IN THE SUPREME COURT OF FLORIDA

CASE NO. 86,900 AND 86,901

JERRY WHITE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

JERRY WHITE,

Appellant,

v.

ROBERT A. BUTTERWORTH, ETC.,

Appellee.

ON APPEAL FROM THE NINTH JUDICIAL CIRCUIT, IN AND FOR ORANGE COUNTY,
AND THE SECOND JUDICIAL CIRCUIT IN AND FOR LEON COUNTY

SUMMARY INITIAL BRIEF ON APPELLANT'S APPEAL FROM THE DENIAL OF HIS MOTION 3.850 RELIEF AND IN SUPPORT OF APPELLANT'S APPLICATION FOR STAY OF EXECUTION; AND SUMMARY INITIAL BRIEF OF APPELLANT'S APPEAL FROM DENIAL OF HIS CIVIL SUIT PURSUANT TO CHAPTER 119 AGAINST THE ATTORNEY GENERAL

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

TODD G. SCHER
Florida Bar No. 0899641
Assistant CCR

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

Counsel for Jerry White

TABLE OF CONTENTS

TABLE OF AUTHORITIES

INTRODUCTION

According to Judge Evans, Mr. White's current 3.850 challenge to his death sentence is "troublesome" (T. 11/27/95 hearing at 54) and "difficult" (T. 11/29/95 hearing at 59). According to Assistant Attorney General Richard Martell during the oral argument before this Court on November 30, 1995, Mr. White's case is not the most serious and aggravated death case.

In Claim I of the pending 3.850 motion, Mr. White presented his claim that he did not receive an adequate adversarial testing during his 1982 trial and sentencing. Mr. White specifically relied upon documents which were first disclosed to his collateral counsel in November of 1995.

Mr. White submitted an affidavit from his trial counsel, Emmett Moran, in which Mr. Moran stated under oath that he had not received at trial: 1) the sworn statement of Henry Tehani, 2) the sworn statement of Pamela Tehani, 3) the sworn statement of Walter Gallagher, 4) the narrative of Deputy Harrielson, and 5) FDLE notes which included diagrams of the blood and gun powder on Mr. White's clothing. Further, Mr. Moran stated in his affidavit that he would have used these documents had he been aware of them to negate aggravation and establish mitigating circumstances.

Mr. Moran also attested that the morning the penalty phase began, he received a 1967 PSI and a 1968 PSI reflecting the fact that Mr. White's IQ was 72. Mr. Moran has stated under oath that he failed to develop or present this evidence to the jury because he was overwhelmed and worn out. Mr. Moran also stated that due to his anger with Mr. White's prior collateral counsel he did not disclose to them Mr. White's IQ score.

In circuit court Mr. White also submitted an affidavit from Mr. White's trial prosecutor, Francis Wesley Blankner, Jr., in which Mr. Blankner explained that he had concerns at trial about Mr. Moran's ability to provide effective representation. Mr. Blankner during trial observed that Mr. Moran seemed confused or fatigued. Long after the trial and the 1986 evidentiary hearing, Mr. Blankner learned that Mr. Moran's confusion had not been a ploy but was the result of actual physical illness. Mr. Blankner first informed Mr. White's collateral counsel of this new information in 1995; this information was not available in 1986. Mr. Blankner's conclusion is that "the penalty phase appeared inadequate."

Armed with the record of a 72 IQ, collateral counsel has obtained a neuropsychological evaluation which establishes that Mr. White suffers from mental retardation and brain damage. As a result, Dr. Barry Crown has concluded that two statutory mitigating factors exist along with five non-statutory mitigators.

These facts (the 72 IQ and all of material Mr. Moran says was not provided at trial) were not available to either Mr. White or his counsel, Steve Malone, in 1985. As a result, these facts could not be pled in 1985. These facts were not available to either Mr. White or his counsel, Billy Nolas, in 1990. These facts first became available to Mr. White and/or his collateral counsel in November of 1995. In filing his 3.850 below, Mr. White's current counsel contacted prior collateral counsel and obtained affidavits from them regarding their lack of knowledge of these new facts and their diligence in representing Mr. White. As the affidavits establish, prior counsel had made the appropriate Chapter 119 requests in October of 1985 prior to filing Mr. White's original

3.850. As the affidavits establish, Chapter 119 requests were made again in 1990 of all the appropriate state agencies. However, none of the documents at issue were disclosed. Collateral counsel also met with Mr. Moran in order to obtain materials from him, and again Mr. Moran did not provide any of the documents at issue. Collateral counsel in 1985 and in 1990 could not plead facts which were not disclosed to them either by the State or by trial counsel.

In the circuit court proceedings, Assistant State Attorney Paula Coffman represented the State. In argument on the afternoon of Monday, November 27th, Ms. Coffman specifically waived a challenge to the affidavits of prior collateral counsel and conceded due diligence as to Claim I:

> And I will candidly admit that the existing record in this case does not refute the allegations that prior public record demands have been made and if they have been made, that these six or seven items that they're now claiming they've never seen before were not included in those prior disclosures.

(T. 11/27/95 hearing at 32-33).

Ms. Coffman indicated that for strategic reasons she would concede due diligence and that Mr. White's claim fit with the first exception discussed in Rule 3.850(b):

> Your Honor, the fact remains that there is no file within the confines of this warrant to disprove the Chapter 119 allegations in this case. There simply isn't. We would still be here when this third warrant expires, Judge. And, Your Honor, I would point out that what we have here is a fairly short lived window of opportunity, only the third window since the murder in this case that was pronounced by Judge Stroker back in 1982. And, Your Honor, even if we went through all of that, even as a matter of principle I was prepared to stay, go ahead and ask the judge to grant the stay and we'll stay here and litigate the Chapter 119, there would

> be nothing to preclude CCR from doing the same thing the next time, five years from now when a fourth warrant is signed, exactly what they've done in this case, which is to make allegations that would require us to stay here for the 11th hour on a warrant until we disprove them, hopefully.

(T. 11/27/95 hearing at 233-34). Ms. Coffman later reiterated "again the State is not contesting whether or not they had this evidence previously" (T. 11/27/95 hearing at 37). Later still, Ms. Coffman asserted: "[t]he state's position [is] that everything in the motion is true about not having this evidence previously" (T. 11/27/95 hearing at 41). Accordingly, the merits of Claim I were before the circuit court upon the State's stipulation.

On Monday evening when the circuit court orally ruled on Mr. White's 3.850, the judge specifically ruled on the merits of Claim I. However, the written order issued the next morning seemed unclear to undersigned counsel. Accordingly, a motion for rehearing and clarification was filed. The State, through Paula Coffman, responded:

> 2. Moreover, contrary to White's assertion, he actually received the BEST of both worlds: 1) no necessity of proving due diligence and 2) consideration of his claims on their merits in the absence of any proof that he was entitled to such consideration.

Clearly, Ms. Coffman also understood that the judge had accepted her waiver of any due diligence argument and that accordingly the claim was denied on the merits.

Moreover, at the oral argument on the rehearing motion, Judge Evans unequivocally stated that he had considered and denied Claim I on the merits:

> THE COURT: I'm viewing the evidence as to ineffective assistance of counsel as not being time barred.
>
> MR. MCCLAIN: Okay.

THE COURT: Okay?

MR. MCCLAIN: Yes.

THE COURT: I think it's new evidence. So what I've attempted to do is accept it at this point as being true without an evidentiary hearing and saying under Strickland, if I were to accept that as true, is it sufficient in my mind to have changed the outcome of the trial.

(T. 11/28/95 hearing at 5-6). This specifically included Mr. White's allegation of ineffective assistance as to the 72 IQ.

Thus, the issue before this Court is the merits of Mr. White's claim that he did not receive an adequate adversarial testing in 1982 when the judge and jury did not get the benefit of the documents at issue in the current 3.850. Mr. White's 3.850 motion should be treated as if it were a timely filed initial motion. Provenzano v. State, 616 So. 2d 428, 430 (Fla. 1993)("Our remand after Provenzano's initial 3.850 motion was designed to put Provenzano in the same position he would have been in if the files had been disclosed when first requested").

As Mr. White's appeal now is before this Court as a timely filed initial motion containing an affidavit of trial counsel, Emmett Moran, an affidavit of the trial prosecutor, Francis Wesley Blankner, and the report of Dr. Barry Crown setting forth two statutory mitigating circumstances and five nonstatutory mitigating circumstances, an evidentiary hearing is required.

In considering the merits of Claim I, Judge Evans applied the wrong legal standard. He erroneously applied the standard from Jones v. State, 591 So. 2d 911, 915 (Fla. 1991), requiring Mr. White to prove that new evidence "would probably produce

an acquittal on retrial." Order at 4. He failed to apply the proper Brady standard as discussed in Scott v. State, 657 So. 2d 1129 (Fla. 1995)(failure to disclose undermines integrity of the death sentence and thus warranted evidentiary hearing). Moreover, he failed to accept as true Dr. Crown's proffered evaluation finding two statutory mitigating factors and five non-statutory mitigating factors when he noted that in "Taylor v. State ... that mitigating circumstance was given slight weight" (T. 11/28/95 hearing at 17). And he failed to consider the cumulative effect to consider the cumulative effect of the non-disclosure of the new evidence as required by Kyles v. Whitley, 115 S. Ct. 1555 (1995). Since taking the facts as plead as true, undermines confidence in the outcome of the penalty phase, this Court must reverse and remand for an evidentiary hearing.

STATEMENT OF THE FACTS

At Mr. White's trial, the principal issue was whether Mr. White was the first person shot on the morning of March 8, 1981, at Alexander's Grocery Store in Taft, Florida, or whether he was the last person shot. The prosecutor argued that during the course of a robbery, Mr. White shot and killed James Melson and permanently injured Alexander Alexander. Subsequently, the prosecution contended that Mr. White attempted to murder Henry Tehani and his twelve year old daughter, Pamela. After the Tehani's fled when the gun failed to fire, the prosecutor contended that Mr. White accidently shot himself, the bullet passing through Mr. White's penis and through the side and back of his left leg.

The defense at trial and in the penalty phase was that during an altercation between Mr. Melson and Mr. White, Mr. White's gun discharged, the bullet passing

through Mr. White's penis and the side and back of his left leg. Thereafter, a struggle ensued which resulted in Mr. Melson's death and Mr. Alexander's injuries. The defense asserted that Mr. White's encounter with the Tehanis occurred as Mr. White was trying to leave the grocery store. Mr. White's gun was out of bullets, he was in pain and not thinking clearly. He never intended to hurt the Tehanis, let alone kill them.

The issue of when Mr. White was shot was pivotal, particularly to the outcome of the penalty phase. No conclusive crime scene evidence existed. The prosecutor argued that the minimal amount of Mr. White's blood was consistent with Mr. White receiving his injuries right before his fleeing the scene. Certainly, the prosecutor used the testimony of the Tehani's to portray Mr. White as a cold blooded killer as opposed to a scared, injured man with a bullet hole in his penis.

Undisclosed to Mr. White's trial counsel was evidence that there was more of Mr. White's blood by the front of the store than the State's witnesses at trial acknowledged. Undisclosed to Mr. White's trial counsel was evidence that the blood flowing from Mr. White's injuries went inside his shoes as an undisclosed diagram from a forensic expert at FDLE demonstrated. Undisclosed to trial counsel was a diagram of Mr. White's shirt showing smears of blood all over consistent with a struggle with Mr. Nelson after Mr. White had been shot and was bleeding.

Undisclosed to Mr. White's trial counsel were sworn statements by the Tehanis that were inconsistent with their trial testimony. Henry Tehani's statement immediately after the incident did not indicate that Mr. White ever tried to shoot him or his daughter. The statement does not reflect that he noticed a gun until Mr. White was fleeing the

back of the grocery store.[1] This statement negates the State's claim Mr. White attempted to murder the Tehanis.

Pamela Tehani's sworn statements indicated that Pamela, a twelve year old, said that the gun had "no bullets" which had been Mr. White's testimony at trial. If Pamela were correct that there were no bullets, then Mr. White could not have shot himself moments later. Pamela's statement is evidence that Mr. White had already been shot and that his testimony that his gun was out of bullets and he had no intention of shooting the Tehani's was correct.

Undisclosed to Mr. White's counsel until the morning of the penalty phase was the fact that Mr. White had a 72 IQ. When he learned of this, Mr. White's trial counsel did not ask for a continuance, he did not ask for a mental health expert, he did not present to the jury evidence to establish mental retardation. Trial counsel has explained that this failure was because he was physically ill and overwhelmed by the guilty verdict. Trial counsel has acknowledged he "had no business representing Mr. White."

The judge and the jury were given four aggravating circumstances to balance against what the judge called no mitigation which was presented by the defense. On direct appeal this Court struck two of the four aggravators, but refused to order a resentencing since trial counsel had presented no mitigation.

---

[1]In his Answer Brief, the Assistant Attorney General refers to trial counsel's discussion with Mr. Tehani at his deposition regarding a written statement. The written statement Mr. Moran was referring to was Deputy Finlay's report of what "reporter," i.e., Mr. Tehani had told him. In this account, Mr. Tehani supposedly indicated that his daughter fled the store when the "B/M" said "this is a robbery." After Pam was outside, "B/M then began pulling the trigger on the revolver." This is an entirely different statement than the one at issue, which Assistant State Attorney Coffman stipulated was new evidence. The Assistant Attorney General, as explained infra, has improperly refused to accept Mr. Coffman's stipulation as binding upon him.

On September 30, 1985, Governor Graham signed a warrant setting Mr. White's execution for October 23, 1985. Steve Malone, an Assistant CCR, assumed representation of Mr. White.[2] The State stipulated below that Mr. Malone exercised due diligence in October of 1985, but was not provided: 1) the sworn statement of Henry Tehani; 2) the sworn statement of Pamela Tehani; 3) the sworn statement of Walter Gallagher; 4) the narrative of Deputy Harrielson; 5) the FDLE handwritten notes including diagrams of blood and gunpowder residue on Mr. White's clothing; 6) the 1967 PSI; and 7) the 1968 PSI. The Assistant State Attorney, Paula Coffman, specifically conceded: "And I will candidly admit that the existing record in this case does not refute the allegations that prior public record demands have been made and if they have been made, that these six or seven items that they're now claiming they've never seen before were not included in those prior disclosures" (T. 11/27/95 hearing at 33).

On June 12, 1990, Governor Martinez signed a warrant setting Mr. White's execution for July 17, 1990. Billy Nolas had taken over as counsel for Mr. White after Mr. Malone departed. The State stipulated below that Mr. Nolas exercised due diligence in July of 1990, but was not provided: 1) the sworn statement of Henry Tehani; 2) the sworn statement of Pamela Tehani; 3) the sworn statement of Walter Gallagher; 4) the narrative of Deputy Harrielson; 5) the FDLE handwritten notes including diagrams of blood and gunpowder residue on Mr. White's clothing; 6) the 1967 PSI; and 7) the 1968

---

[2]The Assistant Attorney General asserts in his brief: "During all these time periods, White was represented by the same collateral counsel as he is now." Answer Brief at 28. This statement is patently false. Undersigned counsel, Martin McClain and Todd Scher were assigned on November 1, 1995, to assume representation of Mr. White. Neither Mr. McClain nor Mr. Scher had ever previously been Mr. White's counsel or had any involvement in his case whatsoever, prior to November 1, 1995.

PSI. The Assistant State Attorney, Paula Coffman, specifically conceded: "And I will candidly admit that the existing record in this case does not refute the allegations that prior public record demands have been made and if they have been made, that these six or seven items that they're now claiming they've never seen before were not included in those prior disclosures" (T. 11/27/95 hearing at 33).

On October 13, 1995, Governor Chiles signed a warrant setting Mr. White's execution for December 1, 1995. On November 1, 1995, undersigned counsel assumed representation of Mr. White. Undersigned counsel were provided the seven items that Ms. Coffman stipulated were "new." Based upon those "new" facts, Mr. White on November 27, 1995, presented to circuit court his claim that he was denied a constitutionally adequate adversarial testing. The circuit court denied Mr. White's claim specifically on the merits:

> THE COURT: I'm viewing the evidence as to ineffective assistance of counsel as not being time barred.
>
> MR. MCCLAIN: Okay.
>
> THE COURT: Okay?
>
> MR. MCCLAIN: Yes.
>
> THE COURT: I think it's new evidence. So what I've attempted to do is accept it at this point as being true without an evidentiary hearing and saying under Strickland, if I were to accept that as true, is it sufficient in my mind to have changed the outcome of the trial.

(T. 11/28/95 hearing at 5-6).[3] A timely notice of appeal followed.

---

[3]The Assistant Attorney General falsely asserts in his Answer Brief: "Judge Evans found all matters to be procedurally barred, and that the motion itself was time barred." In fact, the (continued...)

As to Case No. 86,901, White v. Butterworth, after Mr. White unsuccessfully tried to bring his Chapter 119 complaint against the Attorney General's Office in proceedings on a motion to compel in the 3.580 court, Mr. White filed a complaint for disclosure of public records in Leon County, Florida, on November 17, 1995, against Robert A. Butterworth, Attorney General, State of Florida, pursuant to Chapter 119 and Brady v. Maryland, 373 U.S. 83 (1963). On November 27, 1995, the Defendant Butterworth filed an answer with affirmative defenses, arguing inter alia that the Leon County court had no jurisdiction to determine whether the materials it had withheld from Mr. White constituted exculpatory evidence. On November 29, 1995, Circuit Court Judge F. E. Steinmeyer, III, denied Mr. White's complaint, specifically holding that "[a]lthough Defendant [Butterworth] has a continuing obligation to disclose Brady material, such claims must be brought in a court of competent jurisdiction." This timely appeal follows. This appeal has been joined with the Rule 3.850 for the purposes of expediency.

---

[3](...continued)
Assistant State Attorney below described the order as providing Mr. White "consideration of his claims on their merits." Response to Motion for Rehearing, paragraph 2.

ARGUMENT I

MR. WHITE WAS DENIED AN ADVERSARIAL TESTING WHEN CRITICAL, EXCULPATORY EVIDENCE WAS NOT PRESENTED TO THE JURY DURING THE GUILT OR PENALTY PHASES OF MR. WHITE'S TRIAL. AS A RESULT, MR. WHITE WAS DENIED HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS, AND CONFIDENCE IS UNDERMINED IN THE RELIABILITY OF THE JUDGMENT AND SENTENCE.

I. THE MERITS OF THIS CLAIM ARE BEFORE THIS COURT.

On November 27, 1995, Mr. White filed his pending 3.850 motion in circuit court. In this motion, Mr. White presented as Claim I his contention that he was deprived of a constitutionally adequate adversarial testing. Mr. White presented this claim in precisely the same fashion that Mr. Hildwin presented his claim of an inadequate adversarial testing in Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995).

Mr. White acknowledged that this was his third 3.850 and that it was filed more than two years after his conviction and sentence of death became final. Mr. White, however, argued that the motion was properly filed under Rule 3.850(b) which provides:

> **(b) Time Limitations.** A motion to vacate a sentence that exceeds the limits provided by law may be filed at any time. No other motion shall be filed or considered pursuant to this rule if filed more than 2 years after the judgment and sentence become final in a noncapital case or more than 1 years after the judgment and sentence become final in a capital case in which a death sentence has been imposed unless it alleges that
>
> (1) the facts on which the claim is predicated were unknown to the movant or the movant's attorney and could not have been ascertained by the exercise of due diligence, or
>
> (2) the fundamental constitutional right asserted was not established within the period provided for herein and has been held to apply retroactively.

Mr. White argued that he fit within the parameters of the first exception. To support his argument Mr. White submitted affidavits from prior collateral counsel and their investigators detailing their diligence and the failure of the State and trial counsel to previously provide the documents discovered in November of 1995 which established the basis for the current claim. Mr. White asserted that because the State and trial counsel had not disclosed the requested evidence to collateral counsel despite due diligence, Mr. White should be "put [ ] in the same position he would have been in if the files had been disclosed when first requested." Provenzano v. State, 616 So. 2d at 430.

In proceedings before Judge Evans on Monday, November 27th, Paula Coffman, as counsel for the State, specifically conceded that Claim I of the 3.850 should be treated as fitting within the first exception of Rule 3.850(b) as argued by Mr. White. Ms. Coffman explained on the record that this waiver was knowledgeably and intentionally:

> And I will candidly admit that the existing record in this case does not refute the allegations that prior public record demands have been made and if they have been made, that these six or seven items that they're now claiming they've never seen before were not included in those prior disclosures. I would personally love to litigate whether or not CCR has ever made a demand on the office of the state attorney for the -- prior November of this year. And if they can prove that they have, I would dearly love to have them prove that they didn't get everything that was in Mr. White's file, every file that we still maintain, those that haven't previously been destroyed due to the passage of time.
>
> Your Honor, the fact remains that there is no file within the confines of this warrant to disprove the Chapter 119 allegations in this case. There simply isn't. We would still be here when this third warrant expires, Judge. And, Your Honor, I would point out that what we have here is a

> fairly short lived window of opportunity, only the third window since the murder in this case occurred to effectuate the sentence in this case that was pronounced by Judge Stroker back in 1982. And, Your Honor, even if we went through all of that, even as a matter of principle I was prepared to stay, go ahead and ask the judge to grant the stay and we'll stay here and litigate the Chapter 119, there would be nothing to preclude CCR from doing the same thing the next time, five years from now when a fourth warrant is signed, exactly what they've done in this case, which is to make allegations that would require us to stay here for the 11th hour on a warrant until we disprove them, hopefully.

(T. 11/27/95 hearing at 32-34)(emphasis added).

Ms. Coffman not only waived the issue of due diligence, she conceded she had "no file within the confines of this warrant to disprove the Chapter 119 allegations in this case. There simply isn't." Ms. Coffman explained:

> The way we've decided to approach this, Judge, since it's our contention that we would still be having this hearing when December 5th comes and goes if we litigate the Chapter 119 claims, Judge, is basically in our response we have decided to accept the allegations as true, that Mr. White didn't know about any of these things previously. And it boils down, Judge, with respect to claim one, anyway, and I'll talk about why the second two claims aren't cognizable regardless of what they had or didn't have.

(T. 11/27/95 hearing at 36)(emphasis added). Later, she reiterated: "again the state is not contesting whether or not they had this evidence" (T. 11/27/95 hearing at 37). Later still she asserted: "[t]he state's position [is] that everything in the motion is true about not having this evidence previously. We don't think it would make any difference in this case" (T. 11/27/95 hearing at 41).

Judge Evans explained at the hearing on the motion for rehearing that he accepted the State's concession:

> THE COURT: I'm viewing the evidence as to ineffective assistance of counsel as not being time barred.
>
> MR. MCCLAIN: Okay.
>
> THE COURT: Okay?
>
> MR. MCCLAIN: Yes.
>
> THE COURT: I think it's new evidence. So what I've attempted to do is accept it at this point as being true without an evidentiary hearing and saying under Strickland, if I were to accept that as true, is it sufficient in my mind to have changed the outcome of the trial.
>
> MR. MCCLAIN: Okay. Your Honor. And that I'm not sure was clear in the order and that's why I filed the clarification because that's what I understood was your position last night. And so that's what I wanted to have clarified.

(T. 11/28/95 hearing 5-6).

In fact in responding to Mr. White's motion for rehearing, the State agreed that the merits of Claim I were before the circuit court:

> 2. Moreover, contrary to White's assertion, he actually received the BEST of both worlds: 1) no necessity of proving due diligence and 2) consideration of his claims on their merits in the absence of any proof that he was entitled to such consideration.

Accordingly, the State expressly, explicitly, and knowingly waived any argument that the merits of Claim I are not before the Court. This Court has held: "Contemporaneous objection and procedural default rules apply not only to defendants, but also to the State." Cannady v. State, 620 So. 2d 165, 170 (Fla. 1993). The State is thus bound by the concession below that the merits of Claim I are properly before the Court.

The brief filed by the Attorney General in this Court tries to ignore the explicit, knowing, intelligent, and strategic waiver made by Ms. Coffman. This is improper. The arguments raised by the Assistant Attorney General could have been easily addressed by Mr. White in circuit court had the State raised the issue. For example, the Assistant Attorney General asserts that Henry Tehani's sworn statement was discussed during Mr. Tehani's pretrial deposition and thus prior collateral counsel should have known of its existence (Answer Brief at 32). Had this matter been raised in the circuit court, Mr. White's undersigned counsel could have explained that Emmett Moran had been discussing with Mr. Tehani at the deposition the handwritten report prepared by Deputy Finlay detailing what Mr. Tehani had related to Deputy Finlay: "The reporter Tehani stated he had entered the store with his 12 yr. old daughter (Wit. #2) to purchase groceries, the B/M was standing inside the store's front door reading a magazine." This handwritten report by Finlay goes on to relate a version of the events which was different from Mr. Tehani's trial testimony: "The B/M approached the reporter and his daughter stating this is a robbery .... At that time the 12 yr. old daughter (Wit. #2) ran towards the front of the store and out the door. The B/M then began pulling the trigger on the revolver." This written report by Deputy Finlay also contained Mr. Tehani's description of the "B/M."

Since the State did not contest the fact that Mr. Tehani's sworn statement was not new, Mr. White was not in a position to develop the record on this point. Certainly, had the State contested the matter below, Deputy Finlay's report would have been placed in the record through the testimony of Emmett Moran. The simple fact of the matter, which

the Assistant Attorney General would prefer to ignore, is that Ms. Coffman was right to concede that the materials Mr. White alleged were new were in fact new and not previously disclosed.

In arguing that Deputy Gallagher's sworn statement is not new, The Assistant Attorney General also ignores the fact that Deputy Gallagher's sworn statement completely contradicts Greg Taylor's trial testimony. In his brief, the Assistant Attorney General argues that Deputy Gallagher's reveals nothing new. However, Deputy Taylor testified at trial that there was only one blood stain by the front counter (R. 592), and that he obtained a blood swab from that one blood stain for testing (R. 604). Deputy Gallagher's sworn statement was that "in front of the counter there were three (3) blood splatters." Again below, Ms. Coffman wisely conceded this was new evidence. We now know for the first time that according to Deputy Gallagher there were two blood spatters that Deputy Taylor did not see, test, or photograph.

Similarly, Ms. Coffman conceded that the 72 IQ[4], the FDLE materials, all the items attached to Mr. Moran's affidavit (see App. 1) were new. Given that concession, the Assistant Attorney General cannot now on appeal contest whether the evidence is new. Cannady v. State. Accordingly as this Court held in Provanzano v. State, 616 So. 2d at 430, Mr. White should be "put [ ] in the same position he would have been in if

---

[4]As to the IQ, the Assistant Attorney General relies upon Mr. White's previous Claim of ineffective assistance of counsel arising from Mr. Moran's question of Mr. White's mother as whether she knew of a 74 IQ. Prior collateral counsel was advised that there was no basis for the question and thus raised ineffectiveness as to asking such a question without any basis in fact. Moreover, Ms. Coffman concession that this evidence was new and not available to Mr. White or his counsel in 1985 and in 1990 settles the matter; for purposes of these proceedings it is "new."

the files had been disclosed when first requested." The only way to do that is to consider the merits of Mr. White's claim as the State stipulated below. As the circuit court properly concluded, the merits of Mr. White's Claim I are before the Court.

II. AS THE STATE CONCEDED BELOW, EXCULPATORY EVIDENCE WAS NOT DISCLOSED TO TRIAL COUNSEL.

In the lower court, the State of Florida, through Assistant State Attorney Paula Coffman, repeatedly conceded that the information presented in Mr. White's 3.850 motion was newly discovered information, and therefore not disclosed by the prosecution to either defense counsel at trial or to prior collateral counsel in response to prior public records requests. The record from the proceedings below conclusively establishes that this was the State of Florida's position. Assistant State Attorney Coffman acknowledged on the record below that "I will candidly admit that the existing record in this case does not refute the allegations that prior public record demands have been made and if they have been made, that these six or seven items that they're now claiming they've never seen before were not included in those prior disclosures" (Transcript Hearing of November 27, 1995, at 33). Assistant State Attorney Coffman acknowledged on the record below that "Mr. White didn't know about any of these things previously" Id. at 36). Assistant State Attorney Coffman acknowledged on the record below that "the state is not contesting whether or not they had this evidence previously or not" (Id. at 37). Assistant State Attorney Coffman acknowledged on the record below that the "state's position is that everything in the motion is true about not having this evidence previously" (Id. at 41).

Because this claim is before the Court on its merits, as the State conceded below and as the Court expressly found, it should be analyzed by this Court as if it were an appeal from the summary denial of an initial Rule 3.850 motion -- that is, the court should determine whether the files and records conclusively establish that Mr. White is not entitled to relief. Moreover, the trial court failed to attach portions of the record which conclusively rebut Mr. White's entitlement to relief, which it was required to do when summarily denying relief on the merits. See Fla. R. Crim. P. 3.850; Hoffman v. State, 571 So. 2d 449, 450 (Fla. 1990). If the files and records do not conclusively rebut Mr. White's allegations, an evidentiary hearing is warranted.

Because this claim is before the Court on its merits as if it had been presented in an initial postconviction motion, and the trial court denied without an evidentiary hearing and without attaching an portion of the record which conclusively established that Mr. White was not entitled to relief, this Court's review "is limited to determining whether the motion conclusively shows on its face that [Mr. White] is entitled to no relief." Gorham v. State, 1067, 1069 (Fla. 1988); Hoffman. In Gorham, this Court reversed the summary denial of a Brady/ineffective assistance of counsel claim when it determined that the trial court erred in failing to hold an evidentiary hearing and failed to attach portions of the record which conclusively rebutted the allegations in the motion. In Hoffman, the Court likewise was faced with allegations of "colorable claims" involving Brady violations and ineffective assistance of counsel,[5] and it remanded for an

[5]Certainly, in Mr. White's case, he has raised a "colorable claim" of either a Brady violation or ineffective assistance of counsel given the State's concession that its position was that "everything in the motion is true about not having this evidence previously." See McClain v.
(continued...)

evidentiary hearing after the trial court summarily denied without attaching portions of the record. Hoffman, 571 So. 2d at 450. In Lightbourne v. Dugger, 549 So. 2d 1364, 1365 (Fla. 1989), this Court reversed the summary denial of a Brady claim in a successive 3.850 motion because, "[a]ccepting the allegations . . . at face value, as we must for purposes of this appeal, they are sufficient to require an evidentiary hearing with respect to whether there was a Brady violation." Id. at 1365. In Muhammad v. State, 603 So. 2d 488 (Fla. 1992), this Court reversed the summary denial of a Brady claim and ordered an evidentiary hearing. The claim alleged in Muhammad that the State withheld evidence from defense counsel, namely statements of witnesses to the offense which contained exculpatory information regarding Mr. Muhammad's mental state at the time of the offense, and that as a result he was denied his right to effectively cross-examine witnesses against him based on these undisclosed statements. Id. at 489. Those types of allegations, similar to the statements which the State has conceded were not disclosed to counsel in Mr. White's case, warranted a reversal and a remand for a full evidentiary hearing. Id. at 490. The same result should obtain in Mr. White's case.

In his postconviction motion, Mr. White alleged that specific pieces of information were withheld from defense counsel at the time of trial: (1) a handwritten statement of Henry Tehani dated March 8, 1981; (2) a handwritten statement of Pamela Tehani dated March 8, 1981; (3) a typed report of officer Walter Gallagher dated March 8, 1981; (4)

[5](...continued)
State, 629 So. 2d 320, 321 (Fla. 1st DCA 1993). ("We consider the state's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel without recourse to matters outside the record, warrants reversal of that portion of the order which denied appellant's ineffective assistance of counsel claims").

handwritten notes of Florida Department of Law Enforcement (FDLE) forensics analysts; and (5) a narrative report by Sergeant John Harrielson. Trial counsel Emmett Moran attested in a sworn affidavit that none of these pieces of information was disclosed to him by the State. The truth of these allegations was conceded below by the State of Florida. See Transcript of 11/27/95 Hearing at 32-33; 36; 41. Given the State's concession that the "existing record in this case does not refute the allegations" contained in Mr. White's motion, an evidentiary hearing is required on whether there was either a Brady violation or whether Mr. White received ineffective assistance of counsel. Hildwin v. Dugger, 654 So. 2d 107(Fla. 1995); Gorham; Hoffman; Squires v. State, 513 So. 2d 138 (Fla. 1987); Demps v. State, 416 So. 2d 808 (Fla. 1982).

At trial, defense counsel Mr. Moran attempted to present evidence and argument to the jury that the victims, James Melson and Alexander Alexander, were shot during a struggle which occurred over the gun Mr. White had in his possession when he entered the grocery store. Not only did Mr. Moran need to present testimony which affirmatively supported the theory of defense, he needed and tried to diffuse the testimony of two key witnesses -- Henry Tehani and Pamela Tehani. Without the information which has now been disclosed for the first time, Mr. Moran lacked concrete evidence to support his arguments and corroborate Mr. White's testimony.

On the other hand, the State's theory at trial and at the penalty phase centered on belittling Mr. White's testimony. Specifically, the state contended that Mr. White murdered Mr. Melson in cold blood and attempted to murder Mr. Alexander and the Tehanis. After his gun failed to fire and the Tehanis fled, the trial prosecutor asserted

that Mr. White, while fiddling with the gun, shot himself and fled the premises. The evidence now disclosed which was not presented to Mr. White's jury establishes conclusively that the prosecutor's scenario was false.

Mr. Moran has recently attested in an affidavit to the following information:

> 1. My name is Emmett Moran. I represented Jerry White for his first-degree capital murder trial which took place in Orlando, Florida, in 1982. After a jury trial, Mr. White was convicted and sentenced to death.
>
> 2. During Jerry White's trial, I had continuing problems with not receiving information from both the prosecution and law enforcement officers involved in the case. In fact, several times during the trial I complained to Judge Stroker that I did not believe I had gotten all the information that the State had on this case. As the discovery disclosures that are located in the record establish, I was getting information from the state and law enforcement up until the time of trial and continued to get more information even as the trial was proceeding. This made it very difficult for me to concentrate on the trial itself and the testimony that was presented because I had to be trying to figure out how I could use the discovery being provided at the same time as conduct the trial. I believe that the State took advantage of my ill health during Mr. White's trial. In fact, I was not as mentally sharp as I should have been due to what I later learned were some serious physical problems. Nevertheless, I did and I do not believe I had been provided with important information from the State, information which was needed so that Jerry White could have a fair trial.
>
> 3. One of the significant problems with the State's case was the crime scene itself. The sloppiness by the police in securing the crime scene and processing it was evident. Also, the sloppiness at the crime scene was highlighted by the fact that bullets were located in the store by witnesses in the case right up to the time of trial, yet the State never told me about this until during the trial. Because there was no way to tell the order in which the shots were fired in the store, all the forensic evidence from the crime scene was significant, and any information which corroborated Jerry's

defense would therefore have been vital. Certainly if Jerry was shot first, as he testified, he would have been acting under a severe mental disturbance which would have been admissible at the penalty phase. Information which corroborated Jerry's testimony would have been important for the jury to know.

4. Jerry was arrested almost immediately after the crime, and the police obviously believed that they did not need to be careful in processing the crime scene since they had their suspect. In order to demonstrate that the shootings occurred during the course of self-defense, it was critical to have as complete a picture of the crime scene as possible. Any crime scene evidence corroborating Jerry's testimony would have been very important information which I would have presented to the jury had I known of it. I have now, in November of 1995, been shown several reports concerning the crime scene and forensic testing which I did not receive at trial. These reports are attached to this affidavit. Had I had this information, I would have presented it to the jury. This information was important to Jerry's defense, especially at the penalty phase.

5. Regarding the crime scene, one issue of great importance was the amount of blood that was present near the front counter of the store. This was important because at the trial, Jerry testified that after he and Mr. Alexander began arguing by the cash register, Jerry unzipped his jacket and showed him the gun. Then, Jerry testified, Mr. Melson grabbed for the gun, Jerry grabbed also, and during the struggle the gun went off and hit Jerry in the groin area. Given that the bullet had hit Jerry's penis and leg, a significant amount of blood should have been present at that location. However, the information which had been disclosed about blood in the front of the store revealed only that one blood stain was detected by the front counter. For example, Gregory Taylor from the Orange County Sheriff's Office testified that "[o]n the floor in front of the check-out counter area was red stain on the floor that looks like a blood stain." Taylor never indicated that there was more than one area of blood near the check-out counter where Jerry had claimed he was shot, but rather consistently referred to only one area of blood near the counter.

6. Jerry's current collateral counsel have been shown me a typed statement of Orange County Sheriff's Department office Walter J. Gallager, dated March 8, 1981. This statement is also attached to this affidavit. In this statement, Officer Gallagher indicates that he was the staff duty officer in charge on March 8, 1981, and was called to respond to the crime scene in Taft by Sgt. Hadsell. The report goes on to state that Gallagher "entered about six (6) feet into the store, carefully avoiding any physical contact with evidence present. Directly in front of the counter there were three (3) blood spatters, and on the aisle left of the counter facing the rear of the store there appeared to be blood stains that had been caused by someone walking through fresh blood." I had not been provided with this statement, and therefore did not know that a witness was available to testify that more than one blood spatter was located near the front counter where Jerry claimed he was shot during the struggle with Mr. Alexander over the gun. If I had had this statement, I would have used it at trial to corroborate Jerry's defense.

7. Moreover, Jerry's present attorneys have shown me materials from the Florida Department of Law Enforcement (FDLE) which I am certain had not been disclosed to me at the time of trial. These materials, attached to my statement, include some reports that I did receive, for example, the laboratory reports. However, I received no handwritten notes from FDLE nor any diagrams like those I have been shown at this time. This is information I definitely wanted and would have used at the trial. For example, the FDLE records contain a diagram of the pants Jerry was wearing on the day of the crime. The diagram shows a considerable amount of blood went into Jerry's shoes. This would indicate the course of blood flow from Jerry's injuries.

8. Jerry's collateral counsel have also shown me a report by Deputy John Harrielson dated March 23, 1981, which I have attached to this affidavit. In this report, one of the things Harrielson discusses is when he went to the hospital to interview Jerry after he was shot. Harrielson's report explains that at the hospital, Jerry made the statement that the reason he was there "is about the store." Harrielson then writes that Jerry stated that "he did not see anyone

inside the store when he went in; he also stated that he got shot inside the store." This statement contradicts Harrielson's trial testimony in a significant respect. At trial, Harrielson testified that at the hospital, Jerry told him that he was shot by a black man in the store. However, according to this March 23 report, Harrielson never mentions that Jerry said he was shot by a black man. I did not have this contradictory statement. Had I been provided with this information, I would have presented it to the jury.

9. In addition to crime scene information which would have corroborated Jerry's defense and his testimony, any other evidence which would have impeached the important testimony of Henry Tehani and Pamela Tehani would have been significant. As I explained, I never believed that I had gotten all the information that was available in this case. Jerry's collateral counsel have also shown me several statements and reports regarding the Tehanis which I did not receive at the time of trial. Had I had these items, which were clearly exculpatory to Mr. White, I would have used them at trial. These under-oath statements could also have been introduced at the penalty phase. These statements have also been attached to this affidavit.

10. At trial, Mr. Tehani testified that he and his daughter Pamela entered the store and were walking toward the meat counter when Pamela turned around and told him to look at the man who was waving a gun at them. Mr. Tehani then testified that the man pushed him to go toward the freezer while waving the gun, and that his daughter was behind him. Mr. Tehani then said that it hit him suddenly that the man meant business "because I took a second look on the gun that he was holding. It was a .38 with a short barrel." Mr. Tehani then explained that he offered to give the man some money and even pulled his wallet out to show him money, and the man replied that he didn't want the money. Mr. Tehani testified that he then noticed that the man "has some money hanging from his pocket, . . . [a]ll different dollars and ten dollars, but mostly the dollars was hanging." Then, Mr. Tehani explained, the man kept telling him to get into the freezer, and then the man pulled the trigger twice. He knew the man had pulled the trigger because he heard the click of the gun. Mr. Tehani then

testified that after pulling the trigger a second time, the man "shook his head and went back around the other aisle." After the man walked away, Mr. Tehani told his daughter to get out and run, but she was scared so he ran to the door, held it open, and she began to walk, not run, out of the store.

11. Jerry's collateral counsel have shown me a handwritten statement signed by Henry Tehani and dated March 8, 1981. In this statement, Mr. Tehani indicates that a black male "came and told me and daughter to get in freezer - but I insist it he want my money I'll give him all that I have - but I also talket [sic] to him that there is a cop outside - and he has a mustache on - he came toward me and push me to go in the freezer. But I won't go - and as sooner he went around the other side of the counter and I run outside and called out hey daughter she came running out the door when he found out that we were out side he run out the back door." Mr. Tehani further declared under oath that the man "was high on drugs or drink [sic] and when he ran through the back-door he look he was drunk." This statement is completely different from Mr. Tehani's trial testimony in several extremely important aspects. Significantly, nowhere in the statement does Mr. Tehani ever mention that the man in the store pointed a gun at him and that he attempted to shoot him twice, certainly a glaring omission. The prosecutor argued to the jury that Jerry intended to kill Henry Tehani by shooting him, yet Mr. Tehani never mentions this incident in his statement. This undisclosed statement completely transforms the tenor of the interaction with Jerry White in the store, for Tehani did not even recall Jerry trying to shoot him.

12. Because Mr. Tehani in his sworn statement does not mention Jerry trying twice to shoot him, he also fails to mention another important detail to which he testified -- that after twice clicking the gun, Mr. White "shook his head" and turned away. The implication that Mr. White "shook his head" after the gun failed to go off is clear -- that Mr. White was disappointed or upset that the gun did not go off. The failure of Mr. Tehani to mention either the gun or the fact that Mr. White "shook his head" when the gun did not discharge would have been significant to present, for the tenor of the exchange between Jerry and the Tehanis is different without these details. The fact that Mr. White had a

gun and that he "shook his head" when it failed to discharge must not have been a significant an event if Mr. Tehani did not even mention it in his sworn statement. Mr. Tehani's March 8 handwritten sworn statement also fails to mention that he saw bunches of money in Jerry White's pockets during the confrontation. This is another significant omission which should have been presented to the jury. According to Henry Tehani's testimony, he noticed the money sticking out of Jerry's pants, in specific denominations, after Jerry had told him that he did not want the money in Tehani's wallet. Yet right after the incident, no mention of this money is made. I would have wanted the jury to know of this information.

13. While failing to mention these significant facts, the one thing that Mr. Tehani's statement does include is that Mr. White was drunk or high on drugs at the time of the encounter in the store. For Mr. Tehani to mention this fact, and not the fact that the man was waiving a gun at him and attempting to shoot him twice, indicates that the man's intoxication was a significant feature of the interaction. Had I known about this statement, I would have wanted the jury to know that while Mr. Tehani did not remark on the attempted shooting incident, he did specifically detail that the man was drunk or high on drugs, new facts which further alter the tenor of the exchange in the store in a manner consistent with Jerry's defense. These new facts were important not only to present at the guilt phase, but also at the penalty phase.

14. Jerry's collateral counsel have also shown me a sworn statement of Pamela Tehani, also dated March 8, 1981. In this statement, Ms. Tehani wrote that after she and her father entered the store, the man "came up behind us and said to get in the freezer[.]" The man "was pointing a gun at us" and her father asked him to take his money but he refused to take it and "he shot at us but there were no bullets[.]" Ms. Tehani then explained that the man "started to walk towards the front of the store" and "my father and I ran out[.]" This statement was likewise not provided to me at the time of Jerry's trial. I would have wanted this statement because not only does it contradict Henry Tehani's testimony and statement, but is also corroborates Jerry's testimony. It indicates that it was obvious that the gun had "no bullets." Nowhere does Ms. Tehani mention any money in the

> pockets, nor the fact that after the gun clicked twice, the man "shook his head" and walked away. Given the importance of the Tehanis' testimony in this case, these contradictory statements should have been brought to the jury's attention at the guilt and penalty phases because they not only impeached their trial testimony, but also corroborated Jerry White's defense.

As Mr. Moran explains in his statement, he was not provided with the Tehanis' statements, the Gallagher report, the FDLE notes, or the Harrielson narrative. This information, individually and collectively, was significant evidence which, as counsel stated, he needed to effectively defend Jerry White at the guilt and penalty phases. As the State of Florida conceded below, Mr. Moran was not provided with the reports, documentation, and information detailed in his affidavit. A wealth of exculpatory and impeachment evidence was not disclosed to trial counsel. This evidence was discovered in the post-conviction process. This evidence would have been investigated, pursued and presented to Mr. White's jury had Mr. Moran known of its existence. It was consistent with the theory of defense and would have effectively countered the State's case. At the penalty phase, this evidence would have negated aggravation (Mr. White did not attempt to murder the Tehanis) and established mitigation (Mr. White had been shot through the penis and was suffering under extreme emotional disturbance as a result). This new evidence was not presented to the jury according to Mr. Moran because he was unaware of its existence as he has now indicated. Certainly to the extent that the State argues that somehow Mr. Moran's unawareness of this evidence was due to his lack of diligence, then Mr. White received ineffective assistance of counsel. See Section III, infra. However, Mr. Moran knows that significant exculpatory evidence

was not provided, and he has so sworn. This allegation must be accepted as true. Lightbourne v. Dugger, Scott v. State.

III. DEFICIENT PERFORMANCE.

To the extent that the State of Florida argues that Mr. Moran's unawareness of this information was due to the attorney's lack of preparation or diligence, Mr. White received ineffective assistance of counsel. As with the allegations concerning the Brady material, this claim is before the Court on its merits. Paula Coffman, Assistant State Attorney, stipulated that this claim should be considered on the merits. The lower court accepted the State's stipulation as was clarified during the argument on Mr. White's motion for rehearing, "I'm viewing the evidence as to ineffective assistance of counsel as not being time barred .... I think it's new evidence" (Transcript of 11/28/95 hearing at 5-6). As with the allegations concerning the Brady material, this Court has not hesitated to order an evidentiary hearing when, as here, a prima facie colorable claim of ineffective assistance of counsel claim has been made. Given the State's on-the-record acknowledgment that "[t]he existing record in this case does not refute the allegations" contained in Mr. White's motion, an evidentiary hearing on ineffective assistance of counsel must be ordered. McClain v. State, 629 So. 2d 320, 321 (Fla. 1st DCA 1993) ("We consider the State's admitted inability to refute the facially sufficient allegations of ineffective assistance of counsel, without recourse to matters outside the record, warrants reversal of that portion of the order which denied appellant's ineffective assistance of counsel claims"). Moreover, Mr. White must be "put [ ] in the same position he would

have been in if the files had been disclosed when first requested." Provenzano v. State, 616 So. 2d at 430.

As with Brady claims, this Court has not hesitated to remand for evidentiary hearings when presented with prima facie claims of ineffective assistance of counsel. See Cherry v. State, 659 So. 2d 1069 (Fla. 1995); Harvey v. Dugger, 656 So. 2d 1253 (Fla. 1995); Breedlove v. Singletary, 595 So. 2d 8 (Fla. 1992); Rose v. State, 601 So. 2d 1181 (Fla. 1992); Mills v. Dugger, 559 So. 2d 578 (Fla. 1990); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1985); LeDuc v. State, 415 So. 2d 721 (Fla. 1982); Meeks v. State, 382 So. 2d 673 (Fla. 1980). The standard for granting a hearing on an ineffectiveness claim is the same as for a Brady claim: "[t]he law is clear that under Rule 3.850 procedure, a movant is entitled to an evidentiary hearing unless the motion or files and records in the case conclusively show that the movant is entitled to no relief." O'Callaghan, 461 So. 2d at 1355.

At trial, the prosecutor, Mr. Blankner, repeatedly alleged that discovery had been provided, but that Mr. Moran had lost it or forgotten about it. To the extent that the state now asserts that Mr. Moran is confused and that discovery had been provided but that Mr. Moran forgot about it or lost it, then Mr. Moran's performance was deficient. Mr. Moran acknowledges that he had a physical condition which affected his mental condition at trial:

> As I indicated above, I was in ill health during Jerry's trial. Because of my illness, I was feeling very poorly during the trial, and was not as mentally sharp as I would have been if I had been well. During the trial, I felt that the state was taking advantage of the situation by overwhelming me with late disclosures of evidence, evidence which I needed to

represent my client. Later, in 1985, during Jerry's first death warrant, attorney Steve Malone, who was representing Jerry in his postconviction proceedings, raised issues which constituted a personal attack on me, such as claiming that I was drunk during Jerry's trial. Alcohol was not the problem, it was my health. After Jerry's trial I learned that I was suffering from diabetes, which was the reason for my problems during the trial. I know that because of these problems I was not as sharp as I would have been if I had not been sick, nor was I in a position to adequately keep up with the late disclosures by the prosecution. Now I have learned that not only was the state providing me with information late, but that they never gave me some things altogether.

However, Malone's actions in 1985 angered me a great deal, and I even filed a grievance against him with the Florida Bar. Because of Malone's personal attacks against me, which were reported in the Orlando newspapers, I did not have open discussions with him about Jerry's case, and in fact sat at the prosecutor's table during the evidentiary hearing so I could help the prosecutor defend me. Due to the accusations being made against me, the true facts about my condition did not come out at the evidentiary hearing, nor did an explanation of how my condition affected my representation of Jerry.

Moreover, then-Assistant State Attorney Blankner has recently attested to Mr. Moran's physical problems:

My name is Francis Wesley Blankner, Jr. I am an attorney in private practice in Orlando, Orange County, Florida. I am a board certified criminal trial specialist. In 1982, I was employed as an Assistant State Attorney in Orlando, and prosecuted Jerry White for first-degree capital murder. I was the trial prosecutor. Mr. White was found guilty of murder, and sentenced to death by Judge Stroker.

Mr. White was represented at trial by attorney Emmett Moran. At the time I was familiar with Mr. Moran and his reputation. When I learned that Mr. Moran would be representing Mr. White, I was concerned. My concern was as to whether Mr. Moran was up to the task of representing a

> capital defendant. However, as the prosecuting attorney I was not in the best position to question the abilities of the defendant's counsel. I felt somewhat torn by an ethical dilemma. Since Mr. Moran was known to have had a drinking problem, I decided to monitor Mr. Moran during the trial for signs of alcohol consumption. As I testified to in 1986, I regularly smelled his breath during the trial to make sure that he had not been drinking alcoholic beverages.
>
> Even though I detected no smell of alcohol, I did notice that Mr. Moran appeared confused or fatigued at times during the trial. Because of my concerns about Mr. Moran, I readily agreed to continuances. I hoped that giving Mr. Moran more time would help him get prepared to represent Mr. White. Judge Stroker also seemed anxious to accommodate Mr. Moran. I recall that the trial proceedings generally did not start before 10:00 am. Even at that, it was not unusual for Mr. Moran to be late. He also frequently complained of not feeling well or acted fatigued, particularly in the afternoons.
>
> At the time, I did not know whether Mr. Moran's seeming confusion or fatigue were genuine or a ploy. Long after the trial and long after the 1986 evidentiary hearing, I learned through Mr. Moran that he in fact had been physically ill at the time of Mr. White's trial, a matter Mr. Moran professed he was not aware of at the time of trial. I did not tell Mr. White's collateral counsel about this until November of 1995.

In addition to failing to present the evidence discussed in the prior section, to the extent the State claims it was disclosed contrary to its representations below, Mr. Moran has also now disclosed that he received information on the eve of the penalty phase indicating that Mr. White was mentally retarded. However, he failed to develop it and present it to Mr. White's jury. He also failed to disclose it to Mr. White's collateral counsel. Mr. Moran, in his affidavit, has attested:

> One of the matters that was not adequately presented at Jerry's sentencing was his IQ score of 72, which is located

> in a PSI report from 1967. I had a lot of trouble getting information about Jerry's priors, particularly prior PSIs, and had to ask Judge Stroker for an order to get this information from the state. I do recall getting a portion of a PSI on the day of the penalty phase which revealed Jerry's low IQ, but by that point I was very tired and overwhelmed by the fact that Mr. White had been found guilty and was facing the death penalty. The 72 IQ did not get presented to the jury. I am aware that other defendants have been given life sentences because of low IQ scores. Moreover, because of the attacks made against me in 1985, I did not discuss the 72 IQ with Steve Malone.

Mr. Blankner has stated under oath:

> In reflecting back upon Mr. White's penalty phase, no real sense of who Jerry White is was provided by the defense. Even though Mr. Moran was given a two day continuance to prepare for the penalty phase, little insight into Mr. White was provided. Certainly by today's standard, the penalty phase appeared inadequate.

It is clear that Mr. White's jury never knew about this information. Whether the state failed to disclose, or whether trial counsel rendered deficient performance in failing to discover and present it, Mr. White did not receive a reliable adversarial testing at either the guilt or penalty phase.

This Court has consistently held that a capital defense attorney renders deficient performance if he or she fails to investigate, prepare, and present mitigation where no strategic reasons exists for failing to do so. See, e.g. Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(Counsel rendered deficient performance because he "failed to unearth a large amount of mitigating evidence which could have been presented at sentencing," including two statutory mental health mitigating factors and that defendant "showed signs of organic brain damage"); Deaton v. Singletary, 635 So. 2d 4 (Fla. 1994)("clear evidence

was presented [at the evidentiary hearing] that defense counsel did not properly investigate and prepare for the penalty phase"); Heiney v. State, 620 So. 2d 171 (Fla. 1993)(lower court correctly found deficient performance; "[t]he failure to investigate [the defendant's] background, the failure to present mitigating evidence during the penalty phase, [and] the failure to argue on [the defendant's] behalf ... was not the result of a reasoned professional judgment"); Phillips v. State, 608 So. 2d 778 (Fla. 1992)(lower court correctly found deficient performance, which was conceded by the State because counsel failed to investigate defendant's life history, IQ between 73 and 75, and existence of two statutory mental health mitigating factors); Mitchell v. State, 595 So. 2d 938 (Fla. 1992)(defense counsel thought he would obtain a non-guilty verdict and "had not prepared for the penalty phase"); State v. Lara, 581 So. 2d 1288 (Fla. 1991)(defense counsel "did not investigate in any detail the defendant's background, and did not properly utilize expert witnesses regarding defendant's psychological state. In short, the court finds that [counsel] virtually ignored the penalty phase"). Federal law also counsels that a capital defense attorney must investigate, prepare and present mitigation. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991)(given the existence of mental health mitigation, "that absolutely none was presented to the sentencing body, and that no strategic reason has been put forward for this failure, we find that counsel's actions were objectively unreasonable"); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991)("[h]ere it was not a reasonable strategy that led counsel not to investigate, but lack of thoroughness and preparation").

It is clear that this claim is before the Court on its merits, and that accepting Mr. Moran's affidavit as true and accepting Mr. Blankner's affidavit as true, Mr. Moran's performance was deficient. Accordingly, an evidentiary hearing is required.

IV. MR. WHITE WAS PREJUDICED BY THE STATE'S FAILURE TO DISCLOSE AND NO ADEQUATE ADVERSARIAL TESTING OCCURRED.

1. The Facts.

Mr. White was prejudiced by the withholding of the "new" facts. Mr. Emmett Moran, Mr. White's trial attorney, has explained how he would have used the Tehani statements at both the trial and penalty phase:

> 9. In addition to crime scene information which would have corroborated Jerry's defense and his testimony, any other evidence which would have impeached the important testimony of Henry Tehani and Pamela Tehani would have been significant. As I explained, I never believed that I had gotten all the information that was available in this case. Jerry's collateral counsel have also shown me several statements and reports regarding the Tehanis which I did not receive at the time of trial. Had I had these items, which were clearly exculpatory to Mr. White, I would have used them at trial. These under-oath statements could also have been introduced at the penalty phase. These statements have also been attached to this affidavit.
>
> 10 At trial, Mr. Tehani testified that he and his daughter Pamela entered the store and were walking toward the meat counter when Pamela turned around and told him to look at the man who was waving a gun at them. Mr. Tehani then testified that the man pushed him to go toward the freezer while waving the gun, and that his daughter was behind him. Mr. Tehani then said that it hit him suddenly that the man meant business "because I took a second look on the gun that he was holding. It was a .38 with a short barrel." Mr. Tehani then explained that he offered to give the man some money and even pulled his wallet out to show him money, and the man replied that he didn't want the

money. Mr. Tehani testified that he then noticed that the man "has some money hanging from his pocket, . . . [a]ll different dollars and ten dollars, but mostly the dollars was hanging." Then, Mr. Tehani explained, the man kept telling him to get into the freezer, and then the man pulled the trigger twice. He knew the man had pulled the trigger because he heard the click of the gun. Mr. Tehani then testified that after pulling the trigger a second time, the man "shook his head and went back around the other aisle." After the man walked away, Mr. Tehani told his daughter to get out and run, but she was scared so he ran to the door, held it open, and she began to walk, not run, out of the store.

11. Jerry's collateral counsel have shown me a handwritten statement signed by Henry Tehani and dated March 8, 1981. In this statement, Mr. Tehani indicates that a black male "came and told me and daughter to get in freezer - but I insist it he want my money I'll give him all that I have - but I also talket [sic] to him that there is a cop outside - and he has a mustache on - he came toward me and push me to go in the freezer. But I won't go - and as sooner he went around the other side of the counter and I run outside and called out hey daughter she came running out the door when he found out that we were out side he run out the back door." Mr. Tehani further declared under oath that the man "was high on drugs or drink [sic] and when he ran through the back-door he look he was drunk." This statement is completely different from Mr. Tehani's trial testimony in several extremely important aspects. Significantly, nowhere in the statement does Mr. Tehani ever mention that the man in the store pointed a gun at him and that he attempted to shoot him twice, certainly a glaring omission. The prosecutor argued to the jury that Jerry intended to kill Henry Tehani by shooting him, yet Mr. Tehani never mentions this incident in his statement. This undisclosed statement completely transforms the tenor of the interaction with Jerry White in the store, for Tehani did not even recall Jerry trying to shoot him.

12. Because Mr. Tehani in his sworn statement does not mention Jerry trying twice to shoot him, he also fails to mention another important detail to which he testified – that after twice clicking the gun, Mr. White "shook his head" and turned away. The implication that Mr. White "shook his head" after the gun failed to go off is clear – that Mr. White

was disappointed or upset that the gun did not go off. The failure of Mr. Tehani to mention either the gun or the fact that Mr. White "shook his head" when the gun did not discharge would have been significant to present, for the tenor of the exchange between Jerry and the Tehanis is different without these details. The fact that Mr. White had a gun and that he "shook his head" when it failed to discharge must not have been a significant an event if Mr. Tehani did not even mention it in his sworn statement. Mr. Tehani's March 8 handwritten sworn statement also fails to mention that he saw bunches of money in Jerry White's pockets during the confrontation. This is another significant omission which should have been presented to the jury. According to Henry Tehani's testimony, he noticed the money sticking out of Jerry's pants, in specific denominations, after Jerry had told him that he did not want the money in Tehani's wallet. Yet right after the incident, no mention of this money is made. I would have wanted the jury to know of this information.

13. While failing to mention these significant facts, the one thing that Mr. Tehani's statement does include is that Mr. White was drunk or high on drugs at the time of the encounter in the store. For Mr. Tehani to mention this fact, and not the fact that the man was waiving a gun at him and attempting to shoot him twice, indicates that the man's intoxication was a significant feature of the interaction. Had I known about this statement, I would have wanted the jury to know that while Mr. Tehani did not remark on the attempted shooting incident, he did specifically detail that the man was drunk or high on drugs, new facts which further alter the tenor of the exchange in the store in a manner consistent with Jerry's defense. These new facts were important not only to present at the guilt phase, but also at the penalty phase.

14. Jerry's collateral counsel have also shown me a sworn statement of Pamela Tehani, also dated March 8, 1981. In this statement, Ms. Tehani wrote that after she and her father entered the store, the man "came up behind us and said to get in the freezer[.]" The man "was pointing a gun at us" and her father asked him to take his money but he refused to take it and "he shot at us but there were no bullets[.]" Ms. Tehani then explained that the man "started to walk towards the front of the store" and "my father and I ran

> out[.]" This statement was likewise not provided to me at the time of Jerry's trial. I would have wanted this statement because not only does it contradict Henry Tehani's testimony and statement, but is also corroborates Jerry's testimony. It indicates that it was obvious that the gun had "no bullets." Nowhere does Ms. Tehani mention any money in the pockets, nor the fact that after the gun clicked twice, the man "shook his head" and walked away. Given the importance of the Tehanis' testimony in this case, these contradictory statements should have been brought to the jury's attention at the guilt and penalty phases because they not only impeached their trial testimony, but also corroborated Jerry White's defense.

These undisclosed Tehani statements constitute material evidence particularly as to the penalty phase. During the State's closing, Mr. Blankner, the prosecutor, explained to the jury that Henry and Pamela Tehani were key witnesses in the case against Mr. White (R. 926). The prosecutor highlighted the Tehanis' testimony:

> And his testimony (Mr. White's) was that he didn't intend to shoot Mr. Tehani and twelve-year-old Pamela Tehani. Do you remember that testimony yesterday? I ask you to consider that in light of all the evidence in this case.
>
> ...[H]e walked in with that loaded revolver, and he attempted to get out of that store when the Tehani's came in. And they kind of surprised him, walked past him, and walked right down the aisle, and didn't say a word to him. As you remember, he was standing over by the magazine rack, standing at the store exit, waiting here (indicating).
>
> He tells you that he went up to them – if you'll remember – and wanted them to go into the freezer, but he wasn't going to shoot them. This was a loaded gun, ladies and gentlemen, a loaded gun...
>
> [Jerry White] wants you to believe that he had the presence of mind to know – and he never testified that he looked in the gun or removed anything from the gun – that when Mr. Tehani, after several times, and after the defendant pushed him towards the freezer, that the defendant then

> pulled the trigger. I suggest to you that he intended to kill Mr. Tehani and his daughter Pamela Tehani, just as he intended to kill James Melson, and intended to kill Mr. Alexander...
>
> For whatever reason that gun did not go off, remember what the defendant did, in the testimony of Mr. Tehani. I suggest to you that it's incredible to believe that the defendant would pull the trigger and show Mr. Tehani that the gun was empty, if that was his intent, to scare him. Pointing the gun would be enough; pulling the trigger and showing him it was empty would do nothing. I suggest to you that surprised the defendant. He pulled that trigger and nothing happened. And do you remember what Mr. Tehani said, that he started fiddling with the barrel? I suggest that's attempting to see why it didn't work, and getting it to work.
>
> And after fiddling with the barrel, and trying to bet them back into the freezer, Pamela Tehani cried, and he pulled the trigger a second time, but he was only trying to scare them.

(R. 926-28)(emphasis added). The prosecutor then explained that the jury should infer from the Tehanis' trial testimony that Jerry White

> was going to shoot them to death. No witnesses. . . I suggest to you he went toward that front door when he saw Mr. Tehani and his daughter making their escape. And it was at that point in time, after he had fiddled with that gun, that he pushed the gun back in his pants and decided he had best get out of there. Now when Mr. Tehani was getting into his van, that was when he shot himself right there, at the counter. The blood was there.

(R. 928-29). The Tehanis were key witnesses by the State's account (R. 926). The Tehani testimony and the State's emphasis of it would have been refuted had trial counsel been given the opportunity to cross examine them with their sworn statements to the police about what really occurred in the store that day. Certainly it would have been significant at the penalty phase for the jury to know that Mr. Tehani had provided a

sworn statement soon after the crime which fails to even mention that Jerry White tried to "kill" him and his daughter. Without the sworn statements of the Tehanis, trial counsel could only point out that Mr. White did not attempt to rob the Tehanis (R. 941, 945, 951).

The State argued that Mr. White shot the victims, attempted to shoot the Tehanis, and then shot himself (R. 910-929). However, "there was no way to tell the order in which the shots were fired in the store, all the forensic evidence from the crime scene was significant, and any information which corroborated Jerry's defense would therefore have been vital. Certainly if Jerry was shot first, as he testified, he would have been acting under a severe mental disturbance which would have been admissible at the penalty phase." See App. 1 (Affidavit of Emmett Moran).[6] Information which corroborated Mr. White's testimony would have been important for the jury to know and would have frustrated the State's theory. The reliability of the outcome of the guilt phase and certainly the penalty phase is undermined. These undisclosed statements would have gone towards negating aggravation and establishing mitigation (extreme emotional disturbance).

Regarding the crime scene, one issue of great importance was the amount of blood that was present near the front counter of the store. This was important because at the trial, Mr. White testified about the struggle between Mr. Alexander and himself (R.

---

[6]On November 30, 1995, Mr. White supplemented this Court's record with a sworn declaration of Dale Nute, a forensic science expert. Mr. Nute, who is still attempting to review the evidence as it comes in on a daily basis, has determined now that, based upon the newly discovered information, "There is no way to conclude beyond a reasonable doubt the sequence of the shootings."

825). However, the State's theory during the closing argument was that Mr. White shot himself just prior to leaving (R. 928-29). Had trial counsel been provided with the crime scene information that has since been disclosed, he would have shown that Mr. White was shot during the initial struggle after he was attacked. Walter J. Gallager, of the OCSO, wrote a report dated March 8, 1981. In this statement, which the State conceded below had not been disclosed previously, Officer Gallagher indicates that he was the staff duty officer in charge on March 8, 1981, and was called to respond to the crime scene in Taft by Sgt. Hadsall. The report goes on to state that Gallagher "entered about six (6) feet into the store, carefully avoiding any physical contact with evidence present. Directly in front of the counter there were three (3) blood spatters, and on the aisle left of the counter facing the rear of the store there appeared to be blood stains that had been caused by someone walking through fresh blood." Trial counsel for Mr. White did not receive this report, as Mr. Moran attested in his affidavit and as the State conceded below. Trial counsel would have used this report in preparation for and at the trial. However, he did not know that a witness was available to testify that more than one blood spatter was located near the front counter. This evidence would have corroborated Mr. White's testimony regarding his injury during the struggle with Mr. Alexander over the gun.

Gregory Taylor from the Orange County Sheriff's Office testified that "[o]n the floor in front of the check-out counter area was red stain on the floor that looks like a blood stain." (R. 592). Taylor never indicated that there was more than one area of blood near the check-out counter where Jerry had claimed he was shot, but rather

consistently referred to only one area of blood near the counter. This was an issue of great importance because at the trial, Mr. White testified that after he and Mr. Alexander began arguing by the cash register, Mr. White unzipped his jacket and showed him the gun (R. 825-30). Then, Mr. White testified, Mr. Melson grabbed for the gun, Mr. White grabbed also, and during the struggle the gun went off and the bullet went through Mr. White's penis and left leg (R. 825-35). Given that the bullet had hit Mr. White's penis and left leg, the prosecutor urged that a greater amount of blood should have been present at that location. The absence of blood was used by the prosecutor to argue that Mr. White must have shot himself right before fleeing the store. The information which had been disclosed about blood in the front of the store revealed only that one blood stain was detected by the front counter. The undisclosed fact that there was more blood would have precluded the prosecutor's argument. This "new" evidence would have corroborated Mr. White's testimony regarding the struggle with Mr. Alexander over the gun.

Trial counsel for Mr. White received no handwritten notes from FDLE nor any diagrams. This information was released on November 22, 1995. The FDLE records contain a diagram of the pants Mr. White was wearing on the day of the crime. The diagram reflects gun powder residue on the right half of Mr. White's zipper. This consistent with the pants having been unzipped at the time of discharge; that in turn raises the issue of whether the gun was inside the pants or just the barrel. It is also hard to explain how a left handed individual with a gun in his pants would fire the gun in

such a way as to leave gun powder residue on the right half of the zipper while the exiting bullet travels through the penis and through the left leg.

The FDLE diagram shows a considerable amount of blood went into Mr. White's shoes. This would indicate the course of blood flow from Mr. White's injuries and would explain why less blood than would be expected was left at the scene. This would have negated the prosecutor's argument. The diagram of Mr. White's shirt shows smears of blood in locations consistent with Mr. Melson struggling with him after Mr. White was shot and smearing blood in the struggle. This is information trial counsel would have used at the trial, as Mr. Moran attested to in his affidavit and as the State conceded below. This evidence would have corroborated Mr. White's testimony regarding the events at the store. It would have established and negated aggravation.

In deputy John Harrielson's March 23, 1981, report, he states that he went to the hospital to interview Mr. White after he was shot. Deputy Harrielson's report explains that at the hospital, Mr. White made the statement that the reason he was there "is about the store." Deputy Harrielson then writes that Mr. White stated that "he did not see anyone inside the store when he went in; he also stated that he got shot inside the store." This statement contradicts Harrielson's trial testimony in a significant respect. At trial, Deputy Harrielson testified that at the hospital, Mr. White stated he knew why the deputies were there:

A We asked him, do you know why we're here?

Q What did he responds, if anything?

A He said, yes, it's about the store in Taft. And he said, when I went into the store no one was in there, and then all at once a black male came up and shot me...

(R. 849). However, according to his March 23 report, Harrielson never mentions that Mr. White stated he had been shot by a black man. Trial counsel did not have this contradictory statement, as he attested in his affidavit and as the State conceded below. If he had been provided with this information, he would have presented it to the jury.

Furthermore, the evidence regarding Mr. White's mental retardation was not adequately or timely provided to Mr. White's trial counsel. Mr. Moran, Mr. White's trial attorney, has explained in an affidavit that:

> During Jerry White's trial, I had continuing problems with not receiving information from both the prosecution and law enforcement officers involved in the case. In fact, several times during the trial I complained to Judge Stroker that I did not believe I had gotten all the information that the State had on this case. As the discovery disclosures that are located in the record establish, I was getting information from the state and law enforcement up until the time of trial and continued to get more information even as the trial was proceeding. This made it very difficult for me to concentrate on the trial itself and the testimony that was presented because I had to be trying to figure out how I could use the discovery being provided at the same time as conduct the trial. I believe that the State took advantage of my ill health during Mr. White's trial. In fact, I was not as mentally sharp as I should have been due to what I later learned were some serious physical problems. Nevertheless, I did and I do not believe I had been provided with important information from the State, information which was needed so that Jerry White could have a fair trial...
>
> One of the matters that was not adequately presented at Jerry's sentencing was his IQ score of 72, which is located in a PSI report from 1967. I had a lot of trouble getting information about Jerry's priors, particularly prior PSIs, and had to ask Judge Stroker for an order to get this information

> from the state. I do recall getting a portion of a PSI on the day of the penalty phase which revealed Jerry's low IQ, but by that point I was very tired and overwhelmed by the fact that Mr. White had been found guilty and was facing the death penalty. The 72 IQ did not get presented to the jury. I am aware that other defendants have been given life sentences because of low IQ scores. Moreover, because of the attacks made against me in 1985, I did not discuss the 72 IQ with Steve Malone.

(App. 1). Trial counsel never sought the assistance of an expert in mental retardation and was therefore not able to explain the complexities of this condition and how it played a role in bringing Jerry White on trial for his life.

Here, Mr. White was denied a reliable adversarial testing. The jury never heard the considerable and compelling evidence that was obviously exculpatory as to Mr. White. Whether the prosecutor failed to disclose this significant and material evidence or whether the defense counsel failed to do his job, there can be no dispute that the jury did not hear the evidence in question. In order "to ensure that a miscarriage of justice [did] not occur," Bagley, 473 U.S. at 675, it was essential for the jury to hear the evidence.[7] Confidence is undermined in the outcome since the jury did not hear the evidence.

At this juncture, Mr. White's factual proffers must be accepted as true; aggravation would have been negated and mitigation would have been established.

---

[7]Mr. White argues Brady and ineffective assistance of counsel in the alternative. Either the prosecutor unreasonably failed to disclose or defense counsel unreasonably failed to discover exculpatory evidence. Either way the resulting conviction was unreliable and the Sixth Amendment violated.

2. The Law.

In Kyles v. Whitley, 115 S. Ct. 1555 (1995), at issue were various statements of key prosecution witnesses which the defendant contended had not been disclosed to his trial counsel. The Supreme Court found a material Brady violation because statements by two of the key prosecution witnesses made almost contemporaneously with the occurrence of the incident were not disclosed to the defense. These statements contradicted the witnesses' trial testimony, and had they been disclosed, "[t]he value of two of those witnesses would have been substantially reduced or destroyed. " Kyles, 115 S. Ct. at 1569. In particular, the Court in Kyles elaborated on the undisclosed statement of witness Smallwood, who in a statement made almost immediately after the incident, failed to include in his police statement several critical facts to which he testified at trial, facts which were extremely significant to the State's case. In finding that the failure to disclose Smallwood's initial police statement was a material Brady violation, the Court observed:

> A jury would reasonably have been troubled by the adjustments to Smallwood's original story by the time of the time of the second trial. The struggle and shooting, which earlier he had not seen, he was able to describe with such detailed clarity as to identify the murder weapon as a small black .32 calibre pistol, which, of course, was the type of weapon used. His description of the victim's car had gone from a "Thunderbird" to an "LTD"; and he saw fit to say nothing about the assailant's shoulder-length hair and moustache, details noted by no other eyewitness. These developments would have fueled a withering cross-examination, destroying confidence in Smallwood's story and raising a substantial implication that the prosecutor had coached him to give it.

Kyles, 115 S. Ct. at 1570 (footnote omitted)(emphasis added). The Court also addressed the State's argument that Smallwood's undisclosed prior statement was similar to his trial testimony, concluding that "it differed in one of the most important" respects, and "[d]efense counsel was not, therefore, clearly put on notice that Smallwood's [credibility] was open to serious attack." Id. at 1570 n.14. "[T]he question is not whether the State would have had a case to go to the jury if it had disclosed the favorable evidence, but whether we can be confident that the jury's verdict would have been the same." Id. at 1575. Of course under Brady, this principle applies with equal force to confidence in the sentencing verdict. Id. at 1565; Brady, 373 U.S. at 87. See also Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

The factual similarities between Kyles and the evidence withheld in Mr. White's case are significant. Here, as in Kyles, witness statements made contemporaneously to the incident in question were not disclosed by the State.[8] Henry Tehani's contemporaneous statement failed to mention any attempted murder by Mr. White, yet his trial testimony dramatically detailed a cold attempt by Mr. White to execute him and his daughter. As Mr. Moran explained in his affidavit, Henry Tehani's undisclosed statements "completely transforms the tenor of the interaction with Jerry White in the store, for Tehani did not even recall Jerry trying to shoot him" (Affidavit of Emmett Moran at p. 7). Moreover, Mr. Moran explained that "[t]he failure of Mr. Tehani to

[8]It is unclear from the Kyles opinion whether the State conceded that the witness statements were not disclosed to defense counsel, as it did in Mr. White's case. See 11/27/95 Hearing Transcript at 37 ("again the state is not contesting whether or not they had this evidence previously or not); Id. at 41 ("state's position that everything in the motion is true about not having this evidence previously").

mention either the gun or the fact that Mr. White 'shook his head' when the gun did not discharge would have been significant to present, for the tenor of the exchange between Jerry and the Tehanis is different without these details" (Id. at 8). As Mr. Moran observed, "[t]hese new facts were important not only to present at the guilt phase, but also at the penalty phase" (Id. at 9).

The analysis of the Kyles court is equally as persuasive in Mr. White's case: "[s]ince the evolution over time of a given eyewitness's description can be fatal to its reliability, .. the [Tehani's testimony] would have been severely undermined by use of their suppressed statements." Kyles, 115 S. Ct. at 1571. "A jury would reasonably have been troubled" by the glaring inconsistencies between the suppressed statements and the trial testimony, particularly at the penalty phase in Mr. White's case. Contrary to the State's argument below that "an omission for a written statement is not the same thing as an inconsistency" (11/27/95 Transcript at 42), Kyles, finding a Brady violation regarding suppressed statements which omitted significant facts which later surfaced during the trial testimony, establishes otherwise. Certainly if a witness is unable to provide a description of an assailant, but later at trial provides a detailed description, that first statement, which omitted any mention of a description, is impeachment evidence. If the initial statement with the omission is suppressed, as it was in this case, "[d]efense counsel would not ... clearly [be] put on notice that [the witness's testimony] was open to serious attack." Kyles, 115 S. Ct. at 1570 n.14. Mr. White is entitled to a hearing.

Kyles is also instructive on the suppression of Gallagher's report and the FDLE notes, which the State also conceded below were new and not previously disclosed to

counsel for Mr. White. In Mr. White's case, "[d]amage to the prosecution's case would not have been confined to evidence of the eyewitnesses, for [Gallagher's report and the FDLE notes] would have raised opportunities to attack not only the probative value of crucial physical evidence and the circumstances in which it was found, but the thoroughness and even the good faith of the investigation, as well." Kyles, 115 S. Ct. at 1571.[9] Trial counsel, in his affidavit, noted that "[o]ne of the significant problems with the State's case was the crime scene itself .... Because there was no way to tell the order in which the shots were fired in the store, all the forensic evidence from the crime scene was significant, and any information which corroborated Jerry's defense would therefore have been vital" (Affidavit of Emmett Moran at 2). Not only would this new evidence have been useful at the guilt phase, but certainly the newly discovered Brady material which corroborates Mr. White's testimony that he was shot first would have been admissible at the penalty phase, and significant for the jury to know. See Garcia v. State, 622 So. 2d at 1330-31 (suppressed statement "clearly material as to penalty" and "State's failure to disclose the statement undermines the integrity of the jury's [ ] recommendation of death and constitutes a clear Brady violation").

Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986); Chaney v. Brown, 730 F.2d 1334 (10th Cir. 1984). This standard is met and reversal is required once the reviewing court concludes that there exists a

---

[9]See the affidavit of Dale Nute submitted November 30, 1995.

"reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. This standard applies whether the breakdown in the process occurs because the prosecutor failed in his duty to disclose or the defense attorney failed in his duty to investigate. Strickland; Bagley.

Materiality is established and reversal is required once the reviewing court concludes that there exists "a reasonable probability that had the [withheld] evidence been disclosed to the defense, the result of the proceeding would have been different." United States v. Bagley, 473 U.S. 667, 680 (1985). To determine materiality, undisclosed evidence must be considered "collectively, not item-by-item." Kyles v. Whitley, 115 S. Ct. 1555 (1995). Such evidence must be disclosed regardless of a request by the defense, and the State has a duty to evaluate the point at which the evidence collectively reaches the level of materiality. Bagley, at 682; Kyles. However, the defendant does not have the burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 668, 693 (1984). The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Such a probability undeniably exists here. Mr. White was denied a full and fair hearing on this issue. Given the State's concessions that this information was previously undisclosed, reversal is mandated. Roman v. State, 528 So. 2d 1169 (Fla. 1988).

Unfortunately, Judge Evans in ruling upon the merits of Mr. White's claim applied the wrong standard. He held Mr. White to prove that he would have been acquitted. "This Court finds that the several documents, individually or collectively, would not probably produce an acquittal on retrial." Order at 4. The circuit court erred.

Here, evidence favorable to the defense, evidence that supported and furthered the defense, was not disclosed to the defense (App. 27). This must be accepted as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989). Taken as true this undisclosed evidence undermines confidence in the outcome of the penalty phase, and warrants as evidentiary hearing. Scott v. State, 657 So. 2d 1129 (Fla. 1995).

To the extent that counsel failed to discover and/or present this information, Mr. White was prejudiced by counsel's omissions.

Prejudice is established when the "new" evidence would have established mitigation and/or negated aggravation. See Hildwin v. Dugger, 654 So. 2d 107 (Fla. 1995)(prejudice established by "substantial mitigating evidence"); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992)(prejudice established by "strong mental mitigation" which was "essentially unrebutted"); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992) (prejudice established by expert testimony identifying statutory and nonstatutory mitigation and evidence of brain damage, drug and alcohol abuse, and child abuse); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991)(prejudice established by evidence of statutory mitigating factors and abusive childhood); Bassett v. State, 541 So. 2d 596, 597 (Fla. 1989)("this additional mitigating evidence does raise a reasonable probability that the jury recommendation would have been different"). Prejudice was found in these

cases despite the existence of numerous aggravating factors. See Hildwin v. Dugger, 20 Fla. L. Weekly at S39 (four aggravating factors); Phillips v. State, 476 So. 2d 194 (Fla. 1985)(four aggravating factors); Mitchell v. State, 527 So. 2d 179 (Fla. 1988)(three aggravating factors); Lara v. State, 464 So. 2d 1173 (Fla. 1985)(same); Bassett v. State, 449 So. 2d 803 (Fla. 1984)(same); Deaton v. Singletary, 635 So. 2d 4 (Fla. 1993)(same). The new evidence presented by Mr. White's is identical to that which established prejudice in these cases. Mr. White is entitled to an evidentiary hearing.

This Court has regularly found low IQ score and/or mental retardation to be significant mitigation warranting the imposition of a life sentence in override cases. Riley v. State, 601 So. 2d 222 (Fla. 1992)(borderline mentally retarded IQ score of 80 warranted a life sentence in an override case); Cochran v. State, 547 So. 2d 932 (fla. 1989)(IQ of 70 warranted a life sentence in override case); Morris v. State, 557 So. 2d 27 (Fla. 1990)(borderline retardation with an IQ score of 75 warranted life sentence in override case); Duboise v. State, 520 So. 2d 260 (Fla. 1988)(IQ score of 79 along with other mitigation warranted a life sentence in override case); Brown v. State, 526 So. 2d 903 (Fla. 1988)(IQ score in 70-75 range classified defendant as borderline deficient and warranted life sentence in override case); Thompson v. State, 456 So. 2d 444 (Fla. 1984) (IQ between 50 and 70 warranted life sentence in an override case). Clearly, a low IQ can constitute compelling mitigation. At this juncture, this Court must accept as true Dr. Crown's compelling recitation of substantial mitigation. Confidence must be undermined in the outcome where evidence of mental retardation and brain damage was not presented at the penalty phase. Moreover, had this mitigation been presented, a

resentencing would have been ordered when this Court struck two (2) aggravating circumstances on direct appeal. Mr. White's death sentence is constitutionally unreliable.

Confidence in the outcome of Mr. White's trial is undermined because the unpresented evidence was relevant and material to Mr. White's guilt of first degree murder and certainly to whether a death sentence was warranted. Here, exculpatory evidence did not reach the jury.[10] Either the State unreasonably failed to disclosed its existence, or defense counsel unreasonably failed to discover it. Counsel's performance and failure to adequately investigate was unreasonable under Strickland v. Washington. Moreover, the prosecution interfered with counsel's ability to provide effective representation and insure an adversarial testing. This information taken individually and certainly as a whole would have affected the outcome of the trial had it been presented to trial counsel.

Mr. White's prior post-conviction counsel, Billy Nolas, explained in his affidavit, the importance of the contradictions between the sworn statement of Henry Tehani and the trial testimony with regard to the use he would have made of them

> ...I would have been waving it in every court I appeared while representing Mr. White. This statement is totally different from Mr. Tehani's trial testimony. At Mr. White's trial,

---

[10]Barkauskas v. Lane, 878 F.2d 1031, 1034 (7th Cir. 1989)(the undisclosed impeachment evidence, in conjunction with that already presented to the jury, may have "pushed the jury over the edge into the region of reasonable doubt that would have required it to acquit"); Ouimette v. Moran, 942 F.2d 1, 10 (1st Cir. 1991)(confidence undermined in the outcome because suppressed evidence "might have affected the outcome of the trial"); Chambers v. Armontrout, 907 F.2d 825, 832 (8th Cir. 1990)(in banc)(reasonable probability exists where "jury might have acquitted"). See also Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991); Williams v. Whitley, 940 F.2d 132 (5th Cir. 1991).

> Mr. Tehani's testimony provided the elements necessary to establish that Mr. White committed attempted murder when he tried to shoot Mr. Tehani and his daughter Pamela. However, Mr. Tehani's sworn statement, made within an hour of the incident, does not indicate that a gun was pulled on him or that an attempt to shoot ever occurred. Mr. Tehani's concern in his statement would appear to be more that a drunk or drugged up black man was making a scene in the store. The difference between the statement and the trial testimony is simply huge and would have been important at trial, and pivotal in the penalty phase and the direct appeal where the Florida Supreme Court struck two aggravating circumstances but failed to order a new sentencing proceeding.

The new information would have in particular aided trial counsel in the penalty phase. After he was shot in the penis and leg, Mr. White was no doubt acting under a severe mental disturbance which would have been admissible at the penalty phase. This coupled with his mental retardation and brain damage would have been important information the jury needed to know. It would have established two statutory mitigating circumstances, five non-statutory mitigating circumstances, and would have lessened the weight of the aggravation.

In finding no prejudicial ineffective assistance of counsel, Judge Evans applied the wrong standard. He did not accept Mr. White's proffered evidence as true. Judge Evans explained on the record:

> When you look at Taylor v. State, you've got a defendant who tested with an IQ of between 68 to 70, which is less than the case in Mr. White's analysis. And even with that, it is described as mildly retarded. And that mitigating circumstances was given slight weight and that was upheld.

(T. 11/28/95 hearing at 17). Thus Judge Evans relied upon the fact that a judge in another case hearing mental health testimony about a different defendant found it to be

mitigation warranting little weight. He found that to be a basis for concluding that Dr. Crown's testimony which he had not heard would be of little weight. However, Dr. Crown specifically identified two statutory and five nonstatutory mitigating circumstances. Judge Evans was obligated to accept Dr. Crown's statements as true. Accepting it as true, there are two statutory mitigating circumstances and five nonstatutory mitigating circumstances to weigh against two aggravating circumstances. As a matter of law, confidence must be undermined in what the result of the balancing would have been. See Stringer v. Black, 112 S. Ct. 1130 (1992); Deaton v. Singletary; Hildwin v. Dugger; Phillips v. State.

The prosecution denied the defense the information necessary to alert counsel to the avenues worthy of investigation and presentation to the jury. As a result, no constitutionally adequate adversarial testing occurred. Confidence is undermined in the outcome. Aggravating evidence would have been undermined; mitigation would have been established. Accepting Mr. White's allegations as true, there is a reasonable probability of a different outcome. Mr. White was convicted and sentenced without a constitutionally adequate adversarial testing. Accordingly, a stay of execution should be granted and an evidentiary hearing must be held, and thereafter, Mr. White's conviction and sentence must be vacated and a new trial and/or new penalty phase ordered.

ARGUMENT II

THE LOWER COURT ERRED IN DENYING MR. WHITE'S REQUESTS FOR GRAND JURY TRANSCRIPTS, THE NAMES OF GRAND JURORS, AND FOR AN *IN CAMERA* REVIEW OF THE GRAND JURY TRANSCRIPT.

Mr. White filed a motion to compel the disclosure of the transcript of the grand jury testimony in his case and the names of grand jurors. In the alternative, Mr. White requested an *in camera* review by the lower court. This motion was followed by a supplemental motion. Both were denied by the lower court.

Due to the recent release of sworn statements that contradict testimony given by witnesses at his trial, see Claim I, Mr. White believes that those witnesses may have made additional prior inconsistent statements at the grand jury proceedings. Defense counsel did not have the sworn statements at the time of the trial, as the State conceded below. In fact post-conviction counsel have just recently acquired them after requesting public records in Mr. White's case over ten (10) years ago, as the State conceded below. The sworn statements are materially different than the trial testimony given by the witnesses.

At trial, Mr. Tehani testified that he and his daughter Pamela entered the store and were walking toward the meat counter when Pamela turned around and told him to look at the man who was waving a gun at them (R. 450-51). Mr. Tehani then testified that the man pushed him to go toward the freezer while waving the gun, and that his daughter was behind him (R. 451). Mr. Tehani then said that it hit him suddenly that the man meant business "because I took a second look on the gun that he was holding. It was a .38 with a short barrel." (R. 451). Mr. Tehani then explained that he offered to

give the man some money and even pulled his wallet out to show him money, and the man replied that he didn't want the money (R. 452). Mr. Tehani testified that he then noticed that the man "has some money hanging from his pocket, . . . [a]ll different dollars and ten dollars, but mostly the dollars was hanging." (R. 452). Then, Mr. Tehani explained, the man kept telling him to get into the freezer, and then the man pulled the trigger twice (R. 453). He knew the man had pulled the trigger because he heard the click of the gun (R. 453). Mr. Tehani then testified that after pulling the trigger a second time, the man "shook his head and went back around the other aisle." (R. 454). After the man walked away, Mr. Tehani told his daughter to get out and run, but she was scared so he ran to the door, held it open, and she began to walk, not run, out of the store. (R. 454).

In a sworn statement signed by Henry Tehani and dated March 8, 1981, Mr. Tehani indicates that a black male "came and told me and daughter to get in freezer - but I insist it he want my money I'll give him all that I have - but I also talket [sic] to him that there is a cop outside - and he has a mustache on - he came toward me and push me to go in the freezer. But I won't go - and as sooner he went around the other side of the counter and I run outside and called out hey daughter she came running out the door when he found out that we were out side he run out the back door." Mr. Tehani further declared under oath that the man "was high on drugs or drink [sic] and when he ran through the back-door he look he was drunk." He only noticed the gun after the black male ran out the back door. Mr. Tehani was instructed to complete the statement

in "FULL DETAIL." The sworn statement was handwritten by Mr. Tehani in his own words.

This statement is completely different from Mr. Tehani's trial testimony in several extremely important aspects. Significantly, nowhere in the statement does Mr. Tehani ever mention that the man in the store pointed a gun at him and that he attempted to shoot him twice, certainly a glaring omission. The prosecutor argued to the jury that Mr. White intended to kill Henry Tehani by shooting him, yet Mr. Tehani never mentions this incident in his statement. This undisclosed statement completely transforms the tenor of the interaction with Jerry White in the store, for Tehani did not even recall Mr. White trying to shoot him. Because Mr. Tehani in his sworn statement does not mention Jerry trying twice to shoot him, he also fails to mention another important detail to which he testified -- that after twice clicking the gun, Mr. White "shook his head" and turned away. The implication that Mr. White "shook his head" after the gun failed to go off is clear -- that Mr. White was disappointed or upset that the gun did not go off. The failure of Mr. Tehani to mention either the gun or the fact that Mr. White "shook his head" when the gun did not discharge would have been significant to present, for the tenor of the exchange between Mr. White and the Tehanis is different without these details. The fact that Mr. White had a gun and that he "shook his head" when it failed to discharge must not have been a significant an event if Mr. Tehani did not even mention it in his sworn statement. Mr. Tehani's March 8 handwritten sworn statement also fails to mention that he saw bunches of money in Mr. White's pockets during the confrontation. According to Henry Tehani's testimony, he noticed the money sticking

out of Mr. White's pants, in specific denominations, after Mr. White had told him that he did not want the money in Tehani's wallet. Yet right after the incident, no mention of this money is made.

On March 8, 1981, Ms. Pamela Tehani gave a sworn statement in which she wrote that after she and her father entered the store, the man "came up behind us and said to get in the freezer[.]" The man "was pointing a gun at us" and her father asked him to take his money but he refused to take it and "he shot at us but there were no bullets[.]" Ms. Tehani then explained that the man "started to walk towards the front of the store" and "my father and I ran out[.]"

This sworn statement contradicts Henry Tehani's testimony and sworn statement, and it corroborates Mr. White's testimony. It indicates that it was obvious that the gun had "no bullets." Nowhere does Ms. Tehani mention any money in Mr. White's pockets, nor the fact that after the gun clicked twice, the man "shook his head" and walked away.

These statements were material. The Tehanis were key witnesses in this case according to the prosecutor (R. 926). The prosecutor highlighted the Tehanis' testimony:

> And his testimony (Mr. White's) was that he didn't intend to shoot Mr. Tehani and twelve-year-old Pamela Tehani. Do you remember that testimony yesterday? I ask you to consider that in light of all the evidence in this case.
>
> ...[H]e walked in with that loaded revolver, and he attempted to get out of that store when the Tehani's came in. And they kind of surprised him, walked past him, and walked right down the aisle, and didn't say a word to him. As you remember, he was standing over by the magazine rack, standing at the store exit, waiting here (indicating).
>
> He tells you that he went up to them – if you'll remember -- and wanted them to go into the freezer, but he

> wasn't going to shoot them. This was a loaded gun, ladies and gentlemen, a loaded gun...
>
> [Jerry White] wants you to believe that he had the presence of mind to know -- and he never testified that he looked in the gun or removed anything from the gun -- that when Mr. Tehani, after several times, and after the defendant pushed him towards the freezer, that the defendant then pulled the trigger. I suggest to you that he intended to kill Mr. Tehani and his daughter Pamela Tehani, just as he intended to kill James Melson, and intended to kill Mr. Alexander...
>
> For whatever reason that gun did not go off, remember what the defendant did, in the testimony of Mr. Tehani. I suggest to you that it's incredible to believe that the defendant would pull the trigger and show Mr. Tehani that the gun was empty, if that was his intent, to scare him. Pointing the gun would be enough; pulling the trigger and showing him it was empty would do nothing. I suggest to you that surprised the defendant. He pulled that trigger and nothing happened. And do you remember what Mr. Tehani said, that he started fiddling with the barrel? I suggest that's attempting to see why it didn't work, and getting it to work.
>
> And after fiddling with the barrel, and trying to bet them back into the freezer, Pamela Tehani cried, and he pulled the trigger a second time, but he was only trying to scare them.

(R. 926-28).

Given the importance of the Tehanis' testimony in this case, these contradictory statements merit the disclosure of the grand jury testimony to Mr. White's representatives.

Furthermore, in deputy John Harrielson's March 23, 1981, report, previously undisclosed to any of Mr. White's defense counsel, he states that he went to the hospital to interview Mr. White after Mr. White was shot. Deputy Harrielson's report explains that at the hospital, Mr. White made the statement that the deputy was there to speak to Mr. White "about the store." Deputy Harrielson then writes that Mr. White stated that

"he did not see anyone inside the store when he went in; he also stated that he got shot inside the store." This statement contradicts Harrielson's trial testimony in a significant respect. At trial, Deputy Harrielson testified that at the hospital, Mr. White stated he knew why the deputies were there

> A We asked him, do you know why we're here?
>
> Q What did he responds, if anything?
>
> A He said, yes, it's about the store in Taft. And he said, when I went into the store no one was in there, and then all at once a black male came up and shot me...

(R. 849). However, according to his March 23, 1981, report, deputy Harrielson never mentions that Mr. White stated he had been shot by a black man.

Mr. White established the prerequisites for requiring disclosure of the grand jury testimony in this case. Having a copy of the grand jury testimony, pursuant to Florida Statute §905.27 is essential in order to:

> a. Ascertaining whether it is consistent with testimony [including deposition testimony] given by the witness before the court; [or]
>
> b. Determine whether the witness is guilty of perjury; or
>
> c. Furthering justice [or]
>
> d. Determining whether the State has violated Brady or Giglio v. United States, 405 U.S. 150 (1972).

Brady; Giglio; § 905.27, Fla. Stat (1994).

In Butterworth v. Smith, 494 U.S. 622, 110 S. Ct. 1376 (1990), the United States Supreme Court held that

> [w]hen an investigation ends, there is no longer a need to keep information from the targeted individual in order to prevent his escape–that individual presumably will have been exonerated, on the one hand, or arrested or otherwise informed of the charges against him on the other. There is also no longer a need to prevent the importuning of grand jurors since their deliberations will be over. Similarly, the concern that some witnesses will be deterred from presenting testimony due to fears of retribution is, we think, not advanced by this prohibition; any witness is free *not* to divulge his own testimony . . .

Butterworth, at 110 S.Ct. 1381-82 (footnotes omitted)

An analysis of the Supreme Court reasoning in Butterworth is dispositive of the issue before this Court. Reviewing the history of the grand jury, the Supreme Court noted that the most important reason for the tradition of secrecy surrounding the institution in its developmental years was "to safeguard citizens on overreaching Crown and unfounded accusations." Butterworth v. Smith, 110 S. Ct. at 1380. These interests are still served by the preservation of secrecy in certain limited circumstances. For example, until such time as the grand jury makes a decision, secrecy encourages witnesses to come forward and precludes suspects from being sufficiently forewarned to flee the jurisdiction. Id. at 1380. However, "[w]hen an investigation ends, there is no longer a need to keep information from the targeted individual to prevent his escape . . ." Id. at 1381. Mr. White's grand jury was discharged long ago and Mr. White will certainly not flee; therefore, there is no need for a veil of secrecy. Mr. White's constitutional rights dictate that this testimony be revealed.

More often than not, the secrecy of the grand jury may now be used as a tool by the State to inflict an unfair disadvantage upon the accused. The Supreme Court has

noted "that grand juries are expected to 'operate within the limits of the First Amendment,' as well as other provisions of the Constitution." Butterworth v. Smith, 110 S. Ct. at 1380 (quoting Branzburg v. Hayes, 408 U.S. 665, 708 (1972)); see also Wood v. Georgia, 370 U.S. 375 (1962). The limited interest in pre-indictment secrecy is served by an equally limited prohibition against disclosures. However, any permanent ban against ever disclosing the inconsistent testimony and perjury committed by state witnesses cannot be reconciled with the constitutional rights of the accused.

In determining whether to release the grand jury transcripts the lower court should have reviewed them *in camera*, Grand Jury Fall Term, A.D. 1991 v. City of St. Petersburg, Fla., 624 So. 2d 291 (Fla. 2nd DCA 1993), but did not. The standard for an *in camera* review are less stringent. Keen v. State, 639 So. 2d 597 (Fla. 1994). The discrepancies between sworn statements and testimony demonstrate the particularized need this Court has required. Keen, 639 So. 2d at 600, text and n. 4. See also Dennis v. United States, 384 U.S. 855 (1966); and Miller v. Wainwright, 798 F.2d 426 (11th Cir. 1987). Furthermore, Mr. White has demonstrated the materiality of these statements and their usefulness. Armstrong v. State, 642 So. 2d 730 (Fla. 1994).

Mr. White's trial attorney has provided an affidavit stating that he would have used the contradictions above to impeach witness testimony and corroborate Mr. White's testimony. The grand jury testimony would have cemented these issues in Mr. White's favor with the jury, or would have provided yet further contradictory statements. The Tehani testimony and the State's emphasis of it would have been rebutted had trial counsel been given the opportunity to cross examine them with their sworn statements

and their testimony to the grand jury about what really occurred in the store that day. Deputy Harrielson's account of Mr. White's statement would have been impeached. This is information trial counsel would have used at the trial. This evidence would have corroborated Mr. White's testimony regarding the events at the store. This information would have also aided trial counsel in the penalty phase.

Having the grand jury testimony will greatly assist Mr. White's post-conviction counsel in investigating Mr. White's case and pursuing challenges to Mr. White's conviction and sentence.

Those sections of Chapter 905 preventing disclosure of the witness list and/or release of the grand jury testimony to post-conviction counsel are overbroad. Thomhill v. Alabama, 310 U.S. 88, 60 S.Ct. 296. The issue of overbreadth has not yet been fully decided. State v. Knight, 20 Fla. L. Weekly D2240, 2241 (Fla. 4th DCA 1995).

Mr. White has met the requirements for the disclosure of the grand jury testimony and the names of the grand jurors. Alternatively, Mr. White has met the less stringent requirements for an *in camera* review of the grand jury testimony. Relief is warranted at this time.

ARGUMENT III

THE LOWER COURT'S FAILURE TO REVIEW MATERIALS WITHHELD BY THE STATE OF FLORIDA FOR EXCULPATORY EVIDENCE VIOLATES MR. WHITE'S FEDERAL EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, HIS STATE CONSTITUTIONAL RIGHT OF ACCESS TO COURTS, AND HIS STATE RIGHT TO THE EFFECTIVE ASSISTANCE OF POST-CONVICTION COUNSEL.

The failure of either the Leon County or the Orange County Circuit Court to review the materials withheld by the State of Florida for the existence of exculpatory evidence violates the Eighth and Fourteenth Amendments to the United States Constitution, Article I, Sections 21 & 24 of the Florida Constitution, Chapter 119 of the Florida Statutes, Mr. White's right to effective assistance of post-conviction counsel, and the principles announced in Brady v. Maryland, 373 U.S. 83 (1963), and Walton v. Dugger, 634 So. 2d 1059 (Fla. 1993).[11]

On November 1, 1995, a public records request was sent on behalf of Mr. White to Richard Martell, Assistant Attorney General (Record on Appeal, Jerry White v. Robert A. Butterworth, at 10-11). The Attorney General's files were viewed on November 9, 1995, and on that date, Richard Martell provided counsel for Mr. White an "Inventory of Withheld Materials" (Record on Appeal, Jerry White v. Robert A. Butterworth, at 12). In order to expedite the disclosure of records to which Mr. White believed he was entitled, Mr. White subsequently filed a Motion to Compel the Disclosure of Public Records in the Circuit Court of the Ninth Judicial Circuit, in and for Orange County, pursuant to

---

[11]The argument in this section of Mr. White's brief addresses the appeal in White v. Butterworth, 86-901, which has been joined with the Rule 3.850 appeal for the purpose of expediency.

Chapter 119, and Brady v. Maryland, 373 U.S. 83 (1963). Mr. White's Motion to Compel included a claim that the Attorney General in Leon County had not provided Mr. White with all of the material requested. Mr. White requested the Orange County Circuit Court perform an *in camera* review of the material withheld by the Attorney General for compliance with the Public Records Act, and for Brady material. The State objected to the inclusion of the Office of the Attorney General in the Motion to Compel on the grounds that the court did not have jurisdiction over agencies outside Orange County.[12]

Because of the Orlando prosecutor's refusal to permit the Orange County court to address the Attorney General's Office non-disclosure, Mr. White subsequently and properly filed a civil Complaint for Disclosure of Public Records against the Attorney General in the Circuit Court of the Second Judicial Circuit, in and for Leon County (Record on Appeal, Jerry White v. Robert A. Butterworth, at 1-3). The Leon County Circuit Court had full jurisdiction to consider Mr. White's claims for disclosure.

This Court has held:

> We agree that with respect to agencies outside the judicial circuit in which the case was tried and those within the circuit which have no connection with the state attorney, requests for public records should be pursued under the procedure outlined in chapter 119, Florida Statutes.

Hoffman v. State, 613 So. 2d 405, 406 (Fla. 1992). Since the Attorney General was not found in the circuit which entered the judgment and sentence, jurisdiction was proper in

---

[12]In other cases such as George Trepal, the Attorney General's Office submitted itself to the 3.850 court's jurisdiction. However, Mr. Martell never appeared in Orange County and submitted to that circuit court's jurisdiction.

Leon County, where the Attorney General was found. This Court's ruling in Hoffman was a determination that full jurisdiction to decide Mr. White's civil case against the Attorney General, brought under Chapter 119, rested with the Leon County Circuit Court.

Nevertheless, the Attorney General argued in its answer to Mr. White's civil complaint that the Leon County Circuit Court did not have jurisdiction to entertain claims that withheld material claimed to be exempt from Chapter 119 disclosure constituted Brady material (Record on Appeal, Jerry White v. Robert A. Butterworth, at 6-12). In its final order, the Leon County Circuit Court held:

> As an affirmative defense, Defendant asserted that this Court did not have jurisdiction to consider any claims that documents exempt from disclosure under ch. 119 must nevertheless be disclosed under Brady v. Maryland, 373 U.S. 83 (1963). CCR argued to the contrary during a hearing on November 28. The Court agrees with Defendant. Although Defendant has a continuing obligation to disclose Brady material, such claims must be brought in a court of competent jurisdiction.

(Record on Appeal, Jerry White v. Robert A. Butterworth, at 16). Despite Mr. White's request, the Leon County Circuit Court refused to review withheld material for exculpatory evidence[13].

This Court should reject the Circuit Court's conclusion that it was without jurisdiction to determine whether the withheld exempt materials constituted Brady, reverse, and remand for an in camera inspection. The lower court's conclusion places

---

[13]Mr. White sought to introduce the record on appeal from Mr. White's trial, but the court refused to accept the record in evidence.

Mr. White in an irreconcilable position. The Orange County prosecutor refused to permit the Orange County court, presumably a court of "competent jurisdiction" since that is where the criminal trial occurred, to address the materials not provided by the Attorney General's Office, and insisted Mr. White file a civil suit in Leon County under Hoffman. Yet the Attorney General's office in the Leon County suit claims that the Leon County court is not "competent" to review the material for a Brady violation. By its actions, the Attorney General's office has managed to foreclose a Brady review of these materials and continues to forcefully argue that Mr. White should die on Monday, December 4th, at 12:05 p.m, while a package containing potentially exculpatory evidence remains secret and inviolate. This violates due process.

The circuit court's refusal to accept the record on appeal in Mr. White's case and review the undisclosed records for Brady material denied Mr. White the rights guaranteed by Brady. Further, in Kyles v. Whitley, 115 S. Ct. 1555 (1995), the United States Supreme Court held that in determining whether evidence not disclosed by the state is "material" in violation of Brady, the defendant is entitled to a determination of the cumulative effect of all suppressed evidence favorable to the defendant rather than consideration of each item of evidence individually. Mr. White was denied that determination by the Leon County Circuit Court, under Hoffman the only court with proper jurisdiction over the Office of the Attorney General.

Mr. White was further denied his due process rights by the fact that his Motion to Vacate Judgment of Conviction and Sentence and Request for Stay of Execution raised claims relying on Brady. That Motion was denied by the Circuit Court in Orange County

on Tuesday, November 28, 1995, including Mr. White's claims alleging a violation of Brady. The issues of Mr. White's request for access to the Attorney General's file pursuant to Ch. 119 were also decided on November 28, 1195, albeit, by a different court. Under Kyles, Mr. White is entitled to review of those claims together with the materials withheld by the Attorney General. The actions of the Leon County Circuit Court together with this Court's ruling in Hoffman have nullified Mr. White's rights under Brady. It is improper for the State and the lower court to take the position that there was no violation of Brady, when the State and a different lower court has refused to permit Mr. White access to all the public records which would form the further "tools" for the presentation of such claims. Provenzano v. State, 561 So. 2d 541 (Fla. 1991). Perhaps, it is time for this Court to reconsider the wisdom of the ruling in Hoffman.

The Leon County Circuit Court determined that the Attorney General has an obligation to disclose exculpatory material under Brady v. Maryland, 373 U.S. 83 (1963), (Order dated November 29, 1995), but refused to hold the Attorney General to that obligation. As the only court with proper jurisdiction over the Attorney General, the circuit court's ruling refusing to review withheld material for Brady effectively relieved the State of Florida of its obligation to disclose exculpatory evidence and left Mr. White without recourse in a court of law.[14]

The circuit court's ruling also denied Mr. White access to courts as guaranteed by Article I, Section 21, Florida Constitution:

---

[14]While executive clemency is normally the avenue to address issues which the courts of law have not, will not, or cannot remedy for whatever reason, Mr. White was never provided the opportunity to present any clemency matters to the Governor prior to the signing of the death warrant.

> **Access to courts.** – The courts shall be open to every person for redress of any injury, and justice shall be administered without sale, denial or delay.

By determining that it was not the court of competent jurisdiction to review the withheld material in camera to determine if any materials constituted Brady, the Leon County Circuit Court in effect decided that the proper court to make that determination was the trial court with jurisdiction over Mr. White's Motion to Vacate Judgement of Conviction and Sentence and Request for Stay of Execution. Yet, the Circuit Court in Orange County is without jurisdiction over the Attorney General, and the Orange County prosecutor refused to allow the Orlando court to address the matter as Hoffman permits. Mr. White is left without any court in which to seek redress.

The Attorney General is in possession of material that has not been disclosed to Mr. White. No court has accepted the responsibility to determine whether any of that undisclosed material is exculpatory. Mr. White is caught in an egregious "Catch 22." This Court has told him that he must bring any Chapter 119 lawsuits against the Attorney General in the circuit court where the Attorney General is found (Hoffman), but that circuit court has ruled that while it will decide to sustain the withholding of material by the Attorney General, it will not determine whether those materials constitute Brady. The Leon County Circuit Court decided that the 3.850 court was the proper court to perform a review for Brady. The Orange County Circuit Court where the Rule 3.850 motion was heard could not review the material for Brady because it was determined by this Court that jurisdiction over agencies outside the judicial circuit in which the Rule

3.850 motion is pending rests only where that agency is found. Hoffman. In the case of the Attorney General, jurisdiction lies in Leon County.

The Constitution of this State guarantees that all persons shall have the courts of this state available for redress of injuries. The Leon County Circuit Court should reviewed the withheld material for Brady, yet refused to conduct the review mandated by Kyles, Brady, and Walton v. Dugger, 634 So. 2d 1059, 1062 (Fla. 1993).

The Circuit Court's refusal to make the determination whether the material withheld by the State of Florida constituted Brady also denied Mr. White the effective assistance of post-conviction counsel. Spalding v. Dugger, 526 So. 2d 71 (Fla. 1986). Post-conviction counsel sought the disclosure of records in order to pursue claims on behalf of Mr. White. Yet, post-conviction counsel has been foreclosed from pursuing claims based on Brady because the Circuit Court refused to review withheld material for exculpatory evidence and no court has reviewed that withheld material together with claims raised based on other previously undisclosed Brady material. By placing Mr. White in this untenable "Catch-22," the circuit court for Leon County has acted to deny Mr. White any semblance of the due process guaranteed by the 14th Amendment and the Florida Constitution.

ARGUMENT IV

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

The undersigned attorneys were assigned to Mr. White's case following this Court's denial of the Capital Collateral Representative's petition in In Re: Jerry White,

Case No. 86,706 (Order of October 31, 1995). In that petition, CCR Michael J. Minerva informed the Court that the CCR office was unable to undertake Mr. White's representation due to its current caseload overload and inadequate funding. CCR's petition also argued that to force CCR to represent Mr. White during this critical time period would not only deprive Mr. White of his right to effective representation during this warrant, but also violate the CCR attorneys' ethical obligations towards Mr. White as well as their other clients.[15] After hearing oral argument, this Court denied all relief without opinion. Justices Kogan and Shaw dissented.

It has become apparent during these past several weeks that Mr. White has not been receiving the effective assistance of counsel. The undersigned attorneys had no familiarity whatsoever with Mr. White's case prior to October 31, 1995, and had never met or spoken with Mr. White prior to that time. Although between them the undersigned counsel represent over forty (40) death sentenced individuals in active litigation in both state and federal court, counsel had to suspend working on those cases so that they could devote their attention to Mr. White's case. Given that they had no

---

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

familiarity with Mr. White's case, this task has been impossible, and counsel have a grave fear that because they lack the necessary familiarity with this case, issues are being overlooked or missed. Mr. White should not be put to death under these circumstances.

Counsel's efforts to render effective representation have also been constantly thwarted by the State since they were assigned to this case. In furtherance of their representation of Mr. White, counsel made public records requests on various state agencies to obtain whatever records were available regarding Mr. White.[16] These agencies included agencies outside of Orange County, namely the Attorney General's Office in Leon County, and the State Attorney and Sheriff's Office in Polk County, where Mr. White had some prior cases. In order to expedite compliance with their requests, Mr. White's counsel filed a motion to compel disclosure of records and an amendment thereto in the Orange County circuit court. Rather than agree to jurisdiction in Orange County over these agencies in an effort to expedite the situation and assist Mr. White's counsel in obtaining these records, see Hoffman v. State, 613 So. 2d 405 (Fla. 1993), the Orlando prosecutor refused to allow these matters to be raised in Orange County,

---

[16]In responding to this claim as raised in Mr. White's petition for extraordinary relief filed on November 29, 1995, White v. Singletary, No. 86-907, the State argued that "[t]he simply answer to this is that Chapter 119 was on the books when CCR first assumed representation of Mr. White in 1985, and that all of these matters could have been resolved earlier" (Response at 3). Capital appeals Chief Martell has apparently not bothered to review the transcript of the hearing below when Assistant State Attorney, Paula Coffman acknowledged on the record that "I will candidly admit that the existing record in this case does not refute the allegations that prior public records demands have been made and if they have been made, that these six or seven items that they're not claiming they've never seen before were not included in those prior disclosures" (11/27/95 Transcript at 33). As established by the allegations in the 3.850, requests were made in 1985 and 1990, but as Ms. Coffman conceded, the new information was not disclosed in those prior requests. Mr. Martell is bound by those representations. Repeatedly writing in pleadings to this Court that no requests were made in 1985 and 1990 does not change the fact that they were made in 1985 and 1990, as Ms. Coffman conceded.

thereby necessitating the filing of lawsuits in various counties. Because these lawsuits involve more paperwork and additional procedural steps, they remain pending at this time.[17] Had the State agreed to permit these matters to be raised in the motion to compel, rather than oppose Mr. White's efforts to seek a rapid resolution to the issue, they could have been addressed and resolved in a more expeditious manner. Now, additional attorney time and resources have had to be expended to litigate the Leon and Polk County lawsuits. Counsel has the obligation to seek and obtain these records, as the Court made very clear in Porter v. State, 653 So. 2d 374 (Fla. 1995), where the Court barred a claim premised on a document discovered in a county clerk file which the Court ruled had been available to collateral counsel for years had they diligently sought it. This public records litigation is necessary, but also time consuming, and is not made any easier by the State's refusal to assist in the production of the requested materials. See Hoffman, 613 So. 2d at 406 ("we encourage state attorneys to assist in helping defendants obtain relevant public records from such outside agencies so as to facilitate the speedy disposition of postconviction claims). The Orange County State Attorney's Office complained that it should not perform CCR's job for CCR, and that obtaining Chapter 119 material is CCR's job.

Not only have counsel had difficulty with agencies outside of Orange County, but the Orange County Sheriff's Office (OCSO) stonewalled Mr. White's counsel for several weeks concerning the production of crime scene photographs. These crime scene

---

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

photos are critical to Mr. White's case, and are necessary for counsel's ability to familiarize themselves with this case. When it provided records responsive to the public records request, the OCSO provided no photographs. A motion to compel was filed, and a subpoena duces tecum issued for production of all records, including photographs. No photos were produced pursuant to the subpoena, although OCSO detective John Harrielson stated under oath in a deposition taken November 20, 1995, that he had many negatives in the office.[18] Counsel requested reproductions of those negatives, and Harrielson stated on the record that they would be available for pick-up on Wednesday, November 22. The photographs were not provided. When a CCR investigator finally contacted Harrielson over the Thanksgiving weekend, he indicated that he would not provide any photographs absent a court order. On Monday, November 27, Mr. White filed another motion to compel production of the photographs. The court ordered the prosecutor to inquire as to the photos, and she later reported that the photos would be copied but only if Mr. White would pay over $700 for them. On the evening of November 27, Judge Evans ordered the production of the photographs by the end of business on Tuesday at no charge to Mr. White, an indigent. These pictures were finally disclosed at 1:00 PM yesterday, November 28, 1995. Counsel are in the process of having these pictures analyzed by a forensics expert. Mr. White is not receiving any semblance of effective representation.[19]

---

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

[19]Additionally, Mr. White has yet to be provided with a copy of his medical file from the Florida State Prison (FSP). Now FSP is refusing to provide these materials to Mr. White unless (continued...)

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

---

[19](...continued)
CCR prepays for the records, a procedure which is time consuming and which there is simply no time to do at this stage. Yet FSP will not release these files, and Mr. White is without recourse. Initiating a lawsuit in Bradford County at this time will certainly not get the records to Mr. White's counsel any faster, and in fact will only require more attorney time and resources which are not available.

In its response to the habeas petition filed on November 30, 1995, Capital Appeals Chief Martell incorrectly asserts that Mr. White's medical file is contained in the appendix to the 3.850 motion. Given that Mr. Martell represents Respondent Singletary, who is the Secretary of the Department of Corrections, the ignorance of the difference between a DOC inmate file and a DOC medical file is disconcerting. What is contained in the appendix is Mr. White's inmate file, hence the identification of those records as "Inmate File" in the index to the appendix. The DOC medical file is an entirely separate file containing medical, psychological, and other confidential information obtainable only with a release from Mr. White. As counsel correctly asserted in their pleading, they have yet to receive Mr. White's medical file because of the prepayment issue.

not permit this to happen. Mr. White is not receiving the effective assistance of counsel. Habeas relief is warranted.

CONCLUSION

For all of the reasons discussed herein, Mr. White respectfully urges the Court to stay his execution, remand his case to the circuit court for a full and fair evidentiary hearing, order disclosure of all public records sealed by the circuit court, order disclosure of the grant jury transcripts, vacate Mr. White's unconstitutional conviction and death sentence, and grant all other relief which the Court deems just.

I HEREBY CERTIFY that a true copy of the foregoing brief has been furnished by facsimile transmission and/or hand delivery to all counsel of record on **December 1, 1995**.

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

TODD G. SCHER
Florida Bar No. 0899641
Assistant CCR

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

BY: _____
Counsel for Jerry White

Copies furnished to:

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

Charlie McCoy
Assistant Attorney General
Department of Legal Affairs
The Capitol
Tallahassee, FL 32399-1050