

IN THE  
SUPREME COURT OF FLORIDA  
CASE NO. 75,055

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ASKARI ABDULLAH MUHAMMAD,  
Appellant,  
v.  
THE STATE OF FLORIDA,  
Appellee.

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APPEAL FROM THE CIRCUIT COURT OF  
THE EIGHTH JUDICIAL CIRCUIT, IN  
AND FOR BRADFORD COUNTY, FLORIDA

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REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

INTRODUCTION

The trial court summarily denied all of the petitioner's claims on the grounds that they were either raised on direct appeal or should have been raised. To the extent that claims should have been raised on direct appeal but were not, petitioner alleges ineffective assistance of appellate counsel. However, as to the substantial factual allegations revealed by the postconviction investigation, an evidentiary hearing is required because these include matters not of record at the time of the direct appeal.

Based upon the record on direct appeal, this Court found that Mr. Muhammad made a competent choice to waive counsel and was competent to stand trial. Through the affidavits of trial counsel, a competent mental health evaluation, and statements of eyewitnesses which were not provided to the defense, collateral investigation has revealed substantial evidence that Mr. Muhammad was insane at the time of the offense, was not competent to waive counsel, and was not competent to waive his sentencing jury. As an example it is now known that Mr. Muhammad has an obsessive fear of men which, in combination with his suspiciousness, grandiosity and paranoia, made it impossible for him to trust his appointed attorney or to submit to a competency evaluation.<sup>1</sup> Collateral investigation revealed that this mentally ill man did not make a competent, rational choice to waive counsel. At the very least an evidentiary hearing is required to develop a reliable, competent record which this Court can review.

Mr. Muhammad's initial brief presented several substantial issues predicated upon, inter alia, Brady v. Maryland, 373 U.S. 83 (1963), and new evidence regarding competency and detailed the extensive facts supporting these arguments. The bottom line of all of these issues is that Mr. Muhammad was denied a fair adversarial testing of his guilt or innocence and of the

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<sup>1</sup>Collateral investigation has revealed why Mr. Muhammad has an obsessive fear of men. When he was eight (8) years old, Mr. Muhammad had to stop his father from raping his 10 year old sister. After spending two years in prison during which time the family literally starved, the father returned home and abused Mr. Muhammad even more viciously for reporting the rape.

appropriate penalty at his capital trial and sentencing. As Mr. Muhammad's initial brief explained, for example, the trial court never had evidence from Mr. Muhammad's trial counsel regarding his competency at the time of trial. Neither the trial court nor Mr. Muhammad had the statements of eyewitnesses to the offense or the assistance of a competent mental health professional. As the initial brief also explained, Mr. Muhammad's capital sentencing proceeding was stripped of all adversarial character because of failures by both the court and defense counsel. Mr. Muhammad was thus found guilty and sentenced to death by default -- not because any tribunal made a decision based upon facts presented to it in an adversarial proceeding. Mr. Muhammad's Rule 3.850 motion stated valid claims for relief, supported by factual proffers, and required an evidentiary hearing for its proper resolution.

A criminal defendant is entitled to a fair trial. As the United States Supreme Court had explained:

[A] fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). To insure that a true adversarial testing, and thus a fair trial, occurs, the Constitution imposes obligations upon the prosecutor as well as defense counsel. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment.'" United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). Of course, the trial court is also obligated to ensure that these and other constitutional guarantees are fulfilled.

Here, Mr. Muhammad was denied a reliable adversarial testing due to both the State's nondisclosure and his own mental illness. Consequently, the jury never heard and considered compelling material evidence which would have established that Mr. Muhammad was insane and that he did not deserve a death sentence. Whatever the cause, the deprivation of a defendant's right to a fair adversarial testing requires a reversal when there is a reasonable

probability that the outcome could have been affected, undermining confidence in the results. Strickland; Bagley.<sup>2</sup>

There is no dispute that Mr. Muhammad's penalty phase lacked any adversarial nature whatsoever. Mr. Muhammad did not ask to waive his sentencing proceeding. He did not ask for the death penalty. To the contrary he argued that this offense was not one for which the legislature required the death penalty. Collateral investigation has revealed that he waived counsel due to mental illness and a phobic distrust of men. It is now known that his mental state deteriorated between the competency hearing and the time of trial. Finally, it is known that this mentally ill person was overwhelmed at the penalty phase by the appearance of 100 uniformed correctional officers. It is known that his waiver of the sentencing jury was prompted by his illness and the circumstances. No proper competency inquiry was made. Under the circumstances no reliable adversarial testing had occurred. Had the trial court been aware that Mr. Muhammad was waiving counsel at the penalty phase to avoid the presentation of evidence regarding his mental illness and painful family history, under the circumstances of this case, the court would have had a duty to appoint special counsel to represent to public interest. Klokoc v. State, No. 74,146, slip op. at 7 (Fla. Sept. 5, 1991).

Prejudice is manifest. The State concedes that Mr. Muhammad has a long standing history of schizophrenia (Reply Brief at 29). Schizophrenia is a severe mental illness which is of itself evidence of the statutory mitigating circumstance of extreme mental or emotional disturbance. Mines v. State, 390 So. 2d 332 (Fla. 1980). In addition, every expert has agreed that Mr. Muhammad suffered a psychotic break at the time of the offense which would

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<sup>2</sup>Of course, in capital cases, the United States Supreme Court has stated:

In capital proceedings generally, this Court has demanded that factfinding procedures aspire to a heightened standard of reliability. [Citation.] This especial concern is the natural consequence of the knowledge that execution is the most irremediable and unfathomable of penalties; that death is different.

Ford v. Wainwright, 477 U.S. 399, 411 (1986).



constitute evidence of extreme duress as well as substantially impairing his capacity to conform his conduct to the requirements of law. There was no knowing and voluntary waiver of the presentation of the overwhelming mitigating evidence existent this case. No reliable adversarial testing has occurred.

In addition to the substantial evidence of incompetence, collateral investigation has also revealed critical eyewitness statements which were requested but never provided to Mr. Muhammad or his counsel. These statements have been obtained by a public records request to the Office of the Inspector General. They document that Mr. Muhammad was described as "not knowing what had happened" and having a "blank expression."

Finally, during the trial and at the penalty phase the courthouse was dominated by the presence of uniformed correctional officers which even further confused and intimidated this mentally ill defendant. Collateral counsel has filed a video tape of a news cast which documents over a hundred uniformed correctional officers packed into a courtroom designed to hold 80 spectators. Mr. Muhammad told the court that he waived his penalty jury because" ... I do not believe my right to the impartiality of the trial jury ... is a right that is being fairly accorded to me" (R. 1523-24).

The Court must consider the totality of the circumstances in assessing all of these claims and in analyzing the prejudice. Strickland v. Washington, 466 U.S. 668, 695-96 (1984) (A court must consider the totality of the evidence); United States v. Bagley, 473 U.S. 667, 683 (1985) (the reviewing court should assess the adverse effect of the failure to disclose evidence in light of the totality of the circumstances). No adversarial testing occurred at Mr. Muhammad's capital trial and sentencing. The State's brief ignores the totality of the circumstances establishing Mr. Muhammad's entitlement to relief and never addresses (much less explains) how the Court can confidently rely upon the results of the trial proceedings. As is explained herein and in Mr. Muhammad's initial brief, an evidentiary hearing and relief are required.

## ARGUMENT I

**THE TRIAL COURT'S SUMMARY DENIAL OF MR. MUHAMMAD'S MOTION TO VACATE WAS ERRONEOUS AS A MATTER OF FACT AND LAW AND THE COURT FURTHER ERRED IN FAILING TO ADEQUATELY IDENTIFY AND TO ATTACH TO ITS ORDER THE PORTIONS OF THE RECORD CONCLUSIVELY REFUTING EACH CLAIM.**

The State did not contest the facts alleged by Mr. Muhammad in his motion to vacate. There was no reply filed by the state, there was no argument permitted, there was no evidentiary hearing, and no specific parts of the record were attached to the order summarily denying petitioner's claims. The State makes a unique argument that no such references are necessary when the trial court finds there was a procedural bar (Appellee's brief at 10). However, Hoffman v. State, 571 So. 2d 449 (Fla. 1990), does not support the State's position. The circuit court's order does not address the facts alleged in the motion to vacate which were not of record at the time of the direct appeal. The record does not conclusively establish that Mr. Muhammad is entitled to no relief.

Mr. Muhammad has presented a wealth of new evidence which requires an evidentiary hearing. On the Brady claim, post-conviction investigation has discovered critical statements by eyewitnesses that the State refused to turn over to Mr. Muhammad or his counsel. These statements directly contradict central themes of the State's case. Immediately after the incident, Mr. Muhammad is described as "not knowing what happened", having a "blank expression" and "his eyes appeared to be stretched to unusual size." There is a statement from an inmate employee warning the officers that their cruel and arbitrary treatment might result in violence. None of these statements were known to the judge or jury. Instead the State pictured Mr. Muhammad as acting with full rational deliberation.

New evidence has been discovered regarding Mr. Muhammad's deteriorating mental condition after the competency hearing. On direct appeal, counsel for Mr. Muhammad argued there was insufficient evidence to support a finding of competency. This Court agreed that, "Nothing in the record available to Judge Carlisle dispositively demonstrates Muhammad was incompetent." 494 So. 2d at

973. New evidence discovered by postconviction counsel now demonstrates Mr. Muhammad's incompetency. Affidavits from two trial attorneys document the deterioration of Mr. Muhammad's mental state subsequent to the competency hearing. In addition to the affidavits of the trial attorneys, a complete evaluation including a full review of records, complete testing and a competent expert interview revealed that Mr. Muhammad is schizophrenic and brain damaged. Significantly, Dr. Carbonell found that Mr. Muhammad's dismissal of his trial counsel and refusal to see mental health experts was the result of an obsessive fear of men, fear of exposing his mental illness and inability to relive the horrors of his childhood (PC-R. 928-44). None of these facts were before the Court on direct appeal.<sup>3</sup> These issues are not barred for failure to raise them on direct appeal because they were not part of the record. Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990). The trial court erred in failing to require that the State reply to the 3.850 motion, for failing to conduct an evidentiary hearing and for failing to attach specific parts of the record that directly refute each claim raised.

#### ARGUMENT II

**MR. MUHAMMAD'S SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BECAUSE NO RELIABLE TRANSCRIPT OF HIS CAPITAL TRIAL EXISTS AND CRITICAL RECORDS WERE NOT INCLUDED IN THE RECORD ON DIRECT APPEAL PRECLUDING RELIABLE APPELLATE REVIEW.**

Although the State argues that the reconstructed record of the competency hearing is sufficient, this Court acknowledged that the reconstructed record was "sketchy." 494 So. 2d at 971. This Court also conceded that "Muhammad's competency is the primary question in this case." 494 So. 2d at 972. This Court made critical findings based upon this incomplete record." Mr. Muhammad represented in open Court that he was unaware that Dr. Amin was no longer a confidential defense expert. This Court denied the claim on the grounds that ". . . the reconstructed record does not indicate Muhammad raised any objection to the waiver." 494 So. 2d at 973.

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<sup>3</sup>This Court was led to believe on direct appeal that Mr. Muhammad refused to seek any excuse for the murder "apparently based on his interpretation of Moslem teachings that he should take responsibility for his actions." 494 So. 2d at 975.

Given the additional facts that have been discovered in the post-conviction investigation, this sketchy record does not meet constitutional standards of reliability. Gardner v. Florida, 430 U.S. 349 (1977); Entsminger v. Iowa, 386 U.S. 748 (1967). Mr. Muhammad's statements during the hearing are not recorded. Further evidentiary hearing is required to determine what statements were made in regard to the alleged waiver of confidentiality as well as other issues now before the Court.

The State alleges that the presentence investigation was provided to Mr. Muhammad. The record shows the presentence investigation was ordered by the trial court after Mr. Muhammad had been removed from the courtroom. There is no record that the pre-sentence investigation was ever provided to Mr. Muhammad other than a notation "cc: Askari Abdullah Muhammad" on a DOC letter transmitting the report the judge. There is no record whether the PSI was actually sent to Mr. Muhammad or whether he actually received it. At no time did the court ask Mr. Muhammad if he had received the PSI or if he wanted to comment on it. This is not a "disingenuous misrepresentation." The State asks this Court to speculate whether the report was received; petitioner requests that a hearing be conducted to make a factual record which does not require speculation.

The record is confused and confusing. It required the personal intervention of the Chief Justice of this Court with the chief judge of the Eighth Circuit which eventually produced a proliferation of Supplemental Records. If in fact appellate counsel had the records of the motions to dismiss the indictment due to grand jury bias, he was ineffective for failing to raise the issue on direct appeal.

Moreover, the record does not establish itself as being complete. An evidentiary hearing is required.

#### ARGUMENT III

**MR. MUHAMMAD WAS DENIED THE ASSISTANCE OF COUNSEL CONTRARY TO FARETTA AND THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

On direct appeal this Court held that there was "nothing in the record" before Judge Carlisle to indicate that Mr. Muhammad was not competent to waive

counsel (494 So. 2d at 973). Mr. Muhammad has now presented significant evidence which was not part of the record which requires an evidentiary hearing. Specifically, collateral counsel has established through the affidavits of trial counsel and subsequent expert evaluation that Mr. Muhammad waived his right to counsel because he had an obsessive fear of men, that his mental state deteriorated significantly after the competency hearing and before trial, and he was so mentally ill that he wished to avoid presentation of mental health issues which were too painful for him to tolerate.

The State does not contest that collateral counsel has presented the following new evidence regarding Mr. Muhammad's competency which was unknown to the trial court or this Court at the time of direct appeal:

1. Mr. Muhammad is brain damaged (PC-R. 927-38).
2. Mr. Muhammad was evaluated on death row one year before this offense and found to be in urgent need of medication and treatment for his paranoid schizophrenia (PC-R. 1060).
3. After a complete psychological and neurological examination including full and complete testing, Mr. Muhammad has been determined to be incompetent to waive counsel at the time of trial due to the paranoia and grandiosity resulting from his schizophrenia (PC-R. 930).
4. A competent mental health expert has expressed a professional opinion that Dr. Amin's opinion of competency at the time of trial was unprofessional, incompetent and unethical. The testing performed was "nutritional testing" and Dr. Amin described his evaluation as talking to a friend without trying to "tease out" mental illness" (PC-R. 246-47).
5. Trial counsel Stephen Bernstein described a deteriorating mental condition after the trial court competency hearing and explained that Mr. Muhammad waived counsel because of his mental illness (PC-R.559-62).
6. After the competency hearing, but before the trial, trial counsel Susan Cary described Mr. Muhammad as "more confused and disoriented than I had ever seen him. I was unable even to complete the interview due to his state of mental distress. He was unable to discuss his case at all." (PC-R. 1624-25).
7. Prior records of a skull series noted positive findings including a "widened fissure on the left and asymmetric smile."<sup>4</sup> (PC-R. 933).

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<sup>4</sup>Dr. Carbonell refers to these records in her report and would testify in regard to these records if an evidentiary hearing is granted.

8. There are statements of eyewitnesses that were never provided to Mr. Muhammad or his counsel that describe him as "having a blank expression" and "not knowing what happened."<sup>5</sup>

These facts are far from exhaustive of the wealth of new information which is detailed in the initial brief. These facts are more than sufficient to require an evidentiary hearing. The trial court is in error in dismissing this claim because it was "rejected on direct appeal." The State is in error in alleging that there are no new facts. This Court was not aware of many significant facts regarding Mr. Muhammad's mental state at the time of direct appeal. This Court could only say that "Nothing in the record available to Judge Carlisle dispositively demonstrates Muhammad was incompetent." (494 So. 2d at 973).<sup>6</sup>

Post-conviction counsel has presented a wealth of credible evidence to demonstrate that Mr. Muhammad was in fact incompetent. This is much more than is necessary to require an evidentiary hearing. Mills v. Dugger, 559 So. 2d 578 (Fla. 1990); Heiney v. Dugger, 558 So. 2d 398 (Fla. 1990); Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Lemon v. State, 498 So. 2d 923 (Fla. 1986); Blackledge v. Allison, 431 U.S. 63 (1977). Facts not "of record" are at issue in this case; such facts cannot be resolved now by this Court as there is no record to review. An evidentiary hearing is required.

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<sup>5</sup>These statements directly contradict the State's theory that Mr. Muhammad acted rationally and purposefully and corroborate Mr. Muhammad's arguments at the penalty phase that his offense was not one of those heinous, unique killings for which the legislature of the state of Florida has reserved the death sentence.

<sup>6</sup>This Court indicated reservations about the reliability of the examination conducted by Jamal Amin and relied on the cold record of Mr. Muhammad's advocacy although this Court observed that Mr. Muhammad's lengthy dialogues were "wordy" and "flowery" (494 So. 2d at 976).

#### ARGUMENT IV

MR. MUHAMMAD WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE MENTAL HEALTH EXPERT RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION, AND BECAUSE THE STATE FAILED TO DISCLOSE CRUCIAL INFORMATION, DEFENSE COUNSEL FAILED TO RENDER EFFECTIVE ASSISTANCE DEPRIVING HIM OF A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION.

The trial court found that Mr. Muhammad's Ake claim was procedurally barred because it was raised on direct appeal.<sup>7</sup> No claim was raised on direct appeal that Dr. Amin provided an inadequate evaluation. To the extent that appellate counsel should have raised this claim, it was ineffective not to do so. On direct appeal, Dr. Amin's performance was discussed only in relation to the violation of psychiatrist/client confidentiality (Initial Brief at 13-14) and the insufficiency of the Amin report as a basis for the trial court's competency finding (Initial Brief at 15-20).

It is only in the collateral proceeding that evidence was produced to document Dr. Amin's inadequate evaluation. Dr. Amin also was made ineffective in that he was not aware of eyewitness statements describing Mr. Muhammad's mental state. Collateral counsel can document background material which was never considered by the expert, essential testing which was never performed, and the assessment of Dr. Amin's performance by a qualified competent professional who has reviewed all of the background materials, who has conducted the essential testing and who has given an expert opinion relative to Dr. Amin's competence. Like an ineffective assistance of counsel claim, ineffective assistance of a mental health expert requires collateral data that is outside the record. It is only through evidentiary hearing that disputes regarding what background materials were provided can be resolved through the testimony of the trial attorney.

This Court addressed only two issues relative to Dr. Amin on direct appeal: (1) it was not error to fail to appoint a second expert; and (2) based on the record before the Court, deficiencies in the report did not

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<sup>7</sup>Ake v. Oklahoma, 470 U.S. 68 (1985), is neither cited nor argued by appellate counsel on direct appeal.

substantially undermine the sufficiency of evidence supporting competency. (494 So. 2d 972-74). At no time did this Court make a finding that Dr. Amin provided competent mental health assistance to the defense.

This is not a case where there are merely differing expert opinions as the State alleges (Answer Brief at 49). Dr. Amin did not conduct a professionally adequate evaluation. As a black Muslim, he went to see Mr. Muhammad "like a friend" who was trying to find out what happened "without specifically trying to tease out any mental illness." Apparently, the "battery of tests" which he conducted were some kind of nutritional tests (PC-R. 481, 1066).<sup>8</sup>

We now know that Mr. Muhammad lost confidence in his attorneys and refused to see mental health experts due to his mental illness including his obsessive fear of men. The State argues that because Mr. Muhammad refused to see two trial experts that he cannot raise a claim regarding Dr. Amin's incompetence (Answer brief at 51). The State's position is obviously that an incompetent defendant can waive his incompetency. However, the law is to the contrary. Hull v. Freeman, 932 F.2d 159 (3rd Cir. 1991). Here nonrecord material in the motion to vacate established that Mr. Muhammad's mental illness prevented him from cooperating with counsel and the mental health experts at the time of his trial.

Mr. Muhammad has now presented not just a "different opinion" but has offered an expert opinion that Dr. Amin's time with Mr. Muhammad did not constitute a professional or adequate evaluation:

So, in spite of the fact, that Dr. Amin had known Mr. Muhammad to suffer from a schizophrenic like illness, in spite of the fact that he believed that MR. Muhammad's paranoia had intensified and that Mr. Muhammad had a complete psychotic break, he gave an opinion, based only a visit as a "friend", that Mr. Muhammad was not insane. he not only was unprofessional, but unethical. He had previously worked as part of Mr. Muhammad's defense. Mr. Muhammad would have had no way of knowing that this was no longer the case. Mr. Muhammad should have been told. In addition, to visit as a "friend", to do no testing and to state that your evaluation is incomplete, and then to offer an opinion as to sanity, is incomprehensible. In fact, Dr. Amin took no

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<sup>8</sup>Psychiatrists are not trained or qualified to do any type of psychological or neuropsychological testing.



notes during his 1980 visit, perhaps another indication of the nonprofessional nature of his visit.

Those who had close contact with Mr. Muhammad at the time of his trial (his attorney for example) clearly felt different. Dr. Amin, however, apparently conducted no inquiry into the criteria for evaluation of competency to stand trial. He noted clearly the symptoms of increased paranoia and suggested a "complete break with reality" and yet for inexplicable reasons took the word of a man with such symptoms to make his finding of sanity.

(PC-R. 246-47). This is not a case of different opinions among experts. This is a case of a so-called evaluation based on a visit like a friend and some nutritional testing being offered as competent mental health assistance.

Due process requires an "adequate . . . evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). The Eleventh Circuit has recently considered a case in which, like Mr. Muhammad, the defendant had a lifelong history of serious mental illness. The court found that although Dr. Alfred Habeeb was a licensed expert and gave an opinion that the defendant was sane and competent, his assistance was insufficient where competent expertise would have aided the defense significantly. Cowley v. Stricklin, 929 F.2d 640, 645 (11th Cir. 1991). The State's argument that a subsequent opinion by a psychologist was insufficient to attack the competence of a psychiatrist was found to be without merit. The court noted that, as in Mr. Muhammad's case, defendant Cowley had a significant psychiatric defense which was the sole defense available to him.<sup>9</sup>

Collateral investigation has produced a plethora of new evidence regarding Mr. Muhammad's mental state that was never heard by the trial court and which never appeared in the record. The mental health assistance provided by Jamal Amin was woefully inadequate. No mental health assessment of statutory or nonstatutory mitigation was ever made. An evidentiary hearing is required.

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<sup>9</sup>In Mr. Muhammad's case, the prejudice suffered as a result of the inadequate mental health assistance includes the trial court's finding of competency to proceed and competency to waive counsel at both the guilt-innocence and penalty phase of the trial.

#### ARGUMENT VI

**MR. MUHAMMAD'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS WERE ABROGATED BECAUSE HE WAS FORCED TO UNDERGO CRIMINAL JUDICIAL PROCEEDINGS ALTHOUGH HE WAS NOT LEGALLY COMPETENT.**

Collateral counsel has adduced substantial new evidence regarding competency which requires an evidentiary hearing on this claim. See Claim III. Counsel has also shown prejudice by documenting the compelling evidence available to Mr. Muhammad at the sentencing phase of the trial. See Claim VII.

#### ARGUMENT VII

**THE DEATH SENTENCE IS NOT RELIABLE AND MUST BE VACATED BECAUSE MR. MUHAMMAD WAS NOT COMPETENT TO WAIVE HIS SENTENCING JURY, BECAUSE THE TRIAL COURT FAILED TO CONDUCT PENALTY PROCEEDINGS BEFORE AN ADVISORY JURY, AND BECAUSE THE RESULTANT SENTENCE OF DEATH WAS CONTRARY TO THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

Collateral counsel has adduced substantial new evidence regarding competency which requires an evidentiary hearing on this Claim. See Claim III.

The mitigating evidence which could have been presented is overwhelming. As a child, Thomas Knight, was one of 15 children. Both the father and mother were abusive to the children. They lived in abject poverty. The house was so full of cracks that the neighbors could see right through. There was no running water or indoor plumbing. At one time the door fell off and was not repaired for months.

At age eight (8) Thomas saved his ten year old sister who was being raped by their father. Over the mother's objections, the neighbors insisted that the police be called. Based on Thomas' statement, the father served two years in prison. During that time, the family literally starved and the children survived by begging food from neighbors. Thomas' clothing was so ragged, he had to hold them together to cover himself. While the father was in prison, the mother wrote a pitiful letter begging for the release of her alcoholic, abusive husband because the family was suffering from such terrible deprivations. Unfortunately, the mother blamed Thomas for the father's

absence. He started stealing to try and provide the family with food to compensate for the father's absence.

At age nine (9), he was the youngest child ever to be committed to Okeechobee School for Boys. Since he had to be removed from the house and there was no alternative placement in the small Fort Pierce community, he was sent to the Boys' School. The superintendent of the Boys' School recalls Thomas as a frail child who "radiated a need for sympathy." At age 10, Thomas' mother was anxious to have him come home since he was seen as the "father" for the family. The situation deteriorated when the father returned home. He again molested Thomas' beloved older sister so the mother sent her away to live with relatives so the father could stay in the home. The father sadistically beat Thomas for sending the father to prison. Thomas was tied to the bed and beaten so often that he began having severe headaches related to the beatings. The neighbors would hide him to try to protect him.

As an adolescent, Thomas' behavior became more and more erratic and bizarre. He was either abnormally quiet and withdrawn, or jumpy and hysterical. Although the Boys' School was being investigated at the time for its barbaric treatment of the boys, Thomas told a teacher he would rather be at the Boys' School than at home. However, all of his teachers report that he was not a trouble maker at school.

The Knight family had a history of mental illness. Thomas' grandfather was reported to have killed two women, was then found incompetent and died in a mental hospital. A sister died in a mental institution. An uncle was in and out of mental hospitals and a brother could not work because he had nervous breakdowns. Finally, at age 15, Thomas was sent to an adult prison.

At age 21 Mr. Muhammad was found incompetent to stand trial and sent to a state mental hospital. There he was treated with thorazine for symptoms of schizophrenia. He escaped twice to see his mother and the records state that "He says that he is going to escape from this ward, or from any situation even, just to see his mother." At the time of his release he was described as a latent schizophrenic who could "decompensate under the effects of

environmental stress ...." Outpatient treatment was recommended for drug abuse. When Mr. Muhammad was returned to court, he was sentenced to prison where he was treated with thorazine. When he returned home, the father had left and Mr. Muhammad became a loving caretaker for the younger children. During one of the father's visits, Mr. Muhammad tried to defend his mother against one of the father's violent attacks. She had the police pick up Thomas and tell him not to return home.

Thomas moved to Miami where he lived with his sister and brother, worked and attempted to make a life for himself. However, he remained troubled by trance like states and sleeplessness. He began self-medicating by abusing drugs such as LSD, marijuana soaked in heroin, cocaine, occasional amphetamines and heroin. However, he had no prior history of violence and his family was shocked when he was arrested for murder.

At age 23 he was jailed in Dade county. Evaluators noted bizarre behavior and he was put in isolation on suicide watch. He was given valium because he felt like he would explode. A neurological exam noted positive findings including a widened fissure on the left and asymmetrical smile. At age 24 he was diagnosed as a paranoid schizophrenic in a chronic state. Exaggerated suspiciousness and paranoia are a common theme throughout all of Mr. Muhammad's records.

In 1975, Mr. Muhammad was sent to Florida State Prison's death row. Due to his refusal to shave because of a skin condition and his refusal to answer to the name Thomas Knight (his name had been legally changed to Askari Abdullah Muhammad), he was held in total isolation in a punishment cell with no radios or television, inadequate light, and virtually no contact with other people literally for years.

One year before the instant offense, he was evaluated and diagnosed as a paranoid schizophrenic. The evaluation expressed real concern that the prison was providing no medication or treatment.

In 1980, Mr. Muhammad's mother was in poor health and very poor. It was over a year since she had been able to visit her son. When she arrived at the

prison, he was told that he had to shave because his clipper pass had expired. He initially refused but then agreed to do so. At that time he was told that his mother had already been told that he had refused to visit and sent home. At the time one of the inmate employees stated: "I told him I said, 'Man you fucking around like that, you gonna cause somebody to get hurt.'"<sup>10</sup>

Later that night. What the state hospital had predicated many years before came true:

"This patient has unresolved oedipal sexual conflicts and presently shows some signs of identity problems. Deep underlying paranoid fantasies seem to represent a fear that this father will kill him because of the patient's love for his mother, and in a psychotic state this male could kill a male in delusional defense from the murderous onslaught on the father represented by the male."

Statements from eyewitnesses which have been discovered by collateral counsel report that after the killing Mr. Muhammad had a blank expression and "didn't know what had happened." "His eyes appeared to be stretched to an unusual size."

Although some bits and pieces of this background information came out in the record at trial, most of it was unknown. To the extent that trial counsel, Stephen Bernstein, failed to develop this information and present it to a competent mental health expert or the court, he was incompetent. To the extent that the mentally ill defendant was too mentally incompetent to present it in his own behalf, he did not make a knowing and voluntary waiver of mitigation at the penalty phase. In either event, no adversarial testing occurred and prejudice is manifest. There is compelling evidence of extreme mental or emotional disturbance, extreme duress and substantially impaired capacity as well as a wealth of nonstatutory mitigation. Due to the ineffective assistance of counsel, the ineffective assistance of the mental health expert and the very nature of Mr. Muhammad's illness, none of these facts were presented at the penalty phase. Due process requires that Mr.

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<sup>10</sup>Statement taken by the Inspector General which was not provided to defense counsel or Mr. Muhammad.

Muhammad be given an opportunity to establish these facts at an evidentiary hearing.

#### ARGUMENT IX

**THE STATE'S MISCONDUCT THROUGH THE GUILT AND PENALTY PHASES DENIED MR. MUHAMMAD HIS RIGHTS TO A FUNDAMENTALLY FAIR AND RELIABLE CAPITAL TRIAL AND SENTENCING DETERMINATION AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

Trial counsel made a pretrial request for all statements of witnesses. As a pro se defendant, Mr. Muhammad also requested all such statements. At trial, one of the prison employees revealed during his testimony that written and taped statements had been taken from eyewitnesses. Mr. Muhammad immediately objected that these statements had not been provided to him. The State assured the court that all statements had been provided.

In the collateral investigation a public records request has revealed that in fact statements were taken from eyewitnesses which were never turned over to Mr. Muhammad or his counsel. In the motion to vacate Mr. Muhammad claimed both a violation of Brady<sup>11</sup> and the Florida discovery rules had occurred. Contrary to the State's allegations, specific quotes from these eyewitness statements have been provided to the Court to established their critical, exculpatory nature:

At an evidentiary hearing, Mr. Muhammad can show that in fact the reports suppressed by the State expose the truth that Mr. Muhammad told the correctional officer that he was unable to shave due to a skin condition. The suppressed transcripts of interviews also contain a statement from an inmate employee who warned the officers that their cruel and arbitrary treatment of Mr. Muhammad might result in a violent outburst: "I told him I said, 'Man you fucking around like that, you gonna cause somebody to get hurt.'" Finally, the suppressed statements describe Mr. Muhammad immediately after the incident as "not knowing what happened," having a "blank expression," and "his eyes appeared to be stretched to an unusual size." The relevancy of these statements to the circumstances and motivation of the offense are more than obvious. They are also very relevant to Mr. Muhammad's mental state at the time of the offense. The jury, the trial judge and this Court were all misled as to the true circumstances and Mr. Muhammad's motivation.

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<sup>11</sup>Brady v. Maryland, 373 U.S. 83 (1963).

(Appellant's Brief at 80-81).<sup>12</sup> These statements corroborate the opinion of all the mental health experts<sup>13</sup> that Mr. Muhammad suffered a psychotic break due to the refusal of his mother's visit. It is simply untrue that these are only conclusory allegations (Reply Brief at 79). It is also untrue that the Brady claim could have been raised on direct appeal since the State denied on the record that there were any such statements and therefore the existence or substance of the statements was unknown. This case differs from Preston v. State, 528 So. 2d 896 (Fla. 1988) where the exculpatory nature of the suppressed evidence was known at the time of the direct appeal.

An evidentiary hearing is required to determine the extent of the prejudice to the petitioner of the statements which were suppressed. An evidentiary determination will require the testimony of a mental health expert as to the significance of the eyewitness observations. This Brady claim cannot be properly evaluated by this Court without an evidentiary hearing. The trial court is simply wrong in saying that the claim was procedurally barred for failure to raise it on direct appeal. However, to the extent that a claim could have been made regarding the trial court's failure to conduct a Richardson hearing, appellate counsel was ineffective in failing to do so.

#### ARGUMENT X

THE TRIAL COURT'S FAILURE TO GRANT MR. MUHAMMAD'S MOTIONS FOR CHANGE OF VENUE AND FOR INDIVIDUAL, SEQUESTERED VOIR DIRE DEPRIVED HIM OF HIS RIGHT TO A FAIR AND IMPARTIAL JURY IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

News reports of the sentencing in Mr. Muhammad's murder trial, state that Mr. Muhammad excused the sentencing jury because of publicity and the presence of "more than 100 uniformed correctional officers" (PC. 1154).<sup>14</sup>

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<sup>12</sup>In addition these records can corroborate Susan Cary's affidavit that when she spoke to Mr. Muhammad by telephone during his police interrogation for this offense, his primary concern was that she tell his mother that he did not refuse the visit with her.

<sup>13</sup>Dr. Amin also opined that Mr. Muhammad had suffered a "complete psychotic break."

<sup>14</sup>The small courtroom in the Bradford County Courthouse where the trial occurred is designed to hold 80 people and is only 16 miles from Florida State Prison where the offense occurred.

The video tape recording of the television news reports shows with dramatic clarity the pro se defendant, confronting a courtroom packed with uniformed guards. The audio portion reports:

Once again the Bradford County Courthouse was packed with prison guards for the sentencing of Askari Abdullah Muhammad. Muhammad was convicted on October 26th of murdering a Florida State prison guard while on Death Row. The same ominous display of guards appeared at the 1st sentencing date but Judge Chester Chance rescheduled to review the inmate's past history before deciding his fate. Today he made his ruling.

(PC-R. video tape).

In Woods v. Dugger, the Eleventh Circuit described the setting in which Mr. Muhammad's trial took place:

Turning to the record, we note that the trial was held in Union County, Florida. Union County is a small rural county in Northern Florida. Just over ten thousand people live in Union County, but one-third of those are prisoners. Tate Rose, What Life is Like in a Place Where Half the Residents are Behind Bars, Chicago Tribune, October 21, 1985, at Temp Sec. p. 1, col. C. In the neighboring counties of Bradford and Union there are four state prisons which employ twenty-two hundred workers, and the prisons are responsible for \$71 million of the local economy. Stuart, A Town's Fact of Life: The Death Row, Prison, New York Times, April 6, 1984 at Sect. A, p. 14, col. 1. The Florida Statistical Abstract also reports that Union County is one hundred percent rural, Florida Statistical Abstract 3 n. 2, 13 (Shermyen, ed. 1989), and that thirty-two hundred people are employed outside of the home. Id. at 171.

The jury was drawn exclusively from Union County. Richard Dugger, the State Secretary of Corrections, told the New York Times, in a reference to the town of Starke in neighboring Bradford County, "The only time the community takes note of what's going on at the prison ... is when a guard is killed." Nordheimer, "Town Pays Little Mind to Executions," New York Times, Sept. 8, 1984, at Sect. 1, p. 6, col. 3.

923 F.2d 1454 (11th Cir. 1991)(emphasis added). Union and Bradford counties are both rural counties dominated by the prison industry.

In Mr. Muhammad's case, public reaction to the killing of the guard was so widespread and immediate that the sitting grand jury requested that the prosecutor expedite the case so they could consider it before the end of their term.<sup>15</sup> The pretrial publicity was massive. Television news carried a report that the head of the Department of Corrections, Jim Smith, personally attended the guard's funeral. Due to inmate crowding, Judge Green had ordered

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<sup>15</sup>The grand jury consisted of many correctional employees and relatives.



reduction of the population at Florida State Prison by one third to reduce tensions between guards and inmates. One news clip includes an interview of Mr. Smith at Florida State Prison where he states that D.O.C. intended to refuse to comply with Judge Green's order<sup>16</sup> (PC-R. video tape).

Affidavits describing the atmosphere in Bradford and Union Counties, document that the massive publicity regarding Mr. Muhammad's case resulted in the formation of organizations for the protection of guards. Additional publicity was generated when a death warrant was signed on Mr. Muhammad's prior death sentence prior to his trial in Bradford County. Further publicity resulted from the law suit against the Department of Corrections alleging mounting tensions due to poor prison conditions and overcrowding (R. 159-162). Mr. Muhammad and his counsel filed motions for change of venue and individual voir dire citing the massive publicity and the impossibility of a fair trial in Bradford County. The motions for change of venue were denied.<sup>17</sup>

At an evidentiary hearing, post-conviction counsel would present evidence that there was a coercive, intimidating atmosphere of armed guards stationed around the Bradford County courthouse, both inside and outside of the courtroom, in full view of the jury. This armed presence of correction guards was not documented in the original trial record. An evidentiary hearing is required to document the number of guards and the overall effect during the trial.

At the time of sentencing, Mr. Muhammad was confronted with rows of hostile, uniformed correctional officers. He informed the court that he wished to waive the sentencing jury because they had not been sequestered and because of the overwhelming presence of the uniformed guards:

A No, Your Honor, no one has promised me any reward for taking this position. Again, I have thought about this position. It is based, in part, with the jury being absent from these proceedings the several days that we have been away, in

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<sup>16</sup>Judge Green was assigned to preside over Mr. Muhammad's case but subsequently recused himself because he was accused of bias.

<sup>17</sup>The first trial of Mr. Muhammad resulted in a mistrial when a news article regarding his case was actually found inside the jury room.

conjunction with the representation of the Department of Corrections in this courtroom, I feel that for this jury to be influenced as I am influenced by this overwhelming presence of the Department of Corrections, I feel that it is to my best interest to exercise this right, Your Honor.

(R. 1522)(emphasis added). Mr. Muhammad then articulated his objection to the court:

A Your Honor, as I stated earlier, I feel that at this time, under the present circumstances of what has happened thus far in this proceeding, I do not believe my right to the impartiality of the trial jury submitting and advising the sentence, via a recommendation to this Court, is a right that is being fairly accorded to me.

As I stated earlier, because of the absence of the jury upon the Court's own motion that the jury was not to be sequestered, and I stated earlier, the presence of the representatives of the Department of Corrections, I believe, Your Honor, that effect upon this jury is chilling my right to an impartial jury to submit a recommendation to this Court.

(R. 1523-24)(emphasis added). Mr. Muhammad clearly objected to the denial of his right to an impartial jury.

Subsequent to the denial of the motion for change of venue and the objection that due to the presence of the guards that the right of an impartial jury was not being provided, the trial court had a duty to assure due process:

The due process clause of the Fourteenth Amendment guarantees the right of state criminal defendants to be tried by an impartial jury. The Fourteenth Amendment incorporates the essence of the Sixth Amendment right to be tried "by a panel of impartial, 'indifferent' jurors [whose] verdict must be based upon the evidence developed at the trial." Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751 (1961)(citations omitted). As Chief Justice Warren noted in his concurrence in Estes v. Texas, 381 U.S. 532, 552, 85 S.Ct. 1628, 1637, 14 L.Ed.2d 543 (1965)(Warren, C.J., concurring) due process requires the courts to safeguard against "the intrusion of factor into the trial process that tend to subvert its purpose." Id. at 560, 85 S.Ct. at 1641. Specifically, the courts must guard against "the atmosphere in an around the courtroom [becoming] so hostile as to interfere with the trial process, even though all the forms of trial conformed to the requirements of law..." Id. at 561, 85 S.Ct. at 1642.

Woods, 923 F.2d at 1456-57. Once the trial court denied the motions for change of venue, the court assumed the heavy duty of assuring the fairness of the trial. In Mr. Muhammad's case, he told the court he did not believe that the right to an impartial jury "is being fairly accorded to me." Yet, the

court took no corrective action thereby forcing Mr. Muhammad to chose between his right to a jury and his right to an impartial proceeding. Under the circumstances, as orchestrated by the State, he could not have both.

The United States Supreme Court has not hesitated to reverse where evidentiary rulings or state action have encroached upon a defendant's fundamental constitutional right to present a defense. See, Chambers v. Mississippi, 410 U.S. 284 (1973); Rock v. Arkansas, 107 S. Ct. 2704 (1987); Crane v. Kentucky, 106 S. Ct. 2141 (1986). A defendant cannot be forced to chose between two constitutional rights. See State v. Yawn, 320 So. 2d 880 (Fla. 1st DCA 1975) (defendant cannot be forced to choose between the right to discovery and the right to a speedy trial through state's failure to act). When Mr. Muhammad told the judge that he was waiving a jury because the presence of the guards was chilling his right to an impartial jury, the court erred in forcing him to make a Hobson's choice between a prejudiced jury or no jury at all. The court failed to safeguard the trial process against the intrusion of factors that "tend to subvert its purpose." Estes v. Texas, 381 U.S. 532, 552 (1965). As Mr. Muhammad's objection notes, the prejudice was compounded by failing to sequester the jury.

The courtroom atmosphere was virtually that of a lynch mob. Such a circumstance is inherently prejudicial and lacking in due process. The question is not whether the jurors actually articulate whether they are prejudiced but whether is an unacceptable risk of impermissible factors coming into play. Holbrook v. Flynn, 475 U.S. 560 (1986); Estelle v. Williams, 425 U.S. 501 (1976); Sheppard v. Maxwell, 384 U.S. 333 (1966); Estes v. Texas, 381 U.S. 532 (1965); Irvin v. Dowd, 366 U.S. 717 (1961). The presence of armed uniformed guards throughout the trial in a community dominated by the prison industry constitutes an impermissible factor. Further, the risk of a prejudicial effect is unacceptable when there is "a probability of deleterious effects." Williams, 425 U.S. at 504. In this case, the presence of armed guards throughout the trial and the dismissal of the sentencing jury due to the guards constitute a probability of a deleterious effect.

Furthermore, there can be no compelling state interest which was furthered by allowing the correctional officers to overwhelm the courtroom. In fact, the officers were in violation of D.O.C. rules. In Woods v. Dugger, the court noted that:

Section III.C. of the Department of Corrections Policy and Procedure Directive regarding employees uniforms and clothing states that "the uniform ... is not to be worn during off-duty hours or when the employee is not acting in an official capacity, except when traveling to and from work." Under department rules, therefore, no state interest can justify the uniformed presence of these off-duty correctional officers.

923 F.2d at 1460. The burden of alleviating the risk was minimal and due process was denied when the court failed to take any action to correct the prejudice. Norris v. Risley, 918 F.2d 828 (9th Cir. 1990).

An evidentiary hearing is appropriate to develop the facts. To the extent that the issue should have been raised on direct appeal, there was an objection on the record and appellate counsel was ineffective for failing to raise this issue. Relief is warranted.

#### REMAINING CLAIMS

As to the remaining arguments presented by Mr. Muhammad, he relies upon the presentations of his Initial Brief, noting only that the issues involve fundamental error and/or the ineffective assistance of counsel, which rendered Mr. Muhammad's death sentence unfair, unreliable, and unindividualized and which require an evidentiary hearing.

CONCLUSION

For each of the reasons discussed herein and in the initial brief, the trial court's summary denial of Mr. Muhammad's Rule 3.850 motion was erroneous. An evidentiary hearing and relief are required.

I HEREBY CERTIFY that a true copy of the foregoing motion has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 16th, 1991.

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