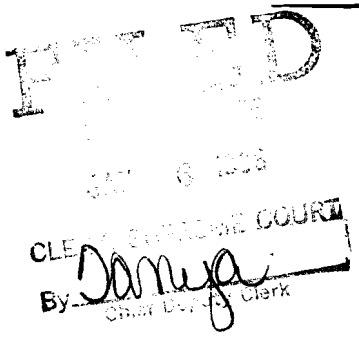
No. 67,524

IN THE

Supreme Court of Florida



TED HERRING,

Appellant,

—vs.—

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM DENIAL OF MOTION TO VACATE JUDGMENT AND SENTENCE BY THE CIRCUIT COURT OF THE SEVENTH JUDICIAL CIRCUIT OF FLORIDA, IN AND FOR VOLUSIA COUNTY

REPLY BRIEF OF APPELLANT

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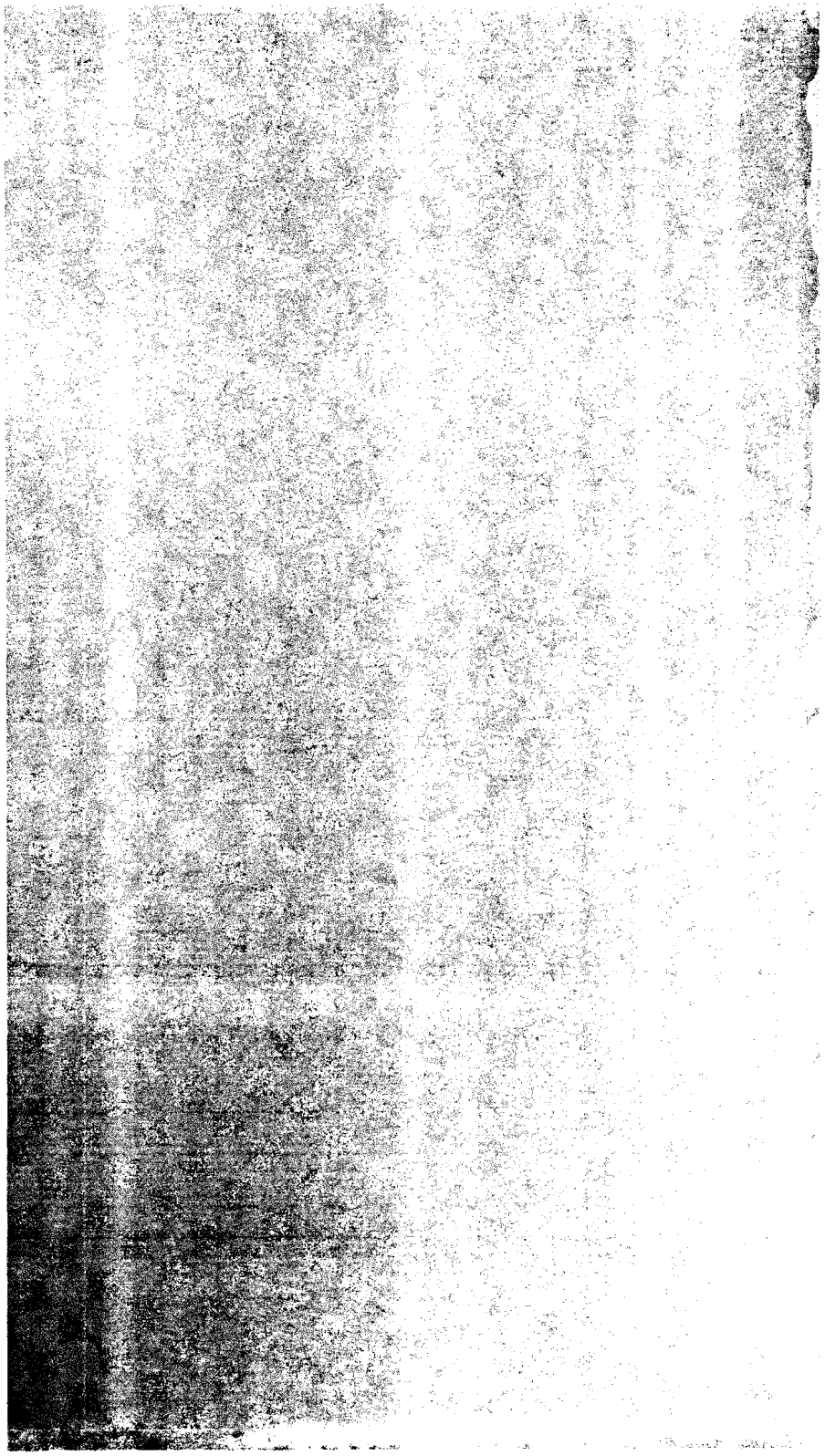

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IN THE

Supreme Court of Florida

Case No. 67,524

TED HERRING,

Appellant,

—VS—

STATE OF FLORIDA,

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ARGUMENT

I.

CARUTHERS REQUIRES THAT HERRING'S DEATH SENTENCE BE REVERSED WITH INSTRUCTIONS TO IMPOSE A LIFE SENTENCE

In *Caruthers v. State*, 465 So.2d 496 (Fla. 1985), this Court, finding that the operative facts of the homicide for which Carl Allen Caruthers had been convicted were legally insufficient to warrant the death penalty, vacated his death sentence and instructed the trial court to impose a mandatory life sentence. Point I of the Initial Brief of Appellant ("Herring's Initial Brief") demonstrates that the material facts of the crime for which Ted Herring was convicted were identical to, and no more grievous than, the facts in *Caruthers*. Herring's Initial Brief at 5-19. The crux of the State's response is that "a prior case is not reviewable in light of a subsequent decision." Answer Brief of Appellee ("State's Answer") at 4.

The State's response is an incorrect statement of the law. It also misses the point. We do not contend that *Caruthers* constitutes a development in Florida's death penalty law justifying the reconsideration of Herring's death sentence. Rather, we have shown that Herring's death sentence is an aberration; that *Caruthers* is a correct application of Florida law as it exists now *and* as it existed at the time

Herring was sentenced to death. The State has made no effort to rebut this demonstration, nor can it, for Herring's death sentence is a clear deviation from Florida law and is therefore an unconstitutional application of Florida's death penalty statute.

A. The Factual Identity Between This Case and *Caruthers v. State* Is Indisputable

Caruthers and the case at bar are identical in all material respects. Both victims were convenience store clerks who were shot in the course of robberies. *Caruthers*, 465 So.2d at 497; *Herring*, 446 So.2d 1049, 1051 (Fla. 1984). Each defendant confessed and, in confessing, stated that he had not intended to hurt the clerk but that the shots were fired as a reflex reaction in response to a sudden movement. *Caruthers*, 465 So.2d at 497, 498; (A170).[1]

In *Caruthers* three shots were fired; here it was only two. *Id.* The statutory aggravating circumstances sufficient to warrant a death sentence were absent in both cases. Neither case involved "a particularly lengthy, methodic, or involved series of atrocious events or a substantial period of reflection or thought by the perpetrator." *Preston v. State*, 444 So.2d 939 (Fla. 1984). Nor was there sufficient evidence in either of these cases that "the dominant or only motive for the murder was the elimination of witnesses." *Oats v. State*, 446 So.2d 90, 91 (Fla. 1984).

The State's efforts to distinguish *Caruthers* prove nothing. *Caruthers* cannot be distinguished. The State nevertheless argues:

> [A]ppellant overlooks the obvious distinction that three aggravating circumstances present in the instant case were absent in *Caruthers*, and that *Caruthers* [sic] had no significant history of prior criminal activity (along with other nonstatutory mitigating factors), while appellant's factors on mitigation were of minimal weight.

State's Answer at 4. (Footnote omitted.)

[1] The State finds fault with the citations to the record contained in Herring's Initial Brief. As indicated in Herring's Initial Brief at 2, citations to the First Supplement to the Transcript of the Record on Appeal are indicated by the abbreviation "Supp." These numbers appear in the lower righthand corner of each page and were used on Herring's direct appeal. The State has elected to cite to the transcripts of the individual proceedings at the various stages of the trial. The page numbers of these transcripts appear on the upper righthand corner of each page and consequently are different from the "Supp." citation numbers cited in Herring's Initial Brief.

The State's asserted distinctions, aside from being incorrect,[2] are irrelevant. In *Caruthers*, this Court held that the facts of the shooting justified a *vacatur* of Caruthers' death sentence with instructions to impose a life sentence. The State does not dispute that the facts pertaining to the two shootings were identical, and consequently, that different sentences resulted from factually indistinguishable homicides.

B. Herring's Death Sentence Is an Arbitrary and Inconsistent Application of Florida's Death Penalty Statute

The focal point of the State's response is that

> appellant misapprehends the nature of Florida law regarding proportionality. A prior case is not reviewable in light of a subsequent decision, as he suggests here. *Iafero* [sic] *v. State*, 459 So.2d 1034, (Fla. 1984), *Sullivan v. State*, 441 So.2d 609 (Fla. 1983).

State's Answer at 4.

Contrary to the State's assertion, this Court has never held that "a death sentence is not reviewable in light of a subsequent decision." Indeed, in *Tafero v. State*, 459 So.2d 1034 (Fla. 1984), one of the cases cited by the State in support of this proposition, this Court held precisely the opposite. It recognized that the Supreme Court's decision in *Enmund v. Florida*, 458 U.S. 782, 73 L. Ed.2d 1140, 102 S. Ct. 3368 (1982) constituted "such a change in the law" that *Enmund* claims would thereafter "be cognizable in post-conviction proceedings." *Id.* at 1035. *See Witt v. State*, 387 So.2d 922 (Fla.), *cert. denied*, 449 U.S. 1067, 66 L. Ed.2d 612, 101 S. Ct. 796 (1980).

The State's argument is plainly unresponsive to Herring's claims. Point I of Herring's Initial Brief demonstrates that, as in *Caruthers*, the imposition of the death penalty here would be disproportionate under

[2] In *Caruthers*, this Court held that the trial court incorrectly applied both the heightened premeditation and avoidance of arrest aggravating circumstances. It has been shown that the trial court committed the same errors in this case. *See* Herring's Initial Brief at 8-17. The remaining aggravating circumstance referred to by the State, a prior robbery conviction, is insufficient to justify the different sentences in the two cases in view of the factual similarity of the two homicides.

Additionally, the State cannot rely on the strength of the mitigating evidence in *Caruthers* to distinguish the cases inasmuch as the mitigating evidence which Herring's counsel failed to search for or introduce, and which was readily available, is precisely the kind of evidence considered by this Court in *Caruthers*. *See* Herring's Initial Brief at 25-28 and the discussion *infra* at 8-10.

Florida law and an inconsistent and unfair application of Florida's death penalty statute. This showing has been made not simply by reference to the *Caruthers* opinion, but also by means of a careful examination of a substantial body of case law (1) construing the heightened premeditation and avoidance of arrest aggravating circumstances, and (2) barring the doubling up of aggravating circumstances on the basis of the same act. It is not contended that *Caruthers* alone requires that Herring's death sentence be vacated, but that Florida law and the federal constitution require that result. *Caruthers* only serves to highlight the reasons why Herring's death sentence is inconsistent with Florida law, and is therefore a defective application of the Florida death penalty statute.[3]

C. Two Aggravating Circumstances Were Erroneously Applied

Herring's Initial Brief demonstrates that two statutory aggravating circumstances were erroneously applied, and that a comparison of this Court's analysis in *Caruthers* with the case at bar compels the conclusion that both the heightened premeditation and avoidance of arrest aggravating circumstances were unconstitutionally applied here. Herring's Initial Brief at 8-18. The State makes no effort whatsoever to rebut these claims. It simply asserts that because these issues were considered by this Court on direct appeal, the Court need not reconsider these claims now. State's Answer at 5.

As set forth more fully *infra* at Point IV, this Court has frequently used post-conviction proceedings to review the substantive merits of

[3] The State's final assertion is that "the proportionality [Herring] urges is not required by *Gregg v. Georgia*, 428 U.S. 153 (1976), nor by *Spaziano, Zant v. Stephens, Proffitt, Furman* or any other case," citing *Pulley v. Harris*, 465 U.S. 37, 79 L. Ed.2d 29, 104 S. Ct. 871 (1984). State's Answer at 4-5. (Footnotes omitted.) Although the Supreme Court held in *Pulley v. Harris* that proportionality *review* is not constitutionally mandated, this Court has steadfastly regarded proportionality review as a "feature of state law." *State v. Henry*, 456 So.2d 466, 469 (Fla. 1984), citing *Proffitt v. Florida*, 428 U.S. 242, 49 L. Ed.2d 913, 96 S. Ct. 2960 (1976). Furthermore, nothing in *Pulley* even intimated that a state is free to administer its death penalty statute arbitrarily, inconsistently or unfairly. The "twin objectives" of "measured, consistent application and fairness to the accused" emphasized in *Spaziano v. Florida*, ___ U.S. ___, 82 L. Ed.2d 340, 352, 104 S. Ct. 3154, 3162 (1984), *quoting Eddings v. Oklahoma*, 455 U.S. 104, 110-111, 71 L. Ed.2d 1, 10-11, 102 S. Ct. 869, 874 (1982), as a constitutional precondition for the existence of a death penalty statute have not been modified by *Pulley* or any other case. The inconsistent application of Florida law here, as reflected most clearly by *Caruthers*, is the issue here, an issue which the State has failed to address.

claims that were or could have been raised on direct appeal. Accordingly, these claims are properly raised here.

D. Both the Heightened Premeditation and Witness Elimination Aggravating Circumstances Were Impermissibly Based On the Same Aspect of the Shooting

Both the heightened premeditation and witness elimination aggravating circumstances were based on precisely the same aspect of the crime, the firing of a second shot. *See* Herring's Initial Brief at 11. This practice is impermissible under Florida law. *Richardson v. State*, 437 So.2d 1091 (Fla. 1983); *Provence v. State*, 337 So.2d 783 (Fla. 1976), *cert. denied*, 431 U.S. 969, 53 L. Ed.2d 1065, 97 S. Ct. 2929 (1977). The State's response to this claim is that Herring's failure to raise this issue on direct appeal precludes him from doing so now. State's Answer at 5.

The same considerations that justify a review of Herring's claims that two aggravating circumstances were erroneously applied warrant consideration of this claim. This Court's practice of frequently reviewing — in post-conviction proceedings — claims that either were or could have been raised on direct appeal justifies a review of the merits of Herring's claims here. *See infra* Point IV.

II.

HERRING WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT HIS SENTENCING HEARING

Herring's Initial Brief demonstrates, by means of extensive reference to the record and substantial case authority, that Herring was denied effective assistance of counsel at his sentencing hearing. The State asserts that none of these claims "is warranted or remotely supportable." State's Answer at 6. It characterizes Herring's ineffective assistance of counsel claims as amounting to a "general denigration of his counsel's qualifications and hyperbolic derision of his performance." *Id.* The State insists that Herring's contentions are comprised of "factual misrepresentations" and finds fault with "the intensity of appellant's insults." *Id.*

The State's arguments demonstrate repeatedly that, at the very least, Herring is entitled to an evidentiary hearing on his ineffective assistance of counsel claims. Time and again, the State responds to claims asserted by Herring based on specific acts and omissions of Herring's sentencing counsel with its own interpretation of the facts and analysis of the record. It thereby concedes the existence of disputed issues of material fact requiring a hearing.

A. The Trial Court Applied the Incorrect Standard in Denying Herring's Ineffective Assistance of Counsel Claims

We have argued that the trial court erred by employing an outcome-determinative test in reviewing Herring's ineffective assistance of counsel claims. Herring's Initial Brief at 20-22. The State finds fault with this claim because in its view the trial court faithfully adhered to the *Strickland* test, but simply failed to "mimic the *Strickland* words." State's Answer at 7. The State further contends that Herring's argument somehow makes use of a "sophistic trick" in asserting this claim. *Id.*

The trial court's opinion explicitly states that the reason for its summary denial of Herring's ineffective assistance of counsel claims is that even if counsel had been deficient as shown by Herring, the result would have been no different. (A163) This Court found this formulation of the *Strickland* test improper precisely because it imposes a burden of proof on a defendant greater than that required by *Strickland*. *Wilson v. Wainwright*, 474 So.2d 1162 (Fla. 1985). *See also Nealy v. Cabana*, 764 F.2d 1173 (5th Cir. 1985). The *Strickland* test requires a showing of a *reasonable probability* that the death penalty would not have been imposed, and not the greater demonstration that the result would have been different but for counsel's deficient representation. Herring's reasoning is no more "sophistic" than this Court's in *Wilson* or the Fifth Circuit's in *Nealy*.

B. Herring Is Entitled to an Evidentiary Hearing on His Ineffective Assistance of Counsel Claims

This Court has frequently admonished trial courts to conduct evidentiary hearings on ineffective assistance of counsel claims in Rule 3.850 proceedings. *O'Callaghan v. State*, 461 So.2d 1354, 1355 (Fla. 1984); *Vaught v. State*, 442 So.2d 217 (Fla. 1983); *LeDuc v. State*, 415 So.2d 721 (Fla. 1982). Moreover, the rule itself explicitly requires that a hearing be held unless the record *conclusively* shows that the petitioner is entitled to no relief. Fla. R. Crim. P. 3.850. If the trial court declines to grant an evidentiary hearing, the court must "attach that portion of the file or record which conclusively shows that the prisoner is entitled to no relief." *Meeks v. State*, 382 So.2d 673, 676 (Fla. 1980). In summarily denying Herring's Rule 3.850 petition the trial judge failed to follow this procedure.

Herring's Initial Brief demonstrates the existence of "a pattern of egregious and blatant incompetence" by sentencing counsel including a failure to conduct presentence "preparation, research and investigation," as well as "a claim of failure to present available mitigating

evidence." *Vaught v. State*, 442 So.2d 217, 219 (Fla. 1983). In *Vaught*, this Court found an evidentiary hearing necessary under these circumstances, because the acts of omission could not be found in the record. A hearing is equally warranted here.

1. *Sentencing Counsel Failed to Present Strong Evidence of Herring's Mental and Emotional Condition Which He Had in His Possession*

Although the State concedes that Herring's counsel had in his possession the psychological reports described in Herring's Initial Brief at 23-25, it attempts to diminish the importance of these reports as mitigating evidence and to explain why counsel made no effort to use them. The State argues that the reports were too old to be of any value, that they were cumulative to Herring's mother's testimony, and that they were not sufficiently strong evidence of a mental or emotional disturbance to justify a finding of this statutory mitigating circumstance. The State also contends that counsel wisely decided, for tactical reasons, not to introduce these reports. State's Answer at 7-10.

The principal flaw in these arguments is that it is pure speculation to suggest that counsel deliberately chose not to introduce the reports either because he believed they would impeach Herring's mother, because they would open the door to rebuttal evidence, or for any other reason. A hearing will show that counsel's failure to introduce the reports resulted from gross negligence and professional incompetence. *See* discussion *infra* at 8-10. Without a hearing, there is no basis for the conclusion that the psychological reports were strategically withheld from the jury's consideration.

The State's efforts to disparage the value of the reports are unconvincing. The State relies on *Middleton v. State*, 465 So.2d 1218, 1224 (Fla. 1985) for the proposition that the reports provided no evidence of Herring's mental condition at the time of the crime. In *Middleton* the psychological report in issue was limited to a description of Middleton's personality when he was twelve, which this Court found to be of little probative value. The psychological reports here state that Herring is organically brain damaged. (A114) Organic brain damage is not cured with age.

Nor are the reports cumulative to the mother's testimony. They attested to specific facts about the nature of Herring's mental and emotional disease which Herring's mother — the only witness to testify on behalf of Herring at his sentencing — could not. Morevoer, despite the State's attempts to minimize their value, as reports of independent experts, not prepared for this litigation, they had far greater probative

value than the testimony of Herring's mother, who possessed no expertise and had the strongest possible interest in the outcome.[4]

2. *Herring's Counsel Failed to Investigate or Present Other Readily Available Evidence in Mitigation*

To prepare adequately for the sentencing phase of a capital case, counsel must conduct "an exhaustive investigation for potential mitigating evidence." *King v. Strickland*, 714 F.2d 1481, 1490 (11th Cir. 1983) *vacated*, ____ U.S. ____, 81 L. Ed.2d 358, 104 S. Ct. 2651, *aff'd on remand*, 748 F.2d 1462, *cert. denied*, ____ U.S. ____, 85 L. Ed.2d 301, 105 S. Ct. 2020 (1985). When counsel neglects to present available evidence in mitigation, the defendant is deprived of a fair sentencing hearing. *See id.*

The State does not dispute Herring's claim that his counsel made no effort to search for mitigating evidence, nor can it, for there is nothing in the record to suggest that Herring's counsel ever undertook such a search. Instead, the State attempts to excuse the derelictions of Herring's counsel by arguing that the mitigating evidence Herring adduces in his Rule 3.850 petition would not have helped him. For a variety of reasons, the State's argument is seriously flawed.

First, in addressing the affidavits Herring has now secured from character witnesses, the State acknowledges that "[i]t is not at all clear what effect such evidence would have had on a jury." State's Answer at 11. This concession alone undermines the State's position that the record conclusively establishes that Herring is entitled to no relief.

Second, the State suggests that the character witnesses' testimony would be "very dated." *Id.* This proposition must be rejected. Herring was 19 when tried, not 40 or 50. Moreover, several of these affidavits were by family members and friends who had known Herring his entire life. It was for the jury to determine the value and accuracy of their testimony.

[4] The State's argument that the reports were cumulative is also inconsistent with its position that the reports were not presented because they would have opened the door to the admission of Dr. Friedenberg's testimony "as to appellant's anti-social character at the time of the crime." State's Answer at 8. If the reports were merely cumulative to Herring's mother's testimony, then surely her testimony opened the door to Dr. Friedenberg's rebuttal testimony.

Third, the State asserts that the testimony of the defendant's relatives would be "merely cumulative." State's Answer at 11. As noted *supra* at 2-3, the State has attempted to distinguish *Caruthers* by contrasting the substantial mitigating evidence offered there with the "minimal" evidence adduced by Herring. State's Answer at 4. In *Caruthers*, this Court noted that "[a]t the sentencing phase, several members of his family testified regarding his devotion to his younger brother, kindness toward others, parental love, church activities, and favorable school record." 465 So.2d at 498. The same type of evidence was available to Herring, but his counsel never looked for it. Among the affidavits submitted with the present petition was that of Gwendolyn Myers, Herring's sister, who stated in part:

> Had I been asked, I would have responded that I love my brother very much, that he has always been protective of me; that he frequently took the blame for my sister and me when she and I misbehaved so we shouldn't be punished; that he took care of me when my mother was in the hospital; that we attended church together as we grew up, where Ted sang in a choir and was an usher; and that I have always relied upon him for support and guidance. I would also have testified that we grew up in difficult circumstances, financially and emotionally, and that Ted was particularly sensitive to these problems.
>
> Additionally, had I been asked to testify as to my brother Ted's love and affection for his family, his good nature, his protectiveness, and how hard he tried to be the "big man in the family," I would have done so.

(A130-131).

Fourth, the State's suggestion that favorable character testimony might have led to the introduction of Herring's "prior drug involvement, his current anti-social psychological makeup, and any other negative information which could have been used to rebut the alleged mitigating factors," State's Answer at 11, is flawed in two critical respects. An evidentiary hearing would show that because sentencing counsel made no search for mitigating evidence, no tactical decision was ever made in this regard. Additionally, it is settled law that the State is limited to evidence pertaining to the nine statutory aggravating circumstances at the sentencing phase of the proceedings. The introduction of mitigating evidence does not give the State license to introduce whatever evidence

it wishes by way of rebuttal. The State remains confined to evidence relating to the nine aggravating circumstances; a defendant's mitigating evidence does not "open the door" to anything further.

> This result is dictated because, in order to satisfy the requirements of *Furman v. Georgia*, 408 U.S. 238, 92 S. Ct. 2726, 33 L. Ed.2d 346 (1972), the sentencing authority's discretion must be "guided and channeled by requiring examination of *specific factors* that argue in favor of or against imposition of the death penalty, thus eliminating total arbitrariness and capriciousness in its imposition." (Emphasis supplied) *Profitt v. Florida*, 428 U.S. 242, 258, 96 S. Ct. 2960, 2969, 49 L. Ed.2d 913, 926.

Elledge v. State, 346 So.2d 998, 1003 (Fla. 1977). Much of the evidence the State asserts had been wisely avoided was simply inadmissible.

Fifth, the State cites facts not in the record in support of its arguments. For example, the State asserts:

> Use of the defendant's relatives ... would have revealed such information as the fact that appellant's mother kicked him out of the house....

State's Answer at 11.[5] The State thus attempts to convert this appeal into a trial on the merits of Herring's claims. The proper arena to introduce evidence is a hearing before a trial court, not an appeal from the summary denial thereof.

3. *Herring's Sentencing Counsel Failed to Contest the Existence of the Heightened Premeditation Aggravating Circumstance*

Herring's sentencing counsel made no attempt to contest the existence of the heightened premeditation aggravating circumstance. Contrary to the State's assertion, Herring is not raising the inapplicability of this aggravating circumstance "in the guise of ineffective assistance." State's Answer at 12. Herring has shown that his sentencing counsel did not zealously or effectively marshal available arguments in support of his client. *See* Herring's Initial Brief at 28-30. This Court has found such

[5] The State also asserts, without any evidentiary support, that "[t]he State had witnesses who would have testified adversely to the defendant had mitigation evidence on these matters been offered." State's Answer at 11.

a failure to constitute ineffective assistance of counsel *regardless* of the merits of the underlying argument. *Wilson v. Wainwright*, 474 So.2d 1162.

4. *Counsel's Lack of Skill and Knowledge Undermined the Reliability of the Proceedings*

Herring's sentencing counsel exhibited both a general ignorance of the rules of evidence and criminal procedure and a lack of familiarity with relevant legal principles on numerous issues central to the outcome of the proceeding. The State contends that this showing is "utterly frivolous," and constitutes a "general attack on Quarles' ability" which "states no omission or error in itself." State's Answer at 12. Contrary to the State's assertions, Herring has made this showing by reference to specific instances in which sentencing counsel failed to represent him with a minimally acceptable degree of professional competence. Herring's Initial Brief at 30-37.

The State contends that the statement in Herring's Initial Brief at 30 that sentencing "counsel did not even represent Herring at trial," State's Answer at 12, is inaccurate. The State asserts that Herring "knows full well that attorney Quarles filed many pre-trial motions, conducted hearings, and was present throughout the trial. Likewise, the active trial attorney, Howard Pearl, was present during sentencing." State's Answer at 12. The State also challenges Herring's assertion regarding counsel's lack of trial experience in capital cases, quoting from counsel's affidavit in which he states that he " 'handled 5 to 10 cases in which the death penalty was legal possibly [sic]' prior to Herring's trial." *Id.* at 6.

It is simply untrue that Quarles (Herring's sentencing counsel) played any role in representing Herring at trial or that Pearl (Herring's counsel at trial) was active in any way during the sentencing phase. The two lawyers had discrete functions. If the State contends otherwise, that is a further reason for an evidentiary hearing.

It is also false to suggest that Quarles had any experience in *trying* a capital case or representing a defendant at the sentencing phase of a capital trial. Prior to his representation of Herring, Quarles had never done either, nor has he since. Herring is entitled to show that Quarles' lack of capital *trial* experience was a substantial factor leading to the death sentence ultimately imposed. Herring is further entitled to cross-examine Quarles and thereby discover what he meant by his statement that he "handled 5 to 10 cases in which death was a legal possibility." We intend to demonstrate that this statement proves, at most, that Quarles took part in the processing of "5 to 10" capital felony cases in

their preliminary stages, long before trial on those matters. It carefully avoids conceding that he had never tried a capital case.

a. Counsel's Lack of Skill Resulted in the Admission of Highly Prejudicial Testimony

The State responds to Herring's claim that counsel failed to support his general objections to the introduction of the testimony of the probation officer, discussed *infra* at 16, by suggesting that this claim is nothing more than a challenge to the ruling allowing the testimony in. That is incorrect. As set forth in Herring's Initial Brief at 41-47, there was abundant authority for the exclusion of the testimony, none of which was presented by counsel. Counsel also declined to review the case upon which the trial court based its ruling. The State's suggestion "that counsel did not need to review *Sireci* during the hearing proves nothing, except perhaps that he was already familiar with the case," State's Answer at 13, is, of course, sheer speculation. There is no evidence to support the State's suggestion that counsel was at all familiar with *Sireci v. State*, 399 So.2d 964 (Fla. 1981). Had he been, he could have successfully argued that it was inapplicable.

b. Counsel's Ignorance of the Rules of Evidence Resulted in the Erroneous Admission of Highly Prejudicial Testimony

A basic principle of Florida criminal law is that "[c]ross-examination regarding an irrelevant criminal incident constitutes reversible error," *Sneed v. State*, 397 So.2d 931 (Fla. 5th Dist. Ct. App. 1981). Herring's counsel, nevertheless, failed to object as the prosecutor cross-examined Herring's mother regarding Herring's involvement in illegal narcotics activity. In response, the State makes the remarkable argument that this testimony actually *helped* Herring. State's Answer at 14. This Court can judge for itself how "helpful" these questions were intended to be, and whether any minimally competent attorney would have interposed an objection:

> Q. Did you tell Mr. Brock that the reason you sent your son to Florida, was because your son had become involved in some drug dealings in New York City, and it was necessary for him to get away from New York City quickly, that the word was out that people involved, who were supplying your son with drugs, were out to get him?
>
> * * *

> Q. Do you recall telling the correctional officer, Mr. Brock, that your son got involved over his head with drug suppliers and they were blaming him for the missing drugs?

(A194).

c. Counsel's Ignorance of the Rules of Evidence Resulted in the Exclusion of Mitigating Evidence

Herring's counsel committed an error of the most fundamental sort by failing to present mitigating evidence during the sentencing hearing and then attempting to introduce this evidence during his summation. Herring's Initial Brief at 34-35. The State's response that the error was not prejudicial (State's Answer at 14) misses the point. A clearer illustration of basic ineptitude could not be found.[6]

d. Counsel's Lack of Preparation Resulted in the Exclusion of Relevant Mitigating Evidence

Herring's sentencing counsel sought the introduction of evidence concerning similar capital felony cases in which life sentences were imposed. Herring's Initial Brief at 52-53. Despite the trial court's repeated requests for authority to support the admission of the proffered evidence, counsel meekly replied: "I can't cite the court any. I just feel certain there is." (A196) The State asserts that counsel had an ethical obligation to admit that there were no cases to support the introduction of the evidence. State's Answer at 14. This is incorrect. It has been shown that there was substantial legal support for the introduction of the testimony. Herring's Initial Brief at 35-37, 53. Moreover, sentencing counsel's lack of preparation and understanding of the law led the court to apply the wrong standard in sentencing Herring. Herring's Initial Brief at 53-54.

e. Counsel Instructed the Jury to Disregard a Significant Statutory Mitigating Circumstance

During his closing argument sentencing counsel indicated to the jury that Herring's age was not an applicable mitigating circumstance. The State urges this Court to adopt the trial court's finding that the court reporter erroneously injected the word "not." State's Answer at 15. We are unaware of any authority to support the trial court's alteration of the record, *sua sponte*, to support its conclusion in order to avoid the necessity of a hearing.

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[6] The State also suggests that this error was in fact no error at all, but a clever ploy devised by sentencing counsel "which helps demonstrate [his] diligence." State's Answer at 14. This suggestion, which can only be characterized as bizarre, finds no support in the record.

III.

THE TRIAL COURT IMPERMISSIBLY RELIED ON A NON-STATUTORY AGGRAVATING CIRCUMSTANCE

Florida's capital sentencing scheme restricts the judge and jury's consideration of aggravating factors to the nine aggravating circumstances enumerated in the State's death penalty statute. *Elledge v. State, supra.* In summarily denying Herring's Rule 3.850 petition, the trial judge stated that Herring's perceived perjury during the trial phase of the proceedings was a critical factor leading to the death sentence ultimately imposed:

> The Defendant not only initially gave conflicting stories to the police but perhaps most damaging of all he told the jury the preposterous story of how a second robber "beat him to the punch"; robbed and shot the clerk. *Frankly, this preposterous story doomed the defendant not only as to a conviction but as to a sentence as well.*

(A162-163) (Emphasis supplied.)

Perjury is not an aggravating circumstance enumerated in Florida's death penalty statute. *See* Herring's Initial Brief at 38-39. While a trial judge may properly deplore its use, he cannot rely upon it as justification for a death sentence.

The State counters that:

> Appellant might as well argue the judge relied on the fact that he confessed, or that his "counsel tried to 'sneak' in the poems," or that he put his mother on the stand; all are mentioned in the order. None warrant [sic] an assumption of impropriety.

State's Answer at 17.

The State thus seems to suggest that the trial judge's statement that Herring's "preposterous story" was perhaps the most critical factor leading to his death sentence is simply part of the judge's factual account of the proceedings. That, of course, is not the case. The trial judge did not cite Herring's confession or any other event in the course of the proceedings as a factor that "doomed the defendant not only as to a conviction but as to *a sentence as well.*" (A163) (Emphasis supplied.)

The trial judge's opinion could not be any clearer: Herring's death sentence was imposed by the trial judge because, *inter alia*, the judge believed that Herring told a "preposterous story" while testifying at the trial. Florida's death penalty scheme requires the sentencer to focus on a discrete set of issues in rendering a sentence. Fla. Stat. Ann. § 921.141(5) (West 1985). In finding Florida's death penalty statute constitutional, the Supreme Court held that the legislation "passes constitutional muster" because, *inter alia*, it provides "that after a person is convicted of first-degree murder," there is a separate "informed, focused, guided, and objective inquiry into the question whether [the defendant] should be sentenced to death." *Proffitt v. Florida*, 428 U.S. 242, 259, 49 L. Ed.2d 913, 96 S. Ct. 2960 (1976). The trial judge failed to confine his inquiry in this manner in violation of the Florida death penalty statute and the federal constitution.[7]

IV.

HERRING IS ENTITLED TO A REVIEW ON THE MERITS OF HIS REMAINING CLAIMS UNDER RULE 3.850

The State contends that "this court has consistently refused to address claims which were or could have been brought on direct appeal absent fundamental error." State's Answer at 18. Yet many of the cases cited by the State in support of this proposition demonstrate precisely the opposite. Contrary to the State's assertion, this Court's analysis in those cases is not merely dicta "provided for the benefit of bench and bar." *Id.* at 19. Rather, they are decisions on the merits which have the force of precedent.

In *Porter v. State*, 10 F.L.W. 573 (Supreme Court of Florida, October 25, 1985), one of the cases cited by the State, this Court noted that Porter's claims, which included counsel's conflict of interest and grand jury impropriety, "could have been, should have been, or were raised on direct appeal," *id.* The Court nevertheless considered the merits of his claims. Similarly, in *Francois v. State*, 470 So.2d 687 (Fla. 1985), another case cited by the State, this Court considered Francois' claims that the trial court's jury instructions were insufficient, and that the prosecutor made improper inflammatory arguments to the jury despite

[7] Because the trial judge first disclosed his reliance on Herring's supposed perjury in his decision denying Herring's Rule 3.850 petition, this improper use of a non-statutory aggravating factor is not a point that Herring raised or could have raised on direct appeal.

Francois' failure to raise these issues on direct appeal. *Id.* at 689. *See Raulerson v. State*, 462 So.2d 1085 (Fla. 1985) (claim regarding a prospective juror's knowledge about case considered notwithstanding failure to raise issue on appeal); *Armstrong v. State*, 429 So.2d 287 (Fla.) *cert. denied*, 464 U.S. 865, 78 L. Ed.2d 177, 104 S. Ct. 203 (1983) (Armstrong's attack on jury instructions reviewed on merits despite procedural bar).

The foregoing cases are not isolated instances in which this Court has elected to review the substance of claims that either could have been raised on direct appeal but were not, or were considered on direct appeal and raised again in post-conviction proceedings. Herring's Initial Brief cites numerous other examples of cases in which this Court has reviewed the merits of claims arguably subject to the procedural default rule. *See* Herring's Initial Brief at 40-41. The constitutional mandate of fairness and consistency in capital cases entitles Herring to a full review of each of the claims raised in Point IV of Herring's Initial Brief.

A. The Admission of the Probation Officer's Testimony Was Constitutional Error

It has been shown that the admission of the testimony of Mary White, a probation/parole officer who testified at the penalty phase of Herring's trial regarding certain highly prejudicial statements allegedly made to her by Herring, was constitutionally impermissible. Herring's Initial Brief at 41-47. We have demonstrated that (1) White's testimony was highly inflammatory; (2) it was admitted in violation of Florida's sentencing statute because it constituted evidence of a non-statutory aggravating circumstance; (3) it was admitted on the basis of an erroneous application of *Sireci v. State*; 399 So.2d 964 (Fla. 1981); (4) it was improperly admitted because Herring was not given *Miranda* warnings prior to his interview with White; and (5) the prosecution improperly failed to give defense counsel prior notice of White's testimony. *Id.*

The State responds only to the third of these contentions, and then simply asserts the testimony was admissible. The State's silence respecting Herring's other four claims must be regarded as a concession that White's testimony was inadmissible. *See* State's Answer at 19.[8]

[8] Even the State's meager response to the third claim is unpersuasive. While the State correctly points out that "the heinous, atrocious and cruel factor was considered close by the judge," *id.* at 19, it has apparently forgotten about its own concession at the penalty phase that this aggravating circumstance was inapplicable, which, given the established facts of the homicide, was well-founded. (A202) That the trial judge found the applicability of this factor a "close call," only demonstrates the judge's lack of understanding as to the heinous, atrocious and cruel aggravating circumstance, and not that White's testimony was admissible.

B. The Jury Instructions at the Penalty Phase of the Trial Were Constitutionally Inadequate

Herring's Initial Brief demonstrates that the jury instructions provided by the trial court at the penalty phase of Herring's trial were defective because they lacked the clarity and precision which the Eleventh Circuit has repeatedly emphasized is constitutionally required. Herring's Initial Brief at 47-51. The State makes no effort to answer this argument.

C. The Trial Court Failed to Consider the Proportionality of Imposing a Death Sentence in This Case

The trial court committed constitutional error by excluding evidence that should have been admitted and by applying an incorrect standard in imposing Herring's death sentence. Herring's Initial Brief at 52-54. In connection with the first of these claims, in *Lockett v. Ohio*, 438 U.S. 586, 57 L. Ed.2d 973, 98 S. Ct. 2954 (1978), the Supreme Court held that a defendant is unrestricted in terms of the mitigating evidence he is permitted to introduce. Here the trial court refused to admit evidence that other criminal defendants charged with capital crimes in similar circumstances had been given life sentences. Herring's Initial Brief at 53. As to the latter claim, it has been shown that the trial court's failure to admit this evidence stemmed from its refusal to balance the facts and circumstances of this homicide against the facts of other similar capital felonies as required by Florida law. *Id.* at 54.

Once again, the State makes no attempt to rebut these claims.

D. The Prosecutor Made Improper and Inflammatory Comments In Her Closing Argument at the Sentencing Phase of Herring's Trial

In her closing argument at the sentencing phase of Herring's trial the prosecutor stated:

> And I will suggest to you, rather than a mitigating circumstance, [appellant's age] should be considered as an aggravating circumstance, because Ted Herring, as he stands before you now, is twenty. If he gets life imprisonment, he will be up for parole and possibly out on the streets at forty-five. ***He will be out on the streets to kill and rob again at forty-five.***

(A207) (Emphasis supplied.)

Herring's Initial Brief shows that these comments were inflammatory and that this Court found that precisely the same comments were grounds for ordering a resentencing in *Teffeteller v. State*, 439 So.2d 840 (Fla. 1983) *cert. denied*, ____ U.S. ____, 79 L. Ed.2d 754, 104 S. Ct. 1430 (1984). Herring's Initial Brief at 55. The State does not challenge the substance of these arguments; it relies solely on its claim of procedural default.

V.

THE STATE HAS NOT RESPONDED TO THE CLAIMS RAISED IN POINTS V — VIII OF HERRING'S INITIAL BRIEF

The State has failed to respond in any meaningful way to the claims raised in Points V—VIII of Herring's Initial Brief. These claims are fully set forth at 56-61 of Herring's Initial Brief and do not require reiteration.

CONCLUSION

The trial court's order should be reversed and Herring's conviction and sentence should be set aside; in the alternative, Herring's death sentence should be reversed with instructions to impose a life sentence; or, in the alternative, Herring's death sentence should be vacated and remanded for a new sentencing hearing.

Dated: January 3, 1986

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been furnished by First Class mail, postage prepaid to Jim Smith, Attorney General of the State of Florida, at 125 East Orange Avenue, Daytona Beach, Fl. 32014, this 3rd day of January, 1986.

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Jeremy G. Epstein