IN THE

SUPREME COURT OF FLORIDA

CASE NO. 70,658

STATE OF FLORIDA,

Appellant/Cross-Appellee,

v.

JOHN MICHAEL,

Appellee/Cross-Appellant.

REPLY BRIEF OF APPELLEE/CROSS-APPELLANT

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PRELIMIARY STATEMENT

References to the record throughout this brief will be designated as follows: "R" indicates reference to the record on direct appeal to this Court; "PC" indicates reference to the record on appeal of Mr. Michael's Motion to Vacate Judgment and Sentence. All other citations will be self-explanatory or will be otherwise explained. Quotes from the State's reply brief reproduced herein are generally presented as they appear in the original.

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I.

THE RULE 3.850 COURT'S RULING THAT TRIAL COUNSEL WAS PREJUDICIALLY INEFFECTIVE AT THE SENTENCING PHASE OF MR. MICHAEL'S CAPITAL TRIAL, AND ITS SPECIFIC FINDINGS IN SUPPORT OF THAT RULING WERE NOT ERRONEOUS AS A MATTER OF FACT OR LAW, WERE WELL SUPPORTED BY THE RECORD, AND ARE THEREFORE ENTITLED TO THIS COURT'S DEFERENCE

The State's reply brief asserts:

> Appellee/Cross-Appellant urges restate my issue this court to treat the Circuit Court's finding that he did not receive the effective assistance of counsel as a matter of fact.

(Reply Brief of Appellant/Cross Appellee [hereinafter "State's Reply"], p. 22 [reproduced as in original]). At first glance, it may appear that the State is arguing that Mr. Michael contended in his initial brief that resolution of the constitutional question of trial counsel's effectiveness or lack thereof is strictly a question of fact, and that such an analysis is erroneous under Strickland v. Washington (See, e.g., State's Reply, p. 22). Obviously, this was and is not Mr. Michael's assertion. Whether or not an attorney renders effective assistance is a mixed question of fact and law. The facts are what the Circuit Court found -- e.g., inter alia, that counsel completely failed to investigate, prepare for, or even "think" about mitigating evidence, that this omission was based on absolutely no "tactic" or "strategy", that this omission was not "reasonable" and failed to comport with minimal professional standards, and that Mr. Michael was substantially prejudiced as a result of counsel's deficiency. The proper law, which the Circuit Court applied, is Strickland v. Washington, 486 U.S. 688 (1984). The Circuit Court's factual findings are well-supported by the record (counsel himself, for example,

acknowledged his deficiency, see infra; see also, Initial Brief of Appellee/Cross-Appellant, pp. 17-19) and are entitled to this Court's deference. Applying proper legal standards to those facts, Strickland v. Washington, supra, Mr. Michael's right to relief is plain. The answer to the "mixed question" is that relief was properly granted.

Inconsistently, the State also protests that "Appellee/Cross-Appellant is simply in error to state that the reasonableness of counsel's behavior is a matter of law" (State's Reply, p. 22), yet goes on to argue that "[w]hether what was done or not done was professionally reasonable is a question of law." (Id.) The reason for this inconsistency, as well as for the various other incongruities in the State's reply brief are also plain: the State has appealed this case simply because it disagrees with Judge Schaeffer's factual findings. However, the State cannot provide a single reason -- other than its own disagreement -- demonstrating that her reasoned findings and conclusions are factually or legally wrong. No such reason exist.

What Mr. Michael did argue is that the Rule 3.850 court made careful, reasoned findings of fact after a thorough review of the record, extensive pleading by the parties, and an evidentiary hearing, and that the court correctly applied the appropriate legal standard (Strickland v. Washington) in arriving at its ruling that Mr. Michael's trial counsel was prejudicially ineffective for failing to investigate the existence of, "think" about, and present evidence on statutory mitigating circumstances. (See Initial Brief of Appellee/Cross-Appellant [hereinafter "Initial Brief"], pp. 8-22; see also Order Granting Rule 3.850 Relief, PC 649, 652-55; Order Denying State's Motion for Rehearing, PC 672-73). Other than a general disagreement with the ultimate outcome, it is impossible to discern the basis of the State's

challenge to the Rule 3.850 court's orders. Judge Schaeffer's sound findings on this issue are not subject to reversal simply because the State disagrees.

In fact, even the State concedes that "[t]he [c]ourt[s] of the state do not interfer[e] with a trial court's factual findings where there is ample support in the record for them." (State's Reply, p. 22, citing Swarthout v. State, 165 So. 2d 773, 774 (Fla. 3d DCA 1964)). This Court also should not "interfere" (State's Reply, p. 22) with the Circuit Court's well supported findings concerning trial counsel's unreasonable failure to investigate statutory mitigating circumstances and the substantial prejudice resulting from this unreasonable deficiency (See Initial Brief, pp. 8-22; Order Granting Rule 3.850 Relief, PC 655). Interestingly, the State itself even admits that it does not disagree with the Rule 3.850 court's "findings" (See Reply Brief, p. 2: "The state's attack is on the trial court's legal conclusions, not its factual findings." (emphasis added)). Since the "legal conclusions" are amply supported by the factual findings, and since proper legal standards were applied, we are still at a loss as to why the State has taken an appeal. The correct law, see Initial Brief, pp. 8-22, amply supports the grant of relief. Judge Schaeffer was right, and as in numerous other similar cases, her proper grant of relief should not be disturbed. See, e.g., Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985).

Although the State concedes the correctness of the Rule 3.850 court's factual findings, its reply brief misrepresents the record in an effort to show that Judge Schaeffer should be reversed. That effort should not be allowed to succeed. For example, the State contends that trial counsel "met with [Mr. Michael's] mother and sister prior to trial and explored his childhood and prepare for the 1273-75, (R.

1288-89) penalty phase." (State's Reply, p. 23) (reproduced as in original). On this issue, the Circuit Court's findings (findings supported by the record, see infra) rejected and belied the State's contention. The State argued this below, and its factual position was not credited. The Circuit Court's factual findings in this regard were and are proper, as the record shows -- e.g., trial counsel's testimony at the Rule 3.850 evidentiary hearing revealed that he did not even know who Mr. Michael's sister was, but rather "assumed", during his testimony at the Rule 3.850 hearing, that an unidentified "individual" he had seen with Mr. Michael's mother prior to and during the trial was Mr. Michael's sister. (See PC 1274). Moreover, the first time counsel even brought up the penalty phase with Mr. Michael's mother was in the courtroom during the brief recess between the guilt-innocence and the penalty phases, immediately before the sentencing proceeding was to commence. At the time, he did not know that the individual seated with Mrs. Michael was his client's sister, had no awareness of who other individuals that Mrs. Michael had brought to court were, and never spoke to anyone (other than the brief exchange with Mr. Michael's mother) about the penalty phase. (See PC 1273). This is far from reasonably investigating mental health (or any type of) mitigation. This was this attorney's (an attorney who we now know conducted no investigation for the penalty phase) "preparation." As Judge Schaeffer found, this was a far cry from effective assistance under the facts and circumstances relating to this case, this defendant's background, and this and United States Supreme Court's standards for reasonable attorney assistance at the penalty phase of a capital proceeding.

The State also continues to assert that trial counsel had Dr. Mitchell, his court-appointed expert, on "telephone standby status" for penalty phase testimony.

(State's Reply, p. 23). This factual contention was also discredited by the Rule 3.850 court -- it was specifically rejected below by factual findings which find ample support in the record. Dr. Mitchell testified at the Rule 3.850 hearing that he was never called by trial counsel with regard to penalty phase testimony (e.g., PC 1227), that the issue was never discussed with him, and that he was never asked to evaluate Mr. Michael in terms of available mental health mitigating evidence. The State's assertions are belied by Judge Schaeffer's orders, the record, and this Court's opinion on direct appeal:

> Michael contends that the trial court failed to consider his mental and emotional disturbances in mitigation. In support of this contention, Michael introduced the report of one psychiatrist which expressed the possibility that he might not have been competent to stand trial. Evidence of incompetency to stand trial is not evidence of a defective mental condition at the time of commission of the offense. The psychiatrist who questioned his competency to stand trial could not form an opinion as to his competency at the time of the murder, nor did he express an opinion on any statutory mental mitigating circumstance.

Michael v. State, 437 So. 2d 138, 141 (Fla. 1983). The report expressed no opinion because counsel never asked the doctor to provide one. Counsel never asked because he failed to investigate, prepare for, or "think" about these issues. At the Rule 3.850 hearing, Dr. Mitchell did provide an opinion on mitigation -- finally, then, he was asked to. His conclusion there was that substantial statutory and non-statutory mitigation did exist in the case, mitigation which would have made a difference (See, Initial Brief, pp. 8-29).

In short, counsel never asked Dr. Mitchell to provide an evaluation of mental health mitigation; counsel never had the doctor ready to testify. Even counsel testified at the Rule 3.850 hearing only about his general "recollection" that he

"recall[ed] talking to Dr. Mitchell on the telephone" (PC 1276). The State's quantum leap in logic from the above testimony to the bold and unsupported assertion that trial counsel had his expert on "telephone standby status for the penalty phase" is belied by the record and was discredited by the Rule 3.850 court. (See Order Granting 3.850 Relief, PC 654). Judge Schaeffer's findings are amply supported.

The Rule 3.850 court reviewed extensive pleadings and supporting documents, and heard the evidence presented at the evidentiary hearing before resolving factual disputes. Although the State may not like what Judge Schaeffer found, the law is clear that a trial judge is in the best position to evaluate such evidence and make such findings: "[W]e pay great deference to the trial judge's findings because he was in a position to observe the [witness's] demeanor and credibility, unlike we as a reviewing court." Valle v. State, 474 So. 2d 796, 804 (Fla. 1985); see also Lambrix v. State, 494 So. 2d 1143, 1146 (Fla. 1986). Judge Shaeffer did hear and carefully evaluate the evidence before making her findings, and those findings are, as extensively discussed in Mr. Michael's initial brief, amply supported by the record. This Court should not disturb the findings she has made. See Swarthout, supra, 165 So. 2d at 774.

Contrary to the State's assertions, the record here supports far more, and the Rule 3.850 court found far more, than merely "that counsel did not get a written report on the statutory mental mitigating factors." (State's Reply, p. 23). It is the underlying reason for counsel's failure in this regard -- i.e., "the failure to properly investigate the existence of statutory mental mitigating factors and the failure to present proof of them at the sentencing phase" (Order Granting Rule 3.850 Relief, PC 655) -- which formed the basis of the Rule 3.850 court's ruling. This

finding was amply supported by the record, as is evident from the court's order itself (see PC 652-56), and thus, again, should not be disturbed.

Again, as it did in its initial brief, the State attempts to defend trial counsel's omissions by arguing that "asking for a written report on statutory mitigating factors at the inception of the case is fraught with dangers." (State's Reply, p. 23). The "dangers" of such a practice are still unclear, but in any event, as the Rule 3.850 court found, trial counsel never asked for such a report, nor such an opinion, nor even investigated the possibility of the existence of such factors. Even if, for the sake of argument, we accept the State's assertion that a confidential report concerning mental health mitigation should not have been sought "at the inception of the case," Judge Schaeffer's amply supported factual finding remains undisturbed, and entitles Mr. Michael to relief: trial counsel never conducted any such investigation, at any time, and never asked the expert to provide any opinion on mitigation. The issue in this case is not when an opinion was sought. The fact is that no such opinion or evaluation was ever sought. Trial counsel admitted as much when, after the death sentence was imposed, he moved for the first time for the appointment of an expert to evaluate potential mental health mitigating evidence. (R. 1269-70). At the hearing on that motion trial counsel admitted: "I will be very candid with the Court, and perhaps this is an oversight on my part, but from the outset I did not perceive this to be a death penalty case." (R. 2129). The question here does not involve timing, it involves unreasonable and prejudicial attorney conduct -- facts which the Circuit Court has now found.

The Circuit Court found the Rule 3.850 evidentiary record more than sufficient to overcome the "presumption" that trial counsel's failure to investigate and present

amply available evidence of the existence of statutory mitigating factors was not the result of "sound trial strategy." (E.g., PC 653 ["[N]either a reasonable investigation into the doctor's opinions as to statutory mitigating circumstances was made, nor a strategic choice not to investigate or to limit the investigation. Counsel simply never thought about it!"][Circuit Court's Order][emphasis in original].) The Rule 3.850 court found that trial counsel's failure to investigate the existence of such factors belied any "strategic" or "tactical" reasons for counsel's failure to present proof regarding such available mitigating factors. (See Order, PC 654). The finding is well supported by law: it is by now axiomatic that no "strategy" can be ascribed to attorney conduct based on ignorance or on the failure to investigate and prepare -- such failures are unreasonable. See, e.g., Kimmelman v. Morrison, 106 S. Ct. 2574, 2588-89 (1986) (failure to request discovery based on mistaken belief that State was obliged to hand over evidence); Code v. Montgomery, 799 F.2d 1481, 1483 (11th Cir. 1986) (failure to interview potential alibi witnesses); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir.) (little effort to obtain mitigating evidence), cert. denied, 107 S. Ct. 602 (1986); Aldrich v. Wainwright, 777 F.2d 630, 633 (11th Cir. 1985) (failure to depose any of the State's witnesses), cert. denied, 107 S. Ct. 324 (1986); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses was not the result of a strategic decision made after reasonable investigation), cert. denied, 471 U.S. 1016 (1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984) (failure to investigate mental condition and history of alcoholism); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978) (defense counsel presented no defense and failed to investigate evidence of provocation); Gomez v. Beto, 462 F.2d 596 (5th Cir. 1972)

(refusal to interview alibi witnesses); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985) (counsel did not pursue a strategy, but "simply failed to make the effort to investigate"); see also, O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984) (failure to investigate mental health mitigating evidence).

There can be no question but that the Rule 3.850 court applied the appropriate legal standard in determining whether Mr. Michael was prejudiced by his trial counsel's unreasonable failures and whether Mr. Michael was therefore entitled to relief. The court's carefully thought through order demonstrates a correct application of Strickland v. Washington, the controlling constitutional standard. (See Order Granting 3.850 Relief, PC 649, et seq.). The State below disagreed and filed for rehearing. The Circuit Court then prepared a further carefully reasoned order denying rehearing to clarify for the State what it had found in its initial order -- an order reflecting a painstaking review of the record and careful, thoughtful resolution of contested issues of fact. If the initial order was somehow not clear enough for the State, the order denying rehearing further explained the application of the Strickland v. Washington standard to Mr. Michael's case. (See Order Denying State's Motion for Rehearing, PC 672-75). Again dissatisfied with the Circuit Court's findings and conclusions, the State brings the issue to this Court. Its dissatisfaction, however, is all it has now again presented, and its dissatisfaction is simply not enough to warrant reversal.

The Circuit Court's findings of fact are supported by the record. The Circuit Court's conclusions are supported by the facts found and the appropriate law. Judge Schaeffer's grant of relief should be affirmed.

II.

MR. MICHAEL WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL BY COUNSEL'S FAILURE TO INVESTIGATE AND PRESENT AMPLY AVAILABLE NONSTATUTORY MITIGATING EVIDENCE, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

The State baldly asserts that this issue was not properly before the Rule 3.850 court and thus should not be addressed by this Court. (See State's Reply, p. 24). We are at a loss with regard to this assertion: as discussed below, this issue was raised and thoroughly presented by Mr. Michael before the Circuit Court, and was specifically referred to by the lower court's Order on the Rule 3.850 motion. We are even more puzzled by the State's arguments that Mr. Michael now "takes a position in this Court diametrically opposed to the position advanced in the circuit court," and that "it contradicts evidence that Appellee/Cross-Appellant presented as his own to the circuit court." (State's Reply, p. 24). Mr. Michael will respond below to the former contention -- i.e., that this issue was not presented to the Rule 3.850 court -- but is simply unable to comprehend, and thus to respond to, the latter bald assertions. As to those, all that need be said is that the State is wrong, as demonstrated by even a cursory review of the pleadings and transcripts included in the Rule 3.850 Circuit Court record.

A substantial portion of Mr. Michael's original Rule 3.850 Motion was devoted to his claim that he was deprived of the effective assistance of counsel because "[t]rial counsel failed to conduct a reasonable investigation into Mr. Michael's life and family history, and into his educational, medical and psychiatric history or to obtain educational, medical, psychological and other records which would have led to or established mitigating evidence." (Defendant's Motion to Vacate Judgment and

Sentence, PC 234, 235-36, 238-40; see also Attachments to Defendant's Motion to Vacate Judgment and Sentence, PC 273-304). The Rule 3.850 court expressly declined to rule on this issue, not because it had not been properly raised, but because the court's order granting relief on other grounds (see Issue I, supra) rendered, in the court's opinion, such a ruling unnecessary. (See Order Granting Rule 3.850 Relief, PC 657: "It should be noted that the Court has not addressed all the alleged acts or omissions of counsel in the penalty phase raised by Defendant in his pleadings since a new sentencing hearing is being ordered based on the two matters raised and discussed in this Order").

Counsel's failure to investigate and present the amply available non-statutory mitigating evidence (discussed at length in Mr. Michael's Rule 3.850 Motion and its attachments, proven at the evidentiary hearing below, and detailed in Mr. Michael's initial brief before this Court) was unreasonable and prejudicial attorney conduct, and deprived Mr. Michael of the effective assistance of counsel. Applying the same (correct) analysis to this issue as it did to the previous claim (see Issue I, supra), the Rule 3.850 court could not but have held, had it ruled on this issue, that Mr. Michael's sentence of death should be vacated on this ground as well.

The Rule 3.850 court did not, however, find it necessary to rule on this claim. Although we are confident that the Circuit Court's sound reasoning with regard to Issue I, supra, will be affirmed, should this Court reverse, Mr. Michael's case must be remanded for a proper initial ruling on this issue by the lower court -- a ruling which the Rule 3.850 court has not yet provided. See, e.g., Blake v. Kemp, 758 F.2d 523, 525 (11th Cir. 1985); see also id. at 539 (Tjoflat, J., dissenting).

III.

MR. MICHAEL WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

As discussed in Issues I and II, supra, and in Mr. Michael's initial brief, counsel's duty to investigate is paramount, particularly in capital cases. See, e.g., Strickland v. Washington, 486 U.S. at 688 ("Counsel has a duty to make reasonable investigations or to make a reasonable decision that make particular investigations unnecessary"); see also Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986); Thomas v. Kemp, 796 F.2d 1322 (11th Cir. 1986). As in the preceding issues, it was trial counsel's breach of the duty to investigate which is at the heart of the instant claim. Because he did no, or woefully inadequate, investigation, no "strategy" or "tactic" can be ascribed to the specific errors and omissions discussed herein and in Mr. Michael's initial brief. See, e.g., Mauldin v. Wainwright, 723 F.2d 799, 800 (11th Cir. 1984); Thomas v. Kemp, supra, 796 F.2d at 1324-25; Tyler v. Kemp, supra, 755 F.2d at 741; cf. Thompson v. Wainwright, 787 F.2d 1447 (11th Cir. 1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

Mr. Michael will discuss below those specific errors and omissions which require a response and/or further argument; as to those not discussed below, Mr. Michael relies on the arguments presented in his initial brief.

A. Counsel's Failure to Adequately Investigate His Client's Mental Health

As the State readily concedes, "trial counsel . . . clearly recognized that he was dealing with a client whose mental health was subject to question." (State's Reply, p. 14). Indeed, a court appointed expert (Dr. Mitchell) recognized pretrial

that a serious question as to Mr. Michael's competency existed. (See R. 488-94, 2186-93; see also State's Reply, p. 14). Trial counsel therefore was on notice of serious questions regarding his client's mental health, and competency to stand trial, yet conducted no further investigation into the issues. Counsel neither investigated the underlying causes, history, and nature of his client's "disturbances", nor provided experts with available information, nor requested further testing, nor moved for a competency hearing (which would have been warranted even on the basis of Dr. Mitchell's expressed doubts). Counsel's assistance was prejudicially ineffective in this regard.

The State, however, argues that trial counsel completely fulfilled his duty to investigate by talking to his client: according to the State, because Mr. Michael did not reveal his history of mental illness to counsel or the expert, trial counsel had no further duty to investigate, and no further, independent investigation was required. (See State's Reply, p. 15). According to the State, because "in his interview with Dr. Mitchell [Mr. Michael] revealed a pattern of revealing 'almost nothing regarding personal matters in his life,'" (id.)(emphasis added), it was the client's, and not trial counsel's fault that critical information regarding the client's mental health (discussed herein and in the initial brief) was never brought to light. This Court has already rejected the contention the State has attempted to present: it is not reasonable for counsel or an expert to rely on information provided by a mentally ill client in order to discern whether the client is mentally ill and/or has a history in that regard. See Mason v. State, 489 So. 2d 734, 737 (Fla. 1986). It is counsel's duty to adequately and independently investigate such

matters when mental health is at issue.[1] See Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985); United States v. Fessell, 531 F.2d 1278, 1279 (5th Cir. 1979); cf. Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984). Before any strategy decision can be made, adequate investigation is necessary, and the duty to adequately investigate is not fulfilled by reliance on the information provided by a mentally ill client.

The State's reference to Dr. Mitchell's report amply illustrates precisely why trial counsel's conduct was unreasonable: trial counsel recognized that his client was "disturbed" (PC 1247), and the court-appointed expert who found doubts as to Mr. Michael's competency recognized the client's inability to reveal personal background information. Nevertheless, trial counsel did no independent investigation into the cause, history, and nature of Mr. Michael's obvious psychological impairments, and provided the experts with nothing.

What counsel unreasonably failed to uncover was indispensable to a professionally adequate mental health evaluation. Because he did not investigate, however, counsel knew nothing about his client's history of mental illness, and provided none of this critical information to the mental health experts. The resulting expert conclusions and opinions were therefore inadequate, cf. Mason, supra, because counsel failed his client. See also, Issue IV, infra.

The prejudice suffered by Mr. Michael because of his attorney's failure in this regard is of the most fundamental nature: he was tried and convicted while

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[1] Here, mental health was at issue (e.g., competency), counsel had doubts about his client's mental state, and the facts known to counsel (e.g., Dr. Mitchell's evaluation) demonstrated that, at a minimum, further investigation was necessary.

incompetent to stand trial. All of the experts who performed evaluations with the benefit of the crucial background information which counsel failed to provide to the experts pretrial agreed that Mr. Michael lacked the competency to stand trial. Mr. Michael was unable to disclose relevant information to his attorney, or to relate to his attorney in any meaningful way, and was unable to assist in his defense. (See, e.g., PC 1185, 1215, 1228-29). See Dusky v. United States, 362 U.S. 402 (1960); Hill v. State, 473 So. 2d 1253 (Fla. 1985); Drope v. Missouri, 420 U.S. 162 (1975). Because the Rule 3.850 court applied a wholly inappropriate legal standard, holding that the testimony presented at the Rule 3.850 hearing failed to establish that Mr. Michael was incompetent "at the time of the offense," [2] it erroneously found that Mr. Michael failed to establish the requisite prejudice (See Order, PC 651; Initial Brief, p. 45; Issue IV, infra).[3] The lower court erred.

B. Counsel's Failure to Challenge the Admission of Statements Elicited From Mr. Michael in Violation of the Fifth, Sixth, and Fourteenth Amendments

Again, trial counsel's failure in this regard was a result of his unreasonable failure to conduct an adequate, independent investigation. The compelling mental health evidence discussed in the instant brief and in Mr. Michael's initial brief had a direct relationship to the voluntariness of his statements: his severe mental

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[2] It is axiomatic that the determination of this issue requires that the court consider the defendant's competency at the time of trial. See Hill, supra; Dusky, supra; Drope, supra.

[3] The Rule 3.850 court's reference in its order to the competency question belies the State's argument that the issue was not before the court (see State's Reply, p. 16) as does Mr. Michael's Motion to Vacate Judgment and Sentence (See PC 269).

disturbances left him particularly susceptible to the type of psychological coercion employed by law enforcement here.[4] In large part, because trial counsel's unreasonably inadequate investigation left him and the experts unaware of the extent of Mr. Michael's psychological disabilities and their effect on the voluntariness of the pretrial statements, counsel did not challenge the voluntariness of the statements pretrial. His failure in this regard was the direct result of his unreasonable failure to investigate, and cannot be attributed to any "strategy" or "tactic". See, e.g., Kimmelman, supra, 106 S. Ct. at 2588-89; Code v. Montgomery, supra, 799 F.2d at 1324; Mauldin, supra, 723 F.2d at 801. Mr. Michael was prejudiced -- the statements were central to the State's case. Relief is proper.

IV.

MR. MICHAEL WAS DEPRIVED OF HIS DUE PROCESS AND EQUAL PROTECTION RIGHTS UNDER THE FOURTEENTH AMENDMENT, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE MENTAL HEALTH EXPERTS APPOINTED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT COMPETENT AND PROFESSIONALLY APPROPRIATE EVALUATIONS, BECAUSE HE WAS FORCED TO PROCEED TO TRIAL ALTHOUGH HE WAS NOT COMPETENT, BECAUSE HE WAS DENIED AN INDIVIDUALIZED, FAIR, AND RELIABLE SENTENCING DETERMINATION, AND BECAUSE THE TRIAL COURT REFUSED TO APPOINT MENTAL HEALTH EXPERTS TO CONDUCT THE NEEDED EVALUATION OF MENTAL HEALTH ISSUES RELEVANT TO SENTENCING

As previously discussed, none of the critical background information detailed in the initial brief and in the preceding sections of the instant brief was discovered by trial counsel and provided to the court-appointed mental health experts who evaluated Mr. Michael pretrial. The experts themselves also failed in their

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[4]The Fifth and Sixth Amendment violations occurring during the interrogation process are discussed in detail in Mr. Michael's initial brief (See Initial Brief, pp. 41-42, 71-75).

professional duty to seek it out. Cf. Mason v. State, supra. Consequently, none of the experts were aware of Mr. Michael's extensive childhood history of sexual, physical, and emotional abuse; his prior psychiatric history, including a previous institutional commitment and a diagnosis of schizophrenia; or his family's history of mental illness. The experts knew only what Mr. Michael told them, and, as established at the Rule 3.850 hearing, Mr. Michael's ongoing mental disorders impaired his ability to provide relevant information. (See, e.g., PC 1184-85, 1205-06, 1215).

As this Court has recognized, evaluations based solely on "self reporting," with no review by the examiner of independent data, are suspect at best. Mason v. State, 489 So. 2d at 737, citing, Bonnie R. and Slobogin, C., The Role of Mental Health Professionals in the Criminal Process: The Case for Informed Speculation, 66 Va. L. Rev. 427, 508-10 (1980). The Mason court remanded for an evidentiary hearing at which it could be determined whether the pretrial mental health expert conclusions would have been different had the mental health professionals been provided with the background material undiscovered at the time of trial. Here, Mr. Michael has proven the issue on which the Mason court directed that an evidentiary hearing be held -- the evidence presented at the Rule 3.850 hearing showed that the pretrial conclusions, and the conclusions reached by any competent mental health professional, would have been significantly different than those reached in Mr. Michael's case pretrial had the experts been provided with the substantial, available information relating to John Michael's mental health history. Had counsel conducted a reasonable and adequate independent investigation prior to trial, he would have uncovered a wealth of evidence which would have made a difference, as the unanimous expert

opinions and testimony regarding Mr. Michael's lack of competency and concerning mental health mitigating evidence presented to the Rule 3.850 court demonstrated. The Rule 3.850 evidence shows that Mr. Michael has met Mason's requirements.

The State's assertion that Mr. Michael "failed to offer proof . . . that the mental health evaluations were not professionally adequate," (State's Reply, p. 49), simply ignores the plethora of unrebutted evidence and testimony presented to the Rule 3.850 court. All of the experts who considered the requisite background materials and reviewed the evaluations of the trial experts agreed that those evaluations were indeed professionally inadequate (See, e.g., PC 305, 419-20, 1184, 1208, 1229). Dr. Mitchell, who evaluated Mr. Michael pretrial, provided significant testimony as to how his expert conclusions would have gone far beyond even his own pretrial concerns. At the hearing, all of the experts agreed that Mr. Michael was not competent and therefore should not have stood trial.

As discussed in Mr. Michael's initial brief, the Rule 3.850 court expressly declined to rule on this issue (See Order, PC 657: "it is not necessary to address the issue of inadequate assistance of psychiatric experts since that issue is moot in light of the Court's order"). The court simply failed to rule on this issue with regard to how it affected the guilt-innocence phase of Mr. Michael's trial.[5] For the

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[5]The court did make a general ruling on the competency question in connection with Mr. Michael's ineffective assistance of counsel claim, but, as discussed earlier, based its ruling on a wholly improper legal standard. Despite the overwhelming evidence presented below which demonstrated that Mr. Michael was not competent to stand trial, the court held, with regard to the ineffectiveness claim, that Mr. Michael could show no prejudice because "none of the three doctors who testified at the evidentiary hearing . . . were asked, nor volunteered that the

(footnote continued on next page)

reasons discussed herein and in Mr. Michael's initial brief, and on the basis of the unrebutted evidence adduced below, this Court should reverse and remand for a new trial or, alternatively, remand the case for a proper initial ruling from the Circuit Court.

V.

PERVASIVE AND SYSTEMATIC PROSECUTORIAL MISCONDUCT RENDERED JOHN MICHAEL'S CAPITAL CONVICTION AND SENTENCE OF DEATH FUNDAMENTALLY UNRELIABLE AND UNFAIR, AND JUDICIAL COMMENTS AND INSTRUCTIONS ENHANCED AND FURTHERED THE UNRELIABILITY AND UNFAIRNESS OF THESE PROCEEDINGS, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS

Mr. Michael relies on the arguments presenteed in his initial brief. He notes, however, that this Court's rejection of standard jury instruction-based Caldwell v. Mississippi, 472 U.S. 320 (1985) claims, see, e.g., Combs v. State, ___ So. 2d ___ (No. 68,477, Fla., February 18, 1988), slip op. 4-9; but see, id. at 13-16 (Barkett, J., and Kogan, J., specially concurring), is no bar to Mr. Michael's entitlement to Rule 3.850 relief in this case. Unlike other Florida capital post-conviction litigants, see, e.g., Combs, supra; Foster v. Dugger, Nos. 70,184 & 70,597 (Fla. Dec. 3, 1987), Mr. Michael's challenge is not based solely on the standard jury instructions. Rather, as in Caldwell itslef, Mr. Michael's rights were violated

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Defendant was incompetent at the time of the offense." (PC 650-51) (emphasis added). The experts were not asked because "competency" to stand trial at the time of the offense is not the legal issue: the constitutional standard requires evaluation of the defendant's competency at the time of trial. See Hill v. State, 473 So. 2d 1253 (Fla. 1985); Drope v. Missouri, 420 U.S. 162 (1975); Pate v. Robinson, 383 U.S. 375 (1966); see also Initial Brief, pp. 44-52. The Rule 3.850 court applied a wholly erroneous legal standard, see also, Issue III, supra, and this Court should now correct that misapplication of the law.

because the prosecutor actively and intentionally sought to mislead the jury and minimize its sense of responsibility for the awesome capital sentencing task that the law required it to perform. See Initial Brief, pp. 53-59; see also, Combs, supra, slip op. at 15 (Barkett, J., and Kogan, J., specially concurring) (Caldwell error based on "prosecutor's misleading remarks and the judge's failure to correct them."). In this regard, Mr. Michael's is a classic Caldwell claim which is subject to no procedural bar, i.e., this Court's previous rulings that Tedder v. State, 322 So. 2d 908 (Fla. 1975) and its state law progeny were a sufficient basis on which an objection to jury instructions could be made do not apply to this claim, for the constitutional error is based on what the prosecutor said and how the trial judge confirmed it. Until Caldwell, the "tools" were lacking on which a defendant could base an objection to such Eighth Amendment errors.[6]

Moreover, there can be little doubt that the prosecutor's persistent comments and the trial court's sanctioning instructions "serve[d] to pervert the jury's deliberations concerning the ultimate question of whether in fact [John Michael should be sentenced to die.]" Smith v. Murray, 106 S. Ct. 2661, 2668 (1986). Given these circumstances, no procedural bar can be applied. Id.; cf. Phillips v. Dugger, No. 71,404 (Fla. November 19, 1987), slip op. at 3 (Barkett, J., specially concurring). Previous litigants have not presented this issue and have argued only

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[6]Mr. Michael also continues to urge the Court to reconsider its prior rulings, e.g., Combs, supra, and grant relief because Caldwell is a significant change in law, See Adams v. Wainwright, 804 F.2d 1526 (11th Cir. 1986), reh. denied with opinion sub nom.; Adams v. Dugger, 816 F.2d 1433 (11th Cir. 1987), going far beyond the change announced in Hitchcock v. Dugger, 107 S. Ct. 1821 (1987). Cf. Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987).

that Caldwell is a change in law. This Court therefore has not considered the Smith v. Murray analysis. The Court now should, and accordingly, should grant relief.

Mr. Michael also acknowledges that this Court held in Grossman v. State, ___ So. 2d ___ (No. 68,096, Fla. February 18, 1988) that Booth v. Maryland, 107 S. Ct. 2529 (1987) would not be deemed a sufficient change in law warranting consideration of unobjected-to judicial reliance on victim impact information.[7] Here, however, impermissible victim worth and victim impact information was forcefully argued to the jury. It was used directly "pervert the jury's deliberations concerning the ultimate question of whether in fact [John Michael should die]." Smith v. Murray, supra, 106 S. Ct. at 2668. Under these circumstnaces, this claim also is subject to no procedural bar, id., and relief should be granted.

VI. - IX.

OTHER CLAIMS

Mr. Michael's remaining claims are detailed in his initial brief (pp. 71-79) and will not be detailed again herein. The State has painted a broad picture concerning procedural default. However, no procedural bar can or should be applied.[8] The

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[7]Mr. Michael respectfully urges the Court to reconsider its Grossman opinion. Booth does represent a significant change in Eighth Amendment law, see Initial Brief, pp. 59-71, and involves the critical prerequisites to the consitutional validity of any death sentence -- that such a sentence be individualized and reliable. None of this Court's previous state law opinions would have provided the "tools" on which a litigant could have based a Booth-type Eighth Amendment claim. No procedural bar should be applied.

[8]In this regard, the reasons presented herein and in Mr. Michael's initial brief also apply with full force to Issue V, supra.

claims are significant and involve errors of a fundamental constitutional nature, counsel was prejudicially ineffective in failing to litigate the claims, see Kimmelman v. Morrison, 106 S. Ct. 2574 (1986); Murray v. Carrier, 106 S. Ct. 2639 (1986), and the claims "pervert[ed]" the jury's deliberations on the ultimate questions of whether Mr. Michael was guilty of capital murder and should be sentenced to die. Smith v. Murray, 106 S. Ct. at 2668. Under these circumstances this Court should determine the claims on the merits and should grant Mr. Michael the relief he seeks.

CONCLUSION

Because the Circuit Court's grant of relief (Claim I) is amply supported by the record and based on proper legal standards, that ruling should not be disturbed. Because the Circuit Court erred in its disposition of other issues, those aspects of its Orders should be reversed. Because certain factual issues were never fully and fairly resolved, and others expressly but erroneously not ruled on, this case should be remanded. Because Mr. Michael has shown that his state and federal constitutional rights have been violated, a new trial should be ordered.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Davis G. Anderson, Jr., Assistant Attorney General, Office of the Attorney General, 1313 N. Tampa Street, Suite 804, Tampa, Florida 33602, this 19th day of February, 1988.

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