IN THE SUPREME COURT OF FLORIDA

NO. 62,144

JERRY WHITE,

Appellant,

vs.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT COURT IN AND FOR ORANGE COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE

This appeal arises from the trial court's denial of Mr. White's Motion to Vacate Judgement and Sentence, brought pursuant to Fla. R. Crim. P. 3.850.[1]

After a jury trial on April 20 - 30, 1982, R. James Stroker, Judge, presiding, Mr. White was convicted of first degree murder and armed robbery in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, Florida (RI. 992). The judgment of conviction was rendered on April 27, 1982 (RI. 1977-78). On April 30, 1982, the jury, by a vote of eleven to one, returned an advisory sentence of death on the first degree murder conviction (RI. 1107). 'Judge Stroker's "Findings of Fact and Sentencing Order," sentencing Mr. White to death, was filed on May 4, 1982 (RI. 1992-96). On the same day the court entered a sentence of life imprisonment on the armed robbery conviction (RI. 1990).

Mr. White's Notice of Appeal and Amended Notice of Appeal were filed on May 20 and June 4, 1982 (RI. 2014-15). The convictions and sentences were affirmed by this Court on January

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'References to the trial transcript and record on appeal will be cited as (RI. ____); references to the post-conviction evidentiary hearing under Rule 3.850 as (RII. ____); and references to the appendix as (App. ___).

19, 1984. White v. State, 446 So. 2d 1031 (Fla. 1984). Rehearing was denied on April 11, 1984.

On September 30, 1985, the Governor of Florida signed a death warrant for Mr. White which set his execution for October 28, 1985 (RII. 820). Mr. White's Rule 3.850 motion and application for a stay of execution were filed on October 23, 1985 (RII. 441-553, 820). On October 24, 1985, Judge Stroker entered an order staying the execution (RII. 895-96).

Mr. White filed his "Suggestion that Trial Judge May be Called as Witness" on November 12, 1985 (RII. 908), and an order reassigning the cause to Lawrence R. Kirkwood, J., was entered on the same day (RII. 909). On May 5, 1986, the state filed a motion to stike Claims II through IX of Mr. White's Rule 3.850 motion (RII. 948-53); the motion was allowed on May 31, 1986 (RII. 962).

An evidentiary hearing on Claim I of the Rule 3.850 motion was held on July 28 and 29, 1986, before Kirkwood, J. (RII. 1-440). Proposed Findings of Fact and Conclusions of Law were filed by the defendant on November 13, 1986 (RII. 974-1018), and by the state attorney on November 26, 1986 (RII. 1019-1020). The judge's order denying Mr. White's motion for post-conviction relief was entered on April 9, 1987 (RII. 1021-24). The motion for rehearing, filed on April 24, 1987 (RII. 1029-33), was denied

on December 1, 1987 (RII. 1034). The defendant's notice of appeal was filed on December 29, 1987 (RII. 1035).

STATEMENT OF FACTS

The charges in this case arose from an incident which occurred on Sunday morning, March 8, 1981, at Alexander's grocery store in Taft, Florida. The facts of that incident are as set out in the parties' briefs on direct appeal and in the opinion of this Court. White v. State, 446 So. 2d 1031 (Fla. 1984).

In Claim I of his Motion to Vacate Judgment and Sentence, Mr. White asserted that he "was deprived of the effective assistance of counsel pretrial and during the guilt and penalty phases of trial contrary to the sixth, eighth, thirteenth and fourteenth amendments to the United States Constitution" (RII. 442). The Court, having granted the State's motion to strike the balance of the defendant's claims (RII. 962), held an evidentiary hearing only as to Claim I (RII. 962).

Evidentiary Hearing[2]

Shadrick Martin testified that he had known Attorney Emmet

[2]The evidence at the hearing was produced in the presence of the trial attorney, Emmet Moran. The state moved that Mr. Moran be excluded from the rule of sequestration and be allowed to sit at counsel table (RII. 11). After a lengthy statement by Mr. Moran (RII. 4-9) and over the defendant's objection (RII. 9-10, 14-15), the court granted the motion and invoked the rule of sequestration as to all other witnesses (RII. 12).

Moran since 1980, and that he had worked for Moran off and on after March, 1981 when Martin was released from jail (RII. 26-27). At some point he moved into a bedroom in Moran's condominium (RII. 28). He testified that one morning when he was at his mother's house he received a telephone call from Moran at about 3:00 a.m. During the conversation, Moran stated that he had a client, White, who would not talk with him and that he needed Martin's help on the case (RII. 28). Martin worked with Moran through the entire trial (RII. 28-29). He indicated that there was no preparation for the sentencing portion of the trial. Martin said Moran was upset about losing the case and felt there was no sense in preparing; he would just "play it by ear" (RII. 30). Martin also testified that at that time Moran was operating out of his house because he had been evicted from his office (RII. 31-32).

Martin testified that during the course of White's trial, Mr. Moran "was very depressed over a home situation and he was drinking pretty heavy and [they] were into drugs pretty heavy at the time " (RII. 29). He indicated that Kenneth Herman[3] helped him in some of the preparation for White's trial and "was around

[3]Mr. Herman was unavailable to testify at the evidentiary hearing. The defense proffered his affidavit which was included in the Appendix to the Rule 3.850 motion (RII. 563-65). The proffer was denied (RII. 410-12). See App. A.

when [they] did a little bit of drugs and stuff" (RII. 29). He testified that Moran was using drugs prior to and during the trial, and that he and Moran had an argument about the effect of the drugs on his ability to try the case (RII. 30-31). On cross-examination he specified that the drugs he and Moran were taking were quaaludes, cocaine, marijuana, hashish, dalmans and morphine, and he testified that Moran was drinking at the same time (RII. 34-35). He testified that he had told Moran that it would be dangerous for him, a heart patient, to use cocaine and alcohol (RII. 35).

On cross-examination Martin testified that Moran had represented him twice and had also represented his brother Jimmy (RII. 32-33). When he was released from jail and went to work for Moran, he did so to pay off his legal fees (RII. 33). He testified further that Moran had refused to represent him at one time, and that he had not seen Moran for two years prior to the hearing (RII. 36-38).

Attorney F. Wesley Blankner, Jr. testified that he prosecuted Mr. White's case (RII. 44-45). He stated that he had known Mr. Moran for some time, and that during the preparation of Mr. White's case he considered moving to disqualify Mr. Moran based on his "general knowledge of Mr. Moran." He was aware that Moran had a drinking problem, or "felt he did based on conversations that [Blankner] was aware of" (RII. 45). He

recounted that during a conference in chambers regarding Mr. White's trial, he advised Moran in front of Judge Stroker that he would be checking Mr. Moran's breath for the smell of alcohol, and that if during the case he at any time smelled alcohol, he would move for a mistrial and for the removal of Mr. Moran from the case (RII. **46**). He "had some concerns" about Mr. Moran's effectiveness as an attorney." He had "voiced concerns about how the record would appear" and "said on more than one occasion that in this case there [would] be a **3.850** motion filed because of the way the record **appears."** He said he felt, however, that any **3.850** filed would have less validity because of Mr. White's testimony (RII. **48-49**).

Mr. Blankner stated further that he told Mr. Moran at least nine months prior to trial that there would be no plea offer and that he would be seeking the death penalty (RII. **47**). He indicated that any evidence that was in his possession, inculpatory or exculpatory, was turned over to Mr. Moran, and that he "would allow almost as many continuances **as** [Mr. **Moran]** needed to be prepared so this case would only have to be tried one **time"** (RII. **48**).

With regard to the prior inconsistent statement Mr. White made to detectives while he was hospitalized, Mr. **Blankner** testified that he thought Mr. Moran had presented some records **in** an attempt to show that Mr. White may have been under medication

at the time he gave the statement and thus may not have voluntarily and knowingly waived his rights. Mr. Blankner stated further that now, as a criminal defense attorney, he probably would have used medical experts to interpret those medical reports **(RII. 50-51)**.

The State then called Mr. Blankner as its witness **(RII. 52)**, and, over defense counsel's objection as to his bias in this case, the court qualified him as an expert in the field of the trial of capital cases **(RII. 54-55)**. Mr. Blankner testified that he had seen Mr. Moran in trial. He characterized Mr. Moran's style as **"rambling," "to** attempt to confuse **juries."** He indicated that Moran would jump around from **one** point to another and that some of his questions seemed "very inane." He opined that this trial tactic had been used effectively by Mr. **Moran in** Shadrick Martin's first degree murder case, in which Mr. Martin was found not guilty **(RII. 55-56)**.

Mr. Blankner testified that during Mr. White's trial, he smelled Mr. Moran's breath on a daily basis and that **he** never smelled alcohol. He was convinced **that Moran** was **not** intoxicated on either alcohol or drugs. Moran, however, had said **"several** times that he was not in the greatest of health, but **he was able** to proceed" **(RII. 57)**.

Mr. Blankner expressed his opinion that the evidence in the case was "exceedingly strong." He based this opinion on the

evidence that a twelve-year-old girl and her father came into the store, that Mr. White attempted to "usher [them] into a back room," and that when they refused to go, he pulled the trigger of the gun (RII. 58). He characterized Mr. White's testimony as "detailed" and stated his opinion that Mr. White's testimony would not have been consistent with an intoxication defense[4] (RII. 60). Mr. Blankner explained on cross-examination that he felt that Mr. White's "detailed statement of what he did" and "full memory of what occurred" were inconsistent with such a defense (RII. 63). He did concede that as a defense attorney, he decides on the defense that he is going to present before he decides whether to call his client as a witness, and that he "might very well" check medical records first to see whether intoxication is a valid defense (RII. 65). This check of pertinent medical records, Blankner admitted, could affect his decision as to whether to have his client testify, and whether one defense might be better than another. He would then impart his best legal advice to his client as to his testifying (RII.

[4]The first witness called in the hearing testified as to Mr. White's emergency room records from the Orlando Regional Medical Center for March 8, 1981. The records showed that a blood alcohol test was ordered at 1:30 p.m. and the results were received from the laboratory at 2:47 p.m. (RII. 20-22). The second witness testified to having done a blood alcohol test and to having noted on the record a result of 174 milligrams per deciliter (RII. 25).

65-66). He also indicated that he would consult an expert as to the effects of alcohol or drugs on a person's intentions, that he "would certainly check" the meaning of a blood alcohol level of 174 mg/dl which was recorded within three and one half hours of this incident, and that he certainly "would have checked out the intoxication defense" in this case (RII. 67-70).

Mr. Blankner agreed that the testimony regarding Mr. Alexander's injuries was "totally irrelevant," but did not think that it inflamed the jury because of the other testimony in the case (RII. 70-71). He also stated that he would have objected to the characterization of his client as a "nine-time convicted felon" (RII. 76). Regarding the penalty phase, he testified that the charges of escape, aggravated assault and auto larceny were not admissible, and agreed that as a defense attorney he would not have let in "for a second" that Mr. White had two prior escape charges (RII. 79-80).

Dr. Lisa Miller, an expert in the area of psychopharmacology (RII. 95-98), testified that alcohol is a drug which acts primarily on the central nervous system and causes drowsiness, incoordination, decrease in motor function, decrease in thought processes, and is a general depressant on all of the brain's functions (RII. 98). She testified that at the level of approximately 200 milligrams per deciliter, a person is "definitely drunk" (RII. 99). She stated that the rate of

elmination of alcohol from the body is constant regardless of its concentration in the blood, but the elimination rate is affected by the person's weight **(RII. 99-100)**. She testified that she had inquired about the blood alcohol test that was conducted on Mr. White and determined that it was very accurate. She then described the procedures she used in calculating what Mr. White's blood alcohol level would have been on the morning of the incident **(RII. 101-103)**. Her calculations indicated that the highest blood alcohol level possible at **11:00** a.m. would have been **240** mg/dl and the lowest would have been **211.5** mg/dl **(RII. 104)**.

According to the Florida Hospital records, Mr. White was given **75** milligrams of meperidine, or demerol, intramuscularly at **10:15** p.m on the evening of the incident **(RII. 105, 109)**. Dr. Miller explained that the effect of the drug is much greater when given intramuscularly, that its effects would be apparent within ten minutes, and that since it is a central nervous system deadener, it would make the person drowsy, confused, and possibly euphoric or dysphoric **(RII. 110-11)**. The drug is given as a pre-anesthetic because it makes the person "very, very malleable" **(RII. 111-12)**. She concluded that the trustworthiness of a person who has been under the influence of the drug for about fifteen minutes would be questionable because the drug would affect the thinking process **(RII. 112)**.

Dr. Warren Rice, an expert in neuropsychology (RII. 119-20), testified that in preparation for rendering an opinion in this case, he reviewed the testimony of witnesses, Mr. White's statements, and information on the effect of alcohol on the brain and body. He also consulted with Dr. Cynthia Domaci, a pharmacologist who calculated both forward and reverse extrapolations of Mr. White's blood alcohol level, and he reviewed the graphs which indicated what those levels would have been between 10:00 a.m. and 10:00 p.m. on the day of the incident (RII. 122-23). He testified that based on the calculations reflected in the graphs, at 10:45 to 11:15 a.m.[5] Mr. White would have had a great deal of difficulty in standing and in following through on many forms of thought processes, and he would have been confused and disoriented in his behavior (RII. 124). He stated further that Mr. White's responses would have been reflexive and spontaneous, and that he would not have been able "to make any sort of planned, deliberate kind of goal seeking behavior. It would be rather responsive to situations, but . . . would not be willful or planned in any particular way" (RII. 125). When asked whether Mr. White's testimony seemed inconsistent with a blood alcohol level over .20 mg/dl, Dr. Rice

[5]The crime occurred at about 11:00 a.m. White v. State, 446 So. 2d at 1033.

replied that White's behavior seemed generally reflective of that blood alcohol level, and that, as often occurs in people with high levels of alcohol, Mr. White probably had filled in some of the details that he would not have been able to recall (RII. **125-26**). As to the purported evidence that Mr. White ran from the scene, Dr. Rice stated that this would have been possible due to the fear that he was experiencing, evidenced by White's own testimony, which would have overcome the intoxication for a few moments (RII. **126**). As to Mr. White's driving, the doctor pointed out that the ability to engage in well-rehearsed behavior, such as driving, is often one of the last things to disappear in an intoxicated person, even though the driving would be uncoordinated and chaotic (RII. **126-27**).

Dr. Rice testified further that, because of Mr. White's inability to formulate a goal at the time, he would not have been able to commit a cold and calculated crime at around 11:00 a.m. He also opined that at Mr. White's high level of blood alcohol, he would have been suffering from extreme mental disturbance (RII. 127), and that he would have been unconcerned about the consequences of his behavior (RII. **128**).

With regard to the injection of **75** miligrams of demerol that Mr. White received at 10:15 p.m. followed by his interrogation at 10:30 p.m., Dr. Rice testified that Mr. White would have been very euphoric at the time and that "he might very well [have]

provide[d] answers that he felt were anticipated by whomever was questioning him" **(RII.** 130).

Gerald Jones, an attorney, testified that he had numerous conversations with F. Wesley Blankner during Mr. White's trial, and that Blankner had said that **"he** was frustrated with the way Attorney Moran was handling cross examination, something like that. He said words to the effect, if anyone would have an argument or srounds for insufficiency of counsel, this guy would, words to that affect **[sic]" (RII.** 136-37)(emphasis added).

Emmett Moran testified that he became a member of the Florida Bar in 1960 **(RII.** 138). After describing his work history **(RII.** 139-41), he testified that he had been suspended from the bar, and that he would have to show that he had been rehabilitated in order to become active again **(RII.** 141-42). He identified a contract for legal services and stated that he charged five thousand dollars to represent Mr. White. He indicated that White's mother would pay the fee, and that because Mr. White was indigent, he would get costs. He assumed that under the circumstances, whether these costs would include any money for experts would be **"up** to the Courts" **(RII.** 143-44).

Mr. Moran testified that in 1981-82, he was 62 years of age and had some physical problems. He had congestive heart failure in 1978 and later developed diabetes and hypertension. He stated that he was "always **busy,"** but could not remember whether he had

told the court that he had not worked for the two and one-half month period prior to March 1, 1982 (RII. 144-46). He testified that he had had hypoglycemia for years, and that all during his practice he had "practiced under par" (RII. 146-47). At the time of Mr. White's trial in April, 1982, he "was taking a lot of medication" (RII. 147). Also during the trial, he told Judge Stroker that he did not feel very well and the judge gave him some "energy powder." With regard to his ability to concentrate during the trial, he stated that he "concentrate[d] on what was given to [him] by the investigation department, and what they gave [him] wasn't too much to concentrate about," and that he "didn't have anything to be sharp about" (RII. 149-50). He stated that he "didn't feel too good," and that his diabetes was diagnosed a year after the trial (RII. 151).

Mr. Moran testified that he had never had much assistance for any trial. In Mr. White's case, however, he felt Mr. White did not have a chance. Because Moran "wasn't getting much communication with him," he decided to have Shad Martin talk with White "and find out what the defense was because the state didn't give it to [Moran]." He explained that there were no pictures taken of the back room and the bodies were moved, and he never knew the denominations of the $388.00. Thus "all [he] had was Jerry White's word," and he indicated that he believed Mr. White's version of the incident (RII. 153), which Shad Martin had

told him (RII. 154). When asked whether he got all the discovery he needed from the state, he replied that he did not "get all the cooperation [he] needed" (RII. 157). Later in his testimony, Mr. Moran opined that the state's gathering of the evidence was "terrible, real terrible," and he could not understand why the state did not do a better job (RII. 244).

With regard to Mr. White's blood alcohol level as reflected in the medical center record, Mr. Moran testified that he never checked it. Referring to his twenty years of experience, he felt that self-defense and intoxication were inconsistent defenses (RII. 157). He also said that he knew "a little bit about intoxication and how it works on different people different times, and there's no norm." He expounded on the effect that fear would have on the alcohol -- "Your alcoholic content goes right out the window because one gland takes over and fright can burn out anything . . . . And if his fear was great, I thought it was, it would have fortified any amount of alcohol in his body" (RII. 158). He testified that he decided to use the self-defense theory "almost from the very beginning after [he] talked to Jerry," but he could not recall whether he ever used the words "self-defense" in front of the jury (RII. 159). He then volunteered that it is "hard to say self-defense when you're shooting some little girl in the head," and expressed the opinion that "the whole case was an impossible defense" (RII. 160). In

his view, the evidence was "so overwhelming" that he did not know how anyone could erase from the jury's mind "the fact that Jerry White killed a person and shot another person behind the head," or "explain why he shot at a young girl, 12 years of age." He added that "we have got to give some explanation because he wants a fair trial" **(RII.** 161).

Upon being asked whether he thought it was necessary for a defense attorney to have all the facts before deciding which defense to use in a case, Mr. Moran conceded that this would be a good foundation **(RII.** 206). With regard to the taking of depositions, Mr. Moran stated that sometimes it is a good idea to take them and sometimes it is not **(RII.** 207-10). Upon being referred to several specific racist comments he made while taking depositions[6] and asked whether that helped in the preparation of

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'Examples of these blatantly racist comments follow:

> [Moran] Q **Is** he colored?

(RI. 1185).

> [Moran] Q **I** don't know how they can tell with black people. They all loook alike to me.

(RI. 1198).

> [Moran] Q Two cases that **I** don't understand and that is killing and rapes. **I** never understood half of them yet. The

(footnote continued on next page)

his case, Mr. Moran said that he had been joking and that he did not think they had any value one way or the other because such comments stay in the depositions, which he very seldom uses for

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> reasons behind them are so -- any rape that I ever had lasted three minutes and I thought they must be Supermen -- those black guys.

(RI. **1199**).

> [Moran] Q I deal with these people all day long. My first experience in the law business was listening to five or ten black people talking together. I didn't know what they were saying. They were laughing and talking.

(RI. **1202**).

> [Moran] Q Did I tell you about the guy about several years ago that was holding up a **7-11**. The one that was right near the police station, remember? Down there near Tinker Field they had one there on the Corner on Old Winter Garden Road. These two black boys went in there and one was stoned on heroin. The alarm went out, all right?
> A Um-hum.
> Q The first guy was clearheaded and he goes charging out the door. He told the other guy, come on. The other guy got a paper bag with the money in it and he falls, and the bag splits open, and it's a windy day. The money was falling all around and you could hear the police sirens. He's picking up the money. You're not very funny today. The wind is blowing the money and the police are coming.

(footnote continued on next page)

impeachment. Moran volunteered that he had been "defending color [sic] people in this county for twenty years" **(RII.** 210-12). He went on to expound on the expertise of "color [sic] people" in

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> A That's what the cash register looked like when we got there (Indicating).
> Q **I** had one guy go down and take a lie detector test and on the test he said, are you on something. He said, heroin. He said, that needle didn't move. Okay. I don't mean to talk to you.

(RI. 1204).

> [Moran] Q You know that they really don't know each other unless they . . .
> A (Interposing) They know them be nicknames.
> Q Yeah. Ali. You mean, Aligator? Yeah, oh I know him.
> A Oh, yeah, that's how they get around.
> Q Huh?
> A That's how they get around.
> Q There's Milky and Smokey.
> A Buttermilk.
> Q Yeah, Buttermilk. See, you tell a jury that, you know.

(RI. 1208).

> [Moran] Q You know, **I** really think that the colored should be tried by an all colored jury. You know why? Mostly in these areas where they have enemies they've gone to the police and the police are so damm tired of going to their domestic affairs. So, finally one gets a pistol, right?
> A Um-hum.

(footnote continued on next page)

athletics, stated that his comments were not antiblack, and that the comments did not hurt the case because the jury never heard them **(RII. 215-17).**[7] Mr. Moran testified that he used experts

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> Q And they walk in the bar, right? And one guy says, his eyes was flashing. And the other guy says, his eyes was darting. To the white people that don't mean a damm thing. To them, **I** guess, it means that something is going to happen, right?

(RI. 1209).

> [Moran] Q Now, see, your ancestors, they haven't been running around in those jungles there for **300** or 400 years clearing those logs with tigers chasing them and all that.
> A May not have: **I** couldn't tell you.
> Q They're jumping up and down doing that dance, and have some of that kick-a-poo (Phonetic) juice.
> A Well, **I** don't drink **so I** couldn't tell you.
> **Q** That's why they **--** did you ever notice how they shoot a basketball: how high they can jump?

(RI. 1232).

After being asked how making racist statements to witnesses helped him prepare for the case, Mr. Moran made a lengthy statement to the judge about his health and asked to be recalled the next day when he could "give better testimony" **(RII. 161-65).**

[7]The court interrupted at this point to inquire about the relevance of the questioning and referred to "strategy reasons for not using the intoxication defense" **(RII. 218-19).** The state interposed an objection **(RII. 220-21),** and Mr. Moran voiced his own objections and resentments to defense counsel's questioning **(RII. 221-23).**

only in very special cases. For an intoxication defense, he would "get a bunch of jurors that have red noses, to look like drunks" because "alcohol is different" and "[t]here are different kinds of drunks" **(RII. 223)**. He admitted that he never discussed intoxication with Mr. White, and then referred to Mr. White's own notes as to what he said had happened **(RII. 224)**. Moran explained that there were "too many facts in the case that intoxication could not have done anything for the case," and suggested that he himself was an expert on intoxication. Moran conceded that before he decided not to use an intoxication defense, he did not consult with any experts regarding the blood alcohol levels **(RII. 225, 227)**. He admitted that he did have a copy of the medical records indicating the blood alcohol levels, and that he did know that Mr. White had had some problems with alcohol, but Moran was not sure Mr. White was an alcoholic **(RII. 227)**. He did not remember whether he had obtained Mr. White's prison records, medical records, service records, school records or psychological records before trial **(RII. 228-29)**.

Concerning Shadrick Martin's testimony regarding Moran's alcohol and drug use prior to and during the trial, Mr. Moran asserted that Martin was a liar and a schizophrenic and Moran denied having taken any of the drugs to which Martin had referred **(RII. 229)**. He also denied that he was drinking during the trial. He could not answer whether or not he had alcohol on his

breath when, some time after Mr. White's trial, he appeared in court in front of Judge Salfi[8] **(RII. 231).**

Mr. Moran testified that it was not part of his strategy to allow into evidence the testimony concerning Mr. Alexander's paralysis, and that the testimony came in "too fast" for him to object. He agreed that the testimony was not relevant, that its admission was harmful and designed to gain sympathy, but he asserted that as a trial attorney, it is impossible to watch everything that goes on in the courtroom **(RII. 232-33).**

Upon further questioning, Mr. Moran stated that he normally would object to a comment such as the one the prosecutor made about Mr. White's being a "nine-time convicted felon" **(RII. 234-35).** He then stated that he had no help while handling the case, that Mr. White "resigned **himself."** He reiterated that he never found out the denominations of the **$388.26.** As to why he did not object to the convicted felon statement, he asserted that he reached a point in the trial when he "felt [they] were so beat" and **"[t]he** evidence was so **horrible."** Ultimately he said that he did not know why he had not objected, and that it would not have

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[8]Newman Brock testified that he knew of a **"run-in"** Mr. Moran had had with Judge Salfi **(RII. 189).** The incident in question was documented in the defendant's motion, at App. A, The Florida Bar v. Emmett Moran, **462** So. 2d **1089, 1090** (Fla. **1985)(RII. 537-38),** and this opinion was admitted into evidence during the hearing as defense exhibit **4 (RII. 42).** See App. **B** and C.

made any difference whether the number of felonies referred to was five or nine **(RII. 235-36)**. He then added that it was not a good idea to object frequently because "[j]urors get tired of it" **(RII. 236)**.

Mr. Moran did not recall that the judge, during the suppression hearing, told him that he needed experts to interpret the medical records **(RII. 237-39)**. Nor could he recall whether he did consult with any expert before the suppression hearing **(RII. 240)**.

Mr. Moran had further memory lapses as to when he began to prepare for the penalty phase of the trial, as to whether he looked at Mr. White's prior criminal record before he started this phase, and as to whether he looked at the state's exhibits before they were put into evidence in this phase **(RII. 240-41)**. He testified that to the best of his recollection he talked with "everyone [in Mr. White's family] that would come and talk to [him]," but could not recall how frequently he did so **(RII.** 241). He thought he went over Mr. White's background and childhood history and upbringing with Mr. White's mother, but could not recall if he talked with other relatives **(RII. 241-42)**. He could not remember if he had anything to use in mitigation in the penalty phase. More importantly, Moran did not know whether intoxication could have been used in mitigation **(RII. 243)**. He could not give any reason for not using the records on

intoxication in the penalty phase, and indicated that by that time he was "devastated" and "overwhelmed by the evidence" and did not "know what would have helped the case, except a miracle" (RII. 245). While counsel continued to try to find out why Moran did not use any objective information about Mr. White's intoxication in the penalty phase (RII. 246-49), Moran countered by stating that he made a list of the words the expert said about intoxication, and that none of them fit Mr. White. He continued:

> What's the sense of intoxication? And he didn't have any of those, you know, slurred speech, and, you know, confusion didn't help much because he was pretty confused when he got in that store. That would be for a person not drunk. No, I didn't see that he fit the silhouette of intoxication to the point his faculties were impaired so that he couldn't form the specific intent, or he was only reacting to a situation. And the only reason he reacted that way is because he wasn't a chronic alcoholic, but he was a sporadic alcoholic . . . .
>
> I just said that I didn't feel that it had any particular value, and in the penalty phase which I think happened the day after the trial or two days after the trial, you know, I don't see how I could have personally -- I'd have done anything to keep Mr. White out of the electric chair, and if I thought that I could -- that I could use a technique, you know, your're asking me a lot of questions, very broad, very conclusive. They're not even questions. I did the best I could, Mr. Malone. I'll tell you another thing. I'm -- I don't know Jerry White that much, although, I guess -- I defended you once before, didn't I, Jerry?

THE DEFENDANT: No, you didn't.

(RII. **248-49**).

On cross-examination Mr. Moran indicated that in the beginning of his practice he used "psychiatrists to water down the specific intent idea. . . . And if it's done in a . . . nice general way and said without being too classical, the jury will listen. . . . It all depends how sincere you are" (RII. **257**). He again referred to Mr. White's notes in which he supposedly told Moran everything that happened (RII. **259**). He asserted that the notes reflected the same story as White's trial testimony, and substantially the same thing that Shad Martin told him after interviewing White (RII. **261**).

Dr. Samuel Crockett testified that Mr. Moran first came to him as a patient in March, **1983**. He was referred by another physician who forwarded records dating back to **1978** (RII. **166-67**). Crockett was asked to reevaluate Moran because of symptoms which resulted in a primitive diagnosis of diabetes (RII. **168-70**).

Dr. Garnett Gettins, a doctor of osteopathy, testified that she had been treating Moran for eighteen or nineteen years (RII. **171-72**). She stated that Moran had only one prescription during April of **1982**, and that was for capoten, a heart medication (RII. **173**). At that time Moran had a heart condition and diabetes, and he had "frequent bronchial attacks and quite a few sore throats"

(RII. 175). She testified that she had no opinion as to whether the capoten would have had any effect on Moran as to his ability to function as a lawyer, but did opine that the capoten would not, in combination with cocaine, marijuana, hashish, or quaaludes, have such an'effect. She also stated that because she did not prescribe the other drugs, she did not know about any interaction between them **(RII. 178).** Though the doctor knew that Moran had used alcohol in the past, she did not believe he was using it during April of **1982 (RII. 179).**

Newman Brock, an attorney qualified as an expert in criminal defense trial work **(RII. 181-84),** testified that in his opinion Mr. Moran was incompetent **(RII. 185).** He recalled that he had seen Mr. Moran act very strange on several occasions **(RII. 187, 188, 189)** and testified that he thought Moran had a drinking or drug problem **(RII. 188).** He stated that Moran "did not seem to have his mental faculties about him," and that he had smelled alcohol on Moran's breath on a number of occasions **(RII. 189).** Brock testified further that Moran had appeared intoxicated at meetings of the grievance and ethics committees of the Florida Bar, and that he would make excuses that he was ill and could not appear **(RII.** 189).[9] Finally Mr. Brock testified that Mr. Moran's

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[9]**At** this point in the hearing, Mr. Moran attempted to object to the testimony as irrelevant, rambling, not precise and highly derogatory. He also offered to stipulate to an alcohol problem **(RII. 190)** (emphasis supplied).

reputation in the community for both professional competency and temperance in drinking was not good (RII. **190-91**).

Joseph Durocher, the Public Defender of the Ninth Circuit, testified that he had known Moran and been friends with him since **1967** (RII. **198-99**). He indicated his awareness of Moran's problems with the Orange County Bar and grievances, and of some financial problems which resulted in insolvency. He testified that Moran did not "enjoy a high reputation for professional competence" and also testified to his awareness of Moran's alcohol problem (RII. **199-200**).

Mr. DuRocher testified that he had a conversation with Moran regarding the Office of the Capital Collateral Representative investigation of the White case, and that he took contemporaneous notes of that conversation. He testified that Moran told him in that conversation that he had had the beginnings of diabetes at the time of the trial, that his understanding level was low, and that "he just wasn't sharp." Moran told him further that when he walked, he was "off balance," and that he could not concentrate. He stated to DuRocher that the prosecutor had accused him of drinking during the trial, but that the real problems were diabetes, energy, and blood sugar. DuRocher also testified that Moran was apprehensive about cooperating with the CCR investigation because it might "aggravate the problems he was having with the Bar" (RII. **200-202**).

James M. Russ, an attorney qualified as an expert in the area of criminial law and capital cases **(RII. 267-69),** testified that in his opinion Mr. White did not receive the effective assistance of counsel at trial as "this concept has been described and defined by the United States Supreme court in the case of Strickland [v.] Washington" **(RII. 270).** He stated three general areas on which he based his opinion:

> First of all, my opinion is that under the Strickland standard, that the assistance of counsel at the guilt phase of the trial was ineffective, as the phrase is used in Strickland. And the general reason that I say that is as I read the record, there was no overall theory or approach to the defense of the case. There was no plan or program which the defense lawyer was working towards, was trying to present to bring the jury to a position.
>
> Secondly, there was a total lack of awareness as to the racial ramifications and components of this trial.
>
> Thirdly -- well, **I** say there was no theory of defense. The only viable theory of defense, in my professional judgment, was to address the question of the defendant's state of mind at the time of the killings and that the -- at the time of the robbery, and that that, in turn, tied into the concept of premeditation for the first degree murder theory, and tied into the concept of specific intent to rob, tying into both the felony murder theory and the robbery theory.
>
> Now, that, in turn, tied into the evidence relating to the question of the non-sobriety of the defendant at the time, and at the place of the killings.
>
> I'd say that, when I say there was no theory

> of defense, that the defense counsel only, in the beginning stages of the trial, presented a very confused defense of a mix of excusable and justifiable homicide by having the defendant testify that, (a), it was an accident, there was a mistake; or (b), it was a -- done in self-defense, or a mistake, and neither one of those theories were [sic] supportable by the evidence that was presented, either by the prosecution or by the defense.

(RII. **271-72**). Mr. Russ then proceeded to give a detailed description of the acts and omissions on Mr. Moran's part which led Mr. Russ to conclude that Mr. White did not receive the effective assistance of counsel under the Strickland standard (RII. **272-309**).

Ella Carruthers, Mr. White's aunt, his mother's sister (RII. **351-52**), testified that neither Moran nor any associate of his talked with her about the case before trial. She was familiar with his legal fees for the case because she took a night job to help Mr. White's mother pay them (RII. **352**).

Regarding the family history, Ms. Carruthers testified that, prior to moving to Orlando in **1953**, the family lived in Quincy on a tobacco farm, where they had no indoor plumbing nor running water. Because Jerry White's mother worked doing laundry and cleaning houses, Ms. Carruthers used to babysit for Jerry. Ms. Carruthers' parents had worked on the farm for a long, long time. They did not have "a lot of money" (RII. 353-54). In 1953, Ms. Carruthers, father became disabled, and her older brother, who

was seventeen, came to Orlando, got a job and sent for the rest of the family. In Orlando, the family remained close. Jerry, his mother and stepfather, lived across the street from Ms. Carruthers, so she saw Jerry every day. She testified that Jerry "mostly read and stayed to himself" when he was a teenager (RII. 355-57).

Ms. Carruthers recalled an incident when Mr. White was drinking. He burned one of his arms but did not realize it until the next day. She testified that he would work all week and drink on the weekends (RII. 358).

With regard to Mr. Moran's behavior during the trial, which Ms. Carruthers witnessed, she testified that at one point the judge asked Mr. Moran he was "still with us," and everyone in the courtroom laughed. Another time Mr. Moran was in the hallway "scrambling around for some papers and like he was confused." She stated that "either he was drinking, or in another world or something, you know, didn't look normal." Ms. Carruthers was not asked to testify at the trial but would have done so had she been asked. She stated that Mr. White should be spared "because if Jerry was sober, in his right mind, he wouldn't harm a fly" (RII. 359-60).

Vassie Roofe, another aunt of Mr. White's, testified that she, too, used to babysit for Jerry (RII. 361-62). In Orlando the family stayed together, and she frequently saw Jerry, who

lived across the street. While Jerry was growing up, Ms. Roofe said he liked to draw (RII. **363-65).**

Ms. Roofe recalled Mr. White started drinking when he was about sixteen years of age. She had been with him when he drank, usually on weekends, because he worked during the week. According to her, he acted **"[a]** little bit strangely" when he drank (RII. **365-66).**

Ms. Roofe testified that she was in the courtroom during Mr. White's trial, and that she attempted to speak with Mr. Moran once in the hallway. Mr. Moran, however, did not think it was a good idea for the family members to talk with him. He never asked her about Jerry's or the family's background. She would have testified if she had had a chance (RII. **366-67).**

Wesley Youns, Sr., Mr. White's uncle, testified that he came to Orlando in **1953** from Quincy (RII. **369-70).** In Quincy he worked on a tobacco farm and before his family moved to Quincy they lived in Cottondale and were sharecroppers. Mr. Young knew Mr. White's stepfather, Ulysses Pinkins, a migrant worker. Young also worked with Mr. White and said that he was **"a** very good worker" (RII. **373-74).** No one ever asked Young to testify at the trial, which he would have liked to do (RII. **374-75).**

Walter Young, another uncle of Mr. White's, testified that he helped his sister with the financial arrangements for the trial. When he tried to talk with Mr. Moran, he said Moran

"wasn't too alert, like he kind of sleepy at the time." When Young asked Moran about his condition, Moran told him "he was sick and on medication" **(RII. *375-76).***

Mr. Young recounted a conversation he had had with Mr. Moran just before Mr. White testified. They talked "about whether or not he [Moran] should let Jerry White testify on his own behalf and [Mr. Young] was against it, sir, and it was because [he] felt like, you know, [White] had a past record, that this would have a bad influence on the jury. But, however, Mr. Moran was the attorney. He said he could handle it, sir." Mr. Young was not sure whether Mr. Moran decided completely "on his own" to have Mr. White testify **(RII. *377).***

Mr. Young described the family's life in Cottondale and Quincy as "kind of hard living." He stated that his sister, Jerry's mother, lived with the family on the tobacco farm in Quincy when she was pregnant because she was not married at the time **(RII. *377).***

Mr. Young testified that Jerry White was about twelve years old when his stepfather was shot and killed. Jerry never knew his real father, and his stepfather, before his death, was gone much of the time doing migrant labor. Mr. Young opined that the absence of a father had "a great effect" on Jerry. He also volunteered the information that Jerry's mother was also raised by a stepfather, which had an effect on her. He stated that the

area where Jerry grew up was a rough and poor neighborhood. He recalled the time when Jerry went to the Florida School for Boys and stated that he thought it caused Jerry to "grow up a little too fast" (RII. **383-85).**

According to this uncle as well, Jerry White was a good worker. Even when he was too young to work, he worked hard along with the men. The only time Young would have any trouble with Mr. White was on Mondays, when White would forget what day it was because he had been drinking during the weekend. At the time of his arrest, Jerry did not seem to be able to handle any kind of pressure, and his mother **"was** trying to get him to go to see a psychologist at that time" (RII. **386-88).**

Mr. Young testified at sentencing. He talked to Mr. Moran by telephone shortly before he was called to the stand, but they did not discuss his testimony; Moran merely asked him to be "like a character **witness."** Moran did not ask him questions about Mr. White's background or his drinking history; he was just asked to "tell what kind of person Jerry was" (RII. **388-89).** Had he been given the opportunity, he would have testified about Jerry White's background (RII. **389).**

Mabel Pinkins, Jerry White's mother, stated that she testified to **"a** few words" during the trial. She did not talk with Moran before she did so. Ms. Pinkins saw Mr. Moran two or three times before the trial started. She took part of the legal

fees to his office. He never talked with her about the family history and background (RII. **390-92).**

Ms. Pinkins testified that Jerry was born at home in Quincy, where she, her parents and siblings were living on a tobacco farm. Ms. Pinkins later moved back to Cottondale. She worked long hours shucking peanuts so her cousin had to care for Jerry. Later she moved from Cottondale to Pensacola and then she moved back to Quincy where she married Ulysses Pinkins. In **1953** they moved to Orlando to be with other family members. Ulysses not around much of the time because he was picking fruit. Jerry never knew his real father, and his stepfather was killed. Ms. Pinkins left her husband because he drank and lost the family's money. Afterward she had to support the family on seventy-eight dollars per month from welfare. Not able to maintain her rent payments, she was forced to move. She worked as a maid for ten dollars per day (RII. **392-99).**

Ms. Pinkins recalled that Jerry went to the Boys School when he was about thirteen or fourteen for truancy. When he returned, he was quiet and withdrawn for "a long, long time." Ms. Pinkins first noticed that he was drinking when he was about fifteen. She also noted that when Mr. White was released from prison before this offense, he was withdrawn and ill (RII. 400-01).

As to Ms. Pinkins' observations of Mr. Moran during the trial, she said that most of the time his head was down and he

was "rippling through his papers or something." She talked with him a couple of times in the hallway, but he never explained to her what she should testify to (RII. **402-03**).

Pauline Forster was Jerry White's fiance before this incident. She attended the trial. She described Mr. Moran as having acted "unsteady, disoriented and really intoxicated" (RII. **405**). She was in court when the jury laughed at Moran, and the judge had to call order. She tried unsuccessfully to talk with Mr. Moran. Whenever she got close to Moran, she could smell alcohol, and she said his eyes were red (RII. **406**).

Ms. Forster described Mr. White as "very kind" and helpful. She stated that when Mr. White drank **"he** was not **himself."** According to her, Mr. White was **"as** a person who didn't handle his liquor well" (RII. **407**). Before her testimony in the penalty phase, Mr. Moran merely told her to **"just** say something **good."** Ms. Forster described Mr. White's family as "very good" and "very **close"** (RII. **407-08**).

Judge's Findings and Order

In his "Order Denying Defendant's Motion for Post Conviction Relief," the motion judge set out, first, the "Facts Which Gave Rise to Defendant's Conviction" (RII. **1021-22**); second, the "Claims Raised by Defendant," wherein he noted that he had granted the state's motion to strike Claims II - IX of the defendant's motion, and had held an evidentiary hearing only as to

Claim I, that the defendant was denied the effective assistance of counsel at the trial level (RII. **1022**); and, third, the "Findings of Fact Deduced at Evidentiary Hearing" (RII. **1022-24**).

SUMMARY OF ARGUMENT

Defense counsel's performance pre-trial and during the guilt and penalty stages was so deficient and prejudicial that Mr. White's convictions and sentence were rendered unreliable under the standards enunciated in Strickland v. Washington, **466** U.S. **668 (1984)**. Knight v. State, **394** So. 2d **997** (Fla. **1981)**. Counsel's ineffectiveness primarily involved; his failure to present an intoxication 'defense, and his failure to dissuade his client from testifying to an unbelievable combination self-defense/accidental/justifiable homicide defense. There was a wealth of information to support an intoxication defense, but counsel unreasonably failed to perform any investigation. The intoxication defense could have reduced Mr. White's culpability to a lesser degree of guilt since it directly rebutted allegations of premeditation and specific intent. Counsel blamed his own client for the results, asserting that Mr. White's self defense theory was unbelievable. In this regard, counsel committed his second gross error. Had he established a proper attorney-client rapport, 'he could have dissuaded Mr. White from his destructive course, steering him instead toward the only

viable defense of voluntary intoxication. This did not happen. Not only did the theory of defense not have the ring of truth, it was also inconsistent with the statement Mr. White gave to the police on the night of the incident. Counsel, despite being aware of this statement, nevertheless permitted his client be ambushed at trial with devastating impeachment evidence.

Since counsel was not cognizant of the intoxication defense, he never asked for an instruction on it. Nor, for that matter, did he request a special charge on the defense he did posit. Counsel failed to present lay and expert witnesses to establish Mr. White's intoxication and state of mind at the time of the offense. Such testimony would have demonstrated to the jury that Mr. White was incapable of forming the requisite specific intent. Counsel's performance was deficient because he presented no viable theory of defense when one was available. Counsel's conduct was not based on informed strategic choice, but on ignorance and omission.

There were several other instances of counsel's ineffectiveness. Whether attributable to his alcoholism, to which he was willing to stipulate, or to his age, poor health, legal and illegal drug usage; it was painfully obvious that counsel was overwhelmed by the task at hand.

Counsel botched an effort to suppress Mr. White's hospital bed statement to the police. Mr. White was under heavy

medication and intoxicated at the time, rendering his statement involuntary.

Counsel's racism not only demonstrated a lack of loyalty to his client, it also obstructed any awareness of the extant racial ramifications of the case.

Counsel's voir dire was atrocious. He never explored racial animus amongst the jury. He avoided mentioning his theory of defense because he had none. He failed to sensitize the jury as to their awesome role in capital sentencing. He made no effort to rehabilitate jurors who expressed reluctance to sit in a capital case. He did not challenge a prosecution prone juror nor another who had a preconceived opinion about premediation.

During trial, counsel's peformance steadily declined. He failed to object and ask for curative instructions several times when the prosecutor made prejudicial and inflammatory remarks in his opening and closing statements. Defense counsel unreasonably and prejudicially waived his opening statement when the case demanded that one be made. Trial counsel's closing argument, was incoherent, convuluted, and illogical.

Defense counsel's direct and cross examination of witnesses was so disjointed that the court had to intervene on several occasions during counsel's bumbling performance. Counsel admitted his own ineptitude. He also failed to object to evidence of unrelated crimes and to ask for a "Williams Rule"

hearing and a curative instruction on the evidence. Counsel's most egregious error was his failure to appreciate and utilize the scientific-medical evidence demonstrating Mr. White's high blood alcohol level at the time of the crime.

Defense counsel neither requested any jury instructions nor objected to the court's omission to give a charge on lesser included offenses.

The defense case at the penalty phase was completely lacking in structure, plan or preparation. Counsel stated he would "play it by ear." He failed to perform reasonable investigation of mitigating circumstances, utterly failing to present any evidence of Mr. White's history of alcohol abuse. Counsel failed to effectively interview family members: speaking to them only briefly and at the very last minute. No case history was prepared. The importance of uncovering, investigating and "humanizing" mitigation evidence for the sentencer was simply not done. O'Callaghan v. State, 461 So.2d 1354 (1984). Moreover, counsel did not object to the prosecutor's introduction and argument of inadmissible evidence regarding several improper aggravating factors. Counsel's own argument at the penalty phase was illogical, ridiculous and detrimental since he damned his own client. Trial counsel registered no objection to the court's erroneous instructions to the jury, nor did he object to improper exhibits going to the jury room. Trial counsel undeniably failed

to discharge his responsibility at sentencing to provide accurate information indispensible to a reasoned determination of whether Mr. White should live or die. Counsel's failure to perform reasonable investigation into Mr. White's background thereby prejudiced him, in that vital information concerning Mr. White's character and alcoholism, which would have made a compelling case for a lesser conviction and/or a life sentence, remained undisclosed to judge and jury.

The court made multiple inaccurate statements to the jury diminishing their sense of responsibility for the awesome sentencing decision. The jury was told that the court was "not required," "not obligated," and "not bound" to follow the jury's recommendation and that the final decision as to punishment rests "solely" with the judge. These inaccurate comments violated Caldwell v. Mississippi, 472 U.S. 320 (1985) in that they misled the jury to believe responsibility for determining the appropriateness for the sentence lies elsewhere. These misleading statements of the jury's responsibility in sentencing are incompatible with eighth amendment principles requiring reliability and an individualized sentencing determination. The court never explained that great weight and deference are given to the jury's sentence and that the jury has primary responsibility for sentencing. Since the jury received a "false

impression as to the significance of their role, a danger of bias in favor of death was created." Id.

Mr. White, the defendant in this case, is black. The victims were white. Mr. White was tried by an all white jury. Eight prospective black jurors were eliminated. These facts establish a prima facie case of the state's purposeful discriminatory use of peremptory challenges to remove blacks from the jury which decided Mr. White's fate. Batson v. Kentucky, 106 S. Ct. 1912 (1986), State v. Neil, 457 So. 2d 481 (1984).

Several prospective jurors who expressed varying degrees of reservation regarding capital punishment were excluded from the guilt phase of the trial.. These exclusions violated Mr. White's due process right to an impartial jury composed of a fair cross section of the community. With regard to one juror (De Pascale) in particular, the record is particularly clear that he was removed because of his general scruples against the death penalty. But it is also patently evident in the record that he was not irrevocably opposed to the death penalty to the extent that his views would have prevented or substantially impaired the performance of his duties as a juror. Witherspoon v. Illinois, 391 U.S. 510 (1968), Gray v. Mississippi, 107 S. Ct. 2045 (1987).

The state withheld exculpatory evidence in violation of Brady v. Marvland, 373 U.S. 83 (1963) and Fla. R. Crim. P. 3.220 which was material to the defense. This evidence, if properly

investigated and presented, could have undermined confidence in the outcome of the trial. The primary evidence was of a fourth bullet that would have established that the victims were not shot "execution style" and that Mr. White had no intent to harm two witnesses who came on to the scene just after the shootings. The other evidence involved the fact that money was found on the victim after Mr. White fled the scene which fact tends to contradict the state's armed robbery theory. Defense counsel was also ineffective for not properly using this evidence once he learned of it and for not moving for an immediate Richardson [v. State, 246 So. 2d 771 (1971)] hearing when the evidence surfaced in order to determine whether the state violated Rule 3.220 and if so, what sanctions should be imposed.

Mr. White was convicted and sentenced to death without a sufficient finding of intent to kill. Although the jury returned a general verdict, the evidence presented likely established that the jury found the homicide was not premeditated. Under Enmund v. Florida, 458 U.S. 782 (1982), (see also Tafero v. State, 459 So. 2d 1034 [Fla. 1984]), the eighth amendment forbids the death penalty when one does not intend or contemplate a life be taken. Cabana v. Bullock, 106 S. Ct. 689 (1986). Due to the paucity of facts, the evidence presented was insufficent even to prove "reckless endangerment." Tison v. Arizona, 107 S. Ct. 1676 (1987).

Execution by electrocution and surgical removal of the capital defendant's brain for post-mortem study violates contemporary standards of decency in violation of the eighth amendment.

ARGUMENT

I.

DEFENSE COUNSEL'S PERFORMANCE PRETRIAL AND IN THE GUILT AND PENALTY PHASES OF THE DEFENDANT'S TRIAL WAS SO DEFICIENT AND PREJUDICIAL THAT BOTH THE CONVICTION AND THE DEATH SENTENCE WERE RENDERED UNRELIABLE, IN VIOLATION OF THE DEFENDANT'S RIGHTS UNDER THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 16 OF THE DECLARATION OF RIGHTS OF THE FLORIDA CONSTITUTION.

No constitutional guarantee is more central to our system of criminal justice than the requirement that a person accused of a crime receive the effective assistance of counsel. "Of all the rights that an accused person has, the right to be represented by counsel is by far the most precious, for it affects his ability to assert any other right he may have." United States v. Cronic, 466 U.S. 648, 654 (1984). Counsel for the accused "are necessities, not luxuries," Gideon v. Wainwright, 372 U.S. 335, 344 (1963), necessities not only for the accused, but for the proper functioning of the criminal justice system itself. "The very premise of our adversary system of criminal justice is that partisan advocacy on both sides of a case will best promote the

ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975). There is grave doubt that the "very premise" of our system, an accurate determination of guilt and punishment, was served in this case.

The motion judge had before him the defendant's Rule 3.850 motion which set out in detail trial counsel's ineffectiveness pretrial (RII. 449-56), during the guilt phase (RII. 456-76), and during the penalty phase of trial (RII. 477-89). He had before him the transcript of the defendant's trial (RII. 415, RI. 1-1112). He heard two days of testimony as summarized above. Yet somehow, in the face of the overwhelming evidence of Mr. Moran's incompetence at trial, and of the substantial prejudice to Mr. White which flowed from that ineptitude, the judge concluded that "Mr. Moran's conduct during the defendant's trial, when viewed as a whole, did not fall below reasonable professional norms," and that the defendant had "not demonstrated that, but for the claimed unprofessional errors of Mr. Moran that there is a reasonable probability that the result of the proceeding would have been different" (RII. 1024). To have so concluded the judge had to have virtually ignored the overwhelming evidence elicited at the hearing in support of Mr. White's claim.

A. Failure to Present the Most Viable Defense

"[T]he defense of intoxication just flows through this trial" (RII 286).

Defense counsel's major and most prejudicial error was his failure to present this defense. Counsel's testimony on the matter at the evidentiary hearing demonstrated his lack of investigation of this issue and his ignorance of the relevant law.

Florida law regarding voluntary intoxication is clear:

> Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery. Bell v. State, 394 So.2d 979 (Fla. 1981); State ex re. Goepel v. Kelly, 68 So.2d 351 (Fla. 1953). A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So.2d 347 (Fla. 1982); Palmes v. State, 397 So.2d 648 (Fla.), cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). Moreover, evidence elicited during the cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Mellins v. State, 395 So.2d 1207 (Fla. 4th DCA), review denied, 402 So.2d 613 (Fla. 1981).

Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985)(emphasis added). Intoxication is also a defense to a first degree felony murder charge when robbery is the underlying felony. Jacobs v. State, 396 So. 2d 1113 (Fla.), cert. denied, 454 U.S. 430 (1981). That voluntary intoxication is a defense to specific intent crimes is not a novel principle. Garner v. State, 23 Fla. 113, 9

So. 835 (Fla. 1891). The standard governing a defendant's right to a jury instruction in this regard is also settled: Any evidence of voluntary intoxication at the time of the alleged offense is sufficient to support a defendant's request for an instruction on the issue. Gardner, supra; Mellins v. State, 395 SO. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981); cf. Bryant v. State, 412 So. 2d 347 (Fla. 1982). Moreover, Florida's courts have consistently recognized that competent counsel must pursue an intoxication defense if there is evidence of intoxication, even where counsel explains in post-conviction proceedings that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985). See also Presley v. State, 389 So. 2d 1385 (Fla. 2nd DCA 1980); Price v. State, 487 So. 2d 34 (Fla. 4th DCA 1986). The key question is whether the record reflects any evidence of voluntary intoxication. Gardner, supra; Mellins, supra; Parker v. State, 471 So. 2d 1352 (Fla. 2d DCA 1985); Heathcoat v. State, 430 So. 2d 945 (Fla. 2d DCA), aff'd, 442 So. 2d 955 (Fla. 1983).

The record of Mr. White's trial is replete with evidence of voluntary intoxication, much more than legally sufficient to support the defense and require an instruction. And more evidence was available and would have been presented to the jury, had counsel been effective. The evidence that Moran really made

no effort to develop through examination included:

Judith Rayburn volunteered that the defendant "appeared to be intoxicated" when she saw him in the store shortly before the offense (RI. **433**).

Henry Tehani stated that the defendant looked **"droggy"** [sic] and not sober (RI. **473-44**).

Larry Laird indicated that he was with the defendant until **3:00** a.m. the day of the incident and they were drinking (RI. **661-62**).

Robert L. Parsons, the urologist, added that the defendant appeared to be under the influence of alcohol when he examined him at about **2:30** p.m. (RI. **679-681**).

David Jollie told the jury that he and the defenant were drinking until 3:00 a.m. the day of the incident (RI. **795**).

Jerry White testified that he stayed up all night the night before the incident, drinking (RI. **808, 880**), that he "was drinking until the morning" (RI. 809), and that he had two glasses of gin on Sunday morning (RI. **881**).

In addition, Pamela Tehani stated during her deposition that the defendant "looked drunk" or **"doped up"** at the time of the offense (RI. **1463**). Edward Dudley in his deposition stated that he gave the defendant **"a** beer" or **"a** drink" that morning (RI. **1547**). This testimony did not reach the jury. Henry Tehani, in his deposition, insisted over and over that the defendant was

"drunk or druggie [sic]" (RI. 1428, 1423, 1431-32, 1436), that he was "leaning and swaying" (RI. 1429), and that he ran as though he were drunk and was "staggering" (RI. 1445). Only part of his testimony reached the jury.

When White was taken to the hospital after the incident, his blood alcohol level was measured and it registered 174 milligrams (RI. 852-53). The report reflecting this level was introduced at the suppression hearing (RI. 853). Had counsel had his wits about him, he would have consulted an expert as to the meaning of this blood alcohol level, of which he was aware before trial (RII. 227). He consulted no one (RII. 227). Had he done so, he would have learned the following:

Dr. Lisa Miller could have told him that at 11:00 a.m. on the day of the crime Mr. White's blood alcohol level would have been between 211.5 milligrams and 240 milligrams per deciliter, and that at a level of approximately 200 milligrams per deciliter, a person would be "definitely drunk" (RII. 104, 99).

Dr. Warren Rice could have told him that at that level of intoxication Mr. White's responses would have been reflexive and spontaneous, that he would not have been able "to make any sort of planned, deliberate kind of goal seeking behavior" (RII. 125). He could have told him also that Mr. White's behavior, as reflected in his testimony, seemed generally reflective of that blood alcohol level, and that, as often occurs in people with

high levels of alcohol, Mr. White probably filled in some of the details that he would not have been able to recall (RII. **125-26**). He could have told him that it would have been possible for Mr. White to run after the incident because the fear he was experiencing, as reflected in his testimony, probably would have overcome his intoxication for a few moments, and that he would have been able to drive, though badly, because well-rehearsed behavior such as driving is one of the last responses to disappear (RII. **126-27**). Finally, Dr. Rice could have told Mr. Moran that because of Mr. White's inability to formulate a goal at the time, he would not have been able to commit a cold and calculated crime at around 11:00 a.m., that he would have been suffering from extreme mental disturbance, and that he would have been unconcerned about the consequences of his behavior (RII. **127-28**). Mr. Moran did not learn these facts due to his inattention or ignorance. Neither did the jury.

At the evidentiary hearing attorney Moran purported to be an expert on alcoholism and the effects of alcohol on the body and mind (RII. **158, 223, 225, 227**). At trial, however, when real knowledge of the subject could have helped his client, neither Moran nor anyone else seemed to appreciate the significance of

the defendant's high blood alcohol reading **(RI. 868-69)**.[10] Much worse was that during trial the jury was not enlightened either through testimony, argument or instruction as to the significance of any of the information they received about Mr. White's condition. Thus, evidence which would have shown that the defendant was incapable of premeditating a murder, or forming the intent to rob, was left devoid of any legal meaning for the jury.

The issue of intoxication was a question for the jury to decide after proper instructions. The state all but handed counsel this defense, and he ignored it, all the while complaining that the state did not cooperate with him and did not do a good job **(RII. 157,** 244). Due to his ignorance of the law, defense counsel never asked for the pertinent jury instruction. At the evidentiary hearing, Mr. Moran, with the wisdom of hindsight and wrapped in fear that the investigation of his representation of Mr. White would cause him further problems with the Florida Bar (RII. 202), tried to couch his error in terms of

[10] When Mr. Moran was cross-examining John Harrielson at trial during the hearing on the motion to suppress Mr. White's statement, he posited that a blood alcohol level of **174** milligrams "would be more than intoxicated on the chart" **(RI. 856)**. Curiously, he did nothing to enlighten the judge on this point in spite of the fact that, as Moran stated during the motion hearing, a different judge, hearing the same motion to suppress pretrial, told him that there should be medical testimony on the issue **(RI. 871)**. Not surprisingly, the judge denied the motion **(RI. 872)**.

a tactical decision. He asserted that the defendant's version of the incident and his claim of self-defense were inconsistent with a voluntary intoxication defense (RII. 157, 224-227). The motion judge bought this excuse (See RII. 1023). Both, however, ignored the relevant law on the'matter.

Voluntary intoxication can be relied on as a defense along with another, inconsistent defense as long as proof of one does not necessarily disprove the other. As is set forth above, very little evidence is necessary to require an instruction on the defense. These propositions are clearly set out in Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), cited in Gardner, supra,:

> At the charge conference defense counsel requested an instruction on the defense of intoxication. The request was denied because of appellant's testimony to the effect that she had not been intoxicated. Conviction and this appeal followed.
>
> Appellant takes the position that there was some evidence of intoxication so that she was entitled to an instruction on this theory of defense.
>
> Appellee counters by pointing out that while inconsistent defenses are permissible this is so only so long as proof of one does not disprove the other. In addition, appellee maintains that even if there was error in this regard it was harmless because defense counsel "fully and completely argued the meaning of intent and intoxication." Therefore, the jury had an opportunity to consider the effect of intoxicatiion in this context so that the failure to instruct could not have "injuriously affected the substantial rights of the appellant" citing

Paul v. State, 376 So.2d 1213, 1214 (Fla. 3rd DCA 1979).

> There were no scientific tests made to determine whether appellant was intoxicated at the time of the alleged offense. There could therefore be no empirical evience of intoxication. The only evidence on this issue was the testimony of the police officers. We have concluded in a previous case, however, that evidence elicited solely in the cross-examination of the state's witnesses may be sufficient to give rise to a dutv to instruct on a defense suqqested by that testimony. To hold otherwise would seriously jeopardize the right of the accused to refrain from testifying.
>
> Voluntary intoxication is a defense to... crimes requiring a specific intent. Where intent is a requisite element of the offense charged and there is some evidence to support this defense, the question is one for the jury to resolve under appropriate instructions on the law.
>
> The law is very clear that the court, if timely requested,... must give instructions on legal issues for which there exists a foundation in the evidence.

Mellins, 395 So. 2d at 1208-09 (emphasis added) (citations omitted). Thus, even when (1) the evidence arises from cross-examination of state's witnesses, (2) the defense is not supported by empirical evidence, (3) the defendant does not testify, or does and denies intoxication, or (4) where the defense is proffered as an alternative theory of defense, the defense is available and an instruction is required. Pope, supra; Edwards v. State, 428 So. 2d 357 (Fla. 3rd DCA 1983); Mellins; Price; Gardner, supra.

The evidence in Mr. White's case far surpassed these standards. First, inasmuch as a defense of voluntary intoxication may be utilized even though it is inconsistent with another proffered defense, it may certainly be utilized where, as here, it is not inconsistent with the other proffered defense. Contrary to Mr. Moran's assertions at the evidentiary hearing, there is no logical nor .legal inconsistency between a defense of voluntary intoxication and a defense of self-defense. "[P]roof of one does not disprove the other." Mellins, supra. In fact, the intoxication defense would have corroborated the self-defense theory attested to at trial, and would have explained one of the most devastating pieces of evidence against Mr. White - the one Moran admitted was not addressed by the self-defense theory - the attempted shooting of the Tehanis after the killings in the store had occurred. In addition, the evidence of the defendant's intoxication arose from the direct as well as the cross examination of the state's witnesses. There was empirical evidence to support the .defense and the defendant himself testified that he was drinking all night the night before the incident and that he had two glasses of gin that morning.

Counsel's inexplicable and unreasonable failure to investigate and present the defense, and request an appropriate instruction on it, deprived Mr. White of a viable defense which in all probability would have resulted in a conviction of a

lesser degree of homicide. "[C]ounsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." Strickland v. Washinaton, 466 U.S. 668, 691 (1984). In this case, Moran admitted at the evidentiary hearing that he did not investigate the intoxication defense. He never checked Mr. White's blood alcohol level as reflected in the medical center records (RII. 157). He never discussed intoxication with Mr. White (RII. 24). He never consulted any experts regarding the blood alcohol levels (RII. 225, 227). Rather, he relied on his own expertise on intoxication and his "professional judgment" that there were "too many facts in the case that intoxication could not have done anything for the case" (RII. 225). At the same time he admitted that the defense he decided to use, self-defense, was hard to sustain "when you're shooting some little girl in the head," and expressed the opinion that the case was impossible to defend (RII. 160). He had also admitted that he "wasn't getting much communication" with his client, so he decided to have Shadrick Martin talk with White "and find out what the defense was because the state didn't give it to [him]" (RII. 153). This testimony clearly illustrates that Moran's failure to present the intoxication defense was hardly a reasonable strategic choice.

> [S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable

> professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances. . . .

Strickland, supra, 466 U.S. at 690-691 (emphasis supplied).

B. Failure to Dissuade Mr. White from Testifying and Relying on Self Defense

The "too many facts" to which Moran referred came primarily from his client's testimony. "The man knew where his car was. He had enough alertness to grab the money off the counter, put it in his pocket. He had enough alertness to change his clothes" (RII. 225). Nothing was gained in this case by putting the defendant on the stand. On the contrary, as Mr. Russ testified, "That was one of the severe errors of this defense and which created all kinds of unnecessary problems" (RII. 338-39). Moran knew that Mr. White had made a statement to the police on the night of the shooting which was inconsistent with his sworn testimony concerning the details of what happened in the store (RII. 292-93).

The motion judge concluded, incorrectly, that "the facts are clear, the Defendant wanted to take the stand, to tell his story" (RII. 1023). There is nothing in the record to support this conclusion. By Mr. Moran's own testimony, which was corroborated

by Shadrick Martin (RII. 28), he had very little communication with Mr. White; indeed, he relied on Martin to find out from White "what the defense was." Even at the time of the evidentiary hearing, he admitted that he did not "know the man very well" (RII. 153).[12] The truth of this statement became

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[12]It is apparent from depositions that Mr. Moran had not even seen his client or conducted any investigation on the case by August, because he was surprised when he was told that his client had shot himself in the penis during the robbery.

> Q But he didn't see anything, but he got shot by a black male and he didn't say anything else?
> A We advised him of his rights.
> Q What if he did shoot him?
> A He shot himself.
> Q Oh, yeah. Wait a minute.
> A The best we can picture, Mr. Moran, is that he stuck the gun inside of his breeches and it went off.
> Q He didn't hit his ding-a-ling, did he?
> A He did.
> Q He did hit it?
> A Yeah.
> Q Well, where he's going he won't -- well, anyway, he shot it off. It blew his ego, My God.

(RI. 1200-01). Moreover, the underlined comment reflects a lack of confidence in Moran's own ability to represent his client and to present a defense that would lead to anything but a prison term. In a subsequent colloquy, Moran's remarks make it clear that he was apparently incapable of regarding Mr. White's injury as anything other than something humorous.

> [Witness] A He didn't look like it. He was trying to poke something in his pocket

(footnote continued on next page)

painfully obvious when, later in the hearing, Moran, after reiterating that he did not know White well, said to him, "I defended you once before, didn't I, Jerry?", to which Mr. White replied, "No, you didn't" (RII. 249). Mr. Moran also testified that during the trial he had no help from Mr. White, that Mr. White had "resigned himself" (RII. 235). Walter Young's testimony undermines the judge's conclusion, also. He testified that when he expressed to Moran his opinion that White should not take the stand, Moran's response was that he was the attorney and "he could handle it" (RII. 377).

(footnote continued from previous page)

> or whatever.
>
> [Moran] Q He was afraid he was going to lose his pecker.
>
> A Whatever.
>
> Q He was pulling it -- he was afraid -- gee, maybe we can get it sewed back on again because he was -- he shot himself in the ding dong: He's a hell of a robber this guy. If the meat had moved in the meat counter, he'd shot that. You know, the best time to pull a hold up is a Sunday morning when everybody's going to church, do you know that?
>
> A I don't know. I ain't ever tried it.

(RI. 1404). Mr. White's act of shooting himself was another glaring example (to all but attorney Moran) of how abnormal his behavior was at the time of the crime, and could have been potential corroboration that he was intoxicated.

It was up to Mr. Moran to establish a relationship with his client. As Mr. Russ testified at the evidentiary hearing,

> [I]f the lawyer has worked with the client, has built a rapport with the client, has a true attorney-client relationship and this is something that takes time and takes patience and takes human involvement. Clients aren't just chattels like bottles of Cola. They are human beings and they have got to be worked with and they have got to be treated as human beings, and once that human relationship is set up, I found over a -- now, what, since 1965, over twenty years, that even the most recalcitrant client, when treated in this manner, is going to come around to accepting the advice and counsel of his lawyer.

(RII. 343-44). It was also up to Moran to investigate the intoxication defense, and to give Mr. White professional counsel as to the advisability of his taking the stand. "The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant." Strickland, supra, 466 U.S. at 691. Here, there is nothing to indicate that Mr. White made any informed strategic choice as to "want[ing] to take the stand." It is apparent that no attorney-client relationship was ever established, and, thus, there is no reason to believe that Mr. White received any advice from his attorney on which to base any choices at all; informed, strategic, or otherwise. Therefore, Mr. Moran's failure to present the intoxication

defense, insofar as this failure was supposedly based on Mr. White's desire to take the stand, cannot be considered reasonable or proper.

Contrary to the motion judge's conclusion, the defendant has shown, in accordance with the standards set out in Strickland, supra, and in Knight v. State, 394 So. 2d 997 (Fla. 1981), that his counsel's performance was deficient and that the deficient performance prejudiced his defense. By Moran's own testimony, the defense he presented was not viable, and he failed to present the only defense that was. Had the jury heard the testimony that was available regarding the defendant's intoxicated state at the time of the crime, had they received the benefit of expert witnesses to enable them to evaluate that testimony, and had they been properly instructed by the judge "to consider whether the defendant was so intoxicated that he could not form the [premeditation required for murder or the specific intent required for robbery]," Fouts v. State, 374 So. 2d 22, 26 (Fla. 2d DCA 1979), the only reasonable verdict would have been one of a lesser degree of homicide. Here, as in Pope v. State, supra, the purported defense "was never fully developed during trial. Instead, defense counsel relied primarily on the presumption of innocence, referring to the events surrounding the [killing] as being 'a mystery,' and the state's case as being 'just a lot of facts thrown together.' In short, the defense was premised

simply on a general plea of not guilty and the incomplete defense of voluntary intoxication." Id. at 329. See Beck v. Alabama, 447 U.S. 625 (1980). As the Supreme Court noted in Beck, a case involving a trial court's failure to provide lesser included offense instructions, the prejudice resulting in a capital conviction and sentence of death obtained under such circumstances is constitutionally intolerable. Here, it was counsel that so gravely prejudiced his client. Cf. Beck, supra. As characterized by an expert, the Moran/White self-defense theory was "totally erroneous" (RII. 273), a "convoluted mix of excusable and justifiable homicide" (RII. 292), and a "fantasy story" (RII. 294) that turned out to be a "self-destructive . . . disaster" (RII. 295).

C. Other Instances of Counsel's Ineffectiveness

Mr. Moran's ineffectiveness was not confined to his failure to present a defense. Sadly, his inability to represent his client pervaded the entire trial. Whether this inability stemmed from his alcoholism, to which he was willing to stipulate (RII. 190) and to which other witnesses testified, or stemmed from drug use to which Shadrick Martin testified (RII. 29-35), or related to Moran's old age, his ill health and being under medication, to which he and others referred (RII. 144-51, 147), see, e.g., RII. 57, 201-02, 376, or was due to his being "overwhelmed" by the

case (RII. 245), the fact remains that he did not effectively represent his client.

1. Ineffectiveness pretrial. Mr. Moran took some depositions. They are remarkable primarily because of the statements and attitudes expressed by Mr. Moran rather than because of any information he obtained: Mr. Moran repeatedly made racist comments (RI. **1186, 1198, 1199, 1202, 1204, 1208-09, 1232,** 1262), **see,** supra, p. **16** n.4, comments that demonstrated his lack of loyalty to his client (RI. **1200-01, 1388, 1404,** 1498), and accurate but inappropriate comments about his inability to handle the case (RI. **1200-01, 1251-52, 1404, 1491).**

As to jury selection, Mr. Moran was whoefully derelict. He exhibited a complete lack of knowledge about how voir dire should proceed in a capital case. **See** RII **273-81.** The state was able to educate the jury to its theory of the case and familiarize the prospective jurors with the propriety of recommending death. Mr. Moran, meanwhile, avoided his theory of defense and the matter of capital sentencing but for his sole comment inviting the jury to "just follow the law in it. That's about the best you can do [and] let you own conscience be your guide." (RI. **87).** He also dropped the ball during voir dire as to the potential issue of premeditation:

> MR. **MORAN:** There is one other point that the state touched on, and that's how much time it takes to have a premeditated murder. And I don't know if anybody had **a**

> stop clock or how you determine or what, but I'm not going to touch that one either. That's up to your own individual judgment as to whether it had premeditation or not.

(RI. **89**). In particular, either by way of cross examination or in colloquy with the judge, he failed to attempt to rehabilitate jurors who indicated varying degrees of reluctance to serve on a capital case (RI. **138-39, 141-42**), and he failed to object to their excusals for cause (RI. **169**). (**See** Argument IV, infra.) Further, Moran failed to move to excuse jurors who had read about the case or had seen something about it on television (RI. **27, 36, 86, 115, 126**; RII. **273**). He also left a clearly prosecution-prone juror in the box, one who stated that "crime is getting out of hand" (RI. **27**), and he did not challenge an alternate who had read about the case, had formed an opinion about it and about the concept of premeditation (RI. **196-97, 202**). Moran also did not object to the prosecutor having and using the **"rap** sheets" of all the venire persons as a tool in jury selection, nor did he ask for copies of these for his own use (RII. **280**). Further, as Mr. Russ pointed out at the evidentiary hearing, Mr. Moran never addressed the question of the prospective jurors' attitudes about race. Mr. Russ testified that he "read for pages into this transcript before [he] realized that the defendant was black and that the persons who had been shot... were white persons. Those matters of racial attitudes, on the part of the venire, were never addressed by defense counsel" (RII. **273**). Mr. Moran had

the right to explore for racial animus that may have been blatant or lurking since Mr. White was black and the victims were white. See Turner v. Murray, 476 U.S. ___, 106 S. Ct. 1683 (1986) (defendant in a capital case where crime is interracial is entitled to have jurors informed of race of victim and questioned on issue of racial bias). (See Argument III, infra.)

Moran's manner of ending his voir dire was eerie and alienating:

> That's all I'm going to say. I'm going to trust it to your own conscience and your own sense of fairness and to your common sense. I can tell by looking at you how I feel about how you think without going into a alot of detailed questions, because I can't read minds; but I watch eyes and everything else, and I read them well. I read them very well, and that's all I'm going to say.
>
> Thank you very much.

(RI. 166).

2. Ineffectiveness during the guilt phase of trial.

Moran sat idly by as the prosecutor began his opening statement and immediately referred to the extremely inflammatory, irrelevant fact that the victim who had been shot, but not killed, was "crippled and a quadraplegic at this time and will not testify in this trial. He is not capable of testifying. He is on a respirator in Tampa" (RI. 216; RII. 281-82). Moran further failed to object to detailed testimony concerning the quadraplegic (RI. 642-45) and to closing argument related to the

same issue (RI. 916, 918). When this case was before the Florida Supreme Court, the state conceded that the information about Alexander's inquiries was irrelevant. White v. State, 446 So. 2d, 1031, 1034 (Fla. 1984). This Court, finding that Moran waived the issue, did not reverse, because in the absence of an objection, there was no fundamental error. Id. Had the error been preserved by proper objection, it would have been stricken, or had the error been preserved, reversal would have resulted. Vaczek v. State, 477 So. 2d 1034 (Fla. 5th DCA 1985); Atto v. State, 393 So. 2d 30 (Fla. 2nd DCA 1981).

Moran also did not object to comments which could not be and were not supported by the evidence: that Mr. White "marched" the victims to a back room and shot them there (RI. 217-18).

Mr. Moran waived opening. As Mr. Russ testified at the evidentiary hearing, this was "a serious omission." Mr. Russ explained:

> If the defense counsel was relying upon the presumption of innocence and the burden of proof, then there may be some justification for sitting back and not making an opening statement, and just rocking along and arguing to the jury in closing, "Well, they haven't proved their case."
>
> At this point in time, defense counsel, since he presented this amalga[ma]tion of excusable and justified homicide, when he put his client on the stand, then it has to be assumed that he had that idea in his mind at the point in time that he was called upon to

> make an opening statement, since that is an affirmative defense.
>
> It seems to me that, in my judgment, my professional judgment, that an opening statement was compelled, that in any instance where the defense counsel is going to put on an affirmative defense that he has to get that up front to the jury in the voir dire and, certainly, in the opening statement, that he can't let all this harmful evidence come in from the State's witnesses and without having forewarned the jury that "there's more coming, ladies and gentlemen, there's more coming." That when the last witness for the prosecution sits down, that's not the end. Well, he totally failed to do that.
>
> As I said before, I don't consider it, the defense that was presented to, ultimately presented, to have any basis, both in the evidence or the law. Ultimately, it was a wrong defense, but regardless of whether it was a wrong or a right defense, it was totally ignored by the failure to give the opening statement.

(RII. 282-83).

Mr. Moran continued to demonstrate his incompetence as he bumbled his way through cross-examination (RI. 251, 254, 401, 475-76, 568, 620-22, 687, 717, 719, 758-59, 764-65). His ineptitude prompted the judge to intervene numerous times (RI. 298, 402, 521-22, 622-23, 624, 630, 634, 635-36, 739, 765). See RII. 284-85. Moran himself admitted his incompetence several times during the trial (RI. 301, 346, 401, 475-76, 521, 534, 584, 719, 721, 758-59, 903).

Mr. Moran's bumbling was not lost on the jury. Both Ella Caruthers and Pauline Forster testified at the evidentiary hearing that the jury, and everyone else, laughed at him (RII. 359, 406). Nor was it lost on the public; at least two newspaper articles appeared in which comments were made about Moran's ineptitude and the judge's and jury's response thereto (RII. 604, 611). The second of these articles dealt with the continuance of the penalty phase and the judge's criticism of Mr. Moran for his lack of preparation. This prompted Mr. Moran to action; he requested a hearing on the matter (RI. 1018-19, 1021-22) and moved for a mistrial (RI. 1024).[13]

Worse than the bad impression created by Mr. Moran's lack of preparation and incompetent cross-examination, however, was his resulting inability to deal with the physical evidence in the case. Whether due to stupidity or a failure to depose crucial witnesses, his lack of familiarity with this evidence -- painfully obvious in his attempts to cross-examine witnesses who testified concerning it -- made it apparent that he had done no investigation to determine whether the evidence corroborated

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[13]Both of Moran's motions were denied (RI. 1019, 1024). The judge did, however, permit Mr. Moran (RI. 1019-20, 1023) to make a statement in his own defense in open court, out of the presence of the jury (RI. 1038-41). Had Mr. Moran been as attentive to his client's interests as he was to his own, the result of the trial might have been different.

White's, or the state's, version of the shootings. As a result, he of course could not put before the jury anything on the issue.

When it came time for the prosecutor's closing argument, Moran remained passive as the prosecutor made numerous improper arguments to which any effective attorney would have objected. The prosecutor again referred to the paralysis of Alexander and then heightened the prejudicial effect by saying that Alexander was a community citizen (RI. 916, 918). Moran sat. The prosecutor made two highly objectionable references to Mr. White's prior convictions, saying that he was a "nine-time convicted felon," that those felonies were evidence that Mr. White "knew" the gun was loaded, and that Mr. White committed robbery and shot the victims "execution-style" (RI. 923, 932). Moran did not object to this improper and prejudicial argument. At the evidentiary hearing, Moran admitted that he usually would object to a comment that his client was a nine-time convicted felon and tried to excuse his failure to do so by saying that he had no help handling the case (RII. 235).

The prosecutor's use of the the prior convictions was not for the sake of impeachment or for attacking credibility, but for the sake of indicating a propensity to commit crime, and it was thus clearly improper. Davis v. State, 397 So. 2d 1005, 1008 (Fla. 1st DCA 1981). Panzavecchia V. Wainwright, 658 F.2d 337 (5th Cir. Unit B 1981). Because of Moran's failure to object,

however, this Court held the error could not be raised on appeal. White v. State, 466 So. 2d at 1035. Had Moran objected, reversal would have been required. Dixon v. State, 426 So. 2d 1258 (Fla. 2d DCA 1983). Brown v. State, 284 So. 2d 453 (Fla. 3rd DCA 1973).

In his rebuttal closing, the prosecutor attacked defense counsel personally, saying he did not know why Moran thought he could "trick" the jury, and implied Moran had suborned perjury by testifying through his client (RI. 950, 961). Moran acquiesced. The prosecutor also said Mr. White was trying to "disguise" himself when his identity was not an issue (RI. 959).

The prosecutor's unbridled, improper argument was permitted only because Mr. White's counsel apparently was not capable of interposing objections, which would have resulted in either instructions to the jury to disregard the comments, or reversal on appeal.

Mr. Moran's own closing was incoherent. No persuasive or even logical theory unfolded. He made offensive comments, and crucial mistakes in his rendition of the facts which the state in turn used in its rebuttal to Mr. White's detriment (RI. 949, 957). He failed to use to his advantage the surprise testimony of Frank Walker that a fourth bullet had been found. In fact he misconstrued this disclosure to mean that five shots had been

fired instead of four (RI. 937). The significance of this additional bullet is set out in Argument V, infra.

The evidence that Mr. White was intoxicated was not used in any effective manner by Moran, even though intoxication would have negated intent and explained White's behavior while confronting the Tehanis. The jury was left with no guidance on the issue, Moran made only a single confusing reference to Mr. White perhaps being drunk (RI. 936).

Further, Moran made offensive comments about the community during his argument, and referred disparagingly to a witness who was a friend of Alexander's as "old man Walker" (RI. 940), and to the victim of the crime as the "big brave guy" (RI. 951). There was no good reason to attack this witness and the victim in such a manner. In fact there was every reason not to risk offending the jury in this way.

When it came to the jury instructions, Moran did not object to the omission of instructions on the lesser included offenses of third degree murder (RI. 968-70) and second degree murder under the felony murder theory (RI. 967).[14] The absence of the third degree murder instruction was particulary prejudical because its elements encompassed the self-defense theory.

[14]The charge conference was not recorded therefore it is unknown what instructions if any were requested, agreed upon or rejected.

This Court held that Moran's failure to object waived this issue. White v. State, 466 So. 2d at 1035. Had Moran objected, the instructions would have been given, and if not given, reversal would have resulted.

Moran also failed to object to the judge's failure to include specific intent in the definition of robbery (RI. 973-74; RII. 298). This instruction would have been the heart of the defense, had the proper defense, voluntary intoxication, been presented, and, as specific intent is an element of the crime, the instruction should have been given in any event.

Mr. Moran committed other grave errors in the guilt phase. The first was his totally inept handling of the motion to suppress Mr. White's hospital bed statement.

On the morning the case was set for trial, Moran filed a motion to suppress before Keating, J. He did not attempt to present any evidence however (RI. 2049-68). The trial was continued because of counsel's lack of preparation and late-filed motion, and the remainder of the suppression hearing was held the next day, March 2, 1982 (RI. 2070-85).

On the second day of the hearing, counsel referred to White's level of intoxication at the time of the statement, and to the fact that medical records reflected that White had been given demerol just prior to the questioning (RI. 2078-81). However, aside from simply introducing the records, Moran never

produced any evidence as to the effects of demerol or of the combination of the drug with alcohol, which would have tended to show the involuntariness of the statement. Judge Keating did not rule on the motion at that time.

The case went to trial with no ruling on the motion to suppress. The state did not use the statement in its case in chief, preferring to reserve it for cross-examinatiion if the defendant took the stand. After White testified that the shooting resulted from a fight over money when the grocery store owner tried to cheat him out of over one hundred dollars, the prosecutor then cross-examined him on the previous inconsistent statement. He asked, "Mr. White, isn't it a fact that you talked and had a discussion with Detective John Harrielson on March the 8th, 1981, over at Florida Hospital, and on that date you told Detective Harrielson a different story?" (RI. 843). The defense objection was overruled (RI. 843). Finally, in the presence of the jury, Moran said, "Your Honor, one more thing. I think I'll move to suppress that evidence" (RI. 844), after which the suppression hearing was held again (RI. 847-72). And again, Moran did not offer any medical evidence on the effect of intoxication on the voluntariness of the statement, or on the effect on Mr. White of the injection of demerol, and he incorrectly conceded that the failure to "Mirandize" Mr. White had nothing to do with the voluntariness of the statement given

(RI. 864). The motion was denied, after the judge commented on the fact that Moran had proffered no medical testimony relating to the effect of White's intoxication or of his having been given demerol prior to the questioning (RI. 868-71). Moran had stated that his wife had some opinion on the issue: "Of course, without expert medical testimony, my wife indicates --," to which the judge responded that he was "not going to permit [Moran], once again, to tell [the Court] what [his] wife indicates. She has not, at this point, been qualified to be anything other than [his] wife, at this trial, assisting" (RI. 871).

It is clear that the attempt of the state to introduce the statement surprised Moran, either because he forgot about it, or because of his own impaired state. When he was unable to adequately conduct an examination of his client during the suppression hearing (RI. 861-62), Moran gave up trying and said, "I'm just going to sit down and find out. Are there any more surprises?" (RI. 863).

On direct appeal, this Court held that "[a]lthough the court in ruling on the motion did not again use the specific word 'voluntary,' the evidence supports a finding that the defendant was alert at the time and that the statement was voluntarily given." White v. State, 446 So. 2d at 1035. Of course neither this Court nor the trial court had the benefit of expert testimony as to the effects of the intramuscular injection of

demerol which Mr. White received fifteen minutes prior to making the statement. Such testimony was presented at the evidentiary hearing:

Dr. Lisa Miller testified that the effects of an intramuscular injection of demerol will be apparent within ten minutes, and that, as it is a central nervous system deadener, it will make the patient drowsy, confused, and possibly euphoric or dysphoric (RII. 110-11). The drug is given as a pre-anesthetic because it makes the patient "very, very **malleable"** (RI. **111-12).** She testified that the trustworthiness of a person under the influence of the drug for approximately fifteen minutes would be questionable because the drug would be affecting the thinking process (RII. **112).**

Dr. Warren Rice testified that at the time Mr. White made the statement in question, fifteen minutes after the demerol injection, he would have been very euphoric and "might very well [have] provide[d] answers that he felt were anticipated by whomever was questioning **him"** (RII. **130).**

See also RII. **632-33,** report of Dr. Cynthia Dommisse, and **638,** report of Dr. Warren Rice.

"A prior inconsistent statement may be admitted to impeach a defendant who testifies at his trial. Harris v. New York, 401 U.S. **222, 225, 91 S.** Ct. **643, 645, 28** L.Ed.2d **1 (1971).** Before admitting the statement, the court must determine that it was

made voluntarily. Nowlin v. State, 346 So. 2d 1020 (Fla. 1977)." White v. State, 446 So. 2d at 1035. The court must look to the totality of the circumstances in determining voluntariness. Brewer v. State, 386 So. 2d 232, 237 (Fla. 1980). The state has the burden of proving voluntariness by a preponderance of the evidence. DeConingh v. State, 433 So. 2d 501, 503 (1983). Had Mr. Moran acted competently and presented the above evidence at the hearing on the motion to suppress, the judge would not have admitted the statement, or if he had, this Court would have reversed on appeal. Reddish v. State, 167 So. 2d 853 (Fla. 1967). DeConingh v. State, 433 So. 2d at 504.

Second, Moran failed to object to the use of the testimony of the Tehanis on the uncharged purported attempt to shoot bystanders after the killing, and he further failed to request a limiting instruction on the use of this "Williams Rule" evidence. After Henry Tehani testified both at the preliminary hearing (RI. 1131-43) and at deposition (RI. 1415-64) that White had tried to kill him and his daughter, the state filed a notice of intent to rely on that incident as "Williams Rule" evidence (RI. 1801). Mr. Tehani then testified for the state at trial and recounted his entry into the store with his daughter, apparently after the shooting had already taken place. He said he saw only the defendant in the store at that time; that the defendant tried to make him and his daughter go into a freezer; that the

defendant was waving or pointing a gun at them: and that he heard the hammer of the gun click twice, but it did not fire (RI. 445-79). Pamela Tehani recounted the facts in a similar manner (RI. 481-88).

"It is axiomatic that evidence of unrelated crimes is generally inadmissible." Townsend v. State, 420 So. 2d 615, 616 (Fla. 1982). The use of such evidence solely as a means to prove character "is ordinarily deemed so inherently prejudicial that it automatically requires reversal. . . ." Dixon v. State, 426 So. 2d 1258, 1259 (Fla. 2d DCA 1983). Under Fla. Stat. 90.404(2)(b)(2), when such

> evidence is admitted, the court shall, if requested, charge the jury on the limited purpose for which the evidence is received and is to be considered. After the close of the evidence, the jury shall be instructed on the limited purpose for which the evidence was received and that the defendant cannot be convicted for a charge not included in the indictment or information.

Ibid.

This rule of evidence is designed to prevent the jury's confusion of issues and meant to prevent the jury from forming improper and prejudicial inferences from the introduction of prior crimes, wrongs or acts. Limiting instructions are crucial in clarifying the purpose for which such evidence is to be received and considered. But a timely request for a limiting instruction is required if such instruction is to be given at the time the

potentially prejudicial evidence is received. Milton v. State, 438 So. 2d 935 (Fla. 3rd DCA 1983) (no fundamental error found because at close of all evidence trial court gave limiting instruction). The failure to give a requested limiting instruction during the course of the trial is reversible error. Rivers v. State, 425 So. 2d 101, 105 (Fla. 1st DCA 1982).

In this case, the testimony of the Tehanis was used in the guilt phase for the unlawful purpose of trying Mr. White on the uncharged and irrelevant offense of intending to kill the Tehanis, as well as to underscore the criminal propensity of this "nine-time convicted felon" who "didn't want to be caught" (RI. 927-29). Assuming the evidence was admissible to prove motive, opportunity, intent, preparation, plan, knowlege, identity, or absence of mistake or accident, Rivers v. State, 425 So. 2d at 102, a jury instruction was essential to properly limit the jury's consideration of it. The evidence was highly inflammatory and damaging; as Moran indicated at the evidentiary hearing, the case was impossible to defend because it is "hard to say self-defense when you're shooting some little girl in the head" (RII. 160). To allow the jury to use this evidence for all purposes was devastating, but Moran failed to request a limiting instruction.

Additionally, the lack of a limiting instruction was prejudicial error which "rose to such a level as to make the

[defendant's] trial fundamentally unfair and in violation of the Fourteenth Amendment." Panzavecchia v. Wainwright, 658 F.2d 337, 341 (5th Cir. 1981). United States v. Silva, 745 F.2d 840, 844 (4th Cir. 1984). Both Panzavecchia and Silva dealt with the improper joinder of offenses where prior convictions were admitted which were relevant to one, but not both, charges. In Silva, where the trial judge repeatedly charged the jury to consider the prior conviction only for the purposes of one charge, the court held that the prejudical effect of the introduction of the evidence was cured by the limiting instructions. Silva, at 844. Here, counsel did not request, and the jury thus did not hear, such an instruction. Thus nothing alleviated the prejudicial effect of the evidence.

3. Ineffectiveness at the Penalty Phase.

[I]n the sentencing phase, there is no structure. There is no plan. There is no preparation. It's Alice in Wonderland. It's crazy, crazy (RII. 302).

After the guilty verdict, Moran, when was asked by a reporter what he planned to do for the penalty phase, responded that he would "[s]ay a few Hail Marys" (RI. 609). Shadrick Martin, Moran's investigator, testified that there was no preparation, that Moran was upset about losing, and that he felt there was no sense in preparing and that he [Moran] would just "play it by ear" (RII. 30).

Moran essentially corroborated Martin's testimony. In spite of his extensive memory lapses about the penalty phase (RII. 240-43), he was able to testify at the evidentiary hearing that by the time of the penalty phase he was "devastated," "overwhelmed by the evidence," did not "know what would have helped the case except a miracle," and "hurt" (RII. 245). When asked why he used neither the evidence regarding Mr. White's intoxication nor information about Mr. White's background at penalty, he could not give an answer and admitted that he "make[s] mistakes in a trial" (RII. 245-49).

The hearing testimony of Mr. White's family members and his fiance confirmed that Moran made no effort to talk with them about Mr. White's life or to otherwise investigate sources of mitigating evidence except in the minutes preceding the beginning of the penalty phase (RII. 359-60, 366-67, 374-75, 388-89, 390-92, 407-08).

The penalty phase was first set for April 28, 1982. That morning, Moran moved for a contiunace, contending that he was not prepared to proceed because the state had not provided him with documents relating to Mr. White's record of criminal convictions. Stating that if he understood the law correctly, he had "a right to go into the past crimes, and to mitigate," Moran asserted that he had "not had the opportunity to prepare for the electric chair" (RII. 998-1000). The court, placing Mr. Moran's blatant

incompetence in not timely obtaining the records in balance with the seriousness of the proceedings, granted a forty-eight hour continuance (R. 1001-02).

When the court reconvened, Moran continued to complain about his inability to get the necessary records from the state and often he rambled far from the matter at hand. For example, with no warning he moved the court to hold one of the witnesses, a paramedic, in contempt because the witness "took the stand and lied to the Jury" about the location of Alexander's wounds. The court held that the witness had testified to the best of his ability (RI. 1023). Moran next addressed an issue that turned out to be a focal point of his penalty phase: whether one of the witnesses had stolen some money from Alexander after he was shot. Moran then abruptly digressed to talking about some threatening phone calls he had received from one of the witnesses (RI. 1025-26).

Next, Moran came close to touching on a real issue but ultimately dropped the ball again. He wanted to put the witness Frankie Walker on the stand to talk about where he had found the bullet recovered after the shootings. He thought this testimony would negate a showing of an execution-style killing, relating that only to the heinous, atrocious or cruel aggravating factor (RI. 1028-30). When the state agreed not to argue that factor, Moran dropped his argument relating to that testimony as it may

have shed light on the path of the bullet (RI. 1028-31). He failed to recognize that the same argument, with the support of ballistics testimony, also would have provided rebuttal to an argument and a finding that the crime was cold and calculated. He presented no such evidence, undertook no investigation to find it, and retained no ballistics expert on the issue. Given his testimony at the evidentiary hearing, that he only uses experts "in very special cases" (RII. 223) and that "there's no experts in life" (RII. 239), it is hardly surprising that he never presented any relevant evidence on this issue -- just as he never presented any expert testimony to inform the jury that, because of Mr. White's intoxication and resulting inability to formulate a goal at the time of the shootings, he would not have been able to commit a cold and calculated crime (RII. 127).

Moran's failure to investigate mitigating information resulted in his failure to introduce such highly probative and compelling evidence. This failure together with his physical and mental impairment, to which he himself admitted at the evidentiary hearing (RII. 147-51), resulted in an unfocused and bumbling attempt to conduct an adequate penalty phase. For example, he failed to introduce competent evidence of Mr. White's low I.Q., and instead ventured to establish the opposite by trying to get that evidence in through the hearsay and unqualified testimony of White's mother (RI. 1056).

Moran's failure to interview family members or conduct any extensive background investigation also resulted in the jury's not hearing significant evidence of Mr. White's deprived and tumultuous upbringing (RII. 353-58, 361-66, 370-75, 377-89, 392-401; see also RII. 566-603, 679-84, 690-91).

The sentencing court and jury were also deprived of the most compelling evidence in mitigation -- expert testimony on the effect of Mr. White's intoxication. Reasonably competent counsel would have retained the services of an expert such as Dr. Rice, supra, at pp. 11-12. Based on Mr. White's blood alcohol test taken between 1:30 p.m. and 2:47 p.m. on March 8, 1981 (RII. 22-23), and the extrapolations which were prepared from that test (RII. 101-103), Dr. Rice stated that at the time of the incident Mr. White would have had a great deal of difficulty in standing and in following through on many forms of thought processes, and he would have been confused and disoriented in his behavior (RII. 124). He stated further that Mr. White's responses would have been reflexive and spontaneous, and that he would not have been able "to make any sort of planned, deliberate kind of goal seeking behavior. It would be rather responsive to situations, but... would not be willful or planned in any particular way" (RII. 125). He stated that Mr. White's behavior as reflected in his testimony at the time of the incident seemed generally indicative of a blood alcohol level over .20 mg/dl, and that, as

often occurs in people with high levels of alcohol, Mr. White probably had filled in some details of the incident that he would not have been able to recall (RI. 125-26). Because of Mr. White's inability to formulate a goal at the time, Rice testified that White would not have been able to commit a cold and calculated crime at around 11:00 a.m., that he would have been suffering from extreme mental disturbance, and that he would have been unconcerned about the consequences of his behavior (RII. 127-28).

Moran also failed to object to improper closing argument. The prosecutor argued that the jury could consider evidence of the incident involving the Tehanis as the aggravating factor that the killing was to "have no eyewitnesses" (RI. 1077), and that it proved that the killing was cold and calculated (RI. 1079). He argued that the jury could consider that the killing occurred during the course of a robbery and that it was committed for pecuniary gain as two separate aggravating factors (RI. 1076, 1077). Moran did not object.[15]

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[15]On direct appeal, this Court found that there was no evidence in the record to support the trial judge's finding of the cold and calculated aggravating factor, and also agreed with appellant that "the trial court erroneously doubled two aggravating factors by finding that appellant committed the murder both while in the commission of a robbery and for pecuniary gain." White v. State, 446 So. 2d 1031, 1037 (Fla. 1984).

The prosecutor argued that the crime was committed "execution style" when there was no such evidence (RI. 1079). Arguing an improper nonstatutory aggravating factor, he told the jury that if they recommended life with a mandatory minimum of twenty-five years, they could "consider the likelihood of whether or not [White] would come out of prison and therefore be back" (RI. 1081), implying he would thereafter commit other crimes then. Moran again made no objections. Finally, when the state appealed to the jury to act not on the evidence, but on the fact "that this is your community," an inflammatory, nonstatutory and irrelevant consideration, Moran remained seated still (RI. 1082).

Perhaps Moran was motivated to silence by his preferred trial tactics, expressed at the evidentiary hearing, that it is not a good idea to object frequently because "[j]urors get tired of it" (RII. 236). The reality of the matter is that Mr. White would have been better served by a jury tired of defense counsel's objections than by a jury inflamed by the prosecutor's totally improper argument, which undoubtedly influenced their decision to recommend the death penalty.

Moran's closing argument was "without theory . . . continuity or reason. It was a rambling, incoherent mumbo-jumbo" (RII. 296-97). Moran argued that while Mr. White may have been convicted of nine felonies, only five were violent. He opened with the statement that "the purpose of this hearing is to not

only show the aggravating circumstances, but also for the defense to extract out of those felony charges that are allegedly being violent, the mitigating circumstances**(RI. 1082) -- an approach which can truly be characterized as "damning with faint praise."

Moran attempted to argue that which he had produced no evidence to show: Mr. White was not carrying a gun during the prior robbery which resulted in three convictions. The state objected, and took the opportunity to state in front of the jury that the three year mandatory minimum sentence imposed on the charge meant "he would have had to have carried the gun" (RI. 1083). The objection was sustained.

Two of his other arguments in mitigation would have been laughable had they not so clearly reflected Moran's tragic incompetence in this capital case. He contended that while Mr. White had been convicted of felonies in the past, he had never killed anyone although "he had many opportunities to do it" (RI. 1084, 1088), and that, if the judge overruled the death sentence which he seemed to assume the jury would recommend, and imposed life with a twenty-five or thirty year minimum, "that would put [Mr. White] back out on the street at the age of fifty-seven. By that time... your violent nature will have mellowed by age" (RI. 1090). This was, indeed, "play[ing] it by ear," as Shadrick Martin, at the evidentiary hearing, testified Moran intended to do at the penalty phase (RII. 30). Moran continued with the

argument that the evidence showed that there was a struggle before the killing, although he did not tell the jury that that fact related to the cold and calculated aggravating factor (RI. 1085).

Moran maintained silence again when it came to improper instructions at the penalty phase. Those instructions were recitations by the court that certain aggravating circumstances were not supported by the evidence, which placed undue weight on the other circumstanes and implied that the court had found the latter to exist (RI. 1097-99).

This Court held on direct appeal that Moran had waived the above-described errors by failing to object. White v. State, 445 So. 2d at 1036. The motion judge engaged in circular reasoning and found that "absent some fundamental error, failure to object, is not ineffective assistance of counsel" (RII. 1023). This was inaccurate and erroneous.

Moran also improperly acquiesced in the state's sending to the jury room its chart listing aggravating and mitigating circumstances. In fact, he was careful to put on the record the defendant's personal agreement to the jury's having this exhibit (RI. 1105-06), but there is no indication that he informed Mr. White that allowing this exhibit to go to the jury room violated Florida Rule of Criminal Procedure 3.400. On direct appeal this Court agreed that it was improper to submit the chart to the jury

during its deliberations, but held that "appellant cannot at trial create the very situation of which he now complains and expect this Court to remand for resentencing on that basis." White v. State, 466 So. 2d at 1036. Had Mr. White had competent counsel, it is doubtful that he would have "create[d]" this situation.

Moran also failed to object to the state's introduction of exhibits which reflected crimes not admissible at penalty (RI. 1042-51). Mr. Blankner, the former prosecutor, testified that the charges, reflected in the exhibits were inadmissible, and he agreed that as a defense attorney he would not have let in "for a second" that Mr. White had two prior escape charges (RII. 79-80).

Moran's anemic attempt to finesse a penalty phase, to "play it by ear" (RII. 30) without conducting any investigation apart from interviewing witnesses outside the courtroom door, was palpably ineffective, as was his pathetic attempt to present a closing argument. Such ineffectiveness in the penalty phase requires reversal. Kina v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir.), vacated and remanded for reconsideration, 467 U.S. 1211 (1984), adhered to on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, 471 U.S. 1016 (1985)(death sentence vacated because of trial counsel's failure to investigate adequately the existance of mitigating circumstances coupled with his inadequate closing argument). Doualas v. Wainwright, 714 F.2d 1532 (11th

Cir.), vacated and remanded, 468 U.S. 1206, adhered to on remand, 739 F.2d 531 (1984) (same). Accord, Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985). In Tyler, the court set forth the rationale for enhanced standards of effectiveness for attorneys handling capital cases:

> In Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving adequate and accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty decision that was made was thus robbed of the reliability essential to assure confidence in that decision.

Tyler, 755 F.2d at 745 (emphasis supplied).[16]

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[16] Mr. White's case is similar to other federal cases in which relief has been granted due to the deficiencies of trial counsel's representation. See, e.g., Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984), subsequent history in, 799 F.2d 1442 (11th Cir. 1986)(failure to use available evidence which would have established innocence and significantly undermined the State's case for guilt). Here, as in Smith, counsel's failure was due to a constitutionally inadequate pre-trial investigation. As stated, counsel's highest duty is the duty to fully and adequately investigate a case, especially when significant evidence which would alter the result is available. Here, as in Smith, it was available, but counsel failed in his duty. See also Kimmelman v. Morrison, supra, 106 S. Ct. 2574, 2588-89

(footnote continued on next page)

The serious acts and omissions committed by defense counsel, set forth above, individually and collectively demonstrate that Mr. White was deprived of the effective assistance of counsel

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(footnote continued from previous page)

(1986)(failure to request discovery based on mistaken belief state obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986)(failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1986)(little effort to obtain mitigating evidence), cert. denied, 107 S. Ct. 602 (1986); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985)(failure to depose any of the state's witnesses), cert. denied, 107 S. Ct. 324 (1986); Kina v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984)(failure to present additional character witnesses resulted from failure to make reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Gaines v. Homer, 575 F.2d 1147 (5th Cir. 1978)(failure to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972)(failure to interview alibi witnesses); see also Nealv v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(counsel "simply failed to make the effort to investigate").

The failures did not end at guilt-innocence. At sentencing, counsels' failure to properly investigate and prepare resulted in substantial prejudice. In this case, as in Thomas v. Kemp,

> It cannot be said that there is no reasonable probability that the results of the sentencing phase of the trials would have been different if mitigating evidence had been presented to the jury. Strickland v. Washinaton, 466 U.S. at 694. The key aspect of the penalty trial is that the sentence be individualized, focusing on the particular-ized characteristics of the individual. Greaa v. Georgia, 428 U.S. 153 (1976). Here the jurors were given no information to aid them in making such an individualized determination.

796 F.2d 1322, 1325 (11th Cir. 1986); see also Tvler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

through behavior of counsel which "fell below an objective standard of reasonableness" and which was so prejudicial that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Strickland v. Washinaton, 466 U.S. at 688, 694. Knight v. State, 394 So. 2d at 1001. Setting aside the instances of actual prejudice which have been demonstrated, however, this case falls into that limited class of cases which the Supreme Court has identified, in which the circumstanes surrounding defense counsel's representation of his client create a presumption of ineffectiveness rendering an inquiry into counsel's actual performance at trial, or into prejudice, unnecessary. For example, ineffectiveness is presumed when counsel actively represents conflicting interests, Cuyler v. Sullivan, 446 U.S. 335 (1980), and when the state interferes with the assistance of counsel, United States v. Cronic, 466 U.S. 648, 659 n. 25 (1984); Strickland v. Washinston, 466 U.S. at 692; Geders v. United States, 425 U.S. 80 (1976); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). The Supreme Court described the category of cases in which ineffectiveness would be presumed as those in which the "surrounding circumstances" of counsel's representation of an accused are so likely to have affected his performance that prejudice should be presumed, or where, "based on the actual conduct of the trial, that there was a breakdown in

the adversarial process that would justify a presumption that respondent's conviction was insufficiently reliable to satisfy the Constitution." Cronic, 466 U.S. at 662.

In gauging counsel's singularly disgraceful conduct, and deciding whether the judgment and sentence here are reliable, it bears restating that defense counsel was representing a man who was on trial for his life. The Supreme Court has consistently adhered to its requirement that the qualitative difference between a prison term and a death sentence requires a heightened degree of reliability in the death sentencing determination. Caldwell v. Mississippi, 472 U.S. 320 (1985); Eddings v. Oklahoma, 455 U.S. 104 (1982). This Court has also recognized that "death penalty cases are different, and consequently the performance of counsel must be judged in light of these circumstances." Knight v. State, 394 So. 2d at 1001. That heightened standard should be applied in reviewing the factual basis of this claim.

Counsel's physical incapacities are well documented in the Rule 3.850 motion and the testimony presented at the evidentiary hearing on that motion. Moran confessed his incompetency and physical incapacity at trial and at the hearing. Though at the hearing he denied that he was drinking during the trial, he offered to stipulate to an alcohol problem, and he admitted that he was not sharp, had an energy problem, and was on a lot of

medication. Other witnesses at the hearing testified that he was taking drugs and drinking during the trial, that he appeared intoxicated, and that he had the smell of alcohol on his breath. He was laughed at by the jury, and his incompetence was reported by the local media. This is not a case of which the criminal justice system can be proud, nor is it one in which this Court can have confidence in the reliability of the outcome.

The presumption that counsel was "conscious of his duties to his clients and that he sought conscientiously to discharge those duties," Cronic, 466 U.S. at 658 n. 23, vanishes in the circumstances of this case. The mere fact that Moran was seated at defense table and made some attempt to represent Mr. White does not satisfy his constitutional right to the effective assistance of counsel. "That a person who happens to be a lawyer is present at trial alongside the accused . . . is not enough to satisfy the constitutional command. . . . An accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair." Strickland, 466 U.S. at 685. Mr. White recognizes that he was not entitled to a "perfect" trial, but neither should his trial have been the equivalent of a "sacrifice of [an] unarmed prisoner to gladiators." United States ex. rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir. 1975).

In Javor v. United States, 724 F.2d 831 (9th Cir. 1984), the court found counsel who slept through parts of the trial ineffective without inquiring into resulting prejudice. Analogizing the situation to a case in which counsel was so intoxicated during trial that he did not know what happened during parts of the trial, State v. Keller, 57 N.D. 645, 223 N.W. 698 (1929), the court noted in terms applicable to this case:

> Prejudice is inherent in this case because unconscious or sleeping counsel is equivalent to no counsel at all. The mere physical presence of an attorney does not fulfill the sixth amendment entitlement to assistance of counsel, Holloway v. Arkansas, 435 U.S. at 489, 98 S.Ct. at 1181, particularly where the client cannot consult with his or her attorney or receive informed guidance from him or her during the course of the trial.

Id. at 834.

In this case, Mr. White would have been better off with Moran sleeping, since he did little but embarass the defense and offend the jury by his feeble attempts to participate in the "trial." Under these circumstances, Moran should be held more blameworthy than Mr. White for a defense that was absurd ab initio. Had Moran developed the type of attorney-client relationship expected in such cases and had he had an adequate understanding of the law and facts of the case, he would have been able to appreciate the sheer folly of the defense of self-defense or accident or justifiable homicide. Moreover he could have dissuaded Mr. White either from testifying altogether or at

least as to the preposterous story. Since Moran, however, neither knew the pertinent law with regard to intoxication, nor had even a superficial grasp of the facts and never established a working relationship with his client, Mr. White was at the mercy of his and his lawyer's ignorance.

Moran's physical and mental impairments, and racial prejudice, resulted in his refusal or inability to adequately investigate this case and in his improper and entirely ineffective conduct of the trial. This is the case to which the court was referring in Cronic when it said that there could be some cases in which "there was a breakdown in the adversarial process that would justify a presumption that respondent's conviction was sufficiently unreliable to satisfy the Constitution." United States v. Cronic, 466 U.S. at 662.

In House v. Balkcom, 725 F.2d 608 (11th Cir. 1984), the court found counsel ineffective when there were so many errors in counsel's conduct that "a particularized inquiry into prejudice would be 'unguided speculation.'" Id. at 615. A similar standard was applied in Youns v. Zant, 677 F.2d 792 (11th Cir. 1982), when counsel's unfamiliarity with the facts was so wide ranging that ineffective assistance "cried out from the record" and required the court to vacate the conviction and sentence. Id. at 798.

After reviewing the record in this case, can this Court say with any degree of assurance that it is "confident in the outcome" of the proceeding? "'Truth,' Lord Eldon said, 'is best discovered by powerful statements on both sides of the question.'" United States v. Cronic, 466 U.S. at 655. Where were Moran's "powerful" statements? Was it when he admitted in the jury's presence, during the cross examination of the ballistics expert, "I'm not too sure what I'm talking about" (RI. 758), or when he said he "forgot" questions on cross examination (RI. 719), or when he said, in response to an objection by the prosecutor, that he would "withdraw whatever he said" (RI. 687)? Is that what the Supreme Court had in mind as effective counsel when it held, in Cronic, that competent counsel was necessary "to require the prosecution's case to survive the crucible of meaningful adversarial testing"? Perhaps Moran made his "powerful" statements in defense of his client on trial for his life when he argued to the judge that his objection should be sustained, but then said, "Judge, I think he -- I just want to -- I used to file a Motion in Limine, but I'm getting too old for those things" (RI. 534), or when he admitted later that he was not "totally up on the rules of evidence" (RI. 584). These and other examples of Moran's gross failure to adequately represent his client, set out above, powerfully demonstrate that this case did not even come close to satisfying the "very premise" of our

adversary system of criminal justice, "that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and the innocent go free." Herring v. New York, 422 U.S. 853, 862 (1975).

In Wilson v. Wainwright, 474 So. 2d 1162 (Fla. 1985), this Court granted a death-sentenced inmate a new appeal of his conviction and sentence when it found that his appellate counsel did not assume his professionally required partisan role in defense of his client. The Court condemned conduct similar to Moran's in unforgettable terms:

> [T]he basic requirement of due proces in our adversarial legal system is that a defendant be represented in court, at every level, by an advocate who represents his client zealously within the bounds of the law. Every attorney in Florida has taken an oath to do so and we will not lightly forgive a breach of his professional duty in any case: in a case involving the death penalty it is the very foundation of justice.

Id. at 1164.

There is a reasonable probability that if this case had been handled competently, the verdict would have been to a lesser degree of murder. Moreover, had the jury nevertheless returned a verdict of murder in the first degree, they would have returned a recommendation for a life sentence based on what should have been the evidence.

In sum, whether on the basis of a presumption of prejudice arising from the circumstances surrounding defense counsel's

representation of his client, or on the basis of the numerous instances of demonstrable prejudice, Mr. White was denied the effective assistance of counsel in violation of his rights under the sixth, eighth and fouteenth amendments to the United States Constitution, and Article I, Section 16 of the Declaration of Rights of the Florida Constitution. His conviction and sentence must be vacated.

II.

THE COURT AND PROSECUTOR MADE INACCURATE STATEMENTS TO THE JURY DIMINISHING THEIR SENSE OF RESPONSIBILITY FOR THE AWESOME CAPITAL SENTENCING TASK THAT THE LAW CALLED ON THEM TO PERFORM, CONTRARY TO THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The gravamen of this claim is that primarily the remarks to the jury by the judge caused them to attach too little significance to their role and sentencing verdict, and thus enhanced the risk of an unreliable death sentence.

The trial had hardly begun before the first error occurred. The judge, in his prefatory remarks to the jury, explained that if they found the defendant guilty of first degree murder, the case would then move into a sentencing phase where the jury would be asked to

> render[] an advisory opinion to the court as to whether the defendant should be sentenced to life imprisonment or to death on the

> charge of murder in the first degree if he is, in fact, convicted on that charge. The court then sentences the defendant to either life imprisonment or death. The court, however, is not obligated to follow the recommendation nor advice of the jury.

(RI. 5).

> Thus, the jury does not impose the sentence or punishment if such a verdict is rendered. The imposition of the punishment is the function of the court that than the function of the jury. However, because such a verdict could lead to a sentence of death, your qualification to serve as a juror in this case depends in part upon your attitude toward rendering a verdict that could result in a death penalty.

(RI. 6)(emphasis added).

The prosecutor also made the point to the prospective jurors that "it's the judge's decision as to what sentence would be imposed. But it requires a recommendation from the jury." (RI. 19)(emphasis added).

On the second day of jury selection, the judge, in the presence of the prospective jurors who were there the day before and for the benefit of the newly added members to the prospective panel, explained again that

> [i]f a conviction of murder in the first degree is entered, there are only two possible sentences: one is life imprisonment, and one is death.
>
> After the arguments and evidence are presented to that jury, the jury will then have an opportunity, by majority vote of the jury, to recommend to the court either the sentence of life or death. The court then sentences the defendant to life imprisonment

> or to death. The court is not required to follow the recommendation of the jury.
>
> Thus, the jury itself does not impose the punishment if such a verdict is rendered. The imposition of punishment is a function of the court rather than a function of the jury. However, because such a verdict could lead to a sentence of death, your qualification to serve as a juror in this case depends in part upon your attitude toward rendering a verdict in a case that could result in a death penalty.

(RI. 116)(emphasis added).

On the third day of jury selection, the judge repeated his refrain as to the jury's role in sentencing.

> So that you understand how that procedure would work, if a verdict of guilty in the first degree of murder is rendered by the jury in this case, then as soon as possible after the rendition of that verdict, the same jury will be given additional evidence, those aggravating or mitigating circumstances which they may properly consider, as well as argument of counsel. And then that jury will be asked to render an advisory opinion to the court on whether the court should impose life imprisonment or death in the case.
>
> The court then does the actual sentencing. The court is not bound by the jury's recommendation. Thus, the actual penalty is the responsibility of the court, not the jury. The imposition of punishment is a fuction of the court, not the jury.

(RI. 191)(emphasis added).

The next time the jury was reminded of their role occurred just before the state began its case as to the penalty. The judge stated:

> The punishment for this crime is either death or life imprisonment without the possibility

> of parole for twenty-five years. The final decision as to what punishment shall be imposed rests solely with the judge of this court. However, the law requires that you, the Jury, render to the Court an advisory sentence as to what punishment should be imposed upon the defendant.

(RI. 1044)(emphasis added).

Only once did the judge provide the jury with any indication that although their decision as to sentencing was merely a recommendation, nevertheless, it was a matter that they should approach with seriousness.

> The fact that the determination of whether a majority of you recommend a sentence of death or sentence of life imprisonment in this case is a factor that can be reached by a single ballot and should not influence you to act hastily or without due regard to the gravity of these proceedings. Before you ballot, you should carefully weigh, sift, and consider the evidence, and all of it, realizing that human life is at stake, and bring to bear your best judgment in reaching your advisory sentence.

(RI. 1102) Cf. Fla. Std. Jury Instr. (Crim.) (for 921.141 Fla. Stat.).

These comments to the jury violated Caldwell v. Mississippi, 472 U.S. 320, 105 S. Ct. 2633, 2639 (1985) in that they diminished the importance of the jury's role in sentencing in a manner that was constitutionally impermissible. Caldwell held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe

that the responsibility for determining the appropriateness of the defendant's death lies elsewhere," id., 105 S. Ct. at 2639.

The judge in this case failed to point out that the jury's decision would be reviewed with a presumption of correctness. Thus the jury was wholly unaware of the extreme deference and great weight their decision carried in their determination as to whether death would be the proper punishment. See McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Ross v. State, 386 So. 2d 1191, 1197 (Fla. 1980); Stone v. State, 378 So. 2d 765, 773 (Fla. 1980); Le Duc v. State, 365 So. 2d 149, 151 (Fla. 1978), cert. denied, 444 U.S. 885 (1979)). In explaining the sentencing process to the jury, the judge failed to inform them that a court may override a jury's recommendation only when the facts suggesting a sentence of death are "so clear and convincing that virtually no reasonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). As in Caldwell, these comments misled the jury as to the great weight their decision carried. They were given a "false impression as to the significance of their role in the sentencing process*@which in turn "created a danger of bias in favor of the death penalty." Adams v. Wainwright, 804 F.2d 1526, 1531 n.7, 1532 (11th Cir. 1986), modified sub nom Adams v. Dugger, 816 F.2d 1495 (11th Cir. 1987), cert sranted, 56 U.S.L.W. 3601 (March 7, 1988). See also Caldwell, 105 S. Ct. at 2641.

Under Florida's capital sentencing statute, the jury has the primary responsibility for sentencing. At the sentencing phase of a Florida capital trial, the jury plays a critical role.[17] See Fead v. State, 512 So. 2d 176 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987); Brookings v. State, 495 So. 2d 135 (Fla. 1986); Garcia v. State, 492 So. 2d 360 (Fla. 1986); Tedder v. State, supra, 322 So. 2d at 910; Adams v. Wainwright, supra, 804 F.2d 1526. Thus, any intimation that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, irrespective of the sentencing jury's own decision, is inaccurate and a misstatement of law. The judge's role is not that of the "sole" or "ultimate" sentencer. Rather, it is to serve as "buffer where the jury allows emotion to override the duty of deliberate determination" of the appropriate sentence. Cooper v. State, 336 So. 2d 1133, 1140 (Fla. 1976); see also Adams v. Wainwright, supra, 804 F.2d at 1529. While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation,

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[17]Justice Rehnquist, writing the Court's opinion in Wainwright v. Witt, 105 S. Ct. 844, 851 (1985) noted that "[i]n Witherspoon the [Florida] jury was vested with unlimited discretion in choice of sentence."

which represents the judgment of the community, is entitled to great weight. McCampbell v. State, supra, 421 So. 2d at 1075; Tedder v. State, supra, 322 So. 2d at 910. Mr. White's jury was led to believe that its verdict meant very little and that the judge was virtually free to impose whatever sentence he wished. Caldwell prohibits comments that seek

> to give the jury a view of its role in the capital sentencing procedure that [is] fundamentally incompatible with the Eighth Amendment heightened need for reliability in the determination that death is the appropriate punishment in a specific case. Id. at 2645, quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

Diminishing the importance of the jury's role in the sentencing determination, by "minimiz[ing their] sense of responsibility," the judge defied eighth amendment jurisprudence which has long-emphasized the need for juries in capital cases to recognize and appreciate the gravity of their decision and the finality of the consequences. See Caldwell, 105 S. Ct. at 2646. The instructions likewise enhanced the risk of an unreliable death sentence.

> The chance that is increased by the fact that, in an argument like the one in this case, appellate review is only raised as an issue with respect to the reviewability of a death sentence. If the jury understands that only a death sentence will be reviewed, it will also understand that any decision to "delegate" responsibiility for sentencing can only be effectuated by returning that sentence [of death].

Caldwell, 105 S. Ct. at 2641 (emphasis supplied).

A jury that is unconvinced that death is the appropriate punishment might nevertheless vote to impose death as an expression of its "extreme disapproval of the defendant's acts" if it holds the mistaken belief that its deliberate error will be corrected by the 'ultimate' sentencer, and is thus more likely to impose death regardless of the presence of circumstances calling for a lesser sentence. See Caldwell, 105 S. Ct. at 2641. Moreover, a jury "confronted with the truly awesome responsibility of decreeing death for a fellow human," McGautha v. California, 402 U.S. 183, 205 (1971), might find a diminution of its role and responsibility for sentencing attractive. Caldwell, 105 S. Ct. at 2641-42. As the Caldwell Court explained:

> In evaluating the prejudicial effect of the prosecutor's argument, we must also recognize that the argument offers jurors a view of their role which might frequently be highly attractive. A capital sentencing jury is made up of individuals placed in a very unfamiliar situation and called on to make a very difficult and uncomfortable choice. They are confronted with evidence and argument on the issue of whether another should die, and they are asked to decide that issue on behalf of the community. Moreover, they are given only partial guidance as to how their judgment should be exercised, leaving them with substantial discretion. Given such a situation, the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize its role. Indeed, one divided on the proper sentence, the presence of appellate review

> [or judge sentencing] could effectively be used as an argument for why those jurors who are reluctant to invoke the death sentence should nevertheless give in.

Id. at 2641-42.

Mr. White's case involves precisely the eighth amendment error that Caldwell condemned. Appellant argues the denial of this claim even though he is aware that this Court has held that the Mississippi statute pertinent to Caldwell is different from the Florida statute, hence Caldwell law is not applicable to Florida. See Grossman v. State, No. 68,096 (Feb. 18, 1988) and cases cited. Cf. Combs v. State, slip op. at 13 (February 18, 1988)(Barkett and Kogan, JJ., specially concurring)("Caldwell indeed is applicable to Florida's sentencing scheme . . . [and] appellant's Caldwell claim should be sustained under the analysis of Justice O'Connor's concurrence, which constitutes the essential holding on which a majority of the Caldwell court agreed"), with Combs, slip op. at 1 (Overton, J.)("[W]e refuse to apply" Caldwell to Florida); Phillips v. Dugger, 515 So. 2d 227 (Fla. 1987); Darden v. State, 475 So. 2d 217, 221 (Fla. 1985). Cf. Foster v. State, 12 F.L.W. 598, 598-99 (1987)(Barkett, J., specially concurring, disagreed with the Court's Caldwell dictum and concluded that "the jury and judge acting together constitute the sentencer in Florida. Caldwell thus is binding upon both.").

Mr. White makes this argument because the very issue is pending before the United States Supreme Court in Dusser v.

Adams, 56 U.S.L.W. 3601 (March 7, 1988). Moreover, in Mann v. Duaaer, ___ F.2d ___ No. 86-3128 (April 21, 1988), the en banc Eleventh Circuit held that "the Florida [sentencing] jury plays an important role in the Florida sentencing scheme," id., slip op. at 17, thus:

> Because the jury's recommendation is significant . . . the concerns voiced in Caldwell are triggered when a Florida sentencing jury is misled into believing that its role is unimportant. Under such circumstances, a real danger exists that a resulting death sentence will be based at least in part on the determination of a decisionmaker that had been misled as to the nature of its responsibility. Such a sentence, because it results from a formula involving a factor that is tainted by an impermissible bias in favor of death, necessarily violates the eighth amendment requirement of reliability in capital sentencing. See Adams v. Wainwright, 804 F.2d 1526, 1532 (11th Cir. 1986), modified 816 F.2d 1493 (11th Cir. 1987), cert. granted, 56 U.S.L.W. 3608 (U.S. March 7, 1988).

Id.

Given the pendency of Duaaer v. Adams, supra, this Court should preserve its jurisdiction to address this claim since it is an issue upon which reasonable jurists disagree.

It is noteworthy that in Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986), this court, while underscoring the critical role the jury plays in Florida's capital sentencing scheme, referred to none other than Caldwell.

> It is appropriate to stress to the jury the seriousness which it should attach to its recommendation and, when the recommendation is received, to give it weight. To do otherwise would be contrary to Caldwell v. Mississippi, 472 U.S. 320, 105 S.Ct. 2633, 86 L.Ed. 2d (1985), and Tedder v. State, 322 So.2d 908 (Fla. 1975).

In Pope v. Wainwright, 496 So. 2d 798, 804-05 (Fla. 1986), cert. denied, 107 S. Ct. 1617 (1987), this Court, rejecting the defendant's Caldwell claim, stated

> We find nothing erroneous about informing the jury of the limits of its sentencing responsibility as long as the significance of its recommendation is adequately stressed.

(emphasis added). See also Smith v. State, 515 So. 2d 182, 185 (Fla. 1987)(jury instructions "properly stress[ed] the importance of jury's role. . . .").

Caldwell involves the essential eighth amendment requirements to the validity of any death sentence: that such a sentence be individualized (i.e., not based on factors having nothing to do with the character of the offender or circumstances of the offense), and that such a sentence be reliable. Id., 105 S. Ct. at 2645-46. The opinion established, for the first time, that comments which diminish a capital jury's sense of responsibility render the resulting death sentence unreliable and therefore constitutionally invalid. Caldwell represents a "substantial change" in eighth amendment law because it established a class of constitutional claims that did not

previously exist. Adams v. Dusser, supra, 816 F.2d at 1495-97, 1499. Thus, Caldwell's holding that the eighth amendment is violated by the "fear [of] substantial unreliability as well as bias in favor of death sentences" resulting from "state-induced suggestions that the sentencing jury may shift its sense of responsibility . . .," 105 S. Ct. at 2640, clearly represented a substantial change in the law. As such, Caldwell falls squarely within the standards enunciated in Witt v. State, 387 So. 2d 922 (Fla.), cert. denied, 449 U.S. 1067 (1980), and Downs v. Dusser, 514 So. 2d 1069 (Fla. 1987)(same).

It is significant that every judge of the Eleventh Circuit who has passed on a Caldwell claim has recognized the novelty of the constitutional doctrine which Caldwell established, see, e.g., Adams v. Wainwright, supra, 804 F.2d at 1526; Harich v. Dusser, No. 86-3167 (11th Cir. April 21, 1988), and the fact that Caldwell applies to the Florida capital sentencing scheme. Id.; Mann v. Dugger, supra.

Caldwell also substantially changes the standard of review, pursuant to which such issues must be analyzed: Under Caldwell, the State must show that comments such as those provided to Mr. White's sentencing jury had "no effect" on their verdict. Id. at 2646. No opinion had so held before Caldwell was announced. Cf. Thompson v. Dusser, 515 So. 2d 173 (Hitchcock changed standard of review). The State cannot show that the improper instructions

had "no effect" on the jury's sentencing determinations. Caldwell, 105 S. Ct. at 2645-2646.

The jury, in this case, could not have missed the impact of the pervasive improper instructions. Because they were not properly informed of their critical role, they could not have felt the full weight of their advisory responsibility. The court's isolated comment as to the "gravity of the [] proceedings" was contradictory of the several earlier remarks and was too little, too late. See RI. 1102. Moreoever, this sole comment did not elucidate the Tedder test. The jury at best could only have been confused due to the cross signals it received as to its role. A reasonable juror could well have been left with an understanding of the law that violated Caldwell. See Sandstrom v. Montana, 442 U.S. 510, 514 (1979)("whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable jury could have interpreted the instructions"). Faced with at odds comments, a juror could have believed that there was no cause to worry because the judge was the sentencer. "Perhaps an extraordinarly attentive juror might rationally have drawn [from these instructions] an inference," Washinston V. Watkins, 655 F.2d 1346, 1370 (5th Cir. 1981), of what his or her true function was. However, a juror could have concluded otherwise and the test is whether a juror could have interpreted the instructions in a manner so as to

violate the constitution. Id.; accord Cronin v. State, 470 So. 2d 802, 804 (Fla. 4th DCA 1985)(standard of review is "whether there was a reasonable possibility that the jury could have been misled"). Plainly a reasonable juror could have been. Cf. Godfrey v. Georgia, 446 U.S. 420, 428-29 (1980); Andres v. United States, 333 U.S. 740, 752 (1948).

The judge in the case at bar did not merely inform the jury that their role was to render an advisory sentence, See In re Standard Jury Instructions in Criminal Cases, 327 So. 2d 6 (Fla. 1976), modified and amended, 431 So. 2d 599 (Fla. 1981) and in 1985, The Florida Bar re Standard Jury Instructions in Criminal Cases, 477 So. 2d 985 (Fla. 1985). Instead he explicitly told them several times that he "was not obligated to accept their recommendation" (RI. 5-6, 116, 191, 1044). Each time the judge so instructed the jury, he violated Caldwell, by diluting the jury's sense of responsibility for its advisory sentence. As a result, the jury may have voted for death due to the misinformation it received. Likewise, Mr. White was denied a "reliable" and "individualized" sentencing determination. Resentencing is therefore required before a properly instructed jury.

III.

THE CONVICTION AND SENTENCE OF MR. WHITE RESULTING FROM A TRIAL IN WHICH ALL THE PROSPECTIVE BLACK JURORS WERE EXCLUDED VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Mr. White is black. The victims were white. The jury venire included at least seven and possibly eight black people who were removed from sitting as jurors. See Affidavit of Roy Mathews (App. D). One black juror was excused by defense counsel and six or seven were excused by the state. Of those excused by the state, three were challenged peremptorily, and three were challenged because of their beliefs on the death penalty. Ibid. The result was that all black people were removed and Mr. White was tried by an all-white jury.

These facts establish a prima facie case of purposeful discriminatory use of peremptory challenges in order to remove members of a cognizable racial group to which Mr. White belongs. Batson v. Kentucky, 106 S. Ct. 1712, 1722-23 (1986). State v. Neil, 457 So. 2d 481 (Fla. 1984) (peremptory challenges cannot be exercised solely on basis of race).

Mr. White's trial predated the Batson and Neil decisions. Had defense counsel, nevertheless, been sensitive to matters of racial discrimination in jury selection -- a concept that had been extant since Swain, infra -- there was nothing to prevent him from objecting to the prosecutor's actions during

impanelment. See RII. 331. Had he done so, he could have also urged the judge to conduct an inquiry in order to determine whether the prosecutor had "neutral explanations" to justify his challenges. Batson v. Kentucky, 106 S.Ct at 1723. Cf. Swain v. Alabama, 380 U.S. 202, 85 S.Ct 824 (1965). See Pearson v. State, 514 So. 2d 374, 376 (1987) citing Griffith v. Kentucky, 107 S. Ct. 708 1987, for the rule that Batson should be applicable to litigation pending on direct or federal review or not vet final when Batson was decided. See RII. 278.

The state denied Mr. White equal protection when it put him on trial before a jury from which members of his race had been purposely excluded.

IV.

THE TRIAL COURT IMPROPERLY EXCLUDED FROM THE GUILT PHASE OF TRIAL THOSE JURORS WHO EXPRESSED RESERVATIONS ABOUT CAPITAL PUNISHMENT, BUT WHO COULD MAKE A FAIR DETERMINATION AS TO GUILT, THEREBY VIOLATING MR. WHITE'S RIGHT TO A JURY COMPOSED OF A CROSS-SECTION OF THE COMMUNITY IN THE GUILT PHASE, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

Several jurors were challenged for cause. These exclusions were based on the jurors' responses to the prosecutor's voir dire questions. These jurors, while possibly expressing their inability to fairly determine the issue of the appropriate

punishment, could have rendered an unbiased version as to the matter of guilt or innocence despite their beliefs on the death penalty. The following colloquies formed the basis for excluding three of these jurors.

Juror DePascale expressed reservations about capital punishment, saying that he had a "problem" with it, but that he was not "totally against the death penalty.!! However, he also said that if he heard proof beyond a reasonable doubt, he "would be able to bring back a guilty verdict":

> MR. BLANKNER: All right. And, Mr. DePascale, how about yourself?
>
> MR. DePASCALE: I have a problem with it. I don't necessarily automatically feel that it's -- it would be impossible for me to give a fair verdict, but it would probably affect my opinion.
>
> MR. BLANKNER: Okay. When you say it would affect your decision, which decision do you mean, if you can explain to me? I know this puts you on the spot a little bit.
>
> MR. DePASCALE: I'm not sure that I'm against the death penalty, but I wouldn't say I'm in favor of it.
>
> MR. BLANKNER: Okay. Let me ask you this: Could you base your verdict whether or not the defendant is guilty of murder in the first degree, guilty of armed robbery solely upon the evidence as presented to you in the case?
>
> MR. DePASCALE: Yes. But as you asked someone before I'm not sure that I wouldn't be asking more than somebody else might be.

MR. BLANKNER: Okay. You might require the state to prove more than the law would require?

MR. DePASCALE: Well, I'm not really sure what the law would require. I would be more definite than the average person, probably.

MR. BLANKNER: Okay. Let me ask you the question this way: Would your opinion about the death penalty, your unsureness about the death penalty, prevent you from bringing back a verdict of guilty as charged, even though you were convinced -- Let me finish the question -- even though you were convinced beyond a reasonable doubt of the defendant's guilt of murder in the first degree?

MR. DePASCALE: If I was convinced beyond a reasonable doubt, I would be able to bring back a guilty verdict.

MR. BLANKNER: Okay.

MR. DePASCALE: I just think that convincing me might be more difficult because of the fact that the death penalty was involved.

MR. BLANKNER: Okay. Let me ask you this question: Would you only return a verdict of guilty with a recommendation of life imprisonment?

MR. DePASCALE: No, I couldn't say what the situation would be at that point. I'm trying to be, you know, as honest and tell you my feelings.

MR. BLANKNER: Yes, sir. We appreciate that. I know it's a tough question.

MR. DePASCALE: I really couldn't say a hundred percent that, you know, I would not in some circumstances, you know -- I'm not saying that I'm totally against the death penalty. So there might be an occasion, but

I believe that the odds would be, you know, severely against the -- against me --

MR. BLANKNER: Would I be correct in saying that you don't believe everyone charsed with first desree murders should recieve the death penalty?

MR. DePASCALE: That's risht.

MR. BLANKNER: Okay. Can you think of any factual situations in your mind, hypothetically, where you would think a person might deserve the death penalty?

MR. DePASCALE: I can't think of any right now, but Im not saying the circumstances may not exist.

(Tr. 29-31).

MR. DePASCALE: Im saying that the state may have a right to put someone else to death, but I personally would not feel that I have that right to recommend that.

MR. BLANKNER: Okay. Because of your beliefs like that, would that prevent you from returning a recommendation of death in any case or in all cases?

MR. DE PASCALE: I would have to say yes.

(Tr. 147).

Juror Harris said that he could serve during the guilt phase, even though opposed to the death penalty:

MR. BLANKNER: Okay. In other words, you could bring back of verdict of murder in the first desree. guilty?

MR. HARRIS: Yes, sir.

MR. BLANKNER: Even thoush the sentence could be death?

MR. HARRIS: Yes. sir.

MR. BLANKNER: Okay. Could you leave open in your mind the possibility of recommending death in a case?

MR. HARRIS: No, sir.

MR. BLANKNER: No. Is there any case whatsoever, no matter how aggravating the circumstances would be in that case, in which you -- Is there any sort of case in which you would recommend the imposition of the death penalty?

MR. HARRIS: No, sir.

(Tr. 137).

Juror Ferree expressed opposition to the death penalty, but was certain that she could serve during the guilt phase:

MR. BLANKNER: Okay. How about yourself, ma'am?

MS. FERREE: Im against it.

MS. BLANKNER: Okay. You are against the death penalty. Would your answers be the same as Ms. Hines (sic)?

MS. HIRES: Hires.

MR. BLANKNER: Hires. Im sorry. Excuse me. Ms. Hires.

MS. FERREE: No.

THE COURT: Mr. Blankner and Mr. Moran, would you approach the bench, please?

(Whereupon, a bench conference was held off the record.)

MR. BLANKNER: Is it Ms. Ferree?

MS. FERREE: Ferree.

MR. BLANKNER: Yes, ma'am. Are you opposed to the death penalty.

MS. FERREE: Yes.

MR. BLANKNER: Are you a member of any organization that asks for the abolition of the death penalty?

MS. FERREE: I'm Catholic, if that makes a difference.

MR. BLANKNER: Excuse me?

MS. FERREE: I'm Catholic.

MR. BLANKNER: Okay. Is that the basic reason you are against the death penalty?

MS. FERREE: I think it is, probably.

MR. BLANKNER: Okay. Would that influence you in returning a verdict in a capital case, knowing that the defendant could receive death?

MS. FERREE: I don't think it would make any difference.

MR. BLANKNER: Excuse me?

MS. FERREE: No, I don't think it would make any difference, no.

MR. BLANKNER: Okay. Would you hold the state to a greater burden of proof than the law requires? In other words, if the law requires that the state prove the defendant's guilt in any case, whether capital, whether how serious the case, that the state prove it beyond a reasonable doubt, can you hold the state to that burden of proof?

MS. FERREE: I'm sorry?

MR. BLANKNER: Can you hold the state to proving the case beyond a reasonable doubt, this case or any other criminal case? By law, the state is required to prove the case. We have the burden of proof. Do you understand that the defendant is presumed innocent until proven guilty by the evidence?

MS. FERREE: Yes. If you prove him guilty; yes, I can.

MR. BLANKNER: Okay. You can hold me to that burden of proof?

MS. FERREE: Yes.

MR. BLANKNER: Would you require the state to prove more than the law requires us to prove?

MS. FERREE: No.

MR. BLANKNER: Okay. Is there any case, any sort of case whatsoever in which you would vote to recommend the death penalty?

MS. FERREE: I don't think there would be.

MR. BLANKNER: Okay. You could not lay aside your personal feelings about the death penalty. Am I correct on that?

MS. FERREE: Right.

(Tr. 142).

This Court in Riley V. State 366 So. 2d 19, 21 (1979), rejected the argument that a defendant in a capital case was entitled to have on the jury which determines guilt or innocence, persons who are unalterably opposed to the death penalty. The United States Supreme Court in Lockhart V. McCree, 106 S.Ct 1758 (1986) rendered a similar decision holding that removal for cause

from the jury that decides the guilt phase of a capital case, persons whose attitudes toward capital punishment would prevent or substantially impair the performance of their duties at the punishment phase, does not violate the sixth amendment right to an impartial jury or to a jury drawn from a fair cross-section of the community.

It would appear that these decisions effectively dispose of Mr. White's claim. This may be true with regard to all but juror DePascale. Mr. De Pascale, as the record plainly shows, was not "unalterably opposed" to the death penalty. At the time of Mr. White's trial, Witherspoon was the law. Witherspoon v. Illinois, 391 U.S. 510, 88 S. Ct. 1770 (1968), stood for the proposition that removal of jurors merely because of general scruples against capital punishment denies the defendant his due process right to an impartial jury. A juror may be excluded for cause only if he makes it "unmistakably clear" that he would automatically vote against the death penalty or that he could not be impartial as to guilt.

As a more easily understood standard supposedly, the Supreme Court stated in Adams v. Texas, 448 U.S. 38, 45; 100 S.Ct 2521, 2526 (1980), that a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as

a juror in accordance with his instructions and his oath. Cf. Wainwright V. Witt, 469 U.S. 810, 105 S. Ct. 844, 852 (1985).

Mr. De Pascale's reservations about capital punishment were patently inadequate as a basis for excluding him since they constituted nothing more than "general objections" to the death penalty Witherspoon V. Illinois, supra, 391 U.S. at 522. This case is controlled by Witherspoon as it was applied in Gray V. Mississippi, 481 U.S. ___, 107 S. Ct. 2045, 2051-54 (1987). The Supreme Court in Gray held that the exclusion of a juror for cause, in a capital prosecution, who was not irrevocably committed to vote against the death penalty, regardless of the facts and circumstances that might emerge in the course of proceedings, was reversible constitutional error which could not be subject to harmless-error review. The Gray Court, reaffirmed its earlier decision in Davis V. Georgia, 429 U.S. 122, 97 S. Ct. 399, where it established a per se rule that a conviction could not stand if a juror was improperly excluded for his beliefs on capital punishment. Id. at 123-124.

Justice Rehnquist, writing for the Court in Wainwright V. Witt, 105 S. Ct. at 851-52 stated that "Witherspoon simply held that the State's power to exclude did not extend beyond its interest in removing those particular jurors opposed to capital punishment . . . [who] might frustrate the State's legitimate interest in administering constitutional capital sentencing

schemes by not following their oaths." Mr. De Pascale, although scrupled, was not so irrevocably opposed to the death penalty that he might have **"frustrated"** the state's interest in this case. The record herein establishes that Mr. White was convicted and sentenced to death after trial by a jury selected in violation of the standards enunciated in Witherspoon and recently applied in Gray. The violation is of constitutional magnitude and constitutes **"fundamental** error," **see** Steinhorst V. State, **412 So. 2d 332, 338** (Fla. **1982),** thereby infecting the validity of the death sentence in this case. Defense counsel's failure to timely object therefore cannot act as a bar to Mr. White being granted relief in the form of a new sentencing hearing.

V.

THE STATE'S INTENTIONAL WITHHOLDING OF EVIDENCE AND DECEPTION CONCERNING ITS EXISTENCE INTERFERRED WITH THE RIGHT OF EFFECTIVE ASSISTANCE OF COUNSEL, AND TO DISCLOSURE OF EXCULPATORY INFORMATION AND VIOLATED DUE PROCESS, CONTRARY TO FLORIDA RULE OF CRIMINAL PROCEDURE **3.220,** AND THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The fair trial requirement of the fourteenth amendment's due process clause demands that prosecutors "refrain from improper methods which are calculated to produce a wrongful conviction **. . . ."** Berser V. United States, **295** U.S. **78, 88 (1935).** In Bradv v. Maryland, **373** U.S. **83, (1963),** the United States Supreme court

held that the government is required to disclose all evidence favorable to the accused. Failure to do so, irrespective of the prosecutor's good faith or bad faith, constitutes a violation of the due process clause where the evidence is material either to guilt or punishment. Id. at 87. See also Pennsylvania v. Ritchie, 107 S. Ct. 989, 1001 (1987).

According to the decision in United States v. Baalev, 473 U.S. 667 (1985), the proper standard for determining a Bradv violation is whether there is a reasonable probability that the result would have been different had the information been disclosed. The term, reasonable probability, means a probability sufficient to undermine confidence in the outcome. Id. at 682. See also United States v. Agurs, 427 U.S. 97, 102 (1976) (conviction must be set aside if falsity could in any reasonable likelihood have affected jury's verdict). Asurs and Baalev read together mandate reversal of a conviction unless the failure to disclose was "harmless beyond a reasonable doubt." Bagley, 105 S. Ct. at 3382. See also Aranao v. State, 497 So. 2d 1161 (Fla. 1986) (Florida follows Bradv analysis).

A. The Fourth Bullet

The state contended at both the guilt and penalty phases of trial, that the killing of Melson and the shooting of Alexander were premeditated, "execution-style," during the course of a robbery. The defense, on the other hand, contended that there

was an argument over money that escalated into a struggle and that the shootings were the result of accident, reckless conduct, or self-defense.

The state's case was based primarily on circumstantial evidence. Central to the state's theory was testimony that witnesses heard three shots fired in quick succession. On this critical issue, corroborated by the physical evidence produced pretrial, the defense was deliberately and profoundly deceived. The truth of the matter, namely that four shots were fired in the store, was not disclosed to the defense until trial. A witness testified that he dug a bullet out of the wall in the room where the shooting took place within a week of the crime. (RI. 305-09). This fourth bullet provided substantial corroborating evidence for Mr. White's version of the crime. It also invited the need for expert ballistics testimony on the location and trajectory of the projectile. The defense had made a timely demand for discovery pursuant to the Florida Rules of Criminal Procedure (RI. 1583). Several deposed witnesses testified that they heard three shots emanate from the grocery store which was the scene of the crime. (RI. 1462 et seq. [F. Walker], 1225 et seq. [J. Walker], 1309 et seq. [Kuykendall]).

The evidence technician testified that two bullets were found, one on the ground and the other in Melson's head. Another unfired bullet was recovered from the front seat of the car.

Alexander's neck wound accounted for the third fired bullet (RI. 646).

At trial, the witnesses testified similarly with one significant exception. Contrary to his deposition testimony, Franklin Walker testified at trial that he had entered the scene of the crime the same day it occurred, and dug a bullet out of a window in the room in which the shooting took place. (RI. 305-06). At his deposition, Walker never mentioned that he had found this bullet. At trial, Walker said he he "lost" the bullet, but opined that it was a .38 caliber, the same as the other recovered bullets (RI. 306). Walker said that he had found the bullet "accidentally," and had then forgot about it. However, he recently "remembered" it and, he said, "told the police about it the other day." (RI. 307).

The state thus had knowledge of the fourth bullet before trial, was prepared for it, and argued its significance. (RI. 963). That fact was not disclosed to the defense before trial, and was not known until Walker testified.

The fourth bullet is significant because it tends to corroborate Mr. White's description of the episode. Unfortunately the information was disclosed too late to conduct any investigation or to adequately prepare a defense based on its existence. That four shots were fired is particularly important in rebutting the claim made by the state that Mr. White had

intended to kill the Tehanis. The state had used this subsequent attempt on the Tehanis to support a theory that the earlier shootings of Melson and Alexander were done "execution-style." The Tehanis testified that the defendant pulled the trigger twice, but that the gun did not fire. Mr. White testified that he never intended to kill the Tehanis. His intent was merely to scare them into moving into the freezer so that he could escape. (RI. 830).

The evidence that four bullets had been fired before the Tehanis entered the store, together with the evidence that the fifth, the unfired bullet, was found in Mr. White's car, demonstrates that Mr. White knew that there were no bullets left in the gun when he used it against the Tehanis because the truth is that there were not. The gun was a .38 caliber snub nose revolver with five chambers. Defense counsel knew that Mr. White had removed one bullet from the chamber, as is normal practice, to safeguard against the gun misfiring.

That the gun was empty when Mr. White used it to frighten the Tehanis would have also negated the state's argument to the jury that they find two aggravating circumstances premised on the theory that Mr. White was going to kill the Tehanis in order to eliminate witnesses, and that these attempted homicides were, moreover, further evidence that Melson's killing was cold and calculated.

The state had a duty to notify defense counsel of Walker's revelation as to the fourth bullet so that counsel could have investigated that fact and used it in his defense. The location of the bullet would have been useful in reconstructing the crime scene. Its trajectory and impact on the wall would have provided related evidence as to whether Alexander's arm wound was defensive, and whether the bullet's residual characteristics were consistent with Mr. White's version that a struggle had preceded and provoked the shootings.

The late revelation as to the fourth bullet compromised defense counsel's ability to effectively use this evidence to Mr. White's advantage. As the record reflects, defense counsel was able only to argue that the fourth bullet acted to impeach a witness's earlier testimony. (RI. 937). The state, knowing defense counsel's impairment, capitalized on his inability to formulate an argument on short notice by withholding from him knowledge of this exculpatory evidence. While relying on its theory that Mr. White intended to kill the Tehanis, the state denied him a crucial fact that would have corroborated his testimony that he thought the gun was empty when he pulled the trigger.

B. The Money Found on the Victim After the Crime[18]

Mr. White's testimony was that he had entered the grocery store with five $100 bills, bought some beer and asked Alex Alexander to give him change. The evidence at trial showed Mr. White had $388 in his possession when he was taken into custody, and that the store's cash register was empty. Mr. White's fingerprints were not on the register. Prints were taken off the money that was recovered. There was evidence at trial that Alex Alexander had $1,301 in his pockets when he was brought to the hospital. (RI. 543-45). This fact was not disclosed to the defense before trial. The state had the obligation to do so. A fingerprint analysis could have been performed on the money found on Alexander. Evidence that Mr. White's prints were on any of those bills would have corroborated Mr. White's version. The state's failure to disclose or to scientifically test this evidence deprived the defendant of an effective defense.

Needless to say, defense counsel was again derelict for failing to immediately ask for a Richardson [v. State, 246 So. 2d 771, 775 (Fla. 1971)] hearing when the exculpatory evidence surfaced. Had he done so, the judge would have been obligated to conduct such an inquiry to determine whether there had been

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[18]This segment of the argument was originally pled as a separate claim (111) in Mr. White's Motion To Vacate Judgment and Sentence.

noncompliance with Fla. R. Crim. P. 3.220; whether the noncompliance resulted in harm, and whether and what sanctions would have been appropriate.

The state's failure to disclose the exculpatory evidence as to either the fourth bullet or the money, violated Fla. R. Crim. P. 3.220, and the Brady rule. Since this violation was sufficient to have affected the outcome of the trial, it also satisfied the Bagley standard. The at-trial revelation of the exculpatory evidence prevented the defense from subjecting the "prosecutor's case to the crucible of adversary testing." United States v. Cronic, 104 S. Ct. at 2047 thus constituting a clear-cut violation of Mr. White's sixth amendment guaranteed right of confrontation and cross-examination. Since the withheld evidence supported a defense which could have resulted in a verdict of less than first degree murder, if not acquittal, the withholding also violated the eighth and fourteenth amendment rights to a fundamentally fair and reliable capital trial and sentencing determination.

VI.

THE SENTENCE OF DEATH WAS OBTAINED WITHOUT A SUFFICIENT FINDING OF INTENT TO KILL ON THE PART OF THE DEFENDANT, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION

The indictment charged Mr. White with murder in the first degree and armed robbery (RI. **1576**). During voir dire, the prosecutor told the jury that in order to find the defendant guilty of the former, it was not necessary that the state prove intent to kill so long as they prove that the killing occurred during the commission of a felony (RI. **52**). The state presented its case under the alternative theories of premeditated and felony murder (RI. **914-915**) and the judge instructed on both. The jury returned a general verdict, not specifying the theory on which they based their decision. The fact that the jury convicted the defendant of armed roobbery strongly suggests that they were persuaded moreso with the state's felony murder theory (RI. **922**). The circumstantial evidence introduced at trial made it all the more likely that this was the theory they accepted rather than that of premeditated murder (**see** RI. **527, 533, 537-545, 565, 593**).

A general verdict is constitutionally illegal if one of the grounds upon which the jury was instructed and could have based their finding is insufficient or unconstitutional. Strombera v. California, **283** U.S. **359 (1931)**, cited with approval Zant v.

Stephens, 103 S. Ct. 2733 (1983). Intent to kill cannot be imputed on the facts in the case at bar.

In Enmund v. Florida, 458 U.S. 782, 102 S. Ct. 3368 (1982), the Supreme Court held that the Eighth Amendment forbids imposition of the death penalty "regardless of whether [the defendant] intended or contemplated that a life be taken." Id. at 801. To do so would run contrary to the purposes that the death penalty is said to serve: retribution and deterrence. The position that capital punishment will deter one who lacked the intent to take a life is certainly untenable. Furthermore, eighth amendment law requires a balance to be struck between the degree of retribution and the degree of the defendant's culpability. Accordingly, where the defendant possesses no intent that a killing take place, the death penalty is unconstitutionally excessive. See Tafero v. State, 459 So. 2d 1034 (Fla. 1984); Cabana v. Bullock, 106 S. Ct. 689 (1986).

Mr. White provided the only direct (and exculpatory) evidence of how the shooting actually occurred. The state's theory, based solely on circumstantial evidence, was purely speculative. Based on the paucity of facts, what actually occurred is so conjectural that the only intent the jury could have found beyond a reasonable doubt, was the intent to commit a felony. Armed robbery does not ipso facto reflect the necessary "reckless indifference to human life," Tison v. Arizona, 107

S. Ct. 1676, 1688 (1987), that is necessary for a sentence of death, id. at 1683. Under Tison, and based upon the record in this case, the eighth amendment will not tolerate Mr. White's execution since his state of mind at the time was not proved. That someone died during the course of an armed robbery is not a sufficient predicate. The execution of Mr. White for having an intent to steal violates the eighth and fourteenth amendments.

VII.

ELECTROCUTION, AND THE SURGICAL REMOVAL OF THE ELECTROCUTED PERSON'S BRAIN FOR STUDY POST-MORTEM, VIOLATES CONTEMPORARY STANDARDS OF DECENCY, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS

Execution of condemned inmates by electrocution is barbaric and inhumane since it does not minimize the unnecessary pain, violence and mutilation proscribed by the eighth and fourteenth amendments and the prohibition against cruel and unusual punishment. See Petitioner's Motion to Vacate Judgment and Sentence, Claim IX (RII. 523-532).

Surgical removal by Florida medical personnel of an executed person's brain for purposes of subsequent neurobiological study or experimentation on this organ is also cruel and unusual infliction of punishment. Ibid.

The process preceding an execution, the act itself and what occurs in the aftermath, does not comport with evolving standards

of human dignity, hence are violative of the eighth and fourteenth amendments.

CONCLUSION

Based on all of the reasons set forth above, Mr. White respectfully requests that this Court reverse his convictions and sentence and remand this case for a new trial or, alternatively, reduce his conviction of murder in the first degree and armed robbery and remand the case for resentencing.

RESPECTFULLY SUBMITTED,

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