IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,154

ED CLIFFORD THOMAS,

Appellant,

V.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SEVENTEENTH JUDICIAL CIRCUIT COURT IN AND FOR BROWARD COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

The following symbols will be used to designate references to the record:

"R" -- Record on Direct Appeal to this Court;

"PC" -- Record on Appeal of Motion to Vacate Judgment and Sentence.

"App" -- Appendix to Motion to Vacate

All other citations will be self-explanatory or will be otherwise explained.

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STATEMENT OF THE CASE AND PROCEDURAL HISTORY

On December 2, 1980, the body of James Walsworth was discovered next to his car in a parking lot in Ft. Lauderdale (R. 287). The following day, the body of Russell Bettis was discovered in an alley in the same general area (R. 304). That area of Ft. Lauderdale contained several gay bars, frequented by male prostitutes and their customers. Acting on informaticn from a citizen, the police picked up Mr. Thomas on December 8, 1980 (R. 609). Mr. Thomas was charged with two counts of first degree murder.

At trial, the State introduced no physical evidence linking Mr. Thomas to the offenses, but relied on Mr. Thomas' statements to the police (R. 618-71), to his father (R. 671-73), and to an acquaintance (R. 725). Mr. Thomas testified, recanted his confession to the police and denied making the statements to his father and the acquaintance (R. 1017-90). The jury deliberated for six or seven hours, returned without a verdict, received a "dynamite" or Allen charge, and returned guilty verdicts cn both counts (R. 1246). The sentencing hearing began the next day (R. 1250, 1318), after trial counsel told the court that he was not prepared to proceed (R. 1250-53).

Defense counsel then called street people, homosexuals, and other friends of Mr. Thomas, to testify as to his prospects for rehabilitation, his general good character, and his friendly, mild nature. Correcticnal officers testified that Mr. Thomas was a good priscner (R. 1254-90). The jury unanimously recommended life on both counts (R. 1315).

In the period between the jury's recommendaticn and judge sentencing, defense counsel was arrested and was under criminal investigation, which essentially forced him to close his office (R. 1333-49). The judge denied a motion for a continuance and a new trial. Sentencing proceeded on August 24, 1981, and the court overrode the life recommendation. Mr. Thomas' convictions and sentences were affirmed by this

Court, two justices dissenting from affirmance of the death sentence. Thomas v. State, 456 So. 2d 454 (Fla. 1984).

On March 11, 1986, the Governor signed a death warrant in Mr. Thomas' case. Mr. Thomas filed an original Petition for a Writ of Habeas Corpus and an Application for a Stay of Execution in this Court and a Rule 3.850 motion in the Circuit Court. This Court stayed the execution. With the state attorney's agreement, the Circuit Court entered an order allowing an amended Rule 3.850 motion to be filed after this Court ruled on the habeas corpus petition. On October 2, 1986, this Court, with one dissenter, denied Mr. Thomas habeas corpus relief. Thomas v. Wainwright, 495 So. 2d 172 (Fla. 1986). A petition for a writ of certiorari filed in the United States Supreme Court was denied. Thomas v. Florida, 107 S. Ct. 1360 (1987). An amended Rule 3.850 motion was filed on May 28, 1987, and was denied without a requested evidentiary hearing on February 15, 1988. Mr. Thomas filed a timely appeal.

ARGUMENT

CLAIM I

THE RULE 3.850 COURT'S SUMMARY DENIAL OF MR. THOMAS' MOTION TO VACATE JUDGMENT AND SENTENCE WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

Under this Court's well-settled precedents, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the files and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734 (Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Thomas' Motion alleged facts which, if proven, would entitle him to relief. The files and records in his case do not "conclusively show that he is entitled to no relief," and the trial court's summary denial of his motion, without an evidentiary hearing, was therefore erroneous.

Mr. Thomas' verified Rule 3.850 motion alleged and supported extensive non-record facts in support of claims which have traditionally been raised by sworn allegations in Rule 3.850 post-conviction proceedings and tested through an evidentiary hearings. Mr. Thomas is entitled to an evidentiary hearing with respect to his claims, unless the files and records in the case conclusively show that he will necessarily lose on each claim. In that instance, the judge must attach "a copy of that portion of the files and records which conclusively shows that the prisoner is entitled to no relief. . . " Fla. R. Crim. P. 3.850. Otherwise, an evidentiary hearing is proper. Those portions of the record which were attached to the trial court's order here (the Defendant's Motion for New Trial; the Pre-Sentence Investigation Report; and the Defendant's Motion for Rehearing) in no way refute or rebut Mr. Thomas' sworn and supported allegations, and an evidentiary hearing was and is therefore proper.

Mr. Thomas' claims are of the type classically recognized as issues warranting full and fair Rule 3.850 evidentiary resolution. Obviously, the question of whether a capital inmate was denied effective assistance of counsel during either the capital guilt-innocence or penalty phase proceedings is a paramount example of a claim requiring an evidentiary hearing for its proper resolution. See O'Callaghan, supra; Squires, supra: Groover v. State, 489 So. 2d 15 (Fla. 1986). Mr. Thomas' claim that he was denied a professionally adequate pretrial mental health evaluation due to failures on the part of counsel and the court-appointed mental health professional is also a traditionally-recognized Rule 3.850 evidentiary claim, see Mason, supra; Sireci, supra; cf. Groover v. State, supra. Numerous other evidentiary claims requiring a full and fair hearing for their proper resolution were also presented by Mr. Thomas' Rule 3.850 motion.

In O'Callaghan, supra, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance claim were not "of record." See also Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983). Indeed, this

Court has stated that it

> . . . encourage[s] trial judge to conduct evidentiary hearings when faced with this type of proceeding in view of the relatively recent decision in the United States Supreme Court in Sumner v. Mata, 449 U.S. 539 (1981). It is important for the trial courts of this state to recognize that, if they hold an evidentiary hearing on this type of issue, under the Sumner decision their finding of fact has a presumption of correctness in the United States district courts.
>
> . . .
>
> The practical effect of the state court's denial of an evidentiary hearing on an ineffective-assistance-of-counsel claim is to leave the factual finding of this issue to the federal courts. It is for this reason that we suggest, even when not legally required, that trial courts conduct, in most instances, evidentiary hearings on this type of issue.

Jones v. State, 446 So. XI 1056, 1062-63 (Fla. 1984).

Thus, this Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. ~~See, e.g.,~~ Zeigler v. State, 452 So. XI 537 (1984); Vaught, ~~supra; Lemon, supra;~~ Squires, supra; Gorham, supra; Smith v. State, 461 So. XI 1354 (Fla. 1985); Morgan v. State, 461 So. XI 1534 (Fla 1985); Meeks V. State, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 Fla. 1983); LeDuc v. State, 415 So. 2d 721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Arango v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Thomas was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of his Rule 3.850 Motion was therefore erroneous.

CLAIM II

> THE FAILURE OF THE TRIAL JUDGE TO CONSIDER NONSTATUTORY MITIGATING CIRCUMSTANCES VIOLATED MR. THOMAS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS, AND TRIAL COUNSEL UNREASONABLY AND INEFFECTIVELY FAILED TO ADDRESS THE ISSUE.

Mr. Thomas' case presents a classic and compelling violation of Hitchcock v.

Dugger, 107 S. Ct. 1821 (1987).[1] Although evidence supporting a multitude of non-statutory mitigating circumstances was presented, the judge failed to give consideration to any evidence which was not directly pertinent to the statutory mitigating circumstances. Thus, in a case in which the jury unanimously recommended a life sentence and in which the judge found two statutory mitigating circumstances, a wealth of evidence in mitigation was never considered by the sentencer. Mr. Thomas was sentenced to death in violaticn of the eighth and fourteenth amendments.

A sentencer in a capital case may not limit his or her consideration of mitigating circumstances. Hitchcock v. Dugger, 107 S. Ct. 1821 (1987); Eddings v. Oklahoma, 455 U. S. 104, 113-14 (1982); Lockett v. Ohio, 438 U. S. 586 (1978). In Florida, a death-sentenced petiticner is entitled to relief if such a limitation occurs either before a sentencing jury or a sentencing judge:

> The record of the sentencing proceeding in this case shows a situation similar to that found in Hitchcock v. Dugger, ___ U.S. ___, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987). There the Supreme Court found that "the sentencing proceedings actually conducted" showed that the sentencing judge operated under the assumption that non-statutory mitigating circumstances could not be ccnsidered. Id. 107 S. Ct. at 1823.
>
> . . . .
>
> [W]e find that the trial judge who sentenced appellant to death did not believe he was obliged to receive and consider evidence pertaining to non-statutory mitigating factors.

'Before the decisicn in Hitchcock, Mr. Thomas presented this claim to this Court in a Petition for a Writ of Habeas Corpus. Relying on its pre-Hitchcock decisicns, the Court denied relief. Thomas v. Wainwright, 495 So. 2d 172 (1986). In the Rule 3.850 proceedings, the trial court found that this Court's denial of the claim and the fact that the claim was not raised on direct appeal foreclosed the trial court's review of the claim (Order, p. 3). As is clear from every post-Hitchcock pronouncement of this Court, no procedural bar now forecloses this Court's review of Mr. Thomas' Hitchcock claim. See Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Thompson v. Dugger, 515 So. 2d 173 (Fla. 1987); Morgan v. State, 515 So. 2d 975 (Fla. 1987); Riley v. Wainwright, 517 So. 2d 656 (Fla. 1987); McCrae v. State, 510 So. 2d 874 (Fla. 1987); Delap v. Dugger, 513 So. 2d 659 (Fla. 1987); Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988); Foster v. State, 518 So. 2d 901 (Fla. 1988); Zeigler v. Dugger, 524 So. 2d 419 (Fla. 1988).

> This finding, based on the record, is sufficient to require a new sentencing hearing.

McCrae v. State, 510 So. 2d 874, 880 (Fla. 1987). When "the trial judge believe[s] that non-statutory mitigating evidence [is] not a proper consideration," resentencing is required. Zeigler v. Dugger, 524 So. 2d 419, 421 (Fla. 1988). See also Morgan v. State, 515 So. 2d 975, 976 (Fla. 1987)("It is abundantly clear from the record that . . . the trial judge did not take into account . . . any evidence of non-statutory mitigating circumstances"); Riley v. Wainwright, 517 So. 2d 656, 659 (Fla. 1987)("[T]he standards imposed by Lockett bind both the judge and the jury under our law"); Messer v. Florida, 834 F.23 890, 892 (11th Cir. 1987)(same).

In Mr. Thomas' case, both the judge and jury were constrained in their consideration of non-statutory mitigation. The jury nevertheless returned a unanimous life recommendation. The judge, however, overrode that recommendation and imposed death, failing to consider evidence of non-statutory mitigation. Mr. Thomas was thus denied an individualized and reliable capital sentencing determination. His entitlement to relief on the merits is obvious: there can be no doubt that the proceedings resulting in his sentence of death violated the mandate of Hitchcock v. Dugger. See also Lockett, supra; Skipper v. South Carolina, 106 S. Ct. 1669 (1986); Eddings, supra. The trial judge's failure to consider evidence of non-statutory mitigating circumstances parallels the Hitchcock sentencing court's limited consideration of non-statutory mitigation. In Hitchcock, the unanimous court held:

> [I]t could not be clearer that the advisory jury was instructed not to consider, and the sentencing judge refused to consider, evidence of non-statutory mitigating circumstances, and that the proceedings therefore did not comport with the requirements of Skipper v. South Carolina, 476 U.S. ___, 106 S. Ct. 1669, 90 L.Ed.2d 1 (1986), Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982), and Lockett v. Ohio, 438 U.S. 586, 98 S. Ct. 2954, 57 L.Ed.2d 973 (1978)(plurality opinion).

107 S. Ct. at 1824.

Ed Thomas' sentence of death resulted from proceedings which were as unconstitutional as those in Hitchcock. Mr. Thomas is entitled to the same relief,

A. THE TRIAL JUDGE BELIEVED THAT HE COULD NOT CONSIDER NON-STATUTORY MITIGATING EVIDENCE

1. Record Evidence that the Trial Judge Improperly Failed to Consider Non-Statutory Mitigation.

Most strikingly indicative of the trial court's failure to consider non-statutory mitigation is what occurred at argument on a defense motion for rehearing, heard after the court had imposed sentence. At least five individuals testified before the jury that Mr. Thomas was an excellent candidate for rehabilitation in prison (R. 1255, 1257, 1259, 1262, 1267, 1268), which is a recognized non-statutory mitigating circumstance. See Skipper, supra. In the later argument to the trial judge, and in discussing the unanimous jury recommendation of life, the following colloquy occurred:

> [MR. KENT: [T]hey, after speaking with different jurors after the fact, took into account certain mitigating circumstances such as the defendant's youth and the defendant prior --
>
> MR. HANCOCK: I apologize for interrupting, but I would object.
>
> THE COURT: I don't want to hear any discussions that you have had with someone else.
>
> MR. KENT: Right. I am going to assume that in making that recommendation the jurors took into account the defendant's youth. [a statutory mitigating circumstance]
>
> THE COURT: So did I.
>
> MR. KENT: His lack of involvement in other criminal activity. [a statutory mitigating circumstance]
>
> THE COURT: So did I.
>
> MR. KENT: And his likelihood and hope for rehabilitation. [a nonstatutory mitigating circumstance]
>
> THE COURT: That is not in the mitigating.

(R. 1374-75)(emphasis added). Actually there was plenty of "[t]hat" (rehabilitation) in evidence, but "[t]hat" is not in the statutory list of mitigating circumstances and, consequently, the trial court did not answer that "[t]hat" was one of the things

he considered.

The record is replete with other documentation that the court believed the statutory list of mitigating circumstances to be an exclusive list. The trial court emphasized that he would not impose sentence without first receiving a presentence investigation (PSI)(R. 24, 1352, 1356-58, 1361). The PSI makes evident that the PSI preparer was under a misconception about capital sentencing, a misconception that foreshadowed the trial court's constitutional error. In arriving at a recommendation, the preparer examined "the aggravating and mitigating circumstances which Florida Statutes sec. 921.141 requires the court to consider. . . ." (App. 2, p. 9)(emphasis added). The preparer then went through the statutory list, without any discussion of non-statutory mitigating circumstances, and arrived at a "simple mathematical process":

> In summation, the entire incident is a tragedy. Any time a life is taken it is a heinous crime. However as a simple mathematical process the aggravating circumstances and mitigating circumstances required for the death penalty are not present in count I, therefore the death penalty is not recommended.
>
> In count II it is felt that the aggravating circumstances outweigh the mitigating circumstances and . . . lead this Officer to professionally recommended [sic] that the court impose the maximum penalty allowed by the law: death.

(App. 2, p. 12)(emphasis added).

This unconstitutional mathematical process was mirrored in the court's sentencing order, the court that admitted placing great weight on the PSI. The court too made findings "[p ursuant to the provisions of Florida Statute sec. 921.141(3)" (R. 1545). The court too listed only the statutory criteria, made no mention of non-statutory mitigating circumstances, and used a simple mathematical process:

> In summary, the Court finds that of nine aggravating circumstances, one is applicable as to Count I, and five were applicable as to Count 11. As to the mitigating circumstances, two applied in this case as to each Count.

(R. 1547-48)(emphasis added). (See also R. 1366-67).

The trial court also revealed through jury instructions the belief that

mitigation was limited. Before the sentencing proceeding began, the jury was informed that "[a]t the conclusion of the taking of the evidence and after argument of counsel, you will be instructed on the factors in aggravaticn and mitigation that you may consider" (R. 1253)(emphasis added). True to his word, the trial court instructed the jury:

> The mitigating circumstances which you may consider if established by the evidence, are these:

(R. 1310 . The statutory list, and only the statutory list, followed.

The state attorney likewise believed that mitigation was limited to the statutory factors, and his comments to that effect to the judge and jury were never corrected. When recommending punishment in a pleading, the state attorney mentioned only statutory mitigation (R. 1542). In closing argument at the penalty phase, the state attorney informed the jury that the law was restrictive:

> And you have to make a recommendation and you have to base that on the law and the facts. And the judge is going to instruct you on what the law is. and there are certain mitigating circumstances you can consider and there are certain aggravating circumstances.

(R. 1291-92)(emphasis added). (See also R. 1293 ["there are certain things you can take into consideration"]).

Clearly, the trial judge did not believe he could consider and did not consider evidence of non-statutory mitigating circumstances. The judge did not consider Mr. Thomas' potential for rehabilitation because "[t]hat is not in the mitigating" cf. Skipper, supra, 106 S.Ct. at 1671 (good behavior in jail is relevant mitigating evidence); the judge gave the jury the same instructicn as that given to the jury in Hitchcock, see 107 S. Ct. at 1824; the judge discussed only statutory mitigating circumstances in his sentencing order, finding that the statutory mitigating circumstances did not outweigh the statutory aggravating circumstances. As reflected in his jury instructions, see Zeigler v. Dugger, 524 So. 2d at 420 ("Unless there is something in the record to suggest to the contrary, it may be presumed that the

judge's perceptien of the law coincided with the manner in which the jury was instructed"), and as shown by his sentencing order, the sentencing judge in Mr. Thomas' case "assumed . . . a prohibition [against non-statutory mitigation]" and foreclosed his review. Hitchcock, 107 S. Ct, at 1823; see also McCrae, supra; Zeigler, supra; Morgan, supra; Messer, supra.

2. Ncn-Record Evidence That The Trial Judge Improperly Failed to Consider Non-Statutory Mitigatien.

In addition to the record evidence discussed above, nonrecord information supports the proposition that Mr. Thomas' trial judge did not believe he could consider non-statutory mitigating circumstances at the time of trial in 1981. The best indication is Herzog v, State, 439 So.2d 1372 (Fla. 1983), a decision regarding another capital case tried before Mr. Thomas' judge. In that case, an override of a jury's life recommendatien was overturned on appeal because, inter alia, there was no indication that the trial court considered non-statutory mitigating circumstances:

> The trial court properly found that no statutory mitigating circumstances existed; however, there is no indication in the sentencing order that the court considered non-statutory mitigating circumstances.

Id. at 1376. The sentencing order in Herzog was signed December 1, 1981, four months after the Thomas order (see App. 20).

In five other capital cases decided around the same time as Nr. Thomas' case, the same trial judge prepared similar sentencing orders discussing only statutory mitigating circumstances. See Wilson v. State, 436 So. 2d 908 (Fla. 1983)(sentencing order dated September 30, 1981, App. 20); Jackson v. State, 464 So. 2d 1181 (Fla. 1985)(sentencing order dated December 2, 1981, App. 20); Livingston v. State, 458 So. 2d 235 (Fla. 1984)(sentencing order dated January 5, 1982, App. 20); McCray v. State, 416 So. 2d 804 (Fla. 1982)(sentencing order dated August 30, 1980, App. 20); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984)(sentencing order dated May 12, 1981, App. 20). It was not until 1984 that the trial court changed its standard sentencing order to include language acknowledging non-statutory mitigating

circumstances. In State v. Thompson, 84-148CF, the court signed a sentencing order on November 8, 1984, stating: "There were no non-statutory mitigating circumstances presented to the court" and "As to the mitigating circumstances none applied in this case, statutory or non-statutory" (App. 20, pp. 4-5). It is manifestly clear that the trial judge who sentenced Mr. Thomas to death came to realize the need to consider non-statutory mitigating circumstances only after Mr. Thomas' case.

The sentencing order in Mr. Thomas' case followed the pattern of the trial judge's pre-Thompson sentencing orders. Furthermore, the record of proceedings in this case shows that the trial court did not consider non-statutory mitigation.

B. THE RECORD NON-STATUTORY FACTORS WHICH WERE IGNOHED

The record of the proceedings in Mr. Thomas's case is replete with non-statutory mitigation. The defense presented numerous lay witnesses at the penalty phase, and the presentence investigation report contained additional non-statutory mitigation.

1. Nonstatutory Mitigation Before The Jury

Even though Ed Thomas had been abandoned by his family at an early age, he managed to fend for himself without trouble while living in the hardened street world. He was preyed upon in this underworld of degradation and anarchy, where, as the police witnesses testified, drugs, alcohol, crime, abject poverty, and illicit homosexual prostitution were pervasive. This is the world, in Fort Lauderdale and elsewhere, where twenty-year-old Ed Thomas was forced to live, and the world in which older, experienced, and moneyed men sought him out for sexual favors (R. 79, 87, 109, 215-26, 153, 189, 113, 92-93).

Ed Thomas was the product of a broken home, and the early victim of an abusive alcoholic father. His father testified, the jury saw him, and he acknowledged that he was a heavy drinker, who would drink until he was drunk, and then pass out (R. 675, 676, 678, 1052, 1280). Ed Thomas' mother left home when Ed was seven years old, when she was driven away by his father, who was drunk (R. 1052, 1286). The father was simply mean when he got drunk (R. 1052). His father threatened to kill her if

she ever returned (R. 1054).

Ed Thomas has not sat down to a family meal since he was six and a half years old (R. 1287). His life at home was miserable. His father remarried without telling the children, and thereafter basically ignored Ed (R. 1288). Ed Thomas went to school through the eighth grade. He took tests while he was in jail on this charge, in an attempt to improve himself. The tests showed he was at a fifth grade level (R. 671, 1280). When he actually did attend school, his father took no interest in what he was doing, and would not meet with Ed and his teachers, even though Ed was having trouble (R. 1280). Ed ran away from home for the first time at age 14 (R. 1204). His father's habitual drunkenness and the beatings he administered caused him to run away. He actually lived under a bridge during this time. His father dealt with the running away situation by having Ed arrested, and then accused Ed of breaking into his own home when he returned, and had him arrested again (R. 1205). When Ed tried to return home at age 17, he was turned away for the last time,

The people who knew Ed in Fort Lauderdale liked and respected him. He was an excellent worker and received commendaticns for his work (R. 574). All agreed that he was a nonviolent individual (R. 1254, 1255, 1257, 1258, 1260, 1261, 1262, 1264, 1265, 1266), with good work habits (R. 1254, 1258, 1282, 1289). He was motivated, and had a real desire to help other people (R. 1254, 1267, 1268). He was a good friend, was well liked, and was considered to be a good person (R. 1255, 1258, 1260, 1262, 1267-69, 1282). He was never angry, but was warm and friendly (R. 1268). He was never known to fight (R. 1265-67). He was very kind and helpful to his friend Bill Ayers' grandmother, who was frail (R. 1254).

Before the homicides, Ed Thomas had emotional problems. He spent a week in the hospital for brain seizures, and his family offered him no help (R. 1289). From the time he was arrested, Ed Thomas caused no problems with police and jail personnel (R. 1272, 1275, 1280). He tried to obtain his GED while he was in jail awaiting trial (R. 1255, 1259, 1279). Jail experts described him as a model prisoner, who would be

no problem in jail. Many witnesses testified that Ed Thomas had high goals and aspirations, and that he had prospects for rehabilitation (R. 1257, 1262, 1267, 1268).

The case against Mr. Thomas came solely from his own statements. No physical evidence connected him with the crimes. The state twice told the jury during voir dire that guilt did not have to be proven beyond all doubt, just beyond a reasonable doubt (R. 27, 34). Lingering doubt was very real in this case, as is evident from the jury's deadlock.

2. Nonstatutory Mitigation In The PSI

The presentence investigation report provided the trial judge with further non-statutory mitigation evidence:

> SOCIAL HISTORY:
>
> Family and Personal Background:
>
> Subject's father is William Charles Thomas, age 48 who resides at 5916 Gilman Street, Garden City, Michigan. Mr. Thomas is employed by Allied Supermarket as a high-low Operator.
>
> The defendant's natural mother is Jeanette Brandon age 40 who resides in Las Vegas, Nevada. Defendant's mother left Mr. Thomas, the defendant and two siblings when the defendant was 7 years old. When the defendant was 8 years old Mr. Thomas began residing in a paramour relationship with Bonnie Thomas until marrying in 1977. Defendant has two siblings, they are: Chuck Thomas age 24 and Nancy Thomas age 19.
>
> During this interview the defendant stated, "In the beginning I didn't mind her staying with dad but they just went out and got married without even telling us kids. That's when they started drinking heavy. They're alcoholics. They probably put away 10 cases of beer a week. My father used to whip us with a mallet hammer, a dog chain and you name it, he'd use it. He'll deny it because he doesn't want his friends to know what he's like. I don't like my step-mother at all."
>
> Education:
>
> Records reflect that the subject completed the 9th grade at Garden City High School located in Garden City, Michigan. The defendant entered into the 3rd grade on three occasions before passing into the fourth grade.

The defendant stated that he had difficulties in school because, "I didn't like the teachers attitude and they would make fun of me because of my age. I was 17 in the 9th grade. Then my parents started talking about getting married and I started running away. I ran away 27 times from 1974 to 1977. I guess you could say that I was the class clown in school. I was so busy making people laugh that I didn't learn anything at all. I took the G.E.D. here in jail and found out I'm on a 5th grade level. That hurt."

Marital: The subject has never been married nor has he fathered any children. Subject stated that he has entered into homosexual experiences since the age of 14 mostly for money. Defendant also stated "there were a few guys I didn't charge but they gave me a place to stay." The defendant further related "I wouldn't choose homosexuals now though because it's a sin. You can't believe in one thing and do another."

Residence: At the time of the subject's arrest, the subject was residing on the roof of McCrory's Department store and on occasion resided with Bill Ayers in a three bedroom trailer located in Margate, Florida.

Religion: The subject is of the Pentecostal faith and related at the time of this interview "I have strong beliefs in God. As far as I'm concerned, they can give me the death sentence because I know I haven't done anything. I guess I'll just be the first one in line to see Jesus."

Interests & Activities:

The subject stated he enjoys spending his leisure hours going to bars and drinking. Subject stated his use of alcohol to be that of approximately 15 cans of beer daily and related that he has experimented with Cocaine and LSD and has used Marijuana on an occasional basis.

. . .

Health:

Physical: . . . . The defendant related that he has suffered from epilepsy in the past and has had reoccurring seizures. . . ,

Mental: , . . . According to Arnold S. Zager, M.D.P.A. "there is a rather significant past psychiatric history which apparently has a most direct bearing upon the present crimes. The subject was born in Marion, Illinois, and raised primarily in Detroit, Michigan. He was initially raised by his father and mother but apparently his mother deserted the family when the subject was only age 7. He was thereafter raised by his father and future step-mother. The subject additionally had an older brother, age 23, and a

younger sister, age 19. He recalls his father being an alcoholic and an apparent child abuser. He described a rather stormy and tumultuous and conflictual childhood, wherein he was frequently savagely beaten by his father on only limited provocation. He specifically recalls that at age 6, he was whipped by his father with a dog chain and later on by a broom handle. He recalls that he was primarily the child who was physically abused and punished by the father in contrast to the other two siblings. He states that he always had an angry and stormy relaticnship with his father, whom he pictures as a rather brutal, sadistic individual. He parenthetically adds that he thought more of a science teacher in this school than of the relationship that he had with his father. He alluded to feelings of deprivaticn and isolation which were prominent feelings and features of his growing years.

In order to gain social acceptance by his family and the world, he became the class clown. In fourth grade and thereafter, he went great lengths to make his fellow school children laugh at his humor. He was also accused of being the bully of the neighborhood, specifically by his father. He impulsively quit school in the 9th grade and apparently engaged in various run-a-way behavior. At age 14, he ran away to California and on his way there hitchhiking, had his first homosexual experience. The subject describes himself basically as a bi-sexual individual who is physically attracted to women but feels out of place and extremely self ccnscious engaging in relaticnships with them. He notes that any homosexual relationships are typically associated with older men. Indeed when he meets a homosexual of his own age, he thinks of him more as a competitor for "clients" rather than a possible sexual object itself. His particular attracticn and involvement in homosexual relaticnships only with older men may have a direct bearing upon his rather stormy and sadistic relationship that he experienced with his natural father.

Mental status examination discloses a husky, muscular well built young white male who was quite cooperative to the interview setting and related in reasonable and positive fashion to this particular physician. His nails were bitten down and he was dressed in a t-shirt and pants. As the interview progressed, he appeared to pick at pimples present on his face. There was no overt evidence of a psychotic thought disorder during the interview nor did he manifest evidence of a schizophrenic process, His associative processes for the most part were intact, although self image and self esteem were significantly impaired. He did not manifest evidence of delusions, hallucinations nor ideas of reference. Sensorium was in- tact as judged by orientation to time, person and place; and memory for recent and past events appeared to be fair. General finding of information was in the below average range, although patient was competent and aware of the Present charqes facinq him. His judgment and insight at times are impulsive and likewise

impaired.

It is also noteworthy that the subject is quite aware that he may very well be given the death penalty if he is convicted of these charges. He adds, "I want to die on my terms. I don't care if I die, but I want to be crucified. He states that he would like such a crucifixion to be placed on national television and feels that it would be quite reasonable that the Pope of the catholic church would make a special trip to this country to witness such a crucifixion. He states this with a rather calm and quite demeanor.

Impressicns:

While Ed appears to know the difference between right and wrong at the time of the commitment of the alleged crime, there appear to be rather definite and significant factors which have a direct bearing upon his carrying out such an act. His apparent history of being physically and perhaps sadistically abused by his father, may have provoked the intensive anger and rage expressed at the victim (Mr. Walsworth). He again felt abused and perhaps ridiculed by Mr. Walsworth and, indeed may have transferred the rage that he felt for many years at his father for his constant physical harassments, to the victim, who may have been comparable in age to his father. The very act of getting even with Mr. Walsworth may have been his unconscious attempt to get even for the evils that he felt may have been done to him by his father for many years. This may have directly impaired his ability to conduct himself in a reasonable degree and to reasonably appreciate the criminality of his acts. That is not to say that he was psychotic at the time, but he was under significant emotional duress. [sic] I would likewise add that when he was interrogated by the Detectives and Police Officers one week later, the stress of that environment may have again rekindled his interrogation and abuse by his father of many years ago and he may very well have admitted to any and all acts to be again free of such harassments."

. . .

Bill Ayers, the defendant's past lover and adoptive father stated "as of July 6, 1981, we have changed our relatianship to that of father-son. I know he didn't do it. He told the police that he did it because he was drunk. He lived with me since November, 1978. I trusted him to take care of my grandmother and she's 81 years old. I would stake my life on him. Ed says Tom Woods did it. I know that there is no way that the kid could ever hurt anyane. I've never seen him show any signs of violent behavior. He used to stay with me three or four days and then go visit his friends. He's not a drifter. We were separated from June til the end of October, He went up North and I went to California. I don't think we'll have any problems with the father-son relationship even though we had a sexual one in the past.

> We both have the same religious beliefs. I'm glad it's changed now because we never really either one of us wanted a sexual relationship. Ed's 20 years old going on 15 and he's got the education of a 12 year old. He belongs at home with me getting the rest of his education so he can become the man I know he can be instead of sitting in jail convicted of 2 murders that I know he didn't commit."

This Court has recognized that the kinds of information before Mr. Thomas' jury and judge are mitigating. For example, a deprived and abusive childhood is mitigating. Holsworth v. State, 522 So. 2d 348 (Fla. 1988)("Childhood trauma has been recognized as a mitigating factor"); DuBoise v. State, 520 So.2d 260, 266 (Fla. 1988)(jury could have considered "deprived family background"); Burch v. State, 522 So. 2d 810, 813 (Fla. 1988)(jury could have considered "family history of physical and drug abuse"); Brown v. State, 526 So. 2d 903 (Fla. 1988)("family background and personal history . . . must be considered"); Livingston v. State, No. 68,323, slip op. at 6 (Fla. Mar. 10, 1988)("childhood . . . marked by severe beatings" is mitigating); see also Eddings v. Oklahoma, 455 U.S. 104, 107 (1982). Evidence that the defendant was good to others and was non-violent is mitigating. Perry v. State, 522 So. 2d 817 (Fla. 1988). Of course, good behavior in jail and prospects for rehabilitation are mitigating. Harmon v. State, 527 So. 2d 182, 189 (Fla. 1988)("model prisoner" is mitigating); McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982); Cooper v. Dugger, 526 So. 2d 900, 902 (Fla. 1988)("potential for rehabilitation is a significant factor in mitigation"); Valle v. State, 502 So.2d 1225, 1226 (Fla.1987)(same); see also Skipper, supra.

C. THE LEGAL ANALYSIS ATTENDANT TO MR. THOMAS' CLAIM

Today, "[t]here is no disputing," Skipper, 106 S.Ct. at 1670, the force of the Lockett, constitutional mandate: a sentence of death cannot stand when the defendant has been denied an individualized sentencing determination by the sentencer's failure to consider mitigating evidence. See Hitchcock, supra; Skipper, supra. In Mr. Thomas' case, the sentencing court's own words (i.e., its instructions to the jury, sentencing order and on-the-record pronouncements) show that it constrained its

review only to statutory mitigation. The sentencing court provided Mr. Thomas with an unconstitutionally restricted sentencing proceeding. Cf. Harvard v. State, 486 So. 2d 537 (Fla. 1986); Scnger v. Wainwright, 769 F.2d 1488, 1489 (11th Cir. 1985)(en banc).

Mr. Thomas' claim falls squarely within Hitchcock and this Court's recent applications of the Hitchcock standard. The claim is not defeated by the fact that non-statutory mitigating evidence was "presented":

> The United States Supreme Court clearly rejected [the] "mere presentation" standard . . .

Riley v. Wainwright, 517 So. 2d at 660, citing Hitchcock, supra. Today, post-Hitchcock, "the mere opportunity to present non-statutory mitigating evidence does not meet constitutional requirements if the judge believes . . . that some of that evidence may not be weighed . . . during sentencing." Downs v. Dugger, 514 So. 2d 1069, 1071 (Fla. 1987).

The eighth amendment errors discussed herein rendered Mr. Thomas' sentencing proceeding fundamentally unfair, Harvard, supra; Riley, supra, and deprived him of an individualized sentencing determination. The failure to provide any meaningful consideration to the numerous non-statutory mitigating factors apparent from this record simply cannot be deemed harmless beyond a reasonable doubt. Id. Mr. Thomas is entitled to Rule 3.850 relief.

CLAIM III

> MR. THOMAS WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL, AND HIS CONVICTIONS AND SENTENCE OF DEATH THEREFORE VIOLATE HIS RIGHTS UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Thomas alleged in his 3.850 Motion that he was denied the effective assistance of counsel with regard to both the guilt-innocence (see Motion to Vacate, Claim X), and the sentencing phases of his trial (see Motion to vacate, Claim I). The trial court summarily denied these claims without an evidentiary hearing. This Court has repeatedly recognized that a post-conviction hearing is necessary on a

claim of ineffective assistance of counsel because the facts necessary to the disposition of this type of claim would not appear on the record. O'Callaghan v. State, 461 So.2d 1354, 1355-56 (Fla. 1984); Vaught v. State, 442 So.2d 217, 219 (Fla. 1983); Jones v. State, 446 So.2d 1056, 1062-63 (Fla. 1984).

A. INTRODUCTION

Mr. Thomas, like every other capital defendant, was entitled to effective assistance of counsel at both the guilt and penalty phases of his capital trial. Strickland v. Washington, 466 U.S. 668, 686 (1984). At both phases counsel has "a duty to bring such skill and knowledge as will render the trial a reliable adversarial testing process." Id., 466 U.S. at 688. The key to effective assistance involves counsel's duty to fully and properly investigate and prepare. See, e.g., Kimmelman v. Morrison, 106 S. Ct. 2574, 2588-89 (1986)(failure to request discovery based on failure to adequately prepare); Thomas v. Kemp, 796 F.2d 1322, 1324 (11th Cir. 1984)(little effort to investigate, obtain, and develop mitigating evidence); King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984)(failure to present additional character witnesses resulted from failure to fully investigate); Gaines v. Hopper, 575 F.2d 1147 (5th Cir. 1978)(failure to fully investigate evidence of provocation); Nealy v. Cabana, 764 F.2d 1173, 1178 (5th Cir. 1985)(failure to fully investigate and develop mitigating evidence); Tyler v. Kemp, 755 F.2d 741 (11th Cir. 1985)(same); Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986)("Defense counsel either neglected or ignored critical matters of mitigation at the point when the jury was to decide whether to sentence Jones to death."), rehearing denied with opinion, 795 F.2d 521 (5th Cir. 1986). Where, as here, counsel fails to investigate, develop, or present important guilt-innocence and penalty phase defenses and/or challenges to state evidence, counsel violates the duty to render effective assistance, and a petitioner is entitled to post-conviction relief. See Kimmelman; Thomas, King; Gaines; Nealy; Tyler; Jones, supra.

Relief is also appropriate where, as here, trial counsel "made errors so serious

that counsel was not functioning as the 'counsel' guaranteed the defendant by the sixth amendment." Strickland v. Washingtcn, 466 U.S. at 687. In this regard, courts have consistently recognized that even if counsel provides effective assistance in some areas, a criminal defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the guilt or penalty trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.23 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). Counsel may in fact be held to have been ineffective due to a single, isolated error. See Kimmelman v. Morrison, 106 S. Ct. 2574 (1986); Nero v. Blackburn, 597 F.2d 991 (5th Cir. 1979).

Courts have recognized that in order to render reasanably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.23 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of knowing the applicable law and presenting legal argument in accord with the applicable principles of law. See, e.g., Kimmelman, supra, 106 S.Ct. at 2588-89; Nero v. Blackburn, supra, 597 F.23 at 994; Beach v. Blackbum, 631 F.23 1168 (5th Cir. 1980); Herring v. Estelle, 491 F.23 125, 129 (5th Cir. 1974); Rummel v. Estelle, 590 F.23 103, 104 (5th Cir. 1979); Lovett v. Florida, 627 F.23 706, 709 (5th Cir. 1980). Counsel have been found to be prejudicially ineffective for failing to raise objections, to move to strike, and to seek limiting instructions regarding inadmissible, highly prejudicial testimony, Vela v. Estelle, 708 F.23 954, 961-66 (5th Cir. 1983), cert. denied, 464 U.S. 1053 (1984); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.23 938 (8th Cir. 1976), or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.23 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.23 at 816-17; and for failing to object to improper jury argument. Vela, 708 F.2d at 963.

Of course, a petiticner must also demonstrate prejudice: "that the decision

reached would reasonably likely have been different absent the errors" of counsel, and that therefore the reviewing court cannot confidently rely upon the proceedings' results. Strickland v. Washington, supra, 466 U.S. at 690. As will be discussed below, Mr. Thomas has demonstrated both deficient performance and prejudice.

Moreover, the files and records in this case did not conclusively refute Appellant's contention that his trial was not a "reliable adversarial testing process" as required by the Sixth Amendment at either the guilt-innocence stage or the penalty phase and the trial court's summary denial of his 3.850 motion was thus error,

B. PENALTY PHASE

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phase of a capital trial. The Supreme Court has held that in a capital case, "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die." Gregg v. Georgia, 428 U.S. at 190. In Gregg, the Court emphasized the importance of focusing attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Roberts v. Louisiana, 428 U.S. 325 (1976); Wocdson v. North Carolina, 428 U.S. 280 (1976).

Courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investigate and prepare mitigating evidence for the sentencers' consideration. Tyler v. Kemp, 755 F.2d 741, 745 (11th cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); King v. Strickland, 748 F.2d 1462, 1463-64 (11th Cir. 1984); Douglas v. Wainwright, 714 F.2d 1532 (11th Cir. 1983), vacated and remanded, 104 S.Ct. 3575 (1984), adhered to on remand, 739 F.2d 531 (1984); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986); Jones v. Thigpen, 788 F.2d 1101, 1103 (5th Cir. 1986). Mr. Thomas' trial counsel did not meet these constitutional standards. See Tyler v. Kemp, supra.

The sixth amendment right to counsel is inextricably related to the right to expert psychiatric assistance. There is in fact a critical dependency between the right to effective assistance of counsel and the separate right to competent mental health assistance for a criminal defendant. Mental health experts are essential for the preparation of a defense and for sentencing whenever the State makes mental health relevant to those issues. Ake v. Oklahoma, 105 S. Ct. 1087 (1905). This independent due process right is necessarily enforceable through the right to effective counsel -- what is required is a competent mental health evaluation, and it is up to counsel to obtain it. Blake v. Kemp, supra. Preparation and investigation in such cases likewise takes on added dimensions. Mental health and mental status issues permeate the law, and careful investigation and assessment of mental health is necessary before strategy decisions are made. Thompsm v. Wainwright, 787 F.2d 1447 (11th Cir. 1986). Thus, when counsel unreasmably fails to properly investigate mental circumstances relevant to sentencing, Blake v. Kemp, supra; Porter v. Wainwright, 805 F.23 930 (11th Cir. 1986), ineffective assistance is demonstrated.

In Mr. Thomas' case, trial counsel's failure to investigate, prepare and present evidence in mitigation and the prejudice resulting from those failures are grossly apparent. Although Mr. Thomas' jury unanimously recommended a life sentence, the judge overrode that recommendation and imposed death. This Court affirmed the override, finding that "there does not appear to be any reasonable basis discernible from the record to support the jury's recommendation." Thomas v. State, 456 So. 23 454, 460 (Fla. 1984).

This Court's cases reviewing death sentences imposed following a jury recommendation of life consistently make me point: such a death sentence cannot stand when the record demonstrates a "reasonable basis" for the jury's life recommendation. See, e.g., Burch v. State, 522 So. 23 810 (Fla. 1988); DuBoise v. State, 520 So. a 260 (Fla. 1988); Fead v. State, 512 so. 2d 176 (Fla. 1987); Ferry v. State, 507 So. 2d 1373 (Fla. 1987); Wasko v. State, 505 So. 2d 1314 (Fla. 1987);

Brookings v. State, 495 So. 2d 135 (Fla. 1986); Amazon v. State, 487 So. 2d 8 (Fla. 1986); Huddleston v. State, 475 So. 2d 204 (Fla. 1985); McCampbell v. State, 421 So. 2d 1072 (Fla. 1982); Tedder v. State, 322 So. 2d 908 (Fla. 1975). When such a "reasonable basis" appears in the record, this Court does not hesitate to reverse an override:

> The principle enunciated in Tedder, "[I]n order to sustain a sentence of death following a jury recommendation of life, the facts suggesting a sentence of death should be so clear and convincing that virtually no reasonable person could differ," . . . has been consistently interpreted by this Court to mean that when there is a reasonable basis in the record to support a jury's recommendation of life, an override is improper . . . . When there are valid mitigating factors discernible from the record upon which the jury could have based its recommendation an override may not be warranted.

Ferry, supra, 507 So.2d at 1376.

Because the jury recommendation is an essential part of the Florida capital sentencing proceeding, this Court has rejected the suggestion that it assess the propriety of an override based solely on the reasonableness of the trial judge's findings:

> The state, however, suggests that the override was proper here because the trial court judge is the ultimate sentencer and his sentencing order represents a reasonable weighing of the relevant aggravating and mitigating circumstances. According to the state's theory, this Court should uphold the trial court's sentence of death. We reject the state's suggestion. Under the state's theory there would be little or no need for a jury's advisory recommendation since this Court would need to focus only on whether the sentence imposed by the trial court was reasonable. This is not the law. Sub judice, the jury's recommendation of life was reasonably based on valid mitigating factors. The fact that reasonable people could differ on what penalty should be imposed in this case renders the override improper.

Ferry, 507 So. 2d at 1376-77 (emphasis added).

A defense attorney's objective at a Florida capital sentencing proceeding is to obtain a life sentence from the judge. An integral part of that process is obtaining a life recommendation from the jury. See Tedder v. State, 322 So. 2d 908 (Fla. 1975). Since under Florida law, a jury recommendation of life can be overridden, a

defense attorney has the duty to persuade the judge to accept the jury's life recommendation and to provide a "reasonable basis" for the jury's life recommendation. Only by reasonably fulfilling all of these responsibilities does a defense attorney provide effective assistance. If counsel fails, through no tactic or strategy, to present a reasonable basis for a jury's life recommendation when such a basis is available for presentation, that is unreasonable attorney conduct, which, within the context of the Florida death penalty, is prejudicial.

As explained in Porter v. Wainwright, supra:

> In light of the very strict standard that applies in jury override cases, and in light of the fact that the sentencing judge viewed this case as one without any mitigating circumstances when in fact, assuming Porter's allegaticns to be true as we must in this posture, there were mitigating circumstances which cannot be characterized as insubstantial, our confidence in the outcome -- the outcome being the trial judge's decision to reject the jury's recommendation -- is undermined. See Strickland, 104 S. Ct. at 2068. We cannot say that, with Porter's proffered evidence in hand, no reasonable person could differ as to the appropriate penalty. Thus, we conclude that, assuming Porter's version of the facts to be true, Porter would have satisfied both the performance and prejudice prongs of the Strickland test for ineffective assistance of counsel.

805 F.2d at 936. If the evidence counsel unreasonably failed to develop and present might have convinced the judge to follow the jury recommendation or provided the "reasonable basis" required for this Court to reverse an override, confidence in the outcome is undermined. Porter, supra; see also Douglas v. Wainwright, 714 F.2d 1532 (1983).

If provided an evidentiary hearing, Mr. Thomas would prove that trial counsel failed to properly investigate, prepare, and present available, compelling mitigating evidence and that this failure was not the result of a reasonable tactical or strategic decisicn. Counsel's failures were undeniably prejudicial: as the evidence proffered in the trial court demonstrates, there is a reasonable probability that but

for counsel's failures there would have been a reasonable basis for the life recommendation, and no override could have occurred.[2]

1. Trial Counsel's Actions Were Unreasonable.

Mr. Thomas was arrested on December 8, 1980, and the public defender was appointed to represent him on January 7, 1981 (R. 1384, 1388). On or about March 3, 1981, Mr. Norman Kent entered an appearance, and the public defender withdrew. Even though the public defender had investigated and prepared the case, Mr. Kent did not speak with the public defender's office with regard to their preparation, investigation and theories of defense.

Mr. Kent did no or grossly inadequate investigation and preparation for the potential capital sentencing hearing, and was totally unprepared for the sentencing hearing before the jury. On June 15, 1981, after the guilty verdict, court adjourned about 9:00 p.m. The sentencing hearing commenced the next day, June 16, 1981, at 9:30 a.m. (R. 1250). [The record is incorrect, indicating that the jury advisory sentencing proceedings occurred on June 25, 1981 (R. 1250). In fact, see R. 1318, indicating sentencing began the day after guilt-innocence, June 16, 1981.)] As trial counsel put it, he was helplessly behind in sentencing preparaticn.

> THE COURT: Is defense ready to proceed?
>
> MR. KENT: No, Your Honor, we are not.
>
> TEE COURT: For what reascn? Put it on the record.
>
> MR. KENT: On the record, Your Honor, the jury deliberated until 9 p.m. last night. I was in the courtroom until 9 p.m. last night, and the ability to put together witnesses for the bifurcated section of the trial has been limited to the twelve hour period between 9:00 yesterday and 9:00 this morning. As the Court knows and has been advised, many of these individuals and witnesses that I might call forward are transients, individuals who have no phone numbers, and

[2] Mr. Thomas does not concede that there was no reasonable basis for the unanimous jury recommendaticn. The reasonableness and propriety of that recommendation, and the impropriety of the override and its affirmance, are raised as separate claims.

> individuals who can't be reached, and individuals who work odd hours on bar shifts,
>
> Some of these individuals have been reached. I, personally, went out last night and served subpoenas to at least nine people. I do not know how many of them are here today to testify in the defendant's behalf. Among those that were attempted to be served were officers, Broward Sheriff's Deputies, who have been jailers of Mr. Thomas for the past six months. I believe that their evidence is extraordinarily probative. So many of them could not be here now. They hoped to come sometime between now and 11:30. I have no guarantee that they will be, because if they were served with a subpoena, they were served with a subpoena after midnight last night.
>
> There is a problem that Mr. Thomas' brother would come and testify for him. but we have not been able to reach him. So if we proceed, we will proceed over objections.
>
> THE **COURT**: Your objection is noted. Bring in the jury.

(R. 1250-52) (emphasis added). Defense counsel again noted his utter lack of preparation, just before evidence was taken (R. 1253). Trial counsel, and witnesses, stated before the jury that they would have had other witnesses present at sentencing, had they had time to get them there (R. 1251, 1253–56; 1282). Mr. Kent explained he tried to contact Dr. Zager, a psychiatrist who had interviewed Mr. Thomas in January at the request of the public defender: "I attempted to contact Dr. Zager, and he is unable to be here *on* such short notice" (R. 1278).

Trial counsel did not begin preparing for the penalty phase of Mr. Thomas' capital trial until twelve (12) hours before that proceeding commenced. This was an unreasonable omission by counsel, falling below an objective standard of reasonableness.

2. Counsel Failed to Provide a Reasonable Basis for a Life Sentence When Such a Basis Was Available, and Prejudice is Shown.

Two types of evidence in mitigation were available -- evidence about Mr. Thomas' neglected, abandoned, and psychologically and physically abused childhood and evidence of his brain dysfunction and severely limited intellectual ability. Either, or both, would provide a reasonable basis for a life sentence.

a. Ed Thomas' Childhood and Molescence Was a Period of Abandonment, Great Neglect and Psychological and Physical Abuse, Which Would Provide a Reasonable Basis For a Life Sentence.

Upon a competent investigation, Mr. Kent would have discovered compelling evidence in mitigation and to refute aggravating circumstances, which would have withstood any attempted judge override. Upon a reasonable and timely investigation, the jury (and trial court) would have heard how Ed Clifford Thomas' life is about childhood -- a childhood of loneliness, abuse, abandonment, neglect, isolation, and terror, and a child who felt entirely alone, unwanted and unloved. This childhood survives in Ed Thomas, who has not recovered from its nightmares and who, thus, remains a child.

Not long after he was born in Marion, Illinois, on August 26, 1960, Ed Thomas' mother noticed that he was "different" from his older brother, Charles, and his younger sister, Nancy. The difference is neuropsychologically relevant. "As a baby, Ed was very active, more active than his brother and sister were when they were babies. As he grew, he still seemed different from the other two. I always believed there was a physical reason for him being different." (App. 11).

When he began school, Ed could not keep up with the other children. He "had many more difficulties than a normal child. . . . [H]e would read and write backwards. If he tried to print an 'E', it would come out backwards, facing to the left. . . . One teacher, I think in the first grade, suggested Ed should go to special classes for slow kids." (App. 11). Ed tried to keep up with his classmates, but was dismally far behind by the third grade, and was retained in the third grade, where he stayed for three years (App. 7).

School records show that Ed consistently scored in the lowest percentiles on standardized achievement and aptitude tests. For four consecutive years, 1972 through 1975, the Cognitive Abilities Test (CAT), an aptitude test, placed Ed in the second and third percentiles six out of eight times, meaning that 97 or 98 percent of

the national student population in his grade level had higher aptitudes than Ed did. In the same time period, the Iowa Test of Basic Skills (ITBS) placed Ed in similarly low percentiles in achievement. Significantly, Ed was doing as well in school as he could: both the CAT and ITBS include Stanine scores which educators use to determine whether a student is achieving *on* a level comparable to his or her aptitude. The Stanine scores reported for Ed during these four years are entirely consistent for aptitude and achievement, demonstrating that Ed was achieving as well as his innate abilities and dysfunctional brain would permit (App. 7).

In 1974, Ed took the Michigan Educational Assessment Program standardized test which measures a student's ability to achieve particular objectives in mathematics and reading. The student responds to five questions on each objective and must respond correctly four times to achieve the objective. *Of* the 40 mathematical objectives, Ed achieved only seven. Of the 20 reading objectives, he achieved ~~none~~. In the seventh grade, Ed was unable to, ~~inter alia,~~ identify arabic numerals, add 2 or 3 numbers, tell time, alphabetize words, match causes with effects, or match words with definitions (See App. 7).

Ed's brother Charles had similar problems in school, and like Ed, never graduated from high school:

> All of us kids had learning problems in school. Nancy did okay, but Ed and I never did very good in school. When I first started to learn to read and write, I would read and write backwards. A lady once told me I had something called dyslexia. I couldn't finish school and neither could Ed. His reading problems were as bad or worse than mine. I was always in regular classes with the other kids, and never got any kind of special help. I failed a few years and got held back. . . . I still don't read very well.

(App. 8). Ed left high school in the 10th grade (App. 7), unable to read. He attempted to establish a life for himself by joining the Army, but could not pass the entrance tests: "After Eddie left school, he wanted to join the Army, so I helped him arrange to take the tests. Eddie couldn't get in the Army because he couldn't read well enough to pass the tests." (App. 9).

In addition to suffering from demonstrated learning disabilities throughout his childhood, Ed was the victim of an unstable and violent home life that did nothing to help him, but in fact mounted difficulty upon difficulty. When he was seven years old, his mother suddenly abandoned the family. The terror of her leaving and the violence in the home in the succeeding years added physical and psychological trauma to an already disabled child's difficulties.

It was 1967 when Ed's mother, Janet Thomas "left the family. I just couldn't take any of the pressures anymore from the kids or my husband, and thought I would go crazy if I stayed." (App. 11). Charles Thomas recalls that he, Ed and Nancy were completely surprised: "When our mother left, we didn't know she was going until it happened. I remember my father came to me and said, 'You should go talk to your mother. She's leaving.' When I asked her why, she told me it was because of my father." (App. 8). Ed's aunt, Rose Strachan, who considered Janet Thomas a friend, says that her leaving "was a complete shock to everyone. . . . She just disappeared." (App. 12).

Shocked and bewildered, the children "were all scared and hurt. We were afraid we'd have to go to reform school or something and get taken away from our father. . . . After a while, the hurt we all felt turned into anger. We were just mad at her for deserting us." (App. 8). Nancy Thomas remembers, "All we knew was we didn't have a mother anymore. We didn't know what was going to happen to us." (App. 10). When Rose Strachan saw the children at that time, "[a]ll three children, but especially Ed, were heartbroken, scared, and confused. . . . I was there when they cried for their mother." (App. 12).

Ed was particularly distraught over his mother's abandonment, having been very close to her before she left, as Rose Strachan remembers:

> He had been the child his mother seemed to favor the most, and he was especially upset when she disappeared. When I saw the family before she left, wherever Ed's mother was, Ed was there. Ed's mother carried Ed around with her all the time and would sit and hold him even when he was a pretty big boy. Even when Nancy . . . was a baby, Ed's mother

> would be carrying Ed around instead of Nancy. She also played with Ed more than she did with the other kids. Ed was short and chunky like his mother's side of the family. I thought Ed's mother favored him because Ed looked so much like one of her sisters, who was mentally retarded.
>
> . . .
>
> Ed took his mother's desertion the hardest. He couldn't understand why his mother wasn't in the house. I used to hold Ed when he cried for her. He would set up such a fuss that he'd get the other kids going too. When my brother [Ed's father] would leave for work, Ed would hang onto his lunch pail, screaming for his father not to leave because he was so afraid his father would disappear too.

(App. 12).

Janet Thomas never communicated with her children after her disappearance. She "never contacted the children or tried to see them." (App. 12). Nancy Thomas hasn't "seen or talked to my mother since then." (App. 10). Charles and Nancy somehow "learned to cope" with her disappearance (App. 8), but Ed remained unhappy, and was determined to find her one day. Ed is "the only one of us who tried to see our mother after she left." (App. 8). Karen Thomas remembers that "[i]t was a really big thing to him to search for and find his mother, He talked about that many times and then actually did go out and find her." (App. 9).

After Janet Thomas abandoned the family, the Thomas home became a nightmare brought to life by the neglect, alcoholism, paranoia, and brutality of William Thomas, Ed's father. William Thomas refused to let anyone assist with the care of the children, and neglected their most basic needs. While he worked, the children were alone: "He wasn't prepared to raise children by himself, but he was never one to ask for help with anything. . . . He had to work to support the family, so the kids were left alone a lot. They just had to fend for themselves." (App. 12). William Thomas "never took very good care of the kids, always making them wear old clothes and never taking them to the doctor or the dentist when they needed it." (App. 9). As they got older, the children were extremely self-conscious about their appearance. They "were always embarrassed around other kids because of the way they looked." (App. 9).

But out of st'le clothes was ot the problem. One of the reasons Janet Brandon left was "my husband's drinking. . . . I just got fed up with the drinking. . . . When my husband drank, he acted different from when he didn't drink. He was much bolder and not very nice." (App. 11). William Thomas "drinks so much, I'm surprised he's still alive. These days, . . . [he] falls asleep when he drinks. But he didn't always fall asleep. He used to get more belligerent and angry than normal when he drank." (App. 9).

The children were the victims of William Thomas' paranoia after his wife's desertion. Saying he was afraid the children would be taken away from him, he imposed unreasonable and rigid regulations about their activities. He also left the household chores to the children. The children's lives were so regulated that they had little or no opportunity for normal childhood experiences or friendships. Charles Thomas says, "We had a pretty crummy childhood" (App. 8), and remembers their childhood as me of confinement and isolation (App. 8).

The children also had to do all of the household chores: "After school, we had a certain amount of time to fix up the house until our father came home. Then we just hoped it was right when he got there. If things weren't just right, he would yell at us or punish us." (App. 8).

The home the children were isolated in contained no affection or loving attentim:

> Our father was real rough and set in his ways. . . . If things didn't go his way, they were just wrong and you were wrong. Our family has never been what you would call close. We couldn't have a heart-to-heart talk with our father or stepmother. There wasn't any affection, like hugging or kissing. I have learned in the last few years to talk to my sister, but didn't even used to be able to do that. I still can't have a real talk with my father.

(App. 8). William Thomas "wasn't me you could talk out problems with. . . . When the kids had problems, they talked to me rather than to their mom and dad." (App. 12).

The children could not and did not talk to their father because they were terrified of him. William Thomas was "real hot-tempered and got angry and violent with the kids over any little thing." (App. 9). Members of the family would have told Ed Thomas' jury the following tales of William Thomas' brutality:

> Ed was more afraid of his father than anything. Ed's father was a big man -- 6'2'' tall, and 240 pounds -- and used to slap the kids around a lot. He often hit the kids in places I thought weren't right. I believed in hitting kids on the rear end, but Ed's father used to hit them on the head with whatever was handy.

(Affidavit of Janet Brandon, App. 11).

> [Ed] would try to do right, but things would turn out wrong and Ed would get a whipping. My son Marvin and Ed were close friends, and Marvin and I took up for Ed lots of times to keep him from getting a whipping. We couldn't see somebody getting a whipping for every little thing like Ed did. Lots of times when some trouble would happen, Marvin would say he did it to try to protect Ed from another whipping.

(Affidavit of Rose Strachan, App. 12).

> When we didn't get the chores done right, or if we left the house or yard, we'd be punished. Sometimes our step-mother would punish us, and hit us when she got mad, but usually punishments came from our father. He usually used a belt on us, and whipped us when he thought we had messed up. Ed got punished more often than Charles and I did. He got a whipping about every day or every other day.

(Affidavit of Nancy Thomas Mayer, App. 10).

> If we broke a rule or didn't do something just right, we got punished. Our father was short-tempered and would beat us with a belt or hit us with his hand. This happened several times a week. It was pretty normal for us to get hit in the head with his hand. Our father didn't go for other kinds of punishment like making us stay in our rooms -- a whipping was much faster. Nancy didn't get as many whippings as Ed and I did because our father was afraid he would hurt her. When he started beating us, all we could do was cover up to try to avoid getting hit. He was a very big man and very strong. We would get beatings over almost anything. Sometimes something would make our father mad and sometimes it wouldn't. There was no way to know what would set him off. Our best defense was to stay out of his way. I finally had to leave home because things got completely out of hand. When I was 16 or 17, my father stuck me with the point of a knife when I left a light on. I had all I could take, and moved out.

> Ed got more beatings than I did because he seemed to challenge our father. Nancy and I were afraid of the old man and tried to stay away from him. But if our father told Ed not to do something, Ed would sometimes do it anyway. Even though he tried to stand up to our father, Ed never won. He'd just get knocked around again.

(Affidavit of Charles Thomas, App. 8).

> I have heard *so* many horror stories about Eddie's father that it's hard to know what to say about him. He used to beat the kids all the time. If the kids weren't in the house when the street lights went out, their father would beat the tar out of them. If one of them did something their father thought was wrong, they'd all get a beating. Once he stabbed Chuck in the stomach with a pocket knife because Chuck didn't turn off the bathroom light. I saw Nancy get beat up when she was 16 for kissing a boy. I've also seen Eddie get smacked around many times or get hit in the head, and have heard about many more times. Once their father made Chuck hit Eddie because Eddie hadn't been getting his chores done or something. Once their father whacked Chuck and Eddie on their heads with a 2 x 4 because their frisbee landed on a neighbor's roof. Three years ago, Chuck and his father went hunting together. His father go real drunk and pulled a knife on Chuck.

(Affidavit of Karen Thomas, App. **9)**.

William Thomas' brutality toward Ed went *so* far as to draw his son Charles into the violence:

> One thing that I feel real bad about is that I sometimes hit Ed too. I was in charge of Ed and Nancy when our father was at work. We had only *so* much time after school to get the housework done, and if it didn't get done, I got a beating. So sometimes I had to hit Ed to make him mind and help get the chores done.

(App. 8).

Ed was the child most strongly affected by the neglect, lack of affection, and brutality of his home. His disabilities, his overwhelming feelings of loss and desertion about his mother's disappearance, his feelings of inadequacy, and his brutalization at the hands of his father created a craving for reassurance and affirmation. While Charles had academic problems similar to Ed's, he was admired in the family for his looks and his artistic ability. Rose Strachan remembers, "Being short and chunky like he was, Ed looked a lot different from his brother Chuck.

Chuck was always handsome, big and muscular. He was stiff competition for Ed. Everybody bragged about Chuck, including [his father] who favored Chuck the most. Ed wanted to be big and admired like Chuck was." (App. 12). If Ed "did do something other people thought was good, he had a smile on his face as wide as he could." (App. 12). Another aunt, Brenda Elliott, remembers Ed as "a child who really wanted some attention":

> I can remember visits when Ed's brother Chuck would show us a drawing he had done and we'd tell him how good it was. Ed would run up to his room, and I knew he was up there drawing something real fast so he could show it to us. He'd come back down with a drawing that wasn't the greatest art, because he wanted us to praise him too. He just wanted to hear someone say, "Oh, Ed, that's good." I always told him how much I liked his drawing because he so dearly loved the praise.

(App. 15).

Ed continually looked for the reassurance that he was loved and cared for by others. Ed "never had anyone to hold him in their arms and say, 'I love you.' The kind words were never there." (App. 15). He "was always after love. He couldn't keep his hands off of you, but all the time wanted to love you. He needed to be loved and to know he was loved. Somehow he needed proof that somebody loved him." (App. 12). Completely insecure, Ed "never could believe that anyone cared about him." (App. 16).

In an attempt to give himself some value, Ed escaped into a world of fantasy, creating stories about his adventures and hoping to get others to believe them. He "wanted to be something that he wasn't. He would make up stuff and tell other people about it like it was really true." (App. 15). One of Ed's stories was a heartbreaking example not only of his desire for value, but also of his desire for something he did not have -- a loving family. He once told an aunt that "he was trying out for a part on the TV show 'The Brady Bunch.' He said he got the part and he was going to portray Bobby. He said this like he believed it and he wanted everyone else to believe it." (App. 15).

Family members repeatedly noticed the behavioral difficulties Ed experienced as a result of his neurologic disabilities and his physically and psychologically abusive home life. But Ed was trapped in a vicious cycle in which his attempts to gain attention and affection often went awry, leading to further beatings, and in which his behavioral difficulties were perceived as "rebelliousness," rather than as a signal that he needed help:

> When Ed tried to do something to get some attention or praise like Chuck got, it seemed like it always turned out wrong. Before he knew it, he would overdo things and something would go wrong. . . . He would try to do right, but things would turn out wrong and Ed would get a whipping.
>
> . . .
>
> I thought since Ed was a small child that he needed psychiatric help. He was entirely different from the other kids. The things he did didn't make any sense. He would do things before he realized he was doing them. . . . I tried to tell my brother Ed needed help. But he thought Ed was just being rebellious. I've been around a lot of kids, and you can tell if a kid is odd, and Ed was. Ed had something wrong with him that needed some strong help. I always thought he had some damage to his brain.

(Affidavit of Rose Strachan, App. 12).

Karen Thomas believed that Ed was "schizophrenic," because his behavior was so unpredictable:

> Eddie was very mixed up. I thought he must be schizophrenic. He'd be normal and then he wasn't. I talked to his father and stepmother about getting him some psychiatric care when Eddie was in the tenth grade, but he never got the help he needed. Eddie could be real nice and happy one minute, and the next minute just go crazy over nothing. One time Eddie found out he had been born in Illinois. He just went nuts because he wasn't born farther south -- he wanted to be a redneck. Sometimes Eddie was very with it and together. Then, out of the blue, he would flash off. He would get upset over nothing and his eyes and face would get red. There was no real reason that I could see for him to get mad and no way to predict what might make him mad. I knew something was wrong with him.

(Affidavit of Karen Thomas, App, 9).

Ed's stepmother recognized his need for help, but was rebuffed in her attempts to locate that help:

> I was worried about Ed and thought he should get some psychiatric help. But everywhere I tried to find help, nobody was interested. One time, he had been missing a lot of school. I went to talk to his counselor who told me I should take him home and make him clean every wall in the house. What good was that going to do? I told Ed he should see a psychiatrist, but he didn't want to do it. So I called a counselor to find out if I could make him see a psychiatrist. She said I couldn't force him to go because he was over 16. She said he had to ask for help. Well, he was asking for help, I thought, in his own way, but just wasn't rational enough to understand what kind of help he needed.

(Affidavit of Bonnie Thomas, App. 13).

Ed's problems culminated in his running away from home numerous times when he was a teenager. He would "go off and then come back", like he "just couldn't sit still." (App. 9). Karen Thomas knew that when Ed got "fidgety and restless," he was "getting ready to go again. . . ." (App. 9). When his stepmoth r asked him wh he ran away, Ed "said he didn't know":

> All he knew was that he'd be in one place doing something and the next thing he knew he was in another state. He didn't remember how he got there. I couldn't get mad at him because it was like he didn't know what he was doing.

(App. 13). When Ed came home, "his father and stepmother didn't want to have anything to do with him. They said they had already done enough." (App. 9).

Damaged by his disabilities and years of abuse, Ed was so mentally, emotionally, and socially immature, however, that he was incapable of surviving on his own. Rose Strachan thinks of him as "forever a child":

> I felt like he never grew up. When Ed was 18, he acted more like he was 13 or 14. Ed was four months older than Marvin, but if you saw them together, you'd think Ed was four or five years younger than Marvin. Part of the reason his life was so rough when he was growing up was because he couldn't understand things. You could tell when you talked to him that nothing would sink into his mind. As he got to be a teenager, he thought he could get out on his own, but he didn't have the mind for it.

(Affidavit of Rose Strachan, Ex. 12).

All of the family members would have related this history and its damaging

effects at Ed Thomas' trial if they had been given the opportunity. None of them was contacted, and in fact, while some knew Ed Thomas was facing a trial, none of them knew he was facing the possibility of a death sentence. (Family affidavits, Exs. 8 - 16). This information would have provided more than a reasonable basis for the jury's life recommendation. See Porter, supra; see also Douglas, supra.

b. Mental Health Mitigation

The mental condition of a capital defendant is a critical factor for sentencer consideration. Trial counsel sought no mental health evaluation of Mr. Thomas and failed even to communicate with the mental health expert who examined Mr. Thomas at the request of the public defender until the night before the penalty phase. Had trial counsel conducted an adequate background investigation and provided the results of that investigation to a mental health expert who had conducted the necessary testing, counsel would have discovered what is now known: Ed Thomas suffers from chronic diffuse cerebral dysfunction -- his innate disability is unrebuttably mitigating, but was not discovered by defense counsel.

The Public Defender had retained Dr. Arnold Zager, who examined Mr. Thomas briefly in January, 1981, and provided a report. Defense counsel, however, never communicated with Dr. Zager until the night before the penalty phase and never provided Dr. Zager with information regarding Mr. Thomas' background. Dr. Zager was unable to appear at the penalty phase on such short notice. Despite counsel's lack of communication with him and failure to provide background information, Dr. Zager could have provided mental health mitigating evidence. This evidence was not presented to Mr. Thomas' jury, but did appear in the PSI prepared for the judge. Dr. Zager's report (reproduced in Claim 11, supra) found, inter alia, that Mr. Thomas was the product of an abusive home, that Mr. Thomas had learning difficulties, that Mr. Thomas' ability to appreciate the criminality of his conduct was impaired, and that Mr. Thomas was under significant emotional distress at the time of the offense (App. 2).

Even with the limited examination he performed, Dr. Zager had mental health evidence to offer, evidence which would have provided a reasonable basis for the jury's unanimous life recommendation. Had counsel done the most minimal preparation -- simply contacting Dr. Zager ahead of time -- such evidence could have been presented. Failing that, counsel could have subpoened Dr. Zager -- who had favorable information -- rather than placing Dr. Zager's scheduling problems ahead of Mr. Thomas' life.

There was, however, even more mental health mitigating evidence available. Current counsel has provided the background history related above to Harold H. Smith, Jr., Ph.D., a board certified clinical and forensic psychologist, who has particular expertise in criminal cases and in the effects of brain dysfunction on the legal issues of culpability and mitigation of punishment (App. 1, C.V. included). His report is reproduced in large part below:

> These various records reflect the fact that Ed Clifford Thomas was identified as being a child who was behaviorally different from his siblings. This was noted by his mother when he was an infant and was also observed by teachers. He repeated several grades and was frequently truant. His academic performance was poor and he eventually dropped out of school. He apparently was a bed wetter until about age 13 and was reported to have bitten his fingernails as he continues to do. It is reported that at about age seventeen he had an episode of "blacking out", and in 1980 was evaluated in regard to seizure activity. Medical records reflect a mildly abnormal EEG which was consistent with that found in an epileptic population and was considered to reflect "diffuse cerebral dysfunction". While at Florida State Prison he also has had seizure activity and had for a period of time been prescribed Dilantin, an anti-seizure medication.
>
> It is also pertinent to note that he was raised within a highly dysfunctional family. According to records his father used alcohol to excess, was physically abusive to his children and to Ed in particular, and that his mother eventually left home when he was about seven years old. Ed Thomas began using alcohol about age 14. He ran away from home multiple times as a teenager and attempted to support himself through his own means, which at times included homosexual prostitution.
>
> Prior to my evaluation I informed Mr. Thomas of the reason for this evaluation and the intended uses of the results,

which were for the purposes of consulting with you in regard to his intellectual and neuropsychological status and his status at the time of trial and to advise and consult to you in general. He consented to the evaluation and was cooperative throughout it. At times it was apparent that he was anxious, and he reflected this anxiety through grinning and smiling. He approached the testing situaticn with a competitive style and attempted to answer all questicns asked and to solve all problems presented to him. The following test results are considered to be valid and reliable.

His level of intellect, as measured by the Wechsler Adult Intelligence Scale-Revised is within the Borderline range. His Verbal, Performance, and Full Scale IQ scores were 80, 79 and 78, respectively. Intelligence is defined as the innate aggregate or global capacity of the individual to act purposefully, to think rationally, and to deal effectively with one's environment. His level of intellect is at about the 7th percentile. This means that 93 percent of the general population in his age range function at a higher level. . . .

[H]e has mild visual perceptualdifficulties, which are consistent with earlier reports of learning impairments. His lansuase during testing was freauentlv in the form of phrases as opposed to complete sentences. Even his phraseology reflected his intellectual limitaticns.

Consistent with his level of intellect is his level of academic achievement. As measured by the Wide Range Achievement Test-Revised (1984 Edition) his Reading Recognition, Spelling, and Arithmetic abilities are at the end of the third grade, beginning of the fourth grade, and the beginning of the fifth grade levels, respectively. This means that 99.2 percent of individuals in his age group read words better than he, and 99 percent of persons in his age group spell and compute mathematical problems better than he. Compared to his age peers, however, his functicning is at the 0.8, first, and first percentiles, respectively. Thus, while his level of intellect is at about the seventh percentile, his actual academic achievement is even lower than what would be expected from a person whose level of intellect is at the 7th percentile. This discrepancy between intellect and achievement is related to his dysfunctional home environment, frequent truancy, and inattentiveness at school . . . he was unable to recite the alphabet or count forward by threes without error.

Mr. Thomas was also administered the Halstead-Reitan Neuropsychological Test Battery (Category Test, Tactual Performance Test, Speech Sounds Perception Test, Seashore Rhythm Test, and the Finger Oscillation Test) and other neuropsychological tests (Parts A and B of the Trail Making Test, Aphasia Screening Test, Grooved Pegboard, Hand Dynomometer, and Wisconsin Card Sorting Test). His Halstead

Impairment Index, a summary index of impaired performances on tests sensitive to the organic integrity of the brain of 0.4 reflects borderline impairment. He scored within the impaired range on the Speech Sounds Perception Test and the Seashore Rhythm Test. Each of these tests require intense concentration to auditory stimuli, and given his history of lowered intellect, poor academic performance, and some noise within the testing facility, these scores are not considered to be useful for the purpose of diagnosis. They are suggestive, however, that he has some difficulties in the perception of auditory stimulation. He also earned a score within the impaired range on the timed portion of the Tactual Performance Test, which is a psychomotor problem solving task. It is noteworthy, also that his performance on the Wisconsin Card Sorting Test was well within the impaired range. This particular neuropsychological test is very sensitive to frontal lobe dysfunction. It reflects deficits in his capacity to shift his thinking from one idea or concept to another and to profit from feedback as to the correctness of his performance. Such a score, given his performances on other tests, is certainly worse than would be expected.

The above neuropsychological test results do not, however, give evidence of lateralized organic impairment at the level of the cerebral cortex, nor are they suggestive of an acute state. These data are most consistent with a chronic condition.

Mr. Thomas has previously **been** evaluated by competent medical authority and has been diagnosed as having seizure disorder. The absence of data which would identify a focal lesion is not inconsistent with an earlier report of seizure disorder. Indeed, some seizure disorders occur without any apparent underlying cause.

In conclusion, Mr. Thomas was noted to have been developmentally different from his siblings, was not able to achieve academically (functioning at lower one percentile or less), has documented history of -seizure disorder, and has a documented history of **EEG** abnormality consistent with diffuse cerebral dysfunctiCn. I have established that he has very low level of intellect (7th percentile) and shows borderline impairment on neuropsychological tests consistent with his developmental and medical history. It is clear that Mr. Thomas has some dysfunction of his brain the nature of which is yet to be identified.

. . .

With reference to mitigating circumstances, although the priscner was not under the influence of "extreme mental or emotional disturbance" when the felonies were committed, it is apparent that his level of intellect is at a low level and there is evidence that he has cerebral dysfunction. The prisoner's immaturity and limited mental capacity at the

> time of the commission of the offense significantly reduced his culpability for the offense. If he had been under the influence of an intoxicant, such as alcohol, his mental capacities are judged to have been diminished more so. Second, the age of the defendant should also be considered in mitigation. His level of intellect is such that he does not think or reason in the same way that his same age peers do. Therefore, his "mental age" is significantly lower than that of his peers and prevents him from thinking and reasoning in ways comparable to average individuals. Finally, his age at which he committed the offense should also be considered. In today's society, adolescence is considered to extend to approximately age 23 because young adults are yet dependent upcn their parents until this age for financial and emotional support, Although Mr. Thomas was not dependent upon his parents at this time, he led a life which clearly reflected that he was not able to create a stable lifestyle for himself.

(App. 1) (emphasis added).

Ample mental health mitigation was available for presentation to Mr. Thomas' jury and judge, and would have provided a reasonable basis for the jury's life recommendation. The inability to appreciate the criminality of one's conduct and being under significant emotional distress, as Dr. Zager found, are unquestionably mitigating. See Fla. Stat. Sec. 921.141(6)(b), (f). Brain damage, as Dr. Smith found, is of course classically mitigating. See e.g., Roman v. State, 475 So. 2d 1228, 1235 (Fla. 1985).

3. Ineffective Assistance Of Counsel Before The Trial Judge

The jury recommendation occurred June 16, 1981. The trial court postponed sentencing three times, waiting for the PSI to be prepared. The judge explicitly stated that he does not impose sentence until he sees "my PSI" (R. 1352; ~~see also~~ R. 1315, 1356-58). The court received the PSI by 5:00 p.m., Friday, August 21, 1981 (R. 549). Defense counsel had been told on Thursday that the report would probably be ready Friday, and that sentencing would occur the following Monday, August 24, 1981 (R. 1356-58).

In the 63 days between the jury recommendation of life and the sentencing Mr. Kent did no or grossly inadequate investigation and/or preparaticn for sentencing before the judge. In the interim between the unanimous jury recommendation and the

sentencing, Mr. Kent was arrested and was under investigation for one or more criminal offenses. He indicated to the trial judge on August 20, 1981, four days before sentencing, that the arrest and investigation had essentially closed down his office:

> MR. KENT: I want to point out to the court that, because of personal reasons, I have asked for a ccntinuance, and on his motion for a new trial -- those personal reasons of which the Court is aware, specifically and to the point, because I was myself arrested on July 16th and was exonerated by the Grand Jury the day before yesterday, and therefore, I am not prepared to proceed at this point with witnesses to amplify my argument on paragraph No. 3. . . . I would, again, on the record, ask the Court to continue the entire proceeding which we have begun. I would ask the Court to continue that proceeding, based on the fact that I was a Defendant in the last thirty days, and I have just been exmerated by a Grand Jury and have not had ample time to prepare . . . .

(R. 1333-34; see also R. 1338).

> I am trying to advise the Court that I have not had an opportunity to move to that cause, because I have been a Defendant in a proceeding myself . . . . and for a period of thirty days, until I was exonerated by the Grand Jury. . . . I suspended my practice of law, virtually. . . .

(R. 1349).

Mr. Kent knew, or unreasonably failed to know, that a PSI was an important document at sentencing. Judge Coker stated repeatedly that the PSI was important to him, and that he did not sentence anyone before receiving a PSI (R. 24, 1315, 1352, 1356-58). Mr. Kent did not provide the probation officer who was preparing the PSI with any relevant information with regard to sentencing (App. 3). As demonstrated in Section 2, supra, an incredible amount of information in mitigation of sentence could have been provided Ms. Taylor. Mr. Kent went out of town the weekend before sentencing, and did not obtain a copy of the PSI before he left. When he returned for sentencing on Monday, the following occurred in court:

> [THE COURT]: I would inquire of you as to whether or not you, or anyone on your behalf, have any legal or other cause to show why sentence should not now upon you be pronounced.
>
> MR. KENT: None at this time, your Honor.

THE COURT: You haven't seen the P.S.I.?

MR. KENT: No, I have not, Your Honor.

(R. 1362). Sentence was imposed immediately thereafter. The PSI preparer was present in court for this hearing, and confirms that counsel did not review the PSI before sentencing (App. 3).

In a motion filed September 4, 1981, after the judge override, trial counsel reiterated his lack of preparation at the time of judge sentencing, and requested resentencing and the opportunity to rebut the contents of the PSI. Trial counsel requested the opportunity to present Dr. Zager's testimony and to contest the contents of the PSI, citing his personal problems as one reason for his lack of preparedness (App. 18). The PSI did in fact contain inflammatory, irrelevant and wrong information. Mr. Thomas was provided no opportunity to rebut the informatia?, through the unreasonable actions of his defense attorney. As is outlined in Claim IV, ~~infra~~, the PSI was readily rebuttable, and defense counsel unreasonably failed to do so.

On September 17, 1981, the trial court conducted a hearing pursuant to the Motion for Rehearing on sentencing. Again, Mr. Kent had conducted no investigation and had no evidence to present. During the hearing, the trial court stated that no copy of the rehearing motion had been presented to him (R. 1372, 1377-78). Mr. Kent argued his motion, after which the trial court deferred ruling (R. 1379). Mr. Kent had been appointed counsel on appeal by this point, and had attempted to file the appeal in the district court of appeals, when all capital cases must be appealed directly to the Florida Supreme Court. He admitted his unfamiliarity with capital work: "I have come to recognize in the short time that I have started to handle this appeal that it is a limited area and expertise which at present is beyond my scope, and I could not hope to learn and become fully aware given the time limitation that I have now in my own practice. . . ." (R. 1379).

Trial counsel unreasonably failed to ensure that the PSI, relied upon by the

tri 1 judge and the State (R. 1378), and complained about by counsel, was included i the record on appeal. Trial counsel was also prejudicially ineffective for failing to ensure that the trial court entered an order granting or denying the Motion for Rehearing on sentencing. The failure of trial counsel to include the PSI in the record on appeal precluded meaningful and constitutional review of the sentence of death by the Florida Supreme Court, in violatian of the sixth, eighth, and fourteenth amendments.

Trial counsel unreasonably failed to challenge the trial judge's exclusive reliance on statutory factors, and the consequent preclusion of consideration of extant non-statutory mitigating circumstances. (See Claim II.) Trial counsel unreasonably failed to challenge the complete failure by the trial judge to justify his override of the unanimous jury recommendation of life. The trial judge failed to include at sentencing or in the written findings any supportable reason for why the jury recommendatim was one that no reasmable person could make. He did not provide proper detailed findings. Trial counsel unreasonably failed to promptly know and argue the law, so as to create a reasonable probability that the override would not have occurred, and/or would not have been upheld on appeal.

Trial counsel unreasonably left uncorrected the trial judge's repeatedly expressed view and opinion that the jury recommendation was not entitled to great weight. The judge expressed his view that he was not "required to follow the advise of the jury," (R. 20), because "you are not going to be sentencing someone to death. The punishment is meeded by the court" (R. 23). Post jury recommendatian, the judge believed he had to follow the law, and, in some manner unarticulated, suggested that the jury had not (R. 1364). The trial court improperly overrode a valid jury recommendation of life, and, if the override is valid, defense counsel unreasonably failed to provide the trial court with the unrebuttable facts and law that would have rendered the override invalid, a violation of the sixth, eighth, and fourteenth amendments.

C. THE GUILT/INNOCENCE PHASE

Counsel for Mr. Thomas committed many unreasonable errors, in the absence of which there is a reasonable likelihood that the result in this case would have been different. Many of these errors involve actions by the court which went uncorrected due to trial counsel's error, errors which involve violations of constitutional provisions separate and apart from the violation of the right to effective assistance of counsel.

1. The Trial Court Revealed to the Jury His Utter Contempt for Homosexual Men, Which Greatly Prejudiced a Defendant Who Was Admittedly Homosexual.

This trial involved testimony by homosexuals about homosexuals. During voir dire, extensive questioning occurred regarding whether the jurors would be biased because of the extent to which homosexuality and "hostility" would be involved in the trial of the case (R. 79, 87, 92-93, 109, 113, 137-38, 215-16). During trial, the trial judge mocked homosexuals, and openly expressed and demonstrated disdain and disgust for homosexuals, prejudicing Mr. Thomas and ensuring that he, a homosexual, would not receive a fair and impartial trial. Many witnesses testified who were homosexual or bi-sexual. Some also testified that they had nicknames: witness James Widdoes' nickname was "Gorilla" (R. 359); witness David Hindroth's nickname was "Fluffy" (R. 399); witness Paul Girardini's nickname was "Choo Choo" (R. 971). The judge revealed sarcastic disrespect for these trial participants. For example, with regard to "Fluffy," the judge interjected:

Q: (By Mr. Hancock) You said you had a nickname.

A: Yes.

Q: If you don't want to tell us -- I am going to ask what is your nickname.

A: I will tell. I don't care. Fluffy.

THE COURT: Fluffy?

(R. 399). During the examination of a police officer, defense counsel was asking a

series of questicns about the suspects and witnesses of whom the officer might have been aware:

> Q: What information did you receive about a black male?
>
> MR. HANCOCK: I object, judge.
>
> THE COURT: Hearsay. Sustained. Did you talk to Fluffy? Did you meet Fluffy?
>
> THE WITNESS: Yes, sir, I talked to him the night of the homicide.
>
> MR. KENT: why?
>
> THE COURT: I just wondered if he met Fluffy.

(R. 942).

Witness Paul Garardin testified upon direct examination, whereupon the judge stated, "Mr. Hancock, do you have any questions of Choo Choo?" (R. 970-71). Other witnesses were not so referred to by first names or nicknames by the Court. The prosecutor followed up cn this nickname mocking during closing argument.

The judge's comments culminated in his ordering one of the defense's most important witnesses to "get out" after his testimony. Witness Robert Redding, Jr., testified about male prostitution in downtown Fort Lauderdale. After Mr. Redding's testimony, and in the presence of the jury, the Judge stated: "Okay, Get him out of here. Next witness" (R. 966). At the bench, the judge said: "He disgusts me" (R. 967). Motion for mistrial was denied. In a post-trial hearing, a juror testified that all the jurors heard the judge's comment (R.27). Counsel was not even aware that the juror had heard the statement, much less that all jurors had.

The trial judge's comments and actions denied Mr. Thomas his rights to due process of law, to reliable guilt/innocence proceedings, to present evidence without judge comment and to effective assistance of counsel under the fifth, sixth, eighth and fourteenth amendments as did the court's refusal to grant a continuance of the post-trial hearing so as to allow defense counsel the opportunity to speak with all the jurors. Trial counsel failed to properly object to the judge's comments and/or

move for a mistrial, and to properly investigate the jurors' awareness of the judge's comments.

2. The Trial Judge's Comments Adversely Affected One of Mr. Thomas' Critical Defense Theories.

Counsel for Mr. Thomas presented evidence and arguments that Mr. Thomas was drunk at the time of his purported ccnfessicn to the police. During voir dire, he repeatedly questioned jurors about alcohol, and how one might act irrationally and speak untruthfully while intoxicated (R. 85, 86, 96, 97, 114, 118, 125, 126, 216, 224-25, 239).

The judge made an unprompted and prejudicial remark about "drinking" that vitiated the very theory defense counsel sought to develop, and which undermined the questioning counsel was conducting. In the presence of the jury, the judge inappropriately quipped: "[L]iquor makes me very affecticnate. Nobody has said anything like that about drinking" (R. 225).

Trial counsel unreascnably did not object to these improper and prejudicial comments, which rendered the proceedings fundamentally unfair.

3. The Trial Judge Commented Adversely Regarding the Law of Evidence.

Counsel for Mr. Thomas frequently objected to hearsay testimony. The judge told the jury and the witnesses his view of hearsay objections:

> (By Mr. Hancock)
>
> Q: What did you do then? What happened next?
>
> A: What happened next? He came back to me and he said --
>
> MR. KENT: Your Honor, objecticn again.
>
> MR. HANCOCK: Judge, I will try to rephrase the questicn.
>
> THE COURT: Please do. I know it is kind of dumb, Mr. Moses, but that's what the law is. You can say what you said, but you can't say what he said. Do you follow that?
>
> THE WITNESS: Yes.
>
> THE COURT: I understand that it is silly.

THE WITNESS: Yes.

THE COURT: But that is the way the law is. Go ahead.

(R. 382). Such comments were common, and were unobjected to by defense counsel.

4. The Trial Court Would Not Allow "Backstriking," and, According to the Florida Supreme Court, Trial Counsel Failed to Properly Preserve this Reversible Error.

Under Florida law, backstriking during voir dire is expressly permitted, and is a right of the defendant. The trial court may not deny the right to backstrike. The trial judge did deny the right to backstrike in this case, permitting defense counsel me opportunity to backstrike and then announcing that no more backstrikes would be allowed (R. 193-96). While trial counsel objected (R. 195-96), he did not properly preserve the error for appeal. See Thomas v. Wainwright, 495 So. 2d 172 (Fla. 1986). Had he, there is a reascnable probability that but for counsel's unreasonable omission, the result in this case would have been different.

5. Trial Counsel Unreasonably Failed to Suppress the Purported Jailhouse Statement From Mr. Thomas to His Father.

After his arrest, Mr. Thomas spoke to his father by telephone. Unknown to Mr. Thomas and his father, the police tape-recorded the conversation. Mr. Thomas purportedly made incriminating statements to his father during the conversation, and the police made Mr. Thomas' father testify to those statements at trial. (See App. 14). At the time of the conversation, Mr. Thomas was entitled to counsel. He also possessed a reasonable expectation that his telephone conversation would be private. The use of that telephone conversaticn against him violated his fourth, fifth, sixth, eighth, and fourteenth amendment rights, and trial counsel unreasmably failed to suppress the use of Mr. Thomas' statement to his father. Given the weakness of the state's case, there is a reascnable probability that but for counsel's error, the result in this case would have been different. See, Kimmelman v. Morrison, 106 S. Ct. 2574 (1986).

6. The Jury Instruction Regarding "Alibi" Was Unconstitutional.

Mr. Thomas' defense was alibi. The jury was instructed:

> Where an alibi is claimed as a defense, it is not necessary that the alibi be proved beyond a reasonable doubt. It is sufficient as a defense if you have a reasonable doubt as to the presence of the defendant at the scene of the alleged crime. If there is such a reasonable doubt it is your duty to find the defendant not guilty.

(R. 1222). Defense counsel did not object.

A reasonable jury could readily interpret this instruction to require the defendant to raise a reasonable doubt vis-a-vis alibi. This instruction is burden shifting, removes the burden from the state to prove the elements of the offense beyond a reasonable doubt, and reduced the reliability of the guilt/innocence determinaticns, in violation of the sixth, eighth, and fourteenth amendments. Trial counsel unreasonably failed to know and provide the correct law, and to object, and, because of the weakness of the state's case, there is a reasonable probability that but for the error, the result in this case would have been different.

D. CONCLUSION

In denying relief as to counsel's deficiencies at the guilt-innocence phase, the trial court found the claim "inappropriately raised at this juncture" (Order, p. 4). Of course, a Rule 3.850 motion is the appropriate vehicle for raising ineffective assistance claims, and the court's denial of the claim without an evidentiary hearing was error.

In denying relief on the penalty phase issues, the trial court concluded (1) that the jury's life recommendation meant trial counsel was not ineffective, (2) that allegations concerning trial counsel's ineffectiveness before the judge were speculative, and (3) that the evidence proffered by Mr. Thomas was cumulative to that presented at the penalty phase. The court made these conclusions without holding an evidentiary hearing and without attaching portions of the files and records which conclusively show that Mr. Thomas is entitled to no relief.

Of course, without an evidentiary hearing, Mr. Thomas has not been provided the opportunity to prove that his claim is not speculative or that his proffered evidence

is not cumulative. Mr. Thomas' allegations and proffered evidence, in fact, show just the opposite: Mr. Thomas has alleged facts which, if proved, would entitle him to relief. Mr. Thomas is, at a minimum, entitled to the opportunity to prove his allegations.

In other cases involving jury recommendations of life where the defendant later alleges ineffective assistance of trial counsel at the penalty phase, Florida circuit courts and this Court have found it entirely proper and necessary to conduct evidentiary hearings before ruling on the claim. See e.g., Francis v. State, 13 F.L.W. 369 (Fla. 1988); Lusk v. State, 498 So. 2d 902 (Fla. 1986). Only after such a hearing can the trial court or this Court determine whether trial counsel's omissions were prejudicial. Id. As these cases demonstrate, a life recommendation does not automatically mean there was no prejudice and does not make an evidentiary hearing unnecessary. See also Porter v. Wainwright, 805 F.2d 930, 933-37 (11th Cir. 1986).

Mr. Thomas' factual allegations -- which must be accepted as true in this proceeding -- demonstrate prejudice. At trial, defense counsel presented the testimony of persons who had known Mr. Thomas a relatively short time and the testimony of Mr. Thomas. Such testimony cannot be qualitatively compared to the testimony of the persons whose affidavits Mr. Thomas proffered: family members who had observed Mr. Thomas throughout his life, who observed the abuse to which he was subjected, and who observed the effects of that abuse on Mr. Thomas' behavior. The jury and judge never learned of Mr. Thomas' dismal school performance or of the results of achievement testing showing that Mr. Thomas functioned at a level far below the norm. Of course, defense counsel presented no mental health evidence in mitigation.

Mr. Thomas is entitled to an evidentiary hearing and thereafter, to Rule 3.850 relief.

CLAIM IV

MR. THOMAS WAS DENIED THE OPPORTUNITY TO REBUT THE INFLAMMATORY AND INACCURATE INFORMATION CONTAINED IN THE PRESENTENCE INVESTIGATION REPORT, DUE TO EITHER UNREASONABLE COURT ACTION OR INEFFECTIVE ASSISTANCE OF COUNSEL, IN VIOLATION OF HIS SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

The jury promptly and unanimously recommended a life sentence for Ed Thomas. Judge Coker, upon hearing the jury recommendation, "defer[ed] imposition of sentence . . . and order[ed] a presentence report" (R. 1315). This was not a pro forma continuance, as later became clear -- Judge Coker relies on presentence investigation reports.

The judge sentencing hearing was postponed three times, as the judge awaited his PSI. At a hearing conducted before sentencing, Judge Coker stated: "I don't [sentence] until I see my P.S.I. (R. 1352). At the conclusion of the hearing, Judge Coker and trial counsel discussed when the PSI would be ready and when judge sentencing would occur, and the judge again emphasized the importance to him of the PSI (R. 1356-58).

The next Monday, Judge Coker stated that he had "ordered a presentence report, which I have now received." (R. 1361) The court "received it late Friday," but defense counsel had not seen the report before Monday. At sentencing, counsel clearly stated that he had not yet seen the report (R. 1362). The judge immediately imposed sentence, and rejected the unanimous jury recommendation of life. Counsel later asked for resentencing citing the fact that he had not seen the PSI before sentencing. The motion was never ruled upon, and counsel was unreasonably and prejudicially ineffective for failing to ensure that an order was entered regarding the motion.

The trial court's action denied Mr. Thomas his right to confront and rebut the information contained in the PSI. The law is clear: "petitioner was denied due process of law when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." Gardner v. Florida, 430

U.S. 349, 362 (1977). The right to see and rebut a PSI is the client's right, Raulerson v. Wainwright, 598 F.Supp. 381, 389 (M.D. Fla. 1980), and includes a reasonable period of time within which to confront the allegations. No time was allowed, and a Gardner remand should have been provided.

Gardner remands were not intended to be hearings at which counsel was provided a PSI by ambush, requiring spmtaneous discourse against the information contained in the PSI. Instead, Gardner "'require[d] that the defense have access to the reports-in-full with sufficient time before the hearing to prepare rebuttal.'" Barclay v. State, 362 So.2d 657, 658 (Fla. 1978). See also Dougan v. State, 398 So.2d 439, 440 (Fla. 1981); Raulerson, supra. The trial court's action denied Mr. Thomas his right to confront the evidence against him. The sixth amendment's right of confrontation is a "fundamental right, essential to a fair trial." Pointer v. Texas, 380 U.S. 400, 403 (1965). Here, in a capital sentencing proceeding which must ensure "heightened reliability in the determination that death is the appropriate punishment," Woodson v. North Carolina, 428 U.S. 280, 305 (1976), that fundamental right was denied.

It appears as if the trial court also saw a copy of a confidential report submitted to the public defenders by Dr. Zager. According to the PSI preparer, Dr. Zager's "report was provided to me by Judge Coker" (App. 3). Part of the report was included in the PSI (App. 2), but not all of it (R. 1553). However, apparently, the trial judge did see all of the report and counsel and petitioner simply were not aware of this fact until later. In denying this claim, the trial court attached a copy of the PSI to his order, but did not indicate whether there were any attachments to the PSI or whether he reviewed any materials in addition to the PSI. A hearing is necessary to determine what what was attached to the PSI and what the trial court reviewed.

The PSI examiner determined that the offense was committed by a cold and calculating adult, who felt no remorse for the offense, who was a habitual heartless offender, and who stood no chance of rehabilitation. She urged the Court in

unequivocal terms to impose death, and the entire tenor of the report is that Mr. Thomas was a mature adult who should be treated like someone fully responsible for his actions. This was not the case, as could have been demonstrated.

Current counsel has conducted an investigation into Mr. Thomas' background, and the result of that investigation, set out in Claim III, supra, is fully incorporated herein. This and other informaticn was available to reasonably effective counsel. The information was presented to Harold H. Smith, Jr., Ph.D., whose report is reproduced in large part in Claim 111, supra, and is fully incorporated herein. The PSI preparer did not have the information provided by Dr. Smith, or the life history presented in Claim III, supra. She did not even attend the trial, and had no idea what the jury heard and saw. Her information was provided by police (R. 8-9; App. 2, pp. 2-4), by Mr. Thomas' alcoholic abusive father, by the prosecutor, the victim's family, and some of Mr. Thomas' friends.

The PSI contained many rebuttable items. The following porticns are pertinent:

a. Ccnclusicns by Preparer

> It appears that the major causative factor in these offenses stems from the defendant's lack of regard for the right of other individuals and the manifestation of learned anti-social behavior and lack of morals.
>
> Ccnsidering the nature of the crime it is felt that the elements exist in order to consider the defendant at this point a habitual offender and a menace of society. It is without a doubt that if this defendant is allowed to be free in society, he will find himself back in the criminal iustice system.
>
> This officer found that the defendant's denial of his involvement and lack of remorse is again a factor that helps to illustrate the lack of moralitv and simple human compassicn on the part of the defendant. The defendant's versicn which in itself was a complete denial of the charqes lacked credible substance when compared to the detailed confessicn that he had given police officers. These murders were both merciless killings which took place without hesitation on the part of the defendant. Count I possibly was not planned however, Count II was obviously calculated with the location being chosen because of it's isolaticn.

Mr. Thomas is not a witful, willful, cold-blooded, compassicnless killer. "Mr.

Thomas has some dysfunction of his brain. . . ." (App. 1). His neuropsychologic 1 tests show impairment to the brain. Quite simply, his brain does not work right. In addition, he has very limited mental and intellectual ability. Ninety-three percent of the general populaticn in his age range functicn at a higher level than he does. He cannot recite the alphabet. He suffers from brain seizures. These conditions are life-long. It is patently absurd to opine that his actions are "learned" as opposed to a result of his mental damage and inherent low intellectual functicning.

b. Statements From Other Individuals

Mrs. Walsworth, the victim's wife, stated, "[h]e [Mr. Thomas] laughed and joked during the trial apparently having no conscience." Her daughter believed "he should be sentenced to the electric chair." Such inflammatory and partisan exhortaticns should not be considered at all during sentencing since they are not relevant to any valid statutory aggravating circumstance. See Booth v. Maryland, 107 S. Ct. 2529 (1987); Scull v. State, ___ so. 2d ___ (Fla. Sept. 8, 1988). However, if such statements are to be submitted to a judge, an opportunity to rebut is imperative. The statements and conclusions are in fact rebuttable. As Dr. Smith noted, Mr. Thomas smiles and laughs inappropriately when he is anxious. (App. 1). Mr. Thomas simply does not have the intellectual ability to understand that he is smiling and laughing inappropriately has no power to control it.

c. Analysis of Statutory Aggravating Circumstances

The PSI preparer "analyzed" the statutory aggravating and statutory mitigating circumstances contained in Florida's death penalty statute, and Judge Coker adopted most of her conclusions. The following examples demonstrate how devastating it was for the report to go unrebutted:

> (h) The capital felony was especially heinous, atrocious or cruel.
>
> . . .
>
> In relaticn to count 11, it is felt that this offense ccntains all the elements of torture, brutality and the

> deliberate infliction of pain, which makes it especially heinous, atrocious and cruel. The defendant admitted that he beat Russell L. Bettis with his hands and kicked him with his feet until he thought he was dead. This manner of death was administered to inflict a high degree of pain with utter indifference to the suffering of Russell L. Bettis.
>
> (i) The capital felony was a homicide and was committed in a cold, calculated and premeditated manner, without any pretense of moral or legal justification.
>
> . . .
>
> Count II, this was a homicide and it was premeditated. Further, there are some elements of it being done in a cold, calculated manner. The defendant, after stabbing to death James P. Walsworth, hunted Russell L. Bettis the only witness to the crime with the intent and purpose of killing him.

The PSI preparer undertook an expert analysis of Mr. Thomas' mental processes: she concluded that Mr. Thomas was indifferent to or actually enjoyed inflicting pain on others, and that he readily did so in a cold, calculated, and premeditated manner. The preparer, however, did not know that Mr. Thomas was mentally deficient in innate ways having nothing to do with volition. She did not know that he could not recite the alphabet or that virtually everyone else in the world thought and functioned better than him. (See App. 1). Brain impairment was intimately related to the preparer's opinions and the court's subsequent conclusions. No opportunity was provided to rebut.

d. Mitigating Circumstances.

The preparer examined only statutory mitigati g circumstances. She conceded Mr. Thomas had no prior record, but rejected all other statutory mitigating factors. There was substantial mitigation available. See Claim 111, supra. There were also mitigating circumstances presented to the jury which the preparer did not see or consider. See Claim II.

The only information the judge saw that was different from what the jury saw was the information contained in the PSI. No opportunity was provided to rebut it, either because of ineffective counsel or unreasonable court action. Consequently,

Mr. Thomas' fifth, sixth, eighth, and fourteenth amendment rights were violated. Mr. Thomas is entitled to an evidentiary hearing and, thereafter, to Rule 3.850 relief.

CLAIM V

THE *JURY* OVERRIDE WAS IMPROPER, AND ***STANDS*** IN VIOLATION **OF** THE EIGHTH AND FOURTEENTH **AMENDMENTS.**

Mr. Thomas' jury unanimously recommended a life sentence. The trial court imposed death, giving no reason for the jury override. The trial court's sentencing order simply lists all of the statutory aggravating and mitigating factors, with each factor followed by a conclusion that it does or does not apply (R. 1545-48). While the sentencing order mentions that the jury recommended life, the order does not explain why that recommendation was unreasonble and provides no justification for the override (Id.). On direct appeal, the State offered no explicit reasons for concluding that the jury recommendation was unreasonable, but speculated that the recommendation was prompted by distaste for the victim:

> The jurors in the instant case were obviously repulsed by the lifestyle of the characters involved (R. 1317). This repulsion could very well account for the recommendation of life rather than death.

(App. 22, Appellee's Brief, p. 20).

This Court responded:

> The fact that the first victim may have been a homosexual and that he may have used the services of appellant as a prostitute, even if it were a valid basis for mitigating the first murder, which we do not hold, is clearly not a valid basis for mitigating the second murder.

Thomas v. State, 456 So. 2d 454, 460-61 (Fla. 1984).

The nature of Florida's capital sentencing process has been long settled. A Florida capital sentencing jury's role is central and "fundamental", Riley v. Wainwright, 517 So. 2d 656, 657-58 (Fla. 1988); Mann v. Dugger, 844 F.2d 1446, 1452-54 (11th Cir. 1988)(en banc), representing the judgment of the community. Id. A Florida sentencing jury's recommendation of life is entitled to "great weight," and can cnly be overturned by a sentencing judge if "the facts suggesting a sentence of

death [are] so clear and convincing that virtually no reasanable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975)(emphasis supplied). See also Mann, 844 F.2d at 1450–51 (and cases cited therein).

The longstanding standard established under Florida law is thus that if a jury recommendaticn of life is supported by any reasanable basis in the record -- such as a valid mitigating factor -- that jury recommendation cannot be overridden. See Ferry v. State, 507 So. 2d 1373, 1376–77 (Fla. 1987); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142–43 (Fla. 1986); Tedder, supra, 322 So. 2d at 910; see also Mann, supra, 844 F.2d at 1450–54 (and cases cited therein). This is "the nature of the sentencing process," Mann, supra, 844 F.2d at 1455 n.10, under Florida law. This standard has in fact been recognized by the United States Supreme Court as a "significant safeguard" provided to a Florida capital defendant. Spaziano v. Florida, 468 U.S. 447, 465 (1984).

Mr. Thomas' jury recommended that he be sentenced to life. However, although mitigation was present in the record, and although there was much more than a reascnable basis for the jury's recommendatian of life, the trial judge ignored Florida law and imposed death. This Court then refused to apply its own settled standards and affirmed that sentence. See Thomas, supra, 456 So. 2d at 460–61. Cf. id. at 461–62 (McDonald, J., dissenting an sentence); id. at 462 (Overtcn, J., dissenting on sentence). This Court violated Mr. Thomas' eighth amendment rights to a capital sentencing determinaticn in accord with Florida's settled standards.[3]

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[3]Additionally, the procedure employed in Mr. Thomas' case violated Gardner v. Florida, 430 U.S. 349 (1977) and Beck v. Alabama, 447 U.S. 625 (1980), for Mr. Thomas has never been provided the opportunity to rebut the supposed basis for the override. Although Florida law requires the trial court to provide "specific written findings of fact" when imposing death, Fla. Stat. sec. 921.141(3), and to specify the basis for an override, Smith v. State, 403 So. 2d 933, 935 (Fla. 1981); Thompson v. State, 328 So. 2d 1, 5 (Fla. 1976), the trial judge provided no findings justifying the override. This Court then speculated as to why the jury's recommendaticn was unreascnable. A Gardner hearing remand is proper.

The trial court overrode the jury recommendation and imposed death. The trial court found, as mitigation, Mr. Thomas' age and that Mr. Thomas did not have a significant history of prior criminal activity (R. 1547). The trial court's findings alone, based on the evidence before the jury, thus demonstrate two valid, reasonable mitigating factors. There was additimal, valid, nonstatutory, reasonable mitigation which was not considered: Mr. Thomas' potential for rehabilitation, his good behavior in jail, his good work record, his history of being abandmed and abused by his family, his history of brain seizures, and his concern and friendliness toward others (See Claim II).

There were thus two (2) valid, recognized, and eminently reasonable statutory mitigating factors and numerous nonstatutory mitigating factors in this case, a case involving four aggravating factors. Whatever balance the trial judge and this Court may have struck, the jury's balancing and resulting life recommendatim, were undeniably reasonable under Florida law. See Mann, supra, 844 F.2d at 1450-55; Ferry, supra; Wasko, supra; Cailler, supra. The trial judge and this Court, however, refused to provide Mr. Thomas with the right which Florida law clearly afforded him: the right not to have a reasonable jury verdict overturned.

In fact, the trial judge failed to even explain why the jury had no rational basis for its recommendation. See Smith v. State, 403 So. ad 933, 935 (Fla. 1981); Thompson v. State, 328 So. ad 1, 5 (Fla. 1976). Despite the prominence of Skipper v. South Carolina, 106 S. Ct. 1669 (1986), mitigating evidence before the jury, and the other significant mitigation cited above, this Court then sustained the override, stating "there does not appear to be any reasonable basis discernible from the record to support the jury's recommendation." Thomas v. State, 456 So. ad at 460. This was a fundamental error of law, an error which deprived Mr. Thomas of his eighth amendment rights.

The state courts thus arbitrarily ignored their own standards and arbitrarily denied Mr. Thomas the protections, i.e., the "liberty interest," afforded under

Florida's capital sentencing statute. See Vitek v. Jones, 445 U.S. 480, 488-89 (1980); Hicks v. Oklahoma, 447 U.S. 343 (1980). Neither the eighth amendment, nor due process, nor equal protection can be squared with the fact that Florida law afforded Mr. Thomas the right to an affirmance of the jury's reasonable life recommendation, while the Florida courts' unfounded, unique, and illogical ruling arbitrarily withdrew that right. See Evitts v. Lucey, 469 U.S. 387, 400-01 (1985); Johnscn v. Avery, 393 U.S. 483, 488 (1969); Smith v. Bennett, 305 U.S. 708, 713 (1961). See also Reece v. Georgia, 350 U.S. 85 (1955).

If a jury recommends life, death may not be imposed if there is any "reasonable basis in the record" for the recommendaticn. Ferry, 507 So. 2d at 1376-77. If any valid mitigating circumstances exist in the record, an override cannot be sustained. That is the right afforded to capital defendants under Florida's capital sentencing statute. That is the right arbitrarily denied to Mr. Thomas.

The record before the jury contained mitigating circumstances which provided a reasonable basis for the life recommendation. Prism rehabilitation and good behavior as a prisoner were testified to by lay persons and correctional officers (R. 1248-60), and that provides a reascmable basis, Skipper v. South Carolina, 106 S. Ct. 1669 (1987). Mr. Thomas' age and his lack of a significant prior criminal history provided a reascmable basis. A deprived and abusive childhood is reasanable mitigation. Holsworth v. State, No. 67,973, Slip op. at 11 (Fla. Feb. 18, 1988); DuBoise, 520 So. 2d at 266; Burch v. State, 522 So. 2d 810, 813 (Fla. 1988).

The override in this case is wrong and arbitrary. See Ferry; Hansbrough; Fead; Wasko; Duboise; cf. Skipper. The jury override procedure in Florida is constitutionally valid only to the extent that it is utilized within specific reliable procedural parameters, and so long as it does not lead to freakish and arbitrary capital sentencing. Spaziano, supra, 104 S. Ct. at 3166. If the jury override here, and the method through which it was sustained, is acceptable under the Florida statute, then "the application of the jury override procedure has resulted in

arbitrary or discriminatory application of the death penalty . . . in general . . . [and] in this particular case," Spaziano, supra. To allow the override to stand in this case would indeed be to validate a procedure providing no meaningful basis upon which to distinguish between those persons who receive life (when a judge does not override, or when an override is reversed) and those who receive death. This violates the eighth and fourteenth amendments. Rule 3.850 relief is proper.

CLAIM VI

THE STATE AND THE COURT CROSS-EXAMINED MR. THOMAS REGARDING MATTERS COVERED BY THE ATTORNEY-CLIENT PRIVILEGE AND ENCOURAGED THE JURY TO DISBELIEVE MR. THOMAS BASED ON EXERCISE OF HIS CONSTITUTIONAL RIGHT TO COUNSEL, IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

Mr. Thomas testified at his trial. Upon cross-examination, the State asked Mr. Thomas how many times he had talked to his attorney about his testimony and whether Mr. Thomas and his attorney had reviewed Mr. Thomas' statements to the police (R. 1059-60). While defense counsel objected to testimony regarding "[h]ow many times" they had talked (R. 1059), he offered no objection to the subsequent questions regarding what Mr. Thomas and his lawyer had discussed and the number of times they discussed it. This was an unreasonable and non-tactical omission by counsel.

On recross examination, the State asked Mr. Thomas if he had a lawyer prior to March 1, 1981, and whether Mr. Thomas had talked to the lawyer after his arrest (R. 1089). According to the State, Mr. Thomas talked to his father by telephone shortly after his arrest but before he had an attorney, and said he had killed someone. Mr. Thomas testified and denied having made the statement to his father, although he admitted that a conversation had occurred. Both he and his father testified about a second later telephone conversation in which Mr. Thomas denied committing the murder. The state wished for the jury to believe that between the two telephone conversations, counsel was appointed for Mr. Thomas, and as a result of counsel's advice, Mr. Thomas changed his story. The State asked Mr. Thomas if he had a lawyer at the time of the second phme conversation (R. 1084-85), and asked his father the

same questicn (R. 681-82). Defense counsel did not object to the question to Mr. Thomas' father, unreasonably, and obviously without any strategy -- he did object to the similar inquiry made of his client (R. 1084-85), but unreascnably failed to request a cautionary jury instruction or move for a mistrial.

Through these inquiries, the state violated Mr. Thomas' constitutional rights and Florida evidence laws. Under Florida law, communications between counsel and client are confidential, and the discussicns may not be revealed. Fla. Stat. 90.502. The acticn by the state also violated Mr. Thomas' right to counsel under the sixth and fourteenth amendments. The attorney-client relaticnship cannot constitutionally be interfered with, and the judge's overruling of objections to these questicns compelled Mr. Thomas to reveal to the jury, state, and court that he had discussed his testimony frequently with his attorney. Court action interfering with a criminal defendant's right to consult with his lawyer deprives the defendant of his "lawyer's guidance" by "placing a sustained barrier to communication between the defendant and his lawyer." Geders v. United States, 425 U.S. 80, 92 (1976). Such action penalizes a defendant for exercising his constituticnal right to counsel. See Brooks v. Tennessee, 406 U.S. 605, 612-613 (1972); cf. Doyle v. Ohio, 426 U.S. 610 (1976).

The jury in this case justifiably had great difficulty reaching a verdict. Any suggestion that Mr. Thomas' story was concocted and/or rehearsed by and with defense counsel would have been extremely prejudicial, and there is a reasonable probability that it would have affected the outcome. The State's acticn and counsel's failure to properly preserve the errors violated Mr. Thomas' rights under the sixth and fourteenth amendments.

CLAIM VII

MR. THOMAS' CONVICTION WAS THE RESULT OF A VERDICT BY GAMBLING, LOT, CHANCE, OR COMPROMISE, AND VIOLATES THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.

The evidence in this case was virtually exclusively Mr. Thomas' own statements. Mr. Thomas testified before the jury and denied making these statements. (R. 1017).

The jury was instructed that it could determine the voluntariness and truthfulness of pre-trial and trial statements. The jury deliberated for many hours and returned to the courtroom unable to reach a verdict. The court then gave the jury a "dynamite" or Allen charge, and they continued their deliberations (R. 1242-43). The trial court later called the jury back and told them that no one wanted them to stay and deliberate beyond 7:00 p.m., without their consent. The Court indicated that the jury could leave and return the next day, or continue. The jury continued (R. 1244), and eventually returned a guilty verdict at 9:00 p.m.

The jury's verdict was arrived at illegally. According to juror Joy Wicker, the guilty verdict was a pure compromise and trade-off, entered into to terminate the jury's protracted deliberation:

> 1. I, Joy Wicker, was a juror in the trial of Ed C. Thomas in June, 1981.
>
> 2. After several hours of deliberation, the jury was deadlocked with some jurors absolutely unable to find Ed Thomas guilty. This deadlock was brought to the attention of Judge Coker who told us to return and continue deliberation. All of the jurors then discussed a compromise. We decided we would find Ed Thomas guilty only if we all agreed to recommend a life sentence. It was only upon this basis that a guilty verdict was reached.
>
> 3. Many jurors who were of the mind to vote guilty were already in favor of a life sentence recommendation because of Ed Thomas' age, lack of criminal record, poor upbringing and family life. Homosexuality, either Mr. Thomas' or the victims', was not considered.

(App. 4).

The feared result of "dynamite" charges came true in this case. Rather than following the judge's instructions on presumption of innocence, requirement of proof of guilt beyond a reasonable doubt, unanimity of verdict, and lesser included offenses, the jury responded to the Allen charge, and illegally "bargained" a verdict to bring their lengthy deliberations to the requested abrupt conclusion. Such a process is no more than "gambling" or "verdict by lot," and deprived Mr. Thomas of his rights to a trial by a fair and impartial jury, to require proof of guilt beyond

a reasonable doubt, to a unanimous jury verdict, to a fundamentally fair and reliable capital guilt/innocence determination and every other constitutional trial right guaranteed by the sixth, eighth and fourteenth amendments.

Verdicts reached "by aggregation and average or by lot, or game of chance or other artifice or improper manner" are flatly illegal and may be avoided. See Marks v. State Road Department, 69 So. *Xi* 771, 774 (Fla. 1954), quoting Wright v. Illinois & Mississippi Telegraph Co., 20 Iowa 195 (1866). This is precisely what occurred in Mr. Thomas' case -- the jury's verdict of guilt, and consequently Mr. Thomas' life, was simply "bargained" for. Such an unreliable guilt/innocence determination simply cannot withstand constitutional scrutiny. See Beck v. Alabama, 447 U. **S. 625,** 638 (1980). The "risk of an unwarranted conviction" Beck, 447 U.S. at 638, here was not merely "enhanced" by the procedure by which the jury arrived at its verdict -- that risk actualized here. In Russ v. State, 95 So. *Xi* 554 (Fla. 1957), the Florida Supreme Court quoted with approval the proposition that bargain verdicts in criminal cases are unacceptable and unconstitutional, and that affidavits of jurors may be received to avoid a verdict "determined by aggregation and average or by lot, game or chance or other artifice or improper manner." 95 So. 2d at 600.

The evidence which would have been presented in support of this claim had the requested (and required, see claim I, supra) evidentiary hearing been held would not have concerned matters "inhering" in the verdict, and thus would have been perfectly admissible. For example, Juror Wicker's affidavit, discussed above and appended to Mr. Thomas' Rule 3.850 Motion, does not reflect her disagreement with the verdict, her own mental process, or anything that otherwise "inheres in the verdict." Rather, her affidavit describes the "lets-make-a-deal" gambling process by which the jury reached its verdict, and thus demonstrates that "the verdict was determined by . . . lot, game or chance or other artifice or improper manner." Russ, supra, 95 So. 2d at 600. A capital guilt-innocence determinaticn deserves more. This was the most constitutionally unreliable procedure imaginable, and completely undermines any

possibility of confidence in the result. ~~Cf. Beck, supra.~~ Mr. Thomas is entitled to, at a minimum, the opportunity to prove this substantial claim at a full and fair evidentiary hearing. This Court should remand for the required hearing.

The Rule 3.850 court's order indicated that this claim was raised by trial counsel in a motion for new trial and that "the actual hearing conducted by this court . . . demonstrates that there is no factual basis to the claim made by the defendant, as it demonstrated only that some of the jurors were troubled by their guilty verdict after learning the trial court's override of their sentencing recommendation" (Order, p. 3). As an examinaticn of the record demonstrates, trial counsel did not raise this issue, although he could have, and his failure to do so was a result of his failure to investigate and prepare (See R. 1333-50). An evidentiary hearing was required (see Claim I), and the Rule 3.850 court erred in summarily denying this claim without such a hearing.

Ineffective assistance of counsel aside, this issue is independently cognizable in the instant proceedings, as it concerns error of a fundamental nature. Errors which deprive a defendant of the right to a trial by a fair and impartial jury are fundamental, and thus may be raised for the first time in collateral proceedings. See Nova v. State, 439 So. 2d 255, 261 (Fla. 3d DCA 1983); cf. O'Neal v. State, 308 So. 2d 569 (Fla. 2d DCA 1975); Dozier v. State, 361 So. 2d 727 (Fla. 4th DCA 1978); Clark v. State, 363 So. 2d 331 (Fla. 1978); Flowers v. State, 351 So. 2d 387 (Fla. 1st DCA 1977). This claim involves precisely such error, as it deprived Mr. Thomas of his rights to a fair trial by an impartial jury, to a unanimous jury verdict, to a conviction obtained by proof of his guilt beycnd a reasonable doubt, to a fundamentally fair and reliable capital guilt-innocence determination, and every other constitutional trial right guaranteed by the sixth, eighth and fourteenth amendments. This issue is thus before this Court on the merits, and the merits demand relief.

CLAIM VIII

MR. THOMAS 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 THE SOLE MENTAL HEALTH EXPERT APPOINTED TO EVALUATE HIM PRIOR TO TRIAL FAILED TO CONDUCT A COMPETENT AND PROFESSIONALLY APPROPRIATE EVALUATION, AND BECAUSE HE WAS THUS SENTENCED TO DEATH DESPITE THE EXISTENCE OF NUMEROUS MENTAL HEALTH RELATED STATUTORY AND NON-STATUTORY MITIGATING FACTORS CALLING FOR A SENTENCE OF LIFE IMPRISONMENT, AND THE RULE 3.850 COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THIS ISSUE.

The issue here presented is whether Mr. Thomas' due process rights to a professionally competent, court-funded evaluatian of his mental status at the time of the offense, and to discover extant mitigating factors, was violated by the failure of the sole mental health expert appointed pretrial to conduct a competent and professionally adequate evaluatim which, had it been conducted, would have established myriad statutory and non-statutory mitigating circumstances. While the merits of this claim cannot be conclusively determined without an evidentiary hearing, on the basis of the allegations made and evidence proffered in the lower court and herein, more than a reasonable likelihood is demonstrated that Mr. Thomas will prevail on his claim after full and fair evidentiary development.

In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court recognized that the due process clause entitles an indigent defendant not just to a mental health evaluation, but also to a professional, valid evaluation. Because the psychiatrists who evaluated Mr. Mason pre-trial did not know about his "extensive history of mental retardation, drug abuse and psychotic behavior," id. at 736, or his "history indicative of organic brain damage," id. at 737, and because the court recognized that the evaluations of Mr. Mason's mental status would be "flawed" if the physicians had "neglect[ed] a history" such as this, id. at 736-37, the Court remanded Mr. Mason's case for an evidentiary hearing. Id. at 735.

More recently, in State v. Sireci, 502 So, 2d 1221 (Fla. 1987), this Court upheld the trial court's determination, in a successor posture, that

> a limited evidentiary hearing [was] necessary to address the claim that Sireci was deprived of his rights to due process and equal protection because the two psychiatrists appointed before trial to evaluate his sanity at the time of the offense failed to conduct competent and appropriate evaluations. The trial court further held that the hearing [was] necessary solely to determine the effects, if any, this claim may have had on the sentencing hearing. The court specifically found, and [the Florida Supreme Court] agree[d], that the alleged violation of due process/equal protection ha[d] no bearing on the prior determination of Sireci's guilt.

Id. at 1223. (emphasis added).

A criminal defendant is constitutionally entitled to expert mental health assistance when the State makes his or her mental state relevant to guilt/innocence or sentencing. Ake v. Oklahoma, 105 S. Ct. 1087 (1985). This constitutional entitlement requires a professionally "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985).

Florida law also provides, and thus provided Mr. Thomas, with a state law right to professionally adequate mental assistance. See, e.g., Mason, supra; cf. Fla.R.Crim.P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal Due Process Clause. See Hicks v. Oklahoma, 447 U.S. 215, 223-27 (1976); Vitek v. Jones, 445 U.S. 480 (1980). In this case, both the state law interest and the federal right were denied.

The right to expert mental health assistance is necessarily enforceable through the right to effective counsel -- what is required is competent mental health assistance, and it is up to counsel to obtain it. Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). Thus, when counsel unreasonably fails to properly investigate mental circumstances, Blake, supra; Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986), ineffective assistance is demonstrated.

Mr. Thomas' mental condition was relevant to both guilt-innocence and sentencing issues. Had counsel insured that Mr. Thomas received competent mental health assistance, by providing a mental health expert with background information and by

consulti g with that expert in a timel mann r regardi g guilt-innocence and penalty phase issues, substantial beneficial information could have been elicited. As is now known, substantial questions could have been raised about the voluntariness and truthfulness of Mr. Thomas' purported statements: as Dr. Zager found, Mr. Thomas' abusive relationship with his father could have influenced him to provide statements to the police; as Dr. Smith found, Mr. Thomas' intellectual and reasoning ability is substantially impaired and would have been even further diminished if Mr. Thomas had been drinking alcohol, as the evidence showed he had been at the time of the statements to the police. See, Gurganus v. State, 451 So. 2d 817 (Fla. 1984). Mr. Thomas' statements were the only evidence against him, and the failure to adequately challenge them with available information about Mr. Thomas' mental condition was grossly prejudicial.

Likewise, counsel could have obtained invaluable evidence for the penalty phase. Had he taken the minimal step of consulting with Dr. Zager and asking about penalty phase issues, Dr. Zager could have provided evidence that Mr. Thomas' ability to appreciate the criminality of his conduct was impaired and that Mr. Thomas was under emotional distress at the time of the offense, in addition to evidence regarding Mr. Thomas' abusive relationship with his father, his abandonment by his mother and his learning difficulties (see App. 2). Had counsel gone further -- provided a mental health expert with background information and requested appropriate testing -- he could have discovered, as Dr. Smith did, that Mr. Thomas' intellectual functioning is lower than 93 percent of the population in his age range, that 99 percent of individuals in his age group read, spell, and compute mathematical problems better than Mr. Thomas does, that Mr. Thomas cannot recite the alphabet, and that Mr. Thomas suffers from chronic diffuse cerebral dysfunction (App. 1). Trial counsel unreasonably failed to ensure that Mr. Thomas received the competent assistance of a mental health expert.

Initial counsel, Mr. Angel, engaged the services of Dr. Arnold S. Zager, M.D.,

on January 9, 1981, and requested detailed evaluation regarding Mr. Thomas' personality, background, emotional status, and other pertinent psychiatric data," and regarding penalty phase issues (Letter dated January 9, 1981). In a follow-up letter dated January 13, 1981, Mr. Angel noted that Mr. Thomas had been treated for epilepsy recently and asked whether neurological testing was necessary. Hospital records reflecting an epileptic seizure episode were sent to Dr. Zager, but no neurological work-up was done. As detailed in Claim III, supra, defense counsel conducted virtually no background investigation and thus provided Dr. Zager with no information regarding Mr. Thomas' history. Even the brief mental health evaluation revealed statutory and non-statutory mitigating evidence, but defense counsel did not even contact Dr. Zager until the night before the penalty phase (R. 1278). There can be no doubt about the substantial mitigating effect of the type of mental health evidence which was available. It never reached the jury or judge, however, because of trial counsel's failure to insure that Mr. Thomas received competent mental health assistance and because of Dr. Zager's inadequate evaluation.

The trial court viewed this issue as a claim which could have been raised on direct appeal and thus denied it "as a matter of law." (Order, p.4). No evidentiary hearing was held. As this Court has held, claims such as this are traditionally-recognized Rule 3.850 evidentiary claims. See Mason, supra; Sireci, supra; cf. Groover v. State, 489 So. 2d 15 (Fla. 1986). As in Sireci and Mason, Mr. Thomas has proffered more than significant evidence of mental and emotional disturbances, organic brain damage, and severe intellectual limitations which would have, if adequately assessed and evaluated by a mental health expert in conjunction with professionally adequate evaluation, supported a myriad of statutory and non-statutory mitigating factors. Mr. Thomas is undeniably entitled to an evidentiary hearing and thereafter to Rule 3.850 relief.

CLAIM IX

BY PRECLUDING CONSIDERATION OF DOUBT ABOUT GUILT AS A NON-STATUTORY MITIGATING CIRCUMSTANCE, THE FLORIDA SUPREME COURT HAS ADMINISTERED THE FLORIDA DEATH PENALTY STATUTE IN A WAY THAT VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS.

The evidence linking Mr. Thomas to this case was exclusively witnesses who said Mr. Thomas confessed to them. Mr. Thomas testified, repudiated one "confession," and denied making two others. The jury deliberated 6-7 hours, returned without a verdict, received a "dynamite" or Allen charge, and returned a guilty verdict. At sentencing, doubt about guilt evidence was introduced that was not introduced at trial (R. 1266).

The jury reached a verdict by compromise, according to which a life recommendation would follow. (See Claim VII). Without question, and as has been documented, doubt about guilt was a significant factor in the jury's unanimous life recommendation. The judge override was affirmed, this Court concluding that the jury's unanimous recommendation was not one that would be made by a reasonable perscn.

The death sentence stands in this case because, inter alia, this Court considers itself "precluded" from considering a powerful non-statutory mitigating circumstance --doubt about guilt. This preclusicn violated the eighth and fourteenth amendments. See Hitchcock v. Dugger, 107 S. Ct. 1821 (19870; Lockett v. Ohio, 438 U.S. 586 (1978). Because Mr. Thomas' death sentence resulted from a state process that precluded consideration of doubt about guilt as a reasonable basis for a life sentence, the death sentence violated the eighth and fourteenth amendments.

CONCLUSIONS AND RELIEF SOUGHT

For the foregoing reasons, Mr. Thomas respectfully requests that this Honorable Court vacate the conviction and sentence of death or, in the alternative, remand the cause for an evidentiary hearing and findings of fact.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been furnished by U.S. Mail, first class, postage prepaid, to Georgina Jiminez-Orosa, Assistant Attorney General, 111 Georgia Avenue, Room 204, West Palm Beach, Florida, 33401, this 7th day of October, 1988.

Matt J. McCl
Attorney