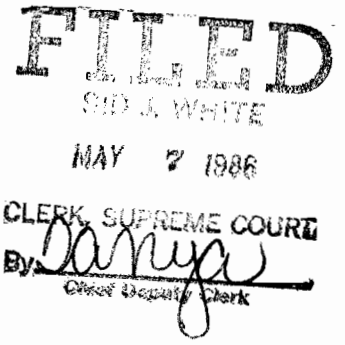
IN THE

SUPREME COURT OF FLORIDA

No. 68619



JOHN EARL BUSH,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE NINETEENTH JUDICIAL CIRCUIT, IN AND FOR MARTIN COUNTY, FLORIDA.

INITIAL BRIEF OF APPELLANT

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INTRODUCTION

This is an appeal from the trial court denial, without evidentiary hearing, of Defendant's Motion to Vacate Judgment[s] and Sentences brought under Fla.R.Cr.Pr. 3.850. In this brief, the parties will be referred to as "Mr. Bush" or "defendant" for the Defendant John Earl Bush; and "state" for Appellee State of Florida.

The following abbreviations will be used: "R" refers to the record on direct appeal, including the transcript of Mr. Bush's trial; the Motion to Vacate Judgment[s] and Sentences filed by Mr. Bush in the Circuit Court of the Nineteenth Judicial Circuit (Martin County, Florida) shall be referred to as the "Motion"; exhibits contained in the three-volume appendix submitted with the Motion shall be "App., Ex. [letter designation]."

STATEMENT OF THE CASE

Defendant Mr. Bush was charged in Martin County with first degree murder, armed robbery, and kidnapping, to which he entered pleas of not guilty. After a jury

trial, in Lee County (on a change of venue), Mr. Bush was convicted as charged. The penalty phase jury, by a 7-5 vote, recommended a death sentence, and trial judge Trowbridge imposed that sentence, along with life sentences on the robbery and kidnapping charges. This court affirmed; rehearing was denied. Bush v. State, 461 So.2d 936 (Fla. 1984). A Petition for Writ of Certiorari to the United States Supreme Court was denied, as was clemency.

The Governor signed a death warrant on March 20, 1986. Execution was scheduled for April 22, 1986. Mr. Bush filed a Motion to Vacate Judgment[s] and Sentences on April 21, 1986, along with a Motion for Stay of Execution. Judge Trowbridge heard argument, denied the Motion for Stay, and denied the 3.850 Motion, all without evidentiary hearing. An immediate Notice of Appeal to this Court was filed along with a Motion for Stay of Execution which was granted. This Court has now established a briefing and argument schedule on Mr. Bush's appeal, pursuant to which this initial brief of defendant Mr. Bush is being filed.

No written order has been entered by Judge Trowbridge explaining the reasons for denial of the 3.850 Motion, nor is a transcript of his oral denial (in which he does set forth his reasons) available to counsel at

this time.

STATEMENT OF THE FACTS

On the evening in question, Mr. Bush, a young black man, got together with Alfonso Cave, "Pig" Parker, and Terry Wayne Johnson in Fort Pierce, Florida. After a few drinks, they purchased a gallon of gin (R. 768), drank it, and proceeded to travel in Mr. Bush's car towards Stuart, intending to go to Palm Beach (R. 814). They reached Martin County at approximately 11:00 p.m. and stopped briefly at a store in Stuart. Then they drove out toward Indiantown and stopped at another store (R. 845). Mr. Bush went in and bought a bag of potato chips. For the next several hours they rode around in Stuart.

Finally, the group headed back towards Fort Pierce and again stopped at the store where Frances Slater, an eighteen year old white female worked (R. 817). Mr. Bush went in to purchase a pack of cigarettes. Cave and Parker got out of the car and came up behind him as Frances Slater was coming from the back of the store. Cave then pulled a gun on her (R. 819). Cave and Parker told her to open the cash register and the floor safe (R. 819). Cave pulled Slater out of the store with him and ordered Mr. Bush to pick up the money bag. Cave and Parker put her in

the back seat of Mr. Bush's car and told Mr. Bush to drive away (R. 819).

Mr. Bush was driving south on U.S. 1 when his companions told him to head towards Indiantown (R. 819). Then Cave and Parker ordered Mr. Bush to stop (R. 820). Slater was put out of the car; Mr. Bush's statement pretrial and testimony at trial was that it was his intention to let her go at that point (R. 821). However, Cave and Parker decided that she might be able to identify them; they therefore told Mr. Bush to get rid of her. Cave gave his knife to Mr. Bush after Mr. Bush refused to take the gun (R. 822). Mr. Bush, not wanting to kill the girl, faked a blow at her with the knife and stabbed her superficially. The woman fell to the ground (R. 820). Mr. Bush then turned to get back into the car when he heard a shot fired by Parker. This was the fatal gunshot wound to the victim's head. (R. 837).

On the following Saturday morning, after the police had seized Mr. Bush's car pursuant to a search warrant, Mr. Bush went to the Martin County Sheriff's Department to see about his car. At that point, Lloyd Jones, a black detective, questioned Mr. Bush about the Slater murder investigation. Detective Jones read Mr. Bush his rights, and asked Mr. Bush to repeat them on the tape. Mr. Bush

tried to read them back, but because of his limited education, he stumbled over several phrases (R. 687-688). Mr. Bush denied any involvement in the crime and further stated that he was in Palm Beach at the time of the murder. The detectives questioned Mr. Bush, repeatedly and persistently referred to the fact that "only one person pulled the trigger," and told Mr. Bush he should think about that before denying involvement in the crime.

The officers questioned Mr. Bush for approximately an hour and a half. Following the interrogation, Mr. Bush remained at the Sheriff's Department, where he stayed all day. The detectives, particularly Charles Jones and Lloyd Jones, both black, continued to talk with Mr. Bush about the Slater murder (R. 631).

At approximately 3:00 p.m. on that Saturday, Mr. Bush agreed to go with Detective Jones to West Palm Beach to check out his alibi. Another deputy also went with them (R. 632). They attempted to locate Mr. Bush's alibi witness, but the witness didn't show.

After dinner, Mr. Bush decided to make another statement to the detectives. At this point, Mr. Bush was not reread his rights, but Jones took the statement from him anyway (R. 638) at approximately 7:35 p.m. The last time Mr. Bush was advised of his rights had been eleven

hours earlier, prior to his first statement at 8:40 a.m. that morning (R. 742). During this second statement, Mr. Bush identified his three companions during the evening of the murder. Mr. Bush described his involvement in the incident but denied stabbing or shooting the woman (R. 749-757).

After taking this statement, the detectives brought Mr. Bush back to the Sheriff's Department in Stuart, where a third statement was taken from him at 9:20 p.m. (R. 767-786). Mr. Bush had now been with the detectives for over thirteen hours. Detective Charles Jones advised Mr. Bush of his rights prior to this third statement (R. 763). The third statement was, to a large degree, confirmatory of the second statement. Mr. Bush again denied stabbing Slater (R. 769). Mr. Bush admitted that he felt remorseful at Slater's death. In fact, he said, "I hate that she's dead, because I have sisters at home." (R. 778).

After this third statement, Mr. Bush was placed under arrest. The next morning he was taken before a magistrate for a probable cause hearing.

On May 7, 1982, the Jail Administrator of the Martin County Jail "received information" that Mr. Bush wanted to talk to Sheriff John Holt (R. 650). At that point,

Sheriff Holt went to the jail and talked to Mr. Bush. Sheriff Holt told him that he would have to get in touch with his attorney because an attorney had been appointed to represent him (R. 652). Mr. Bush was led to the telephone where he called Attorney Richard Schopp. After Mr. Bush spoke with Schopp, Sheriff Holt spoke with Schopp. Schopp told Holt that he advised Mr. Bush not to talk to the Sheriff, but Mr. Bush told him that he was going to talk anyway (R. 655). After the telephone conversation, Mr. Bush was taken to the Detective Bureau where a fourth statement was taken from him. Mr. Bush's reason for making the fourth statement was to make it clear that he did not shoot Slater, that he did not pull the trigger (R. 812). He admitted stabbing her, but he explained that he felt he had no other choice (R. 812). All four statements were introduced at trial.

The record shows considerable confusion as to Mr. Bush's legal representation during this crucial period. After Mr. Bush's arrest on May 4, and arraignment on May 5, 1982, the Public Defender office, anticipating that it would be representing the defendant, sent letters to the state attorney, and to county and city law enforcement personnel requesting that no contact be made with Mr. Bush without prior notification of the office, in order to

protect Mr. Bush's fifth and sixth amendment rights (R. 1320, 1322, 1324, 1326, 1328, 1330, 1332). However, that office was unable to represent Mr. Bush because of conflict with the other co-defendants (R. 1334-36), whereupon private attorney Schopp was appointed on May 6, 1982 (R. 1318). On that same day, the appointment was formally rescinded (R. 1315), apparently without the knowledge of Attorney Schopp (who, on May 17 and 18, was still filing motions with the court on Mr. Bush's behalf, R. 1343-58). Mr. Bush's actual trial counsel Muschott was appointed on May 18, 1982.

On May 12, 1982, without notifying Schopp or any other attorney representing Mr. Bush, detectives placed Mr. Bush in a physical lineup for the purpose of allowing potential witnesses to identify him (R. 363, App., Ex. UU at 39-40). No attorney representing Mr. Bush was notified or was present at the time of the lineup (R. 364).

On August 3, 1982, pursuant to motion, an order was entered appointing a psychiatrist and a psychologist to examine the defendant (R. 1526). Attorney Muschott advised Dr. Tingle, the court-appointed psychiatrist, of the appointment and requested consultation to determine competency to stand trial and the existence of duress and mitigation. Counsel met with Tingle for a half-hour. The

two men apparently decided (without the psychiatrist ever seeing Mr. Bush) that an examination would be fruitless. No psychiatric or psychological evaluation was done of Mr. Bush (App., Ex. Q).

During the trial, one of the state witnesses, Danielle Symons, indicated that she had been present at the above-described lineup (R. 350). The witness was shown a photograph of the lineup and indicated that she had identified one of the individuals in the photograph as someone whom she had previously seen in connection with the crime (R. 351).

The state then called the detective who took the photograph of the lineup and sought to introduce the photograph into evidence (R. 364). The defense attorney entered an objection on the grounds that the state had failed to establish as a predicate that the defendant was represented at the lineup or that he had waived his rights to have an attorney present at the lineup (R. 364). The court overruled the objection on the grounds that the lineup occurred prior to the indictment of the defendant on May 20, 1982, and the photograph was admitted into evidence (R. 365). The detective thereafter proceeded to identify Mr. Bush as the individual in the photograph, and testified that he was the same person identified at the

lineup by Danielle Symons (R. 366).

Two forensic science experts testified at Mr. Bush's trial (and at the trials of all co-defendants): Dr. Ronald Keith Wright, the medical examiner who performed the autopsy of the victim, and Daniel C. Nippes, a criminalist who "placed" the victim in Mr. Bush's car on the night of the murder by the use of fiber and hair analysis. Muschott did not cross-examine Dr. Wright on two critical areas of his testimony: 1) that the superficiality of the stab wound was caused by the victim's attempting to take evasive action (R. 466-7); and 2) that the victim's bladder release resulted from the victim's fear prior to death (R. 471). Nippes testified that hair from the victim found in defendant's car had been "forcibly removed" (R. 920); defense counsel conducted no cross-examination of Nippes whatsover (R. 921).

The victim was the granddaughter of Frances Langford and Ralph Evinrude, prominent citizens of Martin County (R. 31). Her parents are in the newspaper business in the county (R. 32). Extensive pre-trial publicity necessitated the change in venue to Lee County. The state repeatedly during voir dire of potential jury members and during argument reminded the panel of who the victim's

forebears were. The victim's family was present in the courtroom and behaved in such a way as to require Judge Trowbridge to remind them, on two record occasions, of proper courtroom decorum (R. 1026, 1295 - and see App., Ex. A, C, and F).

After the state closed, the defense introduced no witnesses on Mr. Bush's behalf, apparently relying on his fourth statement to police - already in evidence - to present his case. During closing arguments, in addition to arguing the law of felony-murder and of principals, the prosecutor advised the jury that Mr. Bush had fired the fatal bullet (R. 922), although the only evidence presented during trial which would conceivably have supported such an argument was Nippes' testimony that a .38 "live round" bullet had been found in Mr. Bush's car under the front seat on the drivers side (R. 914).

After jury verdicts of guilty as charged on all three counts, the state at penalty phase relied on guilt phase testimony and only added evidence of Mr. Bush's prior felony conviction; the sole defense witness was Mr. Bush himself, who took the witness stand against his attorney's advice (R. 1292). During penalty phase closing argument, the state specifically directed the jury's attention to the victim's family, sitting down to

Thanksgiving dinner and seeing the victim's twin sister-an argument termed "improper" by this Court in its original Bush affirmance.

The court's instructions to the jury included statements to the effect that the final decision rested solely with the trial judge (R. 1127, 1287). The jury returned a recommendation of death, on a 7-5 majority vote (R. 1295).

In accordance with the jury's recommendation, Judge Trowbridge imposed the death sentence, finding three aggravating circumstances and no circumstances in mitigation. As aggravating circumstances, the court found defendant's previous conviction of a violent felony, the commission of the homocide in the course of kidnapping and robbery, and that the homocide was committed in a "cold, calculated, and premeditated manner" (R. 1301-4). In discussing possible mitigating circumstances and then discarding them, the court found that defendant's participation in the offense was not relatively minor, in part because the judge did not believe defendant's lack of intent (R. 1304-5); and that defendant did not act under duress or domination, because there was no evidence to support that claim (R. 1306). In summing up, the Court said: "Frankly, I find the record totally devoid of

anything that may be said in your own behalf (R. 1307)."

* * * *

Other facts alleged in defendant's motion and supporting appendices but not part of the original record will be discussed in conjunction with the specific claims below.

SUMMARY OF ARGUMENT

Issue I: Mr. Bush filed a Motion to Vacate Judgment[s] and Sentences with the circuit court. After hearing argument, the judge summarily denied the Motion without affording an opportunity for an evidentiary hearing on any of the seven claims presented in the motion. Five of those claims require an evidentiary hearing to permit Mr. Bush to prove his allegations. A sufficient proffer was made as to each claim to demonstrate that the record does not and cannot "conclusively refute" the factual allegations. Under the prevailing case law, the claims themselves, which include inter alia allegations that the court-appointed psychiatrist performed inadequately in failing to conduct any evaluation; that Mr. Bush was in fact incompetent to stand trial; and that trial counsel rendered ineffective assistance of counsel, require an evidentiary hearing.

Issue II: Mr. Bush's motion contains seven claims,

none of which are frivolous and all of which present substantial constitutional issues. The trial court's summary denial of all seven issues constitutes error.

Claim I: The failure of the court-appointed psychiatrist to do any mental evaluation of Mr. Bush violates the United States Supreme Court requirement in Ake v. Oklahoma, 470 U.S. ___, 105 S.Ct. 1087, 84 L.Ed.2d 55 (1985) that an indigent receive competent expert psychiatric assistance. That failure was prejudicial in light of the recent evaluation of Mr. Bush, which shows that: he was incompetent to stand trial; there was present evidence of duress and coercion and of lack in intent which could have been used in his defense; his admissions to police officers were "involuntary"; and substantial emotional and psychological mitigation was available.

Claim II: Mr. Bush was in fact incompetent to stand trial, and therefore his convictions and sentences violate his constitutional due process rights.

Claim III: Mr. Bush received the ineffective assistance of counsel, in that numerous omissions by his trial attorney cannot be justified by any reasonable trial strategy and in fact resulted in the prejudice called for under the Strickland test, to wit, but for the deficiencies, the result (conviction and death sentence)

is reasonably likely to have been different. In addition to failing to assure that a competent mental evaluation was conducted, trial counsel failed to suppress damaging evidence, failed to attend critical depositions, failed to prepare for rebuttal of damaging expert testimony, failed to formulate any strategy at penalty phase, failed to seek crucial jury instructions, and in general, failed to render professionally adequate representation.

Claim IV: The state intentionally introduced evidence and argument to the effect that Mr. Bush had shot the fatal bullet, despite its knowledge that co-defendant Parker was the shooter. The state had no evidence to support an inference that Mr. Bush fired the gun; nonetheless, it told the jury that he had done so. This blatant misrepresentation of the facts is facially prejudicial and impermissible under prevailing case law, both state and federal.

Claim V: Prosecutorial appeals to sympathy for the family of the victim were pervasive throughout the trial. The one comment during the state's closing argument to which defense counsel objected was viewed in isolation on direct appeal, and found by this court to be "harmless error." In fact, that single comment was part of a structured, intentional effort on the part of the

state to use the disruptive atmosphere in the courtroom to capitalize on a course of conduct in which the state was clearly seeking to elicit an improper and emotional response from the jury. In light of the new standards for measuring prosecutorial misconduct in argument, as set forth in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633 86 L.Ed.2d 231 (1985) the inflammatory argument constitutes fundamental error and taints both conviction and sentence.

Claim VI: Penalty phase jury instructions which improperly advised the jury that the trial judge was the sole decision maker as to what sentence would be imposed were improper and violate the standards established in Caldwell v. Mississippi, supra. The sentence therefore cannot stand.

Claim VII: Racial factors play an improper role in the imposition of Florida's death sentence. Statistical evidence not available until after Mr. Bush's trial demonstrate that the death penalty in Florida is disproportionately imposed on black defendants who kill white victims - which is the case here. Because of the intrusion of the impermissible factor of race into the sentencing determination, Florida's capital statute as applied is unconstitutional.

ISSUE I

THE TRIAL COURT ERRED BY DENYING defendant'S FACIALLY SUFFICIENT MOTION TO VACATE JUDGMENT[S] AND SENTENCES WITHOUT FIRST CONDUCTING AN EVIDENTIARY HEARING.

Mr. Bush's post-conviction motion, filed pursuant to Fla.R.Cr.P. 3.850, contains seven separate claims. Those claims are all appropriate for post-conviction relief and five require an evidentiary hearing to resolve disputed facts.

Claim I alleges that a court-appointed mental health expert was incompetent in failing to conduct any evaluation of defendant, thus inhibiting the discovery and consideration by the jury and court of (1) defendant's incompetency to stand trial; (2) substantial mitigating factors which should have been used at penalty phase; (3) development of the defenses of inability to form an intent to kill and of duress; and (4) substantial mental evidence that defendant's statements to police were "involuntary" Claim I is cognizable on a 3.850 motion because of Ake v. Oklahoma, 470 U.S. ___, 105 S.Ct. 1087 84 L.Ed. 2d 55 (1985), which requires that indigent defendants be afforded the assistance of a reasonably competent psychiatric expert where the mental condition of the defendant is at issue, constitutes a fundamental change in the law.

It is also cognizable because his own attorney participated in the decision to deprive him of that to which the Court found him to be entitled: a psychiatric examination. Major constitutional changes of law which constitute a development of significance may be raised for the first time in a proceeding on a motion for post-conviction relief. State v. Washington, 453 So.2d 389 (Fla. 1984). When counsel participates in the deprivation of a right specifically provided him by the Court without informing his client, defendant cannot be held to have waived it. Johnson (Larry Joe) v. Wainwright, ___ F.2d ___ (11th Cir. 1985). Mr. Bush is entitled to an evidentiary hearing, since he has properly raised the issue of the competency of his court-appointed psychiatrist, and because the record below fails to show conclusively that he is entitled to no relief. See Meeks v. State, 382 So.2d 673 (Fla. 1980).

Claim II alleges that defendant was in fact incompetent to stand trial in November 1982, based on the recent psychological evaluation. Claim II is cognizable on a 3.850 motion because under Hill v. Florida, 473 So.2d 1253 (Fla. 1985), the competency of a defendant to stand trial is an appropriate post-conviction issue. Moreover, the trial of an incompetent person violates due process

under both federal and state law. Dusky v. United States, 362 U.S. 402 (1960). Because the record below fails to show conclusively that the defendant is entitled to no relief, an evidentiary hearing is required. Meeks, supra.

Claim III alleges that defendant's trial counsel, apparently because he "wasn't being paid enough," rendered ineffective assistance of counsel by committing specific errors and omissions, which separately or together, create a "reasonable probability" that the result of defendant's trial would have been different absent the deficiencies, especially in light of the narrow 7-5 jury recommendation of death. Claim III is cognizable on a 3.850 motion under the authority of Stewart v. State, 420 So.2d 862 (Fla. 1982). Stewart held that the claim of ineffective assistance of counsel is a collateral matter which should be addressed through a motion for post-conviction relief. In addition, it was clearly erroneous for Judge Trowbridge to refuse to conduct an evidentiary hearing where Mr. Bush had alleged in his Motion that his trial attorney had rendered ineffective assistance of counsel through specific acts and omissions, and where Mr. Bush was prepared to present evidence of the ineffective assistance provided by his trial attorney. Vaught v. State, 442 So.2d 217 (Fla. 1983); See also O'Callaghan v. State, 461

So.2d 1354 (Fla. 1984).

Claim IV alleges that the state intentionally and deliberately presented false testimony and argument to the jury to the effect that Mr. Bush shot the fatal bullet, when in fact all evidence showed and the state believed that co-defendant Parker did the shooting. Claim IV is cognizable on a 3.850 motion because defendant is entitled to post-conviction relief if perjured testimony at trial was used with the knowledge of the state. Rogers v. State, 467 So.2d 819 (Fla. 5th DCA 1985); Young v. State, 453 So.2d 182 (Fla. 2d DCA 1984); Monson v. State, 443 So.2d 1067 (Fla. 1st DCA 1984). Again, an evidentiary hearing is required unless the motion for post-conviction relief, the record, and the files of the case conclusively show that the movant is entitled to no relief. Muhammad v. State, 426 So.2d 533 (Fla. 1983).

Claim V, based on egregious inflammatory prosecutorial argument, and Claim VI, involving flatly incorrect jury instructions in light of recent U.S. Supreme Court case law (to wit, Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed. 2d 231 (1985), while properly before the court in post-conviction proceedings, do not require an evidentiary hearing for determination. Claim V is cognizable on a 3.850 motion

because impropriety at trial, which rises to the level of a due process violation of a fundamental constitutional right, may be considered fundamental error which can be raised in spite of the failure to object at trial. Hargrove v. State, 427 So.2d 713 (Fla. 1983). Fundamental error, unlike mere constitutional error, may be raised for the first time in a motion for post-conviction relief, notwithstanding that it could have been, but was not, raised on direct appeal. Nova v. State, 439 So.2d 255 (Fla. 3rd DCA 1983). Jury arguments may be considered grounds for mistrial or reversal if they are highly prejudicial or inflammatory. Pitts v. State, 307 So.2d 473 (Fla. 1st DCA 1975); Porter v. State, 347 So.2d 499 (Fla. 3rd DCA 1977). Because the inflammatory arguments of the prosecution deprived Mr. Bush of the substance of a fair trial, thereby denying him due process of law, his conviction may be collaterally attacked pursuant to Fla.R.Cr.P. 3.850. Marti v. State, 163 So.2d 506 (Fla. 3rd DCA 1964); Young v. State, 177 So.2d 345 (Fla 2d DCA 1965).

Defendant contends that Claim VII, alleging that the death penalty in Florida is imposed in an arbitrary and unconstitutional manner because of improper racial influences, is based on recent sociological data not

available at the time of Mr. Bush's trial. Defendant seeks an evidentiary hearing in order to create the necessary statistical record on which this claim is based. Claim VII is cognizable on a 3.850 motion because it is a mixed question of law and fact, constituting an attack on the constitutional validity and fundamental fairness of the sentence of death imposed on Mr. Bush. McCrae v. State, 437 So.2d 1388 (Fla. 1983). A post-conviction proceeding under Fla.R.Cr.P. 3.850 has been likened to a combination of the common-law writ of habeas corpus and a motion for writ of error corian nobis. Jackson v. State, 452 So.2d 533 (Fla. 1984). It, therefore, constitutes the most appropriate forum for raising this claim, the merits of which may only be established through an evidentiary hearing. Furthermore, under the standard set forth in McClesky v. Kemp, 753 F.2d 877 (11th Cir. 1985) (en banc), the statistical evidence proffered is sufficient to require such a hearing in order to show that Mr. Bush's sentence resulted from purposeful discrimination.

Trial Judge Trowbridge listened to argument by counsel and, without designating specific portions of the record which "conclusively refuted defendant's allegations" - as required by both rule and black letter case law - denied all of defendant's claims without

hearing any testimony. In so doing, Judge Trowbridge erred; the case must be reversed and remanded for evidentiary hearing and redetermination.

ISSUE II

BECAUSE THE ISSUES RAISED ARE SUBSTANTIAL AND NON-FRIVOLOUS, ARE NOT CONCLUSIVELY REFUTED BY THE RECORD, AND ENTITLE DEFENDANT TO RELIEF, THE TRIAL COURT ERRED IN DENYING DEFENDANT'S MOTION TO VACATE JUDGMENT[S] AND SENTENCES

Defendant's Motion raises seven separate grounds for relief. Each of these claims will be discussed below in summary fashion. The facts alleged by defendant in support of these claims were extensively pled in his Motion; only an evidentiary hearing will permit defendant to prove these non-record facts.

CLAIM I

THE INCOMPETENCE OF THE COURT-APPOINTED PSYCHIATRIST, WHO CONDUCTED NO MENTAL EVALUATION AT ALL, PREJUDICIALLY DEPRIVED DEFENDANT OF A NECESSARY COMPETENCY HEARING, OF CORROBORATING EVIDENCE OF DOMINATION AND LACK OF INTENT, OF EVIDENCE OF THE INVOLUNTARINESS OF HIS CONFESSION, AND OF SUBSTANTIAL MITIGATION, IN VIOLATION OF DUE PROCESS, EQUAL PROTECTION, AND SIXTH AND EIGHTH AMENDMENT RIGHTS.

At the time of the offense and at trial, Mr. Bush suffered from organic brain damage and was impaired from years of physical and sexual abuse, poverty, neglect, and

institutionalization. Profound facts relevant to his mental capacity - and critical both to competency and to a proper sentencing determination - were never brought to the attention of the court or the jury because of the unprofessional behavior of the court-appointed mental health experts (and trial counsel) pretrial.

As an indigent whose mental capacity was at issue at all stages of a capital case, Mr. Bush was entitled to a competently conducted psychiatric and psychological evaluation. Defense counsel moved for appointment of a psychologist and psychiatrist for that purpose, and that motion was granted. Counsel advised the appointed experts by letter that they were to determine competency to stand trial and at the time of the offense, and also to determine whether mitigating circumstances existed. (App., Ex. Q). No evaluation was ever undertaken by the court-appointed psychologist and psychiatrist. They never even met Mr. Bush. The notes of Dr. Tingle (App., Ex. Q), reflect the sum total of the psychological and psychiatric assistance rendered to Mr. Bush: a half-hour chat with trial counsel. This is the court-appointed psychiatrist's understanding of his role:

1) Competence to stand trial was not at issue (it was).

2) Mental status at time of event not at issue (it was).

3) No previous history of psychiatric disorder (false).

4) Question of coercion or undue influence not basis of psychiatric indices.

His response to whether a psychiatrist could help:

> "No, as it's a question of truthfulness essentially."

The discussion reflects a fundamental misunderstanding of the role of a mental health expert in a capital trial. Competence was at issue; trial counsel made it so by requesting appointment. Mental status at the time of the offense was at issue; defenses of duress and coercion and of lack of intent were involved. The development of mitigating circumstances, statutory and non-statutory, is always at issue in a capital case. And Mr. Bush's ability to make a "voluntary" confession was at issue. Yet without knowing anything of Mr. Bush's history, and without conducting any sort of evaluation, the psychiatrist determined he could not be of assistance. This conduct falls well below the standard required of those in the mental health professions, and resulted in clear prejudice. A professionally reasonable evaluation

has now demonstrated that there was evidence defendant was incompetent to stand trial; that there existed substantial mental mitigating circumstances; that Mr. Bush is especially vulnerable to domination. By relying on demonstrably unreliable information gleaned from trial counsel, by failing to seek information from Mr. Bush, and by failing to conduct any evaluation or testing, Dr. Tingle reached conclusions at stark odds with the truth. In addition, well-established standards for psychiatric evaluations were extant at the time of Dr. Tingle's non-evaluation, but were entirely disregarded by that sole defense psychiatrist. These standards are set forth in the Motion.

Ake v. Oklahoma, 470 U.S. ___, 105 S.Ct. 1087, 84 L.Ed 2d 55 (1985) holds that due process[1] requires an indigent defendant be provided with a competent and appropriate psychiatric examination when a defendant can demonstrate to the court his mental health is at issue. Florida law and federal Constitutional law make the mental status of a defendant in a capital trial relevant to a

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[1] The sixth amendment concern that a fair trial and effective counsel be provided is interwoven with the due process rights implicated by the necessity for a competent mental health evaluation. See Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985).

competency determination, and Florida law unquestionably places the mental status of the defendant at issue in the penalty phase, Fla. Stat. 921.141(5)(h) and (i), and (6)(b), (e), (f) and (g). See also, Lockett v. Ohio, 438 U.S. 586 (1978). Trial counsel moved for an examination to determine competency and to ascertain whether mitigation existed before trial. Mr. Bush has now demonstrated his mental condition at the time of the offense and at trial was in fact "seriously in question", Ake, 105 S.Ct. at 1090, triggering the state's obligation: "the state must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense." Ake, 105 S.Ct at 1097 (emphasis added).

With this holding, the Supreme Court recognized the entitlement of an indigent defendant, not only to a "competent" psychiatrist (i.e., one who is duly qualified to practice psychiatry), but also to a psychiatrist who performs competently -- who conducts a professionally competent examination of the defendant and on this basis, provides professionally competent assistance to defense counsel. The rationale underlying the holding of Ake compels such a conclusion. Mr. Bush has set forth in his

3.850 Motion and Memorandum the minimum standards of the mental health profession necessary to insure a competent evaluation: the taking of history, performance of testing and interviewing are all essential to a reliable mental status determination. He is prepared to prove, through expert testimony, that those standards are minimal. Florida malpractice law requires they be followed - no less is demanded for indigents facing the death sentence. Nothing was done here.

In fact, the Florida legislature recently appears to have acknowledged the requirements of Ake by adopting a statute during its last session which specifically provides for "training of mental health experts" to implement proper competency determinations for criminal defendants. Florida Statute 916.108 (1985) provides a plan for training mental health professionals to perform forensic evaluations.

Mr. Bush has been sentenced to death, and no sentencer knew he suffered from organic brain damage and psychological disorders, or of his traumatic and impoverished upbringing. Neither at guilt nor at penalty phase were critical facts about Mr. Bush's personality and psychological impairments presented to the jury. These fundamental prerequisites of a fair trial and reliable

sentencing determination are totally lacking in Mr. Bush's case.

Mr. Bush has starkly shown through the detailed evaluation and diagnosis conducted recently that significant evidence of incompetency was in existence at the time of trial to require a competency hearing. There is one reason Mr. Bush did not receive a competency hearing: his court appointed "expert" never saw him. The defendant has proffered a sufficient factual premise for an Ake violation to give him the opportunity to now prove it at an evidentiary hearing.

Nor has the personality makeup of Mr. Bush ever been presented to any sentencer. That evidence stands in bold contrast to the non-existent "defense" at penalty phase, and forms the basis for finding a number of mitigating factors where before there were none. There was present the compelling evidence of Mr. Bush's impoverished, abused, and neglected upbringing. "Evidence of a difficult family history and of emotional disturbance is typically introduced by defendants in mitigation." Eddings v. Oklahoma, 455 U.S. 104, 115 (1982). Why wasn't it introduced here? Mr. Bush's suffering from institutionalization, beatings, and sexual abuse, those "compassionate and mitigating factors stemming from the

diverse frailties of humankind," Woodson v. North Carolina, 428 U.S. 280, 304 (1976), obviously presented a strong case for life. Where was the mention of it? See also Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

Clear and unequivocal findings would have established persuasive statutory and nonstatutory mitigating circumstances, where there were none before, and would have affected the outcome of the sentencing proceeding. Because the advisory sentence was by a 7-5 vote, only one juror needed to be swayed to the side of life.

1. Mr. Bush probably is now and was at the time of the crime suffering from diffuse organic brain damage. (App. Ex. P at p. 9). Much of his conduct is therefore not within his rational control.

2. He suffers from learning disabilities (App. Ex. P. at p. 8).

3. Mr. Bush's history and test results demonstrate a passive and dependent personality, typical of "followers".

4. His I.Q. shows a borderline intelligence score of 76.

5. Mr. Bush has numerous cognitive deficiencies impairing his judgment and common sense. (App., Ex. P, at

p. 8).

6. He has an impaired ability to control impulses, and "acts without thinking".

7. He has difficulty making major decisions for himself without the guidance of others (App., Ex. P, at pp. 8, 9).

8. He could be severely impaired in his ability to plan or foresee that events will occur.

9. He demonstrates the personality of someone who has been physically and sexually abused. (App., Ex. P., at p. 9).

10. He has a low self-concept and strong need to be accepted, resulting from his childhood and imprisonment in his early years.

11. He could live constructively in a prison population if given life.

The propriety of a death sentence under Enmund v. Florida, 458 U.S. 782 (1982), has been disputed throughout these proceedings. Mr. Bush's mental status impaired his ability to foresee that a killing would take place or that lethal force would be used. Every sentencing decisionmaker has been deprived of this information - information which does not just counsel against the death sentence here, but forbids its imposition.

In sum, the incompetence of Mr. Bush's "expert" prejudicially deprived him of substantial relevant evidence, which is now available - and must be heard.

CLAIM II

DEFENDANT WAS DEPRIVED OF A FAIR TRIAL AND DUE PROCESS BECAUSE HE NEVER HAD A COMPETENCY HEARING AND WAS IN FACT TRIED, CONVICTED, AND SENTENCED WHILE INCOMPETENT TO STAND TRIAL

Trial of an incompetent violates due process, both federal and state. Dusky v. United States, 362 U.S. 402 (1960). At the time of trial, Mr. Bush was incompetent and could not assist himself or his attorney. According to recently conducted medical and psychological evaluations, defendant suffered from organic brain damage and other psychological impairments at the time of trial, conditions which, under the facts of this case, equaled incompetency. This new and compelling information is well documented and presented in the 3.850 motion and appendices, which explain the nature of the mental condition and its effect on Mr. Bush and his relationship with counsel.

Mr. Bush's position is not that he must in his sworn allegations establish beyond dispute that he was incompetent at trial, but only that he is plainly entitled to a proper hearing on this claim.

Mr. Bush has raised the claim more than sufficiently. Florida Rule of Criminal Procedure 3.211 lists indicia of incompetency. Several of those indicia of competency were lacking in Mr. Bush because of his mental condition. Incompetency meed not be proven in order to obtain a hearing on it, else the constitution is violated. Pate v. Robinson, 383 U.S. 375 (1966). The required hearing is to determine competency. No hearing has been had, even though competency was raised and a psychiatrist was appointed. Unknown to any court, that psychiatrist never conducted an evaluation. Serious competency questions exist. A 3.850 hearing is mandatory. Jones v. State, 478 So.2d 346 (Fla. 1985).

The background, history, and psychological testing results of Mr. Bush, gathered by Dr. D'Amato and contained in his evaluation, are set forth in detail in the Motion itself. Mr. Bush's mental condition at the time of trial critically impaired his ability to have a rational and factual understanding of the proceedings and to assist in his defense. Specifically based upon what we can now reconstruct, Mr. Bush would have been impaired in:

1) appreciating the charges against him, and of the range of possible penalties;

2) understanding the adversary nature of the legal

process;

3) having an ability to disclose pertinent facts surrounding the offense;

4) relating to his attorney and assisting in planning his defense;

5) having an ability realistically to challenge prosecution witnesses and to testify relevantly.

Mr. Bush's competency to stand trial was supposed to be determined pre-trial. It was not. There is no credible conflicting evidence on defendant's incompetency claim. Sufficient evidence of incompetency has been produced to warrant an evidentiary hearing, and eventual vacation of his convictions and sentences and a new trial.

CLAIM III

MR. BUSH WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

> "[Defense counsel Muschott] told [us] that he wasn't getting paid enough to represent [Mr. Bush] but he would see what he could do."

Affidavit of W.C. Bush, Jr., defendant's brother, App., Ex. C (emphasis added).

The United States Supreme Court has established the national standard for evaluating defense attorney's performance in connection with claims of ineffective

assistance of counsel. Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984). The Strickland test contains two prongs: first, defendant must demonstrate specific errors or omissions (or a combination of same) which result in deficient performance, measured by an objective standard of reasonably competent counsel performing under prevailing professional norms and in light of the "totality of the circumstances"; second, defendant must show that there is a "reasonable probability," defined as a probability sufficient to undermine confidence in the outcome, that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

In determining whether counsel's performance is deficient, the Court requires that counsel's alleged "errors" be presumed to reflect "sound trial strategy." Strickland, supra, 104 S.Ct at 2066; the defendant must overcome this presumption. The Eleventh Circuit, in interpreting this requirement, has held that in some circumstances, the error may on its face (in the context of the record) constitute presumptive ineffectiveness, requiring a showing that counsel's particular decision was prompted by "reasonable trial strategy" to overcome the presumption. Smith v. Wainwright, 741 F.2d 1248 (11th

Cir. 1984).

As has been extensively set forth in the Motion, (see Introduction, pp. 2-3) discussion of this claim is hampered by the failure of trial counsel Muschott to turn over any of his files or records in connection with Mr. Bush's case. We therefore must make assumptions based on the face of the existing record, and on ancillary non-record materials and evidence, as to possible strategic decisions taken by Muschott, unless we receive an evidentiary hearing and the use of discovery to explore Muschott's actual behavior in handling this cause.

Counsel is mindful of the frequent admonitions contained in the cases dealing with ineffective assistance of counsel claims that while defendant is entitled to a competent professionally adequate defense, he is not entitled to a "perfect" one. However, where no defense strategy is apparent from the record, counsel submits that defendant may show what reasonably effective counsel could and should have done to pursue a viable defense theory in each stage of the capital proceeding. This court has ruled that an "ill-advised" choice of theory of defense may constitute deficient representation. Stewart v. State, 481 So.2d 1210 (Fla. 1985); in this case, little "theory" is apparent.

The Supreme Court, as noted, requires that counsel be evaluated in the context of the total circumstances of the case, as they existed at the time of trial. Therefore, we must first look at the state's case. Aside from proof of the corpus delicti, most significant to the prosecution were Mr. Bush's admissions and statements to police officers, especially the fourth statement in which he admitted his participation in the robbery and kidnapping, and that he had stabbed the victim. As corroboraton, the state had Dr. Wright's testimony about the stab wound, Nippes' testimony "placing" the victim in Mr. Bush's vehicle, Danielle Symon's eye-witness identification of Mr. Bush's vehicle and of Mr. Bush himself in the store just prior to the murder (and presumably while the robbery was in progress), and police officers' testimony about stopping Mr. Bush's car after the murder. In addition, to rebut possible defense inferences that the events had not been pre-planned, the state offered testimony that defendant had been in another convenience store earlier in the evening, and that defendant and his companions had been together at the beach that same night. Finally, to rebut Mr. Bush's statements of lack of intent to kill, the state produced evidence that the superficiality of the stab wound was

caused by the victim's evasive action, that a .38 live round was found on Mr. Bush's side of the car, and that the victim was in terror prior to her death and had had her hair ripped from her head sometime during the criminal episode.

Looking at the penalty phase of Mr. Bush's trial, the state clearly had two "objective" aggravating circumstances: Mr. Bush's prior conviction and the commission of the subject homicide in the course of two statutorily designated aggravating offenses. Muschott was therefore on notice that he would have to produce sufficient mitigation to outweigh aggravating circumstances already present.

Pre-trial

Competency to stand trial: Defendant has already discussed this egregious failure of trial counsel in connection with claims I and II herein. Even unsophisticated counsel should have been aware that a psychiatric "evaluation" made without any examination of the client/patient, and based purely on counsel's own inaccurate knowledge of the "facts," as summarized in a half-hour interview, must of necessity be inadequate to determine competency. Defendant has proffered sufficient

evidence of his actual mental condition that the prejudice resulting from this deficiency of trial counsel is clear: had a proper mental status evaluation been made, Mr. Bush would have been found "incompetent to stand trial", and neither convictions nor sentences could have resulted.

Defense counsel's failure to provide a psychiatrist or psychologist with background, social history and records of Mr. Bush, and to direct or guide an expert in any manner contributed to the decision not to make any evaluation. The courts have "long recognized a particularly critical interrelation between expert psychiatric assistance and minimally effective assistance of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). Counsel has a duty, concurrent with that of a defense expert, to ensure a competent mental evaluation. Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). Counsel ensured no evaluation. The prejudice here at guilt phase - the trial of a mentally incompetent defendant, and at penalty phase - the failure to develop the available extensive mitigating evidence - is apparent.

Suppression of damaging evidence - the statements: Clearly there was insufficient evidence in the state's possession to convict John Earl Bush of first degree murder absent his confession. The other evidence

presented by the state served merely to lay the necessary legal predicate for the introduction of the statements. Therefore, any theory of defense of Mr. Bush had to begin with an effort to suppress his admissions and statements. Incredibly, Muschott's only effort to do so appears to have been during the trial, upon general objection. He did not file a Motion to Suppress nor did he call his client as a witness for the limited purpose of exploring surrounding circumstances; he conducted minimal cross-examination; he even failed to object on the ground (later raised) on direct appeal, that the circumstances were inherently coercive and that implied promises were made by the questioning officers.

Most significantly, counsel failed to utilize the court-appointed psychiatrist to attempt to establish involuntariness. Dr. D'Amato would testify that Mr. Bush's organic brain syndrome and passive personality and other factors would likely have rendered him particularly susceptible to the influences noted above, and thereby rendered his statement involuntary. Even though counsel had a court-appointed psychiatrist at his disposal, he did not even attempt to make use of his services.

Had Muschott vigorously contested the admissibility of Mr. Bush's statements, via a comprehensive pre-trial

evidentiary hearing on a motion to suppress - which included psychological evidence - the statements would have been suppressed. The prejudice of Muschott's failure to so proceed is clear.

Counsel's failure to file a motion to suppress in connection with Mr. Bush's statements to law enforcement personnel resulted in an incomplete exploration of the total circumstances surrounding those statements. Even the incomplete investigation in fact conducted in the middle of trial demonstrates that the confessions may have been suppressible. Had counsel operated in a competent manner, he would have been able to bring out other facts to support suppression. Indeed, in light of what we now know about Mr. Bush's psychological difficulties, counsel would have succeeded in suppressing all the statements had he been constitutionally "effective."

Where a confession is obtained through interrogation without full benefit of the Miranda Warning or rights thereunder, it is inadmissible. Miranda v. Arizona, 384 U.S. 436 (1966). Even when such Miranda rights are given, the focus of the inquiry is whether the confession has been extracted by any sort of threat or violence or obtained by any direct or implied promise, however slight, or by the exertion of improper influence. Bram v. U.S.,

168 U.S. 532 (1897); Harrison v. State, 12 So.2d 307 (Fla. 1942); Frazier v. State, 107 So.2d 16 (Fla. 1958); Garriel v. State, 317 So.2d 141 (1976).

Whether or not Miranda rights are given is a prerequisite to obtaining an admissible confession. However, that is not the end of the inquiry. Depending upon the totality of the circumstances, a confession may be inadmissible because it was not voluntary, even though Miranda rights have been read. In order to render a confession voluntary or admissible, the mind of the accused must be, at the time it is obtained or made, free to act uninfluenced by fear or hope. If the attending circumstances or declarations of those present are calculated to delude the accused as to his true position and exert improper and undue influence over his mind, the confession is unlawfully obtained. Harrison v. State, supra; Frazier v. State, supra.

The state violated the defendant's fifth and fourteenth amendment rights under the United States Constitution by the use of these statements procured through improper influence and the suggestion of a benefit if the defendant would confess. Even if there is other evidence to support a conviction, it is not harmless error to introduce a coerced confession. Consequently, Mr.

Bush's judgments and sentences must be vacated.

Suppression of damaging evidence - the line-up: The facts surrounding the line-up are outlined in the Statement of Facts above. Counsel's failure to file a motion to suppress, so as to provide an evidentiary forum for exploration of all the circumstances surrounding the line-up resulted in his being unable, at trial, to keep out the line-up identification evidence. However, the law on the issue would have supported suppression.

In United States v. Wade, 388 U.S. 218 (1967), the United States Supreme Court held that "courtroom identifications of an accused at trial are to be excluded from evidence [when] the accused [is] exhibited to the witnesses before trial at a post-indictment lineup conducted for identification purposes without notice to and in the absence of the accused's appointed counsel." Wade, supra, at 219-220. Although the lineup in the instant case occurred prior to the indictment of Mr. Bush, and at a time when he may have been technically without counsel, the rationale of Wade still applies, and evidence which became tantamount to a courtroom identification of Mr. Bush by those witnesses who had previously seen him in the lineup should not have been admitted.

The Wade decision did not hinge on the indictment of

the defendant per se, but rather, on the fact that indictment constitutes a "critical" stage in any adversary proceedings against a defendant:

> [T]oday's law enforcement machinery involves critical confrontations of the accused by the prosecution at pre-trial proceedings where the results might well settle the accused's fate and reduce the trial itself to a mere formality. In recognition of these realities of modern criminal prosecution, our cases have construed the Sixty Amendment guarantee to apply to "critical" stages of the proceedings.

Wade, supra, at 218, 224. In explaining what it meant by the term "critical", the Court in Wade stated:

> As early as Powell v. Alabama, [287 U.S. 45 (1964)], we recognized that the period from arraignment to trial was "perhaps the most critical period of the proceedings...," Id., at 57, during which the accused "requires the guiding hand of counsel...," Id. at 69, if the guarantee is not to prove an empty right....
>
> [I]n addition to counsel's presence at trial, the accused is guaranteed that he need not stand alone against the State at any stage of the prosecution, formal or informal, in court or out, where counsel's absence might derogate from the accused's right to a fair trial.

Wade, supra, at 218, 225-226 [emphasis added, footnote omitted]. Thus, the application of Wade is not limited to the period after indictment, but extends to the time of arraignment as well.

This position is buttressed by the decision of the

United States Supreme Court in Brewer v. Washington, 430 U.S. 387 (1976):

> Whatever else it may mean, the right to counsel granted by the Sixth and fourteenth Amendments means at least that a person is entitled to the help of a lawyer at or after the time that judicial proceedings have been initiated against him --"whether by way of formal charge, preliminary hearing, indictment, information, or arraignment."

430 U.S. 387, 398 [emphasis added]. See also Michigan v. Jackson, (U.S. Apr. 1, 1986) (No. 84-1531). Clearly, when a defendant is included in a post-arraignment lineup, he must be afforded the assistance of counsel.

That a physical lineup for identification constitutes an adversarial confrontation for which the assistance of counsel is indispensable was clearly noted in the Wade opinion:

> [N]either witnesses nor lineup participants are apt to be alert for conditions prejudicial to the suspect. And if they were, it would likely be of scant benefit to the suspect since neither witnesses not lineup participants are likely to be schooled in the detection of suggestive influences. Improper influences may go undetected by a suspect, guilty or not, who experiences the emotional tension which we might expect in one being confronted with potential accusers.
> ...In short, the accused's inability effectively to reconstruct at trial any unfairness that occurred at the lineup may deprive him of his only opportunity meaningfully to attack the credibility of the witness' courtroom identification.

Wade, supra at 88 U.S. 218, 230-231 [footnotes omitted].

Although counsel did object to the admission of testimony about the pre-trial line-up identification, his failure to file a motion to suppress prevented a full hearing on inquiry into whether the witness' in court identification of Mr. Bush was tainted by the unconstitutional line-up procedure.

Suppression of damaging evidence - the hypnotized eye witness: Danielle Symons testified at trial that she saw the defendants at the convenience store where the victim worked. She specifically identified Mr. Bush from a physical line-up and identified his car from a photo-pak (R. 350, 351).

However, at deposition, it became apparent that somewhere along the line, Ms. Symons' memory had been hypnotically enhanced (App., Ex. RR, Symons deposition, p. 30, 31). In light of the current per se exclusionary rule in Florida with reference to witnesses whose testimony is induced by hypnosis, because of its inherent unreliability, Bundy v. State, 471 So.2d 9 (Fla. 1985) Muschott's apparent failure to explore this matter is inexplicable. It should be noted that in Parker's post-sentence investigation report, App. Ex. WW, it is stated:

> Under hypnosis, Ms. Symons gave information regarding the persons and the car she had seen.

[dated 5/1/82, and apparently a summary of a police

sentence investigation report, App. Ex. WW, it is stated:

> Under hypnosis, Ms. Symons gave information regarding the persons and the car she had seen.

[dated 5/1/82, and apparently a summary of a police report].

Suppression of damaging evidence - other matters: Defendant has alleged in his Motion the search and seizure of Mr. Bush's car may have been unconstitutional and the evidence gained thereby inadmissible, and that the photo-pak used to identify his vehicle may have been improperly suggestive. Without an opportunity to examine the underlying search warrant and the actual photo-pak, counsel cannot prove these allegations. However, sufficient facts are established in the Motion to warrant evidentiary inquiry into these matters.

Trial--Guilt Phase

Assuming that, even with vigorous and competent efforts on Muschott's part, trial counsel would have been unable to suppress Mr. Bush's statements and unable to suppress the physical evidence seized from Mr. Bush's car, we must now examine the configuration of this case as it would have presented itself to counsel and determine possible trial strategies which competent counsel would have pursued.

In fact, given the statements, there is only one "theory" available to the defense - to corroborate Mr. Bush's version of the events: that Mr. Bush's participation in the entire criminal episode, including the homicide, resulted from his submission to the domination of his companions, that Mr. Bush had no intent or expectation of being part of a homicide; that Mr. Bush indeed stabbed the victim superficially because he felt he had to; and finally that Mr. Bush did not inflict the fatal wound. Certainly there is no alternate theory apparent on the record that was being pursued by Muschott. Every error and omission of counsel must therefore be examined in light of this defense strategy.

Failure to use psychological evidence: The sole evidence presented to the jury of the facts outlined above was Mr. Bush's own "testimony" introduced through his several statements to law enforcement personnel. Defendant has now, through competent and thorough mental evaluation, proffered evidence of his psychological make-up which would have substantially corroborated his version of the facts (see App., Ex. P): 1) his history and test results demonstrate a passive and dependent personality, typical of "followers"; 2) his IQ (76) reflects borderline intelligence, and he has numerous cognitive deficiencies

impairing his judgment and common sense, as well as learning disabilities; 3) he could be severely impaired in his ability to plan or foresee that events will occur; 4) he would not have had the ability to form the intent necessary to commit premeditated murder; 5) he has a low self-concept and strong need for peer acceptance. None of these facts were presented to Mr. Bush's jury - because Muschott failed to develop them with the court-appointed expert he himself had sought. This glaring error resulted in a "defense" into which counsel failed to breathe any life whatsoever.

Failure to request jury instructions on intoxication and coercion: The record contains substantial evidence, primarily through defendant's statements, that the defendant had been drinking heavily all day on the day of the offense. In addition, his admissions were consistently to the effect that his actions on the date in question had been coerced by one or more of the co-defendants. Inexplicably, trial counsel failed to request jury instructions on these two matters, thus undercutting his own defense theory.

Failure to rebut inference that Mr. Bush fired the gun: In conjunction with a theory of corroborating defendant's statements, it was absolutely imperative that

Muschott avoid any suggestion his client might have fired the fatal bullet. Yet, counsel committed at least two errors in this regard which resulted in the state's misleading and prejudicial arguments to the jury (see Claim IV below) that Mr. Bush had fired the gun.

a. Georgeann Williams

Georgeann Williams was Mr. Bush's girlfriend at the time of the offense. She was a witness for the state at the trial, and testified only that she saw the defendant late on the evening of the offense, that he was in his car with some other people, and that she lent him gas money (R 476-80).

Because she was listed as a state witness, the co-defendants took her deposition on October 19, 1982; Muschott was not present (see App., Ex. SS). Apparently, for the very first time, it was revealed that Parker had told her, when she was visiting Mr. Bush at the County Jail, that he, Parker, shot the victim (see Parker transcript, App., Ex. YY at p. 884). Her testimony at the deposition was to the effect that although Mr. Bush had done the stabbing, Parker told her he had fired the fatal bullet, but that if she told anyone, it would be his word against hers (App. Ex. SS, Williams deposition, p. 28).

In fact, until the taking of her deposition, Ms. Williams had told only her sister and her mother - but no one representing either the state or the co-defendants. This testimony was used by the state in Parker's trial, (Parker transcript, App., Ex. YY at p. 883), buttressed by the testimony of Ms. Williams' mother and sister to rebut the implication of "recent fabrication."

Unaccountably, Muschott never used this testimony in Mr. Bush's trial - either at guilt or at penalty phase, although the inculpatory statement of a co-defendant would have been admissible hearsay as against penal interest. Since the state argued that Mr. Bush fired the gun, the failure to use Parker's admission was clearly prejudicial and harmful to Mr. Bush's case.

b. Tom Madigan

Madigan was the crime scene investigator for the state. His testimony at deposition, that the bullet fragment removed from the victim's skull was from a .32 caliber bullet, was not brought out at trial. The prejudice to Mr. Bush from this omission is discussed more fully in Claim IV; it is probable that Muschott's absence from the deposition (see App., Ex. TT) resulted in his overlooking this important testimony.

Failure to prepare for expert testimony:

a) Dr. Wright and the stab wound

Medical examiner Wright testified that the two-inch stab wound and the incised wound, taken together, indicated that the knife penetrated and then was dragged along the victim's skin surface in an upward direction (R. 466). In response to the state's question, Dr. Wright testified that the pattern was consistent with evasive action of the victim (R. 466). On redirect, Dr. Wright reiterated that this was consistent with the victim backing away (R. 474).

During closing argument at guilt phase, the prosecutor argued that John Earl Bush "intended to rip [the victim's] insides out, not just to jab her" (R. 979); later state argument presented to the jury as a fact that the victim was moving backwards when stabbed (R. 994).

Defendant's statement to police officers was to the effect that he never intended to kill the victim, but rather stabbed her superficially in a deliberate attempt to "fake it" and thus get the other perpetrators to leave her alone (see R. 824, 1181).

Muschott never cross-examined Dr. Wright on this issue. Undersigned counsel has now done what Muschott should have done had he been interested in providing

competent assistance of counsel to his client, i.e. consulted with an independent forensic pathologist, Dr. Robert R. Stivers, Fulton County Chief Medical Examiner. Dr. Stivers' report is appended to the Motion as App., Ex. II.

In Dr. Stivers' professional opinion, the configuration of the stab and incised wounds is such that "evasive action" by the victim is just one of the many possible ways in which these wounds could have occurred; in Dr. Stivers' words, there are an "infinite number" of other possible explanations for the same autopsy findings. Most importantly, Dr. Stivers states that the findings are not inconsistent with the defendant's testimony that he was intentionally trying to make the wound superficial and non-fatal and had no intent to kill the victim.

Clearly, had Muschott asked appropriate questions of Dr. Wright on this issue during cross-examination, he would have substantially undercut the state's graphic argument that his client "intended to rip her insides out." His failure to consult with an expert in forensic pathology so as to develop questions for cross-examination is both error and prejudicial in light of the only plausible defense theory in this case.

b) Dr. Wright and the empty bladder

Muschott failed to ask any questions of Dr. Wright to challenge the implication that the victim emptied her bladder as a result of sheer terror. The state then argued during closing that, in stabbing her, Mr. Bush "intended to rip her insides out. He didn't intend just to jab her. And what did it do to her? Scared her so bad she wet her pants in fear. Look at the stains. You look at them." (R. 979, emphasis added).

Two of the co-defendants' attorneys, however, did cross-examine on this point, and were able to establish that there were other possible causes for the victim's voided bladder, other than fear. See Johnson transcript, App., Ex. LL, pp. 500-502; Parker transcript, App., Ex. MM, pp. 669-670. Thus, competent protectors of their clients' rights were able to defuse a highly damaging and prejudicial piece of testimony and reduce its harmful impact on the jury.

c) Nippes and the "forcibly removed" hair

Criminalist Nippes testified that a human caucasian head hair recovered from the right rear seat of Mr. Bush's car (and identified as coming from the victim, R. 921) had been forcibly removed from the scalp, as demonstrated by examination of the shaft and root areas (R. 920).

Muschott asked no questions of this witness (R. 921). The state then emphasized the forcible removal of the victim's hair during closing argument (R. 978). At penalty phase argument, the state went even further:

> [W]hat could be more cruel than Frances Slater being put in the back of that car and her hair being ripped from her head?

(R. 1273, emphasis added)

The facts about the victim's hair were developed by two of the co-defendants' attorneys during their respective cross-examinations of Nippes: that Nippes found one "forcibly removed" hair (Parker transcript, App., Ex. QQ, p. 378; Johnson transcript, App., Ex. PP, p. 857); that there are any number of ways by which a hair can be "forcibly removed," (Parker transcript, App., Ex. QQ, p. 378; Johnson transcript, App., Ex. PP, p. 858), including vigorous brushing (Johnson transcript, App., Ex. PP, p. 858; Parker transcript, App., Ex. QQ, p. 379); and finally that finding one "forcibly removed" hair in the vehicle does not prove where the "forcible removal" occurred, i.e., it could have occurred elsewhere and been transferred on clothing, etc. (Johnson transcript, App., Ex. PP, pp. 858-9). Again, competent counsel removed the sting from this testimony and rendered it far less harmful to their clients' cases.

The absolute failure of trial counsel to conduct any investigation into the reliability or basis of the expert opinions of Dr. Wright or Daniel Nippes in this cause resulted in the admission of highly incriminating and unrebutted testimony against Mr. Bush. The courts have repeatedly pronounced that "[A]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 214, 217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980); Rummell v. Estelle, 590 F.2d 103, 104-05 (5th Cir. 1979); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[A]t the heart of effective representation is the independent duty to investigate and prepare.") The Supreme Court has repeatedly stressed the importance of defense access to and consultation with experts to minimize the risk of error when the state intends to introduce expert testimony which will be a factor at trial. Ake v. Oklahoma, 470 U.S. ___, 105 S.Ct. 1087 84 L.Ed.2d 55 (1985). See Blake v. Kemp, 758 F.3d 523, 529-533 (11th Cir. 1985). See also Little v. Streater, 452 U.S. 1 (1981) (In a paternity action, the state cannot deny the putative father blood grouping tests, if he cannot otherwise afford them).

Trial--Penalty Phase

Muschott had no "theory" in mind whatsoever for the penalty phase of Mr. Bush's trial. This is evident from the fact that he put on no testimony other than that of his own client - who took the stand against advice of counsel (R. 1292).

A few weeks ago, the Eleventh Circuit Court of Appeals was presented with an "ineffectiveness of counsel" claim based on facts which in many respects parallel the facts herein. Thompson v. Wainwright, No. 84-5815, slip op. 1986 (11th Cir. April 10, 1986). In Thompson, the defendant challenged effectiveness at his sentencing hearing; his attorney had called no witnesses, just as in Mr. Bush's case. In discussing the trial attorney's failure to investigate and present mitigating evidence, the court held that failure to investigate the background of Thompson's co-defendant and failure to investigate or consider offering psychiatric reports constituted deficient representation (slip op., p.8).

> In a capital case, where a defendant's life may well depend on the extent and nature of his participation, the background of a co-defendant could be crucial. Here, one of [the attorney's] goals was to affix blame for the crime on [the co-defendant] and his failure to investigate [the co-defendant's] background is, therefore, not understandable.

The Eleventh Circuit then addressed counsel's failure to investigate his client's background--and even though Thompson had directed his lawyer not to do so (in contrast to the instant case, in which Mr. Bush issued no such directive, and family members were anxious to testify), the Circuit Court concluded that the attorney's "failure to conduct any investigation of [the defendant's] background fell outside the scope of reasonably professional assistance." (slip op. at 12)

In Thompson, because the defense attorney was hampered by his client's behavior and did have a legitimate penalty phase strategy, and most important, because the aggravating evidence of the defendant's participation in the crime was overwhelming, the Eleventh Circuit found no prejudice from trial counsel's errors.

In Mr. Bush's trial, the advisory penalty verdict was on a 7-5 vote; the evidence in mitigation which Mr. Bush is profferring is substantial. Both counsel error and prejudice are demonstrably present.

The substantial available mitigating evidence includes documentation of Mr. Bush's organic brain damage, his impoverished, abused and neglected youth, and the effect of his incarceration in an adult prison at the tender age of sixteen. This evidence, proffered in Mr.

Bush's Motion, would have been persuasive enough to the sentencing jury and court to have affected the outcome of the sentencing proceeding, decided by one vote. The Supreme Court has recognized the substantiality of such testimony as evidence of the many "compassionate and mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The jury and sentencing court are required to consider "relevant facts of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting death." Woodson, supra, at 304. Available evidence would have established both statutory and nonstatutory mitigating circumstances, described in the Motion. In light of the trial court's comment that the record was totally devoid of any mitigation and in light of the nonetheless 7-5 jury recommendation, the prejudice prong of Strickland is clearly met by Muschott's errors.

Other Errors

Disruption in the Courtroom: On the last day of the guilt phase of Mr. Bush's trial, just before the jury brought in its verdict, trial Judge Trowbridge cautioned:

> Gentlemen, I caution every one that we are not going to have any emotional outburst when the verdict is read. If there is anybody here that thinks they can't handle it, they ought to get out of here now and take care of their problems out in the hall.

(R. 1026).

The court reiterated this cautionary warning just prior to the death recommendation being brought back:

> As I said the other day before the verdict came back in again, I don't want any emotional outburst regardless of which way it goes and if there is anyone who can't handle it they should leave the courtroom at this time.

(R. 1295).

The incentive for these unusual instructions can be found in the affidavits of Mr. Bush's father (App., Ex. A), brother (App., Ex. C), and neighbor (App., Ex. F), who faithfully attended the trial:

> Things went bad at the trial because very time John Earl's lawyer would be doing good, the family of the girl who was killed would make noises. . . The judge never said anything about the people saying things, except for right before the verdict. . .The courtroom was packed full of white people who we knew hated us because of the way they acted.

(App., Ex. A).

> At the beginning of the trial, it seemed like Mr. Muschott was doing a pretty good job because he was asking a lot of questions of the witnesses and objecting a lot to unfair things. Whenever he would do this, the family of the girl who was killed would make

> noises and comments right out loud. The judge only said something about it a couple of times, and warned against the outburst right before the verdict. This kind of thing went on through the whole trial and we were sick about it because no one did anything about it.

(App., Ex. C).

> [T]he judge never did anything about all the outbursts in the courtroom from the crowd whenever John Earl's lawyer was asking questions or objecting . . .

(App., Ex. F).

John Earl Bush, a young black man, was charged with the murder of an 18 year old white woman, the daughter and granddaughter of prominent citizens (a fact of which the state reminded potential jurors repeatedly throughout jury voir dire). The case was highly publicized, so much so that a change of venue was authorized. Television cameras were present in the courtroom. In this context, the emotional behavior of the victim's family could not have been anything but highly intimidating to the jury and witnesses, and psychologically demoralizing to the defendant, his attorney, and his family.

Undersigned counsel have determined that local television stations have in their archives videotapes of all or portions of Mr. Bush's trial. We have as yet been unable to view same and to determine if the described behavior of the victim's family was in fact preserved. We

will, if given the opportunity, issue subpoenas for these videotapes and present them during Mr. Bush's evidentiary hearing.

Failure to object to repeated misstatements of law and improper prosecutorial remarks and argument: This issue is addressed below substantively as Issue V.

* * *

In his Motion, Mr. Bush has listed numerous other errors of counsel which illustrate the the overall deficient nature of the presentation he received at trial. Those errors are cumulative to the more prejudicial failings discussed above. In order properly to evaluate the errors and omissions of Mr. Bush's counsel, an evidentiary hearing is essential.

Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 446 U.S. 903 (1980). See also, Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); Rummel v. Estelle, 590 F.2d 103, 104-105 (5th Cir. 1979); Gaines v. Hooper, 575 F.2d 1147, 1148-50 (5th Cir. 1978). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982) ("[a]t the heart of effective

representation is the independent duty to investigate and prepare").

Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Hearring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovette v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Counsel have been found to be ineffective for failing to raise objections, to move to strike and to seek limiting instructions regarding inadmissible, highly prejudicial testimony, Vela v. Estelle, 6708 F.2d 954, 961-66 (5th Cir. 1983), cert. denied, ___U.S. ___, 79 L.Ed.2d 195 (1984); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 938 (8th Cir. 1976), or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch,

584 F.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; and for failing to object to improper jury argument, Vela, 708 F.2d at 963. See also Smith v. Wainwright, 741 F.2d 1248 (11th Cir. 1984) (counsel's failure to impeach key state witness with pretrial statement may have been ineffectiveness; remanded for determination.)

Even if counsel provides effective assistance at trial in some areas, counsel may still be ineffective in his performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Under certain circumstances, even a single error by counsel may be sufficient to warrant habeas corpus relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981) (counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburnj, 597 F.2d at 944 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard").

Defendant's obligation, in the procedural context of this cause, is to proffer sufficient facts (supported by affidavits, records, etc.) to demonstrate that his claims

may have merit, that his factual allegations cannot be and are not in fact conclusively refuted by the record, and that he is therefore entitled to an evidentiary hearing. Without that hearing, defendant submits, he is unable to demonstrate ultimately that he is entitled to vacation of his judgment and sentences.

Defendant contends that he has met the two pronged Strickland test in connection with numerous deficiencies in his attorney's representation and that he is therefore entitled to an evidentiary hearing on these deficiencies.

CLAIM IV

THE STATE MATERIALLY MISLED THE JURY BY PRESENTING AND ARGUING FACTS WHICH IT KNEW TO BE FALSE, WHICH WERE UNSUPPORTED BY THE EVIDENCE, AND WHICH TOTALLY CONTRADICTED THE PROSECUTOR'S THEORY IN CO-DEFENDANTS' CASES, IN VIOLATION OF DEFENDANT'S FIFTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

> State: [This] is what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julius Slater." R 922 , closing argument (guilt phase - emphasis added).

Mr. Bush was charged with the kidnapping, robbery, and murder of the victim along with three co-defendants (Johnson, Parker, and Cave). The cases were severed, and the trials proceeded separately; Mr. Bush was tried first.

The medical examiner testified at Mr. Bush's trial,

that the victim had three areas of injury: a cut fingernail, a stab wound, and a gunshot wound to the back of her head (R. 462). A bullet fragment from the victim's skull was introduced into evidence (R. 475). In describing the stab wound, Dr. Wright testified that no vital organs were involved (R. 465). Consequently, he testified that the cause of death was the gunshot wound in the head (R. 471).

Dr. Wright's testimony at the several co-defendants' trials was consistent on these two points with his testimony at Mr. Bush's trial. However, there was one important substantive difference in the testimony which the state elicited from Dr. Wright on direct examination: In Johnson's trial, the state had Dr. Wright testify that the two major wounds were consistent with there being two <u>different</u> attackers, one who stabbed and one who shot the victim (App., Ex.. LL, p. 493). In Parker's trial, on redirect, the state again had Dr. Wright testify that the two different wounds were <u>more</u> consistent with a two-attacker theory than a one-attacker theory (App., Ex. MM, p. 673). In Mr. Bush's trial, this issue was not addressed <u>at all</u> with witness Wright.

Criminalist Daniel Nippes, like Dr. Wright, also testified at all four trials. The majority of his

testimony related to hair and fiber samples found in Mr. Bush's vehicle and compared with known standards from the victim found in the back seat of the car. However, there was one major difference in the state's presentation of this witness during the four trials: At no time did the state in Cave's or Johnson's or Parker's trials offer the evidence that it did offer in Mr. Bush's trial (R. 914) to the effect that a live round of .38 special RP ammunition was found underneath the left front (driver's side) of the vehicle; there was no objection by defense counsel to the introduction of this evidence.

Although this .38 live round was introduced into evidence and implicitly had some relevance to Mr. Bush's case, the fact was that ballistics showed the fragment removed from the victim's skull was from a .32 caliber weapon, not a .38! The report from the Florida Department of Law Enforcement, Tallahassee Regional Crime Lab, signed by Donald E. Champagne, Crime Laboratory Analysis and Firearm Division (App., Ex. NN) says that the bullet fragment "appears to be a .32 caliber class plain lead alloy bullet . . ." Det. Tom Madigan of the Martin County Sheriff's Office testified at deposition August 12, 1982 (a deposition which defense attorney Muschott failed to attend) that Champagne in fact "made a comparison of the

base of the bullet in comparison to .32 caliber rounds that he had and that the .38 - he made a comparison of a .38 and a .32 caliber weapon and the width of the .38 was too big for - to matching with the base." This comparison was done in the deponent's presence (App., Ex. TT, deposition of Madigan at p. 44, emphasis added). The ballistics report and Madigan's testimony, that the fatal bullet was .32 caliber and not .38, were never disclosed to the jury. The murder weapon was never found. However, the state did introduce the testimony of Dr. Wright - the pathologist who did the autopsy and who was never qualified as an expert in ballistics (see R. 455-7) - to the effect that the bullet fragments were "consistent with being a .38." (R. 469). This testimony of Dr. Wright was adduced despite the state's ballistics evidence that the fragments were .32 caliber.

The most damaging testimony in three of the four trials consisted of pre-trial statements made to the police by each defendant. On the critical issues, all three confessions were consistent: Cave used the gun in the course of the robbery, Mr. Bush stabbed the victim, and Parker shot her in the head.

The .38 "live round" found in Mr. Bush's car was in fact absolutely irrelevant to Mr. Bush's case. There was

no evidence, other than Mr. Bush's own pre-trial statements to the police, as to how the victim was killed. Nonetheless, the state, in addition to arguing theories of felony-murder and aiding and abetting, also argued on closing at guilt phase:

> You heard the first statement; he denied everything. You heard the second statement; he admits being there. You heard the third statement; he admits participating. You heard the fourth statement; he admitted stabbing. He didn't make a fifth statement and I don't know what it would be and it would be unfair for you to speculate what it would be. But I do know that they recovered from his car on the driver's side in the front seat a .38 bullet. They didn't recover it from the back seat where Mr. Cave was. They didn't recover it from the right front seat on the passenger's side where Mr. Parker was, and they didn't recover it from the right back side where "Bo Gator" was. They recovered it from where Mr. Bush was sitting the entire night driving that car. That's where the bullet came from. (R. 980)
>
> * * *
>
> Remember what Mr. Nippes told you. This is a .38 Special. This is a live round.
>
> State's Exhibit Number 22 is what happens when a live round is fired by John Earl Bush and smashes into the skull of Frances Julia Slater. (R. 922, emphasis added)

The state's unfounded statement that John Earl Bush smashed the victim's skull with a .38 bullet is not only totally unsupported by any evidence in the record, but also is unsupported by any evidence outside the record

(such as co-defendants' statements or police reports; Parker first testified at his trial in January 1983 that Mr. Bush fired the gun, two months after Mr. Bush's trial). That statement is flatly contradicted by the state's own argument made at co-defendant Parker's trial. And that statement is false.

At Cave's trial, the state urged the jury to believe Cave fired the fatal bullet; at Parker's trial, that Parker fired that bullet; and at Mr. Bush's trial , that the defendant herein fired the bullet. If there were no evidence, if the reality were totally unknown, the state's inconsistent argument might be forgiven - but there is evidence because of the totally consistent statements by three of the four co-defendants as to who inflicted the mortal wound: J.B. Parker, not John Earl Bush. It is indisputable that the state knew Parker fired the gun. In fact, in Parker's Post-Sentence Investigation Report, (App., Ex. WW) under "State Attorney Comments" Stone and Medelis are quoted as saying: "Parker was the shooter and if anyone deserved to be executed, he does." (emphasis added).

For the state to present selective irrelevant evidence (as it did with the "live round" .38), and then to argue falsely and without basis in the evidence that

John Earl Bush blew the victim's skull apart is unconscionable on the facts of this case. Nonetheless, the state proceeded to introduce evidence (the "live round .38") and more importantly to argue to the jury that Mr. Bush was responsible for the victim's mortal head wound. For the state to so argue, knowing that the argument is false, is a blatant violation of Mr. Bush's constitutional rights.

The Eleventh Circuit ruled only a few weeks ago that, where the prosecutor knowingly allows materially false testimony to be introduced at trial, fails to step forward and make the falsity known, and then knowingly exploits the false testimony in its closing argument to the jury, the defendant's due process rights have been violated and the conviction and sentence cannot stand. Brown v. Wainwright, No. 85-3217 (11th Cir. Mar 17, 1986), citing Giglio v. United States, 405 U.S. 150 (1972). The test set forth in Brown (and Giglio) is whether the false testimony could in any reasonable likelihood have affected the judgment of the jury. Brown, slip. op. at p. 16.

It is well-settled law that a defendant may challenge on a 3.850 motion the prosecutor's knowing use of false information. Cf. Cash v. State, 207 So.2d 18 (Fla. 3d DCA 1968); Smith v. State, 191 So.2d 618 (Fla.

4th DCA 1966) and Wade v. State, 193 So.2d 459 (Fla. 4th DCA 1967). There is simply no question that the state evidence and argument were both knowingly false and prejudicial to Mr. Bush. The conclusion can only be that Mr. Bush's constitutional rights were violated by the state's actions herein, requiring a reversal. An evidentiary hearing is clearly necessary to permit Mr. Bush to prove his allegations.

CLAIM V

THE PROSECUTOR'S CLOSING ARGUMENTS AT PENALTY PHASE, CULMINATING AN INTENTIONAL AND DELIBERATE EFFORT THROUGHOUT THE TRIAL TO ENGENDER SYMPATHY FOR THE VICTIM'S FAMILY, WERE INFLAMMATORY, IMPROPER AND HIGHLY PREJUDICIAL, AND THEREBY VIOLATED MR. BUSH'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Defendant's Motion lays out the record circumstances surrounding the one "irrelevant and improper" prosecutorial argument to which objection was made at trial and which was previously appealed to this court. Bush v. State, 461 So.2d 936 (Fla. 1984). In its prior decision, this court held that "each case must be considered upon its own merits and within the circumstances pertaining when the questionable statements are made", citing Darden v. State, 329 So.2d 287, 291

(Fla. 1976). Bush, supra, at 941 (emphasis added).

However, without having been directed to the numerous other flagrantly abusive and improper statements of the prosecutor, this court found the above single statement "of minor impact." Bush, supra, at 942. The climate in the courtroom, discussed in defendant's Motion (at pp. 41-3), was also a relevant circumstance creating a context in which better to evaluate the challenged statement; this pervasive atmosphere which surrounded the jury during the entire trail must be included in any determination of the effect of the state's improper remarks.

Most important, on June 11, 1985, the United States Supreme Court decided Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) and held that unless it could be shown that improper closing arguments had no effect on sentencing, a new sentencing hearing is required. This was the first case in which the Court had ever announced standards for, or vacated a sentence of death because of, an improper prosecutorial argument in the penalty phase of a capital trial. This decision marks a significant and fundamental change in the law regarding the standard for evaluating the effect of argument on capital sentencing.

Furthermore, the United States Supreme Court has granted a petition for certiorari, vacated the judgment and remanded to the Eleventh Circuit, for further consideration in light of Caldwell, the case of Tucker v. Kemp, No. 85-5496, 762 F.2d 1496 (11th Cir. 1985), vacated and remanded in light of Caldwell, 38 Cr.L.Rptr. 4105 (U.S. Dec. 2, 1985). The Eleventh Circuit had held prosecutorial misconduct during penalty argument harmless error under the test for prejudice adopted for ineffective assistance of counsel in Strickland v. Washington, ___ U.S. ___, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) by relying on Donnelly v. DeChristoforo, 416 U.S. 637(1974). The Supreme Court, has also granted the petition, vacated and remanded, Rogers v. Ohio, 85-5503, 38 Cr.L.Rptr. 4105, for further consideration, in light of Caldwell. Caldwell and the cases it influenced are specifically applicable to the instant case: the standard of review of prosecutorial remarks and argument has been fundamentally altered since the trial of this case, and requires vacating the sentence of death.

In Caldwell, the Court held a death sentence could not stand where the prosecutor minimized the jury's importance in the death-sentencing determination. The rationale of the Caldwell decision is based on capital

cases interpreting the eighth amendment which emphasize the need for reliability in the capital sentencing process. Cladwell supra, 105 S.Ct. at 2641-2, 2646. The legal standard set by the Supreme Court in Caldwell is a significant departure from that previously used to determine the propriety of prosecutorial closing arguments, articulated in Donnelly v. DeChristoforo, 416 U.S. 637 (1974), for two reasons.

Donnelly was a non-capital case holding that challenges to the prosecutorial arguments are to be subjected to a "fundamental fairness" standard under the sixth and fourteenth amendments. Donnelly supra at 642. While the same "fundamental fairness" wording is used in Caldwell, the Court for the first time makes clear that for the purpose of reviewing arguments in the sentencing phase of a capital case, it will apply a heightened standard corresponding with the need for enhanced reliability of the sentencing determination under the Eighth Amendment. The Court holds:

> In this case, the prosecutor's argument sought to give the jury a view of its role in the capital sentencing procedure that was fundamentally incompatible with the Eighth Amendment's heightened "need for the reliability in the determination that death is the appropriate punishment in a specific case." Woodson v. North Carolina, 428 U.S. at 305, 96 S.Ct., at 2991 (plurality opinion). Such comments, if left

> uncorrected, might so affect the fundamental fairness of the sentencing procedure as to violate the Eighth Amendment.

Caldwell, supra 105 S.Ct. at 2645.

More important, however, is the abandonment by the Court in Caldwell of any necessity for demonstrating prejudice when a prosecutorial argument may affect the reliability of the death sentencing decision, thereby implicating the eighth amendment. Unlike a number of prior cases requiring a showing of prejudice when an improper closing argument is made, the standard adopted by the Supreme Court bypasses an inquiry into prejudice when the argument inherently affects the death sentencing determination. The Court states "[b]ecause we cannot say that this effort had no effect on the sentencing decision, that decision does not meet the standard of reliability that the Eighth Amendment requires." Caldwell, supra. 105 S.Ct. at 2646. Justice O'Connor's concurring opinion casts the standard in similar language: "I believe the prosecutor's misleading emphasis on appellate review misinformed the jury concerning the finality of its decision, thereby creating an unacceptable risk that 'the death penalty may [have been] meted out arbitrarily or capriciously' or through 'whim or mistake'." Caldwell, supra 105 S.Ct. at 2647.

The Court concluded, "This Court has repeatedly said that under the eighth amendment the qualitative difference of death from all other punishments requires a corresponding greater degree of scrutiny of the capital sentencing determination." Caldwell, supra 105 S.Ct. at 2639 citing California v. Ramos, 463 U.S. 992, 998-9 (1983).

This fundamental change in the law, coupled with defendant's expanded record references in his Motion which show the context in which the state's remarks must be evaluated, require this Court to revisit the issue of improper prosecutorial argument and to vacate Mr. Bush's death sentence.

CLAIM VI

THE PENALTY PHASE JURY INSTRUCTIONS, WHEN COUPLED WITH IMPROPER PROSECUTORIAL VOIR DIRE, UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE OF RESPONSIBILITY

Judge Trowbridge advised the sentencing jury twice that he and he alone bore the ultimate decision as to penalty (R. 1127,1287). The prosecutor made similar statements during jury voir dire (R. 51, 223).

The instructions did not, however, inform the jury that the sentencing judge must grant great deference to the life recommendation penalty phase jury, or that in

fact such overrides are seldom affirmed by the Florida Supreme Court. See Tedder v. State, 322 So.2d 908, 910 (Fla. 1975); Radelet, Rejecting the Jury, 18 U.Cal., Davis L. Rev. ___ (1985). The misleading jury instructions in this case created an error of constitutional magnitude for the reasons articulated in the recent case of Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985). The Court in Caldwell held that prosecutorial argument which tended to diminish the role of a capital sentencing jury violated the eighth amendment. The prosecutor in Caldwell had argued that the jury's decision would be automatically reviewable by the Mississippi Supreme Court; the United States Supreme Court vacated the death sentence.

The case here is far stronger than Caldwell. In Mr. Bush's case the information received by the jury came with the imprimatur of the court, whereas in Caldwell the information was provided merely by counsel in argument. In addition, the misleading instructions here were supported by misleading prosecutorial argument, further minimizing the jury's sense of responsibility.

CLAIM VII

FLORIDA'S DEATH PENALTY IS IMPOSED IN AN ARBITRARY AND DISCRIMINATORY MANNER ON THE BASIS OF IMPROPER RACIAL FACTORS, RENDERING THE PROCESS UNCONSTITUTIONAL UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

In his Motion, defendant has cited substantial sociological research findings which unanimously conclude that the death penalty in Florida is imposed under the current statute on the basis of improper and unconstitutional racial considerations. The most important and comprehensive study, which evaluated all homocides committed in Florida over a five-year period, was not compiled and available until 1983, after Mr. Bush's trial. The data presented by Professor Samuel R. Gross and Robert Mauro of Stanford University demonstrate that, when controlled for other factors which might influence the death-sentence decision, the race of the victim is determinative of whether a death sentence is in fact imposed and affirmed on appeal.

Florida has had a long-standing history of de jure racial segregation and discrimination in virtually all areas of public life, which did not come to an end statewide, until 1971, with the end of de jure school segregation. Moreover, the effects of de jure race discrimination have continued beyond the end of such

official discrimination and indeed continue to be reflected, for example, in the unemployment levels of blacks, the disproportionate concentration of blacks in lower paid and lower status jobs, the median level of black family income in comparison with white family income, and the disproportionately low numbers of black students in institutions of higher education in Florida. 1980 Census data. [Exhibit available].

The historic background of race discrimination in Florida is significant. Historically, the lives of blacks in Florida, as elsewhere, have been devalued in countless ways. This devaluation process was officially sanctioned for many years and, in Florida, official sanction of such discrimination in critical areas such as education ended only shortly before Mr. Bush was tried. See Debra P. v. Turlington, 644 F.2d 397, 407 (5th Cir. 1981) (Unit B). From the history, the inference must be drawn that jurors, prosecutors and judges, like any other predominantly white group of decision-makers in this state, are not immune -- or even particularly sensitive to -- the subtle, but powerful influence of race discrimination in their decision making. Thus, history must be examined in order to accurately assess the decision-making -- and primary concerns -- of the decision-makers in Mr. Bush's case.

Within the past few days, the United States Supreme Court has evidenced a heightened scrutiny of capital cases in which a black defendant is accused of murdering a white victim. In deciding Turner v. Murray, No. 84-6466, U.S. Supreme Court (April 30, 1986 - slip opinion), the Court expressed its concern for the continuing existence of racial prejudice, the risk of which "is especially serious in light of the complete finality of the death sentence." Slip op. at 7 (Justice White, plurality opinion). Turner holds that, because of the subjective judgments necessary in a capital sentencing proceeding before a jury, the defense has a constitutional right, on request, to delve into possible racial prejudice of prospective jurors during voir dire.

The statistical evidence which defendant proffers herein shows that racial prejudice in Florida permeates the death sentence process. Factors which have no proper role constitutionally in determining sentence are in fact infecting sentencing determinations. The denial of Mr. Bush's Motion on this claim, without providing him with an evidentiary forum in which to prove his allegations, must be reversed and remanded.

The evidence proffered in the Motion and summarized above is sufficient to require an evidentiary hearing

since, if the allegations are proven, Mr. Bush's constitutional rights have clearly been violated. A black man convicted of killing a young white woman, Mr. Bush falls squarely within that class of cases in which the death sentence is imposed disproportionately and arbitrarily on the basis of racial factors which can play no part in a constitutionally acceptable death-sentencing process.

CONCLUSION

For the reasons above-stated and based on the argument and citations presented, defendant respectfully requests this court to reverse the trial court's denial of his Motion to Vacate Judgment[s] and Sentences, and to remand for an evidentiary hearing on all issues which require the hearing of testimony.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to David Phoebus, Assistant State Attorney, Office of the State Attorney, 815 S.W. Colorado Ave., Suite 330, Stuart, Florida 33494, this 6th day of May, 1986.

Sondra Goldenfarb
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