

IN THE SUPREME COURT OF FLORIDA

CASE NO. 89,199

JOHN D. FREEMAN

Appellant

v.

STATE OF FLORIDA

Appellee

ON APPEAL FROM THE CIRCUIT COURT
OF THE FOURTH JUDICIAL CIRCUIT FOR DUVAL COUNTY,
STATE OF FLORIDA

APPELLANT'S INITIAL BRIEF

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's summary denial of Mr. Freeman's motion for postconviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The type size and style in this brief is 12 pt. New Courier.

The following symbols will be used to designate references to the record:

"R1." -- record on direct appeal on Case No. 87-3527 will be referred to as "Freeman I";

"R2." -- record on direct appeal on Case No. 86-11599 will be referred to as "Freeman II";

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

REQUEST FOR ORAL ARGUMENT

Mr. Freeman has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow oral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue. Mr. Freeman, through counsel, accordingly urges that the Court permit oral argument.

TABLE OF CONTENTS

PRELIMINARY STATEMENT i

REQUEST FOR ORAL ARGUMENT i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vi

STATEMENT OF THE CASE AND FACTS 1

SUMMARY OF ARGUMENT 2

ARGUMENT I
THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S WHEN THE RECORD COULD NOT CONCLUSIVELY REBUT THAT CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT PHASE OF MR. FREEMAN'S SECOND TRIAL. 5

ARGUMENT II
THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL. 20

ARGUMENT III
MR. FREEMAN WAS DENIED HIS RIGHT TO A RELIABLE CAPITAL SENTENCE WHERE HIS SENTENCING JURY DID NOT RECEIVE INSTRUCTIONS GUIDING AND CHANNELING ITS SENTENCING DISCRETION IN VIOLATION OF MAYNARD V. CARTWRIGHT, STRINGER V. BLACK, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. 52

ARGUMENT IV
THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM THAT HE WAS SENTENCED TO DEATH IN RELIANCE UPON AUTOMATIC AGGRAVATING FACTORS WHICH FAILED TO GUIDE AND CHANNEL THE SENTENCERS' DISCRETION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS 54

ARGUMENT V
THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIMS THAT THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS RENDERED HIS DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. 67

ARGUMENT VI
THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM THAT HIS SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. 67

ARGUMENT VII

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM THAT HIS SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. FREEMAN TO PROVE THAT DEATH WAS INAPPROPRIATE. 70

ARGUMENT VIII

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS FIRST CAPITAL TRIAL, AND THE STATE FAILED TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE, ALL IN VIOLATION OF MR. FREEMAN'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE U.S.CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS. 72

ARGUMENT IX

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM THAT THE STATE'S DECISION TO SEEK THE DEATH PENALTY IN HIS CASES WAS BASED UPON RACIAL CONSIDERATIONS, AND MR. FREEMAN'S DEATH SENTENCE VIOLATES THE EQUAL PROTECTION CLAUSE AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS. 79

ARGUMENT X

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM OF CUMULATIVE ERROR. 81

ARGUMENT XI

THE LOWER COURT IN SUMMARILY DENYING MR. FREEMAN'S POSTCONVICTION MOTION FAILED TO ATTACHED THE PORTIONS OF THE RECORD WHICH SUPPORTS ITS ORDER CONTRARY TO FLA. R. CRIM. P. 3.850. 83

CONCLUSION AND RELIEF SOUGHT 84

TABLE OF AUTHORITIES

CASES

Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991) . . . 66

Barkauskas v. Lane, 878 F.2d 1031 (7th Cir. 1989) 73

Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995) 21

Beck v. Alabama, 447 U.S. 625 (1980) 82

Bertolotti v. State, 476 So.2d 130 (Fla. 1985) 65

Brady v. Maryland, 373 U.S. 83 (1963) 5-7, 11, 17, 45, 72

Breedlove v. State, 580 So.2d 605 (Fla. 1991) 7

Brown v. Borg, 951 F.2d at 1017 18

Chaky v. State, 651 So.2d 1169 (Fla. 1995) 22, 79

Chapman v. California, 386 U.S. 18 (1967) 70

Clemons v. Mississippi, 110 S. Ct. 1441 (1990) 70

Cunninghman v. Zant, 928 F. 2d 1086 (11th Cir. 1991) 52

Demps v. State, 416 So. 2d 808 (Fla. 1982) 7

Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991) 81

Dougan v. State, 595 So.2d 1 (Fla. 1992) 80

Espinosa v. Florida, 113 U.S. 26 (1992) 53

Eutzy v. Dugger, 746 F.Supp. 1492 (N.D. Fla. 1989), aff'd., No. 89-4014 (11th Cir. 1990) 22

Freeman v. State, 563 So.2d 73 (Fla. 1990) 2, 67, 73

Gardner v. Florida, 430 U.S. 349 (1977) 80

Garron v. State, 528 So. 2d 353 (Fla. 1988) 62

Gorham v. State, 597 So.2d 782 (Fla. 1992) 7

Gregg v. Georgia, 428 U.S. 153 (1976) 80

Gunsby v. State, 670 So.2d 920 (Fla. 1995) 83

<u>Hall v. State</u> , 614 So.2d 473 (Fla. 1993)	21
<u>Harrison v. Jones</u> , 880 F.2d 1279 (11th Cir. 1989)	66
<u>Hildwin v. Dugger</u> , 654 So.2d 107 (Fla. 1995)	21
<u>Hitchcock v. Dugger</u> , 481 U.S. 393 (1987)	53
<u>Johnson (Calvin) v. State</u> , Case No. 88,986 Slip Op. at page 9 (Fla. October 22, 1998)(rehearing pending)	79
<u>Johnson v. Mississippi</u> , 108 S.Ct. 1981 (1988)	68
<u>Kyles v. Whitley</u> , 115 S. Ct. 1555 (1995)	20, 79
<u>Lemon v. State</u> , 498 So. 2d 923 Fla. 1986)	20, 78, 81
<u>Lewis v. State</u> , 377 So. 2d 640 (Fla. 1980)	57
<u>Maynard v. Cartwright</u> , 108 S.Ct. 1853 (1988)	53
<u>McClesky v. Kemp</u> , 481 U.S. 279 (1987)	79-81
<u>Melbourne v. State</u> , 51 Fla. 69 (1906)	56
<u>Miller v. Pate</u> , 386 U.S. 1 (1967)	18
<u>Miller v. State</u> , 373 So. 2d 882 (Fla. 1979)	65
<u>Mills v. Dugger</u> , 559 So.2d 578 (Fla. 1990)	23
<u>Muhammad v. State</u> , 603 So. 2d 488 (Fla. 1992)	7
<u>Murphy v. Puckett</u> , 893 F.2d 94 (5th Cir. 1990)	66
<u>Murphy v. Puckett</u> , 893 F.2d 94 (5th Cir. 1990)	55
<u>Nowitzke v. State</u> , 572 So. 2d 1346 (Fla. 1995)	65
<u>Peek v. State</u> , 395 So. 2d 492 (Fla. 1981)	53
<u>Penry v. Lynaugh</u> , 109 S. Ct. 2934 (1989)	65
<u>Provenzano v. State</u> , 616 So. 2d 428 (Fla. 1993)	78
<u>Rembert v. State</u> , 445 So. 2d 337 (Fla. 1984)	53, 55
<u>Roman v. State</u> , 528 So.2d 1169 (Fla. 1988)	19
<u>Rowe v. State</u> , 120 Fla. 649 So. 22 (1935)	56

<u>Santos v. State</u> , 629 So.2d 838 (Fla. 1994)	22
<u>Small v. State</u> , 533 So. 2d 1137 (Fla. 1988)	53
<u>Stanley v. Zant</u> , 697 F.2d 955 (11th Cir. 1983)	51
<u>State v. Gunsby</u> , 670 So. 2d 920 (Fla. 1995)	6
<u>Stevens v. State</u> , 552 S. 2d 1082 (Fla. 1989)	52
<u>Strickland v. Washington</u> , 466 U.S. 668 (1984)	5, 20, 66, 72
<u>Stringer v. Black</u> , 112 S.Ct. 1130 (1992)	53, 55
<u>United States v. Bagley</u> , 473 U.S.667 (1985)	5, 6, 19, 72, 73
<u>Valle v. State</u> , 502 So. 2d 1225 (Fla. 1987)	54
<u>Wike v. State</u> , 596 So. 2d 1020 (Fla. 1992)	26, 27
<u>Williams v. Griswald</u> , 743 F.2d 1533 (11th Cir. 1984)	20
<u>Woodson v. North Carolina</u> , 428 U.S. 280 (1976)	51
<u>Zant v. Stephens</u> , 462 U.S. 862 (1983)	83

MISCELLANEOUS AUTHORITY

Fla. R. Crim. P. 3.220	19
Fla. R. Crim. P. 3.850	i, 83
Sixth, Eighth, Fourteenth Amendments, U.S. Constitution.	52, 54-5, 81

STATEMENT OF THE CASE AND FACTS

The Circuit Court of the Fourth Judicial Circuit in Duval County, Florida entered the judgments of convictions and sentences under consideration. Mr. Freeman was charged by Indictment on Case No. 86-11599 with first degree murder and

burglary on December 4, 1986 (hereinafter referred to as Freeman II)(R2.12-13). He was charged with first degree murder and burglary in Case No. 87-3527 on April 23, 1987 (hereinafter referred to as Freeman I)(R1.145).

In Freeman I, Mr. Freeman was found guilty on October 9, 1987 (R1. 399-401). After a penalty phase on October 13, 1987, the jury recommended a life sentence (R1.441). On December 11, 1987, the trial court overrode the jury and imposed a sentence of death (R1. 572-97). On direct appeal, this Court affirmed Mr. Freeman's convictions, but ordered a life sentence imposed. Freeman v. State, 548 So.2d 125 (Fla. 1989).

While the first case was pending on appeal, the state moved forward with a second trial, Freeman II, on September 15, 1988 (R2. 1564). After a penalty phase on September 16, 1988, the jury recommended death by a nine to three vote, without knowing that the death sentence would be set aside in Freeman I.

On November 2, 1988, the trial court imposed a death sentence (R2.257-59) also without knowing that this Court would impose a life sentence in Freeman I. On direct appeal, this Court affirmed Mr. Freeman's convictions and death sentence. Freeman v. State, 563 So.2d 73 (Fla. 1990).

Mr. Freeman filed his first postconviction motion on Freeman II, on June 29, 1992 and an amended Rule 3.850 motion on October 26, 1994 (PC-R. 12, 178). Mr. Freeman was provided a direct appeal attorney on Freeman I but was not given a postconviction attorney because a life sentence had been imposed.

In his amended Rule 3.850 postconviction motion Mr. Freeman raised eleven claims. On July 29, 1996, the lower court summarily denied all of Mr. Freeman's claims without an evidentiary hearing (PC-R. 424). The court's order was filed without attachments.

Mr. Freeman filed a Motion for Rehearing on August 12, 1996 that was denied on September 12, 1996 (PC-R. 424, 435). Notice of Appeal was timely filed on October 9, 1996 (PC-R. 442). Mr. Freeman files this appeal challenging the summary denial of his claims.

SUMMARY OF ARGUMENT

1. The lower court summarily denied without record attachments Mr. Freeman's claim that the jury was not presented with critical exculpatory evidence at guilt phase. The files and records cannot conclusively rebut that the jury did not hear compelling evidence because the state misled it and the court as to the existence of this evidence. As a result, defense counsel was unable to provide effective assistance of counsel because his ability to litigate was severely restricted. An evidentiary hearing was warranted.

2. The summary denial of Mr. Freeman's claim that he received ineffective assistance of counsel at penalty phase was error. Trial counsel failed to present substantial mitigating evidence which was not refuted by the record. Mr. Freeman's allegation that trial counsel failed to present any mental health statutory and nonstatutory mitigation evidence when abundant

information was available was sufficient to warrant an evidentiary hearing. The lower court attached no portions of the record to support its finding.

3. Mr. Freeman was denied his right to a reliable sentencing when his jury did not receive adequate instructions that guide its sentencing discretion by explaining the limiting constructions of the aggravating circumstances.

4. The lower court erred in denying Mr. Freeman's claim that he was sentenced to death on the basis of unconstitutional automatic aggravating factors. These factors failed to channel the jury's discretion in sentencing Mr. Freeman to death.

5. The state's argument and conduct during penalty phase of Mr. Freeman's trial was fundamentally unfair in that it interjected improper and impermissible matters into the proceedings. Mr. Freeman pled sufficient facts to warrant an evidentiary hearing.

6. The lower court erred in summarily denying Mr. Freeman's claim that his sentence of death was based on an unconstitutional prior conviction and on misinformation by the state regarding the prior conviction. Mr. Freeman was entitled to an evidentiary hearing on this issue.

7. Shifting the burden to Mr. Freeman to establish that mitigating circumstances must outweigh the aggravating circumstances was error and conflicts with Mullaney v. Wilbur. Mr. Freeman was entitled to relief because his jury was unconstitutionally instructed.

8. The lower court erred in summarily denying Mr. Freeman's claim that he received ineffective assistance of counsel at guilt phase of his first trial and that exculpatory evidence which was never presented to the jury. Mr. Freeman pled facts that can not be refuted by the record and must be taken as true under Lemon v. State. The court attached no records to support its denial.

9. Mr. Freeman alleged that the state's decision to seek the death penalty in his case was based on unconstitutional racial considerations. He pled sufficient facts under McClesky to warrant an evidentiary hearing. The court erred in summarily denying this claim.

10. Mr. Freeman's trials were plagued by procedural and substantive errors. These mistakes are not harmless when considered as a whole since the combination of errors deprived him of a fundamentally fair trials.

11. The lower court erred in failing to attach portions of the record on which it relied contrary to Fla. R. Crim. P. 3.850.

ARGUMENT I

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S WHEN THE RECORD COULD NOT CONCLUSIVELY REBUT THAT CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT PHASE OF MR. FREEMAN'S SECOND TRIAL.

The adversarial process in Mr. Freeman's second trial (hereinafter referred to as Freeman II) did not occur. The jury was prevented from hearing exculpatory evidence that was helpful

to the defense. The state actively sought to mislead the court and jury as to the existence of this evidence.¹ As a result, defense counsel was unable to provide effective assistance to Mr. Freeman because his ability to litigate was severely restricted. "[T]o ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence.²

The lower court concluded that no Brady violations occurred in this case because, as to the majority of the evidence alleged in Mr. Freeman's motion, the court believed that defense counsel had the information or could have obtained it through the exercise of due diligence (PC-R. 426-427). If this is true, then defense counsel knew or should have known of this evidence and Mr. Freeman received ineffective assistance of counsel. The evidence was not presented to the jury. Either the state suppressed it, or defense counsel knew about it yet failed to present it. In either case, Mr. Freeman is entitled to relief or at least an evidentiary hearing on the claim. State v. Gunsby,

¹ A criminal defendant is entitled to a fair trial. See, Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing occurs, the prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and material either to guilt or punishment." United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S., at 685.

² Mr. Freeman pled Brady and ineffective assistance of counsel in the alternative. The lower court misconstrued this concept (PC-R. 426).

670 So. 2d 920, 924 (Fla. 1995) ("In the face of due diligence on the part of Gunsby's counsel, it appears that at least some of the evidence presented at the rule 3.850 hearing was discoverable through due diligence at the time of trial. To the extent, however, that Gunsby's counsel failed to discover this evidence, we find that his performance was deficient under the first prong of the test for ineffective assistance of counsel."). Contrary to the lower court's order, the allegations contained in Mr. Freeman's motion were not "mutually inconsistent" in terms of establishing a cognizable claim for relief.

The lower court further observed that "[a]ny ineffective assistance of counsel argument is also without merit because Defendant is trying to avoid a procedural bar." (PC-R. 428). The court's conclusion is erroneous as a matter of fact and of law. No procedural bar applied to a Brady or ineffective assistance of counsel claim. The legal basis for these types of claims are only cognizable in a collateral attack under Rule 3.850. Mr. Freeman alleged that he was denied an adversarial testing at the guilt phase due to either ineffective assistance of counsel or the suppression of evidence by the state. Claims of ineffective assistance of counsel are properly brought in a Rule 3.850 motion, and in fact can only be pursued through collateral attack.

Claims involving Brady violations also can only be properly brought in a collateral proceeding because they involve fact which are not "of record." See, Muhammad v. State, 603 So. 2d

488, 489 (Fla. 1992); Demps v. State, 416 So. 2d 808, 810 (Fla. 1982); Breedlove v. State, 580 So.2d 605 (Fla. 1991); Gorham v. State, 597 So.2d 782 (Fla. 1992). The files and records in this case show that Mr. Freeman is entitled to relief.

The State's case hinged on the testimony of police officers and neighbors as to the location of the struggle, the point of injury to the victim, what the victim said and their ability to observe the incident. The thrust of Mr. Freeman's defense was that the facts of the case were indicative of manslaughter, not first degree murder. Therefore, independent evidence that corroborated Mr. Freeman's version of the facts was critical.

The defense case depended on a strong attack on the witness' credibility and the availability of any exculpatory evidence which corroborated his version of the facts. However, available impeachment and exculpatory evidence was not provided to the jury, either because the state failed to disclose it or defense counsel failed to discover it.

A key feature of the trial was whether the victim shot at the defendant in an attempt to prevent his escape or vice versa. Officer T.L. Tyson, the first officer on the scene, gave conflicting testimony. He testified first that the victim said he had been shot by Mr. Freeman and that Mr. Freeman had been hiding behind a door and jumped him (R2. 1232).

During cross-examination, Tyson testified that in his deposition he had said that Collier said, "I caught the guy in my house. He was hiding behind a door." Tyson also testified that

Collier had not elaborated any further except to say that he had been shot, which was obviously not the case (R2. 1242). Tyson then qualified his answer and said that he did not have his report when he gave his deposition and said he did not remember talking to the neighbor at the scene, Mr. Hopkins (R2. 1243). On re-direct, Tyson changed his mind again when the state "refreshed" his memory with his undisclosed supplemental police report (R2. 1248-49). No fingerprint testing was done on the gun recovered at the scene. No testing was done of either Mr. Collier's hands or Mr. Freeman's hands to see which one had fired the gun. No bullet was recovered from the wall of the residence, even though the police identified where the bullet had lodged (R2. 1256-75).

Harold Hopkins, an elderly neighbor of the victim, testified that Mr. Collier told him that there had been a break-in, that he had been pistol whipped and that he needed help (R2. 1179). Tommy Wayne Cohen, Tyson's son who had ridden to the scene with his father, testified that Mr. Collier said he was attacked as soon as he opened the front door and was pushed off the porch (R2. 1350). Obviously, the sequence of events among the state's witnesses was inconsistent. Therefore, any impeaching evidence available to the defense was critical.

Mr. Freeman consistently gave the same story:

I got up around 6 a.m. this morning and started walking around the neighborhood. I went to McDonald's on Lem Turner Road where I ate and sat around for about two hours. I left McDonald's and walked around some more.

I went up to this house on Carbondale and knocked on the front door to see if anyone was home. No one came to the door so I went around back. I took a screen off a rear window and opened the window. It was not locked. I crawled inside and started looking for money. I was in the house about 30 minutes when the man came home.

I didn't hear him come inside. He asked me what I was doing in his house. I didn't answer him but started making my way to the front door. Before I could get outside he pointed a gun at me. I grabbed the gun and we fell out the front door down the steps. I got the gun from him and hit him once or twice -- I am sorry, one or two times in the head with the gun. I then threw the gun down and ran to the river. The gun went off one time while we were fighting for it. The police arrested me about two blocks away. I was hiding under a dock. This statement was written for me by Detective W.R. DeWitt at my request, signed John Freeman.

(R2. 1366). Mr. Freeman told Officer Gorsage the same story. Officer Gorsage recalled that the defendant said the victim hit his head on the corner of the porch (R2. 1322). At the time this statement was taken the victim was alive, and Mr. Freeman had no motivation for lying. However, he had no other independent witnesses to corroborate his version of the facts.

A witness was available who could have testified that Mr. Freeman did not intend to kill the victim, only that he was fighting back because the man had shot at him. This witness gave this statement to police and Mr. Stetson, the state attorney, six months before trial. On March 24, 1987, Kathryn Grace Mixon (then Freeman) was interviewed in the State Attorney's office by

Mr. Stetson and Detective Moneyhun. She responded to the following questions by Mr. Stetson:

Q But you're sure that John D. Freeman tell [sic] you that the only reason he shot and killed the man was because the man--I'm sorry--that he beat and killed the man was because the man shot at him first; right? That is what he told you.

A Now, do what? Don't get me confused, please.

Q You're certain that John told you that the only reason that he killed the man - - beat him and killed him was because the man shot at him first?

A He didn't -- he said he did not intentionally to kill the man. He just fought back because the man shot at him.

Q And the only reasons he fought back is because the man shot at him first?

A Shot at him.

(Statement of Kathryn Grace Mixon (then Freeman) March 24, 1987). If trial counsel had been given this statement, it would have established that Mr. Freeman had given consistent statements and would have impeached the credibility of the police officers. This available evidence was not provided to the jury. The reliability of the statements of the state's witnesses remained uncontroverted. The jury was denied important information as to the intent of Mr. Freeman, which directly affected the degree of the crime they were to consider during deliberations. See Brady v. Maryland.

The police showed a complete indifference to investigating and testing the physical evidence that would show what actually

happened. Detective Dewitt, a 17 year veteran of the Jacksonville Sheriff's Department and lead investigator, failed to perform even the most basic investigation of the case. He failed to have the bullet removed from the wall in the house to have it analyzed (R2. 1368); he failed to have a neutron activation test done to see who fired the gun (R2. 1369); he failed to ask where Mr. Freeman was in the house when Collier came home; he failed to ask whether Mr. Freeman heard Collier come into the house; he failed to ask where they were standing when Mr. Freeman grabbed the gun; he failed to ask when Mr. Freeman grabbed the gun; he failed to ask why Mr. Freeman didn't take the money, the checkbook or the gun; he failed to ask why Mr. Freeman did not shoot Collier; and he failed to have the gun dusted for prints to see who fired the shot (R2. 1379, 1381-89). Evidently, Detective Dewitt depended on the evidence technician to sua sponte conduct an investigation.

The duty of collecting and preserving the physical evidence fell to Juan Anstette, a crime technician of 15 years experience (R2. 1256). At trial, he testified that he did not observe any bullet holes in the house or the overhang on the porch (R2. 1273).³ Officer Anstette collected evidence to be tested but there is no indication that the testing was ever done (R2. 1273).

³Another technician was at the scene, but he was never identified, mentioned in any report or disclosed to defense counsel (R2. 1257). In fact, several officers are reflected in the record as being at the scene but no reports or statements from their reports were ever disclosed at trial or provided through 119 requests by CCR. See, Officers Smith and Phelps (R2. 1257); Officers Thompson and Hughley (R2. 1294).

By refusing to complete the most elementary investigation of the crime scene, the state was able to argue that Mr. Freeman was lying about his version of the facts and that the jury would be justified in finding he intended to commit a murder.

Nothing could have been further from the truth. Detective Dewitt in his testimony said, "I examined the step outside the front and determined there was no blood on that step" (R2. 1355). According to the state's testimony, no blood was present on the front step area, only a pool of blood five to six feet from the house (R2. 1355). This was patently false.

A crime scene photograph of the front step of the residence distinctly shows blood on the step and on the ground immediately next to the step. The corner brick of the step appears to be freshly chipped as well.⁴ The only explanation for the blood by the step was that the victim had hit his head on the step. The positioning of the blood stain demonstrates that the victim and defendant fell next to the step where the calculator had fallen out of the victim's pockets. No other explanation is possible.

It is also clear that Dr. Floro's testimony was severely flawed. Dr. Floro testified at trial that the victim died from exsanguination (R2. 1198), and that the victim would have been unconsciousness in five to six minutes and dead in another five

⁴It is not clear from the record whether this photograph was used at trial. If defense counsel had the photograph but failed to use it to impeach the state's witnesses then he was ineffective under Strickland. If the prosecutor did not disclose the photograph, then it is a violation of Brady. Until CCR can complete its investigation or receive 119 compliance, the issue must be pled in the alternative.

or ten minutes (R2. 1203). Due to the State's manipulation of Dr. Floro's testimony or defense counsel's ineffectiveness, however, the jury never learned the inconsistencies and inaccuracies contained in Dr. Floro's testimony.

After arriving at home and finding Mr. Freeman in his house, Mr. Collier began to struggle with Mr. Freeman. Mr. Collier had a gun, and a shot was fired while the two were struggling in the house. The two men, still struggling, fell crashing out the front door of the house, and Mr. Collier subsequently was injured as his head hit the concrete step leading from the porch. The two continued to struggle, and Mr. Freeman, who had retrieved the gun, hit Mr. Collier over the head with the weapon. He then fled from the scene, and was apprehended shortly thereafter.

Leonard Collier, still alive, made it to the street near the end of his driveway, where he then fell to the ground. A neighbor, Harold Hopkins, who had witnessed part of the struggle from his home across the street, called the police (R2. 1161). Officer T.L. Tyson responded almost immediately. Id.

Officer Tyson called for the rescue unit, and then immediately took a towel and applied pressure to the head wounds to try to stop the bleeding (R2. 1232). According to Officer Tyson's testimony at trial, Mr. Collier was "excited." (R2. 1233). Officer Tyson's son, Tommy Cohen, who was with his father that morning, also testified that when his father went to investigate the Collier residence, he took over assisting Mr. Collier. According to Tommy Cohen's testimony, Leonard Collier

was "hollering" and acting "extremely hyper." (R2. 1349). Another officer at the scene described the victim as "rolling on the ground," and "moving trying to get up." (R2. 1286).

The rescue unit responded to the scene almost immediately, and transported the victim to the University Hospital of Jacksonville. Mr. Collier was in the hospital by 10:30 AM on November 11, 1986, and was combative while being treated. He died at approximately 4:00 PM that afternoon.

Collateral counsel have consulted with an expert medical examiner, who was provided with all the available materials and testimony regarding the events leading up to the victim's death. At an evidentiary hearing, Mr. Freeman would provide the court with testimony regarding the fact that exsanguination, the victim's cause of death as determined at trial, can be prevented when the bleeding is external, as it was in this case.⁵ Moreover, the medical examiner could explain, as he should have to a jury, the incongruence of death by exsanguination given the facts that the bleeding was wholly external, the only artery

⁵Dr. Floro conceded that there was no evidence of internal bleeding:

Q [by Mr. Stetson] Dr. Floro, please tell the jury what you found internally?

A [by Dr. Floro] Yes, sir. On opening the head there was difused [sic] hemorrhaging just on the skull, outside of the skull. On this inside nothing is wrong. There was no broken skull bone. The brain was normal. There is no bruising. There is no hemorrhaging inside the brain.

(R2. 1197).

affected was a minor one, and the wounds were attended to almost immediately.

The expert medical examiner also could provide testimony at an evidentiary hearing regarding the inconsistencies and misrepresentations in Dr. Floro's trial testimony. An important issue at trial was whether the victim hit his head on the front concrete step of his house when he and Mr. Freeman came struggling out onto the front lawn. In statements to the police, Mr. Freeman indicated that, during the struggle, "the victim hit his head on the concrete, on the corner of the concrete on the front porch" (R2. 1307). Moreover, a photograph of the crime scene clearly indicates an area of blood on the grass right in front of the concrete step. The particular wound at issue was an L-shaped angulated wound on the left parietal area. Dr. Floro, on direct examination, testified that in his opinion, this wound was inflicted by a gun handle (R2. 1201). However, the photographs, police report, and diagram discussed above clearly indicate that the source of the more serious wounds was not the gun, but rather the concrete step.

If trial counsel had been given the photographs, police report, or diagram, he could have confronted the court with this blatant Brady violation and asked for a mistrial, or presented the facts contradicting the State's case to the jury. Even if trial counsel had the photograph and improperly failed to impeach the state's witnesses, he still did not have Detective Dewitt's

exculpatory police report or the diagram showing that the state knew there was blood on and near the front step.

In closing argument, the prosecutor repeatedly referred to the false conclusions created by the State's false evidence:

Mr. Jolly: It was not consistent, none of the injuries in his opinion, his expert opinion, he had done thousands of autopsies, were consistent with the victim falling on the porch. There was no scrape that would be consistent or go along with a fall on a porch to cause any of these injuries. These injuries according to medical examiner, Doctor Floro, were from this -- this gun wheeled [sic] by that defendant (R2. 1465)

Mr. Stetson: Number eight, he said that the victim hit his head on the front steps. That's how he got hurt like this, another lie. All you have got to do for that is take these photos of the dead man back there and look at the ears of this man and the multiple injuries all over -- located all over his head. That tells you the truth about the statement of the defendant fell down and hit himself on the steps. They are lies. The defendant is trying to figure out a way where he is not guilty (R2. 1482).

The jury could not disregard the false information. The force of a prosecutor's argument can enhance immeasurably the impact of false or inadmissible evidence. Brown v. Borg, 951 F.2d at 1017 citing Miller v. Pate, 386 U.S. 1,6 (1967).

This evidence would have corroborated the theory of defense, but the State suppressed it. Detective Dewitt's police report of November 17, 1986, reflects that he knew there was a large amount of blood adjacent to the front step of the house. A handwritten diagram from the state attorney's file points out the location of the blood on the step with a circle not far from the calculator

that was recovered. In fact, the state affirmatively misrepresented that Mr. Collier could not have injured his head on the step, even going so far as to steer Dr. Floro away from mentioning blood near the front step of the house (R2. 1223) and blatantly arguing that there was no blood on or by the front step (R2. 1355,1482). The prosecutor had a duty not to mislead the jury. Brown v. Borg, 951 F.2d 1011, 1015 (9th Cir. 1991). The prejudice to a defendant's right to a fair trial is even more palpable when the prosecutor not only withheld exculpatory evidence, but has knowingly introduced and argued false evidence. Id. Either this photo was not disclosed by the state or defense counsel failed to discover or effectively use it during the trial. Regardless, the physical evidence corroborated Mr. Freeman's version of the struggle and the jury was entitled to know it.

Failure to honor Fla. R. Crim. P. 3.220 requires a reversal unless the State can prove that the error was harmless. Roman v. State, 528 So.2d 1169 (Fla. 1988).

Exculpatory evidence and statements material to the defendant's case were not disclosed. The undisclosed police reports, statements and pictures corroborated the defense theory in Mr. Freeman's case. Rule 3.220(a) was violated. This evidence was "within the State's possession or control." It was in the possession of the law enforcement agency "investigating" the case and the state attorney's office. The non-disclosure cannot be found to be harmless. Nor could there be any tactical

or strategic reason for not presenting such evidence to the jury.

The prosecution's suppression of evidence favorable to the accused violated due process. United States v. Bagley, 473 U.S. 667 (1985). The prosecutor must reveal to the defense any information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. It is of no constitutional importance whether a prosecutor or a law enforcement officer is responsible for the misconduct. Williams v. Griswald, 743 F.2d 1533, 1542 (11th Cir. 1984). The Constitution provides a broadly interpreted mandate that the State reveal anything that benefits the accused, and the State's withholding of information, such as the sworn statements, police reports and photographs here renders a criminal defendant's trial fundamentally unfair. See, Kyles v. Whitley, 115 S. Ct. 1555 (1995).

ARGUMENT II

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL.

The lower court erred in summarily denying this claim without a full and fair evidentiary hearing. The files and records in this case by no means show that Mr. Freeman is "conclusively" entitled to "no relief" on this and related claims. See Lemon v. State, 498 So. 2d 923 Fla. 1986). In Strickland v. Washington, 466 U.S. 668 (1984), the United States Supreme Court held that counsel has "a duty to bring to bear such

skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Trial counsel failed to carry out this duty.

The lower court concluded without the benefit of an evidentiary hearing that "[m]ore is not necessarily better" in evaluating counsel's failure to investigate and present substantial mitigating evidence (PC-R. 429). For this proposition, the lower court cited Hall v. State, 614 So.2d 473 (Fla. 1993). Hall is a direct appeal case, not a postconviction action, and does not address trial counsel's duty to investigate, prepare and present mitigating evidence in a capital case. See, Rose v. State, 675 So.2d 567 (Fla. 1996). ("It is apparent from the record that counsel never meaningfully attempted to investigate mitigation, and hence violated the duty of counsel 'to conduct a reasonable investigation, including an investigation of the defendant's background, for possible mitigating evidence'") (quoting Baxter v. Thomas, 45 F.3d 1501 (11th Cir. 1995)). See also, Hildwin v. Dugger, 654 So.2d 107, 110 n.7 (Fla. 1995) (although recognizing that "Hildwin's trial counsel did present some evidence in mitigation at sentencing," failure to present abundant and available mental health mitigating evidence amounted to constitutionally ineffective assistance of counsel). In Mr. Freeman's case, trial counsel, without a reasonable tactic or strategy, failed to present the evidence outlined in the motion vacate. At a minimum, an evidentiary hearing was warranted.

The lower court also overlooked a wealth of case law which established that trial counsel in a capital case has the duty to investigate and present mitigating evidence, and that the failure to do so constitutes ineffective assistance of counsel unless there was a reasonable tactical decision for not presenting the evidence in question. Even then, a tactical or strategic decision must flow from an informed judgment, not made in a vacuum. "A tactical or strategic decision...cannot be made and options exercised **unless and until** an investigation into the defendant's background and character has been made." Eutzy v. Dugger, 746 F.Supp. 1492, 1499 (N.D. Fla. 1989), aff'd., No. 89-4014 (11th Cir. 1990).

"A strategy of silence may only be adopted after an investigation, however, limited." *Id.* In Mr. Freeman's case, available evidence of statutory mental health mitigating factors was available (PC-R. 225-229). Evidence of mental health statutory mitigating factors which was available in Mr. Freeman's case yet not presented is the weightiest type of mitigation. Chaky v. State, 651 So.2d 1169 (Fla. 1995); Santos v. State, 629 So.2d 838, 840 (Fla. 1994).

While "more" may not always be better, as the lower court opined, "more" contemplates that "some" was presented in the first instance. In this case, no mental health mitigation evidence was presented. As was alleged in the Rule 3.850 motion, such evidence was readily available to trial counsel. The lower court erred as a matter of fact and law in failing to afford Mr.

Freeman an evidentiary hearing. Mills v. Dugger, 559 So.2d 578 (Fla. 1990).⁶

Before the commencement of the penalty phase on Friday, September 16, 1988, defense counsel requested a brief continuance until the following Monday or Tuesday.

(Defendant not present)

MR. MCGUINNESS: We would be seeking a continuance, Your Honor, till Monday or Tuesday. There is a gentleman, Mr. David Sorrells, who previously testified on Mr. Freeman's behalf, and we would be seeking to elicit his testimony again in this penalty phase. He is basically Mr. Freeman's best friend and could give evidence regarding Mr. Freeman's work habits, how he relates to other people, particularly children and a number of other matters which we feel germane to non-statutory mitigation...

...She cares for an invalid husband and also a small child, and I don't think they understood the urgency of it. We tried to explain it to them. We know David Sorrells is in town. We know if we were given until Monday or Tuesday we could locate him and have him here. We also do not have numerous witnesses to put on in this case. We have two or three witnesses that we need to testify.

I think from reviewing this -- and I have reviewed the past record -- that David Sorrells is absolutely crucial for us to put on in the sentencing hearing because he knew John Freeman growing up. He can corroborate that John Freeman was the victim of child abuse because he saw the scars.

He also knew what kind of person John Freeman was, what his work habits were and

⁶This exact argument was presented to the lower court in the form of a motion for rehearing filed after the court's summary denial. The lower court denied the motion for rehearing (PC-R. 440).

what -- everything Mr. McGuinness has said which I won't repeat, but given 24 hours we can get Mr. Sorrells here. The fact we have not gotten him here so far is because we did not know where he was, but we have located him now. It's just a matter of being able to get him into court.

(R2. 1569-73) (emphasis added). Counsel presented a litany of reasons why he did not have this "crucial witness" under subpoena. After discussing the matter, the court inquired as to why Mr. Sorrells' prior testimony could not simply be read to the jury:

THE COURT: Why don't we use his prerecorded testimony given under oath? What's the matter with that? First of all it appears to me that the testimony he is going to give could be given by other individuals, whoever they may be. They could be given by Mr. Freeman. They could be given by Mr. Freeman's mother who apparently you know she is available, could be given by his father, given by his brother. You mentioned all these people. The testimony is to corroborate is the word you used or cumulative is the word I am using. The point is it could be given by other people.

(R2. 1574). Defense counsel went on to explain the difficulties with this position (R2. 1576), but the court went on to indicate that only if there were problems with having Dr. Legum would he consider granting a continuance (R2. 1578). Defense counsel made his final plea to the court:

MR. MCGUINNESS: Essentially all we can do, Your Honor, is tell the Court that we believe this gentleman's testimony would be material and helpful. It is non-statutory mitigation that we wish him to address. John Freeman at this point is in a posture where the recommendation will be made either as to life or death, and I as his counsel would very much wish to put on as much as we can in

support of the life recommendation. I can assure the Court that if we cannot reach and subpoena this fellow by Tuesday we will go forward anyway, but I believe we can do it.

(R2. 1579) (emphasis added).

After noting that "this trial has been continued for a long time since 1986 for a lot of different reasons" (R2. 1580), the court explained:

You've known that the trial was set this week for months, and if the witness was available during those preceding months he should have been served with a subpoena for this week and then by having him under subpoena I could have extended the subpoena to another week or another day, but -- just like we do with all the witnesses.

(R2. 1580-81) (emphasis added). The court denied the motion for continuance, and allowed Mr. Sorrells' prior testimony to be read to the jury.

Defense counsel failed to subpoena this critical witness for Mr. Freeman's penalty phase, and the court erred in not allowing the brief continuance to assure Mr. Sorrells' presence. The requested continuance was not for an unreasonable length of time. It was important for the jury to consider live testimony of a non-family member witness who was able to provide insight as to the Freeman household that a family member could not. It also was important for the jury to know that Mr. Freeman did have the support of a friend who took the time to testify on his behalf, particularly since the court informed the jury that Mr. Sorrells was "not available to testify" (R2. 1681). Counsel was deficient in failing to subpoena this critical witness, and the court

erroneously restricted the presentation of mitigation at Mr. Freeman's penalty phase. Additionally, as co-counsel's remarks indicate, the defense had not secured the presence of other witnesses for the penalty phase (R2. 1573).

In Wike v. State, 596 So. 2d 1020 (Fla. 1992), this Court dealt with an identical situation as the one in Mr. Freeman's case and reversed the sentence of death in that case. This Court held that the trial court had abused its discretion in denying the motion for continuance:

The general rule is that the granting or denying of a motion for continuance is within the discretion of the trial court. Given the circumstances of this case, we conclude that the trial court abused its discretion in denying Wike's motion for a continuance. We emphasize that Wike's request for a continuance was for a short period of time and for a specific purpose. It is clear that Wike's family members, specifically, his cousin and ex-wife, could have provided admissible evidence for the jury to consider during the penalty phase had the continuance been granted. Ordinarily, we are reluctant to invade the purview of the trial judge; however, we find that the failure to grant a continuance, if only for a few days, under these circumstances was error. Consequently, we must remand this case for a new penalty phase proceeding before a new jury.

Id. at 1025 (citations omitted)(emphasis added).

Mr. Freeman's case is controlled by Wike. Defense counsel's requested continuance was not for an unreasonable length of time. In fact, counsel assured the court that "given 24 hours we can get Mr. Sorrells here" (R2. 1574). Moreover, implicit in the Wike holding is the notion that, regardless of the availability of other mitigation witnesses, a continuance should be granted in

order to allow counsel to present additional relevant and admissible mitigating evidence.

Evidence regarding Mr. Freeman's character and background, his young life marked by severe physical and psychological abuse, emotional and educational deprivation, his history of severe head injuries, and his serious problem with alcohol and drug addiction, were inadequately presented in the penalty phase. Mr. Freeman was sentenced to death by a judge and jury who knew very little about him.

Proper investigation and preparation would have resulted in evidence establishing an overwhelming case for a life sentence for Mr. Freeman. Counsel also neglected to provide the mental health expert who examined Mr. Freeman with critical family background information, medical history records, and accounts and evidence of Mr. Freeman's substance abuse problem.

Numerous family members, friends, and neighbors were available to testify regarding the details of Mr. Freeman's life history, but this information was never presented to the judge and jury.

Born into poverty in rural Georgia, Mr. Freeman suffered a critical head injury when he was just a baby that was of such severity as to suggest permanent impairment. His mother, Mary Freeman, explains:

I remember John being in a bad accident when he was just two and we lived in the housing project in Georgia. My kids and I were outside on the front lawn and John went across the street. I was hollering at him to come back when the neighbor pulled in to

park. As John stepped off the curb, the guy backed over John. I started hollering and the guy didn't hear me because he was drunk. Before I could pull John out from under the car, he pulled up and stopped on John's chest and head. I was beating on the car and he finally moved. I took John to the hospital. He had tire marks on his head and chest. He was hurt real bad and his insides were squeezed.

(Affidavit of Mary Freeman). Only a few years later, Mr. Freeman may have suffered further brain damage when he almost drowned at the beach. Mr. Freeman's chances in life were severely impaired before he was even school-aged due to a significant childhood medical history.

School records show that Mr. Freeman's academic performance was dismal at best. Even in the earliest grades, he was described by teachers as "slow" and "withdrawn." None of Mr. Freeman's early grades in any subject were above average except for physical education in the second grade; most were far below average or failing. By the fifth grade, Mr. Freeman was referred to special education classes, but he never progressed or improved. Guidance Department notes for that year show him to be "somewhat hyperactive." In the eighth grade, Mr. Freeman tragically failed all subjects in all four grade periods.

Mr. Freeman's biological father, Charles Jewell, was incarcerated when Mr. Freeman was just a toddler. Shortly thereafter, Mr. Freeman's mother married Charles Freeman, an abusive, quick-tempered man whose wrath was to be feared:

[O]ur lives became a living hell. From the beginning, when our step-father moved in, he would abuse all us kids, in particular, John

and me. He hated us most of all because we were "Jewells"

(Affidavit of Robert Jewell). Charles Freeman was a man who used strong-arm and violent tactics. His beatings were frequent and brutal:

From the beginning, our lives were miserable. At that time, John was 3 or 4 years old, and our step-father began beating on John and Robert. I remember him taking John and Robert outside to the railroad tracks and beating them so bad that they were all bloody and bruised from head to toe. I can't imagine the terror that they must have felt and it makes me sick to think that they would have to see each other being beaten.

(Affidavit of Danette Rucker). By all reports, the step-father's physical abuse was so frequent and brutal that Mr. Freeman suffered numerous severe head injuries:

[All of a sudden he would snap and take out his anger on us kids. He would beat and hit us with anything and everything in sight, including belts, switches and his fists. I have many memories of my step-father just flying off the handle and pounding his fists into John's head.

(Affidavit of Robert Jewell).

As a child, Mr. Freeman was thrown into the world without a true father, a mother who could protect him, or any semblance of a stable and nurturing family structure. Even the school system failed him by ignoring the clear signs of trouble at home:

No one at school ever tried to find out what was happening to us either. I remember having to go to school with bruises and welts all over our bodies, but no one ever helped.

(Affidavit of Robert Jewell). Mr. Freeman's sister recalls:

Sometimes, I tried to grab the belt that my step-father would hit [Robert and John] with because I couldn't stand it. He would hit them in the head with his fists or all over their bodies with sticks. . . . I know that teachers at school had to have seen the bruises and cuts on John, but the only time they called my parents was to say that John was real slow in school and failing his classes.

(Affidavit of Danette Rucker). Mr. Freeman's school records clearly show the effects of his early brain damage and family circumstances and the resulting emotional and mental disorders. They provide a clear signal of early immaturity and mental impairment, a fact that would tip off a competent mental health expert that something was wrong with Mr. Freeman's emotional and intellectual functioning even at an early age. However, counsel failed to provide these and other background materials to Dr. Legum.

Charles Freeman was not only physically abusive but he also sexually molested his step-children:

When I was six years old, my step-father began sexually abusing me and continued to do so until I was 13. Just recently, I remembered lying next to my step-father in bed and my mother on the other side, while he was fondling me. . . . I would cry and beg my mother not to leave me alone in the house with my step-father. Even now, I wake up at night crying because of the horrible memories I have.

(Affidavit of Danette Rucker). Family members also report that the behavior of Mr. Freeman's step-father was not only violent, but flagrantly neglectful and often deranged:

Our step-father also had a sick sense of humor, if you could call it that. For

example, he used to show us pictures of when he was in Vietnam. These pictures were of blown up mutilated bodies . . .

(Affidavit of Robert Jewell).

When he was real young, John would be allowed to drink beer from my step-father's beer cans. Our step-father would also, for fun, bring out his old pictures of Vietnam. They were bloody pictures of women and children with their heads blown off and body parts all over the ground.

(Affidavit of Danette Rucker).

As a youngster, John had nowhere to go to escape the daily abuse and cruelty of his step-father and he continued to be the victim of violent beatings. Not surprisingly, John began running away from home to escape the violence and abuse, although he was emotionally and psychologically ill equipped to stand on his own two feet. His sister said:

John dealt with the constant beatings and insults by running away from home. He would always avoid confrontations if he could. He and Robert were put in the Dozier School and foster homes. They would do anything to stay away from home.

John started drinking and smoking pot when he was 10 or 11 years old. The only time John would get attention from our step-father was when he was insulted for doing something wrong. He was called "stupid" and "dumb" and other four-letter words on a daily basis. . .

(Affidavit of Danette Rucker). John's older brother, Robert, recalls:

As John and I grew older, we started to run away from home a lot to escape the abuse. But the police always found us and brought us back . . . I eventually was sent to many foster homes because I just could not stand being in that house. Our Mom didn't do

anything to try and stop our step-father's beatings. . .

[One time,] our step-father dragged [John] into the bedroom, tied his hands to an oak bed with neckties, and whipped him for a good ten minutes with a belt. I remember the black and blue marks and welts on his body after that beating. . . .

(Affidavit of Robert Jewell).

The cruelty and violence in the Freeman household did not go unnoticed by nearby residents:

Everyone in the neighborhood knew about the abuse that those poor kids suffered at the hands of their stepfather. It's a miracle they even managed to survive. The beatings and emotional and verbal abuse they went through have to affect them even today. No one could go through what they did and be OK. They were always beaten and bloody. I also know that man sexually abused Danette Freeman.

(Affidavit of Kelly Shea). Another neighbor recalls:

I grew up next to the Freemans and was best friends with Danette Freeman. . . She moved next door to our house to get away from Charles Freeman, her step-father. She told me he had been sexually molesting her since she was a little girl. . .

We knew Charles was mean and would beat the boys because we could hear them screaming and hollering when they were getting a whipping, clear across to our house. Those poor kids never had a chance and they never had a daddy.

(Affidavit of Bobbie Hart). Counsel failed to present the many local residents who could have provided objective testimony to the jury and judge regarding the cruel and abusive nature of the Freeman household.

Certainly, Mr. Freeman's medical and family history is replete with accounts and observations that provide a reasonable context within which to view his brain damage. (See infra). John was never provided counseling, assistance with school work, advice for everyday problems, affection, nurturing, or parental love and a sense of safety. Instead he was met at every turn with extreme psychological and physical abuse. This is especially significant in light of John's brain dysfunctions and the concomitant need for special intervention:

John was always a quiet kid, and would often be real withdrawn, and he wouldn't have anything to say. He was never given a real chance to make something of himself because of our upbringing. He never did real well in school, either.

(Affidavit of Robert Jewell). In fact, school records show that at about the same time he began to use alcohol and drugs regularly, John failed every single subject.

As Mr. Freeman approached puberty, he fell prey to the drug world. His background is replete with numerous high risk factors of substance abuse. His physically abusive home environment is just one of many elements which contributed to a childhood filled with psychological distress. As a young man, Mr. Freeman found escape in dangerous and self-destructive behavior, becoming a heavy user of alcohol and marijuana:

[A]s we got older, John started running with a different crowd, and started getting involved in a lot of drinking and drugs.

My recollection is that John got involved in drugs and alcohol while he was in junior high school . . .

I'd see him drink himself real drunk on Friday and Saturday nights. I worked weekdays, so I couldn't drink with John during the week like we did on the weekends. But John drank heavily on the weekdays too. John drank straight from the bottle -- Wild Turkey, Jack Daniels, and Vodka too. As an example of how much he'd drink, I remember he drank a whole fifth of whiskey straight from the bottle in about two hours. His drinking caused him to pass out more times than I can remember. John also smoked a lot of marijuana. He'd drink and smoke at the same time. He's [sic] smoke bad weed too. It didn't matter to him what the weed was laced with -- he'd smoke it.

(Affidavit of Dwayne Alan Watson). Passing out from overconsumption of alcohol and drugs, blackouts and other incidents of loss of consciousness continued:

John got his share of bumps on the head. For example, when we were about 17 - 17 [sic] years old, John was on his bike and fell off it and hit his head hard enough to knock him out for a little while. He didn't know where he was when he got up.

(Affidavit of Dwayne Alan Watson).

Later, in his teens, John began using cocaine and other hard drugs. Of course, this did nothing but further cripple him:

I remember a party that John and I were at about 1981-1982 where John was using cocaine. The drug situation was so bad at this party that I left early, but John stayed.

Looking back, if John had any money, he'd spend it on drugs and alcohol. It seems to me that when he got into trouble, the reason was because he needed money for drugs and alcohol. He must have been addicted to the stuff.

(Affidavit of Dwayne Alan Watson). John's drug addiction was an obvious and deceptively easy method of escape from the

degradation and despair of a lifetime of feeling unloved, unneeded, and unwanted.

Due to John's violent and abusive home life, emotional and psychological deficits were inevitable. These problems, combined with brain damage and substance abuse, seriously incapacitated John, particularly in times of stress. Life without parental love and affection took its toll. John grew up without a stable family and no one ever gave him the love and support he craved and needed in order to have a fair chance at a normal life.

Despite John's numerous mental and emotional problems, he was a gentle, caring man. He was, by all accounts, a non-violent person:

John was always a sweet guy. He was also a very giving person. He would go out of his way and help someone out in trouble, and was a real likeable guy.

John spent a lot of time at my house before he got arrested, and I got to know him well. I have never seen him be violent, or even show a bad temper. He was just real quiet.

(Affidavit of Kelly Shea).

The emotional scars inflicted by John's home environment were still very much evident as he awaited trial in the Duval County Jail. There, he was prescribed a variety of anti-depressive medications, including Pamelor, Elavil, Sinequan, and others. Jail records describe his condition:

3/28/87 Pt. remains depressed [with] degenerative symptoms.

4/1/87 Pt. was tearful, and condition appears worse. He continues deteriorating. Appears to be losing weight . . . Pt. used to

read books, but is no longer interested in reading.

(Inmate Medical Records, Duval County Jail). Several months later, John was sent to the University Hospital in Jacksonville for depression and attempted suicide:

8/21/87 24 yr. old male referred from the jail. . . . Reportedly the pt stored up his medication instead of taking it daily in order to kill himself via overdose.

(Medical records, University Hospital of Jacksonville).

Psychiatric nursing notes describe John at this time as having a flat affect, poor coping patterns, problems with insomnia, poor memory, and suicidal ideations. The testimony of Dr. Legum at the penalty phase of John Freeman's trial reflects nothing to indicate that he was even aware of or provided with these medical records.

As the unfolding tragedy of John Freeman's young life clearly shows, substantial mitigation was amply available. The bulk of this evidence, however, never reached the jury or the judge. Moreover, defense counsel's own expert, Dr. Legum, had such little background history regarding Mr. Freeman's life history that he could only testify to intellectual deficits.

Both statutory and nonstatutory mitigating factors were readily supportable, yet they were not argued during the penalty phase because the information had never been gathered. Had defense counsel thoroughly investigated, a wealth of mitigation would have been discovered, and the mental health expert would have been able to support his conclusions. The jury viewed Mr.

Freeman as a hypothetical defendant, rather than an individual. The death sentence should not be allowed to stand, as it is fundamentally unreliable.

Dr. Jethro Toomer, an eminently qualified psychologist, has reviewed all the available records which Dr. Legum did not have at his disposal. He also has reviewed the transcripts of trial testimony as well as conducted a series of mental health examinations on Mr. Freeman.

At an evidentiary hearing, Dr. Toomer would be able to testify, based upon these materials, to substantial and compelling mitigation, both statutory and nonstatutory. Having had the benefit of reviewing the documents which Dr. Legum did not possess and clearly should have, Dr. Toomer is prepared to explain how the relevant mental health mitigating circumstances apply to Mr. Freeman. He will also be able to corroborate his findings with information that was not discovered at the time of Mr. Freeman's penalty phase.

Dr. Toomer would explain that Mr. Freeman is of dull normal intelligence, and experiences severe deficits in his secondary thought processes. Mr. Freeman's decisionmaking ability is remarkably low, and he has an almost non-existent ability to reason abstractly.

In Dr. Toomer's opinion, Mr. Freeman's intellectual deficiencies are only part of his serious mental health problems. Psychological test results reveal signs of organicity, and indicate visual and motor skills impairment. Dr. Toomer will

also be able to explain how organic brain damage affects a person's behavioral patterns, particularly when, as in Mr. Freeman's case, drug and alcohol abuse exist in tandem to the brain damage.⁷

Mr. Freeman's personality testing also reveals that his worst scores were in the areas of thought disturbance, self-depreciation, and chemical abuse. Mr. Freeman's background history, information which the jury, judge, and Dr. Legum were not provided, serve not only to corroborate Dr. Toomer's findings, but also provide insight as to Mr. Freeman's behavioral tendencies.

Another aspect of Mr. Freeman's mental health diagnosis is severe depressive tendencies, especially when he is experiencing high levels of actual or perceived stress. Given his high level of self-depreciation, not to mention the complete absence of any type of nurturing and loving home environment, this finding is by no means unexpected. In fact, self-destructive and suicidal behavior is not uncommon among this personality type. Again, information concerning Mr. Freeman's attempted suicide was neither presented to Dr. Legum, addressed in his testimony, or offered to the jury during the penalty phase of the trial. Also absent from Dr. Legum's testimony and the entire penalty phase is

⁷The fact that no testimony was adduced during the penalty phase regarding drug and alcohol abuse is made even more remarkable given the fact that on the Miranda waiver form signed by Mr. Freeman on November 11, 1986, there is a notation that Mr. Freeman had smoked marijuana immediately before the crime occurred.

an explanation of the variety of medications Mr. Freeman had been prescribed while in the Duval County Jail, and why these had been prescribed.⁸

In addition to the suicide attempt, the jail records are replete with references to Mr. Freeman's deep depression and fluctuating mental condition during his stay at the jail. None of this was discussed at the penalty phase by counsel or by the defense expert. Records from the University Hospital of Jacksonville, where Mr. Freeman was sent after attempting suicide, reveal that Mr. Freeman was "depressed" and "suicidal." Other notes indicate that his judgment and insight are poor. This information was crucial in order for Dr. Legum to render a complete and professionally adequate opinion, and important for the jury to consider in mitigation.

At an evidentiary hearing, Dr. James Larson, a neuropsychologist, with specialized training in forensic psychology, would have testified to the existence of both statutory and nonstatutory mitigation. Dr. Larson reviewed all the information available regarding Mr. Freeman, and conducted a battery of neuropsychological tests in order to assess Mr. Freeman's mental health status.

⁸Without the benefit of an evidentiary hearing, it cannot be determined where the breakdown occurred in relation to the Duval County Jail Records. Either the prosecutor failed to disclose these reports to the defense, or defense counsel unreasonably failed to investigate and provide Dr. Legum with these critical reports.

Dr. Larson's testing reveals that Mr. Freeman is brain damaged. Mr. Freeman suffers from impairments in motor functioning, memory deficits, and higher critical functioning, which includes problems in abstract thinking and judgment capabilities. Dr. Larson can also explain that Mr. Freeman is of dull-normal intelligence, and that the diagnosis of Organic Brain Syndrome interacts with his intellectual deficits to cause Mr. Freeman a host of difficulties due to the impairments.

The examination administered by Dr. Larson also reveals that Mr. Freeman suffers from a depressive personality disorder as well as a schizoid disorder. Given the wealth of information that is now known about Mr. Freeman, Dr. Larson's diagnoses can be corroborated and explained through Mr. Freeman's background history.

Dr. Larson's evaluation, testing, and review of background materials also supports the existence of statutory mitigation. See Fla. Stat. sec. 921.141(b) (defendant suffering from an extreme mental or emotional disturbance at the time of the crime), and (f) (that at the time of the offense, defendant's ability to conform his conduct to the requirements of the law was substantially impaired). Dr. Larson can also testify to the existence of substantial nonstatutory mitigation, including child abuse, substance abuse, a history of severe head injuries, and educational deficits. All of these factors also can be interrelated with the diagnosis of Organic Brain Syndrome.

Another area of critical importance which was never addressed by defense counsel at Mr. Freeman's penalty phase was Mr. Freeman's previous murder conviction, obviously a highlight of the prosecution's case in aggravation. In fact, the prosecution, in order to prove the aggravating circumstance, presented the testimony of Debra Epps, the former wife of the victim in that case. Ms. Epps testified that her ex-husband was stabbed six times in his home, and that the perpetrators entered the home, committed burglary, and then killed the victim. (R2. 1614). She referred to several items which were allegedly taken from the residence Id.

The next witness to testify regarding this aggravating circumstance was Detective William DeWitt, through whom the judgement and sentence were introduced into evidence. (R2. 1618). On cross-examination, defense counsel began to question Detective DeWitt about the existence of fingerprints in that case. The prosecution objected, and indicated in front of the jury that if the defense was to be permitted to go into the facts of the previous case, then the state should be allowed "to go into the facts indicating guilt in that case, the evidence, strong evidence of guilt in that case." (R2. 1622). After sending the jury out, the court permitted a factual proffer of the witness, during which defense counsel elicited that a man by the name of Darryl McMillion was named as someone who may have had something to do with the Epps murder. After a brief proffer of Detective DeWitt by the prosecution, the prosecutor remarked that the

parties were, in fact, retrying the Epps murder (R2. 1624). Rather than inform the court that this evidence was relevant mitigation, counsel ceased any further inquiry on this matter, to the court's apparent surprise (R2. 1625).

At no time during the penalty phase did counsel inform the jury of the substantial and compelling evidence of his client's innocence of the prior felony with which the state was seeking to prove an aggravating circumstance. Ample evidence existed that should have been presented to the jury in its consideration of whether the state had proven the aggravating circumstance beyond a reasonable doubt, and whether the defense had demonstrated the existence of mitigating circumstances. The trial court clearly would have permitted defense counsel to present and argue such evidence (R2. 1736).

For example, the defense never presented the evidence which pointed to Darryl McMillion, not John Freeman, as being the one responsible for the murder. McMillion's alibi was certainly open to attack, and the jury was entitled to know this. The jurors were never made aware of the fact that when McMillion was arrested in North Carolina and extradited to Florida, he had a knife on his person, a knife which disappeared upon his arrival in Jacksonville:

Q Where is that knife?

A I have no idea. The last time I saw it was when I got off the plane here in Jacksonville.

One detective that flew down, one of the officers that flew down had possession of the

knife. When I got off the plane, he handed it to another officer inside the hangar. Since then, I haven't seen the knife.

Did they steal it from you?

A I would imagine so. I haven't seen it since then, and I have never had any receipt for it since then.

(R1. 1588). The knife that was used to commit the murder of Mr. Epps was never recovered.

Approximately one month after Mr. Freeman was convicted of the Epps murder, a hearing on a Motion for New Trial Based on Newly Discovered Evidence was held. During that hearing, Mr. Freeman presented the testimony of four witnesses who came forward after the guilty verdict. These witnesses testified that they had seen McMillion in Jacksonville immediately preceding the date of the Epps murder. Other witnesses who have recently been found also indicate that McMillion was in Jacksonville in October, 1986. This directly contradicts his trial testimony and casts serious doubt on his already precarious alibi. Once again, another critical piece of information which corroborated the other substantial evidence against McMillion was never revealed to Mr. Freeman's penalty phase jury.

Moreover, despite assertions by McMillion and the prosecution to the contrary in that case, promises and undisclosed deals were made with McMillion and were not disclosed to either defense counsel or the jury.⁹ For example, a few days

⁹This information was never disclosed by the prosecution and constitutes a Brady violation. See, Argument VIII.

after Mr. Freeman was convicted, the following communication was had between McMillion and the prosecutor:

10/16/87

Brad,

How's it going? Pretty good here, so far! Just thought I'd drop a line to say thanks for getting me down here so fast. I talked to my classification officer today. He said he would put me in for work release as soon as possible. But I still need to see what I can get done about that V.O.P. in Polk Co.

So far I haven't been able to find out anything here. If you can do anything for me from that end I would appreciate it. If not, maybe you can get in touch with Tim Collins for me and get him to go ahead and file a motion for a fast and speedy trial on that VOP.

Thanks,

/s/Darryl McMillion

(Files of the State Attorney).

What is clear from the files in Mr. Freeman's case is that McMillion's relationship with the prosecutors did not end after he was convicted. Evidence of deals made between the prosecution and its star witness reveals that much more was going on behind the scenes as far as McMillion was concerned:

State Attorney
Fourth Judicial Circuit of Florida
Duval County Courthouse
Jacksonville, Florida 32203-2982

January 20, 1989

Mr. Daryl McMillion
683 North Main Street
Lot 20
Darlington, South Carolina

Dear Daryl:

Enclosed are letters to the Prosecutor in Bartow, Florida, and your Public Defender in Waukegan, Illinois.

I have recommended a reinstatement and transfer of your probation to both parties. I am confident they can come to some agreement regarding the matter.

If I can be of further service, please let me know.

Sincerely,
ED AUSTIN
STATE ATTORNEY

By: Kevin Blazs
Assistant State Attorney

(Files of the State Attorney).¹⁰ The letter to the Assistant State Attorney in Bartow reads as follows:

January 20, 1989

Chip Tredwell
Assistant State Attorney
State Attorney's Office
P.O. Box 9000
Barto, Florida 33830

Dear Mr. Tredwell:

¹⁰Interestingly, the letter from the prosecutor to McMillion was written some fifteen months after the communication from McMillion while he was still incarcerated. There is nothing in the State Attorney files that reveals other communications between the prosecutor and McMillion between the time of the October 16, 1986 letter and the January 20, 1989 communications. It is apparent, therefore, that information is still being withheld by the State Attorneys Office regarding any deals made with McMillion. For example, the question of how state attorney Blazs knew McMillion's South Carolina address in 1989, and how he was aware that McMillion was having problems in other jurisdictions, can only be answered by the fact that there were other communications between McMillion and the Office of the State Attorney in the years following his appearance as a witness against Mr. Freeman. A hearing should have been held to determine if this is a Brady violation.

I am writing regarding an outstanding VOP Arrest Warrant for Daryl McMillion (Case No. 83-4179).

As I mentioned to you in prior phone conversations, this Defendant testified truthfully for the State in a successful Murder prosecution. He received no promises from our office for his assistance.

However, he has now started a new life in South Carolina and wishes to put this matter behind him. The VOP arises from his failure to pay \$1,200.00 in restitution -- an amount he is still unable to pay in one lump sum.

Therefore, I am recommending that his probation be reinstated and the Warrant be withdrawn. His address is 683 North Main Street, Lot 20, Darlington, South Carolina. His Public Defender is John Greenlees, 18 North Count Street, Waukegan, Illinois, 60085 (312-360-6461). I expect him to contact you in an effort to reinstate and transfer the probation.

Thank you for your attention to this matter.

Sincerely,

ED AUSTIN
STATE ATTORNEY

By: Kevin Blazs
Assistant State Attorney

(Files of the State Attorney). The letter to McMillion's attorney reads similarly, indicating that Mr. Blazs, after learning of the arrest warrant, spoke to the state attorney in Bartow and recommended that the warrant be recalled.

Other information was available at the time of Mr. Freeman's penalty phase that should have been presented in relation to the prior capital felony aggravator. Regarding McMillion's

involvement in the murder, other disclosed files reveal information that was critical to establishing Mr. Freeman's innocence. Immediately following his conviction, a witness named Dudley Andrew Gang surfaced. Mr. Gang met with the detectives on the Epps case, as well as State Attorney Blazs, on the eve of a Motion for New Trial Based on Newly Discovered Evidence. Mr. Gang told the police and the prosecutor that he had shared a cell in the Duval County Jail with McMillion. According to Gang, McMillion told him after the trial that the prosecutors were giving him good deals to testify, and that he had lied about his whereabouts at the time of the murder.¹¹ He also told Gang that he had put a false name and information on the McDonalds employment application in Tulsa because he was running from the authorities. He admitted that he was there when the murder went down, and that he had given the stolen Epps property to John Freeman. (Jacksonville Sheriff's Office Notes, November 17, 1987).

Mr. Gang himself discusses the events leading up to his involvement with McMillion:

2. In October of 1987, I was in the Duval County Jail and shared a cell with an inmate named Darryl McMillion. McMillion told me in no uncertain terms that he was responsible for the murder that John Freeman was being tried for. The property from the murder was given to Freeman by McMillion, according to what he told me.

¹¹McMillion claimed to be in Tulsa, Oklahoma on October 20, 1986, the date of the murder in Jacksonville.

3. When I was in the cell with McMillion, he was testifying against Freeman at his trial. McMillion told me that he was getting a deal from the State to testify that Freeman did the murder. He knew all the facts about the case because he was the one that killed Epps.

4. I called Brad Stetson from the State Attorney's Office and told him that McMillion had confessed to me that he committed the murder that Freeman was being tried for. I was told that if I didn't say anymore about what I knew that they would see what they could do about helping me with my escape charge. Shortly after that, my charges were nolle prossed.

5. I will be happy to testify about what I know about this case. All of the above information is true and correct.

(Affidavit of Dudley Andrew Gang). Mr. Gang never testified at any proceeding related to Mr. Freeman's conviction for the Epps murder. It is unclear what, if anything, Mr. Freeman's defense counsel knew about Mr. Gang and what he had to say.¹² What is clear, however, is that the jury that sentenced Mr. Freeman to die never knew of the substantial and compelling evidence that cast serious doubt as to the Epps conviction. This is certainly mitigating evidence, and the jury was entitled to know of its existence.

Evidence bearing on who John Dwayne Freeman was and where he came from would have suggested that his personality and motivations could be explained, at least in part, by his personal

¹²Again, it is uncertain where the breakdown occurred with Mr. Gang. Either the prosecution withheld Mr. Gang's statements and thus violated Brady, or defense counsel failed to investigate this crucial information. An evidentiary hearing is warranted.

history and would have shown that John Freeman is worth saving. It is precisely this kind of evidence the United States Supreme Court had in mind when it wrote that unless the sentencer could consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," a capital defendant will be treated not as a unique human being, but rather as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). This is just the kind of humanizing evidence that "may make a critical difference, especially in a capital case." Stanley v. Zant, 697 F.2d 955, 969 (11th Cir. 1983). It would have made a difference between life and death in this case.

As the unfolding tragedy of John Freeman's life clearly shows, substantial mitigation was amply available. The bulk of this evidence, however, neither reached the jury nor the court. Counsel's performance was deficient. In fact, counsel's own mental health expert, Dr. Legum, had such little background information regarding Mr. Freeman's life history that he could only testify about test scores showing educational deficits. This Court has affirmed the necessity of appropriate background investigation at the penalty phase of the trial. A new sentencing is required when counsel fails to investigate and, as a result, substantial mitigating evidence is never presented to

the judge or jury. Stevens v. State, 552 S. 2d 1082 (Fla. 1989).¹³

The prejudice to Mr. Freeman resulting from counsel's deficient performance is also clear in that the jury did not hear this mitigating information. Confidence is undermined in the outcome. Mr. Freeman's sentence of death should not be permitted to stand under the sixth, eighth, and fourteenth amendments. Rule 3.850 relief must be granted and a resentencing ordered.

ARGUMENT III

MR. FREEMAN WAS DENIED HIS RIGHT TO A RELIABLE CAPITAL SENTENCE WHERE HIS SENTENCING JURY DID NOT RECEIVE INSTRUCTIONS GUIDING AND CHANNELING ITS SENTENCING DISCRETION IN VIOLATION OF MAYNARD V. CARTWRIGHT, STRINGER V. BLACK, HITCHCOCK V. DUGGER, AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

At the penalty phase of Freeman II, the jury received inadequate instructions on the aggravating circumstances (R. 1746-47). Mr. Freeman's jury was not given adequate guidance as to what was necessary to establish the presence of an aggravator. This left the jury with unbridled discretion. This violated the eighth amendment. See, Maynard v. Cartwright, 108 S.Ct. 1853 (1988); Stringer v. Black, 112 S.Ct. 1130 (1992).

The "committed during a felony" aggravating factor cannot support a death sentence by itself. Rembert v. State, 445 So. 2d

¹³Although some mitigation was presented, it was but the tip of the iceberg. Much more was readily available but was not presented because of a failure to investigate, see Cunninghman v. Zant, 928 F. 2d 1086 (11th Cir. 1991), or because the prosecution did not disclose information pertinent to mitigation.

337 (Fla. 1984). Yet, Mr. Freeman's jury was not so instructed. This error undermined the reliability of the jury's sentencing determination and prevented the jury from fully assessing mitigation and its weight relative to the aggravating factors.

Pecuniary gain must be established beyond a reasonable doubt and "the primary motive for this killing was pecuniary gain." Small v. State, 533 So. 2d 1137, 1142 (Fla. 1988)(emphasis added), relying on Peek v. State, 395 So. 2d 492, 499 (Fla. 1981). Mr. Freeman's jury received no such instruction and the trial court did not apply this limiting construction of this aggravator. Espinosa v. Florida, 113 U.S. 26 (1992).

The jury also was provided inadequate instructions on the aggravator of "heinous, atrocious and cruel." Here the jury instructions did not adequately explain the limiting constructions placed on this factor. Espinosa v. Florida, 112 S.Ct. 26 (1992); Hitchcock v. Dugger, 481 U.S. 393 (1987).

The failure to instruct on the limitations left the jury free to ignore the limitations, and left no principled way to distinguish Mr. Freeman's case from a case in which the limitations were applied and death, as a result, was not imposed. Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). Rule 3.850 relief is mandated.

ARGUMENT IV

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM THAT HE WAS SENTENCED TO

DEATH IN RELIANCE UPON AUTOMATIC AGGRAVATING FACTORS WHICH FAILED TO GUIDE AND CHANNEL THE SENTENCERS' DISCRETION, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Freeman was convicted of one count of felony murder (R2. 1564). The jury was instructed at the penalty phase regarding automatic statutory aggravating circumstances and Mr. Freeman thus entered the sentencing hearing already eligible for the death penalty, whereas other similarly (or worse) situated petitioners would not. The trial court also relied upon automatic statutory aggravating circumstances. Under these circumstances, Mr. Freeman's sentence of death violated his sixth, eighth and fourteenth amendment rights.

The death penalty in this case was predicated upon unreliable automatic findings of statutory aggravating circumstances -- the very felony murder finding that informed the basis for conviction. As the sentencing order makes clear, felony murder and pecuniary gain were found as statutory aggravating circumstances. Aggravating factors must channel and narrow sentencers' discretion.

A state cannot use aggravating "factors which as a practical matter fail to guide the sentencer's discretion." Stringer v. Black, 112 S. Ct. 1130 (1992).

Since Mr. Freeman was convicted for felony murder, he automatically faced statutory aggravation for felony murder. This Court has held that the felony murder aggravating factor cannot support a death sentence by itself. Rembert v. State, 445

So. 2d 337 (Fla. 1984). Yet, Mr. Freeman's jury was not so instructed, and the trial court did not apply this limitation.

Defense counsel provided ineffective assistance in failing to object or argue effectively regarding consideration of these automatic aggravating factors. Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Mr. Freeman was denied a reliable and individualized capital sentencing determination, in violation of the sixth, eighth, and fourteenth amendments. Relief is proper.

ARGUMENT V

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIMS THAT THE PROSECUTOR'S INFLAMMATORY AND IMPROPER COMMENTS AND ARGUMENTS RENDERED HIS DEATH SENTENCE FUNDAMENTALLY UNFAIR AND UNRELIABLE IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

At the penalty phase of Freeman II, the prosecutors injected impermissible, improper, and inflammatory matters into the proceedings. The prosecutors urged consideration of improper matters, misstated the law, and injected emotion into the proceedings. The prosecutors' arguments were fundamentally unfair and deprived Mr. Freeman of due process.

At the penalty phase, the State presented the testimony of Debra Epps, former wife of Alvin J. Epps, to provide background information of the Epps' family and Mr. Epps' murder. Ms. Epps was not present at the time of the murder and had no personal knowledge of the circumstances of that offense. She testified in the guilt phase at the first trial for the sole purpose of

identifying personal property taken during the burglary of the Epps' home.

Although Ms. Epps identified Mr. Freeman in court as the man who was tried and convicted for the burglary, robbery and first degree murder of her former husband, her testimony was not confined to the issue of identification. She began her testimony by detailing her employment status and her children. Ms. Epps then described how her former husband was stabbed six times and bled to death alone in their home.

Debra Epps's testimony was wholly improper. The fact that Alvin Epps had a family was immaterial and irrelevant to any issue in the penalty proceeding and could have no other effect than to prejudice the jury. See Rowe v. State, 120 Fla. 649 So. 22 (1935); Melbourne v. State, 51 Fla. 69 (1906). The law is well established that a member of a murder victim's family may not testify for the purpose of identifying the deceased where a nonrelated witness is available to provide such identification. Lewis v. State, 377 So. 2d 640 (Fla. 1980). The rule is no less compelling where the family member identifies the defendant, especially where there are other nonrelated witnesses available for the same purpose. The testimony of a victim's family is simply not permissible if introduced solely for the purpose of accentuating the fact that the deceased left a surviving spouse or children. Lewis v. State, supra; Rowe v. State, supra. That was the singular purpose of Ms. Epps' testimony.

Debra Epps' testimony was not relevant to any issues before the jury at the penalty phase. The prosecutor introduced Mr. Freeman's judgments of conviction for the Epps offenses and documentary proof of the prior capital felony and prior violent felonies. The state could have established Mr. Freeman's identity through fingerprint evidence, or through Detective DeWitt, who testified that he was familiar with the Epps case and was present at the prior trial (T. 1617-1618). Ms. Epps' identification of Mr. Freeman from the previous trial was not necessary and was calculated to introduce highly prejudicial and non-statutory aggravating evidence of a surviving spouse and children. Ms. Epps' comments on the nature of the crime itself also were inadmissible.

The tenor of the state's closing argument in the penalty phase was an appeal to emotion rather than to reason. The prosecutor repeatedly commented on the testimony of Debra Epps and emphasized the murder of Mr. Epps to inflame the minds and passions of the jury to recommend the death penalty to avenge the dual crimes. The argument commenced:

This defendant has committed first degree murder, the ultimate crime not once but twice. You heard this morning just in case there is any doubt or confusion that was Mrs. Epps who lived there in the home with Mr. Epps when he was killed by this defendant, convicted by a jury, fair trial, convicted right there in the same neighborhood.

Now if John Freeman had killed only--I hate to use the word only. It belittles it. If John Freeman had killed Leonard Collier and that was the crime for which you are convicted him and you did not have Alvin Epps

as an additional victim of this man, let's just suppose that for a second, what if we weren't here with Alvin Epps also dead in his own home then you would have the one first degree murder of Leonard Collier.

Ladies and gentlemen, remember in jury selection you didn't know about this other crime during the entire first part of the trial. That was so that you wouldn't be-- make your decision based upon other facts. Now it is entirely proper and relevant for you to know about Mr. Epps, . . .

(R2. 1690-1691).

The prosecutor continued with his assertions that Mr. Freeman deserved the death penalty to avenge the Epps murder:

This is the judgement [sic] and sentence we entered, . . . It convicts John Freeman of murder in the first degree. It convicts him of burglary with an assault. Those are the same two charges he was convicted of in this case, in addition robbery with a deadly weapon, . . .

In that case he was convicted by a jury. You can see the date on this, the 11th of December, 1987, last year. He was convicted of a separate murder. . . .

You heard from Ms. Deborah Epps. Remember that was an entirely different case. She had nothing to do with Mr. Collier except she lives in the same neighborhood. That was on the 20th of October, 1986. Where? Just about a half a mile to the mile away from Mr. Collier's house. That was--you know the date of this crime, the 11th of November, so put it together. It's about 20, 21 days a part. It isn't like he went out and did these at the same time or on the same day, three weeks a part, two entirely separate incidences.

Obviously Mr. Freeman wasn't caught after the first murder of Mr. Epps. If he had been Mr. Collier would be here today, but he wasn't. He remained at large. He was caught later.

Now you heard from Ms. Epps that her former husband was stabbed six times. He died in the master bedroom in the rear. You also heard that he was alone when it happened. You also heard there was a point of entry on the side of the house, and you also heard just like in the Collier case, doors in the rear of the house.

(R2. 1692-1693).

The appeal for retribution for the prior murder continued with the following exhortations to the jury:

This defendant has previously killed another human being besides Mr. Collier and has been found guilty in another separate trial for first degree murder and related felonies. That is the sad truth, and they can't deny that. . . . The most damaging thing that anyone could have on their record before this Court today are prior felony-- a prior first degree murder conviction, and it was a burglary of a dwelling just like this case.

. . . What do they [the defense] put up against that? Let's look at it real close. First of all he is artistically talented. I already talked about he was a kid. So is every other defendant. He had a father. So does every other defendant. He has artistic talent. I don't deny that. Take them back and look at them. He draw well. Does that counteract the picture that he painted out at the Leonard Collier residence? He painted a real pretty picture out there, didn't he? How about the picture he painted at Mr. Epps' house? He stabbed him six times and left him to die full of his own blood.

(R2. 1724-1725).

In urging the jury to recommend death, the prosecutor repeatedly strayed from arguments relevant to aggravating and mitigating circumstances, engaging in oratory deliberately intended to arouse the prejudice and passions of the jury. The prosecutor exhorted the jury to recommend death because of the

Epps' murder, going so far as to imply that Mr. Freeman had not been punished for that crime:

We are going to decide what to do with the defendant who has committed first degree murder twice.

(R2. 1619).

How many times is this going to happen to this defendant?

(R2. 1693).

He also armed robbed him [Epps] and also committed a burglary with an assault. That's worse, but it doesn't matter because a prior first degree murder cries out for the death penalty when you have been convicted of a second time. How many times does it take before we apply the law?

(R2. 1702).

[I]f there ever was a case that called for the death penalty this is it because of that [the prior murder].

(R2. 1723).

The prosecutor's inflammatory argument continued with his blatant appeals to the sympathies of the jurors for Mr. Collier's and Mr. Epps' children. Although cautioning the jurors to "not get off of our duty as jurors and start sympathizing" with the defendant (R2. 1695), the prosecutor indulged in a sympathetic tirade on behalf of the two victims:

I ask you to go back there and just--if there is any question about it just get your watch out and everybody just sit there in silence for five minutes and think of what agony Mr. Collier went through during that five minutes.

(R2. 1705-1706).

You know, you heard a little bit about Leonard Collier, not much. Leonard Collier is a nice man, a college professor. He was a home owner.

(R2. 1720).

They [defense counsel] say he loves children. Well, what about the Epps' children? Can he help them?

(R2. 1725). Not only was this argument improper as detracting the jurors from their proper function as factfinders relating to aggravating and mitigating circumstances, but also the argument was an improper appeal to the sympathies of the jurors for the two victims. The trial court properly sustained the objections to the above comments (R2. 1720, 1725-1726), and admonished the prosecutor:

I think there is something wrong with it. I think it misfocuses what the jury is to decide. It's not an aggravation and not only is it an aggravation it is a--it's something the jury absolutely should not consider according to the United States Supreme Court, and therefore I am not going to grant the motion for a mistrial but I will instruct the jury they are to disregard the last comment of the prosecutor and it should be no way used in their advisory sentence.

(R2. 1726). Notwithstanding the curative instruction to the jury (T. 1727), the prosecutor's argument was so egregious, inflammatory and unfairly prejudicial that a mistrial was the only proper remedy. Garron v. State, 528 So. 2d 353 (Fla. 1988).

The prosecutor concluded his comments by again urging the jury to recommend death based on the non-statutory aggravating circumstances that Collier and Epps were homeowners:

This defendant went out and executed these two men. No one is immune to the death penalty like I said before. Doesn't matter who they are. That includes John Freeman.

* * *

Now just a few moments I am going to be sitting down. I want to close with a few words. This defendant in this case has committed murder in the first degree, the burglary of a dwelling, killed the home owner. He could have fled but he didn't. He stayed and killed the home owner. It was needless. He lied in wait and brutally, savagely attacked Mr. Collier without any provocation.

He showed no mercy whatsoever and left that home owner to die in the puddle of his own blood. If we look at his past and his character today what do we find out? We find out that previously during the burglary of the dwelling he has killed another home owner. He could have fled, lied in wait and brutally and savagely attacked that person, showed no mercy whatsoever and stabbed him six times and left that man to die in the pool of his own blood. That's what kind of man we are talking about.

The death penalty is good law. It should be applied in this case and ask you to do your duty, have courage, follow the law. When the aggravating factors outweigh the mitigating factor like they do in this case the death penalty is the only way to express this outrage.

(R2. 1727-1729).

The prosecutor repeatedly told the jurors that the mitigating factors presented by Mr. Freeman were not legitimate considerations. The prosecutor argued:

Every single first degree murderer who has ever faced the bar of justice as I have said has had someone come and testify for them in their behalf, and that's fine. That's the way it should be, but let's not

get off of our duty as jurors and start sympathizing. It's not our job.

You heard from his brother Robert Jewel. Let me ask you this also: You got the photographs of the defendant as a child. You don't have photographs of the victim as a child. Those weren't relevant.

Now you heard from his brother much the same thing. Then you heard from Dr. Lou Legum who testified about the defendant's lack of intelligence. I submit to you all the judge will not tell you that lack of intelligence is a reason to not give the death penalty.

(R2. 1695).

[Y]ou heard a lot of questions and answers when Mr. McGuinness was [examining the defense psychologist]. What is your greatest fear, being locked up, what is your wish, I wish I could start all over again, I am sorry for what I did. That's how they got out the defendant's statement about how he want sympathy, pity from you all. That's what he is asking for through the doctor, sympathy, pity, just what you are not supposed to consider? How much pity and sympathy did he show the victims? None.

The judge will tell you are not supposed to base your decision upon sympathy and pity. That's what he is desperately attempting to get. Those questions had nothing to do with intelligence, to curry your sympathy.

(R2. 1697).

All right. Now the third [mitigating factor] and this would apply to any defendant no matter who he is who has been convicted of first degree murder. It will always apply. Any other aspect of the defendant's character or record and any other circumstances of the offense, so all that really is what you are considering here already is the defendant's character and the circumstances of the offense. Those are the two things that I

have mentioned earlier, and all they are doing here is saying other aspects, okay? So that is a catch-all category which you should consider anything they introduce under that, but keep in mind it's a catch all category. It's not anything that's designated like these. It's a catch all.

(R2. 1709).

This is a case like Nowitzke v. State, 572 So. 2d 1346 (Fla. 1990), where this Court ordered a new trial. Nowitzke, 572 So. 2d at 1350.

The prosecutors' arguments went beyond a review of the evidence and permissible inferences. They were intended to overshadow any logical analysis of the evidence and to generate an emotional response, a clear violation of Penry v. Lynaugh, 109 S. Ct. 2934 (1989). This Court has called such improper prosecutorial commentary "troublesome". Bertolotti v. State, 476 So.2d 130, 132 (Fla. 1985).

Aggravating circumstances specified in Florida's capital sentencing statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty. Miller v. State, 373 So. 2d 882 (Fla. 1979).

Trial counsel rendered ineffective assistance by failing to object to many of the improprieties and failing to present effective argument. Under the sixth amendment, defense counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland v. Washington, 466 U.S. 668, 688 (1984). Counsel's

failure to object to the State's highly improper arguments, comments, and actions was well "outside the wide range of professionally competent assistance." Id. at 690. Defense counsel is responsible for knowing the applicable law and making objections based upon that law. See Atkins v. Attorney General, 932 F.2d 1430, 1432 (11th Cir. 1991)(failure to object to admission of evidence which was inadmissible under state law constituted ineffective assistance); Harrison v. Jones, 880 F.2d 1279, 1282 (11th Cir. 1989)(failure to challenge use of inadmissible prior conviction to enhance sentence constituted ineffective assistance); Murphy v. Puckett, 893 F.2d 94, 95 (5th Cir. 1990)(failure to raise valid double jeopardy argument constituted ineffective assistance). Here, defense counsel failed to raise substantial meritorious objections. Defense counsel's inaction undermines confidence in the outcome of Mr. Freeman's penalty phase. As a result Mr. Freeman's death sentence is neither fair, reliable nor individualized. Mr. Freeman's death sentence should be set aside.

ARGUMENT VI

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM THAT HIS SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The judge and jury relied on Mr. Freeman's prior conviction to establish the "prior capital offense" aggravating circumstance

upon which this death sentence was based. On November 2, 1988, the sentencing court found this aggravating circumstance:

1. The defendant was previously convicted of another capital felony or of a felony involving the use or threat of violence to the person. F.S. 921.141(5)(b). This defendant, the evidence shows beyond a reasonable doubt, has been previously convicted of: (1) Burglary of a Dwelling with an Assault; (2) Armed Robbery and (3) Murder in the First Degree (R2.257-59).

Having heard the facts of the prior capital conviction through testimony by the victim's widow, the jury voted by 9-3 margin that he should be sentenced to die. Eight months later, the Florida Supreme Court set aside the prior death sentence and imposed a life sentence. Freeman v. State, 547 So. 2d 125 (Fla. 1989)[Freeman I].¹⁴ The court and the jury in Freeman II were unaware of the tenuous nature of the evidence of guilt in Freeman I or that the key state's witness, Darryl McMillion, had confessed to the crime after testifying in court. See, Argument VIII. It was the "possibility" that an invalid prior conviction may have resulted in the death sentence that warranted reversal in Johnson v. Mississippi, 108 S.Ct. 1981 (1988). The same possibility exists here.

In order to prove the aggravating circumstance, the prosecution presented the testimony of Debra Epps, the former wife of the victim in that case. Ms. Epps testified that her ex-husband was stabbed six times in his home, and that the

¹⁴The Florida Supreme Court conceded that testimony by the victim's widow was improper.

perpetrators entered the home, committed burglary, and then killed the victim (R2. 1614). She referred to several items which were allegedly taken from the residence. (Id.).

The next witness to testify regarding this aggravating circumstance was Detective William DeWitt, through whom the judgement and sentence were introduced into evidence. (R2. 1618). On cross-examination, defense counsel began to question Detective DeWitt about the existence of fingerprints in that case. The prosecution objected, and indicated in front of the jury that if the defense was to be permitted to go into the facts of the previous case, then the state should be allowed "to go into the facts indicating guilt in that case, the evidence, strong evidence of guilt in that case." (R2. 1622). After sending the jury out, the court permitted a factual proffer of the witness, during which defense counsel elicited that a man by the name of Darryl McMillion was named as someone who may have had something to do with the Epps murder. After a brief proffer of Detective DeWitt by the prosecution, the prosecutor remarked that the parties were, in fact, retrying the Epps murder. (R2. 1624). Rather than inform the court that this evidence was relevant mitigation, counsel ceased any further inquiry on this matter, to the court's apparent surprise. (R2. 1625).

Substantial and compelling evidence of Mr. Freeman's innocence of the prior felony with which the state was seeking to prove an aggravating circumstance was not presented. Ample evidence existed that should have been presented to the jury in

its consideration of whether the state had proven the aggravating circumstance beyond a reasonable doubt, and whether the defense had demonstrated the existence of mitigating circumstances.

For example, the jury never knew the evidence which pointed to Darryl McMillion, not John Freeman, as being the one responsible for the murder. See, Argument I, Supra.

This Court did not know that the prior conviction rested on the perjured testimony of Darryl McMillion. Had this Court known, the case would have been reversed. As a result of this error, misleading aggravating evidence was presented to the jury. This improper evidence introduced through the victim's widow indicated that Mr. Freeman had previously killed her husband (R2.1611). Certainly, this evidence added weight to the aggravation side of the scale, and likely tipped the scale in favor of a death recommendation. Under these circumstances, the State cannot demonstrate beyond a reasonable doubt that the jury hearing that Mr. Freeman had previously murdered a man did not tip the jurors' balancing in favor of a death recommendation.

In Clemons v. Mississippi, 110 S.Ct. 1441, 1451 (1990), the Supreme Court noted that Johnson v. Mississippi error was subject to harmless error analysis set forth in Chapman v. California, 386 U.S. 18 (1967). Since the prior murder conviction was the feature of the State's case for death in Freeman II (R2. 1700-02), and since the record contains mitigation upon which the jury could have based a life recommendation, the State cannot

establish beyond a reasonable doubt that the Johnson error in Mr. Freeman's case was harmless. Relief is proper.

ARGUMENT VII

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM THAT HIS SENTENCE OF DEATH VIOLATES THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE THE PENALTY PHASE JURY INSTRUCTIONS SHIFTED THE BURDEN TO MR. FREEMAN TO PROVE THAT DEATH WAS INAPPROPRIATE.

The court and the prosecutor shifted to Mr. Freeman the burden of proving whether he should live or die.

Prosecutorial argument and judicial instructions at Mr. Freeman's capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Freeman, but also unless Mr. Freeman proved that the mitigation he provided outweighed and overcame the aggravation. The trial court then employed the same standard in sentencing Mr. Freeman to death.

This standard shifted the burden to Mr. Freeman to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the aggravation. The standard given to the jury violated state law.

In his preliminary penalty phase instructions to the jury, the judge told the jury that its job was to determine if the mitigating circumstances outweighed the aggravating circumstances (R2.1610). This erroneous instruction was repeatedly emphasized by the prosecutor during closing argument (R2. 1691, 1700, 1706, 1707).

The jury understood that Mr. Freeman had the burden of proving whether he should live or die. The judge again repeated this incorrect statement of the law twice immediately before the jury retired for deliberations (R2.1746,1747).

The instructions and the State's improper argument in closing violated Florida law and the eighth and fourteenth amendments. The instructions shifted the burden of proof to Mr. Freeman on the central sentencing issue of whether he should live or die.

In being instructed that mitigating circumstances must outweigh aggravating circumstances before the jury could recommend life, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Mr. Freeman is entitled to a new sentencing hearing. Counsel's failure to object to the clearly erroneous instructions was deficient performance. But for counsel's deficient performance, there is a reasonable probability that the jury would have recommended life. Accordingly, Rule 3.850 relief is warranted.

ARGUMENT VIII

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM OF INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS FIRST CAPITAL TRIAL, AND THE STATE FAILED TO DISCLOSE CRITICAL EXCULPATORY EVIDENCE, ALL IN VIOLATION OF MR. FREEMAN'S RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE U.S.CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS.

A criminal defendant is entitled to a fair trial. Strickland v. Washington, 466 U.S. 668, 685 (1984). Also, the prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and `material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985) (quoting Brady v. Maryland, 373 U.S. 83, 87 (1963)). Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland.

Mr. Freeman was denied a reliable adversarial testing. The jury never heard the compelling evidence that was obviously exculpatory to Mr. Freeman. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to have heard this evidence. The evidence that was not presented at Mr. Freeman's trial may "have pushed the jury ever the edge into the region of reasonable doubt." Barkauskas v. Lane, 878 F.2d 1031 (7th Cir. 1989).

In Freeman I, Mr. Freeman was convicted of first degree felony murder, burglary with an assault, and robbery, for an incident which occurred on October 20, 1986. See Freeman v. State, 547 So. 2d 125, 126 (Fla. 1989). Medical examiner testimony revealed that the deceased, Alvin Epps, was stabbed six times (R. 1085). Several items belonging to the deceased were missing from his home, and at trial, witnesses testified that Mr. Freeman was in possession of these items near the day of the murder.

The crux of the defense at trial was that Mr. Freeman was not involved in the homicide, and that he received the aforementioned property from a man named Darryl McMillion at a place called Betty's Tavern. Ralph Moneyhun, the lead detective in this case, testified at trial that Mr. Freeman told him on November 26, 1986, that he bought the property from McMillion sometime in October, 1986 (R. 2393). After interrogation by Moneyhun, Mr. Freeman was arrested for the murder of Alvin Epps.¹⁵

Other than glancing at a phone book and checking out Betty's Tavern, Moneyhun conducted absolutely no investigation into Darryl McMillion's involvement in the Epps murder until the end of March, 1987 (Deposition of Ralph Moneyhun, September 15, 1987, at 6-7). It was at this time that defense counsel contacted Douglas Freeman, who informed counsel that he knew McMillion and where he lived in Jacksonville. Following this meeting, Moneyhun contacted Douglas Freeman concerning his knowledge of McMillion Id. at 7. A records check revealed that McMillion had outstanding warrants in several jurisdictions Id. at 11-12.

¹⁵Mr. Freeman, at the time of this interrogation, had already been in jail, having just been charged with the murder of Leonard Collier. On November 19, 1986, Detective Moneyhun spoke with Detective William DeWitt, the lead detective for the Collier murder. After this conversation, Detective Moneyhun decided to question Mr. Freeman as to his potential involvement in the Epps homicide. Mr. Freeman denied any involvement. The following day, November 20, 1986, Douglas Freeman, John Freeman's half-brother, contacted Detective Moneyhun regarding some property that Douglas Freeman had gotten from John, property which turned out to be related to the Epps family. It was after this conversation that Detective Moneyhun again interrogated Mr. Freeman.

McMillion was arrested in Fayetteville, North Carolina, and transported to Jacksonville in August 1987 (R. 1528). He testified at trial that he was in Tulsa, Oklahoma, on October 20, 1986 (R. 1529). At trial, the state produced an application allegedly completed by McMillion in which he applied for a job at a McDonalds in Tulsa on October 20, 1986 (R.1541).¹⁶ In addition to his using an alias, Darryl McMann, on the McDonalds application, McMillion admitted at the trial that most of the information on the application was false. For example, the name of McMillion/McMann's high school was false (R1. 1578), his year of graduation was false and his employment history was false (R1. 1578-79, 1581).

McMillion also testified at Mr. Freeman's trial that when he was arrested in North Carolina, he was in possession of a knife. (R1. 1588). When he was returned to Jacksonville, however, the knife had disappeared:

Q Where is that knife?

A I have no idea. The last time I saw it was when I got off the plane here in Jacksonville.

One detective that flew down, one of the officers that flew down had possession of the knife. When I got off the plane, he handed it to another officer inside the hangar. Since then, I haven't seen the knife.

Q Did they steal it from you?

¹⁶Although he could not remember the exact date that he applied for the job (R. 1541), the state showed McMillion the document and he subsequently "recalled " that it was October 20, 1986.

A I would imagine so. I haven't seen it since then, and I have never had any receipt for it since then.

(R1. 1588). This point is of critical importance, as the knife used in the Epps murder was never recovered. No investigation into the disappearance of the knife, possibly the murder weapon, was ever conducted. No depositions of the officers who transported McMillion from North Carolina were ever taken.

Critical exculpatory evidence was also withheld from Mr. Freeman by the prosecution in order to secure a conviction. This evidence not only was exculpatory, it also would have provided valuable impeachment evidence of state witnesses. Moreover, it was a source of compelling mitigation that could have been utilized by Mr. Freeman at the penalty phases of both capital offenses for which he was tried.

The prosecution was quick to assert at trial that it had made no promises or secret deals with its key witness, Darryl McMillion (R1. 1527). Records disclosed, however, reveal otherwise, and also indicate that information is still being withheld regarding the State's relationship with Darryl McMillion.

Promises and undisclosed deals were made with McMillion and were not disclosed to either defense counsel or the jury.

Other evidence disclosed which had not been revealed to defense counsel at the time of Mr. Freeman's trial consists of notes indicating that Douglas Freeman was subjected to a polygraph examination by the Duval County Sheriff's Office.

Douglas Freeman, who is the half-brother of John Freeman, provided critical testimony against his brother at the trial. In fact, Douglas Freeman maintained constant contact with the detectives and the state attorneys throughout the investigation of his brother, and was utilized often by the police as a source of information. Nor has any report regarding this polygraph been disclosed to current counsel pursuant to Chapter 119.

While the aforementioned notes indicate that Douglas Freeman was polygraphed, there is no polygraph report or results of this polygraph listed in discovery or located in any files pertaining to the Epps murder case. The importance of such a report, the results, and the conditions under which the polygraph was administered is evident, and defense counsel was never made aware of any of this information.

Here, exculpatory evidence and statements material to the defendant's case were not disclosed. The undisclosed statements and evidence of secret deals between the prosecution and state witnesses were obviously corroborative of the defense theory in Mr. Freeman's case. Certainly Rule 3.220(a) was violated. This evidence was "within the State's possession or control." It was in the possession of the law enforcement agency "investigating" the case and the state attorney's office. The nondisclosure cannot be found to be harmless. Nor could there be any tactical or strategic reason for not presenting such evidence to the jury.

The lower court concluded that this claim was time barred and without merit because "the alleged exculpatory information

was equally accessible to the defense" (PC-R. 431-432). However, the state used this prior felony as an aggravating factor in the Freeman II trial. In fact, it was the main feature of the state's case. It is obvious from the nature of the evidence pled that the information would have been useful in penalty phase of Freeman II. It could not be used because it was withheld by the state. The lower court can offer no explanation as to how trial defense counsel would have gotten access to letters written by the state attorney reflecting the deals their "witnesses" were receiving in exchange for their testimony. Nor can the court suggest how defense counsel would know or have access to a confidential polygraph examination of Doug Freeman, unless the state disclosed it. The lower court admits that the witness that the state hid during trial, Dudley Gang, was not revealed to trial counsel until after trial. The court cannot explain away these violations because it is not "of record." Mr. Freeman's allegations should have been taken as true as dictated by Lemon, supra. Instead, the court has interjected its own strategy for defense counsel who has never testified. The lower court cites to Provenzano v. State, 616 So. 2d 428 (Fla. 1993) to support its argument (PC-R. 432). However, in Provenzano, trial counsel had sua sponte offered an alleged strategy for not moving for a change of venue at trial. There is no such record in Mr. Freeman's case.

Likewise, in determining whether a death sentence should be imposed it is appropriate to look at the underlying circumstances

to determine the weight that should be given to a "prior violent felony" aggravator. See, Chaky v. State, 651 So.2d 1169 (Fla. 1995); Johnson (Calvin) v. State, Case No. 88,986 Slip Op. at page 9 (Fla. October 22, 1998)(rehearing pending).

Accordingly, Mr. Freeman's conviction must be vacated and a new trial ordered. Kyles v. Whitley, 115 S. Ct. 1555 (1995).

ARGUMENT IX

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM THAT THE STATE'S DECISION TO SEEK THE DEATH PENALTY IN HIS CASES WAS BASED UPON RACIAL CONSIDERATIONS, AND MR. FREEMAN'S DEATH SENTENCE VIOLATES THE EQUAL PROTECTION CLAUSE AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The State sought the death penalty based upon racial considerations. See, McClesky v. Kemp, 481 U.S. 279 (1987). Mr. Freeman offered to enter guilty pleas in both cases (although maintaining his innocence in Freeman I) in exchange for a life sentence. This offer was rejected by the State because the State Attorney's Office wanted to "get the numbers up" on seeking the death penalty in homicides involving white defendants and black victims. Mr. Freeman's trials were occurring in the same time period that the same State Attorney's Office was seeking a death sentence at a resentencing proceeding in Dougan v. State, 595 So.2d 1 (Fla. 1992). In that case, the black defendant had been convicted of murdering a white victim as part of a "race war." Also in the same time period, the United States Supreme Court issued its opinion in McClesky v. Kemp, holding that statistical evidence showing a racial disparity in death sentences did not

create a constitutional claim but that a criminal defendant must show intentional discrimination. Clearly, the subject of racial disparity in seeking death sentences was a prominent topic at the time, as evidenced by the State's reaction to the plea offer.

The State's racially-based decision to seek death in Mr. Freeman's cases violated equal protection and the eighth amendment. The racial basis of the State's decision is an arbitrary, unjustifiable classification which has no rational relationship to accomplishing a legitimate state objective. McClesky, 481 U.S. at 291, n.8. The State's decision to seek death was based upon purposeful discrimination which had a discriminatory impact upon Mr. Freeman. Id. at 292.

The central tenet of eighth amendment jurisprudence is "to minimize the risk of wholly arbitrary and capricious action." Gregg v. Georgia, 428 U.S. 153, 189 (1976). The Supreme Court has required that "any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 358 (1977).

The lower court concluded that this claim "suffers" from the same defect cited in McClesky, supra.(PC-R. 433). Mr. Freeman alleged in his postconviction motion that the State Attorney's office refused to participate in plea negotiations with trial counsel because the office wanted to "get the numbers up" on seeking the death penalty in homicides involving white defendants and black victims. He also offered that his trials occurred during the same time as the highly-publicized Dougan trial.

These facts must be taken as true under Lemon, supra. If taken as true, these facts would establish a constitutional violation under McCleskey, supra. The lower court's summary denial of this claim was error.

The State's decision to seek death in Mr. Freeman's cases violated equal protection and the eighth and fourteenth amendments to the U.S. Constitution. Trial counsel was ineffective in failing to litigate this issue. Mr. Freeman is entitled to relief.

ARGUMENT X

THE LOWER COURT ERRED IN SUMMARILY DENYING MR. FREEMAN'S CLAIM OF CUMULATIVE ERROR.

Mr. Freeman contends that in both cases he did not receive the fundamentally fair trial to which he was entitled under the eighth and fourteenth amendments to the U.S. Constitution. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). The process itself has failed because the sheer number and types of errors involved in his trials, when considered as a whole, virtually dictated the convictions and sentence.

The errors have been pointed out throughout all of Mr. Freeman's pleadings and direct appeals. While there are means for addressing each individual error, addressing these errors on an individual basis will not afford adequate safeguards against improper convictions and an improperly imposed death sentence -- safeguards which are required by the Constitution.

Death is an unusual penalty, unique in its severity, and thus greater caution and safeguards must be utilized to ensure

the constitutional validity of each death sentence See, Gardner v. Florida, 430 U.S. 349, 357 (1977). This same principle was posited in Woodson v. North Carolina, 428 U.S. 280 (1976):

Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson, 428 U.S. at 305 (emphasis added). This rationale has been applied to both the sentencing and guilt-innocence phases of a capital defendant's trial See, Beck v. Alabama, 447 U.S. 625, 638 (1980).

Mr. Freeman contends that numerous violations occurred at both stages of his trials. These claims have been raised in direct appeal or are currently being raised. The claims which arise as a result of Mr. Freeman's trials should not only be considered separately. Rather, these claims should be considered in the aggregate, for when the separate infractions are viewed in their totality it is clear that Mr. Freeman did not receive the fundamentally fair trials to which he was entitled under the Eighth and Fourteenth Amendments. Gunsby v. State, 670 So.2d 920 (Fla. 1995). The constitutional claims raised on direct appeal and in postconviction, show that the trials were fundamentally flawed. The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative

effects of harmless error must be carefully scrutinized in capital cases. In Mr. Freeman's cases, relief is proper.

ARGUMENT XI

THE LOWER COURT IN SUMMARILY DENYING MR. FREEMAN'S POSTCONVICTION MOTION FAILED TO ATTACHED THE PORTIONS OF THE RECORD WHICH SUPPORTS ITS ORDER CONTRARY TO FLA. R. CRIM. P. 3.850.

The trial court issued its order on August 1, 1996 summarily denying all of Mr. Freeman's claims without an evidentiary hearing(PC-R. 424). Contrary to the dictates of Rule 3.850, the lower court failed to attach portions of the record which support its order. See, Fla. R. Crim. P. 3.850. Mr. Freeman is entitled to an evidentiary hearing on his claims. This case should be remanded for hearing and proper consideration of his claims.

CONCLUSION AND RELIEF SOUGHT

For the foregoing reasons, Mr. Freeman prays that this Court will reverse the trial court's order summarily denying his claims for postconviction relief and remand for a full evidentiary hearing or vacate the convictions and sentences, including his sentence of death, and remand for a new trial.

I HEREBY CERTIFY that a true copy of the foregoing Amended Motion to Vacate has been furnished by United States Mail, first class postage prepaid, to all counsel of record on November 2, 1998.

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