

IN THE SUPREME COURT OF FLORIDA

CASE NO. SC01-1415

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STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

ASKARI ABDULLAH MUHAMMAD, f/k/a THOMAS KNIGHT,

Appellee/Cross-Appellant.

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

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ANSWER BRIEF OF APPELLEE/INITIAL BRIEF OF CROSS-APPELLANT

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**PRELIMINARY STATEMENT**

This proceeding involves an appeal by the State of Florida of the circuit court's granting of Rule 3.850 relief as to Mr. Muhammad's sentence of death, as well as an appeal by Mr. Muhammad of the denial of other issues raised pursuant to Rule 3.850.<sup>1</sup> The following symbols will be used to designate references to the record in this appeal:

"R" -- record on direct appeal to this Court;

"Supp. R" -- supplemental record on direct appeal;

"PCR [vol.]" -- record on post-conviction appeal;

"Supp. PCR. [vol.]" -- supplemental record on postconviction appeal"<sup>2</sup>

All other citations, such as those to exhibits introduced during the evidentiary hearing, are self-explanatory.

**REQUEST FOR ORAL ARGUMENT**

Although Appellant has not requested oral argument, Mr. Muhammad requests that oral argument be heard in this case. This Court has not hesitated to allow oral argument in other capital cases in a similar posture. A full opportunity to air the issues through oral argument

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<sup>1</sup>In its initial brief, the state has incorrectly styled the case as an appeal from the "Eleventh Judicial Circuit in and for Miami-Dade County". In fact, the judgment below now before this court arises out of the Eighth Judicial Circuit in and for Bradford County.

<sup>2</sup>At the time of this filing, the Clerk had not met the May 9, 2002 deadline for supplementing the record. Mr. Muhammad's Motion for an Extension of Time on behalf of the clerk and himself was also pending on the due date for filing. Accordingly, citations to items that were to be supplemented will be referred to the individual motion, document, etc., followed by the page number of the particular item.

would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

TABLE OF CONTENTS

	<u>Page</u>
PRELIMINARY STATEMENT . . . . .	i
REQUEST FOR ORAL ARGUMENT . . . . .	i
TABLE OF CONTENTS . . . . .	iii
TABLE OF AUTHORITIES . . . . .	v
STATEMENT OF THE CASE AND OF THE FACTS . . . . .	1
LOUIS E. "PETE" TURNER . . . . .	3
STIPULATION . . . . .	3
DARRYL BREWER . . . . .	4
ARTHUR JONES . . . . .	4
LENSON HARGRAVE . . . . .	5
BOYD McCASKILL . . . . .	6
BRAD FISHER, Ph.D. . . . .	7
FREDERICK REED REPLOGLE . . . . .	11
STEPHEN BERNSTEIN . . . . .	11
BILL SALMON . . . . .	14
JUDICIAL NOTICE . . . . .	16
SUMMARY OF ARGUMENTS . . . . .	16
STANDARD OF REVIEW . . . . .	20
ARGUMENT I	
MR. MUHAMMAD WAS DEPRIVED OF AN ADVERSARIAL TESTING PRE-TRIAL AND AT THE GUILT PHASE DUE TO A COMBINATION OF CONSTITUTIONAL ERROR RESULTING IN MULTI-FOLD PREJUDICE TO MR. MUHAMMAD . . . . .	20
A. <u>Brady</u> Violation . . . . .	20
B. The <u>Brady</u> Material . . . . .	22

C.	<u>Ake v. Oklahoma</u> . . . . .	50
D.	Ineffective Assistance of Counsel . . . . .	51
E.	Mr. Muhammad is Entitled to Relief . . . . .	52
ARGUMENT II		
	THE LOWER COURT'S ORDER GRANTING A RESENTENCING SHOULD BE AFFIRMED . . . . .	53
A.	Introduction . . . . .	53
B.	Sentencing determination . . . . .	56
C.	Invalid Waiver of Mitigating Evidence and Penalty Phase Jury . . . . .	66
D.	Suppression . . . . .	70
	CONCLUSION . . . . .	87
	CERTIFICATE OF SERVICE . . . . .	87
	CERTIFICATION OF TYPE SIZE AND STYLE . . . . .	88

**TABLE OF AUTHORITIES**

	<b><u>Page</u></b>
<u>Agan v. Singletary</u> , 12 F.3d 1012 (11th Cir. 1994) . . . . .	16, 79
<u>Ake v. Oklahoma</u> , 407 U.S. 68 (1985) . . . . .	29, 50
<u>Blanco v. Singletary</u> , 943 F.2d 1477 (11th Cir. 1991) . . . . .	69, 70
<u>Brady v. Maryland</u> , 373 U.S. 83 (1963) . . . . .	2, 17, 20, 48
<u>Deacon v. Dugger</u> , 635 So. 2d 4 (Fla. 1994). . . . .	69
<u>Deacon v. State</u> , 635 So. 2d 4 (Fla. 1993) . . . . .	70
<u>Emerson v. Gramley</u> , 91 F.3d 898 (7th Cir. 1996) . . . . .	69
<u>Faretta v. California</u> , 422 U.S. 806 (1975) . . . . .	51, 69
<u>Florida Bar v. Cox</u> , 794 So.2d 1278 (Fla. 2001) . . . . .	48
<u>Garcia v. State</u> , 622 So. 2d 1325 (Fla. 1993) . . . . .	21, 49, 66
<u>Glenn v. Tate</u> , 71 F.3d 1204 (6th Cir. 1995) . . . . .	69
<u>Hildwin v. Dagger</u> , 654 So. 2d 107 (Fla. 1995) . . . . .	61
<u>Hoffman v. State</u> , – So.2d – (Fla. July 5, 2001) 2001 WL 747399 (Fla.) . . . . .	48
<u>Kyles v. Whitley</u> , 514 U.S. 419 (1995) . . . . .	40
<u>Kyles v. Whitley</u> , 514 U.S. 419 (1995) . . . . .	22, 50, 52
<u>Lightbourne v. State</u> ,	

742 So. 2d 238 (Fla. 1999) . . . . .	22
<u>McMann v. Richardson</u> , 397 U.S. 759 (1970) . . . . .	27
<u>Mitchell v. State</u> , 595 So. 2d 938 (Fla. 1992) . . . . .	61
<u>Muhammad v. State</u> , 494 So.2d 969 (Fla. 1986) . . . . .	11
<u>Muhammad v. State</u> , 603 So. 2d 488 (1992) . . . . .	2, 21
<u>Muhammad v. State</u> , 494 So. 2d 969 (Fla. 1986), <u>cert. denied</u> , 479 U.S. 1101 (1987) . . . . .	1
<u>Mulaney v. Wilber</u> , 421 U.S. 641 (1975) . . . . .	27
<u>Occhicone v. State</u> , 768 So.2d 1037 (Fla. 2000) . . . . .	48
<u>Phillips v. State</u> , 608 So. 2d 778 (Fla. 1992) . . . . .	61
<u>Ragsdale v. State</u> , 720 So. 2d 203 (Fla. 1998) . . . . .	29
<u>Richardson v. State</u> , 604 So.2d 1107 (Fla. 1992) . . . . .	58
<u>Rogers v. State</u> , 782 So. 2d 373 (Fla. 2001) . . . . .	20, 48
<u>Rose v. State</u> , 675 So. 2d 567 (Fla. 1996) . . . . .	61
<u>Scott v. Dugger</u> , 604 So. 2d 465 (Fla. 1992) . . . . .	86
<u>Soon v. State</u> , 619 So.2d 246 Fla. 1993) . . . . .	70
<u>State v. Ex Rel Boyd v. Green</u> , 355 So. 2d 789 (Fla. 1978) . . . . .	27
<u>State v. Gunsby</u> , 670 So. 2d 920 (Fla. 1996) . . . . .	52

<u>State v. Hugins,</u> 788 So.2d 238 (Fla. 2001) . . . . .	48
<u>State v. Lara,</u> 581 So. 2d 1288 (Fla. 1991) . . . . .	61
<u>Stephens v. State,</u> 748 So. 2d 1028 (Fla. 1999) . . . . .	20, 60
<u>Strickler v. Greene,</u> 119 S.Ct. 1936 (1999) . . . . .	48
<u>Strickler v. Greene,</u> 527 U.S. 263 (1999) . . . . .	40, 70
<u>Swafford v. State,</u> 679 So. 2d 736 (Fla. 1996) . . . . .	52
<u>United States v. Agurs,</u> 427 U.S. 97 (1976) . . . . .	50
<u>United States v. Bagley,</u> 473 U.S. 667 (1985) . . . . .	40
<u>United States v. Bagley,</u> 473 U.S. 667 (1985) . . . . .	48
<u>Way v. State,</u> 760 So.2d 903 (Fla. 2000) . . . . .	48
<u>Woods v. Dugger,</u> 923 F.2d 1454 (11 <sup>th</sup> Cir. 1991) . . . . .	67
<u>Young v. State,</u> 739 So. 2d 553 (Fla. 1999) . . . . .	21, 50, 65



**STATEMENT OF THE CASE AND OF THE FACTS**

Mr. Muhammad was charged by indictment October 24, 1980, with one count of first-degree murder in Bradford County, Florida (R. 1-2). The case was ultimately presided over by Judge Chester B. Chance. Attorney Stephen Bernstein was appointed to represent Mr. Muhammad (PCR V. 1 at 165). Mr. Bernstein filed a Motion to Withdraw which was granted and Mr. Muhammad was allowed to proceed *pro se*. Judge Chance appointed Frederick Replogle to act as standby counsel (PCR V. 1 at 157).

On October 26, 1982, the jury rendered a verdict of guilty (R. 1502). Mr. Muhammad waived his right to a jury during the penalty phase and presented no evidence in mitigation (R. 1517, 1525, 1542).

On January 20, 1983, without a jury recommendation, Judge Chance imposed the death sentence (R. 1584-85). This Court affirmed. Muhammad v. State, 494 So. 2d 969 (Fla. 1986), cert. denied, 479 U.S. 1101 (1987).

On February 23, 1989, Mr. Muhammad filed a Rule 3.850 motion and on April 24, 1989, Mr. Muhammad filed his Consolidated Motion for Evidentiary Hearing, Supplement to and in Support of Motion for Rule 3.850 Relief, and Proffer in Support of Motion for Evidentiary Hearing and Motion to Vacate together with his Appendix. The State did not file a response. Nevertheless, on August 31, 1989, the trial court summarily denied relief. On September 14, 1989, Mr. Muhammad filed his motion for rehearing and on October 12, 1989, the trial court denied that motion.

Mr. Muhammad timely appealed the circuit court's denial of post

conviction relief. On June 11, 1992, this Court ordered that an evidentiary hearing be held on Mr. Muhammad's claims that the State violated Brady v. Maryland, 373 U.S. 83 (1963). See Muhammad v. State, 603 So. 2d 488, 490 (1992). This Court stated:

In this case, Muhammad alleges that despite his repeated requests for discovery the State suppressed exculpatory statements of prison employees who witnessed the offense. He further alleges that the State insisted that it had no such statements, when in fact there were such employee statements. Muhammad contends that these statements contained exculpatory information regarding his mental state at the time of the offense, and that he was denied his right to effectively cross-examine witnesses against him based on the statements. Because the trial court believed that this point was inappropriate to a rule 3.850 proceeding, it did not address the merits of whether the alleged Brady violation would require a new trial. Accordingly, we reverse the trial court's ruling on the alleged Brady violation and remand to the trial court for an evidentiary hearing on this issue.

Muhammad v. State, 603 So.2d 489 (1992).

An evidentiary hearing was held June 12 and June 13, 2000. On September 1, 2000, Mr. Muhammad filed his Motion to Amend the Pleadings to Conform with the Evidence (PCR V. 5 at 765-769) and the parties submitted written closing arguments (PCR V. 5 at 770-903). On May 8, 2001, Judge Chance, who presided over Mr. Muhammad's trial in 1982, and originally sentenced Mr. Muhammad to death, entered his Order Granting Motion for Post-Conviction Relief in Part, vacating the death sentence and found that a new sentencing hearing was required (PCR V. 1, 904-911). The State appealed and Mr. Muhammad hereby responds to that appeal and cross appeals.

At the evidentiary hearing the following was presented:

**LOUIS E. "PETE" TURNER**

The first witness called at the hearing, Louis E. "Pete" Turner, the Department of Corrections ("DOC") investigator who led the investigation into the death of Officer Burke, authenticated the documents at issue, establishing that they, in fact, were the fruits of DOC's investigation (the very interviews with inmates and correctional officers that Mr. Muhammad has both sought and alleged were withheld for approximately 20 years)(PCR V. 6 at 7 et seq. and Defendant's Exhibits 1 and 2.

Additionally, and in the process of identifying the documents, Mr. Turner identified typed transcripts of taped statements which bore the notation "inaudible" in several places and for which no tapes were in his possession. (PCR V. 6 at 19-20).

**STIPULATION**

The State stipulated to undersigned's representation that Mike Chavis, former CCR investigator, "would testify that he received each document counsel has already had marked as a composite exhibit through the public records process. . .in lieu of him having to come down." (PCR V. 6 at 59-60).

**DARRYL BREWER**

Darryl Brewer, a former death-row correctional officer whose knowledge of Mr. Muhammad's mental state at the time of Mr. Burke's death came to light via the withheld documents, was called by Mr. Muhammad as a witness (PCR V. 6 at 38 et seq.) He testified that he worked on death row for his entire tenure at Florida State Prison,

that he was there on the evening of Mr. Burke's death, and that he was able to observe Mr. Muhammad afterwards (PCR V. 6 at 39). Mr. Brewer testified that Mr. Muhammad "had a different look than he did before." (PCR V. 6 at 39). That Mr. Muhammad looked noticeably different than when Mr. Brewer had seen him before and that his eyes were big, "large and scary like...real large." (PCR V. 6 at 39-40).

Finally, Mr. Brewer testified that, during trial, he was present in the courtroom after testifying in the original action and that the courtroom was "around eighty percent" full of DOC personnel in uniform (PCR V. 6 at 40).

**ARTHUR JONES**

Arthur Jones, an inmate with knowledge of the events of the day that Mr. Burke was killed who was discovered through the DOC documents ultimately disclosed to Mr. Muhammad during postconviction testified on behalf of Mr. Muhammad (PCR V. 6 at 42 et seq.). Mr. Jones knew Mr. Muhammad for at least six years before Mr. Burke was killed<sup>3</sup> Mr. Jones testified that, on the day of Mr. Burke's death, Mr. Muhammad's "whole person, he was just changed.... He just wasn't the same person he be [sic] every day." (PCR V. 6 at 43-44).

**LENSON HARGRAVE<sup>4</sup>**

Lenson Hargrave, testified he knew Mr. Muhammad from 1975-1980 was the occupant of the cell next to Mr. Muhammad's for more than a

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<sup>3</sup> Mr. Jones testified that he knew Mr. Muhammad from "the street," before Mr. Muhammad landed on death row. (PCR V. 6 at 43).

<sup>4</sup> It should be noted that Mr. Hargrave is incorrectly referred to in the transcript as "Linson Hardgrave."

year before, and testified that on the evening in 1980 that Mr. Burke was killed, he had knowledge of Mr. Muhammad's mental state on the evening Mr. Burke was killed (PCR V. 6 at 47 et seq.)

Mr. Hargrave first testified as to the treatment Mr. Muhammad received from the guards on death row, stating that the guards would give Mr. Muhammad "a hard time whenever they could...unplugging his TV, writing him frivolous DRs, beating him, going in his cell, forcibly pulling him out, sometimes using excessive force." (PCR V. 6 at 48-49).

Mr. Hargrave testified to Mr. Muhammad's behavior leading up to the time that Mr. Burke was killed, stating that, "he was in his cell pacing back and forth and talking to himself" from about 10:30 a.m. until about 6:00 p.m. (PCR V. 6 at 49). Mr. Hargrave testified that this was not how Mr. Muhammad normally acted, that, "[n]ormally he was very quiet, did his law work, said his prayers, and he would--if somebody talked to him he would talk back to them." (PCR V. 6 at 49-50).

As for the events immediately following Mr. Burke's death, Mr. Hargrave testified:

I saw Mr. Muhammad in the--in the hallway outside my cell, and he looked--I saw Officer Burke laying on the floor and Inmate Askari was standing outside my cell, and he looked like he was in left field someplace.

And I looked down at Officer Burke again and I looked at Askari, and he just didn't seem to know where he was at, know who--know what was going on.

I heard Officer--not officer but Sergeant Owens come on the tier, and he called him, he said, "Thomas," and Askari kept looking at me. And Owens called him again, he said, "Thomas,

Thomas," he said, "You and I have never had no trouble, put down the knife and come with me."

At that time Askari kind of frowned and he looked down in his hand and he dropped the knife and walked off with Sergeant Owens.

(PCR V. 6 at 50-51).

**BOYD McCASKILL**

Boyd McCaskill, whose contact with Mr. Muhammad the evening that Mr. Burke was killed only came to light through the withheld documents, testified next. (PCR V. 6 at 56 et seq). He saw Mr. Muhammad shortly after Mr. Burke died and his description of Mr. Muhammad, like those of Mr. Hargrave, Mr. Jones, and Mr. Brewer, painted a far more vivid picture than the documents available at the time of Mr. Muhammad's trial (e.g., depositions). He testified:

He was looking all wild and crazy, you know. I asked him, I said, "What's wrong?" He looked like he was having a seizure or something. He was groaning real hard. So he never did respond to let me know what was wrong, you know, but I knew to back off. I don't think he was pretty much all there....

Mr. McCaskill finished by stating that this was a change from when he had previously seen Mr. Muhammad (PCR V. 6 at 56-58).

**BRAD FISHER, Ph.D.**

Dr. Brad Fisher, testified on behalf of Mr. Muhammad as an expert clinical forensic psychologist. In addition to reviewing the withheld documents and Mr. Muhammad's psychological background materials to assess their import *vel non*, Dr. Fisher examined Mr.

Muhammad in 1979, only months before the death of Mr. Burke.<sup>5</sup> (PCR V. 6 at 67-72).

Dr. Fisher testified as to his understanding--based upon court records, prison records, and interviews--of the events involving Mr. Muhammad during the early part of October 12, 2000. (PCR V. 6 at 74-75). He referred to "precipitating stresses" upon Mr. Muhammad, events of significant psychological import that lead to other, ultimate psychological events. Id.

Mr. Muhammad had a visit scheduled with his mother, a person who was very important to him and who had traveled a long distance to see him. Id. Correctional Officer Padgett approached Mr. Muhammad and ordered him to shave. Id. Mr. Muhammad asked for clippers since, for two reasons, he couldn't shave with a blade: 1) he had a skin condition and 2) religious doctrine. Id. Mr. Muhammad had a medical pass that allowed him to use clippers instead of a blade, but he was informed that it had expired and, furthermore, that there were no clippers available for him to use at that time. Id.

Mr. Muhammad was ordered to shave with a blade and refused, for the reasons stated above. Id. He was then informed that he was receiving a disciplinary report, that he would not be allowed to see his mother, and that he was being sent to Q Wing. Id. Dr. Fisher identified the "precipitating stresses" as having to shave with a blade, being denied a visit with his mother, receiving a disciplinary

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<sup>5</sup> It should be noted that Dr. Fisher examined Mr. Muhammad closer in time to the death of Mr. Burke than any other mental health professional.

report, and being sent to Q Wing (solitary confinement), where Mr. Muhammad had been sent in the past--as far back as when he was fifteen), stating that understanding these events--the "precedents"--provides insight to understanding the events later in the day culminating with the death of Mr. Burke. Id; Defendant's Exhibit 4.

Dr. Fisher then authenticated a videotape of Q Wing, Defendant's Exhibit 5, and described the "tomb"-like living conditions from which Mr. Muhammad was released only three times a week for a fifteen-minute shower for the ten-plus consecutive years he spent there, including the two during which he was preparing for his trial (PCR V. 6 at 77-83). Mr. Muhammad had only a twenty-watt light bulb--not enough to read by--and could only request two law books at a time while preparing for trial. Id. Finally, regarding Q Wing, undersigned introduced materials on solitary confinement upon which Dr. Fisher relied in coming to his expert opinions. Defendant's Exhibit E.<sup>6</sup> (PCR V. 6 at 8 ).

Dr. Fisher then discussed the significance of some of the Brady material, Defendant's Exhibit 2 (documents also contained in Defendant's Exhibit 1, the withheld material), a letter from L.E. Turner to Thomas Elwell (the original prosecutor on the case) with seven typed statements attached (PCR V. 6 at 86-88). Dr. Fisher described the import of these withheld statements, the "critical"

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<sup>6</sup> It should be noted that there was some confusion on the clerk's part regarding the marking of exhibits, hence, some defense exhibits are identified by number while others are identified by letter. See, e.g., (PCR V. 6 at 84; Index to Exhibits).

importance of having data from the time of the event he is studying in order to form an expert opinion. (PCR V. 6 at 88-89). The descriptions of Mr. Muhammad contained in the withheld documents-- descriptions of behavior that was unlike that of a sane person who had just killed someone--along the other material he had reviewed (e.g., Mr. Muhammad's history, interviews, etc.), led Dr. Fisher to conclude within a reasonable degree of clinical forensic psychological certainty that Mr. Muhammad suffered paranoid delusions frequently centering upon the Department of Corrections and attorneys that would have seriously limited Mr. Muhammad's ability to consult with and assist his attorney (PCR V. 6 at 91); that he could have "intelligently"<sup>7</sup> waived his right to an attorney but could not have done so "knowingly" (due to his delusional system of thought);<sup>8</sup> that being a delusional paranoiac had nothing to do with intelligence (that people suffering from such a mental disorder are frequently intelligent); but that Mr. Muhammad's paranoia prohibited him from making a "knowing" decision (PCR V. 6 at 94; PCR V. 6 at 137); and that the courtroom full of uniformed guards fed into Mr. Muhammad's

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<sup>7</sup> It is not unusual for a paranoid schizophrenic to be intelligent (PCR V. 6 at 92).

<sup>8</sup> During Dr. Fisher's testimony, the defense introduced Exhibit G, Judge Green's now-unsealed Recusal Order, illustrating that his anger toward the State in response to their unseemly practices prohibited him from any longer presiding over Mr. Muhammad's trial. The crux of the State's act was to accuse Mr. Muhammad of having a child with his attorney, Ms. Susan Cary, Esq. Dr. Fisher testified that this sort of behavior by the State would place reality in jeopardy with Mr. Muhammad while giving his paranoia a more strong foundation (PCR V. 6 at 94).

paranoia and caused Mr. Muhammad to waive his penalty phase jury. See Defendant's Exhibit H.

Based upon the information provided to Dr. Fisher (including, *inter alia*, the trial transcript, Judge Green's unsealed recusal appendix, Mr. Muhammad's prison and medical records, the Brady material, and the testimony of Mr. Brewer, Mr. Jones, Mr. Hargrave, and Mr. McCaskill) he concluded that--within a reasonable degree of clinical forensic psychological certainty--Mr. Muhammad suffered from a mental infirmity, disease or defect and that he did not know what he was doing was wrong on October 12, 1980; that he was under the influence of an extreme mental or emotional disturbance and that he was under extreme duress at the time; that his family background was "chaotic and difficult"; and that nothing in the materials led him to conclude that Mr. Muhammad had the ability to form the intent to torture. (PCR V. 6 at 97-101).

**FREDERICK REED REPLOGLE**

The next witness called by Mr. Muhammad was Frederick Reed Replogle, Mr. Muhammad's "stand-by" attorney at trial.<sup>9</sup> (PCR V. 6 at 157 et seq.). Mr. Replogle testified that, at Mr. Muhammad's trial, even though he was to be present during the course of the trial as standby counsel, he sat in the back of the courtroom and was "specifically directed not to have contact with the defendant." (PCR V. 6 at 159); see also 3.850 Motion, Volume II, Appendix 36

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<sup>9</sup> The fact that Mr. Muhammad was provided standby counsel was relied upon by this Court in upholding Mr. Muhammad's conviction. Muhammad v. State, 494 So.2d 969 (Fla. 1986).

(Affidavit of Mr. Replogle). Mr. Replogle further testified that "there were quite a few correctional staff" in the courtroom during the trial, known to him "as correctional staff because of their wearing uniforms." (PCR V. 6 at 161).

**STEPHEN BERNSTEIN**

Mr. Muhammad called Stephen Bernstein, Mr. Muhammad's one-time counsel in this case, appointed to represent him by Judge Green. (PCR V. 6 at 165 et seq.). Mr. Bernstein elaborated on the "precipitating stresses" present for Mr. Muhammad on the day of October 12, 1980, pointing out that Mr. Muhammad's mother was elderly and had to travel a long way under difficult conditions to come see her son(PCR V. 6 at 166-67).

Mr. Bernstein testified that his theory of Mr. Muhammad's case was that Mr. Muhammad "had a previously diagnosed mental condition, that that condition was aggravated by being on death row, by being in the circumstances he was in, by the events that happened [on October 12, 1980]."

Mr. Bernstein authenticated his discovery request in this case, Defendant's Exhibit 10, and perused Defendant's exhibit 1. (PCR V 6 at 169-170; 171. Regarding Defendant's Exhibit 1, the withheld material, and the portion of it entered into evidence as Defendant's Exhibit 2, Mr. Bernstein testified that he was not provided them during the course of discovery (PCR 6 at 172). Regarding the statements describing Mr. Muhammad, he testified that "that would be exactly the type of information that you would want to furnish and that the psychiatrist would request." (PCR V. 6 at 172-73). Mr.

Bernstein further testified that he had not received handwritten notes of guards contained in Defendant's Exhibit 1. (PCR V. 6 at 173).

When asked the import of the withheld materials, Mr. Bernstein stated:

It would be useful in presenting the insanity issue. It's useful in, first of all, giving adequate factual predicate information to the experts who would later form an opinion as to whether [Mr. Muhammad] was competent and whether he was sane, two different issues. And then also in a death penalty case, whether the mitigating circumstances would be supported by facts.

And again, specifically why I gave information to the experts, I gave them copies of the jury instructions that pertained to the mitigating circumstances so that they knew exactly what the law would advise the jury about so they would know what to look for factually and see if they could provide testimony that would support that.

(PCR V. 6 at 174-175). He also pointed out that the withheld statements might also have altered the Court's decision to let Mr. Muhammad represent himself (PCR V. 6 at 188).

Mr. Bernstein stated that he would "[c]ertainly" have tried to develop and use information from a mental health expert who, based upon the withheld documents and the evidence to which they led, found that Mr. Muhammad was not competent to stand trial, waive counsel, waive mitigation, or waive his penalty phase jury, "especially in this case, because Askari elected not to cooperate in the interview process by the experts," (PCR V. 6 at 175), later pointing out that mental illness affects a client's ability to cooperate. (PCR V. 6 at 201). He added that, since some of the statements were from guards,

they were of greater value for evaluating Mr. Muhammad because they would likely be found more credible. (PCR V. 6 at 176).

Mr. Bernstein also pointed out about the withheld materials, that important information was withheld from him, and thus he doesn't know what else had been withheld from him (PCR V. 6 at 201).

After reiterating by several examples the import of the withheld information and going on to point out the State's strenuous efforts at trial to defeat any strategy calling into question Mr. Muhammad's mental health, Mr. Bernstein testified that Thomas Elwell, the original prosecutor's, reputation for telling the truth is not good. (PCR V. 6 at 179-80).

**BILL SALMON**

Mr. Muhammad's final witness was Bill Salmon, a long-time criminal attorney who was accepted by the Court as an expert as to defense strategy and what would have been done with the withheld documents by a reasonably competent attorney and the consequences of the State's failure to disclose the evidence at trial (PCR V. 6 at 203-204 et seq.).

Upon reviewing the record in this case and the withheld documents, Mr. Salmon offered his expert opinion as to whether the lack of the undisclosed materials would have had an effect on a reasonably competent attorney preparing for trial, stating:

in the context of the case, as I understand it from my review of the record, mental issues were a prominent facet of this case from the beginning, and certainly from all indications, it appeared to be where a defense of Mr. Muhammad was headed until that was changed later on, as the record also reflects.

I believe that had reasonably competent defense counsel had each of the documents that I have reviewed, it would have affected almost every phase of this prosecution, including pretrial decisions to be made by Mr. Muhammad, decisions to be made by his counsel, decisions to be made by this Court with regard to findings of competency, and perhaps as fundamental as the very defense that would have been used in this case.

(PCR V. 6 at 207-208).

Mr. Salmon testified that, pretrial, it would be of heightened importance to get the withheld documents to "qualified experts who could use them in their assessment. . .both in regard to competency to proceed as his counsel and ultimately a defense at trial," and, if the experts opined that mental health was at issue in these regards, a reasonably competent attorney "would have moved. . .to have the Court make an initial determination of [Mr. Muhammad's] competency to assist counsel and his competency to proceed to trial." (PCR V. 6 at 208).

Additionally, Mr. Salmon testified that, in his expert opinion, the withheld materials would have availed defense counsel of impeachment materials vis-a-vis the State's opening, closing, witness testimony, and "the major issue for conviction for capital murder in this case, that being premeditation." (PCR V. 6 at 209-213). He identifying those documents that would be useful for impeachment of individual State witnesses and the State's case as a whole, and those that would be of use regarding mental health issues, identifying useful, material differences between the withheld statements and those provided prior to trial (e.g., depositions, etc.). (PCR V. 6

at 209-220; 222-228).

Further, Mr. Salmon cited the portion of the trial record wherein Mr. Elwell, the prosecutor at trial, was asked by the Court if he had any employee statements in his possession and Mr. Salmon pointed out that Mr. Elwell responded, "Flatly that, 'There are none, your Honor, there are no statements relative to the defendant made by employees.'" (PCR V. 6 at 221-222 (referring to pages 25-27 of the October 11, 1982, 1:30 p.m. session trial transcript). He later sums up his expert opinion regarding the prosecutor's conduct:

I don't know what may have been going through Mr. Elwell's mind at the time or what might have motivated him to say that, but he certainly has an obligation as a representative of the state to accurately respond to very specific questions asked of him by the Court, and it seems to me that he doesn't want [the statements] found. He doesn't want to say anything that is going to acknowledge that there may be undiscovered and potentially impeaching, if not exculpatory, reports [un]disclosed. He wants to try to shut that down. I don't know why he would do that. You'd have to ask him. . . . I don't know that there is any logic to it. The reports were there, obviously.

(PCR V. 6 at 264-265).

Finally, Mr. Salmon testified that, in his expert opinion, failure to disclose the materials would disadvantage a layperson even more than a professional lawyer, especially one in Mr. Muhammad's situation, i.e., locked up on Q Wing without free access to legal source materials. (PCR V. 6 at 229).

#### **JUDICIAL NOTICE**

At the close of the hearing, the Court took judicial notice of

several items and accepted them into evidence. (PCR V. 6 at 269 et seq.). Defendant's Exhibits 14 (records from the case of VanPoyck v. Barton and Thornton (dealing with conditions on Q Wing)), 15 (excerpts from Costello v. Wainwright (dealing with mental health issues in Florida prisons)) and 16 (Florida Bar disciplinary records of Thomas Elwell). Also, the Court allowed undersigned to submit, after the close of the hearing, the appellate proceedings in Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994).

#### **SUMMARY OF ARGUMENTS**

1. Due to the State's withholding of Brady<sup>10</sup> evidence, Mr. Muhammad was deprived of an adversarial testing pre-trial and at the guilt phase which resulted in numerous constitutional violations rendering Mr. Muhammad's conviction constitutionally infirm. In his Order granting Relief in Part, Judge Chance found that he did not have the information contained in the Brady material to consider at trial and that this had a prejudicial affect upon Mr. Muhammad's penalty phase. Judge Chance, however, did not analyze the impact of the withholding of the Brady material as it pertained to pre-trial proceedings or the guilt phase. This was error. Judge Chance's finding of historical fact that he did not have the information at trial to consider is to due deference by the Court and should not be disturbed on appeal. Under a full Brady analysis however, Mr. Muhammad is entitled to guilt phase relief as well, as there was substantial competent evidence adduced below that the information

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<sup>10</sup>Brady v. Maryland, 373 U.S. 83 (1963).

contained within the Brady evidence, by itself, and in conjunction with other evidence, undermined confidence in the outcome of Mr. Muhammad's guilt phase.

The State's theory at trial was that Mr. Muhammad stabbed Corrections Officer Richard Burke while having full control of his mental faculties, knowledge of what he was doing, and had the intent to commit-first degree premeditated murder. No evidence of Mr. Muhammad's mental state was introduced at Mr. Muhammad's trial. Information regarding Mr. Muhammad's mental state and demeanor prior to, during, and after the offense would have challenged and defeated the State's case of first degree pre-meditated murder as well as death. Judge Chance found the evidence presented at the evidentiary hearing showed that Mr. Muhammad was "not in his right mind at the time of the murder" (PCR V1. 906). Thus, this evidence is relevant to, and material to pre-trial and guilt phase issues, for example, competency to proceed, the insanity defense, and Mr. Muhammad's decision to proceed *pro se*. Consequently, the lower court erred in failing to analyze the impact of the Brady evidence regarding the pre-trial issues and the guilt phase. Additional constitutional violations occurred resulting in multi-fold prejudice to Mr. Muhammad as a result of the State's failure to disclose the Brady evidence including ineffective assistance of counsel, ineffective assistance of mental health experts and an invalid waiver of counsel. At most, Mr. Muhammad is entitled to a new trial; at a minimum, he is entitled to an evidentiary hearing on the issues and to cumulative consideration of all the errors alleged in his motion as they pertain

to pre-trial proceedings and the guilt phase.

2. The lower court's order granting a resentencing should be affirmed in all respects. The findings of historical fact made by the lower court (Judge Chance) that the sentencer (Judge Chance) did not have the information contained within the Brady evidence is fully supported by competent and substantial evidence, as is the finding of prejudice. The lower court properly determined, in accordance with the evidence presented and the law that in the interests of justice Mr. Muhammad's death sentence could not stand (PCR V1 911) and constitutionally infirm.

Competent substantial evidence (as well as un-refuted evidence) adduced at the evidentiary hearing, through expert and lay witness testimony, as well as documentary evidence, overwhelmingly established that evidence of substantial statutory and non statutory mitigation was withheld by the State and not considered by Judge Chance during his original sentencing determination resulting in prejudice to Mr. Muhammad. Judge Chance's finding of prejudice should be treated as finding of fact because it was Judge Chance alone who originally sentenced Mr. Muhammad to death who has now heard the evidence, and who has now determined that the sentence he originally imposed was a improper. Thus, that finding should not be disturbed on appeal.

The prejudice to Mr. Muhammad was also established by numerous factors not specifically addressed by the lower court, which although not considered, should have been, and further support Judge Chance's finding of prejudice. Additionally, even assuming *arguendo* the State

did not withhold the evidence, Eighth Amendment error occurred rendering Mr. Muhammad's death sentence unconstitutional due to the fact that statutory and non statutory mitigating evidence was not considered by Judge Chance. Judge Chance's finding that the resulting death sentence was a miscarriage of justice is supported both in fact and law.

In sum, the lower court's order granting a new sentencing phase is fully supported and should be affirmed.

#### **STANDARD OF REVIEW**

The lower court made findings of fact and thus this Court should defer to the lower court's factual findings. Rogers v. State, 782 So. 2d 373, 377 (Fla. 2001) and not disturb those findings unless the lower court abused its discretion. Questions presenting mixed issues of law and fact are to be reviewed de novo. Stephens v. State, 748 So. 2d 1028 (1999).

#### **ARGUMENT I**

##### **MR. MUHAMMAD WAS DEPRIVED OF AN ADVERSARIAL TESTING PRE-TRIAL AND AT THE GUILT PHASE DUE TO A COMBINATION OF CONSTITUTIONAL ERROR RESULTING IN MULTI-FOLD PREJUDICE TO MR. MUHAMMAD.**

The same evidence that mandates that a new sentencing phase be held equally mandates that Mr. Muhammad be granted a new trial. The lower court however, did not consider the impact of the Brady evidence upon the guilt phase. Nothing in this Court's review supports the lower court's failure to address the Brady claim as it pertains to the guilt phase.

#### **A. Brady Violation**

Mr. Muhammad's 3.850 motion alleged (among other things) specific violations of Brady v. Maryland, 373 U.S. 83 (1963).<sup>11</sup> After summary denial of Mr. Muhammad's Rule 3.850 motion, this Court remanded the matter to the trial court:

In this case, Muhammad alleges that despite his repeated requests for discovery the State suppressed exculpatory statements of prison employees who witnessed the offense. He further alleges that the State insisted that it had no such statements, when in fact there were such employee statements. Muhammad contends that these statements contained exculpatory information regarding his mental state at the time of the offense, and that he was denied his right to effectively cross-examine witnesses against him based on the statements. Because the trial court believed that this point was inappropriate to a rule 3.850 proceeding, it did not address the merits of whether the alleged Brady violation would require a new trial. Accordingly, we reverse the trial court's ruling on the alleged Brady violation and remand to the trial court for an evidentiary hearing on this issue.

Muhammad v. State, 603 So.2d 489 (1992). No where in this Court's remand is there an instruction to the lower court that materiality of the Brady evidence was only to be considered regarding penalty phase issues, nor would such a limitation have been supported in law. See e.g. Garcia v. State, 622 So. 2d 1325 (1993)(applying Brady evidence with equal force to both guilt and penalty phase issues); Young v. State, 739 So. 2d 553 (1999). The lower court analyzed the Brady evidence only as it regarded the penalty phase: "the issue

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<sup>11</sup>Mr. Muhammad also filed his Motion to Amend the Pleadings to Conform with the Evidence which requested the court to address other claims raised in the 3.850 motion, which the court did not do (**PCR V. 765-769**).

becomes what impact, if any, this information would have had on the sentencing court's decisionmaking [sic] process" (PCR V. 1 at 909 ). Because no determination was made regarding the impact of the Brady material upon the pre-trial proceedings and guilt phase allegations, the facts must be taken as true for purposes of determining not only their individual merit, but also whether the cumulative effect of the evidence not known to Mr. Muhammad's jury deprived him of a reliable and fair trial. Kyles v. Whitley, 514 U.S. 419 (1995); Lightbourne v. State, 742 So. 2d 238 (Fla. 1999); Young, 739 So. 2d at 553.

#### **B. The Brady Material**

The judge, jury, Mr. Muhammad's trial counsel, and Mr. Muhammad were deprived of significant exculpatory evidence pre-trial and during the guilt/innocence phase of Mr. Muhammad's trial bearing upon a critical fact -- Mr. Muhammad's mental state at the time of the offense. During the post conviction process, counsel for Mr. Muhammad came into possession of a letter dated **June 2, 1981** by Prison Inspector L.E. "Pete" Turner to the prosecutor, Thomas Elwell to wit:

**Pursuant to your request**, I have **re-interviewed** and received statements from those personnel who had the closest contact with KNIGHT immediately following his alleged attack on Officer Richard Burke, October 12, 1980.

(Defense Exhibit 1)(emphasis added). Those statements contained the following evidence, material to Mr. Muhammad's mental state:

At approximately 9:26Am on October 12, 1980, I was advised that KNIGHT, Thomas, B/M, DC#017434, had a visitor here to see him. I advised KNIGHT, Thomas approximately 9:45 AM he had a visit; I also told him he had to shave to

comply with State Rules and Regulations. He said he could no [sic] shave with a razor nor could he use shaving powder; he said he need [sic] the barber clippers to shave. I asked him if he had a shaving pass; he said No. I gave him a direct verbal order to shave. KNIGHT then stated, "well, it looks like I'll just have to start sticking people." **During this conversation with KNIGHT, in my opinion, he never got what I call hostile but very disturbed (upset).** I notified the hall Sergeant and explained the situation with Inmate KNIGHT.

\* \* \*

The date October 12, 1980, I arrived at the exit area from where Inmate KNIGHT, Thomas, was being escorted by Officers unknown by me at this time. I observed inmate KNIGHT as having on a pair of boxer shorts and a pair of shower slides. **I also observed his facial expression and it appeared to say I've done something terrible, his eyes appeared to be stretched at an unusual size.** Inmate KNIGHT responded to all verbal orders and cooperated without having to be forced. Inmate KNIGHT appeared as if had nothing to worry about, and if he had the chance, he would do it all again. KNIGHT's facial expression showed no regrets and no remorse.

\* \* \*

At approximately 6:00 PM, October 12, 1980, while working L-wing, I heard a call for assistance from R-Wing. I ran to R-Wing and onto the R-2-S row. Sergeant H.J. Owen was kneeling over Officer Burke when I got down there, inmate KNIGHT, Thomas, DC#017434, B/M. was standing in front of cell 5. I went back to the grille gate and told other Officers to get the MT down there. I then went back to Sergeant Owen and Officer Burke. **Inmate KNIGHT then came down and was looking down at Officer Burke with a blank expression on his face.** I then ordered him off the row. When I ordered him off the row, at this time he looked at me like "there ain't nothing you can do" and then started down the row toward the grille gate. He did not say anything that I can recall all

the way off the row and I turned him over to Lieutenant Long, where I seem to recall him saying something but I cannot remember what it was as I was grabbing the stretcher and going back down the row. At no time did inmate KNIGHT appear not to know what was happening or where he was at, his responses to all orders given him were responded to without question or delay.

\* \* \*

On October 12, 1980, at approximately 7:00 PM, this Writer, during the investigative procedure regarding the death of Officer Burke, did participate in the initial contact of the suspected person, Thomas KNIGHT, who was Mirandized. Inmate KNIGHT was observed by this Writer to be emotionally calm, during questioning, and continually projected full control of his replies and displayed a mannerism which was polite and exact.

\* \* \*

On October 12, 1980, Inmate KNIGHT, Thomas DC# 017434, B/M, was brought into the Colonel's office area. After being charged with the murder of Correctional Officer R.J. Burke, Inmate KNIGHT was in good self-control, calm collected, and knew exactly what he was doing. Inmate KNIGHT appeared to have no remorse for the killing of Officer Burke. When Inmate KNIGHT was charged, he did not appear to be surprised. This Writer has a tape recording of an interview with inmate KNIGHT on October 12th.

\* \* \*

When I observed inmate KNIGHT, Thomas, DC #017434 at the time Officer Burke was killed, as I was approaching where KNIGHT was stabbing Officer Burke. I ordered inmate KNIGHT to leave Officer Burke alone. Inmate KNIGHT got up off his knee and backed away from Officer Burke. Inmate KNIGHT, to me, acted like he was completely in control of his actions at this time. Inmate KNIGHT said nothing in my presence. I think that Inmate KNIGHT knew what he was doing. Because earlier that day, he had threatened to kill the first Officer he came

into the contact with. I think Inmate KNIGHT had planned the whole crime in advance.

\* \* \*

At approximately 6:55 P.M., October 12, 1981, you and myself proceeded to the FSP Confinement area holding cell. The purpose of our visit was to attempt to interview inmate KNIGHT regarding the death of COI Richard Burke.

Inmate KNIGHT was verbally advised of his rights and declined to make a statement.

My observations of KNIGHT at the time he was Mirandized indicated the inmate to be alert, coherent, and in control of all faculties. KNIGHT displayed no evidence of agitation or, remorse.

(Defense Exhibit 1)(emphasis added).

Investigation conducted based upon the evidence learned from the Brady material, revealed that additional observations of Mr. Muhammad's behavior and demeanor existed that were never disclosed. At the evidentiary hearing, Mr. Muhammad presented the Brady material, testimony of a prison guard and inmates who observed Mr. Muhammad before, during, and after the offense. As the lower court found:

[the]Defendant put on a number of witnesses who testified that Defendant appeared not to be in his right mind just before and after the murder. Correctional officer Darryl Brewer testified that he saw Defendant after the murder.[He] testified that he saw Defendant after the murder, and that Defendant had a much different look about him than normal. Brewer stated that "his eyes was [sic] big and to me he looked scary . . . [His eyes were] kind of large and scary like, I mean, real large." Inmate Lenson Hargrave noticed that Defendant "looked like he was in left field someplace, and testified that during the afternoon of the incident, Defendant was in his cell "pacing

back and forth and talking to himself."

Boyd McCaskill, another inmate who encountered Defendant the day of the murder, emphasized that he had never seen Defendant in such a state: "[Defendant] was in undershorts and all. He was looking all wild and crazy, you know. I asked him, I said, "What's wrong?" He looked like he was having a seizure or something. He was groaning real hard. So he never did respond to me to let me know that what was wrong, you know, but I knew to back off. I don't think he was pretty much all there. . . .

(PCR V. 6 at 906-07)(emphasis added)(internal citations omitted).

Mr. Muhammad was convicted of killing Correctional Officer Richard Burke on R-Wing at Florida State Prison when Officer Burke escorted Mr. Muhammad to be showered. Earlier that day, Mr. Muhammad was refused a visit with his mother whom he had not seen in years when he would not use a razor to shave for the visit believing he had a medical pass which would have allowed him to use a clippers instead due to a skin condition. In response to Mr. Muhammad's position regarding the razor, the guards would not allow Mr. Muhammad his visit, gave him a disciplinary report, and informed him that he would be transferred to Q-Wing, an isolation cell. The State's theory at trial was that Mr. Muhammad had the intent to, and did commit first-degree premeditated murder of Officer Burke.

Mr. Muhammad's only defense to the alleged murder of Officer Burke was insanity. The traditional defenses, alibi, mistaken identity, voluntary intoxication, were inapplicable by virtue of the security protocol for inmate showers on R-Wing. Mr. Bernstein, Mr. Muhammad's one-time lawyer who was permitted to withdraw from the case before trial, raised the issue of insanity and sought expert

assistance. As Mr. Bernstein, testified at the evidentiary hearing however, the trial court precluded **any** evidence of insanity<sup>12</sup> (PCR V. 6 at 175). He was never provided the withheld materials and thus was never able to provide that evidence to the court to further establish the applicability of the insanity defense, nor did he have the Brady material to provide to experts to further establish the insanity defense, nor was he even able to discuss the importance of such evidence with his client -- Mr. Muhammad (PCR. V. 6 at 167). Furthermore, he did not have the Brady evidence from which to conduct additional investigation that would have led to additional exculpatory evidence. The factual circumstances -- location of the offense, the eyewitnesses, the factual impossibility that another could have committed the alleged crime, would lead "reasonably competent attorney[s]" to the conclusion that insanity was the only viable defense to the instant charge as Mr. Bernstein and Mr. Salmon testified to at the evidentiary hearing (PCR. V. 6 at 172-75).<sup>13</sup> See also, McMann v. Richardson, 397 U.S. 759 (1970).

Mr. Bernstein testified to the significance of the

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<sup>12</sup> Of course the effect of this ruling was to relieve the State of its burden to rebut the presumption of insanity. Such burden shifting, by a Circuit Court Judge, when viewed from the vantage point of equal protection, is constitutionally repugnant. State v. Ex Rel Boyd v. Green, 355 So. 2d 789, 792 (Fla. 1978). See also Mulaney v. Wilber, 421 U.S. 641 (1975).

<sup>13</sup> Likewise, Mr. Muhammad's prior counsel, Susan Cary, spoke to Mr. Muhammad only minutes after the alleged offense and visited with him within 24 hours of Officer Burke's death. She reached similar conclusions regarding Mr. Muhammad's insanity. (See Appendix 26 to Rule 3.850 motion).

circumstances present on the day of the offense, pointing out that Mr. Muhammad's mother was scheduled to visit Mr. Muhammad that day, that Mr. Muhammad was denied the visit and that Mr. Muhammad's mental illness was significant with respect to those events (PCR V. 6 at 166-67). Any evidence tending to detail Mr. Muhammad's behavior was critical. He further testified that his theory of Mr. Muhammad's case was that Mr. Muhammad " had a previously diagnosed mental condition, that that condition was aggravated by being on death row, by being in the circumstances he was in, by the events that happened [on the day officer Burke was killed]." (PCR V. 6 at 167). Defense counsel Bernstein was very concerned and aware of Mr. Muhammad's history of bizarre behavior and findings by two Florida Circuit Judges of incompetency to waive counsel and proceed *pro se* only months prior to trial (PCR V. 6 at 166, 174-75, 188-89; Appendix 6 to Rule 3.850 Motion). Mr. Bernstein raised the issue of competency and sought expert assistance. He was never provided the withheld materials and thus was never able to provide that evidence to the court to further argue that Mr. Muhammad was incompetent and should not have been allowed to proceed *pro se*, nor did he have the Brady material to provide to experts (including Dr. Amin, upon whom the court relied to make a competency determination)<sup>14</sup>, to further establish that Mr.

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<sup>14</sup> The competency hearing itself was fatally flawed. The hearing was not recorded and conflicting evidence exists as to whether the hearing addressed Mr. Muhammad's right to present an insanity defense or his competency to stand trial (See. Appendix 28 to Rule 3.850 motion). No testimony was taken at the hearing. It should be noted that the prior Judge, Judge Green had already found Mr. Muhammad incompetent.

Muhammad was incompetent to proceed and to waive counsel; Mr. Bernstein was also unable to even discuss the importance of such evidence with his client -- Mr. Muhammad -- or to conduct further investigation (PCR. V. 6 at 172-75). Instead, Mr. Muhammad and Mr. Bernstein, due to the State's suppression of evidence, were uninformed and deprived of any opportunity to make informed decisions -- whether that decision was regarding waiver of counsel, decisions as to defense strategy, waiver of penalty phase jury and presentation of mitigating evidence. Mr. Muhammad was allowed to proceed *pro se*, in spite of his mental illness and without material exculpatory and impeachment evidence.

Specifically, Mr. Bernstein testified that he was not given the withheld documents contained in Defense Exhibits 1 and 2. (PCR V. 6 at 172-73). Regarding the statements describing Mr. Muhammad's demeanor and behavior as documented in this material, he testified "that [it] would be exactly the type of information that you would want to furnish and that they were the type a psychiatrist would request." (PCR V. 6 at 172-73). Mr. Bernstein testified regarding the import of the evidence as it pertained pre-trial and to the guilt phase:

It [the Brady material] would be useful in presenting the insanity issue. It's useful in, first of all, giving adequate factual predicate information to the experts who would later form

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Additionally, since the Brady material was not provided to Mr. Bernstein or the mental health expert, Mr. Muhammad was denied his right to a competent mental health professional. See R. 3.850 Ake claim. Ake v. Oklahoma, 407 U.S. 68 (1985); Ragsdale v. State, 720 So. 2d 203 (Fla. 1998).

an opinion as to whether [Mr. Muhammad] was competent and whether he was sane, two different issues.

(PCR V. 6 at 174 175).

Mr. Bernstein also pointed out the withheld statements might also have altered the court's decision to let Mr. Muhammad represent himself (PCR V. 6 at 188). He further testified that he would "[c]ertainly" have tried to develop and use information from a mental health expert who, based upon the withheld documents and the evidence to which they led, found that Mr. Muhammad was not competent to stand trial, waive the insanity defense, waive counsel, waive mitigation, or waive his penalty phase jury, "especially in this case, because Mr. Muhammad elected not to cooperate in the interview process by the experts" (PCR V. 6 at 175), and pointed out that in his experience, mental illness affects a client's ability to cooperate (PCR V. 6 at 201). Thus, this evidence would have explained Mr. Muhammad's inability to cooperate with mental health experts -- important information to refute allegations that Mr. Muhammad was choosing to be difficult with the experts for no apparent reason. Mr. Bernstein highlighted the fact that since some of the statements were from prison guards, the evidence was of greater value for evaluating Mr. Muhammad because the guards would likely be found credible given the circumstances (PCR V. 6 at 176). Mr. Bernstein also pointed out the State's strenuous and successful efforts at trial to defeat his strategy of calling into question Mr. Muhammad's mental health (PCR V. 6 at 179-80).

The State's attitude was to resist [an insanity defense] . . . it is strongly indicated in that they moved to strike the defense because of lack of cooperation, and I think that clearly some of the interviews revealed that there must have been questioning, you know, was he calm, was he rational, so there was a concern for that issue, there was an awareness of that issue. There was an awareness because I announced that was what I was going to go look for in terms of asking that experts be appointed. So, I think that they clearly were trying to mount whatever information would combat any sanity issues.

(PCR V. 6 at 176-77).

The significance of the Brady material regarding Mr. Muhammad's trial was further established by attorney Bill Salmon, who Mr. Muhammad called as a legal expert and who was accepted as such by the lower court (PCR V. 6 at 204). Mr. Salmon reviewed Mr. Muhammad's case and the Brady evidence and offered his expert opinion as to the affect of the withholding of the statements describing Mr. Muhammad's demeanor and mental state at the time of the offense.:

. . .in the context of the case, as I understand it from my review of the record, mental issues were a prominent facet of this case from the beginning, and certainly from all indications, it appeared to be where a defense of Mr. Muhammad was headed until that was changed later on, as the record also reflects. I believe that had reasonably competent defense counsel had each of the documents that I have reviewed [Defense Exhibit 1], it would have affected almost every phase of this prosecution, including pretrial decisions to be made by Mr. Muhammad, decisions to be made by his counsel, decision to be made by this Court with regard to findings of competency, and perhaps as fundamental as the very defense that would have been used in this case.

(PCR V. 6 at 207-208). Mr. Salmon testified that as it pertained pretrial, it would be of heightened importance to get the withheld

documents to "qualified experts who could use them in their assessment . . . both in regard to competency to proceed as his counsel and ultimately a defense at trial," and, if the experts opined that mental health was at issue in these regards, a reasonably competent attorney "would have moved . . . to have the Court make an initial determination of [Mr. Muhammad's] competency to assist counsel and his competency to proceed to trial (PCR V. 6 at 208). In fact, the evidence presented at the evidentiary hearing demonstrated Mr. Salmon's point. At the evidentiary hearing, Mr. Muhammad presented the testimony of Dr. Brad Fisher, a clinical psychologist. Dr. Fisher reviewed the the information presented in the Brady material revealing the eyewitness observations of Mr. Muhammad's demeanor and mental state just prior to, during, and after the offense. Dr. Fisher testified at the evidentiary hearing that, in his opinion, Mr. Muhammad suffered from a mental infirmity, disease or defect and that because of his delusional condition, he did not know what he was doing or the consequences thereof, or did not know what he was doing was wrong (PCR V. 6 at 97). Dr. Fisher testified that the evidence was significant in successfully determining Mr. Muhammad's mental state at the time of the offense. Dr. Fisher testified as to the importance of the Brady material:

. . .as a psychologist, an important area of understanding a person and how they are functioning, particularly how they are functioning at a particular time, a critical time, oh, they exploded and is something, so you're looking at a particular event and time, is to ask those who were there. The people who were there were officers and other prisoners. So if this is a perfectly normal, rational,

non-mentally disturbed person, he might be able to give you a picture with a high degree of accuracy of what happened then.

There are some questions about -- voiced over twenty years, of mental concerns on the part of Muhammad Askari. Consequently, in a situation like this where you have a very tragic, horrible event, it would be critical to any psychologist in gathering information, trying to voice some sort of opinion from a psychological perspective about it, to say was there anybody else around and what did they think. So this is that.

(PCR V. 6 at 88-89)(emphasis added).

Dr. Fisher also explained the importance of considering the circumstances leading up to the event in conjunction with the Brady material in order to assess Mr. Muhammad's mental state at the time of the offense:

. . . .A murder is a rare event, and so you need to gather data to make a coherent attempt to explain it. I've already mentioned one of those things you would look at.

Another thing would be what I have already referred to as precipitating stresses. They could be anything from, oh, I was really drunk at the time or I caught my wife in bed with someone else to, in this case, in my opinion, I think the issue of how the whole not being able to visit with his mother cannot be excluded as helping to explain what was going on then.

Q. Okay. And would the same be true then as far as the conditions of Q wing, knowing he was going to be going there?

A. Yeah, I consider that all part of the same thing, that he's been there, he knows what it's like an he knows that that's where he's headed.

Q. Specifically now going back to those typed statements, when you read through those were -- was there any information in here which was important and helpful for you in coming to some conclusions regarding Askari Muhammad's mental state?

And what would those have been?

Q. Again, trying to be concise and isolate them, among them, there are really a couple of different things, one and here I'm not differentiating what was stated by a guard versus an officer, we have descriptions like a dazed look, a look as though his eyes were stretched, a blank look. So there's some bells ringing that something's going on there that wasn't typical.

But secondly, and this one may be harder to explain, but I put it in because I believe it, you have a consistent explanation that, oh, he was totally in control and totally calm.

Well, here's a person who's just been involved in a murder, he got denied a visit with his mother, who some might say big deal, it was a big deal to him, and he's going to Q wing for, you know, forever and a day, it strikes me as odd that he would be so, if indeed he was calm, not caring, I think is the words that were there.

So these things all struck me as something's--something's not right here, and this all comes from this data.

(PCR V. 6 at 89-91).

Dr. Fisher also testified regarding the significance attached to the fact that Mr. Muhammad was told he was going to Q-wing after he refused to shave and was denied his mother's visit. Dr. Fisher referred to Defense exhibit 5 (video tape of Q-Wing), where Mr. Muhammad was placed on October 12, 1980 and where he remained for nearly 11 years including the entire time he was preparing his own defense:

. . .he was allowed out of there only -- not for --and no recreation, no TV, no radio. Books didn't really matter because he could barely read with that light that was there.

The books had to be requested -- he couldn't go to the law library and get the books. If he had any books at all, he had to put in a request. I believe there are a

maximum of two that came from a person who went to the law library for him. But again, he said he couldn't read because of the light bulb.

(PCR V. 6 at 82).

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... he did get out . . . three times a week for five minutes for a shower, so that was his out of cell time.

(PCR V. 6 at 83).

Dr. Fisher also reviewed scholarly materials on solitary confinement contained in Defendant's Exhibit E and described the psychological stressor placed upon Mr. Muhammad due to the fact that he knew he was being sent to Q wing in relation to the events leading up to Officer Burke's killing. Mr. Muhammad knew what Q wing was like. Additionally, he was further punished with a DR, and was denied his mother's visit--all of these being significant factors placed upon a mentally ill individual -- these precipitating events to Officer Burke's death must be taken into account with the Brady material that includes eyewitness descriptions of Mr. Muhammad's strange behavior on the day Officer Burke died. An understanding of Q-Wing -- where Mr. Muhammad was told he was going -- is critical for proper cumulative assessment of Mr. Muhammad's state of mind at the time surrounding Officer Burke's death.

Had this evidence been presented with the eyewitness accounts of Mr. Muhammad's bizarre behavior, the applicability of the insanity defense could have been successfully argued to the court, presented and argued to the jury, and would have supported a jury instruction on the defense of insanity -- things Mr. Bernstein testified he would

have done if he had been provided the material (PCR V. 6 at 174-76). Instead, because of the non disclosure, the jury knew nothing regarding Mr. Muhammad's mental state at the time of the offense.

Dr. Fisher testified that Mr. Muhammad's mental health history was also important to take into account in conjunction with the Brady evidence in assessing Mr. Muhammad. Dr. Fisher described it in the following manner:

It is my belief that he is paranoid, most probably a paranoid schizophrenic. I have to underline that. I have made that statement as early as my evaluation of 1979, and it's been made of him as far back as, you know, 1970 by other doctors, and that the literature would support, as with alcoholism or any number of other disorders, that this is not something that you would expect to go away. You can be medicated for it, you can be treated for it, but it doesn't -- you wouldn't expect it to be there today and gone tomorrow.

\* \* \*

. . . From his delusion, he knew exactly what he was doing. He knew what he was doing but was not based on the same reality that we share, so that from our perspective he does not know what he is doing, but he knows what he's doing but it's based on what I am describing as a delusion.

(PCR V. 6 at 98).

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It is my opinion that on October 12th of 1980 he suffered from a serious mental illness.

(PCR V. 6 at 99)<sup>15</sup>.

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<sup>15</sup>Additional material relied upon by Dr. Fisher included a 1971 Northeast Florida State Hospital report that stated about Mr. Muhammad:

The Brady evidence revealing Mr. Muhammad's strange behavior at the time of the offense, alone, and in conjunction with other mental health evidence regarding Mr. Muhammad puts the case in an entirely different light. Because of the accounts contained in the Brady material describing Mr. Muhammad's mental state at the time of the offense, Dr. Fisher was able to opine that Mr. Muhammad was acting within his delusion, and the accounts of his demeanor supported that conclusion. That Mr. Muhammad was "not in his right mind" (as summarized by Judge Chance (PCR V. 1 at 906)) after being denied his visit with his mother is also supported by evidence that Mr. Muhammad's mental health problems centered partly around his mother (Def. Exhibit 4; See Appendix 25 to Rule 3.850 motion; Northeast Florida State Hospital records).

Had the Brady evidence been disclosed it could have been presented at trial along with evidence (introduced at the evidentiary hearing) that reveals that Mr. Muhammad had a long history of mental illness recognized by numerous doctors, that mental illness runs in Mr. Muhammad's family and evidence indicating a head injury, psychosis, previous prescription for antipsychotic medication,

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

(emphasis added).

hallucinations, suicidal ideations, possibility of "temporal lobe type epilepsy", black outs, paranoia, schizophrenia, drug poisoning, organic brain damage, and unresolved oedipal sexual conflicts. (See Defense Exhibit 4).

Dr. Fisher also testified at the evidentiary hearing he reviewed materials that contained a high volume of doctor's evaluations:

He's been institutionalized on many occasions from the early ages, as early as age nine, again, being an adult prisoner at age fifteen. And the stays have not only been in prison but in places like Florida State Hospital.

These, and for whatever reasons, there are a bunch, I would say as many as fifteen to twenty doctors' evaluations relating to competency, relating to a particular court case, relating to different things dating back to 19-- well, I don't know if he had any in the record in '66, but they are definitely there dating back to '70. . . .

(PCR V. 6 at 70).

The Brady evidence alone, as well as in conjunction with other evidence, was critical to the only defense -- insanity -- available to Mr. Muhammad and casts Mr. Muhammad's entire case in a new light. Had the evidence been disclosed it would have made for a compelling case that Mr. Muhammad first, should not have been allowed to proceed *pro se*, and second, that Mr. Muhammad had a compelling insanity defense. The State's failure to disclose this evidence has undermined confidence in the outcome of the guilt verdict.

The non disclosure affected the trial in many other ways as well. The Brady material also constitutes impeachment evidence that was withheld from Mr. Muhammad. At trial, Mr. Muhammad attempted to

impeach the testimony of prison personnel with the information he had available. However, since Mr. Muhammad was deprived of the Brady material, he was never given the opportunity to use it, or even decide not to use it. The Brady material consists of material evidence that would have been extremely useful as impeachment evidence. (See PCR V. 6 at 211-12). Mr. Muhammad was prejudiced as a result of the State's suppression of this evidence. Mr. Salmon testified that in his expert opinion, the withheld material would have availed defense counsel of evidence to refute the State's opening and closing arguments for premeditation as well as provided valuable impeachment evidence: "the major issue of conviction for capital murder in this case, that being premeditation." (PCR V. 6 at 209-213). Mr. Salmon reviewed the withheld documents page by page identifying those that would be useful for impeachment of individual state witnesses and the state's case as a whole, and those that would be of use regarding mental health issues, identifying useful material differences between the withheld statements and those provided prior to trial (PCR V. 6 at 209-220; 222-228). Mr. Salmon also added that the withholding of the materials would disadvantage a layperson even more than a professional lawyer, especially one in Mr. Muhammad's situation, i.e., having been confined to Q-Wing at the time of his trial and without free access to legal materials. (EH 229). The law is clear that impeachment evidence must be disclosed under Brady, see United States v. Bagley, 473 U.S. 667 (1985), and the suppression does not need to be deliberate. Kyles v. Whitley, 514 U.S. 419, 432 (1995); Strickler v. Greene, 527 U.S. 263 (1999).

Dr. Fisher also testified regarding the issue of whether Mr. Muhammad had the ability in 1980 and 1981 to assist an attorney with a reasonable degree of rational understanding:

A. It is my opinion, and shared by many of the other doctors, that this is a paranoid person and delusional and that his paranoid delusions center around frequently the Department of Corrections and attorneys and this would have resulted in serious limitation in October of 1980 and in the months and even the couple of years that followed because these delusions persisted in these abilities on his part.

(PCR V. 6 at 91). Regarding Mr. Muhammad's ability to intelligently, knowingly or voluntarily waive his right to an attorney, Dr. Fisher testified:

A. Intelligently, yes. He's an intelligent man. Unfortunately, intelligence and his kind of mental disturbance, there's not a connection in my opinion. You can be smart and you can be paranoid. To be paranoid doesn't mean you're dumb.

So yes, he can do anything intelligently, but to your word knowingly, that means, in my mind, that he would have a similar reality base that you and I have and hopefully that we share. I don't believe he does.

He does believe, as I believe you and I do, that the door is brown. And if we ask many questions in that area we would have similar beliefs. But if you asked us about what is the role of the Department of Corrections or its attorneys, we would find great diversions, and in my belief he functions with delusional thinking there and did in 1980 and '81.

(PCR V. 6 at 91-92).

It was also proven at the evidentiary hearing that Mr. Muhammad suffers from severe paranoia (paranoid schizophrenia and at the very least paranoid personality disorder). Evidence admitted at the evidentiary hearing established that the State manipulated the

situation of Susan Cary's representation in order to have her removed from Mr. Muhammad's case, the one person Mr. Muhammad trusted<sup>16</sup>.

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<sup>16</sup>Judge Greene's Appendix to his Order of Recusal explains the circumstances for Ms. Cary's withdrawal from the case:

On October 13, 1980 this Court sat as a first appearance judge in this case in the absence of the County Judge of Bradford County. Because of the circumstances and notoriety of the case, and immediate appointment of counsel was deemed advisable. Joe Forbes, Esquire and Susan Cary, Esquire were appointed at first appearance. Apparently Ms. Cary had represented Defendant in a previous matter. She advised the Court that prior to the first appearance hearing she had been denied the right to consult with Defendant privately. Assuming the problem was one of security, I called Superintendent Strickland and reminded him of the right and need of the Defendant to consult with counsel privately. I believed the problem was alleviated and advised co-counsel accordingly. The Defendant and the attorneys left to return to Florida State Prison at which it was assumed the attorney/client consultation would continue. I later received a call from Forbes that private visitation was not being permitted. Accordingly the Order for Access was entered and served on Superintendent Strickland instanter.

During the day of the first appearance -- the hour is unclear, I received information from Department of Corrections personnel that the reason for the "visitation problem" was essentially the following: That Susan Cary, a Caucasian female, had conceived a child by the Defendant, Thomas Knight, a black male, while "attorney/client" consultations were taking place at Florida State Prison. The allegations were later embellished that they were "caught in the act" in the classification office at Florida State Prison. That this caused widespread embarrassment to the Department of Corrections and as a result, caused certain animosity toward Ms. Cary among Department of Corrections officers and personnel.

My memory does not serve whether this tale was first related by the officers who

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transported the Defendant to first appearance; the institutional investigator or Superintendent Strickland during the telephone conversation.

The tale seemed more a type of character assassination bred by resentment over the killing of Officer Burke or in resentment of Mr. Cary's previous representation of the Defendant than it seemed factual. I had misgivings as to why anyone would communicate such a story to the trial judge in a potential death case.

It also seemed to me extremely strange that in a case of such emotional intensity and public notoriety that the administration at Florida State Prison would allow anything to interfere with the Defendant's right to counsel unless those reasons were real and clearly related to the security of the institution and then only by following legal channels.

As developments continued, it came to my attention that Joe Forbes had moved to withdraw because of allegations of professional incompetence allegedly made by co-counsel Cary.

In the interim, the State moved this Court to discharge one of the appointed counsel for "legal " reasons. I have no knowledge of the motives for this motion but same was denied by the Court.

This Court received a telephone call from Susan Cary, Esquire, the night of the hearing on the Motion to Withdraw seeking information as to the result and reasoning. I related to her the foregoing. She expressed shock and disbelief of the allegations. She promptly and completely denied them. She also explained that the statements made about Mr. Forbes professional objectivity were relating to situational and resource considerations for investigation and preparation of Knight's defense and not as related to his competence as an attorney per se.

Ms. Cary expressed a desire to discuss the matter of the continuation of her representation with the Defendant prior to a decision. She asked for and received an oral extension of the time permitted for her responses in order to allow her sufficient time to complete the trial in south Florida and

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consult with the Defendant. She also expressed a willingness to assist the Court in the recommendation of successor lead counsel. Because of the notoriety of this case, I welcomed this and asked her to proceed.

In the interim, I contacted various counsel concerning appointment. Because of the facts of the case and the statutory maximum fee permitted several asked not to be appointed.

Ms. Cary appeared in chambers at [sic] few days later. She advised she had talked to Superintendent Strickland and shown him a certified copy of the decree of adoption of the child, who was biracial, which positively refuted the allegations. She advised further that under these circumstances she would prefer not to undertake representation of the Defendant as (sole) appointed counsel.

Accordingly, an order was entered appointing Stephen N. Bernstein, Esquire, effective January 1, 1981 (when he became available) and discharging Ms. Cary effective the same date.

Given the nature of the allegations against Ms. Cary concerning her relationship with the Defendant and the known resentment of her at Florida State Prison, I had doubts of her effectiveness as "lead" counsel for Defendant. If the "relationship" allegations were true, her professional objectivity could suffer and later precipitate a challenge to competency of appointed counsel in the event of a conviction. Further, if the allegations were false, I realized her ability to prepare the case and try it would likely be seriously hampered by Department of Corrections personnel. I feared that the counsel/access/rumor question would overshadow the merits of the homicide case and in any event would, again, give rise to a later attack of the competency of court-appointed counsel.

The hearing on Forbes' Motion to Withdraw was held without the presence of Susan Cary, Esquire, (she was in trial in south Florida and unavailable).

In an effort to continue to assure competent counsel and to minimize public notoriety and, further, to minimize potential embarrassment to Ms. Cary, Forbes' motion was

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granted with certain enigmatic (I hoped) statements from the bench to the Defendant which referred to a "close personal relationship" with Ms. Cary.

An order was entered allowing Mr. Forbes to withdraw retaining Ms. Cary as appointed counsel until a day certain (later extended) in which she could decide whether to file an appearance pro bono publico.

In the interim between first appearance and the withdrawal motion hearing, this Court was contacted by a correctional officer, not assigned to Florida State Prison, who retold the story about Ms. Cary, used certain epithets in referring to her and said it was common knowledge around Department of Corrections that the allegations were true.

Since this Court had had ex parte communications with defense counsel --though not about the merits of the homicide case -- I thought it advisable to relate the situation to the Assistant State Attorney prosecuting the case and did so. He suggested under the circumstances perhaps I should step aside.

The file reflects continuing interference with the right of the accused and his lawyers to consult by the Florida State Prison Administration. (Ms. Cary related three times since the Order for Access was entered; Mr. Bernstein called this Court relating the problem on at least one occasion. A call to Superintendent Strickland, again, did not alleviate the problem. Again, in an effort to prevent collateral matters from becoming a cause celebre, a call to Secretary Wainwright was employed and was effective, apparently, in the alleviation of the visitation problem.

Based upon the foregoing, the Order of Recusal was entered. My intention to enter same was stated of-record at an earlier hearing.

As a post-script I later saw the correctional officer who had previously sought me out with the tale about Ms. Cary. I asked him the source of his information -- he indicated it was confidential but reliable. I advised him of the adoption decree -- he said lawyers are good at changing things to suit them (or words of similar import). He said he

This served only to exacerbate Mr. Muhammad's mental illness and distort his decision making ability regarding the progress of his trial. Dr. Fisher testified regarding this matter and its significance regarding Mr. Muhammad:

Q. Okay. Now beyond, Dr. Fisher, how a normal person would be incensed by false allegations, such as that may be, what kind of effect would that have had on Askari Muhammad vis a vis his mental health and what you described as his paranoia?

A. Well, unfortunately, I state that this -- I'm describing him as being paranoid and that these beliefs that the state's out to get him and is doing all sorts of things that are unfair and untoward in order to get him, and I'm saying that I hold reality and you will share that reality and that he is paranoid, this would give his paranoia a stronger foundation and perhaps put our reality in more jeopardy, but more importantly it would take his paranoia and support it more.

(PCR V. 6 at 93-94).

Additionally the physical nature of Q wing in conjunction with the denial of law library privileges and the denial of material exculpatory evidence served to deny Mr. Muhammad the ability to

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knew it was true because they were "caught in the act."

I advised I had discussed the matter with Ms. Cary -- he was indignant! He said if he'd known I was going to tell her he would never have confided in me.

DATED this 21st of January, A.D. 1981

Signed

R.A. Green, Jr., Circuit Judge

(PCR Defense Exhibit G).

effectively represent himself. Mr. Muhammad was denied a fair trial. Regarding this evidence, the lower court stated in its order:

It should be noted at this juncture that the Florida Supreme Court's remand was a narrow one; this Court is to decide only whether the State committed any Brady violations. In spite of this restriction, the defense offered as evidence documents such as a recent video tape of a cell on Q-Wing at Florida State Prison; almost the entire record of Van Poyck v. Barton, et al., (in an apparent attempt to document the poor treatment of prisoners by guards); [] none of which is germane to the issue at hand.

(PCR V. 1 at 905)(internal citations omitted).

The lower court however, should have considered all of the circumstances surrounding this case and the cumulative effect on the trial in order to conduct a proper Brady analysis. Ultimately, the effect of the State's improper conduct about the tale of Susan Cary and Mr. Muhammad's "relationship," which resulted in Ms. Cary getting off of the case, upon Mr. Muhammad is relevant. At the evidentiary hearing, Dr. Fisher discussed the importance of these combined factors and the impact upon Mr. Muhammad (PCR V. 6 at 94-95). This testimony went un-rebutted.

To further complicate matters, not only was mentally ill Askari Muhammad allowed to proceed *pro se*, and deprived of material exculpatory evidence, his appointed standby counsel, Mr. Replogle, was instructed not to have any contact with Mr. Muhammad (PCR V. 6 at 159 and Appendix 30 to Rule 3.850 motion). At trial however, Mr. Muhammad repeatedly stressed his request for assistance of counsel. For example:

I request that this Court allow me the assistance of counsel, as I believe it is set forth in the Sixth Amendment to the Constitution of these United States. I believe the Constitution clearly states that I have the right under that Constitution to be assisted by counsel. And because I choose to exercise this right, I therefor move this Court to appoint counsel for that purpose of assisting the defendant in preparing and presenting his defense, whatever defense that may be, to this Court. Thank you, Your Honor.

(R. 1673-75). Clearly, Mr. Muhammad did not understand what he was forgoing by proceeding *pro se*, especially in light of the court's instructions to Mr. Replogle not to assist Mr. Muhammad. Mr. Muhammad's case is not the typical *pro se* situation. The state's failure to disclose the Brady evidence serves to exacerbate these other errors. In order to insure that a constitutional adversarial testing, and hence a fair trial, occur, certain obligations are imposed upon the prosecuting attorney. The prosecutor is required to disclose to the defense evidence "that is both favorable to the accused and 'material either to guilt or punishment'". United States v. Bagley, 473 U.S. 667, 674 (1985), quoting Brady v. Maryland, 373 U.S. 83, 87 (1963). In Strickler v. Greene, 119 S.Ct. 1936, 1948 (1999), the Supreme Court reiterated the "special role played by the American prosecutor" as one "whose interest . . . in a criminal prosecution is not that it shall win a case, but that justice shall be done." See Hoffman v. State, - So.2d - (Fla. July 5, 2001), 2001 WL 747399 (Fla.); State v. Hugins, 788 So.2d 238 (Fla. 2001); Florida Bar v. Cox, 794 So.2d 1278

(Fla. 2001); Rogers v. State, 782 So.2d 373 (Fla. 2001). The State's duty to disclose exculpatory evidence is applicable even though there has been no request by the defendant. Strickler at 280.<sup>17</sup> The State also has a duty to learn of any favorable evidence known to individuals acting on the government's behalf. Id. at 281. Exculpatory and material evidence is evidence of a favorable character for the defense which creates a reasonable probability that the outcome of the guilt and/or capital sentencing trial would have been different. Garcia v. State, 622 So. 2d 1325, 1330-31 (Fla. 1993). This standard is met and reversal is required once the reviewing court concludes that there exists a "reasonable probability that had the [unpresented] evidence been disclosed to the defense, the result of the proceeding would have been different." Bagley, 473 U.S. at 680. "The question is not whether the defendant would more likely than not have received a different verdict with the evidence, but whether in its absence he received a fair trial, understood as a trial resulting in a verdict worthy of confidence." Kyles v. Whitley, 514 U.S. at 434; Strickler v. Greene, 119 S.Ct. at 1952. This Court has also indicated that the question is whether the State possessed exculpatory "information" that it did not reveal to the defendant. Young v. State, 739 So.2d at

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<sup>17</sup>This Court has recognized that the United States Supreme Court in Strickler eliminated the due diligence element of a Brady claim. Occhicone v. State, 768 So.2d 1037, 1042 (Fla. 2000); Way v. State, 760 So.2d 903 (Fla. 2000).

553. If it did and it did not disclose this information, a new trial is warranted where confidence is undermined in the outcome of the trial. In making this determination "courts should consider not only how the State's suppression of favorable information deprived the defendant of direct relevant evidence but also how it handicapped the defendant's ability to investigate or present other aspects of the case." Rogers v. State, 782 So.2d at 385. This includes impeachment presentable through cross-examination challenging the "thoroughness and even good faith of the [police] investigation." Kyles v. Whitley, 514 U.S. at 446.

At the evidentiary hearing it was established that the State failed to disclose exculpatory evidence to the defense and the evidence was material. The United States Supreme Court and this Court have explained that the materiality of evidence not presented to the jury must be considered "collectively, not item-by-item." Kyles v. Whitley, 514 U.S. 419, 436 (1995); Young v. State, 739 So.2d 553, 559 (Fla. 1999). Thus, the analysis is whether "the favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." Id. at 1566 (footnote omitted). The Supreme Court has previously described the totality of the circumstances analysis as follows:

[I]f the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed. This means that the omission

must be evaluated in the context of the entire record. If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt.

United States v. Agurs, 427 U.S. 97, 112-13 (1976)(emphasis added)(footnote omitted). When these principles are applied to Mr. Muhammad's claims, his entitlement to relief is clear.

**C. Ake v. Oklahoma**

The effect of the state's withholding of the evidence revealing Mr. Muhammad's demeanor and state of mind at the time of the offense and that he was not "in his right mind" was to deny Mr. Muhammad the effective and competent assistance of a mental health expert. Ake v. Oklahoma, 470 U.S. 68 (1985). As the evidence showed at the evidentiary hearing, had Mr. Bernstein been provided this evidence he would have presented the evidence to an expert in order to support his motion that Mr. Muhammad was not competent, argued that Mr. Muhammad should not have been allowed to proceed *pro se*, argued to the court the applicability of the insanity defense and presented that evidence and defense at Mr. Muhammad's trial. All of these options were foreclosed by the State's actions and thus, experts that had been utilized pre trial in Mr. Muhammad's case were rendered ineffective because they did not consider any of the evidence regarding Mr. Muhammad's mental state at the time of the offense. The State's actions violated due process, equal protection, and the Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States

Constitution and corresponding provisions of the Florida Constitution. See Ake, 470 U.S. at 68.

**D. Ineffective Assistance of Counsel**

Similarly, the effect of the State's withholding of the Brady material rendered Mr. Muhammad's counsel (while he represented Mr. Muhammad pre-trial) ineffective. Thus, Mr. Muhammad's right to effective assistance of counsel under the Sixth Amendment to the United States Constitution was violated.

The trial court allowed Mr. Muhammad to waive representation of counsel and proceed pro se. However, as with any waiver, the waiver must be knowing, voluntary, and intelligent. Faretta v. California, 422 U.S. 806 (1975). Mr. Muhammad's waiver of trial counsel was none of these because he was denied access to the Brady material. Having been deprived of this evidence, Mr. Muhammad's decision was uninformed and thus, invalid.

**E. Mr. Muhammad is Entitled to Relief**

The circuit court erred in failing to consider the Brady evidence and the cumulative effect of all the evidence not presented at Mr. Muhammad's trial as required by Kyles v. Whitley, 514 U.S. 419 (1995), and this Court's precedent. Swafford v. State, 679 So. 2d 736, 739 (Fla. 1996); State v. Gunsby, 670 So. 2d 920 (Fla. 1996). Furthermore, courts cannot properly consider the effect of unrepresented evidence item-by-item but must evaluate the collective impact of such evidence.

The withholding of the Brady material infected the trial from before it began and throughout. Due to the State's suppression of the

employee statements, Mr. Muhammad, his attorney, and the trial court were all denied the ability to make informed decisions.

As was testified to by attorneys Bernstein and Salmon, the withheld documents would have had a strong impact on pretrial strategy (PCR V. 6 at 165; 203 et seq). Both Mr. Bernstein and Mr. Salmon, as well as Dr. Fisher, testified that the withheld statements would have been important information to provide to mental health experts -- and the trial court -- pretrial to determine, inter alia, whether Mr. Muhammad was sane at the time of Officer Burke's death, whether he was competent to stand trial, to waive an insanity defense and to represent himself (PCR V. 6 at 61 et seq). Dr. Fisher testified that, in his expert opinion the withheld documents were strong evidence that Mr. Muhammad was not sane at the time of Officer Burke's death, he was not competent to stand trial and he was not competent to represent himself. Id. If any of these things had been found to be true--much less all of them, there is more than a reasonable probability that the outcome of Mr. Muhammad's trial would have been different. Brady; Kyles.

The circuit court overlooked this analysis, and thus erred in not evaluating the effect of the Brady evidence either by itself or in conjunction with the other evidence presented herein that was not presented to Mr. Muhammad's jury. Mr. Muhammad is entitled to a new trial after full consideration.

#### **ARGUMENT II**

**THE LOWER COURT'S ORDER GRANTING A RESENTENCING SHOULD BE AFFIRMED.**

## A. Introduction

In originally sentencing Mr. Muhammad, Judge Chance stated:

THE COURT: Thank you. Take the defendant out first, the evidence and arguments of counsel, I find that the State has established at least several of the aggravating circumstances that are required by the law of the State of Florida with regard to the imposition of the death penalty beyond and to the exclusion of every reasonable doubt.

I have found that the defendant has elected not to present any evidence of testimony with regard to any mitigating circumstances. I have searched my mind and the record to find, during the course of the proceeding, that I cannot find that there are any mitigating circumstances. I have listened to the defendant's arguments through today and find that he has failed to mention, during his argument, any mitigating circumstances in this matter. On the other hand, I believe that the Court's responsibility in a matter like this is a grave one and a responsibility that cannot be hastily entered into. As a result, I have requested a presentence investigation to be independently prepared for the Court to review to determine where there exists any basis for any mitigating circumstances in this case. At the conclusion of the presentence investigation and the filing of this Court, I will schedule a sentencing proceeding.

(R. 1572-73).

Subsequently, the court pronounced its sentencing determination:

THE COURT: The defendant having not offered any evidence with regard to mitigation, the Court ordered a Pre-Sentence Investigation and reviewed that at great length. The Court finds that there are no statutory mitigating circumstances.

It is therefore the reasoned judgment of this Court after weighing both the aggravating and mitigating circumstances, that the circumstances require the imposition of the

penalty of death.

Therefore, the defendant having knowingly waived representation of attorney, the Court adjudicates the defendant guilty of murder in the first degree, and saying nothing sufficient, it is the sentence of the Court that the defendant shall be put to death by electrocution.

Mr. Muhammad, you are advised that you have a right [under] Florida Statutes to have the Supreme Court automatically review this proceeding. If you wish to be represented by counsel on appeal, the Court will appoint one to represent you.

We need the defendant fingerprinted.

MR. HERBERT: May we approach the Bench, Your Honor?

THE COURT: Yes.

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(side bar conference between court Mr. Herber and Mr. Elwell without reporter)

THE COURT: For the record, the State Attorney's Office indicates that although there are no statutory mitigating circumstances, the court also can consider other outside mitigating circumstances. The Court finds no other outside mitigating circumstances.

(R. 1586-87)

In granting Mr. Muhammad penalty phase relief after hearing the evidence presented at the evidentiary hearing Judge Chance ruled:

The Court found that the State had proven these three aggravators beyond a reasonable doubt. Without the benefit of any argument on mitigating factors, the Court was forced to find that none existed in this case, ultimately pronouncing a sentence of death upon Defendant. Defendant now argues that had the Court known of this information at the time of sentencing, the outcome would be different. The sentencing court does have the responsibility of combing the record in search of possible mitigators

when a defendant chooses to present none on his own behalf, and that evidence must be considered and weighed "to the extent it is believable and uncontroverted." *Farr v. State*, 621 So. 2d 1368 (Fla. 1993)(citing *Santos v. State*, 591 So. 2d 160 (Fla. 1991); *Campbell v. State*, 571 So.2d 415 (Fla. 1990); *Rogers v. State*, 511 So. 2d 526 (Fla. 1987)).

Here, the information relied upon by Defendant appears only in depositions, incident reports, and interviews, which were not made part of the official court record. Thus, the sentencing court could not have known of its existence unless brought to its attention by either side. Such information is evidence of the mitigating factors found in Florida Statutes sections 921.141 (6)(b) and (6)(f); whether the defendant was under the influence of extreme mental or emotional disturbance at the time of the murder, and whether the defendant's capacity to appreciate the criminality of his conduct or to conform that conduct to the requirements of law was substantially impaired. Even if the level of disturbance did not rise to the level of "extreme", it is certainly worth considering as a non statutory mitigating factor pursuant to section 921.141 (6)(h).

Defendant's failure to present mitigators on his own behalf imposes an even greater duty upon the sentencing court to comb the record in search of factors which might weigh in favor of imposing a life sentence. The absence of any such information undermines confidence in the result of the proceedings, as the sentencing court was unable to make a fair and just comparison of the aggravators and mitigators present in the case. It is well-settled that because "death is different", a greater degree of scrutiny must be given to capital cases. *California v. Ramos*, 463 U.S. 992, 998-99 (1983). Trial courts have "the undelegable duty and solemn obligation to . . . consider any and all mitigating evidence." *Walker v. State*, 707 So. 2d 300 (Fla. 1997). In this case, it cannot be said with any certainty that the newly-discovered evidence presented by Defendant would not have resulted in a different outcome, and this Court finds that the interests of justice require that a new sentencing hearing be held.

(PCR V. 1 at 909-11) (emphasis added).

Judge Chance granted Mr. Muhammad a resentencing because the evidence presented at trial was not available to him to consider when rendering his sentencing decision and he could not say that the withheld evidence would not have made a difference (PCR V. 1 at 910-11). As found by Judge Chance, this evidence included eyewitness observations that Mr. Muhammad "appeared not to be in his right mind just before and after the murder" (PCR V. 1 at 906). (See Argument I).

**B. Sentencing determination**

Because no evidence regarding mental health and insanity was allowed during the guilt phase, and because no evidence was presented in mitigation -- including the suppressed Brady evidence, Judge Chance was unable to conduct a reliable and constitutionally adequate sentencing determination. In fact, Judge Chance made this specific finding (See PCR V. 1, 910-11).

It is now known that due to the Brady evidence, critical evidence existed that would have helped to explain the circumstances surrounding Officer Burke's death and Mr. Muhammad's mental state as it pertained thereto. This evidence is relevant to both the guilt/innocence and penalty phases.

The evidence contained in the Brady material in and of itself constituted mitigating evidence, both statutory and nonstatutory, as Judge Chance found (PCR V. 1 at 910). At the evidentiary hearing, Mr. Muhammad established through the unrefuted testimony of Dr.

Fisher that both statutory mitigating factors existed by virtue of the information contained in the Brady material. Dr. Fisher testified that Mr. Muhammad was under the influence of an extreme mental or emotional disturbance at the time Officer Burke was killed, that Mr. Muhammad was under extreme duress, and because of his mental illness Mr. Muhammad could not appreciate the consequences of his actions (PCR V. 6 at 100; 97).

The trial court found the aggravating factors of under sentence of imprisonment, previous conviction of capital felony and heinous, atrocious or cruel. As to heinous, atrocious or cruel the court stated:

Fact: The victim was in the process of escorting the Defendant to the shower when the offense occurred. There is no evidence in the record that the victim provoked the Defendant in any way nor is there any indication that the victim was aware that he was about to be attacked.

The Defendant stabbed the victim multiple times with a sharpened kitchen spoon ignoring the victim's plea for mercy. This offense occurred in the full view of another officer, who was prevented from coming to the victims aid by the security system at Florida State Prison.

CONCLUSION: Applying the standards set down previously by the Supreme Court of Florida, the Court concludes that Richard James Burke died as a result of planned, methodical, cruel, wanton, malicious, atrocious, conscienceless, pitiless crime unnecessarily torturous to the victim. Therefore this is an aggravating factor.

(R. 458-59). At the evidentiary hearing, however, Dr. Fisher testified that there was nothing to indicate that Mr. Muhammad

possessed the necessary intent to torture required for the aggravating factor of heinous, atrocious cruel (PCR V. 6 at 101). Richardson v. State, 604 So.2d 1107 (Fla. 1992). Additionally, the evidence refutes the trial court's initial finding that the event was "planned" thus further diluting the court's support for the HAC aggravator.

At trial, Judge Chance found:

There is no evidence that the murder was committed while the Defendant was under the influence of extreme mental or emotional disturbance. Quite to the contrary, the Defendant carried on his activities normally and indicated that the reason for the killing was that he felt he was wrongfully denied visitation privileges.

(R. 460).

However, as found by Judge Chance, after the evidentiary hearing the evidence supports a finding of this statutory mitigating factor. This finding is supported by competent substantial evidence - the eyewitness accounts of Mr. Muhammad's behavior at the time of the offense refutes Judge Chance's prior ruling at trial that Mr. Muhammad carried on his activities normally. Mr. Muhammad presented unrefuted testimony at the evidentiary hearing that established this mitigating factor contrary to the trial court's finding.

At trial, the court further stated:

There is no evidence of duress in any degree which would mitigate the crime the Defendant stands convicted.

(R. 461).

Again, Mr. Muhammad presented unrefuted trial testimony to

establish this mitigating factor through the Brady evidence itself and the evidence learned of as a result of it, such as other eyewitness accounts and Dr. Fisher's expert opinions.

At trial, Judge Chance rejected another weighty mitigating circumstance:

The evidence affirmatively showed that the Defendant had the capacity to appreciate the criminality of conduct. The evidence did not show that his capacity to conform his conduct to the requirements of the was substantially impaired.

(R. 455-463) (emphasis added). However, this mitigating factor was proven at the evidentiary hearing also. The state failed to call any experts to refute the evidence of these statutory mitigating factors.

Judge Chance found:

In this case, it cannot be said with any certainty that the newly-discovered evidence presented by Defendant would not have resulted in a different outcome, and this Court finds that the interests of justice require that a new sentencing hearing be held.

(PCR V. 1 at 911).

It cannot be stressed enough that the judge who made this determination, the Honorable Chester B. Chance, is the same judge who presided over Mr. Muhammad's trial and gave the original death sentence without a jury recommendation. Thus, his finding that the evidence that was presented by Mr. Muhammad at the evidentiary hearing was material is even more compelling and should be treated as findings of fact -- fully supported by un-rebutted evidence and are subject to deference by this Court. Stephens v. State, 748 So. 2d 1028, 1033 (Fla. 1999).

During the evidentiary hearing, Mr. Muhammad presented a wealth of un-refuted mitigation, both statutory and non-statutory.

As Judge Chance found, the sentencer in this case was left with virtually nothing to weigh against the aggravation (See PCR V. 1 at 909) even though it existed.

As the United States Supreme Court has recently observed, "[m]itigating evidence ... may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death eligibility case." Williams, 120 S.Ct. 1495, 1516. That there were aggravating circumstances presented by the State in no way conclusively establishes a lack of prejudice in light of the circumstances of Mr. Muhammad's case.

Here, three aggravators were found: 1) Defendant was under sentence for a capital felony at the time of the murder; 2) Defendant had previously been convicted of a capital felony; and 3) the murder was especially heinous, atrocious, or cruel.

The trial court found no mitigation and therefore "the Court was forced to find that none existed" (PCR V. 1 at 909). Under these circumstances, Mr. Muhammad has established prejudice. See Rose v. State, 675 So. 2d 567, 572 (Fla. 1996); Hildwin v. Dagger, 654 So. 2d 107 (Fla. 1995); Phillips v. State, 608 So. 2d 778, 783 (Fla. 1992); Mitchell v. State, 595 So. 2d 938, 942 (Fla. 1992); State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991). Furthermore, as Judge Chance found, if the evidence does not rise to the level of statutory mitigation, it certainly qualifies as nonstatutory mitigation that was never considered.

Prejudice is further established in this case in light of other matters not explicitly discussed by the lower court. For example, evidence was presented at the evidentiary hearing that establish numerous other non-statutory mitigating factors and rebutted the State's reliance upon aggravating factors. Consequently, Mr. Muhammad's death sentence is constitutionally infirm.

Since the Brady evidence must not be viewed in isolation, this lower court should have also considered the enormous amount of other mitigation evidence in conjunction with the mitigation evidence contained in the Brady material that was never heard or considered by the trial court in making its sentencing determination. An overview of this evidence reveals that Mr. Muhammad had a long history of mental illness and numerous doctors recognized this fact. Mental illness also runs in Mr. Muhammad's family (See Appendices to Rule 3.850). One example of the many reports recognizing Mr. Muhammad's illness:

The question remains of course, as to why the one mental health professional who saw [Mr. Muhammad] prior to trial failed to recognize any of the problems that were so blatant. Dr. Amin's deposition provides some answers. He initially evaluated Mr. Muhammad in 1979 and saw him several times. Dr. Amin stated that Mr. Muhammad had delusions, was grandiose and very concerned about impressing the examiner with his intelligence. He states that Mr. Muhammad was suffering from a "schizophrenic-like illness". He noted that Mr. Muhammad was concrete and could explain proverbs to him. In fact, his 1979 report indicates that Mr. Muhammad talks to himself, has a family history positive for mental illness, grew up in a poverty ridden environment and used drugs from an early age. He described Mr. Muhammad as follows:

"Dull facial expression. Poor eye contact with his gaze constantly shifting around the interview room in a suspicious manner. His speech was productive, but his associations were intermittently loose and he would stop for a few seconds only to begin again with an apparently different subject. Also the connections between his thoughts were difficult if not impossible to follow."

He noted that Mr. Muhammad was suffering from a schizophreniform illness and had an underlying paranoid personality pattern. Yet, when he returned to see Mr. Muhammad in 1980, he states a number of contradictory things. He notes that he believes Mr. Muhammad had a complete psychotic break, "a complete break with reality" as a result of being refused a visit with his mother. He also notes that he does not think that Mr. Muhammad was legally insane because Mr. Muhammad told him that he was not insane, and that he had to rely on this opinion because his own evaluation was incomplete. In fact, Dr. Amin notes that he went to see Mr. Muhammad "like a friend" who was trying to find out what happened without specifically trying to tease out any mental illness". Dr. Amin also states:

"So that first visit, primarily, I went to see what was the story. Why had he allegedly killed this guard? You know, what was going on? Here we are out here trying to save his life from the first time, and he does something like this. So I primarily wanted to know for my own satisfaction what was going on"

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

state that your evaluation is incomplete, and then to offer an opinion as to sanity, is incomprehensible. In fact, Dr. Amin took no notes during his 1980 visit, perhaps another indication of the nonprofessional nature of his visit.

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

(Defense exhibit 4; see Appendix 31 to rule 3.850 motion). Mr. Muhammad's records also indicate a head injury, psychosis, previously on antipsychotic medication, hallucinations, suicidal ideations, possibility of "temporal lobe type epilepsy", black outs, paranoia, schizophrenia, drug poisoning, organic brain damage, and unresolved oedipal sexual conflicts.

Dr. Fisher also testified at the evidentiary hearing that he reviewed materials that contained a high volume of doctor's evaluations:

He's been institutionalized on many occasions from the early ages, as early as age nine, again, being an adult prisoner at age fifteen. And the stays have not only been in prison but in places like Florida State Hospital.

These, and for whatever reasons, there are a bunch, I would say as many as fifteen to twenty doctors' evaluations relating to competency, relating to a particular court case, relating to different things dating back to 19-- well, I don't know if he had any in the record in '66, but they are definitely there dating back to '70. . . .

(PCR V.6 at 70).

Additionally, the sentencing court never knew and never considered Mr. Muhammad's social history establishing more mitigation. A summary of the evidence contained in the Appendix to the rule 3.850 motion (never considered by the trial court) reveals Mr. Muhammad's life proved to be anything but normal and was beleaguered by emotionally charged events well documented in numerous social service and court records. He grew up in a terribly poor family that struggled unsuccessfully against tremendous odds. His father was alcoholic and his mother worked in the fields whenever she was able and had fifteen pregnancies, suffered illnesses associated with childbirth, diabetes and heart trouble. Based on the accounts of Mr. Muhammad's sisters, their father beat him often and with ferocity, leaving his body bruised and welted. When Mr. Muhammad was approximately nine years old, he witnesses his father undressed and sexually assaulting his sister, Mary Ann. Mr. Knight beat Mr. Muhammad and told him to go back outside and play.

Ultimately, the father was arrested and charged with attempted incest. Mr. Muhammad was called as witnesses and testified against his father. The same month the father was taken to prison, Mr. Muhammad was committed to the Florida School for Boys in Okeechobee for 10 months. He was nine years old, the youngest child ever placed there. Mr. Muhammad's entire life is replete with tragedy and abuse. None of this evidence was considered. The events surrounding Officer Burke's death cannot be considered in isolation and Mr. Muhammad's tragic life story is significant in a proper sentencing

determination.

The aforementioned significant and compelling evidence that has never been considered along with the Brady evidence, further demonstrates and supports Judge Chance's finding that confidence in the sentence is undermined. Young v. State, 739 So. 2d 553 (Fla. 1999); Garcia v. State, 622 So. 2d 1325 (Fla. 1993).

**C. Invalid Waiver of Mitigating Evidence and Penalty Phase Jury**

Likewise, the lower court did not address the failure of the State to disclose the Brady material upon Mr. Muhammad's decision to waive presentation of mitigating evidence and decision to waive jury sentencing recommendation. This waiver was not valid for two significant reasons: 1) his mental illness -- delusions which were exacerbated by actions of the State, and 2) the State's failure to disclose the Brady material, depriving Mr. Muhammad of information from which to make a fully informed and knowing waiver.

Dr. Fisher testified regarding Mr. Muhammad's paranoia and the effect it had upon any decision he made regarding his case including his decision to waive the presentation of mitigating evidence and his penalty phase jury (PCR V. 6 at 99). Not only did Mr. Muhammad believe (and correctly so) that the State was withholding information from him, and knew that the State had a hand in getting the only lawyer he trusted off of his case through false accusations (see Argument I), he felt he was wrongly denied his visit with his mother (on top of his preexisting mental illness). Also, Mr. Muhammad had received a disciplinary report, was sent to Q-Wing where he was denied access to the law library and at one time his former attorneys

-- all in conjunction with his mental illness -- then as if this wasn't enough -- his courtroom was packed full of uniformed DOC guards during sentencing **and** trial. (PCR V. 6 at 159-162) ("I believe in fact that there were quite a few correctional staff, again, really only known to me as correction staff because of their wearing uniforms, in attendance during the course of the trial"); (See also Defense Exhibit 5 (video tape of courtroom); PCR V. 6 at 40-41 (testimony of Darrell Brewer)).

Dr. Fisher testified as to the significance of the uniformed presence as it related to Mr. Muhammad:

In my opinion, it exacerbated his condition.  
(PCR V. 6 at 95).

Regarding the enormous presence of uniformed guards in the courtroom Mr. Muhammad told the trial court:

[BY MR. MUHAMMAD]: Again, I have thought about this position. It is based, in part, with the jury being absent from these proceedings the several days that we have been away, in conjunction with the representation of the Department of Corrections in this courtroom, I feel that for **this jury to be influenced as I am influenced by this overwhelming presence of the Department of Corrections, I feel that it is to my best interest to exercise this right, Your Honor.**

(R. 1522) (emphasis added). Accordingly, it was precisely because of the overwhelming presence of uniformed guards during Mr. Muhammad's trial and in conjunction with his paranoia and state conduct including the Brady violation that affected Mr. Muhammad's decision to forgo a penalty phase jury. Moreover, standing alone, the

number of uniformed guards present at Mr. Muhammad's trial facts warrant relief under Woods v. Dugger, 923 F.2d 1454 (11<sup>th</sup> Cir. 1991). The lower court erred in refusing to consider all the circumstances of the case in analyzing Mr. Muhammad's Brady claims. The existence of this additional evidence further supports Judge Chance's finding of prejudice.

In conjunction with the suppression of evidence by the state and the entire circumstances of the capital proceedings relief is mandated. Dr. Fisher testified that Mr. Muhammad would not have had the ability to validly waive his penalty phase jury and right to present mitigating evidence (PCR V. 6 at 99).

Dr Fisher also testified regarding the significance of going to Q-Wing:

The issues involved, in my opinion, on October 12th he had a visit set up with his mother, who came from Miami, someone of critical importance in his life.

He -- there is an order that you have to shave. He has a medical permit that says he gets to use clippers because of a skin condition. That had expired. So they said to him, essentially, your mom's here, you have to shave. He said, well, I'll use my clippers. They said your medical thing for that has expired, shave. he says no. Then they say, well, we'll write you up, which I think their procedure would call for that, and his response to that, well it's been alluded to by the inmates here earlier today.

But what you had was a situation that started-- in my field the jargon is precipitating stresses. And so you had visit to mother, someone very important coming to see him, that is canceled. In addition, he gets a disciplinary. Because of the disciplinary, he knows because he's been there before and he knows what happens when you get disciplinaries, he's going to go to Q wing.

So you have don't see mother, you don't shave, or have to shave using a blade, you're going to Q wing and you're getting a disciplinary, and so all of this is happening on the early part of October 12th, 1980.

(PCR V. 6 at 74-75). This evidence must be considered as well, as it is pertinent to a complete and accurate understanding of the circumstances facing Mr. Muhammad at the time of the offense. Further, in light of Mr. Muhammad's mental illness, these circumstances affected his decision making throughout the case.

Assuming, *arguendo*, that Mr. Muhammad did have the requisite mental state to validly waive the jury recommendation and presentation of mitigation, the State's failure to disclose the Brady material, relevant to the penalty phase, renders the waiver invalid. As with any waiver of a constitutional right, Mr. Muhammad's waiver must be knowing, voluntary, and intelligent in order to be valid. Faretta v. California, 422 U.S. 806 (1975); Deacon v. Dagger, 635 So. 2d 4 (Fla. 1994). Furthermore, if a defendant "waives" mitigation, yet counsel has failed to investigate and thus the client is in the dark about what it is he is "waiving," the Sixth Amendment is violated. Deacon; Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); Emerson v. Gramley, 91 F.3d 898 (7th Cir. 1996); Glenn v. Tate, 71 F.3d 1204 (6th Cir. 1995). Here, Mr. Muhammad who represented himself, was "in the dark" as to what he was waiving by the state's failure to disclose the evidence. Accordingly, any purported waiver is invalid as it was uninformed and unknowing. Because Mr. Muhammad did not have this important information he was deprived of making a knowing, intelligent, and voluntary waiver of

his penalty phase jury, nor did he have the information necessary in order to make a knowing, intelligent, and voluntary waiver of his right to present mitigating evidence. Mr. Muhammad did not know the Brady evidence existed so he could not make an informed decision not to present it to a jury or the judge. Consequently, the penalty phase jury waiver was unconstitutional as was his decision to waive presentation of mitigating evidence.

Additionally, in situations where attorneys are faced with a client that insists upon waiving the presentation of mitigating evidence, the attorneys are required to present to the court the evidence in mitigation they would have presented but for their client's waiver. See Deacon v. State, 635 So. 2d 4 (Fla. 1993); Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991); and Soon v. State, 619 So.2d 246 Fla. 1993). Accordingly, the trial court must consider what mitigation evidence existed prior to sentencing even when a defendant waives the presentation. Here the trial court did not do that. However, due to the lower court allowing Mr. Muhammad to waive his trial counsel, and the fact that trial counsel was deprived of the Brady evidence, and the instructions to standby counsel Mr. Replogle the court was never apprised of material exculpatory evidence relevant to the penalty phase. This was error and Mr. Muhammad is entitled to relief.

#### **D. Suppression**

The statements of individuals who recounted Mr. Muhammad's demeanor were suppressed. Brady requires the State to disclose statements whether or not a specific request was made. Strickler v.

Greene, 527 U.S. 263, 278 (1999)("We have since held that the duty to disclose [Brady] evidence is applicable even though there has been no request by the accused, [] and that the duty encompasses impeachment evidence as well as exculpatory evidence.")(internal citations omitted). Here however, requests were made making the State's conduct even more egregious considering the fact that Mr. Muhammad was a brain damaged *pro se* defendant with severe mental illness including numerous diagnoses of schizophrenia.

Prior to trial Mr. Muhammad (as well as his previous attorney), made several requests for discovery pursuant to Fla.R. Crim P. 3.220 (See R. 61; R. 49-51; R. 418-19; also entered into evidence at the evidentiary hearing as Defense Exhibit 10-12).

Mr. Muhammad complained on the record regarding the lack of discovery concerning a list of witnesses the State intended to call at trial. He was informed that the State was not required to inform the defense as to which witnesses they would call (R. 1273-1275).<sup>18</sup>

At trial, Mr. Muhammad called Leonard Ball, the prison investigator. Ball testified that taped and written statements were obtained from prison employees (R. 1393). Mr. Muhammad informed the court that he had filed a written demand for discovery on September

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<sup>18</sup> Mr. Muhammad also objected that the photographs taken of the victim (and of the scene) were not provided in discovery (R. 1360, 1395). The court's response was that Mr. Muhammad should have deposed the medical examiner and denied Mr. Muhammad access to the photographs (R. 1361, 1401). No Richardson hearing was held. It should also be noted that postconviction counsel has requested the entire investigative file, however no original photographs and no audio tapes have ever been produced.

2, 1982 but the State did not respond (R. 1398), stating that discovery was provided to Mr. Bernstein (R. 1400) and the court denied Mr. Muhammad's request (R.1401).

At trial, Mr. Muhammad also called Kenneth Crawford (prison investigator). Mr. Muhammad asked whether inmates were interviewed and the court refused to permit the question:

Q. Where was it?

A. The interviews took place in the colonel's are in the Florida State Prison.

Q. Were officers being interviewed?

A. I believe so, yes.

Q. Do you know their names, Mr. Crawford?

MR. ELWELL: Objection irrelevant and immaterial.

MR. MUHAMMAD: Again, Your Honor as I stated earlier, if these officers have anything to aid in this cause, then I want to talk with these officers.

THE COURT: Sustained.

MR. ELWELL: Thank you, Your Honor.

THE COURT: The purpose of this trial is not pretrial discovery.

MR. MUHAMMAD. I am aware of that, Your Honor.

THE COURT: All right.

BY MR. MUHAMMAD:

Q. Were any inmates interviewed , Mr. Crawford?

MR.ELWELL: State objects, irrelevant and immaterial.

THE COURT: Sustained.

(R. 1410-11).

Mr. Muhammad made it clear to the court that he had in fact requested copies of statements of his demand for discovery:

THE COURT: Do you have any other motions or other matters at this time?

MR. MUHAMMAD: Just one.

THE COURT: All right.

MR. MUHAMMAD: I was unable to find my demand for discovery that I had filed in this case on September 2nd, 1982, and you had asked whether I had requested -- or rather, I believe your word was, did I demand the statements. In paragraph two, yes, Your Honor, I did make that demand.

THE COURT: That's part of the demand for discovery--you did no more than was contained in the demand for discovery filed in this matter; is that correct?

MR. MUHAMMAD: Repeat that, please, Your Honor.

THE COURT: Your actions regarding those matters are solely contained with the demand for discovery that you filed in this case; is that right?

MR. MUHAMMAD: My actions?

THE COURT: Yes.

MR. MUHAMMAD: Which actions, Your Honor?

THE COURT: You made no motion for inspection or copying of certain documents you made no effort to take any depositions is that correct?<sup>19</sup>

MR. MUHAMMAD: What I am saying, Your Honor, is

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<sup>19</sup> This Court must also consider the fact that Mr. Muhammad filed a written motion requesting an investigator (R. 396-7) which was denied (R. 404-5). The court also denied enforcement of subpoenas filed by Mr. Muhammad.

when I had submitted this demand, we were at that hearing on October 11th. The State represented to you, Your Honor, that there were no statements, and I stated to you, Your Honor, that there were statements. When Mr. Elwell stated to you that there were not any, you closed the matter.

MR. ELWELL: Your Honor, if I could set the State's side of the record clear. The issue that arose that the defendant is now misunderstanding. You asked the Court because he raised the question if there were any racial statements that I intended to use in this case. I indicated and the record will reflect it, there were no racial statements, and I did not intend to offer any racial statements made by the defendant.

MR. MUHAMMAD: That's not what I was saying, Your Honor. When I asked for statements, I was asking for statements of officers.

MR. ELWELL: The record will support my position. I think the defendant is totally in error.

THE COURT: All right. We will let the record reflect whatever it did reflect on that day.

(R. 1428-30).

Mr. Muhammad was correct. Prior to the trial, Mr. Muhammad had complained about not receiving discovery, in particular statements made by employees-- statements made in addition to and later than the "official incident reports" and in addition to the taped statements referred to by the State. Mr. Muhammad told the Court that he believed he did not have certain materials that the State was in possession of:

MR. MUHAMMAD: With the material that the State furnished to Mr. Bernstein, it is responsive to Mr. Bernstein. However, I submit to this Court Mr. Bernstein is no longer defense counsel in this case, and that if I submit a request for

certain discoverable materials I believe the rules require the State to honor the request that the Defendant submits.

In a deposition by a person named Mr. Leonard Ball, Mr. Bernstein questioned Mr. Ball during a deposition hearing and if I'm not mistaken a Mr. Enwall, an Assistant State Attorney was present at that deposition hearing.

Mr. Bernstein learned at that deposition hearing that there had been certain statements made by employees down at the prison. Mr. Bernstein learned that he had not been supplied with those statements. He requested of Mr. Enwell [sic] to be provided with those statements.

The record that I was provided with by the clerk did not contain those statements.

In my demand for discovery it was my hope that the State would come forward with this information. Because I believe this information is discoverable information pursuant to Rule 3.220 of the Florida Rules of Criminal Procedure.

Your Honor,, I do not know what the State intends to present in this cause. However, pursuant to the rules I believe I am entitled to discover certain Materials.

Your Honor, the State has not responded to any requests I have made regarding discovery.

THE COURT: Mr. Elwell.

MR. ELWELL: Your Honor, the entire packed-- First of all, the State complied with a discovery response when he was represented by counsel.

All the matters that were then current and german [sic] and relevant under the rule of procedure , as well as those matters that fall within the purview of the Brady decision were provided.

When the pack was transmitted by the Clerk it contained all those matters that were not

then earlier obtained.

The State has complied completely with its discovery responsibility as well as with any responsibility it has on any evidence which may tend to be exculpatory towards this defendant.

THE COURT: The Defendant indicates there are a couple of matters of a statement.

MR. ELWELL: Yes, sir. To address that particularly in that deposition taken on Dr. Jamal Amin in Tallahassee, Florida, I asked him a question regarding any comments that were made and any racism that occurred. That was at that time perhaps a question that was directed because Mr. Bernstein intended to proceed with the defense of insanity.

It was a question that was asked predicated on the knowledge that I had from reading reports of psychiatrists some eight or nine years old to this day regarding the previous offense that this Defendant was convicted on.

They would, in my opinion, offer no relevancy even if an insanity defense was predicated because they were hearsay reports of psychiatrists, which are not admissible in a court of law. Therefore, that question was predicated upon things that are not discoverable.

THE COURT: (to State attorney Elwell): **What about statements made by employees?**

MR. ELWELL: **There are none, Your Honor. There are no statements relative to the Defendant made by employees.**

THE COURT: Motion for continuance based on the failure of the State to make discovery is denied.

(R.25-27; October 11, 1982, 1:30 p.m. session)(emphasis added).

Defendant's evidentiary hearing exhibit 1, **statements of employees relative to the defendant**, proves that Mr. Elwell's

statement was not true when he stated "[t]here are no statements relative to the Defendant made by employees." Mr. Elwell made that representation to the the trial court on October 11, 1982. The statements included in the Brady material were attached to a letter dated **June 2, 1981** authored by Investigator Turner to State Attorney Elwell. Therefore, those statements were in existence as of June 2, 1981. Thus, Mr. Elwell was either mistaken or not being truthful on October 11, 1982 regarding the existence *vel non* of the statements attached to the June 2, 1981 letter. Evidence of Mr. Elwell's reputation for lack of truthfulness was also presented at the evidentiary hearing (PCR V. 6 at 180; see also Defense Exhibit 6) but was not considered by the court (PCR V. 1 at 905).

Additionally, the Brady material was never provided to Mr. Muhammad's prior counsel. Mr. Bernstein's requests were made January 8, 1981 and January 14, 1981. The State's discovery answers were made on January 22, 1981, March 15, 1982 and directed to Mr. Bernstein (R. 165-169; 295). The statements at issue were not included in the discovery provided to Mr. Bernstein; Mr. Bernstein testified that he was certain he had not been provided the instant discovery based on his review of his case files and the absence on such information, the fact that he did not provide such information to his experts nor mention it in correspondence with the experts, and the fact that he did not recall the information (PCR V. 6 at 172-73).

Mr. Muhammad made his written discovery requests on September 3, 1982 and informed the court of the discovery problems pretrial and during trial. The State never responded to Mr. Muhammad's request.

The State argues that the State's Answer to Demand for Discovery, prior to trial, satisfied disclosure of the Brady material wherein it states that "all of the above named witnesses had made oral or written statements which were made available to the defense" (State relying upon R. 166-69 and PCR V. 6 at 249-50; see also State's Memorandum Regarding Post-Conviction Relief at p. 9). This argument fails for several reasons: First, the State does not satisfy its obligation under discovery or Brady by merely listing a witness name and checking a box that the person made a statement. See e.g. Kyles; Strickler; Second, the State's discovery responses were dated January 22, 1981 and March 15, 1982. Significantly, it is only the first Response (dated January 22, 1981) that indicates that the witnesses made written statements. The Brady material in question did not even exist at that time (see investigator Turner letter dated June 2, 1981 referring to attached statements). The second response, dated March 15, 1982, merely listed names and stated that the individuals may have information relevant to the offense. Absolutely no disclosure was made that the written statements (made after the first discovery response) existed. Mr. Muhammad moved at the evidentiary hearing that the state did not disclose the subsequent statements made by employees regarding Mr. Muhammad's demeanor. Accordingly, the State's assertion that the statements were "made available to defense" is misleading and factually incorrect *vis a vis* the subsequent statements. The State clearly violated its continuing duty to disclose exculpatory and impeachment material.

Accordingly, both Fla. Rules of Crim. P. (discovery) and Brady

were violated. Judge Chance's finding is supported by competent substantial evidence.<sup>20</sup>

The evidence clearly existed, the State had a duty to disclose it. Evidence is suppressed within the meaning of Brady regardless of the good or bad faith of the prosecutor. Kyles.

Mr. Muhammad proved that the State withheld these materials and the state has offered no credible evidence to rebut that fact.

The State however, again asks this Court to speculate (contrary to the evidence presented at the evidentiary hearing) that Mr. Bernstein **may** have had these materials, and gave them to Mr. Muhammad, yet offered no proof. No proof exists because this suggestion is flatly wrong and contrary to Mr. Elwell's own statement on the record at the time Mr. Muhammad asked for the documents. Elwell stated there were no documents, however we now know that Elwell was not true when he made that representation because the very same documents that Mr. Muhammad asked for and that Elwell said did

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<sup>20</sup> Instead, the state now asks this Court to determine what Mr. Elwell "really meant" when he stated, "**there are no statements relative to the Defendant made by employees**" asking this Court to attach a meaning to Mr. Elwell's plain and clear words that simply is not present and constitutes mere guess work. Additionally, evidence was presented at the evidentiary hearing that Mr. Elwell had a reputation in the community for not being truthful (Testimony of Stephen Bernstein, PCR V. 6 at 179-80; See also Defendant's Exhibit 16 (Elwell bar materials)).

Additionally, Defendant's exhibit, appellate proceedings in Agan v. Singletary, 12 F.3d 1012 (11th Cir. 1994), demonstrates that similar withholding of evidence occurred in the Agan case in which, just as in Mr. Muhammad's case, Mr. Elwell and prison investigator Turner were involved. See Agan v. Singletary, 12 F.3d at 1015 ("Prison investigator L.E. Turner prepared a report and compiled a file during his investigation of the DeWitt murder. However, the file was not discovered until some eight (8) years later".).

not exist -- have turned up. Likewise, the State's suggestion ignores Mr. Bernstein's testimony that he was not provided these documents and knew this because they were not reflected in his notes for his opening argument or in the materials provided to his expert and that these were the type of materials he would have used in his opening and given to an expert. (PCR V. 6 at 172-73).

The State asserts that "the State did not possess some of the evidence" (State's Initial Brief at 31), but fails to point any evidence or record citation to support this conclusion. (See State's Initial Brief at 31, 32.) In fact, the record clearly shows that the State was in possession of the statements introduced as Brady material at the evidentiary hearing.

At the evidentiary hearing, Mr. Muhammad called Louis E. Turner, Sr., who testified that he was a prison inspector in 1980 with the Department of Corrections including Florida State prison through March of 1987, and that he was involved in the investigation of Officer Burke's death (PCR V. 6 at 7-8). Mr. Turner was shown Defense Exhibit 1 and identified the items contained therein as material generated as a result of his investigation of Officer Burke's death, including identifying seven typed statements, hand written statements, a letter written by him to the state attorney regarding interviews, and handwritten notes of interviews of inmates (Defense exhibit 1).

Directly contrary to the State's assertion that it was not in possession of the material, Mr. Muhammad clearly proved that indeed the State was. The law is clear that "the individual prosecutor has

a duty to learn of any favorable evidence known to others acting on the government's behalf in the case, including the police." Kyles, 514 U.S. at 437. Moreover the State's assertion that it was not in the possession of the evidence is inconsistent with its suggestion that the State provided that material (material it did not have) to Mr. Muhammad.

The State further argues that the "lower court improperly considered the impact of evidence that was disclosed in determining that the allegedly withheld evidence was material. (See State's Initial Brief at 30). This argument is without merit because a Brady analysis requires consideration of the withheld evidence in conjunction with the entire case, not in isolation. Kyles.

The state also argues that the evidence was cumulative and not material (State's Initial Brief at 30). Simply because a party disagrees with a court's ruling does not establish that the ruling was incorrect. Moreover, Judge Chance's findings of fact "will not be disturbed on appeal" unless the record fails to contain substantial competent evidence to support them. Stephens. The record supports Judge Chance's findings.

The State's assertion that the evidence is cumulative (State's Initial Brief at 36-37) fails for additional reasons as well. At the evidentiary hearing, and in its closing argument, the State attempted, **but failed**, to show that the information contained in the materials that were withheld was available to Mr. Muhammad through another source, i.e., depositions. Specifically, the State relies upon depositions taken March 4, 1981. First, the Brady material came

into existence after the March 4, 1981, because they were gathered in response to Mr. Elwell's June, 1981 request to Investigator Turner, directing him to obtain additional statements. Second, the depositions are not an accurate or adequate substitute for the Brady material. Mr. Muhammad proved this at the evidentiary hearing and competent substantial evidence supports the Judge Chance's findings consistent with the evidence presented. The State relies upon the March 4, 1981 deposition of Harry Owens, page 9, line 6 wherein Mr. Owens stated: "Well, to me he sounded a little scared. He might have because -- I don't know if he was scared of some retaliatory action or what. The main thing I was interested in at the time was Officer Burke." The State maintains that this statement is equivalent to the withheld material. It clearly is not. In this deposition Owens merely states that Mr. Muhammad sounded a little scared and says so **equivocally**. However as legal expert Bill Salmon testified, the statement in this deposition is not nearly as powerful as the information contained in the materials that were withheld, and the deposition was not an adequate substitute for the information found in the Brady material. (PCR V. 6 at 227).

The State also attempts to use the deposition of T.A. Henderson taken on March 4, 1981 line 6, page 20 for the same purpose wherein Mr. Henderson was asked: "Can you tell me how he appeared to you when you saw him? What I'm looking for is if you can characterize whether he was angry, belligerent, whether he was scared, what?", and answered: I don't think he had any attitude about him. Question: Blank?, Answer: Just blank. I mean, there was nothing that you

could, you know, see on his face that would show fear or anger." As legal expert Bill Salmon pointed out however, the information in the Brady material specifically revealed that during the event "Inmate Knight then came down and **was looking down at Officer Burke with a blank expression on his face.**" There is a critical and qualitative difference between the description of Mr. Muhammad merely having a blank attitude wherein the time, place and circumstances are not identified compared to the Brady material wherein the time and the circumstances are revealed - that Mr. Muhammad had a blank expression while looking down at Officer Burke. This information was important to Dr. Fisher, and Mr. Bernstein pointed out that there is a significant difference between "attitude" described in the deposition compared to the actual expression on Mr. Muhammad's face at the time of Officer Burke's death (PCR V. 6 at 197). There was no mention in the deposition about Mr. Muhammad's demeanor or expression at the time he was looking down at Officer Burke.

The State also attempts to rely on the deposition of K.O. Crawford taken April 6, 1982 wherein Mr. Crawford (not a trained psychologist or medical doctor) was asked whether he thought Mr. Muhammad was insane or sane during a particular 30 minute period with a Mr. Clark (State's exhibit 5(Crawford deposition p.39, line 19)) wherein Crawford states that Mr. Muhammad was calm. However again, the timing of the events described in the deposition is critical -- in the deposition, Crawford is referring to the interview of Mr. Muhammad that occurred in the colonel's office **one to two and half hours after** Officer Burkes' death. Additionally, compare the Brady

material wherein Mr. Muhammad is being escorted after Officer Burke's death wherein it was revealed about Mr. Muhammad: **I also observed his facial expression and it appeared to say I've done something terrible, his eyes appeared to be stretched at an unusual size** (emphasis added).

The State's reliance upon the March 4, 1981 deposition of Dana Padgett also fails wherein Padgett stated that Mr. Muhammad was quiet most of the time and that Mr. Muhammad seemed upset while in his cell. Again however, as Mr. Salmon testified, the information contained in the Padgett deposition does not address Mr. Muhammad's demeanor and mental state **during** Officer Burke's death. Additionally, the Brady material is qualitatively different wherein it reveals that Mr. Muhammad was **"very disturbed (upset)"**. The deposition is in no way an equivalent to the information contained in the Brady material or information discovered as a result of investigation prompted by the Brady material, e.g., inmate observations. Mr. Muhammad was denied both the actual Brady material and the opportunity to conduct an investigation as a result.

In this regard both Mr. Bernstein and Dr. Fisher also testified that the timing of the observations was an important factor in assessing the data contained therein (PCR V. 6 at 136). Dr. Fisher also testified that the testimony of the inmates (information learned as a result of the Brady material) he listened to was important information to consider in rendering his opinions (PCR V. 6 at 136). Having heard all of the evidence -- evidence characterized by Judge Chance as evidence showing Mr. Muhammad was not in his right mind --

Judge Chance found that he did not have the Brady evidence to consider at trial. This is a finding of fact supported by competent substantial evidence in the record.

Contrary to the State's argument that Judge Chance abdicated his role in failing to find that the Brady material was not disclosed (State's Initial Brief at 30), Judge Chance specifically found the evidence was not in the record and he did not have it to consider. Judge Chance's finding is fully supported by the evidence and the law. The historical findings of fact "will not be disturbed" if supported by competent and substantial evidence.

Moreover, Judge Chance's finding that "[he could not say] with any certainty that the newly-discovered evidence presented by Defendant would not have resulted in a different outcome" should also be considered a finding of fact given the fact that Judge Chance was the person who imposed the original death sentence. His finding regarding the impact of the evidence is extremely compelling -- rather than being a mere hypothetical legal exercise. Who better to be in a position to determine the value of the evidence than the individual who actually presided over the original proceedings, heard the evidence and imposed the sentence? The finding should be given deference and not disturbed. Scott v. Dugger, 604 So. 2d 465 (Fla. 1992).

Furthermore, Judge Chance considered only the absence of the Brady material upon his original sentencing determination: "The sole issue, as framed by the Supreme Court of Florida, is whether the State withheld exculpatory evidence from the Defendant.[] nor does it

cover the sentencing factors such as Defendant's family history and background." (PCR V. 1 at 906). Thus, the judge did not consider the other evidence introduced at the evidentiary hearing (e.g., Mr. Muhammad's family history and background, history of mental illness) which make an even stronger case for a life sentence under the cumulative analysis required by Kyles; Young.

At the evidentiary hearing below, Mr. Muhammad presented a wealth of information which was not considered Judge Chance. A large number of extremely detailed materials existed regarding Mr. Muhammad's childhood; these materials were critical to a full understanding of Mr. Muhammad's life and were also critical to the sentencing decision. Even without this evidence, Judge Chance found that the Brady evidence alone was such that to allow the death sentence to stand would contravene the interests justice (PCR V. 1 at 911). His finding is correct both in fact and law.

Finally, even assuming that Judge Chance did not specifically find that the State suppressed the evidence, Mr. Muhammad's death sentence violates the Eighth Amendment and is unconstitutional and Judge Chance's finding that the death sentence rendered in this case was a "miscarriage of justice" is supported both in fact and law. Judge Chance made a finding of fact that he did not have the statements regarding Mr. Muhammad's mental state relevant to the time of the offense when he imposed the death sentence. Consequently, Judge Chance did not have this evidence to consider - and did not consider it - during his sentencing calculus when rendering sentence upon Mr. Muhammad. Judge Chance found that the evidence was material

to his sentencing determination. Accordingly the death sentence is unconstitutional and must be reversed.

**CONCLUSION**

Mr. Muhammad submits that relief is warranted in the form of a new trial, and that the order granting Mr. Muhammad a new sentencing proceeding be affirmed in all respects.

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that a true copy of the foregoing Answer Brief of Appellee/Initial Brief of Cross-Appellant has been furnished by United States Mail, first class postage prepaid, to Sandra S. Jaggard, Assistant Attorney General, Office of the Attorney General, Rivergate Plaza, Suite 950, 444 Brickell Avenue Miami, Florida 33131, on May 13, 2002.

**CERTIFICATION OF TYPE SIZE AND STYLE**

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