IN THE SUPREME COURT OF FLORIDA

CASE NO. 68773

RONALD J. STRAIGHT, Appellant, v. STATE OF FLORIDA, Appellee.	EMERGENCY: EXECUTION IS IMMINENT -- EXECUTION IS NOW SCHEDULED FOR 7:00 A.M., MAY 20, 1986

APPEAL FROM THE TRIAL COURT'S ACTIONS DENYING A STAY, A HEARING ON DEFENDANT'S 3.850 MOTION, AND DENYING THE RELIEF REQUESTED THEREIN, AND MEMORANDUM IN SUPPORT OF DEFENDANT'S REQUEST TO THIS COURT TO ENTER A STAY OF EXECUTION

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Ronnie Straight has not been allowed to prove that his sentencing judge did not believe she could consider non-statutory mitigating circumstances when she decided in 1977 that death was the appropriate punishment. The trial judge's error goes to the heart of that which the Eighth Amendment guarantees: a meaningful sentencing determination, unrestricted by statutory criteria which, standing alone, "exclude[] from consideration in fixing the ultimate punishment of death the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 91976); see Harvard v. State, 11 F.L.W. 55 (Fla. Feb. 6, 1986). The sentencing judge's error resulted from an "understanding of the law that the mitigating circumstances relevant to sentencing were the areas specifically listed in the statute." App. 1. According to trial counsel, "[t]his was our reasonable interpretation of the statute, and provided the parameters within which the trial was conducted and sentencing determined." Id.

The Court knows this issue. It is a glitch that was dealt with in Harvard, when the Court applauded the candor of the trial judge who, deluded by what he "reasonably understood," made it "apparent from the record that . . . [he] believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute. . . ." 11 F.L.W. at 55. The Court reversed the denial of 3.850 relief, ordered a new sentencing hearing, and underlined the importance of having the

issue determined "by the trial judge rather than by this Court on the face of a cold record." Id. at 56.

Last Wednesday, Mr. Straight asked this Court to "fashion a procedural remedy" and "a supervised examination of those cases in which petitioners like Mr. Straight can demonstrate that the death penalty statute pre-1978 operated in fact as a trap for the unwary." See Application for Stay of Execution, and Petition for Relief Pursuant to Harvard v. Florida, 11 F.L.W. 55 (Fla. 1985). The Court declined.

This 3.850 proceeding followed, and counsel unsuccessfuly attempted to obtain the presence of the sentencing judge at a non-evidentiary hearing conducted Friday afternoon. The trial judge had "declined" to hear the 3.850 proceeding in 1982, and was "on vacation" last Friday. The judge who presided on Friday ruled that the sentencing judge's attendance was unnecessary because he was not going to rule on the merits of the petition, accepting instead the state's assertion that Mr. Straight's 3.850 motion "was an abuse of the post-conviction process."

In this appeal, Mr. Straight will demonstrate (1) that he is entitled to a proper determination of his Harvard claim, and (2) that the claim is not barred, and its procedural history was misrepresented by the state to the court below. Mr. Straight will also demonstrate that, based upon each claim presented to the lower court, he is entitled to a stay of execution, and a vacation of the judgment and sentence.

ARGUMENT

CLAIM I

MR. STRAIGHT'S SENTENCING JUDGE REASONABLY BELIEVED THAT SHE WAS PRECLUDED FROM CONSIDERING NON-STATUTORY MITIGATING CIRCUMSTANCES, AND THE LACK OF A PROCEDURE TO DETERMINE WHETHER CAPITAL SENTENCING JUDGES PRIOR TO LOCKETT DID IN FACT LIMIT THEIR SENTENCING CONSIDERATION TO STATUTORY MITIGATING CIRCUMSTANCES INJECTS INTO THE DEATH PROCESS THE SORT OF ARBITRARINESS CONDEMNED IN FURMAN V. GEORGIA.

> From my research, it was my understanding of the law that the only mitigating circumstances relevant to sentencing were the ones specifically listed in the statute. From my discussions with and observation of the other trial participants, it was my impression those feelings were shared by the prosecutor, Ralph Greene, and the trial judge, Honorable Virginia Q. Beverly. It was my further impression, Judge Beverly would not have considered mitigating evidence which did not pertain to the statutory mitigating circumstances. This was our reasonable interpretation of the statute, and provided the parameters within which the trial was conducted and sentencing determined.

(App. 1, affidavit of H. Randolph Fallin).

At the time of Mr. Straight's sentencing trial, which occurred during the two-year period between Cooper v. State, 336 So. 2d 1122, 1139 (Fla. 1976), when this Court appeared to hold that the statutory mitigating circumstances were exclusive, and Lockett v. Ohio, 438 U.S. 586 (1978), when the United States Supreme Court held that the capital sentencer must be permitted

to consider mitigating circumstances not listed in the capital statute, Florida's capital statute was capable of reasonably being interpreted as limiting the sentencer's consideration of mitigating circumstances to statutory mitigating factors. As this Court explicitly recognized in Harvard v. State, 11 FLW 55 (Fla. Feb. 6, 1986), reasonable judges, defense attorneys and prosecutors did reasonably construe the capital statute as limiting the sentencing decision to consideration of the statutorily enumerated mitigating circumstances. Harvard, FLW at 58; see also Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc). See also Spaziano v. Florida, 104 S.Ct. 3154, 3158 n.4 (1984); Barclay v. Florida, 463 U.S. 939, 961 n.2; Songer v. Wainwright, 105 S.Ct. 545 (1985) (Marshall, J., dissenting from denial of certiorari).

In Harvard and Songer, this Court and the Eleventh Circuit respectively required resentencing because the sentencing judges in those cases candidly stated, at state post-conviction proceedings, that they interpreted Florida law as limiting consideration of mitigating circumstances. Every indication in the record of Mr. Straight's case, and evidence which can be presented outside of the record, demonstrate that the confusion in Florida law prior to Lockett affected the sentencing proceeding in this case. In fact, all of the actors in Mr. Straight's trial, judge and attorneys alike, apparently acted in reliance on this reasonable misinterpretation of Florida law.

A. Facts Upon Which Relief is Requested

Mr. Ronald Straight and Mr. Timothy Palmes were co-defendants, but were tried separately. The trial judge, Honorable Virginia Q. Beverly, sentenced both defendants to death, the only death sentences she has ever imposed. These were the first capital trials over which she had presided. The proceedings occurred in the following chronological order: (1) Mr. Palmes was tried and convicted of first-degree murder; (2) Mr. Straight was tried and convicted of first-degree murder; (3) Mr. Straight was sentenced; (4) Mr. Palmes was sentenced.

Mr. Straight's proof that the trial judge declined to consider nonstatutory mitigating circumstances because she felt limited by the language of the statute and interpretive case law includes: (a) record evidence from Mr. Straight's sentencing; (b) record evidence from Mr. Palmes' sentencing; and (c) non-record evidence, presented through the affidavit of defense counsel. The evidence is convincing that the trial court in this action, like the trial judges in Harvard and Songer, believed that she was restricted in what she could consider in mitigation, a constitutional error which requires resentencing.

1. Record Evidence from Mr. Straight's Sentencing

a. The Prosecutor

The prosecutor, during closing argument, revealed his limited view of the allowable range of mitigating evidence, in what was a reasonable and tellingly normal but constitutionally infirm

explication of the sentencing process. First, the prosecutor told the jury that the statute provided the exclusive list of allowable mitigation:

> Now, the Court will talk to you at some length later on and I'll talk to you now and I know [defense attorney] Fallin will, too, about how you are supposed to determine when death is the appropriate recommendation. The law doesn't leave it up to your own good graces or your gut feelings or your reactions. It spells out in, I think, pretty clear and unmistakable terms the criteria which you are to use in order to determine whether or not death is an appropriate recommendation to the Court. In other words, you're going to have a guideline and all you have got to do is look at the guideline and see how the facts of this case or the background of that man fit those guidelines in order to determine what your recommendation should be.
>
> Before getting to the specifics of the case itself, I'd like to look a little bit with you at the law concerning the death penalty. Now, the Florida Statute sets out a list of what is called aggravating and mitigating circumstances as you heard the Court mention a moment ago and the Court will go into some length about it, but there are eight aggravating circumstances and there are seven mitigating circumstances and it's pretty much your job to determine which aggravating, if any, and which mitigating, if any apply and then to determine, which is the balancing or the weighing process, which outweighs the other in deciding what your recommendation should be. And I'm going to, as Mr. Fallin will, to discuss with you the aggravating and mitigating circumstances and talk with you about what I think you will find the aggravating circumstances are and what the mitigating, if any, I think you will find.
>
> . . . .

> As I said before, the law doesn't leave the recommendation of life or death to your speculation or your whim. It sets out very clear guidelines by which you are to follow and the Court will give you a copy of them and you can read them over and I submit to you, Ladies and Gentlemen, that given the facts of this case, his prior record and the aggravating and mitigating circumstances that will be set out to you by the Court and which you can take with you into the Jury Room, there is no recommendation you can make but that that man should die in the electric chair and I ask you to do just that.
>
> Thank you.

Id. at 8-9, 21 (emphasis added). Without question, the record reveals that the prosecutor (and the jury through him) believed that the jury and judge were restricted to "the criteria which you are to use." "[T]here are seven . . . very clear guidelines."

Defense counsel did not object to these statements, but embraced them, sharing with the other participants a flawed but reasonable view of the statute.

b. The Defense Attorney

Defense counsel began his closing argument by stating:

> Ladies and Gentlemen, I concur somewhat in Mr. Greene's statements outlining the aggravating and mitigating circumstances that you are to consider in arriving at your verdict; however, I differ with him in one respect as to whether it's irrelevant or relevant as to what effect in applying the death penalty would have because I think if it were otherwise the statute would so provide. The statutes -- and if you will read and you'll have copies of this back in the Jury Room for you to read over these aggravating and mitigating circumstances -- are drawn in a way -- they are pretty loosely drawn. They are pretty wide open in

discrepancy.

Id. at 22. Defense counsel later said: "I think [the prosecutor] fairly summarized what they [the enumerated circumstances] say and you will have a copy of them to read." Id. at 24. Mr. Straight's attorney also argued that:

> What it all boils down to is it's your job to fit the facts and plug those facts into these mitigating and aggravating circumstances and give those whatever weight, whatever it be that you think it deserves, and bring back your advisory opinion.

Id. at 25-26.

c. The Trial Court

The sentencer believed she was restricted by the statutory mitigating circumstances, as revealed by her comments and jury instructions. In her Order of Judgment and Sentence, the trial court recited that she had summarized facts "and applied them to each element of aggravation or mitigation . . . ." The Court then "summariz[ed] these elements of aggravation or mitigation. . . ." The judge then considered and analyzed only the statutory mitigating circumstances, one by one. This system paralleled the system proposed by the prosecutor and defense attorney, and the system the jury was instructed to follow.

The final jury instructions told the jury that "the aggravating circumstances are limited to such as the following as may be established by the evidence: [the statutory aggravating circumstances were then read]. Then, in strikingly parallel language, the jury was instructed that "the mitigating

circumstances which you may consider, if established by the evidence, are these: [the statutory mitigating circumstances when then read]." Sentencing Transcript at 29-33 (emphasis added). At no point in the instructions was the jury told that it could legitimately consider any relevant mitigating circumstances, in addition to the mitigating circumstances specified in the instructions.

2. Record Evidence from Mr. Palmes' Sentencing

Mr. Palmes was sentenced after Mr. Straight. The prosecutor and the trial judge were the same, in both trials. Their interpretation of proper sentencing procedure, the same procedure utilized at Mr. Straight's trial, underscores that the trial judge limited her consideration of mitigating circumstances to those listed in the statute.

Mr. Palmes waived a jury advisory sentence. The prosecutor began argument by reminding the judge of the restrictive nature of the mitigating circumstances:

> I would like to review very briefly the legal criteria upon which the Court I'm sure will base its sentence.
>
> As set out in Florida Statutes, the statute lists aggravating and mitigating circumstances, and we have gone over those at great length in the trial of Ronnie Straight, and of course, they apply as well here.
>
> . . . .
>
> There are at least from reading over the mitigating circumstances that the Court should

> consider as enumerated by the Supreme Court, I don't find any mitigating circumstances. I don't think there are any.

Sentencing Transcript, 62, 70, State v. Palmes. See Appendix 19, Motion to Vacate.

The trial court revealed that her evaluation of mitigation was so restricted:

> The court has considered mitigating factors and circumstances as outlined by the statute.
>
> Taking one by one . . .

Id. at 86. The court then discussed only the statutory mitigating circumstances, one by one.

3. Nonrecord Proof

Trial counsel has provided an affidavit which gives life to what everyone thought and did at Mr. Straight's trial:

> 1. I am an attorney in private practice in Jacksonville, Florida. My business address is 437 East Monroe Street. I was licensed in Florida in 1970, and I have been actively engaged in the practice of law since then.
>
> 2. I represented Ronald J. Straight in Case No. 76-2231-CF, in the Circuit Court, Fourth Judicial Circuit, in and for Duval County, Florida. This was a first-degree murder case.
>
> 3. I had never tried a first-degree murder case before Mr. Straight's case. The trial judge was Honorable Virginia Q. Beverly. She had never presided over a first-degree murder trial and capital sentencing proceeding before the trials of Mr. Straight and his co-defendant, Mr. Timothy Palmes.
>
> 4. I read the Florida death penalty statute and case law regarding capital

> proceedings in order to prepare for Ronald Straight's trial. From my research, it was my understanding of the law that the only mitigating circumstances relevant to sentencing were the ones specifically listed in the statute. From my discussions with and observations of the other trial participants, it was my impression these feelings were shared by the prosecutor, Ralph Greene, and the trial judge, Honorable Virginia Q. Beverly. It was further my impression, Judge Beverly would not have considered mitigating evidence which did not pertain to the statutory mitigating circumstances. This was our reasonable interpretation of the statute, and provided the parameters within which the trial was conducted and sentencing determined.

See Appendix 1, Motion to Vacate.

Nonstatutory mitigating circumstances were available for the judge's consideration. Among other things, there was evidence and information before the trial court that Mr. Straight had a substantial history of drug abuse which controlled and perverted his behavior. According to the PSI, drugs played an important role in the crime. Mr. Straight was very remorseful for the victim's death. He had undergone extensive psychological counseling, and had sought counseling and drug treatment in the past. Residual doubt about guilt was also clearly mitigating.

The trial court refused to consider any such evidence.

B. Harvard Relief is Appropriate

"There are presently close to forty (40) inmates on Death Row who were sentenced prior to the date of the Lockett decision . . ." Harvard v. State, 11 FLW 193 (Fla. April 24, 1986) (Booth, J., dissenting from denial of rehearing). Some of those cases

undoubtedly do not present the issue of the ambiguity of Florida's law pre-Lockett. This case does. Mr. Straight should be allowed to live until the constitutionality of his death sentence can be determined.

In recent months, this Court and the Eleventh Circuit have addressed the confusion in Florida's capital sentencing law prior to Lockett v. Ohio, 438 U.S. 586 (1978). This Court in Harvard v. State, 11 FLW 55, 56 (Fla. 1986), reaffirmed that it "has previously recognized that" prior to Lockett "our death penalty statute could have been reasonably [but incorrectly] understood to preclude the introduction of nonstatutory mitigating evidence." The Eleventh Circuit has also recognized the "confusion in Florida law surrounding nonstatutory mitigating evidence in capital sentencing." Hitchcock v. Wainwright, 770 F.2d 1514, 1516 (11th Cir. 1985) (en banc). See also Songer v. Wainwright, 769 F.2d 1488 (11th Cir. 1985) (en banc).

In Harvard, at state post-conviction proceedings held in 1985, counsel for Harvard argued that during the post-Furman, pre-Lockett period (1972-1978), reasonable counsel and judges could have differed as to whether non-statutory mitigating circumstances could be considered in capital sentencing proceedings. Counsel for Mr. Harvard argued that different views as to this question were reasonable, but the trial court candidly and forcefully insisted that there was only one reasonable view:

THE COURT: Counsel, you know, you assert

> that. It's so very difficult because of the apparent limiting language for me to, you know, to see that there could be a reasonable interpretation where mitigation was to be unlimited. All of the words, you know, really seem to suggest limited aggravating, limited mitigating. And I understand your assertion; but I'll tell you, you know, up front, it's hard for me to see --
>
> MR. BURR [counsel for Mr. Harvard]: Sure.
>
> THE COURT: -- that other so-called reasonable interpretation.
>
> MR. BURR: Right. What appeared to Your Honor was the reasonable interpretation[,] was that they were limited.
>
> THE COURT: Right.

Transcript of Hearing on August 26, 1985, at 12-13, State v. Harvard, No. 74-173-CF-A-01. See Appendix 14, Motion to Vacate.

Judge McGregor opined that the Florida Supreme Court was simply "covering" by finding that the statute did not limit:

> THE COURT: (Interposing) But, you know, you're double-talking as much as in my judgment the Supreme Court was double-talking. They wanted to, I guess, preserve the statute and not find it unconstitutional.

Id. at 15.

The judge continued to make his position known in unique vocal terms:

> [COUNSEL]: That's precisely how the statute operated unconstitutionally through counsel in this case. It's not -- we don't have to say the statute on its face was unconstitutional. We can accept what the Florida Supreme Court has consistently said, and that is that it wasn't. On its face, it could have been read not to preclude non-statutory mitigating evidence.

But as a practical matter --

THE COURT: (Interposing) Not by reasonable men. Thank you.

Id. at 17. And again,

[COUNSEL]: At the time, did you share the same belief that Mr. Dressler [Harvard's trial counsel] did? That there was a limitation.

THE COURT: Yes.

Id. at 20 (emphasis added).

Judge McGregor denied a stay of execution in Harvard, and an appeal was taken to the Florida Supreme Court. This Court stayed Harvard's execution and ultimately remanded for resentencing, holding that:

> An appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute in determining whether to impose a sentence of death or life imprisonment without parole for twenty-five years. See Lockett; Eddings, cf. Jacobs v. Wainwright, 105 S. Ct. 817 (1985) (Brennan, J., dissenting); Songer v. Wainwright, 105 S. Ct. 545 (1984) (Marshall, J., dissenting). In his order denying relief, the trial judge in the instant case addressed the allegation that he failed to consider nonstatutory mitigating circumstances and expressly found that "reasonable lawyers and judges at the time of Mr. Harvard's trial could have mistakenly believed that nonstatutory mitigating circumstances could not be considered. The court certainly carried out its responsibility on the basis of that premise at the time of Mr. Harvard's trial." We note that nonstatutory mitigating factors may

> arise not only from evidence presented in the penalty phase but also from evidence presented and observations made in the guilt phase of the proceedings. Whether nonstatutory factors actually presented in the guilt phase or the newly asserted nonstatutory mitigating factors would have influenced the trial judge is a determination which, under these circumstances, should be made by the trial judge rather than by this Court on the face of a cold record. In view of the trial judge's statement in this case, and the fact that the scope of appellant's presentation at his 1980 resentencing was limited pursuant to this Court's order, we have no alternative but to conclude that appellant's death sentence was imposed in violation of Lockett and that appellant is, therefore, entitled to a new sentencing hearing.

Harvard, 11 FLW at 55-56. The same thing had happened in Songer. See 769 F.2d at 1489.

Thus, in the course of post-conviction proceedings in Harvard and Songer, the trial judge in each case commented that at the time of sentencing he had misinterpreted the Florida statute and as a result had not considered any nonstatutory mitigating evidence in making his sentencing decision.

In Mr. Straight's case, however, the original sentencing judge did not preside at either post-conviction proceeding. The opportunity of inquiry, which revealed the constitutional error in Songer and Harvard, therefore was unavailable to Mr. Straight. Life or death cannot constitutionally depend upon this kind of a roll of the dice. Harvard and Songer happened to come back before the original judge in post-conviction. They won; they live, at least for now. Mr. Straight's judge did not hear the

post-conviction challenge. He loses; he dies, because he cannot ask his original judge the questions critical to the Songer/Harvard claim. Furman cannot permit him to die for that arbitrary a reason.

Fairness requires that some sort of procedural device be fashioned to obtain the information that was deemed controlling in Harvard and Songer. There are at least two possibilities. First, this Court could simply seek the information from the trial judges directly. Second, the inmates themselves could be permitted to subpoena their trial judges to make the relevant Harvard inquiries.

Mr. Straight respectfully suggests that the most equitable and expeditious approach would be to devise a procedural mechanism modeled after the procedure adopted by this Court in the wake of Gardner v. Florida, 430 U.S. 349 (1977). In Gardner, the United States Supreme Court held that it violated due process of law and the eighth amendment for a death sentence to be imposed where the sentencing judge had considered confidential information not made known to the defendant or to his counsel. The sentencing judge in Gardner had considered the confidential portion of the presentence investigation report (PSI) that the judge had ordered to be prepared. Though the Court found this procedure to be violative of the Constitution, it did not resolve the question of the precise remedy for the violation. Id. at 362.

Following Gardner, this Court issued orders to trial judges requiring the judges to state whether they imposed death sentences in consideration of any information not known to the defendant. If the trial judge responded in the affirmative, then this Court vacated the death sentence and remanded to permit the defendant an opportunity to rebut the information contained in the PSI.

The decisions in Harvard and Songer necessarily imply a right to learn from the trial judge, upon some showing certainly met in this case, whether he or she mistakenly understood the Florida statute as limiting consideration of mitigating circumstances. The Harvard/Songer claim cannot be allowed to turn on the fortuity of coming before the original sentencing judge in post-conviction proceedings in which the judge volunteers the information. A procedure similar to that employed in Gardner cases would permit acquisition of the necessary information in an orderly and nonintrusive manner.

The alternative to a Gardner-type inquiry is an evidentiary hearing at which the sentencing judge would be called as a witness. At such a hearing, the sentencing judge's testimony would be admissible.

A judge may not be asked to testify about his mental processes in reaching a judicial decision. Fayerweather v. Ritch, 195 U.S. 276 (1904). However, a judge may appropriately testify as to his or her personal knowledge of historical facts. See 10

Moore's Federal Practice Section 605.2 (1982). In Fayerweather, the testimony of the trial judge was introduced in an effort to demonstrate that the judge had not made certain findings which were legally necessary to his decision rendered in the case six years earlier. The judge's decision had not spelled out his reasoning, but the intermediate findings were implied by the result. The Supreme Court held that it would not allow the judgment to be disturbed on the basis of testimony as to the mental process leading to the judge's decision.

The rule established in Fayerweather was recently discussed by the Eleventh Circuit in Washington v. Strickland, both in the panel opinion, see 673 F. 2d 879 (5th Cir. 1982) (Unit B), and in the opinion following rehearing en banc. See 693 F 2d 1243 (5th Cir. 1982) (en banc) (Unit B), reversed on other grounds, 104 S. Ct. 2054 (1984). In that habeas corpus proceeding the state sentencing judge testified as to "a number of matters of basic, historical facts that were relevant, and indeed crucial to [the petitioner's] habeas claims," and the Eleventh Circuit found that testimony "entirely appropriate." 673 F. 2d at 902. The trial judge had also testified, however, as to the weight he had accorded various aggravating and mitigating circumstances, and as to whether certain evidence that it was suggested might have been presented would have altered his sentencing determination. The Eleventh Circuit found that this testimony as to the trial judge's analysis of evidence presented violated the Fayerweather

preclusion of testimony as to mental processes in reaching a judicial decision, citing policy reasons for continued adherence to the rule -- namely, the risk of inaccurate testimony, the importance of finality and integrity of judgments, and considerations of federalism in habeas corpus proceedings. 693 F. 2d. at 1263. Similarly, in Goode v. Wainwright, 704 F. 2d 593, 605 n.14 (11th Cir. 1983), reversed on other grounds, 104 S. Ct. (1984), the Court refused to allow testimony on the degree of the trial court's reliance on a non-statutory aggravating factor.

Here the question would not be one of the judge's mental processes, going to the weight or reliance placed by the judge on certain factors. It is a question of pure fact -- whether at the time of sentencing the trial judge read the Florida law as limiting consideration of mitigating circumstances to those enumerated in the statute, and whether, therefore, nonstatutory mitigating evidence was considered. Moreover, the policy considerations cited in Washington v. Strickland do not apply. There is little risk of inaccuracy, as the judge would not be asked about his or her analysis in the particular case, but rather his or her understanding of the law during the period in question. As to the importance of finality and considerations of federalism, this Court has itself held that a sentence rendered under such a mistaken interpretation of the Florida statute is unlawful and must not stand. See Harvard.

Thus, at present the right to learn from the trial judge

whether he or she mistakenly understood the Florida statute as to limit consideration of mitigating circumstances turns on the fortuity of (1) finding that years after sentencing the trial judge is still active and still sitting in criminal matters, and (2) coming before that judge in post-conviction proceedings in which the judge volunteers the information. Mr. Straight must be given the opportunity to put this question to the judge that sentenced him to death.

As detailed in the statement of facts, there is every reason to believe that the trial judge who sentenced Mr. Straight to death was operating under the same widespread mistaken interpretation of the Florida capital sentencing statute. As the trial judge in Harvard observed in addressing the allegation that he had failed to consider non-statutory mitigating circumstances at the 1975 sentencing in that case, "reasonable lawyers and judges at the time of Mr. Harvard's trial could have mistakenly believed that non-statutory mitigating circumstances could not be considered. The court certainly carried out its responsibility on the basis of that premise at the time of Mr. Harvard's trial." Harvard, 11 FLW at 56. This Court commended the Harvard trial judge "for his candor" in making the remark, acknowledging that "at the time appellant was originally sentenced, our death penalty statute could have been reasonably understood to preclude the introduction of nonstatutory mitigating evidence." Id.

Mr. Straight was sentenced to death in 1977, during the height of this period of confusion over interpretation of the Florida capital statute. It would be fundamentally unfair and a denial of due process of law to put Mr. Straight to death without allowing him the opportunity to learn by questioning the trial judge in his case whether that judge shared the same mistaken understanding of the law which was voluntarily admitted by the judges in Harvard and Songer, and which required resentencing in accordance with Florida law in each of those cases.

Absent a less intrusive procedure, Mr. Straight must be permitted the opportunity to call Judge Beverly as a witness on the Songer/Harvard issue. This would be an appropriate means of conducting the critical inquiry, and the sentencing judge's testimony on the matter would be admissible.

C. The Claim is Not Barred

The state filed a Motion to Dismiss, alleging that this 3.850 motion should be dismissed without a merits ruling, arguing that (1) all second or subsequent petitions for relief under Rule 3.850 should be pro forma dismissed, and (2) with respect to this specific petition, the Harvard issue had been previously raised and ruled against on the merits. (ROA 567). After argument, the judge, who had not had an opportunity to read the trial transcript, the first 3.850 pleading and hearing transcript, or the new pleadings before him, "agree[d] with the State," and dismissed the petition on procedural grounds, refusing to rule on

the merits (ROA 592; Tr. 58).

What the state told the court was not true, and the trial court's actions were premised on the misrepresentations. With regard to the Harvard claim, the state told the court below that it was "an issue which he has litigated in the state courts" and the federal courts, and should be dismissed. (Tr. 13). Counsel for Mr. Straight informed the court that this claim does "not appear in any other pleading in this proceeding," and that:

> If the Court is inclined to grant this three-page [Motion to Dismiss], based upon the allegations that are in it, I would urge the Court to have before it, before that happens, all the federal court papers in this case and all the decisions and the pleadings before the Florida Supreme Court and to read them very carefully.
>
> I am not accusing Mr. Menser of doing anything untoward. I think he is merely confused about the status of the previous papers and the litigation prior to the filing of these papers.

(Tr. 41). The trial court accepted the state's unsupported and unsupportable position, and dismissed the 3.850.

A second 3.850 motion can be dismissed upon either of two circumstances:

> A second or successive motion may be dismissed if the judge finds that it fails to allege new or different grounds for relief and the prior determination was on the merits or, if new and different grounds are alleged, the judge finds that the failure of the movant or his attorney to assert those grounds in a prior motion constituted an abuse of the procedure governed by these rules.

Rule 3.850. Neither circumstance is extant upon this record, and a stay should issue so as to allow proper consideration of the claim.

1. The Motion Did Allege New and Different Grounds for Relief

How the state could allege otherwise is perplexing. It is to be hoped that the state does not intentionally mislead. Neither on direct appeal, nor in first post-conviction, has any mention of this claim been made.

2. The Failure to Assert This Claim Previously Should Not Bar Relief

A new claim is allowable where "there has been a change in the law since the first petition or that there are facts relevant to the issues in the cause that could not have been discovered at the time the first petition was filed." Witt v. State, 465 So.2d 510, 512 (Fla. 1985). Both conditions are met.

First, due to circumstances completely out of Mr. Straight's control, he has not been able to "discover" and present the critical fact--Judge Beverly's statement--deemed dispositive in Harvard and Songer. Fortuity, and nothing more, kept Judge Beverly away from both 3.850 proceedings.

Second, Harvard is a change in law. This Court in Harvard held that a defendant "seeking post-conviction relief is entitled to a new sentencing hearing when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing

statute." Harvard, 11 FLW at 55. The dissenters in Harvard argued that this claim ought not be cognizable in a state post-conviction proceeding, but this view clearly was rejected by a majority of the Court. The state, on Petition for Rehearing in Harvard, voiced its strong discontent with this Court's action making such Lockett-type claims cognizable in 3.850 motions.

Without question, the judicial recognition of the pre-Lockett confusion is recent. Perhaps the best example of this is Carl Songer's case, also a successor. Songer raised the Lockett claim in a successive state postconviction proceeding; the sentencing judge stated at that proceeding that he had not considered non-statutory mitigating evidence in sentencing Songer to death. This Court affirmed the denial of post-conviction relief. Songer v. State, 463 So. 2d 229 (Fla. 1985). The Eleventh Circuit mandated resentencing in Songer's case. This Court, in Harvard, subsequently agreed with the reasoning of the Eleventh Circuit in Songer. The path from Songer to Harvard demonstrates the evolving nature of this claim.

In addition, application of the new successive bar rule to this case would constitute an unconstitutional ex post facto application of the successor rule, violating the ex post facto clause and the due process clause. At the time Mr. Straight filed his first state post-conviction proceeding pursuant to Fla. R. Crim. P. 3.850, the Rule and interpretive case law did not bar successive applications raising new claims. Subsequent to denial

of that first application by the state trial court and this Court, the Rule was amended to bar successive applications raising new claims. The trial court's application of the newly amended Rule to Mr. Straight's Lockett claim violated the ex post facto clause.

Decisions by the United States Supreme Court "prescribe that two critical elements must be present for a criminal or penal law to be ex post facto: it must be retrospective, that is, it must apply to events occurring before its enactment, and it must disadvantage the offender affected by it. . . . A law need not impair a 'vested right' to violate the ex post facto prohibition." Weaver v. Graham, 450 U.S. 24, 30 (1981).

Both prongs of the Graham test are met here. The application of the successor bar clearly would be retrospective. Rule 3.850 was amended to include the bar on November 30, 1984 and December 28, 1984; the amendment did not become effective until January 1, 1985. Mr. Straight's Rule 3.850 application was filed and denied in 1982. Further, the amendment would, if applied to this case, disadvantage Mr. Straight. The prevailing law in 1982 was that presentation of a new claim in a successor was proper. "Successive presentation of the same claim for relief in collateral proceedings is improper," Francois v. Wainwright, 470 So. 2d 685 (Fla. 1985), but not the presentation of a new claim. "A second or successive motion for similar relief, as used in Rule 3.850, has been interpreted to mean a motion stating

substantially the same grounds as a previous motion attacking the same conviction or sentence under the Rule." McCrae v. State, 437 So. 2d 1388, 1390 (Fla. 1983). Under the pre-1985 amendment law, the Lockett claim could not have been barred as successive. Because application of the 1985 amendments to this 1982 case would be a retrospective application that would disadvantage Mr. Straight, application of the 1985 successive bar would violate the ex post facto clause.

Some pre-Graham cases held that no ex post facto violation occurs if the "change effected is merely procedural." Graham, 450 U.S. at 30 n.12. "Alteration of a substantive right, however, is not merely procedural, even if the statute takes a seemingly procedural form." Id. The new successor bar is substantive rather than merely procedural, for the same reasons that in Florida criminal statutes of limitations are "considered as vesting a substantive right, rather than being a procedural matter." State ex rel. Mauncy v. Wadsworth, 243 So. 2d 345, 347 (Fla. 1974) (emphasis in original). See also Lane v. State, 337 So. 2d 976, 977 (Fla. 1976). Similarly, the Florida Supreme Court has held that a statute pursuant to which a trial judge may retain jurisdiction to review any parole order "substantially alters appellant's situation to his disadvantage" and thus may not be applied retroactively. Prince v. State, 398 So. 2d 976, 976 (Fla. 1981).

This portion of Mr. Straight's claim is similar to the issue

addressed in Talavera v. Wainwright, 468 F.2d 1013 (5th Cir. 1972). Talavera involved the standards that govern severance from joint trials with co-defendants. At trial, the standards governing severance were set out by Fla. Stat., sec. 918.02. While the case was pending on appeal, that statute was repealed and replaced by the more stringent Fla. R. Crim. P. 1.190. This Court judged Talavera's severance claim based on the then-new Rule 1.190. The former Fifth Circuit held that application of the Rule violated the ex post facto prohibition:

> The Florida Supreme Court thus held petitioner to the standards of Rule 1.190, Fla.R.Crim.Proc. 33 F.S.A. But that rule was not operative at the time of petitioner's trial; rather, petitioner was tried in 1967, when Fla.Stat.Ann. [Section] 918.02 was still in effect. Petitioner thus could be held only to the standards of [section] 918.02, and that statute on its face demands less of the movant than does Rule 1.190.
>
> * * *
>
> We think it sufficient to repeat without lengthy citation what is now an axiom of American jurisprudence: The Constitution prohibits a state from retrospectively applying a new or modified law in such a way that a person accused of a criminal offense suffers a significant prejudice in the presentation of his defense. See, e.g., Bouie v. City of Columbia, 1964, 378 U.S. 347, 84 S.Ct. 1697, 12 L.Ed.2d 894; Kring v. Missouri, 1883, 107 U.S. 221, 2 S.Ct. 443, 27 L.Ed. 506. The two severance rules involved here differ markedly, and by applying the newer version retrospectively, the state has cut off petitioner's right to present the merits of his motion for severance. The new rule requires the movant to state the grounds on which it is based and further requires "a

> showing" of prejudice. But the statute in effect at the time petitioner stood trial only required "a motion." We interpret that statute, and the state has cited to us no cases to the contrary, as having allowed movants to elaborate the grounds supporting their motions after filing. Petitioner claims that he relied on that interpretation of the old statute when he filed his motion, and he alleges that he would have presented valid reasons why the motion should have been granted in the state had only given him an opportunity to do so.
>
> We do not purport to question the constitutionality of either statute; indeed, petitioner correctly admits that that question is not before us. We merely hold that a defendant in a state criminal prosecution is denied due process of law when any of his substantive rights are disposed of by the retroactive application of a statute or rule that was not in effect at the time he sought to exercise the right.

Id. at 1015-16 (emphasis added) (footnote omitted).

CLAIM II

MR. STRAIGHT WAS DENIED AN INDIVIDUALIZED AND ACCURATE CAPITAL SENTENCING DETERMINATION DUE TO THE UNCONSTITUTIONAL APPLICATION OF THE FLORIDA CAPITAL SENTENCING STATUTE WHICH WAS REASONABLY INTERPRETED AT THE TIME OF MR. STRAIGHT'S TRIAL TO RESTRICT CONSIDERATION OF MITIGATING CIRCUMSTANCES ONLY TO THOSE CIRCUMSTANCES NARROWLY SET OUT IN A CAPITAL STATUTE, WITH THE RESULT THAT SIGNIFICANT, RELEVANT MITIGATING FEATURES OF THE CASE WERE NOT INVESTIGATED, PRESENTED OR CONSIDERED IN THE DETERMINATION OF WHETHER MR. STRAIGHT SHOULD BE SENTENCED TO DIE IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

As Mr. Straight discussed above in Claim I, at the time of his original sentencing the Florida capital sentencing statute was, because of its facial ambiguity, capable of unconstitutional application in limiting consideration of mitigating factors strictly to only those enumerated in the statute. Mr. Straight's counsel at trial, relying upon the express terms of the statute and its judicial interpretation, reasonably believed that consideration of mitigating factors under the Florida capital sentencing scheme was limited only to those factors expressly enumerated in the statute. As a result of this belief, counsel forwent any significant fact gathering, investigation, analysis, preparation, presentation or argument of the mitigating features of the case that did not fall within the statutory mitigating circumstances. The result was that virtually nothing in mitigation was presented on Mr. Straight's behalf as calling for a sentence less than death.

The affidavit of trial counsel, filed as Appendix 1 to the Motion to Vacate, confirms both counsel's belief in the limiting nature of the statute and the effect that such a belief had upon his representation of Mr. Straight. At the time of Mr. Straight's trial, counsel reasonably believed that the consideration of mitigating circumstances was strictly limited to those enumerated in the statute. He did not believe that he could present any evidence in mitigation that did not fall strictly within the statutory factors. Counsel's belief was based upon the language of the statute and interpretative case law.

Counsel's preparation and investigation for the penalty phase of Mr. Straight's trial, as well as his preparation of evidence and argument in that proceeding, were based upon this understanding of the Florida capital sentencing statute. Had counsel not believed that he was restricted by the statute, counsel should have investigated mitigation for the penalty trial -- beyond that which he had done specifically for the guilt phase. Had he discovered additional information pertaining to Mr. Straight's character as well as other non-statutory mitigating factors such as his life history, he should have presented and argued such evidence.

There was absolutely no evidence introduced regarding Mr. Straight's background or early life. There was no attempt to humanize Mr. Straight or to present his positive qualities,

despite the fact that this is considered by many commentators to be the first duty of defense counsel in a capital sentencing trial. See Goodpaster, The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases, 58 N.Y.U.L.Rev. 299, 335 (1983).

The humanity of a person about to be sentenced for a capital offense is the critical question at the penalty phase of a capital case. Evidence bearing on who Ronald Straight was and where he came from would have suggested that his personality and motivations could be explained, at least in part, by his personal history and would have shown that there was a Ronald Straight worth saving. It is thus precisely the kind of evidence the United States Supreme Court had in mind when it wrote Lockett v. Ohio and Eddings v. Oklahoma. The Lockett Court was concerned that unless the sentencer could consider "compassionate and mitigating factors stemming from the diverse frailties of humankind," capital defendant's will be treated not as unique human beings, but 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 could have made the difference between life and death in this case. Trial counsel's belief that he was limited to the statutory mitigating

circumstances explains this absence of crucial, relevant evidence.

Due to the reasonable belief of counsel that non-enumerated mitigating factors could not be considered in the capital penalty determination, substantial and relevant mitigating evidence was not presented to or considered by the jury or the judge in determining the appropriate penalty, though such evidence was readily available. Upon a reasonable non-restrictive mitigation investigation, counsel would have discussed the following:

Ronald Straight was born and grew up in an inner city ghetto of North Philadelphia. The violent and drug saturated milieu of this area is an all too familiar tale of urban decay and human tragedy. In 1969, the Pennsylvania Crime Commission described North Philadelphia as the part of the city "where social conditions are the most unstable." At that time, 34% of the heads of households in North Philadelphia were earning less than $60 per week, and despite a city-wide unemployment rate of 2.8%, 11.6% of North Philadelphians were without jobs and 27% of the 16-19 years olds in the area who had dropped out of school also had no jobs. The Commission further observed that "[i]t is not surprising, in view of the facts above [unemployment rates in North Philadelphia], that 26 percent of all juveniles in the North Philadelphia area have records of contact with the police." See Appendix 12, pp. 9-10, Motion to Vacate.

Violence was an integral part of existence and survival in

the neighborhood and family where Ronnie grew up. Ronnie's father was himself the victim of an abusive and neglectful father, who threw him down the stairs when he was an infant. See Appendix 3, Affidavit of Alfreda Straight, Motion to Vacate. As is often the case, the cycle of familial abuse perpetuated itself in Raymond Straight Sr., such that Ronnie, his brother Raymond Jr., and their mother were the victims of frequent and brutal beatings at the hands of the father. Ronnie's mother aptly described Mr. Straight as a man who "always had a beer in one hand and a belt in the other" Id. and remembers that he constantly berated and rejected Ronnie. Id. She recalled one occasion, when Ronnie was only six years old, his father told him to get out of the house and never come back. Ronnie started packing his clothes, fully intending to comply with the command of his father, but was stopped from leaving by a concerned uncle. Id. Mrs. Straight was frequently beaten herself: she remembers one incident where her husband beat her so severely, blackening both of her eyes and causing extensive bruising to her body, that she couldn't get out of bed for a week. Id. As he grew older and more physically mature, Ronnie would intervene when his father attempted to brutalize his mother, and, according to Mrs. Straight, prevented him from killing her on several occasions. Id.

In addition to being hurt and terrorized by his father's rejection and abuse, Ronnie was confused by his father's

indiscrete attraction toward young women in the community, some of whom served as a babysitter for the Straight family. See Appendix 4, Affidavit of Raymond Straight, Jr.; Appendix 3, Affidavit of Alfreda Straight, Motion to Vacate. His father's behavior was consistently incongruous with his widely-professed commitment to religious values. See Appendix 5, Affidavit of Sarah Atkinson, Motion to Vacate.

Mrs. Straight loved, and still loves Ronnie as any mother does her children, and tried to the best of her ability to give both of her sons the spiritual sustenance and moral guidance that was lacking in their paternal relationships. Because her husband forced her to work full time most of their married life, and because the constant physical and psychological abuse inflicted by him eventually led to her mental collapse, Mrs. Straight was unable to prevent Ronnie from ultimately falling prey to the moral and spiritual pitfalls that abounded in their community. She begged her husband to assume the role of a father to Ronnie and help him resist the lure of the streets and the drug life, but, in her words, "he (the father) just didn't care about anything except where his next drink was coming from." See Appendix 3, Affidavit of Alfreda Straight, Motion to Vacate.

Ronnie as a young boy was remembered as a kind, considerate, and compassionate child. A close friend of the family remembers that she frequently depended upon him to babysit for her four children, and that many of the other women in the neighborhood

also depended on Ronnie's help. See Appendix 5, Affidavit of Sarah Atkinson, Motion to Vacate. His mother recalls that Ronnie was always inviting less fortunate friends over for dinner, and was constantly bringing home stray or abandoned animals to take care of. See Appendix 3, Affidavit of Alfreda Straight, Motion to Vacate. Ronnie did well in the Catholic grammar school he attended, making excellent grades and always displaying a cooperative and respectful attitude. His early life was consistently marked by his constant attempts to win the approval and affection of those around him, the approval and affection that was not forthcoming from his father. "Because Ronnie was so hurt by [his] father's rejection and abuse, it was easy for people to talk him into things in exchange for their acceptance and attention. The older kids in the neighborhood would always take advantage of Ronnie's good nature and his desire for everyone to like him. They talked him into participating in petty robberies and other minor crimes, and he got confused into believing that this kind of daring behavior made him more of a man." See Appendix 4, Affidavit of Raymond Straight, Jr., Motion to Vacate.

Ronnie's desperate need for the guidance and support of a strong paternal role model ultimately led him to the only alternative -- the adolescents in his community who roamed the streets engaging in petty crime and drug abuse. In the words of his mother, "the older boys in the neighborhood manipulated and

exploited Ronnie because he so desperately wanted to be admired and respected. . . they got him involved in drugs and made him a part of their gangs." See Appendix 3, Affidavit of Alfreda Straight, Motion to Vacate. By the time he was fourteen, Ronnie was addicted to heroin. Heroin was sold openly on the street corners. Drug addiction was an obvious, easy, and frequently utilized method of escape from the degradation and despair of the neighborhood, and the young addicts' desperate attempts to obtain the necessary funds for maintenance of their heroin habits was a constant source of local crime.

Surviving in this urban jungle was difficult even for those children fortunate enough to have a loving and stable home environment. For a boy like Ronnie, with the additional handicap of an alcoholic and abusive father, descent into the life of drug addiction that constantly beckoned every resident of the neighborhood was all but inevitable.

The Pennsylvania Crime Commission, in their 1969 report on gangs in Philadelphia (Appendix 12, Motion to Vacate) noted:

> ... one factor in the growth and perpetuation of the gangs is social pressure to belong. This is least likely to be resisted by those who because of an inadequate home life or other reasons feel the greatest need for status, recognition, a sense of belonging and security. Thus, it is obvious that the membership of a gang will be a highly volatile mix of immature adolescents, many of whom are emotionally, psychologically or intellectually crippled often by conditions for which they are no more responsible than they are for the family into which they were born. Because the gang or "corner" fufills

> psychological or emotional needs of its members, it perpetuates itself. It recruits new members merely by its existence in an area where sufficient youth are attracted by their own needs.

Appendix 12, pp. 6-7, Motion to Vacate (emphasis added).

When Ronnie was only thirteen years old, his mother had a nervous breakdown - rendering his only consistant and dependable source of parental nurturance unable to guide and protect him. To escape the physical and psychological abuse of his father, and the pain of watching his mother's collapse, Ronnie began spending more and more time on the streets, and by the tenth grade had dropped completely out of school. He became a member of the "Octavian Hill" gang, and by the age of fourteen was using heroin intervenously on a daily basis. See Appendix 2, Report of Dr. Diana Fishbein; Appendix 7, school records, Motion to Vacate.

Nowhere was the young Ronald Straight's decline more evident than in his academic performance. His work at the Catholic primary school he attended for the first eight years of his education was consistently exemplary: not only did he maintain a solid "B" average there, but he also consistently ranked among the highest for such traits as cooperation, self-control, perserverance, and courage. See Appendix 6, school records, Motion to Vacate. Coincidental with his mother's mental breakdown and his increasing involvement with drugs, gangs, and the street life, the precipitous decline in his academic performance in high school stands in stark contrast to his

stellar work in grammar school -- when he did attend classes enough to even receive grades, they were barely passing. The remarks of his teachers and the administrators at his high school indicate an abrupt and marked change in behavior. Id.

By the ninth grade, his teachers at Thomas Edison High School were aware of Ronnie's need for special assistance. His father, however, intervened and kept Ronnie from participating in a program designed to help youngsters like himself. Records indicate that Ronnie's father rejected the school's recommendation that he be placed in a special school because of his psychological and behavioral problems. Ronnie's school file indicates that on 10/20/59 it was decided that the "next referral request father to contact school." Id. On 3/2/60, the school noted:

> "Mother called. Told her that school counselor and welfare officer have decided that their efforts with the boy have not proved effective. As was promised the father, before the school will submit a Boone referral we shall permit the boy to remain here on probation with the father taking responsibility for the handling of the boy. It was under such terms that Mr. Straight agreed to 'go along' with us in our handling of the case. It is clearly understood that if Ronald continues to become a problem during the period of probation, a Boone referral will be made. However, we will notify the home of any incidents which might lead to an ultimate referral so that the father can take any corrective action."

Id. Then on 4/4/60 the school notes: "Boy to try to get a job. Parents agree that withdrawl from school would be best."

Id. The final note on Ronnie's records shows: "5/20/60 The parents secured a job for Ronald rather than have him referred to special school."

Ronnie's heroin addiction, and the accompanying expense of maintaining it, soon led to several convictions and incarcerations in Philadelphia. Psychiatric and Psychological Evaluations and Diagnoses offered by the Pennsylvania authorities describe Ronald Straight as a "very personable individual who becomes overwhelmed by feelings of inadequacy and self doubt." On 4-2-69, a Pennsylvania prison psychological report noted:

> Straight was friendly, cooperative and spontaneous during the interview. Dependency, emotional immaturity, feelings of inadequacy and environmental pressures which became overwhelming resulted in an escape from reality through the use of drugs. Many of his other difficulties apparently stemmed from attempts to support his drug habit. Presently there appears to be a gradual improvement in controls, some gain in maturity and a desire for change.

Appendix 10, Pa. Bureau of Corrections records, Motion to Vacate. Shortly after that examination, a parole review was conducted in Mr. Straight's case on April 14, 1969, and it concluded that "he can be credited with much improvement over the past six months..." His life and death struggle with the disease of drug addiction surfaced soon after the report. Ronnie attempted suicide by slitting his wrists on 5-5-69. See Appendix 10, Pa. Bureau of Corrections records, Motion to Vacate.

In late 1971, a Pennsylvania correctional counselor reported

that "Ron plans to enter Eagleville Hospital for continued treatment of his drug addiction problem... He has a winning personality and could do well if his addition can be overcome." See Appendix 10, Pa. Bureau of Corrections records, Motion to Vacate. Mr. Straight did enter Eagleville upon his release and those records indicate that his tormented family relationships continued to plague him:

> Christmas Day was upsetting to him. His parents came to visit and he felt they rejected him through their criticism. He left the grounds on 12/25 and used cocaine, methedrine, and wine.

Appendix 8, Eagleville Hospital records, Motion to Vacate.

By this time, Ronald Straight had spent 12 of his 30 years in prison. Most of his arrests and convictions revolved around the sale and use of drugs, and the others were for burglary, robbery, and other economic crimes. See Appendix 10, Pa. Bureau of Corrections records, Motion to Vacate. Even his attempt at marriage had failed because of his drug habit. See Appendix 3, Affidavit of Alfreda Straight, Motion to Vacate.

Ronald Straight's gradual downward spiral into the escape of dangerous and self-destructive drugs was the result of many causative factors clearly identifiable through a reasonable examination of and investigation into his life history. Dr. Diana Fishbein, in her report (Appendix 2, Motion to Vacate) notes:

> Ronald Straight's background is replete with numerous high risk factors of substance abuse. His physically abusive family environment, traumatic hospitalization, and

> mother's mental illness are but a few of the elements which contributed to a pervasive childhood filled with psychological distress. The impoverished neighborhood of his youth, marked by violence and substance abuse were further psychological distressors.
>
> Mr. Straight's hyperactivity, learning dysfunctions, and behavioral problems constituted another psychosocial indicator of later drug addiction in that Mr. Straight had very low achievement motivation.

In fact, Mr. Straight's mental illness resulting from his years of drug dependency and family/community dynamics is evident: Both genetic and environmental factors contributed to Mr. Straight's substance abuse disorder. Mr. Straight has had a drug addiction for 20 years, during which time he exposed himself to large and continuous amounts of drugs. He has suffered from chronic substance abuse disorder. Due to the continuous nature of his addiction and the quantities of drugs consumed over this continuous period, Mr. Straight was probably unable at the time of his offense and trial to make substantial judgments. As a result of this continuous period of substance abuse, Mr. Straight has sustained considerable brain damage. Twenty years of opiate abuse has rendered Mr. Straight incapable of having the requisite mental capacity to make reasoned judgments.

Id.

In sum, had counsel not felt limited to the statutory mitigating circumstances, these are a few of the things he would have found.

CLAIM III

THE PROSECUTOR URGED THE JURY TO CONSIDER HIS NONRECORD EXPERTISE IN IDENTIFYING THE WORST AMONG CRIMINALS AND INFORMED THE JURY OF OTHER NONRECORD MATTERS, INCLUDING HIS REASONS FOR GRANTING IMMUNITY TO THE STAR WITNESS, HIS PURPORTED KNOWLEDGE THAT THAT WITNESS GAVE HIM THE SAME STORY SHE GAVE THE JURY, AND HIS MISINFORMATION ABOUT WHAT IMMUNITY MEANT, ALL MATTERS DESIGNED TO ACCREDIT THE STATE'S PURCHASED WITNESS, IN VIOLATION OF MR. STRAIGHT'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Mr. Timothy Palmes, Ms. Jane Albert (Palmes' girlfriend), and Ronald Straight were suspects in the disappearance of Mr. Jim Stone. They were arrested, along with Ms. Albert's 7-year-old daughter, in California. Ms. Albert initially refused to speak with officers about the disappearance of Mr. Stone. After speaking with Assistant State Attorney Greene, she decided to provide a story which would result in her not being prosecuted for first-degree murder, and which would allow her to maintain custody of her child, so long as she testified to that story at trial. See Affidavit of Ms. Lissa Gardner, Appendix 13, Motion to Vacate. She was granted immunity by the State Attorney who prosecuted the case, Mr. Greene.

Ms. Albert was a critical and devastating witness. So was her daughter. Mr. Greene repeatedly "testified" by telling the jury his expert opinion regarding Jane Albert's relative lack of involvement in the offense, how necessary it was to give her immunity, that she was telling the truth because she had nothing

to lose, and that her "story" had not changed from the first (or since the time she had started talking to him).

This vouching for the worth, degree of culpability, and credibility of a major witness was rampant. The following are illustrations of Mr. Green's unethical and unconstitutional statements of "facts" and expert prosecution opinions.

A. Voir Dire

> Also, many times the State has to make -- the State, that is myself, has to make a decision as to who's the least bad person in a given situation. We use him in order to prosecute the worst.

(R. 140).

> Also, many times the State has to make a pretty tough decision as to who is the least bad person in a given situation in order to use them to get the worst. Now, that's just a real practical down to earth approach to life, something you can't get away from.

(R. 149).

> [S]ometimes they have to make some pretty tough decisions about who to call and sometimes they have to give immunity to people in order to make a case at all . . . .

(R. 197).

> [S]ometimes the State has got to make some tough decisions about its witnesses and how its going to put its case on. In this particular case the State has given a witness immunity to testify.

(R. 222).

> [T]he State is sometimes faced with some tough decisions about deciding who is the least involved person, who they will

prosecute, who they will not prosecute in the case. . . . Now, Mr. Green made an explanation yesterday that in this case the State has granted immunity to a witness in exchange for her testimony. [another assistant speaking]

(R. 222).

[T]he State has given one witness immunity in exchange for her testimony.

(R. 279).

[W]e made some rather tough decisions. In this case a witness has been granted immunity in exchange for her testimony.

(R. 308).

[T]he State . . . have (sic) granted immunity to one witness.

(R. 315).

[T]he State many times has to make some tough decisions as to who is the least bad person in the case. Sometimes we have got to use people in order to testify against other people so that we can convict them. We have just got to have it. Now, in this particular case we have made some pretty tough decisions, I have, and a particular witness has been given immunity. . . .

(R. 356).

You heard me a minute ago talking about immunity and about life is a funny thing, it's kind of tough sometimes when you have got to make some tough decisions you just can't have your cake and eat it too and in this particular case the state has granted immunity to a particular witness.

Now, <u>immunity meaning that that witness is not going to be prosecuted however guilty he or she may be.</u>

(R. 262).

> Sometimes we have to make some pretty tough decisions in order to feel like we can prosecute an individual at all and under this particular case the State has given immunity to a particular witness and the witness will testify. Immunity.

(R. 390).

> You have heard me say the State in this case has granted immunity in this case to one witness in order that the witness might testify and assist the State in this case.

(R. 404).

> The State must make a decision as to when to prosecute. In this case we have given immunity to one witness for her testimony.

(R. 430).

> [A] bird in the hand is worth two in the bush, but I'll say this much: Sometimes the State has to decide who's the worst in this matter because without someone we have no evidence.

(R. 458; objection, question withdrawn).

> You have heard me say <u>there's a witness I have given immunity to.</u>

(R. 468).

The entire potential jury panel heard all the questions of the jurors in the jury box. The prosecutor in the case had personally granted immunity to the star witness, in order to prosecute the "worst."

B. Closing Argument

Jane Albert testified. I talked to you on voir dire about immunity. You said you weren't' going to let that unduly affect you, it didn't bother you and I don't think it should.

Jane Albert testified, "They told me they'd give me immunity if I'd tell them what had happened." The police didn't even know there had been a crime or anything else for that matter, so she told them. She came here today and told the same story -- or yesterday.

Now, you know nothing can happen to you once immunity is given to you. There isn't any reason to lie after that, absolutely none. She told you about the killing that day only what she was told. She wasn't there. She said that Timothy Palmes told her that Ronnie jammed the pistol down his throat, down Jim Stone's throat and knocked his teeth out. Well, she wasn't there. That's what she was told. We know that isn't true. For all I know he did put the pistol in his throat. He obviously didn't knock his teeth out.

At any rate, she tells you she was told about the killing that day at home. She knows all the planning, what happened afterward and she told it to you in great detail.

(R. 927-28).

Ronald Straight would have you believe, I guess, that somehow with some unknown thought in mind that Jane and Stephanie concocted this story in secret conversations, I guess, on the way to California and then Stephanie some weeks later, having never talked to her mother and being separated from her, came to Jacksonville and told this story to us. Well, I'll submit to you that's the most unreasonable and ridiculous thing I have ever heard. That little girl came here to Jacksonville and told the story to us just like she told it to you the other day on the witness stand because it's the truth.

(R. 920).

> Now, the Court will tell you -- I want to go back again to one of my opening comments. I said to you, the Court, I believe, will tell you that in deciding who to believe -- and you have got to decide whether to believe him -- in deciding who to believe, you can consider the demeanor of the witness, the reasonableness of his testimony, his interest in the outcome of the case, his ability to remember. How about let's look -- let's look at all the witnesses that the State called. There isn't a one of them that has an interest in the outcome of this case. Jane Albert doesn't. She can't be harmed. She can't. Stephanie, no, she can't help her mother because her mother is not in any danger.

(R. 936-38).

> Mr. Fallin talks about immunity, talks about we gave the wrong person immunity and now we have made a mistake. He says we'd like to go back and he suggests why we may have given the wrong person immunity. Well, that's immaterial and you're not here to consider that and you told me you wouldn't consider it, that you can't take back immunity. You can't do it. he suggests that she came in here to testify and got up there and lied because she was afraid we'd take away the immunity and maybe prosecute her for murder. You can't do that. It's given and you can never take it back. That woman can come in here and say anything and with perfect immunity got up and told the truth and I think you will find that's what she did. She said, I didn't have a darn reason in the world to lie, none.
>
> He talks about how much she loves Tim Palmes. Well, she said she did love Tim Palmes. She got up there and told the truth about him, about that man, too (indicating). [completely improper reference to a former trial]

(R. 1008).

Mr. Greene's expertise and purported personal knowledge of matters not in the record, and vouching for his witness, were improper. Furthermore, his statements about immunity and "nothing to lose" were not only nonrecord but were also not true. Jane Albert and Stephanie believed they had plenty to lose if they did not implicate Ronnie Straight through testimony. Undersigned counsel recently interviewed them:

> 3. During the course of our conversation with Ms. Jane Albert, Mr. Olive asked Ms. Albert, "What did immunity mean to you?" Ms. Albert answered, "It meant that I would not be prosecuted." Mr. Olive then asked Ms. Albert, "What would have happened if, after you received immunity, you refused to testify or you refused to implicate Ronald J. Straight?" Ms. Albert answered, "I would have been prosecuted."
>
> 4. Ms. Jane Albert further explained that with a grant of immunity, that the Prosecutor, Mr. Greene, had promised her that she "would receive a new identity and a new address. As a new location would require money, I assumed that I would receive money for my testimony also."
>
> 5. Ms. Jane Albert stated that immunity also meant that she would not be separated from her daughter, Stephanie. Ms. Albert said, "When we were arrested in California, Stephanie and I were taken in different police cars. Later, the California police said that they had 'lost' Stephanie. I didn't want them to know how much I cared for her, but she was my life -- she is my life."
>
> 6. Mr. Olive then asked Stephanie Albert what would have happened if she had refused to testify at trial. Stephanie said that, "While my Mom was in jail in California, I was placed in a home. I had

> never been separated from my Mom before. I was forced to take naps; I had to be held down to force me to take a nap. I also remember having to clean toilets. If I didn't testify, I knew that I wouldn't see my Mom again. I also knew that if I didn't testify that my Mom would get blamed for murder, because there was no one else to testify that my Mom was at work.

The improper and incorrect prosecutor comments deprived Mr. Straight of a reliable and fair guilt/innocence determination and had an unconstitutional effect on the sentencing determination, in violation of the Sixth, Eighth, and Fourteenth Amendments.

The prosecutor provided textbook examples of illegal conduct. The rules of the profession are well known. DR 7-106, Code of Professional Responsibility provides, in relevant part:

> (C) In appearing in his professional capacity before a tribunal, a lawyer shall not:
>
> (1) State or allude to any matter that he has no basis to believe is relevant to the case or that will not be supported by admissible evidence.
>
> * * *
>
> (3) Assert his personal knowledge of the facts in issue, except when testifying as a witness.
>
> (4) Assert his personal opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt or innocence of the accused; but he may argue, on his analysis of the evidence, for any position or conclusion with respect to the matters stated herein.

The new Model Rules have incorporated these provisions unchanged.

Rule 3.4(e). Likewise, the ABA Standards for Criminal Justice, The Prosecution Function (2d ed. 1980) Section 3-5.8 provide:

> (a) The prosecutor may argue all reasonable inferences from the record from evidence in the record. It is unprofessional conduct for a prosecutor intentionally to misstate the evidence or mislead the jury as to the inferences it might draw.
>
> (b) It is unprofessional conduct for the prosecutor to express his or her personal belief or opinion as to the truth or falsity of any testimony or evidence or the guilt of the defendant.
>
> (c) The prosecutor should not use arguments calculated to inflame the passions or prejudices of the jury.
>
> (d) The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence, by injecting issues broader than the guilt or innocence of the accused under the controlling law, or by making predictions of the consequences of the jury's verdict.
>
> (e) It is the responsibility of the court to ensure that final argument to the jury is kept within proper, accepted bounds.

The prosecutor in this case violated each of these proscriptions.

The Code, the Model Rules, and the ABA Standards are not simply arbitrary rules of the profession, however, which have no bearing on the justice or constitutionality of the outcome of a trial or sentencing proceeding. "Rules of evidence and procedure are designed to lead to just decisions and are a part of the framework of the law . . .; and a lawyer should not by subterfuge put before a jury matters which it cannot properly consider." EC

7-25. In United States v. Young, the Supreme Court recently looked to the ethical standards established by the bar for "[t]he line separating acceptable from improper advocacy". 84 L.Ed.2d at 7.

The United States Court of Appeals for the Eleventh Circuit has identified four areas of prosecutorial misconduct in closing arguments. A prosecutor may not (1) assert that the death penalty is the "last line of defense" against a defendant, necessary because of the "possibility of incompetence of corrections . . . personnel" who would "let him out again," Tucker v. Kemp, 762 F.2d 1496, 1507, 1508 (11th Cir. 1985); (2) express personal opinions about guilt, or personal belief in the death penalty, Brooks v. Kemp, 762 F.2d 1303, 1408 (22th Cir. 1985); (3) "invite . . . the jury to rely on the expertise of the prosecution instead of exercising fully its own discretion to choose punishment", Drake v. Kemp, 762 F.2d 1449, 1459 (11th Cir. 1985); Brooks, 762 F.2d at 1410; or make improper appeals to emotion. Hance v. Zant, 696 F.2d 940 (11th Cir. 1983).

The condemned arguments in these cases did not, however, result in reversals, because the court applied what is now considered to be an incorrect "prejudice" standard. In Brooks, the opinion of the Court imported the "materiality" standard of Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052 (1984), as the test for prejudice from an improper closing argument, and required that there be a reasonable probability that but for the

misconduct, the result would have been different. After these Eleventh Circuit decisions, a major new Supreme Court case set the correct standard for prejudice.

In Caldwell v. Mississippi, 105 S.Ct. ___ (1985), the United States Supreme Court held that improper prosecutorial comments at sentencing will warrant reversal unless the state can demonstrate the comments had no effect on the sentencing decision. Certiorari was granted shortly thereafter in Darden v. Wainwright, Docket No. 85-5319 (argued January 13, 1985), to examine the Eighth Amendment of improper comments at guilt/innocence. The William Tucker case itself was remanded to the Eleventh Circuit, in light of the new "no effect" test articulated in Caldwell.

Ralph Greene testified from the lectern more effectively than if he had been sworn, and had taken the witness stand. He told the jury critical information, which the defense had absolutely no opportunity to rebut: that his witnesses had told the truth all along, and that they had no motive to testify against Ronnie Straight, since immunity had already been granted.

Of course, no one but Mr. Greene and the witnesses know what the "story" was the first time it was told to Greene and purchased by him with a blank check. His statement that it had changed was pure non-record prejudicial hearsay, bolstering the, as improperly characterized by him, better witness. The bold assertion that Jane Albert would walk free even if she testified

that Mr. Straight was innocent is especially prejudicial, wrong (as we now know), but non-rebuttable.

Jane Albert (and her daughter's) credibility were critical at sentencing as well as at guilt/innocence. Ronald Straight's guilt could be less than Jane Albert's, and his participation in the offense could in fact be relatively minor. Improper prosecutorial misconduct skewed that mitigation circumstance, because the prosecutor's improper improvature on Jane Albert concluded Ronnie Straight's hopes at such mitigation. The eighth amendment does not stand for such unreliability in sentencing.

The prosecutor said that regardless of what Stephanie and Jane Albert said on the stand, no prosecution of Jane Albert would occur. That's what immunity meant, according to Mr. Greene. That is not what Jane Albert and Stephanie thought.

As Appendix 13 to the Motion to Vacate reveals, Jane Albert thought that she had to implicate Ronnie Straight, or she would be prosecuted. This puts a much different tint on her testimony than that espoused by Mr. Greene, and rises to the level of not just failing to "reveal the deal," but in fact affirmatively misrepresented the deal. Giglio.

In sum, Ralph Greene told the jury that he personally gave Jane Albert immunity, so that he could obtain a conviction of who was, in his mind, the worse murderer: Ronald Straight. He then told the jury in closing argument that the jury should believe this purchased witness, because she told Greene when she first

talked to him the same story she told the jury. The same statements were made about daughter Stephanies "consistent" story. Mr. Greene there explained (incorrectly) that those two witnesses had no reason to lie. According to Mr. Green, the terms of immunity were that regardless of what the witnesses testified to, no prosecution would result. Not only were these terms never revealed during trial, they were not an accurate reflection of what the hired gun believed the terms were.

If Mr. Greene is to be taken for his voir dire word, the conviction in this case depended on the testimony of a purchased murderer: Jane Albert. Her, and daughter Stephanie's credibility was the linchpin binding Ronald Straight. Mr. Greene trampled the constitution, bending over backwards to attach his personal voucher to his star witness otherwise soiled credibility. Recent case law has focused sharply on such prosecutorial misconduct, and the injection of intolerable unreliability into the life/death education which result from such typical exesses. Under this new law, Mr. Straight is entitled to relief.

CLAIM IV

MR. STRAIGHT WAS CONVICTED AND SENTENCED TO DEATH BASED UPON UNRELIABLE AND UNREBUTTABLE HEARSAY STATEMENTS MADE BY AN IMMUNIZED, CONFESSED MURDERER, IN VIOLATION OF BRUTON V. U.S. AND THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Bought witnesses spewed rank hearsay to convict Ronnie Straight. Jane Albert, an immunized confessed murderer (principal/aider abettor), testified for the prosecution. She, and many other witnesses, repeatedly and prejudicially testified to out-of-court declarations made by nontestifying witnesses. Those statements were offered as truth, and no opportunity was provided to confront the declarants. The trial court's allowance of this hearsay, on crucial and dispositive issues, violated Mr. Straight's constitutional right to confront the witnesses against him, depriving him of a fair trial and sentencing hearing.

Mr. Straight has steadfastly stated that he is innocent of the murder, and of any participation in the murder, of Jim Stone. The State conceded at trial that they needed Jane Albert to have sufficient evidence against Mr. Straight. See Claim III, supra. The crucial, convicting testimony will be discussed in this claim, in order to demonstrate that the State's case against Mr. Straight was specious without deals being cut to crucial witnesses. Those bought witnesses then provided unverifiable and irrebuttable devastating hearsay to convict Mr. Straight. This fundamental error should be cognizable whenever it is brought to the Court's attention, but the trial court repeatedly allowed the

hearsay into evidence, inter alia, under a so-called co-conspirator exception to the hearsay rule.

Jane Albert was the greatest offender. Her testimony is peppered with hearsay. The potential for unreliability could not be clearer: the State gave Jane Albert immunity, and then elicited from her statements allegedly made by her ex-lover Tim Palmes, in which she (through Palmes) implicated Mr. Straight.

The worst (and best) example of the impossibility of confronting Jane Albert's testimony comes from an episode she describes as occurring at her residence after Mr. Stone was killed. According to Jane Albert, she came home after Tim Palmes ordered her to, on the day of the killing. When she arrived, Palmes allegedly made the following outrageous statement:

> Q. Okay. What, if anything, did Tim Palmes tell you about the killing?
>
> A. We laid down across the bed and he told me that --
>
> Q. Could you speak up, Jane?
>
> A. He told me that when Jim got there that Ronnie had grabbed him by the hair of the head and shoved the pistol down his throat and broke his teeth out.
>
> Q. Okay.
>
> A. And he said then they --
>
> Q. This is what Tim told you happened, is that correct?
>
> A. Yes.
>
> Q. Okay.

> A. He said then they told Jim to take everything out of his pockets and to take off his jewelry and he did and he said they tied his hands and led him down the hall and that Jim -- that (pause) that he lived for thirty minutes, that he begged, that he could get the money and that Ronnie had bashed in the side of his head with a hammer and he was making a mess and Tim told him to stop. And Ronnie went out of the room, came back into the room with a pillow and the .38 and Tim said, "No, we don't need any noise," and he told him to bring him a knife or he told him to get a knife and that Ronnie came back -- he had -- he told me that Ronnie -- he had a big machete. It was an old National Guard machete. He cut wood and cattails and things in the woods, stuff, and he told me that Ronnie stabbed it through Jim's stomach and that he was still living and he said then he came back with the butcher knife. Tim told him to stop making a mess and that he stabbed him several times in the chest and then that Tim took the knife and stabbed him in the chest.

(R. 332-33). This is simply the worst example of hearsay. No exception to hearsay covers the statement, even though it was offered as a hearsay exception, a statement "in furtherance of a conspiracy." The statement was a grossly and gratuitously prejudicial description of a murder, having nothing to do with furthering any conspiracy. There is no exception that would allow this testimony. The State capitalized on this noncontestable hearsay at closing argument:

> Jane Albert told you that Tim told her Monday afternoon that Ronald Straight was making a mess of it, starting with a machete and knife, not killing, but a mess, and that he, Timothy Palmes, finished the job, took the knife out and finally killed the man. Well, it was a mess. Dr. can't even tell

you the exact number of wounds. He said some of the wounds to the hands could have been made with a machete. He doesn't know. You recall in State's Exhibit 10 you see how the body -- the body is laying on its back here, this being the side that was up, (indicating) left side. You can see the wounds to the knuckles or wounds to the hands, the fingers. Someone just stabbing with that machete or the knife or both.

I could just picture him and I think you can in your mind's eye, too, that man right there, (indicating) he didn't look then that way, didn't have that suit on, tie, hair a little longer, mustache. He said earlier that Jim ought to be his and that's what he meant. He made a mess of it. Blood on the wall, in the room, all over the room, apparently, Mr. Stone in that box moving his hands up, getting hit on his hands with the knife, with the machete.

(R. 912-13).

Jane Albert was a fertile source for the State's hearsay, non-confrontable attack on Ronald Straight. Her entire testimony is little more than hearsay:

Q. Okay. What did Tim say to you?

A. He said, "You know we're going to kill him."

(R. 309) (hearsay; objection overruled).

Q. All right. And do you recall the last Saturday in September, that is, September the 25th, when you were down at Scott Furniture Store?

A. Yes, sir. Jim had taken off that day to go to a ball game and early that afternoon Tim came down to the store and Nathaniel and Chester Lloyd were there.

Q. Where was Ron? Nathaniel and Chester Lloyd, you said they worked there at the

store?

A. Yes.

Q. And so, you and Nathaniel, Chester Lloyd and Tim? Who else was there?

A. Nobody.

Q. Was Stephanie there?

A. No, sir.

Q. Where was Ronnie?

A. He was seeing a friend.

Q. All right. What, if anything, occurred prior to Ronnie getting back?

A. Tim started talking to Nathaniel and Chester about the murder and --

Q. What did he say?

A. -- and ripping Jim off. He asked them if they wanted to go in with him.

Q. With you all?

A. Yeah, with us and --

. . . .

BY MR. GREEN:

Q. What did he say, if you can recall?

A. I don't recall the exact words because I was working, but they were sitting right beside my desk and (pause) I don't know if they knew or -- I mean, I say they knew it was -- all of us. I knew because I was sitting there listening to it. I had to know, you know.

Q. What was Tim saying to Chester and Nathaniel?

A. That they -- we were going to rip Jim

off and -- not as to how they were going to do it exactly, but what they were going to take. They were going to take the accounts at first and just so Mr. Stone wouldn't have them and the car and the money that came into the store on the first of the month. Nathaniel and Chester didn't want anything to do with it. Tim took Chester out by himself and talked to him, I guess, and came back in and Chester was just kind of laughing at him like he thought it was a joke, you know.

Q. Did Ronnie ever arrive at the store?

A. Yes, sir. He came in later and said he was hungry. I fixed him a sandwich and --

Q. Did the conversation about ripping off Jim ever resume?

A. Yeah.

Q. All right. And was Ronnie there then?

A. Yes.

Q. What was said and who was saying it?

A. Well, Ronnie was -- Tim was saying, you know, that Jim made it necessary that it happen that way and that they tried to be solid, was the word Ronnie used, with Jim and Jim couldn't see it, so the guys didn't want anything to do with it, you know, they just -- finally they just walked away from Tim and Ronnie.

Q. Chester and Nathaniel did?

(R. 318-21).

A. [I]n the meanwhile I had talked to Tim and that was my part, was to get Jim to the apartment, and I asked him to -- you know, if he could come by and have a cup of tea and he said no and I said, "Okay, I'll see you there," and hung up and Tim said, "Tell him you left your money at the apartment and that you have to come back," and I said that it wouldn't work, that Jim knew I didn't leave

my money, that I had already stopped taking my money home from the store with me. I had started putting it in the safe.

Q. Okay.

A. And so, I said -- we had discussed before --

Q. You and Tim and Ronnie?

A. Yes, sir.

Q. All right.

A. -- telling Jim that Nancy was at the house.

Q. What's Nancy's last name?

A. I think it was Bechem. I'm not real sure.

Q. How old was she?

A. She was fifteen at the time.

Q. Did she live --

A. There in the complex with her mother.

Q. Okay.

A. THat Tim and Ronnie had both -- well, they knew that that was the way to get Jim to the apartment and so I was to meet him at the Volkswagen place and to tell him that Nancy was at the apartment and when I got to the Volkswagen place, I waited and Jim didn't come and finally my name came over the intercom. I had a telephone call. It was Jim and he had gone to the wrong Volkswagen dealership. He had gone to the one on Phillips Highway and I was at the one on Atlantic Boulevard which we had used since we bought the car.

Q. All right. What happened?

A. That he had gone to the wrong

dealership, so he told me that he was going to the store and he would send Chester after me, which he did.

Q. Chester picked you up?

A. Yes.

Q. About what time was that?

A. About 9:30.

Q. Okay.

A. And I called Tim before Chester got there and I told him that the plan fell through and he said, "You know what to do and you know how to get him here, so do something positive for a change."

(R. 322-24).

A. (Pause) The first thing I knew it was 11:00 o'clock and I answered the phone and I said, "Good morning, Scott Furniture." Tim said, "Good morning, Scott Furniture," back to me.

Q. Speak up, Jane, if you can. I know that you've got a cold and it's hard --

A. I'm sorry.

Q. -- even if you didn't have a cold.

A. Tim had answered back, "Good morning, Scott Furniture," and --

Q. What did he say to you?

A. I asked him if everything was all right and he said, "Everything is going according to plan. Jim was a good little boy. He did exactly what we told him to do." I asked him where Stephanie was. He said, "She's in her room," and I asked where Ronnie was and he said, "He's right here. Everything was cool."

Q. Did he tell you where Jim Stone was?

A. He told me he was in the box.

Q. Alive or dead?

A. That he was sitting on it.

. . . .

(R. 327-30).

None of these hearsay statements could be rebutted.

Nancy Gilliam, who allegedly overheard conversations with Tim Palmes and Ronnie Straight, also testified to hearsay statements. According to her, Tim Palmes "told me that I knew too much and that I would have to go with them" (R. 238). She then testified to a conversation, full of Tim Palmes' hearsay:

A. Then Tim told me that I was not going to be in the room, but --

Q. What room are you talking about, Nancy?

A. The back bedroom where -- in the back bedroom.

Q. All right. Tim told you you were not going to be in there, but what?

A. That I was going to be with Jane and Jane was going to take the money from the cash register and go to the bank.

Q. What was she going to do at the bank?

A. Going to get the money out of Jim's account.

Q. All right. And what was going to happen at the apartment, Nancy?

A. Stephanie was supposed to open the door and let him in.

Q. Now, who was telling you this? Was it

Tim?

A. Yes.

Q. Did Ronnie tell you some of this, too?

A. Yes.

Q. Do you remember which parts Ronnie told you?

A. No.

Q. But you do remember that he was telling you parts of this?

A. yes.

Q. All right. Now, what was to happen after Stephanie let Jim Stone into the apartment?

A. She was supposed to tell him that I was in the back bedroom.

Q. Were you going to be there?

A. No.

Q. Was Jim Stone supposed to think you were there?

A. Yes.

Q. What was going to happen then?

A. They were going to hit him over the head and then shoot him and then put him in a box.

Q. What was going to happen to the box, Nancy?

A. It was going to be thrown into a lake.

Q. And what was going to happen after the box and the body were disposed of?

A. We were going to go to California.

Q. Who was going to go to California?

A. Me, Ronnie, Tim, Stephanie and Jane.

Q. All right. Now you told us that Jim Stone's money from the bank and money from the cash register were going to be taken?

A. Yes.

Q. Did Ronnie and Tim tell you that anything else was going to be taken?

A. His credit cards and his car.

Q. All right. And what was the purpose of taking the credit cards?

A. Tim was going to change his name over to Jim Stone. He was going to use his identification.

Q. How were you all going to go to California?

A. By airplane.

Q. Did they tell you how they were going to get the car out to California?

A. No.

Q. Now, did they tell you anything about Jim Stone's disappearance, how they planned for it to look?

A. That him and Jane were -- his wife was to think that him and Jane took off.

Q. Now, did they tell you anything else that afternoon, Nancy, about Jim Stone, what they were planning?

A. No.

Q. Nancy, did Ronnie participate in this conversation?

A. Yes.

Q. Did you believe them?

A. Yes.

Q. Nancy, what was your condition when you went into that apartment that day?

A. I was pretty high, but when I heard my name mentioned it straightened me out.

(R. 241-44).

She then testified to Jane Albert's hearsay:

A. I was gone a couple of months, but Jane -- I had called up Jim and I had kind of hinted around to him, but he didn't -- he didn't catch on and he told Jane where I was and Jane came and talked to me that night and asked me to come over after I got off work and me and Angie Clements, a friend of mine that I was living with at the Beach, came over there with me and nothing much was said, you know, except that I wouldn't say anything, and they asked me would I say anything and I said no.

Q. Why did Jane come out and get you? What did she tell you then?

A. She told me not -- she came in and she told me to go get dressed, she wants to talk to me, and I told her I was working and she told me to go get dressed, so I went and I put on a pair of pants and I went outside with her and she told me that, you know, they were afraid that I was going to talk and that they wanted some reassurance. She wanted me to go with her then, but I had to work so I told her I'd come by after work.

Q. And is that when you went by with Angie?

A. Yes.

Q. And what did you tell Tim and Ronnie at that time?

A. I told them that I wouldn't say anything because I was involved, too.

(R. 246-47).

Jane Albert's daughter, Stephanie, continued the hearsay barrage. She testified to much hearsay, but the most prejudicial was Tim Palmes' alleged statement: "He told me to tell Jim goodbye" (R. 568).

The remainder of the transcript is replete with hearsay, but these three witnesses were particularly damaging. They all offered purported statements which no one could confront. This was particularly damaging, since these three witnesses had special reasons to lie about hearsay:

a. Jane Albert -- Jane Albert had every reason to lie. Tim Palmes is dead, executed by the State, based on her testimony. Ronald Straight is next in line. She is living comfortably in Jacksonville, not having served a day in prison.

b. Stephanie -- If she did not say what she said, her mother would go to jail. See App. 13.

c. Nancy Gilliam -- She was a 15-year-old runaway, topless go-go dancer, and dope addict. She testified, and was not placed in juvenile custody.

Virtually all the hearsay was "justified" and admitted pursuant to a co-conspirator rule. But the exception was not applicable. The reliability of the hearsay statements is virtually nil, and the prejudicial value massive. Their introduction into evidence rendered the conviction and sentence fundamentally unreliable, in violation of the fifth, sixth,

eighth and fourteenth amendments.

The amorphous character of the crime of conspiracy has necessitated the implementation of safeguards to prevent abuse by over-zealous prosecutors. The rule in conspiracy cases is that the words and acts of conspirators, occurring during the pendency of and in furtherance of the conspiracy, are substantive evidence against co-conspirators. From this general rule of substantive criminal law comes a rule of evidence: under certain conditions, the out of court statements of one conspirator can be introduced against a co-conspirator, as an exception to the rule against hearsay. If certain very specific elements are demonstrated, such "hearsay" evidence can be introduced in a criminal case, without violating the confrontation clause.

A. The Introduction of Palmes' Statements Violated Mr. Straight's Rights to Confront the Witnesses Against Him.

Bruton v. United States, 391 U.S. 123 (1968), prevents the introduction into evidence of a non-testifying co-defendant's out of court statements. A defendant is entitled under the Sixth and Fourteenth Amendments to confront the witnesses and evidence used to convict or sentence, in order to ensure the integrity of the adversarial truth-seeking judicial function. This is a constitutional, as opposed to evidentiary, restriction.

The harm from the introduction of such non-rebuttable statements is patent in this case. For example, the following evidence was introduced against Ronald Straight through Jane

Albert, against which he had no defense:

Q. Okay. What, if anything, did Tim Palmes tell you about the killing?

A. We laid down across the bad and he told me that --

Q. Could you speak up, Jane?

A. He told me that when Jim got there that Ronnie had grabbed him by the hair of the head and shoved the pistol down his throat and broke his teeth out.

Q. Okay.

A. And he said then they --

Q. This is what Tim told you happened, is that correct?

A. Yes.

Q. Okay.

A. He said then they told Jim to take everything out of his pockets and to take off his jewelry and he did and he said they tied his hands and led him down the hall and that Jim -- that (pause) that he lived for thirty minutes, that he begged, that he could get the money and that Ronnie had bashed in the side of his head with a hammer and he was making a mess out of the room, came back into the room with a pillow and the .38 and Tim said, "No, we don't need any noise," and he told him to bring him a knife or he told hi to get a knife and that Ronnie came back -- he had -- he told me that Ronnie -- he had a big machete. It was an old National Guard machete. He cut wood and cattails and things in the woods, stuff, and he told me that ronnie stabbed it through Jim's stomach and that he was still living and he said then he came back with the butcher knife. Tim told him to stop making a mess and that he stabbed him several times in the chest and then that Tim took the knife and stabbed him in the chest.

(R 332-33). This is simply the worst example of hearsay. No exception to hearsay covers the statement, even though it was offered as a hearsay exception, a statement "in further once of a conspiracy." The statement was a grossly and gratuitously prejudicial description of a murder, having nothing to do with furthering any conspiracy. There is no exception that would allow this testimony. The State capitalized on this non-confrontable hearsay at closing argument:

> Jane Albert told you that Tim told her Monday afternoon that Ronald Straight was making a mess of it, starting with a machete and knife, not killing, but a mess, and that he, Timothy Palmes, finished the job, took the knife out and finally killed the man. Well, it was a mess. Dr. can't even tell you the exact number of wounds. He said some of the wounds to the hands could have been made with a machete. He doesn't know. You recall in State's Exhibit 10 you see how the body -- the body is laying on its back here, this being the side that was up, (indicating) left side. You can see the wounds to the knuckles or wounds to the hands, the fingers. Someone just stabbing with that machete or the knife or both.
>
> I could just picture him and I think you can in your mind's eye, too, that man right there, (indicating) he didn't look then that way, didn't have that suit on, tie, hair a little longer, mustache. He said earlier that Jim ought to be his and that's what he meant. He made a mess of it. Blood on the wall, in the room, all over the room, apparently, Mr. Stone in that box moving his hands up, getting hit on his hands with the knife, with the machete.

This incredibly damaging and inflammatory description of the offense is classically irrebutable. There was no way for Mr.

Straight to cross-examine his co-defendant's description of his acts, when the words were spoken through another immunized putative co-defendant. These, and the copious other, hearsay declarations outlined in the petition, violated the Sixth, Eighth, and Fourteenth Amendments, and produced an unreliable guilt verdict, Beck v. Alabama, 447 U.S. 625 (1980), and sentencing determination. Gardner v. Florida, 430 U.S. 349 (1977).

Unless some exception to hearsay was applicable, and the hearsay evidence was supported by clear indicia of reliability, the constitutional clause was violated.

B. The Co-Conspirator Exception to Hearsay Did Not Apply, And, If It Did, an Improper and Unreliable Procedure Was Utilized for Admission and Use of the Hearsay Statements

At common law, the statement of a co-conspirator was admissible against another co-conspirator, if a) the existence of the conspiracy was first proven independent from the hearsay; b) it was first proven that the person against whom the statement was offered was one of the conspirators; and c) the statement was made in furtherance of the conspiracy. Fornell v. State, 214 So. 2d 753 (2nd DCA 1968); Henchell v. State, 257 So. 2d 889 (Fla. 1972). As further protection from the power of a conspiracy related hearsay rule, a defendant was entitled to cautionary jury instructions regarding the admission and limited use of such hearsay. Boyd v. Florida, 389 So.2d 642 (2nd DCA 1980).

Florida statute now provides similar protection. Fla. Stat Section 90.803(18)(e) (1983):

> A statement by a person who was a coconspirator of the party during the course, and in furtherance, of the conspiracy. Upon request, the court shall instruct the jury that the conspiracy itself and each member's participation in it must be established by independent evidence, either before the introduction of any evidence or before evidence is admitted under this paragraph.

Florida law suggested at one time that, when a substantive criminal count of conspiracy was introduced as an exception to hearsay, the existence of the conspiracy still had to be established beyond a reasonable doubt. Boyd, 389 So. 2d at 647. The Florida Supreme Court, for the first time, defined the degree of proof of conspiracy necessary to allow such "hearsay" admission in Nelson v. State, No. 65, 279 (May 1, 1986). In Nelson, the Court reversed a conviction and death sentence because of Bruton error, when the state introduced a "co-conspirator's" statement, having established "insufficient nonhearsay evidence that Nelson was involved in a conspiracy . . . ." slip op. at 4-5.

Absolutely none of the above protections were afforded Mr. Straight, and the resulting Bruton error is fundamental. First, no independent proof of conspiracy or any standard of proof for the finding of a conspiracy was required before copious co-defendant hearsay was admitted. Second, there was no attempt to

ensure that Palmes's statements were in furtherance of a conspiracy. The most critical example is the one quoted in section A, supra. Palmes purportedly gave some description of the murder, which was testified to by Jane Albert. The description of the murder had absolutely nothing to do with furthering conspiracy, one of the indicia of reliability required. Nevertheless, the statement was introduced wholesale, and the state capitalized upon it in final argument.

Finally, no instruction was given the jury at all regarding caution in analyzing co-conspirator statements or the burden of proof of conspiracy. The resulting conviction is fundamentally flawed.

CONCLUSION

A stay is required so that the claims for relief can be fully developed at an evidentiary hearing, and so that this Court can judiciously determine the issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished by hand delivery to Mark Menser, Assistant Attorney General, Office of the Attorney General, Elliot Building, Tallahassee, Florida this 17th day of May, 1986.

_____
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