IN THE SUPREME COURT OF FLORIDA

CASE NO. 96,802

ANTHONY BRADEN BRYAN,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT
OF THE FIRST JUDICIAL CIRCUIT,
IN AND FOR SANTA ROSA COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This appeal is from the October 21, 1999, summary denial of Mr. Bryan's Emergency Motion for postconviction relief and Supplemental Emergency Motion for postconviction relief by Circuit Court Judge Kenneth B. Bell, First Judicial Circuit, Santa Rosa County, Florida, following a Huff[1] hearing held on October 19, 1999.

As of the time of the filing of this brief, counsel had not received the Record on Appeal from the lower court. Therefore, the following abbreviations will be utilized to cite to the record in this cause, with appropriate page number(s) following the abbreviation:

"T1." – transcript of status conference conducted on October 11, 1999;

"T2." - transcript of status conference conducted on October 13, 1999;

"T3." - transcript of Huff hearing conducted October 19, 1999;

"3.850"- Mr. Bryan's Emergency Motion for postconviction relief filed on October 15, 1999 in this cause;

"Supp."- Mr. Bryan's Supplemental Emergency Motion for postconviction relief filed on October 18, 1999, in this cause;

"Compel"- Mr. Bryan's Motion to Compel Public Records filed October 19, 1999;

"Sup.Compel"- Mr. Bryan's Supplement to Motion to Compel filed October 21, 1999;

1Huff v. State, 622 So. 2d 982 (Fla. 1993)

"Order"- Judge Bell's Order Denying Emergency Motion to Vacate Judgment and Sentence, dated October 21, 1999

"PC-R1." - record on appeal from the 1991 evidentiary hearing;

"PC-R Supp." - supplementary record on appeal from the 1991 evidentiary hearing;

"R." — record on direct appeal to this court;

Individual affidavits attached to Mr. Bryan's supplemental motion for postconviction relief will be referred to by the last name of the affiant, with reference made to the appropriate page number(s).

This brief was prepared using a fixed-width, 12-point Courier font (10 cpi).

REQUEST FOR ORAL ARGUMENT

This Court has scheduled Oral Argument in this case for Tuesday, October 26, 1999 at 9:00 a.m. Oral argument is more than appropriate in this case given the issues presented in this Brief and the stakes at hand.

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STATEMENT OF THE CASE AND FACTS

Anthony Braden Bryan was convicted and sentenced to death by a 7-5 vote on May 16, 1986. This Court affirmed on direct appeal and the United States Supreme Court denied petition for certiorari. Bryan v. State, 533 So.2d 744 (Fla. 1988), cert. denied, 490 U.S. 1028 (1989). Mr. Bryan was forced to file his initial Rule 3.850 motion and petition for writ of habeas corpus on October 2, 1990, in advance of the actual due date, because a death warrant was signed prematurely. He was only afforded evidentiary hearing on his allegation of Ineffective Assistance of Penalty Phase Counsel (PC-R Supp. 304-305). All other claims were summarily denied. On August 29, 1991, the circuit court denied all relief (PC-R1. 306-398). This Court affirmed the lower court and denied habeas relief. Bryan v. Dugger, 641 So.2d 61 (Fla. 1994). Mr. Bryan filed a petition in federal court on October 19, 1994, pursuant to 28 U.S.C. sec. 2254. The district court denied relief without further hearing on July 19, 1996. The Eleventh Circuit Court of Appeals affirmed the district court on May 11, 1998, Bryan v. Singletary, 140 F.3d 1354 (11th Cir. 1998), and certiorari was denied by the United States Supreme Court on February 22, 1999, 119 S.Ct. 1068 (1999). On September 23, 1999, Governor Bush signed Mr. Bryan's death warrant and execution is scheduled for Wednesday, October 27, 1999, at 7:00 a.m.

Following a status conference on October 13, 1999, Judge Kenneth Bell, First Judicial Circuit, ordered Mr. Bryan to file

any motions by October 15, 1999, with any supplemental motion due October 18, 1999, at noon (T2. at 2). A Huff hearing was conducted October 19, 1999. Although stating on the record his Order could not be in writing until Monday, October 25, 1999 (T3. at 152; 158) Judge Bell denied all relief by Order dated October 21, 1999. This appeal follows.

First Postconviction Motion, Ineffective Assistance of Counsel During Guilt Phase

In Claim III of his **1990** Emergency Motion to Vacate, Mr. Bryan alleged his trial counsel was constitutionally ineffective during the guilt-innocence phase of his 1986 jury trial. That claim contained allegations of failure to investigate and prepare, failure to impeach Sharon Cooper, failure to properly cross-examine other witnesses, failure to investigate and suppress an audiotaped conversation between Cooper and Bryan, and failure to present a mental health defense pursuant to Gurganus v. State, 451 So.2d 817 (Fla. 1984) (PC-R Supp. 125-132). On December 3, 1990, Mr. Bryan filed an Amendment/Supplement to Motion for Fla. R. Crim. P. 3.850 Relief. Regarding Claim III, footnote 1 stated:

> Undersigned counsel has made every reasonable attempt to locate and interview Ms. Cooper. At this time, Ms. Cooper has not been located. Ms. Cooper absconded from the North Carolina Department of Corrections on February 3, 1989, where she was on probation. Undersigned has contacted the North Carolina Department of Corrections in an attempt to locate her. She remains at large despite all attempts to locate her [reference to Attachment deleted].

(PC-R Supp. 319).

Also regarding Claim III, footnote 2 (referring to the audiotape of the Cooper/Bryan conversation) in the amended pleading stated:

> Undersigned counsel has yet to receive a copy of the tape or a transcript of the recording, although diligent efforts have been made to obtain it.

(PC-R Supp. 322).

In its **1990** Response to the Emergency Rule 3.850 motion, the State asserted that Claim III should be summarily denied because Bryan "has simply made the most conclusory of allegations" and dismissed the allegation that postconviction counsel did not possess the audiotape on the basis the audiotape was litigated as a Richardson v. State, 246 So.2d 771 (Fla. 1971), violation on direct appeal and "the entire claim is procedurally barred and should be stricken." The State did not contest either of collateral counsel's representations: (a) that Sharon Cooper could not be located despite diligent efforts; and (b) that the audiotape had not been produced despite diligent efforts to obtain it. (PC-R Supp. 329-332).

The trial court's October 25, 1990, Preliminary Order found "the allegations are merely conclusory in nature and therefore facially insufficient" regarding Claim III. (PC-R1. 302-303). The trial court's Second Preliminary Order found the amended assertions in Claim III remained "merely conclusory in nature and are therefore facially insufficient." (PC-R1.304-305).

On appeal to this Court from the 1990 proceedings, issue nine was the ineffective assistance of counsel guilt-innocence claim. This Court disposed of the issue as follows:

> The deficiencies listed in issue nine do not demonstrate ineffective assistance of counsel under Strickland v. Washington [cite omitted].

641 So.2d at 63.

Clearly, Mr. Bryan has never received a hearing or merits determination on his claim of ineffective assistance of guilt-innocence phase counsel.

Current Postconviction Motion, Ineffective Assistance of Counsel During the Guilt Phase.

In Mr. Bryan's October 15, **1999**, motion, he alleged he was denied an adversarial testing due to trial counsel's ineffectiveness during the guilt-innocence phase in Claim II and in reliance upon his Factual Statement and Summary of Claims (3.850 at 4-27). Mr. Bryan alleged Sharon Cooper had been located, interviewed, and she provided vital information regarding Mr. Bryan's condition and state of mind before, during, and after the homicide. Mr. Bryan alleged the audiotape had been received for the first time on October 13, 1999, and further alleged that the recording was a blatant violation of Mr. Bryan's 5th and 6th Amendment rights, constituted Miranda, Giglio and Henry violations and established prejudicial ineffective assistance of trial counsel during guilt-innocence, and it contained clear evidence of Mr. Bryan's mental state shortly after his arrest which should have been provided to confidential mental health experts. In his supplemental motion, Mr. Bryan

attached the affidavits of persons substantiating Ms. Cooper's statements and October 18, 1999, affidavit from Dr. James Larson, which, in part, stated:

> 4. Within the last few days, current postconviction lawyers representing Mr. Bryan have provided me with new information that has surfaced for the first time. This information includes statements made by Sharon Cooper to investigators working for Mr. Bryan, an affidavit from Rosie Onzell Sanders dated October 15, 1999, an affidavit from Catherine Judy Wahby dated October 13, 1999, and a September 6, 1983 cassette tape recording of a telephone conversation between Sharon Cooper and Tony Bryan.
>
> 5. I have reviewed my files and all information I had regarding Mr. Bryan before the new information surfaced and considered all the information now available regarding Mr. Bryan's mental state at the time of the homicide. In so doing, I was able for the first time to consider Mr. Bryan's family, social and psychological history; his Major Depressive Syndrome; his Organic Personality Syndrome; evidence regarding narcotic and alcohol consumption and abuse during the relevant time period; Sharon Cooper's information regarding his state of mind during the relevant time period; three suicide attempts which occurred in 1983; Dr. Phillips' finding of incompetency on June 21, 1984; Dr. Montes' February 3, 1986, report suspecting Mr. Bryan suffered from Ganser's Syndrome; Dr. Herlihy's 1984 testimony that Mr. Bryan was insane on May 27, 1983, when he committed a bank robbery; Rodney Bondreaux's counselling notes from April-June, 1984; Dr. Gentner's determination of December 16 & 18, 1985, that Mr. Bryan's full scale IQ was 77; and all known psychological and psychiatric records in existence regarding Mr. Bryan.
>
> 6. My review of the totality of mental health evidence presently available leads me to conclude the following within a reasonable degree of psychological certainty:
>
> (a) The statutory mental health mitigating circumstances as defined in F.S. 921.141 (6)(b) & (f) apply in Mr. Bryan's case.
>
> (b) Extensive nonstatutory mitigation exists as well...

(c) In light of the new information, considered together with prior available mental health information, I have for the first time reviewed the applicability of statutory aggravating circumstances which have a mental health component [HAC, CCP, Avoid Arrest]...I have concluded that none of these aggravating circumstances can be said to exist in Mr. Bryan's case. While mental health experts may disagree on the applicability of these circumstances, I certainly could not testify beyond a reasonable doubt that any of the circumstances apply to Mr. Bryan. Based upon the documented impulsive character of Mr. Bryan's actions between May 27, 1983, and his arrest August 27, 1983, I do not feel any aggravating circumstance requiring heightened planning or a specific motive or intent can be proved.

(d)...I can not testify beyond a reasonable doubt that Mr. Bryan was sane at the time of the homicide or insane at the time of the homicide without the opportunity to interview Sharon Cooper. I have not had that opportunity up until the present time.

(e) I do believe that the combination of an active major mental illness, organic brain impairment, alcohol and narcotic consumption, sleep deprivation, food deprivation, borderline intellectual ability, and the overall internal and external stressors at work on Mr. Bryan were serious conditions relating to his ability or lack thereof to form specific intent to rob, kidnap, and/or murder George Wilson. With all information currently available, I feel I could have testified at Mr. Bryan's capital trial by answering hypothetical questions posed by defense counsel regarding Mr. Bryan's state of mind at the time of the robbery, kidnapping, and homicide. I could have testified to the combined effects of: Major Depressive Disorder on Mr. Bryan; Organic Brain Syndrome on Mr. Bryan; Mr. Bryan's impulsive personality profile; alcohol, cocaine, amphetamine, and marijuana consumption on Mr. Bryan's moderately impaired brain; Mr. Bryan's borderline intellectual functioning; the effects of sleep deprivation on Mr. Bryan; the effects of suicidal ideation on Mr. Bryan; and the effects of malnourishment on Mr. Bryan. I believe these conditions would have rendered Mr. Bryan less capable of making rational choices and directing his own behavior, that he would not have been in effective control of his behavior, and he would have had a mental defect causing him to lose his ability to understand or reason accurately.

(f) With this new information, combined with the known mental health information previously available, I would have advised Ted Stokes--had he asked me--that Tony Bryan should not testify during his capital trial, regardless of whether or not he was considered legally competent by the court.

(Larson at 2-6)(emphasis supplied).

The following arguments were made during the Huff hearing:

MR. THOMAS: ... I would note that Mr. Bryan's ineffective assistance of counsel guilt phase claim was denied as being legally insufficient.

And as we interpret the law regarding successive 3.850's, is if this information that was not available at the time can now be pled along with information that was originally found legally insufficient, that would entitle us to a hearing on this claim.

My response to what Mr. Stokes did during the trial is apparently he never listened to the tape.

(T3. at 21-22).

MR. THOMAS: We have pled due diligence in this case. And I believe the Supreme Court says that due diligence is something, if you have pled it affirmatively, that it's something that would be subject to an evidentiary hearing.

In the Swafford case itself what they did was they remanded and said, "If this evidence...if they did not exercise due diligence, then you don't have to have a determination on the merits, but you must have an evidentiary hearing regarding due diligence initially." And then if you decide they should have had it years ago, then you don't go to a merits determination. But if you decide and if you determine that in fact we did everything in our power to obtain it and that it was suppressed and we did not receive it and that once we did receive it we pled it in timely fashion, then we should go on to a merits determination.

But in either event the only way to satisfy this Court one way or another is to have -- take evidence, call prior investigators, call prior attorneys that worked on the case, ask them what they did, what they did not do.

> What we know is the State of Florida nor the Santa Rosa County Sheriff's Department have ever certified they gave us everything in 1990, 1994, not now.

(T3. at 23-24).

Mr. Bryan, with great clarity and specificity, alleged due diligence regarding Sharon Cooper and in good faith asserted that the audiotape came into collateral counsel's possession on October 13, 1999. The trial court was fully advised of the prejudice Mr. Bryan suffered by failure of his trial counsel to suppress the audiotape at trial, failure to use the audiotape with mental health experts, and failure to question Sharon Cooper about Mr. Bryan's mental state. This prejudice was gleaned from the new information obtained. Further, the court was advised of the problematic map indicating the deceased's body was found two days prior to the official version in this case and the relevance of such information in impeaching the State's "chief witness," Sharon Cooper.

The trial court stated its "initial reaction was to grant such a hearing," but time considerations appear to have prevailed over an accurate and legal determination ("The execution date, previously stayed almost a decade ago, is impending"; "I am ordered to expedite my ruling. Time and limited resources converge with this mandate dictating a pithy ruling")(Order at 2). Further, the State clearly goaded the trial court into rendering a premature decision in this case:

> **THE COURT:** Well, help me out, Counsel. You all again do, happily for me, a lot more of this than I do. I'm going to have to review all of this, and it may be Saturday or Sunday before I'm able to make a decision

by the time I review everything, the case law and make a recent [sic] decision.

Can we just go ahead and set aside time now so everybody can start getting their ducks in a row, and, if we need to let the ducks go -- you all know on Monday? Or do you want to wait until I make a ruling on Monday whether or not we need an evidentiary hearing?

MR. MARTELL: Your Honor, I really think the sooner the better, even if, as you indicated, it may not be your full order, if it's just an inclination as to what your ultimate disposition is going to be. The logistics of this are that the death warrant is effective from 7 a.m. Monday, October 25th, to 7 a.m. Monday, November 1st, with execution scheduled at 7 a.m. Wednesday, the 27th.

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MR. MARTELL: So I appreciate the fact that you are going to have logistical difficulties, but, you know, if you could even do your preliminary order by noon tomorrow when you leave, I think that might really help all the parties; because once the Florida Supreme Court rules Mr. Bryan can't [sic] ask the Eleventh Circuit for permission to file a successive habeas, and he can go to the U.S. Supreme Court, which is traditionally done, too. So there will be other courts down the way who would like a signal of some kind, as far as what's going to happen.

(T3. at 145-147).

Thereafter, the court discussed his authority to enter a stay and the continuous warrant provision at some length (T3. at 147-151, 158). Again, the State pressed the court to decide quickly so the execution could proceed:

MR. MARTELL: Well, my experience in the last death warrant case that was carried out was Allen Lee Davis. And the Defendant filed his post conviction motion on Monday. The Judge only gave us until Tuesday morning to respond, so we did a response; and we emailed it to the State Attorney in Jacksonville. And he filed it. By the time we got to the hearing Tuesday afternoon at the end of the hearing the judge denied it, and we

> proceeded; and execution was carried out during the course of the warrant.
>
> I still think that doing it within the course of the warrant should be the choice unless there is truly an extenuating and extremely abhorrent circumstance that makes that physically impossible.
>
> ******
>
> It can't be a hurry-up job when we're talking about a 1983 murder. I'm sorry. That's my bottom line.

(T3. at 151-152, 154).

The lower court was clearly rushed into a decision by agents of the State of Florida. The court rendered a "pithy ruling" (Order at 2) within 48 hours of the Huff hearing after indicating throughout the hearing that it would be Monday, October 25th before a reasoned order could be rendered after reviewing all the files and records in the case. The lower court merely concluded the claims were untimely and barred, despite affirmative allegations to the contrary and admitted facts in dispute. The trial court made no mention of Dr. Larson's affidavit in his order. The court admitted to reviewing only "[r]elevant portions of the extensive case file" (Order at 1). The court clearly did not conduct a cumulative analysis of the claims presented, the prior postconviction proceeding, and the trial record.

First Postconviction Motion, Ineffective Assistance of Counsel During Penalty Phase

In Claim I of Mr. Bryan's **1990** motion, he alleged ineffective assistance of penalty phase counsel. (PC-R Supp. 88-119). He was granted an evidentiary hearing and relief was denied. In denying relief, the circuit court found:

> None of the mental health experts testified at the evidentiary hearing that their conclusions as to the defendant's mental state would have been changed through the receipt of the additional information submitted in preparation for this post-conviction relief proceeding.

641 So.2d at 64 (citing lower court order).

This Court relied on the following in affirming the lower court's denial of relief:

> Furthermore, of the three doctors who testified at the post-conviction hearing, Dr. Gentner did not believe Bryan met the criteria for either of the statutory mitigators and the other two doctors felt that only one mitigator existed.

641 So.2d at 64.

Current Postconviction Motion, Ineffective Assistance of Penalty Phase Counsel

Mr. Bryan pled in his current Emergency Motion for Postconviction Relief the vital importance of evidence previously unavailable: Sharon Cooper's state of mind information and the audiotape of Cooper's illegal conversation with Mr. Bryan. Dr. Larson's affidavit, referred to extensively above, demonstrates the prejudice suffered by Mr. Bryan due to nondisclosure of the audiotape and the unavailability of Sharon Cooper.

First Postconviction Motion, Ake Claim

Mr. Bryan's 1990 postconviciton motion raised the issue that the mental health experts who saw him did not conduct a constitutionally adequate evaluation due to trial counsel's ineffective assistance and failure to provide the mental health experts with necessary background information. (PC-R Supp. 38-43).

This claim was summarily denied.

Current Postconviction Motion, Ake Claim

Mr. Bryan's current postconviction motion raises an Ake claim, however, new and different grounds exist for this claim because of the new evidence previously unavailable to postconviction counsel (3.850 at 47-55). In the instant proceedings, the lower court summarily denied this claim as procedurally barred (Order at 5).

SUMMARY OF ARGUMENT

This appeal is from the erroneous summary denial of Mr. Bryan's Emergency Motion and Supplemental Motion for postconviction relief by Circuit Court Judge Kenneth B. Bell, First Judicial Circuit, Santa Rosa County, Florida, following a Huff hearing held on October 19, 1999.

Mr. Bryan's death warrant was signed by Governor Bush on September 23, 1999, and execution is scheduled for 7:00 a.m., Wednesday, October 27, 1999. On October 1, 1999--two days earlier than required--Mr. Bryan filed public records requests under Florida Rule of Criminal Procedure 3.852 (h)(3). Despite the summary denial, Judge Bell granted Mr. Bryan's Motion to Compel public records, but set no time frame for their delivery to counsel.

What counsel discovered in the partial public records received through the Rule 3.852 (h)(3) process formed a substantial basis for the postconviction claims. An audiotape never before disclosed to postconviction counsel was received on

October 13, 1999. Mr. Bryan's prior postconviction counsel alleged in 1990 that this audiotape was being withheld. Mr. Bryan alleged--and was prepared to prove at an evidentiary hearing--that his attorneys and investigators exercised due diligence in seeking the audiotape, but it was only produced under the current warrant. An evidentiary hearing is necessary, at a minimum, to adjudicate counsel's claim of having exercised due diligence.

The audiotape is a central piece of material evidence in this case. It was referred to in Mr. Bryan's trial in 1986, but trial counsel never listened to the tape. The tape, in conjunction with existing federal prison records, Mobile City Jail records, University of South Alabama Medical Center records, federal hospital records, and mental health evaluations, demonstrates that Anthony Bryan was incompetent and in the midst of a suicide attempt at the time Sharon Cooper, as an undisclosed agent of the Santa Rosa County Sheriff's Department, pursuant to a written agreement with State authorities, attempted to obtain a recorded confession from Mr. Bryan under false pretenses. The undisclosed audiotape forms the basis for an ineffective assistance of guilt phase counsel claim that could not have been known by collateral counsel in prior proceedings.

The prosecutor utilized the audiotape to impeach and ridicule Mr. Bryan's trial testimony. While the trial court was going to permit the playing of the tape for the jury in rebuttal, the prosecutor knowingly avoided doing so and instead had Sharon

Cooper testify to its contents. Her testimony was misleading and incomplete. The prosecutor failed to correct her misleading testimony and trial counsel--having never listened to the tape--could neither seek its suppression nor cross-examine Cooper in that regard. The jury was left with the false impression that Mr. Bryan and Sharon Cooper had a conversation consisting solely of discussions regarding a concocted alibi for the homicide. In truth, the tape reveals a mentally incompetent, depressed Anthony Bryan who denies every attempt by Cooper to implicate him in the homicide. Regardless of whether the tape was suppressed as illegally obtained evidence, as it surely was, or utilized to impeach Cooper and enhance Mr. Bryan's defense, it was material exculpatory evidence.

Further, the tape is one piece of evidence upon which Dr. James Larson relied in providing opinions supportive of statutory mitigation, rebutting aggravation, and in support of a voluntary intoxication/mental defect defense (See generally Larson affidavit). It also underlies Dr. Larson's opinion that Anthony Bryan should not have testified at trial.

Additionally, a legible map dated October 1, 1983, was obtained for the first time in the Rule 3.852 (h)(3) public records process. This map appears to be initialled by Rick Cotton, one of the investigators on this case. The map shows the location where George Wilson's body was located and also shows the location where a shotgun shell cartridge was recovered. This map forms the basis for a challenge to the truthfulness of State

testimony during Mr. Bryan's trial. The authorities maintained at trial that Sharon Cooper voluntarily cooperated with them and led them to the area of the homicide on October 3, 1983---two days after the dated map. This evidence was argued extensively by the prosecutor to bolster Cooper's testimony regarding the homicide itself. According to the prosecutor, it purportedly demonstrated she not only had a conscience, but she was a truthful witness. This evidence was either suppressed by the State or not discovered by trial counsel. In either event, it constitutes undisclosed exculpatory evidence. Mr. Bryan alleged due diligence and a hearing should have been granted on this basis alone.

Sharon Cooper was unavailable in 1990, when Mr. Bryan was forced to file a premature Rule 3.850 motion while under his first death warrant. Mr. Bryan's amended Claim II contained footnote 1 alleging Cooper's unavailability and the State never contested this allegation. Records clearly establish that Cooper absconded from North Carolina and Florida probation in 1989 and was not apprehended by authorities until late 1997. Counsel for Mr. Bryan alleged due diligence regarding Sharon Cooper with great specificity. Sharon Cooper was finally located, using the last name "Jacobs" a few months before the current death warrant was signed. For the first time in the history of this case, Cooper was asked specific and thorough questions regarding Mr. Bryan's state of mind during her time with him and at the time of the homicide. Her answers demonstrate the ineffectiveness of Mr.

Bryan's trial counsel during both phases of the capital trial. She supports a defense based upon this Court's ruling in Gurganus v. State, 451 So.2d 817 (Fla. 1984), during guilt phase and provides vital state of mind information regarding mental health and nonstatutory mitigation for penalty phase. Dr. Larson's affidavit establishes the vital importance of this information.

The lower court failed to enforce Mr. Bryan's rights to Rule 3.852 (h)(3) public records in the early stages of the process, then granted Mr. Bryan's Motion to Compel while simultaneously summarily denying his postconviction claims. This renders the "remedy" meaningless.

The lower court failed to presume the postconviction claims true for purposes of determining if an evidentiary hearing was required. Despite his "initial inclination to grant such a hearing" (Order at 2), the lower court denied a hearing (even regarding due diligence). The lower court failed to conduct a cumulative analysis of the import of the claims in conjunction with the entire existing record and files in this case. Further, the lower court refused to enforce Mr. Bryan's constitutional right to minimal due process in clemency proceedings.

In formulating its Order summarily denying Mr. Bryan's motion for postconviction relief, the lower court ignored and misstated the law, resolved a myriad of factual disputes without the taking of evidence, failed to attach portions of the record to support its decisions, and denied Mr. Bryan the hearing to

which he was entitled without reading the entire record of Mr. Bryan's prior proceedings.

The State, as is its practice, urged the lower court to procedurally bar Mr. Bryan's claims; notwithstanding the lack of merit to the State's argument, the lower court concurred without any meaningful discussion supporting application of procedural bars. Mr. Bryan maintains that the State's procedural-bar argument is unfounded, and that the lower court could not legally have found a lack of diligence without first holding an evidentiary hearing on the issue.

As this Court has said on numerous occasions, the death penalty is reserved for the most aggravated and least mitigated of premeditated murders. Mr. Bryan possesses, and properly pled below, evidence that, given an evidentiary hearing, would prove at a minimum that this case is one of the least aggravated and most mitigated. This Court is constitutionally obliged to remand this case so that Mr. Bryan can prove that he cannot be legally executed.

ARGUMENT I

THE TRIAL COURT ERRED IN DENYING MR. BRYAN AN EVIDENTIARY HEARING ON HIS MOTION TO VACATE JUDGMENT AND SENTENCE BY APPLYING INCORRECT LEGAL STANDARDS, BY RESOLVING DISPUTED BUT UNREBUTTED FACTS IN FAVOR OF THE STATE WITHOUT GIVING MR. BRYAN AN OPPORTUNITY TO PRESENT EVIDENCE, BY FAILING TO READ AND CONSIDER THE ENTIRE RECORD, AND BY FAILING TO ATTACH PORTIONS THEREOF TO HIS ORDER SUMMARILY DENYING MR. BRYAN'S MOTION. HENCE, MR. BRYAN HAS BEEN DENIED ANY, MUCH LESS A FULL AND FAIR, ADVERSARIAL TESTING OF THE STATE'S CASE CONTRARY TO THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

A. THE TRIAL COURT APPLIED INCORRECT LEGAL STANDARDS TO MR. BRYAN'S MOTION.

The lower court identified Mr. Bryan's Emergency Motion to be one falling under 3.850 (**f**)(Order at p. 3). However, the lower court completely failed to conduct the proper analysis for a case falling under that section of the rule, to wit: whether the motion alleged new or different grounds for relief and whether the prior determination was on the merits or whether the failure to assert the new or different grounds was an abuse of the process. Fla. R. Crim P. 3.850(f). Instead, the lower court then applied a different section of Fla. R. Crim. P. 3.850 in order to deny the motion:

> It is also untimely. Neither of the two (2) grounds for such a successive, untimely motion provided for by Rule 3.850(b)(1) or (2) has been satisfied.

(Order at p. 3). The court relied upon Fla. R. Crim. P. 3.850(b)(1) in order to deny Mr. Bryan's motion in that the lower court stated that the audiotape and new information revealed by Sharon Cooper were "available to trial counsel" (Order at p. 4) and then erroneously applies a "newly discovered evidence" test relying upon Jones v. State, 709 So.2d 512,521 (Fla. 1998)[2].

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2 Here, however, Mr. Bryan can satisfy the Jones test because Sharon Cooper was unwilling and unavailable to provide the new information to postconviction counsel until collateral counsel was only recently able to talk to her. With regard to the other new evidence, the facts are in dispute as to whether trial counsel ever actually had the tape (especially given the fact that the prosecution stated in a discovery response that no electronic surveillance or recordings existed (T3. 143) or the map dated 9/1/83.

The lower court clearly misapprehended the character of the evidence and Mr. Bryan's claims at issue. The audiotape, the new information learned from Sharon Cooper and the new material (map) showing that the body was really discovered on 9/1/83 constitute evidence that was previously unavailable to prior postconviction counsel and are the new and different grounds for Mr. Bryan's Emergency Motion for postconviction relief and Supplement thereto. It is irrelevant in this analysis whether the information was available to trial counsel. The question to be determined is what prevented collateral counsel from having this evidence before. As clearly demonstrated in the Emergency Motion and Supplement, and at the Huff hearing, the failure of state agencies to provide the audiotape and 9/1/83 document (despite requests) as well as Sharon Cooper's unavailability for a decade is what precluded these claims from being raised at an earlier juncture.

However, properly applying the section of Rule 3.850(b) that was only partially cited by the trial court, i.e., applying the language of that section which the trial court chose to ignore, demonstrates that, even under Rule 3.850(b), Mr. Bryan is without question entitled to an evidentiary hearing.

The trial court excised from Rule 3.850(b)(1) the language that sets out the pleading standard for that section, to wit, that an out-of-time claim may not be brought under section (b) "unless [the defendant's motion] **alleges** the facts on which the claim is predicated were unknown to the movant or the movant's

attorney and could not have been ascertained by the exercise of due diligence." (Emphasis added). The trial court then replaced the language and erroneously heightened Mr. Bryan's pleading requirement, stating: "Though **alleged**, Mr. Bryan has failed to carry the initial burden of **showing** on his motion that: the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence." (Order at 3)(Emphasis added). In short, the trial court admitted that Mr. Bryan met the pleading standard required by the Rule, but then changed the standard to support denial of an evidentiary hearing. Error is established.

Moreover, in applying Fla. R. Crim.P. 3.850 (b)(1), the lower court interpreted that section's language "movant's attorney" to include the movant's **trial attorney**. This was error.

The lower court applied its erroneous legal analysis to deny Claims II (Ineffectiveness of Trial Counsel during the Guilt Phase), Claim III (ineffectiveness of trial counsel during the penalty phase and Claim V (denial of full and fair adversarial testing due to ineffective assistance of counsel during both phases of the capital trial and due to the state's violation of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963), Giglio v. United States, 405 U.S. 150, 405 S.Ct. 763 (1972) Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1601 (1966) and United States v. Henry, 447 U.S. 264, 271 (1980)).

In summarily denying Mr. Bryan's claim based upon Ake v. Oklahoma, the lower court merely stated that the claim was:

> procedurally barred as outlined on pages 57-59 of the State's Response. Additionally, as noted by the Eleventh Circuit, there is an unavoidable and fundamental inconsistency between the known facts of the case and the arguments the Defendant makes in his claim.

(Order at 5)(fn omitted).

First, the lower court's refusal to articulate in it's order **its** findings in this matter should be deemed insufficient under case law requiring the lower court to either attach portions of the record that conclusively refute this claim or sufficiently recite in its order its rationale for denying each and all of Mr. Bryan's claims. Demps v. State, 714 So.2d 365, 366 (Fla. 1998); Anderson v. State, 627 So.2d 1170,1171 (Fla. 1993).

Second, the lower court completely failed to conduct the proper analysis by considering the new or different grounds for this claim. Moreover, as discussed below the lower court accepts the state's rendition of the facts as true even though the facts regarding the acquisition of the new information are clearly in dispute.

Third, the lower court in relying upon the Eleventh Circuit's opinion that the "known facts of the case" are inconsistent with arguments made by Defendant, clearly shows that the lower court totally ignored the whole bases for the instant claim, i.e., the "known facts of the case" when this case was before the Eleventh Circuit are not the facts now known and that is exactly why this claim is proper -- because of the new

information we now know and could show, for the first time, that the prior facts of the case are unreliable and that the new facts form the bases for new and different grounds for Mr. Bryan's postconviction motion.

In denying Mr. Bryan's cumulative error claim (Claim VII), Claim VIII regarding the false and misleading evidence presented at trial, and Mr. Bryan's clemency claim, the lower court again completely fails to sufficiently recite its rationale for denying the claims. The ruling of the lower court is only that the claims must be summarily denied "as the State argues" (Order at 5). Here, the lower court does not to cite to pages in the State's Response it relies upon. Additionally, as discussed below, the State's rendition of the facts is in dispute. It was improper for the lower court to simply adopt the State's argument.

In effect, the lower court abdicated its responsibility of acting and adjudicating matters as a neutral detached tribunal to Mr. Bryan's adversary, the State. The lower court's actions in this regard are no less objectionable and improper than when the State prepares a sentencing order for mere signing by the judge. (e.g., Card v. State, 652 So. 2d 344 (Fla. 1995)).

At a minimum, the lower court erred in failing to grant Mr. Bryan a hearing regarding the due diligence affirmatively pled in Mr. Bryan's Emergency Motion and Supplement and argued at the Huff hearing. Although directed to the case law at the Huff hearing, the lower court failed to apply Swafford v. State, 679

So. 2d 736 (Fla. 1996)(remanding for evidentiary hearing on whether evidence was newly discovered when state alleges nothing more than an allegation defense counsel had years to find the evidence) to the instant proceedings. See also, Steinhorst v. State, 636 So.2d 498, 500 (Fla. 1994)(matter remanded in part for factual determination regarding availability of relevant records). In Mr. Bryan's case, the State likewise did nothing more than allege that the evidence could have been found earlier. The lower court erroneously relied upon that allegation to support its order summarily denying Mr. Bryan's motion.

B. THE LOWER COURT ERRED IN SUMMARILY DENYING MR. BRYAN'S MOTION BECAUSE FACTS UPON WHICH IT IS PREMISED ARE CLEARLY IN DISPUTE AND NOT REFUTED BY THE RECORD.

At the outset, counsel for Mr. Bryan urges this Court in determining this claim to note that the State attempted to introduce non-record material through attachments to its Response and at the Huff hearing in an attempt to refute Mr. Bryan's claims. (T3. 75-81). This attempt, in and of itself, establishes that facts are in dispute and an evidentiary hearing is warranted.

Moreover, it should be recognized that the State's Response refers to and relies upon nonrecord matters (See, e.g., State's Response at page 50 fn. 14, State utilizing FBI summary of Cooper's Sept 2, 1983 statement to "fashion" the chronology of events appearing at pp. 50-53 of the Response) which are clearly improper for the lower court to have based its summary denial upon. Even so, the non-record and the record matters relied upon

fall far short of conclusively refuting Mr. Bryan's claims as required for summary denial, Lemon v. State, 498 So. 2d 923 (Fla. 1986), but do demonstrate that facts are in dispute necessitating an evidentiary hearing.

1. The lower court accepted as true the state's version of the "facts", incorporating them into its order, notwithstanding the fact that the record fails to refute them and that no evidence was taken and that the state's rendition of the facts were in direct conflict with those asserted by Mr. Bryan.

The lower court's order summarily denying relief must be reversed because the order clearly states the judge relied upon the State's version of the facts -- facts which are in dispute -- facts demonstrated to be in dispute in Mr. Bryan's Emergency Motion To Vacate Judgment and Sentence, the State's Response and at the Huff hearing. The lower court's improper reliance upon the State's version of the facts could not be more clear:

> My examination and analysis parallels the essence of **the State's rendition of the facts** . . . .
>
> The procedural history and case **facts** are well chronicled **in the State's Response and are incorporated herein** by this reference.

(Order at 2.) (emphasis added). In the last quote the lower court cited pages 1-28 of the State's Response. The State did not merely recite facts of procedural history in pages 1-28. For example, within these pages, the State presented as "fact" the following:

> As the State's Notice of Filing of October 12, 1999 indicates, Bryan **apparently** made only three pre-1999 public record requests -- one in 1990 to FDLE, in which compliance was secured, and two in 1994 -- to the Attorney General's Office and the Office of the State Attorney. Although Bryan was advised that access was

> granted to files of the latter agency, collateral counsel **would not seem** to have followed up on this grant of access . . . .

(State's Response at page 18, fn. 4)(emphasis added).

Clearly in dispute is the issue of due diligence and prior collateral counsel's attempts to secure these public records. Accepted as fact by the lower court was the State's assertion that "Bryan **apparently** made only three pre-1999 public record requests" and "collateral counsel **would not seem** to have followed up . . ." (emphasis added). Mr. Bryan's Emergency Motion to Vacate sufficiently pled facts in contradiction to the State's "rendition" and supported these claims with argument at the Huff hearing. (See e.g. 3.850 at pp. 2; 6-12; 15-16; 21-24; 26-27; 41; 44; 53-55; 56-57; 91; 103 and T3. at 13-16; 17; 21; 23; 24; 29). It was clear error for the lower court to rely upon the State's speculation and unproven version of these disputed facts.

The lower court clearly accepted the State's "rendition" of the facts without regard to the reality that the facts are in dispute:

> **The State's factual statements** and argument on this issue if [sic] on point and **accepted by this Court.**

(Order at p. 4).

The lower court's *ad hoc* acceptance of the State's representations and its decisions based thereon are error. The lower court's failure to attach portions of the record is proof that the record does not conclusively rebut Mr. Bryan's claims. In fact, it actually demonstrates that issues of fact are in dispute necessitating an evidentiary hearing.

2. Without taking any evidence, the lower court made erroneous conclusions regarding Mr. Bryan's claim that the state failed to correct false and misleading testimony and presented misleading argument regarding the discovery of the victim's body in order to bolster the credibility of their "chief" witnesses at trial, Sharon Cooper.

In Claim VIII of Mr. Bryan's Emergency Motion to Vacate Judgment and Sentence, he alleged that he was denied a full and fair adversarial testing during his capital proceedings due to trial counsel's ineffective assistance of counsel pretrial, during the guilt/innocence phase and during the penalty phase and due to the State's violations of Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194 (1963) and Giglio v. United States, 405 U.S. 150, 405 S.Ct. 763 (1972) and as a result he was denied his right to due process of law as well as his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution and corresponding law and, as a result, critical exculpatory evidence was never presented to the jury and confidence was undermined in the judgment and sentence. (See generally Supp.).

Mr. Bryan alleged in this claim:

> The State withheld material, exculpatory and/or impeachment evidence which indicates the body of George Wilson and the shotgun shell casing were located prior to Sharon Cooper's arrival in Santa Rosa County and her purported assistance to law enforcement. The State argued misleading and apparently false evidence in this regard during Mr. Bryan's capital trial. Mr. Bryan's trial counsel failed to discover this evidence which directly calls into question the "extremely professional" investigation by the Santa Rosa County Sheriff's Office and the credibility of Sharon Cooper's trial testimony. Mr. Bryan was severely prejudiced and should be granted a new trial as a result of this misconduct.

(Supp. at 2).

> Records received through the Fla. R. Crim. P. 3.852 (h)(3) process reveal that false and misleading testimony was presented at trial and went uncorrected by the State at Mr. Bryan's trial. These records show that law enforcement actually discovered the body of George Wilson, the victim in this case, two days prior to the time represented at trial, independent of the assistance of Sharon Cooper.

(Supp. at 3)(emphasis original).

* * *

> Because of the records disclosed through Fla. R. Crim P. 3.852 (h)(3) we now know that the picture painted to the jury was not true.

(Supp. at 8). Mr. Bryan pled that he had evidence (evidence generated by law enforcement disclosed through Fla. R. Crim P. 3.852 (h)(3)) that showed that the body was actually found two days prior to when the evidence at trial represented the body was found. This evidence was critical and the Motion to Vacate thoroughly outlined the prejudice suffered by Mr. Bryan as a result of the State's failure to correct false and misleading evidence and using the false and misleading evidence in its arguments to jury. (3.850 at 4-17). Moreover, the prejudice resulting from this false evidence was demonstrated in the State's Response noting that this Court relied upon the credibility of Sharon Cooper to support the aggravating factors of "committed to avoid arrest" stating: "In this connection, we note that the body was not discovered until approximately a month later **after Cooper went to the police and assisted in the search for the body.**" Bryan, 533 So. 2d 744, 748-749 (Fla. 1988)(emphasis added). (State's Response at 5). This Court

relied upon the facts presented at trial in the record in 1988 in making its decision on Mr. Bryan's direct appeal. It is now known that evidence exists which calls into question the reliability and veracity of the facts presented at trial and relied upon by this Court.

The State's Response illustrates that these facts are in dispute:

> it is preposterous to think that Wilson's body had been discovered any time prior to September 3, 1983. **It is likely that this "claim"**, which cannot be regarded as anything other than a red herring, **simply arises from a typographical error**. . . .

(State's Response at p. 66)(emphasis added).

The State's Response -- "likely that this claim . . . simply arises from a typographical error" -- is merely conjecture -- non record speculation -- to lead the lower court into denying Mr. Bryan's properly pled claim. The State's own response demonstrates disputed facts in need of evidentiary development. If the State is going to allege a mere "typographical error" then the State must present evidence showing it. It is unconscionable to deny Mr. Bryan a hearing upon this mere speculation and guess work by the State. Mr. Bryan was erroneously denied a hearing.

The disputed facts are significant because the State's theory -- and representations to the jury -- painted the picture that law enforcement had no idea that George Wilson was dead before their contact with Sharon Cooper. This evidence is also critical because the state bolstered the credibility of Sharon Cooper by arguing that, but for Sharon Cooper, law enforcement

would not have been able to piece together the alleged events of the offense, *ergo*, the State argued, since Sharon Cooper was reliable *vis-a-vis* the information given as to the location of the body, the jury should believe her regarding the entire episode surrounding George Wilson's death and her version of Tony Bryan's involvement therein.

At trial, the prosecutor told the jury:

> [Sharon Cooper] ultimately, contacted the FBI and told Art Small of the FBI what had happened, about the murder.
> At this point no one knows what happened to George Wilson. He's just gone. His body has not been recovered.
> Sharon Cooper goes and tells the FBI what happened and that, in fact, she and this defendant were involved in George Wilson's disappearance.
> The FBI put her on an airplane and fly her back to Pensacola, where she's picked up by officers of the Okaloosa County Sheriff's Department and the FBI. They then begin a search of the area to see if Sharon Cooper can take them to where George Wilson's body and George Wilson's automobile could be found. And, in fact, after driving around a lot of back roads, Sharon Cooper was able to take them to a spot on the Juniper Creek and she said, "This is where it happened." In fact, she became very upset and started crying and said, "This is it."
> Well, George Wilson's body was not at that site. But police officers walked down the little wooded path that was the last path George Wilson walked down and they looked down right by the river and there was an expended shotgun shell, a green expended shotgun shell. They searched down river a little ways and they found George Wilson's body. . .

(R. 260-261)(emphasis added).

The record reveals that law enforcement was well aware that George Wilson was missing, his wallet and other belongings had been found in the creek, and that he may be dead by August 13, 1983, almost three weeks before law enforcement claims Sharon Cooper led them to the location of the homicide. (Lt. Glen

Mr. Bryan's trial attorney attempted to demonstrate that both Cotton and Boswell were no longer with the Santa Rosa County Sheriff's Office. The trial court excluded evidence of wrongdoing by these officers on the basis it was irrelevant to the case. Had Mr. Bryan's trial counsel discovered or been advised that these officers were central characters in a deception, i.e., presenting Cooper in a more favorable light and with a more accurate memory than was truly the case, he would have been allowed to show the bias and misconduct of the officers.

Instead, the prosecutor was free to argue as follows:

> "Then he talks about, by innuendo, you know, by kind of a sly reference, you know, Ron Boswell retired from the Sheriff's department, Rick Cotton mysteriously retires from the Sheriff's Department. I think they probably would resent that. What has that got to do with this case? Why does he have to try, by innuendo, to slander these former police officers in this case? Does it have anything to do with this case? No. If it did, you would know all about it. It has nothing to do with this case. I submit to you, their handling of this case was extremely professional, in every sense of the word."

(R. 797)(emphasis supplied).

If Boswell and Cotton (who, coincidentally, was the primary actor in violating Mr. Bryan's rights regarding the recently obtained recorded telephone conversation between Cooper and Bryan)(See Claim V, Emergency Motion to Vacate) had in fact misled the jury, judge, and Mr. Bryan's trial counsel about the date and surrounding circumstances of the discovery of George Wilson's body, then the above argument could not have been made. The prosecutor would not only have been unable to bolster the

testimony of his "chief witness", Sharon Cooper, and his "extremely professional" investigators, but he would have been required to answer to charges of suppressing material, exculpatory and/or impeachment evidence and charges of misleading the judge and jury.

To the extent that the State failed to disclose this evidence, Brady v. Marlyand, 373 U.S. 83, 83 S.Ct. 1194 (1963) was violated. This evidence is exculpatory and material because it is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334, 1339-40 (10th Cir. 1984); Brady, 373 U.S. at 87 (reversing death sentence because suppressed evidence was relevant to punishment, but not guilt/innocence). Had the jury been presented this evidence it would have called into question issues bearing upon things such as police misconduct and the veracity of Sharon Cooper. Instead the State was able to bolster Cooper's credibility without challenge. Under Bagley, exculpatory evidence and material evidence are one and the same.

Materiality must be determined on the basis of the cumulative effect of all the suppressed evidence and all the evidence introduced at trial. Kyles v. Whitley, 155 U.S. 1555 (1955). The lower court failed to conduct this analysis.

Materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an

issue in dispute at trial, to (2) its refutation of a prosecutorial theory, impeachment of a prosecutorial witness, or contradiction of inferences otherwise emanating from prosecutorial evidence, to (3) its support for a theory advanced by the accused. Smith, supra; Miller v. Pate, 386 U.S. 1, 6-7 (1967). E.g., Davis v. Heyd, 479 F.2d 446, 453 (5th Cir. 1973); Clay v. Black, 479 F.2d 319, 320 (6th Cir. 1973). The new facts supporting this claim go to all of these.

It does not negate materiality that a jury which heard the withheld evidence could still convict the defendant or sentence him to death. Kyles v. Whitley. In assessing whether materiality exists, the proper test is not whether the suppressed evidence establishes the defendant's innocence or even whether the reviewing court weighing all the evidence would decide for the State. Rather, because "it is for a jury, and not th[e] Court to determine guilt or innocence," Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981), materiality is established and reversal required once the reviewing court concludes that the withholding of evidence undermines confidence in the results on "the issue of guilt . . . [or] punishment," United States v. Agurs, 427 U.S. at 105, 106 (emphasis added); Bagley, and when there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [either phase of the capital] proceeding would have been different." Bagley, 105 S. Ct. at 3383. The evidence here is exculpatory and material.

To the extent that trial counsel had or should have had this evidence and failed to utilize it, Mr. Bryan was rendered ineffective assistance of counsel under Strickland v. Washington, 466 U.S. 668 (1984). In Strickland, the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668 (citation omitted). Strickland requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. Mr. Bryan pled each in his Emergency Motion To Vacate Judgment and Sentence and Supplement thereto. Given a full and fair evidentiary hearing, he can prove each. Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hopper, 575 F.2d 1147, 1148-50 (5th Cir. 1982) ("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F. 2d 636, 637 (5th Cir. 1970).

Counsel have been found to be prejudicially ineffective for failing to impeach key State witnesses with available evidence;

for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976); or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963. Moreover, counsel has a duty to ensure that his or her client receives appropriate mental testing, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to a single error where the basis of error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes

the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington; Kimmelman v. Morrison.

In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon both the prosecutor and defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagely, 473 U.S. 667, 674, (1985) quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 685. Where either or both fail in their obligations, a new trial is required if confidence in the outcome is undermined. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Whether due to the failure to disclose the evidence or trial counsel's failure to find and utilize it, the result is the same: Mr. Bryan was denied a full and fair adversarial testing to which he is entitled. Moreover, regardless of the reasons why this critical information was not utilized, the State had the obligation to correct the falsity and prevent false and misleading evidence from going uncorrected to the jury. The State clearly did not correct the falsity -- instead the State used the falsity to its advantage in arguing its case. The United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294

U.S. 103, 55 S. Ct. 340 (1935). Due process, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative. . .of sovereignty. . .whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88, 55 S. Ct. 629, 633 (1935). As Mr. Bryan's Emergency Motion to Vacate Judgment and Sentence and Supplement thereto demonstrated, the false and misleading information existed and was presented to the jury. The prosecution has a duty to alert the defense when a State witness gives false testimony, Napue v. Illinois, 360 U.S. 264, 79 S. Ct. 1173 (1959); Mooney v. Holohan, and to correct the presentation of false State-witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28, 78 S. Ct. 103 (1957). Where, as here, the State uses false or misleading evidence, and suppresses material exculpatory and impeachment evidence, due process is violated where the material evidence relates to a substantive issue, Alcorta, the credibility of a State witness, Napue; Giglio v. United States, 405 U.S. at 154, or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1, 87 S.Ct. 785 (1967). Such State misconduct also violates due process when evidence is manipulated by the prosecution. Donnelly v. DeChristoforo, 416 U.S. 637, 94 S. Ct. 1868 (1974). All of these occurred in Mr. Bryan's case.

The "deliberate deception of a court and jurors by presentation of known false evidence is incompatible with the

rudimentary demands of justice." Giglio, 405 U.S. at 153. Unlike cases where the denial of due process stems solely from the suppression of evidence favorable to the defense, in cases involving the use of false testimony, "the Court has applied a strict standard. . .not just because [such cases] involve prosecutorial misconduct, but more importantly because [such cases] involve a corruption of the truth-seeking process." Agurs, 427 U.S. at 104, 96 S.Ct. 2397. Accordingly, in cases involving knowing use of false evidence the defendant's conviction must be set aside if the falsity could in any reasonable likelihood have affected the jury's verdict. Kyles v. Whitley, 155 S.Ct. 1555, n.7 (1995) quoting United States v. Agurs, 427 U.S. at 103, (1976). Mr. Bryan is entitled to a new trial if there is **any reasonable likelihood** that the falsity affected the verdict[3]. Without question there is a reasonable likelihood that the uncorrected false and/or misleading testimony and argument **affected** the verdicts at guilt-innocence and affected the jury's 7-5 vote for death.

Mr. Bryan was denied a fair trial and thus, the due process clause of the Fourteenth Amendment to the United States Constitution was violated. This evidence also goes to the credibility of the State's "chief" witness, and Mr. Bryan's Sixth Amendment right to confront and cross-examine witnesses against him is violated as well. See Chambers v. Mississippi, 410 U.S.

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3 The lower court completely failed to address the Giglio portion of this claim and in so doing failed to apply the correct standard.

284, 93 S. Ct. 1038 (1973). Of course, counsel cannot be effective when deceived; *a fortiori* suppression of exculpatory or impeaching information violates the Sixth Amendment right to effective assistance of counsel. United States v. Cronic, 466 U.S. 648, 104 S. Ct. 2039 (1984).

No effective cross examination of the chief witness in Mr. Bryan's trial was possible as Mr. Bryan's Emergency Motion To Vacate Judgment and Sentence and Supplement thereto demonstrated.

The jurors at Mr. Bryan's trial were never allowed to hear the important information we now know. The lower court erred in denying Mr. Bryan an evidentiary hearing on this matter. This Court should remand Mr. Bryan's case to the lower court for such a proceeding.

3. Without taking any evidence, the lower court erroneously relied upon this court's direct appeal opinion to resolve the disputed, fact-based claims Mr. Bryan raised regarding an exculpatory audio tape.

Although complaining (without any support in law) that the postconviction motion did not include attachments of all items of evidence to support the claims, Mr. Martell did demonstrate the need for an evidentiary hearing:

> **MR. MARTELL:** I cannot conceive of how a meaningful review of this motion can occur without the tape.

(T3. at 79).

The State also disputed (but failed to refute) issues of fact surrounding the contents of the audio tape in its Response--"It is additionally hard to see the exculpatory nature of a tape which shows the defendant seeking to concoct a false alibi"

(State's Response at p. 32). The State represented to the lower court that the tape only "showed" a concocted alibi -- Mr. Bryan properly pled claims regarding the tape to the contrary -- facts are in dispute. Clearly, the audio tape is the best evidence of its content. As Mr. Martell stated himself, how can a meaningful review be done without the tape? The lower court refused to listen to it or to consider it when summarily denying the Motion to Vacate. This was error.

Regarding due diligence, the State asserted in its Response ". . . Bryan **apparently** made only three pre-1999 public record requests -- one in 1990 to FDLE, in which compliance was secured, and two in 1994 -- to the Attorney General's Office and the Office of the State Attorney. Although Bryan was advised that access was granted to files of the latter agency, collateral counsel **would not seem** to have followed upon on this grant of access . . . . " (State's Response at 18)(emphasis added)(States Response at p. 32 "recording always available"). These facts are in dispute as collateral counsel properly and sufficiently pled due diligence regarding the audio tape and previous efforts to secure it. Swafford v. State, 679 So.2d 736 (Fla. 1996). (3.850 at 6-12; T3. at 131-134). The State's conclusory speculation ("apparently" and "would not seem to have") is wholly improper to deny Mr. Bryan relief upon. At a **minimum**, Mr. Bryan was entitled to a hearing on due diligence. Swafford.

In denying Mr. Bryan's claims based upon the withheld audio tape, the lower court ruled:

> As to the tape, the Supreme Court of Florida has already determined that the trial judge "inquired fully into the dispute and obviously concluded the prosecutor offered the tape to the defense and that there had been no discovery violation."

(Order at p. 4 citing Bryan v. State, 533 So.2d 744, 748 (Fla. 1988)).

The lower court's ruling is totally insufficient to deny Mr. Bryan relief on his claims raised in his Emergency Motion to Vacate Judgment and Sentence and Supplement thereto. Mr. Bryan's current claims **are not** based upon a Richardson violation. Rather, his claims are based upon new grounds supported by the contents of the audio tape that was withheld from collateral counsel until October 13, 1999. Having been given the first opportunity ever to listen to this tape, collateral counsel discovered that the contents of the tape establish a wealth of evidence **not previously available to collateral counsel**, including violations of the 5th and 6th Amendments to the United States Constitution, Giglio violations by the State at trial, exculpatory evidence and evidence critical to Mr. Bryan's state of mind when making statements used against him at trial and material to the penalty phase. This claim clearly is not refuted by the record because one of the bases for the claim is that false and misleading evidence was presented at the trial. Had current collateral counsel been given the opportunity, evidence of the false and misleading evidence and the prejudice resulting therefrom would have been introduced. Mr. Bryan should have been given this opportunity, he was not, and this is error.

The State's Response that the circuit court at the 1990 evidentiary hearing "found all other claims to be procedurally barred (including that relating to the tape-recorded conversation between Bryan and Cooper)" (State's Response at p. 10) is misleading and the lower court adopted the State's assertion without independently considering the record in this case. The only prior rulings regarding the tape are based upon the tape *vis a vis* a Richardson violation. Here, Mr. Bryan has raised new grounds for relief not previously available to collateral counsel which have not been denied on the merits. He is entitled to an evidentiary hearing.

4. Without taking any evidence, the lower court resolved disputed but unrefuted issues of fact regarding the discovery of Sharon Cooper and her vital information.

Mr. Bryan's Emergency Motion to Vacate Judgment and Sentence extensively pled factual evidence of due diligence and the inability of prior collateral counsel to locate Sharon Cooper. (3.850 at pp. 6-12). The State responded in the most cursory and conclusory fashion stating e.g., "the alleged factual bases for this claim have long been either known to Bryan's trial or collateral counsel, or could have been discovered through the use of due diligence. . .(State's Response at p. 45). First, as discussed above, the State and lower court applied the wrong legal standard -- whether this information was available to trial counsel is not the issue, that is an analysis of "newly discovered" evidence. The issue here is that this is new evidence supporting postconviction claims that were **not**

previously available to collateral counsel. Second, whether this evidence was previously available or not to prior collateral counsel (or trial counsel for that matter) is an issue of fact to be decided at an evidentiary hearing on due diligence. Swafford.

Mr. Bryan's Emergency Motion to Vacate Judgment and Sentence properly pled the prejudice to Mr. Bryan as a result of this heretofore unavailable evidence. (See generally, 3.850). The State's attempt to refute this allegation fails. The State relied upon Sharon Cooper's December 27, 1985 deposition as if it is dispositive of the issue (State's Response at 47-48). However a close reading of the questions and answers relied upon the State demonstrate that Cooper's answers regarding Mr. Bryan's statements amounted to a legal conclusion. It is clear that trial counsel did not ask critical factual questions regarding Tony Bryan's mental state; for example, his drug use, types of drugs used, amount of drugs used, frequency of drugs used, whether he was drinking, the amount and frequency, his sleep patterns and ability to concentrate and carry on meaningful conversation, etc. The State in its response again merely guessed that "reasonable counsel in Stokes position could quite well have concluded that the witness's subsequent deposition in 1985 constituted her final statement of these issues. . . . " (State's Response at p. 48). However, that conclusion cannot be made without evidentiary development of the new evidence. Moreover, the State's response completely fails to address Mr. Bryan's assertions in his Emergency Motion to Vacate Judgment and

Sentence that had trial counsel had this information, he would have used it at trial and that this could be proven at an evidentiary hearing (3.850 at 41; 44).

The State's allegation that the matters testified to by Sharon Cooper at trial (referring to alleged uncharged misconduct) were only the "tip of the iceberg, compared to what Sharon Cooper could have testified about, had trial counsel followed the newest strategy now proposed by Bryan's collateral counsel" (State's Response at 51) is also without merit and improper. There is no evidence that Sharon Cooper could have legally referred to any additional collateral crimes simply by providing state of mind testimony. Furthermore, the State's reliance upon such an unfounded assertion purports to be "fashioned" by non-record information. (State's Response at p. 50 fn. 14).

5. Without taking any evidence the trial court resolved disputed but unrefuted issues of fact regarding Mr. Bryan's properly pled claim under Ake v. Oklahoma[4].

In summarily denying Mr. Bryan's claim based upon the heretofore unavailable evidence, the lower court merely states:

> [the claim is] procedurally barred as outlined on pages 57-59 of the State's Response. Additionally, as noted by the Eleventh Circuit, there is an unavoidable and fundamental inconsistency between the known facts of the case and the arguments the Defendant makes in his claim.

(Order at p. 5)(footnote omitted).

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4 Ake v. Oklahoma, 470 U.S. 68, 105 S.Ct. 1087 (1985)

Clearly, the lower court failed to recognize that new or different grounds can be properly used in a second motion for postconviction relief. Fla. R. Crim P. 3.850(f). New and different grounds were pled in Mr. Bryan's Ake claim in his current Emergency Motion to Vacate Judgment and Sentence. The lower court's reliance upon the Eleventh Circuit's prior ruling that "the known facts of the case" demonstrate an inconsistency with Mr. Bryan's allegations makes it clear that the lower court failed to understand that the "known facts" relied upon in the past are not the facts now known and pled as grounds for relief in Mr. Bryan's Emergency Motion to Vacate Judgment and Sentence. It was error for the lower court to summarily deny this claim. The lower court's order completely ignores the affidavit of Dr. James Larson, psychologist, pled and attached to Mr. Bryan's Emergency Motion to Vacate Judgment and Sentence and Supplement thereto. Dr. Larson reviewed the evidence previously unavailable to collateral counsel. With this evidence, combined with the totality of known evidence, he concluded for the first time that the statutory mental health mitigating circumstance of "capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was substantially impaired" applied in addition to "extreme mental or emotional disturbance" Mr. Bryan's case. Fla. Stats. 921.141 (6)(b) & (f). Dr. Larson also concluded extensive nonstatutory mitigation applied. Because of the new information, Dr. Larson was able for the first time to opine that the aggravating circumstances that

contain a mental state component, i.e. "for the purpose of avoiding arrest", "heinous atrocious, or cruel" and "cold, calculated, and premeditated" do not apply to Mr. Bryan's case. Fla. Stats. 921.141 (5)(e),(h) & (i). Dr. Larson is also now able to call into question Mr. Bryan's ability to form specific intent to rob, kidnap or murder George Wilson. The State failed to refute these assertions. The lower court completely failed to address these issues and should have granted an evidentiary hearing.

C. THE TRIAL COURT FAILED TO SUPPORT ITS ORDER BY ATTACHING PORTIONS OF THE RECORD THAT SUPPORT IT.

The lower court summarily denied all of Mr. Bryan's claims but in doing so, the lower court completely failed to attach any portions of the record to support the decision, contrary to established law.

> If the motion, files and records in the case conclusively show that the prisoner is entitled to no relief, the motion shall be denied without a hearing. **In those instances when the denial is not predicated on the legal sufficiency of the motion on its face, a copy of that portion of the files and records that conclusively shows that the prisoner is entitled to no relief shall be attached to the order.**

Fla. R. Crim. P. 3.850 (d) (1999)(emphasis added). Here, the lower court did not rule that Mr. Bryan's postconviction motion was legally insufficient on its face. Accordingly, the lower court erred in failing to attach portions of the record. Roberts v. State, 678 So. 2d 1232,1236 (Fla. 1996). A court must "attach to its order the portion or portions of the record conclusively showing that a hearing is not required." Hoffman v. State, 571

So. 2d 449, 450 (Fla. 1990). The files and records in this case do not conclusively rebut Mr. Bryan's allegations and the lower court failed to attach anything from the record or files demonstrating that Mr. Bryan is not entitled to relief. (See, generally Order). The record does not conclusively rebut Mr. Bryan's claims and actually demonstrates that issues of fact are in dispute necessitating an evidentiary hearing.

Additionally, the lower court failed to sufficiently recite in its order its rationale for denying each and all of Mr. Bryan's claims. Demps v. State, 714 So.2d 365, 366 (Fla. 1998); Anderson v. State, 627 So.2d 1170,1171 (Fla. 1993). For example, the lower court ruled "The clemency claim in Claim V [sic], the cumulative error argument in Claim VI [sic], and the Claim VIII regarding the timing of the discovery of the body must be summarily denied as the State argues." (Order at 5). This finding completely fails to satisfy the lower court's responsibility to fully and fairly adjudicate Mr. Bryan's claims. As this Brief demonstrates, even if this Court decides that the lower court's order sufficiently addressed Mr. Bryan's claims, the order denying relief must still fail because the order clearly states it relies upon the State's version of the facts -- facts which are in dispute -- facts demonstrated to be in dispute in Mr. Bryan's Emergency Motion To Vacate Judgment and Sentence, the State's Response and at the Huff hearing. The court's improper reliance upon the State's version of the facts could not be more clear:

> My examination and analysis parallels the essence of **the State's rendition of the facts** . . . .
>
> The procedural history and case **facts** are well chronicled **in the State's Response and are incorporated herein** by this reference[5].

(Order at 2)(emphasis added). The lower court clearly accepted the State's "rendition" of the facts without regard to the fact that the facts are in dispute "The State's factual statements and argument on this issue if [sic] on point and **accepted by this Court**." (Order at 4)(emphasis added).

The lower court failed to follow the procedure of Fla. R. Crim. P. 3.850(d) and corresponding case law. Moreover, the lower court went beyond merely failing to follow the law as demonstrated by its *ad hoc* acceptance of the State's representations and its decisions based thereon.

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5 In this quote the lower court cited pages 1-28 of the State's Response. The State did not merely recite facts of procedural history in pages 1-28. For example, within these pages, the State presented as "fact" the following:

> . . . Bryan apparently made only three pre-1999 public record requests -- one in 1990 to FDLE, in which compliance was secured, and two in 1994 -- to the Attorney General's Office and the Office of the State Attorney. Although Bryan was advised that access was granted to files of the latter agency, collateral counsel would not seem to have followed up on this grant of access . . . .

(State's Response at page 18, fn. 4). Clearly in dispute is the issue of due diligence and prior collateral counsel's attempts to secure these public records. Mr. Bryan's Emergency Motion to Vacate sufficiently pled facts in contradiction to the State's "rendition" and supported these claims with argument at the Huff hearing. (See generally 3.850 and T3.). It was error for the lower court to rely upon the State's version of these disputed facts.

The lower court clearly denied Mr. Bryan the process to which he is entitled. Mr. Bryan's case should be remanded for an evidentiary hearing on his claims.

D. THE LOWER COURT FAILED TO CONDUCT A PROPER REVIEW OF THE COMPLETE RECORD OF MR. BRYAN'S CASE BEFORE ISSUING ITS RULING.

In order for a court to determine whether a defendant is entitled to relief on his postconviction motion, it must first review **all** of the files and records in that case:

> If the **motion, files, and records in the case conclusively show** that the prisoner is entitled to no relief, the motion shall be denied without a hearing.
>
> * * *
>
> Unless the **motion, files, and records of the case conclusively show** that the prisoner is entitled to no relief...

Florida Rule of Criminal Procedure 3.850(d) (emphases added).

The lower court stated that it had only reviewed "**relevant portions**" of Mr. Bryan's "**extensive case file**". (Order at 1). Clearly, the lower court failed to follow a basic requirement of 3.850(d), that it must review all of the files and records before determining that Mr. Bryan was entitled to no relief. Furthermore, it would have been impossible for the lower court to know what portions of the record were "relevant" without reading the entire record.

The claims presented to the court below contain several elements connected to past factual and procedural matters which developed during Mr. Bryan's trial, direct appeal and postconviction proceedings. For example, Claim VII of Mr.

Bryan's Emergency Motion to Vacate Judgement and Sentence alleges that the outcome of his trial is materially unreliable because no true adversarial testing occurred due to the cumulative effects of several errors. Both Federal and Florida case law require the lower court to consider the cumulative effect of all of the errors presented by Mr. Bryan during all of his postconviction proceedings in conjunction with the evidence presented at trial. See, Kyles v. Whitley, 115 S.Ct. 1555 (1995); Young v. State, 24 Fla. L. Weekly S277 (Fla. 1999); Lightbourne v. State, 1999 WL 506961 (Fla. July 8, 1999); Swafford v. State, 679 So.2d 736 (Fla. 1996); State v. Gunsby, 670 So.2d 290 (Fla. 1996).

It is impossible for the lower court to have properly decided Claim VII of Mr. Bryan's Emergency Motion to Vacate, or any other claim, without reviewing all of the files and records in Mr. Bryan's case[6]. Furthermore, because the lower court failed to attach any portions of the record that support its findings, it is impossible to know which parts of the record, if any, the lower court considered before deciding any of Mr. Bryan's claims. The lower court, apparently because of its concern with timing, failed to properly apply the standard for a stay of execution. State v. Schaeffer, 467 So. 2d 698 (Fla. 1987). This Court must vacate the order and remand Mr. Bryan's emergency motion back to the lower court with directions to

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6 It should also be noted that, based on the date of the lower court's order denying relief (October 21, 1999) and the date the court reporter transcribed the Huff hearing held below (October 22, 1999), the lower court denied Mr. Bryan relief without the benefit of a transcript of the extensive arguments made therein.

review all of the records and files in this case before deciding if an evidentiary hearing is necessary.

ARGUMENT II

MR. BRYAN HAS BEEN DENIED PUBLIC RECORDS DEMONSTRATED TO BE RELEVANT TO EXISTING POSTCONVICTION CLAIMS AND HAS BEEN DENIED DUE PROCESS OF LAW, EFFECTIVE ASSISTANCE OF COUNSEL, EQUAL PROTECTION, AND ACCESS TO COURTS UNDER THE UNITED STATES AND FLORIDA CONSTITUTIONS.

A. THE TRIAL COURT CORRECTLY GRANTED MR. BRYAN'S MOTION TO COMPEL PUBLIC RECORDS, YET RENDERED THIS ORDER MEANINGLESS BY FAILING TO ENTER A STAY OF MR. BRYAN'S EXECUTION.

In its Order Granting Defendant's Motion to Compel Production of Public Records, the lower court found: "on the evidence, it is hereby ORDERED AND ADJUDGED that those agencies listed on the October 19, 1999, Motion to Compel shall disclose their records pursuant to Chapter 119 and relevant case law." Thus, the lower court found, as it had required Mr. Bryan to demonstrate in its October 14th Scheduling Order, that a substantive, good faith showing that further review is necessary was made. See October 19, 1999, Scheduling Order at page 2 ("The Defendant will have to make a substantive, good faith showing (so certified to by his counsel) that further review is **necessary** before the above schedule will be modified **or before any motion to compel for non-production of public records will be considered.**") (emphasis added).

The lower court concluded further public records disclosure and review were **necessary**, but, nonetheless, neglected either to enter a stay of execution or to meaningfully enforce Mr. Bryan's right to amend his motion for postconviction relief based upon

information in these **necessary**, however, as of the filing of this appeal, still yet-to-be-received, public records. The error here is clear: the lower court, as evinced by its Order Granting Defendant's Motion to Compel Production of Public Records, has found i) that the public records that have been withheld from Mr. Bryan have been withheld illegally, and ii) that these records are **necessary** for him to properly prepare his motion for postconviction relief. To come to such conclusions without granting Mr. Bryan a stay of execution or an opportunity to amend his motion for postconviction relief once the withholding agencies have complied with Florida law and the lower court's Order is error of constitutional magnitude and demands that this Court remand Mr. Bryan's case for full disclosure of necessary public records.

B. THE TRIAL COURT FAILED TO ENSURE THAT MR. BRYAN RECEIVED FULL, LAWFUL PUBLIC RECORDS COMPLIANCE FROM STATE AGENCIES WITHHOLDING INFORMATION NECESSARY FOR MR. BRYAN TO ADEQUATELY CHALLENGE HIS JUDGMENT AND SENTENCE, PASSING THE RESPONSIBILITY TO THIS COURT AND DENYING MR. BRYAN A FULL AND FAIR HEARING.

Though the lower court found that public records necessary for Mr. Bryan to adequately challenge his judgment and sentence were illegally withheld from Mr. Bryan, it then abandoned its responsibility to protect Mr. Bryan's constitutional rights--seemingly because it felt it lacked the time to deal with the issue (notwithstanding the lower court's power to enter a stay) and because it found the issue too "difficult" to resolve:

> The public records issue in Claim I has been the most difficult to resolve. The general circumstances which surround and give rise to this last minute records request deluge is best addressed and resolved by the

> Supreme Court of Florida. The reality is that there is insufficient time for such a broad request to be satisfied in a case such as this and resolve all issues within a thirty-four (34) day warrant-to-execution window.

(Order at 5). No reading of the Florida Constitution justifies a circuit court denying a defendant access to courts or due process by abdicating responsibility to the Florida Supreme Court when it finds that it has "insufficient time" or that an issue is too "difficult to resolve." However, that is exactly what the lower court did in this case. The lower court should have exercised its authority to enter a temporary stay of execution.

Further evidence of the lower court's reliance upon this Court to do its duty is seen on page two of the Order wherein the lower court stated, "Both [the Supreme Court of Florida and the United States Supreme Court] are well aware of the issues and simply await my decision." Just because this Court is attempting to do all that it can to keep abreast of the lower court proceedings in an effort to better perform its proper function is no basis for the lower court to ignore its own. The constitutions of the United States and the State of Florida, as well as general principles of justice, dictate that Mr. Bryan not be executed without due process of law simply because a lower court believed it was on too tight a schedule to resolve a difficult issue bearing on Mr. Bryan's life.

ARGUMENT III

THE LOWER COURT FAILED TO CONDUCT THE REQUIRED CUMULATIVE ANALYSIS.

The lower court failed to consider the cumulative effect of all of the errors presented by Mr. Bryan during all of his postconviction proceedings in conjunction with the evidence presented at trial. This analysis applies equally to the guilt/innocence phase and the penalty phase. Kyles v. Whitley, 115 S.Ct. 1555 (1995); Young v. State, 24 Fla. L. Weekly S277 (Fla. 1999); Lightbourne v. State, 1999 WL 506961 (Fla. July 8, 1999); Swafford v. State, 679 So.2d 736 (Fla. 1996); State v. Gunsby, 670 So.2d 290 (Fla. 1996). Whether taken individually or collectively, the errors that occurred throughout Mr. Bryan's capital proceedings are not harmless. Accordingly the lower court erred in summarily denying Mr. Bryan's Emergency Motion for postconviction relief and Supplement thereto. Mr. Bryan has been denied his right to due process of law and his rights under the Fifth, Sixth, and Eighth Amendments to the United States Constitution. This matter should be remanded to the lower court for the proper cumulative analysis to be conducted.

CONCLUSION

As this Brief demonstrates, due to the lower court's summary denial of Mr. Bryan's Emergency Motion for postconviction relief and Supplement thereto, refusal to grant a stay of execution, refusal to grant Mr. Bryan an evidentiary hearing, and mistreatment of the public records issues, Mr. Bryan has been denied a full and fair adversarial testing of his meritorious claims. As a result Mr. Bryan has been denied due process of law and his rights under the Fifth, Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution and corresponding Florida law.

Accordingly, this Court should stay Mr. Bryan's impending execution and remand this case to the lower court for an evidentiary hearing providing Mr. Bryan the opportunity to vindicate his constitutional rights or grant any other relief this Honorable Court deems appropriate.

I HEREBY CERTIFY that a true copy of the foregoing Initial Brief of Appellant has been furnished by Hand Delivery, to all counsel of record on October 25, 1999.

GREGORY C. SMITH
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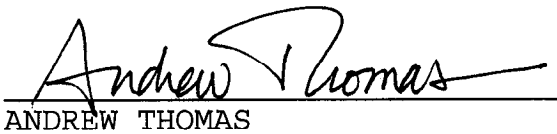

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