IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

ROBERT DEWEY GLOCK,

Appellant,

v.

STATE OF FLORIDA.

Appellee.

APPLICATION FOR STAY OF EXECUTION AND
SUMMARY INITIAL BRIEF OF APPELLANT ON APPEAL
OF DENIAL OF MOTION FOR FLA.R.CRIM.P. 3.850
RELIEF, AND DENIAL OF MOTION TO PROCEED
IN FORMA PAUPERIS

ON APPEAL FROM THE CIRCUIT COURT
FOR THE SIXTH JUDICIAL CIRCUIT,
IN AND FOR PASCO COUNTY, FLORIDA

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PRELIMINARY STATEMENT

This is an emergency appeal from the lower court's denial of Mr. Glock's motion for Rule 3.850 relief. Mr. Glock's execution is presently scheduled for January 17, 1989. All matters involved in the Rule 3.850 action, and all matters presented on Mr. Glock's behalf before the lower court, are raised again in this appeal and incorporated herein by specific reference, whether detailed in the instant brief or not.[1]

Given the pendency of the death warrant which has been signed against Mr. Glock, and the corresponding emergency nature of the instant proceedings, counsel has consolidated into this document Mr. Glock's application for stay of execution as well as his application to proceed in forma pauperis, since without that designation, the Office of the Capital Collateral Representative's continued representation of Mr. Glock is in question.

With regard to the Rule 3.850 appeal, certain matters should be noted at the outset. Although the Rule 3.850 motion and the files and records in the case did not "conclusively show the [Mr. Glock was] entitled to no relief," Fla. R. Crim. P. 3.850, the

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[1]The exigencies of under-warrant litigation have made it impossible for counsel to prepare the type of appellate brief counsel would normally prepare. Counsel notes at the outset that because of these exigencies, a table of authorities and summary of argument have been impossible to prepare.

lower court did not require the State to respond to the motion and summarily denied the motion. No evidentiary hearing was held, even though serious and legitimate questions regarding the constitutional validity of Mr. Glock's capital conviction and sentence have been raised. This brief is intended to demonstrate that a careful, judicious and studied review of the record is proper and necessary, that an evidentiary hearing is warranted, that a stay of execution is warranted in this case, and that given an adequate opportunity, Mr. Glock can establish his entitlement to relief. In short, the normal appellate process is warranted upon this record. The Court is also referred to Mr. Glock's Motion to Vacate Judgment and Sentence and its appendix, both of which are fully incorporated herein by specific reference.

Mr. Glock's execution should be stayed given the substantial nature of the claims he presents to this Court. The issues raised by Mr. Glock reflect the substantial, meritorious nature of Mr. Glock's challenge to the proceedings which resulted in his conviction and sentence -- the record supports these claims and the instant brief discusses as much of that evidence as counsel is able to discuss under the circumstances.

This Court has not hesitated to stay executions when warranted to ensure judicious consideration of the issues presented by capital prisoners litigating during the pendency of

a death warrant. See Johnson v. State, No. 72,231 (Fla. April 12, 1988); Gore v. Dugger, No. 72,300 (Fla. April 28, 1988); Riley v. Wainwright, No. 69,563 (Fla. November 3, 1986); Groover v. State, No. 68,845 (Fla. June 3, 1986); Copeland v. State, Nos. 69,429 and 69,482 (Fla. October 16, 1986); Jones v. State, No. 67,835 (Fla. November 4, 1985); Bush v. State, Nos. 68,617 and 68,619 (Fla. April 21, 1986); Spaziano v. State, No. 67,929 (Fla. May 22, 1986); Mason v. State, No. 67,101 (Fla. June 12, 1986). See also Roman v. State, ___ So. 2d ___, No. 72,159 (Fla. 1988)(granting stay of execution and a new trial); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(granting stay of execution and post-conviction relief); Kennedy v. Wainwright, 483 So. 2d 426 (Fla. 1986). Cf. State v. Sireci, 502 So. 2d 1221 (Fla. 1987). The issues Mr. Glock presents are no less substantial than those involved in any of those cases. A stay is proper.

Citations in this brief shall be as follows: "R. [page number]" shall indicate any reference from the record on direct appeal. Citations to the Motion to Vacate Judgment and Sentence and its appendix shall be: "App. [number]" or otherwise explained. All other citations shall be self-explanatory or otherwise explained.

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ARGUMENT

CLAIM I

THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. GLOCK'S MOTION TO VACATE JUDGMENT AND SENTENCE WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Glock's motion alleged facts which, if proven, would entitle him to relief. The files and records in this case do not "conclusively show that [Mr. Glock] is entitled to no relief," and the trial court's summary denial of his motion, without an evidentiary hearing, was therefore erroneous.

Mr. Glock's verified Rule 3.850 motion alleged and supported extensive non-record facts in support of claims which have traditionally been raised by sworn allegations in Rule 3.850 post-conviction proceedings and tested through an evidentiary hearing. Mr. Glock is entitled to an evidentiary hearing with respect to his claims, unless the files and records in the case conclusively show that he will necessarily lose on each claim.

In that instance, the judge must attach "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief . . ." Fla. R. Crim. P. 3.850. Otherwise, an evidentiary hearing is proper. Those portions of the record which were attached to the trial court's order here (Volumes I, II, and III of the jury trial, portions of the transcript of the sentencing hearing, and portions of the transcript of the charge conference) in no way refute or rebut Mr. Glock's sworn and supported allegations, and an evidentiary hearing was and is therefore proper.

Mr. Glock's claims are of the type classically recognized as issues warranting full and fair Rule 3.850 evidentiary resolution. Obviously, the question of whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. See O'Callaghan, supra; Squires, supra; Groover v. State, 489 So. 2d 15 (Fla. 1986). Mr. Glock's claim that he was denied a professionally adequate pretrial mental health evaluation due to failures on the part of counsel and the court-appointed mental health professional is also a traditionally-recognized Rule. 3.850 evidentiary claim, see Mason, supra; Sireci, supra; cf. Groover v. State, supra. Numerous other evidentiary claims requiring a full and fair hearing for their proper resolution were also presented by Mr. Glock's Rule 3.850 motion.

In O'Callaghan, supra, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance claim were not "of record." See also Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983). Thus, this Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Zeigler v. State, 452 So. 2d (1984); Vaught, supra; Lemon, supra; Squires, supra; Gorham, supra; Smith v. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc v. State, 415 So. 2d 721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Arango v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Glock was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of his Rule 3.850 Motion was therefore erroneous.

CLAIM II

THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. GLOCK'S MOTION FOR ORDER OF INSOLVENCY WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

A criminal defendant has a right to counsel, a right guaranteed by the sixth and fourteenth amendments of the United States Constitution and by Article I, Section 16 of the Florida Constitution. For this right to be meaningful, courts and legislatures have long provided that indigent criminal defendants must be provided counsel with little or no cost to themselves.

Florida law provides for the appointment of counsel in criminal cases where the Court has determined the accused is

indigent. To determine indigency, the legislature enacted sec. 27.52 of the Florida Statutes which reads in pertinent part:

> 27.52 Determination of indigency.--
> (1) The determination of indigency of any accused person shall be made by the court at any stage of the proceedings. Any accused person claiming indigency shall file with the court an affidavit which shall contain the factual information required in subsection (2).
>
> (2)(a) A person is indigent for the purposes of this part if he is unable to pay for the services of an attorney, including costs of investigation, without substantial hardship to himself or his family.
> (b) In determining whether a defendant is indigent, the court shall determine whether any of the following facts exist, and the existence of any such fact shall create a presumption that the defendant is not indigent:
> 1. The defendant has been released on bail in the amount of $5,000 or more.
> 2. The defendant has no dependents and his gross income exceeds $100 per week; or, if the defendant has dependents, his gross income exceeds $100 per week plus $20 per week for each of the first two dependents of the defendant and $10 per week for each additional dependent.
> 3. The defendant owns cash in excess of $500.
> (c) The court shall also consider the following additional circumstances in determining whether a defendant is indigent:
> 1. The probable expense and burden of defending the case;
> 2. The ownership of, or equity in, any intangible or tangible personal property or real property or the expectancy of an interest in any such property by the defendant; and
> 3. The amount of debts owed by defendant or debts that might be incurred by the defendant because of illness or other misfortunes within his family.

This statute gives a clear guideline to the courts so that insolvency may be adequately assessed and representation provided when needed.

On August 25, 1983, and on October 14, 1983, Judge William H. Seaver of the Sixth Judicial Circuit, in and for Pasco County, Florida, declared Mr. Robert Glock to be indigent for purposes of the criminal charges for which he now stands convicted. In part, those orders read as follows:

> The above named defendant appearing before this Court, and said defendant having filed in this Court the above Affidavit of Insolvency/~~Partial Insolvency~~; and testimony having been taken before the Court; and the Court being otherwise fully advised in the premises, it is thereupon,
>
> ORDERED and ADJUDGED that the Defendant be, and he is hereby declared to be insolvent/~~partially insolvent~~ within the meaning of Sec. 27.52 FLORIDA STATUTES, and it is further
>
> ORDERED and ADJUDGED that the Office of the Public Defender for the Sixth Judicial Circuit in and for Pasco County, Florida or _____[Robert Trogolo, as Special Assistant Public Defender], a licensed practicing attorney, is hereby appointed to represent said defendant in the above styled cause.

(R., Vol. I and II, no page numbers). As indicated, these rulings of insolvency and appointment of counsel were made after the court considered Mr. Glock's Affidavit of Insolvency, and after having been assured that, in fact, Mr. Glock had no personal or family resources with which to hire private counsel. Accordingly, the court ordered that Mr. Glock was insolvent and appointed as "Special Assistant Public Defender" Mr. Robert Trogolo.

Mr. Trogolo represented Mr. Glock from that time until the time of Mr. Glock's appeal. On June 13, 1984, Judge Wayne L. Cobb, Circuit Judge for the Sixth Judicial Circuit in and for Pasco County, Florida, ordered Mr. Trogolo to represent Mr. Glock for purposes of appeal (R., Vol. II, no page number). Mr. Trogolo withdrew from the case, however (R., Vol. II, no page number), and Mr. William Dayton was appointed on October 23, 1984 (R., Vol. II, no page number). In his order of June 13, 1984, Judge Cobb specifically ordered "that the Defendant in this cause is insolvent" (R., Vol. II, no page number).

Mr. Glock has remained incarcerated since the time of his arrest in 1983 and his financial situation is unchanged. The recently filed Motion for Order of Insolvency was appended with an affidavit as recent as November 14, 1988, and a Statement of Prison Account also dated November 14, 1988, which indicated Mr. Glock had a total of $.02 in his prison account and no current assets.

Under sec. 27.702 of Florida Statutes (1987):

> The capital collateral representative shall represent, without additional compensation, any person convicted and sentenced to death in this state who is without counsel and who is unable to secure counsel due to his indigency or determined by a state court of competent jurisdiction to be indigent for the purpose of instituting and prosecuting collateral actions challenging the legality of the judgment and sentence imposed against such person in the state courts, federal courts in this state, the United States Court of Appeals for the Eleventh Circuit, and the United States Supreme Court. A determination of indigency

> by any trial court of this state for purposes of representation by the public defender shall be prima facie evidence of indigency for purposes of representation by the capital collateral representative. Representation by the capital collateral representative shall commence upon termination of direct appellate proceedings in state or federal courts, notice of which shall be effected as provided by s. 27.51. Upon receipt of files from the public defender, the capital collateral representative shall assign each such case to personnel in his office for investigation, client contact, and such further action as the circumstances may warrant.

Mr. Glock was declared insolvent at the time of trial by Judge Seaver and he was declared insolvent at the time of the appeal by Judge Cobb. Under both of those orders, counsel was appointed to represent Mr. Glock. Since "[a] determination of indigency by any trial court of this state for purposes of representation by the public defender shall be prima facie evidence of indigency for purposes of representation by the capital collateral representative" (id.), the lower court's denial of Mr. Glock's Motion for Order of Insolvency was clearly erroneous and obviously intended to deprive Mr. Glock of his statutory right to pursue collateral appeals of his convictions and sentences. This Court should now grant relief and order Mr. Glock be found insolvent so that the representation of the Capital Collateral Representative may continue.

CLAIM III

THE ADMISSION OF CO-DEFENDANT PUIATTI'S CONFESSION AND OF HIS STATEMENTS DURING THE JOINT CONFESSION VIOLATED BRUTON V. UNITED STATES, 391 U.S. 123 (1968), AND DEPRIVED MR. GLOCK OF HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Under Bruton v. United States, 391 U.S. 123 (1968), the admission of a co-defendant's confession at a joint trial violates the defendant's right to cross-examination under the Confrontation Clause of the sixth amendment, despite instructions that the jury is to consider that confession only against the co-defendant. Id., 391 U.S. at 126. Following Mr. Glock's direct appeal, the Supreme Court decided Cruz v. New York, 107 S. Ct. 1714 (1987), holding that the Bruton rule applies even when the defendant's own confession is admitted against him. Id., 107 S. Ct. at 1719.

Robert Glock and his co-defendant, Carl Puiatti, were jointly tried for first degree murder, kidnapping, and robbery. At that trial, three post-arrest statements were admitted: (1) a statement made by Mr. Glock on August 21, 1983, (2) a statement made by Mr. Puiatti on August 21, 1983, and (3) a statement at which both defendants were present on August 24, 1983. The admission of Mr. Puiatti's statement and of the August 24 statement in this capital trial deprived Mr. Glock of his rights under the Confrontation Clause, his rights to due process, and his rights to a fair and reliable capital sentencing determination.

The Rule 3.850 court summarily dismissed this claim, stating that the issue had been raised on appeal in Puiatti v. State, 495 So. 2d 128 (Fla. 1986), and decided against Mr. Glock, and that the claim was without merit (Order Denying Motion for Post-Conviction Relief). The court's order entirely failed to discuss the substantial merits of Mr. Glock's claim, to attach portions of the files and records in the case which "conclusively show that [he] is entitled to no relief," Fla. R. Crim. P. 3.850, and to recognize the significance of Cruz, supra, to the merits and cognizability of Mr. Glock's claim.

A. Background Facts: The Statements

Mr. Glock and Mr. Puiatti were arrested on August 20, 1983, in Morristown, New Jersey (R. 1778). A computer check of the license of the car they were driving revealed that the car was stolen and its owner was a homicide victim in Florida (R. 1789). Florida authorities were notified (R. 1799), and arrived in New Jersey on August 21, 1983 (R. 1800).

During the evening of August 21, both Mr. Glock and Mr. Puiatti were interviewed concerning their knowledge of the homicide, and both defendants provided tape-recorded statements (R. 1830-32; 1836-38; see also App. 16, 17).[2] Mr. Glock was

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[2]Edited versions of these tapes were admitted into evidence and were played for the jury at trial, but the tapes were not transcribed into the record (R. 1835, 1842). Undersigned counsel

(footnote continued on following page)

interviewed first. After describing how he and Mr. Puiatti picked up the victim and drove out of town, Mr. Glock described the offense as follows:

> Robert — We went up to this dirt road and to where some houses were and found that there were houses there and turned around. Come back up the dirt road and saw the orange grove there and the dirt road going to the orange grove. We drove down the grove to where a certain spot. I got out of the passenger's side, lift up the back seat, she asked for her or I had already given her her purse and I.D. and everything. She asked for her glove and I gave her her glove.
>
> . . .
>
> Stahl — Then what happened, when you let her out of the car what happened?
>
> Robert — We, after we let her out, we drove down towards the, we turned around and went back towards the dirt road and Carl . . . .
>
> Stahl — Was she running from you?
>
> Robert — No she was standing there. She just stood there. We went or turned around and went back towards the dirt road. Carl stopped the car and suggest we had to shoot her because she could identify us. We turned around and went back towards

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(footnote continued from previous page)

has attempted to obtain copies of the tapes which were played for the jury, but has been informed that a court order is necessary before the tapes will be copied. Thus, counsel does not know exactly what the jury heard and is relying upon transcripts of the statements obtained from trial counsel's file. See App. 16 and 17.

her, Carl was on the side that she was on. He pulled the gun out which was laying beside him and fired either one or two shots, I forget how many it is. Both shots did hit.

Stahl Which gun was that?

Robert That was the .38

Stahl What foot barrel was it? Was it long or short?

Robert Long barrel. .38 Special, Colt.

Stahl Colt. OK. Go ahead. He fired two shots, did she fall?

Robert No she did not.

Stahl What happened after that?

Robert We kept on driving by her. He saw that she didn't fall and turned around and as we were heading back towards her, he told me that we were going to have to kill her. So he handed me the gun because she was was [sic] on the passenger's at the time.

Stahl What gun did he hand you?

Robert The .38

Stahl .38, ok, go ahead.

Robert As he passed her, I fired a shot. It hit.

Stahl And what did she do, did she fall?

Robert No, she did not.

Stahl What happened then.

Robert We drove by and turned around a gain [sic] and Carl took the gun and fired and when we come back by her again, we stopped and fired the

rest of the shots. We kept on going after that.

(App. 16)(emphasis added).

Mr. Puiatti was then interviewed and explained his involvement in the offense as follows:

Carl — So we pulled off in this dirt road, it was like by an Orange Grove, I remember that. And she had her purse and asked to get out of the car and then she asked for her husband's baseball glove and we gave it to her . . . and I . . . .

. . . .

Stahl — Then what happened. She got out of the car and . . .?

Carl — And I started to drive away. And Bobby say's hey man we have to kill her. And we went back and caught the ___?___ I didn't want to. We drove back there and acted like we were, I asked her for the rings.

Stahl — Was she already out of the car when you asked her for the rings.

Carl — Yes.

Stahl — Then what happened, did she take the rings off that point?

Carl — Yes and gave then to me. And I shot her in the shoulder.

. . . .

Stahl — Ok. So you shot her in the shoulder the first time?

Carl — Yes.

Stahl — Then what happened?

Carl — I took off and Bobby thought she was still standing and told me to go back, so I said ok and I turned

around and went back and I shot her again.

Stahl Where?

Carl In the chest area.

Stahl Ok. Then what happened?

Carl She kind of went behind those bushes and Bobby took the gun from me. . .

Stahl Which gun?

Carl The .38, the Special.

Stahl ok.

Carl The same one and he shot her or shot at her when she was in the bushes, I don't know if he hit her or not, but then she came out and he shot her I think two more times.

Stahl Then what happened?

Carl She walked a little bit and then I think fell.

. . . .

Stahl Ok. Then what happened? Did you see her fall to the ground.

Carl When we started to take off, she walked a few feet and fell to the ground, yes.

Stahl Then what happened?

Carl Then we took off, got back on the road.

(App. 17)(emphasis added).

After being transported to Florida on August 24, 1983, Mr. Glock and Mr. Puiatti were taken to the Pasco County Sheriff's Office, where they each provided a written statement to law

enforcement (R. 1844-45; 1847). Later that same evening, Mr. Glock and Mr. Puiatti participated in an oral statement to law enforcement which was transcribed by a court reporter (R. 1853). In that statement, Mr. Puiatti described the events, with occasional interjections by Mr. Glock:

> By Detective Stahl: Question: Okay. Carl, you can go ahead.
>
> Mr. Puiatti: Okay. We walked to a Shop and Go Store near Bradenton and called a taxicab to take us to the mall. We got to the mall about 8:00 o'clock that morning, and, uh, hung around until it opened. And that day we watched a couple of movies in the mall and we were kind of looking around in the parking lot for a customer to come in to try to get their car. We had no luck that day.
>
> That night, later that night, we tried to hitchhike out of town and tried for a couple of hours, and it was about 1:00 o'clock in the morning and we had no luck. So there was a truck parked over by the mall and it was open, so we went in and slept for a few hours until that morning.
>
> Detective Wiggins: I need to interrupt. What was the date on this?
>
> Mr. Puiatti: This was Monday.,
>
> Detective Wiggins: Monday. Do you remember what date it was?
>
> Mr. Puiatti: The 15th.
>
> Detective Wiggins: The 15th.
>
> Mr. Puiatti: The 15th, yeah. It was Monday.
>
> Okay. The following morning, which was Tuesday, the 16th, we went and got something to eat. And we were getting very low on money, so we waited around the mall parking

lot until it opened again. And I'm not sure of the exact time.

Do you remember the time when she came?

Mr. Glock: Whenever she came by?

Mr. Puiatti: Yeah.

Mr. Glock: It was approximately 10:20 - 10:30.

Mr. Puiatti: About 10:30 that morning a woman pulled into the mall parking lot in a - interrupted --

Detective Stahl: What location was that at the mall?

Mr. Puiatti: It was by, uh, something Lindsey.

Mr. Glock: Belk-Lindsey.

Mr. Puiatti: Belk-Lindsey Store, and there was a J.C. Penny close to it.

Mr. Glock: Super-X Drugs was -- interrupted.

Mr. Puiatti: Yeah, Super-X Drugs was there, too.

And, anyway, she pulled in in an orange 1977 Toyota SR-5 Corolla. That's what it was, Corolla.

At that time when she pulled in she had opened the door and started to get out of the car, and Robert had a handbag with a .38 in it and went up to her, put the gun on her, and she started to scream. And he told her to get in the backseat.

At that time I got in the car and started -- and got behind the driver's wheel and started to pull out of the mall.

At that time Robert went through her purse and found fifty dollars and also found that she had a, uh, bank account. So she's offering to go to her bank and withdraw some

money for us, and we -- so we went to the Palmetto Bank on Palmetto Avenue and withdraw a hundred dollars in four twenties and two tens. She wrote out a check, and we went through the drive-through and withdrew it.

By Detective Stahl: Question: Who was operating the car at that time?

Mr. Puiatti: I was operating the car at that time.

Question: Where were you sitting at, Robert, in the car?

Mr. Glock: In the driver -- I mean in the passenger's seat.

Question: Where was the female?

Mr. Puiatti: Right behind me. She was sitting right behind me, the driver.

Question: Can you describe this person?

Mr. Puiatti: I would say maybe five/six, hundred and forty pounds, a hundred thirty pounds, reddish hair. She had tan shorts on with a white blouse and sandals on and, uh, uh, cap on, but the kind like a sun cap that had nothing in the middle, and reddish hair.

Question: Okay.

Mr. Glock: Large plastic rimmed glasses, also.

Detective Wiggins: Do you remember what color the cap was?

Mr. Puiatti: Blue, I believe.

Mr. Glock: Blue with either yellow or white trim.

Mr. Puiatti: White trim.

Okay. At that time after we left the bank we got on 301 heading north. We proceeded to drive to -- what was the name of around that area -- to about five miles

before Dade City, and found a dirt road by orange groves.

I pulled in the dirt road by the orange groves and made a left turn into the orange groves. At that time we drove down the dirt road to the end where we saw a street, so we turned around and came back and stopped about not quite halfway through, let her out of the car, gave her her purse and her husband's baseball glove. And I asked her for her wedding band and diamond ring she had on.

. . . .

By Detective Stahl: Question: Then what happened when you let her out of the car?

Mr. Puiatti: Okay. We left her and started to take off. And as we were taking off, we started talking back and forth, and Robert said to me that he thought that we should shoot her. And after going back and forth a little bit, I agreed, and turned the car around.

Then we drove up next to her and acted like we were looking for directions, and I shot her in the right -- right by the right shoulder, and drove off.

When I was driving off, Robert noticed that she was still standing.

Mr. Glock: There were two shots fired at her, and then -- interrupted --

Mr. Puiatti: You tell it.

Mr. Glock: When we first turned around and came back toward her on the first time, he shot the first time and hit her in the shoulder, the right shoulder, and then fired a second time. I don't know if the second time he hit her or that was when he missed her and hit the tree or whatever.

Mr. Puiatti: Yeah.

Mr. Glock: I don't know if he missed the second shot or not.

Mr. Puiatti: Yeah. It was because -- interrupted --

By Detective Stahl: Question: You agree with that, Carl?

Mr. Puiatti: Yeah.

Question: Go ahead, Bobby.

Mr. Glock: Then we kept on driving, and I noticed that she was still standing. Carl turned around and handed me the gun at that time and drove back by her, and I fired a shot. No, I fired two shots at that time.

Mr. Puiatti: Yeah.

Mr. Glock: I fired two shots. Uh, then we kept on driving back by, turned around again, (pausing).

Mr. Puiatti: Went back by again, stopped, (pausing).

Mr. Glock: Yeah. Stopped and turned around and headed back toward her.

Mr. Puiatti: (Affirmative nod.)

Detective Wiggins: She was still standing?

Mr. Glock: I only fired one shot at that time. Only fired two shots the whole time.

Mr. Puiatti: Three.

By Detective Stahl: Question: I just want to interrupt you. Carl, at the time when you said you shot her once in the shoulder, then you shot in the chest; didn't you?

Mr. Puiatti: Yes, I shot her twice.

Mr. Glock: It was the third shot that you missed.

Mr. Puiatti: So those first two, yeah.

Question: So you shot her twice, Carl.

Mr. Puiatti: Yes.

Question: Once in the shoulder, you said (interrupted).

Mr. Puiatti: And once in the chest area.

Question: Chest. And how many times -- how many shots did you -- (interrupted.)

Mr. Glock: Two.

Question: So how many shots in total did you fire?

Mr. Glock: Me?

Question: Yeah.

Mr. Glock: Two.

Question: And -- (pausing)

Mr. Puiatti: Altogether, five. One missed.

Question: One missed. So that was a total of five shots?

Mr. Glock: The sixth shot got hung up in the gun and we didn't worry about it.

Question: Okay. And how many times did you go back now?

Mr. Glock: We passed by her once - twice - three times.

Question: Three times you went back and on the third time what happened?

Mr. Glock: That's when I fired my second and final shot, and that's when she -- as we were driving away after the last shot, she fell over.

Mr. Puiatti: She walked about ten yards and then fell over.

Question: And then -- proceed. Continue with what happened.

Mr. Puiatti: Okay. Then we drove out of the orange grove and got back onto 301.

(R. 1910 - 1919)(emphasis added).

Before trial, Mr. Glock's attorney filed a Motion for Severance of Defendants, stating in part:

> 3. Certain statements and admissions made by the co-Defendant which may be admissible against the co-Defendant makes [sic] reference to the Accused but are not admissible against the Accused.
>
> 4. A severance is necessary to promote a fair determination of the guilt or innocence of the Accused for the following reasons:
>
> a) Evidence admissible against the co-Defendant is not admissible against the Accused.
>
> . . . .
>
> d) There is a possibility of jury confusion as to different standards of responsibility and as to whom particular pieces of evidence apply.
>
> e) The co-Defendant may introduce evidence that the Accused is solely responsible for the crimes charged.

(R., Vol. II, no page number).

At a hearing on the Motion to Sever, trial counsel argued that the tape-recorded statement made in New Jersey and portions of the joint statement were not admissible against Mr. Glock (R. 340-41, 347), and that their admission would violate Bruton (R. 343, 347). Trial counsel also pointed out that if the statements were admitted at the guilt-innocence phase of trial, "the jury is going to have these statements or what they hear from these

statements not only for the purpose of determining guilt or innocence but for the purpose of making a recommendation on the penalty phase of the case." (R. 356).

The trial court denied the Motion to Sever, finding as to the Bruton ground of that motion:

> Mr. Glock also complains that certain statements and admissions made by his co-defendant, Mr. Puiatti, may be used by the State but are not admissible against him. Bruton v. United States. . . . Pursuant to Rule 3.152(b)(2), Fla. R. Crim. P., the State has indicated that it intends to introduce at the joint trial of the defendants, the statements made by each defendant in New Jersey on August 21, 1983, and the joint statement made by the defendants on August 24, 1983, in Dade City, Florida. The State has furnished the court a copy of the transcript of the statements made in New Jersey and the court has reviewed a transcript of the joint statements contained in the court file.
>
> A review of these statements indicate [sic] that all of these statements are "interlocking," that is, all of these statements affirm substantially the same material facts of the offenses charged. State v. Stubbs, 239 So. 2d 241 (Fla. 1970); Parker v. Randolph, 442 U.S. 62 . . . (1979); Damon v. State, 397 So. 2d 1224 (Fla. App. 3d 1981). In fact, the only disagreement found in the statements is that in the statements made by the defendants in New Jersey each of the defendants said it was the other who first suggested shooting the victim. However, even that disagreement seems to have been resolved in the joint statement made later in Florida. In any event, the fact that a co-defendant's statement is "predictably more exculpatory concerning immaterial details of the crime does not render its admission in any meaningful sense harmful to his case." Damon v. State, id. at 1226.

(R., Vol. II, no page number).

At trial, the court ruled that Mr. Glock's August 21 tape-recorded statement was not admissible against Mr. Puiatti and that Mr. Puiatti's August 21 tape-recorded statement was not admissible against Mr. Glock (R. 1835). The court received both statements into evidence (R. 1833, 1841), and the tapes were played for the jury (R. 1835, 1842).

Before the tape of Mr. Puiatti's statement was played, trial counsel renewed the Motion to Sever, stating that admission of the tape constituted a violation of Bruton (R. 1839-40). The court denied the motion (R. 1840), and instructed the jury, "you are not to consider this tape to be any evidence against Mr. Glock." (R. 1841).

When the State moved to introduce the August 24 written statement of Mr. Puiatti, defense counsel again renewed the motion to sever, stating that a curative instruction would be insufficient to cure the violation of Mr. Glock's rights (R. 1849). The trial court received the statement in evidence, and instructed the jury, "this is a written statement by Mr. Puiatti. And you are not to consider this as any evidence against Mr. Glock." (R. 1849-50). That statement was not read to the jury, but was provided to the jury during deliberations (R. 1849).

Later in the trial, the State asked the court reporter who transcribed the August 24 statement to read that statement to the jury (R. 1899). At the subsequent bench conference, the State moved the statement into evidence, but the court denied that

request (R. 1902). In a pretrial hearing, the court had indicated that it would probably not permit providing the jury with a transcript of the statement because of the "[u]ndue impression it might make." (R. 716).

At the bench conference, defense counsel renewed Mr. Glock's Motion to Sever because "[s]ome parts of the statement constitute a violation of the Bruton Rule. Specifically it's a part that's very critical, the actual shooting, in that statement." (R. 1902). The court denied the motion (R. 1903), and the statement was read to the jury (R. 1905-43).

B. The Admission of Mr. Puiatti's Statements Violated Mr. Glock's Rights Under the Confrontation Clause

In Cruz v. New York, 107 S. Ct 1714 (1987), the United States Supreme Court reviewed the rationale of the Bruton rule and answered a question about which confusion had existed since the Court's plurality opinion in Parker v. Randolph, 442 U.S. 62 (1979):

> The Confrontation Clause of the Sixth Amendment guarantees the right of a criminal defendant "to be confronted with the witnesses against him." We have held that the guarantee, extended against the States by the Fourteenth Amendment, includes the right to cross-examine witnesses. See Pointer v. Texas, 380 U.S. 400, 404, 85 S.CT. 1065, 1068, 13 L.Ed.2D 923 (1965). Where two or more defendants are tried jointly, therefore, the pretrial confession of one of them that implicates the others is not admissible against the others unless the confessing defendant waives his Fifth Amendments rights so as to permit cross-examination.

Ordinarily, a witness is considered to be a witness "against" a defendant for purposes of the Confrontation Clause only if his testimony is part of the body of evidence that the jury may consider in assessing his guilt. Therefore, a witness whose testimony is introduced in a joint trial with the limiting instruction that it be used only to assess the guilt of one of the defendants will not be considered to be a witness "against" the other defendants. In Bruton, however, we held that this principle will not be applied to validate, under the Confrontation Clause, introduction of a nontestifying codefendant's confession implicating the defendant, with instructions that the jury should disregard the confession insofar as its consideration of the defendant's guilt is concerned. We said:

> "[T]here are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored. Such a context is presented here, where the powerfully incriminating extrajudicial statements of a codefendant, who stands accused side-by-side with the defendant, are deliberately spread before the jury in a joint trial. Not only are the incriminations devastating to the defendant but their credibility is inevitably suspect...." 391 U.S., at 135-136, 88 S. Ct., at 1627-1628 (citations omitted).

We had occasion to revisit this issue in Parker, which resembled Bruton in all major respects save one: Each of the jointly tried defendants had himself confessed, his own confession was introduced against him, and his confession recited essentially the same facts as those of his nontestifying codefendants. The plurality of four Justices found no Sixth Amendment violation. It understood Bruton to hold that the Confrontation Clause is violated only when introduction of a codefendant's confession is "devastating" to the defendant's case. When

the defendant has himself confessed, the plurality reasoned, "[his] case has already been devastated," 442 U.S., at 75, n. 7, 99 S. Ct., at 2140, n. 7 (plurality opinion), so that the codefendant's confession "will seldom, if ever, be of the 'devastating' character referred to in Bruton," and impeaching that confession on cross-examination "would likely yield small advantage," id., at 73, 99 S.C.T at 2139. Thus, the plurality would have held Bruton inapplicable to cases involving interlocking confessions. The four remaining Justices participating in the case disagreed, subscribing to the view expressed by Justice BLACKMAN that introduction of the defendant's own interlocking confession might, in some cases, render the violation of the Confrontation Clause harmless, but could not cause introduction of the nontestifying codefendant's confession not to constitute a violation. ID., at 77-80, 99 S.Ct., at 2141-2142 (BLACKMUN, J., concurring in part and concurring in judgment). (Justice BLACKMUN alone went on to find that the interlocking confession did make the error harmless in the case before the Court, thereby producing a majority for affirmance of the convictions. Id., at 80-81, 99 S.CT., at 2142-2143.) We face again today the issue on which the Court was evenly divided in Parker.

We adopt the approach espoused by Justice BLACKMUN. While "devastating" practical effect was one of the factors that Bruton considered in assessing whether the Confrontation Clause might sometimes require departure from the general rule that jury instructions suffice to exclude improper testimony, 391 U.S., at 136, 88 S.Ct., at 1628, it did not suggest that the existence of such an effect should be assessed on a case-by-case basis. Rather, that factor was one of the justifications for excepting from the general rule the entire category of codefendant confessions that implicate the defendant in the crime. It is impossible to imagine why there should be excluded from that category, as generally not "devastating," codefendant confessions that "interlock" with the defendant's own confession. "[T]he infinite variability of

> inculpatory statements (whether made by defendants or codefendants), and of their likely effect on juries, makes [the assumption that an interlocking confession will preclude devastation] untenable." Parker, 442 U.S., at 84, 99 S.Ct., at 2145 (STEVENS, J., dissenting).

Cruz, 107 S. Ct. at 1717-18.

It is clear after Cruz that admission of a codefendant's confession at a joint trial violates the defendant's Confrontation Clause rights, even when the defendant's "interlocking" confession is admitted. Thus, despite a limiting instruction and despite the admission of Mr. Glock's statements, the admission of Mr. Puiatti's August 21 statement and portions of the August 24 statement violated the Bruton rule.

Bruton forbids the introduction of a nontestifying codefendant's confession which is not directly admissible against the defendant. Cruz, 107 S. Ct. at 1719. Because a codefendant's confession is presumptively unreliable, Ohio v. Roberts, 448 U.S. 56, 66 (1980), it is directly admissible against the defendant only if the confession bears sufficient "indicia of reliability." Lee v. Illinois, 106 S. Ct. 2056, 2063 (1986). This is so because the Confrontation Clause only permits the introduction of "trustworthy" hearsay:

> In Roberts, we recognized that even if certain hearsay evidence does not fall within "a firmly rooted hearsay exception" and is thus presumptively unreliable and inadmissible for Confrontation Clause purposes, it may nonetheless meet Confrontation Clause reliability standards if it is supported by a "showing of particularized guarantees of trustworthiness." 448 U.S., at 66, 100 S.Ct., at 2539.

> However, we also emphasized that "[r]eflecting its underlying purpose to augment accuracy in the factfinding process by ensuring the defendant an effective means to test adverse evidence, the Clause countenances only hearsay marked with such trustworthiness that 'there is no material departure from the reason of the general rule.'" Id., at 65, 100 S. Ct., at 2539, quoting Snyder v. Massachusetts, 291 U.S. 97, 107, 54 S. Ct. 330, 333, 78 L.Ed.2d 674 (19340.

Lee, 106 S. Ct. at 2063-64. There is a "weighty presumption against the admission of such uncross-examined evidence." Lee, 106 S. Ct. at 2065. In assessing the reliability of a codefendant's confession to determine whether this "weighty presumption" has been overcome, a court should examine factors such as the circumstances surrounding the confession, the discrepancies between the codefendant's and defendant's statements, and whether those discrepancies involve significant issues in dispute at trial. Lee, 106 S. Ct. at 2064-65.

In Mr. Glock's case, law enforcement officers interviewed Mr. Puiatti on August 21, 1983, after they had already obtained a confession from Mr. Glock. At trial, the interviewing detective explained how Mr. Puiatti's confession came about:

> Q When Mr. Puiatti first spoke with you, what did Mr. Puiatti say?
>
> A At first Mr. Puiatti denied being involved in any homicide. And stated that he was picked up at his house by Mr. Glock. And that was all he knew.
>
> Q What did you say in response to that?
>
> A I advised Mr. Puiatti that I had already obtained the confession from Mr. Glock.

> And he told me, I was square one as to exactly what had occurred. And a short time after that, a moment was when Mr. Puiatti -- then Mr. Puiatti stated that he would tell us the truth as to what occurred.

(R. 1837). Another detective present at the interview testified:

> Q Okay. How did the conversation with Mr. Puiatti start?
>
> A Mr. Puiatti agreed to talk about what had occurred, and he had initially went into recite or reiterate the story that he had previously told me.
>
> Q That Glock had picked him up in the car?
>
> A Yes.
>
> Q When he made that statement, what happened?
>
> A He was stopped by Detective Stahl, who advised him that Mr. Glock had given a statement concerning the incident.
>
> Q What happened?
>
> A At this time Mr. Puiatti just sat back in the chair at the table we were seated at. And the whole room was quiet for a good solid minute. He then advised that he would give a statement.

(R. 1805).

At the pretrial suppression hearing, Mr. Puiatti testified regarding the circumstances surrounding his August 21 confession:

> Q Carl, do you recall that pause that the detectives testified about on Wednesday, they talked about a pause which occurred during questioning by Detective Quinlan, Detective Stahl and Detective Wiggins on August 21 of 1983?
>
> A Yes, sir, I do.
>
> Q Carl, what was it that prompted you to pause?

A Well, before I paused, Detective Stahl had gotten up and had told me that Robert Glock had already given him a statement, and he got closer to me and stood over me and said that he didn't come all the way from Florida to hear a bunch of lies, pointing his finger at me.

Q Then what happened?

A Then I just hung my head, looked toward the ground, and there was a moment of silence around the room.

Q Who spoke to you next?

A Detective-Sergeant Quinlan who was seated to my left, and he said to me, "Carl, it would be in your best interest to cooperate with these gentlemen." At which time I decided that it would be in my best interest to cooperate with them, judging by what Detective Quinlan had said, and thought it would keep me out of the electric chair if I did.

(R. 624-25).

Q Now, Mr. Eble asked you about the pause that you talked about. What story did you tell them before the pause occurred?

A I hadn't really told them much of any story, sir, just that -- what I had originally said when I was put in -- brought into custody.

Q Is that the one about being picked up by Glock and that you weren't with him when the car was stolen?

A Yes, sir.

Q And then what? You said Detective Stahl said what to you?

A Detective Stahl told me that he had already gotten a statement from Mr. Glock, and he got right in my face pointing his finger at me, told me he didn't come all the way from Florida to hear a bunch of lies.

Q Did he holler at you?

A He raised his voice, yes, sir. Not in a hollering manner, but he raised his voice, and he is, to me, a very imposing figure.

Q Well, in other words it wasn't a normal conversation, not like I'm talking to you right now.

A No, it wasn't.

Q You say he raised his voice but he didn't holler?

A Yes.

Q You said he pointed his finger at you.

A Yes, sir.

Q How close did he get to you?

A He was standing. I was seated and he was standing over me, maybe about right there (indicating).

Q Was there a table between you?

A No, sir.

Q All right. And what did he say to you about Mr. Glock?

A He told me that Mr. Glock had given him a statement and started naming off some things that Mr. Glock had said on his statement.

Q He told you what Mr. Glock had said?

A Yes, sir.

Q What did he say Mr. Glock had said?

A Things related to the crime.

Q What -- what I'm trying to get is why did you change your mind and decide to tell another -- the true story?

A Because Detective-Sergeant Quinlan told me it would be in my best interest to cooperate.

Q I thought that happened later.

A That happened before I gave the statement of what happened. It happened right after Detective Stahl said that to me and I looked down at the ground, that's when the -- Sergeant Quinlan said to me, "Carl, it would be in your best interest to cooperate with these gentlemen."

Q Why did you look down at the ground? What was the pause for?

A No special reason. Just to think for a minute.

Q Figured they had you and you might as well tell them; right?

A No.

Q Why?

A I looked down at the ground because naturally I was a little upset that Mr. Glock had given them a statement.

(R. 632-34).

At the August 21 statement, then, Mr. Puiatti had been confronted with the fact that Mr. Glock had confessed, had been told "[t]hings related to the crime" which Mr. Glock had said, and was "a little upset that Mr. Glock had given them a statement." He had initially denied involvement in the offense and obviously intended to maintain that denial until he was confronted with Mr. Glock's confession. As explained in Lee, supra, Mr. Puiatti knew the "jig was up" and that his and Mr. Glock's interests were antagonistic:

The unsworn statement was given in response

> to the questions of police, who, having already interrogated Lee, no doubt knew what they were looking for, and the statement was not tested in any manner by contemporaneous cross-examination by counsel, or its equivalent. Although, as the State points out, the confession was found to be voluntary for Fifth Amendment purposes, such a finding does not bear on the question of whether the confession was also free from any desire, motive or impulse Thomas may have had either to mitigate the appearance of his own culpability by spreading the blame or to overstate Lee's involvement in retaliation for her having implicated him in the murders. It is worth noting that the record indicates that Thomas not only had a theoretical motive to distort the facts to Lee's detriment, but that he was actively considering the possibility of becoming her adversary: prior to trial, Thomas contemplated becoming a witness for the State against Lee. This record evidence documents a reality of the criminal process, namely that once partners in a crime recognize that the "jig is up," they tend to lose any identity of interest and immediately become antagonists, rather than accomplices.

Lee, 106 S. Ct. at 2064. As in Lee, the circumstances surrounding Mr. Puiatti's August 21 confession do not rebut the presumption of unreliability.

Mr. Glock's and Mr. Puiatti's August 21 confessions also differed in several significant respects. Mr. Glock stated that it was Mr. Puiatti's idea to shoot the victim and that it was Mr. Puiatti who kept noticing that the victim was still standing and who decided they should shoot her again (see App. 16). Mr. Puiatti said just the opposite -- that it was Mr. Glock's idea to shoot the victim, that he (Mr. Puiatti) did not want to shoot her, and that it was Mr. Glock who noticed she was still standing and who told Mr. Puiatti to go back (see App. 17). Clearly, in a

first degree murder trial, these discrepancies involve significant issues regarding Mr. Glock's and Mr. Puiatti's relative roles in the offense and regarding premeditation.

Thus, as in Lee, the significant discrepancies between the statements do not overcome the presumptive unreliability of Mr. Puiatti's confession:

> We also reject Illinois' second basis for establishing reliability, namely that because Lee and Thomas' confessions "interlock" on some points, Thomas' confession should be deemed trustworthy in its entirety. Obviously, when codefendants' confessions are identical in all material respects, the likelihood that they are accurate is significantly increased. But a confession is not necessarily rendered reliable simply because some of the facts it contains "interlock" with the facts in the defendant's statement. See Parker v. Randolph, 442 U.S. 62, 79, 99 S. Ct. 2132, 2142, 60 L.Ed.2d 713 (1979)(BLACKMUN, J., concurring in part and concurring in the judgment). The true danger inherent in this type of hearsay, is, in fact, its selective reliability. As we have consistently recognized, a codefendant's confession is presumptively unreliable as to the passages detailing the defendant's conduct or culpability because those passages may well be the product of the codefendant's desire to shift or spread blame, curry favor, avenge himself, or divert attention to another. If those portions of the codefendant's purportedly "interlocking" statement which bear to any significant degree on the defendant's participation in the crime are not thoroughly substantiated by the defendant's own confession, the admission of the statement poses too serious a threat to the accuracy of the verdict to be countenanced by the Sixth Amendment. In other words, when the discrepancies between the statements are not insignificant, the codefendant's confession may not be admitted.
>
> In this case, the confessions overlap in

> their factual recitations to a great extent. However, they clearly diverge with respect to Lee's participation in the planning of her Aunt's death, Lee's facilitation of the murder of Odessa, and certain factual circumstances relevant to the couple's premeditation.
>
> . . . .
>
> The subjects upon which these two confessions do not "interlock" cannot in any way be characterized as irrelevant or trivial. The discrepancies between the two go to the very issues in dispute at trial: the roles played by the two defendants in the killing of Odessa, and the question of premeditation in the killing of Aunt Beedie.

Lee, 106 S. Ct. at 2065 (emphasis added).

The same analysis applies to the objected-to portions of the August 24 statement. Mr. Puiatti had been in continuous custody and obviously still had an interest in exculpating himself. During that statement, Mr. Puiatti dominated the conversation and once again stated that it was Mr. Glock's idea to shoot the victim, that he (Mr. Puiatti) only agreed to do so after "going back and forth," and that it was Mr. Glock who noticed that the victim was still standing (see App. 18). Mental health evidence not discovered (see Claim VII, infra) or presneted at the time of Mr. Glock's trial demonstrates why Mr. Puiatti dominated the conversation: Mr. Glock was under the substantial domination of Mr. Puiatti and was "not able to function independently . . . . He therefore could not give a free and voluntary confession. . . ." at the joint statement (App. 7). This evidence requires an evidentiary hearing for the proper resolution of this claim. Because of the domination of Mr. Puiatti, during extensive and

significant portions of the August 24 statement, Mr. Glock sat silent, while Mr. Puiatti related his versions of the events. See Hall v. Wainwright, 559 F.2d 964, 965 n.4 (5th Cir. 1977).

Under Lee, supra, Mr. Puiatti's statements clearly did not bear sufficient "indicia of reliability" to be independently admissible against Mr. Glock. Their admission thus violated Bruton and Cruz, and deprived Mr. Glock of his sixth, eighth, and fourteenth amendment rights.

C. The Bruton Violation Was Not Harmless

A Bruton violation can be harmless. Cruz, 107 S. Ct. at 1719. The analysis of harmlessness is distinguished from the analysis of whether a codefendant's confession is sufficiently reliable to be independently admissible against the defendant. Id. at 1718-19. In fact, the reliability of the codefendant's confession "cannot conceivably be relevant to whether, assuming [the confession] cannot be admitted, the jury is likely to obey the instruction to disregard it, or the jury's failure to obey is likely to be inconsequential." Cruz, 107 S. Ct. at 1719.

Thus, even when the defendant's confession is admitted and interlocks in some respects with the codefendant's confession, the introduction of the codefendant's confession is not necessarily harmless. Cruz, 107 S. Ct. at 1718-19. The question under Bruton is whether the jury is likely to obey its instructions to compartmentalize the confessions and the defendants, considering each confession only against the

defendant who made the confession. Id. If the confessions "interlock" to some degree, the likelihood of harm is much greater than if the confessions are "positively incompatible." Id. at 1718. Here, it is clear that the confessions described the same series of events, making it likely that the jury would have been unable to follow its instructions to keep the confessions and defendants separate.

D. The Error Herein Deprived Mr. Glock of Due Process

The denial of the right of confrontation which occurred because of the Bruton violation in Mr. Glock's case deprived Mr. Glock of due process as guaranteed by the fourteenth amendment. As discussed above, the introduction of Mr. Puiatti's statements at his and Mr. Glock's joint trial violated the Bruton rule, which is designed to protect a defendant's rights under the Confrontation Clause. The United States Supreme Court long ago established that the deprivation of Confrontation Clause rights also constitutes a deprivation of due process: "we have expressly declared that to deprive an accused the right to cross-examine the witnesses against him is a denial of the Fourteenth Amendment's guarantee of due process of law." Pointer v. Texas, 380 U.S. 400, 405 (1965). Mr. Glock was denied his rights to due process.

E. The Introduction of Mr. Puiatti's Statements Deprived Mr. Glock of His Eighth Amendment Rights to a Fair, Reliable, and Individualized Capital Sentencing Determination

It is clearly established that a capital defendant has a fundamental right to a fair, reliable and individualized capital sentencing determination. See Gregg v. Georgia, 428 U.S. 153 (1976); Proffitt v. Florida, 428 U.S. 242 (1976); Lockett v. Ohio, 438 U.S. 586 (1976); Zant v. Stephens, 462 U.S. 862 (1983); Caldwell v. Mississippi, 472 U.S. 320 (1985); Mills v. Maryland, 108 S. Ct. 1860 (1988).

Mr. Glock was denied these fundamental rights when Mr. Puiatti's statements were introduced at their joint trial. As noted above, the foundation of the Bruton rule against the admission of codefendant' statements in joint trials is the likelihood of juror confusion regarding against which defendant a statement may be considered. Bruton, supra; Cruz, supra.

As pointed out by defense counsel in argument on the Motion to Sever (R. 356), this confusion extends to the penalty phase of a capital trial. The error is especially egregious in Mr. Glock's case because Mr. Puiatti's statements indicated that Mr. Glock decided they should shoot the victim and that Mr. Glock told Mr. Puiatti to go back to the victim. As discussed in Claim IV, infra, Mr. Puiatti's counsel relied upon Mr. Puiatti's statements to infer that Mr. Glock lied about his role in the offense and to cross-examine Mr. Glock's mental health expert at the penalty phase. These statements were thus highly relevant to

central capital sentencing issues such as the relative roles of the defendants and premeditation.

The key question here is whether the Bruton error may have affected the sentencing decision. Obviously, the burden of establishing that the error had no effect on the sentencing decision rests upon the State. See Caldwell v. Mississippi, supra. That burden can only be carried on a showing of no effect beyond a reasonable doubt. Compare Chapman v. California, 386 U.S. 18 (1967), with Caldwell, supra. The State cannot carry this, or any burden of harmlessness, with regard to the Bruton error in Mr. Glock's case.

F. This Claim is Cognizable in These Proceedings

The lower court rejected Mr. Glock's claim because it found that the claim had been decided on direct appeal adversely to Mr. Glock. The court's ruling, however, failed to recognize that Mr. Glock's claim involves fundamental error and is based upon new law.

Cruz v. New York, 107 S. Ct. 1714 (1987), did not exist at the time of Mr. Glock's trial or direct appeal, and represents a significant change in law which was unavailable to Mr. Glock at trial or on direct appeal. In Witt v. State, 387 So. 2d 922 (Fla. 1980), cert. denied, 449 U.S. 1067 (1980), this Court held that state post-conviction relief is available to a litigant on the basis of a "change of law" which:

> (a) emanates from [the Florida Supreme] Court or the United States Supreme Court, (b) is

> constitutional in nature, and (c) constitutes a development of fundamental significance.

Witt, 387 So. 2d at 922. The Court also noted that usually such "changes of law" will be the type that "necessitate retroactive application." Id. at 929. See also Adams v. Dugger, 816 F.2d 1493, 1496-97 (11th Cir. 1987). Cruz fully meets each of these requirements.

Cruz is obviously fundamental, constitutional, and retroactive. See Puiatti v. State, 521 So. 2d 1106 (Fla. 1988). And Cruz is a "change in law." Compare Puiatti v. State, 495 So. 2d 128 (Fla. 1986), vacated, 107 S. Ct. 1950 (1987), with Puiatti v. State, 521 So. 2d 1106 (Fla. 1988). As the Eleventh Circuit has explained in a similar context:

> Adams' Caldwell [v. Mississippi, 105 S.Ct. 2633 (1985)] claim was raised for the first time in state court in his second 3.850 motion. The Florida Supreme Court refused to consider the merits of that claim because it had not been raised on direct appeal. Adams [v. State], 484 So. 2d [1216] at 1217 [Fla. 1986]. Failure to comply with an independent and adequate state procedural rule ordinarily precludes federal habeas review of a claim, absent a showing of cause for, and prejudice resulting from, the procedural default. [Wainwright v.] Sykes, 433 U.S. [72] at 87 [1977]; Spencer v. Kemp, 781 F.2d 1458, 1463 (11th Cir. 1986) (en banc). It is doubtful, however, that an adequate and independent state law ground is present in this case.
>
> Under Florida law, claims based on constitutional changes in the law since the time of a petitioner's direct appeal of sufficient magnitude to warrant retroactive application are cognizable in Rule 3.850 proceedings, Witt v. State, 387 So. 2d 922, 929 (Fla.), cert. denied, 449 U.S. 1067 (1980); Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984) (finding Enmund v. Florida,

> 458 U.S. 782 (1982), a change in law cognizable in post-conviction proceedings); Edwards v. State, 393 So.2d 597, 600 n.4 (Fla. App.), petition denied, 402 So.2d 613 (Fla. 1981) (finding Cuyler v. Sullivan, 446 U.S. 335 (1980), a change in law cognizable in post-conviction proceedings), as are claims involving fundamental errors, despite the failure to raise such claims on direct appeal. E.g., Palmes v. Wainwright 460 So.2d 362, 365 (Fla. 1984) (suppression of evidence is fundamental error cognizable in collateral proceedings); Nova v. State, 439 So.2d 255, 261 (Fla. App. 1983) (infringement of right to jury trial held fundamental error); Reynolds v. State, 429 So.2d 1331, 1333 (Fla. App. 1983) (sentencing error that could cause defendant to be incarcerated for greater length of time than provided by law is fundamental and "petitioner is entitled to relief in any and every legal manner possible"). In fact, Adams' Caldwell claim is the very type of claim for which Florida created the Rule 3.850 procedure. See Witt, 387 So.2d at 927 (genesis of Rule 3.850 procedure was Florida's desire to provide a mechanism for petitioners to raise challenges based on major constitutional changes in the law "where unfairness was so fundamental in either process or substance that the doctrine of finality had to be set aside"). Therefore, the Florida Supreme Court's holding that Adams' Caldwell claim is barred for failure to raise it on direct appeal either must rest on an incorrect determination as to the applicability of Caldwell, or represents application of a procedural bar with regard to a type of claim that Florida does not regularly and consistently bar. See Ake v. Oklahoma, 470 U.S. 68, 74-75 (1985) (when application of state procedural bar depends on an antecedent ruling as to whether federal constitutional error has been committed there is no independent and adequate state law ground); Spencer, 781 F.2d at 1470 (state procedural rule that is sporadically applied is not independent and adequate state ground).

Adams v. Dugger, 816 F.2d 1493, 1496-97 (11th Cir., 1987)(on rehearing)(footnotes omitted).

That analysis applies fully to Mr. Glock's claim. Cruz involves the most fundamental of principles: the rights to confrontation and due process. See Pointer v. Texas, 380 U.S. 400, 403 (1965). Cruz by definition, is retroactive. It falls squarely within the Witt analysis. The United States Supreme Court recognized as much when it vacated and remanded Mr. Puiatti's case to this Court for reconsideration in light of Cruz. Puiatti v. State, 495 So. 2d 128 (Fla. 1986), vacated, 107 S. Ct. 1950 (1987); Puiatti v. State, 521 So. 2d 1106 (Fla. 1988).

Moreover, Bruton/Cruz error is "fundamental error". The right of confrontation has long been recognized as a "fundamental right," Pointer v. Texas, 380 U.S. 400, 403 (1965). As the Court held in Pointer:

> There are few subjects, perhaps, upon which this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal.

Pointer, 380 U.S. at 405. Mr. Glock was denied this fundamental right. Such fundamental errors are cognizable in Florida collateral proceedings. See, e.g., Palmes v. Wainwright, 460 So. 2d 362, 365 (Fla. 1984); Nova v. State, 439 SO. 2d 255, 261 (Fla. App. 1983).

Cruz error is no less "fundamental" than Cuyler v. Sullivan, 446 U.S. 335 (1980), error -- found cognizable in Florida post-

conviction proceedings in Edwards v. State, 393 So. 2d 597, 600 n.4 (Fla. 3d DCA), petition denied, 402 So. 2d 613 (Fla. 1981). See also Adams v. Dugger, supra, citing Edwards. Cruz error is no less "fundamental" than Enmund v. Florida, 458 U.S. 782 (1982), error -- found cognizable in Florida post-conviction proceedings in Tafero v. Wainwright, 459 So. 2d 1034, 1035 (Fla. 1984). See also Adams, supra, citing Tafero. It is no less "fundamental" than Caldwell v. Mississippi, 105 S.Ct. 2633 (1985). See generally Adams v. Dugger, supra. It involves an error of fundamental constitutional magnitude no less than those found cognizable in Florida post-conviction proceedings in Reynolds v. State, 429 So. 2d 1331, 1333 (Fla. App. 1983) (sentencing error); Palmes v. Wainwright, 460 So. 2d 362, 265 (Fla. 1984)(suppression of evidence); Nova v. State, 439 So. 2d 255, 261 (Fla. App. 1983)(right to jury trial). See Adams, supra, citing Reynolds, Palmes, and Nova. See also, O'Neal v. State, 308 So. 2d 569, 570 (Fla. 2d DCA 1975)(right to notice); French v. State, 161 So. 2d 879, 881 (Fla. 1st DCA 1964)(denial of continuance); Flowers v. State, 351 So. 2d 3878, 390 (Fla. 1st DCA 1977)(sentencing error); Cole v. State, 181 So. 2d 698 (3d DCA 1966)(right to presence of defendant at taking of testimony). It is "the very type of claim" for which Florida's post-conviction review rules were created. Adams v. Dugger, supra, 816 F.2d at 1497, citing Witt v. State.

Furthermore, the Bruton/Cruz violation in Mr. Glock's case extended to the penalty phase of this capital trial, resulting in

an abrogation of fundamental eighth amendment principles. The error herein denied Mr. Glock his eighth amendment rights to an individualized and reliable capital sentencing decision focused solely on the "particularized characteristics of the individual."

G. Conclusion

The lower court erred in failing to consider the fundamental error involved in Mr. Glock's claim and in failing to assess Mr. Glock's claim in light of Cruz. Mr. Glock's claim is cognizable in these proceedings and the Cruz analysis demonstrates the meritorious nature of that claim.

Mr. Glock's sixth, eighth, and fourteenth amendment rights were deprived by the introduction of his codefendant's statements at their joint trial. A stay of execution, an evidentiary hearing, and Rule 3.850 relief are proper.

CLAIM IV

THE TRIAL COURT'S DENIAL OF A SEVERANCE AT BOTH THE GUILT AND PENALTY PHASES OF TRIAL DEPRIVED MR. GLOCK OF HIS RIGHTS TO A FUNDAMENTALLY FAIR TRIAL AND VIOLATED THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTTS.

Mr. Glock and his codefendant, Carl Puiatti, were tried jointly. Before trial, Mr. Glock's trial counsel filed a motion to sever, stating in part:

> 3. Certain statements and admissions made by the co-defendant which may be admissible against the co-defendant makes reference to the accused but are not admissible against the accused.

4. A severance is necessary to promote a fair determination of the guilt or innocence of the accused for the following reasons:

a) Evidence admissible against the co-defendant is not admissible against the accused.

b) There is a possibility of antagonistic defenses.

c) One defendant may testify and the other not, thus calling attention to one defendant exercising his rights against self-incrimination.

d) There is a possibility of jury confusion as to different standards of responsibility and as to whom particular pieces of evidence apply.

e) The co-defendant may introduce evidence that the accused is solely responsible for the crimes charged.

5. The accused is now prejudiced in the preparation of his case and will be further prejudiced at a joint trial because the codefendant has not filed reciprocal discovery and has not advised counsel for the accused of his possible witness, defenses, including reliance on the defense of insanity (see attached letter to counsel for accused which has not been answered).

(R., Vol. II, no page number).

The Court denied the severance, but noted that the motion could be raised again (R., Vol. II, no page number). Defense counsel repeatedly requested a severance throughout the trial and penalty phase (See, e.g., R. 1839, 1849, 1860, 1876, 1902, 2113, 2266, 2354). All those requests were denied.

Under Florida law, severance of joint defendants is proper when it is necessary to a "fair determination of each defendant's

guilt or innocence":

> Rule 3.152(b)(1) directs the trial court to order severance whenever necessary "to promote a fair determination of the guilt or innocence of one or more defendant. . . ." As we stated in Menendez v. State, 368 So. 2d 1278 (Fla. 1979), and in Crum v. State, 398 So. 2d 810 (Fla. 1981), this rule is consistent with the American Bar Association standards relating to joinder and severance in criminal trials. The object of the rule is not to provide defendants with an absolute right, upon request, to separate trials when they blame each other for the crime. Rather, the rule is designed to assure a fair determination of each defendant's guilt or innocence. This fair determination may be achieved when all the relevant evidence regarding the criminal offense is presented in such a manner that the jury can distinguish the evidence relating to each defendant's acts, conduct, and statements and can then apply the law intelligently and without confusion to determine the individual defendant's guilt or innocence. The rule allows the trial court, in its discretion, to grant severance when the jury could be confused or improperly influenced by evidence which applies to only one of several defendants.
>
> A type of evidence that can cause confusion is the confession of a defendant which, by implication, affects a codefendant, but which the jury is supposed to consider only as to the confessing defendant and not as to the others. A severance is always required in this circumstance. Bruton v. United States, 391 U.S. 123, 88 S. Ct. 1620, 20 L.Ed.2d 476 (1968).

McCray v. State, 416 So. 2d 804 (Fla. 1982). An examination of the guilt and penalty phase proceedings demonstrates that Mr. Glock was not provided a "fair determination" as to guilt or punishment.

The lower court summarily dismissed this claim, stating that the issue had been decided against Mr. Glock on direct appeal and was without merit (Order Denying Motion For Post-Conviction Relief, pp. 1-2). The court's ruling did not take into account the fundamental error involved in Mr. Glock's claim and did not consider the effect of Cruz v. New York, 107 S. Ct. 1714 (1987), on the necessity of a severance.

Clearly, Mr. Glock was entitled to a severance based on the State's introduction of codefendant Puiatti's statements in violation of Bruton (see Claim III, supra, specifically incorporated herein). As stated in McCray, this is exactly the "type of evidence that can cause [jury] confusion." Introduction of Mr. Puiatti's statements undoubtedly prejudiced Mr. Glock, for in those statements Mr. Puiatti asserted that it was Mr. Glock's idea to shoot the victim and to return to her when she did not fall (see App. 17, 18; see also Claim III).

As defense counsel pointed out in the pretrial hearing on the Motion to Sever (R. 343), during trial it became clear that Mr. Glock faced prosecution not only by the State but also by his codefendant. At a bench conference during the testimony of the lead detective, counsel for Mr. Puiatti announced his intention "of making it clear that Mr. Glock is a liar. That he is responsible for Mrs. Ritchie's death" (R. 1859). Defense counsel renewed the Motion to Sever, which was denied (R. 1860-61).

During the cross-examination of the detective, Mr. Puiatti's counsel did indeed try to show that Mr. Glock was a "liar". To

do this, counsel relied upon Mr. Puiatti's August 21 statement, Mr. Glock's August 21 statement, and the August 24 statement. Counsel's point was that Mr. Puiatti's August 21 statement was true, while Mr. Glock's was not:

> Q. So the taped statement is what Mr. Puiatti told you, when he told you that he was going to tell the truth?
>
> A. Yes.
>
> Q. Mr. Glock told you on his statement didn't he, didn't you ask him on that tape recording, if that was the truth and Mr. Glock was telling you the truth?
>
> A. Yes, I asked him that.
>
> . . .
>
> Q. Just answer my question. What Mr. Glock told you on the taped statement, was that -- what he told you was that he was telling the truth on that, and he said that it was Mr. Puiatti's idea to kill Mrs. Ritchie, correct?
>
> A. Correct.
>
> . . .
>
> Q. What Mr. Puiatti told you on the taped statement, what he said was the truth, was that it was Mr. Glock's idea to kill Mrs. Ritchie, correct?
>
> A. That's correct.
>
> Q. When the two of them were at the Sheriff's Department and gave the court reporter the statement under oath, didn't Mr. Glock agree that Mr. Puiatti was telling the truth about that?
>
> A. It was Glock's idea, and Puiatti went along with it after he kicked it around.
>
> Q. Isn't that right, that when he got down here in front of the court reporter, he

gave you a different statement than what he said before, and admitted that it was his idea to kill Mrs. Ritchie.

A. Yes.

. . .

Q. Okay. Mr. Stahl, on that tape recording of the way I heard that tape recording, and maybe I missed it, the way that I heard that tape recording was that the way that Mr. Glock described the shooting, was that Puiatti shot first, Glock shot the second time and Puiatti shot the third time?

A. Correct sir.

Q. Mr. Glock told you that was the truth on that taped statement, didn't he?

A. Yes he did.

Q. And again, you hadn't told Mr. Puiatti that Glock was trying to put the blame on him for shooting her last, did you?

A. No I didn't.

Q. Mr. Puiatti told you that he was going to tell the truth, didn't he?

A. Yes he did.

Q. And Mr. Puiatti told you on that taped statement that he shot the first time, and the second time, but then Glock grabbed the gun and finished off Mrs. Richie. Shot and killed her. Isn't that what he said, that he took the gun and shot Mrs. Ritchie, emptied the gun into her?

A. That was the third time.

Q. Right, when you got back down to Florida, and in front of the court reporter, when the two of them were sitting there together, didn't Mr. Glock agree that Mr. Puiatti was telling the truth? That it was Mr. Glock who shot last, that he grabbed the gun and shot Mrs. Richie?

A. It was a little conflict there, because -- Puiatti said he shot the first time and then -- Glock said he shot the second time. He didn't know whether he shot once or two times. And then I had to question Puiatti about that, and Puiatti said he shot the first time, he shot her in the chest and in the shoulder. And the second time in the chest.

And Glock said that he finished the rounds on the third time.

Q. So it was Mr. Glock who finally downed her? And in front of the court reporter, he admitted that Mr. Puiatti told the truth the whole time, and it was he who took the gun and emptied the gun into Mrs. Ritchie?

A. Correct. That was the finish.

. . .

[Q] Do you recall Mr. Stahl, how Mr. Puiatti also told you that Mr. Glock used to talk alot? He used to talk so much, incessantly talking, or something to that effect? And it would drive Mr. Puiatti nuts?

A. He did say something to that effect, and that he spoke incessantly.

Q. And that Mr. Glock drove him nuts with his incessant talking?

A. Constant talking, yes.

(R. 1864-71). Mr. Puiatti's counsel followed through on his promise to attempt to show Mr. Glock was a "liar" and to show Mr. Puiatti's August 21 statement was the true account of the offense. Thus, the statement which was not supposed to be evidence against Mr. Glock -- Mr. Puiatti's August 21 statement -- was used by the co-defendant to attack Mr. Glock.

Following this witness's testimony, Mr. Glock's counsel

again renewed the Motion to Sever based on "What has become obvious, that Mr. Glock has been tried not only by the State, but by Mr. Puiatti's counsel" and "based on what we have heard on the statements" (R. 1876-77). The motion was denied (R. 1877).

During closing argument, Mr. Puiatti's counsel continued his attack on Mr. Glock based on Mr. Puiatti's taped statement:

> [MR. EBLE:] . . . Detective Stahl also told you one more thing I think it's important to think about. Carl turned to him on the airplane and complained about Mr. Glock being an incessant talker, talking constantly, and that it drove him nuts.
>
> I submit to you, ladies and gentlemen, that there is something wrong with Mr. Glock.
>
> . . .
>
> The incessant talking of Mr. Glock, Mr. Puiatti snapping, saying he didn't want to, he didn't want to, and something snapped.
>
> MR. VAN ALLEN: Objection. There is no evidence he said I don't want to, I don't want to. It's only --
>
> MR. EBLE: <u>It's on the tape recorded statement</u>. I believe the jury can remember what's there and what's not.
>
> THE COURT: I don't remember.
>
> MR. EBLE: I submit it's on the tape recorded statement.
>
> You have everything there that Mr. Puiatti said. Think back to the tape recorder statement. I think it's back there. Ladies and gentlemen, you can have the testimony played back. You can have the Court Reporter read it back if you don't remember it yourself.

(R. 2056-59).

Mr. Puiatti's counsel clearly encouraged the jury to consider Mr. Puiatti's August 21 statement -- which was admitted only aginst Mr. Puiatti -- as evidence that Mr. Glock was a liar and that Mr. Glock was primarily responsible for the offense. Thus, although the State was not permitted to use that statement against Mr. Glock, counsel for Mr. Puiatti did.

The prejudice to Mr. Glock resulting from the joint trial continued into the penalty phase. During the testimony of a psychologist called on Mr. Glock's behalf, counsel for Mr. Puiatti continued to emphasize Puiatti's statement that the shooting was Mr. Glock's idea. Mr. Puiatti's counsel asked whether the psychologist's findings were consistent with the fact that the shooting was Mr. Glock's idea (R. 2264). Defense counsel objected, pointing out that that "fact" came only from Mr. Puiatti's August 21 statement, which was not in evidence against Mr. Glock, and renewed the Motion to Sever (R. 2264-66). The motion and objection were overruled (R. 2266), and Mr. Puiatti's counsel was allowed to continue questioning the witness based on facts from Mr. Puiatti's August 21 statement (R. 2267-69).

The State also contributed to jury confusion in closing argument at the penalty phase, urging the jury to consider Mr. Glock and Mr. Puiatti as "two peas in a pod" (R. 2403), and arguing that "there's no reasons to treat them any differently . . . . They are very, very similar." (R. 2404). Such arguments in no way comport with the fundamental eighth amendment

requirement of an individualized capital sentencing determination, and highlight the necessity of a severance.

The State also argued that the jury should not find the mental health testimony presented by both Mr. Glock and Mr. Puiatti credible because "[a]ll the doctors said is that Mr. Glock and Mr. Puiatti did not have anti-social personalities" (R. 2407), once again lumping the two defendants together. While one of Mr. Puiatti's experts had testified that Mr. Puiatti did not have an anti-social personality (R. 2158), no such testimony was presented by Mr. Glock's mental health witness (See R. 2239-70). The State's argument urged the jury to consider evidence presented by Mr. Puiatti against Mr. Glock and to consider Mr. Glock and Mr. Puiatti as one -- rather than as two, individual defendants who had presented different evidence and deserved individualized consideration.

Likewise, the trial court added to the notion that the sentencing decision was joint rather than individualized. In instructing the jury at the penalty phase, the court informed the jury that their task was to advise the court regarding "what punishment should be imposed upon Mr. Glock and Mr. Puiatti" (R. 2443)(emphasis added). The court then provided the jury with a single list of aggravating and mitigating circumstances applicable to both defendants (R. 2443-44). These instructions did not distinguish between the two defendants nor tell the jury that they must make an individualized determination as to each defendant.

Clearly, the actions of Mr. Puiatti's counsel, the State, and the court during the penalty phase deprived Mr. Glock of his eighth amendment rights to a fair, reliable, and individualized capital sentencing determination. The failure to grant a severance resulted in the jury being presented with improper, inaccurate, and misleading argument and information. See Caldwell v. Mississippi, 105 S. Ct. 2633 (1985).

The denial of a severance thus denied Mr. Glock his fundamental rights to a fair determination of his guilt and punishment. The lower court erred in summarily dismissing this claim without considering the fundamental errors raised by the claim. Fundamental error is cognizable in Florida post-conviction preceedings. See, e.g., Palmes v. Wainwright, 460 So. 2d 362 (Fla. 1984); Nora v. State, 439 So. 2d 255 (Fla. App. 1983). See also Adams v. Dugger, 816 F. 2d 1493, 1496-97 (11th Cir. 1987).

Furthermore, because a severance was required by the admission of codefendant Puiatti's statements, the analysis of Cruz, supra, fully applies to this claim as well as to Mr. Glock's Bruton claim. See Claim III, supra, fully incorporated herein. As discussed in Claim III, section F, supra, Cruz is a fundamental, constitutional and retroactive change in law, making Mr. Glock's severance claim cognizable in Rule 3.850 proceedings.

The denial of a severance at the guilt and penalty phases of Mr. Glock's trial was error. The lower court's summary dismissal

of this claim was error. A stay of execution and Rule 3.850 relief are proper.

CLAIM V

ROBERT DEWEY GLOCK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT/INNOCENCE AND SENTENCING PHASES OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Regarding Mr. Glock's claim of ineffective assistance of trial counsel, the lower court stated that "throughout the motion, Mr. Glock fails to specifically allege any grounds which would constitute ineffectiveness" and then proceeds to go into some detail trying to "explain away" the specific allegations that presumably were never made. The court also erroneously assumed that cases cited by Mr. Glock must be cited as factually "on point" as opposed to being cited for the legal principles for which they stand. The motion attempted to explain the legal precedent involved in evaluating claims of ineffective assistance of counsel in an effort to provide a framework in which the court could evaluate Mr. Glock's claims. It then went on to report some of the evidence that would be presented at an evidentiary hearing to support Mr. Glock's claims of ineffective assistance of counsel at both the guilt/innocence and penalty phases.

Contrary to the lower court's assertion, the Rule 3.850 motion sets out numerous specific allegations of trial counsel's deficient performance and presents a wealth of information demonstrating the prejudice resulting from counsel's

deficiencies. The lower court denied the claim without an evidentiary hearing, see Claim I, supra, although the allegations in the motion and the entire record in this case demonstrate Mr. Glock's entitlement to an evidentiary hearing and to Rule 3.850 relief. Without conducting an evidentiary hearing, the lower court made findings regarding Mr. Glock's claims and regarding trial counsel's strategy. There is simply no record upon which to base these findings. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); see also Claim I, supra. The lower court erred, for the motion and the files and records in this case do not conclusively show that Mr. Glock is entitled to no relief. Fla. R. Crim. P. 3.850. An evidentiary hearing was and is required. Given the opportunity of an evidentiary hearing, Mr. Glock would establish what his Rule 3.850 motion alleged: counsel's performance was deficient and those deficiencies operated to Mr. Glock's substantial prejudice.

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). As a result, where errors, deficiencies, or omissions of counsel "undermin[e] the [reviewing] court's confidence in the outcome of the . . . proceeding," or when the court is unable "to guage the effect of [an attorney's] omission," relief is appropriate. See State v. Michael, No. 70,658 (Fla. Sept. 22, 1988), slip op. at 2. Strickland v. Washington requires a

defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice.

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); 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. Hopper, 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 and factual arguments to assist his client in accord with the applicable principles of law and the facts of the case. See, e.g., Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979); Beach v. Blackburn, 631 F.2d 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.2d 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.2d at 104; Lovett v. Florida, 627 F.2d 706, 709 (5th Cir. 1980).

Counsel have been found to be prejudicially ineffective for failing to impeach key State witnesses with available evidence; for failing to raise objections, to move to strike, or to seek

limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); 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 prosecutorial jury argument, Vela, 708 F.2d at 963. Moreover, counsel has a duty to ensure that his or her client receives professionally adequate expert mental health assistance, Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's mental health is at issue. See, e.g., Mauldin, supra, See United State v. Fessel, 531 F.2d 1278, 1279 (5th Cir. 1979).

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her 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). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant 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. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the sixth amendment standard"); Strickland v. Washington, supra; Kimmelman v. Morrison, supra.

Counsel must also discharge significant responsibilities at the penalty phase of a capital trial:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Tyler v. Kemp, 755 F. 2d 741, 743 (11th Cir. 1985).

The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die [made] by a jury of people who may have never made a sentencing decision." Gregg v. Georgia, 428 U.S. 153, 190 (1976)(plurality opinion). In Gregg and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Woodson v. North Carolina, 428 U.S. 280 (1976).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration, see State v. Michael, supra, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 714 F.2d 1481, 1490-91 (11th Cir. 1983), adhered to on remand, 748 F.2d 1462, 1463-64 (11th Cir. 1984), cert. denied, ___ U.S.___, 85 L.Ed.2d 301 (1985); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), adhered to on remand, 739 F.2d 531 (1984), cert. denied, ____ U.S. ____, 84 L.Ed.2d 321 (1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these constitutional standards. See King v. Strickland, supra; Tyler v. Kemp, supra; Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1985); see also O'Callaghan v. State, 486 So. 2d 1454 (Fla. 1984); Douglas v. Wainwright, supra; Thomas v. Kemp, supra, 796 F.2d at 1325.

Each of Mr. Glock's counsel's errors are sufficient, standing alone, to warrant Rule 3.850 relief. Each undermines confidence in the fundamental fairness of the guilt-innocence and penalty determinations. The allegations are more than sufficient to warrant a Rule 3.850 evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d

923 (Fla. 1987); see also, Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983).

With regard to the defense counsel's failures at penalty phase, some of the evidence that would be presented at an evidentiary hearing is detailed in the Motion to Vacate Judgment and Sentence and Appendix (see specifically Claims III and V, specifically incorporated herein by reference). An evidentiary hearing would have put forth all of the testimony relating to Mr. Glock's history of abuse, abandonment and neglect, particularly focusing on how this history affected Mr. Glock's patterns of behavior. The information was there; the jury had a right to hear it; Mr. Glock had a right to have it presented. However, because trial counsel failed to properly investigate and prepare, this wealth of information never reached the jury or judge. As the Rule 3.850 motion alleged, trial counsel failed to obtain and present background records regarding Mr. Glock, including school records, social service records, and family court records, and failed to obtain and present life history information from numerous family members. Had counsel properly investigated and prepared, these sources would have provided compelling mitigating evidence, including the following:

> 1) Mr. Glock grew up under apalling conditions and suffered a lifetime of abuse, rejection and abandonment. His mother was an alcoholic drug abuser who viciously battered her children and threatened them with future brutality to insure their silence. His father abandoned the family when Mr. Glock was only two years old (See Motion to Vacate, pp. 77-81).

2) Despite his childhood of abuse and rejection, Mr. Glock was capable of displaying love and care to his family and was known to be protective of them (See Motion to Vacate, p. 81).

3) School records show that Mr. Glock's behavior in the classroom deteriorated as early as age six. At ages eight and ten, he was referred for psychological evaluations (See Motion to Vacate, pp. 81-84).

4) To escape his abusive homelife, Mr. Glock began running away from home (See Motion to Vacate, pp. 84-85).

5) At age thirteen, Mr. Glock was placed in foster care and later in a children's home (See Motion to Vacate, pp. 85-89).

6) Mr. Glock's abusive childhood led him to seek approval and affection from those around him in anyway he could (See Motion to Vacate, pp. 89-90).

7) Although Mr. Glock's father reappeared in his life when Mr. Glock was fourteen years old, Mr. Glock was once again thrust into an abusive situation, this time at the hands of his stepmother (See Motion to Vacate, pp. 90-96).

8) Mr. Glock's codefendant was very authoritative toward Mr. Glock and constantly told him what to do (See Motion to Vacate, pp. 96-97).

All of the information detailed in the Rule 3.850 motion and summarized above establishes significant mitigation regarding Mr. Glock's life and regarding his involvement in the offense. The information alone is mitigating. Had it been obtained and provided to a mental health expert, further mitigation would have been discovered regarding Mr. Glock's relationship with his codefendant and his involvement in the offense (See Claim VII,

infra). Especially telling about Mr. Glock's history in the context of the offense is the result of the abuse and neglect he suffered: he developed a passive dependant personality disorder which made him subject to the influence and domination of those whose approval he sought (See App. 7, Report of James Merikangas, M.D.; see also Motion to Vacate, pp. 103-11).

The prejudice here is obvious. Because the information outlined above was never fully explored and not presented to the jury or the judge, "[t]he death penalty that resulted was . . . robbed of the reliability essential to assure confidence in that decision." Tyler v. Kemp, supra. Mr. Glock was denied his right to an individualized and reliable capital sentencing determination because of trial counsel's failures.

Likewise, at the guilt phase of trial, counsel's performance was deficient, to Mr. Glock's substantial prejudice. As the Rule 3.850 motion alleged, counsel's failures included:

1. Defense counsel failed to ask for a change of venue even though one half of the jury panel knew of the incident through the media.

2. Defense counsel's voir dire was deficient in that he continually linked the codefendants together, thereby adding to the prejudice of the joint trial to which he had earlier objected. He never discussed the jury's ability to keep the defendants separate. Additionally, Mr. Trogolo was constrained by the court when only a limited voir dire was permitted.

3. Defense counsel failed to ask for an instruction on voluntariness with regard to the introduction of statements.

4. Defense counsel's admission of Mr. Glock's guilt at the outset coupled with his repeated references to this being the "act of a depraved mind" (R. 2016, 2017, 2018) unneccesarily stressed the horror of the crime thereby constituting a breach of his duty of loyalty to his client.[3]

The prejudice from these deficiencies is also obvious: through defense counsel's ineffectiveness, Mr. Glock was deprived of his right to a fair and reliable determination of his guilt in a capital case. See Beck v. Alabama, 447 U.S. 625 (1980). Counsel failed to assure that Mr. Glock obtained a fair and impartial jury and that the jury fairly assessed the evidence, and failed to maintain his duty of loyalty to his client.

Mr. Glock's claims regarding ineffective assistance of counsel are more than sufficient to require an evidentiary hearing and thereafter Rule 3.850 relief. The lower court erred in denying an evidentiary hearing and in summarily denying the claim. A stay of execution, an evidentiary hearing, and Rule 3.850 relief are proper.

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[3]The Court is advised that the Motion to Vacate Judgment and Sentence incorrectly referred to the "sentencing closing argument" when this record cite is to the closing argument at guilt phase.

CLAIM VI

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING, AND ITS APPLICATION OF THIS SAME IMPROPER STANDARD IN IMPOSING SENTENCE, DEPRIVED MR. GLOCK OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW, AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

Robert Glock was sentenced to death by a sentencing judge who presumed that death was appropriate once one or more aggravating circumstances were established, unless Mr. Glock overcame that presumption by showing that mitigating circumstances outweighed aggravating circumstances. In his sentencing order, the judge recited his understanding of the law:

> "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. . . ." State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973).

(App. 13, Findings in Support of Sentences, p. 2).

As the Eleventh Circuit has recently explained, the presumption discussed in Dixon may be an appropriate appellate review standard, but is constitutionally impermissible when employed by the sentencing authority:

> The Florida Supreme Court, sitting as an appellate body, has consistently stated that it will presume a sentence of death to be appropriate when one or more valid aggravating factors exists, even if the other aggravating factors relied upon by the sentencer are found to be improper. See, e.g., White v. State, 446 So.2d 1031, 1037 (Fla. 1984)("When there are one or more valid aggravating factors which support a death sentence, in the absence of any mitigating

factors, death is presumed to be the appropriate penalty."). In the present case, the terminology that death is presumed appropriate seeped into the sentencing instructions given by the trial judge. The jury was instructed:

> When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances provided.

Jackson contends that such an instruction amounts to a constitutional error. We agree.

It is true that in Ford v. Strickland, 696 F.2d 804 (11th Cir.)(enbanc), cert. denied, 464 U.S. 865, 104 S.Ct. 201, 78 L.Ed.2d 176 (1983), this court upheld the Florida Supreme Court's practice of not requiring resentencing even after the Court determined that some aggravating circumstances found by the jury lacked evidentiary support. As we explained, the Florida Supreme Court's "presumption" that a death sentence should be affirmed due to the existence of five aggravating circumstances and no mitigating circumstances "seems very like the application of a harmless error rule." Id. at 815.

In this case, however, the jury was instructed that death was presumed to be the appropriate penalty. Justice McDonald of the Florida Supreme Court has astutely pointed out the problems created when such a presumption is relied upon by the sentencing authority:

> I would like to comment on the reference in the majority opinion to State v. Dixon, 283 So.2d 1 (Fla. 1973), cert. denied, 416 U.S. 943 [94 S.Ct. 1950, 40 L.Ed.2d 295](1974). I do not embrace the language from that opinion recited in this majority opinion as "when one or more of the aggravating circumstances is found death is presumed to be the proper sentence unless it or they are overridden by one or more of the

> mitigating circumstances." If that language is restricted to the role of this Court in reviewing death sentences imposed by the trial court, it is acceptable. But I fear that it is construed by the trial judges as a directive to impose the death penalty if an aggravating factor exists that is not clearly overridden by a statutory mitigating factor. The death sentence is proper in many cases. But it is the most severe and final penalty of all and should, in my judgment, be exercised with extreme care. I am unwilling to say that a trial judge should presume death to be the proper sentence simply because a statutory aggravating factor exists that has not been overcome by a mitigating factor.

Randolph v. State, No. 54-869 (Fla. Nov. 10, 1983)(LEXIS, States library, Fla. file) (McDonald, J., dissenting), withdrawn, 463 So. 2d 186 (Fla. 1984), cert. denied, 473 U.S. 907, 105 S. Ct. 3533, 87 L.Ed.2d 656 (1985).

Such a presumption, if employed at the level of the sentencer, vitiates the individualized sentencing determination required by the Eighth Amendment. The Supreme Court has "emphasized repeatedly . . . [that] it is essential that the capital-sentencing decision allows for consideration of whatever mitigating circumstances may be relevant to either the particular offender or the particular offense." Roberts v. Louisiana, 431 U.S. 633, 637, 97 S.Ct. 1993, 1995, 52 L.Ed.2d 637 (1977)(per curiam). The question is whether a sentencing procedure "'create[d] the risk that the death penalty w[ould] be imposed in spite of factors which may call for a less severe penalty.'" Sumner v. Shuman, ___ U.S. ____, 107 S. Ct. 2716, 2726, 97 L.Ed.2d 56 (1987)(quoting Lockett v. Ohio, 438 U.S. 586, 608, 98 S.Ct. 2954, 2966, 57 L.Ed.2d 973 (1978)(plurality opinion)); see also Peek v. Kemp, 784 F.2d 1479, 1488 (11th Cir. 1986)(en banc)(criticizing jury instruction in Spivey v. Zant, 661 F.2d 464 (5th Cir. Unit B. Nov. 1961), cert. denied, 458 U.S. 1111, 102 S.Ct.

3495, 73 L.Ed.2d 1374 (1982), because that instruction "may well have skewed the jury towards death and misled the jury with respect to its absolute discretion to grant mercy regardless of the existence of 'aggravating' evidence"). The jury instruction in this case created precisely that risk.

Presumptions in the context of criminal proceedings have traditionally been viewed as constitutionally suspect. Sandstrom v. Montana, 442 U.S. 510, 99 S. Ct. 2450, 61 L.Ed.2d 344 (1985). When such a presumption is employed in sentencing instructions given in a capital case, the risk of infecting the jury's determination is magnified. An instruction that death is presumed to be the appropriate sentence tilts the scales by which the jury is to balance aggravating and mitigating circumstances in favor of the state.

It is now clear that the state cannot restrict the mitigating evidence to be considered by the sentencing authority. Hitchcock v. Dugger, ___ U.S. ___, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 969, 71 L.Ed. 2d 1 (1982); Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). In considering the constitutionality of Florida's capital sentencing scheme, the Supreme Court unambiguously declared:

> While the various factors to be considered by the sentencing authorities do not have numerical weights assigned to them, the requirements of Furman are satisfied when the sentencing authority's discretion is guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition.
>
> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable various aggravating circumstances to be

> weighed against the mitigating ones. As a result, the trial court's sentencing discretion is guided and channeled by a system that focuses on the circumstances of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.
>
> Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 2969, 49 L.Ed.2d 913 (1976). Rather than follow Florida's scheme of balancing aggravating and mitigating circumstances as described in Proffitt, the trial judge instructed the jury in such a manner as virtually to assure a sentence of death. A mandatory death penalty is constitutionally impermissible. Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L. Ed. 2d 944 (1976); see also State v. Watson, 423 So.2d 1130 (La. 1982) (instructions which informed jury that they must return recommendation of death upon finding aggravating circumstances held unconstitutional). Similarly, the instruction given is so skewed in favor of death that it fails to channel the jury's sentencing discretion appropriately. Cf. Gregg v. Georgia, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932, 49 L.Ed.2d 859 (1976)(sentencing authority's discretion must "be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action").

Jackson v. Dugger, 837 F. 2d 1469, 1473-74 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988).

In Mr. Glock's case, the sentencing judge presumed that death was appropriate unless the mitigating circumstances outweighed the aggravating circumstances and believed that if Mr. Glock did not meet this burden, death was "mandated by Florida law." (R. 2617). The application of this improper standard violated the eighth and fourteenth amendments and deprived Mr. Glock of his rights to due process and equal protection and of

his fundamental right to a fair, reliable, and individualized capital sentencing determination.

This Court has held that shifting the burden to the defendant to establish that the mitigating circumstances outweigh the aggravating circumstances would conflict with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), as well as with State v. Dixon, 283 So. 2d 1 (Fla. 1973). Arango v. State, 411 So. 2d 172 (1982). In Arango, this Court held that a capital sentencing jury must be

> told that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed. . . .
>
> [S]uch a sentence could only be given if the state showed the aggravating circumstances outweighed the mitigating circumstances.

Accord State v. Dixon, 283 So. 2d 1 (Fla. 1973).

Mr. Glock's sentencing proceeding did not follow this straightforward due process and eighth amendment requirement. Rather, Mr. Glock's sentencing jury was specifically instructed that Mr. Glock bore the burden of proof on the issue of whether he should live or die and his sentencing judge employed this unconstitutional standard in sentencing him to death. According to the instructions given to Mr. Glock's jury, the State needed only to show that aggravating circumstances existed sufficient to justify imposition of the death penalty, at which point it became the defense's burden to show that mitigation outweighed the aggravating circumstances proved by the State, before a life sentence could be recommended. Nowhere was the jury correctly

instructed that before a death sentence could be imposed, the State must prove that the aggravating circumstances outweighed the mitigating circumstances. Cf. Arango, supra.

At the beginning of the penalty phase of the trial, the court told the jury that the mitigating circumstances must outweigh the aggravating circumstances. The jury was erroneously advised that:

> [T]he State and the defendants may present evidence relative to the nature of the crimes and the character of the defendants. You are instructed that this evidence when considered with the evidence that you have already heard is presented in order that you might determine, first, whether sufficient aggravating circumstances exist that would justify the imposition of the death penalty; and, secondly, whether there are mitigating circumstances sufficient to outweigh the aggravating circumstances, if any.

(R. 2140)(emphasis added).

At the penalty phase charge conference, defense counsel requested an instruction which properly stated the burden of proof (R. 2359-60). The proposed instruction stated:

> If you find that there are sufficient aggravating circumstances that would justify the impostion of the death penalty, then you must consider the evidence in mitigation. It will be your duty to determine whether there are sufficient aggravating circumstances to outweigh the mitigating circumstances beyond and to the exclusion of a reasonable doubt.
>
> (Omit from Standard Instructions the following: "whether there are mitigating circumstances sufficient to outweight [sic] the aggravating circumstances, if any.")
>
> State v. Dixon, 283 So.2d 1, 9 (Fla. 1973)

(App. 19). Counsel argued that the instruction was necessary to inform the jury "that it is their responsibility to determine that the aggravating circumstances outweigh the mitigating circumstances beyond and to the exclusion of every reasonable doubt." (R. 2360). The court denied the requested instruction (R. 2361).

During closing argument at the penalty phase, the State informed the jury that the court would instruct them:

> [S]hould you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances.

(R. 2394).

This misstatement of the burden of proof was repeated by the court, to the jury, during the instructions given immediately prior to penalty phase deliberations. The jury was instructed:

> As you have been told, the final decision as to what punishment shall be imposed is the responsibility of the judge. It is my responsibility, however, it is your duty to follow the law that will now be given to you by the Court, and to render to the Court an advisory sentence based upon your determination as to whether sufficient aggravating circumstances exist to justify the imposition of the death penalty <u>and whether sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist</u>.

(R. 2442)(emphasis added).

> If you find the aggravating circumstances do not justify the death penalty, your advisory sentence should be one of life imprisonment without possibility of parole for twenty-five years.

> Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that would out weigh the aggravating circumstances.

(R. 2443-44)(emphasis added). Defense counsel maintained his previous objection and requested instruction (R. 2448).

At the sentencing hearing held several weeks after the conclusion of the trial, the court found that one mitigating circumstance and three aggravating circumstances applied to Mr. Glock. The court then imposed the death sentence, explaining:

> And in weighing this mitigating factor that I find for Mr. Glock, and the aggravating factors that I find, I'm convinced that the sentence of death is mandated by Florida law.

(R. 2617)(emphasis added).

The court also relied upon the misstatement of the burden of proof provided to the jury in its sentencing order. Prior to stating its findings, the court discussed the law applicable to the sentencing determination, quoting the following passage:

> "When one or more of the aggravating circumstances is found, death is presumed to be the proper sentence unless it or they are overridden by one or more of the mitigating circumstances. . . ." State v. Dixon, 283 So.2d 1, 9 (Fla. 1973).

(App. 13, Findings in Support of Sentences, p. 2).

The jury instructions and the court's improper shifting of the burden of proof violated the eighth amendment, Arango and Dixon, supra, and Mullaney v. Wilbur, 421 U.S. 684 (1975). The burden of proof was shifted to Mr. Glock on the central

sentencing issue of whether he should live or die. This unconstitutional shift of the burden violated Mr. Glock's due process rights under Mullaney, supra. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, supra. Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Glock's rights to a fundamentally fair and reliable capital sentencing determination, i.e., one which is not infected by arbitrary, misleading and/or capricious factors. See Jackson, supra; Arango v. State, supra; State v. Dixon, 383 So. 2d 1 (Fla. 1973); see also Arango v. Wainwright, 716 F.2d 1353, 1354 n.1 (11th Cir. 1983).

The argument and instructions presented the sentencing jury with misleading and inaccurate information and thus violated Caldwell v. Mississippi, 105 S. Ct. 2633 (1985), as well. The instructions "perverted [the sentencer's determination] concerning the ultimate question of whether in fact [Robert Glock should be sentenced to death]." Smith v. Murray, 106 S. Ct. 2661, 2668 (1986)(emphasis in original). Reasonable jurors could interpret the instructions as creating a presumption in favor of death. Mills v. Maryland, 108 S. Ct. 1860 (1988).

The trial court's instructions and the court's application of this unconstitutional standard allowed Mr. Glock to be sentenced to death without ever requiring the State to prove that death was the appropriate sentence. Once an aggravating circumstance was established, death was presumed unless and until the defense overcame that presumption and showed that the

mitigating circumstances outweighed the aggravating circumstances. See Mills, supra. Mr. Glock was deprived of rights which, even in an ordinary misdemeanor, are mandated as a matter of fundamental fairness. See In re Winship, 397 U.S. 358 (1970). Mr. Glock's death sentence resulted from a proceeding at which the "truth-finding fuction" was "substantially impair[ed]." Ivan v. City of New York, 407 U.S. 203, 205 (1972). His sentence of death therefore violates the eighth and fourteenth amendments and must be vacated.

The lower court summarily dismissed this claim, finding that the issue had been decided adversely to Mr. Glock on direct appeal and was without merit (Order Denying Motion for Post-Conviction Relief, p. 4). Mr. Glock respectfully submits that the court erred.

This claim involves fundamental due process, equal protection and eighth amendment principles which are clearly cognizable in Rule 3.850 proceedings. See, e.g., Palmes v. Wainwright, supra; Nova v. State, supra. See also Adams v. Dugger, supra. The errors herein rendered Mr. Glock's capital sentencing proceedings and death sentence fundamentally and inherently unreliable. A capital sentencing decision must be individualized and reliable. Employing a burden-shifting presumption in the capital sentencing context destroys all individualization and reliability, for such a presumption produces a death sentence which is not based upon the "particularlized characteristics of the individual" and the

specific circumstances of the offense. Jackson v. Dugger, supra. Thus, the use of a presumption such as that involved here deprives a capital defendant of the most fundamental of eighth amendment protections -- the right to an individualized determination that death is appropriate.

The lower court erred in summarily dismissing this claim. Mr. Glock respectfully urges that the Court now grant a stay of execution and the relief to which the precedents cited above demonstrate his entitlement.

CLAIM VII

THE LOWER COURT ERRED IN DENYING MR. GLOCK'S CLAIM THAT FAILURES ON THE PART OF DEFENSE COUNSEL AND THE MENTAL HEALTH EXPERTS DENIED MR. GLOCK AN INDIVIDUALIZED AND RELIABLE SENTENCING DETERMINATION BECAUSE THE EXPERTS RENDERED PROFESSIONALLY INADEQUATE EVALUATIONS, IN CONTRAVENTION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The rights to professionally adequate mental health assistance and effective assistance of counsel are closely intertwined. The mental health professional's judgments are rendered invalid if defense counsel fails to provide the expert with necessary, important background information. Counsel in such instances fails to secure for his or her client a professionally adequate mental health evaluation -- this is ineffective assistance. See Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). Where the expert's opinions at the time of the defendant's initial proceedings are inadequate or invalid, the expert violates the accused's rights to professionally adequate

mental health assistance -- relief again is warranted. See Mason v. State, 489 So. 2d 734, 735-37 (Fla. 1986); State v. Sireci, 502 So. 2d 1221, 1223-24 (Fla. 1987). The results of trial level proceedings founded upon inaccurate or inadequate professional evaluations -- whatever the reason for the inadequacy -- cannot be relied upon. Post-conviction relief is appropriate in such instances. Mason; Sireci.

Again, this type of claim is one in which an evidentiary hearing is required to determine matters not of record that bear on the adequacy of the examinations performed and on the allegations of ineffective assistance of counsel. See Claim I, supra. However, the lower court summarily dismissed the claim without attaching portions of the files and records in the case which demonstrate Mr. Glock is entitled to no relief. Rather, the court determined that the claim lacked merit, without any record upon which to make such a determination. This was error. As the discussion in the Rule 3.850 motion, the summary of that discussion presented below, and the entire record demonstrate, Mr. Glock has presented allegations which entitle him to relief, were he given the opportunity to establish those allegations at an evidentiary hearing.

In Mr. Glock's case, Dr. Fesler was appointed, on defense counsel's motion, to determine Mr. Glock's competency to stand trial. Defense counsel, however, failed to provide Dr. Fesler with much of the relevant background information (see, e.g., Motion to Vacate, Claim III; Appendix to Motion to Vacate),

regarding Mr. Glock necessary to a professionally valid and accurate evaluation. Prior to sentencing, Dr. Stephen J. Szabo, M.D., was appointed as a confidential expert to evaluate Mr. Glock for possible mitigation. There is no evidence that Dr. Szabo requested any psychological testing nor conducted any neurological examinations. He had available for review a report from Epworth Children's Home and Mr. Glock's military records. Without speaking to family members, reviewing any other records or conducting any examination, Dr. Szabo found there were no mitigating circumstances present.

The other expert appointed for sentencing was Dr. Gerald Mussenden. Dr. Mussenden did not have access to the family or the extensive records in Mr. Glock's case. His report alluded to various problems that were then never further investigated by a psychiatrist. There was substantial information available that was not reviewed by Dr. Mussenden and therefore not made part of his conclusion.

Dr. James Merikangas recently reviewed the extensive background information available regarding Mr. Glock, and conducted a professionally adequate evaluation of Mr. Glock. His conclusions, in contrast to those of the mental health experts who examined Mr. Glock at the time of trial, demonstrate substantial and compelling mitigating evidence which was never presented to Mr. Glock's sentencing jury or judge.

In summary, Dr. Merikangas concluded:

1) Mr. Glock is the product of a very disturbed background and upbringing, which included severe physical abuse by his mother and stepmother and consistent rejection and abandonment by his natural father.

2) During his youth, Mr. Glock was frequently evaluated by mental health, social service, and educational workers, who found him unable to assert himself in his environment.

3) During his youth, Mr. Glock periodically lived in various shelters, at one time being committed to a children's home.

4) Throughout his youth and young adulthood, Mr. Glock suffered from severe depression.

5) Although he was the victim of continuous violence as he grew up, Mr. Glock avoided engaging in violence himself, instead running away from the violence in his parents' homes.

6) Despite his disturbed background, Mr. Glock attempted to build a life for himself by entering the military and attempting to remain employed.

7) Mr. Glock was clinically depressed at the time of the offense.

8) As a result of his violent and disturbed background, Mr. Glock suffers from a passive dependent personality disorder.

9) Consequently, Mr. Glock is subject to undue influence and domination which leads him to do almost anything to avoid rejection.

10) During the offense, Mr. Glock was under the domination of his co-defendant and would not have participated in the offense but for that dominating influence.

11) During the joint statement made with his codefendant, Mr. Glock was under his codefendant's domination and was unable to

function independently or provide a free and voluntary confession.

12) Mr. Glock is extremely remorseful regarding the offense.

See App. 7.

Dr. Merikangas also reviewed the evaluations made by previous mental health examiners and provided his opinions regarding the adequacy of those evaluations. In summary, Dr. Merikangas concluded that the previous evaluations were professionally inadequate because the examiners were not provided the extensive background information available regarding Mr. Glock and because the evaluations themselves were inadequate. As a result of these inadequacies, the previous mental health examiners were unaware of the extensive abuse Mr. Glock suffered, of the extent to which Mr. Glock was influenced by his codefendant, of Mr. Glock's inability to take deliberate action, and of the numerous mitigating factors evident from Mr. Glock's history. See App. 7.

As previously mentioned, James A. Fessler, M.D., performed a pretrial evaluation on Mr. Glock. Dr. Fessler had records from the Epworth Children's Home plus military records, records which encompassed a total period of about three years of Mr. Glock's life. Other than those minimal records plus an interview with Mr. Glock, there is no evidence that Dr. Fessler performed any testing or sought any additional information from family or other sources.

Stephen J. Szabo, M.D., had been asked to evaluate Mr. Glock for mitigation. With the same records available that Dr. Fessler had, Dr. Szabo performed no additional testing and sought no additional sources of information. He too relied on Mr. Glock's self-reporting to determine no mitigation existed.

Dr. Gerald Mussenden apparently had the same records available and did, in fact, conduct some independent testing of Mr. Glock. However, Dr. Mussenden did not have access to extensive family background information and additional records which would have made a difference to his conclusions.

James Merikangas, M.D., recently evaluated Mr. Glock and not only found substantial mitigation but had serious questions regarding Mr. Glock's ability to "voluntarily confess" in the presence of Carl Puiatti. Dr. Merikangas interviewed and tested Mr. Glock, interviewed and read affidavits of family members, and had available a great deal of documentation of Mr. Glock's history. (See Appendix 7).

The prejudice to Mr. Glock is clear: substantial mitigation was present that went unpresented. A thorough and competent evaluation has produced serious questions regarding Mr. Glock's dependency and his competence to voluntarily confess in light of that dependency.

A criminal defendant is constitutionally entitled to expert mental health assistance when the state makes his or her mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). This constitutional

entitlement requires a professionally "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985).

Florida law also provides, and thus provided Mr. Glock, with a state law right to professionally adequate mental health assistance. See, e.g., Mason, supra, 489 So. 2d 734; cf. Fla. R. Crim. P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal Due Process Clause. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 427 U.S. 215, 223-27 (1976). In this case, both the state law interest and the federal right were denied.

Mr. Glock's Rule 3.850 motion more than sufficiently alleged his claims of ineffective assistance of counsel and professionally inadequate mental health evaluations. Summary denial without benefit of an evidentiary hearing on this claim was clearly erroneous and must be reversed. A stay of execution and Rule 3.850 relief are proper.

CLAIM VIII

MR. GLOCK'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS WERE DENIED BY IMPROPER CONSIDERATION OF THE VICTIM'S CHARACTER AND VICTIM IMPACT INFORMATION.

Once again, the lower court misinterpreted a claim made by Mr. Glock in Claim VI of his Motion to Vacate Judgment and

Sentence and denied the claim as lacking merit. However, Mr. Glock very clearly established that victim impact evidence was presented to the jury and that a victim impact statement was presented to the judge. The court claimed that Mr. Glock's "claim that there was a victim impact statement presented to the jury is dishonest." (Order Denying Motion For Post Conviction Relief, December 22, 1988, no page number, Cobb, J.). This is simply false. Mr. Glock never claimed a "statement" was given to the jury. Rather the claim is that improper victim impact information was presented to the jury in several ways and that a victim impact statement was presented to the judge.

During opening statements, Mr. Van Allen, one of the prosecuting attorneys, told the jury that they would hear from two "friends" of Sharilyn Richie, Reverend Manuel and Reverend Franklin (R. 1642). Van Allen then told the jury they would also hear from the victim's husband, Larry Richie, who would describe his frantic search for his wife. Van Allen said:

> He began calling around, calling every friend that he could think of where she could have gone.

(R. 1644). Finally, Van Allen told the jury "the story of what is probably most any woman's nightmare." (R. 1648).

Mr. Eble objected to the reference to the minister testifying, saying that from the ministers' testimony, the jury would infer that the victim was a "churchgoer" and "a good woman." Mr. Eble argued that this testimony was intended to "poison the jury and appeal to their sympathies in this case."

(R. 1654). It was also clear from Mr. Eble's objection to the statement that Mr. Van Allen's tone and mannerism conveyed a sense of urgency with regard to Mr. Richie:

> . . . his comments relative to Mr. Ritchie, in reference to Mr. Ritchie's panic that he was frantically trying to call everybody. . .

(R. 1654). Finally, Mr. Eble objected to the comment about "every woman's nightmare." (R. 1655). As Mr. Elbe clearly pointed out, this was all intended to inflame and impassion the jury. Mr. Glock's counsel joined these objections, but the Judge overruled the objections and denied the motion for mistrial (R. 1655).

Counsel for both defendants even offered to stipulate to the identity of the victim in an attempt to keep out the ministers' testimony and avoid the improper evidence (R. 1732). The State refused the stipulation. Clearly, the only purpose in having the "ministers" identify the victim was to show that Mrs. Richie was a "good, church-going" person. The Court permitted this improper testimony.

Through the testimony of Reverend Franklin, the State introduced a photo of the victim "all dressed up in nice clothing" (R. 1735). Again, the state's purpose was to evoke sympathy for the victim.

Over objection, the State called the victim's husband, Larry Richie, to testify. He had no testimony to offer that was not cumulative so the State's only purpose was to evoke sympathy for him over the "murder of his wife" (R. 1753-1755). Again, the

record transcript cannot show the demeanor of the witness, nor can it capture voice intonation or expression. Even though the State "promised" that Mr. Richie "would not break down" (R. 1755), it is not difficult to imagine how sympathetic the witness appeared to the jury. When his testimony was clearly cumulative, there was no reason for his appearance before the jury except to inject emotionalism into their verdict.

The State made sure its point was pressed home to the jury by introducing the entire contents of the victim's purse, including photographs of her family and her appointment calendar (R. 1822). The calendar gave a portrait of the victim, documenting her daily activities. Defense counsel objected on grounds of relevency and undue prejudice but the court permitted all the contents of the victim's purse to be admitted, and thus taken to the jury room during deliberation (R. 1827).

All of this was improper information placed before the jury, deliberately designed to influence the jurors' decisions through emotionalism and sympathy. Clearly, under Booth v. Maryland, 107 S. Ct. 2529 (1987), admission of this kind of evidence is a violation of the eighth amendment.

Under Booth v. Maryland, 107 S. Ct. 2529 (1987), the eighth amendment is violated by the presentation of such victim impact information. Part of the rationale used by the Court in this decision was that the jury must make an "individualized determination" of whether the defendant in question should be executed, based on "the character of the individual and the

circumstances of the crime." Booth, supra at 2532. Cf. Scull v. State, No. 68,919 (Fla., Sept. 8, 1988). It was clearly improper for the State to try to make the victim's "good character" and the effect of the victim's death on her family an issue here. See Booth, supra; see also Vela v. Estelle, 708 F. 2d 954 (5th Cir. 1983).

Additionally, the Court not only had this evidence to consider at sentencing but was provided with a pre-sentence investigation report that included the following:

> STATEMENT OF LARRY RITCHIE - 4-17-84
>
> Mr. Ritchie described his relationship with his wife as being a "very happy relationship, we were deeply in love". Describes the impact of this loss as "total devastation, I felt that I had been cheated of a loved one. Our overall relationship could be described as "joyful" and now I feel incomplete. My total lifestyle is changed, I don't like living alone.
>
> While describing the impact on other family members Mr. Ritchie advised that the loss "nearly destroyed her mother". "I have a deep heartache for the other family members and I hope to always keep in contact with them. I fear that my family ties with them have been endangered and that I will grow away from them through time.
>
> In regards to his personal feelings and recommendation for disposition, Mr. Ritchie was adamant about enclosing Bible scriptures as part of his statement. Mr. Ritchie advised that he felt we were living in a "society in breakdown" and that the defendants should "be executed in order to uphold standards so that we could live in an orderly society". "I don't hate them, I only hate what they have done". "Our laws are based on the Bible and we should follow it."

> Genesis 9: 6 "Whoever sheds the blood of man, by man shall his blood be shed; for in the image of God has God made man." NIV
>
> Exodus 21:12 "Anyone who strikes a man and kills him shall surely be put to death." NIV
>
> Proverbs 6:16,17 "Six things the Lord hates . . . hands that shed innocent blood." NIV
>
> "She died from the circumstances she feared the most".

(App. 11).

In Scull v. State, No. 68,919 (Fla. Sept 8, 1988), this Court held that it was error for the trial judge to consider victim-impact statements since such statements "injected irrelevant material into the sentencing proceedings." Scull, slip op. at 9.

The lower court states, "although a victim impact statement was presented, this court did not consider in determining the appropriate sentence for Mr. Glock." (Order Denying Motion, supra.) However, the lower court specifically stated in its Findings in Support of Sentences, May 16, 1984 (R., Vol. II, no page number), the following: "The pre-sentence investigation for each defendant was also considered." That pre-sentence investigation report on Robert Glock contains Mr. Ritchie's statement (App. 11). The lower court cannot now simply try to cure the error under Booth and Scull, supra, by claiming that the statement was not considered, particularly when the contemporaneous findings in support of sentence clearly state that he did consider the statement.

The victim impact information presented to the judge and jury deprived Mr. Glock of fundamental eighth and fourteenth amendment rights to an individualized and reliable capital sentencing determination. Booth and Scull, supra, represent fundamental, constitutional and retroactive changes in law which demonstrate Mr. Glock's entitlement to relief. The lower court erred in denying this claim. A stay of execution and Rule 3.850 relief are proper.

CLAIM IX

THE PROSECUTOR'S ARGUMENT IN CLOSING AT THE GUILT PHASE OF MR. GLOCK'S CAPITAL TRIAL THAT PREMEDITATION IS PRESUMED BY LAW DEPRIVED MR. GLOCK OF DUE PROCESS AND EQUAL PROTECTION AND OF HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

This claim is set out in Mr. Glock's Motion to Vacate Judgment and Sentence as Claim VII (Motion to Vacate, pp. 138-41, specifically incorporated herein), and will not be repeated in detail in this brief. The lower court summarily dismissed the claim, stating that it should have been raised on direct appeal and was without merit (Order Denying Motion for Post-Conviction Relief, p. 7).

This issue involves fundamental error which infected both the guilt and penalty phases of Mr. Glock's trial and is thus cognizable in these Rule 3.850 proceedings. See Palmes, supra; Nova, supra. See also Adams v. Dugger, supra. The prosecutor's argument relieved the State of its burden of proof on the issue of premeditation, in violation of the fundamental constitutional

mandate of In re Winship, 397 U.S. 358 (1970) and Mullaney v. Wilbur, 421 U.S. 684 (1975), and presented the sentencing jury with misleading and inaccurate information in violation of Caldwell v. Mississippi, 105 S. Ct. 2633 (1985). A stay of execution and Rule 3.850 relief are proper.

CLAIM X

THERE WAS NO KNOWING AND INTELLIGENT WAIVER OF MIRANDA RIGHTS IN MR. GLOCK'S CASE: HIS EMOTIONAL DEPENDENCY PRECLUDED HIM FROM VALIDLY WAIVING THOSE RIGHTS AND GIVING A FREE AND VOLUNTARY CONFESSION.

This claim was presented in Mr. Glock's Motion to Vacate Judgment and Sentence as Claim XII (Motion to Vacate, pp. 167-69, specifically incorporated herein), and will not be repeated in this brief. The lower court summarily denied this claim, saying the claim should have been raised on direct appeal (Order Denying Motion for Post-Conviction Relief, p. 7).

The court's ruling did not consider that this claim requires an evidentiary hearing for its resolution. See Claim I, supra. The claim alleged facts necessary to its disposition which were not "of record," see O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984), requiring an evidentiary hearing. The files and records in this case do not "conclusively show that [Mr. Glock] is entitled to no relief," Fla. R. Crim. P. 3.850, and an evidentiary hearing is required. Given that opportunity, Mr. Glock would prove what he has alleged. A stay of execution, an evidentiary hearing, and Rule 3.850 relief are proper.

CLAIM XI

THE INSTRUCTION ON FELONY MURDER ALTHOUGH THE FELONIES WERE COMPLETE DEPRIVED MR. GLOCK OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

This claim was raised in Mr. Glock's Motion to Vacate Judgment and Sentence as Claim XV (Motion to Vacate, pp. 177-79, specifically incorporated herein). The lower court denied the claim as an issue which should have been raised on direct appeal (Order Denying Motion for Post-Conviction Relief, p. 8).

The court's ruling did not consider that this claim alleged the ineffective assistance of trial counsel, and thus required an evidentiary hearing for its resolution. See Claim I, supra. Additionally, the claim alleged fundamental due process and eighth amendment principles involving Mr. Glock's right to a reliable verdict in a capital case. See Beck v. Alabama, 447 U.S. 625 (1980). As reflected by the allegations presented by the Rule 3.850 motion and by the entire record in this case, this claim was properly raised and its merits require relief. A stay of execution, an evidentiary hearing, and Rule 3.850 relief are proper.

REMAINING CLAIMS

CLAIMS XII, XIII, XIV, AND XV

These claims were presented as Claims VIII, IX, X, and XI, respectively, of Mr. Glock's Motion to Vacate Judgment and Sentence (Motion to Vacate, pp. 141-67, specifically incorporated

herein), and will not be repeated in this brief. The lower court ruled on the merits of these sentencing claims, stating:

> In Claims VIII, IX, X and XI, Mr. Glock claims that his rights were prejudiced by instructions and argument to the jury during the sentencing phase.
>
> These claims are without merit and are DENIED.

(Order Denying Motion for Post-Conviction Relief, no page number). In this ruling, the court erred.

These claims reflect fundamental eighth amendment error which rendered Mr. Glock's capital sentencing proceeding and his resulting death sentence fundamentally unreliable. As reflected by the allegations presented in the Rule 3.850 motion and by the entire record in this case, these claims present substantial and meritorious eighth amendment issues. A stay of execution and Rule 3.850 relief are proper.

CLAIMS XVI, XVII, AND XVIII

These claims were presented in Mr. Glock's Motion to Vacate Judgment and Sentence as Claims XIII, XIV, and XVI, respectively (Motion to Vacate, pp. 169-77, 178-79, specifically incorporated herein). The lower court rejected these sentencing claims because they either were or should have been raised on direct appeal (Order Denying Motion for Post-Conviction Relief, pp. 7-8). However, these claims involve fundamental constitutional error which is appropriately raised in Rule 3.850 proceedings. See Palmes, supra; Nova, supra. See also Adams v. Dugger, supra.

The claims reflect fundamental eighth amendment errors which rendered Mr. Glock's capital sentencing proceeding and resulting death sentence fundamentally unreliable. As reflected in the allegations raised in the Rule 3.850 motion and by the entire record in this case, the claims are properly raised and their merits require relief. A stay of execution and Rule 3.850 relief are proper.

CONCLUSION

Mr. Glock has presented compelling claims establishing violations of the most fundamental constitutional rights. The lower court refused to hold an evidentiary hearing and summarily denied relief. The lower court erred, and this Court should now correct that error.

A stay of execution, an evidentiary hearing, and Rule 3.850 relief should be granted.

Respectfully submitted,

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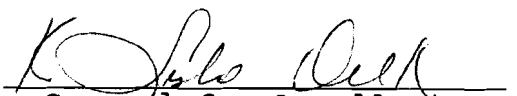
By: 
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Robert Landry, Assistant Attorney General, Department of Legal Affairs, Park Trammel Building, 1313 Tampa Street, Tampa, Florida 33602, this 5th day of January, 1989.

Attorney