IN THE SUPREME COURT OF FLORIDA

CASE NO. SC07-704

JASON DIRK WALTON,

Appellant,
v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PINELLAS COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page:

Cases

Constitutions

Statutes

Rules

Other Authorities

PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Walton'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;

"RS" – resentencing record on direct appeal;

"PCR-1" & "PCR-2"—records on prior 3.850 appeals to this Court;

"PCR-3" -- record on instant 3.851 appeal to this Court.

REQUEST FOR ORAL ARGUMENT

Mr. Walton 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. Walton, through counsel, accordingly urges that the Court permit oral argument.

STATEMENT OF CASE AND FACTS

A. The initial trials.

Jason Dirk Walton was indicted in Pinellas County, Florida on March 2, 1983, with three counts of first-degree murder in the shooting deaths of Gary Peterson, Bobby Martindale and Steven Fridella. R. 1-2. The three men were found dead from shotgun wounds in Pinellas County in 1982 but the crime went unsolved until Robin Fridella (Steven Fridella's wife) and another man contacted police. They had information that one of the men who shot the victims was Terry Van Royal. As a result Van Royal was arrested and gave information that led to the arrest of Richard Cooper. It was a day later that Mr. Walton and his younger brother, Jeff McCoy, were arrested.

Jason Walton was tried and convicted in February 1984. R. 2475-80. During the penalty phase, prosecutors Doug Crow and Allen Geesey introduced the written confessions of the actual killers (Richard Cooper and Terry Van Royal) in an effort to establish that Mr. Walton "ordered" the shootings. Assistant State Attorney Geesey presented the testimony of a regular jailhouse informant, Paul Skalnik, for the purpose of telling the jury *what co-defendant Cooper had told him* about Mr. Walton's alleged role in the crime. Cooper, who was housed in the same cell with Skalnik while awaiting trial, allegedly gave Skalnik information about Mr. Walton:

> SKALNIK: Mr. Cooper stated that he had been talking to a man by the name of J.D. Walton who he classified as the **ringleader** of the four men . . .
>
> During this time of discussion with Richard Cooper, Mr. Cooper told me that J.D. Walton had told him they were going to eliminate them.

R. 2555 (emphasis added). Following the jury recommendation, Circuit Court Judge William Walker sentenced Jason Walton to death on March 14, 1984. R. 2117.

The State had already obtained convictions and death sentences against Richard Cooper merely a few weeks before Mr. Walton's first trial. During Cooper's penalty phase, which took place in January of 1984, the Assistant State Attorney Crow scoffed at the idea that Mr. Walton had influence over Cooper:

> ASA CROW: I suppose they are going to stand up and say, well, Richard Cooper told the police when he was trying to limit his involvement that the J.D. Walton character, he was Charles Manson and poor Mr. Cooper, it's his fault he's running around killing somebody every time J.D. yells at him. **Well that's ludicrous, it absolutely ludicrous, and I don't know how they are going to argue for that based upon the evidence that you have heard that you could be reasonably convinced that he acted under extreme duress telling someone to kill someone, substantial domination** is telling somebody or yelling at somebody, is that sufficient justification or mitigation of homicide. **That's an incredible proposition**.

Cooper, (SC60-65133) R. 1577-1578.

During Cooper's trial, the State questioned whether or not Mr. Walton was even armed during the crime:

> ASA CROW: But what is the evidence? **What did J.D. Walton have or at least that did this man say that he thought he had. A single shot .357 that wouldn't fire.** And what did Richard Cooper have? A 12-gauge shotgun with four shells and possible more.
>
> Now, was he in a position for anybody to tell him what to do? Was he in a position to be afraid of anyone?
>
> Now, he was ready, posed and willing with his finger on the trigger and he made the decision to pull that trigger and to cock it and to pull the trigger again, and aimed it at a second victim and to cock it again and pull the trigger again and aim it at a third victim and then to reload either the last shot or the fourth shot and to come back in the house and pull the trigger again and then cock it again and eject the shell inside the house.

Cooper, R. 1578-1579 (emphasis added).

The State admitted that there was no evidence to support the idea that Mr. Walton was the mastermind:

> ASA CROW: Substantial domination or extreme duress those don't exist here and there is no evidence.
>
> Have they produced any evidence to substantiate that statement, any evidence whatsoever, any evidence about [what] J.D. Walton is like? Absolutely not. And I submit to you there is a good reason why they didn't because there is not any evidence there to reasonably convince you.

Cooper, R. 1579 (emphasis added).

Richard Cooper hired mental health expert Dr. Sidney Merin to testify on his behalf at the hearing prior to sentencing.[1] As part of Cooper's defense team, Dr. Merin testified that he viewed the crime or the "incident itself. . . . as a panicked reaction to J.D. Walton's emotional and even hysterical command." Id. at 403. He went on to opine that Cooper "was with a high degree of probability maliciously and destructively duped by J.D. in view of the fact that Richard Cooper is a follower type of personality." Id. at 406. Assistant State Attorney Crow vigorously attacked the basis for the doctor's theories regarding Mr. Walton's personality and role in this crime. Cooper, R. 416-418. The prosecutor similarly questioned the validity of Dr. Merin's belief that "J.D. may well have feigned being distressed or excited or even hysterical" in order to get Cooper to participate in the crime. Id. at 418. Ultimately, the prosecutor was successful in vigorously cross-examining the doctor and discrediting his opinion, thus establishing that Mr. Walton was not responsible for Cooper's actions. Cooper was sentenced to death by Judge Walker on March 14, 1984.

In August of 1984, Assistant State Attorneys Bruce Young and Allen Geesey tried and convicted triggerman Terry Van Royal, this time with Judge Fred

[1] Cooper was convicted on January 13, 1984. But, Cooper's sentencing hearing took place on March 14, 1984, after the State presented Walton as the "ringleader" who ordered the shootings at Walton's trial. Cooper, Sentencing, R. 389.

L. Bryson presiding. During Van Royal's trial – that took place after Mr. Walton's - the State countered defense counsel's mitigation with the argument that Van Royal was not in fear of "J.D." and that he was not dominated by him. Van Royal, (SC60-66144) R. at 2229; see also 1882, 2240. On September 18, 1986, Van Royal's conviction was affirmed but his death sentence overturned and a life sentence ordered by this Court based on the delay in entering written findings in support of death. Van Royal v. State, 497 So. 2d 625 (Fla. 1986).[2]

B. Mr. Walton's resentencing.

On direct appeal, this Court reversed the death sentences and remanded Mr. Walton's case for a new penalty phase because of the introduction of Paul Skalnik's hearsay testimony:

> In Bruton v. United States, [391 U.S. 123 (1968)] it was held that a statement or confession of a co-defendant which implicates an accused is not admissible against the accused unless he has an opportunity to confront and cross-examine the co-defendant. To admit such statement is unquestioned error. [citations omitted].
>
> **The record supports appellant's assertion that these confessions were the primary evidence relied on by the state in the penalty phase before the jury and that the trial judge considered the confessions in sentencing appellant to death.**

Walton v. State, 481 So. 2d 1197, 1201 (Fla. 1985) ("Walton I") (emphasis added).

[2] The oral death sentence was imposed on October 19, 1984, without the benefit of written findings. The trial court did not enter written findings in support of the death penalty until April 15, 1985, long after the notice of appeal was filed on Van Royal's case. Mr. Walton's resentencing jury never knew that Van Royal death sentence was reversed.

In 1986, Assistant State Attorney Crow came out of the gate pointing the finger at Jason Walton as the leader of the group:

> On June 18th, 1992, in the Highpoint area of Pinellas County, just a few yards away from this courthouse, Pinellas County Sheriff's Office was called to a scene of three terrible crimes. **An eight-year-old boy just hours earlier . . . . had called the hospital and then called the Clearwater Police Department with a frantic message, hysterically related that his daddy's dead.** The three robbers had come and killed them and ransacked the house. Terrified, he was transferred to the Sheriff's Office, and deputies arrived.
>
> . . .
>
> And there were four people responsible. Richard Cooper, Terry Royal, Jeff McCoy, **teenagers had come down with this man, 25-year-old man at the time J.D. Walton** robbed and pillaged and murdered the three individuals. The evidence will show, and you will hear from **Jeff McCoy, this man's younger brother who is serving a life sentence without parole for 25 years, as a result of being recruited by J.D. Walton in the crime**. . . . .
>
> . . .
>
> And it was about two weeks before the murder that he began **recruiting his young friends** . . . He told them there will be drugs, there will be a lot of money, let's take guns and they did that. **Only one person had any information that there might be something there to steal and that was J.D. Walton.**
>
> . . .
>
> His gun misfired, and **then following his lead Terry Royal and Richard Cooper opened fire resulting in the death of these three young men.**

RS. 493-496 (emphasis added) (State's opening argument).

The State re-presented the facts from the guilt phase during the resentencing. ASA Geesey elicited hearsay testimony from Detective Halliday that Co-Defendant McCoy told him that Mr. Walton was the leader of the group and the one who was giving all the orders. RS. 597. During Jeff McCoy's testimony, Geesey went on to elicit information about how Mr. Walton and the co-defendants went to get high on drugs after the crimes. During this exchange, the jury was informed that they usually went to Mr. Walton's because he had a trailer and that he usually supplied the drugs. RS. 631-32. The State portrayed Mr. Walton as the ringleader:

> ASA GEESEY: Of the four of you, three of you were teenagers and Jason was the only one in his twenties; isn't that correct?
>
> MCCOY: Yes, sir.
>
> . . .
>
> ASA GEESEY: Inside the house where the murders occurred, other than the one time Richard Cooper told you to tie up the victims after being told to do that by your brother, did anybody ever give any instructions to you?
>
> MCCOY: Not to me, no, sir.
>
> ASA GEESEY: Did you hear anybody giving orders other than Jason Walton?
>
> MCCOY: Not where I was at.[3]

RS. 631-32.

[3] The defense objection to the question regarding the orders was overruled.

ASA Crow left the jurors with the argument that Mr. Walton was the ringleader who went out recruiting and arming "teenagers" to do his "dirty work:"

> But the evidence is damning, and **it points to this man's responsibility as a ringleader**, as a participant, as a person with a motive. For if you ask yourselves who had the motive, who had the reason for these three young people to die, there is only one answer in those four defendants, and the answer is J.D. Walton.

RS. 797 (State's closing argument) (emphasis added).

> It was a brutal, bloody, atrocious crime, and . . . it's of this man's making and his cohorts in crime, **the three teen-agers he recruited, armed and brought down here with him to execute three men for which only he possessed a motive to kill.**

RS. 799 (emphasis added).

> . . .two weeks before the murder happened he began recruiting his friends, his friends, teen-agers, 19-year-old Richard Cooper and Terry Royal, and his 18-year-old brother to be participants in the crime.

RS. 800-801.

> But J.D. Walton knew how to get there, and he led his recruits there to commit the crimes that he had intended, and he told them and what would you tell young people if you wanted to do something terrible like this, young people involved in drugs and the drug culture, young people who probably needed some money, lots of drugs, big cash, were any found? . . . But it was a carrot in front of these teen-agers that this man helped them urge commit the crimes.

RS. 802.

> They planned to bring the weapons down, and **J.D. took the handgun, typically he had other people do the dirty work, but unquestionably, he was the ringleader. He was the planner, he was the prime mover among these younger individuals.**

RS. 803 (emphasis added).

> . . . Jason Walton arrived last because he made sure as ring leader, as a person most affected, as a person who was identified, that there were no witnesses left and that the vendetta was carried out.

RS. 810.

There was no new evidence to support the State's theory in aggravation of the death sentence. On August 14, 1986, the jury recommended that death sentences be imposed by a vote of 9 to 3. RS. 864. On August 29, 1986, the State presented the trial court and Mr. Walton's lawyer with a lengthy factual and legal memorandum supporting a death sentence RS. 150-162. The State's memorandum presented a number of material "facts" which were not present in this record. Circuit Court Judge Mark McGarry followed the jury's recommendation and imposed death.[4]

C. Prior post-conviction proceedings.

The initial course of post-conviction litigation was complicated by the State's failure to turn over records to which Mr. Walton was entitled. Mr. Walton filed his initial post-conviction motion on December 17, 1990**.** PCR-1. 294.

[4] This Court denied relief on Mr. Walton's direct appeal following his resentencing. Walton v. State, 547 So. 2d 622 (Fla. 1989) cert. denied, Walton v. Florida, 110 S. Ct. 759 (1990) ("Walton II"). Although the State's use of psychiatric testimony concerning the child found unhurt at the murder scene was in violation of the Eighth Amendment, and a nonstatutory aggravating factor, this Court found the error to be harmless. This error must be considered cumulatively with the due process violations presented herein.

Following a limited evidentiary hearing on two claims, the lower court denied all of Mr. Walton's claims in 1991. PCR-1. 933-36. An appeal was taken to this Court in which Mr. Walton challenged the denial of the Strickland/Brady/Giglio claim due to the prosecutors' use of inconsistent theories in securing the death sentences against Mr. Walton and a public records claim. PCR-1. 958. In 1993, this Court relinquished jurisdiction to the trial court and ordered it to allow Mr. Walton's public records requests before deciding the merits of the other issues raised. Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993).

During the course of the litigation, Mr. Walton alleged that the resentencing proceeding was contaminated with the very same evidence that this Court rejected in Walton I when it remanded for resentencing. PCR-3. 43-55. Mr. Walton alleged that Judge McGarry's written sentencing order relied on facts that were not in evidence and that this Court had already determined that the facts were inadmissible and attributable only to Richard Cooper and Paul Skalnik. PCR-3. 45. The Order states:

> The evidence indicates Jason D. Walton then **grabbed** one of the victims **by the hair and attempted to fire the .357 at him; the gun misfired. Shortly afterward, Cooper and Royal opened fire . . . All of the victims in the ghastly incident died as a result of gunfire brought down upon them through the leadership of the defendant, Jason D. Walton.**

RS. 198 (emphasis added).

In 1998, Mr. Walton alleged that Paul Skalnik is and was a state agent:

> This case is particularly distressing because it calls into question the conduct of the State and its bizarre relationship with Paul Emil Skalnik. As if it were not enough that this resentencing was infected with non-record extraneous matter, it has now been ascertained that much of the information supplied by Mr. Skalnik was manufactured.

PCR-3. 91 (Third Amended Motion to Vacate Judgments of Conviction and Sentence with Special Request for Leave to Amend filed on November 6, 1998). Mr. Walton went on to allege the significant problems that occurred as a result of the State's use of Paul Skalnik, as well as the facts that point to the allegation that the police were feeding him information:

> Mr. Skalnik was in possession of facts which raised further the question of his role in the system. According to Mr. Skalnik, he was isolated from the outside world, was isolated from other prisoners, has no knowledge of the defendants, and had no contact with any witnesses in the case. On June 14, 1983, Mr. Skalnik gave a taped statement outlining all of his knowledge in the case as allegedly related to him by Mr. Cooper. Eight months later, however, Mr. Skalnik came to know a remarkable piece of information known only to the detectives in the case and eight-year-old Chris Fridella. This information was not contained in Mr. Skalnik's lengthy statement. This information can only be found in one document: on one page in the police reports in police custody.

PCR-3. 94-95.

Mr. Walton detailed Paul Skalnik's role as a state agent in other cases as well:

> One thing is certain. Before the Highpoint Murders, Mr. Skalnik had been instrumental in securing for the State convictions in over thirty cases. As of 1984, because of his intense participation as an informant, he was granted special privileges and protection and housed in the Pinellas County jail.
>
> The fine line between Paul Skalnik, the informant, and the State blurred. They became one. There are more incidents in this case and in other cases which show that Mr. Skalnik and the State mutually shared facts, such facts lending credibility to Mr. Skalnik's testimony. The various conversations between Skalnik and State authorities oftentimes resulted in Mr. Skalnik portraying the State's theory of the case. For instance, in Mr. Walton's first penalty phase, Mr. Skalnik not only set forth the State's theory of the case, he added additional elements of premeditation that are refuted by all of the evidence in the record.

PCR-3. 96-97.

After being denied relief in the circuit court following the second round of evidentiary hearings, Mr. Walton filed a supplement to the initial brief that had been filed in 1992. On appeal, Mr. Walton raised several issues, including the following: (1) the due process violation committed by the trial court in relying on unreliable, non-record facts concerning Mr. Walton's participation that were presented during the first penalty phase in support of the death sentences; (2) the Brady violation due to the State's failure to turn over information about a witness that could have been used to show that Mr. Walton was not the mastermind of these crimes; (3) the trial court's failure to consider the newly discovered evidence of Van Royal's testimony that also would have demonstrated that Mr. Walton was

not the "ringleader;" (4) the issue of disparate treatment because Van Royal, one of the shooters, received a life sentence; and (5) the trial court error in allowing a State mental health expert to testify against Mr. Walton in post-conviction due to his prior relationship with co-defendant Cooper. This Court affirmed the denial of post-conviction relief. Walton v. State, 847 So. 2d 438 (2003).

D. Current post-conviction litigation.

After Mr. Walton filed his first habeas corpus petition in federal court, the United States Supreme Court rendered its decision in Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005).[5] In Bradshaw v. Stumpf, the United States Supreme Court recognized that a prosecutor's use of inconsistent and irreconcilable theories to secure a death sentence against separately tried co-defendants can violate due process. Additionally, Mr. Walton learned about new witnesses who could establish what Mr. Walton has been alleging for fifteen years: that Paul Skalnik is and was a state agent. Based on the U.S. Supreme Court precedent and the discovery of newly discovered evidence that supported the previously alleged Brady claims, Mr. Walton decided to file a successive motion for post-conviction relief pursuant to Rule 3.851 on February 10, 2006. PCR-3. 1-25.

[5] Mr. Walton's Petition for Writ of Habeas Corpus in the United States District Court, Middle District of Florida filed on September 30, 2004 remains pending. Walton v. McDonough, 8:04-cv-2176-T-26TBM. The proceedings have not been stayed during the course of this State court litigation.

In the Rule 3.851 motion, Mr. Walton alleged that he was in possession of fourteen boxes of documents that related to Paul Skalnik. Throughout the course of protracted litigation regarding public records in this case, both during the course of litigation on the initial 3.850 motion before this Court and during the course of litigation in separate lawsuits filed pursuant to chapter 119, the State and law enforcement agencies have consistently maintained that Paul Skalnik is not a state agent and has refused to turn over many documents based on various exemptions. See, i.e., Jason D. Walton v. Bernie McCabe, Office of the State Attorney, Case No. 94-7220-CI-20, Sixth Judicial Circuit, Pinellas County, Florida. Mr. Walton learned that in the course of litigation in federal court, co-defendant Richard Cooper filed three affidavits from witnesses who could establish that Mr. Skalnik was working for the Pinellas County Sheriff's Office and the Office of the State Attorney in the Sixth Judicial Circuit as an informant. These affidavits formed the basis of the Rule 3.851 motion and were provided to the lower court. The successive motion was filed based on the newly discovered evidence that could prove what Mr. Walton has alleged all along: Paul Emil Skalnik is a state agent. PCR-3. 3-10.

In addition to the substantive issues regarding the facts in his case, Mr. Walton also challenged Florida's lethal injection procedures under the Eighth Amendment and alleged that the restriction on his access to public records

pursuant to Rule 3.852 is unconstitutional. PCR-3. 20-24. The motion was subsequently amended to include an Eighth Amendment challenge based on the data revealed by the American Bar Association's report that exposed systemic flaws Florida's death penalty. PCR-3. 578-264; 2524-2830 (American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty System: The Florida Death Penalty Assessment Report (Sept. 2006)).

The Honorable W. Douglas Baird, Circuit Court Judge, denied Mr. Walton's public records requests by written order dated November 6, 2006. PCR-3. 2497-2523. The lower court relied Sims v. State, 754 So. 657 (Fla. 2000), Rutherford v. State, 926 So. 2d 1100 (Fla. 2006), and Hill v. State, 921 So. 2d 579 (Fla. 2006) in denying access to the records that could have helped Mr. Walton prove his claims. Before the lower court conducted the case management conference that was scheduled for December 21, 2006, the State of Florida's botched execution of inmate Angel Nieves Diaz was widely publicized in the press. On December 14, 2006, the Office of the Capital Collateral Representative for the Southern Region (CCRC-South) filed a petition in this Court challenging the method of execution on behalf of Ian Deco Lightbourne and other death sentenced individuals represented by that office including Mr. Walton. PCR-3. 2989-3009.

Based on the new evidence that would support Mr. Walton's pending Eighth Amendment challenge, he sought to continue the case management conference.

PCR-3. 2985-3035. The circuit court reset the case management hearing to January 16, 2007. PCR-3. 625. At the case management conference, Mr. Walton made it clear that he was not waiving or withdrawing his pending claim nor did he waive his right to challenge any future protocol. PCR-3. 1765-67; 1773-74. On February 9, 2007, this Court dismissed Mr. Walton's interest in the petition without prejudice:

> Other than petitioner Lightbourne, all of the petitioners' claims are dismissed. **The dismissal is without prejudice to the petitioners' filing any claim which they may have in the appropriate court for that individual petitioner.** This Court has made no decision as to the validity of the claims raised and whether those claims are timely or otherwise barred. **If a petitioner files a claim, the court in which the claim is filed shall treat the claim as if it had initially been filed in that court.**

Ian Deco Lightbourne et al v. Bill McCollum etc., et al, SC06-2391 (February 9, 2007) (emphasis added).

The lower court denied relief by order dated March 9, 2007 - before Mr. Walton ever had the opportunity to amend his Eighth Amendment Claim. PCR-3. 626-637. Upon receipt of the order summarily denying relief, Mr. Walton filed a Motion for Rehearing challenging the lower court's reliance upon this Court's opinion in Diaz v. Florida, 945 So. 2d 1136 (Fla. 2006) in denying the lethal injection claim. PCR-3. 1829-1843. Mr. Walton explained that he was in the process of drafting a motion for leave to amend based on newly discovered

evidence premised upon the events surrounding the execution of Angel Diaz and the evidence that the State has withheld information that would support Mr. Walton's claims. Mr. Walton did not begin preparing to file an amended claim until after he received a copy of the The Final Report with Findings and Recommendations, released by The Governor's Commission on Administration of Lethal Injection and dated March 1, 2007. PCR-3. 1829-30. The Motion for Rehearing was denied on March 29, 2007 and this appeal follows. PCR-3. 1845-47.

STANDARD OF REVIEW

Mr. Walton has presented several issues which involve mixed questions of law and fact. Thus, a *de novo* standard applies. Bruno v. State, 807 So. 2d 55, 61-62 (Fla. 2001).

SUMMARY OF THE ARGUMENT

ARGUMENT I: In Bradshaw v. Stumpf, the United States Supreme Court has recognized that the State's conduct in flip-flopping theories in order to secure death sentences against separately tried co-defendants can violate due process. Mr. Walton has consistently argued for fifteen years that although it undisputed that he never fired any of the fatal shots, the State sought and obtained the death penalty in his resentencing trial based on the theory that Mr. Walton organized a premeditated murder of three people. This scenario was a total fiction created by the State and a

violation of due process. The foul play that occurred in Mr. Walton's case is similar to the misconduct that rendered Mr. Stumpf's death sentence unreliable, except that the prosecutor's behavior in Mr. Walton's case was even more egregious. Mr. Walton is entitled to a new resentencing proceeding due to the prosecutor's use of inconsistent theories beginning with the initial trials and continuing throughout the post-conviction litigation.

ARGUMENT II: Mr. Walton has alleged for over fifteen years that the State's improper use of jail-house informant and state agent, Paul Skalnik, contributed to the death sentences in violation of Mr. Walton's Constitutional rights including the right to confront the witnesses against him, the right to a fair trial, and his right to due process. Mr. Walton filed his Rule 3.851 motion after he learned that during the course of litigation in federal court, co-defendant Richard Cooper filed three affidavits from witnesses who can establish what Mr. Walton has said all along: that Skalnik is and was a State agent. The lower court erred in denying a hearing on this claim because the files and records do not conclusively show that he is not entitled to relief.

ARGUMENT III: Mr. Walton challenged Florida's then-existing method of execution based on research that showed that the sequential administration of sodium thiopental for anesthesia and pancuronium bromide to induce paralysis and potassium chloride to stop the heart and cause death raises serious questions as to

whether this method is cruel and unusual under the Eighth and Fourteenth amendments of the United States Constitution. This challenge was pending when the State of Florida's execution of Angel Diaz became a nationally publicized debacle. The lower court's failure to allow Mr. Walton to amend his pending Eighth Amendment challenge was abuse of discretion.

ARGUMENT IV: Mr. Walton alleged that a report produced by the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team established newly discovered evidence that Florida's death penalty system is so seriously flawed and broken that it does not meet the constitutional requisite of being fair, reliable or accurate. The lower court erred in denying a hearing on this claim.

ARGUMENT I

THE STATE'S USE OF INCONSISTENT THEORIES IN ORDER TO SECURE DEATH SENTENCES AGAINST MR. WALTON AND HIS CO-DEFENDANTS VIOLATED MR. WALTON'S RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS OF THE U.S. CONSTITUTION

A. The Prosecutor has a duty to seek justice.

In Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005), the United States Supreme Court recognized that a prosecutor's use of inconsistent and irreconcilable theories to secure a death sentence against separately tried co-defendants can violate due

process. In Bradshaw v. Stumpf, the Supreme Court reviewed the voluntariness of Stumpf's guilty plea to the charge of aggravated murder for the shooting death of the victim and whether his conviction and death sentence could stand in light of his allegation that his due process rights were violated. Id. at 2402-2403. Stumpf's position was that the prosecutor's decision to take a contrary position regarding the identity of the sole triggerman in the trial of the co-defendant violated the fundamental right of due process.

John David Stumpf was arrested in connection with his role in the home invasion robbery of Norman and Mary Jane Stout. During the course of the robbery, committed by Stumpf and Clyde Daniel Wesley, both victims were shot but only Mr. Stout survived. While it was undisputed that Stumpf shot the husband, the identity of the triggerman who killed Mrs. Stout remains unclear.[6] Id. at 2402-2404. Stumpf pled guilty to the charge of aggravated murder and a three-judge panel held an evidentiary hearing to determine the sentence. The prosecutor presented evidence in support of the theory and argument that Stumpf was the actual shooter who killed the wife. Despite Stumpf's position that Wesley was the triggerman, Stumpf was sentenced to death for the aggravated murder of Mary Jane Stout. Id. at 2403.

[6] The driver of the getaway car, Norman Leroy Edwards, eventually testified against both Stumpf and Wesley in separate proceedings.

In a later proceeding, Wesley was also tried and convicted of the murder. By this time, the prosecutor had a statement from a jailhouse informant that Wesley had confessed that he was the actual shooter. At trial, Wesley denied this and the jury was informed that Stumpf had already received a death sentence for his role in the crime. In spite of the prosecutor's vigorous argument that Wesley should be sentenced to death due to his status as the actual shooter (contrary to the position taken at Stumpf's sentencing hearing), the jury recommended life. Id. at 2403-2404.

Stumpf sought to withdraw his plea based on the evidence and argument that was presented at Wesley's trial. Interestingly, the prosecutor jumped back to the original inconsistent and irreconcilable theory that Stumpf was the actual shooter during the course of his post-conviction proceedings. Faced with the predicament of having Stumpf's conviction and sentence overturned based on the newly discovered testimony of the jailhouse informant, the prosecutor now contended that the informant was not credible. Stumpf v. Mitchell, 367 F. 3d 594, 614-616 (6th Cir. 2004), rev'd and remanded by Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005).

The Sixth Circuit Court of Appeals overturned the lower court's denial of Stumpf's eventual petition for federal habeas corpus relief on two alternative grounds:

> first, that his guilty plea was unknowing and involuntary because he was manifestly not aware that specific intent was a element of the crime to which he pleaded guilty and second, that Stump's due process rights were violated by the state's deliberate action in securing convictions of both Stumpf and Wesley for the same crime, using inconsistent theories.

Stumpf v. Mitchell, 367 F. 3d at 595.

The Sixth Circuit found that the conviction obtained through the use of inconsistent theories violated the notion of fundamental fairness:

> "[b]ecause inconsistent theories render convictions unreliable, they constitute a violation of due process rights of any defendant in whose trial they are used.

Stumpf v. Mitchell, at 613. The fact that the prosecutor secured the later conviction against Wesley based on newly discovered evidence was not sufficient to cure the problem in this case, according to the lower federal court, because Stumpf had timely filed a motion to withdraw his guilty plea and the State took no corrective action. Id. at 616. Thus, the Sixth Circuit clearly was concerned with the State's disingenuous behavior that extended well into Stump's post-conviction proceedings.

The U.S. Supreme Court ultimately rejected Stumpf's collateral attack of his guilty plea based on the characterization of the plea being a result of what may have turned out to be a "poor deal" and not the product of an uninformed decision. Bradshaw v. Stumpf, at 2407. The Court further concluded that despite the use of

patently irreconcilable theories, Stumpf's conviction would stand because the "precise identity of the triggerman was immaterial to Stump's conviction for aggravated murder." Id. However, the Court went on to recognize that the use of the alternate theories required a remand to the lower court in order to determine what effect the State's conduct may have had on Stumpf's sentence and to determine whether the imposition of the death penalty violated due process. Id. 2407-08. The Supreme Court made this distinction because of the possibility that Stumpf's role in the offense may have been a material fact that resulted in his death sentence. Id. at 2408. The U.S. Supreme Court recognized that the flip-flopping by the State in order to secure the death sentence against Stumpf may have violated due process even though the change in theories occurred *after* his conviction and sentence. Id. at 2407-2408.

Justice Souter wrote separately in order to frame the issues in the case:

> As I see it, Stumpf's argument is simply that a death sentence may not be allowed to stand when it was imposed in response to a factual claim that the State necessarily contradicted in subsequently arguing for a death sentence in the case of a codefendant.
>
> Stumpf's position was anticipated by Justice Steven's observation 10 years ago that **'serious questions are raised when the sovereign itself takes inconsistent positions in two separate criminal proceedings against two of its citizens,' and that 'the heightened need for reliability in capital cases only underscores the gravity of those questions** . . . .' Jacobs v. Scott, 513 U.S. 1067, 1070, 130 L.Ed. 2d 618, 115 S. Ct. 711 (1995) (citation and internal quotation marks omitted).

Bradshaw v. Stumpf, at 2408 (Souter, J., concurring) (emphasis added). Those serious questions are raised in this case as well.

B. The disingenuous use of inconsistent theories infected the entire penalty phase proceeding.

1. INTRODUCTION.

Mr. Walton has consistently argued for fifteen years that although it is undisputed that he never fired any of the fatal shots, the State sought and obtained the death penalty in his resentencing trial based on the theory that Mr. Walton organized a premeditated murder of three people. This scenario was a total fiction created by the State and a violation of due process. PCR-1. 168-169; see also Supplemental Brief of Appellant, p. 24, dated 10/24/01. The scenario in Mr. Walton's case is similar to Mr. Stumpf's, except that the prosecutor's behavior in this case was even more egregious. In Stumpf's case, the prosecutor argued that the co-defendant was the actual shooter based on newly discovered evidence and after Stumpf had already been convicted and sentenced. The serious foul play came about during Stumpf's post-conviction proceedings when the *same* prosecuting attorney[7] attempted to maintain the conviction and sentence. The prosecutor vouched for the credibility of the jailhouse informant in Wesley's trial

[7] ASA Crow was involved in the prosecutions of both Cooper and Mr. Walton. ASA Geesey prosecuted both Van Royal and Mr. Walton.

but later argued that he was not credible and that there was evidence to support the theory was Stumpf was the triggerman all along.

In this case, prosecutor Crow successfully argued at co-defendant Cooper's trial that it was "ludicrous" and an "incredible proposition" that Cooper was under the control and substantial domination of Mr. Walton; that there was not "any evidence" that could reasonably convince the jury of that fact. Cooper, R. 1577-78. This version was put forth in order to convince Cooper's jury that the statutory mitigator that he was under the substantial domination of another would apply. Assistant State Attorney Crow scoffed at the idea that Mr. Walton had influence over Cooper:

> ASA CROW: I suppose they are going to stand up and say, well, Richard Cooper told the police when he was trying to limit his involvement that the J.D. Walton character, he was Charles Manson and poor Mr. Cooper, it's his fault he's running around killing somebody every time J.D. yells at him. **Well that's ludicrous, it absolutely ludicrous, and I don't know how they are going to argue for that based upon the evidence that you have heard that you could be reasonably convinced that he acted under extreme duress telling someone to kill someone, substantial domination** is telling somebody or yelling at somebody, is that sufficient justification or mitigation of homicide. **That's an incredible proposition**.

Cooper, (SC60-65133) R. 1577-1578. The prosecutor went on to tell Cooper's jury that "substantial domination or extreme duress those don't exist here and there is no evidence." Cooper R., 1579.

Nevertheless, in Mr. Walton's first trial in 1984, prosecutors Crow and Geesey introduced the written confessions of Cooper and Van Royal in order to show that Mr. Walton ordered the shootings. The State also presented the testimony of jailhouse informant Paul Skalnik in an effort to establish that Jason Walton was the dominator or the "ringleader." Just a few month later, prosecutors Young and Geesey told Van Royal's jury that Van Royal was not in fear on Jason Walton. By the time Mr. Walton's case was remanded for resentencing, the ASA Crow was at it again:

> They planned to bring the weapons down, and **J.D. took the handgun, typically he had other people do the dirty work, but unquestionably, he was the ringleader. He was the planner, he was the prime mover among these younger individuals.**

RS. 803 (emphasis added). All along, it was the same set of prosecutors arguing different facts to different jurors depending on the intended result.

Unlike the situation in Stumpf's case, there was no new or different evidence to support the State's duplicitous use of alternate positions. Also unlike the situation in Stumpf's case, Mr. Walton was sentenced to death *after* Cooper was sentenced to death based on a different version and theory. The State's use of inconsistent and irreconcilable theories infected Mr. Walton's entire proceedings. As alleged in the Rule 3.851 motion, the State tainted the resentencing proceeding by putting "facts" from the record in the first trial – unreliable hearsay - in the

written argument in support of the death sentence; suppressed material information concerning a key witness that could have been used in mitigation to establish that Mr. Walton was not the ringleader in these crimes; argued at co-defendant Van Royal's trial that Mr. Walton was the "ringleader" but has tried to discredit newly discovered evidence that Van Royal never said that Walton was the mastermind of the group; and unethically used a mental health professional with a conflict of interest in order to continue the charade well into Mr. Walton's post-conviction proceedings. PCR-3. 10-19. Mr. Walton is entitled to a new penalty phase proceeding.

2. THE LOWER COURT ERRED IN DENYING RELIEF.

In erecting a procedural bar to Mr. Walton's Stumpf claim, the lower court looked to Fla. R. Crim. P. 3.851(d)(2)(B) which states that a claim is time barred unless "the fundamental constitutional right asserted was not established within the period provided for in subdivision (d)(1) and has been held to apply retroactively." PCR-3. 632-33. The lower court erred in finding that this newly recognized right has not been held to apply retroactively: in the case of Bobby Raleigh, this Court considered a Stumpf claim that was raised in oral argument in a post-conviction case on the merits. Raleigh v. State, 932 So. 2d 1054 (Fla. 2006).[8] This Court

[8] Raleigh's conviction and sentence became final in 1998. Raleigh v. State, 705 So. 2d 1324 (Fla. 1997), cert. denied, 525 U.S. 841.

recognized that in Stumpf, United States Supreme Court held that the use of inconsistent theories warranted remand to determine what effect the alternative arguments may have had on the defendant's sentence and to determine whether the death penalty violated due process. Raleigh. Ultimately, with respect to Mr. Raleigh, this Court held that relief was not warranted because the State did not take an inconsistent position in the respective trials. Id. As in the Raleigh case, there is no procedural impediment to this due process claim. See Van Poyck v. State, 961 So. 2d 220, 227 (Fla. 2007) (acknowledging that Stumpf stands for the proposition that "a due process claim grounded in inconsistent positions taken by the prosecution in trials of co-defendants" may impact on the materiality of who was the triggerman).

With respect to the merits, the lower court recognized that Mr. Walton challenged the State's arguments in aggravation as presented in his trial in advocating for a death sentence as compared to the arguments presented in the co-defendants' trials in support of the position that they were not under extreme duress or the substantial domination of Jason Walton at the time of the murders. PCR-3. 631. However, the lower court erred in determining that the theories presented by the State in the Walton, Cooper, and Van Royal trials were not "legally inconsistent." PCR-3. 633. The lower court began its analysis by reviewing this Court's prior decision with respect to the State's presentation of

inconsistent statements that was raised in Mr. Walton's case in the context of an ineffective assistance of counsel claim:

> Evidence introduced at Walton's trial showed that Walton originated the plan to rob the victims on a rainy night, Walton armed the group prior to the robbery, and Walton was the only defendant involved who knew the location of the victims' house. See Walton II, 547 So. 2d at 623-24. In the face of this overwhelming evidence, it is clear that the introduction of two statements by a state attorney in a codefendant's trial would not have been overly persuasive. Certainly, non-introduction of this evidence does not undermine our confidence in the outcome. Walton, 547 So. 2d at 456.

The lower court found the following:

> [T]he State's theories advanced in each of these proceedings were legally consistent with one another. During Walton's second penalty phase proceeding following remand, [footnote omitted] the Stare argued in its opening and closing statement that Walton was the leader of the burglary and subsequent murders in that he recruited his co-defendants to commit the burglary and subsequent murders in that he recruited his co-defendants to commit the burglary, provided firearms to his co-defendants prior to the burglary, and was the only co-defendant who knew the location of the residence to be burglarized. [record citation omitted]. At no time during this proceeding did the State argue that Walton forced his co-defendants to shoot the victims. Rather, the argument advanced by the State was that Walton was the first defendant to attempt to fire at the victims and, after his handgun misfired, the other co-defendants followed his lead and shot the victims. This theory is in no way inconsistent with the State's argument at the Cooper and Van Royal proceedings that those defendants were not acting under extreme duress or the substantial domination by Walton when they shot the victims. PCR-3. 634.

The lower court's determination that the positions taken by the state in Walton and his co-defendants' cases were "legally consistent" seems to be based on the idea

that the *results* sought were not *necessarily* mutually exclusive – the lower court failed to consider what the juries were actually told based on the facts presented. One person can be the leader of a group while the members may not necessarily be under the influence of that leader; this may be the case during a criminal act or in any other context. The problem here, i.e., the due process violation, lies in the simple axiom that the ends do not justify the means in our system of justice.

3. THE STATE CONTAMINATED THE RESENTENCING PROCESS BY ASSERTING NON-RECORD "FACTS" IN SUPPORT OF THE ALTERNATE THEORY THAT MR. WALTON WAS THE RINGLEADER.

The State advanced the current theory of the crime – that Mr. Walton was the ringleader – in the Sentencing Memorandum provided to the trial court at the resentencing. RS. 150-152. The prosecutor represented that certain facts, *which are not found anywhere in the record*, were in the record for the trial court's consideration. As a result, these non-record "facts" became the basis for Mr. Walton's death sentence. The "facts" in the sentencing order tracked the language contained in the State's Sentencing Memorandum. As a result of the State's actions, the resentencing proceeding was contaminated by the very evidence forbidden by this Court in State v. Walton, 481 So. 2d 1197 (Fla. 1985):

> Appellant contends he was denied his right to confront witnesses against him in the penalty phase of his trial in violation of our decision in Engle v. State, 438 So. 2d 803 (Fla.1983), cert. denied, 465 U.S. 1074, 104 S. Ct. 1430, 79 L.Ed.2d 753 (1984), because the confessions of codefendants Cooper and McCoy were presented to the jury and considered by the judge in imposing sentence, without Cooper and McCoy being available for cross-examination. We agree with this contention and find that a new penalty trial before a new jury is required.

Id. at 1200.

Despite the reasons for the reversal in Walton I, the State advised the court that inadmissible assertions attributable only to co-defendant and actual killer Richard Cooper, and state informant Paul Skalnik, were in evidence. RS. 150-152. The sentencing court merely accepted the State's memorandum as a draft sentencing order. That Order recites:

> The evidence indicates Jason D. Walton then **grabbed one of the victims by the hair and attempted to fire the .357 at him; the gun misfired. Shortly afterward, Cooper and Royal opened fire. . . . All of the victims in the ghastly incident died as a result of gunfire brought down upon them through the leadership of the defendant, Jason D. Walton.**

RS. 198 (emphasis added). This Court specifically noted that these words were attributable *exclusively* to Richard Cooper and Paul Skalnik:

> Cooper's statement also indicated that when appellant's gun failed to discharge, appellant ordered Cooper and Van Royal to shoot the victims and they complied. Cooper's statement further reflected that when he left the house, appellant called him back to shoot Fridella again. Cooper's **former cellmate, who was called as a witness for the state to corroborate Cooper's confession**, testified that Cooper

> told him appellant was the **"ringleader" and that appellant informed Cooper prior to their arrival at the victim's house that they were going to "eliminate them."**

Walton I, 481 So. 2d at 1198-99 (emphasis added).

The "facts" as set forth in the Order are facts that were found only in Cooper's confession and Skalnik's testimony. That the State Attorney's Office wrote these facts into the Order thus injecting the order with extremely prejudicial language is unquestionable: the Sentencing Memorandum is part of the Court record. RS. 150, 152. These facts are simply not in evidence. There is no testimony in the resentencing proceeding that even resembles this information. There is no evidence in the record supporting the finding that the victims "died as a result of gunfire brought down upon them through the leadership of the defendant, Jason D. Walton." RS. 198. Nevertheless, these false and tainted "facts" were fed to the court in the State's memorandum and then found their way into the Sentencing Order. Thus, the State's decision to flip-flop and use alternate theories, depending upon who was being tried, resulted in actual prejudice to Mr. Walton.

4. THE STATE WITHHELD EVIDENCE THAT WOULD HAVE ESTABLISHED THAT MR. WALTON WAS NOT THE RINGLEADER.

Mr. Walton previously established that the State withheld materials, documents, and information about Robin Fridella.[9] Ms. Fridella was a key person in this case given her status as the wife of victim Steven Fridella, the brother of victim Gary Peterson, and ex-lover of Mr. Walton. The withheld information could have been used to attack the State's theory of the case: that the murders were the result of a robbery and that Mr. Walton was the "mastermind" who had control over three young boys. The new information shows that the "mastermind" may have been the person who would do anything to keep her children. The withheld information showed that Robin Fridella was not to be believed; may have been involved in the murders; and may have had a strong influence over Jason Walton that was not known by the jury.[10]

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[9] This Court considered and rejected Mr. Walton's Brady claim regarding the withheld materials on his appeal of the 3.850. Therefore, these facts were only being presented to establish that the State's use of inconsistent theories infected the entire process. However, Mr. Walton does not waive or abandon any issues previously raised with respect to the suppressed materials.

[10] At the 1999 evidentiary hearing, the trial attorney identified a police report that showed a civil trespass violation against Robin Fridella filed by Steven Fridella involving the couple's son that had been withheld. PCR-2. 3922, 4253 (Exhibit 7). The trial attorney also identified a Pinellas County Sheriff's Office supplemental report dated June 18, 1982 that he had never seen. The report revealed that Robin Fridella was administered a polygraph about three days after the homicide and it indicated that she was not telling the entire truth and was deceptive in her answers.

At the 1999 evidentiary hearing, Dr. Pat Fleming testified that the withheld information was "critical" and would have impacted on her initial evaluation. PCR-2. 4121. For example, Dr. Fleming explained that the crime was inconsistent with Mr. Walton's previous history and non-violent behavior. Dr. Fleming said that the State painted a picture of Mr. Walton as a very controlling and aggressive man but the withheld information rebutted that argument and explained the effect that Mrs. Walton's abandonment had on Mr. Walton, why he was a passive follower and that Mrs. Fridella was a controller and "...she was an angry woman." PCR-2. 4141. Dr. Fleming testified that her initial interview of Mr. Walton in 1990 was accurate but incomplete. PCR-2. 4135. At that time, she simply viewed Robin Fridella as a girlfriend and she did not realize the control she exercised over

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PCR-2. 3923-24, 4254 (Exhibit 8). Trial counsel also identified information from handwritten police field notes that said, "Robin didn't get along with her brother Gary Peterson. If she couldn't have Christopher and Steven back, no one could have him. Told Robin is involved with MC gang connection". PCR-2. 3928, 4256 (Exhibit 10).

Trial counsel also identified police handwritten notes that said, "Had a lot of problems with Robin over the children. She said if she couldn't have them, no one would. ...Robin said she would do anything to get the kid". PCR-2. 3929 (Exhibit 11). Several of the handwritten notes from the police indicate that they interviewed people who knew Mrs. Fridella and Steve Fridella and knew that they fought over custody of the children. One note indicated that Steve Fridella attempted to change the joint custody status and get full custody of his children. PCR-3. 3931, 4260 (Exhibit 14). The withheld information also showed that Mrs. Fridella once found her husband in bed with another woman. One witness told police, "Steve burned her enough that she might have something to do with it". PCR-3. 4258 (Exhibit 12).

Mr. Walton. In 1991, Mr. Walton was unaware that his mother's neglect and Mrs. Fridella's manipulation went hand in hand to move his behavior at the time of the crime. Had the withheld information been available in 1990, Dr. Fleming said it would have opened a new line of questioning and examination for her. Because of the State's game playing, Mr. Walton was deprived of his right to present relevant mitigating evidence and the ability to confront the State's disingenuous portrayal of him as the "ringleader."

5. THE STATE CONTINUED TO PLAY BOTH SIDES DURING POST-CONVICTION PROCEEDINGS: DR. SIDNEY MERIN.

Dr. Sidney Merin, Ph.D., was retained as a mental health expert by co-defendant Cooper and he ultimately testified for the defense prior to Cooper's sentencing. The State was successful in discrediting his testimony during rigorous cross-examination:

> [BY ASA CROW]: Q. Your initial conclusions were based on speculation, was it not, that J.D. was, quote, a skilled manipulator?
> [BY MERIN]: A. I'm not sure what you mean by speculation.
> Q. Assuming the truth of what the Defendant told you.
> A. I would have to assume the truth of what he told me consistent along with the psychological examinations and the nature of his personality was consistent pretty much with what I found. So, I would conclude then with what he was telling me about J.D. was probably a reasonable representation of his perception of J.D.
> Q. In other words, you reached the conclusion that J.D. was a skilled manipulator because J.D. told you he was?
> A. No, he didn't tell me he was a skilled manipulator. I drew that vast amount of information from him and around him.

Q. But you didn't talk to anybody else who ever knew or ever saw or ever talked to J.D. Walton?
A. That's correct.
Q. And you never saw or talked to J.D. Walton?
A. That's correct.
Q. And you never reviewed any of the depositions in the case about the relationship with J.D. Walton and Cooper?
A. That I recall.
Q. So, in psychological tests it would tell you about [Cooper's] personality?
A. That's correct.
Q. Not about J.D. Walton?
A. That's correct.
Q. They didn't tell you anything about whether J.D. Walton was a skilled manipulator, did they?
A. No.
Q. Are you suggesting that that is not speculation then?
A. We function on the basis of the perceptions that that individual has. Perceptions of the world around you --
Q. Could you answer my question and then explain it later, Dr. Merin?
A. Yes.
Q. You don't consider a conclusion that J.D. Walton was a skilled manipulator based solely upon what [Cooper] told you, what [Cooper] told you with the facts and the test reflecting [Cooper's] personality? You don't consider that speculation?
A. No.
Q. And you also speculated, did you not, that J.D. was malicious – excuse me that [Cooper] was maliciously duped by J.D. Walton.
A. Yes.
Q. And you wouldn't consider that speculation either?
A. That would be speculation. That would be my view considering everything that happened with this Defendant.

Cooper, R. 416-418. Cooper was sentenced to death.

However, after Mr. Walton filed his motion for post-conviction relief based, in part due to ineffective assistance of counsel in the penalty phase, the State

apparently decided that Dr. Merin was credible after all.[11] The State hired Dr. Merin – who had an ethical duty to Mr. Cooper – to evaluate Mr. Walton. Merin's 1984 evaluation of Cooper was based solely on personal interviews with Cooper and a copy of Cooper's interview with Detective Ron Beymer and Detective J.M. Halliday. Cooper, R. at 399, 414, 433. Based on this limited information from and about Mr. Cooper, Dr. Merin arrived at an opinion of *Mr. Walton's* personality. He determined that Mr. Walton was a skilled manipulator who feigned being distressed or even hysterical Id. at 418. In fact, Dr. Merin testified that his conclusion that Mr. Walton was a dominating personality was arrived at by determining that Mr. Cooper's personality was such that he would respond to a very powerful authoritative personality. Thus, Mr. Walton had to have such a personality. Id. at 433. Dr. Merin testified to this at the sentencing phase of Mr.

[11] Mr. Walton's counsel objected to Dr. Merin's testimony on the basis that the doctor would not have been available to testify at Mr. Walton's trial because he was the confidential mental health expert for Mr. Cooper. PCR-2. 418. Counsel objected that this would have caused a conflict of interest and Dr. Merin's testimony could not have been considered at trial. PCR-2. 418-19. On appeal to this Court following the denial of the 3.850, Mr. Walton argued that the lower court's refusal to sustain the objection and its admission of Dr. Merin's testimony deprived Mr. Walton of his rights to confrontation, to due process, and to a full and fair hearing on the issues. This Court denied relief on this issue. Mr. Walton presents these facts to this Court only in the context of the inappropriate use of inconsistent theories even in post-conviction that give rise to this due process claim. However, Mr. Walton does not waive or abandon any issues previously raised with respect to Dr. Merin's role in his case.

Cooper's trial and even through rigorous cross-examination, stuck by his conclusions about Mr. Walton's personality. All of these conclusions were premised upon Cooper's out-of-court statements to Dr. Merin.

When Dr. Merin began his evaluation of Mr. Walton prior to Mr. Walton's evidentiary hearing, he had pre-determined the issues he was to decide. In evaluating the mental condition of a defendant, the professional has an obligation to make a thorough assessment based on sound evaluative methods and to reach an objective opinion. Dr. Merin would have been ethically prohibited from testifying for the State at Mr. Walton's resentencing after testifying on behalf of Mr. Cooper at his sentencing. Furthermore, in evaluating Mr. Cooper, Dr. Merin was privy to Mr. Cooper's personal version of the events that occurred on May 11, 1982, and to Mr. Cooper's statement to police taken after his arrest. Had Dr. Merin testified at Mr. Walton's resentencing, Mr. Walton would have been subjected to a sentencing proceeding at which his co-defendant's unconfronted statements were used to sentence Mr. Walton to death. This Court reversed in Walton I for precisely the same error. This simply cannot be squared with the Due Process Clause, the Confrontation clause, or the Eighth Amendment.

Nevertheless, Merin had been asked to review materials for Mr. Walton and was asked by the State to review materials for Cooper's case within a few weeks of each other. Both Mr. Cooper and Mr. Walton's cases were proceeding in post-

conviction at the same time and in front of the same judge. Portions of the evidentiary hearing were heard on the same day, confusing the facts and interfering with Mr. Walton's ability to confront Dr. Merin's testimony. The State's treatment of Dr. Merin is somewhat similar to the situation in Stumpf's case. In Stumpf, the prosecutor vouched for the credibility of the jailhouse snitch; but when the jury would not buy into his theory, he then decided that the snitch was not so credible after all. Here, the State did not buy into Dr. Merin's theory – that Cooper was under the control and domination of Mr. Walton – and he was able to get the trial court to reject the psychiatrist's testimony as well, as evidenced by the death sentence. There are virtually no new facts or evidence that would have changed the State's opinion of Dr. Merin's credibility. The only thing that changed was the State's objective and the new objective was to convince the post-conviction judge that Mr. Walton was the dominator. This type of gamesmanship cannot be tolerated under the Due Process Clause.

6. THE STATE'S POSITION REGARDING THE CREDIBILITY OF CO-DEFENDANT VAN ROYAL HAS BEEN INCONSISTENT.

During the prior evidentiary hearing in this case, Mr. Walton attempted to prove that newly discovered evidence showed that Mr. Walton was not the ringleader. Co-defendant Terry Van Royal has disavowed earlier statements he made asserting that Walton was the mastermind or leader of the group committing

the murders. During the prior evidentiary hearing, Mr. Walton's former attorneys testified regarding their prior interviews of Van Royal subsequent to the resentencing trial of Walton. They testified that Van Royal told them that Walton was not the leader of the group which killed the victims in the instant case, and that the murders were entirely unexpected.

This case involved critically important facts that were unavailable to either the judge or the jury in determining Mr. Walton's fate. These facts, which are consistent with the State's arguments at both Cooper's and Van Royal's trials, could have been used to counter the State's arguments that Mr. Walton was the leader. Yet, in post-conviction proceedings, the State took untenable position that a "co-defendant's version of how the crime occurred is not newly discovered evidence." PCR-2. 2241. Thus, the State apparently agreed, in August of 1984, that Walton was not the mastermind or the ringleader and that he was not in control of Van Royal. But by August of 2000, the State took the completely opposite position and attempted to discredit Van Royal's statements and to argue that they did not matter. Obviously, it did matter, as the State went to great lengths during Mr. Walton's trial to convince both the judge and the jury to sentence him to death due to his alleged role in recruiting young teenagers to do his "dirty work".

ARGUMENT II

MR. WALTON WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE STATE WITHHELD EVIDENCE WHICH WAS MATERIAL AND EXCULPATORY IN NATURE AND/OR PRESENTED MISLEADING EVIDENCE. SUCH OMISSIONS RENDERED DEFENSE COUNSEL'S REPRESENTATION INEFFECTIVE AND PREVENTED A FULL ADVERSARIAL TESTING OF THE EVIDENCE.

Mr. Walton has alleged for over seventeen years[12] that the State's improper use of jail-house informant and state agent, Paul Skalnik, contributed to the death sentences imposed in this case in violation of Mr. Walton's Constitutional rights including the right to confront the witnesses against him, the right to a fair trial, and his right to due process. Mr. Walton filed his most recent Rule 3.851 motion after he learned that during the course of litigation in federal court, co-defendant Richard Cooper filed three affidavits from witnesses who can establish that Mr. Skalnik was working for the Pinellas County Sheriff's Office and the Office of the State Attorney in the Sixth Judicial Circuit as an informant. PCR-3. 6, 191-218. After learning about the existence of the affidavits, Mr. Walton filed his successive

[12] Mr. Walton filed his initial motion for post-conviction relief on December 17, 1990 in which he made claims concerning Paul Skalnik's status as a state agent and the use of his testimony to contaminate the resentencing proceeding. PCR-1. 45-295.

motion for post-conviction relief based on the discovery that the State withheld material evidence in violation of the Fifth, Sixth, Eighth, and Fourteenth amendments to the U.S. Constitution. PCR-3. 3-10 (Claim I).

The lower court was informed that co-defendant Cooper has been granted a motion for discovery that will allow him to access eight (8) boxes of documents that relate to Paul Skalnik that have been sealed based on exemptions claimed by the State. PCR-3. 8, 220-221. On February 13, 2006 Mr. Walton filed a public records request pursuant to Florida Rule of Criminal Procedure 3.852 seeking access to those same boxes. PCR-3. 1870-76. He further alleged that Florida Statute §119.19 and Rule 3.852, by prohibiting a capital post-conviction defendant's counsel from seeking public records by means other than those detailed within said section and rule, violate Article I, § 24 of the Florida Constitution and relevant case law by impermissibly restricting the defendant's right to access the records through his counsel. PCR-3. 23-24 (Claim IV).

Mr. Walton was denied access to public records and the claim was summarily denied without a hearing. This was error. Mr. Walton is entitled to an evidentiary hearing unless the motion and record conclusively show that he is entitled to no relief. Peede v. State, 748 So. 2d 253, 257 (Fla. 1999); Gaskin v. State, 737 So. 2d 509, 516 (Fla. 1999). In order to prove a violation of Brady, a claimant must establish that the government possessed evidence that was

suppressed, that the evidence was "exculpatory" or "impeachment" and that the evidence was "material." United States v. Bagley, 473 U.S. 667 (1985); Kyles v. Whitley, 514 U.S. 419 (1995). Evidence is "material" and a new trial or sentencing is warranted "if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceedings would have been different. Kyles, 514 U.S. at 433-434. When police or prosecutors conceal significant exculpatory or impeaching material in the State's possession, it is ordinarily incumbent on the State to set the record straight. Banks v. Dretke, 540 U.S. 668, 675-676 (2004). A rule "declaring 'prosecutor may hide, defendant must seek,' is not tenable in a system constitutionally bound to accord defendants due process." Id. at 696. A proper materiality analysis under Brady also must contemplate the cumulative effect of all suppressed information. Further, the materiality inquiry is not a "sufficiency of the evidence" test. Id. at 434.

In Giglio v. United States, 405 U.S. 150 (1972), the Supreme Court recognized that the "deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with 'rudimentary demands of justice.'" Because of the seriousness of this type of violation, "where the prosecutor knowingly uses perjured testimony, the false evidence is material 'if there is any reasonable likelihood that the false testimony could have affected the judgment of

the jury.'" Guzman v. State, 868 So. 2d 498 (Fla. 2003) quoting United States v. Agurs, 427 U.S. 97, 103.

In the claim below. Mr. Walton alleged that the State's exploitation of non-record facts at the resentencing, in support of the theory that Mr. Walton was the "ringleader," was a violation of Mr. Walton's right of confrontation as well as a violation of his right to due process under Bradshaw v. Stumpf, 125 S. Ct. 2398 (2005). Mr. Walton detailed the significant problems that occurred as a result of the State's use of Paul Skalnik, as well as the facts that point to the allegation that the police were feeding him information.[13] Mr. Walton's allegations regarding Skalnik are not new:

> One thing is certain. Before the Highpoint Murders, Mr. Skalnik had been instrumental in securing for the State convictions in over thirty cases. As of 1984, because of his intense participation as an informant, he was granted special privileges and protection and housed in the Pinellas County jail.

[13] According to Mr. Skalnik, he was isolated from the outside world, was isolated from other prisoners, has no knowledge of the defendants, and had no contact with any witnesses in the case. On June 14, 1983, Mr. Skalnik gave a taped statement outlining all of his knowledge in the case as allegedly related to him by Mr. Cooper. Eight months later, however, Mr. Skalnik came to know a remarkable piece of information known only to the detectives in the case and eight-year-old Chris Fridella. This information was not contained in Mr. Skalnik's lengthy statement. This information can only be found in one document: on one page in the police reports in police custody. PCR-3. 94-95.

> The fine line between Paul Skalnik, the informant, and the State blurred. They became one. There are more incidents in this case and in other cases which show that Mr. Skalnik and the State mutually shared facts, such facts lending credibility to Mr. Skalnik's testimony. The various conversations between Skalnik and State authorities oftentimes resulted in Mr. Skalnik portraying the State's theory of the case. For instance, in Mr. Walton's first penalty phase, Mr. Skalnik not only set forth the State's theory of the case, he added additional elements of premeditation that are refuted by all of the evidence in the record.

PCR-3. 96-97. (Third Amended Motion, p. 58-59.)

Mr. Walton provided the lower court with copies of the affidavits that had been filed in Cooper's case in federal court. The first affidavit was provided by Anthony Giovanniello, a former correctional officer at the Pinellas County Jail, who stated in pertinent part:

> 3. I met a man named Paul Skalnik not long after I began my employment with the Pinellas County Sheriff's Office. He was, at that time, an inmate at the Pinellas County Jail and I was a correctional officer. I was a correctional officer for approximately one year before I was moved into a street patrol division. It seems that Skalnik was an inmate pretty much the entire time I was a correctional officer.
>
> 4. I had a cordial relationship with Paul Skalnik during the time he was an inmate. He was different from most of the other inmates. I was unusual for an inmate to be polite and treat the jail staff with respect, be well-spoken and charismatic. Skalnik was all that and then some. He was also an intelligent and engaging man who was able to carry a conversation.
>
> 5. As a correctional officer you take notice of those inmate who are not belligerent, rude and constantly shouting or creating chaos inside jail. An inmate such as Skalnik provided some level of sanity and it was more pleasurable to interact with him as opposed to the

> more common type inmates. As a result of his approach, I would often get Skalnik a cup of coffee or a bite to eat between the regularly scheduled meals. We would also speak on a regular basis. I had many conversations with Skalnik during my time as a correctional officer.
>
> 6. It was during those conversations that Skalnik told me that he was working as an agent for the sheriff's department and the state attorney's office. He informed me that detectives would give him access to their files and computers so he could learn the facts of a case. Skalnik also indicated that it was arranged for him to be given access to an inmate involved with the case files he had just reviewed so that he could get that inmate to confess to him or provide him with certain information. Skalnik would then alert the detectives when he had the information they needed. He led me to believe that he was assisting the Pinellas County detectives so they would help him get a reduced sentence on his own charges.

PCR-3. 193-195 (Giovanniello Affidavit). The next affidavit came from the former director of the Pinellas County Jail, Charles Felton, who alleged in pertinent part:

> 2. I was the Director of the Pinellas County Jail from 1981 to 1992. I was assigned to the Florida Department of Corrections Youth Offender Office prior to being named Director of the PCJ. The then newly-elected Pinellas County Sheriff, Jerry Coleman, recruited me and I agreed to oversee his jail. I was the Superintendent of the Cook County Jail system in Chicago before I relocated to Florida. I served as Director of Dade County Jail after leaving Pinellas County. I am currently with the Small Business Administration.
>
> 3. Since the PCJ was under the control of Sheriff Coleman, I viewed my role as not only seeing to it that the jail was run properly but to also assist with and support the police work being conducted by the sheriff's office as well as other law enforcement agencies throughout Pinellas County. For example, PCSO detectives were given unimpeded access to inmates. They would be permitted to take

an inmate outside the jail facility if doing such would assist them with their case work. This was an informal process as long as the detectives were local. We were familiar with the local detectives and again, we were there to assist them with their crime fighting efforts. If, however, a law enforcement officer from, say, south Florida wanted to take an inmate outside the jail facility, it would have been necessary for a written request to be made so we could confirm that the request was legitimate and that the officer was in fact a member of the requesting agency and the like.

4. The PCSO detectives, at times, conducted their police work inside the jail, too. They would interview defendants, witnesses and informants. It was also common for the detectives to ask that certain inmates be housed together. Such a request usually involved a jail house informant or snitch and would be arranged through the jail detectives.

5. The jail detectives were a squad of officers who investigated crimes that took place inside the jail. They also coordinated all law enforcement activities that took place inside the jail. For example, if a detective was working a crime took place outside the jail and wanted to have a certain person housed with an informant, those arrangement would be made through the jail detectives. This, too, was an informal process and there would not be forms to fill out or paper work, the system was designed to be efficient and to assist the detectives with their police work.

***

> 7. It was common practice to use jailhouse informants or snitches and confidential informants. Sometimes law enforcement officers from outside jurisdictions would be brought in to act as inmates, planted inside the jail and directed to obtain a confession or uncover certain information related to an active investigation. There were also times when an inmate serving as a jailhouse or confidential informant would assist the detectives in such a capacity. They would have knowledge of case related information, be briefed on the type of information needed by the detectives handling the investigation and then given access to a specific inmate.

PCR-3. 198-200 (Felton Affidavit). Johnny Touchton, a private investigator and former law enforcement officer, completed an affidavit as well. Touchton was asked by Pinellas County Sheriffs Detectives to employ Mr. Skalnik in his private cases or by serving papers. Detectives told him that Mr. Skalnik had been an inmate at the Pinellas County Jail and was recently released. PCR-3. 203-204 (Touchton Affidavit).

Mr. Walton was prejudiced by the failure of the State to disclose that Mr. Skalnik is and was a State agent. Because both Mr. Skalnik and the State have repeatedly denied that he was working for the State and not just a helpful jail informant, the State must prove that the false and misleading testimony was harmless beyond a reasonable doubt. This Court should consider the State's actions in securing the testimony of Paul Skalnik by intentionally placing him in a cell with co-defendant Cooper with the express purpose of eliciting information regarding the crime. The State first used Skalnik's testimony for the express

purpose of establishing that Mr. Walton was the "ringleader." Even after the this Court remanded the case for a new penalty phase precisely due to the admission of the unreliable hearsay testimony of Paul Skalnik, the State continued to use facts that only came from him in order to infect the resentencing proceeding. The prejudice analysis must include that fact that trial counsel could not impeach Paul Skalnik with his status as a state agent as well as the fact that the State used Skalnik's testimony in order to contaminate the resentencing proceeding in violation of Bradshaw v. Stumpf. If the State had admitted from the beginning that Paul Skalnik was a state agent then the trial counsel could have effectively challenged his testimony during the first trial: the State would not have been able to use this unreliable testimony in support of the bogus theory that Mr. Walton was the "ringleader." It was precisely due to Mr. Walton's alleged status as a "ringleader" that he was sentenced to death in this case.

Mr. Walton was entitled to an evidentiary hearing on this issue as the records and files do not conclusively establish that he is entitled to no relief. The summary denial of a hearing was in error.

ARGUMENT III

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. WALTON'S CLAIM THAT FLORIDA'S EXISTING METHOD OF EXECUTION BY LETHAL INJECTION CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION

A. The denial of access to public records was in error.

Following the legislature's adoption of lethal injection as Florida's primary method of execution in 2000, this Court upheld the constitutionality of the method in Sims v. State, 754 So. 2d 657 (Fla. 2000). Mr. Walton subsequently brought his challenge to Florida's then-existing method of execution based on new research that showed that the sequential administration of sodium thiopental for anesthesia and pancuronium bromide to induce paralysis and potassium chloride to stop the heart and cause death raises serious questions as to whether this method is cruel and unusual under the Eighth and Fourteenth amendments of the United States Constitution. Leonidas G. Koniaris et al., Inadequate Anesthesia in Lethal Injection for Execution, LANCET 2005; 365:1412-14; PCR-3. 20-22 (Rule 3.851 motion, Claim III).[14] At the same time, in February 2006, Mr. Walton filed public records

[14] This challenge to the 2000 procedures was pending when the State of Florida executed inmate Angel Nieves Diaz giving rise to serious concerns regarding the Florida Department of Corrections ability to carry out executions in a manner consistent with the requirements of the U.S. Constitution. Mr. Diaz was executed under procedures that were promulgated in August 2006. Lightbourne v. McCollum, 969 So. 2d 326 (Fla. 2007).

requests directed to the Department of Corrections and the Attorney General's Office seeking information regarding the procedures for carrying out executions by lethal injection. PCR-3. 1858-76.

The records were requested pursuant to Fla. R. Crim. P. 3.852. See Ventura v. State, 673 So. 2d 479 (Fla. 1996); Muehleman v. Dugger, 634 So. 2d 480 (Fla. 1993); Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993); Mendyk v. State, 592 So. 2d 1076 (Fla. 1992); State v. Kokal, 562 So. 2d 324 (Fla. 1990); Provenzano v. Dugger, 561 So. 2d 541 (Fla. 1990). Counsel for Mr. Walton has the duty to seek and obtain every public record in existence in this case. Porter v. State, 653 So. 2d 375 (Fla. 1995), cert. denied 115 S. Ct. 1816 (1995). This Court has ruled that collateral counsel must obtain every public record in existence regarding a capital case or else a procedural default will be assessed against the defendant. Porter v. State, 653 So. 2d 375 (Fla. 1995). However, a concomitant obligation under relevant case law as well as Chapter 119 rests with the State to furnish the requested materials. Ventura v. State, 673 So. 2d 479 (Fla. 1996). When the State's inaction in failing to disclose public records results in a capital post conviction litigant's inability to fully plead claims for relief, the State is estopped from claiming that the post conviction motion should be denied or dismissed. Id. ("The State cannot fail to furnish relevant information and then argue that the claim need

not be heard on its merits because of an asserted procedural default that was caused by the State's failure to act").

This Court applies the "abuse of discretion" standard when reviewing appeals from denials of requests for public records. Hill v. State, 921 So. 2d 579 (Fla. 2006). "Discretion is abused only when the judicial action is arbitrary, fanciful, or unreasonable, which is another way of saying that discretion is abused only where no reasonable person would take the view adopted by the trial court." Parker v. State, 904 So. 2d 370, 379 (Fla. 2005).

After hearing argument on the public records requests, the lower court entered an order denying each of Mr. Walton's requests based on this Court's decisions in Sims, Hill, and Rutherford, supra. This was in error. Mr. Sims, Mr. Hill, and Mr. Rutherford were under death warrant at the time they made their public records requests relating to lethal injection, so their requests were governed by Fla. R. Crim. P. 3.852(h)(3), which does not allow requests to agencies from which the inmate has not previously requested records. Mr. Walton was not under warrant at the time of making his requests, and therefore his records requests fall under Fla. R. Crim. P. 3.852(i). Mr. Walton is entitled to the records that could assist him in proving his Eighth Amendment claim.

B. The denial of an evidentiary hearing on Mr. Walton's Eighth Amendment challenge was in error.

Mr. Walton's challenge to the 2000 lethal injection procedures was pending in December 2006 when the State of Florida executed inmate Angel Nieves Diaz. That event gave rise to serious concerns regarding the Florida Department of Corrections' ability to carry out executions in a manner consistent with the requirement of the U.S. Constitution. The trial court summarily denied relief on Mr. Walton's lethal injection claim despite being well aware of the widely-publicized execution and the fast-paced developments that followed as well as having been notified by Mr. Walton that he intended to amend his claim once Florida decided on new procedures for executing condemned inmates. The summary denial entered on March 9, 2007 was a violation of due process and an abuse of discretion. PCR-3. 637.

The lower court was informed – via the motions for rehearing and for leave to amend – that Mr. Walton was actively in the process of drafting a motion for leave to amend based on newly discovered evidence premised upon the events surrounding the Diaz execution.[15] PCR-3. 2985-3035; 1829-43. The lower court's

[15] The execution was on December 13, 2006; the all writs petition and the motion to continue were filed on December 14, 2006; the Governor declared a moratorium on executions on December 15, 2007 and shortly thereafter created the Commission on Lethal Injection; the case management conference in this case was set for January 16, 2007; on January 30, 2007, Mr. Walton learned the DOC had completed an internal report on December 20, 2006; on February 9, 2007, this Court entered the Order clarifying that the circuit court would have jurisdiction

actions in denying Mr. Walton a fair opportunity to pursue his claim was in total disregard of the significant events that were occurring at the time. Mr. Walton argued below that the events that occurred during the Diaz execution, it was apparent that the "factual underpinnings" of the decision in Sims v. State, 754 So. 2d 657 (Fla. 2000) lacked validity. Provenzano v. State, 739 So. 2d 1150, 1156 (Fla. 1999) (Justice Lewis, concurring). PCR-3. 2987. Nevertheless, the court relied upon this Court's opinion in Diaz v. Florida, 945 So. 2d 1136 (Fla. 2006) without any acknowledgement that it was only five days after this Court's decision that Florida carried out the Diaz execution giving rise to the necessity of amending the pending claims.[16]

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over Mr. Walton's challenge to lethal injection; on March 1, 2007, the Commission issued its report; and on March 9, 2007, the lower court entered the order denying all relief. Rehearing was denied on March 28, 2007.

[16] Mr. Diaz's challenge to Florida's method of execution was based on substantially the same evidence raised by Mr. Walton:

> In Hill, Rutherford, and Rolling, the defendants argued that a research study published in April 2005 in The Lancet presented new scientific evidence that Florida's procedure for carrying out lethal injection may subject the inmate to unnecessary pain. See Leonidas G. Koniaris et al., Inadequate Anesthesia in Lethal Injection for Execution, 365 Lancet 1412 (2005). The defendants also argued that this study had not been available to this Court when it decided Sims and thus an evidentiary hearing was required. We found the study to be "inconclusive" and not requiring an evidentiary hearing. [citations omitted]. . . .As we explained in Hill, the study in The Lancet does not assert that providing an inmate with "'no less than two' grams" of sodium pentothal, as is Florida's procedure, is not sufficient to render

At the case management conference, Mr. Walton addressed the status of the pending lethal injection claim. Mr. Walton made it clear that he was not waiving or withdrawing his pending claim nor did he waive his right to challenge any future protocol. See PCR-3. 1765-66; 1773. By the time of the case management conference, the Governor had declared a moratorium on executions and declared that a special commission would study the protocol in Florida and make any recommended changes. Id. PCR-3. 1766; 1769; 1770. At the time of the hearing, Mr. Walton did not have sufficient information regarding the status of Florida's intended protocol for carrying out its death sentences; Mr. Walton still had not

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> the inmate unconscious. **Nor does it provide evidence that an adequate amount of sodium pentothal is not being administered in Florida, or that the manner in which this drug is administered in Florida prevents it from having its desired effect.** [citations omitted].
>
> Diaz asserts that the Court should reconsider the information contained in the study in light of "newly discovered evidence" relating to lethal injection. In September 2005, Dr. Richard Weisman and others wrote a letter commenting on the study and citing data indicating that the effects of the drug sodium thiopental on a dying individual undergoing lethal injection are not comparable to its actions on a ventilated surgical patient. Based on this study data, Dr. Weisman speculated that "current thiopental protocol might not provide adequate thiopental anesthesia during the execution of prisoners."

Diaz v. Florida, 945 So. 2d 1136 (Fla. Dec. 8, 2006) (emphasis added).

obtained any of the documents that he had requested through Rule 3.852. The denial of public records was in error.

The lower court's reliance on this Court's December 6, 2006 opinion in Diaz, supra, evidences a failure to consider – or a decision to ignore - the relevant information provided to the Court by Mr. Walton in the motion to continue the case management conference; the arguments regarding the status of Florida's method of execution presented at the hearing; and information provided in notices of filing after the hearing. PCR-3. 1760-1827, PCR-3. 2985-3035, PCR-3. 3040-3158. The Court failed to consider – or chose to ignore - the information and recommendations contained in the final report issued on March 1, 2007 which was provided by the State. This information included the following:

> 1. The execution team failed to ensure that a successful IV access was maintained throughout the execution of Angel Diaz.
> 2. Failure of the execution team to follow the existing protocols in the delivery of the chemicals.
> 3. The protocols as written are insufficient to properly carry out an execution when complications arise.
> 4. Failure of the training of the execution team members.
> 5. Failure of the training to provide adequate guidelines when complications occur.
> 6. There was a failure of leadership as to how to proceed when a complication arose in the execution process.
> 7. There was inadequate communication between the execution team members and the warden who was not informed of the problem and the changes implemented.

PCR-3. 3159-3178 (Report dated March 1, 2007). The most significant factor not considered by the lower court is that at the time the order denying relief was entered, the State of Florida was without a Constitutional method of execution. [17]

This Court's decision in Sims rested upon the accuracy of the testimony provided by personnel from the Department of Corrections and upon the representation that those procedures would be followed:

> From our review of the record, we find that the DOC has established procedures to be followed in administering the lethal injection and we rely on the accuracy of the testimony by the DOC personnel who explained such procedures at the hearing below. Thus, we conclude that the procedures for administering the lethal injection as attested do not violate the Eighth Amendment's prohibition against cruel and unusual punishment.

Sims at 668. Unfortunately, there has been a repeated failure of the Department of Corrections personnel to do what they say they are going to do whether in the context of the electric chair or lethal injection. As an example, following the litigation in Jones v. State, 701 So. 2d 76 (Fla. 1997), regarding the electric chair, inmate Allen Lee Davis challenged the continued use of the electric chair based

[17] As noted in Lightbourne, new procedures went into effect on May 9, 2007 and were revised again August 1, 2007. On December 20, 2007 this Court denied without prejudice Mr. Walton's motion to relinquish jurisdiction to file a new Rule 3.851 motion in the circuit court based on the following: (1) the botched execution of Angel Nieves Diaz on December 13, 2006; (2) the promulgation of new protocols for carrying out executions by lethal injection; and (3) the grant of certiorari in Baze v. Rees, 128 S. Ct. 34 (2007) which will determine the standard by which to review method-of-execution claims and will address the three-drug cocktail that is employed in carrying out executions by lethal injection.

upon, inter alia, newly discovered evidence that the DOC protocol was not being followed. This Court rejected that challenge and adopted the holding in Provenzano v. State, 739 So. 2d 1150 (Fla. 1999), issued the same day, on July 1, 1999. Nevertheless, this Court expressed reservation regarding DOC's failures to follow procedure: "Once again, we are troubled that there is an indication that DOC has not followed the protocol established for the appropriate functioning of the electric chair and carrying out of the death penalty." Davis v. Florida**,** 742 So. 2d 233 (Fla. 1999). The subsequent bloody execution of Allen Lee Davis, only a week after his challenge was denied, eventually led to the decision to adopt lethal injection as a method of execution in Florida. The details of the Davis execution as well as the prior failures of the Department of Corrections in carrying out executions in a humane and dignified manner are detailed in the case of Provenzano v. Moore, 744 So. 2d 413 (Fla. 1999).

Despite the repeated failures of the Department of Corrections to follow its own policies, the lower court failed to take into account the information revealed in the Department of Correction's internal report regarding Mr. Diaz's execution: that the protocol was not followed and the protocol used did not operate in the manner promised, i.e., rendering the condemned unconscious following the administration of sodium pentothal and rendering the condemned paralyzed following the administration of pancuronium bromide. PCR-3. 3043-3050.

The lower court also failed to consider the directives of this Court and the dictates of fundamental due process. The decision to completely ignore this Court's February 9, 2007 order that clearly contemplated that Mr. Walton could pursue his lethal injection challenge in circuit court was an abuse of discretion. In fact, it was just the day after Mr. Walton served his appeal in this case that this Court recognized how the Diaz execution changed the legal landscape. In the order affirming the circuit court's denial of relief in Mr. Lightbourne's successive 3.851 motion without prejudice, this Court recognized that "as a result of Angel Diaz's execution by lethal injection, a series of events occurred that the trial court could not have considered in denying Lightbourne's motion." Lightbourne v. State, SC06-1241 (Fla. April 16, 2007). Instead of seriously evaluating Mr. Walton's Eighth Amendment right not be executed in a manner that could cause excruciating pain, the lower court relied on law that this Court recognized to be in question.

In this Court's opinion in the Lightbourne case, the following facts were recognized as undisputed:

> . . . [I]n the execution of Angel Diaz, the intravenous lines were not functioning properly because the catheters passed through his veins in both arms and thus delivered the lethal chemicals into soft tissue, rather than into his veins. Lay witnesses to the execution, including Mr. Diaz's spiritual advisor, an interpreter, and a press representative, testified that several minutes after the injections began, Diaz was still moving, squinting, taking deep breaths, and clenching his jaw. It is also undisputed that if pancuronium bromide or potassium chloride, the second and third chemicals administered, are injected into a

> conscious person, significant pain would result from each of the chemicals.

Lightbourne. As a result of the events following the Diaz execution, the DOC issued new protocols for carrying out lethal injection on May 9, 2007 and again on August 1, 2007. Following the evidentiary hearing in the Lightbourne case, this Court upheld the constitutionality of Florida's method of execution based upon the record and evidence presented in that case. In Lightbourne, this Court also recognized that the exact standard for evaluating an Eighth Amendment challenge to a method of execution is uncertain pending the outcome of the decision in Baze v. Rees, 128 S. Ct. 34 (2007) (granting certiorari jurisdiction to consider the State of Kentucky's lethal injection protocol).

This Court's decision in Lightbourne cannot possibly be binding on Mr. Walton since he was not a party to those proceedings. The touchstone of due process is notice and reasonable opportunity to be heard. The right to due process entails "notice and opportunity for hearing appropriate to the nature of the case." Cleveland Bd. of Ed. v. Loudermill, 470 U.S. 532, 542 (1985), quoting Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313 (1950). "[F]undamental fairness is the hallmark of the procedural protections afforded by the Due Process Clause." Ford v. Wainwright, 477 U.S. 399, 424 (1986) (Powell, J., concurring in part and concurring in the judgment). Mr. Walton was not a party to the circuit

court proceedings in Lightbourne and he has never been given the opportunity to present evidence in support of his claim or to make argument as to why his challenge would be meritorious. Accordingly, the decision in Lightbourne cannot be binding on him.

The Eighth Amendment reaches "exercises of cruelty by laws other than those which inflict bodily pain or mutilation." Weems v. United States, 217 U.S. 349, 373 (1909). "Among the 'unnecessary and wanton' inflictions of pain are those that are 'totally without penological justification.'" Rhodes v. Chapman, 452 U.S. 337, 346 (1981). It forbids laws subjecting a person to "circumstance[s] of degradation," Id. at 366, or to "circumstances of terror, pain, or disgrace" "superadded" to a sentence of death. Id. at 370.

However, the Eighth Amendment "proscribes more than physically barbarous punishments." Estelle v. Gamble, 429 U.S. 97, 102 (1976). It prohibits the risk of punishments that "involve the unnecessary and wanton infliction of pain," or "torture or a lingering death," Gregg v. Georgia, 428 U.S. 153, 173 (1976); Louisiana ex. rel. Francis v. Resweber, 329 U.S. 459, 464 (1947) ("The cruelty against which the Constitution protects a convicted man is cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely.") The scope of the Eighth Amendment in this regard is set forth in Estelle v. Gamble, 429 U.S. 97, 102 (1976):

> It suffices to note that the primary concern of the drafters [of the Eighth Amendment] was to proscribe "torture(s)" and other "barbar(ous)" methods of punishment. Accordingly, this Court first applied the Eighth Amendment by comparing challenged methods of execution to concededly inhuman techniques of punishment. Our more recent cases, however, have held that the Amendment proscribes more than physically barbarous punishments. The Amendment embodies "broad and idealistic concepts of dignity, civilized standards, humanity, and decency. . .," against which we must evaluate penal measures. Thus, we have held repugnant to the Eighth Amendment punishments which are incompatible with "the evolving standards of decency that mark the progress of a maturing society" or which "involve the unnecessary and wanton infliction of pain."

(citations omitted). Justice Brennan explained in Glass v. Louisiana, 471 U.S. 1080, 1085 (1985) (Brennan, J., dissenting from denial of certiorari), that the contours of the Eighth Amendment extend beyond simply whether there is conscious pain inherent in the method of execution:

> The Eighth Amendment's protection of "the dignity of man," Trop v. Dulles, 356 U.S. 86 (1958), (plurality opinion), extends beyond prohibiting the unnecessary infliction of pain when extinguishing life. Civilized standards, for example, require a minimization of physical violence during execution irrespective of the pain that such violence might inflict on the condemned. See, e.g., Royal Commission on Capital Punishment, 1949-1953 Report P 732, p. 255 (1953) (hereinafter Royal Commission Report). Similarly, basic notions of human dignity command that the State minimize "mutilation" and "distortion" of the condemned prisoner's body. Ibid. These principles explain the Eighth Amendment's prohibition of such barbaric practices as drawing and quartering. See, e.g., Wilkerson v. Utah, 99 U.S. 130 (1879).

Thus, the Eighth Amendment also requires that the method of execution minimize physical violence as well as mutilation and distortion of the human body.

At the moment, the nation is waiting for the decision in Baze to explain the proper Eighth Amendment standard for evaluating the constitutionality of a method of execution. It does appear that in other contexts, the Eighth Amendment does more than ban unnecessary and physical violence to the body, it imposes upon the government officials, those charged with carrying out punishment, with a duty of care. A state official's failure to prevent harm to prisoners constitutes cruel and unusual punishment in violation of the Eighth Amendment if the official shows "deliberate indifference" to the prisoners' well-being. Farmer v. Brennan, 511 U.S. 825, 834 (1994). State conduct evinced "deliberate indifference" if an official knows of and disregards a risk of unnecessary pain.

The lower court violated the principles of due process and abused its discretion in hastily issuing the orders denying relief in this case. Mr. Walton is entitled to a remand to the circuit court so that he may obtain public records and pursue his challenge to Florida's current method of execution.

ARGUMENT IV

NEWLY DISCOVERED EMPIRICAL EVIDENCE DEMONSTRATES THAT MR. WALTON'S CONVICTION AND SENTENCE OF DEATH CONSTITUTES CRUEL AND UNUSUAL PUNISHMENT IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. The promise of Furman v. Georgia.

Over 30 years ago, the U.S. Supreme Court announced that under the Eighth Amendment, the death penalty must be imposed fairly, and with reasonable consistency, or not at all. Furman v. Georgia, 408 U.S. 238, 310 (1972) (*per curiam*). In Furman, the Petitioners, relying upon statistical analysis of the number of death sentences being imposed and upon whom they were imposed, argued that the death penalty was cruel and unusual within the meaning of the Eighth Amendment. Five justices agreed, and each wrote a separate opinion setting forth his reasoning. As a result, Furman stands for the proposition most succinctly explained by Justice Stewart in his concurring opinion: "The Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed" on a "capriciously selected random handful" of individuals. Id. at 310.

B. Florida's death penalty scheme remains arbitrary and capricious.

On September 17, 2006, the American Bar Association's Death Penalty Moratorium Implementation Project and the Florida Death Penalty Assessment Team published its comprehensive report of Florida's death penalty system. See American Bar Association, Evaluating Fairness and Accuracy in the State Death Penalty Systems: The Florida Death Penalty Assessment Report, September 17, 2006. The ABA looked at numerous factors in Florida including, but not limited to, the number of executions; the number of people who have been exonerated; the quality of representation both at trial and in post-conviction; the lack of a requirement of unanimity and possibility of judicial overrides; racial and geographic disparities; instances of prosecutorial misconduct; the direct appeal process; and the clemency process.

The information, analysis and ultimate conclusions contained in the ABA Report make clear that Florida's death penalty system is so seriously flawed and broken that it does not meet the constitutional requisite of being fair, reliable or accurate. Who in fact gets executed in Florida does not depend upon the facts of the crime or the character of the defendant, but upon the flaws and defects of the capital sentencing process. Thus, "the imposition and carrying out of the death penalty in [Mr. Walton's] case constitute[s] cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments." Furman, 408 U.S. at 239-40.

A review of the areas identified in the report as falling short makes apparent that Florida's death penalty scheme is deficient for many of the same reasons the schemes at issue in Furman were found to be unconstitutional.

Since 1972, Florida has carried out a total of 61 executions. Out of all the death sentences imposed, few are actually carried out. The percentage of murderers in Florida actually executed since 1972 is minuscule. Furthermore, in Florida, since 1972, 22 people have been exonerated and another individual has been exonerated posthumously, while 61 people have been executed. The staggering rate of exonerations certainly suggest that Florida's death penalty system is broken and violates the Furman promise.

The ABA assessment team found that there was inadequate compensation for trial counsel in death penalty proceedings and that the administration of the funding and timing of counsel's ability to seek payment severely hamper obtaining qualified counsel who has adequate funding for a death penalty case. The quality of Florida's capital postconviction representation system has steadily declined over the past ten years when the federal funding for resource centers was eliminated. The outcome of the post conviction process, directly linked to whether state-appointed counsel is incompetent, is purely arbitrary. The ABA assessment team found that capital jurors do not understand "their role or responsibilities when deciding whether to impose a death sentence." Report at vi. The team

recommended that Florida redraft its capital jury instructions to prevent common misconceptions that inject arbitrariness to the process, in violation of Furman. Id. at x. "Florida is now the only state in the country that allows a jury to find that aggravators exist *and* to recommend a sentence of death by a mere majority vote." State v. Steele, 921 So. 2d 538, 548-49 (Fla. 2005) (emphasis in original). The ABA Report on Florida cites a study which concluded that permitting capital sentencing recommendations by a majority vote reduces the jury's deliberation time and may diminish the thoroughness of the deliberation. Report at vi-vii.

In Florida, the judge who presides over a capital sentencing proceedings has the ability to override a jury's sentencing recommendation. Report at 31. This Court adopted the standard to be employed when reviewing a judicial override in Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). However, the Tedder standard has been the source of great debate over the years. Justice Shaw opined in 1988 that the Tedder standard had created Furman error. Combs v. State, 525 So. 2d 853, 859 (Fla. 1988) (Shaw, J., specially concurring). In 1989, a majority of the FSC held that the vigorousness of the Tedder standard had waxed and waned over the years. Cochran v. State, 547 So. 2d 928, 933 (Fla. 1989). A clearer confession that arbitrariness had infected the decision making process is hard to imagine. Layer upon layer of arbitrary sentencing factors entirely divorced from the facts of

the crime or character of the defendant have accumulated and render Florida's sentencing scheme in violation of Furman.

The ABA Report relied on 3 previous studies concerning race and the death penalty as well as an analysis of current statistical discrepancies concerning race and the death penalty. In 1991, a criminal defendant in a capital case was 3.4 times more likely to receive the death penalty if the victim is white than if the victim is African American. Id. 7-8. This statistic has not changed. Id. at viii. The statistics relied on in the ABA Report on Florida make clear that race is a factor in Florida's death penalty scheme. Such a factor causes the death penalty to be arbitrary and capricious. Furman, 408 U.S. at 364-66. Likewise, geographic disparities contribute to the arbitrariness of Florida's death penalty scheme.

"The prosecutor plays a critical role in the criminal justice system." Report at 107. This is especially true in capital cases, where the prosecutor had "enormous discretion" in determining whether to seek the death penalty. Id. This Court regularly orders new trials in capital cases because of prosecutorial misconduct.[18]

[18] Floyd v. State, 902 So. 2d 775 (Fla. 2005); Mordenti v. State, 894 So. 2d 161 (Fla. 2004); Cardona v. State, 826 So. 2d 968 (Fla. 2002); Hoffman v. State, 800 So. 2d 174 (Fla. 2001); Rogers v. State, 782 So. 2d 373 (Fla. 2001); State v. Huggins, 788 So. 2d 238 (Fla. 2001); State v. Gunsby, 670 So. 2d 920 (Fla. 1996); Gorham v. State, 597 So. 2d 782 (Fla. 1992); Roman v. State, 528 So. 2d 1169 (Fla. 1988); Arango v. State, 497 So. 2d 1161 (Fla. 1986), Guzman v. State, 941 So. 2d 1045 (Fla. 2006); Smith v. State, 931 So. 2d 790 (Fla. 2006); Ventura v. State, 794 So. 2d 553 (Fla. 2001); Duest v. Dugger, 555 So. 2d 849 (Fla. 1990).

On occasion, the Court has found the prosecutorial misconduct was only sufficiently prejudicial at the penalty phase to warrant the grant of penalty phase relief. Young v. State, 739 So. 2d 553 (Fla. 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993). Additionally, on a number of occasions, the Court has determined that the prosecutor acted improperly, but prejudice was insufficiently established to warrant relief from either the conviction or the death sentence.

This Court reviews all cases in which a death sentence is imposed to determine whether death is a proportionate penalty. The ABA assessment team noted a disturbing trend in this Court's proportionality review: "Specifically, the study found that the Florida Supreme Court's average rate of vacating death sentences significantly decreased from 20 percent for the 1989-1999 time period to 4 percent for the 2000-2003 time period." Report at 212. The shift in the affirmance rate and in the manner in which the proportionality review was conducted is an arbitrary factor.

The U.S. Supreme Court has explained that its decisions finding ineffective assistance in Rompilla v. Beard, 545 U.S. 374 (2005), Wiggins v. Smith, 539 U.S. 510 (2003), and Williams v. Taylor, 529 U.S. 362 (2000), were all dictated by its decision in Strickland v. Washington, 466 U.S. 668 (1984) and therefore each of

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This is not an exhaustive listing, but demonstrates the prevalence of prosecutorial misconduct in capital cases in Florida.

those decisions, while issuing between 2000 and 2005, actually date back to Strickland. Certainly, the manner in which the retroactivity rules currently operate has as at least as much to do with who gets executed and who does not as do the facts of the crime and the character of the defendant. This Court's application of its retroactivity rules is arbitrary and violates Furman.

This Court frequently relies upon procedural defaults to create procedural bars that preclude consideration of meritorious issues that go to the reliability of the conviction and sentence of death. See Swafford v. State, 828 So. 2d 966, 977-78 (Fla. 2002). Certainly, the refusal to consider issues that go towards the reliability of the conviction and/or the sentence of death increase the risk that the innocent or the legally undeserving will be executed. It decreases a "meaningful basis for distinguishing the few cases in which [death] is imposed from the many cases in which it is not." Furman, at 313 (White, J., concurring).

Clemency is a critical stage of the death penalty scheme. However, the assessment team found Florida's clemency process to be severely lacking and entirely arbitrary because there are no rules or guidelines delineating factors for the Board to consider regarding clemency. Report at vii.

The ABA assessment team found that: "The deficiencies in crime laboratories and the misconduct and incompetence of technicians have] been attributed to the lack of proper training and supervision, the lack of testing

procedures and the failures to follow such procedures, and inadequate funding." Report at 83. The result of these problems is errors that go unchallenged and uncorrected before the jury, yet another factor unrelated to the circumstances of the crime or character of the defendant that injects arbitrariness into Florida's death penalty scheme in violation of Furman.

While Florida has recently excluded individuals suffering from mental retardation from the death penalty, it has not extended its logic to those suffering from severe mental disabilities. The ABA assessment team also criticized the burden of proof imposed on capital defendants and recommended that the State be required to disprove a defendant's substantial showing that he is mentally retarded.

C. The lower court erred in summarily denying relief.

Unlike the defendant in Rutherford, supra, Mr. Walton alleged below "how. . . the conclusions reached in the ABA Report would render his individual death sentence unconstitutional." First, if Mr. Walton's death sentence was imposed pursuant to an unconstitutional statute, his sentence would be unconstitutional. But beyond that, Mr. Walton's case was infected by many if not most of the areas of concern detailed in the ABA report. See PCR-3. 1806-1817, (Transcript of Case Management Conference January 16, 2007). Mr. Walton has asserted that he received inadequate representation at every stage of the capital process. However, the trial level of ineffectiveness was not judged under the correct standards as

identified in Rompilla, Wiggins, and Williams, supra. Similarly, the adequacy of his appellate counsel's representation was not evaluated under the proper standards, and procedural bars were used to preclude review of his meritorious issues. Prosecutorial misconduct in the form of improper argument and the withholding of exculpatory and/or impeachment material was tolerated in Mr. Walton's case. Mr. Walton received a death sentence despite the fact that he is not the triggerman, in large part due to the prosecutorial misconduct in arguing inconsistent theories. This resulted in a disproportionate and disparate sentence. The wholly inadequate jury instructions in Mr. Walton's case were unconstitutional. Retroactive effect was not given to the decision in Espinosa v. Florida, 112 S. Ct. 2926 (1992). The sentencing process was tainted by the improper introduction of non-statutory aggravators. The sentencing process was infected by inadmissible hearsay in violation of Mr. Walton's right to confrontation – the decision in Crawford has been held not be retroactive. Mr. Walton likewise did not receive the benefit of the decisions in McNeil v. Wisconsin, 111 S. Ct. 2205 (1991) or Minnick v. Mississippi, 111 S. Ct. 486 (1990) in the consideration of his motion to suppress his statements due to the application of procedural bars. Mr. Walton has not received the benefit of the decision in Ring v. Arizona, 122 S. Ct. 2428 (2002). Procedural bars were applied to preclude consideration of meritorious constitutional claims. Moreover, at no

time was cumulative consideration given to the multitude of problems that permeated Mr. Walton's case. Thus, unlike Mr. Rutherford, Mr. Walton is entitled to relief.

When all of the arbitrary factors that are present in the Florida death penalty scheme that were identified and fully exposed in the ABA Report on Florida are considered together in analyzing the system's ability to deliver and/or produce a reliable result, the conclusion is inescapable: "it smacks of little more than a lottery system." Furman, 408 U.S. at 293 (Brennan, J., concurring). Florida's process cannot "assure consistency, fairness, and rationality" and it cannot "assure that sentences of death will not be "wantonly" or "freakishly" imposed." Proffitt v. Florida, 428 U.S. 242, 259-60 (1976). Accordingly, Florida's death penalty scheme stands in violation of the Eighth Amendment. Mr. Walton's case encapsulates all that is wrong with Florida's death penalty scheme. He was entitled to a hearing.

CONCLUSION

Based on the foregoing, Mr. Walton respectfully requests that this Honorable Court grant a new penalty phase based on the due process violations under Bradshaw v. Stumpf. In the alternative, Mr. Walton requests that this Court remand his case to the lower court for a full and fair hearing on each of his new claims.

CERTIFICATES OF SERVICE AND COMPLIANCE

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief has been furnished by United States Mail, first class postage prepaid, to Katherine V. Blanco, Assistant Attorney General, Concourse Center 4, 3507 East Frontage Road, Suite 200, Tampa, Florida 33601 this 4th day of March, 2008.

The undersigned counsel further CERTIFIES that this INITIAL BRIEF was typed using Times New Roman 14 Point font.

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