that inconsistent with his finding of organic brain damage (PC-R2. 129).

Had Dr. Crown been called to testify in 1995, he could have explained the normal MRI. The jury would have then known that an MRI scan was good for showing anatomic damage to the brain, but not good showing deficits that were electrical or metabolic (PC-R2. 130).

On cross-examination, Dr. Crown said he did not disagree with Dr. Larson's testing and, in fact, Dr. Larson had suggested to Mr. Dunn that he do further neuropsychological testing with Dr. Crown (PC-R2. 131). Dr. Crown did not suggest that Mr. Bates had epilepsy, but that organic impairment was one example of an organic brain deficit that is not shown in an MRI. It was an illustration of the problem with using an MRI to prove definitively whether or not someone suffers from organic brain damage (PC-R2. 132). Despite the fact that Dr. Crown does not know the cause of Mr. Bates's organicity, it did not change the fact that his tests show that there are deficits (PC-R2. 137). Dr. Crown explained that how an individual reacts to an adverse situation, regardless of who created the stress, is based on what the person brings to the situation. Mr. Bates took in the information and came to a faulty conclusion because he has problems with language-based critical thinking (PC-R2. 138).

At the evidentiary hearing, Mr. Bates also presented testimony of mitigation witnesses who were available to corroborate Dr. Crown's opinions. Mr. Gary Scott testified about his military training with Mr. Bates in the Florida National Guard

and their experiences to quell race riots in Liberty City near Miami in 1980 (PC-R2. 44).

Jackie Bates, Kayle Bates' father, testified about Mr. Bates's demeanor at the time of his arrest in 1982, when he drove to Panama City from Tallahassee (PC-R2. 58).

Mr. Joseph Johnson testified that he served with Kayle Bates in the National Guard from 1977-78 until Kayle's arrest (PC-R2. 64). He described their training and Mr. Bates's reactions. He was also with Mr. Bates during the 1980 Miami riots (PC-R2. 78).

Mr. Bates also presented the testimony of CCRC investigator, Staci Brown (PC-R2. 141). Ms. Brown testified that she became involved in Mr. Bates's case in 2001. During the course of her investigation, she spoke with Ranita Bates, Kayle Bates' wife at the time of the crime (PC-R2. 141). She interviewed Ms. Bates on June 25 or 27, 2005.

Before the evidentiary hearing, Ms. Brown tried to make contact with Ranita Bates but she would not return her phone calls (PC-R2. 142). Ms. Bates avoided the service of a subpoena. Ms. Brown was finally able to speak with Ms. Bates on the Saturday before the evidentiary hearing when she attempted to serve a subpoena to testify (PC-R2. 142). Ms. Brown read the subpoena to her over the phone and told her the time and date to appear (PC-R2. 143).

The State objected to Ms. Brown testifying about what Ranita Bates had told her in her June, 2005 interview (PC-R2. 144). Though post-conviction counsel argued that at Mr. Bates's resentencing this hearsay would have been admissible either through Ms. Brown or through any of the mental health experts, the trial court sustained the State's hearsay objection (PC-R2. 146). As a result, Mr. Bates proffered Ms. Brown's testimony.

Ms. Brown proffered that she spoke with Ranita Bates for three hours in June, 2005. Mrs. Bates said after Kayle served in the National Guard in Miami and Panama, his behavior changed (PC-R2. 147). When he returned from Miami, he withdrew. He was much "quieter" and distant. Kayle did not want to go to Miami and did not want to leave his family.

Kayle woke her up with his nightmares. He woke up screaming very loud. He would "act crazy" and did not recognize where he was. Kayle broke out in cold sweats (PC-R2. 148). Ranita said Kayle was not very detailed about serving in Miami, but she knew he did not want to go down there in the first place.

SUMMARY OF THE ARGUMENTS

1. The trial court's order denying DNA testing under Fla. R. Crim. P. 3.853 was based on incorrect facts. The trial court misapplied the law when it denied DNA testing based on the fact that Mr. Bates had made contradictory statements to police.

2. Mr. Bates was denied effective assistance of counsel at resentencing when trial counsel failed to present evidence of organic brain damage through an expert who was present in court and willing and available to testify.

3. The summary denial of Mr. Bates's claims was error because the files and records do not conclusively show that he was not entitled to relief.

4. Other errors by the lower court rendered Mr. Bates's sentence and conviction unconstitutional and unreliable regarding change of venue, pre-trial publicity, the unconstitutionality of the heinous, atrocious and cruel aggravator, burden-shifting jury instructions, innocence of the death penalty, and execution by lethal injection is cruel and unusual.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. BATES'S MOTION FOR DNA TESTING PURSUANT TO FLA. R. CRIM. P. 3.853 AND FLORIDA STATUTES § 923.11.

> The serologist and other doctors will testify that they have examined swabs and the body of Janet Renee White and that **she was, in fact, sexually assaulted.**

(T. 282)(emphasis added).

This was prosecutor Jim Appleman's opening statement to Mr. Bates's all – white jury in 1982. The victim was white and Mr. Bates is African American. Mr. Bates was charged in the indictment with sexual battery alleging that he committed a sexual battery "by vaginal penetration by the penis" (T. 272).

During closing argument, Mr. Appleman repeatedly argued that Mr. Bates had raped the victim (T. 591, 605, 606, 607, 636). He also said that the fibers found on the victim's body and the presence of semen on her panties, which could not be typed, had come from a non-secretor and argued that Mr. Bates had committed the murder and rape of the victim (T. 608, 611). The State explicitly and plainly argued that the "Defendant unzipped his pants" and "had sexual intercourse with his penis with her" (T. 632).

Clearly, the jury believed Appleman's arguments. It believed that the real perpetrator of the crime engaged in sexual intercourse with the victim, or at least, wiped semen on the panties found at the scene. Thus, the availability of advanced DNA testing of this biological material to definitively identify the perpetrator is highly relevant. This is so regardless of whether contradictory and incriminating statements were given by Mr. Bates at the time of his arrest.

On October 18, 2001, this Court authorized Fla. R. Crim. P. 3.853, and set out procedures for obtaining DNA (deoxyribonucleic acid) testing under section 923.11 Florida Statutes. Amendment to Florida Rules of Criminal Procedure Creating Rule 3.853, 807 So. 2d 633 (Fla. 2001). This rule sets forth the procedure for a convicted defendant to obtain DNA testing of biological evidence. See Zollman v. State, 820 So. 2d 1059 (Fla. 2d DCA 2002). Pursuant to Rule 3.853, Mr. Bates timely filed a motion for DNA testing in the circuit court.

Fla. R. Crim. P. 3.853 requires that:

> (b) *Contents of Motion* . The motion for postconviction DNA testing must be under oath and must include the following:
> (1) a statement of the facts relied on in support of the motion, including a description of the physical evidence containing DNA to be tested and, if known, the present location or last known location of the evidence and how it originally was obtained;
> (2) a statement that the evidence was not tested previously for DNA, or a statement that the results of previous DNA testing were inconclusive and that subsequent scientific developments in DNA testing techniques likely would produce a definitive result;
> (3) a statement that the movant is innocent and how the DNA testing requested by the motion will exonerate the movant of the crime for which the movant was sentenced, or a statement how the DNA testing will mitigate the sentence received by the movant for that crime;
> (4) a statement that identification of the movant is a genuinely disputed issue in the case and why it is an issue or an explanation of how the DNA evidence would either exonerate the defendant or mitigate the sentence that the movant received;
> (5) a statement of any other facts relevant to the motion; and
> (6) a certificate that a copy of the motion has been served on the prosecuting authority.

Fla. R. Crim. Pro. 3.853 (2004).

> Pursuant to Florida Rule of Criminal Procedure 3.853, the defendant must allege with specificity how the DNA testing of each item requested to be tested would give rise to a reasonable probability of acquittal or a lesser sentence. See Fla. R. Crim. P. 3.853 (b)(1)(6); Hitchcock v. State, 866 So. 2d 23, 2004 Fla. LEXIS 4, 29 Fla. L. Weekly S13 (Fla. Jan. 15, 2004). It is the defendant's

> burden to explain, with reference to specific facts about the crime and the items requested to be tested, how the DNA testing will exonerate the defendant of the crime or will mitigate the defendant's sentence. *Id*.

Robinson v. State, 865 So. 2d 1259 (Fla. 2004).

Mr. Bates's Motion for Postconviction DNA Testing met each of these requirements. The motion set forth the relevant facts, the last known location and a detailed description of the items for which Mr. Bates requested DNA testing:

> FDLE Crime Lab Analyst Suzanne Harang testified as a forensic serology expert at Mr. Bates' trial. She testified that she conducted ABO blood typing tests of the exhibits submitted to her. Her testing produced many inconclusive results:
>
> The victim's saliva standard was unsuitable for testing at that time (T. 539);
>
> The victim's vaginal swab was positive for semen but the grouping tests were inconclusive (T. 551);
>
> Semen smear slides indicated the presence of semen but it could not be typed (T. 540);
>
> State's exhibit #17, the victim's purple skirt and pantyhose, tested positive for the victim's blood type but other blood on the skirt was inconclusive (T. 541);
>
> State's exhibit #20, blue panties of the victim, tested positive for semen, but not for blood. Enzyme tests of that sample were inconclusive (T. 542). In addition, she only tested a semen stain on the inside of the panties and did not test a stain on outside of the panties (T. 554).
>
> State's exhibit #22, a blue shirt, tested positive for blood type A, but was not identified conclusively as DNA

testing can now accomplish (T. 543).

State's exhibit #21, white briefs, tested positive for semen stain, but could not be typed for ABO antigens (T. 544);

State's exhibit #19, green pants, tested positive for type A blood, but was not identified conclusively as the victims as DNA testing can now accomplish (T. 544);

State's exhibit #26, an acid phosphotase test, which Ms. Harang was not able to examine because it was wet (T. 546);

State's Exhibit #28, a vaginal washing of the victim, tested positive for non-motile intact sperm. It could not be grouped with ABO typing and the PGM analysis was inconclusive. Ms. Harang testified that it was possible that this was consistent with a non-secretor (T. 546-547, 555).

State's Exhibit #29, a piece of blue cord, tested positive for blood type A, but could not identify source (T. 547-548).

Throughout her testimony, Ms. Harang could not say where the semen came from that she found in the panties, vaginal swabs and washings or on the white briefs (T. 556). These exhibits are in the possession of the Bay County Clerk's Office and have been documented and photographed by defense counsel.

Additional physical evidence was collected at the crime scene and elsewhere containing biological material, including the victim's clothing, debris from the victim and Mr. Bates' clothing, and a blue cord. Cotton fibers were tested and linked to the green pants collected by Dr. Sapala and tested for blood by Ms. Harang. These fibers can now be conclusively tested with new technology.

(PC-R2. 326-27).

The inconclusive results proved nothing except the blood type of the victim and Mr. Bates, which was hardly probative. Instead, it was simply circumstantial when it should have been dispositive. Similarly, Mr. Bates included the required statement that the evidence was not tested previously for DNA. He stated that he is innocent and how the DNA testing requested will exonerate him of the crime for which he was sentenced. He stated how the DNA testing will mitigate the sentence he received for that crime:

> No DNA testing was ever conducted of the biological evidence collected in the White homicide. The only testing involved serology testing and blood typing, which was possible at the time. Such testing was not available prior to Mr. Bates' trial. No testing of hair samples was conducted from the debris collected from the victim's body or the clothing of the victim and the defendant.
>
> * * *
>
> Mr. Bates maintains that he did not kill Ms. White. By showing that Mr. Bates was not the source of the hairs, semen or blood found on the body of Ms. White, Mr. Bates can establish that someone else committed the murder. Knighten v. State, 829 So. 2d 249 (Fla. 2d DCA 2002). Likewise, testing of the rape kit, the victim's clothing, the blue cord and Mr. Bates' clothing can establish the presence at the crime scene of DNA profiles that are not Mr. Bates.

(PC-R2. 328-29) Mr. Bates also included the necessary statement that his identification is a genuinely disputed issue in the case:

> The definitive answers that could be provided through DNA analysis of the biological evidence would provide the answers that law enforcement sought when the evidence was first submitted in 1982 for forensic analysis. The State believed at the time of the submissions that the biological evidence could identify the perpetrator of the White homicide. DNA could definitively identify the perpetrator now.
>
> * * *
>
> The identity of Ms. White's assailant was litigated at trial and has been disputed during the post-conviction litigation process. The DNA testing of all the biological evidence could establish that Mr. Bates commit (sic) the crime for which he is now serving a death sentence. The DNA testing will bear "directly on [Mr. Bates'] guilt or innocence. Zollman v. State, 820 So. 2d at 1063.

(Id.).

The trial court denied Mr. Bates's Motion for Postconviction DNA Testing based on Mr. Bates's purported confession to police and that no sexual battery of the victim occurred. However, the lower court's finding is wrong!

Even though the trial court recognized that Mr. Bates had filed a pre-trial motion to suppress statements because he claimed he had been coerced into making them by racist and over-zealous Bay County jail and police officers, the court still denied DNA testing.

The State argued in its answer brief on direct appeal that Mr. Bates "concocted" ten or more stories about what happened to the victim. (State's answer at pg. 17). The trial court acknowledged in its order that Mr. Bates denied giving a

second taped confession (PC-R2. 456). Mr. Bates has repeatedly argued from the time of his original trial that his statements were internally inconsistent and coerced.

The trial court also denied DNA testing because of its opinion that there was no rape of the victim but only an attempted sexual battery--"the presence of semen in the vagina of the victim becomes irrelevant to any issue of the defendant's guilt or innocence" (PC-R2. 455). However, this was not true at the time of trial.

Prosecutor Jim Appleman argued to the jury that Mr. Bates **raped and murdered** the victim. Mr. Bates was charged in the indictment with sexual battery alleging that he committed a sexual battery "by vaginal penetration by the penis" (T. 272). Mr. Appleman argued in opening statements that "the serologist and other doctors will testify that they have examined swabs and the body of Janet Renee White and that **she was, in fact, sexually assaulted**" (T. 282)(emphasis added). As stated previously, Mr. Appleman made it a feature of his closing argument to accuse Mr. Bates of raping the victim. The trial court's mistaken reading of the record -- that there was no mention of a rape or sexual battery in Mr. Bates's trial is contrary to the record. As such, no deference or presumption of correctness can be given to the judge's order denying DNA testing when it is based on incorrect facts and is contrary to the record.

Moreover, the trial court ignored Mr. Bates's request to test <u>all</u> the evidence,

including the victim's underwear. Whether or not Mr. Bates's semen is present on the victim's underwear is highly relevant to his guilt or innocence. The State in fact argued this at trial. During closing arguments, the State specifically argued that Mr. Bates wiped himself with the victim's underwear (T. 632). Thus, according to the States own argument, whether penetration occurred would not preclude DNA testing from reaching a true result as to who attempted to sexually assault and murder the victim.

The record reflects that the perpetrator of the sexual assault and the murder were the same individual. Based on the State's argument at trial, logic dictates that excluding Mr. Bates as the perpetrator of the sexual assault would also exclude him as the perpetrator of the murder. If the semen found on the victim's panties and in the vaginal samples does not match Mr. Bates, than he is not the perpetrator of this crime. It logically follows then, that Mr. Bates's purported statements were indeed false.

The need for DNA testing is compounded by the misconduct that pervaded Bay County at the time of Mr. Bates's arrest and subsequent trials. The conditions of the medical examiner's office at the time testing was conducted and samples were collected was so inadequate that Bay County had difficulty retaining medical examiner personnel.

During Mr. Bates's trial, Dr. Joseph Sapala had problems conducting

adequate examinations and evidence collection as Medical Examiner for Bay County. He complained about the inadequate funding, an ill-equipped morgue, with inadequate equipment and broken refrigeration systems. He worked 18 months before resigning. He worked on Mr. Bates's case during those 18 months. Dr. Sapala had been outspoken about the problems he had experienced during that time period, and was quoted in the Panama City News-Herald as saying "This is like a living soap opera. Who's going to get Panama-ed next?" See, Panama City News-Herald, February 12, 1995.

Between Mr. Bates's original trial and the 1995 resentencing, Medical Examiner William Sybers eventually left the Medical Examiner's Office in 1992 after FDLE began investigating him for the death of his wife by injection of lethal chemicals. Part of the controversy was that Dr. Sybers had his wife's body embalmed before an autopsy could be performed. He was ultimately indicted and convicted.

Sheriff Lavelle Pitts also was indicted on charges of perjury by a grand jury in 1988 for conduct during his tenure in office since 1981. Grand jurors stated that Sheriff Pitts was "not qualified and morally unfit" to hold office and urged his removal. Though the statute of limitations had run on the underlying felonies, the indictment alleged that Pitts had lied to a grand jury (PC-R. 553). Thus, the chances for human error in the collection of forensic evidence and testing in Bay

County was even greater where Mr. Bates ran the risk of getting "Panama-ed."

By showing that Mr. Bates was not the source of the hair, semen or blood found on the victim, Mr. Bates could discover exculpatory evidence that the unreliable forensic evidence in 1983 could not provide. Knighten v. State, 829 So. 2d 249 (Fla. 2d DCA 2002). DNA testing could provide exculpatory evidence that could show that Mr. Bates had not committed a rape, sexual battery or an attempted sexual battery on the victim. Likewise, testing of the rape kit, the victim's clothing, the blue cord and Mr. Bates' clothing can establish the presence at the crime scene of DNA profiles that are not Mr. Bates.

At the 1995 resentencing, the State offered the old forensic evidence from 1983 through forensic pathologist, Dr. James Lauridson, and Suzanne Livingston, FDLE crime lab analyst supervisor. Neither witness conducted the testing, yet they testified about the results of testing conducted in 1983 (RS. Vol. X, p. 285-308; 202-212).

If DNA testing showed that Mr. Bates was not the source of the biological material, then that information would be mitigating and something he could argue justified a lesser sentence. DNA testing would bear "directly on [Mr. Bates'] guilt or innocence as to one or more elements of the offense charged." Zollman v. State, 820 So. 2d at 1063.

In light of the fact that the State used unreliable and outdated forensic

evidence in aggravation of Mr. Bates's sentence at the 1995 resentencing, he is now entitled to discover evidence which could rebut the aggravating circumstances against him. DNA testing of the unreliable forensic evidence would not prejudice the State in any way. Yet, it could provide a wealth of exculpatory information that would be mitigating for Mr. Bates. The trial court's erroneous fact findings are entitled to no deference when they are contradicted by the record. DNA testing should be allowed.

ARGUMENT II

MR. BATES WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL DURING HIS 1995 RESENTENCING, IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

In his post-conviction motion, Mr. Bates alleged that he'd been denied effective assistance of counsel at his 1995 resentencing. An evidentiary hearing was granted on only one issue in his ineffective assistance of counsel claim--whether trial counsel was ineffective for failing to present the testimony of Dr. Barry Crown. Dr. Crown was to be called to testify about the mental health mitigator of organic brain deficits and its effect on Mr. Bates. It was incumbent on trial counsel to investigate and present to the jury the particularized characteristics of Mr. Bates that made him ineligible for the death penalty. The failure to present competent and substantial evidence that Mr. Bates suffered from organic brain deficits when an expert was readily available to do so was below the professional

standards of a reasonably competent attorney.

In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688 (citation omitted). Beyond the guilt-innocence stage, defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The United States Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976) (plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the sentencer's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also, Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

Counsel's highest duty is the duty to investigate, prepare and present the available mitigation. Wiggins v. Smith, 123 S. Ct. 2527 (2003); see also Williams v. Taylor, 120 S. Ct. 1495 (2000). The conclusions in Wiggins are based on the principle that “strategic choices made after less than complete investigation are reasonable” only to the extent that “reasonable professional judgments support the

limitations on investigation." The Wiggins Court clarified that "in assessing the reasonableness of an attorney's investigation, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." Wiggins at 2538. Here, trial counsel's failure to pursue any investigation, and the subsequent failure to present mitigation evidence was unreasonable in light of all the circumstances.

Throughout the Wiggins' Court's analysis of what constitutes effective assistance of counsel, they turned to the American Bar Association (ABA) Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases. See id. at 2536-7. Under the ABA guidelines, trial counsel in a capital case "should comprise efforts to discover *all reasonably available* mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor. ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1(c), p 93 (1989) (emphasis added)." Id. at 2537.

Under the ABA Guidelines, specific requirements should be met from the initial appointment on a case through its conclusion.[2] Guideline 11.4.1(c) states, "the investigation for preparation of the sentencing phase should be conducted regardless of any initial assertion by the client that mitigation is not to be offered.

[2] The ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases was updated in February 2003. However, references in this case are to the edition that was in effect from 1989 to February 2003.

This investigation should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor." In order to comply with this standard, counsel is obliged to begin investigating **both** phases of a capital case from the beginning. See Id. at 11.8.3(A). This includes requesting all necessary experts as soon as possible. See Commentary on Guideline 11.4.1(C). Here, trial counsel's failure to present Dr. Crown kept the jury from considering a major mental health mitigator– organic brain damage and evidence that in other stressful situations, Mr. Bates had similar stress reactions.

The testimony at the evidentiary hearing shows that trial counsel's performance was ineffective in failing to present evidence of Mr. Bates's organic brain damage and how that brain damage affected Mr. Bates's reaction to extremely stressful situations. The lower court found that trial counsel did in fact present mental health mitigation through the testimony of doctors James Larson and Elizabeth McMahon (PC-R2. 890). However, the fact that trial counsel did "something" is not the standard under Strickland v. Washington, 466 U.S. 668 (1984). It does not excuse trial counsel's decision not to present evidence of organic brain damage. It is unrebutted by the State that organic brain damage is a significant mental health mitigator. It is a weighty mitigating circumstance because it can be quantified with cognitive testing. This mitigation was central to a jury that

was already ambivalent about sentencing Mr. Bates to death.

Neither doctors Larson nor McMahon could testify about organic brain damage. Neither doctor had done the testing with the expertise that Dr. Crown had. Dr. Crown is a licensed, board certified psychologist in Florida and limits his practice to clinical and forensic psychology and neuropsychology. Dr. Crown was a National Institute of Mental Health post-doctoral fellow in clinical psychology at Harvard Medical School in Massachusetts General Hospital (PC-R2. 120). He is qualified by examination in forensic neuropsychology, child and adult neuropsychology, neuroimaging and developmental disabilities (PC-R2. 121). He was qualified as an expert in neuropsychology. Dr. Crown testified that neuropsychology studies the relationship between brain function and behavior. Organic brain damage means some kind of deviation or impairment to the brain which can occur at any of three levels, anatomic, electrical or metabolic (PC-R2. 124).

In May, 1995, Dr. Crown was asked by Mr. Dunn to see Kayle Bates and determine whether he had any neuropsychological impairments or organic brain damage. Based on his tests, Dr. Crown concluded that:

> He had impairments in problem solving, particularly related to language based critical thinking, understanding if-then relationships. He had difficulties with memory and retrieval of information and then the retrieval of that information. And he had some specific problems with auditory selective attention, meaning that when there

> were distractions in the background of-- in the environment he had difficulty focusing in and listening to what the important aspects of something were.

(PC-R2. 126).

His findings were consistent with the background materials he reviewed in that Mr. Bates' behavior was consistent with the deficits he found (PC-R2. 127). Mr. Bates had a lower stress threshold. He had difficulty processing information and was like a faulty computer. Information could be correctly typed into the computer, but it would be "gobbly-gook" on the screen. In 1982, Mr. Bates would have had a low stress threshold and been distraction-prone due to auditory selective attention deficits (PC-R2. 128). The spraying of mace at the time of the crime was significant to Dr. Crown to the extent that "chemicals have a different effect on a person who has a lower brain threshold it might have created disinhibition, meaning that rather than backing off he moved forward." (PC-R2. 128).

At the time of the May resentencing, Mr. Dunn told Dr. Crown his testimony was not "necessary." (PC-R2. 128). Dr. Crown was aware that an MRI had been done and that the result had been normal, but he did not find that result to be inconsistent with his finding of organic brain damage (PC-R2. 129). An MRI is an anatomic view of the brain. Mr. Bates has a functional metabolic basis for his problem, not anatomic.

Dr. Crown could have explained to the jury that:

> An MRI is an anatomic view of the brain. . .brain damage can occur in three different ways. Anatomical, which is what the MRI scan measures, electrical or metabolic. Most people with epilepsy have normal MRIs. It is not unusual to find people with various forms of brain damage that have normal MRIs. I think we have learned a lot in the last decade about the inconsistencies and fallacies of MRI, which is why we have now moved to functional neuroimaging, functional MRIs which give us a better picture of what actually goes on in the brain and how it works. And that correlates with the neuropsychological testing. We can have an anatomically clean MRI and there can still be problems. It is like using a camera to take a picture of Swiss cheese. Depending on your focus and depending on the ability of the camera you may not even see the holes in the cheese with a picture.

(PC-R2. 129).

Had Dr. Crown been called to testify in 1995, he could have explained the normal MRI. The jury would have then known that an MRI scan was good for showing anatomic damage to the brain, but not good showing deficits that were electrical or metabolic (PC-R2. 130). At the resentencing, Dr. Crown was present in Panama City at the time of resentencing. Defense counsel told him to go home without discussing how he could rebut the State's new MRI testing of Mr. Bates. Contrary to the lower court's conclusion, it was not trial counsel's "strategy" to send Dr. Crown away to prevent the State from getting into the negative MRI test. Trial counsel conceded that he was not prepared. That is not a reason or strategy.

Dr. Crown opined that on the date of the crime, Mr. Bates had a breakdown in his cortical functioning (PC-R2. 138). At his deposition during Mr. Bates' May resentencing, Dr. Crown explained that Mr. Bates had an impingement which is also described as a disinhibition in certain situations. Rather than making someone inhibited or controlling their behavior, Mr. Bates' behavior was the opposite and it released inhibition and uncontrollable behavior. This could happen with stress, alcohol or lack of sleep (PC-R2. 138). At that point, higher cortical function in the brain shuts down and the subcortical regions take over to keep things going (PC-R2. 139).

According to Dr. Crown, there were precursors of this behavior prior to the date of the crime:

> There were micro situations that had occurred within his family, his relationships with family members, relationships with his wife, reactions to being in the National Guard and serving in Miami during –or after those McDuffy riots. So there were indicators, I don't know that anyone would have necessarily picked up the thread, but he had nightmares that [he] acted out, [and he] had been described as not being the same.

(PC-R2. 140). Even though these situations did not evince themselves in the same way as the crime, Dr. Crown opined that did not preclude them from occurring. At the evidentiary hearing, Mr. Bates also presented testimony that proved these micro situations existed, but they were not recognized as significant by trial counsel at resentencing.

Mr. Gary Scott testified that he and Kayle had participated in jungle training during his tenure with the Florida National Guard (PC-R2. 42-43, 47). Mr. Bates was also deployed to quell race riots in Liberty City near Miami in 1980 (PC-R2. 44). Mr. Scott testified that Kayle was afraid and nervous (PC-R2. 46). His main concern was getting back to his wife and child (PC-R2. 47). He also knew that Kayle had undergone tear gas training in basic training but had not participated with him in those drills (PC-R2. 55-56). Mr. Scott worked across the street from Kayle in Tallahassee and had frequent contact with him. Under normal circumstances, he could argue and push Kayle and he would not be aggressive with him (PC-R2. 50).

Jackie Bates, Kayle Bates' father, testified that at the time of Kayle's arrest in 1982, he drove to Panama City from Tallahassee (PC-R2. 58). When he saw Kayle for the first time the day of the arrest, Kayle was "going out of his mind." (PC-R2. 58). He was babbling and talking so fast it was like a machine gun (PC-R2. 59). Jackie could barely understand him and thought there was something physically or mentally wrong with Kayle because he was "out of it," shaking and trembling (PC-R2. 59). Kayle's reaction did not seem like typical fear or excitement from the serious charges. He had never seen Kayle this extreme before (PC-R2. 59). Kayle seemed overwhelmed and it was "really bad." (PC-R2. 59).

Mr. Joseph Johnson testified that he served with Kayle Bates in the National

Guard from 1977-78 until Kayle's arrest (PC-R2. 64). They saw each other at monthly weekend drills and summer camp. He went through jungle training in Panama with Kayle where they were trained in Vietnam War-type situations. The terrain in the jungle was "very unforgiving" and not a place you want to make a mistake (PC-R2. 66); the wildlife was dangerous and even the jungle trees were poisonous (PC-R2. 66). He was also with Kayle during the 1980 Miami riots which resulted from a police altercation involving the killing of a black man (PC-R2. 67). It was a hostile environment. The National Guard issued the men M-16 rifles, ruck sacks, helmets and a 20-round clip of live ammunition (PC-R2. 67-68) although they had not trained with live ammunition outside the shooting range. When they were given live rounds, they knew it was very serious (PC-R2. 69).

When they arrived in Miami, they found that the problems were being caused by the white and Hispanic law enforcement officers not the people. The neighborhood people gave them food and bought them drinks (PC-R2. 70). Mr. Johnson recalled being on guard duty one night about 2:30 a.m. and they heard loud shouting coming from the street. They thought the police had cornered a hardened criminal. When they arrived on the scene, they found a pregnant woman cornered against the wall by four policemen (PC-R2. 71). The officers were screaming questions as to why she was outside after curfew. The woman was in tears and the officers were harassing her beyond what Mr. Johnson believed was

reasonable. They escorted the woman home.

On another occasion, Mr. Johnson was on patrol and they came upon a young black man hiding in a thicket. He was out after the curfew. He ran out from hiding and begged Mr. Johnson and his fellow Guardsmen to walk him home because he was afraid of the police (PC-R2. 72). Mr. Johnson observed that Miami police would treat people differently who came through roadblocks. Black people were made to get out of their cars and be searched. White people were waved through (PC-R2. 72). This was in an area in Liberty City where they heard that rioters had pulled a person out of a car and had killed him (PC-R2. 73). No one came away from that experience unaffected.

Mr. Johnson was also required to go through tear gas training. This was done in basic training. He was not present during Kayle's tear gas training, but he was familiar with soldiers who had reacted badly to that training (PC-R2. 73). During tear gas training, he was made to take off the gas mask and got a "face full" of CS gas (PC-R2. 77). It was a very bad experience. But the training is supposed to show you how to disperse the gas without panicking (PC-R2. 78). He witnessed an incident where a soldier's mask malfunctioned and did not filter the gas. The soldier inhaled a mouthful of gas and panicked. Mr. Johnson said not everyone reacts the same way.

The nightmares described by Dr. Crown were substantiated by Renita Bates,

Kayle's wife, whom Mr. Dunn did not make available to Dr. Crown or any other experts (PC-R2. 102). She described Mr. Bates's nightmares after his return from the Miami riots and that he was "out of it." Mrs. Bates's description is consistent with the testimony of Jackie Bates and his observance of Mr. Bates's behavior after his arrest. The descriptions were exactly the same as what Mr. Bates reported to Dr. Crown. Mr. Bates was described as babbling, talking fast, like he was "going out of his mind."

Contrary to the lower court's order that Dr. Crown's testimony would have been considered cumulative, doctors Larson and McMahon did not testify to these incidents and this evidence was not cumulative to what Dr. Crown offered. In 1995, doctors Larson and McMahon testified that Mr. Bates would become "unwrapped" in stressful situations and under stress, his emotional controls broke down (R. 525, 620). They both said he would react impulsively without evaluating alternatives or consequences (R. 622). But, the doctors had nothing to support their conclusions. As a result of trial counsel's lack of preparedness and lack of investigation, neither had spoken to Mr. Bates's wife or father nor had they pieced together the reactions of Mr. Bates with the information that had come in from law enforcement around the time of the crime.

For example, Mr. Tunnell testified that when Mr. Bates first approached him at the crime scene he was talking fast, and he was sweating as if he had exerted

himself. He described the wooded area around the crime scene as "jungle-like." Mr. Bates responses to Tunnell's questions were quick and rapid fire. They were not inconsistent and did not make sense.

Similarly, trial attorney Anthony Bajocsky testified that when he saw Mr. Bates at the jail for the first time after the crime his responses were "bizarre." They made no sense and were internally inconsistent and contradictory. He would have moved for a mental health evaluation if he had continued on the case. Yet at trial, Mr. Dunn did not make the connection or provide the necessary background information for his experts to link Mr. Bates's behavior to the organic brain impairments.

Because of counsel's failure to present Dr. Crown, the jury never knew that Mr. Bates suffered from organic brain damage. Mr. Dunn never presented it for fear that he could not rebut the State's threat of presenting a normal MRI result through a court-appointed neurologist. But, trial counsel never addressed the gravity of the State's threat with Dr. Crown. Dr. Crown, who was present, **was** an expert in neuropsychology and was qualified in neuro-imaging. He testified that he could have explained that the State's normal MRI result does not mean that the person tested does not have organic brain damage.

Even though he thought organic brain damage was an important and significant mental health mitigator, trial counsel acknowledged he had no tactical

or strategic reason for not calling Dr. Crown:

> Q. Had you had information that showed organic brain damage that you were able to rebut the [court] neurologist would you have presented that?
>
> MR. DUNN: Well, I think today I know I had it. I just didn't realize that I had it at the time and, yeah, I would have presented it.

(PC-R2. 102).

While trial counsel suspected that an MRI would not show the type of functional deficits or impairments exhibited by Mr. Bates, he did not know Dr. Crown could explain to the jury the shortcomings of MRI testing in showing organic brain damage (R. 325). Dr. Crown was prevented from offering any rebuttal to the MRI testing done in this case because counsel ineffectively did not ask.

The State's MRI testing was conducted during the lunch hour at trial. The State was allowed to do this last minute testing because trial counsel forgot to list Dr. Crown on his witness list. Dr. Crown was not asked by trial counsel to review the neurologist's standards, methods or procedures while conducting the MRI. Even though he was present and capable of rebutting the State's evidence, Dr. Crown was not called to testify on the subject on which he was hired. Mr. Bates was deprived of a competent mental health expert. Ake v. Oklahoma, 470 U.S. 68 (1985).

By counsel's own admission, mental health mitigation was the "lynchpin" of the defense case. Yet, trial counsel failed to present evidence that Mr. Bates suffered from organic brain damage which is characterized as a significant mental health mitigator. He had no tactic or strategic reason for not presenting evidence of Mr. Bates' organic deficits. The only explanation offered was that he did not feel he could refute a "court" neurologist with Dr. Crown. Mr. Dunn admitted he was "overwhelmed." He had a full time job elsewhere. He was doing Mr. Bates's case pro bono. The Bates trial began and Mr. Dunn's Georgia client was being executed on the same day. The trial court would not allow a continuance and this Court only allowed Mr. Dunn a twenty-four hour continuance. Mr. Dunn's lack of preparation was evidenced by the fact that he retained Dr. Crown only five days before trial. He did not list Dr. Crown as a witness and the State objected that it received no notice. He did not attend Dr. Crown's deposition during the trial. The prejudice to Mr. Bates was that he was forced to go forward with counsel who was overwhelmed and exhausted.

It cannot be said that Mr. Bates had an adversarial testing when a significant mental health mitigator was omitted due to a lack of preparation by his counsel. The jury never heard that Mr. Bates had neurological deficits dating back to 1971, that included poor memory, difficulty problem solving, auditory selection attention problems, low threshold for stress, difficulty processing information when he is

distracted, and difficulty reasoning in times of stress. Mr. Bates's deficits lowered his threshold for dealing with stress and confrontation, and caused a breakdown in his cognitive cortical functioning.

Evidence of organic brain damage and its effect on stress responses would have deeply affected an already ambivalent jury. The trial court precluded Mr. Dunn from waiving a life sentence without the possibility of parole for twenty five years. The jury did not know that no one from death row had ever been granted parole even with the twenty-five year parole eligibility. During deliberations, the jury sent a question to the trial court asking if it could impose a sentence of life without the possibility of parole to which the court replied it could not. The final jury vote was 9 to 3 for death because the jury believed Mr. Bates would soon be eligible for parole. Thus, it cannot be said that the weighty mental health mitigator of organic brain impairment, the only explanation offered by the defense as to why this murder occurred, would have been insignificant.

ARGUMENT III

THE TRIAL COURT ERRED IN SUMMARILY DENYING MR. BATES'S CLAIMS

A trial court has only two options when presented with a Rule 3.850 motion: "either grant an evidentiary hearing or alternatively attach to any order denying relief adequate portions of the record affirmatively demonstrating that appellant is not entitled to relief on the claims asserted." Witherspoon v. State, 590 So. 2d 1138

(4th DCA 1992). The law strongly favors full evidentiary hearings in capital postconviction cases, especially where a claim is grounded in factual, as opposed to legal, matters. "Because the trial court denied the motion without an evidentiary hearing and without attaching any portion of the record to the order of denial, our review is limited to determining whether the motion conclusively shows whether [Mr. Bates] is entitled to no relief." Gorham v. State, 521 So. 2d 1067, 1069 (Fla. 1988). See also LeDuc v. State, 415 So. 2d 721, 722 (Fla. 1982).[3]

Some fact-based claims in postconviction litigation can only be considered after an evidentiary hearing. Heiney v. State, 558 So. 2d 398, 400 (Fla. 1990). "The need for an evidentiary hearing presupposes that there are issues of fact which cannot be conclusively resolved by the record. Where a determination has been made that a defendant is entitled to such an evidentiary hearing (as in this case), denial of that right would constitute denial of all due process and could never be harmless." Holland v. State, 503 So. 2d 1250, 1252-3 (Fla. 1087). "Accepting the allegations . . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing." Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989).

[3] Under the latest version of Fla. R. Crim. P. 3.851, evidentiary hearings are mandated for all factually-based claims. While the new version of the rule is not strictly applicable to the instant cause, the intent behind the new rule is equally apposite to Mr. Bates's case.

A. Ineffective Assistance of Counsel for Failing to Adequately Argue Waiver of Parole

Under the unique facts of this case, the sentencing court's refusal to instruct Mr. Bates's jury on life without the possibility of parole sentencing alternative deprived Mr. Bates of due process and a fundamentally fair sentencing. The sentencing court's refusal coupled with the State's arguments ensured that Mr. Bates' was resentenced to death. Trial counsel failed to adequately argue the applicability of the life without parole sentencing alternative and failed to object to prejudicial arguments made by the State with regard to Mr. Bates' future dangerousness.

On July 23, 1992, Mr. Bates' first motion for post-conviction relief was granted based on the denial of effective assistance of counsel at the penalty phase of his capital trial. This Court upheld the granting of relief and remanded for a new sentencing proceeding before a jury. Bates v. Dugger, 604 So. 2d 457 (Fla. 1992). In the interim, Florida Statute § 775.082(1) was amended to include the sentencing option of life imprisonment without the possibility of parole to defendants convicted of first-degree murder. On May 25, 1994, the change in the statute became effective.

As a result of getting post-conviction relief, Mr. Bates had no sentence at the time of the enactment of the amendment to Fla. Stat. § 775.082(1). Prior to his resentencing, Mr. Bates filed a Motion for Pretrial Ruling on the Applicability of

Life Without Parole Sentencing Option (R. 273). At the time of the resentencing, Mr. Bates had served over half the mandatory minimum of twenty-five years. Mr. Bates feared that the jury would sentence him to death, not because they believed he deserved death, but because they felt there was no reasonable sentencing alternative. The State argued that application of the amendment to Mr. Bates would violate the ex post facto provisions of the state and federal constitutions. What the State and the trial court failed to understand and resentencing counsel failed to adequately argue is that prohibiting the application of the amended statute to Mr. Bates violates the Eighth Amendment.

As a result of trial counsel's ineffectiveness and the trial court's adverse ruling, the State was able to argue non-statutory aggravating factors during closing argument. The State, in cross examination of Mr. Bates' character witnesses and during closing argument, emphasized Mr. Bates' "true character" based on the facts of the crime (R. 779). The State briefly mentioned mitigation and connected Mr. Bates' "true character" to the possibility that he could eventually be released with his "true character" still intact. The State further argued that the mitigating circumstances were to be considered towards "the sentence of life imprisonment with a minimum mandatory of twenty five years before the defendant is eligible for parole." (R. 779-80). In making this argument, the State emphasized Mr. Bates' future dangerousness as an issue for the jury. See Hitchcock v. State, 673 So. 2d

859, 860 (Fla. 1996) (finding capital defendant was prejudiced by State argument that defendant would be eligible for parole at expiration of twenty-five years given that resentencing occurred so close to the expiration of that period). Resentencing counsel failed to object to these prejudicial comments made during closing argument.

The prosecutor's comments had an effect on the jury. After deliberating for almost three hours, the jury presented the trial court with the following question:

> Are we limited to the two recommendations of life with minimum 25 years or death? Or can we recommend life without the possibility of parole?

(R. 830). The jury's question confirmed Mr. Bates' fear that the jury would sentence him to death because they felt there was no meaningful sentencing alternative. However, because defense counsel failed to object to the State's prejudicial comments during closing argument, which amounted to non-statutory aggravation, and the trial court prevented counsel from instructing the jury about a reasonable sentencing alternative, counsel was unable to rebut the State's argument.

In a capital case, specific standards must be met to ensure that the proceeding is fundamentally fair. The federal constitution requires that extraordinary measures are taken "'to ensure that the prisoner sentenced to be executed is afforded process that will guarantee as much as is humanly possible,

that the sentence was not imposed out of whim, passion, prejudice or mistake.'" Caldwell v. Mississippi, 472 U.S. 320, 329 n. 2 (1985)(quoting Eddings v. Oklahoma, 455 U.S. 104, 117 (1981)). This is because "the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death in its finality differs more from life imprisonment than a 100 year prison term differs from one of only a year or two." Woodson v. North Carolina, 428 U.S. 280, 305 (1976). Due to resentencing counsel's failure to adequately argue the issue of application of amended Fla. Stat. § 775.082(1) to Mr. Bates case in the context of the Eighth Amendment, and his failure to object to prejudicial arguments made by the State regarding Mr. Bates future dangerousness, the sentencing court's analysis of the issue was flawed. The resulting prejudice is that Mr. Bates' jury only sentenced him to death because they felt no reasonable sentencing alternative existed.

B. Ineffective Assistance of Counsel --the Exclusion of Jurors

Prior to the start of the 1995 resentencing, defense counsel Tom Dunn moved for a 24 hour continuance of jury selection because he had a client who was to be executed in Georgia on the same date that the resentencing was to begin (R. 437-43). The judge denied the request (R. 1658-77). Defense counsel appealed to this Court in an emergency motion to stay the proceedings until he was available to begin the resentencing the following day. This Court granted his request and

ordered that a 24 hour stay be put into place until Mr. Dunn was available (R. 459).

Mr. Dunn had a telephone conference with the judge and prosecutor as to what to tell the jury venire that had been ordered to appear. Defense counsel thought a court reporter was present in the Panama City courtroom, however, there is no record of this conference. An agreement was reached that the parties would send the jury home and be told to return the next day unless there were other trials besides Mr. Bates that needed to be selected from the pool (R. 660-2). Mr. Bates's trial, however, was the only trial that was to go forward that day. Contrary to the agreement, the prosecutor, without the presence of defense counsel or Mr. Bates, allowed some jurors to be excused from the panel for hardship reasons. Regardless of the fact that co-counsel Hal Richmond was present (PC-R2. 689), **Mr. Bates was not present**. The next day, defense counsel objected and proffered that the excusals were granted in a discriminatory manner which resulted in African-American jurors being improperly excused from the panel of jurors to be used to select Mr. Bates's jury (R. 661). However, no record of this was preserved.

Defense counsel was ineffective for failing to ensure that a full and complete record existed on which to document the excusal of the members of the jury panel. While the lower court found that "Counsel protested the lack of record as to potential jurors who were excused and requested a mistrial" (PC-R2. 689), nothing in the record reflects that counsel attempted to ensure there was a record of the

excusals. The record simply indicates that counsel objected to jury selection having gone forward in the absence of his presence, argued there was no record of the excusal process and moved for a mistrial. After jury selection was complete, resentencing counsel renewed his motion for mistrial, which was denied (PC-R2. 1265-70). At this time, the State presented the testimony of Judge Glenn L. Hess, who granted the excusals of several jurors (PC-R2. 1270). Defense counsel requested the opportunity to cross-examine Judge Hess (Id.), but Judge Hess never testified. Counsel failed to pursue his testimony.

Defense counsel should have moved to reconstruct the record while the discussion was still fresh in the minds of all parties. Mr. Bates was prejudiced by the failure of counsel to ensure a complete record because without a record there is nothing for the appellate courts to review. While the lower court notes that this Court denied Mr. Bates's claim that the court erred in going forward with jury qualification, it misunderstands that this is the prejudice Mr. Bates suffered. Mr. Bates could not establish a basis for a claim pursuant to Batson v. Kentucky, 476 U.S. 79 (1986) or other jury selection issue without a complete record.

C. Failure to Disclose Police and Prosecutorial Misconduct.

In March, 1990, Mr. Bates's original trial judge Fred W. Turner testified that the state attorneys were the "right arm of the court" and that it was customary for assistant state attorneys in his division to furnish secretarial and clerical help. It

was normal practice for assistant state attorneys in his division to draft sentencing orders in capital cases and the judge failed to see that his ex parte relationship with the state attorney could be a problem (PC-R. 271-272). On the basis of that "custom," Mr. Bates was granted a new sentencing.[4]

Unfortunately, that "custom" was the just the tip of the iceberg in Bay County where at the time of Mr. Bates's trial and resentencings, police and prosecutorial misconduct was the norm instead of the exception. As a result, Mr. Bates's trial and jury were beset with improper influences. The failure to disclose this information prejudiced Mr. Bates to the extent that his trial was fundamentally unfair in that no adversarial testing could occur. When this new information is considered cumulatively with the evidence previously presented, confidence in the reliability of the outcome of Mr. Bates's 1995 resentencing was undermined. Kyles v. Whitley, 514 U.S. 419 (1995).

Jim Appleman, the Bay County State Attorney, had a personal and financial interest in Mr. Bates's conviction and death sentence. This violated Mr. Bates's due process rights. Even though Mr. Bates offered to waive his right to parole at his 1995 resentencing if the prosecution would allow the jury to be instructed on

[4] This Court and a Bay County circuit judge had reversed Mr. Bates's conviction two times. One reversal was based on the trial judge's failure to consider mitigating evidence and the other was reversed because that same trial judge allowed Mr. Appleman to write his order in sentencing Mr. Bates to death. By 1995, Mr. Bates was an indigent man.

life without parole as a possible sentence, Mr. Appleman refused. Even after the jury sent back a question asking whether it had the option of imposing life without parole, Mr. Appleman still refused. Instead, Mr. Appleman urged the jury to sentence Mr. Bates to death because he had already served a large portion of the 25 year minimum-mandatory sentence that accompanied a life sentence. He urged this non-statutory aggravator, even though Mr. Bates had two other life sentences which meant he would never be paroled from prison. Mr. Appleman did not want the jury to know this information because he had a personal and financial reason for obtaining Mr. Bates's conviction and death sentence.

Election records show that Mr. Appleman received campaign contributions from the victim's friends and family from the time of Mr. Bates's trial until his 1995 resentencing. At trial, Mr. Bates was sentenced to death on the basis of victim-impact statements given by Mr. Appleman's contributors. Victim-impact statements are normally only given by family members, law enforcement and attorneys to the probation office to compile a pre-sentence report. That report comprises a recommendation to the judge as to what sentence to impose. In 1983, a friend of the victim, Dennie Sanders, who worked with his father, Harry Sanders, in a large construction business in Panama City, attended the trial was allowed to give a victim impact statement to the Bay County Parole and Probation officer, C. Joseph Attwood to include in the report. The report stated:

> DENNIE SANDERS spoke to this officer and advised that he knew Renee White, the victim, for twelve years and that she was a lifelong friend of Mr. Sanders' wife.
>
> He states that Renee was a hard worker and honest person and that this murder was cold blooded and there did not appear to be any mitigating circumstances. He states that the defendant deserves no mercy because he gave none to the victim.

Pre-Sentence Investigation Report dated 3-11-83. Mr. Sanders also attended Mr. Bates's resentencing in 1995. One potential juror notified the judge that she recognized him in the courtroom:

> Juror Brian: But that was it and now something else came up yesterday. When I was outside Danny Sanders came up to me, and I hadn't seen Danny since he built a house, he and his dad built a house. And Danny came up and said hey, Ms. Brian. I said Danny -- you know, he looked so different and it's been a while since I've seen him, and then I found out from the other people, those other people sitting over here, his family–Ms. White -- and Danny is there with him. Now, I do not know what Danny's standing there – relationship is with all these people. I thought I better say something because I might screw something up.

(R. 2. 1075).

Mr. Sanders not only had a close relationship with the victim's family and a real interest in Mr. Bates's conviction, but election records show that he was a large contributor to Mr. Appleman's campaign after his successful prosecution of Mr. Bates. In 1984, shortly after trial, Mr. Sanders and his father contributed $750 to Mr. Appleman's re-election. Prior to trial in 1980, Mr. Sanders and his father

contributed $1,000 in cash, lodging, party supplies and beverages for Mr. Appleman's re-election. While the lower court claims that many of Mr. Bates's allegations are irrelevant to the proceedings before the court (PC-R2. 690), the lower court overlooked the contributions made prior to his trial and his resentencing. These contributions and the failure to disclose them create the appearance of impropriety.

Other friends and family of the victim contributed generously to Mr. Appleman's re-election L.E.Thomas, a family relation, donated in 1992. In 1996, shortly after Mr. Appleman's 1995 resentencing success in securing a conviction against Mr. Bates, James Dickerson, owner of the insurance company where the victim worked and a witness at the original trial, contributed to the campaign. Also, Harry A. McClaren, the state's mental health expert who testified at the resentencing, contributed, as did Merion and Anne White. In 2000, Dr. McClaren continued to contribute to Mr. Appleman as did L.E. Thomas, and Zachary and Brenda Taylor, friends of the victim. Though Mr. Appleman was not running in the 2004 election, Dr. McClaren contributed to the campaign of Steve Meadows instead. None of these financial and personal interests were disclosed to the defense at the time of either resentencing. The information regarding Dr. McClaren was impeachment evidence that could have been used at resentencing.

The significance of these contributions is not just a curiosity but that the

funds were used for other purposes that impacted criminal defendants such as Mr. Bates. In 1999-2001, the State of Florida Elections Commission filed a complaint and investigated improprieties in Mr. Appleman's use of campaign funds. The Elections Commission rendered an order of probable cause citing a litany of abuses for false reporting, for using campaign funds to defray normal living expenses on 30 separate occasions, and for making or authorizing expenditures prohibited by Florida Statute sec. 106.19(1(d) on 60 separate occasions. The chairman of the Florida Elections Commission issued a probable cause order on August 7, 2001. Thus, it is probable that some of the funds given by the friends and family members of the victim may not have been used only for Mr. Appleman's campaign. The trial court's conclusion that this claim dealt only with contributions after Mr. Bates's resentencing is wrong. The subject of the investigation concerned contributions occurring prior to and during the time of resentencing.

Financial problems were not new to the Appleman administration. A grand jury was convened in October, 1993 to investigate charges of corruption in the State Attorney and other public offices. Florida Department of Law Enforcement investigated Mr. Appleman's office for a widespread practice of prosecutors soliciting contributions from defendants in exchange for dropped or reduced charges. One defendant who refused to pay spoke to the Panama City News-Herald on July 9, 1993. She said that after she had refused the offer and complained to the

newspaper, her charges were ultimately dropped when the State Attorney's Office lost the evidence. Mr. Appleman defended the practice as a way to recoup the costs of investigations and save weak cases from being "total losses." Mr. Appleman was quoted as saying he did not think the practice favored wealthy defendants." (PC-R. 549). After the public outcry, Mr. Appleman discontinued the program but it was not clear how long the practice had been followed. In 1994, Mr. Appleman's office was again investigated for public records violations. In 1995 at Mr. Bates's resentencing, defense counsel argued that it had not received the complete state attorney file in his case. It is still not clear whether the entire file had been disclosed.

The Fourteenth Amendment to the United States Constitution guarantees that Florida cannot deprive an individual of life, liberty or property without due process of law. This guarantee is based on fundamental fairness. Immigration and Naturalization Service v. Lopez-Mendoza, 468 U.S. 1032 (1984); Engle v. Issac, 456 U.S. 107, 131 (1982); Smith v. Phillip, 455 U.S. 209, 219 (1982). This concept is generally recognized in Rochin v. California, 342 U.S. 165, 169 (1952). The United States Supreme Court has explained those notions of fundamental fairness may be violated when personal interest is injected into the prosecutorial decision-making process. Marshall v. Jerrico, Inc., 446 U.S. 238, 249-250 (1980).

In Florida, prosecutors are "quasi-judicial officers," Gluck v. State, 62 So.

2d 71, 73 (Fla. 1952). "It is their duty to see that a defendant gets a fair and impartial trial." Id. "[P]rosecuting officers are clothed with quasi-judicial powers and its is consonant with the oath they take to conduct a fair and impartial trial." Stewart v. State, 51 So. 2d 494, 495 (Fla. 1951). See, Oglesby v. State, 23 So. 2d 558 (Fla. 1945). As a result, due process prohibits a prosecutor from having a personal, familiar, and or/financial interests in obtaining a criminal conviction.

At the time of filing the charges against Mr. Bates and during the proceedings leading up to his conviction, prosecuting attorneys were obligated to comply with the Code of Professional Responsibility and the Code of Ethics for Public Officers and Employees. The Code of Professional Responsibility precludes prosecutors from participating in cases where there is the appearance of conflict. However, Florida's Code of Ethics for Public Officers and Employees is even more explicit. Section 112.311 of the Florida Statutes provides in pertinent part:

> (6) It is declared to be the policy of the state that public officers and employees, state and local, are agents of the people and hld their positions for the benefit of the public. They are bound to uphold the Constitution of the United States and the State Constitution and to perform efficiently and faithfully their duties under the laws of the federal, state, and local governments. **Such officers and employees are bound to observe, in their official acts, the highest standards of ethics consistent with this code and advisory opinions rendered with respect hereto regardless of personal considerations, recognizing that promoting the public interest and maintaining the rest of the people in their government must be of foremost concern.**

Section 112.311 (emphasis added).

Here, Mr. Appleman's failure to disclose his personal and financial interests with the victim's family and friends to defense counsel at resentencing was a due process violation. Any information that may impeach the credibility of law enforcement is material and should be disclosed. See, Kyles v. Whitley *supra,* citing Brady v. Maryland, 373 U.S. 831 (1963). Had he done so, Mr. Bates could have investigated law enforcement's credibility and whether he had a good faith basis to move for recusal of Mr. Appleman's office.

In Kyles v. Whitley, the United States Supreme Court recognized that evidence that impeached the prosecution and police investigation could establish a Brady violation:

> Damage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for Beanie's various statements would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and **even the good faith of the investigation**, as well. . . . [the evidence's] disclosure would have revealed a remarkably uncritical attitude on the part of the police.
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> * * *
>
> Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand, though, the defense could have examined the police to good effect on their knowledge of Beanie's statements and so have attacked the reliability of the investigation in

> failing even to consider Beanie's possible guilt and in tolerating (if not countenancing) serious possibilities that incriminating evidence had been planted.

514 U.S. 419, 445-6. (citations omitted)(emphasis added). Here, the undisclosed evidence would have not only been of value just on its face, but as impeachment evidence against Dr. McClaren. The synergistic effect of the nondisclosures exposed the prosecution's biased motives and law enforcement's techniques to substantial impeachment evidence.

The jury was entitled to make a decision after hearing all of the evidence. Light v. State, 796 So. 2d 610 (Fla. 2d DCA 2001)(judge is not examining whether he believes the evidence presented as opposed to contradictory evidence, but whether nature of evidence is such that a reasonable jury may have believed it); Cardona v. State, 826 So. 2d 968 (Fla. 2002).

In reviewing the materiality of the nondisclosures, a court must review the net effect of the suppressed evidence and determine "whether the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Maharaj v. State, 778 So. 2d 944, 953 (Fla. 2000). Further, "[i]n applying these elements, the evidence must be considered in the context of the entire record." Occhicone v. State, 768 So. 2d at 1041. When that is done, this Court must conclude that a new trial is warranted.

In United States v. Agurs, 427 U.S. 97, 103 (1976), the Supreme Court

explained that where "undisclosed evidence demonstrates that the prosecution's case includes perjured testimony and that the prosecution knew, or should have known, of the perjury," a conviction must be set aside "if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury." Id. Unlike a Brady-type situation where no intent to suppress is required to be demonstrated, a "strict standard of materiality" applies in cases involving perjured testimony because "they involve a corruption of the truth-seeking process." Id. at 104. Thus, although both Brady and Giglio require a showing of "materiality," the legal standard for demonstrating entitlement to relief is significantly different. The standard for establishing "materiality" under Giglio has "the lowest threshold" and is "the least onerous." United States v. Anderson, 574 So. 2d 1347, 1355 (5th Cir. 1978). See Craig v. State, 685 So. 2d 1224, 1232-34 (Fla. 1996) (Wells, J. concurring in part and dissenting in part) (discussing differing legal standards attendant to Brady and Giglio claims).

Here, the election contributions by family and friends of the victim and the corruption investigations of the use of election funds were not the only evidence that Mr. Bates's case was tainted. In 1988, Sheriff Lavelle Pitts was indicted by a grand jury on charges of perjury for conduct during his tenure in office since 1981. Grand jurors stated that Sheriff Pitts was "not qualified and morally unfit" to hold office and urged his removal. Though the statute of limitations had run on the

underlying felonies, the indictment alleged that Pitts had lied to a grand jury when he denied under oath that he had sex or attempted to have sex with his employees, and that he had sex with them in his county automobile and office. See, Panama City News-Herald, May 12, 1988. It would have been important for Mr. Bates to know at the time of his trial and resentencing that Sheriff Pitts's credibility could have been impeached with his unfit conduct in office.

What the lower court misunderstood is the impact of this pervasive misconduct, not only on the direct credibility of Sheriff Pitts, but also on the credibility of the investigation as a whole. The Sheriff's office was responsible for evidence collection and for obtaining incriminating statements against Mr. Bates. Evidence of misconduct would have caused a reasonable attorney to investigate further. This is important given Mr. Bates's assertions that his statements were tainted and coerced.

In 1992, shortly after Mr. Bates's first postconviction evidentiary hearing, Dr. William Sybers left the Medical Examiner's Office after FDLE began investigating him for the death of his wife by the injection of lethal chemicals. Part of the controversy was that Dr. Sybers had his wife's body embalmed before an autopsy could be performed. He was ultimately indicted and tried by this Court and convicted. Dr. Sybers had taken over the medical examiner's office shortly after Dr. Sapala testified in Mr. Bates's case.

The pattern of misconduct that has pervaded Bay County for the entire length of Mr. Bates's trial and two resentencings is overwhelming. Yet, none of this information was ever disclosed to Mr. Bates. Mr. Bates, an indigent defendant, has never been able to afford the luxury of due process from the Bay County State Attorney's office, police or the courts that was apparently for sale at a price. He was never privy to the quid pro quo at work when Dr. McClaren, the state's mental health expert, testified at resentencing. Had Mr. Bates known this information, he could have exposed any bias that Dr. McClaren had in favor of getting desirable results for the prosecution. However, this information was not disclosed. It is not the defense attorney's responsibility to ferret out the information from the State, it is the State's continuing duty to disclose. See, Kyles v. Whitley, *supra*.

More importantly, the financial interests of Mr. Appleman so thoroughly intertwined with the victim's family is the utmost in the "appearance of impropriety." The pressure exerted by this group has had its effect on Mr. Bates's legal proceedings to his prejudice. It affected Judge Turner[5] and Mr. Appleman

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[5] At 1985 resentencing, two years after trial, Judge Turner complained about the pressure of Mr. Bates's case. He said in response to a request for a continuance by the defense:

> You see, there is something that you don't feel that I have to feel and that is **the pressure of the public to get these things over with.** There must be an end to this litigation. We are the most visible people on earth. Even the Supreme Court Justices can walk with impunity

who refused to accept Mr. Bates's offer to waive his right to parole. Therefore, these non-disclosures cannot be considered harmless.

Mr. Bates did not know that a person who had given a victim-impact statement against him was a large contributor to Mr. Appleman. He did not know

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> through the streets of Panama City and nobody would say a word to them; but **I am Fred Turner and they know I am a Circuit Judge, and of course, that goes with the territory that I am criticized; but we are the ones that get all of the flack from the local citizens about when will there be an end to these appeals and murder cases. Would you be surprised if I told you that I don't visit first class restaurants in this town; I don't go to civic club meetings unless I am specifically invited as a special guest. I resigned from all of the civic clubs because they grab a hold of you like a dog, a hungry dog on a bone and we're the ones that get the criticism about what is happening to the slow progress of the courts up here and it's a constant thing.** As I said, Justice Erlich [sic] or any of the Justices can walk through Panama City with absolute impunity but me, Judge Bower, or Judge Sirmon can't do that. **There's so many things that you can't imagine that we get into and after all they are the public. They are paying the bills for these prosecutions. . .**
>
> * * *
>
> I don't have any efforts to be frustrated. **I am telling you that the public is getting pretty heated out there about–particularly in death cases and they tell me about it in no uncertain terms. They don't use diplomatic language; they come right out. I'm just saying that's something you're isolated from; you don't hear that and see that.**

(R. S. 171-181)(emphasis added).

that Mr. Appleman's office had a practice of offering lesser deals for a "contribution" to a designated fund. All of these undisclosed matters prejudiced Mr. Bates when he was prevented from investigating them by the State Attorney and law enforcement. The trial court erred in summarily denying this claim because the files and records do not conclusively show that Mr. Bates is not entitled to relief on this claim. An evidentiary hearing is warranted.

D. Systematic Discrimination In The Selection Of Jury.

Mr. Bates is an African-American male. The jury venire from which his jury was selected was made up of approximately 116 persons, of which only six (6) were African-American. Purposeful discrimination in the selection of a jury venire is unconstitutional. It also is a violation of the equal protection clause of the Fourteenth Amendment to the United States Constitution. Holland v. Illinois, 110 S. Ct. 2301 (1991); Swain v. Alabama, 85 S. Ct. 824 (1965). Mr. Bates was denied equal protection under the law because the State tried him before a jury from which members of his race had been purposely excluded. Batson v. Kentucky, 106 S. Ct. 1712 (1986). Mr. Bates was entitled to a fair cross section of the population of the county in which he was tried. Batson, supra.

To the extent that counsel did not adequately object and preserve a record on which to prove the racial bias of the Bay County system of jury selection, Mr. Bates's defense counsel was ineffective. Mr. Bates' defense counsel also did not

object to the systematic discrimination that occurred in this case. Defense counsel's failure to object, and appellate counsel's failure to raise this issue on appeal, constituted ineffective assistance of counsel. See Strickland v. Washington, 466 U.S. 668 (1984).

At trial in 1983, Mr. Bates was sentenced to death by an all-white jury. Even though massive pre-trial publicity inundated Panama City, trial judge W. Fred Turner denied any change of venue. Almost all of Mr. Bates's jurors had been exposed in some fashion to media accounts of the crime. At the beginning of trial, the victim's white minister from the First Baptist Church prayed to God that the all-white jury would appreciate the seriousness of the situation with which we are confronted, and asked for "wisdom and guidance." The minister also prayed for Judge Turner to have "special wisdom." (R. 1211). Mr. Bates was convicted and sentenced to death by a jury vote of 11 to 1.

When Mr. Bates's case was remanded for a new sentencing proceeding in 1985 without a jury. Judge Turner wanted to expedite the resentencing and complained that he did not want to grant a continuance for defense counsel to prepare. The judge admitted to feeling pressure from the community for his role in this case (R. S. 171-181). Judge Turner admitted to being influenced by outside pressure. It stands to reason that the jurors were likewise subjected to this pressure particularly when a minister from their own First Baptist Church prayed for their

"wisdom."

In the 1995 resentencing, the atmosphere was no better. Post-conviction counsel Tom Dunn moved for a 24-hour continuance because he had a client who was to be executed in Georgia on the same date that the resentencing was to begin (R. III 437-43). The judge denied the request (R. XXVIII 1658-77). The judge wanted to expedite the resentencing regardless of whether Mr. Bates had prepared counsel or not.

Mr. Dunn then appealed to this Court in an emergency motion to stay the proceedings until he was available to begin the resentencing the following day. This Court granted his request and ordered that a 24 hour stay be put into place until Mr. Dunn was available (R. III 459). Mr. Dunn had a telephone conference with the judge and prosecutor as to what to tell the jury venire that had been ordered to appear. The agreement was that they would be sent home and told to return the next day unless there were other trials besides Mr. Bates that needed to be selected from the pool (R. IV 660-2). Mr. Bates's trial, however, was the only trial that was to go forward that day. Contrary to the agreement, without the presence of Mr. Dunn or Mr. Bates, the prosecutor excused some jurors from the panel for hardship reasons. Mr. Dunn proffered that the excusals were granted in a discriminatory manner which resulted in African-American jurors being improperly excused from the panel of jurors to be used to select Mr. Bates's jury

(R. IV 661).

Twelve years after his original trial, the African-American population was grossly under-represented in the jury pool and those few who were in the pool were stricken by prosecutors. As a result, only two African-American jurors served on Mr. Bates's jury at his 1995 resentencing. Of the 116 people called for jury duty, only 6 were African Americans. Prosecutor Appleman excused some of those jurors without giving Mr. Bates a chance to respond. This was not a fair cross-section of the community or a trial by a jury of Mr. Bates's peers as is guaranteed by the constitution.

The prejudice to Mr. Bates is that he was tried before a jury of four (4) white males and six (6) white females, and only two (2) African-Americans on his jury. The racial composition of Mr. Bates's jury at resentencing was critical because Mr. Bates, an African-American, had been accused of killing a white victim in 1983. The likelihood of getting a fair and impartial jury of Mr. Bates's peers was nearly impossible under the current system of jury pool selection in Bay County. A cross-section of the community is not represented by the system driver's license selection used in Bay County.

Numerous studies of homicide cases in Florida and nationwide show a link between race and the likelihood that a defendant will receive a death sentence. Studies have shown that a defendant who is accused of killing a white victim is

more likely to receive the death penalty than a defendant accused of killing a black victim. These racial disparities permeate every stage of a capital proceeding, including jury deliberations. Bay County suffers from this racial disparity more than most. Of the five death sentences rendered in Bay County, all five were black defendants with white victims. Three of the sentences were handed down to Mr. Bates over the years since 1983. The other two death sentences were given to Carl Jackson and Eric Turner whose cases were overturned and reduced to life sentences by this Court. See, Jackson v. State, 359 So. 2d 1190 (Fla. 1978); Turner v. State, 645 So. 2d 444 (Fla. 1994). In 1990, the United States Census Bureau reported that the population of Bay County, Florida was 126,994. By 2000, the population of Bay County had grown to 148,217 people of which 10.6 percent were African-American. At an average rate of growth for those ten years, the population in 1995 was 137, 604 people. Even assuming that the population was only ten percent African American then, Mr. Bates's jury pool of 116 people should have reflected a fair cross section of the community and should have contained between 11 and 12 African Americans. From that pool, Mr. Bates would have been able to choose a jury of his peers.

By the time the prosecution finished deciding who Mr. Bates would have the option of choosing from, the pool had already been cleansed of minorities and oriented to favor the prosecution. This method is just part of a long and enduring

practice of allowing a state attorney to participate in general jury qualification without defense counsel present. See, Bates v. State, 506 So. 2d 1033 (Fla. 1999). Therefore, there is some historical evidence of racial discrimination in this case and in Bay County in general. *Cf.* Gorby v. State, 819 So. 2d 664 (Fla. 2002).

In Miller-El v. Cockrell, 537 U.S. 322 (2003), the underlying issue was whether the inmate had made a substantial showing of the denial of a constitutional right by showing where the state had a pattern of excluding African American venire members. *Cf.* Batson v. Kentucky, 476 U.S. 79 (1986). The United States Supreme Court concluded that the defendant had made a substantial showing based on empirical data and an explicit record and said:

> Irrespective of whether the evidence could prove sufficient to support a charge of systematic exclusion of African-Americans, it reveals that the culture of the District Attorney's Office in the past was suffused with bias against African-Americans in jury selection. This evidence, of course, is relevant to the extent it casts doubt on the legitimacy of the motives underlying the State's actions in petitioner's case. Even if we presume at this stage that the prosecutors in Miller-El's case were not part of this culture of discrimination, the evidence suggests they were likely not ignorant of it. Both prosecutors joined the District Attorney's Office when assistant district attorneys received formal training in excluding minorities from juries. The supposition that race was a factor could be reinforced by the fact that the prosecutors marked the race of each prospective juror on their jury cards.

Miller-El v. Cockrell, 537 U.S. at 347.

The same holds true in Bay County. African Americans were systematically excluded from the jury pool. The prosecutor was allowed to excuse all of the hardship cases without Mr. Bates or his counsel present. This system of eliminating minorities has resulted in a due process violation in which Mr. Bates had no minorities on his original trial and only two on his 1995 resentencing twelve years later. This is a violation of the equal protection clause and due process.

E. Pattern Of Discrimination On The Basis Of Race

The death penalty in the United States and in Florida has been discriminately imposed against those accused of killing Caucasians. The probability of execution is overwhelmingly greater in cases where, as here, the victim is white. Mr. Bates's death sentence was imposed pursuant to this pattern of racial discrimination.

University of Florida Sociology professor, Michael Radelet, conducted a study involving homicides in Florida from 1976 through 1987. As a result, Radelet determined:

> Overall, white suspects are more likely to be sentenced to death than black suspects (4.8% and 2.5% respectively). However, further inspection reveals that this may be because (1) 95% of the white suspects are implicated for killing other whites; (2) 86% of the black suspects are convicted of killing other blacks; and (3) those who are suspected of killing blacks are rarely sentenced to death.

Michael L. Radelet & Glen L. Pierce, Choosing Who Will Die: Race and the Death

Penalty in Florida, 43 Fla. L. Rev. 1, 21 (1991). Radelet determined that cases with white victims are almost six times more likely to receive the death penalty than those with black victims. Id. These initial figures are not definitive of racial discrimination because several additional factors may contribute to the likelihood of a death sentence. Therefore, Radelet factored in numerous qualitative difference in homicide cases, including accompanying felonies, the relationship between the defendant and victim, the number of victims, the use of a gun versus some other weapon and urban versus rural location of the homicide. Even controlling for each of these variables, Radelet reported this central finding: "controlling for all other factors, the odds of a death sentence are 3.42 times higher for defendants who are suspected of killing whites than for defendants suspected of killing blacks." Id. at 28.

This Court agreed that a criminal defendant in a capital case is 3.4 times more likely to receive the death penalty if the victim is white than if the victim is an African American. See Reports and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Commission, 1990-91. As part of the problems creating racial disparities in death sentencing in Florida, this Court recognized that "the under-representation of minorities as attorneys and judges serves to perpetuate a system which is, through institutional policies or individual practices, unfair and insensitive to individuals of color. . ." Id. at 11. Of Florida's 20 State Attorneys, 19

are white. The disparities are further compounded by the lack of minority representation on juries. This is particularly true in Mr. Bates' case where there were only six African-Americans in the jury venire, and only two African Americans on Mr. Bates' jury.

To succeed with a Fourteenth Amendment claim, a defendant must show that the decision-makers in his case acted with discriminatory purpose, or that the decision-makers possessed racial biases that created "an `unacceptable risk' that affected the sentencing decision." Dobbs v. Zant, 720 F. Supp. 1566, 1572 ((N.D. Ga. 1989); See also McClesky v. Kemp, 481 U.S. 279, 282 (1987). Mr. Bates's was not granted an evidentiary hearing to prove his claims. The decision to seek the death penalty in Mr. Bates's case and the sentence of death was a direct result of the inherent discrimination in Florida's death penalty statute. Mr. Bates is entitled to an evidentiary hearing and relief thereafter.

ARGUMENT IV - OTHER ERRORS

A. Juror Interview ban is unconstitutional.

Rule 4-3.5(d)(4), Rules Regulating the Florida Bar, is unconstitutional. The rule prevents Mr. Bates from investigating any claims of jury misconduct or racial bias that may be inherent in the jury's verdict. Misconduct may have occurred that Mr. Bates can only discover by juror interviews. *Cf.* Turner v. Louisiana, 379 U.S.

466 (1965); Russ v. State, 95 So. 2d 594 (Fla. 1957).[6]

Mr. Bates requests that this Court declare Rule 4-3.5(d)(4), Rules Regulating the Florida Bar invalid as being in conflict with the Eighth and Fourteenth Amendments to the United States Constitution and to allow Mr. Bates unfettered discretion to interview the jurors in this case. The failure to allow Mr. Bates the ability to freely interview jurors is a denial of access to the courts of this state under article I, section 21 of the Florida Constitution. Even if this Court does not find the rule unconstitutional, Mr. Bates is still entitled to interview jurors on the basis of good cause. Evidence exists that the community pressured judges, and most likely jurors, to convict and sentence Mr. Bates to death. The files and records did not conclusively rebut this claim. An evidentiary hearing is required.

B. Burden Shifting Claim

At the resentencing proceedings in Mr. Bates' case, the jury was repeatedly misinformed as to its responsibility in the sentencing process. The jurors were repeatedly told that their role was simply to render a "recommendation" or an "advisory sentence." The jurors' sense of responsibility was diminished by the trial court's preliminary instructions that the jury render an "advisory sentence," but the

[6] In Buenoano v. State, 708 So. 2d 941 (Fla. 1998), this Court acknowledged that failure of a juror to answer truthfully can constitute grounds for relief. However, in Buenoano, the Court found the issue procedurally barred because collateral counsel failed to exercise due diligence in discovering that a juror had lied during voir dire. For this reason, it is essential that Mr. Bates be permitted to interview the jurors who convicted him and sentenced him to death.

final decision rests with the judge (Vol. IX, T. 15). The State emphasized in its closing argument that the jury merely recommends a sentence (R. 784). During the final instructions, the jury was repeatedly told their recommendation was only "advisory" and that the final decision rests solely with the judge (R. 822-23). The form that the jurors were instructed to sign after deliberating was entitled "Jury Recommendation," and read "the jury by a vote of _____ advise and recommend to the court…" (R. 485).

These were misstatements of law to which trial counsel failed to object. In Caldwell v. Mississippi, 472 U.S. 320 (1985), the Supreme Court held that it is "constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. Id. at 328-29. See also Ring v. Arizona, 122 S. Ct. 2428, 2448 (2002) (Breyer, J., concurring in the judgment) ("Eighth Amendment requires individual jurors to make, and to take responsibility for, a decision to sentence a person to death"). Mr. Bates' jury was also told and instructed that it was his burden to demonstrate that the mitigating factors outweighed the aggravating factors (Vol. IX, 17). During the jury charge, the judge instructed the jurors in the following fashion:

> **As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge; however, it is your duty to follow the law that will now be given to you by the court and render**

> **to the court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty *and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist.***

(R. 823) (emphasis added).

These comments and instructions violate the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution, and Mullaney v. Wilbur, 421 U.S. 684 (1975), and Ring v. Arizona, 122 S. Ct. 2428 (2002). Resentencing counsel's failure to object to the improper burden-shifting constitutes prejudicially deficient performance, as the jury was misinstructed on the proper allocation of the burdens. Under Florida law, a death sentence may not be imposed unless there is a factual determination that "sufficient aggravating circumstances" exist to justify imposing the death penalty. Fla. Stat. § 921.141(3). The burden lies with the State to prove that the aggravators outweigh the mitigators. See State v. Dixon, 283 So. 2d 1 (Fla. 1973). Because imposing a death sentence is contingent on this fact being found, and the maximum sentence that could be imposed in the absence of that fact is life in prison, the Sixth Amendment requires that the State bear the burden of proving this beyond a reasonable doubt. Ring, 122 S. Ct. at 2432.

Trial counsel's failure to know the law and to object to these misstatements of the law constitutes deficient performance. Because trial counsel failed to object, Mr. Bates was prejudiced. His jury returned an advisory recommendation for death

by a 9-3 vote; had the jury been properly instructed, there is more than a reasonable probability that the outcome would have been different. See Strickland v. Washington, 466 U.S. 668 (1984).

C. Heinous, Atrocious and Cruel Aggravating Factor

In Proffitt v. Florida, 428 U.S. 242 (1976), the Supreme Court approved this Court's limiting construction of the "heinous, atrocious, or cruel" aggravating circumstance finding that this aggravating circumstance is directed at "the conscienceless or pitiless crime which is unnecessarily torturous to the victim." Proffitt, 428 U.S. at 255-56. Florida law states that simply because a victim is alive during an attack does not establish that he was conscious. An unconscious victim cannot suffer the "unnecessarily tortuous" trauma required for a finding of the heinous aggravating factor. The state has the burden of proof to establish beyond a reasonable doubt that a victim is in fact conscious during an attack. In Mr. Bates' case, the state did not meet this burden. The medical examiner testified that the victim would have become unconscious within a minute or two (R. 297). The State did not establish beyond a reasonable doubt that the victim was conscious for an extended period of time during the attack. See Rhodes v. State, 547 So. 2d 1208 (Fla. 1989).

The State also failed to prove that Mr. Bates intended to torture his victim. Porter v. State, 564 So. 2d 1060 (Fla. 1990). The evidence presented at the

resentencing established that the victim was heard at 1:05 p.m. and Mr. Bates was taken into custody at 1:20 p.m. The crime lasted for mere minutes. No evidence showed that the victim was tortured. None of the elements required for the finding of the heinous, atrocious, and cruel aggravating factor were present or proven beyond a reasonable doubt. Despite these facts, the trial court found that the murder was heinous, atrocious and cruel (R. 1291).

In Lewis v. Jeffers, 110 S. Ct. 3092 (1990), the Supreme Court held that the Eighth Amendment requires sufficient evidence exist in the record to support a finding that a particular aggravating circumstance is present. Under Lewis v. Jeffers, the question is whether a rational factfinder could have found the elements of this aggravator proven beyond a reasonable doubt. See Jackson v. Virginia, 443 U.S. 307, 319; Jeffers, 110 S. Ct. at 3120-03. In Mr. Bates' case, no rational factfinder could do so.

D. Mr. Bates is innocent of the death penalty.

When a person is sentenced to death and can show innocence of the death penalty, he is entitled to relief. Sawyer v. Whitley, 112 S. Ct. 2514 (1992). This Court has recognized that innocence is a claim that can be presented in a motion pursuant to Rule 3.850. Johnson v. Singletary, 612 So. 2d 575 (Fla. 1993); Jones v. State, 591 So. 2d 911 (Fla. 1991). Innocence of the death penalty constitutes a claim. Scott (Abron) v. Dugger, 604 So. 2d 465 (Fla. 1992). Mr. Bates can show

innocence of the death penalty in that insufficient aggravating circumstances exist that render him ineligible for death under Florida law. Mr. Bates' trial court relied upon three aggravating circumstances: (1) the crime was committed while defendant was engaged in the commission of a robbery or flight therefrom; (2) the capital felony was committed for the purpose of avoiding arrest or effecting an escape from custody; and (4) the murders were committed in a cold, calculated and premeditated manner without pretext of moral or legal justification. Mr. Bates's jury was given unconstitutionally vague instructions on the aggravating circumstances relied upon by the judge to support the death sentence. The instructions were erroneous, vague, and failed to adequately channel the sentencing discretion of the judge and jury or genuinely narrow the class of persons eligible for the death penalty. Therefore, these aggravating circumstances cannot be relied upon to support Mr. Bates' death sentence. Furthermore, Mr. Bates' death sentence is disproportionate. In Florida, a death sentenced individual is rendered ineligible for a death sentence where the record establishes that the death sentence is disproportionate. Here, the lack of aggravating circumstances coupled with the overwhelming evidence of mitigating evidence render the death sentence disproportionate. Mr. Bates is innocent of the death penalty.

E. Aggravating Circumstances are Vague and Overbroad.

Under Florida law, aggravating circumstances "must be proven beyond a

reasonable doubt," Hamilton v. State, 547 So. 2d 630, 633 (Fla. 1989). Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Fundamental error occurred when Mr. Bates' jury received wholly inadequate instructions.

Under Florida law, the sentencing jury may reject or give little weight to any particular aggravating circumstance. A binding life recommendation may be returned because the aggravators are insufficient. Hallman v. State, 560 So. 2d 223 (Fla. 1990). Thus, the jury's understanding of aggravating circumstances may lead to a life sentence. Mr. Bates' jury was not given adequate guidance as to what was necessary to establish the presence of an aggravator. This left the jury with unbridled discretion and violated the Eighth Amendment. In Maynard v. Cartwright, the Supreme Court held that the "channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." 486 U.S. 356, 362 (1980). There must be a "principled way to distinguish [the] case, in which the death penalty was imposed, from the many cases in which it was not." Id. at 363 (quoting Godfrey v. Georgia, 446 U.S. 420, 433 (1980)).

The failure to instruct on the limitations left Mr. Bates's jury free to ignore

the limitations and left no principled way to distinguish his case from one in which the limitations were applied and death was not imposed. Mr. Bates' jury was left with open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Maynard v. Cartwright. Since the jury in Florida is a co-sentencer, prejudice is manifest. Espinosa. The jury was misled by the instructions and the State Attorney's argument as to what was necessary to establish the presence of aggravating circumstances. (see e.g. R. 774-784, 823-24). Relief is proper.

F. Execution by Lethal Injection is Cruel and Unusual.

In light of the United States Supreme Court's recent certiorari review of similar issues regarding the constitutionality of lethal injection, Baze v. Rees, (Docket No. 07-5439), Mr. Bates maintains that execution by lethal injection constitutes cruel and unusual punishment in violation of the Eighth Amendment to the United States Constitution and corresponding Art. I, § 17 of the Florida Constitution. Florida's lethal injection procedures must be compatible with evolving standards of decency and compatible with standards that mark the progress of a maturing society. The process must also be consistent with the notions of the dignity of man, and the State must establish a procedure that is not likely to result in the unnecessary or wanton infliction of pain. See Hudson v. McMillian, 503 U.S. 1 (1992); Trop v. Dulles, 356 U.S. 86 (1958). The existing procedure for lethal injection in Florida violates the Eighth Amendment to the

United States Constitution, as it will inflict upon Mr. Bates cruel and unusual punishment. The lower court found this claim to be procedurally barred because it should have been raised on direct appeal. However, this ignores the very important fact that at the time of Mr. Bates's resentencing and direct appeal lethal injection was not the method of execution employed by the State. Mr. Bates argued that the execution of Florida inmate Bennie Demps by lethal injection demonstrates that Florida Department of Corrections cannot guarantee this procedure can be performed without undue pain and suffering, bodily mutilation, and cruelty. Mr. Demps was executed on June 7, 2000, well after Mr. Bates's direct appeal was final. As such, this claim is not procedurally barred, an evidentiary hearing was required.

G. Capital Sentencing Statute is Unconstitutional.

Florida's capital sentencing statute deprived Mr. Bates of his right to due process of law and constitutes cruel and unusual punishment on its face and as applied. Florida's death penalty statute is constitutional only to the extent that it prevents the arbitrary imposition of the death penalty and narrows the application of the penalty to the worst offenders. See Proffitt v. Florida, 428 U.S. 242 (1976). The Florida death penalty statute, however, fails to meet these constitutional guarantees, and therefore violates the Eighth Amendment to the United States Constitution. Richmond v. Lewis, 113 S. Ct. 528 (1992). Florida's capital

sentencing statute fails to provide any standard of proof for determining that aggravating circumstances "outweigh" the mitigating factors, Mullaney v. Wilbur, 421 U.S. 684 (1975), and does not define "sufficient aggravating circumstances." The statute also does not sufficiently define for the jury's consideration each of the aggravating circumstances listed in the statute. See Godfrey v. Georgia, 446 U.S. 420 (1980). Florida's capital sentencing procedure does not have the independent reweighing of aggravating and mitigating circumstances envisioned in Proffitt. This leads to the arbitrary and capricious imposition of the death penalty and violates the Eighth Amendment. Moreover, Florida law creates a presumption of death where a single aggravating circumstance applies. This creates a presumption of death in every felony murder case, and in almost every premeditated murder case. Once one of these aggravating factors is present, Florida law provides that death is presumed to be the appropriate punishment; this presumption can only be overcome by mitigating evidence so strong so as to outweigh the aggravating factors. This systematic presumption of death cannot be squared with the Eighth Amendment's requirement that the death penalty be applied only to the worst offenders. Richmond v. Lewis, 506 U.S. 40 (1992); Furman v. Georgia, 408 U.S. 238 (1972); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988). To the extent trial counsel failed to properly preserve this issue, defense counsel was ineffective. See Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990).

H. Change of Venue and Pre-trial Publicity.

A defendant in criminal case is entitled to a fair trial by an impartial jury which will render its verdict based on the evidence and argument presented in court without being influenced by outside sources of information. See Irving v. Dowd, 366 U.S. 717 (1961); Rideau v. Louisiana, 373 U.S. 723 (1963); Groppi v. Wisconsin, 400 U.S. 505 (1971); Taylor v. Kentucky, 436 U.S. 478 (1978); Isaac v. Kemp, 778 F.2d 1482 (11th Cir. 1986); Coleman v. Kemp, 778 F.2d 1478 (11th Cir. 1986). Mr. Bates was denied this right when his resentencing was held in Bay County where he was tried for this offense despite the existence of overwhelmingly extensive pretrial publicity and where two prior sentencing proceedings were held. The extensive and prejudicial pre-trial publicity which saturated the community in which Mr. Bates was tried, previously sentenced and ultimately sentenced to death in 1995 was so pervasive it prohibited empanelling an impartial, untainted jury. During individual voir dire, numerous jurors reported knowledge of Mr. Bates' case due to television and newspaper reports from as early as 1982 through 1995. Trial counsel failed to renew his motion to change venue after the individual voir dire showed the jurors had prior knowledge of the case. This was ineffective assistance of counsel.

I. Cumulative Error.

Mr. Bates did not receive the fundamentally fair trial to which he was

entitled under the Eighth and Fourteenth Amendments. See Heath v. Jones, 941 F.2d 1126 (11th Cir. 1991); Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The process in Mr. Bates's case failed because the sheer number and types of errors involved in his trial, when considered as a whole, virtually dictated the sentence that he would receive.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990), the Florida Supreme Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), cumulative prosecutorial misconduct was the basis for a new trial. When cumulative errors exist the proper concern is whether "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). See also Ellis v. State 622 So. 2d 991 (Fla. 1993) (new trial ordered because of prejudice resulting from cumulative error); Taylor v. State, 640 So. 2d 1127 (Fla. 4th DCA 1994). The burden remains on the state to prove beyond a reasonable doubt that the individual and cumulative errors did not affect the verdict and/or sentence. Chapman v. California, 386 U.S. 18 (1967); State v. DiGuilio, 491 So. 2d 1129 (Fla. 1986); Larkins v. State, 655 So. 2d 95 (Fla. 1995).

The flaws in the system which convicted Mr. Bates of murder and sentenced

him to death are many. They have been pointed out throughout not only this pleading, but also in Mr. Bates' direct appeal; and while there are means for addressing each individual error, the fact remains that addressing these errors on an individual basis will not afford adequate safeguards against an improperly imposed death sentence. These errors cannot be harmless. Relief is proper.

CONCLUSION

The foregoing authorities, the trial record, 2006 evidentiary hearing testimony, in conjunction with the summarily denied claims show that a new trial is warranted. Mr. Bates requests that his conviction be vacated and/or any relief which this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Initial Brief has been furnished by electronic filing and by United States Mail, first-class, postage prepaid on this 18th day of January, 2008 to Clerk of Court, Florida Supreme Court, 500 S. Duval St., Tallahassee, FL 32399; Ms. Meredith Charbula, Asst. Attorney General, Dept of Legal Affairs, The Capitol, PL-01, 400 S. Monroe St., Tallahassee, FL 32399-6536.

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I hereby certify that this initial brief is typed in New Times Roman, 14 pt. type.

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