IN THE SUPREME COURT OF FLORIDA

NO. 86907

JERRY WHITE,

Petitioner,

v.

HARRY K. SINGLETARY, Secretary,
Department of Corrections, State of Florida,

Respondent.

NOS. ~~62,144~~ AND ~~71,679~~

JERRY WHITE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CONSOLIDATED PETITION FOR EXTRAORDINARY RELIEF, FOR A WRIT OF HABEAS CORPUS, AND/OR MOTION TO REOPEN DIRECT APPEAL, AND/OR MOTION TO REOPEN 3.850 APPEAL AND REQUEST FOR STAY OF EXECUTION

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

TODD G. SCHER
Assistant CCR
Florida Bar No. 0899641

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
Post Office Drawer 5498
Tallahassee, Florida 32314-5498
(904) 487-4376

Counsel for Petitioner

JURISDICTION

A writ of habeas corpus is an original proceeding in this Court governed by Fla. R. App. P. 9.100. The Constitution of the State of Florida guarantees that "[t]he writ of habeas corpus shall be grantable of right, freely and without cost." Art. I, § 13, Fla. Const. Its constitutional guarantee imbues habeas corpus with special status, which this Court has long recognized:

> The writ of habeas corpus is a high prerogative writ of ancient origin designed to obtain immediate relief from unlawful imprisonment without sufficient legal reason. . . . The writ is venerated by all free and liberty loving people and recognized as a fundamental guaranty and protection of their right of liberty.

Allison v. Baker, 11 So. 2d 578, 579 (1943). In fact, habeas corpus is a centuries-old right, deserving of more protection than even a constitutional right. A lower court has written:

> The great writ has its origins in antiquity and its parameters have been shaped by suffering and deprivation. It is more than a privilege with which free men are endowed by constitutional mandate; it is a writ of ancient right.

Jamason v. State, 447 So. 2d 892, 894 (Fla. 4th DCA 1983), approved 455 So. 2d 380 (Fla. 1984), cert. denied, 469 U.S. 1100 (1985). Regarding the application of procedural rules to petitions seeking the writ, this Court has explained:

> [H]istorically, habeas corpus is a high prerogative writ. It is as old as the common law itself and is an integral part of our own democratic process. The procedure for the granting of this particular writ ***is not to be circumscribed by hard and fast rules or technicalities which often accompany our consideration of other processes***. If it appears to a court of competent jurisdiction that a man is being illegally restrained of his liberty, it is the responsibility of the court to brush

> aside formal technicalities and issue such appropriate orders as will do justice. ***In habeas corpus the niceties of the procedure are not anywhere near as important as the determination of the ultimate question as to the legality of the restraint.***

Anglin v. Mayo, 88 So. 2d 918, 919-20 (Fla. 1956) (emphasis added). Most recently this Court has written:

> The fundamental guarantees enumerated in Florida's Declaration of Rights should be available to all through simple and direct means, without needless complication or impediment, and should be fairly administered in favor of justice and not bound by technicality.

Haag v. State, 591 So. 2d 614, 616 (1992). The obvious relationship between habeas corpus and the constitutional guarantee of liberty explains why habeas corpus is the only writ specifically guaranteed by the Declaration of Rights of the Constitution of Florida. GERALD KOGAN & ROBERT CRAIG WATERS, *The Operation and Jurisdiction of the Florida Supreme Court*, 18 Nova L. Rev. 1151, 1258 (1994). As the history of habeas corpus makes clear, the imposition of procedural technicalities on the filing of petitions for habeas corpus would frustrate the writ's ancient purpose and subvert its constitutional guarantee.

This Court also has the jurisdiction to re-open Mr. White's direct appeal, and the Court should exercise this jurisdiction in Mr. White's case. In Parker v. State, 643 So. 2d 1032 (Fla. 1994), this Court explained that Mr. Parker's death sentence had been vacated by the United States Supreme Court[1] due to constitutional error in this Court's resolution of Mr. Parker's direct appeal. Parker, 634 So. 2d at 1033. This Court detailed that the

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[1]See Parker v. Dugger, 498 U.S. 308 (1991).

Supreme Court had "order[ed] the State of Florida to initiate appropriate proceedings for state courts to reconsider Parker's death sentence." Id. In furtherance of the Supreme Court's directive, the State sought to re-open Mr. Parker's direct appeal, arguing that because the constitutional error went "to this Court's original appellate review, it appears to the state that the appropriate vehicle for compliance is the original appeal itself." See Motion for Establishment of Briefing Schedule on Remand, in Parker v. State, Case No. 63,700 (filed October 16, 1991). This Court granted the State's motion, and in its opinion granting Mr. Parker a life sentence, noted that it had jurisdiction pursuant to Art. V, § 3(b)(1), Fla. Const, the provision granting this Court's mandatory jurisdiction over capital direct appeals. Parker, 643 So. 2d at 1033. See also Hill v. State, 643 So. 2d 1071 (Fla. 1994) (reopening direct appeal after constitutional error found in original appeal); Johnston v. Singletary, 640 So. 2d 1102 (Fla. 1994) ("opening a case" at request of the State to address constitutional error on earlier appeal). This Court also may reopen the 3.850 appeal. See Spaziano v. State, 660 So. 2d 1363 (Fla. 1995).

Whether this Court chooses to exercise its habeas jurisdiction or its jurisdiction to reopen a prior appeal, it is imperative that the Court address the substantial claims presented in this petition. This petition is being filed in order to address substantial claims of error under the Fifth, Sixth, Eighth, and Fourteenth Amendments, claims demonstrating that Jerry White's death sentences violated fundamental constitutional imperatives, and were neither fair, reliable, nor individualized. See Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986) ("It is only in the case of error that prejudicially denies fundamental constitutional rights that this Court will revisit a matter

previously settled by the affirmance of a conviction or sentence").

Given the substance of what this petition involves, pursuant to subsections 3(b)(7) and (9) of Article V of the Florida Constitution and Rule 9.030(a)(3) of the Florida Rules of Appellate Procedure, this Court should grant the requested stay of execution, allow oral argument, consider the claims, and grant the relief sought in this petition.

PROCEDURAL HISTORY

The circuit court of the Ninth Judicial Circuit, in and for Orange County, Florida, entered the judgment of conviction and sentence at issue. Mr. White was indicted in 1981 on charges of first degree murder and robbery with a firearm. Mr. White entered pleas of not guilty to the charges. Mr. White's jury trial began on April 20, 1982, and the jury returned guilty verdicts on April 27, 1982. The penalty phase before the jury was conducted on April 30, 1982, and the jury recommended a death sentence. The trial court imposed a death sentence on May 4, 1982.

Mr. White's convictions and death sentence were affirmed by this Court on direct appeal. White v. State, 446 So. 2d 1031 (Fla. 1984). A motion to vacate judgment and sentence, Fla. R. Crim. P. 3.850, was filed on October 23, 1985. The circuit court conducted an evidentiary hearing, and then denied relief on April 9, 1987. This Court affirmed the circuit court's denial of relief on March 15, 1990. White v. State, 559 So. 2d 1097 (Fla. 1990). Rehearing was denied on May 24, 1990. On June 12, 1990, Florida Governor Bob Martinez signed a death warrant against Mr. White.

A second Rule 3.850 motion was filed on July 10, 1990. The circuit court denied relief on July 11, 1990, and Mr. White appealed to this Court. This Court affirmed the

circuit court's denial of relief on March 15, 1990. White v. State, 565 So. 2d 322 (Fla. 1990). This Court also denied habeas corpus relief in White v. Dugger, 565 So. 2d 700 (Fla. 1990).

After granting a stay of execution due to the claim that Florida's electric chair was inoperative, the United States District Court for the Middle District of Florida denied Mr. White's federal habeas corpus petition, White v. Singletary, ___ F. Supp. ___, No. 90-531-CIV-ORL-19 (M.D. Fla. 1990). Mr. White appealed and the Eleventh Circuit Court of Appeals denied his appeal. White v. Singletary, 972 F.2d 1218 (11th Cir. 1992). Mr. White then filed a petition for writ of certiorari in the United State Supreme Court on March 22, 1995. The petition was denied on May 22, 1995. White v. Singletary, 115 S. Ct. 2008, reh'g. denied, 115 S. Ct. 2636 (1995).

Governor Lawton Chiles signed Mr. White's third death warrant on October 13, 1995. On October 19, 1995, the Office of the Capital Collateral Representative (CCR) filed a pleading in this Court alerting the Court that Mr. White was unrepresented, his prior counsel having withdrawn following the denial of certiorari, and that because of the pending responsibilities it had toward its 141 death-sentenced clients, CCR could not assume Mr. White's case under warrant and render effective assistance of counsel. In Re: Jerry White, Case No. 86,706. After oral argument, this Court summarily denied relief on October 31, 1995, over the dissent of Justices Kogan and Shaw. Thereafter, the undersigned attorneys were assigned to initiate representation of Jerry White.

In the afternoon of November 29, 1995, this Court granted a temporary stay of execution to Mr. White until 12:00 PM on Monday, December 4, 1995. After that time,

the stay will lift. To counsel's knowledge at the time of the filing of this pleading, the Florida State Prison has not yet rescheduled Mr. White's execution.

REQUEST FOR A STAY OF EXECUTION

Mr. White's petition includes a request that the Court stay his execution, which can legally take place after 12:00 PM on Monday, December 4, 1995, when this Court's temporary stay will lift. As will be shown, the issues presented are substantial and warrant a stay. This Court has not hesitated to stay executions to ensure judicious consideration of issues presented by petitioners litigating during the pendency of a death warrant. See, e.g., Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992); Jackson v. Dugger, 547 So. 2d 1197 (Fla. 1989); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1989). Similarly, the Court has been especially vigilant to guard the need for procedural fairness in capital proceedings, and accordingly has not hesitated to enter stays of execution in order to assure that capital petitioners are treated fairly in the litigation of claims for relief during the pendency of a death warrant. See, e.g., Scott v. State, Case Nos. 84,687 & 84,686 (Order dated November 17, 1994) (staying execution pending disposition of claims of newly discovered evidence in successive postconviction motion and habeas petition). Mr. White is entitled to the same treatment and to the fair consideration of his meritorious claims.

ARGUMENT I

MR. WHITE IS BEING DENIED THE EFFECTIVE ASSISTANCE OF COLLATERAL COUNSEL, IN CONTRAVENTION OF SPALDING V. DUGGER.

The undersigned attorneys were assigned to Mr. White's case following this Court's denial of the Capital Collateral Representative's petition in In Re: Jerry White, Case No. 86,706 (Order of October 31, 1995). In that petition, CCR Michael J. Minerva informed the Court that the CCR office was unable to undertake Mr. White's representation due to its current caseload overload and inadequate funding. CCR's petition also argued that to force CCR to represent Mr. White during this critical time period would not only deprive Mr. White of his right to effective representation during this warrant, but also violate the CCR attorneys' ethical obligations towards Mr. White as well as their other clients.[2] After hearing oral argument, this Court denied all relief without opinion. Justices Kogan and Shaw dissented.

It has become apparent during these past several weeks that Mr. White has not been receiving the effective assistance of counsel. The undersigned attorneys had no

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[2]CCR's petition also pointed out every other condemned inmate who has had a successor death warrant signed in the past several years has been represented by counsel who knew the case and were therefore able to render effective assistance. Some of those individuals received stays of execution by this Court, see Jones v. State, 591 So. 2d 911 (Fla. 1991); Johnson v. Singletary, 647 So. 2d 106 (Fla. 1994); Scott v. State, 657 So. 2d 1129 (Fla. 1995); Spaziano v. State, 20 Fla. L. Weekly S464 (Fla. Sept. 12, 1995), and some were executed. See Bolender v. State, 20 Fla. L. Weekly S53 (Fla. 1995); Bolender v. State, 658 So. 2d 82 (Fla. 1995); State v. Salmon, 636 So. 2d 16 (Fla. 1994) (Roy Allen Stewart); Johnson (Larry) v. Singletary, 612 So. 2d 575 (Fla. 1993); Henderson v. Singletary, 617 So. 2d 313 (Fla. 1993); Kennedy v. Singletary, 602 So. 2d 1285 (Fla. 1992); Martin v. Singletary, 599 So. 2d 119 (Fla. 1992). However, unlike Mr. White, all of these individuals had counsel available from the signing of the death warrant, counsel who were intimately familiar with the facts of their cases as well as the clients themselves, and who were able to render effective representation.

familiarity whatsoever with Mr. White's case prior to October 31, 1995, and had never met or spoken with Mr. White prior to that time. Although between them the undersigned counsel represent over forty (40) death sentenced individuals in active litigation in both state and federal court, counsel had to suspend working on those cases so that they could devote their attention to Mr. White's case. Given that they had no familiarity with Mr. White's case, this task has been impossible, and counsel have a grave fear that because they lack the necessary familiarity with this case, issues are being overlooked or missed. Mr. White should not be put to death under these circumstances.

Counsel's efforts to render effective representation have also been constantly thwarted by the State since they were assigned to this case. In furtherance of their representation of Mr. White, counsel made public records requests on various state agencies to obtain whatever records were available regarding Mr. White. These agencies included agencies outside of Orange County, namely the Attorney General's Office in Leon County, and the State Attorney and Sheriff's Office in Polk County, where Mr. White had some prior cases. In order to expedite compliance with their requests, Mr. White's counsel filed a motion to compel disclosure of records and an amendment thereto in the Orange County circuit court. Rather than agree to jurisdiction in Orange County over these agencies in an effort to expedite the situation and assist Mr. White's counsel in obtaining these records, see Hoffman v. State, 613 So. 2d 405 (Fla. 1993), the Orlando prosecutor refused to allow these matters to be raised in Orange County, thereby necessitating the filing of lawsuits in various counties. Because these lawsuits involve more paperwork and additional procedural steps, they remain pending at this

time.[3] Had the State agreed to permit these matters to be raised in the motion to compel, rather than oppose Mr. White's efforts to seek a rapid resolution to the issue, they could have been addressed and resolved in a more expeditious manner. Now, additional attorney time and resources have had to be expended to litigate the Leon and Polk County lawsuits. Counsel has the obligation to seek and obtain these records, as the Court made very clear in Porter v. State, 653 So. 2d 374 (Fla. 1995), where the Court barred a claim premised on a document discovered in a county clerk file which the Court ruled had been available to collateral counsel for years had they diligently sought it. This public records litigation is necessary, but also time consuming, and is not made any easier by the State's refusal to assist in the production of the requested materials. See Hoffman, 613 So. 2d at 406 ("we encourage state attorneys to assist in helping defendants obtain relevant public records from such outside agencies so as to facilitate the speedy disposition of postconviction claims). The Orange County State Attorney's Office complained that it should not perform CCR's job for CCR, and that obtaining Chapter 119 material is CCR's job.

Not only have counsel had difficulty with agencies outside of Orange County, but the Orange County Sheriff's Office (OCSO) stonewalled Mr. White's counsel for several weeks concerning the production of crime scene photographs. These crime scene photos are critical to Mr. White's case, and are necessary for counsel's ability to familiarize themselves with this case. When it provided records responsive to the public

[3]The Leon County lawsuit against the Attorney General's Office is pending on appeal before this Court. White v. Butterworth, Case No. 86-901. The Polk County lawsuit against the Polk County Sheriff's Office is still being litigated in circuit court.

records request, the OCSO provided no photographs. A motion to compel was filed, and a subpoena duces tecum issued for production of all records, including photographs. No photos were produced pursuant to the subpoena, although OCSO detective John Harrielson stated under oath in a deposition taken November 20, 1995, that he had many negatives in the office.[4] Counsel requested reproductions of those negatives, and Harrielson stated on the record that they would be available for pick-up on Wednesday, November 22. The photographs were not provided. When a CCR investigator finally contacted Harrielson over the Thanksgiving weekend, he indicated that he would not provide any photographs absent a court order. On Monday, November 27, Mr. White filed another motion to compel production of the photographs. The court ordered the prosecutor to inquire as to the photos, and she later reported that the photos would be copied but only if Mr. White would pay over $700 for them. On the evening of November 27, Judge Evans ordered the production of the photographs by the end of business on Tuesday at no charge to Mr. White, an indigent. These pictures were finally disclosed at 1:00 PM yesterday, November 28, 1995. Counsel are in the process of having these pictures analyzed by a forensics expert. Mr. White is not receiving any semblance of effective representation.[5]

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[4]This deposition should be located in the record in the rule 3.850 appeal also pending before the Court. White v. State, No. 86-900.

[5]Additionally, Mr. White has yet to be provided with a copy of his medical file from the Florida State Prison (FSP). Now FSP is refusing to provide these materials to Mr. White unless CCR prepays for the records, a procedure which is time consuming and which there is simply no time to do at this stage. Yet FSP will not release these files, and Mr. White is without recourse. Initiating a lawsuit in Bradford County at this time will certainly not get the records to Mr. White's counsel any faster, and in fact will only require more attorney time and resources which are not available.

In its response to the petition filed in In Re: Jerry White, the State took the position that CCR should be forced to undertake Mr. White's case, yet the State of Florida has thwarted counsels' attempts to render effective representation whenever possible. Rather than assisting Mr. White in obtaining records, see Hoffman, the State has chosen to object and make Mr. White expend more time and resources litigating all over the State to obtain records which, with a phone call from the State Attorney's Office or the Attorney General's Office, would certainly be provided without question and in an expeditious manner. At the same time, the State will no doubt argue that counsel have not exercised diligence in attempting to seek these records and that anything that would exist therein would be barred. However, in response to similar arguments in the circuit court, Judge Evans specifically found: "I found [sic] Mr. McClain to one of the best attorneys I have witnesses in many years, and do not accept the arguments of the state regarding this – regarding the sincerity or his professionalism in handling this case." Mr. White will pay with his life because of the State's gamesmanship. This Court should not permit this to happen. Mr. White is not receiving the effective assistance of counsel. Habeas relief is warranted.

ARGUMENT II

THE EXECUTION OF JERRY WHITE, A MENTALLY RETARDED AND BRAIN DAMAGED INDIVIDUAL, WOULD CONSTITUTE CRUEL AND UNUSUAL PUNISHMENT UNDER THE CONSTITUTIONS OF THE STATE OF FLORIDA AND THE UNITED STATES.

Jerry White has never functioned normally: his level of intellectual functioning is such that he cannot control his behavior, plan ahead, realize the consequences of his actions, or anticipate the long term results. He is and will always be, in terms of mental functioning, a child. Mr. White's significant mental deficiencies render the application of the death penalty in his case cruel and unusual under the U.S. Constitution and cruel or unusual under the constitution of the State of Florida. Mr. White's I.Q. establishes that he is mentally retarded. He also suffers from brain damage. The "basic concept of human dignity," Gregg v. Georgia, 428 U.S. 153, 182 (1976), at the core of our system of jurisprudence in capital cases, counsels that Jerry White not be executed.

A. EVOLVING STANDARD

"This Court has not addressed whether executing the mentally retarded is cruel or unusual punishment under article I, section 17 of the Florida Constitution." Hall v. State, 614 So.2d 473, 481 (Fla. 1993) (Barkett, J., dissenting) (emphasis supplied). The United States Supreme Court has held that the issue of executing the retarded is an issue that should be revisited and revaluated. Penry v. Lynaugh, 109 S. Ct. 2934 (1989). "[E]volving standards of decency [] mark the progress of a maturing society" and may lead to a national consensus against executing the mentally retarded. Penry, 109 S. Ct. 2958. In Penry, the Supreme Court noted that "legislation . . . is an objective indicator

of contemporary values upon which" the Court can rely and only a "single state statute (Georgia's) prohibiting execution of the mentally retarded, even when added to the 14 States that have rejected capital punishment completely, does not provide sufficient evidence at present of a national consensus" against the execution of the mentally retarded. Id. at 2955. However, since the Penry decision in 1989, Arkansas, Colorado, Kentucky, Maryland, New Mexico, Tennessee, and Washington have enacted statutory provisions against executing the mentally retarded. In the United States, twenty-three states and the District of Columbia have legislatively determined that executing the mentally retarded is unacceptable to the contemporary values of their citizens. See V. Stephen Cohen, Comment, Exempting the Mentally Retarded from the Death Penalty: A Comment on Florida's Proposed Legislation, 19 Fla.St.U.L.Rev. 457, 468 (1991). Furthermore, the United States Congress has passed 21 U.S.C. 848(1), which states in pertinent part:

> A sentence of death shall not be carried out upon a person who is mentally retarded.

Most recently, President Clinton's Crime Bill was passed which also includes a provision precluding execution of the mentally retarded. (See Violent Crime Control and Law Enforcement Act of 1994; Report 103-711). The national consensus the Supreme Court used in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988), to ban the execution of people sixteen or younger, has occurred with respect to those people who are mentally retarded. Mr. White's execution would therefore offend the evolving standards of decency of a civilized society, see Trop v. Dulles, 356 U.S. 86 (1958), would serve no legitimate penological goal, see Gregg v. Georgia, 428 U.S. 153, 183 (1976), and would

therefore violate the Eighth and Fourteenth Amendments.

In her dissent in Hall v. State, 614 So.2d 473 (Fla. 1993), Justice Barkett noted that:

> [s]ociety has developed a greater understanding of mental retardation. It is generally recognized now that mental retardation is a permanent learning disability that manifests itself in several predictable ways, including poor communication skills, short memory, short attention span, and immature or incomplete concepts of blameworthiness and causation. Davis, Fla.Bar.J. at 13; see also James W. Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 Geo.Wash.L.Rev. 414, 417 (1985); John Blume & David Bruck, Sentencing the Mentally Retarded to Death: An Eighth Amendment Analysis, 41 Ark.L.Rev. 725, 732-34 (1988). A person who is mentally retarded is not just "slower" than the average person. Mental retardation is "a severe and permanent mental impairment that affects almost every aspect of a mentally retarded person's life." Blume & Bruck, 41 Ark.L.Rev. at 734.

Hall v. State, 614 So.2d 473, 481 (Fla. 1993) (Barkett, J., dissenting). Justice Barkett further noted that beyond a national consensus the people of the states of Florida and Georgia have evolved:

> [T]he Georgia Supreme Court has found that execution of the mentally retarded violates its state constitutional provision against cruel and unusual punishment. Fleming v. Zant, 259 Ga. 687, 386 S.E.2d 339 (1989). The Georgia court wrote:
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> > The "standard of decency" that is relevant to the interpretation of the prohibition against cruel and unusual punishment found in the Georgia Constitution is the standard of the people of Georgia, not the national standard. Federal constitutional standards represent the minimum, not the maximum, protection that this state must afford its citizens. Thus, although the rest of the nation might not agree, under the Georgia Constitution, the execution of the mentally retarded constitutes cruel and unusual punishment. Id. 386 S.E.2d at 342 (citation omitted).

> Floridians' attitudes toward the mentally retarded have evolved significantly in recent decades. Those mentally retarded people committed to state care no longer are warehoused in "training centers," and a variety of procedural safeguards have been enacted to protect the rights of those committed to state facilities. See § 393.11, Fla.Stat. (1991) (regulating involuntary admission of the mentally retarded to state residential services); see also David A. Davis, Executing the Mentally Retarded, Fla.Bar.J., February 1991, at 13, 15 (discussing generally how statutes have changed to reflect a more enlightened approach to caring for the mentally retarded). . . .

Id. Justice Barkett additionally wrote that

> This Court has not addressed whether executing the mentally retarded is cruel or unusual punishment under article I, section 17 of the Florida Constitution. I believe it is appropriate to analyze whether imposition of capital punishment in such circumstances is either "cruel" or "unusual." First, because a mentally retarded person such as Freddie Lee Hall [or Jerry White] has a lessened ability to determine right from wrong and to appreciate the consequences of his behavior, imposition of the death penalty is excessive in relation to the crime committed. Coker v. Georgia, 433 U.S. 584, 592, 97 S.Ct. 2861, 2866, 53 L.Ed.2d 982 (1977). As Justice Brennan noted in Furman v. Georgia, 408 U.S. 238, 257, 92 S.Ct. 2726, 2736, 33 L.Ed.2d 346 (1972) (Brennan, J., concurring), a punishment is excessive when it is unnecessary. An excessive punishment "makes no measurable contribution to acceptable goals of punishment and hence is nothing more than the purposeless and needless imposition of pain and suffering." Coker, 433 U.S. at 592, 97 S.Ct. at 2866 (discussing Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976)). I believe imposing the death penalty on mentally retarded defendants is excessive, serves no purpose except to dispose of those some might deem to be "unacceptable members" of society, and therefore, is "cruel."
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> Second, executing a mentally retarded defendant such as Hall [or White] is "unusual" because it is disproportionate. Because mentally retarded individuals are not as culpable as other criminal defendants, I would find that the death penalty

> is always disproportionate when the defendant is proven to be retarded. However, even without a per se rule, Hall's mental retardation and his horrible childhood represent substantial mitigation, which makes the death penalty disproportionate despite the existence of several aggravating factors. See, e.g., Nibert v. State, 574 So.2d 1059, 1063 (Fla. 1990); Smalley v. State, 546 So.2d 720 (Fla. 1989); Blakely v. State, 561 So.2d 560 (Fla. 1990). This case is illustrative of far too many cases we see at this Court; horrible crimes are repeatedly committed by those who endure sickening abuse and deprivation as children. Many, like Freddie Lee Hall, are also mentally retarded and suffer particularly severe abuse because their parents do not understand the nature of retardation. The connection between an individual's childhood and his or her later ability to function as a productive member of society is obvious to those of us who routinely review criminal cases, and while a tragic childhood and mental retardation do not "excuse" later criminal behavior, they do reflect on an individual's culpability. . .
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> In evaluating both the "cruel" and "unusual" punishment prohibitions of article I, section 17 and the evolving standards of decency in Florida regarding the mentally retarded, I find that executing the mentally retarded violates the state constitution. Consequently, I would remand Hall's case for imposition of a sentence of life imprisonment.

Id. (footnotes omitted) (emphasis supplied).

B. MR. WHITE IS A RETARDED AND BRAIN DAMAGED INDIVIDUAL

Dr. Barry Crown, a neuropsychologist and certified addictions specialist, has examined Mr White, reviewed trial testimony, depositions, family affidavits, and other background material regarding Mr. White. Dr. Crown has come to the following conclusions regarding Mr. White's mental condition:

1. Cognitive functioning represents a traumatically impaired profile impaired with functioning within the retarded range (Shipley Abstraction Age = 9 years, 9 months).

2. Neuropsychological impairment (brain damage) with likely multiple causative factors (neurodevelopmental, closed head injury, residual from substance abuse).

3. The pattern of performance is indicative of bilateral deficits, with prefrontal, fronto-temporal, and subcortical involvement.

4. There is a significant auditory attention deficit disorder which likely forms the basis for much of his behavioral dyscontrol.

5. There are significant deficits in language-based critical thinking.

6. Alcohol and/or substance use would aggravate and exacerbate his neurocognitive and emotional status. Reasoning, judgment, and inhibitory control would be diminished.

An individual like Jerry White who suffers from brain damaged and mental retardation is the very opposite of the kind of offender whose "highly culpable mental state" has been held to warrant imposition of the death penalty. Tison. The background of the defendant (mental retardation, brain damage) reflects "factors which may call for a less severe penalty," Lockett v. Ohio, 438 U.S. 586, 605 (1978).

Mr. White's mental retardation, brain damage, and mental age warrant consideration. Mr. White, like other mentally retarded individuals, has a limited ability to understand the external world, a limited repertoire of responsive and coping behaviors, and an inability to mediate and restrain aggression. Mr. White cannot fully or accurately understand the complex world in which he lives. As a result he, like other retarded individuals, is continually subject to frustrations and confusions that the non-retarded never face. His limitations handicap him in trying to cope. See Handbook of

Mental Illness in the Mentally Retarded, at 7 (F. Menolascino & J. Stark, eds. 1984). The mentally retarded lack the impulse controls of a non-retarded person, and are particularly prone to impulsive, unthinking action. Moreover, "the mentally retarded person might accompany perpetrators or actually commit a crime on impulse or without weighing the consequences of the act." Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 428-431 (1985). As a consequence, the mentally retarded person generally has great difficulty suppressing emotions or feelings of frustration. Mercer & Snell, Learning Theory Research in Mental Retardation, at 94-141 (1977). A mentally retarded person may therefore express his frustration as an aggressive reaction. The mentally retarded also tend to have "incomplete or immature concepts of blameworthiness and causation." Ellis and Luckasson, at 429 & n.78.

The Eighth Amendment prohibits "all punishments which by their excessive length or severity are greatly disproportionate to the offenses charged." Weems v. United States, 217 U.S. 349, 371 (1910) (citation omitted). In furtherance of this principle, the Supreme Court's Eighth Amendment decisions have made clear that "a criminal sentence must relate directly to the personal culpability of the criminal offender." Tison v. Arizona, 107 U.S. 1676, 1685 (1987). These decisions have also considered "a defendant's intention – and therefore his moral guilt – to be critical to the degree of criminal culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982); accord Tison, 107 S. Ct. at 1687("Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious is the offense, and therefore, the more severely it ought to be punished"). Because capital punishment is our society's

ultimate sanction, "unique in its severity and irrevocability," Gregg, 428 U.S. at 187, it may be imposed only when a defendant is found to have "a highly culpable mental state." Tison, 107 S. Ct. at 1684; see also id. at 1687("A critical facet of the individualized determination of culpability required in a capital case is the mental state with which the defendant commits the crime"); Godfrey v. Georgia, 446 U.S. 420, 443 (capital punishment is inappropriate unless the crime "reflected a consciousness materially more depraved than that of any person guilty of murder"). The very purpose of the constitutionally required enumeration of aggravating circumstances in capital sentencing statutes is to "genuinely narrow the class of persons eligible for the death penalty" to those most culpable. Zant v. Stephens, 462 U.S. 862, 877 (1983).

These Eighth Amendment proportionality principles forbid the imposition of capital punishment where a defendant lacks the requisite "highly culpable mental state." For this reason, the Constitution requires an individualized inquiry in every capital case into the background and character of the defendant and the circumstances of the offense to determine whether there exist "factors which may call for a less severe penalty." Lockett v. Ohio, 438 U.S. 586, 605 (1978). As Justice O'Connor explained:

> [E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse.

California v. Brown, 107 S. Ct. 837, 841 (1987)(O'Connor, J., concurring)(emphasis added).

Generally, the proportionality required by the Eighth Amendment has been

understood to require individualized, case-by-case assessment of the factors that may diminish culpability. See Eddings; Lockett. The Supreme Court has, however, made several categorical Eighth Amendment judgments about situations in which culpability is automatically insufficient to justify imposition of the death penalty. Some of these judgments have turned on a finding that a category of criminal act, though serious, is insufficiently blameworthy to justify a death sentence. See, e.g., Coker v. Georgia, 433 U.S. 584 (1977)(rape); Eberheart v. Georgia, 433 U.S. 917 (1977)(armed robbery). In other instances the judgment has turned on the level of the defendant's mental state as it relates to the crime: Tison and Enmund, for example, make clear that a defendant may not be sentenced to death unless he has at least been shown to have "a reckless disregard for human life implicit in knowingly engaging in criminal activities known to carry a grave risk of death." Tison, 107 S. Ct. at 1688. In other cases, the judgment has turned on the defendant's mental capacity. See Ford v. Wainwright, 106 S. Ct. 2595 (1987)(execution of the insane violates the Eighth Amendment).

In Thompson v. Oklahoma, 108 S. Ct. 2687 (1988), the Supreme Court made a similar categorical judgment with respect to the execution of juveniles, and held that the Eighth Amendment prohibits the execution of defendants who were under the age of sixteen at the time of the offense:

> It is generally agreed "that punishment should be directly related to the personal culpability of the criminal defendant." California v. Brown, 479 U.S. 538, ___, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O'Connor, J., concurring). There is also broad agreement on the proposition that adolescents as a class are less mature and responsible than adults. We stressed this difference in explaining the importance of treating the defendant's youth as a mitigating

factor in capital cases:

"But youth is more than a chronological fact. It is a time and condition of life when a person may be most susceptible to influence and to psychological damage. Our history is replete with laws and judicial recognition that minors, especially in their earlier years, generally are less mature and responsible than adults. Particularly 'during the formative years of childhood and adolescence, minors often lack the experience, perspective, and judgment' expected of adults. Bellotti v. Baird, 443 U.S. 622, 635 [99 S.Ct. 3035, 3043, 61 L.Ed.2d 797] (1979)." Eddings v. Oklahoma, 455 U.S., at 115-116, 102 S.Ct., at 877 (footnotes omitted).

To add further emphasis to the special mitigating force of youth, Justice Powell quoted the following passage from the 1978 Report of the Twentieth Century Fund Task Force on Sentencing Policy Toward Young Offenders:

"Adolescents, particularly in the early and middle teen years, are more vulnerable, more impulsive, and less self-disciplined than adults. Crimes committed by youths may be just as harmful to victims as those committed by older persons, but they deserve less punishment because adolescents may have less capacity to control their conduct and to think in long-range terms than adults. Moreover, youth crime as such is not exclusively the offender's fault; offenses by the young also represent a failure of family, school, and the social system, which share responsibility for the development of America's youth." Id., at 115.

Thus, the Court has already endorsed the proposition that less culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult. The basis for this conclusion is too obvious to require extended explanation. Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than is an adult. The reasons why juveniles are not trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.

Thompson, 108 S. Ct. at 2698-99(plurality opinion)(footnotes omitted).

In this case, it is not just mental retardation, but also mental age that warrants Eighth Amendment relief. The kinds of characteristics attributed to youthful offenders in Thompson are precisely those characteristics attributable to Mr. White. His brain was, and is, quite simply, malfunctioning, because of his mental retardation and brain damage. This dysfunction was further compounded by other deficits (e.g., substance abuse, emotional deficiencies, and brain damage). His level of functioning is at best that of a 9 year and 9 month child. The same Eighth Amendment concerns implicated by the execution of juveniles apply to the execution of mentally retarded offenders like Mr. White: no defendant who is mentally retarded is "capable of acting with the degree of culpability that can justify the ultimate penalty." Thompson, 108 S. Ct. at 2692.

Under the decision in Allen v. State, 636 So. 2d 494 (Fla. 1994), Mr. White's execution is prohibited. He has a mental age of nine (9). The cruel and unusual standards of the Eighth Amendment of the U.S. Constitution have been met. However, in the event that they have not been met, certainly the cruel or unusual standards of the constitution of the State of Florida has been met. The state constitution clearly states that those punishments that are cruel or unusual are prohibited. Art. I, § 17, Fla. Const. The execution of Jerry White, a retarded and brain damaged individual, would result in just such a punishment.

In a different context, the Supreme Court recognized as much in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). "[I]t is undeniable," the Court explained, "that those who are mentally retarded have reduced ability to cope with and

function in the everyday world." Id. at 442. Precisely because of their "reduced ability to cope with and function in the everyday world," the mentally retarded are uniquely unfit for the imposition of capital punishment. Given the increased susceptibility to confusion and frustration, the propensity to act out the frustration, and the diminished ability to control such impulsive behavior on the part of the mentally retarded, their culpability simply cannot be judged by the same standards applicable to the non-retarded. These disabilities preclude the mentally retarded from forming the "highly culpable mental state" that this Court's consistent precedents require as a predicate for imposing a death penalty. Many jurisdictions have also recognized as much. See, e.g., State v. Hall, 176 Neb. 295, 125 N.W.2nd 918, 926-927 (1964); State v. Behler, 65 Idaho 464, 146 P.2d 338, 343 (1964); Commonwealth v. Green, 396 Pa. 137, 151 A.2d 241 (1959).

In light of all of the above, habeas relief is proper. This Court should vacate Mr. White's unconstitutional sentence of death.

ARGUMENT III

MR. WHITE IS ENTITLED TO THE RECORDS MAINTAINED BY THE FLORIDA PAROLE COMMISSION AND THE FLORIDA BOARD OF EXECUTIVE CLEMENCY.

On November 1, 1995, requests were made to The Florida Parole Commission and the Florida Board of Executive Clemency on behalf of Mr. White, asking for the disclosure of any and all records regarding Mr. White pursuant to Chapter 119, Florida Statutes, and Brady v. Maryland, 373 U.S. 83 (1963). On November 7, 1995, the requests was denied by the Florida Parol Commission; on November 20, 1995, the request was denied by the Florida Board of Executive Clemency.

Mr. White is entitled to these records under Brady v. Maryland. In Brady, the United States Supreme Court specifically held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Brady, 83 S.Ct. at 1196-1197. Brady's meaning on the surface is obvious – the prosecution has an obligation to disclose favorable evidence to the defendant if requested. The true significance of Brady, however, is found outside the literal statement of the prosecutor's obligation. As indicated by this Court, the requirement that the government disclose exculpatory evidence is grounded in notions of due process:

> The principle of Mooney v. Holohan is not punishment of society for misdeeds of a prosecutor but avoidance of an unfair trial to the accused. Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly. An inscription on the walls of the

> Department of Justice states the proposition candidly for the federal domain: 'The United States wins its point whenever justice is done its citizens in the courts.'

Brady, 83 S. Ct. at 1197 (emphasis added).

In United States v. Bagley, 105 S. Ct. 3375 (1985), this Court emphasized that "[t]he Brady rule is based on the requirement of due process. Its purpose is not to displace the adversary system as the primary means by which truth is uncovered, but to ensure that a miscarriage of justice does not occur." Bagley, 105 S. Ct. at 3379-3380 (footnote omitted). If the proceeding is unfair, the accused has not received due process. The accused does not receive a fair judicial proceeding, nor due process, if material exculpatory evidence is withheld, regardless of where the evidence is located.[6]

Disclosure obligations thus extend beyond the actual prosector. In Pennsylvania v. Ritchie, 107 S. Ct. 989 (1987), the Supreme Court framed the issue as follows:

> The question presented in this case is whether and to what extent a State's interest in the confidentiality of its investigative files concerning child abuse must yield to a criminal defendant's Sixth and Fourteenth Amendment right to discover favorable evidence.

Id. at 993-994. At issue in Ritchie were the files of the Children and Youth Services [hereinafter CYS], a protective service agency established to investigate cases of suspected child mistreatment and neglect. CYS, an agency created by the state, was an unrelated third party to the criminal action, as are the Florida Parole Commission and Board of Executive Clemency in the case at bar. CYS did not have any prosecutorial

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[6]See U.S. v. Spagnoulo, 960 F.2d 990, 994 (11th Cir. 1992) ("this court has declined to draw a distinction between different agencies under the same government"); Martinez v. Wainwright, 621 F.2d 184, 186-88 (5th Cir. 1980) (different "arms" of the government are not "severable entities").

function. In fact, the Supreme Court specifically noted that "[t]here is no suggestion that the Commonwealth's prosecutor was given access to the file at any point in the proceedings, or that he was aware of its contents." Ritchie, 107 S. Ct. at 994 n.4.

In Ritchie, the Supreme Court was faced with CYS's failure to comply with the defendant's subpoena requesting exculpatory information contained in its files, because it claimed its records were privileged and confidential under a state statute. After recognizing that it traditionally evaluated claims such as those raised by Ritchie under the broader protections of the Due Process Clause of the Fourteenth Amendment," Ritchie, 107 S. Ct. at 1001, the Court acknowledged that "[i]t is well-settled that the government has the obligation to turn over evidence in its possession that is both favorable to the accused and material to guilt and punishment." Id. at 1001 (emphasis added). The Court went on to note that "[m]oreover, the duty to disclose is ongoing; information that may be deemed immaterial upon original examination may become important as the proceedings progress, and the court would be obligated to release information material to the fairness of the trial." Id. at 1003 (emphasis added).

Under Ritchie, the Brady obligation is on the government, not just the prosecutor:

> At this stage, of course, it is impossible to say whether any information in the CYS records may be relevant to Ritchie's claim of innocence, because neither the prosecution nor defense counsel has seen the information, and the trial judge acknowledged that he had not reviewed the full file. The Commonwealth, however, argues that no materiality inquiry is required, because a statute renders the contents of the file privileged. Requiring disclosure here, it is argued, would override the Commonwealth's compelling interest in confidentiality on the mere speculation that the file 'might' have been useful to the defense.
>
> Although we recognize that the public interest in

> protecting this type of sensitive information is strong, we do not agree that this interest necessarily prevents disclosure in all circumstances.

Id. at 1001 (emphasis added). The Court concluded that "Ritchie is entitled to have the CYS file reviewed by the trial court to determine whether it contains information that probably would have changed the outcome of his trial." Id. at 1002.

The Supreme Court's recent decision in Kyles v. Whitley, 115 S.Ct. 1555 (1995), affirms that the strictures of Brady apply to the government, not just the prosecuting attorney:

> While the definition of Bagley materiality in terms of the cumulative effect of suppression must accordingly be seen as leaving the government with a degree of discretion, it must also be understood as imposing a corresponding burden. On the one side, showing the prosecution knew of an item of favorable evidence unknown to the defense does not amount to a Brady violation, without more. But the prosecution, which alone can know what is undisclosed, must be assigned the consequent responsibility to gauge the net effect of all such evidence and make disclosure when the point of "reasonable probability" is reached. This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to others acting on the government's behalf, including the police.

Id., 57 Cr.L. at 2008. Emphasis supplied.

Mr. White is entitled to due process beyond the parameters of their trial. The United States District Court for the Eastern District of Louisiana discussed this precept in Monroe v. Butler, 690 F.Supp. 521 (E.D.La. 1988):

> Although Brady dealt with trial conduct, its theoretical focus deals more broadly with the fairness of the proceeding in which the condemned conduct occurred. In Brady, that conduct occurred at trial. The State has never disputed the fact that the nondisclosed evidence is favorable to Monroe.

> Nor does the State contend that the evidence is not exculpatory. And this Court found that the evidence was material; it had all the conceptual underpinnings of Brady-type facts.
>
> Nonetheless, the State argued that Brady did not apply because the nondisclosure did not occur until after the trial. It is instructive to note that nothing in Brady or its progeny limits its doctrine of fact-characterization to the pre-conviction context. Brady doctrinally stands for the notion that it is fundamentally unfair for the prosecution to withhold material, exculpatory evidence from the defendant and that the proceeding in which the unfairness occurred should be overturned so that the merit of the Brady facts can be considered. Clearly, such nondisclosure is as unfair where it prevents a defendant from taking full advantage of post-conviction relief as it is when it results in the forfeiture of the defendant's right to a fair trial. The prosecutor's duty to disclose material, exculpatory evidence continues through the period allowed by the State for post-conviction relief. Any other conclusion would, in the words of the Brady Court, "cast [] the prosecutor in the role of an architect of a proceeding that does not comport with the standards of justice...." 373 U.S. at 88, 83 S. Ct. at 1197.

Id., at 525. Footnote omitted.

As Justice Marshall observed regarding the denial of Petition for Writ of Certiorari in Monroe v. Blackburn, 476 U.S. 1145, 106 S.Ct. 2261, 90 L.Ed.2d 706 (1986), any other reading of the rule would be contrary to the basic tenets of Brady:

> In Brady v. Maryland, 373 U.S. 83, 83 S.Ct. 1194, 10 L.Ed.2d 215 (1963), this Court held that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." Id., 373 U.S., at 87, 83 S.Ct., at 1196-1197. In United States v. Agurs, supra, we recognized that
>
> > "there are situations in which evidence is obviously of such substantial value to the defense that elementary fairness requires it to

> be disclosed even without a specific request. For though the attorney for the sovereign must prosecute the accused with earnestness and vigor, he must always to faithful to his client's overriding interest that 'justice shall be done.'" Id., 427 U.S., at 110-111, 96 S.Ct., at 2401 (footnote omitted).

The message of Brady and its progeny is that a trial is not a mere "sporting event"; it is a quest for truth in which the prosecutor, by virtue of his office, must seek truth even as he seeks victory. See United States v. Bagley, 473 U.S. 667, 675, 105 S.Ct. 3375, 3380, 87 L.Ed.2d 481 (1985) (Brady rule to "ensure that a miscarriage of justice does not occur").

The quest for truth may not terminate with a defendant's conviction. In Louisiana, a convicted defendant must receive a new trial whenever

> "[n]ew and material evidence that, notwithstanding the exercise of reasonable diligence by the defendant, was not discovered before or during the trial, is available, and if the evidence had been introduced at the trial it would probably have changed the verdict or judgment of guilty." La.Code Crim.Proc.Ann., Art. 851(3) (West 1984).

When the sovereign has decided that justice will be best served by qualifying the finality of a conviction so that a convicted defendant may yet prove his innocence, its attorney is not free to choose otherwise. And until factfinding proceedings, or the possibility of them, is terminated, the State remains bound by the rules of simple fairness that Brady held to be of constitutional dimension. It would hardly make sense to hold the Sate to a special duty to disclose exculpatory evidence in any adversarial proceeding and then permit the State to avoid this obligation by suppressing the very evidence that would enable a defendant to trigger such proceedings.

In this case there can be no doubt that petitioner's due process rights were violated by the State's failure to disclose to him the information that Detective Gallardo related to the

> New Orleans police. That the information lay undisturbed in the files of the police and not those of the prosecutor should make no difference. The police files that so readily provided the State with the incriminating material to convict a defendant cannot be turned into a dead-letter repository where evidence of innocence is concerned. See Moore v. Illinois, 408 U.S. 786, 810, 92 S.Ct. 2562, 2575, 33 L.Ed.2d 706 (1972)(MARSHALL, J., concurring in part and dissenting in part); Smith v. Florida, 410 F.2d 1349, 1351 (CA5 1959). If by now police are not fully aware of their constitutional obligation to disclose exculpatory evidence even in the absence of a specific request by the prosecutor or defense counsel, this Court should seize this case as a chance to educate them.

Id., 476 U.S. at 1148-1149; 106 S.Ct. at 2263-2264, Marshall, J., dissenting. Footnote omitted.

The State of Florida's obligation to place all favorable evidence in the crucible of an adversarial testing does not disappear when an individual's conviction and sentence of death has been affirmed on direct appeal. The post-conviction process affords Mr. White his only opportunity to have extra-record claims considered by the Florida state courts. That opportunity is neither full nor fair if the State can conceal favorable evidence from an independent judiciary. Insofar as the State has maintained that its state post-conviction remedies are entitled to deference, it cannot be heard to say that it can skew those remedies by concealing relevant exculpatory evidence. Habeas relief is warranted.

ARGUMENT IV

MR. WHITE WAS DENIED HIS RIGHT TO EQUAL PROTECTION UNDER THE LAW AND TO DUE PROCESS OF LAW BECAUSE HE WAS WITHOUT COUNSEL TO PRESENT A CLEMENCY APPLICATION TO THE GOVERNOR OF FLORIDA ADDRESSING THE MATTERS DISCOVERED IN POSTCONVICTION WHICH WARRANT A COMMUTATION OF HIS DEATH SENTENCE, IN VIOLATION OF THE CONSTITUTIONS OF THE STATE OF FLORIDA AND THE UNITED STATES.

The Preamble to the Constitution of the State of Florida reads as such:

> We, the people of the State of Florida . . . guarantee equal civil and political rights to all. . .

Preamble, Fla. Const. This revered concept is secured as a right in that "All natural persons are equal before the law . . ." Art. I, § 2, Fla. Const. Constitutional equality applies with equal vigor to privileges, such as clemency, as well as rights. ABC Liquors, Inc. v. City of Ocala, 366 So. 2d 146 (1st DCA 1979), cert. denied 376 So. 2d 69. Similarly situated parties are entitled to equal treatment before the law. Caldwell v. Mann, 26 So. 2d 788 (Fla. 1946). Fundamental fairness demands equal treatment for those similarly situated persons. Equality as to person, place, and practice are essential elements in the administration of justice. North v. State, 65 So. 2d 77 (Fla. 1953), cert. granted 74 S.Ct. 108, 346 U.S. 864, aff'd 74 S.Ct. 376, 346 U.S. 932, rehearing denied 74 S.Ct. 513, 347 U.S. All men are equal before the law in the defense of their lives. Sheperd v. State, 46 So. 2d 880 (Fla. 1950), rev'd. on other grounds 71 S.Ct. 549, 341 U.S. 50, mandate conformed to 52 So. 2d 903.

Unlike other condemned inmates who had legal representation in successive clemency proceedings, Mr. White was arbitrarily denied the right to present a case to the

Governor before the signing of the death warrant in violation of his rights. Adams v. American Agr. Chemical Co., 78 Fla. 362, 82 So. 850 (1919). See Also Goodrich v. Thompson, 118 So. 60 (1928). Persons found guilty of murder are entitled to the all of the rights and privileges flowing from the law to everyone else under a like state of facts. Mitchell v. State, 25 So.2d 73 (Fla. 1946).

Jerry White's first death warrant was signed in 1985. Prior to the signing of the death warrant, he was appointed counsel to present a case to the Governor of Florida and the Clemency Board, detailing the reasons why clemency would be appropriate. In November of 1995, the Governor of Florida signed another death warrant on Jerry White. However, because Mr. White was without counsel following the denial of his petition for a writ of certiorari by the United States Supreme Court, see White v. Singletary, 115 S. Ct. 2008, reh'g. denied, 115 S. Ct. 2636 (1995), he was precluded from presenting a case in clemency to the Governor of Florida following the exhaustion of postconviction remedies in state and federal courts.

Mr. White may be executed once this Court's temporary stay lifts at 12:00 PM on Monday, December 4, 1995. The undersigned counsel, who have represented Mr. White in his postconviction matters only since October 31, 1995, filed an emergency application for clemency on November 27, 1995, before Governor Chiles. Counsel have supplemented the petition with, inter alia, a letter written by Mr. White's trial attorney, Emmett Moran, who stated that he "had no right" representing Mr. White given his ill health at the time of trial. Mr. White also provided the Governor with a sworn affidavit from Francis Wesley Blankner, the trial prosecutor, who acknowledged that Mr. White's

penalty phase was inadequate. This information, assimilated at the last minute based primarily upon the exculpatory information which has been recently discovered and the mitigation which was discovered in postconviction, should have been addressed prior to the signing of a death warrant so that a timely and considered review of the matters warranting clemency in Jerry White's case could be performed.

Mr. White, unlike other condemned individuals, should have had the opportunity to present this petition *before* this warrant was signed. During the past two years, similarly-situated death-sentenced individuals have been allowed to petition for clemency and the Governor has considered those petitions before signing a warrant. These individuals include Joseph Spaziano, Daniel Doyle, John Bush, Ian Lightbourne, Bobby Lusk, Larry Joe Johnson, Dan Routley, Rickey Roberts, Marvin Johnson, Paul Scott, Raleigh Porter, Phillip Atkins, and Bernard Bolender. Not allowing Mr. White to present such a petition violates equal protection.

It is especially important that condemned individuals like Jerry White be given the opportunity to present to the Governor a clemency petition after the termination of the postconviction proceedings. It is only during the postconviction process that the facts which were not discovered at the time of trial surface, and therefore were not presented to the jury. This is why the important clemency power is vested in the Governor – to address matters not considered by the sentencer, and to address issues which, for technical reasons, cannot be remedied by the courts. Jerry White was deprived of this opportunity.

The necessity of meaningful review of capital cases by the Governor and the

Clemency Board in order to determine the propriety of putting an individual to death has been repeatedly addressed by the courts of this country:

> Executive clemency exists to afford relief from undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not always wise or certainly considerate of circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential in popular governments, as well as in monarchies, to vest in some other authority than the courts the power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

Ex Parte Grossman, 267 U.S. 87, 120-121 (1925). The United States Supreme Court has always recognized the particular value of executive clemency to our system of capital punishment. For example, in Gregg v. Georgia, 428 U.S. 153, 199 & 200 n.50 (1976), the Supreme Court noted, "[n]othing in any of our cases suggests that the decision to grant an individual mercy violates the Constitution," explaining that a system without executive clemency "would be totally alien to our notion of criminal justice." Additionally, the Gregg Court declined to hold that the discretion inherent in clemency power violated the standards set forth in Furman v. Georgia, 408 U.S. 238 (1972).

Because of the complexities of the legal system and the difficulties inherent in attempting to seek redress of constitutional claims in courts of law due to procedural hurdles, the United States Supreme Court, as recently as two years ago, reaffirmed the importance of clemency to remedy injustices which are technically barred from presentation in courts of law:

> Executive clemency has provided the "fail safe" in our criminal justice system. K.Moore, Pardons: Justice, Mercy, and the Public Interest 131 (1989). It is an unalterable fact

> that our judicial system, like the human beings who administer it, is fallible.

Herrera v. Collins, 113 S.Ct. 853, 868 (1993). "Clemency is deeply rooted in our Anglo-American tradition of law, and is the historic remedy for preventing miscarriages of justice where judicial process has been exhausted." Id. at 866 (footnotes omitted).

Executive clemency is a safety net upon which not only society has relied to cure injustices -- the legal system has traditionally relied upon clemency to provide a remedy for miscarriages of justice which, due to legal technicalities, cannot be addressed by the courts. Public confidence in the efficient and reasoned imposition of the most serious penalty is undermined when this historical mechanism for obtaining relief is cast aside. "The objective of commutation is to promote the public welfare. As previously explained, the Florida Constitution grants the Executive power to commute a prisoner's death sentence based on mitigation circumstances, without judicial review. The power of commutation is intended to promote the cause of justice by ensuring that no one falls through the cracks in the State's sentencing procedure." Comment, *Commutation of the Death Sentence: Florida Steps Back From Justice And Mercy*, 20 Fla. St. L. Rev. 253, 266 (1992) (footnotes omitted).

This Court has recognized that the "clemency proceeding is just part of the overall death penalty procedural scheme in this state." Remeta v. State, 559 So. 2d 1132, 1135 (Fla. 1990). The Court further recognized that "this state has established a right to counsel in clemency proceedings in death penalty proceedings, and this statutory right necessarily carries with it the right to have effective assistance of counsel." Id. Jerry White has been deprived of these fundamental guarantees. A clemency hearing is only

meaningful when the legal avenues have been exhausted, not, as happened in 1985 in Mr. White's case, when the direct appeal is decided. For clemency to have any meaning, and for the right to clemency counsel to have any meaning, Jerry White should have had counsel appointed following the exhaustion of his postconviction proceedings, and that counsel provided with the time and resources to present an adequate case for mercy on Jerry White's behalf. The failure to do so deprived Mr. White of equal protection, due process, and his statutory right under Florida law to a clemency proceeding at which he is entitled to be represented by effective counsel. The Eighth and Fourteenth Amendments have been violated. The equal protection clause of the Fourteenth Amendment of the U.S. Constitution applies to the exercise of all powers of the state which can affect the individual. State ex rel. Vars v. Knott, 184 So. 752 (1939), vacated on other grounds 60 S.Ct. 72, 308 U.S. 507, appeal dismissed 60 S.Ct. 72, 308 U.S. 506.

Habeas relief is warranted at this time.

CONCLUSION

For each of the foregoing reasons, Petitioner Jerry White asks this Court to stay his execution, grant habeas relief and/or reopen his direct appeal and/or reopen his prior 3.850 appeal, vacate his unconstitutional death sentence, and grant all other relief which is just and equitable.

I HEREBY CERTIFY that a true copy of the foregoing Petition has been furnished by facsimile transmission and/or hand deliver to all counsel of record on **November 30, 1995.**

MARTIN J. MCCLAIN
Florida Bar No. 0754773
Chief Assistant CCR

TODD G. SCHER
Florida Bar No. 0899641
Assistant CCR

Capital Collateral Representative
Post Office Drawer 5498
Tallahassee, Florida 32314-5498
(904) 487-4376
Counsel for Defendant

BY: _____
Counsel for Jerry White

Copies furnished to:

Richard Martell
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050