IN THE SUPREME COURT OF FLORIDA

CASE NO. 72,154

ED CLIFFORD THOMAS,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative

BILLY H. NOLAS
TIMOTHY D. SCHROEDER

OFFICE OF THE CAPITAL COLLATERAL
REPRESENTATIVE
1533 South Monroe Street
Tallahassee, Florida 32301
(904) 487-4376

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

Mr. Thomas' Reply Brief will not discuss every claim raised in his Initial Brief. For the convenience of the Court, the claims follow the same numbering system employed in the Initial Brief. Mr. Thomas does not waive any claim previously discussed and relies upon the presentations in his Initial Brief regarding any claims *not* specifically addressed herein.

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REPLY 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 FACT AND LAW,

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 (emphasis added). See also Lemon v. State, 498 So. 2d 923 (Fla. 1987). Despite this well-established rule, the State broadly asserts that Mr. Thomas is not entitled to an evidentiary hearing. Mr. Thomas was and is entitled to an evidentiary hearing, as his proffer before the trial court and his Initial Brief before this Court demonstrate. Mr. Thomas will address the necessity of an evidentiary hearing regarding specific claims within the discussion of those claims presented below. Herein, he generally responds to several of the State's broad assertions.

Initially, the State asserts that Mr. Thomas' Rule 3.850 motion was properly denied without an evidentiary hearing because several of his claims were "improvidently raised" in a Rule 3.850 motion (Response at 9). The State apparently does not recognize that the claims it *so* casually dismisses involve extra-record facts and that Rule 3.850 motions are the traditionally-recognized vehicle for such claims. For example, in Claim VIII, Mr. Thomas alleged that he was denied his due process right to professionally adequate mental health assistance because of failures on the part of trial counsel and the appointed mental health expert. This Court has held that such claims are appropriate Rule 3.850 evidentiary claims. See Mason v. State, 489 So. 2d 734 (Fla. 1986); State v. Sireci, 502 *So.* 2d 1221 (Fla. 1987) (affirming circuit court's grant of stay of execution and evidentiary hearing on professional adequacy of pretrial mental health evaluations), subsequent history in

State v. Sireci, 13 F.L.W. 722 (Fla. 1988) (affirming grant of post-conviction relief on this issue), Other claims (e.g., Claims 11, V, VII) alleged by the State to be "improvidently raised" involved extra-record facts requiring that the claims be raised in a Rule 3,850 motion and that an evidentiary hearing be conducted. Cf. O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984) (remanding for Rule 3.850 evidentiary hearing because facts necessary to disposition of claim were not "of record").

In an attempt to demonstrate that Mr. Thomas is not entitled to an evidentiary hearing, the State presents the curious argument that "the evidence before the trial court required his override of the jury's [unanimous life] recommendation," relying upon the dissenting opinion in Brookings v. State, 495 So. 2d 135 (Fla. 1986). (Response at 11).[1] According to the State, no evidentiary hearing is required because "[t]he trial court's decision [to impose death] is supported by competent substantial evidence." Id. This strange argument misses the point entirely. Mr. Thomas' Rule 3.850 motion presented allegations and proffered extra-record facts in support of those allegations, contending that his conviction and sentence of death were unconstitutional because, inter alia, Mr. Thomas was denied the effective assistance of counsel (see Initial Brief, Claims 11, 111, IV, VIII), Mr. Thomas was denied his right to professionally adequate mental health assistance (see, e.g.,

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1. In Brookings, this Court reversed a trial court's override of a jury's life recommendation and ordered the imposition of a life sentence, despite the trial court's finding of five aggravating circumstances. Brookings, 495 So. 2d at 142-43. One justice dissented, believing that "the judge not only may but must overrule the jury when its recomnended sentence is not the appropriate sentence under the law," id. at 145, a proposition to which no other member of this Court subscribed and upon which the State now relies as support of its position that Mr. Thomas' Rule 3.850 motion is "conclusively without merit" (Response at 11). Clearly, this Court's standard regarding jury overrides is that of the Brookings majority: the jury's recomnendation will be sustained where it is supported by a "reasonable basis" and where "reasonable people could differ as to the propriety of the death penalty," Brookings, 495 So. 2d at 143, as it should have been in Mr. Thomas' case. See Claim V, infra.

Initial Brief, Claim VIII); Mr. Thomas was denied his right to have all evidence of mitigation considered, in violation of Hitchcock v. Dugger (see Initial Brief, Claim 11); and Mr. Thomas was denied his right to a life sentence resulting from the jury's reasonable recomnendation of life and because the trial court provided no reason for rejecting the jury's unanimous life recommendation (see Initial Brief, Claim V at 57 n.3). An evidentiary hearing is required precisely because the facts supporting these claims are not "of record," see O'Callaghan, supra, and were not part of "the evidence before the trial court" or the record before this Court, and because Mr. Thomas' allegations are by no means refuted by "the evidence before the trial court."

As he explained in his Initial Brief, Mr. Thomas was and is entitled to an evidentiary hearing. The State has failed to demonstrate that the portions of the record which the trial court attached to its order denying Mr. Thomas' Rule 3.850 motion conclusively show that Mr. Thomas will necessarily lose on each claim.[2]

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.

Significantly, in its argument regarding this claim, the State does not once mention Hitchcock v. Dugger, 107 S. Ct. 1821 (1987), and for good reason: Hitchcock

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2. Mr. Thomas would also note that the State's reliance on prior decisions of this Court in which the denial of evidentiary hearings were affirmed (Response at 8) is seriously misplaced. See Agan v. Dugger, 835 F.2d 1357 (11th Cir. 1987) (remanding for an evidentiary hearing on competency and ineffective assistance of counsel); Troedel v. Dugger, 667 F. Supp. 1456 (S.D. Fla. 1987), aff'd, 828 F.2d 670 (11th Cir. 1987) (granting new trial on Brady/Giglio and ineffective assistance of counsel claims following an evidentiary hearing); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986) (remanding for an evidentiary hearing on ineffective assistance of counsel claim in case where jury recommended life); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988) (affirming order granting resentencing on ineffective assistance of counsel claim following evidentiary hearing).

conclusively establishes Mr. Thomas' entitlement to relief.[3] Mr. Thomas' "sentencing judge refused to consider[] evidence of nonstatutory mitigating circumstances, and . . . the proceedings therefore did not comport with [the eighth amendment]." Hitchcock, 107 S. Ct. at 1824. The State, however, argues as if Hitchcock does not exist.

The fallacies in the State's argument flow directly from its efforts to ignore Hitchcock and its consequent failure to consider any of this Court's post-Hitchcock pronouncements.[4] Thus, for example, while the State argues that no error occurred at Mr. Thomas' sentencing proceedings because evidence of nonstatutory mitigation was "presented" (see, e.g., Response at 19, 20, 22-23), Hitchcock and this Court's post-Hitchcock decisions unequivocally reject this "mere presentation" standard:

> Under Hitchcock, the mere opportunity to present nonstatutory mitigating evidence does not meet constitutional requirements if the judge believes, or the jury is led to believe, that ***some*** of that evidence may not be weighed during the formulation of an advisory opinion or during sentencing. As we recently have stated,
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> > The United States Supreme Court [in Hitchcock] clearly rejected the "mere presentation" standard finding that a Lockett violation had occurred. 107 S.Ct. at 1824. The Court made clear that the fact that the judge and jury heard nonstatutory mitigating evidence is insufficient if the record shows that they restricted their consideration only to statutory mitigating factors.

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3. Indeed the State fails to refer to or in any way discuss any of the capital cases decided by this Court after the issuance of the Hitchcock v. Dugger opinion.

4. These fallacies extend to the State's argument that Mr. Thomas' claim is procedurally barred (Response at 18-19). As is abundantly clear from every post-Hitchcock pronouncement of this Court, no procedural bar now forecloses this Court's review of Mr. Thomas' Hitchcock claim. (See Initial Brief at 5 n.1 and cases cited therein). Under this Court's post-Hitchcock decisions, there is simply no dispute that Hitchcock represents "a substantial change in law" mandating merits review in post-conviction proceedings. Downs v. Dugger, 514 So. 2d 1069, 1070 (Fla. 1987), whether the defendant was sentenced before the issuance of Lockett v. Ohio; Downs, supra; Morgan v. State, 515 So. 2d 975 (Fla. 1987), or after Lockett, see Waterhouse v. State, 522 So. 2d 341 (Fla. 1988); Combs v. State, 525 So. 2d 853 (Fla. 1988).

> Riley v. Wainwright, No. 69,563 (Fla. Sept. 3, 1987), slip op. at 7 (footnote omitted), Accord Thompson v. Dugger, 515 So.2d 173 (Fla. 1987)(consolidated cases).

Downs v. Dugger, 514 So. 2d 1069, 1071 (Fla. 1987) (emphasis added).

Ignoring Hitchcock, the State also asserts that "(t)he judge's instruction [at the penalty phase] did not preclude nonstatutory factors" (Response at 18). This is simply wrong: the instruction in Mr. Thomas' case was identical to that given and found unconstitutional in Hitchcock. Compare R. 1310 ("The mitigating circumstances which you may consider, if established by the evidence, are these: [listing the statutory mitigating circumstances]"), with Hitchcock, 107 S. Ct. at 1824 ("'The mitigating circumstances which you may consider shall be the following . . .' [listing the statutory mitigating circumstances]."). Because Mr. Thomas' jury unanimously recomnended life despite this preclusive instruction, the significance of the instruction to Mr. Thomas' claim is what it reveals about the judge's understanding of the law. As this Court has stated, "Unless there is something in the record to suggest to the contrary, it may be presumed that the judge's perception of the law coincided with the manner in which the jury was instructed." Zeigler v. Dugger, 524 So. 2d 419, 420 (Fla. 1988) (emphasis added). Not only does nothing in the record "suggest to the contrary,'' but everything in the record establishes that Mr. Thomas' judge believed his consideration was limited only to the statutory mitigating factors (see Initial Brief at 7-10).[5]

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5. In addition to the record evidence that the judge limited his consideration to mitigating factors enumerated in the statute, Mr. Thomas' Initial Brief discussed nonrecord evidence demonstrating that at the time of Mr. Thomas' trial, Mr. Thomas' judge believed his consideration was limited to statutory mitigating circumstances (see Initial Brief at 10-11). The State misconstrues this presentation as a claim of ineffectiveness on the part of appellate counsel (Response at 25) and disputes that the cases discussed by Mr. Thomas demonstrate a pattern of limited consideration by the trial judge. Id. at 27.

(footnote continued on following page)

The State is correct that evidence of nonstatutory mitigation was before Mr. Thomas' sentencing jury and judge (Response at 19, 20, 27; see also id. at 68).[6] The evidence in the record established numerous, compelling nonstatutory mitigating circumstances (see Initial Brief at 11-17) (describing record nonstatutory mitigating evidence), and was the kind of evidence which this Court has consistently recognized as mitigating (see Initial Brief at 17 and cases cited therein). The gravamen of Mr. Thomas' claim is that the judge refused to consider that evidence, because his review was constrained only to the statutory mitigating factors, and that thus in a case where the jury unanimously recommended life and where the judge found two statutory mitigating circumstances, death was imposed.

(footnote continued from previous page)

The State's assertions are belied by the record in this case, as well as by the sentencing judge's prior practice. The judge's other sentencing orders make it clear that his consideration in the capital cases cited was constrained to only those mitigating circumstances listed in the statute, notwithstanding the reasons why, pre-Hitchcock, this Court reversed in those cases.

6. Throughout the Response, the State concedes that nonstatutory mitigation was before Mr. Thomas' sentencing jury and judge (see, e.g., Response at 5, 17, 19, 20, 27, 68). In fact, the State even concedes that evidence of Mr. Thomas' emotional distress "could arguably approach a statutory mitigating circumstance." (Response at 24). Depending upon the context, however, the State argues either that this evidence was mitigating (see, e.g., Response, Claim III) or was not mitigating (see, e.g., Response, Claims II and V). Notwithstanding the State's contradictory assertions, what is clear is that the evidence reflected in the record was mitigating, that reversible Hitchcock error therefore occurred, and that the jury override was therefore improper -- it was rendered by a judge who did not consider the nonstatutory mitigation in the record as a "reasonable basis" for the jury's unanimous life recomnendation, for his consideration was constrained. Cf. Tedder v. State, 322 So. 2d 908 (Fla. 1975). There existed, however, much more qualitatively and persuasively distinct statutory and nonstatutory mitigating evidence which was available for presentation. Trial counsel unreasonably and ineffectively failed to investigate and thus failed to discover and present this evidence, evidence which would have altered the result -- with this evidence, no judge could have lawfully overridden this jury's unanimous life recomnendation. Counsel's failure to investigate, develop and present amply available statutory and nonstatutory mitigation was ineffective assistance. Mr. Thomas' death sentence, imposed over a unanimous recomnendation of life, was the prejudice.

In this context, the failure to provide any meaningful consideration to the numerous nonstatutory mitigating factors apparent from this record simply cannot be deemed harmless beyond a reasonable doubt. The errors assuredly had an effect on Mr. Thomas' sentence.[7]

The eighth amendment errors discussed herein and in *Mr.* Thomas' Initial Brief rendered Mr. Thomas' sentencing proceeding fundamentally unfair, see Riley v. Wainwright, 517 So. 2d 656, 657 (Fla. 1987), and deprived him of an individualized and reliable capital sentencing determination. Mr. Thomas is entitled to Rule 3.850 relief. See Morgan v. State, supra; Waterhouse v. State, supra.

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.

A. PENALTYPHASE

According to the State, trial counsel can be found ineffective regarding conduct at the penalty phase of trial only when counsel fails to present any evidence of mitigation (Response at 28, 30). The State's analysis flies in the face of this Court's precedents and of the United States Supreme Court's and the Eleventh Circuit's pronouncements. In two recent decisions, this Court affirmed the grant of and ordered resentencing based on the ineffective assistance of counsel at the penalty phase of capital proceedings. State v. Michael, 530 So. 2d 929 (Fla. 1988); Bassett v. State, No. 71,130 (Fla. Jan. 12, 1989). In Michael, evidence had been

7. The constitutional standard, however, places the burden upon the State to show beyond a reasonable doubt that the Hitchcock errors discussed herein had "no effect'' on Mr. Thomas' sentence. See Skipper v. South Carolina, 106 S.Ct. 1668 (1986); Cooper v. Dugger, 526 So. 2d 900 (Fla. 1988). The State has not even attempted to meet that burden here.

presented at the penalty phase of trial, see Michael v. State, 437 So. 2d 138, 141 (Fla. 1983), but this Court affirmed the circuit court's finding that trial counsel should have obtained the opinions of appointed mental health experts regarding the applicability of mitigating circumstances and that this omission prejudiced Mr. Michael. In Bassett, likewise, trial counsel had presented evidence of mitigation at trial (see Bassett v. State, No. 58,803, ROA 701-18), but this Court found that counsel's failure "to investigate and obtain critical background and educational information mandates relief in the penalty phase . . . ." Bassett, supra, slip op. at 1. Contrary to the State's unique argument, this Court, consistent with the sixth and eighth amendments, does not regard the fact that **some** evidence may have been presented at the penalty phase to be the stopping point in the analysis of an ineffective assistance of counsel claim. Similarly, the Eleventh Circuit does not subscribe to such a standard. See, e.g., King v. Strickland, 748 F.2d 1462, 1464 (11th Cir. 1984) (failure to present additional character witnesses resulted from failure to fully investigate).

This erroneous legal standard aside, the State goes on to argue that "[i]nvestigation had to have taken place" and that trial counsel "obviously" investigated Mr. Thomas' background (Response at 30) (emphasis added). In Mr. Thomas' case, however, counsel clearly stated on the record that he was unprepared for penalty phase and judge sentencing (see Initial Brief at 25-26, 41-43) (citing record).[8] In any event, questions regarding counsel's preparations and investigation -- and lack thereof -- can only be resolved after an evidentiary hearing. See O'Callaghan v. State, supra; Michael, supra. Such a hearing is necessary in this case: the files and records not only fail to conclusively show that Mr. Thomas is

8. The State apparently concedes trial counsel's lack of preparation for judge sentencing. See State's brief at 41-42.

entitled to no relief, see O'Callaghan, supra, but in fact support Mr. Thomas' claim (see Initial Brief at 25-26, 41-43 [discussing counsel's on-the-record statements that he was not prepared to conduct the penalty phase]).

Finally, the State argues that "factors in mitigation to support the life recommendation" were before the trial court and that the evidence proffered to the Rule 3.850 court is cumulative to evidence presented at trial (Response at 29).[9] While Mr. Thomas agrees that evidence of mitigation was before the jury and judge (see Claim 11, supra) and that this evidence provided a "reasonable basis" for the jury's unanimous life recommendation (see Claim V, infra), the evidence presented at trial cannot compare in quality, quantity, and persuasiveness to the evidence which counsel unreasonably failed to investigate and present. That evidence was proffered in Mr. Thomas' Rule 3.850 motion (see Initial Brief at 26-40).[10] Contrary to the State's assertion, the evidence proffered in Mr. Thomas' Rule 3.850 motion is

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9. As noted, the State here argues that "factors in mitigation to support the life recommendation" were present, while inconsistently also arguing that no Hitchcock error occurred because "there was no showing of nonstatutory mitigating circumstances which . . . should be reasonably found to exist." (Response at 23). The State cannot have it both ways. If mitigating factors were present and not considered, as Mr. Thomas has shown in Claim II of this and his Initial Brief, supra, Hitchcock relief is required. If mitigating factors were available but not presented due to trial counsel's failures, as Mr. Thomas has also shown, resentencing is required based on counsel's ineffectiveness. While the State's assertions are mutually exclusive, Mr. Thomas' arguments are not. See Magill v. Dugger, 824 F.2d 879, 883-895 (11th Cir. 1987) (granting resentencing on basis of Hitchcock error and because counsel ineffectively failed to develop and present significant additional available mitigating evidence).

10. Again, Mr. Thomas' contention is not that there was no reasonable basis for the jury's unanimous recommendation of life. (See Claim V, infra). To whatever extent reasonable people could not differ with regard to the conclusion that death was the appropriate sentence (reasonable people could have and did differ, as evidenced by his jury's unanimous recommendation of life), and an override was thus sustainable, this was because counsel unreasonably failed to investigate, develop, and present to the jury or judge the evidence and argument which would have flatly prohibited an override under the Tedder standard. (See Claim V, infra.) As discussed herein and in Mr. Thomas' Initial Brief, had counsel conducted a constitutionally sufficient investigation and presentation, there would have been absolutely no possibility of an override.

anything but cumulative to the evidence before the jury and judge. The quality of the evidence speaks for itself.

The jury heard from recent acquaintances of Mr. Thomas, from Mr. Thomas himself, and from jail personnel. The PSI before the judge contained innumerable unsubstantiated, false and readily rebuttable conclusions about Mr. Thomas by the preparer (see Claim **IV**, Initial Brief and infra), the written report of the evaluation by Dr. Arnold Zager which was based on Mr. Thomas' self-report (see Claim **VIII**, Initial Brief and infra) and the self-serving, unsympathetic comments of Mr. Thomas' father and step-mother -- the very parents who abused Mr. Thomas throughout his life.

In contrast, the evidence proffered in Mr. Thomas' Rule 3.850 motion came from family members who had observed Mr. Thomas throughout his life, who had been subjected to parental abuse and neglect similar to that suffered by Mr. Thomas, who had observed the abuse and neglect inflicted upon him, and who, most importantly, had observed the effects of that abuse and neglect upon Mr. Thomas' behavior and developnent. Further, Mr. Thomas proffered the report of Harold Smith, Ph.D., an eminently qualified clinical psychologist who had conducted a thorough evaluation of Mr. Thomas, including a review of extensive background materials and extensive psychological testing.[11] Here, the mitigation which should have been presented was powerful and compelling. Counsel, however, failed to investigate.

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11. Even Dr. Zager, the pretrial examiner, was not called to the st nd bec use defense counsel failed to call him ahead of time to schedule his testimony. Dr. Zager concluded that Mr. Thomas suffered from a "significant emotional duress" at the time of the offense and and that Mr. Thomas' ability to appreciate the criminality of his acts was impaired. Counsel, however, did not provide the doctor with the myriad background materials available regarding Mr. Thomas, never requested testing, and never even attempted to call the doctor until the night before the penalty phase commenced. This was the first time that he even spoke to the doctor. By that time it was much too late -- the doctor stated that he had other commitments, and counsel gave him no subpoena to produce his testimony at sentencing.

As discussed in detail in Mr. Thomas' Initial Brief, the proffered evidence would have explained to the jury and judge (and to this Court had the trial judge overridden the jury's life recomnendation), in a sympathetic, understanding, and thoroughly humanizing manner, where Ed Thomas came from and how he came to be in his current situation. Additionally, rather than having only Mr. Thomas' testimony to rely on, the jury and judge would have heard from Mr. Thomas' brother and sister regarding their father's brutality. The jury and judge would have heard from family members who had noticed Ed's intellectual, emotional, and psychological impairments throughout his life. Rather than hearing a mental health evaluation based on Mr. Thomas' self-report, the jury and judge should have heard the results of a thorough, proper evaluation. Dr. Smith who, unlike Dr. Zager, did review the extensive background materials regarding Mr. Thomas which counsel never obtained, cf. State v. Sireci, 13 F.L.W. 722 (Fla. 1988), concluded that substantial mitigation was reflected by that history. Dr. Smith also tested Mr, Thomas -- counsel requested no testing from Dr. Zager. The testing demonstrates that 93 percent of the population function at a higher level than Mr. Thomas (that, for example, Mr. Thomas cannot even recite the alphabet without error), that Mr. Thomas was raised in a "highly dysfunctional family," and that Mr. Thomas suffers from diffuse cerebral dysfunction. Dr. Zager was asked to assess none of this, and was not even spoken to until the night before the penalty phase. By then, it was much too late. See n.11, supra. Simply put, had counsel done his job, the trial judge and this Court would have known who Ed Thomas was, and why the override of the jury's unanimous life recommendation was absolutely improper. See Claim V, infra.

The State insists that because Mr. Thomas' jury recommended life, trial counsel cannot be found ineffective. If, however, as this Court determined on direct appeal, there was no "reasonable basis'' to support the jury's recomnendation, this argument is simply untenable. Trial counsel's objective at a Florida capital sentencing

proceeding is not merely to obtain a fortuitous life recommendation from the jury, but to obtain a life recomnendation supported by a "reasonable basis," which the trial court will not override or which this Court will sustain if the trial judge overrides. 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, as it was in this case, that is unreasonable attorney conduct, which, within the context of the Florida death penalty, is prejudicial. See Porter v. Wainwright, 805 F.2d 930, 936 (11th Cir. 1986); Douglas v. Wainwright, 714 F.2d 1532 (1983); Lusk v. Dugger, No. 88-22-Civ-J-12 (U.S.D.C., M.D. Fla., Jacksonville Div., Nov. 1, 1988) ("The fact that [defense counsel] secured a life recommendation from the advisory jury is insufficient, standing alone, to immunize him from allegations of ineffective assistance of counsel at the sentencing phase,").

Finally, Mr. Thomas would note that contrary to the State's assertions, this claim requires an evidentiary hearing for the resolution of questions regarding trial counsel's preparations and regarding the resulting prejudice. See, e.g., O'Callaghan, supra; Squires v. State, 573 So. 2d 138 (Fla. 1987). At such a hearing, Mr. Thomas will prove what he has pled, and what he has pled entitles him to relief. See Michael, supra.[12]

B. THE GUILT/INNOCENCE PHASE

Regarding this aspect of his claim, Mr. Thomas relies upon the argument presented in his Initial Brief, only noting that questions regarding trial counsel's strategy and the resulting prejudice to Mr. Thomas require an evidentiary hearing for their resolution. See O'Callaghan, supra; Squires, supra. At the required hearing, Mr. Thomas would conclusively demonstrate his entitlement to relief.

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12. As to other specific allegations regarding the ineffective assistance of counsel at the penalty phase, Mr. Thomas relies upon the presentation in his Initial Brief.

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 Appellee argues that, "as a matter of law, this Court is precluded from considering this claim" (Response at 38), and cites lengthy passages from this Court's opinion denying Mr. Thomas' petition for a writ of habeas corpus. (~~See id.~~, quoting Thomas v. Wainwright, 495 So. 2d 172, 173-74 (Fla. 1986)). As discussed below, this Court's opinion, as well as the Appellee's own arguments, flatly refutes this contention.

Whether or not it was the actions of the trial court or defense counsel which deprived Mr. Thomas of the opportunity to rebut the Pre-Sentence Investigation Report at issue here,[13] it is undeniably clear that Mr. Thomas himself was never provided such an opportunity. This Court held that there was "no showing that defense counsel at trial did not have an opportunity to review and challenge the report before sentencing." Thomas, supra, 495 So. 2d at 174. Whether or not trial counsel was afforded such opportunity (and Appellant contends that he was not, ~~see~~ n.13, supra), counsel in fact did not review and challenge it at that point, despite the fact that that report, as discussed at length in the Appellant's Initial Brief, was eminently challengeable. This was patently deficient performance.

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13. Mr. Thomas continues to maintain that the trial court gave trial counsel an inadequate opportunity to review and rebut the PSI at issue, in violation of Gardner v. Florida, 430 U.S. 349 (1977), see Thomas, 495 So. 2d at 176-77 (Barkett, J., dissenting), and in no way waives his constitutional claim under Gardner. Rather, Mr. Thomas here argues in the alternative that trial counsel's failure to object and/or to attempt to adequately review and rebut the PSI was prejudicially deficient attorney performance.

This Court expressly declined to rule on the question of trial counsel's ineffectiveness, appropriately, in addressing Mr. Thomas' petition for a writ of habeas corpus, and expressly held that the claim was not in any way barred or defaulted. See Thomas, 495 So. 2d at 174 ("the question of ineffectiveness of trial counsel, upon which we make no pronouncement here because it is not before us, could not have been raised on appeal."); see also id. at 176 (Barkett, J., dissenting) ("It is true that trial counsel (inexcusably, in my opinion)* failed to object to the lack of time for reviewing the report and failed to ask for a continuance to do so." [The footnote explained that "the question of ineffectiveness of trial counsel is not before us"]).

Of course, the question of trial counsel's ineffectiveness with regard to the PSI is properly before this Court: Rule 3.850 is the appropriate (and only) means by which claims of ineffective assistance of trial counsel can be raised. See, e.g., Meeks v. State, 382 So. 2d 673 (Fla. 1980); Groover v. State, 489 So. 2d 15 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Vaught v. State, 442 So. 2d 217 (Fla. 1983); Bertolotti v. State, 534 So. 2d 386 (Fla. 1988). There can thus be no question but that this claim is appropriately brought in the instant proceedings and is squarely before this Court on the merits. Contrary to the State's assertions, this Court indicated as much in its discussion of Mr. Thomas' petition for writ of habeas corpus.

As to the ineffectiveness aspect of the instant claim, the facts recited by the Appellee virtually concede deficient performance:

> On Monday, August 24, 1981, at approximately 1:35 P.M., the hearing on the Appellant's sentence commenced. The trial court stated that it had deferred imposition of sentence until it had received a presentence report. (R. 1361). The Court then inquired of defense counsel if there was any legal or other cause why sentence should not be pronounced. Defense counsel replied "None at this time, Your Honor." (R. 1362). The trial court asked defense counsel if he had seen the P.S.I. Counsel replied that he had not. The court stated that the P.S.I. had been made

> available to counsel on Friday, and it had been there all morning. (R. 1362). The court again asked if there was legal cause to show why sentence should not be imposed. The defense counsel then stated:
>
> > Your Honor, the legal cause that I have to oppose the sentencing at this time was articulated on Thursday afternoon at the motion for new trial, and I would hope to reassert those grounds and reemphasize them today incorporating into the record anything that I said on Thursday . . . .
> >
> > (R. 1362).
>
> Defense counsel then went on to argue to the trial court that it should follow the jury's recommendaticn of life. (R. 1363-1364). At no time did defense counsel further object to the court imposing sentence without his first having an opportunity to review the P.S.I.

(Response at 41-42) (emphasis added). This is precisely why counsel's performance was deficient in this regard: the trial court asked him if he had seen the PSI, counsel stated that he had not, yet made no attempt to nor made any objection to the proceeding. He should have: the PSI contained a great deal that was easily rebuttable, and had it been properly rebutted, as it should have, the trial court may very well not have overriden the jury.

The Appellant also contends, not surprisingly, that no prejudice can be demonstrated as a result of the trial court's consideration of the PSI. As Mr. Thomas discussed at great length in his Initial Brief, the PSI was rife with inaccurate, irrelevant, inadmissible and easily rebuttable information. Mr. Thomas proffered in and with his Rule 3.850 motion a plethora of evidence rebutting the informaticn contained in the PSI and thus supporting his allegations in this regard. Mr. Thomas' allegations in this regard demonstrate that he was indeed prejudiced by the PSI, and by trial counsel's failure to challenge and rebut the information contained therein. Mr. Thomas could have and would have conclusively proved his entitlement to relief had the Rule 3.850 trial court conducted the requisite evidentiary hearing. Because no such hearing was held, the record before this Court

is simply insufficient to fully and properly resolve this claim. See Thomas, supra, 495 So. 2d at 176 (Barkett, J., dissenting) ("Nor does the record support the majority's conclusion that the information provided in the PSI was 'merely cumulative' of that brought out during the sentencing phase of the trial. The PSI contained improper and incorrect 'information' not presented at sentencing. For example, in spite of the lack of any prior criminal record on the part of the defendant, the preparer of the PSI described him as a habitual offender. The jury -- which heard the evidence presented at sentencing but was not exposed to the error-ridden PSI -- unanimously recommended life imprisonment. The only evidence which the judge saw and the jury did not was the PSI."). Indeed, there exists a reasonable likelihood that the judge rejected the jury's verdict of life because of the PSI. Had trial counsel acted reasonably -- had he objected to the PSI and rebutted its false and unsubstantiated contents -- the results would have been different, for there is every reasonable likelihood that there would have been no override.

The ineffective assistance claim asserted herein is the type of post-conviction evidentiary claim traditionally requiring an evidentiary hearing for its proper resolution. See, e.g., O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Squires v. State, 513 So. 2d 139 (Fla. 1987). In O'Callaghan, supra, this Court recognized that a hearing was required because the facts necessary to the disposition of the ineffective assistance claim were not "of record." See also Vaught, 442 So. 2d at 219; Lemon v. State, 498 So. 2d 923 (Fla. 1986); cf. Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Arango v. State, 437 So. 2d 1099 (Fla. 1983). This is precisely the case here, and this Court should therefore remand for the required evidentiary hearing.

CLAIM V

THE JURY OVERRIDE3 WAS IMPROPER, AND STANDS IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

In Ferry v. State, 507 So. 2d 1373 (Fla. 1987), this Court held:

> [W]hen there is a reasonable basis in the record to support a jury's recommendation of life an override is improper . . . .
>
> 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 view a trial court's sentencing order with a presumption of correctness and, when the order is reasonable, 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 1373, 1376-77 (Fla. 1987) (emphasis added); see also Brown v. State, 13 F.L.W. 317 (May 12, 1988); Wasko v. State, 505 So. 2d 1314, 1318 (Fla. 1987); Brookings v. State, 495 So. 2d 135, 142-43 (Fla. 1986); Fead v. State, 512 So. 2d 176 (Fla. 1987); DuBoise v. State, 520 So. 2d 260 (Fla. 1988).

Just as in Ferry, the State here argues that because the trial judge, by the State's reckoning, "carefully consider[ed] and weigh[ed] all the evidence presented during the trial and sentencing procedure" (Response at 46-47), the override was proper. Just as in Ferry, "this is not the law." See Ferry, 507 So. 2d at 1377 (emphasis added). Just as in Ferry, here also "the jury's recommendation was reasanably based on valid mitigating factors," id. -- in fact, the trial court itself found the existence of two statutory mitigating factors. (See R. 1547; finding Mr. Thomas' age and his lack of a significant history of prior criminal activity as

statutory mitigation.) Moreover, as discussed at length in Mr. Thomas' Initial Brief, additional valid, nonstatutory, reasonable mitigation existed. Indeed, the Appellee concedes the presence of ample and reasonable mitigation present on the record of this case. (See, e.g., Response at 51, 68). Thus, irrespective of the trial court's own "weighing," the jury's unanimous recommendation was eminently reasonable, with a more than rational basis,[14] and the trial court's override was thus improper under the law.

Because a reascnable, rational basis existed for the jury's unanimous life recommendation, under the law of Florida, the override here was improper. As a final note, judicial knowledge of information in addition to what the jury knew does not ipso facto make an override proper. (Cf. Response at 51). The question is whether what the jury did was reasonable, not whether what the judge did was reasonable. Otherwise, there would be no need or function for a jury recommendation, which is clearly not the law. See Ferry, supra; see also 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). In any event, the judge in this case knew no more about the offense than the jury did, and much of the information contained in the PSI considered by the court but not by the jury was, as discussed in Claim IV, supra, inaccurate, false, and irrelevant to the sentencing decision. In Ferry, the same situation occurred -- the trial judge there, according to his sentencing order, based his decision at least in part cn a PSI which was not available to the jury. That did not, however, keep the jury's recommendation from being reasonable, or the judge's override from being improper. Simply put, under Florida law, when the jury is reasonable, and life is recommended, life is the result.

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14. As stated, the State's brief virtually concedes as much.

The jury override procedure in Florida is reasonable 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 v. Florida, 104 S. Ct. 314, 3166 (1984). Courts must monitor and apply the "significant safeguards" built into the jury override procedure. Id. If the jury override here, and the method by which it was sustained, can be upheld under Florida's well-established standards, 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." Id. To allow the override to stand in this case would be to approve a procedure directly contrary to this Court's time honored precedents, and a procedure which provides no meaningful basis to distinguish between those persons who are sentenced to life (when a judge does not override, or when an override is reversed) and those who receive death. Such a procedure, of course, would violate the eighth and fourteenth amendments. Mr. Thomas' sentence of death, imposed as the result of such a procedure, therefore stands in stark violation of the constitution. Mr. Thomas respectfully submits that this Court fundamentally erred in upholding this patently improper override on direct appeal, and urges that the Court now correct this error. See Kennedy v. Wainwright, 483 So. 2d 424, 426 (Fla. 1986) (In the case of "error that prejudicially denies fundamental constitutional rights" the Court will revisit a matter previously addressed on direct appeal).

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 LIE IMPRISONMENT, AND THE RULE 3.850 COURT ERRED IN DENYING AN EVIDENTIARY HEARING ON THIS ISSUE.

In his Initial Brief, Mr. Thomas discussed why he was denied his due process right to professionally adequate mental health assistance due to failures on the part of the court-appointed mental health expert and on the part of defense counsel. Without citation to any authority, the State argues that this claim should have been raised on direct appeal (Response at 62). However, as this Court has consistently held, claims regarding the professional adequacy or lack thereof of pretrial mental health evaluations are traditionally-recognized Rule 3.850 evidentiary claims, see Mason v. State, 489 So. 2d 734 (Fla. 1986); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); State v. Sireci, 13 F.L.W. 722 (Fla. 1988); cf. Groover v. State, 489 So. 2d 15 (Fla. 1986), as are claims regarding ineffective assistance of trial counsel. See O'Callaghan, supra; Squires, supra; Groover, supra.

The State characterizes this issue as a claim that "Dr. Smith's evaluation is better, and therefore Dr. Zager was incompetent." (Response at 63). This is a gross (and inaccurate) oversimplification of the issue. Mr. Thomas has claimed that mental health evidence relevant to both guilt/innocence and sentencing was available for his defense, had the mental health expert and trial counsel performed professionally, and that this evidence would have affected the outcome of the trial. Even on the basis of his limited evaluation, Dr. Zager would have had some such evidence to offer (see Initial Brief at 67), had trial counsel taken the simple steps of consulting with him and scheduling his appearance at trial in a timely manner. Likewise, had Dr. Zager

been provided the extensive background materials which were provided to Dr. Smith and ccnducted the necessary testing, additional, thoroughly documented, persuasive mental health evidence could have been presented at trial and sentencing (see Initial Brief at 38-41, 67).

The State concedes that mental health evaluations performed without the benefit of background informaticn are inadequate (Response at 69) and that trial counsel "did not personally provide for mental health evaluation" (id. at 67), but asserts nevertheless that Dr. Zager's evaluation was adequate and based an a review of Mr. Thomas' history. (Id. at 63.) What the State does not recognize, however, is that Dr. Zager's evaluation was based almost exclusively upon Mr. Thomas' self-report (as the State concedes, see Response at 65), a procedure recognized by courts and mental health professionals as inadequate. See Mason, 489 So. 2d at 736-37. Questions regarding the adequacy or lack thereof of Dr. Zager Is evaluation and whether a proper assessment of relevant background information was ever made in this case are questions which can cnly be resolved at an evidentiary hearing. Id.

Whether through the failures of defense counsel, of the appointed mental health expert, or cn the part of both professionals, Mr. Thomas was denied his due process right to professionally adequate mental health assistance. The right to expert mental health assistance is inextricably related to the right to the effective assistance of counsel. When counsel unreasonably fails to properly obtain competent mental health assistance, due process and the right to the effective assistance of counsel are violated. See Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). This is what occurred in Mr. Thomas' case. He is entitled to an evidentiary hearing and thereafter to Rule 3.850 relief.

REMAINING CLAIMS

As to Claims VI, VII and IX (Initial Brief at 60–61, 61–64, 69, respectively), Mr. Thomas relies upcn the argument presented in his Initial Brief.

CONCLUSION

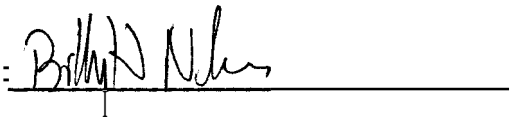
For all of the reasons presented herein and in Mr. Thomas' Initial Brief, he respectfully prays that the Court remand for an evidentiary hearing and vacate his unconstitutional capital conviction and sentence of death.

RESPECTFULLY SUBMITTED,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

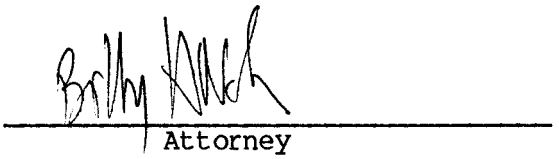
BILLY H. NOLAS
TIMOTHY D. SCHROEDER

OFFICE OF THE CAPITAL
COLLATERAL REPRESENTATIVE
1533 South Monroe Street
Tallahassee, FL 32301
(904) 487–4376

By: 

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the foregoing has been forwarded by United States Mail, first class, postage prepaid, to Deborah Guller, Assistant Attorney General, Department of Legal Affairs, 111 Georgia Avenue, Suite 204, West Palm Beach, FL 33401, this 22nd day of February, 1989.



Attorney