IN THE SUPREME COURT OF FLORIDA

FLOYD MORGAN,	:	
	:	
Appellant	:	
	:	
v.	:	CASE NO. 69,104
	:	
STATE OF FLORIDA,	:	
	:	
Appellee.	:	
	:	

On Appeal From The Eighth
Judicial Circuit, In And For
Union County, Florida

INITIAL BRIEF OF DEFENDANT/APPELLANT FLOYD MORGAN

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I. STATEMENT OF THE CASE

Following trial by jury, appellant Floyd Morgan ("Morgan") was convicted of first-degree murder on June 14, 1978. The next day, June 15, 1978, during the penalty phase of the trial, the same jury that tried and convicted Morgan heard evidence of aggravating and mitigating circumstances.[1/] It then rendered an advisory recommendation as to the sentence Morgan should receive. The jury voted 7 to 5 in favor of imposing the death penalty upon Morgan.[2/] On July 17, 1978, the Circuit Court for the Eighth Judicial Circuit in and for Union County sentenced Morgan to death by electrocution. The judgment and sentence were affirmed by this Court. Morgan v. State, 415 So. 2d 6 (Fla.), cert. denied, 459 U.S. 1055 (1982).

On January 24, 1983, Morgan sought post-conviction relief under Fla. R. Crim. P. 3.850 from the sentence of death imposed upon him in 1978. The Circuit Court denied the motion without a hearing on March 16, 1983. On September 5, 1985, this Court set aside the denial and remanded the case for an evidentiary hearing on the motion. Morgan v. State, 475 So. 2d 681 (1985).

1/ At least eight of these jurors were either employed in the state prison system or had close relatives who were employed there. Trial Transcript ("Trial Tr.") at 6-164. Record references herein to the transcript of the trial will be cited as "Trial Tr.". References to the transcript of the evidentiary hearing on the Rule 3.850 motion, held on December 30, 1985, entitled Transcript of Testimony Proceedings, will be cited as "Tr.". Exhibits will be cited as "Ex."

2/ A vote of 6 to 6 is considered a vote against imposition of the death penalty. See Tr. 33; Rose v. State, 425 So. 2d 521, 525 (Fla. 1982), cert. denied, 465 U.S. 1051 (1984); Harich v. State, 437 So. 2d 1082, 1086 (Fla. 1983); Jackson v. State, 438 So. 2d 4, 6 (Fla. 1983).

The Circuit Court held the hearing mandated by this Court on December 30, 1985. At the hearing, the Court received the testimony of nine witnesses for the defendant; four of these, including two expert witnesses, testified live, and five testified by stipulation. (The stipulated testimony was included in the record as Exhibits 1 through 5.) No witnesses were called by the State to dispute or rebut the testimony offered by the defendant. The testimony on behalf of defendant, cited below, thus stands uncontradicted in the record.

The Circuit Court denied Morgan's motion for post-conviction relief on June 9, 1986, signing the proposed order submitted by the prosecution, and denied Morgan's motion for rehearing on June 25, 1986. Morgan now appeals the Circuit Court's Orders of June 9 and 25, 1986.

This appeal is concerned primarily with the alleged omissions of Morgan's trial counsel at the penalty phase of the trial. However, one of these alleged omissions, concerning failure to investigate and present evidence of Morgan's psychiatric problems arising from his military service in Vietnam, also goes to the question of Morgan's guilt or innocence of first degree murder, as determined at the guilt phase of the trial. See pp. 27-29, infra.

II. STATEMENT OF THE FACTS

William Salmon was Morgan's attorney at both the guilt and penalty phase of his trial. Salmon did not present any live testimony during the penalty phase of the trial. Instead, he read fifteen documents to the jury, including a four-sentence letter of commendation from Governor Askew regarding Morgan's actions during a prison riot, a five-sentence letter from Morgan's mother, stating only

that he had suffered several head injuries, and various prison documents pertaining to vocational training, gain time, good behavior, educational achievement, and psychological evaluations. Salmon did not make these documents part of the record.[3/] See Trial Tr. at 566-76. He did not present any evidence at the penalty phase from Morgan's family members other than the letter from his mother; any evidence from two prison staff members whose lives Morgan had saved during a prison riot; any evidence that Morgan served in the military in Vietnam or suffered from mental problems originating in that service; or any evidence tending to establish that Morgan suffered from some type of organic brain disorder.

A. Evidence That Could Have Been Produced From Family Members

Salmon did not contact any members of Morgan's family to request that they testify at the penalty phase of Morgan's trial or to determine how they might testify if called. Tr. 23-24. Although Morgan indicated to Salmon that he did not wish to have his family involved, Salmon did not specifically explain to Morgan the various factual and legal purposes to which family testimony could be put, did not advise Morgan that in his professional judgment family members should be called to testify at the penalty phase, and did not attempt to persuade Morgan to let him call family members as penalty-phase witnesses. Tr. 25-26. Salmon had the means to contact family members had he wished, but did not do so. Tr. 26-27.

3/ The jury was therefore not given these documents and had to rely on their own memories of their content when considering what sentence to recommend.

At the December 30, 1985 evidentiary hearing, Morgan's four sisters and brothers testified, through stipulated testimony, that they would have gone to Morgan's trial to testify if they had been asked to do so, but that no one in the family was notified of the trial until after Morgan was sentenced. See Exs. 1-4. Alice Diven, Morgan's younger sister, and Robert P. Morgan, his younger brother, would have described to the jury details of Morgan's family life, including the facts that Morgan's stepfather was an alcoholic and abusive to his stepchildren; that he often beat Morgan; that the Morgan children all left home because of their stepfather; and that Morgan was a good brother to Diven, took care of her, and tried to protect her from their stepfather. Ex. 1, ¶¶ 2-4; Ex. 4, ¶¶ 2-4. Diven and Carol Ann Morgan, Morgan's older sister, would have testified that Morgan suffered a head injury in July 1969 and complained of headaches that fall. Ex. 1, ¶ 5; Ex. 2, ¶ 1.

All of Morgan's siblings, if called at the penalty phase of the trial, would have testified that Morgan changed "a lot" in Vietnam and came back a different person. Ex. 1, ¶ 5; Ex. 2, ¶¶ 2, 5; Ex. 3, ¶¶ 3-4, Ex. 4, ¶¶ 5, 6. Diven would have stated that Morgan "didn't care what was going to happen" and cared less about himself and others after coming back from Vietnam; that he left home to get a job after his return; that the killing in this case was out of character for the Morgan that she knew; that he must have "flipped out" if he did it; and that before Vietnam he was not aggressive and "was not one to start a fight." Ex. 1, ¶¶ 5-7.

Carol Ann Morgan would have confirmed this testimony by stating that before he went to Vietnam Morgan "was a shy, quiet kid, who would do anything for anybody"; that when he came back from

Vietnam, he was "very much changed" and sometimes "acted aggressive, loud and domineering" and "like he had a split personality"; that at other times he was fine; and that the "person who committed the murder in this case . . . is not the brother [she] knew before he left home to go to Vietnam." Ex. 2, ¶¶ 2, 5.

James Lee Morgan would have testified that, in his opinion, Morgan's troubles with the law came from the change he experienced in Vietnam. Id., ¶ 2. He would have testified that before Vietnam Morgan was always quiet; that after his return, his attitude was different, he would argue, was afraid of nobody, would not back down to avoid a fight as he had prior to Vietnam, and felt like he was living on "borrowed time"; and that he had never had a fight with Morgan before Vietnam, but that he did have fights with him after he returned. Id., ¶¶ 3-4. He would also have testified to Morgan's frightening, physically dangerous, and emotionally stressful wartime experiences. Id., ¶ 4.

Robert P. Morgan would also have told the jury that Morgan was "different" when he came back from Vietnam, would do "crazy" things to "show off" and impress people, and did not talk to him about his experience in Vietnam; that "[k]illing someone is completely different from the [Morgan he] knew"; that Morgan never acted like that before Vietnam; and that he would run from a fight before his military service. Id., ¶¶ 5, 6.

All four family members would have asked the jury to spare their brother's life. Ex. 1, ¶ 9; Ex. 2, ¶ 6; Ex. 3, ¶ 5; Ex. 4, ¶ 7.

Salmon testified at the hearing on December 30, 1985, that he would have introduced the majority of the statements of Morgan's four sisters and brothers if he had obtained the information contained in

those statements in the course of his preparation for trial. Tr. at 24-25. He also testified that the information would have assisted his argument in mitigation, that it was a mistake for him not to contact members of Morgan's family to determine what mitigating testimony they might have been able to give, and that if he had had more experience at the time, he would have done things differently. Tr. 25, 27, 60.

B. Evidence That Could Have Been Produced From Two Prison Staff Members

Salmon also did not present evidence as to Morgan's actions in saving the lives of two prison staff members, Dale Harden and John G. Sapp, during the "Garment Factory" riot at the Florida State Prison on April 30, 1973. He made one attempt to reach Harden, but did not contact either Harden or Sapp to request that they testify during the penalty phase of Morgan's trial, even though both were still employed in the prison system at the time of trial. Tr. 24.

Dale Harden is currently employed at the Union Correctional Institution in Florida, has been employed in the Florida prison system for 16 years, and has lived in Union County all his life, about 40 years. Tr. 7-8. Had he been called to testify at the penalty phase of Morgan's trial, he would have testified that Morgan was an "exceptionally good" and loyal inmate of good repute and character, who worked hard and did not give Harden any trouble. Tr. 8, 11. He would also have testified that John Sapp would not be alive today if Morgan had not gone to his aid during the Garment Factory riot and that Harden himself and several others probably would not be either. Tr. 9. Harden would also have asked the jury, just about all of whom

he knew personally, to spare Morgan's life because of what he had done to save the lives of Harden and others. Tr. 9-10.

John Sapp, if called at the penalty phase of the trial, would have testified that he had been with the Florida Department of Corrections since 1957, that he worked at the Union Correctional Institution, and that he is married, with a child. Ex. 5. He would also have testified that he was present in April 1973 at the Garment Factory riot; that he was stabbed with a screwdriver in the back, as a result of which he is paralyzed in his left leg and suffers numbness in his right leg; that Morgan sprayed a fire extinguisher on the ten or more inmates surrounding Sapp; and that Morgan's actions helped save Sapp's life. Sapp would have further testified that prison inmates do not look favorably on other inmates siding with prison personnel or supervisors; that Morgan's actions were therefore taken not only at great risk to his personal safety at the time, but also at risk to his continued safety in the prison; and that Morgan never gave Sapp any problems before this incident, behaving in a manner acceptable to Sapp and others. Id.

Salmon testified at the evidentiary hearing that he had wanted to call Harden and Sapp at the penalty phase, in addition to reading the Governor's commendation letter at that phase. Tr. 70. It is his opinion that live testimony from these two guards would have been favorable and more persuasive than the four-sentence letter from the Governor he read into the record. Tr. 27, 63. Salmon also testified that he believes that the jury, which had close ties to persons working in Florida's prison system, would have reacted favorably to testimony from Correctional Department employees that Morgan's actions had helped save their lives. Id. Salmon did not

make a tactical judgment that it was unwise to call Harden or Sapp. Id. He wanted to call them, made one attempt to do so, but failed to contact them. Id. Salmon was not worried that cross-examination of Harden and Sapp would be adverse. Tr. 71.

C. Evidence That Could Have Been Produced Of Mental Problems Arising From Morgan's Military Service In Vietnam

Salmon did not consider pursuing evidence in mitigation or defense that Morgan suffered from the syndrome known as post-traumatic stress disorder ("PTSD") because of his experiences in Vietnam or that he suffered from any type of organic brain disorder. Tr. 30. Other than talking to Morgan, Salmon did not investigate Morgan's military or family history, nor did he review Morgan's history with respect to his mental condition. Tr. 20. Salmon first looked at the prison record either just prior to the beginning of or during the trial. Id.

Dr. Joyce Lynn Carbonell, an associate professor of psychology at Florida State University and an expert in clinical psychology and PTSD, who has worked extensively with Vietnam veterans, was qualified and testified as an expert in her field. Tr. 74-78. She testified at the hearing that publications discussing combat or post-stress problems in Vietnam-era veterans appeared in psychiatric journals as early as 1972. Testimony Tr. at 74-78. As of June 1978, a considerable amount of information was available about the effects of combat on persons participating in it.[4/] The syndrome was not yet

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4/ In 1973, the Russell Sage Foundation, National Institute of Mental Health, and National Council of Churches began to investigate the problems that Vietnam veterans were having. Tr. 79. In 1975, a whole issue of one journal was devoted to discussion of the mental health problems of Vietnam veterans. Tr. 78. In February 1978, the
(Footnote continued)

known as PTSD, but was beginning to be referred to as combat shock and, especially, delayed stress disorder.[5/] Tr. 78. As of 1978, Dr. Carbonell testified, there was enough information about what was then called delayed stress syndrome and combat shock to diagnose that personality and behavior were disrupted as a result of having been in combat. Tr. 79. On the basis of Morgan's prison records alone, on the testimony that could have been given by family members alone, or on Morgan's military records alone, Dr. Carbonell testified, an expert in clinical psychology as of the first half of 1978 would have concluded that there should be further investigation to determine whether the homicide allegedly committed by Floyd Morgan had been caused by the syndrome now called PTSD. Tr. 81-86.

Salmon first spoke to a psychologist, Dr. McMahon, and a psychiatrist, Dr. Barnard, concerning evidence for the penalty phase of Morgan's trial in early June 1978. Tr. 18-19. Although they had access to Morgan's prison file, Salmon did not give them any records or family history relating to Morgan. Tr. 19. Salmon asked Drs. McMahon and Barnard to examine Morgan for any information that they thought would be helpful. Id. Salmon did not point them in any particular direction, nor did he suggest any particular mental condition they should investigate, except in general to suggest that they examine for any mental dysfunctions that they might determine

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President's Commission on Mental Health published a special report on the mental health problems of Vietnam veterans. Tr. 78-79.

5/ Dr. Carbonell testified that the term "PTSD" was formally adopted in 1980, after a number of years of discussion. Tr. 80. The syndrome itself, however, had always existed, but had been given different labels over the course of time. Tr. 81.

from an examination. Tr. 20. Morgan was evaluated on June 7, 1978. Tr. 182. Dr. McMahon's written evaluation is dated June 12, the day Morgan's trial started. Id.

Dr. Carbonell testified that failure to provide Drs. McMahon and Barnard with either Morgan's military records or his family history significantly interfered with their ability to make a proper diagnosis of delayed stress disorder or any other mental conditions. Tr. 100. Dr. Carbonell would expect family information and military records to be available to her in evaluating a patient in a case such as Morgan's. Id. She would have required more than a week or two to evaluate such a patient adequately and would have so informed counsel. Tr. 101. Dr. Carbonell considers it the doctor's responsibility to ask for the patient's records and the lawyer's responsibility to provide materials of which the doctor is unaware. Tr. 102.

Salmon was aware that a 1973 psychological evaluation of Morgan done by Dr. Joanna Byers, a clinical psychologist, was present in his prison records. Tr. 31. He was also aware that Dr. Byers recommended a thorough neurological workup, with an EEG to verify indications of an organic disturbance. Id. Salmon never asked that an EEG be done on Morgan, nor did he ask that any tests be done specifically to determine if Morgan had suffered brain damage. Id. He does not recall reading Morgan's prison file prior to consulting the two doctors who examined Morgan. Tr. 32-33.

D. Limitation Placed On Offering Mitigating Evidence At Trial

It was Salmon's understanding that he was limited by the trial court's rulings to introducing mitigating evidence on only the

statutory mitigating circumstances during the penalty phase of the trial. Tr. 21. Just prior to the start of the penalty phase, Salmon had moved the court to be allowed to introduce evidence in mitigation that was not under the statutory headings enumerating mitigating circumstances in the Florida statute. Id. See also Trial Tr. 555. The court's ruling did not allow Salmon to introduce all evidence he deemed to be mitigative but did allow him to enter any information that he wished to introduce to rebut, explain, or refute any aggravating circumstances that the State presented. Tr. 22; Trial Tr. 560. Salmon believed that if his evidence did not fall within one of the statutory categories for mitigating evidence, he was limited to using such evidence to explain away any aggravating circumstances introduced by the prosecution.[6/] Tr. 22. Salmon's closing argument would have been structured differently if he had not felt limited to the statutory mitigating circumstances. Id. at 69. He would also have pursued additional mitigating circumstances if he had not been so limited. Tr. 69-70.

Lockett v. Ohio, 438 U.S. 586 (1978), was decided on July 2, 1978, approximately two weeks after the penalty phase hearing but two weeks before the Court's sentencing of Morgan on July 17, 1978. Tr. 70. Salmon was unaware of the decision and did not call it to the Court's attention. Id. If Salmon had known of the case, he

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6/ Salmon believed, for example, that he could introduce evidence from the prison records for the purpose of responding to or reducing the effect of the aggravating factor that the defendant was a prisoner at the time he committed the homicide, but that he could not introduce such evidence for purposes of arguing that there were mitigating factors beyond those enumerated in the statute. Tr. 23.

would have moved for a continuance to pursue additional mitigating circumstances and then urged them upon the Court. Id.

In Salmon's best professional judgment, had he presented mitigating evidence from Morgan's family members, the prison staff members, and from experts as to Morgan's psychological condition, Morgan would have secured a majority vote from the jury in favor of life. Tr. 32.

E. Background And Preparation Of Trial Counsel

Salmon was employed by the Public Defender's office in the Eighth Judicial Circuit from 1974 until May or June of 1978. Tr. 14. Prior to Morgan's trial, Salmon had not handled either a homicide or a capital case. Tr. 15, 16, 48. The Public Defender's office did not have a policy at that time as to how it would select attorneys for capital cases, nor did it have a policy of assigning more than one attorney from the office to a capital case. Tr. 15.

Capital cases were uncommon in the Public Defender's office as of the year 1978. Tr. 16. Although he may have discussed Morgan's case in general terms with other public defenders, Salmon did not get any specific advice from them regarding trial of the case. Tr. 50-51.

Salmon's case load at any given time at the Public Defender's office was somewhere between 90 and 110. Tr. 16. To handle these cases, Salmon went to his office at 7:00 or 7:30 a.m. and often would not leave until midnight. Id. This schedule severely limited the amount of time Salmon could spend on any one case, including Morgan's. Id.

Salmon left the Public Defender's office about two weeks prior to Morgan's trial, on or about May 31, 1978. Tr. 17. He took

Morgan's and other cases with him. Id. He was also busy getting his own private practice established in June 1978. Id. He took on cases in his new private practice from the beginning of June. Id. The trial started on June 12. Tr. 182; Trial Tr. Vol. I.

In preparing for trial, Salmon's primary focus was on the guilt phase, not the penalty phase. Tr. 23. His preparation for the penalty phase was undertaken either during or shortly before the trial. Id.

F. Expert Testimony Regarding Ineffectiveness Of Trial Counsel

Baya Harrison, former Deputy Attorney General of Florida and currently a practicing criminal defense attorney in Tallahassee, was qualified at the evidentiary hearing to testify as an expert witness on effectiveness of assistance of counsel. Tr. 108-11. He testified that he has previously evaluated ineffective assistance of counsel claims, both for the State of Florida and in the course of his private practice of criminal law; has handled over 200 cases, at least 15 to 20 of them murder cases, in private practice; has been qualified to testify as an expert witness in Florida on the issue of effectiveness of assistance of counsel three times; and has been recognized by the Bar of Florida for his work in the area of capital punishment cases. Tr. 108-10. Harrison testified to his expert opinion that Morgan was denied constitutionally effective assistance of counsel at the penalty phase of his trial. In his opinion, counsel for Morgan was ineffective in failing (1) to present live testimony as opposed to simply reading excerpts of documents and letters into the record; (2) to call Morgan's family members; (3) to follow up on evidence

suggesting Morgan had suffered some type of serious, traumatic head injury and suffered serious emotional problems; (4) to call Harden and Sapp, the two prison guards; (5) to call Department of Corrections personnel to testify as to Morgan's attempts to rehabilitate himself; (6) to bring out Morgan's military service in Vietnam; (7) to explore evidence that Morgan suffered from PTSD; and (8) to obtain Morgan's military records. Tr. 113-20.

Had Salmon presented such evidence in an effort to humanize Morgan, Harrison testified, there was a distinct likelihood that several more jurors would have been swayed to vote for a life sentence. Tr. 115. Had the jury recommended life, the judge's authority to impose a death sentence would have been limited. Id.

Testimony from Morgan's family would have indicated that he was a decent, loving brother; had a very sad and abusive childhood; was good to his sisters and his mother; suffered some type of serious traumatic head injury; and came back from Vietnam a changed person. Tr. 114. Harrison testified that he did not think it could possibly have been a strategic decision for Salmon to have failed to call members of Morgan's family to so humanize him in the eyes of the jury. Tr. 116. Such evidence would have been "very, very powerful." Id. An effective attorney would not have let his client instruct him not to contact his family members. Tr. 135. Harrison further testified that he did not know of other capital cases in Florida where defense counsel had not put on live testimony when it was available. Tr. 116. Failure to do so was a deficiency which was far below that of reasonably effective assistance of counsel. Id.

Based on Harden's testimony that Morgan's actions in the Garment Factory riot saved the life of Sapp and very likely that of

Harden himself, that he had a good opinion of Morgan, and that he knew all or substantially all of the members of the Union County jury who heard the case, Harrison testified, it was constitutionally ineffective and prejudicial to Morgan for Harden not to have been called by defense counsel as a live witness at the penalty phase. Tr. 117. Such testimony would also have been "extremely powerful." Id. Harrison feels strongly that this evidence would have been likely to move one or more of the seven-member majority of the jury panel to have voted differently on the issue of life or death. Id. Presentation of this evidence was crucial to Morgan's defense at the penalty phase, especially because of the violence that threatens guards in the prisons and because Morgan subjected himself to danger from his fellow prisoners by helping out two of these guards. Tr. 115, 127. Reading a letter from the Governor regarding this incident was much less effective than presenting live testimony from the guards. Tr. 128-29.

Harrison also testified that he believes that Morgan's jury would have been tremendously impressed by the fact that he "had put his life on the line for his country" in Vietnam. Tr. 118, 142. This fact was virtually ignored during the penalty phase. Tr. 118. Harrison could not conceive of any reason that Morgan's combat service in Vietnam would not have been brought home to the jury. Id. This failure was another serious act or omission falling measurably below that of effective assistance of counsel. Id.

To Harrison, there is no question but that PTSD should have been investigated by Salmon. Tr. 119. The Attorney General of the State of Florida, for example, has stated that PTSD is nothing new, that it is just what used to be called shell shock during the Korean War and even in the Second World War. Id. There was sufficient

information in Morgan's Army medical records and from his relatives to indicate that he had been detrimentally affected emotionally while he was in Vietnam. Id. Morgan's change in emotional behavior following Vietnam should have been investigated and exhaustively presented to the jury at his trial. Id. Even a "not very smart lawyer" would have recognized from Morgan's medical files that he had serious emotional problems that were much more serious when he returned from Vietnam. Tr. 133.

A reasonably competent attorney would not stop at the opinion of one psychologist. Tr. 134, 147. Moreover, it is constitutionally ineffective for a lawyer to rely on the opinion of a psychiatrist or psychologist if the lawyer has not provided that doctor with the defendant's files, including his military records and family history. Tr. 146, 148. It is the duty of the lawyer to insure that the expert gets those data. Tr. 146. It fell below constitutionally accepted standards for counsel to fail to obtain Morgan's military records or to investigate what the family could tell counsel and his experts about the change that occurred in Morgan as a result of his Vietnamese service. Id. at 120, 122, 140, 146. Had counsel for Morgan fully prepared for the penalty phase, he could have established eight mitigating circumstances, some statutory, some not statutory, which would have outweighed the aggravating circumstances. Id. at 122-23. A presentation at the penalty phase of Morgan's trial that met constitutionally effective standards would therefore have been likely to change the outcome of the jury's recommendation on life versus death. Id. at 123-24.

III. SUMMARY OF ARGUMENT

The failure of Morgan's trial counsel to present critical mitigating evidence from family members and from two prison staff members and of Morgan's army service, PTSD, and possible organic brain damage were acts or omissions outside the wide range of professionally competent assistance of counsel. Salmon failed to contact family members, who would have testified to Morgan's family life, his personality change following Vietnam, and various head injuries. He also failed to contact two prison staff members, who would have described Morgan's role in saving at least one of their lives during a prison riot. He did not pursue evidence of PTSD or organic brain damage and did not give any records or family or military history to two doctors who examined Morgan prior to trial. He did not call the trial court's attention to the Supreme Court's decision in Lockett v. Ohio, which rejected the ruling under which Salmon had been limited to presenting evidence of only statutory mitigating circumstances and to rebutting statutory aggravating circumstances.

Although Salmon read several documents to the jury, this was no substitute for the presentation of live testimony. In addition, counsel may be ineffective even when they have produced some, but not all, mitigating evidence available. Not putting on live witnesses was not a tactical decision on Salmon's part. Even if it had been, it would not have been a reasonable strategy. Salmon was not worried about adverse cross-examination of live witnesses. Although Morgan indicated that he did not want Salmon to involve his family, this instruction did not absolve Salmon from evaluating the potential merit of presenting family testimony and so advising Morgan.

But for his trial counsel's errors, there is a reasonable probability that Salmon could have established several mitigating circumstances, which would have outweighed the aggravating circumstances presented. It is also reasonably probable that presentation of this evidence at the penalty phase of the trial would have changed the jury's recommendation of seven to five for imposition of the dealth penalty to a recommendation for life. Accordingly, this Court should remand this case to the Circuit Court with instructions to correct Morgan's sentence to life imprisonment. Alternatively, this Court should vacate Morgan's sentence and remand with instructions to convene a new sentencing jury and to conduct a new penalty trial.

With respect to the guilt phase of Morgan's trial, this Court should remand for a determination of whether Morgan was prejudiced in his defense to first degree murder by trial counsel's failure to investigate and pursue a defense based on PTSD.

IV. ARGUMENT

In the Argument which follows, appellant relies upon the uncontradicted evidence which was introduced at the evidentiary hearing, and which has been described above. Appellant asks that this Court make findings in accord with such uncontradicted evidence, and apply thereto the applicable constitutional standards governing ineffective assistance of counsel.

Because the pertinent testimony was not contradicted in the hearing record, the findings of the Circuit Court are not entitled to the deference which would be accorded if they had been based upon resolving conflicts in testimony below: "'[a] finding which rests on

conclusions drawn from undisputed evidence, rather than on conflicts in the testimony, does not carry with it the same conclusiveness as a finding resting on probative disputed facts, but is rather in the nature of a legal conclusion.'" Oceanic International Corp. v. Lantana Boatyard, 402 So. 2d 507, 511 (Fla. 4th D.C.A. 1981), quoting Estate of Donner, 304 So. 2d 742, 748 (Fla. 1978), and Holland v. Gross, 89 So. 2d 255, 258 (Fla. 1956). Accordingly, this Court should reach its own legal conclusion from the undisputed evidence, much of which was simply ignored or overlooked in the Circuit Court's Order denying the 3.850 motion.

Appellant further relies upon the rule stated in Eig v. Insurance Co. of North America, 447 So. 2d 377, 379 (Fla. 3d D.C.A. 1984): "if the trial court's decision is manifestly against the weight of the evidence or is contrary to the legal effect of the evidence, it becomes the duty of the appellate court to reverse such a decision." See also Hull v. Miami Shores Village, 435 So. 2d 868 (Fla. 3d D.C.A. 1983). Moreover, as this Court has stated in In re Alkire's Estate, 144 Fla. 606, 624-25, 198 So. 475 (1940): "The appellate court . . . [has the] duty to decide for itself both the probative force of the evidence as shown by the record, and the law applicable thereto, and to render the judgment or decree which in law should be rendered." This rule of review should apply with particular force here, in a capital case dependent upon applying constitutional standards to critical underlying facts.

A. The Legal Standards Relating To Ineffective Assistance Of Counsel In Capital Cases

A defendant's right to be represented by counsel is a fundamental component of this country's criminal justice system. United States v. Cronic, 466 U.S. 648, 653 (1984). The special value of the right to the assistance of counsel explains why "[i]t has long been recognized that the right to counsel is the right to the effective assistance of counsel." McMann v. Richardson, 397 U.S. 759, 771 n.14 (1970). A criminal trial should not be "'a sacrifice of unarmed prisoners to gladiators.'" Id. at 657, quoting United States ex rel. Williams v. Twomey, 510 F.2d 634, 640 (7th Cir.), cert. denied, 423 U.S. 876 (1975). The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. United States v. Cronic, 466 U.S. at 656.

At the heart of the duty of effective representation is the independent duty to investigate and prepare. Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982), cert. denied, 460 U.S. 109 (1983). The cornerstones of effective assistance of counsel are the informed evaluation of potential defenses to criminal charges and meaningful discussion with the accused of the realities of his case. Goodwin v. Balkcom, 684 F.2d at 805. An attorney does not provide effective assistance if he fails to conduct "a prompt investigation of the circumstances of the case and to explore all avenues leading to facts relevant to the merits of the case and the penalty in the event of conviction," ABA Standards for Criminal Justice, The Defense Function, Standard 4-4.1 (2d ed. 1980), or if his failure to investigate is not based upon a reasonable set of assumptions. Birt v. Montgomery, 709

F.2d 690, 701 (11th Cir. 1983), cert. denied, ____ U.S. ____, 105 S.Ct. 232 (1984). See also Goodwin v. Balkcom, 684 F.2d at 805.

The sentencing stage of any case, regardless of the potential punishment, is "'the time at which for many defendants the most important services of the entire proceeding can be performed.'" Stanley v. Zant, 697 F.2d 955, 963 (11th Cir. 1983), cert. denied, 467 U.S. 1219 (1984), quoting ABA Standards on the Administration of Criminal Justice, Sentencing Alternatives and Procedures § 5.3(e). The lawyer "has a substantial and important role to perform in raising mitigating factors both to the prosecutor initially and to the court in sentencing." ABA Standards for Criminal Justice, The Defense Function, Commentary to Standard 4-4.1, at 4.55. This cannot effectively be done on the basis of broad, general, emotional appeals, or on the strength of statements made to the lawyer by the defendant. Id. Information concerning the defendant's background, education, employment record, mental and emotional stability, family relationships, and the like will be relevant, as will mitigating circumstances surrounding the commission of the offense itself. Id. Investigation is essential to the fulfillment of these functions. Id. "Failure to make adequate pretrial investigation and preparation may be grounds for finding ineffective assistance of counsel." Id.

The special importance of the capital sentencing proceeding gives rise to a special duty on the part of defense counsel to be prepared for that crucial phase of the trial. Stanley v. Zant, 697 F.2d at 963.[7/] The Supreme Court has repeatedly held that the

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7/ See also Strickland v. Washington, 466 U.S. 668, 704-05 (1984) (Brennan, J., concurring in part and dissenting in part); Barefoot v. Estelle, 463 U.S. 880, 913 (1983)
(Footnote continued)

sentencer in capital cases must be permitted to consider any relevant mitigating factor and that capital defendants have a right to offer any evidence they choose on character or the circumstances of the offense.[8/] See, e.g., Skipper v. South Carolina, ____ U.S. ____, 106 S.Ct. 1669 (1986); Eddings v. Oklahoma, 455 U.S. 104, 112 (1982); Lockett v. Ohio, 438 U.S. 586, 605 (1978); Woodson v. North Carolina, 428 U.S. 280, 304 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Jurek v. Texas, 428 U.S. 262, 276 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) .[9/] The right to present and to have the sentencer consider any and all mitigating evidence, however, "'means little if defense counsel fails to look for mitigating evidence or fails to present a case in mitigation at the capital sentencing

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(Marshall, J., dissenting); Zant v. Stephens, 462 U.S. 862, 874 (1983), quoting Gregg v. Georgia, 428 U.S. 153, 188-89 (1976) (opinion of Stewart, Powell, and Stevens, JJ.); Eddings v. Oklahoma, 455 U.S. 104, 118 (1982) (O'Connor, J., concurring).

8/ Thus, a sentencing judge's failure to consider relevant aspects of a defendant's character and background creates such an unacceptable risk that the death penalty was unconstitutionally imposed that, even in cases where the matter was not raised below, the "interests of justice" may impose on reviewing courts "a duty to remand [the] case for resentencing." Eddings v. Oklahoma, 455 U.S. at 117 n., 119 (O'Connor, J., concurring). "Lockett is so fundamental, and the result of an improper exclusion of mitigating evidence potentially of such great magnitude, that such errors simply must be corrected." Jacobs v. Wainwright, ____ U.S. ____, 105 S.Ct. 545, 547 (1984) (Marshall and Brennan, JJ., dissenting).

The cases therefore create an asymmetry weighted on the side of mercy: while a sentencing authority may consider only those aggravating circumstances listed in the relevant statute, it may consider any mitigating factors that it wishes. Stanley v. Zant, 697 F.2d 955, 960 (11th Cir. 1983), cert. denied, 467 U.S. 1219 (1984).

9/ See also Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir.), cert. denied, ____ U.S. ____, 106 S.Ct. 562 (1985); Stanley v. Zant, 697 F.2d at 960.

hearing.'" Strickland v. Washington, 466 U.S. 668, 706 (1984) (Brennan, J., concurring in part and dissenting in part), quoting Comment, 83 Colum. L. Rev. 1544, 1549 (1983). Counsel's general duty to investigate takes on "supreme importance" to a defendant in the context of developing mitigating evidence to present to a judge or jury considering the sentence of death. Id. at 706. Claims of ineffectiveness of counsel in the performance of counsel's general duty to investigate mitigating circumstances should therefore be considered with "commensurate care." Id.

For a defendant to succeed on a claim of ineffective assistance of counsel, a court must determine that, in light of all the circumstances, the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment were outside the wide range of professionally competent assistance. Strickland v. Washington, 466 U.S. at 690. In addition, in order to show prejudice, the "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[10/] Id. at 694. A "reasonable probability" is "a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694; Nix v. Whiteside, ___ U.S. ___, 106 S.Ct. 988, 999 (1986).

Counsel's role in a capital sentencing proceeding is comparable to that at trial -- that is, to ensure that the adversarial testing process works to produce a just result under the standards

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10/ The defendant does not, however, have the burden of showing that "counsel's deficient conduct more likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. at 693. See also Nix v. Whiteside, ____ U.S. ____, 106 S.Ct. 988, 999 (1986).

governing decision. Strickland v. Washington, 466 U.S. at 687. The benchmark for judging the effectiveness of counsel at a capital sentencing proceeding must be whether counsel's conduct so undermined proper functioning of the adversarial process that the proceeding cannot be relied on as having produced a just result. Id. at 686. When the defendant challenges a death sentence, the question is whether there is a reasonable probability that, absent counsel's errors, the sentencer would have concluded that the balance of aggravating and mitigating circumstances did not warrant death. Id. at 695.

B. Under The Applicable Standards, Trial Counsel Was Ineffective At The Penalty Phase Of Morgan's Trial

Applying these standards to this case, the failure of Morgan's counsel to investigate and present evidence of several mitigating factors at the penalty phase of his trial was an act or omission outside the wide range of professionally competent assistance. The mitigating evidence that Morgan's counsel failed to investigate and present at the sentencing proceeding included: (1) testimony from family members; (2) testimony from two prison guards; (3) testimony regarding Morgan's service in Vietnam; and (4) testimony that Morgan may have suffered from PTSD or organic brain damage. In addition, Salmon did not call the trial court's attention to the Supreme Court's decision in Lockett v. Ohio, 438 U.S. 586 (1978), before the trial court imposed sentence on Morgan in July 1978. "Pretrial investigation and preparation preeminently was the key to effective representation" in this case. See Potts v. Zant, 575 F. Supp. 374, 387 (N.D. Ga. 1983), aff'd, 734 F.2d 526 (11th Cir.

1984), cert. denied, ____ U.S. ____, 106 S.Ct. 1386 (1986). Salmon denied Morgan effective representation when he failed to adequately investigate and prepare for the penalty phase.

1. Trial Counsel Failed to Present Evidence from Family Members and Two Members of the Prison Staff

Effective counsel would have investigated and presented mitigating testimony from Morgan's family members and from the two prison staff members whose lives Morgan saved during a prison riot. At the hearing on his 3.850 motion, Morgan submitted stipulated testimony from four of his family members, the sworn testimony in his clemency proceedings of John Sapp, and the live testimony of Dale Harden. Salmon presented no testimony from any of these persons during the penalty phase of Morgan's trial. He also did not contact any of them to request that they testify at the penalty phase of Morgan's trial or to determine how they might testify if called. Tr. 23-24. Salmon had the means to contact family members had he wished to do so. Tr. 26-27. He made only one attempt to contact Harden, but failed to reach him, and did not try to contact Sapp. Tr. 24, 27.

It is clear from the hearing testimony that Morgan's four brothers and sisters and his mother, who was alive at the time of his trial, would have come to Morgan's trial to testify if they had been asked to do so. Exs. 1-4. The testimony of Morgan's family would have provided the jury and the court with significant evidence regarding Morgan's family life. Taken together, the evidence would have indicated that Morgan's father died when he was quite young; that his stepfather was an alcoholic and physically abusive to his stepchildren, beating Morgan frequently; and that Morgan left home

because of this treatment. Ex. 1, ¶¶ 2-4; Ex. 4, ¶¶ 2-4. The jury would also have learned that Morgan was a good brother to his young sister, Alice Diven. Ex. 1, ¶ 3. Morgan's family members would also have testified to his experiences in Vietnam and that he changed considerably during his military service there, returning home more aggressive and emotionally disturbed. Ex. 1, ¶¶ 5-6; Ex. 2, ¶¶ 2, 5; Ex. 3, ¶¶ 2-4; Ex. 4, ¶¶ 5, 6. Morgan's family would have testified to the serious head injury he suffered in 1969. Ex. 1, ¶ 7; Ex. 2, ¶ 1. All four of Morgan's brothers and sisters and his mother would have asked the jury to spare his life. Exs. 1-4.

Salmon also did not present testimony from two prison staff members, Dale Harden and John G. Sapp, regarding Morgan's actions during the Garment Factory riot at the Florida State Prison on April 30, 1973. Harden has been employed in the Florida state prison system for 16 years and has lived in Union County all his life, about 40 years. Tr. 7-8. Had he been called, Harden would have testified that Morgan was a model inmate, worked hard, and was of good repute and character. Tr. at 8, 11. He would also have testified that Sapp would not be alive today if Morgan had not gone to his aid during the Garment Factory riot, and that Harden himself and several others probably would not be either. Tr. 9. Harden would have asked the jury, just about all of whom he knew personally, to spare Morgan's life because of what he had done to save the lives of Harden and others. Tr. 9-10.

Sapp would have testified that he worked at the Union Correctional Institution, is married, and has a child. Ex. 5. He would have also testified to his injuries during the April 1973 Garment Factory riot, that Morgan's actions in spraying a fire

extinguisher on rioting inmates helped save his life, and that Morgan's actions were taken at great risk to his personal safety. Id.

2. Trial Counsel Failed to Present Evidence of Defendant's Mental Problems and His Military Service Related Thereto

Salmon failed to present any testimony regarding Morgan's military service in Vietnam at the penalty phase. Tr. 118. Salmon also did not consider pursuing evidence that Morgan suffered from the syndrome now known as PTSD because of his experiences in Vietnam, or that he suffered from organic brain disorder. Tr. 30. These failures were also acts or omissions outside the wide range of professionally competent assistance of counsel.[11/]

Salmon first consulted a psychologist and a psychiatrist concerning evidence for the penalty phase of Morgan's trial in early June 1978, less than two weeks prior to Morgan's trial. Tr. 18-19, 182. Morgan was evaluated on June 7, 1978, one week prior to trial, and a written evaluation rendered to Salmon on the day of trial Tr. at 182. Salmon does not recall reading Morgan's prison file prior to consulting these doctors nor did he give them any records relating to Morgan. Although the doctors did have access to Morgan's prison files themselves, no evidence was adduced at the hearing that these doctors actually consulted Morgan's prison file. Salmon did not attempt to

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11/ Pursuant to the stipulation of the parties, as approved by the Circuit Court's Order of December 5, 1985, paragraph 3, the question of prejudice resulting from these omissions was to be reserved for a separate hearing, in the event that the court determined that it was ineffective assistance for trial counsel not to have pursued evidence of PTSD, or organic brain damage ascertainable only through an EEG examination. See Tr. 73-74.

obtain Morgan's military records or family history and therefore did not make them available to his doctors. Tr. 19, 20. He did not suggest any particular mental condition they should investigate. Tr. at 20. He did not read Morgan's prison records until just prior to or during trial. Id.

Defendant's expert witnesses testified that PTSD is not a new concept. Tr. 119, 74-78. There was sufficient information in Morgan's Army medical records and from his relatives to indicate to counsel that he had been detrimentally affected emotionally while he was in Vietnam. Tr. at 82, 119. The family's testimony described some of the hallmarks of PTSD, including unexplained bursts of anger, a willingness to fight in someone who had never been willing to fight before, an inability to feel close to people, and alternating periods of anger and hostility. Tr. 84. Effective counsel would have investigated the change in Morgan's behavior following Vietnam.

Salmon should also have obtained Morgan's prison and military records and family history for the use of his doctors in their psychiatric evaluation of Morgan. Morgan's expert in clinical psychology and PTSD testified at the hearing that, as of 1978, there was enough information about delayed stress syndrome and combat shock to diagnose the syndrome. Tr. 79. On the basis of Morgan's prison records, family history, and military records, an expert in clinical psychology as of the first half of 1978 would have concluded that there should be a further investigation to determine whether the homicide allegedly committed by Floyd Morgan had been caused by the syndrome now called PTSD. Tr. 82, 83-84, 85-86.

Salmon should also have investigated evidence indicating that Morgan suffered from organic brain disorder. Salmon was aware that a 1973 psychological evaluation of Morgan done by Dr. Joanna Byers, a clinical psychologist, was present in his prison records. Tr. 31. He was also aware that Dr. Byers had recommended a thorough neurological workup. Id. Salmon never asked that an EEG be done on Morgan, nor did he ask that any tests be done specifically to determine if Morgan had suffered brain damage. Id. Indeed, he does not recall reading Morgan's prison file prior to consulting the two doctors who examined Morgan. Tr. 19.

3. Trial Counsel Failed to Call the Trial Court's Attention to Lockett v. Ohio

It was Salmon's understanding that he was limited at the penalty phase of Morgan's trial to introducing mitigating evidence on only the statutory mitigating circumstances. Tr. 21. The trial court refused to allow Salmon to introduce mitigation evidence that did not fall within the mitigating circumstances enumerated in the Florida statute, but did allow him to enter any information that he wished to rebut, explain, or refute any aggravating circumstances the State presented.[12/] Tr. 21-22; Trial Tr. 555, 560. Thus, Salmon believed

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12/ The confusion in Florida law surrounding the use of nonstatutory mitigating evidence in capital sentencing has been discussed at length in several Eleventh Circuit decisions. See, e.g., Hitchcock v. Wainwright, 770 F.2d 1514, 1516 (11th Cir. 1985), cert. granted, 106 S.Ct. 2888 (1986); Thomas v. Wainwright, 767 F.2d 738, 744 (11th Cir. 1985), cert. denied, ____ U.S. ____, 106 S.Ct. 1241 (1986). In summary, for six years after the Florida death penalty statute was re-enacted in 1972, there was some ambiguity as to whether a defendant had a right to introduce evidence in mitigation at a capital sentencing proceeding when the evidence fell outside the mitigating factors
(Footnote continued)

that he could introduce evidence from Morgan's prison records because such evidence would respond to or reduce the effect of the aggravating factor that the defendant was a prisoner at the time he committed a homicide. Tr. 22-23.

In Lockett v Ohio, the Supreme Court held that the defendant in a capital case must be allowed to present any relevant mitigating circumstances to the sentencer. 438 U.S. 586. Lockett was decided over two weeks before the Court's sentencing of Morgan on July 17, 1978. Tr. 70. Salmon was unaware of the decision and did not call it to the Court's attention. Id. Salmon's failure, as defense counsel in a capital case, to apprise the Circuit Court of the Supreme Court's decision in Lockett before it sentenced Morgan to death was also an act or omission outside the wide range of professionally competent assistance of counsel.

4. Counsel's Acts and Omissions Were Outside the Wide Range of Professionally Competent Assistance

Salmon's failures to investigate and present evidence from family members, from Harden and/or Sapp, and as to Morgan's military service; to provide Morgan's doctors with his military records, prison file, and family history; to investigate and present evidence of PTSD or organic brain disorder; and to alert the trial court to the Supreme Court's decision in Lockett v. Ohio before it sentenced Morgan to death, were acts or omissions of counsel outside the wide range of professionally competent assistance. Strickland v. Washington, 466

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enumerated in the statute. Hitchcock v. Wainwright, 770 F.2d at 1516. The confusion was finally alleviated in 1978, after the United States Supreme Court rendered its decision in Lockett v. Ohio. See Songer v. State, 365 So. 2d 696 (Fla. 1978), cert. denied, 441 U.S. 956 (1979).

U.S. at 690. By failing to investigate and present this readily available mitigating evidence, Salmon failed to ensure that the adversarial testing process worked at Morgan's sentencing trial to produce a just result. See Strickland v. Washington, 466 U.S. at 685. In exercising its discretion, Morgan's jury was not focused on the particularized characteristics of the individual defendant. See Tyler v. Kemp, 755 F.2d at 745. The jury did not have before it "all possible relevant information about the individual defendant whose fate it [was to] determine." Jurek v. Texas, 428 U.S. at 276 (opinion of Stewart, Powell, and Stevens, JJ.).

It is clear that Salmon did not investigate and was not prepared for the most crucial phase of Morgan's trial, the penalty phase. Salmon's investigation and preparation for this phase consisted only of reading Morgan's prison file just prior to or during trial. Tr. 20. Although he read some documents from this file to the jury, he did not even offer these documents into evidence so that the jury might be able to refer to them during their deliberations. See Trial Tr. 566-76. In essence, Salmon failed "altogether to make any preparations for the penalty phase," thereby depriving Morgan of "reasonably effective counsel by any objective standard of reasonableness." See Blake v. Kemp, 758 F.2d 533 (11th Cir.), cert. denied, ____ U.S. ____, 106 S.Ct. 374 (1985). The jury's failure to hear relevant aspects of Morgan's character and background creates "an unacceptable risk that the death penalty was unconstitutionally imposed" on Morgan. Eddings v. Oklahoma, 455 U.S. at 117 (O'Connor, J., concurring). Salmon's failures to investigate and present evidence of mitigating circumstances during the penalty phase of Morgan's trial were acts or omissions outside the parameters of professionally competent assistance of counsel.

The Court of Appeals for the Eleventh Circuit has found counsel ineffective at the sentencing stage in several cases in which counsel did even more investigation and preparation than did Morgan's counsel in this case. In Blake v. Kemp, 758 F.2d 523, for example, defendant's counsel failed to present any witnesses to testify as to mitigating circumstances. The extent of counsel's investigation into character evidence that might be used for mitigation at a penalty proceeding was to interview defendant's father (with other persons accompanying him) on more than one occasion and to meet with both of defendant's parents at counsel's office one time before trial. Id. at 534. Counsel in no way used or even considered additional evidence that might have been available to support the defendant's cause. Id. The Eleventh Circuit concluded that such a performance hardly comported "'with the notion that the sentencing phase be in fact a distinct procedure where the jury's attention is focused not just on the circumstances of the crime, but also on special facts about this defendant that might mitigate against imposing capital punishment.'" Id., quoting Blake v. Zant, 513 F. Supp. 772, 780 (S.D. Ga. 1981). In Tyler v. Kemp, 755 F.2d 741 (11th Cir.), cert. denied, ____ U.S. ____, 106 S.Ct. 582 (1985), the Eleventh Circuit affirmed a district court's decision that the defendant was denied effective assistance of counsel during the sentencing phase because counsel presented no evidence of mitigating circumstances. Counsel in Tyler failed to present the testimony of family members, of defendant's former employer as to her good work record, and of her lack of a criminal record. Id. at 745. Although counsel met with and talked to several of defendant's family members, they refused to testify because they knew nothing of the

murder and therefore believed they had nothing to tell. Id. at 744. Family members testified that counsel did not tell them that their testimony was needed on any subject other than guilt or innocence and did not explain the sentencing phase of the trial or that evidence of a mitigating nature was needed. Id. at 745. They testified that they would have been willing to appear as mitigating-evidence witnesses had they understood that such testimony was useful and needed. Id. Counsel's own testimony revealed that at no time did he discuss with the family members the need for their testimony in mitigation. Id.

Similarly, in King v. Strickland, 714 F.2d 1481 (11th Cir. 1983), vacated and remanded, 467 U.S. 1211, prior opinion reinstated on remand, 748 F.2d 1462 (11th Cir. 1984), cert. denied, ____ U.S. ____, 105 S.Ct. 2020 (1985), the Eleventh Circuit reversed the district court's finding that defendant had been accorded effective assistance of counsel at the penalty stage of his trial. The court concluded that counsel was ineffective even though he had presented some mitigating evidence on defendant's behalf because he had neglected to present other available mitigating witnesses. Id. at 1490.

The courts have also repeatedly stressed the particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel. Beavers v. Balkcom, 636 F.2d 114, 116 (5th Cir. 1981); United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1976); United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). In Beavers v. Balkcom, for example, defendant's counsel learned that he had been confined twice to a state mental institution, but after contacting the facility by telephone, decided that the medical records would not be helpful. 636 F.2d at 115.

Defendant alleged that he was deprived of effective assistance of counsel because his lawyers failed to obtain a psychiatric examination and did not present any medical evidence at trial concerning defendant's mental condition. The court concluded that by not following up on the telephone call to the state mental hospital where the defendant had been previously treated, counsel fell short of the thorough pretrial investigation to which the defendant was entitled. Id. at 116.

5. The Circuit Court's Order Denying the 3.850 Motion Misconstrued the Applicable Law and the Facts

The Circuit Court's Order of June 9, 1986, denying the 3.850 Motion, held (at pp. 6-11) that trial counsel's performance at the penalty stage was not so deficient as to have prejudiced Morgan. This Order misstates both law and fact as to each of trial counsel's failures to present mitigating evidence.

a. Evidence from Two Prison Staff Members

The Order of June 9, 1986, states that the Circuit Court could find no reasonable probability that the jury would have rendered a verdict of life rather than death if the live testimony of two prison staff members had been presented during the penalty phase. Order, at 7. The Order is based on the findings that defense counsel was aware that cross-examination of the two prison guards might reveal the details of Morgan's previous murder, that Salmon attempted to but could not contact the guards, and that Morgan's role in the Garment Factory riot was made known to the jury through a letter of commendation from the then Governor of Florida. Id. at 6. Moreover,

because defense counsel was unable to contact the two guards and because some evidence was presented as to Morgan's action in the riot, the Order states, defense counsel's actions as to presentation of the guards' testimony were tactical choices, not failures to act altogether. Id. at 7.

These findings contain several misstatements of the record. First, Morgan's lawyer, Salmon, was not "unable" to contact the two prison guards, but instead lacked either the time or the inclination to contact them. He made only one attempt to reach one of the prison guards, but failed to do so, and did not attempt to contact him again, or to contact the other guard, even though they were both still employed in the prison system. Tr. 24, 27.

Second, the State would not have been able to cross-examine the two prison staff members about the details of Morgan's first crime because cross-examination would have been limited to the scope of direct examination, which would clearly not have referred to those details. See Fla. Stat. Ann. § 90.612(2); Embrey v. Southern Gas & Electric Corp., 63 So. 2d 258 (1953); Pearce v. State, 93 Fla. 504, 112 So. 83 (1927). Moreover, although the State had the opportunity to adduce this evidence in its own case at the penalty phase, it chose not to do so. Tr. 138. In addition, there is no evidence that the witnesses in question had any connection with the events surrounding Morgan's first crime; that any of these witnesses knew, recalled, or could give admissible non-hearsay testimony about such events; or that Salmon in fact acted out of fear of such cross-examination (indeed, his testimony was to the contrary, Tr. 71).

Third, the documentary evidence presented to the jury by Salmon did not serve to humanize Morgan in the jury's eyes in the

convincing and powerful manner that live testimony would have done.[13/] See Messer v. Kemp, ____ U.S. ____, 106 S.Ct. 864 (1986) (Marshall, J., dissenting); King v. Strickland, 714 F.2d at 1491. See also Thompson v. Wainwright, No. 84-5815, slip op. (11th Cir., Apr. 10, 1986), at 3242 (records would not be particularly persuasive to jury where no witnesses produced). In addition, simply reading excerpts of documents and letters into the record did not negate Salmon's independent duty to investigate and prepare for the penalty phase. See Goodwin v. Balkcom, 684 F.2d at 805. Indeed, the record demonstrates that except for reading Morgan's prison file, Salmon completely failed to investigate any other possible and readily apparent sources of mitigating evidence. As described above, Salmon's failure to do so was in essence a complete failure to make any preparation for the penalty phase and deprived Morgan of "reasonably

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13/ Governor Askew's letter of commendation, for example, stated only that:

> As Governor, I wish to express the appreciation of all individuals concerned for the quick and decisive action you took without regard for your own safety at the Florida State Prison in the recent disturbance in the garment factory on April 30, 1973. Your valuable assistance prevented further injury and perhaps death to the staff members involved.
>
> I fully realize that by the action you took you placed yourself in jeopardy with your fellow inmates, and this action is noteworthy.
>
> A copy of this letter is being sent to the Parole Commission for placement in your record.

Ex. 6. The jury learned nothing of the details of Morgan's actions, nor that one of the persons he had saved was Dale Harden, whom most of them knew personally. Tr. at 9-10. Moreover, since most of the jurors were employed by the State prison system, or had close relatives who were (see n.1, supra), they would have empathized especially with Harden.

effective assistance of counsel by any objective standard of reasonableness." Blake v. Kemp, 758 F.2d at 533.

Moreover, defense counsel may be ineffective even when they have produced some, but not all, mitigating evidence available.[14/] In the United States Supreme Court's very recent decision in Skipper v. South Carolina, 106 S.Ct. 1669 (1986), for example, the Court held that the exclusion by the state trial court of relevant mitigating evidence from two jailers and a "regular visitor" regarding defendant's behavior in jail impeded the sentencing jury's ability to carry out its task of considering all relevant facets of the character and record of the individual offender. Id. at 1672. In so holding, the Court rejected South Carolina's argument suggesting that exclusion of the proferred testimony was proper because the testimony was "merely cumulative" of the testimony of defendant and his wife that his behavior in jail awaiting trial was satisfactory. Id. at 1672-73. The proferred testimony of the jailers in Skipper that the defendant had made a "good adjustment" during several months in jail is, of course, of far more limited persuasive force than the testimony of the two prison staff members in this case to the effect that defendant saved their lives during a prison riot or of Morgan's family

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14/ The Circuit Court cited Francois v. Wainwright, 763 F.2d 1188 (11th Cir. 1985) (per curiam), as support for its argument that nonstatutory mitigating factors need not be fully developed. June 9 Order, at 10. In Francois, however, trial counsel put several family members on the stand. The Eleventh Circuit concluded that any evidence that was not presented in mitigation (including affidavits of family members attesting to defendant's difficult childhood and good character and the reports of psychologists or behavioral scientists to the same effect), while it might in some cases have affected the outcome of the penalty decision, would not have affected the outcome on the facts of defendant's case. Id. at 1190-91.

members regarding his family history. See also King v. Strickland, 714 F.2d 1481 (counsel provided ineffective assistance of counsel at the penalty stage even though he called one character witness, referred to the testimony of two guilt-phase witnesses, and related the opinion of defendant's prior attorney as to defendant's character to the jury, when he failed to present other available character witnesses).

Thus, reading documentary evidence to the jury was simply no substitute for introduction of more persuasive and more comprehensive live testimony from family members, from prison staff members Harden and Sapp, and from doctors who had investigated evidence of Morgan's mental problems. Indeed, expert witness Baya Harrison testified that he did not know of other capital cases in Florida where defense counsel had not put on live testimony when it was available. Tr. 116. The failure to do so was a deficiency which was far below the standard of reasonably effective assistance of counsel.

Fourth, Salmon testified at the 3.850 hearing that he did not make a tactical judgment that it was inadvisable to call the prison staff members during the penalty phase of Morgan's trial. Tr. 24, 27. On the contrary, he wished to call the prison staff members in addition to reading the Governor's letter, but failed to contact them. Tr. 27, 70. Trial counsel for a capital defendant must be deemed ineffective where he testifies that he had no strategy for the sentencing phase and that he failed to consider or develop possible mitigating evidence. Stanley v. Zant, 697 F.2d 955, 966 (11th Cir. 1983), cert. denied, 467 U.S. 1219 (1984). See also Washington v. Strickland, 693 F.2d 1243, 1257 (5th Cir. 1982) (en banc), rev'd on other grounds, 466 U.S. 668 (1984) (the presumption of attorney compe-

tence may be rebutted when trial counsel admits at evidentiary hearing that his decision was not "strategic"). The record thus does not establish that Salmon's decision not to call live witnesses in mitigation was a strategic one.

Moreover, even if trial counsel does not admit that his decision was not made on strategic grounds, a claim of ineffectiveness may be made out where the circumstances clearly show that counsel's failure to offer mitigating evidence could not have been based on reasonable strategy. Stanley v. Zant, 697 F.2d at 966. See also Willis v. Newsome, 771 F.2d 1445, 1447 (11th Cir. 1985) (per curiam), cert. denied, ____ U.S. ____, 106 S.Ct. 1273 (1986) (certain defense strategies or decisions may be so ill chosen as to render counsel's overall representation constitutionally defective). Salmon's failure to present the testimony of family members and of Harden and Sapp, to present evidence of Morgan's military service and of his mental and emotional problems, or to call this Court's attention to Lockett v. Ohio cannot be deemed strategic decisions taken after a reasonable investigation into the alternatives. Salmon made no attempt to contact family members even though he had the means to do so. Tr. 23-24, 26-27. He made only one attempt to reach Harden, but failed to contact him. Tr. 27. He did not investigate Morgan's military background or his mental and emotional problems. Thus, his failure to present available mitigating evidence cannot be considered a tactical decision. See King v. Strickland, 714 F.2d at 1490 (failure to present mitigating testimony was not a strategic decision taken after a reasonable investigation into the alternatives where counsel admitted he was unprepared for the penalty stage because he had not

adequately discussed sentencing with his client, nor had he carefully searched for mitigating evidence).

Moreover, the evidence suggests that Salmon was inexperienced and overburdened when he was assigned to represent Morgan in January 1978. He handled Morgan's case without assistance. Tr. 15. Prior to Morgan's trial, he had not handled a homicide case, whether capital or not. Tr. 16, 48. Salmon's case load at the time was extremely heavy and his hours long. Tr. 16. His schedule severely limited the amount of time he could spend on any one case, including Morgan's. Id. Salmon testified that he would have liked to have been able to spend more time on the preparation of Morgan's case. Tr. 17, 52. In preparing for trial, Salmon's primary focus was on the guilt phase, not the penalty phase. Tr. 23. His preparation for the penalty phase was undertaken either during or shortly before the trial. Id. Other than talking to Morgan, Salmon did not investigate his military or family history, nor did he review his history with respect to his mental condition. Tr. 20. Salmon first looked at the prison record either just prior to the beginning or during the trial. Id. Under these circumstances, it cannot be said that Salmon made a strategic decision based on reasonable investigation that testimony from family members or the two prison guards or evidence regarding Morgan's military service or his mental and emotional problems should not be presented at the penalty phase of Morgan's trial. See Tr. 116.

b. Evidence From Morgan's Family

The Circuit Court's Order also states that defense counsel did not act unreasonably or perform deficiently by failing to call members of Morgan's family at the penalty phase because defense

counsel procured and placed before the jury a letter from Morgan's mother "raising some if not all of the matters other family members might have testified to in person" and because Morgan instructed Salmon not to have his family involved. Order, at 7-8. These too are misstatements of law and of the factual record. First, the statement that the letter from Morgan's mother raised some, if not all, of the matters to which other family members would have testified is a gross misconstruction of that five-sentence letter. In the letter, Morgan's mother stated only that Morgan had had several head injuries, including hitting his head on a metal corner when he was 12, had experienced headaches during and after his military service, and had been kicked in the head by a pony. Trial Tr. 568-69. The letter made no mention of any of the other details of Morgan's life to which his family would have testified, including his abusive childhood, military service in Vietnam, and psychological problems. See Exs. 1-4, Tr. 28-29.

Second, although Morgan "indicated" to Salmon that he did not wish to have his family involved, Salmon did not specifically explain to Morgan the various factual and legal purposes to which family testimony could be put, did not advise Morgan that in his professional judgment family members should be called to testify at the penalty phase, and did not attempt to persuade Morgan to let him call family members as penalty-phase witnesses. Tr. 25-26. Morgan's reluctance to have his family involved does not absolve Salmon from his failure to investigate family testimony for use at the penalty phase. "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." Gaines v.

Hopper, 575 F.2d 1147, 1149-50 (5th Cir. 1978). Defense counsel may not blindly follow the commands of their clients that they not pursue certain investigations. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). Although the decision whether to use such evidence in court is for the client, the lawyer must first evaluate the potential avenues of defense and advise the client of those offering possible merit. Id.

In Thompson v. Wainwright, for example, defense counsel testified that his client directed him not to investigate his past. In his petition for writ of habeas corpus, Thompson contended that his counsel should not have heeded his request because he was aware that Thompson was experiencing mental difficulties. Id. The Eleventh Circuit stated that although Thompson's directions may have limited the scope of his counsel's duty to investigate, they could not excuse his failure to conduct any investigation of Thompson's background for possible mitigating evidence. Id. The court therefore concluded that counsel's failure to conduct any investigation of Thompson's background fell outside the scope of reasonably professional assistance. Id. Similarly, in Mitchell v. Kemp, 762 F.2d 886 (11th Cir. 1985), counsel did not investigate a capital defendant's background, in part because the defendant directed him to leave his family "out of it." Id. at 889. Although the court found that counsel was not ineffective, it noted that the attorney did not blindly follow defendant's instructions. Id. at 890. Although the attorney did not probe deeply into defendant's reasons for not wishing to involve his family, he did make an independent evaluation of character witnesses. Id.

The Fifth Circuit has also held that a capital defendant's stated desire not to use character witnesses does not negate counsel's duty to investigate. Gray v. Lucas, 677 F.2d 1086, 1093-94 (5th Cir. 1982), cert. denied, 461 U.S. 910 (1983). See also Martin v. Maggio, 711 F.2d 1273, 1280 (5th Cir. 1983), cert. denied, 105 S.Ct. 447 (1984) (defendant's instruction that his lawyers obtain an acquittal or the death penalty did not justify his lawyers' failure to investigate an intoxication defense since "[u]ncounselled jailhouse bravado, without more, should not deprive a defendant of his right to counsel's better-informed advice").

Thus, Morgan's indications to Salmon cannot be relied upon to establish that Morgan received effective assistance of counsel. Salmon did not consult effectively with his client. He did not explain to Morgan how family testimony could be used and why it was necessary. Morgan's indications to Salmon cannot excuse Salmon's failure to conduct any investigation of Morgan's background for possible mitigating evidence. See Thompson v. Wainwright, supra.

c. Evidence of Psychological Problems

The Court's Order also states that there is no merit in Morgan's claims that defense counsel failed properly to pursue psychological and psychiatric mitigation because Salmon put before the jury three separate psychological evalutions, obtained the assistance of two experts, and reasonably relied on their expertise. The Order also finds that, although post-traumatic stress disorder ("PTSD") was known to the psychiatric/psychological profession in 1978, it was not known to the legal profession. Order, at 8-9.

These findings totally ignore that, first of all, the psychological reports that were presented to the jury were superficial, incomplete studies. They did not take into consideration and made no mention of Morgan's service in Vietnam or related problems. In addition, Salmon first consulted a psychologist and a psychiatrist concerning evidence for the penalty phase of Morgan's trial less than two weeks prior to the beginning of trial, Morgan was evaluated only one week prior to trial, and a written evaluation was not rendered to Salmon until the very day that trial began. Tr. 18, 19, 182. Salmon did not give these two doctors any records relating to Morgan, including military and family records. If Salmon had made these records available to Morgan's doctors, they should have investigated further to determine whether Morgan suffered from PTSD. Tr. at 82, 83-84, 85-86. Because he did not make any records available to Morgan's doctors, Salmon should not have relied upon the findings they made. Moreover, Morgan presented uncontradicted expert testimony at the December 1985 hearing that the PTSD syndrome was known to the legal profession in 1978 and that Salmon should have investigated whether Morgan suffered from the syndrome before his trial that year. Tr. 119.

C. Morgan Was Prejudiced By Trial Counsel's Ineffectiveness

In order for Morgan to obtain relief, there need only be "a reasonable probability" that, but for counsel's unprofessional errors as set forth in detail in part B above, the results of the

sentencing proceeding would have been different.[15/] There is a reasonable probability that the jury in this case would have recommended a lesser sentence but for Salmon's failure to present evidence of mitigating circumstances at the penalty phase. Considering what the jury in this case might have done if presented with the available mitigating evidence shown at the 3.850 motion hearing herein, it cannot possibly be concluded that there is no reasonable probability that the 7 to 5 vote to recommend death would have been changed. The jury in this case was never apprised of several substantial mitigating factors. Counsel failed to present the jury with sufficient reasons to spare Morgan's life. See Blake v. Kemp, 758 F.2d 523, 535 (11th Cir.), cert. denied, ____ U.S. ____, 106 S.Ct. 374 (1985) (defendant who had been sentenced to death was prejudiced by the failure of his attorney to make any preparations for the penalty phase of his murder trial, where there were character witnesses who could have testified in mitigation).

Had Salmon effectively prepared for the penalty phase, there is a reasonable probability that he could have established each of the mitigating circumstances discussed in part B above, and that each of these -- or several of them cumulatively -- would have outweighed the aggravating circumstances presented in the minds of the jurors. It is thus reasonably probable that presentation of this evidence at the penalty phase of Morgan's trial would have changed the jury's recommendation of 7 to 5 for

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15/ Morgan does not, however, have the burden of proving that this is more likely than not. See supra, note 10.

imposition of the death penalty to a recommendation for life.[16/]

Regarding the evidence that could have been produced from Morgan's family members, for example, Salmon testified that he would have introduced the majority of the statements from Morgan's family that were entered by stipulation at the hearing on December 30, 1985, if he had obtained that information in the course of his preparation for trial. Tr. 24-25. He also testified that he believed that the information would have assisted his argument in mitigation and that it was a mistake for him not to contact members of Morgan's family. Tr. 25, 27. Had Salmon presented live testimony from Morgan's family members, Morgan would have been humanized in the eyes of the jury. It is reasonably probable that such live testimony from Morgan's family regarding his upbringing, life history, military service in Vietnam, change in behavior after Vietnam, and head injury would have convinced the jury to dispense mercy in Morgan's case.

16/ The trial court could have overriden a recommendation of life only if "the facts suggesting a sentence of death [are] so clear and convincing that virtually no reasonable person could differ." Funchess v. Wainwright, 772 F.2d 683, 699 (11th Cir. 1985) (Roney, J., concurring), cert. denied, ____ U.S. ____, 106 S.Ct. 1242 (1986), quoting Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). The Florida death penalty statute requires great deference to the jury's advisory opinion in sentencing, so much so that the trial judge must give explicit reasons for choosing death if the jury recommends life. Proffitt v. Wainwright, 756 F.2d 1500, 1503 (11th Cir. 1985). Thus, it appears unlikely that the trial court would have imposed a death sentence on Morgan if the jury had voted in favor of mercy, and if the evidence presented at the 3.850 hearing had been presented at the time of trial.

Merely reading from Morgan's prison file was simply no substitute for live testimony from his family.

Had Salmon presented live testimony from the two prison staff members whose lives Morgan saved in the Garment Factory riot, it is also reasonably probable that the jury would have been moved to vote differently on the issue of life or death. This was especially true because Union County jurors would be keenly aware of the violence that threatens guards in prisons, because Morgan subjected himself to danger from his fellow prisoners by saving the lives of at least two of the prison staff, and because Harden himself, who had a good opinion of Morgan, knew all or substantially all of the members of the Union County jury who heard the case.[17/] See Tr. 117, 127. Salmon testified that the testimony from the two prison staff members would have been favorable and that the jury would have reacted favorably to it. Tr. 27. The only expert called on the subject opined strongly that this evidence was crucial and would have caused the jury to vote for life rather than death. Id. at 117, 127. Moreover, the testimony of Harden and Sapp would have been much more persuasive to the jury than the letter from the Governor that Salmon read, without explanation, at the penalty phase.

Regarding Salmon's limitation of his presentation to statutory and rebuttal mitigating circumstances, Salmon stated

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17/ Indeed, at least eight of Morgan's jurors were either personally employed in the State's prison system or had close relatives who were employed there. See Trial Tr. 6-164.

that his closing argument would have been structured differently if he had not felt limited to the statutory mitigating circumstances and to rebuttal of the statutory aggravating circumstances. Tr. 69. He also stated that he would have pursued additional mitigating circumstances if he had not been so limited. Tr. 69-70. Furthermore, if Salmon had known of Lockett, he would have moved for a continuance to pursue additional mitigating circumstances and would then have urged them upon the court. Tr. 70. His failure to learn of Lockett and call it to the Court's attention prior to sentencing deprived his client of his constitutional right to consideration of significant, although nonstatutory, factors in mitigation.

For all these reasons, Morgan was prejudiced by the acts or omissions of his counsel at the penalty phase of his trial. But for the unprofessional errors of Morgan's counsel, it is reasonably probable that the result of the penalty trial would have been different. Thus, there is a reasonable probability that, absent defense counsel's errors, the jury would have concluded that the balance of aggravating and mitigating circumstances did not warrant Morgan's death, and that he would not have received a death sentence.

With respect to the guilt phase, the question of prejudice from failure to pursue a defense based on PTSD or organic brain damage, discussed in Section IV-B-2 supra, should be determined through further proceedings on remand, pursuant to the stipulation and order entered in this respect. See Tr. 73-74; n.11, supra.

V. CONCLUSION

The failures of Morgan's trial counsel to investigate and present evidence from two prison staff members, from family members, and of Vietnam-related psychiatric problems, among other failures, were acts or omissions outside the wide range of professionally competent assistance. There is a reasonable probability that the jury in this case would have recommended a life sentence for Morgan but for Salmon's failure to present such evidence of mitigating circumstances at the penalty phase. Accordingly, this Court should remand this case to the Circuit Court with instructions to correct Morgan's sentence to life imprisonment.[18/] Alternatively, this Court should vacate Morgan's sentence and remand with instructions to convene a new sentencing jury and to conduct a new penalty trial.[19/]

18/ The court has authority to grant such relief. See Wilson v. Florida, No. 67-721, slip op. (Fla. Sup. Ct. Sept. 4, 1986).

19/ If this Court does not conclude that Morgan's counsel rendered constitutionally ineffective assistance of counsel at the penalty phase of Morgan's trial, and that it should resentence Morgan to life imprisonment based on the mitigating evidence now in the record that should have been brought out at the penalty phase, it should order new sentencing proceedings on the ground that Morgan was denied the opportunity to present evidence of nonstatutory mitigating circumstances at his trial in 1978. This Court has recently decided that an appellant seeking post-conviction relief is entitled to a new sentencing proceeding when it is apparent from the record that the sentencing judge believed that consideration was limited to the mitigating circumstances set out in the capital sentencing statute in determining whether to impose a sentence of death or life imprisonment. Harvard v. State, 486 So. 2d 537 (Fla. 1986). In Harvard, the Court held that because the trial judge limited the scope of appellant's presentation of mitigating circumstances at his 1977 sentencing and at his 1980 resentencing did not consider such factors, the Court had no alternative but to conclude that appellant's death
(Footnote continued)

With respect to the guilt phase, the court should remand for further proceedings to determine whether counsel's error in failing to develop the PTSD defense (discussed in Section IV-B-2, supra) was prejudicial on the issue of guilt or innocence.

Respectfully submitted,

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sentence was imposed in violation of Lockett v. Ohio and that he was therefore entitled to a new sentencing hearing. Id. In so holding, the Court rejected the argument that the trial judge's denial of appellant's motion for post-conviction relief under Rule 3.850 constituted, by inference, a re-evaluation of the alleged mitigating factors. Id. Instead, the Court held that a new sentencing hearing must be held before the trial judge with the direction that he allow appellant to present evidence of appropriate non-statutory mitigating circumstances. Id. The trial judge was also instructed that he might, in his discretion, convene a new sentencing jury if he concluded that its recommendation would be helpful in his final sentencing decision. Id.