IN THE SUPREME COURT OF FLORIDA

BEAUFORD WHITE,

Appellant,

vs. CASE NO. _____

STATE OF FLORIDA,

Appellee.
_____/

APPLICATION FOR STAY OF EXECUTION AND SUMMARY INITIAL BRIEF FOR APPELLANT, AND, IF NECESSARY, MOTION FOR STAY OF EXECUTION PENDING FILING AND DISPOSITION OF PETITION FOR WRIT OF CERTIORARI IN THE UNITED STATES SUPREME COURT

ON APPEAL FROM THE ELEVENTH JUDICIAL CIRCUIT, IN AND FOR DADE COUNTY, FLORIDA

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Beauford White, on August 21, 1987, filed in the Circuit Court his motion to vacate judgment and sentence pursuant to Fla. R. Crim. P. 3.850. With his motion, Mr. White presented to the Circuit Court a memorandum requesting that the Court grant a stay of execution. On August 22, 1987, the Circuit court heard argument on the stay application [Att. 1 (transcript of proceedings before Rule 3.850 trial court)], and being Mr. White's application for a stay of execution [Aatt. 3 (Circuit Court Order)], and Mr. White's motion to vacate [Att. 2 (Circuit Court Order).] Mr. White immediately filed a notice of appeal [Att. 4]. (The Rule 3.50 motion and accompanying memorandum have been previously lodged with this court.)

The Circuit Court's denial of relief [see Att. 1 (Transcript); Att. 2 (Order)], was based on two "procedural bars"" the two-year limitation period of Rul3 3.850 and the thirty-day filing requirement of Rule 3.851. However, as Mr. White proffered to the trial court, both orally [see Att. 1 (transcript)], and in writing [see Memorandum in Support of Application for Stay of Execution], neither of those procedural bars can be fairly applied in this case. At the very least, an evidentiary hearing concerning the applicability or non-applicability of such procedural bars was required (See Att. 1 [Transcript--containing specific factual proffer]. Should this Court deny a stay of execution, and allow the Circuit Court's

order to stand, Mr. White will be the only Florida capital post-conviction litigant against whom Rule 3.851 will ever be applied -- the rule has been waived with regard to other similarly - situated litigants, see Thompson v. Dugger, 70,739 (Fla. 1987), and the Governor's recently announced warrant signing procedures will make the rule inapplicable in future cases. Mr. White will also be the first, and only litigant against whom the two-year Rule 3.850 limitation will be retroactively applied. This also is unfair -- Mr. White filed his initial Rule 3.850 motion at a time when no such bar applied and the rule's two-year limitation period was never intended to apply a defendant's second Rule 3.850 motion. Such motions, as the rule itself indicates, are governed not by the two-year limitation, but by the rule's own codification of language mirroring that included in Rule 9(b) of the Rules governing 28 U.S.C. sec. 2254 cases in the federal district courts.

Moreover, as Mr. White proffered at the oral argument before the Circuit Court (see Att. 1 [Transcript]), and in his written submissionms (see Memorandum in Support of Application for Stay of Execution), the true facts and the equities involved in the post-conviction litigation of Mr. White's case demonstrate that these rules must not be applied against him, even if they were available. At the very leadst, an evidentiary hearing on these issues should have been held. And, at the very least the ends of

justice require that the merits of Mr. White's claims be heard.

This application for a stay of execution brief is intended to demonstrate that the procedural bars asserted by the State and relied on the court below must fail as a matter fact and as a matter ofl aw. It is intended to demonstrate that Mr. White's petition is before the Court on the merits, and that the merits call for, at the very least, a stay of a wholly improper and constitutionally wrongful execution.

INTRODUCTION

This case presents the same type of misinterpretation of the pre-Lockett Florida capital sentencing statute whch formed the basis of relief in Hitchcock v. Dugger, 107 S.Ct. 1821 (1987) and McCrae v. State, 12 FLW 310 (Fla. June 26, 1987), and which resulted in stays of execution granted by this Court in Thompson v. Dugger, No. 70,739 (Fla. 1987) and Riley v. Wainwright, No. 69,583 (FLa. 1987). In this case, it was counsel who was misled by the pre-Lockett statute, and who therefore failed to aedquately look into and investigate a wealth of available mitigating evidence which would have precluded the trial court's override of the jury's unanimous recommendation that Mr. White receive a sentence of life. Counsel's affidavit was presented in the appendix to the Rule 3.850 motion and was proffered to the court below. The Circuit Court declined to conduct a hearing.

Mr. White's case also presenmts a substantial claim bottomed on Brady v. Maryland and its progeny. It is precisely the type of claim which this Court has found sufficient to warrant a hearing, and relief, in numerous other Florida cases. See Arango v. State, 437 So. 2d 1099 (Fla. 1983), (directing hearing), subseuuent history in, 467 So. 2d 692 (Fla. 1985)(granting post-conviction relief), 497 So. 2d 1161 (Fla. 1986)(reinstating post-conviction relief under United States v. Bagley); Smith v. State, 400 So.2d 956 (Fla. 1981); Demps v. State, 416 So. 2d 808 (Fla. 1982). The truth of the matter in this case is that an appaling level of state misconduct was the basis of a wrongful sentence of death. Agan, the court below declined to conduct a hearing.

Beauford White will be "struck by lightning," Furman v. Georgia, 408 U.S. 238, 309-10 (1972)(Stewart, J., concurring) in the most arbitrary application of capital punishment imaginable, unless this Court looks to the Constitution, and acknowledges the common sense values applied by twelve of Mr. White's peers (the jury) who unanimously voted that taking his life was indeed a cruel and unusual punishment. No one in history has faced Mr. White's merciless fate -- governments simply do not execute people when the jury unanimously says "no". Governments do not execute people who did not kill or intend that death occur, and who express opposition to a killing and withdraw. At the heart of both of the self-evident, common sense truths springing from

the record in Mr. White's case, is the fact that no court would have allowed the government to impose such a sentence had the government itself not suppressed the evidence which demonstrated beyond cavil that Beauford White did not, and does not, deserve to die. Execution when those two factors exist is arbitrary. Execution in the face of both is lightning-like, and is nothing short of whimsical and capricious state action.

The courts have addressed the Enmund claim and found it to be "a serious and substantial one," White v. Wainwright, 632 F. Supp. 1140, 1147 (S.D. Fla. 1986), but rejected it, finding that Enmund was satisfied. One of the cases the courts relied heavily upon was "State v. Tison, 142 Ariz. 454, 690 P.2d 755 (1984), cert. granted, ___ U.S. ___, 106 S.Ct. 1187, 89 L.Ed.2d 299 (1986)," White, 632 F. Supp. 1155. Now Tison has been decided by the United States Supreme Court. and Mr. Tison is being resentenced. If, as the federal districxt court earlier opined, "[p]etitioner White's attempts to distinguish Tison from the instant case are largely unpersuasive," id, 632 F. Supp.at 1156, then Mr. White is, again, bound by Tison, and relief is required. This is even more necessary for Mr. White: "the only real distinction between this case and Tison, . . . is that petitioner verbally objected to the use of lethal force." Id., 632 F. Supp. at 1152. A fortiorari, Mr. White as compared Mr. Tison, should be resentenced. Because of the intervention, and overriding, of

Tison, this Court's standards, see Witt v. State, 387 So. 2d 922 (Fla. 1980), require that the claim be heard. The interests of justice call for relief.

As important, however, is the obvious truth that this Court's analysis of the facts in the case was skewed, because of illegal, unconstitutional, and appalling state action. Resolution of the facts was based upon this Court's findings, which, in turn, like the judge's and jury's, depended heavily on the testimony of Mr. Johnnie Hall, one of the "victims". The federal court was, in fact, led to comment that "the facts are essentially uncontested. Only the inferences drawn from these facts are deeply in controversy." White, 632 F. Supp. at 1142. Yet, as counsel has only now discovered, the facts heretofore relied upon are, or should have been, quite contested. They would have been but for state interference with and denial of Mr. White's rights to receive exculpatory information, to have such information not suppressed, and to not be tried and sentenced during proceedings at which the state knowingly and deliberately allowed its witnesses to lie.

Simply put, "victim" Hall was an absolute unmitigated liar, and the State knew it. This is the witness -- and the only witness -- who testified to the crucial fact that "the mask fell off the face of one of [petitioner's] accomplices," 632 F.Supp. at 1149, leading this and other courts to decide that a robbery

turned into "witness elimination," and that the "offense" was "heinous, atrocious, and cruel." Hall also shocked the courtroom by suddenly and incredibly identifying Mr. White in court. His credibility is inextricable from the "Enmund findings."

Hall was not the innocent bystander described at trial. Four days after the offense, police knew his complicity:

> Charles Ceasar Stinson, N/M, 35, of Milwaukee, Wisconsin, was in Miami with the intention of making a large cocaine buy. Charles Stinson contacted his associate, Gilbert Williams,, N/M, 35, of Miami, who is his contact in Miami, in an effort to arrange the cocaine deal. Gilbert Williams utilized John Hall, N/M, 45, to make the arrangements to buy the cocaine.
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> John Hall contacted Livingston Stocker, N/M, 33, at Ferguson's Grocery Store, located at N.W. 14th Avenue and 71st Street. Livingston Stocker then called another dealer in an attempt to obtain four ounces of cocaine. The first dealer he contacted was unable to supply him with the cocaine. Mr. Stocker then contacted Henry Clayton, N/M, 35, in an effort to obtain the four ounces of cocaine. Henry Clayton agreed to make the deal, and made two phone calls in an effort to obtain the necessary cocaine.
>
> In Clayton's first phone clal, his contact was unable to supply the cocaine. In the second phone call, the contact was given a phone number, allegedly Stocker's phone number, to call when he had the cocaine ready. Clayton then left his residence at 3445 N.W. 199th Street, en route to Stocker's house.
>
> Johnnie Hall, accompanied by Gilbert Williams and Charles Stinson, met Livingston Stocker at Ferguson's Grocery Store, at approximately 9:15 p.m.

> Johnnie Holmes, N/M, 24, a friend of Mr. Stocker, was with Mr. Stocker at Ferguson's Grocery Store when Hall and his friends arrived. The five men entered Mr. Stocker's 1977 Tunderbird, and proceeded to Stocker's residence located at 19335 N.W. 24th Avenue, arriving there at approximately 9:30 p.m.

App. 8. Hall lied about all of this, and the State sat silent. Mr. White did not know any of this, and could not tell counsel. It was only when police files were recently released under the Florida Public Records Act that the truth emerged.

The truth is the State let witnesses lie, and those lies were what put Mr. White on death row. The truth about Hall, and the other truths suppressed and lies presented by the state regarding what actually occurred at the scene of the crime, would have demonstrated that Mr. White never participated in "witness elimination" and was never a participant in a prearranged "heinous, atrocious, and cruel" killing. The suppressed truths would have shown, beyond doubt, that Mr. White was innocent of murder--he was there, he thought, on a robbery; the murders were outgrowths of others' prearranged plans, plans in which Mr. White played no part. See, e.g., Bryant v. State, 412 So. 2d 347 (Fla. 1982) (for felony-murder rule to apply, there must be "casual connection" between underlying felony and the murder). There was no "casual connection" here -- the murder was prearranged by others, and Mr. White was only there on a robbery. The murders for which Mr. White was convicted simply had nothing to do with

the "felonies" on which Mr. White's "felony-murder" conviction were based. However, because of the state's suppression of evidence, and the state-witnesses' known lies, the state may very well have gotten away with presenting the false felony murder theory. Similarly, at sentencing, the state's lies allowed the state to argue for, and misled this and other courts into upholding, a "wrongful sentence of death." See Moore [William Neal] v. Kemp, ___ F.2d ___ (No. 84-8423, 11th Cir., July 27, 1987)(en banc) slip op. at 16. The ends of justice require that these claims be heard and resolved. Otherwise, Mr. White will be sent to his death on the basis of a trial and sentencing proceeding wherein the state's own misconduct "precluded the development of true facts [and] resulted in the admission of false ones." Smith v. Murray, 106 S. Ct. 2639, 2668 (1986); see also, Moore v. Kemp, supra, slip op. at 16. The sentencer's deliberation (the judge's override) was based on "untruthful" and "perverted" facts. Smith v. Murray, supra. Mr. White's claim should not be ignored.

As will be demonstrated, under Tison, resentencing is necessary even on the record as it exists. On the record as it should exist, without the fact blurring by the state-witnesses' known lying, the facts are very much in dispute. No bar exists to considering the facts now presented:

Although Walker made a suppression

> argument in this first habeas petition, this particular claim has not previously been been raised or considered. Therefore, under Sanders v. United States, full consideration of the merits of the claim can be avoided only if there has been an abuse of the writ. 373 U.S. at 17, 83 S.Ct. at 1078. In the present case, Walker has not deliberately withheld this ground for relief, nor was his failure to raise it sooner due to any lack of diligence on his part. Rather, the cause for Walker's delay in presenting this claim rested on the State's failure to disclose. Under the circumstances, Walker has not waived his right to a federal hearing on the claim. The district court has, in fact, already received and considered evidence on this issue, and the memorandum opinion discusses the merits of this suppression claims at some length. 598 F. Supp. at 1430-33.

Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985); see also Moore v. Kemp, No. 84-8423, July 27, 1987, slip op., p. 5 (11th Cir.)(en banc)("An evaluation of a petitioner's conduct in omitting a claim from his first petition necessarily hinges on the petitioner's awareness of the factual and legal basis of the claim which the first petitioner filed.") Mr. White, until only days ago, was simply unaware of the true facts. The procedural issues are more fully discussed below Mr. White's substantial claims are presented below, and in his Rule 3.850 motion..

Mr. White has presented this Court with seven claims challenging the constitutionality of his capital conviction and sentence of death; and his claims must be heard, as this Court's, and the United States Supreme Court's precedents make undeniably

clear. The essence of the Mr. White's claims is that this death sentence is "wrongful" and flatly unconstitutional: Mr. White is "innocent" in the only sense relevant to a capital sentencing proceeding. As the petition shows, he was and is flatly ineligible for a sentence of death. See Moore [William Neal] v. Kemp, ___ F.2d ___, No. 84-8423 (11th Cir., July 27, 1987) (en banc), slip op. at 15-16 (no procedural bar to review applicable where constitutionally "wrongful" death sentence is at issue); see also id., Hill, Circuit Judge, dissenting, slip op. at 5 (no bar applicable to sentencing claims where petitioner's claim is one of "innocence" of statutory aggravating circumstance). Mr. White's claims are before this Court on the merits, and they must be heard.

With regard to Mr. White's "new claims," the law is clear that "[a]n evaluation of a petitioner's conduct in omitting a claim from his first petition necessarily hinges on the petitioner's awareness of the factual and legal bases of the claim when the first petition was filed." Moore v. Kemp (en banc), supra, slip op. at 5. This also is pled and proffered in the instant proceeding: Mr. White was unaware of the legal and factual basis of his claim because state misconduct kept it hidden.

Whether "new" or "old", the claims presented the merits when the "ends of justice" require consideration. As the en banc

Eleventh Circuit has recently held:

> Even where abuse is found, however, a federal court should not dismiss, under Rule 9, a claim in a successive petition if the "ends of justice" require consideration of the claim on the merits. See Potts v. Zant, 638 F.2d 727, 751-52 (5th Cir. Unit B), cert. denied, 454 U.S. 877 (1981); Sanders v. U.S., 373 U.S. 1, 18-19 (1963). . . .
>
> It is not certain what standards should guide a district court in determining whether the "ends of justice" require the consideration on the merits of an otherwise dismissable successive habeas petition. In Kuhlmann v. Wilson, 106 S. Ct. 2616 (1986), a four-justice plurality of the Supreme Court suggested that the ends of justice will demand consideration of the merits of claims only where there is "a colorable showing of factual innocence." Id. at 2627. We need not decide at this time whether a colorable showing of factual innocence is a necessary condition for the application of the ends of justice exception. We merely hold that, at a minimum, the ends of justice will demand consideration of the merits of a claim on a successive petition where there is a colorable showing of factual innocence.
>
> Some adjustment is required to apply this test, phrased as it is in terms of "innocence," to alleged constitutional errors in capital sentencing. We find some guidance in the Supreme Court's opinion in Smith v. Murray, 106 S. Ct. 2661 (1986). In the context of alleged errors in a capital sentencing proceeding the Court in that case sought to apply an analogous standard--that governing when fundamental principles of justice would require the consideration of procedurally defaulted claims in the absence of a showing of cause for the default. The standard was announced in Murray v. Carrier, 106 S. Ct. 2639 (1986) which held that "where a constitutional violation has probably resulted in the conviction of one who is

> actually innocent, a federal habeas court may grant the writ even in the absence of a showing of cause for the procedural default." Id. at 2650.

Moore, supra, slip op. at 15-16. The en banc Court then relied on the Supreme Court's holding in Smith v. Murray, 106 S. Ct. at 2668. It held that, at a minimum, the "ends of justice" require consideration of an "abusive" habeas corpus claim (as they do a "procedurally defaulted" claim), when "the alleged constitutional error [either] precluded the development of true facts [or] resulted in the admission of false ones." Moore, slip op. at 16, citing, Smith, 106 S. Ct. at 2668. This also has been pled in Mr. White's case. See also, Att. 1 (Transcript of Rule 3.850 oral argument -- discussing interests of justice).

Much of what is contained in Mr. White's Rule 3.850 motion is premised on the prosecution's withholding of exculpatory evidence and knowing presentation of false "facts." Clearly, in this case, the constitutional errors "precluded the development of true facts [and] resulted in the admission of false ones." Moore, slip op. at 16, citing Smith v. Murray. The State's case, at guilt-innocence and at sentencing, was bottomed on "false facts."

Finally, an "intervening change[s] in the law," are also pled and presented in Mr. White's case. Those new standards also show that his claims should be heard. Witt, supra.

II. NO ADEQUATE AND INDEPENDENT STATE PROCEDURAL GROUND BARS CONSIDERATION OF THE MERITS OF MR. WHITE'S CLAIMS

In order to preclude review of a corpus petitioner's constitutional challenges to his conviction [and sentence of death], any state-law procedural bar asserted by the State must be both independent and adequate. Spencer v. Kemp, 781 F.2d 1458 (11th Cir. 1986)(en banc); Wheat v. Thigpen, 793 F.2d 621 (5th Cir. 1986); Mann v. Dugger, 817 F.2d 1471 (11th Cir. 1987); Adams v. Dugger, 816 F.2d 1493 (11th Cir. 1986)(on rehearing). Such an alleged bar cannot be unfairly, arbitrarily, or unevenly applied to bar review of a litigant's constituutional claim, and, even if legitimately applied, must further a legitimate (adequate and independent) state interest. Spencer; Adams; Mann. Two procedural bars were relied upon by the Rule 3.850 trial court to decline review of the merits of Mr. White's claims: the thirty-day "under warrant" filing limitation period of Rule 3.851 and the two-year filing limitation period of the "new" Rule 3.850. The application of neither rule against Mr. White furthers any adequate and independent state law ground.

A. RULE 3.851

Beauford White is the only Florida capital post-conviction litigant against whom the 30-day "under warrant" bar of Rule 3.851 has been applied. Should this Court uphold the application of Rule 3.851 against Mr. White, he will be the only litigant

sent to an execution on the basis of this rule--the Florida Governor's recently promulgated standards for the signing of death warrants will make the rule inapplicable in the future, and this Court. has waived the rule in the only other case in which it could have been applied. E.g., Thompson v. Dugger, No. 70,739 (Fla. 1987). Such arbitrariness--singling Mr. White out as the only litigant whose claims must fall under the rule--alone is sufficient to demonstrate that the rule furthers no adequate and independent state law ground. See Spencer v. Kemp, supra (sporadically applied state procedural bar cannot be considered adequate and independent, and therefore is not sufficient to preclude review).

Moreover, the fact that no adequate and independent state law ground is furthered by Rule 3.851 is shown by the rule itself--the rule "applies" only "under warrant." It is a vanishing procedural bar--upon the granting of a stay of execution by any court, Mr. White could submit his claims to the Rule 3.850 trial court which must then determine them on the merits (as in any other "non warrant case.") Such a vanishing bar is the paramount example of a procedural "trap for the unwary," a "trap" not countenanced by the fourteenth amendment's Due Process and Equal Protection Clauses. See Spencer, 781 F.2d at 1469-71, citing Lefkowitz v. Newsome, 420 U.S. 283, 293 (1975). No legitimate "interest" is furthered by such an

arbitrary rule.

Furthermore, even if a state interest where furthered by such a rule (none is), its application against Mr. White remains abhorent to the Due Process and Equal Protection Clauses--the true facts involved in this litigation make the rule's application clearly unconstitutional. See Att. 1 (proffer to trial court. Procedural bars are grounded in equitable principles, and a litigant's conduct is what courts must look to with regard to any procedural bar which the State may assert. Cf. Reed v. Ross, 468 U.S. 1 (1984); Adams v. Dugger, supra. Here, the equities involved clearly show that no adequate and independent state law ground is furthered by the application of Rule 3.851 to bar review of Mr. White's claims. The facts clearly show that there was no "default" in any true sense--that timing of the filing of Mr. White's state-court pleadings was beyond his, or his counsel's control. Those facts were presented to the Rule. 3.850 court and were proffered at the Rule 3.850 trial court "hearing." See generally, Transcript of Rule 3.850 trial court hearing (August 22, 1987 [Dade County Circuit Court, Eleventh Judicial Circuit].) See also, Rule 3.850 motion to vacate and accompanying memorandum. The Rule 3.850 court, however, refused to conduct a hearing on the facts which Mr. White had proffered.

The rule remains arbitrarily applied.

1. THE EQUITIES OF THE LITIGATION OF MR. WHITE'S PRESENT POST-CONVICTION ACTION

Beauford White presented to the Rule 3.850 court, and now to this Court, substantial claims challenging the legality and reliability of his capital conviction and sentence of death. His claims involve no technical niceties. They go to the very heart of the matter; Beauford White does not deserve to die, and this Court must exercise its lawful authority to preclude an unlawful execution from taking place.

The State responded to Mr. White's claims by asserting that he is not entitled to relief, and that his claims should not even be considered, because of actions purportedly taken by Mr. White's counsel, i.e., because Mr. White did not file his state court motion for post-conviction relief within the time period prescribed by Fla. R. Crim. P. 3.851. Essentially, the State's argument was that counsel "abused" the rule's "process," and therefore that counsel's death-sentenced client must die. The gravamen of what the State asserted was that the client must die because the lawyer "waived" the client's right to be heard.

In this case, however, as was proffered below, and as will be shown, Mr. White's counsel neither waived nor abused Florida's post-conviction process, the client acquiesced in none of the "waivers" and "abuses" which the State asserted, and, at the very least, the interests of justice required that Mr. White's claims

be heard for they involve the most fundamental of rights. Each of these matters required, and could only be addressed, at an evidentiary hearing, for they called on the Court to make specific findings of fact from evidence which was not in the record. Mr. White must be allowed to present the unequivocal nonrecord evidence which establishes beyond cavil that he has waived no rights, nor abused the post-conviction process, and therefore that Rule 3.851 furthers no adequate and independent ground barring this Court's review.

i) MR. WHITE NEVER WAIVED HIS STATE-COURT POST-CONVICTION REMEDIES, AND NEVER ABUSED THE POST-CONVICTION PROCESS.

> In cases in which a man's life is at stake and he has not had an opportunity to secure federal review of the alleged constitutional defects in his conviction and sentence, the state must meet a heavy burden when it argues that the petitioner's misconduct is sufficiently grave to warrant the sanction of dismissal.

Potts v. Zant, 734 F.2d 526, 529 (11th Cir. 1984). The courts consistently have so held, and have accordingly mandated evidentiary hearings, in innumerable cases involving the State's allegation that a capital defendant has forfeited his post-conviction remedies by "defaulting during," "abusing," "bypassing," "neglecting," or "waiving" state or federal post-conviction processes. See, e.g., Price v. Johnston, 334 u.S. 266, 292 (1948); Sanders v. United States, 373 U.S. 1, 20-21 (1963); Potts v. Zant, 638 F.2d 727, 747-51 (11th Cir. 1981);

McShane v. Estelle, 683 F.2d 867, 870 (5th Cir. 1982); see also Hall v. Wainwright, 733 F.2d 766, 777 (11th Cir. 1984)("Unless it is clearly shown on the record that a deliberate bypass has occurred, [the court] must hold an evidentiary hearing to discern whether a deliberate bypass has occurred." [emphasis supplied]); Thomas v. Zant, 697 F.2d 977, 988-89 (11th Cir. 1983)(same).

And so it is under Fla. R. Crim. P. 3.850. Rule 3.850 was patterned after the federal habeas corpus statute (28 U.S.C. sec. 2255), and this Court and the district courts of appeal have consistently adopted and applied the federal courts' analysis when "waiver," "abuse," and/or "bypass" allegations are made by the State. See generally, Saunders v. Wainwright, 254 So. 2d 197, 198 (Fla. 1971); McRae v. State, 437 So. 2d 1388, 1390 (Fla. 1983); cf. Whitney v. State, 184 So. 2d 207 (Fla. 3d DCA 1966); Suarez v. State, 220 So. 2d 442 (Fla. 3d DCA 1969). That analysis requires that the question of whether Mr. White waived his post-conviction remedies because of Rule 3.851 can only be determined at an evidentiary hearing. See Potts, 638 F.2d at 748 (hearing required to afford petitioner the opportunity to demonstrate that he did not waive post-conviction remedy); Haley v. Estelle, 632 F.2d 1273, 1276 (5th Cir. 1980)(where State's and petitioner's contentions regarding waiver issue are in conflict, evidentiary hearing is required); McShane v. Estelle, 683 F.2d 867, 870 (5th Cir. 1982)(when facts regarding "waiver" issue are

in dispute, evidentiary hearing is required); cf. Hall, supra; Thomas, supra. At such a hearing, Mr. White would have shown to the Rule 3.850 court, and would undeniably demonstrate to this Court's satisfaction, that he did not abuse or waive his post-conviction remedies.

ii) MR. WHITE HAS PERSONALLY WAIVED NO POST-CONVICTION RIGHTS, AND HAS NOT ABUSED, BYPASSED, OR NEGLECTED THE POST-CONVICTION PROCESS.

The right to file a motion/petition for post-conviction relief (e.g., pursuant to Fla. R. Crim. P. 3.850) is personal, i.e., it belongs to the defendant. See, e.g., Fla. R. Crim. P. 3.850 (demanding that motion be verified by defendant). Consequently, if post-conviction remedies (e.g., Rule 3.850) are to be abandoned, waived, or bypassed, it is the defendant himself who must waive them. The law in Florida and the federal courts is also clear that any such waiver by a defendant of the right to be heard on constitutional claims must be knowing, intelligent, deliberate and intentional. See Saunders v. Wainwright, 254 So. 2d 197, 198 (Fla. 1971)(defendant's waiver of constitutional right by bypassing direct appeal process must "clearly appear" in the record); see also Sanders v. United States, supra, 373 U.S. at 20-21; Fay v. Noia, 372 U.S. 391, 396-99 (1963); Ashby v. Wyrick, 693 F.2d 789, 794 (8th Cir. 1982); Crisp v. Mayabb, 668 F.2d 1127, 1140 (10th cir. 1982); Graham v. Mabry, 645 F.2d 603,

606 (8th Cir. 1981). Mr. White has personally waived no post-conviction remedy. If the Rule 3.850 court was correct that Mr. White's pleading was "late" (a finding which, as discussed infra, is wholly at odds with the equities of this litigation and with the law), Mr. White never wanted it so: he never acquiesced in, accepted, ratified, or agreed to any late filing. He has neither knowingly, intelligently, personally, or deliberately bypassed the requirements of Rule 3.851, as would be proven at a hearing. Therefore, Rule 3.851 is no bar to consideration of Mr. White's claims.

Filing a post-conviction action, or waiving such an action, are personal rights belonging to the defendant, as is the right to file or waive an appeal.

> In order to waive a constitutional right [by the failure to pursue a direct appeal] the waiver of such right must clearly appear in the record, and no such waiver will be implied.

Saunders, supra, 254 So. 2d at 198, citing Baker v. Wainwright, 422 F.2d 145 (5th Cir. 1970) and Fitzgerald v. Wainwright, 440 F.2d 1049 (5th Cir. 1971). This Saunders analysis makes perfect sense: certain "rights" are subject to the actions of counsel, and there "an attorney's conduct may bind the client," Murray v. Carrier, 106 S. Ct. 2639, 2644 (1986); see also Wainwright v. Sykes, 433 U.S. 72, 93 (Burger, C.J., concurring); on the other hand, the decision to pursue or waive post-conviction remedies is

"entrusted to the defendant" for personal consideration, invocation, or waiver. Pursuing or bypassing a post-conviction or appellate remedy, unlike raising objections to trial errors, is the defendant's right, and only the defendant can waive such a right. See, e.g., Fay, supra, 371 U.S. at 396-99; United States v. Stephens, 609 F.2d 230, 233 n.2 (5th Cir. 1980); Ashby v. Wyrick, 693 F.2d 789, 794 n.7 (8th Cir. 1982).

Consequently, in cases wherein the State alleges that the defendant bypassed, waived, abused, or abandoned post-conviction remedies, the State bears the "heavy burden" of showing, at a hearing, that the defendant:

1. Was apprised of the right that was supposedly waived;

2. Understood the consequences of such a waiver; and,

3. Voluntarily, intentionally, and deliberately agreed to such a waiver.

See, e.g., Potts, supra, 638 F.2d at 747-51; Potts, supra, 734 F.2d at 529; see generally Tague v. Louisiana, 444 U.S. 469, 470-71 (1980); Johnson v. Zerbst, 304 U.S. 458, 464 (1938). See also Saunders v. Wainwright, supra, 254 So. 2d at 198. Moreover, "[c]ourts indulge every reasonable presumption against waiver of federal constitutional rights." Johnson v. Zerbst, 304 U.S. at 464 (emphasis supplied); see also Brewer v. Williams, 430 U.S. 387, 404-05 (1977). Mr. White has never:

1. Been apprised that his post-conviction motion ws to be filed in any manner other than in compliance with Rule 3.851;

2. Understood that he was "waiving" any right;

3. Voluntarily, knowingly, intelligently and deliberately agreed to any "waiver."

This would have been established beyond refute had the Rule 3.850 court allowed a hearing, and a hearing was and is required. If there is any fault, the fault is counsel's, not Mr. White's. Mr. White has personally waived nothing -- his claims should be heard. Moreover, his counsel has also waived no rights -- the timing of the filing of this action was beyond counsel's or Mr. White's control.

iii) COUNSEL DID NOT INTENTIONALLY, DELIBERATELY, TACTICALLY, OR KNOWINGLY WAIVE, ABUSE, BYPASS, OR ABANDON ANY POST-CONVICTION REMEDY.

Under Rule 3.851, the thirty-day time limitation period does not apply if "the facts upon which the claim is predicated were unknown to the movant and could not have been ascertained by the exercise of due diligence prior to the end of the thirty-day period." Mr. White proffered just that to the Rule 3.850 court -- a hearing should have been held. Certainly it is counsel, not Mr. White, whose due diligence must be examined. In this case, due diligence can be shown, and the exception applies.

In the Motion for Extension of Time Within Which to File

Post-Conviction Motions previously filed in the Florida Supreme Court, the following was set-out:

> 1. Petitioner's death warrant was signed on June 4, 1987, and his execution set for August 26, 1987. Pursuant to this Court's recent adoption of Florida Rule of Criminal Procedure 3.851, all motions and petitions for post-conviction or collateral relief must be filed by July 6, 1987. See In re Florida Rules of Criminal Procedure, 12 FLW 92 (1987).
>
> 2. Petitioner was represented by Mr. Thomas G. Murray, Assistant Public Defender for the Eleventh Judicial Circuit, at the time of the signing of the death warrant. Undersigned counsel, the Office of the Capital Collateral Representative (CCR), agreed to enter the case at the behest of Mr. Murray who wrote a letter to CCR dated Friday, June 19, 1987. In that letter, which was received Monday, June 22, 1987, Mr. Murray advised Mr. Larry Spalding, the Capital Collateral Representative, that "[i]t had always been my intention to turn the case over to your office if I was unsuccessful in the Supreme Court." Attachment 1. As is discussed below, the matter of success in the United States Supreme Court is yet to be determined. Nevertheless, CCR has agreed to represent Mr. White.
>
> 3. CCR contacted Mr. Murray's office, began receiving files from him June 23, 1987, and finally received all files possessed by Mr. Murray on July 1, 1987. Because of other commitments, no one at CCR has met Mr. White, the client. An intake appointment is scheduled with Mr. White today at Florida State Prison. No background investigation has occurred, and no other investigation for post-conviction issues has been possible. One staff attorney has been reading the record to determine whether any issues are apparent therefrom. Despite the exercise of due diligence by counsel, at this time CCR is

not prepared to present post-conviction pleadings to the state courts.

4. Actions are, however, pending in federal court. On June 4, 1987, the date Petitioner's warrant was signed, Petitioner had nineteen (19) days remaining within which to file his petition for writ of certiorari from the Eleventh Circuit Court of Appeals in the United States Supreme Court, from the decision in White v. Wainwright, 809 F.2d 1478 (11th Cir. 1987). On June 23, 1987, Mr. White's certiorari petition was timely filed in the Supreme Court, along with an application for stay of execution. Thus, Mr. White's habeas corpus petition is still pending in the federal system.

5. Petitioner is required under Rule 3.851 to prepare and file a successive post-conviction motion by July 6, 1987, even though his appeal to the United States Supreme Court on his initial post-conviction motion is still pending. In Ford v. Florida, No. 70,467, pending before this Court, appellant was in the same procedural posture as Mr. White. Mr. Ford had federal habeas corpus proceedings pending in federal court when he filed a successor Rule 3.850 motion in state trial court. The State's position, contained in a motion to dismiss, was that since a petition was pending in federal court, actions filed in state court were ipso facto dismissible. Motion to Dismiss, Record on Appeal, pp. 10-11. The trial court accepted the state's position, and dismissed:

> The Defendant also states in his Motion that he presently has pending in the federal system certain collateral proceedings. Accordingly, the Court finds that this presently pending Motion for Post-Conviction Relief should be denied on this basis as well. State v. Meneses, 392 So.2d 905 (Fla. 1981).

Order entered February 17, 1987, pp. 12-13, Record on Appeal.

6. Accordingly, Mr. White faces a classic Hobson's choice: he can file a successor motion while the federal proceedings are pending, and face dismissal per Ford, or he can wait until the federal action is finally ruled upon, placing himself outside of the Rule 3.851 time limits, and face dismissal. Such traps for the unwary are untenable, and violate due process of law.

7. In a recent order addressing the effect of Rule 3.851, this Court recognized that "some adjustments and changes to this Court's drafted rule may be appropriate," In re Amendment to Florida Rules of Criminal Procedure--Rule 3.851, No. 69,931, slip op. at 1 (May 11, 1987), and invited the Criminal Rules of Procedure Committee of the Florida Bar "to study and evaluate" the rule. Id. The instant case presents circumstances under which some slight adjustment is appropriate. Here, the stated purpose of the Rule, i.e., "to provide more meaningful and orderly access to the courts when death warrants are signed," In re Florida Rules of Criminal Procedure, Rule 3.851, 12 FLW at 92, will be better served by granting the requested extension.

8. The CCR is currently solely responsible for the litigation of three cases under death warrant, and is co-counsel in a case in which this Court entered a stay just last Thursday. In addition, the CCR recently became sole counsel in another warrant case, that of Douglas Ray Meeks, when the volunteer attorney withdrew after a death warrant was signed. CCR is now facing an expedited briefing schedule in the Eleventh Circuit in Mr. Meeks' case, imposed after that court granted a stay of execution. Further, CCR is responsible for conducting an evidentiary hearing Wednesday, July 8, 1987, in Tampa, Florida, which requires extensive further preparation.

9. CCR's budgetary, staffing, and logistical problems have been well documented, and have been presented to this Court on several prior occasions. While CCR still contends that Rule 3.851 violates the state and federal constitutions, as set out in In Re: Florida Rules of Criminal Procedure--Rule 3.851, Comments and Recommendations by the Office of the Capital Collateral Representative (March 30, 1987), and fully incorporated herein, this motion is made in good faith under the Rule for the reasons stated herein.

10. CCR is currently, in addition to its regular case load, litigating three warrant cases. Petitioner's case presents a record well into the thousands of pages. Because CCR only recently became involved in the case, undersigned counsel is just beginning in the process of assuring that the entire record has been assembled, and has just begun the careful preparatory review process which is required in cases of this magnitude.

11. Even is CCR was able to devote all of its resources to the Petitioner's case, it would still be practically impossible to file the necessary state post-conviction motions by July 6, 1987, in the responsible and professional manner which is required by the severity of the sentence involved and to which the Petitioner is entitled. Facts upon which some of the claims which must be raised in the state courts will be based are still in the process of being developed, and are therefore are at least partially "unknown" for the purposes of Rule 3.851. See Fla. R. Crim. P. 3.851(a)(1). Undersigned counsel and staff are currently working literally around the clock to investigate, prepare, and present Petitioner's state post-conviction motions in a timely manner, but are woefully behind the current schedule, through no fault of Petitioner or counsel.

12. Undersigned counsel is not asking

this Court, other than as heretofore stated, to suspend completely the operation of Rule 3.851. Rather, counsel is seeking an extension of time which will best accommodate the interests of all concerned and the stated purposes of the Rule itself. Undersigned counsel is simply requesting that this Court grant the Petitioner a 20-day extension of the time within which to file his state post-conviction motions ude to exigent circumstances. Given the critical and irrevocable nature of the penalty involved, and the unique posture of Petitioner's case, it is wholly fitting and proper for undersigned counsel to take a fresh and objective look at the record, rather than relying on previous efforts of volunteer counsel. To do so, counsel needs the additional time afforded by the requested extension. Moreover, the necessity of filing a second 3.850 motion might well be rendered moot should his pending application to the United States Supreme Court prove successful.

13. This is manifestly not the type of case wherein "petitions and motions for postconviction relief [will be] filed scant day, and even hours, before scheduled execution[]," leaving "little time for judicial consideration." In re Florida Rules of Criminal Procedure, Rule 3.851, 12 FLW at 92. Petitioner's execution is set for August 26, 1987, fifty-one (51) days from the current due date and thirty-one (31) days from the requested due date. This Court will still have the time and opportunity to give Petitioner's case the careful and studied consideration which it provides all capital cases, as will all other courts involved in the process.

14. The instant request is made in good faith and is not interposed for the sake of delay or to otherwise disrupt the orderly processes established by this Court. Counsel simply cannot prepare and present Petitioner's case in the careful and professional manner which the critical and

> irrevocable nature of the death penalty demands without the additional time requested herein. Petitioner's life literally hangs in the balance, and he is without fault in the circumstances which have led to the necessity of the filing of the instant motion.

CCR did not even have the files in the case until July 1, 1987. As this Court is aware, the first step was for counsel to read the transcript and investigate. Given other commitments of counsel, it was impossible to read the record and prepare within the thirty day period, despite the exercise of due diligence.

Without even discussing the normal abnormally unmanageable day to day work required for a very small state agency wiwth only two experienced attorneys (see Att. 1) to represent 150 clients, it is apparent that in the emergency situation extent during Mr. White's warrant, his attorney could do no more. However, the Court should at least be apprised of the most recent "under warrant" work-load of CCR.

As the Court is aware, CCR did not have files, and had not met the client, as of July 1, 1987. Mr. White's counsel, Mark Evan Olive, also represents Mr. Stano, scheduled to be executed with Mr. White. Kenneth Hardwick and William Thompson were scheduled to be executed July 23, 1987. Mark Olive was counsel for both individuals. James Agan, another client of Mr. Olive's, had just received a stay of execution, when involvement in Mr. White's case began. See also Transcript of Hearing Before Rule 3.850 trial court (July 22, 1987)(proffering additional facts on

Rule 3.851 issue). [That proffer is incorporated herein and similarly made to this Court. Time constraints preclude a more thorough detailing of that proffer in this brief.]

Mr. Olive was assigned these cases and without time off, without vacation, and without being dilatory, attempted to represent all the crisis clients. No other experienced attorneys were available to represent these clients. After the Hardwick and Thompson situations were under control, Mr. Olive's attention was turned to the current warrants. It is impossible to describe the sense of responsibility felt by counsel, especially in a "successor" setting, as here, when preparing a case from scratch for a client whom you have known for a matter of days. No stone goes unturned, and no decision is made without constant inner turmoil. Counsel did not sit and wait for the "ideal" moment to spring a Rule 3.850 motion on the Court and counsel for the state. It was prepared under intense and unrelenting pressure.

This Rule 3.850 motion was, in fact, filed as early as humanly possible. See State Court Memorandum in Support of Rule 3.850 motion and application for stay of execution; see also; Rule 3.850 "Hearing" Transcript, supra (specific factual proffer).

Finally, Mr. White should not be penalized, and should not have been penalized, for the real or perceived shortcomings of his counsel. If due diligence and/or unprofessionalism is a

question, an evidentiary hearing should be allowed so as to allow counsel to prove that the diligence given is much more than anyone's reasonable perception of what is "due". Mr. White should not be executed because his lawyer, due to circumstances beyond Mr. White's control and not of his doing, simply could not file his state-court pleadings any sooner.

iv) CCR, AS AN INSTITUTION, COULD NOT ACT ANY SOONER.

Mr. White is indigent. Pursuant to Fla. Stat. Ann. sec. 27.7001, et seq. (West Supp. 1986), the Office of the Capital Collateral Representative (CCR) represents Mr. White in post conviction proceedings. See Fla. Stat. sec. 27.702. CCR must represent all indigent Florida death-sentenced inmates who are without counsel, as the Florida Supreme Court and the Florida Legislature have made clear (see Fla. Stat. Ann. sec. 27.702). App. 11.

CCR proceeded as expeditiously as possible under the circumstances in pursuing post-conviction relief.

CCR opened its doors on October 1, 1985, as a result of the combined efforts of Attorney General Jim Smith, The Florida Bar, The Florida State-Federal Judicial Conference, and a coalition of leaders from the private bar -- efforts undertaken in response to the unanimously recognized crisis in representation of death-sentenced inmates in Florida. As indicated, CCR is required by

statute to represent all of Florida's indigent and unrepresented inmates in post-conviction proceedings. See Fla. Stat. sec. 27.7001, et seq. (1985); see also Report of the Florida Bar, Individual Rights and Responsibilities Committee, "An Analysis of Ch. 85-332, Laws of Florida: Can the Capital Collateral Representative Refuse to Represent any Individual Who is Under Sentence of Death and Indigent?," March, 1987.

It became immediately apparent during CCR's fledgling year of operation that its budget was wholly inadequate to accomplish its legislative mandate. Nevertheless, on July 1, 1986, CCR effectively received a 23% decrease in funding for its second fiscal year. The effects of the decrease were immediate and severe, requiring the closing of CCR's branch office in St. Petersburg, Florida.

CCR's financial, logistical, and practical problems are now fully documented. On March 20, 1987, the Board of Governors of the Florida Bar approved and unanimously agreed to recommend that the legislature adopt the findings and recommendations contained in "A Caseload/Workload Formula For Florida's Office of the Capital Collateral Representative," a report sponsored by the ABA Standing Committee on Legal Aid and Indigent Defendants, Bar Information Program (hereinafter "ABA Report") (App. 13). The ABA Report concluded that for CCR to operate effectively it was necessary that it be funded at $2,991,407, with a staff of 31

attorneys. See also Att. 1 (specific proffer). CCR's budget was approximately one-fourth that amount. Only two of of CCR's attorneys have capital post-conviction experience, and CCR's clients are assigned accordingly.

The ABA Report was the result of an independent study, the purpose of which was to determine the amount of time and resources required in "typical" post-conviction death penalty litigation, including a comparison between those cases that are and are not "under warrant." The results of the study reveal that CCR simply could not, at the budgetary level at which it was operating, initiate and complete post-conviction proceedings in a more timely manner. As the independent study unequivocally demonstrates, CCR simply has no choice but to undertake the representation of individual inmates when necessity so demands, i.e., when a death warrant is signed.

Volunteer attorneys and public defenders around the country were asked to respond to a questionnaire which asked, inter alia, how many attorney and support staff hours were expended in their representation of death-sentenced inmates in capital post-conviction proceedings. The post-conviction process was divided into "steps," and the time required for each step was requested. The six steps, virtually the same in every state, were:

(1) State Circuit Court -- motions for post-conviction relief under Florida Rule of Criminal Procedure 3.850 must be filed in the trial court where the conviction and the death sentence were imposed.

(2) Supreme Court of Florida -- the highest state court where an appeal is taken from the state circuit court's decision regarding a 3.850 petition. Other motions alleging errors in the original direct appeal may also be filed in the Supreme Court in the first instance.

(3) United States Supreme Court -- the court where a petition may be filed requesting a review of the decision of the Florida Supreme Court regarding a state post-conviction petition.

(4) United States District Court -- the court where a federal habeas corpus petition may be filed if relief is denied on a state post-conviction petition in the Florida Supreme Court.

(5) United States Court of Appeals for the Eleventh Circuit -- the court that hears an appeal from the decision of the U.S. District Court regarding writ of habeas corpus.

(6) United States Supreme Court -- a final post-conviction petition may be filed in this court requesting a review of the decision of the U.S. Court of Appeals regarding a writ of habeas corpus.

ABA Report, p. 3, Id.

The ABA Report analyzed the number of attorney hours spent per step as follows:

Table 9

Comparison of Attorney Hours
Entire Sample, Florida Sample, & Documented Sample

Court Level	Entire Sample	Florida Sample	Documented Sample
State Trial Court	400	500	494
State Supreme Court	200	240	369
U.S. Supreme Court (1)	65	77	100
Federal District Court	305	388	500
Federal Circuit Court	320	318	437
U.S. Supreme Court (2)	180	160	100

ABA Report, p. 15. Thus, in documented samples, 494 attorney hours were required just to prepare for and conduct state trial court proceedings in a capital post-conviction action. It is documented that one attorney working eight hours per weekday would need 62 days, or twelve five-day work weeks, to prepare and present post-conviction pleadings in a single case just in the trial court.

The number of "support staff" hours was also obtained:

Support Hours for Entire Sample

Support Responses	State Trial Court	State Supreme Court	US Supreme Court 1	Federal District Court	Federal Circuit Court	US Supreme Court 2
No. Responding	89	68	30	59	38	17
Max. Hours	2,592	986	250	2,200	796	803
Min. Hours	20	5	5	10	24	10
Median Hours	150	80	40	150	166	75
Average Hours	257	160	67	275	237	133

Table 8

Support Hours for Florida Cases

Support Responses	State Trial Court	State Supreme Court	US Supreme Court 1	Federal District Court	Federal Circuit Court	US Supreme Court 2
No. Responding	34	28	6	18	17	7
Max. Hours	2,592	986	175	1,647	700	75
Min. Hours	37	5	20	10	24	10
Median Hours	168	78	45	145	182	45
Average Hours	343	235	79	312	193	44

ABA Report, pp. 17-18, Id. Thus, one support person in Florida working eight hours per five-day work week would need 343 hours, or 44 days, or nine weeks to produce the work necessary for just the post-conviction trial court.

The ABA Report's analysis went further. Twenty-two of the 37 states with the death penalty have a state appellate defender system. Eleven of the programs were able to supply useful information as to time required to provide representation in post-conviction death penalty cases. The results, in number of attorney hours per "step," are:

Table 11

Summary of State Appellate Defenders Time

	State Trial Court	State Supreme Court	US Supreme Court 1	Federal District Court	Federal Circuit Court	US Supreme Court 2
California		464				
Florida	400	200	266	400	400	266
Indiana	[----2250---]					
Kentucky	[-----730---]					
Maryland	[-----800---]					
Nevada	300					
New Mexico	450					
Ohio	[-----600---]					
Oklahoma	400					
So. Carolina	400					
Wyoming	[----------2000----------]					

ABA Report, p. 59, Id.

CCR reported the following attorney hours, corrected by the Delphi Method of Statistical Analysis:

Court Level	Total Estimated Lawyer Time
Florida Circuit Court	500 hours
Florida Supreme Court	200 hours
U.S. Supreme Court	100 hours
Federal District Court	500 hours
Federal Circuit Court (11th)	300 hours
U.S. Supreme Court	100 hours

ABA Report, p. 60, Id.

Expenses and attorney hours increase under death warrant as compared to when cases are progressing normally. Where there is no warrant, a death penalty case proceeds at a rational,

judicious pace, with scheduling of motions and hearings that accommodates the participants' schedules, and the calendars of the various courts. In short, normal, civil, and predictable litigation occurs.

A death warrant jolts the entire process. A litigant can proceed through the trial court, the Florida Supreme Court, the federal district court, the federal circuit court, and the United States Supreme Court in a matter of days. Regardless of the obvious jurisprudential shortcomings of such a process, preparation for each step must be made, and CCR must devote all of its resources to death warrant cases. The cost of litigation under this system substantially increases. ABA Report, p. 24, Id.

Due to the unrelenting pace at which these warrants were signed, CCR was forced to devote all of its meager resources to litigating the cases of those inmates against whom a death warrant was signed and whose execution was imminent. No resources were available to devote to the litigation of cases out of warrant. CCR continues to operate at a frenetic pace to keep astride ever increasing number of warrants signed by the Governor.

Mr. White's case has been further complicated by the fact that the Governor has also signed a warrant on Gerald Stano. CCR has only two available attorneys with sufficient capital

litigation experience to supervise the investigation and preparation process and to appear in court and argue on behalf of death sentenced inmates. Of necessity, these two cases were assigned to Mr. Olive, who had to undertake the role of lead counsel in both cases. (Billy H. Nolas, CCR's only other experienced attorney, was burdened with innumerable other commitments to capital clients during this period of time and CCR's predicament was proffered to the court below. Att. 1. At the very least, a hearing should have been held on the basis of Mr. White's proffer.)

The average documented number of attorney hours required to handle a state post-conviction capital case, just in the state trial court, is 494. "The median figure of 400 hours for the state trial court would represent about 25% of a lawyer's time for a full year [typical private attorney spends 1600 hours per year in private practice] just for providing representation in one post-conviction death penalty case litigated only at that one level." ABA Report, "Time and Expense Analysis in Post-Conviction Death Penalty Cases," p. 11, App. 14. Few cases under warrant stop at the trial court level, and even in those few that do, the pressures of impending execution require that preparation for the next steps in the process be substantially completed in anticipation of a denial from the court below. (See ABA Report, Table 9, supra, for the average number of attorney hours required

for each step.)

Pursuant to its legislative mandate CCR represented 88 death-sentenced inmates through 164 steps in post-conviction litigation during its first year of operation alone. ABA Report, p. 36, App. 13. It must also be remembered that CCR does not "catch-up"--CCR must represent every death-sentenced inmate in Florida whose conviction and sentence have been affirmed on direct appeal, and each case that CCR undertakes remains active for a long period of time, through numerous hearings, investigations, briefs, and oral arguments. A case is no longer active only when an execution occurs or relief is granted. The number of cases and "steps" for which CCR is responsible constantly increases.

The problems which plagued CCR during its first year of operation remain. CCR continues to represent individuals through all appropriate steps and in a timely matter well after the State-created pressure of a death warrant expires. The following warrant cases are examples:

Inmate	Date Warrant Signed
Willie Darden	8/5/86
Roy Stewart	9/10/86
Henry Sireci	9/10/86
Willie Darden	9/24/86
Kenneth Hardwick	8/20/86
Allen Davis	8/20/86
Wardell Riley	10/7/86
George Lemon	10/7/86
Nollie Martin	10/21/86
Theodore Bundy	10/21/86

Gerald Stano	11/6/86
Walter Steinhorst	11/6/86
Buford White	3/18/87
John Mills	3/11/87
Douglas Meeks	4/21/87
James Agan	4/21/87
William Thompson	5/13/87
Kenneth Hardwick	5/13/87
Buford White	6/4/87

v) MR. WHITE'S PREDICAMENT

The State of Florida, by statute, provides an indigent capital inmate such as Mr. White with CCR as his "counsel". The State of Florida then creates a situation--by underfunding and understaffing CCR, and by the Governor's arbitrary signing of warrants without any notice being provided--which renders counsel's role impossible. That is Mr. White's predicament, and that predicament shows no Rule 3.851 bar cannot be demeed an adequate and independent state ground barring review. CCR's predicament has been presented to the Courts. Mr. White should not be punished because his counsel could act no sooner.

B. THE NEWLY ENACTED RULE 3.850 TWO-YEAR LIMITATION PRESENTS NO ADEQUATE AND INDEPENDENT STATE LAW GROUND BARRING REVIEW OF THE MERITS OF MR. WHITE'S SUBSTANTIAL CLAIMS

1. THE RULE ITSELF WAS NOT APPLICABLE

The Rule 3.850 trial court also refused to rule on the merits of Mr. White's claims due to the two-year "limitation" period of the Rule 3.850 <u>now</u> in effect. As with Rule 3.851, <u>no</u> adequate and independent state law ground is furthered by the

application of such a "limitation" to bar review of Mr. White's claims. As even a cursory review of the rule shows, the rule simply did not apply against Mr. White--the two-year limitation is applicable only to the initial filing of a motion to vacate, see Fla. R. Crim. P. 3.850 (1987), and Mr. White's first Rule 3.850 proceeding was more than timely filed. The two-year limitation rule simply is inapplicable to second Rule 3.850 motions. Even the rule itself makes this clear--by including language mirroring Rule 9(b) of the Rules Governing Section 2254 Cases and directing that a "second . . . motion may be dismissed" only on the basis of that 9(b)-type analaysis.

There can be no more arbitrary a procedural "trap for the unwary" than the application of a procedural bar which, as a matter of state law, simply does not exist. See NAACP v. Alabama ex rel. Patterson, 357 U.S. 449 (1958). There, as here, the litigant [Mr. White] "could not fairly be deemed to have been apprised of [the rules] existence." Id. at 457-58. The rule was never intended to apply to "second" state-court post-conviction actions. See also James v. Kentucky, 466 U.S. 341 (1984)(only "firmly established and regularly followed state [procedural] practice can prevent implementation of federal constitutional rights"); Spencer v. Kemp, supra, 781 F.2d at 1469-71.

Consequently, no adequate or independent state law ground was or is furthered by the rule's application against Mr. White.

2. THE RULE'S APPLICATION CONSTITUTES AN UNCONSTITUTIONAL EX POST FACTO PROCEDURAL BAR

Moreover, the application of Florida's new successive bar rule against Mr. White constitutes an obviously unconstitutional ex post facto application of the successor rule, violating the ex post facto and the due process clauses. Decisions by the United States Supreme Court "prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. . . . A law need not impair a 'vested right' to violate the ex post facto prohibition." Weaver v. Graham, 450 U.S. 24, 30 (1981).

Both prongs of the Graham test are met here. The application of the successor bar clearly would be retrospective. The "new" Rule 3.850 was amended and became effective after Mr. White's initial state-court post-conviction proceedings were filed. Clearly, the "new" two-year rule, as [arbitrarily] applied in this case disadvantaged Mr. White. The law in Florida when Mr. White's initial state-court post-conviction pleadings were filed was that presentation of "new claims" in a successor state-court post-conviction action was proper: "Successive presentation of the same claim for relief in collateral proceedings is improper," Francois v. State, 470 So. 2d 687 (Fla.

1985), but not the presentation of a new claim. "A second or successive motion for similar relief, as used in Rule 3.850, has been interpreted to mean a motion stating substantially the same grounds as a previous motion attacking the same conviction or sentence under the Rule." McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983). Under the "old" rule Mr. White's claims could not have been barred as successive. Because application of the "new" 2-year rule to this case would be a retrospective application that would disadvantage Mr. White, its application is flatly improper. Graham, supra.

3. NO SUCCESSOR TWO-YEAR BAR WAS OR IS APPLICABLE TO MR. WHITE'S CLAIMS

A. THE SUPPRESSION OF EVIDENCE/KNOWING USE OF PERJURED TESTIMONY CLAIMS

No "successor" bar could have fairly been applied to Claim I and the related (Brady/Napue) claims of the Rule 3.850 motion. This is so because those claims were and are based on evidence which the State suppressed at the time of Mr. White's trial and initial Rule 3.850 proceeding. Consequently, those claims were not presented in the past due to no fault on the part of Mr. White, but because the basis of such claims (the "evidence" of State misconduct) was suppressed.

To apply a procedural bar against review of such claims [whose basis was withheld by the State] would be manifestly unjust, for it would deprive Mr. White of any "reasonable

opportunity" to have his claim heard solely because of the State's own misconduct. Cf. Michael v. Louisiana, 350 U.S. 91 (1955); Reece v. Georgia, 350 U.S. 85 (1955). The "review" provided to Mr. White under such circumstances would truly be a "meaningless ritual," Douglas v. California, 372 U.S. 353, 358 (1963), and one not countenanced by the due process and equal protection clauses.

Moreover, the "basis" of the claims was unavailable when Mr. White filed his initial Rule 3.850 proceeding. The basis of these claims only became known when, pursuant to Fla. Stat. sec. 119.01, et. seq. (i.e., the Florida counterpart to the federal "Freedom of Information Act"), the police records on which it is based were recently uncovered by Mr. White's counsel. At the time of Mr. White's initial state-court litigation, "Chapter 119" was not interpreted to apply to criminal post-conviction matters. It was only with the advent of the July 9, 1986, decision in Tribune Co. v. In re: Public Records, P.C.S.O. (Miller/Jent), 493 So. 2d 480 (Fla. 2d DCA, 1986) that capital litigants such as Mr. White were allowed access to police files such as the ones at issue in this case. [In fact, even in Mr. White's present case, the Dade County State Attorney's Office refused to comply with his "Chapter 119" requests; the records at issue were then obtained from police files.]

B. DUE PROCESS AND EQUAL PROTECTION WOULD BE ABROGATED BY THE ARBITRARY AND RETROACTIVE APPLICATION OF THE PRESENT RULE 3.850 TWO-YEAR FILING LIMITATION.

Due process and equal protection of law are flatly abrogated by the application of the recently enacted two-year Rule 3.850 limitation to bar review of the merits of Mr. White's claims. That limitation did not exist at the time Mr. White filed his initial Rule 3.850 motion. The law then would not have barred consideration of Mr. White's "successor" claims:

> [A] second or successive motion by the same prisoner attacking the same judgment but stating substantially different legal grounds is permitted under the Rule and should not be summarily dismissed solely on the basis that the prisoner has previously filed another Rule 3.850 motion. See Palmer v. State, 273 So.2d 135 (Fla. 3d DCA 1973); Roberts v. State, 250 So.2d 918 (Fla. 2d DCA 1971); Piehl v. State, 173 So.2d 723 (Fla. 1st DCA 1965), quashed on other grounds, 184 So.2d 417 (Fla. 1966); Archer v. State, 166 So.2d 163 (Fla. 2d DCA 1964).
>
> As the foregoing discussion demonstrates, if the summary denial in the instant case was based upon a determination that the issues raised by the motion either were or could have been presented by direct appeal, or that they were argued in the previous Rule 3.850 proceeding and decided on their merits, then the order denying relief was proper. If, on the other hand, the denial of the motion was based on the supposition that the mere filing of a previous motion for post-conviction relief precluded any consideration of a second or successive motion, then the court's order was error.

McCrae v. State, 437 So. 2d 1388, 1390-91 (Fla. 1983), subsequent

history in McCrae v. State, 12 FLW 310 (Fla. June 26, 1987)(granting post-conviction relief). Mr. White and his former counsel relied on that law. See App. 53 to Rul3 3.850 motion. The law now, i.e., the recently enacted two-year Rule 3.850 limitation, cannot be applied retroactively to bar review. Such arbitrary and retroactive application of a state procedural statute would be the paramount example of a procedural "trap for the unwary." See Lefkowitz v. Newsome. 420 U.S. 283, 293 (1975); Spencer v. Kemp, 781 F.2d 1458, 1469-71 (11th Cir. 1986) (en banc); Wheat v. Thigpen, 793 F.2d 621, 624-27 (5th Cir. 1986). See also Ashby v. Wyrrek, 693 F.2d 789, 793-94 (8th Cir. 1982). And such a procedural "trap" simply cannot be squared with due process and equal protection of law.

In short, the retroactive application of the two-year Rule 3.850 limitation violates the fourteenth amendment just as assuredly as due process and equal protection are abrogated by the retroactive expansion of a criminal statute. The United State Supreme Court's opinion in Bouie v. City of Columbia, 378 U.S. 347 (1964), makes this undeniably clear:

> The basic due process concept involved is the same as that which the Court has often applied in holding that an unforeseeable and unsupported state-court decision on a question of state procedure does not constitute an adequate ground to preclude this Court's review of a federal question. See e.g., Wright v. Georgia, 373 U.S. 284, 291 [83 S. Ct. 1240, 1245, 10 L.Ed.2d 349];

> N.A.A.C.P. v. Alabama, 357 U.S. 449, 456-58 [78 S. Ct. 1163, 1168-69, 2 L.Ed.2d 1488]; Barr v. City of Columbia, ante, [378 U.S.] p. 146 [84 S. Ct. 1734, 12 L.Ed.2d 766]. The standards of state decisional consistency applicable in judging the adequacy of a state ground are also applicable, we think, in determining whether a state court's construction of a criminal statute was so unforeseeable as to deprive the defendant of the fair warning to which the Constitution entitles him. In both situations, "a federal right turns upon the status of state law as of a given moment in the past -- or, more exactly the appearance to the individual of the status of state law as of that moment. . . ." 109 U.Pa.L.Rev. supra, at 74, n. 34.
>
> When a state court overrules a consistent line of procedural decisions with the retroactive effect of denying a litigant a hearing in a pending case, it thereby deprives him of due process of law "in its primary sense of an opportunity to be heard and to defend [his] substantive right." Brinkerhoff-Faris Trust & Sav. Co. v. Hill, 281 U.S. 673, 678 [50 S. Ct. 451, 453, 74 L.Ed. 1107]. When a similarly unforeseeable state-court construction of a criminal statute is applied retroactively to subject a person to criminal liability for past conduct, the effect is to deprive him of due process of law in the sense of fair warning that his contemplated conduct constitutes a crime. Applicable to either situation is this Court's statement in Brinkerhoff-Faris, supra, that "if the result above stated were attained by an exercise of the State's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious," and "the violation is none the less clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid . . . state statute." Id. at 679-80 [50 S. Ct. at 453-54].

Id. at 354-55.

To apply Rule 3.850 in such a way would further no adequate and independent state law ground. Placing Mr. White in such an untenable procedural "trap" simply does not pass muster under the fourteenth amendment. See James v. Kentucky, 466 U.S. 341 (1984) (only "firmly established and regularly followed state practice can prevent implementation of federal constitutional rights.") Barr v. City of Columbia, 378 U.S. 146, 149 (1964) (state procedural rules which are not fairly applied and regularly followed cannot be used to bar review of federal claims); Hathorn v. Lovorn, 457 U.S. 255, 262-63 (1982) ("state courts may not avoid deciding federal issues by invoking procedural rules that they do not apply evenhandedly."); see also Henry v. Mississippi, 379 U.S. 433, 447-48 (1958); Williams v. Georgia, 349 U.S. 375, 389 (1955); Wright v. Georgia, 373 U.S. 284, 291 (1963); Sullivan v. Little Hunting Park, 396 U.S. 229, 233-34 (1969). Accordingly, in NAACP v. Alabama ex rel. Patterson, 375 U.S. 449 (1958), the Supreme Court explained that an arbitrarily applied procedural bar such as the retroactive application of Rule 3.850's two-year limitation would not be considered independent and adequate where the criminal defendant

> could not fairly be deemed to have been apprised of its existence. Novelty in procedural requirements cannot be permitted to thwart review in this court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights.

NAACP v. Alabama ex rel. Patterson, 375 U.S. at 457-58 (emphasis supplied). See also Spencer, supra; Wheat, supra.

The law as it existed when Mr. White filed his initial Rule 3.850 motion would not have barred review. See generally McCrae, supra. To retroactively and arbitrarily apply the Rule 3.850 now in effect would further no adequate and independent state law ground. The assertion of Mr. White's substantial constitutional claims cannot be defeated by the arbitrary, unfounded, unique, and retroactive application of the present Rule 3.850. James v. Kentucky, 466 U.S. at 349 (1984), relying on, Davis v. Wechsler, 263 U.S. 22, 24 (1923). See also Spencer v. Kemp, supra.

III. THIS COURT ON THE BASIS OF MR. WHITE'S CLAIMS, SHOULD GRANT MR. WHITE'S REQUEST FOR A STAY OF EXECUTION.

The issues which Mr. White is seeking to raise are of the type which go to the heart of the fact-finding process, and hence which go the reliability of the guilt-innocence and sentencing determinations.

CLAIM I

THE STATE'S FAILURE TO REVEAL SIGNIFICANT EXCULPATORY AND MITIGATING INFORMATION CONCERNING MR. WHITE'S INVOLVEMENT IN THE OFFENSE VIOLATED MR. WHITE'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Mr. White faced liars at his trial, but he did not know

that, and his defense attorney did not know that. "Victim" Hall, with full state cooperation, testified as a hapless, chummy, victim of circumstances who tragically fell into a robbery-murder, along with his amicable friends who had an evening of gentle, domestic entertainment in mind. Mr. White did not know this wsa false. Officer Derringer did, but sat silentlly at trial and let it be said. In fact, four days after the offense, the police were aware of what Mr. White, the jury, and the judge never learned--"victim" Hall had gathered all the actors together the night of the offense for a major drug transaction:

> Charles Ceasar Stinson, N/M, 35, of Milwaukee, Wisconsin, was in Miami with the intention of making a large cocaine buy. Charles Stinson contacted his associate, Gilbert Williams, N/M, 35, of Miami, who is his contact in Miami, in an effort to arrange the cocaine deal. Gilbert Williams utilized John Hall, N/M, 45, to make the arrangements to buy the cocaine.
>
> John Hall contacted Livingston Stocker, N/M, 33, at Ferguson's Grocery Store, located at N.W. 14th Avenue and 71st Street. Livingston Stocker then called another dealer in an attempt to obtain four ounces of cocaine. The first dealer he contacted was unable to supply him with the cocaine. Mr. Stocker then contacted Henry Clayton, N/M, 35, in an effort to obtain the four ounces of cocaine. Henry Clayton agreed to make the deal, and made two phone calls in an effort to obtain the necessary cocaine.
>
> In Clayton's first phone call, his contact was unable to supply the cocaine. In the second phone call, the contact was given a phone number, allegedly Stocker's phone number, to call when he had the cocaine

> ready. Clayton then left his residence at 3445 N.W. 199th Street, en route to Stocker's house.
>
> Johnnie Hall, accompanied by Gilbert Williams and Charles Stinson, met Livingston Stocker at Ferguson's Grocery Store, at approximately 9:15 p.m.
>
> Johnnie Holmes, N/M, 24, a friend of Mr. Stocker, was with Mr. Stocker at Ferguson's Grocery Store when Hall and his friends arrived. The five men entered Mr. Stocker's 1977 Thunderbird, and proceeded to Stocker's residence located at 19335 N.W. 24th Avenue, arriving there at approximately 9:30 p.m.

App. 8. Rather than admitting at trial that he was the architect of "a large cocaine buy" involving Stocker, Clayton, and the other victims, witness Hall played benign socialite:

> Q Did there come a time when you met with all of these names I have just mentioned, Stinson, Gilbert Williams and Holmes and Stocker to go to Stocker's house?
>
> A At one time we did.
>
> Q What was the reason for that?
>
> A As far as I know, we was going to Stocker's house to drink some beer.
>
> Q Did you know at any time about any drug dealings that may or may not have been contemplated by anybody?
>
> A Not that I know of.
>
> Q Did anybody confide in you or tell you anything about drugs?
>
> A No, sir.
>
> Q At that time?

A No, sir.

(R. 769-770). Of course, the police knew this was laughable, as well it might be, but further fact that Mr. White's rendezvous with the electric chair is predicated upon this liars credibility. Mr. Hall's trial testimony is the only source for the "mask fell off so witnesses have to be eliminated" story, and he, incredibly, identified Mr. White at trial, despite his inability to do so earlier. Hall was a all-important witness for the state, and his depiction of the events is inextricably linked to the validity of any Enmund findings. The police involved in this case were, as became apparent after the trial, about as corrupt as they come, with a habit of stealing drugs and money from homicide victim residences and vehicles and, obviously, then lying about the crime scene and the circumstances of the crime. Their police reports in this case demonstrate beyond cavil that this killing was the plan of Francois and Ferguson, who fully intended all along to kill, but who told Mr. White it was all just a robbery. This was, of course, the theory of defense, and the evidence that proved it was kept under lock and key by those proven to be corrupt police.

Had Mr. White's counsel known that Mr. Hall and the police were drug-dealing liars, Mr. White's explanation would have been absolutely believable, and a life sentence would surely have resulted, much less the possibility of outright innocence of

murder, and guilt of robbery.

A. THIS CLAIM IS NOT BARRED AS SUCCESSIVE

Claims contained in second or subsequent petitions may be dismissed without merits consideration if the State specifically demonstrates and the petitioner fails to refute one of the following matters: that the ground for relief is not a new ground, it was previously determined on the merits, and the ends of justice will not be served by revisiting the claim; or the claim is one not previously presented, and the failure to present the claim earlier is an abuse of the writ. See Rule 3.850. Old claims presented again are "successive;" new claims not previously presented may be abusive."

> The terms "successive petition" and "abuse of the writ" have distinct meanings. A "successive petition" raises grounds identical to those raised and rejected on the merits on a prior petition . . . . The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus.

Kuhlman v. Wilson, 106 S. Ct. 2616, 2622, n.6 (1986)(emphasis added).

Certain important rules accompany, and insulate petitioners from the extraordinary use of, invocation of a "procedural succesor" as opposed to a "merits" dismissal of an initial post-conviction petition. First,

> [T]he burden is on the Government to plead abuse of the writ. "[I]f the Government chooses not to deny the allegation or to

> question its sufficiency and desires instead to claim that the prisoner has abused the writ of habeas corpus, it vests with the government to make that claim with clarity and particularity in its return to the order to show cause." Price v. Johnston, 334 U.S. 206, 291-92 (1948). The Court [in Price] reasoned that it would be unfair to compel the habeas applicant . . . to plead an elaborate negative.

Sanders, 373 U.S. at 10-11; Vaughan v. Estelle, 671 F.2d 152, 153 (5th Cir. 1982). Upon proper pleading by the State, petitioner must show, and must be provided the opportunity to show, that the interests of justice justify rehearing an "old claim," or that a new claim is not abusive, and again that the interests of justice require that the claim be heard even if "abusive." With regard to abuse, the petitioner should be permitted to demonstrate through evidence that the new claim was not earlier known and withheld, not earlier abandoned, or not for some other unjustifiable reason not presented. The gravaman is whether knowing conduct purposed to vex, harass, delay, or cause piecemeal litigation has occurred. Sanders, 373 U.S. at 17-18.

No such conduct occurred here. This information was not earlier known and withheld, or for any other unjustifiable reason withheld. The state hid it. A similar situation was presented in Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985). No bar exists to considering the facts now presented:

> Although Walker made a suppression argument in this first habeas petition, this particular claim has not previously been

> raised or considered. Therefore, under Sanders v. United States, full consideration of the merits of the claim can be avoided only if there has been an abuse of the writ. 373 U.S. at 17, 83 S.Ct. at 1078. In the present case, Walker has not deliberately withheld this ground for relief, now was his failure to raise it sooner due to any lack of diligence on his part. Rather, the cause for Walker's delay in presenting this claim rested on the State's failure to disclose. Under the circumstances, Walker has not waived his right to a federal hearing on the claim. The district court has, in fact, already received and considered evidence on this issue, and the memorandum opinion discusses the merits of this suppression claims at some length. 598 F. Supp. at 1430-33.

Walker v. Lockhart, 763 F.2d 942, 955 n.26 (8th Cir. 1985); see also Moore v. Kemp, No. 84-8423, July 27, 1987, slip op., p. 5 (11th Cir.)(en banc)("An evaluation of a petitioner's conduct in omitting a claim from his first petition necessarily hinges on the petitioner's awareness of the factual and legal basis of the claim which the first petitioner filed.")

B. THERE IS SUFFICIENT LIKELIHOOD THAT MR. WHITE WILL SUCCEED ON THE MERITS THAT A STAY SHOULD ISSUE AND AN EVIDENTIARY HEARING SHOULD BE CONDUCTED

Prosecutors may neither suppress material evidence, nor allow witnesses to lie or shade the truth, nor present misleading evidence, and certainly may never argue to the jury facts or inferences from facts known to be false. The prosecutor's function is to seek justice, not to obtain convictions. See ABA

Standards for Criminal Justice, "The Prosecutor Function", Standards 3-1.1 to 3-1.4. Thus, the prosecutor must disclose information that is helpful to the defense, whether that information relates to guilt or innocence, and regardless of whether defense counsel requests the specific information. United States v. Bagley, 105 S. Ct. 3375 (1985).

The central question in this case has always been the respective roles of the four co-defendants: the State has always conceded that Mr. White did not kill anyone. The State knew that the trigger persons were the other co-defendants -- Marvin Francois and John Ferguson. The State's case against Mr. White was that he was a principal to the murders. The jury's consideration of the evidence -- Mr. White's nonparticipation of the murders and his lack of knowledge of the plans to murder -- compelled them to unanimously recommend life. The trial judge, however, overrode the jury and sentenced Mr. White to death.

The evidence deliberately withheld and the perjured testimony condoned by the State was not known to defense or the trial court. As the Rule 3.850 motion demonstrates, the State deliberately withheld critical exculpatory and mitigating evidence concerning Mr. White's and key others' involvement in the offense. The motion also demonstrates that the State knowingly allowed witnesses to lie, and relied on those lies in its efforts to obtain a capital conviction and sentence of death.

The State's withholding of exculpatory evidence violated the sixth, eighth and fourteenth amendments. The State's concealment of exculpatory evidence deprived Mr. White of a fair trial and violated due process of law. Brady v. Maryland, 373 U.S. 83 (1963). When withheld evidence goes to credibility and veracity, i.e., when it impeaches the testimony of a prosecution witness, the accused's sixth amendment right to confront and cross-examine witnesses against him is violated. See generally Chambers v. Mississippi, 410 U.S. 284 (1973); Davis v. Alaska, 415 U.S. 308 (1974). Of course, counsel cannot be effective when deceived, so hiding exculpatory information violates the sixth amendment right to effective assistance of counsel as well. Cf. United States v. Cronic, 104 S. Ct. 2039 (1984). The fundamental unreliability of a capital conviction and sentence of death gained as a result of such prosecutorial misconduct also violates the eighth amendment.

Those constitutional protections prevent miscarriages of justice and ensure the integrity of fact-finding. Those protections were abrogated in this case. "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." Davis v. Alaska, 94 S. Ct. 1105, 1110 (1974). "Of course, the right to cross-examine includes the opportunity to show that a witness is biased, [and whether] the testimony is exaggerated or unbelievable." Pennsylvania v. Ritchie, No. 85-1347, slip op. at 10 (U.S. S. Ct.

February 24, 1987).

As is obvious, there is "particular need for full cross-examination of the State's star witness," McKinzy v. Wainwright, 719 F.2d 1525, 1528 (11th Cir. 1982), and when that star happens to be a co-defendant, it is especially troubling.

> Thus, "[o]ver the years . . . the Court has spoken with one voice declaring presumptively unreliable accomplice's confessions that incriminate defendants.

Lee v. Illinois, 106 S. Ct. 2056, 2063 (1986). Thus, it is with a very careful eye that the State's handling of star-witness co-defendant's statements should be scrutinized.

We start with the proposition that the State has a duty other than to convict at any cost.

> By requiring the prosecutor to assist the defense in making its case, the Brady rule represents a limited departure from a pure adversary model. The Court has recognized, however, that the prosecutor's role transcends that of an adversary: he "is the representative not of an ordinary party to a controversy, but of a sovereignty . . . whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). See Brady v. Maryland, 373 U.S., at 87-88.

United States v. Bagley, 105 S. Ct. 3375, 3380 n.6.

Counsel for Mr. White made repeated requests for exculpatory, material information pretrial. Exculpatory and material evidence is evidence favorable to the defense which may create any reasonable likelihood that the the outcome of the

guilt and/or capital sentencing trial would have been different. Smith (Dennis Wayne) 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 relevant to punishment, but not guilt/innocence). Under Bagley, exculpatory evidence and material evidence is one and the same.

The method of assessing materiality is well-established. Analysis begins with the Supreme Court's reminder in Agurs that the failure of the prosecution to provide the defense with specifically requested evidence "is seldom if ever excusable." United States v. Agurs, 427 U.S. at 106. Any doubts on the materiality issue accordingly must be resolved "on the side of disclosure." United States v. Kosovsky, 506 F. Supp. 46, 49 (W.D. Okla. 1980); accord United States ex rel. Marzeno v. Gengler, 574 F.2d 730, 735 (3d Cir. 1978); Anderson v. South Carolina, 542 F. Supp. 725, 732 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983); United States v. Feeney, 501 F. Supp. 1324, 1334 (D. Colo. 1980); United States v. Countryside Farms, Inc., 428 F. Supp. 1150, 1154 (D. Utah 1977). "[T]his rule is especially appropriate in a death penalty case." Chaney v. Brown, supra, 730 F.2d at 1344.

Second, materiality must be determined on the basis of the cumulative effect of all the suppressed evidence and all the

evidence introduced at trial; in its analysis, that is, the reviewing court may not isolate the various suppressed items from each other or isolate all of them from the evidence that was introduced at trial. E.g., United States v. Agurs, supra, 427 U.S. at 112; Chaney v. Brown, supra, 730 F.2d at 1356 ("the cumulative effect of the nondisclosures might require reversal even though, standing alone, each bit of omitted evidence may not be sufficiently 'material' to justify a new trial or resentencing hearing"); Ruiz v. Cady, 635 F.2d 584, 588 (7th Cir. 1980); Anderson v. South Carolina, 542 F. Supp. 725, 734-35, 736, 737 (D.S.C. 1982), aff'd, 709 F.2d 887 (4th Cir. 1983) (withheld evidence may not be considered "in the abstract" or "in isolation," but "must be considered in the context of the trial testimony" and "the closing argument of the prosecutor"); 3 C. Wright, Federal Practice and Procedure sec. 557.2, at 359 (2d ed. 1982).

Third, materiality may derive from any number of characteristics of the suppressed evidence, ranging from (1) its relevance to an important 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).

Finally, and most importantly, it does not negate materiality that a jury which heard the withheld evidence could still convict the defendant. Chaney v. Brown, 730 F.2d 1334, 1357 (10th Cir. 1984); Blanton v. Blackburn, 494 F. Supp. 895, 901 (M.D. La. 1980), aff'd, 654 F.2d 719 (5th Cir. 1981). This is so, because, in assessing whether materiality exists, the proper test is not whether the suppressed evidence establishes the defendant's innocence or a reasonable doubt as to his guilt, 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 suppressed evidence "might" or "could" have affected the outcome on the issue of guilt . . . [or] punishment," United States v. Agurs, supra, 427 U.S. at 105, 106, and that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of [both phases of the capital] proceeding would have been different." Bagley, supra, 105 S. Ct. at 3383.

Promises and threats to witnesses are classically

exculpatory. Giglio v. United States, 405 U.S. 150 (1972); Napue v. Illinois, 360 U.S. 264 (1959). Changes in witnesses' stories as prosecution progresses must be revealed. Any motivation for testifying and all the terms of pretrial agreements with witnesses must also. Giglio. Impeachment of prosecution witnesses is often, and especially in this case, critical to the defense case. The traditional forms of impeachment -- bias, interest, prior inconsistent statements, etc. -- apply per force in criminal cases when a person must be allowed to effectively confront a prosecutor, co-defendant, and/or dealing witness:

> In Brady and Agurs, the prosecutor failed to disclose exculpatory evidence. In the present case, the prosecutor failed to disclose evidence that the defense might have used to impeach the Government's witnesses by showing bias or interest. Impeachment evidence, however, as well as exculpatory evidence, falls within the Brady rule. See Giglio v. United States, 405 U.S. 150, 154 (1972). Such evidence is "evidence favorable to an accused," Brady, 373 U.S., at 87, so, that, if disclosed and used effectively, it may make the difference between conviction and acquittal. Cf. Napue v. Illinois, 360 U.S. 264, 269 (1959) ("The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend").

Bagley, supra.

C. THE STATE VIOLATED ITS DISCOVERY OBLIGATIONS.

The State deliberately withheld critical exculpatory and mitigating material. Mr. White's trial attorney filed numerous pre-trial discovery motions asking for material information, including, inter alia, any statements made to police, offense reports, police investigative reports, any information from confidential informants, names of potential witnesses, notes pertaining to the investigation and interrogation of Mr. White, and any other information or material which "tends to establish" or "which can be fairly and probably used by the accused on the issues of guilt or punishment . . . [or] to mitigate punishment,

56-60; Supp. R 1-5).

Information tending to prove that the murders were part of a contract killing about which Mr. White was completely oblivious certainly, at the very least, would have been advantageous to his defense. Such information would have helped to prove Mr. White was unwittingly present at a pre-ordained event -- one over which he had absolutely no control and about which he had no knowledge. It would have assisted him in asserting a lesser degree of culpability and would have been invaluable to his defense at sentencing. Furthermore, evidence that "victim" Hall was heavily involved in the drug business that led to the deaths was highly relevant to his credibility regarding testimony about what

actually occurred.

Undersigned counsel has nearly recently uncovered one thousand pages of police files in this case, including investigative reports, interviews, notes, information on leads and suspects, and police theories on the case. Within these files is Brady, Giglio, and Napue material which would have been indispensable to Mr. White's defense, material evidence that would have affected the guilt/innocence and sentencing phases, but which was withheld. Had Mr. White been furnished these materials, as required by the Constitution, he would have been able to prove his complete and utter helplessness and indeed his own victimization by the perpetrators of this crime. The State knew this was a paid killing, but hid what they knew. Content to prosecute the duped Beauford and send him to the electric chair for something he knew nothing about, the authorities showed no interest in who actually hired Francois and Ferguson, and did not reveal Hall's involvement. The State suppressed evidence of a contract killing so they could "get" Beauford. The true contract facts, as the prosecutor admitted in his penalty phase closing argument, would have undermined the aggravating factor of "witness elimination," and would have precluded a sentence of death:

> Why did these six people die? Is it really because Joe Swain hired Marvin Francois and John Ferguson to kill them?

> ...If it is not and if Marvin Francois was not telling the truth to Adolphus Archie, then you must believe that these people died because the perpetrators of that robbery wanted to leave no witnesses.

(R. 1461-1462). Evidence of a contract would also have served to defeat the state's claim that Mr. White was "equally responsible for everything he set into motion with the other men" (R. 416).

D. THE STATE KNOWINGLY ELICITED FALSE TESTIMONY, AND ALLOWED IT TO GO UNCORRECTED.

The State may not present a lie. Such misconduct is substantially more egregious than hiding information. It is fundamental that the State is prohibited by the fourteenth amendment from knowingly presenting false or misleading evidence to a jury. Alcorta v. Texas, 355 U.S. 28 (1957). The fair trial element of the fourteenth amendment due process clause demands that a prosecutor "refrain from improper methods which are calculated to produce [a] wrongful conviction. . .," Berger v. United States, 265 U.S. 78 (1935), and from "manipulation of [] evidence [which is] likely to have an important affect on the jury determination." Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

A prosecutor also has the constitutional duty to alert the defense when State witnesses testify falsely. Mooney v. Holohan, 294 U.S. 103 (1935); Napue v. Illinois, 360 U.S. 264 (1959). The

prosecution's use of false testimony naturally involves the suppression of evidence favorable to the accused, but the fundamental unfairness and denial of due process engendered thereby stems more from the false testimony itself than from the unavailability to the defense of the evidence which would show that testimony to be false. It is the "deliberate deception of a court and jurors by presentation of known false evidence [that] is incompatible with the rudimentary demands of justice," Giglio v. United States, 405 U.S. 150 (1972), which deprives the accused of due process, rather than the mere failure to comply with discovery requests. This is so because the State's knowing presentation and use of lie is a "corruption of the truth-seeking function of the trial process." Agurs, 427 U.S. at 103-04 and n.8.

The standard for reversal of convictions obtained through the use of false testimony has survived Brady and its progeny: a new trial is required if the false testimony could in any reasonable likelihood have affected the judgment of the jury. Bagley. Unlike those cases wherein the denial of due process stems solely from the suppression of favorable evidence, in cases involving the use of false testimony "the Court has applied a strict standard . . . not just because they involve prosecutorial misconduct, but more importantly because they involve a corruption of the truth-seeking process." Agurs, supra, at 104.

Thus, in Bagley, 105 S. Ct. 3375, the Supreme Court, while arguably modifying the Brady/Agurs materiality standard for reversal when favorable evidence is suppressed by the prosecution, left untouched the standard to be applied when false testimony is used. Quoting with approval the "well established rule that 'a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have effected the judgment of the jury,'" Bagley, 105 S. Ct. at 3381, quoting Agurs, 427 U.S. at 103 (footnote omitted), the Court reasoned that "this rule may as easily be stated as a materiality standard under which the fact that testimony is perjured is considered material unless failure to disclose it would be harmless beyond a reasonable doubt." Id. The misconduct in this case directly affected the result at guilt-innocence and sentencing. Under no construction can it be said that the prosecutorial misconduct resulting in Mr. White's conviction and death sentence was "harmless beyond a reasonable doubt."

Claim I of the motion sets out the appalling degree of dishonesty engaged in by the State in obtaining its conviction and death sentence against Mr. White. Such conduct is intolerable and Mr. White asks that this Court provide a remedy. His conviction and sentence should not stand in light of the facts detailed in the motion. At the very least, an evidentiary

hearing on this claim is warranted. See Smith v. State, 400 So. 2d 956, 962-64 (Fla. 1981); Arango v. State, 437 So. 2d 1099, 1104-05 (Fla. 1983); Demps v. State, 416 So. 2d 808, 809-10 (Fla. 1982).

CLAIM II

MR. WHITE'S SENTENCE OF DEATH IS A VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS IN LIGHT OF THE UNITED STATES SUPREME COURT OPINION IN TISON V. ARIZONA; THEREFORE THE INTERESTS OF JUSTICE REQUIRE A RE-EXAMINATION OF THIS CLAIM.

This Claim, like Claim I, must be analyzed within the "interest of justice" framework. The claims are interwoven: if the State had not engaged in the appalling misconduct described in Claim I, there would have been no sentence of death. No court has examined this claim, even on the present record, in order to make the findings required under Tison v. Arizona, 1075 at 1676 (1987). A claim that Mr. White was not eligible for death because he did not kill or intend that deathh occur was raised in a prior petition. The intervention of Tison dictates that this Court should now apply Tison. See Moore, supra. It is undisputable that Mr. White did not kill, did not intend to kill and did not attempt to kill. Mr. White's role in the affair was to participate in a robbery. However, his accomplices duped him and, unknown to Mr. White, they intended to and did kill. At the

time of Mr. White's trial, Enmund v. Florida had not been decided, thus the trial court's override of the jury's unanimous recommendation of life occurred without the benefit of the correct law. Had Enmund been decided prior to Mr. White's trial, the jury recommendation would have prevailed. The trial court would have probably found that the constitution barred a sentence of death based upon the Enmund considerations. Indeed, the trial court in Mr. White's first 3.850 motion held such, and had the state not hidden the true facts relating to this offense, no court would have upheld the sentencing court's override.

Recently, the United States Supreme Court has promulgated a new standard that must be met before the state may execute when one is not a killer, does not intend to kill or does not attempt to kill. Witt v. State, therefore requires that this claim now be heard. Tison v. Arizona, 107 S.Ct. 1676 (1987), requires two factors to be proven when one is involved in a situation similar to Mr. White's: (1) a person must be found to have a reckless disregard to life, and (2) the person must be found to have been a major participant in the underlying felony. In order for death to prevail, both must be met. A state court factfinder has not found them to exist here and cannot. This Court's prior analysis of this claim, and the result, based as it was on pre-Tison law must be changed, because that analysis actually demonstrates that life is proper, rather than unwarranted.

In Tison, the United States Supreme Court remanded the case to the Arizona Supreme Court, which had upheld the Tisons' death sentences, to determine whether they acted with reckless disregard for life and whether they were major participants in the underlying felony. App. 1. The Arizona Supreme Court has ordered the Tisons to be resentenced. App. 2. The facts of Tison are quite similar to Mr. White's case and likewise require a similar result: as the federal court wrote, "Petitioner White's attempts to distinguish Tison from the instant case are largely unpersuasive." White, 632 F. Supp. at 1156. Briefly stated, the Tison brothers gathered a small arsenal of weapons in order to "break" their father and another out of prison. While on the run the four kidnapped a family, drove them to the desert where the elder Tison shot and killed the family. The two brothers stood off to the side, unaware of their father's decision. The Arizona Supreme Court, relying upon Enmund, first sustained the death sentences, finding:

a) That because Tison knew that the person he broke out of prison was serving time for the killing of a guard, he "could anticipate the use of lethal force during this attempt to flee confinement." State v. Tison, 690 P.2d 747, 749 (Ariz. 1987);

b) That Tison assisted in abducting the victims by arming himself, hiding, escorting the victims to the murder site, he heard the victim beg "Jesus, don't kill me," he heard the shooter

say he was "thinking about it," and he saw the shooter "brutally murder the four captives with repeated blasts from their shotguns." Tison, 107 S.Ct. at 1679; Tison, 690 P.2d at 749;

c) Tison did not make "an effort to help the victims," Tison, 107 S.Ct. at 1679, and, "[a]fter the killings, petitioner did nothing to disassociate himself [from his co-defendants], but instead used the victims' car to continue on the joint venture. . . ." Tison, 690 P.2d at 749; and

d) Tison "intended to kill" because "petitioner's participation up to the moment of the firing of the fatal shots was substantially the same as [the shooters]." Then, he "did nothing to interfere with the murders, and after the murders even continued on the joint venture." Id.

As previously mentioned, the Tison analysis was reversed. There, as here, the courts had "applied an erroneous standard in making the findings required by Enmund v. Florida," Tison, 107 S.Ct. 1676. After the United States Supreme Court spoke, Mr. Tison was returned to the Arizona Supreme Court, which sent him to the trial court, where he is now in resentencing proceedings, "at which the parties may present evidence and oral arguments relevant solely to the issue of whether, in participating in the murders for which [he was] convicted, Tison exhibited reckless indifference to human life." App. 2. Despite the findings already made, the constitution was not satisfied in Tison's case.

The analysis previously applied to Mr. White's claim was even more erroneous than that reversed in Tison.

The United States Supreme Court remanded despite finding that Tison's "participation in the crime was anything but minor," and that Tison "subjectively appreciated that [his] acts were likely to result in the taking of innocent life." Tison, 107 S.Ct. at 1685; see also id., 107 S.Ct. at 1688. The Court concluded:

> Only a small minority of those jurisdictions imposing capital punishment for felony murder have rejected the possibility of a capital sentence absent an intent to kill and we do not find this minority position constitutionally required. We will not attempt to precisely delineate the particular types of conduct and states of mind warranting imposition of the death penalty here. Rather, we simply hold that major participation in the felony committed, combined with reckless indifference to human life, is sufficient to satisfy the Enmund culpability requirement. The Arizona courts have clearly found that the former exists; we now vacate the judgments below and remand for determination of the latter in further proceedings not inconsistent with this opinion. Cabana v. Bullock, 474 U.S. ___ (1986).

Id., 107 S.Ct. at 1688.

Mr. Tison is being resentenced. Mr. White is scheduled for execution. These cases are not different, but for two things: (1) Mr. White objected to the killing, and (2) his jury unanimously objected to his being killed. See White, supra, 632 F. Supp. at 1156 ("[T]he only real distinction between this cae

and Tison ... is that Petitioner verbally objected to the use of force.")

When Mr. White's case was considered upon direct appeal, the Florida Supreme Court "rejected the ultimate rationale adopted by the Supreme Court of the United states in Enmund v. Florida

filed a motion for post-conviction relief, and Judge Klein found that "the defendant did not kill, attempt to kill or intend that a killing take place, and [that he] is therefore entitled to the protections afforded by the Enmund case" (R. 157).

The Florida Supreme Court reversed. However, the Court made no specific findings regarding the two newly announced and required Tison findings, and, unlike the Arizona Supreme Court in Tison pre-reversal, the Court made no finding of intent to kill -- indeed, no such finding can be made. Instead, the Court distinguished the Enmund facts, stated that Mr. White "did nothing to disassociate himself from either the murders or the robbery," found that "it can hardly be said that he did not [come to] realize that lethal force was going to be used," and concluded "that Enmund does not bar the imposition of the death penalty under these facts and circumstances." White II, 470 So.2d at 1380. Two justices dissented. Mr. White did disassociate himself from the murders -- he opposed them, as this Court recognized. He did not intend that lethal force be used

against the victims -- he went along on a robbery. See also Claim I, supra.

It is not possible meaningfully to distinguish Tison from this case. In Tison, the Supreme Court reiterated that "[a]rmed robbery is a serious offense, but one for which the death penalty is clearly excessive. . . ." Tison, 107 S.Ct. at 1683. Underlining its Enmund language, the Court wrote that "the focus [has to] be on his culpability, not on that of those who committed the robbery and shot the victims, for we insist on 'individualized consideration as a constitutional requirement in imposing the death sentence.'" Id.

The Court rejected imposition of death upon findings such as the ones made in this case.

> Participants in violent felonies like armed robberies can frequently "anticipat[e] that lethal force . . . might be used . . . in accomplishing the underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself. Petitioners do not fall within the "intent to kill" category of felony murderers for which Enmund explicitly finds the death penalty permissible under the Eighth Amendment.

Id. 107 S.Ct. at 484. The Florida Supreme Court's analysis in White II likewise fits the Tison facts -- it can hardly be said

that Tison "did not [come to] realize that lethal force was going to be used," Id., 470 So. 2d at 1380. A fortiorari, the Arizona Supreme Court found Tison intended death. (Mr. White never intended death.) However, the United States Supreme Court remanded the case for a state court determination regarding "reckless indifference to human life." Tison, 107 S.Ct. at 1688.

In response, the Arizona Supreme Court vacated the death sentence and ordered resentencing. Tison is now permitted to produce evidence regarding the absence of reckless indifference. This Court, based upon Tison, should vacate the death sentence in this case. The fact that this case involves a jury override provides all the more reason for a grant of relief.

Tison requires that the fact finder find, beyond a reasonable doubt, that a person have (1) major participation in the felony committed, and (2) reckless indifference to human life. These findings are more lacking in this case than they were in Tison.

First, it must be remembered that while "the possibility of bloodshed is inherent in the commission of any violent felony and . . . is . . . foreseen," Tison, 107 S.Ct. at 1684, armed robbery is nevertheless, an offense "for which the death penalty is plainly excessive." Id. at 1683. The two Tison findings must be made.

Mr. White was far from "indifferent." He was participating

in an armed robbery at most, and as in Tison, the possibility of actually turning the inherent possibility of lethal force into a reality arose. Rather than being indifferent, Mr. White withdrew to the extent reasonably feasible under the circumstances. Unlike Tison, Mr. White "verbally opposed the killing," White II, 478 So.2d at 1380. The "fact-finder" must key in upon what was done after a robbery turned into a possible murder, and at this point Mr. White objected, withdrew, and did not participate. Any more by him at that point would have resulted in his certain death at the hands of his co-defendants, as the evidence revealed. Any less may have subjected him to death at the hands of the state. But what he did do does not satisfy the Tison standard--he was not indifferent, much less recklessly so.

As to "major participation in the felony committed," it is important to note that Florida law provides a statutory mitigating circumstance that is relevant: "(d) the defendant was a accomplice in the capital felony committed by another person and his participation was relatively minor." F.S. 921.141(6)(d). The sentencing judge examined seriatim, every other statutory mitigating circumstance, and found them wanting. However, the judge completely omitted any consideration of this circumstance at all. It simply, inexplicably, does not appear in the sentencing order. But Mr. White's participation in the murders was "minor" -- it was nonexistent. See also Enmund v. Florida,

458 U.S. 781, 798 (1982)("Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed . . ."). [Again, this also would have been obvious had the state not withheld the evidence discussed in Claim I, supra.]

The Courts have recognized that Mr. White's claim is "a serious and substantial one." White, 632 F. Supp. at 1147. The intervention of Tison, demonstrates that the issue is certainly sufficiently serious and substantial to require, at the very least, a stay of execution so as to allow judicious determination. The "ends of justice," at the very least, require such a result.

This Court's observations were hauntingly like those in Tison, observations which, while perhaps reasonable ones at the time, were rejected by the United States Supreme Court. The following analysis discusses the courts' previous findings, and the relevance of the findings, under Tison:

a) Because it was an armed robbery of a "drug house," the courts previously found Mr. White "foresaw" lethal force being used:

> At the outset, then, Petitioner knew, at a a bare minimum, that the specific object of the robbery was a narcotics house. He started with ample reason to anticipate that deadly force would be used. That lethal force would be contemplated in the context of such an enterprise seems to be an eminently

reasonable conclusion to draw from the nature of any robbery directed specifically at an illicit drug house. The federal courts have for years recognized the inextricable link between guns, use of the tools of violence anf the drug trade. Whether for their own protection, for the protection of their property or for their use in stealing from others, individuals engaged in buying or selling narcotics are reasonably assumed to be armed. See e.g., United States v. Perez, 648 F.2d 219, 224 (5th Cir.), reh. denied, 655 F.2d 235 (5th Cir.), cert. denied, 454 U.S. 1055, 102 S.Ct. 602, 70 L.Ed.2d 592 (1981); United States v. Pentado, 463 F.2d 355, 360 (5th Cir.), cert. denied, 409 U.S. 1079, 93 S.Ct. 698, 34 L.Ed. 668 (1972). As the United States Court of Appeals for the Secong Circuit noted in United States v. Wiener, 534 F.2d 15, 18 (2nd Cir.), cert. denied, 429 U.S. 820, 97 S.Ct. 66, 50 L.Ed.2d 80 (1976): "Experience on the trial and appellate benches has taught that substantial dealers in narcotics keep firearms on their premisses as tools of the trade almost to the same extent as they keep scales, glassine bags, cutting equipment and other narcotics equipment." In short, given the large sums of money and quantities of narcotics involved, and the high risk of lsoss at point of exchange, it is often reasonable to infer that those present at such an exchange, especially an exchange which might involve the armed robbery of a narcotics dealer, will have occasion to use deadly force. Sadly in South Florida the use of lethal force in the context of a narcotics transaction has been repeatedly and amply demonstrated. See e.g., United Statesv. Alvarez, 755 f.2d 830, 848-49 (11th Cir. 1985), cert. denied, Hernandez v. United States, ---U.S.---, 106 S.Ct. 274, 88 L.Ed.2d 235 (11985); Royer v. State, 389 So. 2d 1007 at 1023-1024 (3rd DCA 1980)(en banc)(Hubbart J. concurring), ("unprecedented degree of violence and murder"); affirmed Florida v. Royer, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983); State v. Sayers, 459 So. 2d 352, 353 (3rd DCA 1984), reh.

> denied, 471 So. 2d 44; Martinez v. State, 413 So. 2d 429, 430 (3rd DCA 1982).
>
> In sum, there is ample reasons indeed to conclude that the foreseeability of lethal force arising out of an armed invasion of a narcotics house was so great as to amount to a near certainty inlight of the armed resistance likely to be offered by the victims. And thus the "hitting of a dope hose" is sharply distinguishable from the ordinary armed robbery, the kind of armed robbery which occurred in Enmund, where the likelihood of the use of letha force is small.

White, 632 F. Supp. at 1152.

1) Robbery is a taking with force, or putting in fear. Here, the force was guns. One on one, or twelve on twelve, it is still robbery. Robbery certainly requires guarding people, so that they will not walk away instead of giving the robber what he or she wants. The Tison brothers "could anticipate the use of lethal force," knowing that the person they broke out of jail was serving time for killing a jail guard. Obviously, breaking someone out of prison with armed force is no less likely to invoke lethal force than is a drug robbery in South Florida. Later, before the killing, the Tison brothers armed themselves, escorted the victims to the murder site, and assisted their father in all the preparations necessary for the murder.

2) However,

> Participants in violent felonies like armed robberies can frequently "anticipat[e]

> that lethal force . . . might be used . . . in accomplishing the underlying felony." Enmund himself may well have so anticipated. Indeed, the possibility of bloodshed is inherent in the commission of any violent felony and this possibility is generally foreseeable and foreseen; it is one principal reason that felons arm themselves. The Arizona Supreme Court's attempted reformulation of intent to kill amounts to little more than a restatement of the felony-murder rule itself. Petitioners do not fall within the "intent to kill" category of felony murderers for which Enmund explicitly finds the death penalty permissible under the Eighth Amendment.

Id. 107 S. Ct. at 484.

b) This Court concluded that Mr. White came to know lethal force would be used:

> White came to realize that lethal force would be used.
>
> Margaret Wood also testified that one of the co-defendants, not White, pointed the gun at her head and said, "We have to start with this little girl and then kill all of you."
>
> Johnny Hall heard Francois say "Shut up nigger," as he shot Stocker in the back of the head . . . .

White, 632 F. Supp. at 1153.

> Even his own confession . . . alludes to a stray suspicion that lethal force on a barbaric scale would be used.
>
> [W]hatever Petitioner may have known at the outset, during the course of this two hour plus carnage he surely came to realize that lethal force would be used.
>
> His participation in the crime was active and his acquiesence in the total

result was complete.

Id. 632 F. Supp. at 1154.

1) Again, the courts previously held that "Petitioner White's attempts to distinguish Tison from the instant case are largely unpersuasive." Id. at 1156. Tison controls, and resentencing is necessary. In Tison, the defendant escorted the victim to the murder site, he heard the victim say "Jesus, don't kill me," heard the shooter say he was "thinking about it," and he saw the shooters "brutally murder the four captives with repeated blasts from their shotguns." Tison, 107 S. Ct. at 1579; Tison, 690 P. 2d at 749.

2) The courts previously identified the similarities between Tison and this case. White, 632 F. Supp. at 1155. It should be noted that Tison "admitted later he would have been willing to kill . . . ." Id, 632 F. Supp. at 1156. Indeed, the Arizona Supreme Court found he intended to. There is no such indication here, but exactly the opposite. In Tison, as here, the Court "applied an erroneous standard."' Tison, 107 S. Ct. 1678.

c) The Courts found that Mr. White continued in the enterprise:

> He facilitated the robbery/murders by . . . . guarding the front door as the murders were executed. At no point did he attempt to stop the shooting, or to leave before the shootings were complete, or to assist the police afterwards in unravelling

> the crime, or to disassociate himself in any way by any act from the bloodbath that ensued.

White, 632 F. Sup. at 1155.

> Mr. White fled the scene of the crime with the two shooters, all of whom returned to his motel room where all the loot . . . was divided up.

632 F. Supp. at 1149. First, the Florida Supreme Court did not find, as the federal court said it did, that Mr. White was "guarding the front door . . . . as eight people were systematically shot . . . ." 632 F. Supp. at 1141. The record will not support such a finding. Second, leaving with the loot is what a robbery is about, as the Tison Court found: "[a]fter the killings, petitioner did nothing to disassociate himself [from his co-defendants], but instead used the victim's car to continue on the joint venture . . . ." Tison, 690 F. 2d at 749. This was not given the weight by the United States Supreme Court that the Arizona Supreme Court felt it deserved, and the United States Supreme Court is correct.

"As in Tison," this Court applied "an erroneous standard." So did the Eleventh Circuit Court of Appeals. This Court should stay the execution, and reassess, in light of Tison.

CLAIM III

> IN THIS CASE, THE EIGHTH AND FOURTEENTH AMENDMENTS AND THE TEDDER AND ELLEDGE STANDARDS, AS RECENTLY APPLIED BY THE FLORIDA

SUPREME COURT, WERE VIOLATED BECAUSE THE JURY'S LIFE VERDICT WAS REASONABLE, WHILE THE JURY OVERRIDE WAS BASED UPON VICARIOUS RESPONSIBILITY AND OTHER IMPROPER FACTORS.

The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific reliable procedural parameters, and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano v. Florida, 104 S.Ct. 3154, 3166 (1984). Courts must monitor and apply the "significant safeguard[s]" built into the override procedure. If the jury override here, and the method through which it was sustained, is acceptable under the Florida statute, then "the application of the jury override procedure has resulted in arbitrary or discriminatory application of the death penalty . . . in general . . . [and] in this particular case." Id. To allow the override to stand in this case would indeed be to validate a procedure providing no meaningful basis, to distinguish between those persons who receive life (when a judge does not override, or when an override is reversed) and those who receive death. This violates the eighth and fourteenth amendments.

The jury that heard the evidence unanimously recommended a life sentence for Beauford White. The state waived before the jury, but the judge found, two circumstances unrelated to the offense, as statutory aggravating circumstances: that Mr. White

was on parole for selling marijuana and for escape, and that thirteen years earlier he had been convicted of attempted rape, an offense for which Mr. White was given a two-year sentence.

Offense-related statutory aggravating circumstances, other than felony murder simplicitur, of necessity reflected other people's conduct -- Mr. White did not kill, tried to stop the killing, and he was scared of his co-defendants when they revealed that they were considering violence. The first vicarious aggravating circumstance, according to the trial judge, was that a great risk of death to many people occurred, a finding reversed by the Florida Supreme Court. White I. Second, the court found that the victims were killed to avoid arrest. Third, the court found the crime to be heinous, atrocious and cruel. Mr. White opposed the killings, and these factors were vicariously imputed to him on the basis of co-defendants' (Francois and Ferguson) conduct.

Judge Fuller then looked at the "full picture" and answered the major question of this case at odds with currently applicable law:

> In the writer's opinion, this crime was one of the most atrocious ever committed in Dade County, Florida. That six people should have died and two others critically wounded during the commission of a robbery, speaks directly to the personalities of the co-conspirators. Counsel for the defendant argues that since his client was not one of the "shooters" and since the fourth co-conspirator was allowed to plead guilty to

> Second Degree Murder and received a twenty year sentence, his client should receive a life sentence as advised by the jury.
>
> . . . .
>
> The plea agreement approved by the Court on defendant Archie was fair, considering his participation and ultimate willingness to give information and truth testimony at the trials of the other co-conspirators. The real issue for review before this Court is whether or not a non-shooting, active and present participant to one of the enumerated felonies should be excused from receiving the same penalty as a shooting participant, with all other criteria being generally equal. He obviously should not receive a more severe penalty but certain should receive the same. To rule otherwise would judicially remove felony murders from the classification of capital cases.

(R. 185). The problem is that all other criteria were not "generally equal."

At no point did the sentencing judge indicate that no reasonable jurors could consider Mr. White's comparatively limited participation and non-killing to be mitigating. In fact, the trial court listed and discussed the statutory mitigating circumstances a, b, c, e, f and g, seriatum, but completely omitted any reference to the most obvious mitigating circumstance: d -- relatively minor participation (compared to co-defendant's) in a capital felony.

Absolutely no effort was made by the judge in the sentencing order to explain that the jurors had been unreasonable in their recommendation. This Court did not find the recommendation to be

unreasonable, and agreed that the circumstances of a killing by others could be used in aggravation. Those rulings were error; the jury's unanimous life recommendation had a rational basis. And a "rational basis" is all the Florida Supreme Court's recent and new applications of the Tedder-override standard call for. Those standards were unavailable when Mr. White's initial post-conviction proceedings were litigated.

DuBoise v. State, No. 67,082 (Fla. 1987), reflects override law "as it now exists":

> The trial judge's findings failed to take into account the standard we enunciated in Tedder v. State, 322 So.2d 908, 910 (Fla. 1975), that "[i]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ." One of the factors upon which a jury can reasonably base a recommendation of life imprisonment is the disparate treatment of others who are equally or more culpable in the murder. E.g., Brookings v. State, 495 So.2d 135 (Fla. 1986); McCampbell v. State, 421 So.2d 1072 (Fla. 1982). According to the only direct evidence of the circumstances of the murder (appellant's statements to cellmate Butler), appellant's two companions were the actual perpetrators of the killing. These principal perpetrators of the murder were never arrested or charged for the crime. This fact could reasonably have influenced the jury and was a reasonable basis for the jury to recommend life imprisonment. Moreover, although we note that the jury, in finding appellant guilty of first-degree murder, could have based its verdict either on the felony murder doctrine or on circumstantial evidence of appellant's

> joiner in the premeditated intent of the others to kill the victim, in making its sentencing recommendation the jury could have been influenced by the lack of direct evidence of such premeditated intent on the part of the appellant. We therefore conclude that the trial court should have followed the jury's recommendation.

And so it is here. If the jury was reasonable in DuBoise, it was reasonable in Mr. White's case. It is quite plain that "reasonable people could differ as to the propriety of the death penalty in this case, [and so] the jury's recommendation of life must stand." Brookings v. State, 495 So.2d 135, 143 (Fla. 1986). See also Wasko v. Florida, No. 65,547 (Fla. March 5, 1987)("[T]he jury may have questioned the respective roles of Wasko and Pierson in this homicide. These [and other] factors gave the jury a reasonable basis for recommending life imprisonment.")

In Ferry v. Florida, No. 67,759 (Fla. April 30, 1987), the Court stated:

> [W]hen there is a reasonable basis in the record to support a jury's recommendation of life an override is improper . . . .
>
> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no

> need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Slip op., p. 7.

Because a rational basis existed for the jury's life recommendation, under the law of Florida, now in effect, the jury's life verdict should stand. As an aside, judge knowledge of information in addition to what the jury knew does not ipso facto make an override proper. The question is whether what the jury did was reasonable, not whether what the judge did was reasonable. Otherwise, there would be no need or function for a recommendation, which is not the law. In any event, the judge in this case knew no more about the offense than the jury did. The same situation occurred in Ferry, supra, where, according to the sentencing order, the judge knew more about the defendant's criminal history than did the jury, based upon a presentence investigation report. App. ___. That, however, did not keep the jury's (or the judge's) action from being reasonable. It is just that when the jury is reasonable, and life is recommended, life is the result.

A. The Jury's Life Verdict Was Eminently Reasonable, And Its Override Violates The Eighth Amendment.

The jury in Mr. White's case could reasonably have relied upon a number of "reasonable" factors in reaching their decision recommending life, factors which in fact the courts have found to be "reasonable." On direct appeal, the Court recognized the "colorable mitigating circumstance" that Mr. White was "not the triggerman." White I, 403 So.2d at 340. Mr. White opposed killing the victims. See, e.g., White II, 470 So.2d at 1380. The trial prosecutor, in fact, told the jury "[Mr. White] did not kill anyone by his own act, and I admit that" (R. 1465). Mr. White then refused to assist Francois and Ferguson by disposing of the guns. In essence, once he discerned that the accomplices were contemplating a murder, not a robbery, Mr. White renounced his participation and opposed the killings, and tried to get them not to do it. Cf. Smith v. State, 424 So.2d 726, 732 (Fla. 1982). The jury's consideration of such mitigating evidence was more than a reasonable basis on which to reject death. Cf. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). And there was more.

Other traditionally recognized mitigating evidence was before the jury: Mr. White had a history of epilepsy (R. 1453); he confessed his involvement in the offense; and, a similarly situated co-defendant [Archie] who also, like Mr. White, never killed, nor intended to kill, was given a twenty-year sentence.

As courts have recognized, the latter factor was worthy of the jury's consideration even if the judge may have deemed it insufficient. Accordingly, in Brookings v. State, 495 So. 2d 135 (Fla. 1986), the Court reversed such an "override" because the jury's life recommendation could well have rested on the independent nonstatutory mitigating effect of the life sentence given to an accomplice. Id. at 142-43. The Court held that the disparate treatment given to a similarly situated accomplice, as opposed to the treatment given the capital defendant, were "reasonable" mitigating factors to be considered by the jury and the court at the penalty phase. Brookings, 495 So.2d at 142-43. Thus, much more than a "rational basis" existed for the jury's life recommendation, as Chief Justice McDonald and Justice Overton, dissenting, recognized in White II.

In this regard, it must be remembered that the additional "factors" which the sentencing judge "noted" in rejecting the jury's recommendation (Mr. White's parole status and his 1965 attempted rape conviction) were not put before the jury because the trial prosecutor failed to exercise due diligence in obtaining those records before the jury's recommendation (see R. 1428, 1431-32, 1435, 1437). Those convictions were never proven beyond a reasonable doubt; the "findings" on those convictions were based only on the presentence investigation report. It is wholly unfair to allow a capital defendant to be so bootstrapped

into an override of a jury's life recommendation. The jury did not have that "evidence" because the State failed to produce it.

Even so, those convictions do not overcome the jury's unanimous life recommendation, else there would be no need for a recommendation. That recommendation had much more than a rational basis. Even in cases involving jury recommendations of death, and no mitigating circumstances, the Court has remanded for resentencing after striking aggravating factors found by the sentencing court. See Nibert v. State, 508 So.2d 1 (Fla. 1987)(remanding for resentencing because "[a]lthough death may be the proper sentence in this situation, it is not necessarily so."). Mr. White's case involved a unanimous, reasonable jury recommendation of life. The override was sustained as to him, but not as to others similarly situated, a violation of the eighth and fourteenth amendments.

B. Statutory Aggravating Circumstances Were Vicariously Applied to Mr. White, In Violation of the Eighth and Fourteenth Amendments.

The trial court found the following aggravating circumstances: under sentence of imprisonment; prior conviction of violent felony; great risk of death to many persons (reversed by the Florida Supreme Court); felony-murder; pecuniary gain (reversed by the Florida Supreme Court for improper doubling); witness elimination; hinder law enforcement (reversed by the

Florida Supreme Court for improper doubling); and heinous, atrocious and cruel. (See generally Claim I, supra [discussing state's misconduct resulting in improper finding of aggravating factors].) Two of the aggravating circumstances remaining after appeal involved not Mr. White's actions, but the actions of his co-defendants: witness elimination and heinous, atrocious, or cruel. Those aggravating factors simply did not involve the conduct of Mr. White. Mr. White opposed the killings.

The application of these circumstances were sustained on direct appeal. Their application however, violates the eighth and fourteenth amendments. Tison is again instructive:

> As the Court notes, ante, at--n. 2, it has expressed no view on the constitutionality of Arizona's decision to attribute to petitioners as an aggravating factor the manner in which other individuals carried out the killings. On its face, however, that decision would seem to violate the core Eighth Amendment requirement that capital punishment be based on an "individualized consideration" of the defendant's culpability, Lockett v. Ohio, 438 U.S. 386, 605 (1978). It therefore remains open to the state courts to consider whether Arizona's aggravating factors were interpreted and applied so broadly as to violate the Constitution. Godfrey v. Georgia, 446 U.S. 420 (1980).

Tison, 107 S.Ct. at 1689-90, fn. 3 (Brennan, J., dissenting). The majority did not reach this issue, but four justices joined in this dissenting opinion.

It is wholly unfair to allow a jury life recommendation to

be overridden when two of the aggravating factors which were sustained did not involve Mr. White's conduct but were vicariously attributed to him on the basis of others' conduct. The eighth and fourteenth amendments do no countenance such a result. Here, as in Tison and Enmund, "[t]he question . . . is not the disproportionality of death as a penalty for murder, but rather the validity of capital punishment for [Mr. White's] own conduct." Enmund v. Florida, 458 U.S. at 798. Thus,

> [t]he focus must be on his [Mr. White's] culpability, not on that of those who committed the robbery and shot the victims, for we insist on "individualized consideration as a constitutional requirement in imposing the death sentence," Lockett v. Ohio, 438 U.S. 586, 605, 98 S. Ct. 2954, 2965, 57 L.Ed.2d 973 (1978)(footnote omitted), which means that we must focus on "relevant facets of the character and record of the individual offender." Woodson v. North Carolina, 428 U.S. 280, 304, 96 S. Ct. 2978, 2991, 49 L.Ed.2d 944 (1976). [Mr. White] himself did not kill or attempt to kill; and . . . [Mr. White had no] intention of participating in or facilitating a murder. . . . It is fundamental that "causing harm intentionally must be punished more severely than causing the same harm unintentionally." H. Hart, Punishment and Responsibility 162 (1968). [Mr. White] did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the State treated them alike and attributed to [Mr. White] the culpability of those who killed. . . . This was impermissible under the Eighth Amendment.

Enmund, supra, at 798 (emphasis in original).

Vicariously holding Mr. White responsible for the

aggravating factors applicable to his co-defendants' conduct was, under the eighth amendment, impermissible. Using such vicariously applied factors to override a jury's unanimous life recommendation was flatly wrong.

C. The Automatic Aggravating Circumstance of Felony Murder was Unconstitutionally Applied.

The death penalty in this case is predicated upon an unreliable automatic finding of a statutory aggravating circumstance. Automatic death penalties upon conviction of first degree murder violate the Eighth and Fourteenth Amendments, as was recently stated by the United State Supreme Court in Sumner v. Shuman, No. 86-246 (June 22, 1987), new law which makes review of this issue proper. The precise question presented in this claim is currently pending before the United States Supreme Court in Lowenfield v. Butler, No. 86-6867, cert. granted, 55 U.S.L.W. 3892 (June 22, 1987). The Court agreed to hear Lowenfield the day Shuman was decided.

In Florida, first degree murder is punishable by death. First degree murder is either 1) willful, deliberate, malicious, and premeditated killing, or 2) felony murder--i.e., killing during the perpetration of a robbery. Mr. White was indicted for and convicted of felony murder, R. 1307, that is, murder during the perpetration of a robbery. Felony murder was then found as a statutory aggravating circumstance.

The sentencer was then entitled to automatically return a death sentence upon a finding of guilt of first degree (felony) murder. Statutes which allow an automatic death penalty for particular types of homicides reflect arbitrariness not allowed by the Eighth Amendment. Godfrey v. Georgia, 446 U.S. 420 (1980); Roberts v. Louisiana, 428 U.S. 325 (1979). Every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which violates the eighth amendment: an automatic aggravating circumstance is created, which does no narrowing ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983). In short, Mr. White was convicted for felony murder, and he then faced statutory aggravation for felony murder. This is too circular a system meaningfully to differentiate between who should live and die, and it violates the eighth and fourteenth amendments.

The United States Supreme Court identified the evil in Sumner v. Shuman, No. 86-246 (June 22, 1987):

> The Nevada mandatory capital-sentencing statute under which Shuman was sentenced to death precluded a determination whether any relevant mitigating circumstances justified imposing on him a sentence less than death. Redefining the offense as capital murder and specifying that it is a murder committed by a life-term inmate revealed only two facts about respondent--(1) that he had been convicted o than death.

> Redefining the offense as capital murder and specifying that it is a murder committed by a life-term inmate revealed only two facts about respondent--(1) that he had been convicted of murder while in prison, and (2) that he had been convicted of an earlier criminal offense which, at the time committed, yielded a sentence of life imprisonment without possibility of parole. These two elements had to be established at Shuman's trial to support a verdict of guilty of capital murder. After the jury rendered that verdict of guilty, all that remained for the trial judge to do was to enter a judgment of conviction and impose the death sentence. The death sentence was a foregone conclusion.
>
> These two elements of capital murder do not provide an adequate basis on which to determine whether the death sentence is the appropriate sanction in any particular case.

Slip op., pp. 13-14. In Mr. White's case, the statutory aggravating factor "had to be established at . . . trial to support a verdict of guilty of capital murder." Id. In a very real sense, all that remained was to impose the death sentence.

The Lowenfield petition for writ of certiorari, which was granted, presented the issue in the following way:

> All parties to this capital case concede that petitioner's death sentence rests upon a single statutory aggravating circumstance that merely repeats an element of the underlying offense. Petitioner's case presents a square conflict in the circuits and, indeed, highlights a sharp divergence of views among a number of state high courts as well.
>
> In Collins v. Lockhart, 754 F.2d 258 (8th Cir. 1985), the Eighth Circuit found unconstitutional the Arkansas capital sentencing scheme which provided an

aggravating circumstance that merely repeated an element of the underlying crime. That court held, as petitioner argues here, that the Arkansas provision was constitutionally infirm because it failed "to distinguish a particular defendant on whom the jury has decided to impose the death sentence from other defendants who have committed the same underlying capital crime," thereby running afoul of the Court's concerns expressed in Furman v. Georgia, 408 U.S. 238 (1972). Collins, 754 F.2d at 264. State high courts have joined in this concern over "double-counting" of aggravating circumstances.

In petitioner's case and others, the Fifth Circuit has declined to adopt the Eighth Circuit's view on the constitutional infirmities created by such a system. (Appendix at ___). See, e.g., Welcome v. Blackburn, 793 F.2d 672 (5th Cir.), cert. denied, 107 S.Ct. 9 (1986); Wingo v. Blackburn, 783 F.2d 1046 (5th Cir. 1986), cert. denied, 55 U.S.L.W. 3346 (U.S. May 4, 1987) (No. 86-5026). Indeed, in petitioner's case, the Fifth Circuit remained unmoved by a failure to guide sentencer discretion far more severe than that confronted by the Collins court. In Collins, the Eighth Circuit overturned a death sentence based on three statutory aggravating circumstances when one such circumstance overlapped with the definition of the crime. Here, the definition of petitioner's crime is identical to the sole aggravating circumstance -- with nothing else supporting his sentence of death.

The bedrock principle upon which this Court's modern capital punishment doctrine is based is that, "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 427 U.S. 153, 189 (1976) (Opinion of Stewart,

> Powell, & Stevens, JJ.). Strict adherence to this doctrine of guided sentencer discretion is crucial due to the qualitative difference of death from all other punishments and the corresponding need for greater scrutiny of and certainty in a capital sentencing determination. See e.g., California v. Ramos, 463 U.S. 992, 998-99 (1983); Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (Opinion of Stewart, Powell, & Stevens, JJ.).
>
> The Louisiana capital sentencing scheme under which petitioner is sentenced to die runs squarely afoul of these constitutional requirements.

The above analysis demonstrates that Mr. White is entitled to the relief he seeks.

D. This Court Failed to Apply the Elledge Standard on Direct Appeal, in Violation of the Eighth and Fourteenth Amendments.

On direct appeal, the Florida Supreme Court recognized that the "colorable [nonstatutory] mitigating circumstance" that Mr. White was "not the triggerman" existed in this case. White I, 403 So. 2d at 340. The Court also struck three aggravating circumstances found by the sentencing judge. However, the Court refused to direct a resentencing. That was error of fundamental constitutional magnitude. Given the existence of a mitigating factor (recognized by the Court) and the Court's striking of three aggravating factors, resentencing was required. See Elledge v. State, 346 So. 2d 998 (Fla. 1977). Given the jury's unanimous verdict for life, and the Florida Supreme Court's recent override standards, the need for application of the

Elledge standard in this case is even more compelling. Mr. White urges that his execution be stayed, and this error corrected.

CLAIM IV

THE TRIAL COURT ERRED IN FINDING NO MITIGATING FACTORS, THE STATE WITHHELD MATERIAL INFORMATION THAT SUPPORTED SEVERAL STATUTORY AND NONSTATUTORY MITIGATING FACTORS, TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO CONDUCT REASONABLE BACKGROUND INVESTIGATION ON MR. WHITE AND TO PRESENT AN OVERWHELMINGLY STRONG CASE IN MITIGATION, AND TRIAL COUNSEL WAS RENDERED INEFFECTIVE BY THE APPLICATION OF STATE LAW, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Because of the state of the law existing in Florida in April, 1978, see Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), Mr. White's trial attorney was effectively precluded from presenting to the jury and judge available and compelling nonstatutory mitigating evidence. As a result of trial counsel's understanding of existing state law and as a result of his failure to do any investigation of Mr. White's background and mental and physical condition, Mr. White did not receive a reliable and individualized capital sentencing determination. See generally Lockett v. Ohio, 438 U.S. 586 (1978). Notwithstanding those facts, substantial evidence existed for a finding of five statutory mitigating circumstances, yet the trial judge erroneously failed to find even one.

A. IN APRIL, 1978, FLORIDA LAW COULD HAVE BEEN INTERPRETED AS PRECLUDING THE INTRODUCTION OF NONSTATUTORY MITIGATING EVIDENCE.

The question presented by Mr. White requires examination of the history of Florida capital sentencing law. The starting point is the statutory language itself. The modern Florida death penalty statute was enacted in 1972, in the wake of Furman v. Georgia, 408 U.S. 238 (1972). Three separate provisions of the statute appeared on their face to limit consideration of mitigating factors to only those expressly set out in the statute. Section 921.141(2), Florida Statutes (1975) directed that the jury consider:

> (a) whether sufficient aggravating circumstances exist as enumerated in subsection (6);
>
> (b) whether sufficient mitigating circumstances exist as enumerated in subsection (7), which outweigh the aggravating circumstances found to exist; and
>
> (c) based on these considerations, whether defendant should be sentenced to life or death.

(emphasis added). The same direction was given to the judge in Section 921.141(3) to consider mitigating circumstances "as enumerated in subsection (7)" and to make written findings "based upon the circumstances in subsections (6) and (7)." Subsection 921.141(6) (referred to as subsection(7), above) states that

mitigating circumstances "shall be the following: [list of specific factors]." Accordingly, from a plain reading of the statute, it appears that consideration of mitigating factors by judge and jury was limited to only those specifically set out in the statute. This reading was carried forward in State v. Dixon, 283 So.2d 1 (Fla. 1973), the landmark decision interpreting the statute. The court's emphasis in Dixon was on the consideration of statutory mitigating factors. The opinion refers frequently to "the" mitigating circumstances including in such references only the statutorily enumerated circumstances and specifically refers to "the mitigating circumstances provided in Fla.Stat. 921.141 (7), F.S.A." in describing the weighing process. Id. at 9. In dissent Justice Ervin's opinion also specifically acknowledges the limitation on consideration of mitigating circumstances contained in the statute. Id. at 17.

In 1976, in Proffitt v. Florida, 428 U.S. 242 (1976), the Court examined the facial validity of the Florida statute and concluded that it satisfied eighth amendment requirements by guiding the discretion of the sentencing authorities through its provisions for balancing aggravating and mitigating circumstances. In the course of reviewing the statute, the Court suggested that the mitigating circumstances provision of the statute may be open-ended, 428 U.S. at 250 n.8.

However, six days after Proffitt was announced the Florida

Supreme Court reviewed the same statute and explicitly declared that the Florida statute did indeed restrict mitigating factors to those set forth in the statute. Cooper v. State, 336 So.2d 1133, 1139 & n.7 (Fla. 1976), cert denied, 431 U.S. 925 (1977). Cooper had proffered among other factors his stable employment history as a mitigating circumstance relevant to his character. The sentencing judge, however, prohibited the introduction of such testimony into evidence at the penalty trial. The Florida Supreme Court held that the trial judge properly precluded the presentation and consideration of the proffered mitigating evidence. The opinion emphasized that the "sole issue" in a penalty trial under the statute was "to examine in each case the itemized aggravating and mitigating circumstances." Id. at 1139 (emphasis added). The court reasoned that allowing nonstatutory mitigating factors to be presented and considered would make the statute unconstitutional, as it would "threaten[] the proceeding with the undisciplined discretion condemned in Furman v. Georgia." Id. The court pointed to and emphasized the statutory limit on consideration of mitigating circumstances -- those "as enumerated in subsection (7)," -- as showing the intent to avoid such arbitrariness. Id. at n.7 (emphasis in original). The court underscored that these were words of "mandatory limitation," id. (emphasis in original), thus leaving no doubt as to its interpretation of the statute. With regard to the

specific nonstatutory mitigating factor before the Court, it commented that "employment is not a guarantee that one will be law-abiding," and then expressed its specific holding:

> In any event, the Legislature chose to list the mitigating circumstances which it judged to be reliable for determining the appropriateness of a death penalty . . . and we are not free to expand that list.

Id. (emphasis supplied). A plain and fair reading of the opinion in Cooper was thus that consideration and presentation of mitigating factors was strictly limited to only those specifically set out in the statute. There is no lack of clarity in the words "mandatory limitation."

In the two years following the Cooper decision, the Florida Supreme Court adhered to its construction of the mitigating circumstances provision as exclusive. See, e.g., Gibson v. State, 351 So.2d 948, 951 & n.6 (Fla. 1977); Barclay v. State, 343 So.2d 1266, 1270-71 (Fla. 1977). More importantly, Cooper was the law when Mr. White's case was tried and it was the law that guided the defense counsel. It was not until 3 months later that Lockett was announced leading to the change in the Florida Supreme Court's interpretation. See Songer v. State, 365 So. 2d 696, 700 (Fla. 1978).

Accordingly, "[a]though the Florida statute approved in Proffitt [may not have] . . . clearly operated at that time to prevent the sentencer from considering any aspect of the

defendant's character and record or any circumstances of his offense as an independently mitigating factor," Lockett, 438 U.S. at 606-07 (emphasis supplied), the statute was unmistakably construed in Cooper as limiting evidence in mitigation "to the itemized aggravating and mitigating circumstances. Evidence concerning other matters have [sic] no place in [a sentencing] . legislature chose to list the mitigating circumstances . . . and we are not free to expand the list." 336 So.2d at 1139 (footnote omitted; emphasis supplied).

Both the Eleventh Circuit Court of Appeals and the Supreme Court have recognized that this was the plain holding of Cooper. For example, in Proffitt v. Wainwright, 685 F.2d 1227 (11th Cir. 1982) the Eleventh Circuit explicitly noted that Cooper had held that mitigating circumstances were limited exclusively to those set out by the Florida statute. Id. at 1238 n.19. In Ford v. Strickland, 696 F.2d 804 (11th Cir. 1983) (en banc), the Eleventh Circuit found that Lockett was a "direct reversal" of the Cooper court's holding that mitigating factors were limited to the statute. Id. at 812. And in Foster v. Strickland, 707 F.2d 1339 (11th Cir. 1983) the Eleventh Circuit repeated its Ford observation that in Cooper "the Florida Supreme Court ruled explicitly that the jury could consider only statutory mitigating circumstances." Id. at 1346. Similarly, the Supreme Court has

recognized the change in Florida law that occurred in 1978 from consideration of only "statutory mitigating circumstances" to "any mitigating circumstances." Spaziano v. Florida, 468 U.S. ___, 104 S.Ct. ___, 82 L.Ed.2d 340, 347 n.4 (1984). See also Barclay v. Florida, ___U.S.___, 103 S.Ct. 3418, 3430 n.2 (1983) (Stevens, J., concurring). The Court has made this recognition in its most recent pronouncement on the issue. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). The Florida Supreme Court has itself recognized that Cooper could be "misconstrued" by courts to limit the consideration of mitigating factors. See Perry v. State, 395 So.2d 170, 174 (Fla. 1981) (trial judge, citing Cooper, "followed the law as he believed it was being interpreted at the time of trial" and precluded evidence of nonstatutory factors). Perry was sentenced in November, 1977, five months before Mr. White was sentenced, giving further evidence of the restrictive application, based on Cooper, of the Florida law during the time period of Mr. White's trial. See also Jacobs v. State, 396 So.2d 713, 718 (Fla. 1981) (judge "held the mistaken belief that he could not consider nonstatutory mitigating circumstances" where sentence was imposed in August, 1976, just after Cooper and before Mr. White's sentencing in April, 1978).

To be sure, two months after Lockett was announced and five months after Mr. White's trial, the Florida Supreme Court did an

abrupt turnaround and reconstrued the statute inconsistently with Cooper. Songer v. State, 365 So.2d 696, 700 (Fla. 1978) (opinion on rehearing). However, this reconstruction, though it may save the facial validity of the statute, cannot be held to apply to Mr. White whose trial occurred after Cooper where the state's highest court expressly applied the statute to restrict mitigating evidence. It is the Cooper holding that guided Mr. White's trial attorney.

Even after Songer the Florida Supreme Court has not been entirely consistent. For example, in Muhammed v. State, 426 So.2d 533 (1983) the court held, in response to an argument that counsel should have presented evidence of the nonstatutory mitigating features of the case, that a lawyer could not be "expected to predict the decision in Lockett v. Ohio," id. at 538, thereby holding that Lockett was indeed a change in Florida law. See also Ford v. State, 374 So.2d 496, 503 (1979) ("Our duty [under the statute] . . . is to apply fairly the aggravating and mitigating circumstances duly enacted by the representatives of our citizenry" (emphasis supplied)).

Nevertheless, it is the statute as it was being applied in 1976 - April 1978 that governed counsel's actions in this case:

> At that time, I, like virtually all criminal defense attorneys, had certain misconceptions as to what was admissible in a capital sentencing proceeding. At that time, such proceedings were controlled by Cooper v. State, 336 So. 2d 1133 91976). Cooper

> instructed that Florida capital sentencers, whether judge or jury, were limited strictly, for purposes of sentence mitigation, to those mitigating factors expressly enumerated in Fla. Stat. sec. 921.141(b).

App. 52. And it is that application that precluded the individualized sentencing determination for Mr. White.

B. MR. WHITE'S TRIAL COUNSEL WAS TOTALLY INEFFECTIVE IN HIS PRESENTATION OF MITIGATING CIRCUMSTANCES.

Mr. White's trial counsel did virtually nothing in the sentencing phase. He did no investigation. He presented a very short testimony from Mr. White's mother. That was all. Mr. White has outlined substantial and compelling nonstatutory and statutory mitigating circumstances readily available for presentation at the sentencing hearing. Notwithstanding trial counsel's understanding of Cooper, he unreasonably failed to investigate, develop and present statutory mitigating circumstances. The applicable law compels that an evidentiary hearing be conducted, and that relief be granted.

Counsel's role is to "assure that the adversarial testing process works to procure a just result under the standards governing decisions." Strickland v. Washington, 104 S. Ct. 2052, 2064 (1984). When confronted "with both the intricacies of the law and the advocacy of the public prosecutor," United States v. Ash, 413 U.S. 300, 303 (1970), a defendant is entitled to counsel

who will "bring to bear such skill and knowledge as will render the trial a reliable testing process." Strickland, 104 S. Ct. at 2065. The constitutional right is violated when the "counsel's performance as a whole," United States v. Cronic, 104 S. Ct. 2039, 1046 n.20, or through individual errors, Strickland, 104 s. Ct. 2064, falls below an objective standard of reasonableness, and when "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 2062. Petitioner must plead and prove (1) unreasonable attorney conduct and (2) prejudice. Mr. White has.

Investigation is the sine qua non of effective assistance of counsel. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982). And while courts should not question informed and tactical choices made by counsel, "when counsel's choices are uninformed because of inadequate preparation, a defendant is denied the effective assistance of counsel." United States v. DeCoster, 487 F.2d 1197 (1973).

"A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective at the time." Strickland, 104 S. Ct. at 2065. Without the aid of an evidentiary hearing, this Court is not able

to determine whether Mr. White's attorney made a tactical decision to do nothing. Yet, while hindsight may produce distorting effects, it is apparent that the same brothers and sisters, the same school teachers, the same baseball coach and the same neighbors and friends were readily available to trial counsel. The same compelling mitigating factors existed in 1978 as they do in 1987.

Of course, the duty of counsel was to investigate mental condition as well. Trial counsel knew that Mr. White suffered from epilepsy and ulcers, and knew that he had a history of drug abuse. When trial counsel unreasonably fails to properly investigate mental circumstances relevant to sentencing, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), ineffective assistance of counsel is demonstrated. "Where the facts known and available, or with minimal diligence accessible, to defense counsel raise a reasonable doubt as to defendant's mental condition, counsel has an affirmative obligation to make further inquiry." Wood v. Zahradnick, 578 F.2d 980 (4th Cir. 1978)(430 F. Supp. 107,111, district court opinion ruled upon by circuit court.).

CLAIM V

MR. WHITE'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY COUNSEL'S FAILURE TO UTILIZE THE ASSISTANCE OF MENTAL HEALTH EXPERTS AND BY COUNSEL'S FAILURE TO DEVELOP AND PRESENT A DEFENSE BASED ON RELEVANT, APPLICABLE MENTAL HEALTH ISSUES AT GUILT/INNOCENCE AND SENTENCING PROCEEDINGS.

Trial counsel did not seek the assistance of any mental health experts in this case. When the state makes "mental condition" relevant to either guilt or sentencing in a capital case, an indigent defendant is entitled to competent and independent assistance by a psychiatrist and/or psychologist. Ake v. Oklahoma, 105 S.Ct. 1087 (1985). The due process and equal protection clause itself requires protection of this interest as a matter of fundamental fairness to the defendant and in order to assure reliability in the truth-determining process. As the court explained in Ake, the provision of competent psychiatric expertise to a defendant assures the defendant "a fair opportunity to present his defense," Id. at 1093, and also "enable[s] the jury to make its most accurate determination of the truth on the issue before them." Id. at 1096. Ake did not exist at the time of trial, direct appeal, or at the time of the first habeas corpus petition.

The State of Florida has made mental state relevant to guilt and punishment in capital cases. First degree murder requires

premeditation or a death during commission of a designated felony. Both theories require that the state prove the presence of "specific intent," fundamentally a mental state issue. Also, the State must prove sanity at the time of the offense beyond a reasonable doubt in order to convict. The State must also prove that any incriminating statement made by the defendant was knowing and intelligent, free and voluntary, and not the product of physical or psychological coercion. Three statutory mitigating circumstances, and innumerable non-statutory circumstances, are mental-state based.

Mr. White's counsel did not seek the assistance of mental health professionals despite the obvious presence of mental health issues in the case. A reasonably competent attorney, with the benefit of Ake, and the Florida Supreme Court's decision in Mason v. State, 489 So. 2d 734 (Fla. 1986), would have done so. Counsel knew, for example, that Mr. White had a history of epileptic seizures: Mr. White testified at a suppression hearing that he had been hospitalized and was receiving medication in jail (R. 29) and was afraid of blacking out (R. 32) during his interrogation by the police. Mr. White had been a heroin addict for many years and had several prior arrests for heroin possession. These things counsel knew, yet failed to pursue and develop. There were other things counsel did not know because he failed to investigate Mr. White's background adequately.

Beauford suffered several significant cerebral traumas as a child. (Dr. Blau's report, App. 48; see also App. 37.) Beauford was severely abused by his father. Id. There was much to be discovered and presented, unquestionably sufficient cause to call for further psychological examination by reasonable counsel.

Had counsel sought a psychological assessment, he would have learned information about Mr. White's mental condition that was crucial to competent representation in a capital case. The allegations in this motion demonstrate that an evidentiary hearing is necessary in order to meet criteria established by the Florida Supreme Court for competent mental evaluations in Mason v. State, 489 So. 2d 734 (Fla. 1986). See also Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985).

Because of the important standards and criteria that exist for valid psychological evaluations, the expertise of Dr. Theodore H. Blau, Ph.D. was utilized in order to assess Mr. White properly. In conducting the evaluations well established standards for competent evaluations were followed:

a) As the Ake Court held, the due process clause protects indigent defendants against incompetent evaluation by appointed psychiatrists. See also Mason v. State, supra. Accordingly, the due process clause requires that appointed psychiatrists render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care

provider as being acceptable under similar conditions and circumstances." Fla. Stat. sec. 768.45(1) (1983). In psychiatry, as in other medical specialties, the standard of care is the national standard of care recognized among similar specialists.

b) In the context of diagnosis, exercise of the proper "level of care, skill and treatment" requires adherence to the procedures that are deemed necessary to render an accurate diagnosis. "[N]ot only must the medical practitioner employ the proper skill and prudence when diagnosing the ailment of a patient but he or she must also employ methods that are recognized as necessary and customary by similar health care providers as being acceptable under similar conditions and circumstances." 36 Fla. Jur. 2d Medical Malpractice sec. 9, at 147 (1962). See also Olschefsky v. Fischer, 123 So. 2d 751 (Fla. 3d DCA 1960).

c) The psychiatric profession has long understood that neurological dysfunction may produce symptoms that are easily mistaken as the manifestations of psychiatric, nonorganic disorders. As one of the nation's leading scholars in forensic psychiatry described it in 1973:

> Organic (bodily-caused)syndromes can mimic functional (mind-caused) disorders in their symptomology. The emotional responses may be identical. Thus, neurological disorders such as brain tumors, various forms of

> epilepsy, general paresis (the late stages of syphilis), traumatic brain damage (concussion, subdural hematoma), multiple sclerosis, and the diseases of aging (such as arteriosclerosis) often produce neurotic or psychotic symptoms.

R. Slovenko, Psychiatry and the Law 400 (1973). See also S. Arieti, American Handbook of Psychiatry 1161 (2d ed. 1974); J. MacDonald, Psychiatry and The Criminal 102-03 (1958). Accord H. Kaplan and B. Sadock, Comprehensive Textbook of Psychiatry 548, 964, 1866-68 (4th ed. 1985); R. Hoffman, Diagnostic Errors in The Evaluation of Behavioral Disorders, 248 J. Am. Med. Ass'n 964 (1982). As succinctly stated in the chapter in the 1985 edition of the Comprehensive Textbook of Psychiatry concerned with personality disorders, "it is the rule, not the exception, that organic defects of the [central nervous system] mimic facets of personality disorder." Id. at 964.

d) Because neurological dysfunctions can be readily but mistakenly diagnosed as personality disorder, the psychiatric profession has recognized that before a diagnosis of personality disorder -- particularly antisocial personality disorder (formerly called sociopathy or psychopathy) -- can be made, the evaluating psychiatrist must first rule out any organic basis for the presenting symptoms. "As the first step in the diagnosis [of personality disorders], careful medical and neurological examinations are required whenever indicated to rule out organic causation." Kaplan and Sadock at 964. See also MacDonald at 98,

102-03 (noting in a 1958 publication, that "[e]pilepsy should always be considered in the psychiatric examination of the suspected criminal. . . . The associated personality disorder [accompanying temporal lobe epilepsy] is not infrequently characterized by aggressive antisocial behavior. In persons with a long history of antisocial conduct, it is especially easy to overlook the possibility of a temporal lobe lesion"). Accordingly,

> [P]sychiatrists have a clear responsibility to search out organic causes of psychic dysfunction either through their own examinations and workups or by referral to competent specialists. As we learn more and more about the manner in which the physical dysfunction produces psychological dysfunction, the psychiatrist assumes an increasing medical obligation to ascertain that the patient's physical condition is thoroughly evaluated.

S. Halleck, Law in the Practice of Psychiatry 66 (1980). Because of this widely accepted principle, therefore, "only in the absence of organic, psychotic, neurotic or intellectual impairment should the patient be . . . categorized [as suffering antisocial personality disorder]." Kaplan and Sadock at 1866.

e) On the basis of these generally-agreed upon principles, the standard of care for both general psychiatric and forensic psychiatric examination reflects the need for a careful assessment of medical and organic factors contributing to or causing psychiatric or psychological dysfunction. Kaplan and

Sadock at 543.

The method of assessment, therefore, must include the following steps:

(1) An accurate medical and social history must be obtained. Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patters of behavior," R. Strub and F. Black, Organic Brain Syndromes 42 (1981), the history has often been called "the single most valuable element to help the clinician reach an accurate diagnosis." Kaplan and Sadock at 837. See also MacDonald at 98, 103, 110 (emphasizing the singular importance of a "painstaking clinical history" in order to differentiate an underlying seizure disorder from an antisocial personality disorder). Among other matters, the medical history must ascertain whether the patient ever experienced serious head injury, and if so, whether the patient's personality changed in the wake of that injury. See Kaplan and Sadock at 489, 877 (explaining that the organic personality syndrome "is characterized by a marked change in personality that is attributable to some specific organic factor," which most commonly is a closed head injury). See also Strub and Black at 42-44.

(2) Historical data must be obtained not only from the patient, but from sources independent of the patient.

It is well recognized that the patient is often an unreliable data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." Kaplan and Sadock at 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past event or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." Id. Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

Bonnie and Slobogin, The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427 (1980). Accord Kaplan and Sadock at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull. Am. Acad. Psych. & L. 267, 274 (1974); H.

Davidson, Forensic Psychiatry 38-39 (2d ed. 1965); MacDonald at 98.

(3) A thorough physical examination (including neurological examination) must be conducted. See, e.g., Kaplan and Sadock at 544, 837-38 and 964; Arieti at 1161; MacDonald at 48. Although psychiatrists may choose to have other physicians conduct the physical examination, Kaplan and Sadock at 544, psychiatrists

> [s]till should be expected to obtain detailed medical history and to use fully their visual, auditory and olfactory senses. Loss of skill in palpation, percussion, and auscultation may be justified, but loss of skill in observation cannot be. If the detection of nonverbal psychological cues is a cardinal part of the psychiatrists' function, the detection of indications of somatic illness, subtle as well a striking, should also be part of their function.

Kaplan and Sadock at 544. In further describing the psychiatrist's duty to observe the patient he is evaluating, Kaplan and Sadock note in particular that "[t]he patient's face and head should be scanned for evidence of disease. . . . [W]eakness of one side of the face, as manifested in speaking, smiling, and grimacing, may be the result of focal dysfunction of the contralateral cerebral hemisphere." Id. at 545-46.

(4) Appropriate diagnostic studies must be undertaken in light of the history and physical examination. The psychiatric profession recognizes that psychological tests, CT

scans, electroencephalograms, and other diagnostic procedures may be critical to determining the presence or absence or organic damage. In cases where a thorough history and neurological examination still leave doubt as to whether psychiatric dysfunction is organic in origin, psychological testing is clearly necessary. See Kaplan and Sadock at 547-48; Pollack at 273. Moreover, among the available diagnostic instruments for detecting organic disorders -- neuropsychological test batteries -- have proven to be the most valid and reliable diagnostic instrument available. See Filskov and Goldstein, Diagnostic Validity of the Halstead-Reitan Neuropsychological Battery, 42 J. of Consulting and Clinical Psych. 382 (1974); Schreiber, Goldman, Kleinman, Goldfader, and Snow, The Relationship Between Independent Neuropsychological and Neurological Detection and Localization of Cerebral Impairment, 162 J. of Nervous and Mental Disease 360 (1976).

(5) The standard mental status examination cannot be relied upon in isolation as a diagnostic tool in assessing the presence or absence of organic impairment. As Kaplan and Sadock have explained, "[C]ognitive loss is generally and correctly conceded to be the hallmark of organic disease," and such loss can be characterized as "(1) impairment of orientations; (2) impairment of memory; (3) impairment of all intellectual functions, such as comprehension, calculation, knowledge, and

learning; and (4) impairment of judgment." Id. at 835. While the standard mental status examination (MSE) is generally used to detect and measure cognitive loss, the standard MSE -- in isolation from other evaluative procedures -- has proved to be very unreliable in detecting cognitive loss associated with organic impairment. Kaplan and Sadock have explained why:

> When cognitive impairment is of such magnitude that it can be identified with certainty by a brief MSE, the competent psychiatrist should not have required the MSE for its detection. When cognitive loss is so mild or circumscribed that an exhaustive MSE is required for its recognition then it is likely that it could have been detected more effectively and efficiently by the psychiatrist's paying attention to other aspects of the psychiatric interview.
>
> In order to detect cognitive loss of small degree early in its course, the psychiatrist must learn to attend more to the style of the patient's communication than to its substance. In interviews, these patients often demonstrate a lack of exactness and clarity in their descriptions, some degree of circumstantiality, a tendency to perseverate, word-finding problems or occasional paraphasias, a paucity of exact detail about recent circumstances and events (and often a lack of concern about these limitations), or sometimes an excessive concern with petty detail, manifested by keeping lists or committing everything to paper. The standard MSE may reveal few if any abnormalities in these instances, although abnormalities will usually be uncovered with the lengthy MSE protocols.
>
> The standard MSE is not, therefore, a very sensitive device for detecting incipient organic problems, and the psychiatrist must

listen carefully for different cues.

Id. at 835. Accordingly, "[c]ognitive impairment, as revealed through the MSE, should never be considered in isolation, but always should be weighed in the context of the patient's overall clinical presentation -- past history, present illness, lengthy psychiatric interview, and detailed observations of behavior. It is only in such a complex context that a reasonable decision can be made as to whether the cognitive impairment revealed by MSE should be ascribed to an organic disorder or not." Id. at 836.

f) In sum, the standard of care within the psychiatric profession which must be exercised in order to differentiate accurately organic dysfunction from psychic dysfunction, is most concisely stated in Arieti's American Handbook of Psychiatry:

> Before describing the psychiatric examination itself, we wish to emphasize the importance of placing it within a comprehensive examination of the whole patient. This should include a careful history of the patient's physical health together with a physical examination and all indicated laboratory tests. The interrelationships of psychiatric disorders and physical ones are often subtle and easily overlooked. Each type of disorder may mimic or conceal one of the other type. . . . A large number of brain tumors and other diseases of the brain may present as "obvious" psychiatric syndromes and their proper treatment may be overlooked in the absence of careful assessment of the patient's physical condition. The psychiatrist cannot count on the patient leading him to the diagnosis of physical illness. Indeed, patients with

> psychiatric disorders often deny the presence of major physical illnesses that other persons would have complained about and sought treatment for much earlier.

Id. at 1161.

A thorough background and history has now been taken and provided to an eminently qualified expert.

The physician is Dr. Theodore H. Blau, Ph.D., is a vastly experienced and eminently qualified psychologist. Dr. Blau is former President of the American Psychological Association and his professional distinctions are too numerous to list. His entire report and 26-page curriculum vitae are submitted as App. 48. Dr. Blau met with Mr. White for seven hours on August 15, 1987. From the materials and his interview with Mr. White, he recites the following background:

> BACKGROUND FACTORS
>
> Mr. White was born in Hobe Sound, Florida. He was the middle of nine children. His early life was characterized by poverty and deprivation. His father was known to be a hostile-aggressive individual who acted-out his rage on his wife and his children, focusing his ire particularly on the son Beauford. His anger included physical assaults with objects such as boards. When Beauford was quite young, his father struck him on the back of the head with sufficient force to cause Beauford's teeth to go through his tongue. The family also states that he almost died from a poisonous spider bite at the age of three or four years.
>
> The mother left the father in Mr. White's early years and moved with her nine children

to Liberty City in Miami. He repeated the first grade because school records from Hobe Sound were lost. He attended a variety of schools.

Mr. White attended Brownsville Junior High School in Miami for grades 7, 8 and 9, completing the ninth grade in 1962. He received a fair number of A's and B's and failed no subjects. His conduct was good. Some teachers saw him as a "top" student.

He began Northwestern Senior High School in grade 9 in 1961 and went through grade 11. After two semesters in the 11th grade he withdrew (October 1963). Although his early school records reflect fairly good scholarship, as he reached high school and his mother was imprisoned he deteriorated in everything except Physical Education. His school records include the results of the Cooperative English Test. At that time Mr. White was 18 years and 4 months of age. His Reading fell at the 8th percentile, his English Expression at the 6th, and Total English at the 9th. On the California Test of Mathematics, his Mathematical Reasoning fell at the 60th percentile and his Fundamentals of Mathematics at the 5th percentile.

In September of 1963 Mr. White's mother went to prison for killing her boyfriend. Her family struggled to make ends meet with both the mother and father absent. Times were hard.

In 1965 Mr. White fathered a child, Valecia, with Sandra Mitchell, his teenage sweetheart. At that time Mr. White was 19. In 1966 Beauford Jr. was born to Mr. White and Ms. Mitchell. Ms. Mitchell reports that Mr. White was an attentive and concerned father.

There is a note that in October of 1968 Mr. White went to the emergency room at Jackson Memorial hospital complaining of "epilepsy." The doctor's report notes a history of

seizures, with three reported on that particular day. The doctor notes "he's had these fits since he was a small child." A note in the Jackson Memorial records indicates a history of head trauma. Medical records report a concussion in 1970.

His sister Gail reports observing a seizure in 1970: "he went into convulsions kicking his legs." Mr. White reports his seizures as including blackouts and amnesia. He emerges from his seizures light-headed and confused. During seizures, he recalls being active, overturning furniture and so forth. It is reported that in June of 1986 Mr. White started to have a seizure in the visiting room of the Florida State Prison. He was taken to the clinic for medication. In an affidavit from his cousin, Gloria Howard, it is noted that seizures were observed in 1969 and 1970 which included foaming at the mouth, falling to the ground and kicking his legs. The presence of seizures on a relatively regular basis was confirmed by other siblings in their affidavits. Mr. White's common-law wife reports that she observed a seizure that required Mr. White to be hospitalized. She describes him being taken by ambulance to the hospital, with a spoon in his mouth.

Mr. White was apparently a drug taker and attended a methadone clinic. Included in the medical records are notes of a history of peptic ulcers and other abdominal distress.

Mr. White has a long and varied history of arrests and convictions. Many of these arrests are related to his drug addiction.

Records from the Department of Corrections-Educational and Vocational Counseling section indicate that Mr. White's IQ was 108 when he was 28 years old. They measured his educational grade level at 6+. This was the result of the Gray-Votaw-Rogers Test. Reading Vocabulary was found to be 7.1 grade level and Comprehension 5.9. Arithmetic Reasoning was 8.2.

> In a social history in DOC records it is noted that Mr. White suffered a brain concussion at age 15 with subsequent seizures.
>
> It is clear from the various medical records and corroboratory reports that Mr. White came from a severely deprived family background and started to do relatively well academically in spite of this background. There is ample evidence that he was probably the victim of several cerebral insults, and as a result developed a convulsive disorder which, though documented with relative clarity, was apparently untreated over the years. The degree and extent of the convulsive disorder is unknown in the absence of adequate medical evaluation.

9. Dr. Blau conducted the following tests:

> EXAMINATION PROCEDURES
>
> History Taking, Review of Records, Interview, Wechsler Adult Intelligence Scale-Revised, Wechsler Memory Scale-Form I, Hand Dynamometer, Luria-Nebraska Neuropsychological Evaluation-Form II, the Neuropsychological Symptoms/Sign Checklist, Rorschach Psychodiagnostic Technique, Minnesota Multiphasic Personality Inventory, and Observations.

Dr. Blau found that Mr. White has "significant mental impairments compounded by brain dysfunction." Mr. White suffered "several cerebral insults" and the resulting "convulsive disorder" has strongly influenced his functioning:

> Alcohol and drug abuse have been outlets for some of the frustrations in his life in the past. His chaotic and inadequate family background made him especially vulnerable to substance abuse. As a basically passive person who suffered from convulsive

> disorders, drugs offered him a passive state of mind. Certainly the kind of stress that he has suffered in his life has led to his difficulty with authority. He attempted to control his conduct in the past, but failed because of his significant mental impairments.
>
> His years of childhood abuse and neglect contribute significantly to his mental disabilities. Children raised in environments similar to Mr. White's are frequently passive and dominated by others who are more aggressive and stronger. In Mr. White's case, he could easily be dominated by others, even though it might not be in his own best interest. He sometimes defends himself by thinking of himself as the "underdog."
>
> His ability to maintain intellectual controls is quite fragile. With the escalation of emotional pressures and anxieties, his judgment fragments and his intellectual controls deteriorate. He will suddenly shift from being quite rational and intelligent to being irrational. When this happens he cannot cognate adequately.
>
> He suffers a mild, low level of depression. His personality pattern is complicated, including a wide quality variability, sudden shifts of focus, contamination, confabulation and perseveration. These together with his somatic/anatomical focus are consistent with neuropsychological deficits such as epilepsy or convulsive disorder.
>
> His severest response to stress and emotional pressure is for his thinking to deteriorate, rendering him unable to make realistic and rational choices.

Dr. Blau's conclusions are extremely significant and dictate relief under this claim:

SUMMARY AND CONCLUSIONS

Psychological examination of Mr. Beauford White indicates that he is a man who functions at the Average range of intellectual capacity unless under stress. There is quite a bit of variability in his intellectual response. There are indications of neuropsychological deficit which may include or result from a convulsive disorder. The personality structure is that of a man who has had a very severely deprived early family and environmental life and has developed consequent personality and behavior traits that cause him severe conflict. His intellectual capacity and his ability to think clearly as well as to make decisions in his own best interests deteriorate very rapidly in the presence of strong emotional stimulation or stress.

In my professional judgment, based on my interview with Mr. White, the results of the battery of neuropsychological tests administered to him, and his documented life history, Mr. White has significant mental impairments compounded by brain dysfunction. His mental deficits have important implications in understanding his responses to severe emotional stress. Under stress, his ability to respond appropriately is seriously compromised. His intellectual functioning is debilitated by his mental illness, and he probably lacks the ability to make reasoned and knowing decisions in most crises. He becomes confused and disoriented, during the seizures he experiences as a result of his convulsive disorder. Despite the complexities and seriousness of Mr. White's mental and emotional disabilities, he is basically a passive person who is not a danger to himself or others.

In my professional opinion, Mr. White's disabilities are relevant to any sentencing determination in his case. It is reasonably probable that his convulsive

disorder, his inability to respond appropriately under stress, and his vulnerability to domination by others are factors which governed his actions and responses both at the time of the offense and at the time of his statement to the police. Further, food and sleep deprivation for a substantial period of time and sustained emotional pressure can trigger convulsive disorders in a person like Mr. White. During these seizures, he would be confused, disoriented, and unable to make informed, rational choices.

It is also my professional opinion that the events surrounding the offense for which Mr. White is convicted, as presented in various court opinions, created conditions that rendered Mr. White unable to act in a manner consistent with society's expectations and the requirements of law. His significant mental deficits prevent him from making reasonable decisions. In such a situation, he would experience great emotional turmoil and duress and his intellectual ability would fragment and deteriorate.

In response to questions posed regarding the applicability of statutory mitigating circumstances:

1) His personality and his cognitive structure are such that he would be easily dominated by very aggressive people;

2) His personality and cognitive structure are such that it is likely that at the time of the offense he was severely crippled in his ability to conform his conduct to the requirements of law; and

3) Under stress and duress he is very likely to fragment in his cognitive ability.

On the basis of what has been learned about Mr. White's mental condition, it is evident Mr. White was deprived of his

right to utilize and present highly relevant and compelling evidence of mental impairments in his defense. Even if not sufficient to rise to the stringent statutory level, such evidence would still have had important mitigating effect, and would have been worthy of the jury's and judge's consideration. See Hitchcock, supra.

a) With regard to guilt/innocence and suppression issues, this finding would have been critical:

> It is reasonably probable that his convulsive disorder, his inability to respond appropriately under stress, and his vulnerability to domination by others are factors which governed his actions and responses both at the time of the offense and at the time of his statement to police. Further, food and sleep deprivation for a substantial period of time and sustained emotional pressure can trigger convulsive disorders in a person like Mr. White. During these seizures, he would be confused, disoriented, and unable to make informed, rational choices.

b) Mr. White's susceptibility to domination of others bore directly on the applicability of statutory mitigating factor 921.141(6)(e), "defendant acted under extreme duress or under the substantial domination of another person." Dr. Blau concluded:

> His personality and his cognitive structure are such that he would be easily dominated by very aggressive people.

c) Mr. White also met the criteria for factor 921.141(6)(f): "The capacity of the defendant to appreciate the

criminality of his conduct or to conform his conduct to the requirements of law was substantially impaired." Here, Dr. Blau went farther than the statute requires:

> His personality and cognitive structure are such that it is likely that <u>at the time of the offense he was severely crippled in his ability to conform his conduct to the requirements of law</u>;...

d) There is no question, based on Dr. Blau's findings that Mr. White also qualified for factor (6)(b): "The capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance."

e) Dr. Blau's evaluation also provides support for findings of numerous non-statutory mitigating factors, information that was never presented but undoubtedly would have been mitigating.

Evidence of child abuse, heroin addiction, head trauma, convulsive disorder, neurological deficits, significant psychological and emotional problems, brain dysfunction, significant mental impairments, severely deprived early family and environmental life, confabulation, preseveration is all enormously pertinent information. Such factors are frequently found in mitigation in capital cases.

Mr. White was deprived of a constitutionally adequate defense as a result of counsel's failure to investigate and present mental health issues in Mr. Whites's defense. Such a

defect requires post-conviction relief.

CLAIM VI

MR. WHITE'S "STATEMENT" WAS OBTAINED IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, TRIAL COUNSEL INEFFECTIVELY SOUGHT SUPPRESSION, AND THE STATE VIOLATED DUE PROCESS BY CONCEALING THE VIOLATION.

The statement allegedly made by Mr. White was introduced into evidence during the testimony of Detective Derringer. Mr. White's conviction was certainly based in large part on his alleged statement.

Trial counsel moved to suppress the statement and an evidentiary hearing was held on January 9, 1978. While counsel properly moved to suppress the purported statement, counsel improperly and unreasonably decided to wage a swearing match, pitting Mr. White's word against the word of the lead police officer, Det. Derringer. The lack of more adequate preparation and presentation of Mr. White's substantial basis for suppression directly resulted in the trial court's erroneous ruling admitting the statement. The interplay of recent Supreme Court standards--Ake, supra, Kimmelman v. Morrison, 106 S.Ct. 2574 (1986), and Colorado v. Connelly, 107 S. Ct. 515 (1986)--standards which were unavailable at the time of Mr. White's trial and previous post-conviction proceedings, demonstrate that the ends of justice call

on this Court to now entertain the claim. Cf. Moore v. Kemp, supra.

Both Mr. White and Det. Derringer testified at the suppression hearing that other police officers were involved in the interrogation. Det. Derringer remembered Det. Alonzo and Det. Mella being present. Mr. White testified that Det. Derringer and two other officers beat him. An effective trial attorney would have deposed all of the other officers involved in the arrest and interrogation in preparation for the suppression hearing. Mr. White's trial counsel did not attempt to depose the others. Det. Derringer was deposed on December 15, 1977. However, a representative of trial counsel was present for merely one quarter of the 7 1/2 hour deposition and since he didn't arrive until near the end of the deposition, he was forced to rush his questions. Incredibly, Mr. White's counsel abdicated the taking of Det. Derringer's deposition, as with all the depositions taken in this case, to the attorney representing co-defendant Francois: the man who killed five people and seriously shot a sixth, the man who went to the house as a hired killer unbeknownst to Beauford. Archie's lawyer was at the deposition of Derringer, too. Beauford's lawyer was gone from pages 26 to 215 of the deposition. When the questioning got to Derringer's interrogation of Beauford, the absurdity of the process became manifest:

Q [By Mr. Diamond] Did you take an informal statement from Beauford White first and then a formal statement from him?

A [By Det. Derringer] I interviewed Mr. White prior to taking his confession.

Q Can you tell me how that interview went?

A Basically, the same information as contained in the formal statement.

Q I'm interested in the manner in which the interview went, not so much the context.

A When he was first brought into my office we sat down. I read him his constitutional rights.

MR. KAYE: Wait a minute. Wait. You're talking about Mr. White?

MR. DIAMOND: Right.

MR. KAYE: Isn't that what the other gentleman [Mr. White's trial counsel] is going to get into?

MR. DIAMOND: I don't know where this gentleman is.

MR. KAYE: I don't want him to have to go through this and repeat it all.

MR. DIAMOND: <u>I'll waive that. I could care less about Beauford White</u>.

(R. 185, 186). Of course Mr. Diamond didn't care about Mr. White. His interests were antithetical to those of Mr. White. In relying on an adverse co-defendant's attorney to develop information for his client's defense, Mr. White's counsel grossly

neglected his responsibility to his client. This lack of diligence can be seen in his treatment of two other very important depositions as well. When Det. Alonzo, an officer present for the arrest and interrogation of Mr. White, was deposed, Mr. White's counsel again left in the middle, with Archie's lawyer, and left it to Francois' attorney to question the witness about Mr. White's interrogation. Likewise, trial counsel did not even attend the deposition of important witness Franklin Cowie, discussed further infra. His preparation for the suppression hearing in this regard was unreasonable and inexcusable.

Uncontraverted facts surrounding the alleged statement should have revealed to any reasonable counsel that the voluntariness of Mr. White's statement was in doubt. Mr. White, who stands 5'7" tall and weighed 140 pounds and has a history of epilepsy, was under the control of three seasoned interrogators for at least 12 hours beginning at either 11 p.m. or 1 a.m. During this time, classic interrogation tactics were used, e.g., sleep deprivation, deprivation of food and water, and isolation in an uncomfortable environment--handcuffed to a chair in a cold room. Derringer did not deny these conditions when he testified. These facts should have been known to trial counsel before the suppression hearing and trial counsel unreasonably failed to have Mr. White's physical and mental status evaluated by a competent

mental health professional to determine how his inabilities and mental dysfunctions interacted with the interrogators' techniques. Had trial counsel done so he would have found:

> It is reasonably probably that his [Mr. White's] convulsive disorder, his inability to respond appropriately under stress, and his vulnerability to domination by others are factors which governed his actions and responses both at the time of the offense and at the time of his statement to the police. Further, food and sleep deprivation for a substantial period of time and sustained emotional pressure will frequently trigger convulsive disorders in a person like Mr. White. During these seizures, he would be confused, disoriented, and unable to make informed, rational choices.

App. 48.

Mr. White did not freely and voluntarily waive his rights to counsel and did not freely and voluntarily make a statement. Mr. White was coerced, promised immunity, slapped, punched, abused and humiliated at a time when he was fatigued, frightened and afraid of having a seizure. Moreover, Mr. White suffers from serious mental/emotional impairments. These impairments were obvious, and law enforcement took advantage of his condition. Three men interrogated him; one of them, Det. Derringer is 6'6" and weighed 240 lbs. When asked why he gave a statement to the police, Mr. White replied:

> A I gave the statement because Detective Derringer promised me that he would give me immunity. If I didn't make the statement, I get another beating. So, he

promised me if I make it, he will go to the State Attorney's office and talk with the DA (T30).

Q In addition to the promise of immunity what effect, if any, did the fact that they pulled your hair, slapped you, and hit you in the ribs have upon you?

A I was frightened. I was fatigued. I was everything. I was scared. I didn't want to cause myself to have no blackout. I don't know what would have happened.

Q Were you afraid because of your epilepsy, and were you afraid for your physical health?

A Yes.

(R. 32).

Derringer was well known for beating statements out of suspects. Clifford Ferguson states in his affidavit, App. 9:

Derringer beat me up. <u>He whipped everyone he talked to</u>. He beat up me, Floyd Albury, Fletcher, Waterboy. Derringer is known to be a mean, brutal cop, all 6'6", 250 lbs. of him. <u>That's how he gets people to confess. He scares and threatens you. He put a paperclip up to a cigarette lighter 'til it got red-hot and he would threaten to poke it inside your ear</u>. He beat the hell out of me. My family saw me when I came home with my mouth bleeding.

Fletcher Cowie testified, under oath, at his deposition that Derringer punched and threatened him.

[t]he big guy [Det. Derringer] hit me in the stomach.

The guy's a big man and he punched me in the stomach and he said, "You're not the first nigger I ever whooped and I can whoop

you and nobody will know it."

Cowie also stated he was hit in the face numerous times with a telephone book, Derringer's and Gergen's trademark. See Potter v. State, 410 So. 2d 164, 166 (3d DCA 1981). Mr. White's lawyer did not show up at all for Cowie's deposition, so he missed an important opportunity to explore Derringer's interrogation methods further with a victim. Francois' lawyer took the deposition, as always, and while interested in evidence of Derringer's style of doing things, he had no burning use for probing how Derringer gets people to say things. Francois didn't make a statement. Beauford did, and his lawyer was deficient in failing to represent him properly.

Similarly, had trial counsel attempted to investigate other allegations of Det. Derringer's misconduct, he would have discovered that Wallace Porter was beaten by Derringer in the same manner as Mr. White and the others mentioned above. Mr. Porter was punched in the stomach, hit in the head with telephone books and abused in many other ways just 16 days after Mr. White's arrest. Fortunately, Mr. Porter's counsel presented evidence corroborating his allegations, thus persuading the Florida Supreme Court that his rights had been violated. (Porter, supra.)

Detective Derringer's actions were not isolated, one time incidents rather, his behavior and reputation were well-known,

and should have been known to trial counsel. Evidence of his brutal interrogation techniques should have been presented on Mr. White's behalf. Failure to do so rendered Mr. White's representation ineffective.

New information is now known about Derringer that was not available at trial but which casts even greater doubt over the conditions of Mr. White's alleged "confession." On September 23, 1982, Derringer was convicted by a federal jury of violating the civil rights of two citizens and of tax fraud. Both offenses bear on Mr. White's suppression claim. The credibility of a witness convicted of a crime of dishonesty is highly questionable. Combining this with a conviction for violating the civil rights of some people he stopped in a Volkswagon, one gets the picture of a less than scrupulous law enforcement officer. This new information is relevant to Mr. White's claim.

On the record, counsel was woefully ineffective in his representation of Mr. White with regard to suppressing a statement made to a notoriously brutal police officer. Subsequent events bear out the story Mr. White told from the beginning. A conviction based on such a "statement" should not be allowed to stand.

CONCLUSION

In support of his request for a stay of execution, Mr. White incorporates all of the claims and arguments outlined in his RULE 3.850 MOTION, its appendices, supporting memorandum, and in the oral proffer presented to the Rule 3.850 trial court, whether discuussed herein or not. He respectfully requests a stay, so as to afford him orderly determination of his substantial claims.

Respectfully submitted,

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By: _____
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail/hand delivered to Richard Kaplan, Assistant Attorney General, Ruuth Bryan Rhode Building, Suite 820, 401 NW 2nd Avenue, Miami, Florida 33128, this 24th day of August, 1987.

Attorney