

IN THE SUPREME COURT OF FLORIDA

CASE NO. _____

ERNEST CHARLES DOWNS,

Petitioner,

v.

MICHAEL W. MOORE,
Secretary, Florida Department of Corrections,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

GREGORY C. SMITH
Capital Collateral Counsel
Northern Region
Florida Bar No. 279080

ANDREW THOMAS
Chief Assistant CCC - NR
Florida Bar No. 0317942

OFFICE OF THE CAPITAL
COLLATERAL COUNSEL
1533-B South Monroe Street
Tallahassee, FL 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

This is Mr. Downs' first habeas corpus petition in this Court following his resentencing. Art. 1, Sec. 13 of the Florida Constitution provides: "The writ of habeas corpus shall be grantable of right, freely and without cost." This petition for habeas corpus relief is being filed in order to address substantial claims of error under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution, claims demonstrating that Mr. Downs was deprived of the fair, reliable, and individualized sentencing proceeding.

Citations shall be as follows: for volumes three through thirteen of Mr. Downs' resentencing proceeding, references will be "R2." and the appropriate page number. Citations to the first two volumes will include the volume number to avoid confusion because the page numbers are not continuous throughout the record but begin again at page one in volume three. Citations to the supplemental record on appeal will be as follows: "R2. Supp. Vol." and the appropriate page number. Citations to Mr. Downs' first trial will be as follows: "R." and the appropriate page number.

This Court's opinion on Mr. Downs' initial direct appeal will be referred to as Downs I. This Court's opinion on his appeal of the first denial of post-conviction relief will be referred to as Downs II. This Court's opinion remanding for resentencing will be referred to as Downs III. This Court's opinion affirming Mr. Downs' death

sentence on direct appeal following his resentencing will be referred to as Downs IV.

INTRODUCTION

Significant errors which occurred at Mr. Downs' capital resentencing were not presented to this Court on direct appeal due to the ineffective assistance of appellate counsel. Appellate counsel failed to raise meritorious issues that were preserved for appeal. In addition, counsel inadequately raised several issues so that this Court was not properly informed of the claims that entitle Mr. Downs to relief.

The issues which appellate counsel neglected demonstrate that counsel's performance was deficient and that the deficiencies prejudiced Mr. Downs. "[E]xtant legal principles . . . provided a clear basis for . . . compelling appellate arguments[s]."

Fitzpatrick v. Wainwright, 490 So. 2d 938, 940 (Fla. 1986).

Individually and "cumulatively," Barclay v. Wainwright, 444 So. 2d 956, 959 (Fla. 1984), the claims omitted by appellate counsel establish that "**confidence** in the correctness and fairness of the result has been undermined." Wilson, 474 So. 2d at 1165 (emphasis in original). As this petition will demonstrate, Mr. Downs is entitled to habeas relief.

PROCEDURAL HISTORY

The Circuit Court of the Fourth Judicial Circuit, Duval County, entered the judgments of conviction and sentence, including the resentencing, under consideration. Mr. Downs was indicted on August

4, 1977, with first degree murder (R. 1). An amended indictment was dated August 11, 1977, with first degree murder and conspiracy to commit first degree murder (R. 3-4). He pled not guilty.

Mr. Downs' jury trial began on December 12, 1977. On December 14, 1977, the jury rendered a verdict of guilty on both counts (R. 837). On December 20, 1977, the jury recommended a death sentence (R. 87). On January 27, 1977, the trial court ore tenus imposed a sentence of death on the count of first degree murder and a sentence of thirty (30) years on the count of conspiracy to commit first degree murder. No findings of fact were entered.

This Court affirmed Mr. Downs' convictions and sentences on direct appeal. State v. Downs, 386 So. 2d 788 (Fla. 1980)(Downs I). Mr. Downs subsequently filed a motion and supplemental motion to vacate his convictions and sentences.

On October 12-13, 1982, and January 11-12, 1983, the circuit court held an evidentiary hearing. On August 12, 1983, the circuit court denied Mr. Downs' motions to vacate (PC-R. 1915-21). This Court affirmed the circuit court's denial of Mr. Downs' motions to vacate. Downs v. Dugger, 453 So. 2d 1102 (Fla. 1984)(Downs II). Mr. Downs petitioned for habeas corpus relief. This Court denied Mr. Downs' petition for writ of habeas corpus. Downs v. Dugger, 476 So. 2d 654 (Fla. 1985).

On August 18, 1987, Governor Martinez signed a death warrant on Mr. Downs. Mr. Downs' execution was scheduled for September 17, 1987. Mr. Downs filed a petition for extraordinary relief, for a

writ of habeas corpus and request for stay of execution dated September 8, 1987. This Court granted Mr. Downs' writ, stayed the governor's warrant, vacated Mr. Downs' sentence, and remanded Mr. Downs' case for a new sentencing before a jury in light of Hitchcock v. Dugger, 481 U.S. 393 (1987); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987)(Downs III).

Mr. Downs' resentencing proceeding began on January 30, 1989. On February 3, 1989, the jury recommended the death sentence by a vote of eight (8) to four (4) for the first degree murder conviction (R2. 1151). On February 17, 1989, the resentencing court ore tenus imposed a sentence of death on the count of first degree murder (R2. 1205-06). A sentencing order was entered on February 17, 1989 (R2. Vol. II, 312-13).

This Court affirmed Mr. Downs' resentencing on direct appeal. Downs v. State, 572 So. 2d 895 (Fla. 1990), cert. denied, 112 S. Ct. 101 (1991)(Downs IV).

On November 30, 1992, Mr. Downs filed a motion to vacate judgments of conviction and sentence with special request for leave to amend. Thereafter, Mr. Downs amended this motion. On March 3, 1997, the circuit court denied the motion to vacate (PC-R.2 175-222). This Court affirmed the denial of Rule 3.850 relief. Downs v. State, 740 So. 2d 506 (Fla. 1999).

**JURISDICTION TO ENTERTAIN PETITION
AND GRANT HABEAS CORPUS RELIEF**

This is an original action under Fla. R. App. P. 9.100(a). See Art. 1, Sec. 13, Fla. Const. This Court has original jurisdiction pursuant to Fla. R. App. P. 9.030(a)(3) and Article V, sec. 3(b)(9), Fla. Const. The petition presents constitutional issues which directly concern the judgment of this Court during the appellate process, and the legality of Mr. Downs' sentence of death.

This Court has the inherent power to do justice. The petition pleads claims involving fundamental constitutional error. See Dallas v. Wainwright, 175 So. 2d 785 (Fla. 1965); Palmer v. Wainwright, 460 So. 2d 362 (Fla. 1984). The Court's authority to correct constitutional errors such as those herein pled, is warranted in this action. Relief is proper.

GROUND FOR HABEAS CORPUS RELIEF

Mr. Downs through this petition asserts that his capital conviction and sentence of death were obtained and then affirmed during this Court's appellate review process in violation of his rights as guaranteed by the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments to the United State Constitution and the corresponding provisions of the Florida Constitution.

CLAIM I

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. DOWNS' FIFTH AMENDMENT RIGHTS WERE VIOLATED WHEN THE STATE IMPROPERLY REFERRED TO HIS POST-ARREST SILENCE.

Mr. Downs' Fifth Amendment rights were violated when the State Attorney elicited testimony and made comments about his post-arrest

silence. In Doyle v. Ohio, 426 U.S. 610 (1976), the Supreme Court established that references to post-arrest silence violate the defendant's due process rights.¹ In Doyle, the Supreme Court acknowledged the motivation for the prosecution's misconduct: "Petitioner's explanation of the events presented some difficulty for the prosecution, as it was not entirely implausible and there was little if any direct evidence to contradict it." Id. at 613 In a desperate move to save his case, the prosecutor in Doyle attempted to impeach the defendant by asking why he did not tell his version of events to the police when he was arrested. In fact, the State defended its actions in that case by pleading "necessity," explaining that the prosecution frequently has no ammunition with which to discredit an exculpatory story that is told for the first time at trial and that post-arrest silence should therefore be admissible to impeach criminal defendants who testify. Id. at 616-17.

The Supreme Court rejected the State's argument:

Silence in the wake of [Miranda] warnings may be nothing more than the arrestee's exercise of these Miranda rights. Thus, every post-arrestee silence is insolubly ambiguous because of what the State is required to advise the person arrested. Moreover, while it is true that the Miranda warnings contain no express assurance that silence will carry no penalty, such assurance is implicit to any person who receives the warnings. In such circumstances, it would be fundamentally unfair and a

¹The Supreme Court in Doyle based its ruling solely on the Fourteenth Amendment and did not address the defendant's Fifth Amendment rights. Justice Stevens' dissenting opinion finding a Fifth Amendment violation was later adopted by the Court in Jenkins v. Anderson, 447 U.S. 231, 235 (1980).

deprivation of due process to allow the arrested person's silence to be used to impeach an explanation subsequently offered at trial.

Id. at 617-18 (citations omitted).

As in Doyle, the State was desperate to discredit Mr. Downs because his trial was essentially a credibility contest between the State's key witness, Larry Johnson, and Mr. Downs. Johnson, who received full immunity in exchange for his testimony, testified that he saw Mr. Downs shoot the victim. Mr. Downs testified that Johnson shot the victim. No one else was present, and the other evidence is virtually evenly split between the two versions of the murder. In a desperate measure to convince the jury that Johnson and not Mr. Downs was telling the truth, the State improperly impeached Mr. Downs' credibility by referring to his post-arrest silence.

In his cross-examination of Mr. Downs, the State Attorney improperly commented on his post-arrest silence:

Q. You never told Detective Starling or Detective Spaulding on August 3rd, 1977, or when you immediately came back to Jacksonville, the information that you just told the jury right now?

A. I didn't come back to Jacksonville until August 5th 1977.

Q. On August 5th when you arrived back in Jacksonville in the Duval County Jail, did you tell Detective Starling or Detective Spaulding all the information that you just told the jury right now? Yes or no?

A. No, I did not.

(R2. 983).

In his closing statement, the State Attorney again improperly referred to Mr. Downs' post-arrest silence and suggested that his trial testimony was fabricated:

He claims he cooperated. Well, you heard the testimony of Detective Starling, it didn't happen that way. They confronted this defendant -- we go back again to the other chart, when he was in Alabama.

All right, when the defendant was in Alabama -- they locate him in Alabama. They tell him, Larry Johnson said you-all were involved in this thing, and you did this and you did that. What does he say? No way, but I know about some insurance things. Give us some names. I'm not going to tell you. Take me back to Jacksonville, maybe I will. He comes back here, and doesn't tell them. Well, he doesn't tell the police anything, he doesn't cooperate at all.

And lo and behold yesterday you hear this whole story about how Larry Johnson was involved, and Barfield, and everyone else.

This defendant is clever, articulate, he's well spoken. It's no surprise he comes before you 11 years later -- and his testimony, ladies and gentlemen, if you look at his testimony, you can consider a couple of things.

(R2. 1093-94).² Because the trial was essentially a credibility contest between Johnson and Mr. Downs, the State's improper impeachment of Mr. Downs' credibility cannot be harmless. This Court

²This comment is also improper because it reflects the State Attorney's personal opinion that Mr. Downs lied to the jury. The purpose of closing argument is to present a review of the evidence and suggest reasonable inferences that may be drawn. It is improper for the State Attorney to express personal opinion, particularly when it impugns the defendant's honesty.

cannot say that these improper comments on Mr. Downs' invocation of his constitutional right had no effect on the jury's deliberations.

The Supreme Court's explanation of why comments on a defendant's choice to not testify are impermissible applies with equal force here:

[C]omment on the refusal to testify is a remnant of the "inquisitorial system of criminal justice," which the Fifth Amendment outlaws. It is a penalty imposed by courts for exercising a constitutional privilege. It cuts down on the privilege by making its assertion costly. It is said, however, that the inference of guilt for failure to testify as to facts peculiarly within the accused's knowledge is in any event natural and irresistible, and that comment on the failure does not magnify that inference into a penalty for asserting a constitutional privilege. What the jury may infer, however, given no help from the court, is one thing. What it may infer when the court solemnizes the silence of the accused into evidence against him is quite another.

Griffin v. California, 380 U.S. 609, 614 (1965).

This Court in State v. Burwick, 442 So. 2d 944, 947 (Fla. 1983), agreed that comments on post-arrest silence create an inference of guilt. However, this Court also recognized that even comments that fail to rise to such a level of implying guilt violate the defendant's rights by impugning his credibility if he testifies: "Failure to offer an explanation during the custodial interrogation can as easily be taken to indicate reliance on the right to remain silent as to support an inference that the explanatory testimony was a later fabrication. There is simply nothing to indicate which

interpretation is more probably correct." Id. at 947 (quoting United States v. Hale, 422 U.S. 171, 177 (1975)).

In State v. Hoggins, 718 So. 2d 761 (Fla. 1998), this Court held that using a defendant's pre-Miranda silence violates article I, section 9 of the Florida Constitution. This Court rejected the State's suggestion that it interpret article I, section 9 consistent with the United States Constitution which does not prohibit reference to post-arrest, pre-Miranda silence. Fletcher v. Weir, 455 U.S. 603, 606 (1982). The Supreme Court reached this conclusion in Fletcher because silence before Miranda warnings are given is not induced by governmental action and its use therefore does not violate due process rights. 455 U.S. at 605-06. This Court recognized that, regardless of the federal rule, Florida courts had long established that comments on silence during and after arrest were impermissible. The standard to determine whether such comments are unconstitutional under the state constitution is whether "the comment is fairly susceptible of being construed by the jury as a comment on the defendant's exercise of his or her right to remain silent." Hoggins, 718 So. 2d at 769 (emphasis added).

Even under the federal constitution which does not prohibit references to a defendant's post-arrest, pre-Miranda silence, such references may constitute prejudicial error. In Hale, the Supreme Court found that if the government fails to establish inconsistency between silence and the exculpatory statement at trial, references to the defendant's silence are irrelevant and therefore inadmissible.

In reaching this conclusion, the Court expressed its concern that the jury would give too much weight to the defendant's prior silence and that any attempt by the defendant to explain it "is unlikely to overcome the strong negative inference the jury is likely to draw from the fact that the defendant remained silent at the time of his arrest." Id. at 180.

The Court acknowledged a variety of reasons why a person would remain silent when arrested:

At the time of arrest . . . innocent and guilty alike -- perhaps particularly the innocent -- may find the situation so intimidating that they may choose to stand mute. A variety of reasons may influence that decision. In these often emotional and confusing circumstances, a suspect may not have heard or fully understood the question, or may have felt there was no need to reply. He may have maintained silence out of fear or unwillingness to incriminate another. Or the arrestee may simply react with silence in response to the hostile and perhaps unfamiliar atmosphere surrounding his detention.

Id. at 177.

This Court in Hoggins agreed that the rules of evidence may be violated by comments on a defendant's silence even in cases where the state constitution is not offended. As under the federal rules, the State must prove that the silence is inconsistent with the defendant's trial testimony in order for it to be admissible. This Court explained that such inconsistency is difficult to establish because "[s]ilence is generally ambiguous." 718 So. 2d at 771. This Court explained that "inconsistency exists only if the prior silence

occurred at a time when it would have been natural for the defendant to deny the accusations against him The time of arrest is not an occasion when circumstances naturally call upon a defendant to speak out." Id.

The effect of such improper comments on post-arrest silence is most harmful in cases such this one where credibility is a central issue. In United States v. Tenorio, 69 F.3d 1103 (11th Cir. 1995), the Eleventh Circuit Court of Appeals reversed a conviction because the State improperly referred to the defendant's post-arrest silence. In that case, the court found that the effect on the jury of the State's misconduct could not have been harmless because the State "directly linked the implausibility of Tenorio's exculpatory story to his ostensibly inconsistent act of remaining silent." Id. at 1107. The court in Tenorio relied on Verlarde v. Shulsen, 757 F.2d 1093 (10th Cir. 1985), in which the court explained that "where the case comes down to a one-on-one situation, i.e., the word of the defendant against the word of the key prosecution witness . . . the importance of the defendant's credibility becomes so significant that prosecutorial error [in] attacking that credibility cannot be harmless beyond a reasonable doubt." Id. at 1095. See also Santana v. State, 548 So. 2d 293 (Fla. 4th DCA 1989)(comment on post-arrest silence cannot be harmless where the case involves a contest of credibility between the victim and the defendant); Bernier v. State, 547 So. 2d 306 (Fla. 4th DCA 1989)(finding improper comment not harmless in case where victim and defendant were only witnesses to

the incident and offered materially different versions of the incident).

Appellate counsel was ineffective for failing to raise this claim on direct appeal. Mr. Downs' trial attorney's failure to object at trial does not preclude raising this claim on direct appeal. In State v. Hoggins, this Court reviewed improper references to a defendant's silence exactly like those that were made in Mr. Downs' case although Hoggins' attorney had also failed to object. This Court explained: "Although defense counsel did not make a contemporaneous objection to the prosecutor's comment on Hoggins' post-Miranda silence, Whitton v. State, 649 So. 2d 861, 865 (Fla. 1994), requires us to examine the entire record, regardless of offered objections, when performing a harmless error analysis." 718 So. 2d at 772. This Court granted relief in Hoggins, finding that "[w]hen the evidence against the defendant is not clearly conclusive, comment on post-arrest silence is not harmless." Id. Applying the standard of whether "a reasonable possibility exists that the error affected the verdict," this Court found that because there were contradictions between the defendant's evidence and the State's, it could not say that the comment on Hoggins' silence did not affect the jury.

The same is true of Mr. Downs' case. As this Court recognized in 1984 when it reviewed Mr. Downs' case, "[i]t has been difficult in reviewing this record in distinguishing fact from allegation." Downs II at 1106. This case is a credibility contest between Larry

Johnson, who was given full immunity in exchange for his testimony, and Mr. Downs. No one else knows what happened, and the other evidence offered is divided between the State's story and Mr. Downs' version. The State's reference to Mr. Downs' post-arrest silence impugned his credibility before the jury by suggesting that his trial testimony was fabricated. If this issue had been raised on direct appeal, this Court would have found, as it did in Hoggins, that the error was not harmless.

The effect of the error is compounded in this case by the fact that the jury that sentenced Mr. Downs to death did not have the benefit of observing Johnson testify. Credibility determinations are based not only on the content of a statement but also on other factors that the resentencing jury could not evaluate. Juries are routinely instructed to evaluate a witness's demeanor when determining whether to accept that witness's testimony. In addition, this Court defers to trial court findings regarding credibility because only they have the opportunity to observe the witness testify. See Woods v. State, 733 So. 2d 980, 986 (Fla. 1999) ("Once competent evidence has been submitted to the jury, determining the credibility of witnesses is solely within the province of the jury."); Blanco v. State, 702 So. 2d 1250, 1252 (Fla. 1997). Because this jury did not have the opportunity to observe Johnson, his credibility remained intact, thereby enhancing the prejudicial effect of the State's impeachment of Mr. Downs' credibility by improperly referring to his post-arrest silence.

When Johnson did testify, at Mr. Downs' first trial, the jury was clearly troubled by his testimony and doubtful of his credibility. As at Mr. Downs' resentencing, the focus of the first trial was the identity of the actual killer. The only evidence the State presented directly proving that Mr. Downs was the triggerman was the testimony of Johnson. During its deliberations, the jury asked the court the following question:

In regard to the question as to whether the defendant did or did not use a firearm, **must the defendant be guilty of actually pulling the trigger**, or is he guilty of using the firearm through association of being an accomplice in a murder of which a firearm was used.

(R. 828) (emphasis added). This Court's opinion granting Mr. Downs a new sentencing proceeding interpreted this question from the jury as a comment on Johnson's culpability as well as his credibility: "The question posed by the jury plainly shows that they considered that Downs' accomplice, Johnson, may have been of equal or greater guilt." Downs III at 1072.

Johnson unequivocally denied that he shot the victim and stated that Mr. Downs was the actual triggerman. The jury's doubts about the identity of the triggerman were rooted in their skepticism of Johnson's credibility. The jury's question regarding the identity of the triggerman proves that the jury that observed Johnson testify had doubts about his credibility because they did not believe his testimony about the crucial issue at the trial. The jury at Mr. Downs' resentencing did not have the opportunity to see Johnson and

simply heard his testimony read by the court reporter. The first jury's question revealing doubt about Johnson's honesty further supports the argument that the State's comment on Mr. Downs' silence was prejudicial. At the resentencing, the jury was again presented with a choice between two versions of the murder: Johnson's cold transcript or the testimony of a defendant whose credibility had been impeached. In this context, this Court cannot find that the improper references to Mr. Downs' post-arrest silence were harmless. Mr. Downs is entitled to habeas relief.

CLAIM II

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT MR. DOWNS WAS DENIED HIS RIGHT TO A FAIR SENTENCING WHEN THE TRIAL COURT DENIED HIS REQUEST FOR AN INSTRUCTION THAT THE JURY MAY CONSIDER MERCY IN ITS SENTENCING DECISION.

Defense counsel requested the following instruction:

If you see fit, regardless of your findings on the other issues I set out to you, you are always free to afford Ernest Downs mercy in these proceedings and recommend a sentence of life imprisonment without parole for 25 years.

(R2. 1048). The State Attorney objected that such an instruction was tantamount to "telling [the jury] that they could just ignore [the law]." (R2. 1048). The court's error in denying the defense request was compounded by the State Attorney's improper argument that the jury could not consider mercy or sympathy: "with respect to this penalty phase, ladies and gentlemen of the jury, the recommendation has nothing to do with sympathy." (R2. 1057). The State Attorney

also told the jury panel that they must "set aside any feelings of anger or sympathy." (R2. 273). The court's ruling was erroneous, and appellate counsel was ineffective for failing to raise this issue on direct appeal.

This Court recognized the importance of mercy in capital sentencing in Thomas v. State, 403 So. 2d 371 (Fla. 1981), when it reversed the defendant's conviction because the trial court refused to excuse for cause a juror "who had admitted in voir dire that he could not 'recommend any mercy' in any required sentencing phase." 403 So. 2d at 375. This Court explained that an inability to recommend mercy is equivalent to a juror admitting that he would not consider mitigating circumstances. Id. at 376 (referring to "[t]he admitted refusal of juror Roberts to weigh mitigating circumstances").

The Supreme Court's discussion in California v. Brown, 479 U.S. 538 (1987), regarding a mercy instruction further supports Mr. Downs' argument that the court erred in this case. In Brown, the defendant objected to an instruction telling the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion, or public feeling." Id. at 542. The defendant argued that the instruction prevented the jury from properly evaluating the mitigating evidence. The Court disagreed because a "reasonable juror would . . . understand the instruction not to rely on 'mere sympathy' as a directive to ignore only the sort of sympathy that would be totally divorced from the evidence adduced during the penalty phase."

Id. at 543. In other words, the word "mere" saved the instruction from the defendant's constitutional challenge. The Court found that a reasonable juror would interpret the instruction as a prohibition against considering sympathy unrelated to mitigation; an instruction prohibiting consideration of sympathy based on the defendant's mitigation would be unconstitutional.³ Eddings v. Oklahoma, 455 U.S. 104 (1982)(holding that a sentencing body must be able to consider any relevant mitigating evidence regarding the defendant's background or character and circumstances of the offense).

In Mr. Downs' case, the jurors were misled and precluded from fulfilling their role as co-sentencers by the State Attorney's erroneous comments. This error was exacerbated by the court's refusal to specifically instruct the jury on the role of mercy in capital sentencing. These errors prevented the jury from "considering as a mitigating factor, any aspect of a defendant's character or record . . . that the defendant proffers as a basis for a sentence less than death." Lockett v. Ohio, 438 U.S. 586 (1978). The purpose of mitigation is to humanize the defendant in the eyes of the jury; this necessarily requires that the jurors be open to feeling an emotional response based on the evidence. Woodson v. North Carolina, 428 U.S. 280 (1976)(recognizing that mitigation is intended to induce consideration of "compassionate or mitigating

³Justice O'Connor's opinion in Brown makes clear that the defendant's rights may be violated if the jury's understanding of its role in sentencing is distorted not only by the court's instructions but also by the State's comments. 479 U.S. at 546 (O'Connor, J., concurring).

factors stemming from the diverse frailties of humankind"). Telling the jurors that such a response is impermissible precludes them from weighing mitigation in violation of Mr. Downs' Eighth Amendment rights. See Eddings; Lockett.

In addition to precluding the jury from weighing the mitigation evidence regarding Mr. Downs' background, the misleading information regarding mercy undermined the effect of other mitigation that does not fall into any clear category in the sentencing statute. In Mr. Downs' case, mercy was particularly relevant because of the lighter sentences given to everyone else involved in the conspiracy and murder. The jury was aware of the disparate treatment of the co-defendants but the mercy instruction prevented them from considering it in mitigation. Because the court also refused a specific instruction that co-defendants' lighter sentences, or the complete avoidance of punishment by Johnson, could be considered as mitigation, the jury was misled to believe that it could not weigh this evidence at all. A mercy instruction would have allowed the jury to consider a life recommendation for Mr. Downs based on the State's treatment of his co-defendants.

CLAIM III

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. DOWNS WAS DENIED HIS CONSTITUTIONAL RIGHT TO AN INDIVIDUALIZED SENTENCING BECAUSE THE TRIAL COURT DENIED HIS REQUEST TO INSTRUCT THE JURY THAT THE LENIENT TREATMENT OF THE CODEFENDANTS COULD BE CONSIDERED IN MITIGATION.

Mr. Downs requested the following jury instruction:

You may also consider as a mitigating factor the immunity and deals given to co-defendants.

(R2. Vol. II, 277). After this request was denied, Mr. Downs requested an alternative instruction also focussing on his co-defendants' participation:

However, if you have any lingering feelings of doubt about whether or not he was the trigger person, you may consider that in weighing the mitigating circumstances against the aggravating circumstances.

(R2. 1028). Counsel explained that this is not a "lingering doubt about guilt" instruction, but one that would essentially address the same issue as the statutory mitigator regarding the defendant's role as an accomplice (R2. 1028). The request was denied.

This Court has held that when a requested jury instruction is supported by the evidence, it must be given. Hooper v. State, 476 So. 2d 1253 (Fla. 1985)(holding that "[d]efendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions."). See also Smith v. State, 424 So. 2d 726 (Fla. 1982). Mr. Downs' requested instructions should have been given because the lighter sentences of Mr. Downs' co-defendants are relevant to the jury's sentencing recommendation and are supported by the facts.

Mr. Downs was entitled to have his jury instructed that his co-defendants' sentences and immunity deals are relevant mitigation because they render a death sentence for him unconstitutionally disproportionate. In Slater v. State, 316 So. 2d 539 (Fla. 1975),

this Court explained that "[d]efendants should not be treated differently upon the same or similar facts. When the facts are the same, the law should be the same." Id. at 542. This Court overturned Slater's death sentence because his codefendant, the triggerman, received a life sentence, explaining that "[t]he imposition of the death sentence in this case is clearly not equal justice under the law." Id. See also Spivey v. State, 529 So. 2d 1088 (Fla. 1988)(remanding for imposition of a life sentence because the codefendants were the "primary motivators" and received lesser sentences); Hazen v. State, 700 So. 2d 1207 (Fla. 1997)(vacating death sentence based on life sentence for codefendant who was "a prime instigator").⁴

This Court has also addressed the disparate sentencing issue in cases such as this one where one co-defendant receives a lighter sentence in exchange for cooperating with the State. In Brookings v. State, 495 So. 2d 135 (Fla. 1986), this Court remanded for imposition of a life sentence despite evidence that Brookings was the triggerman. This Court noted that despite his role as the actual killer, Brookings' death sentence was disparate because his

⁴A defendant seeking relief based on an unconstitutionally disparate sentence is not required to prove that a more culpable codefendant received a lesser sentence; rather, relief is mandated under the Eighth Amendment if an equally culpable codefendant received a lesser sentence. See Caillier v. State, 523 So. 2d 158 (Fla. 1988); Fernandez v. State, 730 So. 2d 277 (Fla. 1999)(remanding for imposition of a life sentence because appellant's degree of participation was similar to that of a codefendant who received a life sentence after a plea negotiation); Scott (Paul) v. Singletary, 657 So. 2d 1129 (Fla. 1995)(recognizing that "[w]e repeatedly have reduced sentences to life where a co-perpetrator of equal or greater culpability has received life or less.").

codefendants received lesser sentences in exchange for their testimony against Brookings. This Court noted that the disparate sentences resulted from "the not infrequent difficult choices confronting prosecuting authorities when deciding who to prosecute and who to plea bargain with." Id. at 142.

This Court faced a similar situation in Hazen v. State, 700 So. 2d 1207 (Fla. 1997), in which it noted that "the State made the strategic decision to give [Hazen's codefendant] a life sentence in exchange for testimony putting Hazen at the scene of the crime. In that respect, [the codefendant] was a crucial witness." Id. at 1212. The fact that the disparate sentences in that case were the result of the State's plea bargaining decisions did not prevent this Court from vacating Hazen's death sentence. See also Malloy v. State, 382 So. 2d 1190, 1193 (Fla. 1979)(remanding for a life sentence due to "conflict in the testimony as to who was actually the triggerman and because of the plea bargains between the accomplices and the State").

The facts of Mr. Downs' case are equally compelling as those in which this Court has imposed life sentences. Gerry Sapp testified that John Barfield offered him \$10,000 to kill the victim in this case (R2. 432-33). He bought a gun from Larry Johnson that he planned to use to kill the victim (R2. 447). Along with Huey Palmer and Ricky Barfield, Sapp was involved in three unsuccessful attempts to kill the victim (R2. 444-45). Mr. Sapp pled guilty to conspiracy and received a five-year sentence. Huey Palmer also testified that

he was approached by John Barfield to kill Mr. Harris (R2. 502). Ricky Barfield and Gerry Sapp were also involved in the discussions about the plans to kill Mr. Harris (R2. 503). Mr. Palmer claimed that although he was involved in the discussions and was present when several attempts were made on Mr. Harris' life, he never intended to take part in the murder (R2. 504-05). Mr. Palmer received complete immunity in exchange for his testimony (R2. 506).

Ricky Barfield participated in several attempts on Mr. Harris' life, including planting a plastic car bomb (R2. 444-45, 503). He was never arrested (R2. 449).

Mr. Barfield initiated the conspiracy, participated in attempts on the victim's life, and first approached Mr. Downs about committing the murder. He is serving a life sentence.

Most important to the jury's deliberations is Johnson's complete immunity from prosecution. Substantial evidence presented at Mr. Downs' resentencing indicates that Johnson is the actual killer in this case. Mr. Downs' testimony that Johnson shot Mr. Harris is supported by the testimony of the other men involved in the conspiracy and murder. Gerry Sapp testified that he and John Barfield met with Johnson and Mr. Downs about killing Mr. Harris (R2. 439-440). The four men discussed possible locations for the murder, and Mr. Barfield showed Johnson and Mr. Downs where Mr. Harris lived (R2.440). The day after the murder, Johnson told Mr. Sapp that he had taken care of it (R2. 452).

John Barfield also testified about the day he drove around Jacksonville with Mr. Sapp, Johnson, and Mr. Downs. As the four men drove past Mr. Harris' apartment, Johnson said that "if he would get him out right then with a gun he would shoot him right then." (R2. 704). Mr. Barfield testified that he did not know or trust Johnson and that he approached Mr. Downs as an intermediary (R2. 703). Mr. Barfield later gave Johnson Mr. Harris' phone number and told him to use the name "Joe Green" when he called to lure him out of the apartment to murder him (R2. 704-05). The day after the murder, Johnson came to Mr. Barfield's house, showed him Mr. Harris' license, told him he had shot Mr. Harris, and demanded to be paid for the murder (R2. 705). Mr. Barfield also testified that when he was incarcerated before his trial, an informant named Harry Murray was placed in his cell and some conversations about the murder were taped (R2. 706-07). Mr. Barfield told Mr. Murray that Johnson had shot Mr. Harris (R2. 716). These conversations occurred before Mr. Barfield was offered a deal by the State Attorney's Office (R2. 717).

Johnson testified that Mr. Downs asked him if he wanted to help kill a man and he said yes (R2. 543). Johnson bought a gun to be used in the murder and he practiced shooting the gun while muffling the sound with a coat (R2. 544, 598). Johnson admitted that he actively participated in discussions regarding the method that should be used to kill Mr. Harris and that he suggested various methods (R2. 547, 594-95). He admitted that he and Mr. Downs drove past the victim's apartment three or four times but did not find him at home

(R2. 548). Johnson also admitted that he made the telephone call luring Mr. Harris to the dirt road where he was murdered (R2. 553-54). Johnson was carrying the ammunition that was used to kill Mr. Harris (R2. 597). After the murder, Johnson and Mr. Downs hid the body in the woods (R2. 566-67). Johnson threw Mr. Harris' keys and moneyclip into the woods and put the victim's money in his own pocket (R2. 567). Johnson wiped the fingerprints from the murder weapon and threw it into the St. Johns River (R2. 576, 597).

Several months later, Johnson began telling people about Mr. Harris' murder (R2. 580). He first contacted the FBI but did not reach an agreement with them because he would not provide any details about the crime before being promised complete immunity (R2. 591). He eventually contacted Detective Spaulding of the Jacksonville Sheriff's Office; he testified that "he was pretty scared of being arrested for murder" (R2. 581). He explained why he came forward: "if anything ever come up over that murder, they would be getting -- looking for me to charge me with it, and I would be facing the electric chair. If there was any chance of me ever getting any kind of immunity, I better go forward and tell the truth." (R2. 581). Before he told the State Attorney's Office the details of Mr. Harris' murder, Johnson knew that the immunity deal was contingent on his claiming that he was not the triggerman (R2. 582).

In its closing statement, the State Attorney acknowledged the involvement of Johnson and the others but encouraged the jury to sentence Mr. Downs to death:

[L]et me just tell you one thing. Without any qualms, ladies and gentlemen, had there been another person, another witness at the end of that dirt road south of Baymeadows Road back in 1977, **I would be here today asking you to put Larry Johnson in the electric chair with that man right there, but we don't have that.**

And there is going to be discussion -- Mr. Arias is going to talk to you, ladies and gentlemen, about minor participants, and the role, and Johnson may have been the culprit, the triggerman. **I don't concede for one moment that Mr. Johnson was the triggerman. Even if he was, ladies and gentlemen, that defendant there participated** directly in the murder, still took the money, lured Mr. Harris out there. He's still guilty.

And I'm not telling you, and **I haven't told you once that Johnson is not guilty of this murder. He was.** What we told you, and I told you the first day about Johnson and his involvement, was we granted his immunity so we could have testimony and so we could make this case, and **there were no minor participants, there wasn't a minor participant in this whole bunch of murdering theives, not a single one.**

. . .

And while we're talking about this mitigating circumstance of accomplices and minor participation, let me talk to you a little bit about immunity, because Mr. Arias is going to get up here and harp on immunity, the State gave immunity to Larry Johnson, it's not fair, it's not fair, and all this other type thing. Well, the Florida Legislature has given the State, not the police, but the prosecuting attorney, the State Attorney the right to subpoena people and give them immunity for participation in crimes.

It's as old as our country, because it's necessary, and there is not a significant -- not an important criminal case that's come down in the history of this country for 200 years,

and we can go back as recently as Watergate where there is more than one person involved in criminal activity where the government, the State has not given concessions on sentences, or worked out some arrangement so the overall criminal activity can be prosecuted.

. . .

And Mr. Arias will probably get up and tell you it's not fair, it's not fair to put the defendant in the electric chair and let Johnson go. Well, let's say we catch maybe 20, 30 percent of our burglary suspects. Does that mean we should let them go because we don't catch the 80 -- other 60 or 70 percent? Should we?

(R2. 1083-86). The State Attorney, who was familiar with the law of disparate sentencing, improperly urged the jury to sentence Mr. Downs to death regardless of the involvement of Johnson in the actual murder. His references to unsolved murders, burglaries, and Watergate ignore that this is a capital case and that disparate sentencing is unconstitutional under the Eighth Amendment. Because the jury did not have the specific instruction regarding the mitigating effect of the codefendants' more lenient treatment, the State Attorney's improper argument succeeded and Mr. Downs was sentenced to death.

While the jury heard the evidence of the co-defendants' participation and their more lenient treatment by the State, in the absence of the requested instruction, the jury could not have known how this evidence was relevant to Mr. Downs' sentence. This Court has recognized that the evidence in this case regarding the relative involvement of the participants is difficult to evaluate. When it

ordered a resentencing, this Court discussed the jury's question indicating its reluctance to believe Johnson and referred to Johnson's involvement in the case as mitigation for Mr. Downs:

This Court has previously recognized as mitigating the fact that an accomplice in the crime in question who was of equal or greater culpability, received a lesser sentence. The question posed by the jury plainly shows that they considered that Downs' accomplice, Johnson, may have been of equal or greater guilt. This, along with other mitigating evidence that was presented, precludes any finding of harmless error beyond a reasonable doubt.

Downs III at 1072 (citations omitted).

And in 1981, when it reviewed Mr. Barfield's case on direct appeal, this Court referred to Johnson as "one of two men who participated in the actual killing." Barfield v. State, 402 So. 2d 377, 379 (Fla. 1981). In addition, the reasons relied upon by this Court to reduce Mr. Barfield's death sentence to life imprisonment could support a life sentence in this case:

(1) Ron Garelick, the murder's mastermind, had previously died; (2) appellant was the middleman; (3) **the state granted Larry Johnson, one of the participants in the actual killing, complete immunity**; and (4) one codefendant, charged with conspiracy to commit first-degree murder, received a five-year sentence, and another codefendant had all charges dropped in exchange for testifying for the state.

Id. at 382 (emphasis added). This Court had previously recognized that Johnson's involvement was a difficult issue when it stated that "[i]t has been difficult in reviewing the record in distinguishing fact from allegation." Downs II at 1106. The passage of time and

the discovery of new evidence have made that issue even more difficult to determine.

The trial court erred in denying Mr. Downs' requested jury instruction regarding the mitigating effect of the lenient treatment of his co-defendants. The jury heard testimony regarding each man's participation in the conspiracy and murder and the lighter sentences, immunity deals, and complete avoidance of punishment arranged by the State. However, the jurors are not lawyers, and in the absence of a specific instruction, they were ignorant of how to use this information.

CLAIM IV

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. DOWNS WAS DENIED HIS RIGHT TO A FAIR SENTENCING BECAUSE THE CIRCUIT COURT CONSIDERED A PRESENTENCE INVESTIGATION REPORT THAT CONTAINED BOTH HEARSAY AND INACCURATE INFORMATION.

Mr. Downs challenged the presentence investigation report on the grounds that it was both inaccurate and contained hearsay (R2. Vol. II, 255-56). The motion was denied (R2. Vol. II, 269). The presentence investigation report to which Mr. Downs objected contained the following information that should not have been before the sentencing court: the State Attorney's belief that "the Defendant's track record shows the Defendant to be a person of violence" and Detective Spaulding's statement that "he had more insight into the Subject and was aware of his violent nature." (R2. Vol. II, 255). The PSI also states that "Mr. Downs denied he knew

anything about the Harris murder," (Id.) which is an improper comment on Mr. Downs' right to remain silent during a custodial interrogation. The PSI falsely states that Mr. Downs had been fired from a job "due to suspicion of theft." (R2. Vol. II, 256). In addition, the PSI contains an inaccurate evaluation of prior arrests and convictions and states that Mr. Downs had two pending felony charges (R2. Vol. II, 255). This information is false and constitutes nonstatutory aggravation. Mr. Downs was denied his right to a fair sentencing and appellate counsel was ineffective for failing to raise this claim on direct appeal.

In Eutsey v. State, 383 So. 2d 219 (Fla. 1980), this Court held that when a defendant disputes the truth of hearsay statements in a presentence investigation report, the state must produce corroborating evidence to support the statements. Reliance on uncorroborated hearsay in a presentence investigation report violates the defendant's due process rights. See McElveen v. State, 440 So. 2d 636 (Fla. 1st DCA 1983); Adams v. State, 376 So. 2d 47 (Fla. 1st DCA 1979). In Eutsey, this Court explained that the defendant must object to particular statements in the PSI rather than make a general challenge to use of the report. 383 So. 2d at 226. Mr. Downs' motion satisfied this standard because he specifically identified the inaccurate and hearsay statements to which he objected. (R2. Vol. II, 255-56).

The statements to which Mr. Downs objected in this case constitute nonstatutory aggravation. As this Court stated in Elledge

v. State, 346 So. 2d 998, 1003 (Fla. 1977): "We must guard against any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death." Under the Supreme Court's decision in Proffitt v. Florida, 428 U.S. 242 (1976), discretion in capital sentencing must be "guided and channeled" to eliminate the arbitrary and capricious imposition of the death penalty. Based on that requirement, this Court has consistently held that only statutory aggravating factors may be considered in the sentencing decision. Moore v. State, 701 So. 2d 545, 552 (Fla. 1997)(Anstead, J., concurring in part, dissenting in part)(citing Grossman v. State, 525 So. 2d 833 (Fla. 1988); Floyd v. State, 497 So. 2d 1211 (Fla. 1986); Drake v. State, 441 So. 2d 1079 (Fla. 1983); Purdy v. State, 343 So. 2d 4 (Fla. 1977)).

CLAIM V

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT MR. DOWNS WAS DENIED HIS RIGHT TO A FAIR SENTENCING BECAUSE THE CIRCUIT COURT DENIED HIS REQUEST TO INSTRUCT THE JURY ON THE LAW OF PRINCIPALS.

Mr. Downs requested that the jury be instructed regarding the law of principals. The circuit court acknowledged that "it seems like it might be appropriate" (R2. 133) but denied the motion based on the State's argument that it was relevant only to guilt/innocence. That argument is insufficient in this case because the focus of the resentencing was the relative culpability of the codefendants and whether Mr. Downs could be sentenced to death in light of their lesser sentences. As this Court recognized on direct appeal of the

resentencing, "the evidence presented to support Downs's assertion that he was not the triggerman is inextricably intertwined with evidence pertaining to the issue of guilt." Downs IV at 899. Mr. Downs was denied his right to a fair sentencing and appellate counsel was ineffective for failing to raise this claim on direct appeal.

If a requested jury instruction is supported by the evidence, it must be given upon the defendant's request. Hooper v. State, 476 So. 2d 1253 (Fla. 1985)(holding that "[d]efendant is entitled to have the jury instructed on the rules of law applicable to his theory of defense if there is any evidence to support such instructions."). See also Smith v. State, 424 So. 2d 726 (Fla. 1982). The principal instruction was relevant to Mr. Downs' resentencing because the focus of the defense, at both the trial and the resentencing, was the involvement of Larry Johnson.

The issue of Johnson's involvement was central to Mr. Downs' defense and proved his argument that he should not be sentenced to death because the more culpable party had been given complete immunity. Because the jury at Mr. Downs' resentencing was instructed that he had been convicted of first-degree murder, Mr. Downs had a right to inform the jury that his conviction was not inconsistent with his defense that Johnson was the actual killer. Without the principal instruction, the jury would assume that Mr. Downs' first-degree murder conviction meant that he was the actual killer, thereby precluding Mr. Downs from proving his defense that Johnson was the triggerman and that he could not be sentenced to death in light of

Johnson's lighter sentence. Under the law of principals, a defendant who did not actually kill the victim may be convicted of first-degree murder if he "aids, abets, counsels, hires, or otherwise procures such offense to be committed, and such offense is committed or is attempted to be committed, is a principal in the first degree and may be charged, convicted, and punished as such, whether he is or is not actually or constructively present at the commission of such offense." Fl.Stat. §777.011. The jury that convicted Mr. Downs was given the principal instruction and convicted him of first-degree murder despite the evidence of Johnson's involvement in the murder. However, under the law of principals, Mr. Downs' first-degree murder conviction is not inconsistent with the evidence of Johnson's involvement in the murder and does not constitute a rejection of that evidence. In fact, the jury that convicted Mr. Downs asked the court the following question during deliberations:

In regard to the question as to whether the defendant did or did not use a firearm, must the defendant be guilty of actually pulling the trigger, or is he guilty of using the firearm through association of being an accomplice in a murder of which a firearm was used.

(R. 828). This Court interpreted the question to reveal the jury's belief that Johnson "may have been of equal or greater guilt." Id. Because the jury was instructed on the law of principals, it convicted Mr. Downs despite the evidence of Johnson's involvement. The conviction is not contrary to the law, but Mr. Downs' death sentence is unconstitutional if Johnson is equally or more culpable.

The same instruction at resentencing would have resulted in a life recommendation.

Mr. Downs presented additional evidence of Johnson's role as the triggerman at his resentencing to support his defense that he cannot be sentenced to death if the actual killer received an immunity deal in exchange for his testimony. However, the jury was instructed that it must accept the first-degree conviction and not reconsider the issue of Mr. Downs' guilt; this instruction essentially precluded the jury from considering the evidence of Johnson's role as the actual killer which seems inconsistent with Mr. Downs' first-degree murder conviction. In the absence of a principal instruction, the jury would not have understood how to use the evidence of Johnson's guilt which clearly mandates a life sentence for Mr. Downs.

Because the jury that sentenced Mr. Downs to death was not informed that the first-degree murder conviction did not require it to reject the evidence proving Johnson's guilt, Mr. Downs was denied his right to present a defense. As a result of the circuit court's denial of the jury instruction on the law of principals, Mr. Downs was sentenced to death despite the evidence of Johnson's culpability and his complete immunity from prosecution.

CLAIM VI

APPELLATE COUNSEL WAS INEFFECTIVE IN RAISING THE CLAIM THAT THE CIRCUIT COURT ERRED IN QUASHING MR. DOWNS' SUBPOENA OF THE STATE ATTORNEY. APPELLATE COUNSEL MISUNDERSTOOD THE PURPOSE OF THE SUBPOENA AND RAISED THE WRONG

ARGUMENT. AS A RESULT, THIS COURT FOUND THE CLAIM TO BE MERITLESS ON DIRECT APPEAL.

Mr. Downs subpoenaed the State Attorney because he wanted to present evidence regarding the treatment of the co-defendants in this case. This evidence is relevant to Mr. Downs' defense at his resentencing that he should not be sentenced to death because his equally and more culpable codefendants received more lenient treatment by the State. On direct appeal, appellate counsel raised a claim regarding the State Attorney subpoena but misstated the issue as one regarding the State's credibility: "In short, Downs wanted to attack the State's credibility." (Direct Appeal Brief at 31). This Court found the claim meritless because "the `state's credibility' was not in issue." Downs IV at 900. Appellate counsel was ineffective because this meritorious claim regarding the relevance of the State Attorney's testimony was misstated as a claim regarding credibility. If appellate counsel had properly raised the claim, this Court would not have found it to be meritless.

The focus of Mr. Downs' resentencing was the involvement of other defendants, in particular Johnson. This Court has recognized the evidence of Johnson's involvement and noted that on this issue it is difficult to "distinguish fact from allegation." Downs II at 1106. When this Court reversed John Barfield's death sentence on direct appeal, it referred to Johnson as "one of the participants in the actual killing." Barfield v. State, 402 So. 2d 377, 382 (Fla. 1981). The jury knew only that Johnson was given complete immunity

by the State in exchange for his testimony accusing Mr. Downs of being the triggerman. However, Mr. Downs sought to place this deal in the appropriate context so that the jury could properly consider his argument that Johnson is the actual killer and that Mr. Downs should not be sentenced to death. Mr. Downs was precluded from presenting relevant evidence regarding the State's decision to deal with Johnson, specifically the fact that he was given four polygraph tests, in violation of his right to a fair sentencing. The jury was deprived of relevant evidence that would have enabled it to evaluate the relevance of Johnson's immunity deal in light of the evidence of his involvement in the murder.

The jury heard substantial evidence of Johnson's role in this crime, including his own statements revealing that he was the triggerman. However, the jury also knew that the State had offered Johnson complete immunity from prosecution in exchange for information incriminating Mr. Downs. Johnson did not receive a life sentence; he received complete immunity. The jury would be inclined to believe that the State chose to deal with Johnson in their efforts to convict Mr. Downs because Johnson was in fact less culpable. As the Eleventh Circuit Court of Appeals recognized in Johnson v. Wainwright, "[a] prosecutor's exercise of the discretion necessary to his office typically carries great legitimacy because of the public's belief that he is carrying out his duties with expertise and in the interest of justice." 778 F.2d 623, 630 (11th Cir. 1985). The circuit court prevented Mr. Downs from presenting relevant evidence

with which to consider whether the State's immunity deal with Johnson was, in fact, "in the interest of justice." This error was compounded by the State Attorney's closing statement in which he discouraged the jury from considering the reasons for such a deal:

[L]et me talk to you a little bit about immunity, because Mr. Arias is going to get up here and harp on immunity, the State gave immunity to Larry Johnson, it's not fair, it's not fair, and all this other type of thing. Well, the Florida legislature has given the State, not the police, but the prosecuting attorney, the State Attorney the right to subpoena people and give them immunity for participation in crimes.

(R2. 1084-85). In other words, the State has the authority to decide which defendant to protect and which to prosecute and the jury should just accept the unfairness without considering the reasons for the State's decisions. However, it is the jury's role to evaluate the credibility of witnesses, and the specific terms of Johnson's deal and the State's motivation in negotiating with him are relevant to Johnson's credibility.

The jury would not believe that an equally culpable codefendant could completely escape prosecution while the State sought the death penalty against another codefendant. Because Mr. Downs was unable to put Johnson's immunity deal in context and explain exactly what was required of him before he could save his life and completely escape prosecution, the jury could not properly evaluate the evidence. In particular, the jury should have been informed that Johnson's deal with the State required that he not confess to being the triggerman.

This condition was clearly stated to Johnson before he decided to cooperate. This fact undermines the veracity of Johnson's testimony against Mr. Downs and is relevant to the jury's ability to evaluate his credibility. Johnson was the State's key witness against Mr. Downs because only he provided testimony that Mr. Downs was the triggerman; his ability to completely escape prosecution is relevant to the credibility of his testimony and the jury was entitled to hear this evidence.

CLAIM VII

**APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING
TO RAISE THE CLAIM THAT THE CIRCUIT COURT ERRED
IN DENYING MR. DOWNS' MOTION TO DISQUALIFY THE
STATE ATTORNEY'S OFFICE.**

Mr. Downs filed a motion to disqualify the State Attorney's Office because the State Attorney had improperly destroyed records relevant to Mr. Downs' case (R2. Vol. I, 109-11). After his conviction, Mr. Downs filed a civil suit seeking records regarding four polygraph tests given to Larry Johnson. His petition for writ of mandamus was granted. Downs v. Austin, 522 So. 2d 931 (Fla. 1st DCA 1988). State Attorney Austin responded that the records had been destroyed. (R2. Vol. I, 130). Because the records had been improperly destroyed, Mr. Downs sought to subpoena the State Attorney so that he could present testimony regarding the State's decision to negotiate with Johnson despite evidence of his involvement. This motion was related to the motion to subpoena the State Attorney because both focussed on the issue of Johnson's involvement in the

murder and his immunity deal. If appellate counsel had raised this claim in conjunction with the State Attorney subpoena claim, this Court would have understood that the issue was not the State's credibility but Johnson's credibility and the State's decision to negotiate with him despite the evidence of his involvement as the triggerman.

The State Attorney referred to the polygraph tests before the circuit court in order to bolster Johnson's credibility. Mr. Downs' due process rights were denied because the State improperly destroyed the polygraph records before they were seen by Mr. Downs or his counsel. This error was compounded when the State opposed and the circuit court denied Mr. Downs' motion for a polygraph examination so that his credibility could be similarly bolstered. Mr. Downs' trial and resentencing were essentially a credibility contest between witnesses regarding the identity of the actual killer. Johnson was the State's star witness who identified Mr. Downs as the triggerman. The State Attorney vouched for his credibility and bolstered him by referring to the polygraph examination. Appellate counsel was ineffective for failing to raise this claim.

CLAIM VIII

APPELLATE COUNSEL WAS INEFFECTIVE IN RAISING THE CLAIM REGARDING THE EXCLUSION OF BOBBY JO MICHAEL'S DEPOSITION. APPELLATE COUNSEL FAILED TO PROPERLY BRIEF THIS ISSUE TO EXPLAIN TO THIS COURT HOW THE TESTIMONY WAS NOT CUMULATIVE TO OTHER DEFENSE EVIDENCE.

Bobby Jo Michael testified in a deposition during post-conviction proceedings that Mr. Downs was with her at the time of the murder. This Court agreed with Mr. Downs that this evidence was relevant to the resentencing and should have been admitted. Downs IV at 899. However, this Court found the circuit court's exclusion of the evidence to be harmless error because it was "cumulative." This Court explained that "Downs succeeded in presenting his theory of penalty defense, and he supported it with various witnesses whose testimony contradicted Johnson's version of the killing in a manner not inconsistent with Michael's perpetuated testimony." Id.⁵ Appellate counsel was ineffective for failing to properly brief this issue on direct appeal. Ms. Michael's testimony is not cumulative to other defense evidence. If appellate counsel had informed this Court of the exact nature of Ms. Michael's testimony, this Court would not have found its exclusion to be harmless error.

Ms. Michael's testimony is relevant to Mr. Downs' resentencing because it supports the defense theory that Mr. Downs was not the triggerman and should not be sentenced to death when Johnson received complete immunity and all the other participants received lighter sentences. On direct appeal, appellate counsel told this Court that Michael's testimony was relevant because it "corroborated" that of other defense witnesses and "bolstered the credibility of Downs'

⁵Mr. Downs was resentenced to death. Therefore, this Court cannot dismiss the circuit court's erroneous rulings excluding defense evidence on the basis that Mr. Downs "succeeded in presenting his theory of penalty defense." Clearly, if Mr. Downs had succeeded, he would not have received a death sentence.

version with the jury." (Initial Brief at 38, 42). Appellate counsel failed to explain to this Court how Ms. Michael's testimony was different from the other defense evidence and how it would have made a difference to the outcome of Mr. Downs' resentencing.

Ms. Michael testified that she saw Johnson and Mr. Downs on the night of the Harris murder. Mr. Downs was at her house at 8:30 on the night of the murder. (R2. Supp. Vol. II, 13). At about 10:30, Johnson arrived. (Id. at 18). Ms. Michael described Johnson's behavior: "he was just plumb fidgety and sticking his hands in first one pocket and then another and pulling out keys and twitching and putting them back in the pocket and hollering at my grandson, Ernest Charles [Downs], 'Let's go, let's go.'" (Id. at 17). Ms. Michael also testified that she frequently saw Johnson with guns and that he told her that he would commit murder "if the price is right." (Id. at 38-39). Ms. Michael also testified that she listened in on a phone conversation between Johnson and her granddaughter in which Johnson admitted that he had confessed to being the triggerman. (Id. at 42-43).

Ms. Michael's testimony is consistent with that of Darlene Perry Shafer who had the telephone conversation with Johnson regarding his role as the triggerman. However, Ms. Michael's testimony is not merely cumulative because Ms. Shafer was impeached by the State Attorney based on prior statements in which she confused the date of the conversation with Johnson. With the addition of Ms. Michael's testimony, the jury would have believed Ms. Shafer about

the phone conversation, resulting in more credible evidence that Johnson was the triggerman. Ms. Michael's testimony is different from that of the other defense witnesses because she is the only one who actually saw Mr. Downs and Johnson on the night of the murder. In addition, unlike the other witnesses who testified that Johnson was the actual killer, Ms. Michael was not involved in the murder or conspiracy in any way so her testimony is not tainted. Ms. Michael's testimony also provides details that no other witness had, including the fact that she had seen Johnson with guns on many occasions and the statement he made to her that he would commit murder "if the price is right."

One witness could have made a difference. The jury that convicted Mr. Downs did not fully believe Johnson as revealed in the question to the court regarding the possibility of convicting Mr. Downs even if he was not the actual triggerman. Ms. Michael's testimony, which corroborates the defense witnesses but also includes several additional details, probably would have changed the jury's recommendation.

CLAIM IX

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. DOWNS WAS DENIED A FAIR SENTENCING WHEN THE STATE INTRODUCED EVIDENCE THAT HE GAVE A FALSE NAME TO THE POLICE WHEN HE WAS ARRESTED.

The State sought to introduce a license Mr. Downs possessed when he was arrested which had Mr. Downs' picture on it but a different name. The State claimed that the license was relevant to

show what Mr. Downs looked like at the time of his arrest (R2. 1019). Surely identity is not an issue in a resentencing. Defense counsel objected that the license was irrelevant and prejudicial (R2. 1019). In addition, because the license was originally issued in 1972 and reissued in 1976, it was impossible to determine in which year the photograph was taken (R2. 1020). Introduction of the license with a false name on it prejudiced Mr. Downs because it was evidence of non-statutory aggravation, and also prejudicial evidence of flight.

Allowing the jury to consider evidence that Mr. Downs committed the crime of using false identification is not probative of any statutory aggravating circumstance. See Moore v. State, 701 So. 2d 542, 545 (Fla. 1997)(noting that "the only matters that may be asserted in aggravation are those set out in the death penalty statute.") (Anstead, J., concurring in part and dissenting in part).

Evidence of offering a false identity when confronted by the police is considered flight evidence and it should have been excluded in this case. This Court has held that evidence of flight is admissible to show "consciousness of guilt." Straight v. State, 397 So. 2d 903, 908 (Fla. 1981). However, in Escobar v. State, 699 S0. 2d 988, 995 (Fla. 1997), this Court explained that such evidence is relevant only if the State can show "a nexus between the flight, concealment, or resistance to lawful arrest and the crime(s) for which the defendant is being tried in a specific case." This Court explained that the admission of such evidence must be limited because it "creates an inference of consciousness of guilt." Id.

CLAIM X

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE A CLAIM THAT MR. DOWNS WAS DENIED HIS RIGHT TO A FAIR SENTENCING BECAUSE THE STATE'S CLOSING STATEMENT IMPROPERLY REFERRED TO THE CITIZENS OF FLORIDA IN URGING THE JURY TO SENTENCE MR. DOWNS TO DEATH.

The State Attorney improperly appealed to the jurors' duty as citizens of the State of Florida in urging them to sentence Mr. Downs to death. The State Attorney concluded his closing statement with the following appeal:

Ladies and gentlemen, this type of outrageous assault on citizens of our community by murderers such as Downs causes society to react, and the State of Florida demands the death penalty here, because there is a society -- the State of Florida has been harmed by this criminal episode that this defendant committed back in April of 1977.

On behalf of the State of Florida, I would ask you and urge you to recommend death for Ernest Charles Downs.

(R2. 1103). The State Attorney's argument was improper and appellate counsel was ineffective for failing to raise this claim on direct appeal.

Appeals to the jurors' sense of civic duty to impose the death penalty are improper. Such arguments are "an obvious appeal to the emotions and fears of the jurors." Bertolotti v. State, 476 So. 2d 130, 133 (Fla. 1985). Arguments such as those in this case which appeal to community sensibilities and civic conscience have repeatedly been held improper. As the Fifth Circuit Court of Appeals explained in Westbrook v. General Tire and Rubber Co.: "Such

argument is an improper distraction from the jury's sworn duty to reach a fair, honest and just verdict according to the facts and evidence presented at trial . . . Our condemnation of a 'community conscience' argument is not limited to the use of those specific words; it extends to all impassioned and prejudicial pleas intended to evoke a sense of community law through common duty and expectation. Such appeals serve no proper purpose." 754 F.2d 1233 (5th Cir. 1985).

The argument in this case encouraged the jury to recommend a death sentence based on what the citizens of the State wanted rather than what the evidence in the case showed to be the appropriate punishment. The State Attorney also improperly told the jury that "the State of Florida has been harmed by this criminal episode." Such arguments encourage the jury to consider impermissible factors in their deliberations in violation of Mr. Downs' due process and eighth amendment rights.

CLAIM XI

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. DOWNS WAS DENIED HIS RIGHT TO A FAIR SENTENCING WHEN THE CIRCUIT COURT DENIED HIS MOTION TO DISQUALIFY THE COURT.

Mr. Downs filed a motion to disqualify the circuit court based on the State's improper reference at Mr. Downs' first trial to Johnson's polygraph examination (R2. Vol. II, 250-54). An affidavit filed in support of the motion explains that "the Court should not be placed in such an untenable position of having to disregard evidence

which it has already heard." (R2. Vol. II, 252). The State improperly bolstered the credibility of its star witness by referring to the polygraph examination. Mr. Downs was prejudiced because his trial was essentially a credibility contest between Johnson and Mr. Downs. Before filing the motion to disqualify the court, Mr. Downs filed a motion to take a polygraph examination in order to counteract the effect of the State's improper reference to Johnson's test, but his motion was denied. The State knowingly referred to inadmissible information in order to win this credibility contest by any means possible.

Mr. Downs was denied his right to be sentenced by a fair and impartial judge. Even the appearance of a partial judge is unacceptable.

The United States Supreme Court has explained that in deciding whether a particular judge cannot preside over a litigant's trial:

the inquiry must be not only whether there was actual bias on respondent's part, but also whether there was "such a likelihood of bias or an appearance of bias that the judge was unable to hold the balance between vindicating the interests of the court and the interests of the accused." "Such a stringent rule may sometimes bar trial by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties," but due process of law requires no less.

Taylor v. Hayes, 418 U.S. 488, 501 (1974)(citations omitted). See also State v. Steele, 348 So. 2d 398 (Fla. 3d DCA 1977)("No judge

under any circumstances is warranted in sitting in the trial of a cause who neutrality is shadowed or even questioned.")

In the instant case, Mr. Downs had a reasonable fear that he would not receive a fair sentencing before the circuit court because of the aforementioned circumstances. The facts alleged in his motion were "sufficient to warrant fear on [his] part that he would not receive a fair hearing by the assigned judge." Suarez v. Dugger, 527 So. 2d 191, 192 (Fla. 1988). In capital cases like Mr. Downs', judges "should be especially sensitive to the basis for the fear, as the defendant's life is literally at stake, and the judge's sentencing decision is in fact a life or death matter." Chastine v. Broome, 629 So. 2d 293 (Fla. 4th DCA 1993).

In this case, the issue of Johnson's credibility, which was improperly bolstered before the court that imposed Mr. Downs' sentence, was central to the State's argument that Mr. Downs should be sentenced to death. The State acknowledged that Johnson was involved in the murder and that he received complete immunity for his cooperation with the State. Johnson is the only witness who identified Mr. Downs as the triggerman. Without his testimony, there is no evidence to support a death sentence. Under this Court's precedent, the State could not seek a death sentence for Mr. Downs unless it proved that he was the actual triggerman and that Johnson, who received complete immunity from prosecution, was less culpable. The State improperly bolstered its witness because it knew that if

the sentencing court did not believe Johnson, it could not sentence Mr. Downs to death.

The issue of Johnson's credibility is complicated by the fact that he did not testify at Mr. Downs' resentencing. The State claimed that he was unavailable to testify because he could not be located. An investigator for the State Attorney's Office testified that he sent a letter to the U.S. Marshal's Office and sent a subpoena to Johnson's last known address (R2. 522). He never received a reply from the Marshal's Office, and the subpoena was returned "address unknown." (R2. 525-56). The State Attorney made no other efforts to find Johnson. Mr. Downs was prejudiced by the State's failure to locate Johnson. As this Court has acknowledged, the first jury that convicted and sentenced Mr. Downs (the only jury that saw Johnson testify) had doubts about his credibility. Downs III at 1072. That jury was particularly concerned with Johnson's testimony that Mr. Downs was the triggerman -- the central issue at Mr. Downs' resentencing. The jury at Mr. Downs' resentencing did not have the opportunity to observe Johnson because of the State's failure to find him, and therefore the jury made no credibility determinations. The court was exposed to inadmissible evidence regarding Johnson's credibility which it could not possibly ignore when determining whether the evidence supported Mr. Downs' death sentence.

The State knowingly referred to inadmissible information in order to bolster their witness's credibility before the sentencing

court. Mr. Downs was prejudiced and the court should have granted his motion to disqualify. Appellate counsel was ineffective for failing to raise this claim on direct appeal. Mr. Downs is entitled to habeas relief.

CLAIM XII

APPELLATE COUNSEL WAS INEFFECTIVE FOR FAILING TO RAISE THE CLAIM THAT MR. DOWNS WAS DENIED HIS RIGHT TO A FAIR SENTENCING BECAUSE THE JURY INSTRUCTIONS IMPROPERLY SHIFTED THE BURDEN TO MR. DOWNS TO PROVE THE APPROPRIATENESS OF A LIFE SENTENCE.

The jury instructions at Mr. Downs' capital penalty phase required that the jury impose death unless mitigation was not only produced by Mr. Downs, but also unless Mr. Downs proved that the mitigation he provided outweighed and overcame the prosecution's aggravation. The effect of this error was repeated when the trial court employed an erroneous standard in sentencing Mr. Downs to death. This standard improperly shifted the burden to Mr. Downs to establish that life was the appropriate sentence and limited consideration of mitigating evidence to only those factors proven sufficient to outweigh the evidence in aggravation. Mr. Downs' Eighth Amendment rights were violated because the instructions precluded the jury from fully considering and giving effect to the mitigation evidence. Under the Eighth Amendment, "[s]tates cannot limit the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the [death] penalty," McCleskey v. Kemp, 481 U.S. 279, 306 (1987); the argument and instructions

provided to Mr. Downs' sentencing jury, as well as the standard employed by the trial court, violated the Eighth Amendment's requirement of individualized sentencing in capital cases. See Lockett v. Ohio, 438 U.S. 586 (1978); Hitchcock v. Dugger, 481 U.S. 393 (1987).

The jury instructions in this case constitute a distinctly egregious abrogation of Eighth Amendment principles. In this case, Mr. Downs, the capital defendant, was required to establish (prove) that life was the appropriate sentence, and the jury's and judge's consideration of mitigating evidence was limited to mitigation "sufficient to outweigh" aggravation. Mr. Downs' jury was instructed to sentence him to death unless he proved "sufficient mitigating circumstances exist to outweigh any aggravating circumstances found to exist." (R2. 1135). The improper instruction was repeated again before the court listed the possible mitigating factors: "Should you find sufficient aggravating circumstances do exist, it will then be your duty to determine whether mitigating circumstances exist that outweigh the aggravating circumstances." (R2. 1136). Such instructions, which shift to the defendant the burden of proving that life is the appropriate sentence, violate the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975). Mr. Downs' attorney requested the proper standard in a proposed jury instruction (R2. Vol. II, 280); the motion was denied. (R2. 1046).

The error was repeated by the trial court in the sentencing order: "The Court does not find mitigating factors to offset or

overcome the aggravating circumstances in this case." (R2. Vol. II, 312). The sentencing order does not address the mitigation evidence presented or indicate why it rejected the substantial evidence presented by the defense. This Court recognized on direct appeal that "Downs did present substantial valid nonstatutory mitigating evidence." Downs IV at 901. This Court also noted that "every capital sentencing court is obligated to `expressly evaluate in its written order each mitigating circumstance proposed by the defendant to determine whether it is supported by the evidence.'" Id. n. 7 at 901. That analysis was not done in Mr. Downs' case.

The instructions, and the standard upon which the court based its own determination, violated the Eighth and Fourteenth Amendments in three ways. First, the instructions shifted the burden of proof to Mr. Downs on the central sentencing issue of whether he should live or die. Under Mullaney, this unconstitutional burden-shifting violated Mr. Downs' due process and Eighth Amendment rights. See also Sandstrom v. Montana, 442 U.S. 510 (1979); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988).

Second, the jury was effectively told that once aggravating circumstances were established, it need not consider mitigating circumstances unless those mitigating circumstances were sufficient to outweigh the aggravating circumstances. Cf. Mills v. Maryland, 486 U.S. 367 (1988); Hitchcock v. Dugger, 481 U.S. 393 (1987). Thus, the jury was precluded from considering mitigating evidence and from evaluating the "totality of the circumstances" in considering the

appropriate penalty. State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973). According to the instructions, jurors would reasonably have understood that only mitigating evidence which rose to the level of "outweighing" aggravation need be considered. This Court must presume that the jury was misled by this instruction, resulting in a death recommendation despite factors calling for life. See Espinosa v. Florida, 505 U.S. 2926 (1992). This Court must also presume that the trial court gave great weight to the jury's recommendation. Espinosa; Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975).

Third, the process is qualitative, not quantitative. A death sentence cannot be imposed merely because the total number of aggravating circumstances exceeds the total number of mitigating ones. As this Court has stated:

It must be emphasized that the procedure to be followed by the trial judges and juries is not a mere counting process of X number of aggravating circumstances and Y number of mitigating circumstances, but rather a reasoned judgment as to what factual situations require the imposition of death and which can be satisfied by life imprisonment in light of the totality of the circumstances present.

State v. Dixon, 283 So. 2d 1, 10. The constitutionality of the statute depends in part upon the faithful application of this standard. Proffitt v. Florida, 428 U.S. 242 (1976). The trial judge did not apply this standard, and Mr. Downs' death sentence must be reversed.

The constitutional infirmity of these instructions and arguments is not simply that they placed the burden of proof on Mr.

Downs -- which they did -- but also that they precluded the jury from considering mitigating evidence unless that evidence was "sufficient to outweigh" aggravation. Thus, although the jury was instructed to consider statutory and nonstatutory mitigation, the burden-shifting instruction essentially negated those instructions by telling the jury that only mitigation "sufficient to outweigh" aggravation need be considered.

Lockett instructs that a capital defendant must be allowed to present any evidence regarding his character and background and the circumstances of the offense which calls for a sentence less than death, and Penry mandates that a capital sentencer must be able to "full[y] consider[]" and "give effect to" that evidence. When a capital sentencer's view of the procedure to be followed in determining sentence does not provide for "full consideration" or for "giv[ing] effect to" mitigating evidence, the sentencing process does not conform to the Eighth Amendment. Penry; Lockett; Hitchcock. This is precisely the effect resulting from the burden-shifting instructions given here.

CONCLUSION AND RELIEF SOUGHT

For all the reasons discussed herein, Mr. Downs respectfully urges this Court to grant habeas corpus relief.

I HEREBY CERTIFY that a true copy of the foregoing PETITION FOR WRIT OF HABEAS CORPUS has been furnished by United States Mail, first class postage prepaid, to all counsel of record on October 18, 2000.

GREGORY C. SMITH, Bar # 279080

CCRC - Northern Region

ANDREW THOMAS, Bar # 317942
Chief Assistant CCRC
Post Office Drawer 5498
Tallahassee, FL 32314-5498
(850) 488-7200

Copies furnished to:
Mark Dunn
Assistant Attorney General