IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,935

NORMAN PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF THE
ELEVENTH JUDICIAL CIRCUIT, DADE COUNTY, FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Parker's Fla. R. Crim. P. 3.850 motion for post-conviction relief. This proceeding challenges both Mr. Parker's conviction and his death sentence. References in this brief are as follows: The trial and sentencing record, which is not consecutively paginated, is cited a5 "R. Vol. #, p. #," with the appropriate volume and page number indicated thereafter. The record on appeal in theae poat-conviction proceedings is cited as "PC-R. ___". All other references are self-explanatory or otherwise explained.

REQUEST FOX ORAL ARGUMENT

Mr. Parker was sentenced to death. This Court has consistently allowed oral argument to be conducted in capital cases. A full opportunity to air the issues in this case through oral argument would be an aid to the Court and the parties. Given the seriousness of the claims involved and the stakes at issue, Mr. Parker respectfully requests that the Court schedule oral argument in thie cause.

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STATEMENT OF THE CASE

Mr. Parker was indicted on murder and other offenses in Dade County, Florida (R. Vol. I, pp. 1-15a). He pled not guilty and was tried in September, 1981. On September 18, 1981, the jury found Mr. Parker guilty (R. Vol. II, pp. 397-403). On September 21, 1981, the jury recommended a death sentence (R. Vol. 24, p. 90). The court entered judgment of conviction on September 21, 1981 (R. Vol. 11, pp. 428-31), and sentenced Mr. Parker to death on November 18, 1981 (R. Vol. II, pp. 443-48).

Thie Court affirmed Mr. Parker's convictions and death sentence on direct appeal. Parker v. State, 456 So. 2d 436 (Fla. 1984). In 1988, Mr. Parker sought habeas corpus relief in this Court and the petition was denied. Parker v. Dugger, 537 So. 2d 969 (Fla. 1988). Mr. Parker also pursued Rule 3.850 relief in the circuit court and presented a number of issues in eupport of hie requests for an evidentiary hearing and Rule 3.850 relief. The trial court summarily denied most of the claims presented, ruling that the errors were insufficient to constitute fundamental error, and denied an evidentiary hearing as to many of the claims of ineffective assistance of counsel which Mr. Parker had presented, including Mr. Parker's claim of ineffective assistance of counsel at the guilt innocence phase. The trial court held a limited evidentiary hearing relating to counsel's ineffectiveness at sentencing for failing to develop mitigating evidence. Although, as related in thie brief, a wealth of evidence was presented by Mr. Parker at the hearing, the trial court thereafter denied relief.

Timely notice of appeal was filed. Mr. Parker's case is now before thie Court. The facts and legal analysis in support of the claims involved in this action are discussed in the body of this brief as they relate to the individual claims presented.

SUMMARY OF ARGUMENT

1. Mr. Parker was denied the effective assistance wf counsel at the penalty phase of trial. The presentations at the limited evidentiary hearing established that Mr. Parker's two defense attorneye each believed the other

was reaponeible for preparing for the penalty phase. As a result of this confueion, neither attorney investigated mitigation, important lay and expert witneeees were never contacted *or* interviewed, and the appointed mental health expert was never provided background information essential to a thorough evaluation. Had counsel investigated and prepared, they would have discovered substantial compelling mitigation regarding Mr. Parker's miserable and deprived childhood and hie serious alcohol and drug abuse problems. Had counsel consulted with the mental health expert and provided him with background materials, the expert would have told the jury that Mr. Parker suffers from brain damage and that two statutory mental health mitigating factors apply. This evidence undermines confidence in the outcome of Mr. Parker's penalty phase. The lower court erred in denying relief.

2. Mr. Parker was denied the effective assistance of counsel at the guilt phase of trial. Mr. Parker's Rule 3.850 motion pled the specific omissions of trial counsel and the prejudice resulting from those omissions. Although Mr. Parker's allegations indicate he is entitled to relief and although the files and records in this case do not conclusively refute those allegations, the lower court denied this claim without an svidentiary hearing. Such a hearing is required. Trial counsel unreasonably failed to litigate meritorious euppression issues and failed to properly investigate and preeent Mr. Parker's alibi defense. As a result, patently inadmissible evidence was introduced against Mr. Parker, and evidence establishing his defense was omitted. There is more than a reasonable probability that, but for counsel's errors, the result of Mr. Parker's trial would have been different. An evidentiary hearing and relief are proper.

3. Statements unconstitutionally obtained from Mr. Parker were erroneously admitted against him at trial. Before and during interrogation initiated by law enforcement, Mr. Parker requested the assistance of an attorney, but law enforcement officers ignored these requests and proceeded to elicit statements from Mr. Parker. These statements were thus obtained in violation of the right to counsel. Trial counsel's failure to properly and

timely litigate this issue was prejudicially deficient performance. Relief is proper.

4. The jury inetructions at the guilt phase provided no definition of felony murder or its elements. The jury was thus left to its own devices to discern the elements of the prosecution's primary theory. Mr. Parker was deprived of hie constitutional right to have all the elemente of the offense proved beyond a reasonable doubt, an error which cannot: be deemed harmless in a case where the deficient instruction involved the primary theory of proeecution and where the jury returned a general verdict. This is fundamental constitutional error, and trial counsel was prejudicially ineffective in failing to object to the court's instructions. An evidentiary hearing and relief are proper.

5. The trial court failed to provide jury instructions on lesser included offenses although Mr. Parker made no record waiver of such instructions. Such an error is fundamental and per se harmful. Trial counsel were prejudicially ineffective in failing to litigate this issue. An evidentiary hearing and relief are proper.

6. The jury instructions regarding and trial court's assessment of the "cold, calculated and premeditated" aggravating factor were deficient under Maynard v. Cartwriaht, and the application of this aggravator violated constitutional ex post facto protections.

7. The State's presentation of constitutionally impermissible information which was irrelevant to any aggravating circumstances denied Mr. Parker his right to an individualized, fundamentally fair, and reliable capital Sentencing decision.

8. Mr. Parker's death sentence rests upon an unconstitutional automatic aggravating circumstance.

9. The sentencing jury was misinformed and misled by the trial court's failure to instruct that his sentences on all offenses could be imposed consecutively and could be ordered to be served consecutively to his other prior convictions.

10. The trial court failed to assure Mr. Parker's presence during all portions of the capital proceedings, in violation of the fifth, sixth, eighth, and fourteenth amendments.

11. Mr. Parker's death sentence rests upon two prior unconstitutionally obtained convictions.

12. The trial court's failure to provide an instruction on circumstantial evidence violated the fifth, sixth, eighth, and fourteenth amendments.

13. The jury's sense of responsibility for its sentencing decision was improperly diminished under Caldwell v. Mississippi.

14. The jury was erroneously inatrueted that Mr. Parker bore the burden of proving a life sentence was warranted, and the trial court applied this unconstitutional standard in sentencing Mr. Parker to death.

15. The erroneous jury instruction that a verdict of life required a majority vote misled the jury and created the risk that death was imposed deepite factors calling for life.

16. The trial court's wrongful excusal of jurors for cause violated the fifth, sixth, eighth, and fourteenth amendments.

17. The trial court's failure to adequately, fairly, and fully consider mitigating evidence violated the eighth and fourteenth amendments.

ARGUMENT I

MR. PARKER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE BY TRIAL COUNSEL'S FAILURE TO INVESTIGATE, PREPARE, AND PRESENT SUBSTANTIAL AVAILABLE MITIGATING EVIDENCE, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

At the penalty phase of Mr. Parker's trial, defense counsel presented only on0 witness. As the circuit court noted in these post-conviction proceedings, "[t]here is no doubt that the mitigating evidence at trial was sparse. The defendant's only witness was Dorothea Parker, his stepmother, whoee main concern appeared to be that the jury would blame her €or her atepson'a deeds" (PC-R. 1453). Mr. Parker's Rule 3.850 motion alleged that substantial mitigating evidence was readily available at the time of his

penalty proceedings but was not preaented because of trial counsel's unreaeonable failures to investigate and prepare. The circuit court ordered an evidentiary hearing on this claim, recognizing that if Mr. Parker established hie allegatione, he would be entitled to relief. At the evidentiary hearing, Mr. Parker presented a wealth of evidence establishing hie entitlement to relief. The circuit court erroneously denied relief.

Defense counsel must discharge very significant constitutional responsibilities at the sentencing phaee 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 [made] by a jury of people who may have never made a eentencing decision." Greaq v. Georqia, 428 U.S. 153, 190 (1976)(plurality opinion). In Greaq and its companion cases, the Court emphasized the importance of focusing the jury's attention on "the particularized characteristice of the individual defendant." Id. at 206. See also Penrv v. Lynaugh, 109 S. Ct. 2934 (1989).

The state and federal courts have expressly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to investisate and prepare available mitigating evidence for the sentencer'e consideration, object to inadmissible evidence or improper jury instructions, and make an adequate closing argument. Baseett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tvler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Trial counsel here did not meet these rudimentary constitutional standards.

Mr. Parker's court-appointed counsel failed in their duty to investigate and prepare available mitigation. There was a wealth of significant mitigating evidence which was available and which should have been presented. However, counsel failed to adequately investigate, Mr. Parker was thus denied

an individualized and reliable capital sentencing decision. His sentence of death is the prejudice resulting from counsel's unreasonable omissions. See Harris v. Duuaer, 874 F.2d 756 (11th Cir. 1989).

A. DEFICIENT PERFORMANCE

Mr. Parker was represented by two attorneys at trial. During the evidentiary hearing held below, Mr. Roffino, the lead attorney, described the circumstances in which he assumed representation of Mr. Parker:

> Q. How did it come about that you became involved in Mr. Parker's case?
>
> A. Well, I was an Assistant Public Defender at the time. I had been an Assistant Public Defender since 1976, when I became a member of the Florida Bar. And I had for several years practiced in various trial courts within the building. I became a, what was known as a Senior Trial Attorney in 1980, late in 1979, early 1980/79, which merely meant that I had administrative responsibility in addition to my trial responsibilities.
>
> And I had during 1978 -- during 1979 and 1980, I had been involved in a number of first degree murder cases and other life felony offenses and other cases that the Public Defender's Office wished for me to become involved in, especially this. Included a couple of wire-tapping cases and things of that nature, which would require some work over and above what the Assistant Public Defender merits and the courtroom would be handling.
>
> In 1981, I became involved in Mr. Parker's case, primarily becauee the two attorneys who had been handling it, Mr. Mervis and Mr. Aaron had both left the office.
>
> I'm not sure when Mr. Aaron left the office, but prior to his leaving, he came to speak to me and indicated he had spoken to Mr. Brummer and they were considering me to pick up this case, Mr. Parker's case.
>
> Upon Mr. Aaron's leaving the office, I know that Mr. Parker [sic] and Mr. Aaron had put a great effort into this case and according to Mr. Aaron, he wanted to Bee to it that it would be followed up upon his leaving the office. And he indicated that they had discussed me as a possible attorney.
>
> And after Mr. Aaron left the office, there came a time, I'm not exactly sure when, when it was finally decided that I and Mr. Velayos would handle Mr. Parker'e trial when it came up. I believe it was in the summer of 1981 and at the beginning, from then until the trial, I had the responsibility for Mr. Parker's trial.
>
> Q. In terms of comparing Mr. Parker's caae to other capital cases, which you've been involved in, was there a difference in the terms of the way Mr. Parker's case was investigated, just from your personal prospective?
>
> A. Well, yea.
>
> From my personal prospective, this was not a caae I had taken from the beginning.
>
> Cases in the Public Defender's Office are generally atarted, very often started later on by trial attorneys who becomes [sic] involved in the case, but not often with regard to first degree murder cases. Obviously, there is a preference to begin with the

case from the very beginning.

In terms of my participation, the only major difference would be that I picked up a file that was -- had been on the brink of trial. Prior to the granting of the motion to suppress, and to that extent, it had been fully prepared for, €or the proceedings up until that point and I wae atarting with that as given.

I had relatively ehort period of time to prepare myself for trial in thie case because once work and depositions had been accomplished previously, moat of the work was done. And I would say that decisions on which way we were going with the case and where the energy of the office were [sic] going to be spent, many of those decisions had already been made. And so, in that sense, it was -- it was different.

Also, of course, I had to put my immediate energy into preparing for the trial, which was coming up rather -- rather quickly.

I could say that also a difference would be the order in which I did things, I know with the nature of the proceedings is and I think that the court should know that normally with a first degree murder case, I would start in reverse. I would start with the death penalty phase first and the factual basis second.

The only basis, it's somewhat more difficult to find and develop to find and develop [sic] evidence relating to background, then it is factual material, where you're dealing primarily with the discovery provided by the State and any investigation you can make coming of that. I would normally start with that first.

And second in the caae was a little bit different. And I had to get ready for the trial first and the death penalty phase next after I had that, had that under control.

* * *

Q. Would it be fair to say that in the context in which you inherited Mr. Parker's case, you were under limited time restraints?

A. No question about that.

Q. Did you have an opportunity, you, yourself, to develop along this type of evidence given that scenario, in which you inherited the case, so and so forth, in Mr. Parker's case?

A. I, myself, dealt with the case as I found it and took it from -- tried to take it from there. Of course, I reviewed what had been done and made some decisions as to where my energy was going to go. And that's, I think, just a matter of necessity and the circumstance.

* * *

I relied, to a certain extent, on the work that had been done up until that date.

(PC-R. 1558-1565).

Mr. Roffino also testified that virtually all time pretrial was apent on the guilt/innocence phase. Cf. State v. Lara, 16 F.L.W. 306 (Fla. May 9, 1991). This was true despite the fact that he knew there was a legitimate possibility that the case would end up in a penalty phase:

Q. Would it be fair to say that the primary focus priar to the trial was an the guilty/innocence phase?

A. To the extent of my energy, yes, sir.
It's obvious, in this type of case the goal is to save the man's life. So, to the extent that there was focus in the same was to save the case by the guilty/ innocence phase was extremely important [sic].

Q. In terms of pre-trial investigation, would it be fair to say that the majority of these efforts went into guilty/innocence type of investigation?

A. Are you talking about my own?

Q. Yes.

A. In terms of my own, yes.

(PC-R. 1562). Mr. Roffino testified that his co-counsel, Mr. Velayoa, was the lead attorney €or the penalty phase, and thus Mr. Velayos was primarily responsible for the preparation of that phaae:

Q. Do you recall. specific conversations with anybody during the penalty phaae, any of the folks who were there for the penalty phaee?

A. Me, personally?

Q. Right.

A. No.
As far as the presentation of the penalty phase, family members, any witnesses, any evidence, Mr. Velayos picked that up to take care of one hundred percent.

(PC-R. 1614-15). (See also R. 1571.)

Mr. Velayos, however, testified at the evidentiary hearing that he was not responsible for the penalty phase:

Q. In terms of the division of labor in the case, would it be fair to say that your responsibility was for the penalty phaae, while Mr. Roffino's was for the guilty or innocent?

A. No. I don't think so.
I think we kind of split the responsibility all along.
I remember, for example, taking and reading the entire file, and--which was quite voluminous, and I also remember participating in the taking of depositions.
I remember taking one in which Mr. wakaman [prosecutor] attended. I think we took it on a Saturday, or something like that.

Q. And --

THE COURT: I'm sorry; did you say -- did you say the decision was not that you were handling the penalty phase?

THE WITNESS: No.
I think we kind of both were working in it together, in the entire file, you know, because I remember that I did participate in the guilt or innocence phase of the trial.

THE COURT: okay.

THE WITNESS: I don't remember, you know, if I waa assigned, so to speak, to do the second phase, or anything like that.

(PC-R. 1797). Mr. Velayos testified further that the decision as to who was to assume responsibility for the penalty phase was not made until the trial had actually begun:

Q. You, in fact, did conduct the penalty phase?

A. Yes, I did.

Q. Could you tell us how that came about?

A. As best I can remember, we finished the guilt and innocence phase like on a Thursday or Friday. I think it wae a Thursday, and Raffino [sic] before that -- I think Mr. Raffino [sic] had -- we had decided that we -- Raffino [sic] was going to give the closing arguments of the guilt phase, and I think that was sometime during the trial.
I don't think we discussed at that particular time who waa going to give the closing arguments, but according to my recollection, it's not very good, but sometime *we* decided who was going to give the closing arguments in the guilty phase.
It wae then that we decided that I was going to conduct the -- that phase of the trial.

Q. So that decision was made after the guilty phase wae concluded?

A, Probably not. Probably at some point during the trial.

Q. During the trial?

A. Yea. But, it was during the trial. It wasn't decided befarehand.
I might be mistaken, but my best recollection is that it was during the trial. It's probably pretty close to the end, I think, because --

(PC-R. 1797-98).

The situation here is thus strikingly similar to that in Harrie v. Dugger, 874 F.2d 756 (11th Cir. 1989), where two attorneye were involved, each thinking the other was responsible for sentencing. Here, as in Harris, because of the confusion, preparation €or the capital sentencing proceeding8 fell through the cracks, and Mr. Parker was deprived of reasonably effective assistance of counsel.

Mr. Velayos testified at the hearing that "not much" of the pretrial preparation went into the penalty phase of Mr. Parker's case. "We were Concentrating on the first phase" (PC-R. 1811-12). He also explained that most of the work on the case had been done prior to his and Mr. Roffino's association with the case by previous counsel who withdrew after leaving the Public Defender's office (PC-R. 1801). However, he admitted that virtually no work had been done regarding the penalty phase by <u>any</u> of the attorneys:

> Q. Were you consulting with Mr. Raffino [sic] on a regular basis on this case?
>
> A. Yeah. We were talking.
> The file was physically in Mr. Raffino's office -- which is not my office, by the way -- until really, until the trial began to -- on the day trial began.
> I don't think we consulted regularly, but I was -- the file was real voluminous. We are talking about three or four boxes. I don't know how many.
> And, most of the depositions had been taken, and most of the investigation had been done by Mr. Aaron and Mr. Mervis and - I mean, the trip to Washington and the reports of the investigators in Washington, and things like that.
> There wae a lot of stuff to read, and most of the time I was reading the material in my office and without consulting Mr. Raffino [sic].
> I think we both were doing that independent of each other.
>
> Q. And thoee files had been developed by Mr. Aaron and Mr. Mervis?
>
> A. Yes.
> We took depositions on this case. I don't remember how many.
>
> Q. Right.
>
> A. But, for the most part the case was pretty prepared.
>
> Q. Did that file, for the most part, deal with the guilt and innocent phase?
>
> A. Yes.
>
> Q. Do you recall anything in the file regarding the penalty phase?
>
> A. No.
> I haven't seen the file in two or three years or so, so I don't remember what was in the file, but I mean, I don't remember -- well, I remember, far example, there was stuff about he was there with stuff -- I mean, there was stuff that we used at the penalty, as far as, for example, the letters from the Drug Rehabilitation.
>
> Q. And a report from the local work facility?

A. Yeah.
Apparently Mr. Parker has gone around schools and thinge, teaching kids about the danger of drug8 and things like that, and all that material wae there by the time that we *got* to trial.

Q. Who was it that got that information?

A. I don't remember. It might have been Mr. Raffino [sic] or it might have been Mr. Mervis. I didn't do it.

Q. Other than that, do you recall anything else in the file specifically in terms of mental health information?

A, Not at the point in which I got the file.
Now, there might have been some somewhere.
Along the line I learned that Mr. Parker had been examined by a Dr. Stillman. I don't remember when, and I don't remember how.

(PC-R. 1801-03). Because of this confusion about who was to handle the penalty phase, virtually no investigation was done, and counsel were unprepared to praeent evidence to the jury. Neither Mr. Roffino nor Mr. Velayos could remember talking to family members, who they had talked to, or what they had discussed. Both testified that they did not go looking for family members to talk to. Mr. Roffino testified:

Q. Do you recall going out to Opa-locka or Liberty City looking for folks?

A. I can tell you for sure, I did not go to Opa-locka or Liberty City. *I* don't know who did or whether we had someone do it or not.

(PC-R. 1613). Mr. Velayos testified:

Q. You talked to Mr. Parker's family before the trial?

A. I remember talking to either one or two persons.
One of the ladies I think had a green jacket on. That is all I remember.

Q. Did you ever go to Opa-Locka or Liberty City and look for witnesses?

A. Never.

Q. Did you ever go out and look for members of Mr. Parker's family, anything along those lines?

A. I personally did not.

Q. Some of Mr. Parker's family members were in court. Do you recall that?

A. Yes.

Q. Did you talk to them while they were in the courtroom?

I know we were in the middle of the trial and all, but --

A. I think, yee.
I think I talked to someone. I think I did.

* * *

Q. You indicated you spoke to two family members?

A. Yes.

Q. Do you remember if they were in the courtroom when you talked to them?

A. No. It was during the break.
I think I talked to them in the courtroom.
I either talked to them in my office or outside the courtroom.

Q. Was it during the proceedings or during a break or --

A. It was during the proceedings time.

Q. During the trial proceedings?

A. Yeah.
It might have been after the weekend, between the guilt and innocence phase. I don't remember that.

Q. Do you remember how it was that they came to the courtroom?

A. I have no idea.

(PC-R. 1813-1816). During cross-examination, Mr. Velayos testified that he did not remember talking to family members:

Q. Did you form the opinion that his family didn't like him?

A. Frankly, I didn't really know who -- I don't remember having that opinion.
Again, my recollection as to the issue that I didn't talk to members of his family, the reason that I didn't talk to them, I can't tell you. I don't know right now.
I cannot tell you what efforts we made to contact the family. ...

(PC-R. 1830).

At the penalty phase of Mr. Parker's trial, the defense called Doretha Parker, Mr. Parker's step-mother, as the sole live witness (R. Vol. 24, pp. 32 et seq.). The defense attorneys did not talk to Mrs. Parker about her testimony. In fact, she was not even told to come to court by defense couneel -- she had gone there of her own accord, Mr. Velayos testified:

Q. The allegations in the motion, sir --

Mr. Velayos, the allegations in the motion that talks about Hr. Parker and the lady who teetified; in fact, she was not even told to come to court by the defense counsel, she had gone there on her own accord.

Do you know whether or not you notified family people to come in?

A. I didn't.

(PC-R. 1840). Similarly, Mr. Roffino testified:

Q. I'd like to ask you some questions and ask you why you did not do some of the things that have been alleged.

Okay.

There is an allegation you did not talk to Mrs. Parker about her testimony, you or Mr. Velayoe chose not to have her not testify as hi0 step-mother of the penalty phase?

A. Yes.

Q. Did you not talk to her?

A. No, I can't say that I did not talk to her.

Keep in mind, Mr. Waksman, I think I've indicated this to you and other counsel, as well, as long as it's been for this time, can't say specifically what I did with specific individuals. I do remember some discuseions with Mrs. Parker, but primarily in terms of preparation €or her testimony at the death penalty phase had to be Mr. Velayos, not me.

(PC-R. 1570-71).

Without any understanding of the purpose or value of her testimony, Mrs. Parker was called to the witness stand. Consequently, important mitigating evidence which she (and other witnesses) could have established was never elicited. Mr. Velayos testified that any discussion with Ms. Parker would have been done by Mr. Roffino. Mr. Roffino testified, "I do remember some discussions with Mrs. Parker, but primarily in terms of preparation €or her testimony at the death penalty phase had to be Mr. Velayos, not me" (PC-R. 1571).

The fiasco regarding Mrs. Parker's testimony is but one example of the failings of counsel. Numerous other members of Mr. Parker's family were never contacted by defense counsel. Several family members testified at the evidentiary hearing. They all said that they were not contacted by defense counsel, but that they would have been more than willing to testify if they had been contacted (PC-R. 1725, 1754-55, 1776, 1874, 1892). They also would have been willing and able to put defense counsel in contact with still other

family and friends (PC-R. 1777, 1892). But defense counsel failed to inveatigata, and so failed to develop the important mitigating evidence that family membera would have provided. They also failed to provide this information to a mental health expert.

The original record itself indicates that Mr. Parker's attorneys were wholly unprepared to conduct the penalty trial:

> **THE COURT:** Okay, are you ready to proceed?
>
> MR. VELAYOS [Defense Counsel]: We don't have the witnesses here. I believe we don't have any other witnesses. We're prepared to rest.
>
> THE COURT: Okay.

(R. Vol. 24, p. 45).

> MR. VELAYOS [to the Court]: As to mitigating circumstances, I believe that none of the statutory mitigating circumstances apply.

(R. Vol. 24, p. 51).

> MR. VELAYOS [to the Court]: I really have not prepared a closing argument. I really don't know. I won't be talking too much.

(R. Vol. 24, pp. *55-56).*

After the jury verdict of death, an additional sentencing proceeding was held before the court. The state presented further evidence. Mr. Parker'a attorneya were just as unprepared as they had been before the jury:

> THE COURT: . . . Is there anything else you would like to point out4
>
> MR. VELAYOS: We have no witnesses.
>
> THE COURT: Is there anything you would like to point out in the pre-eentence report?
>
> MR. VELAYOS: No.
>
> THE COURT: Is there any legal reason why sentence cannot be imposed at this time?
>
> MR. VELAYOS: No.

(R. Vol. 25, p. *8).*

> THE COURT: Would the defendant step forward with his attorney, please. Do the attorneys wish to say anything an behalf of the defendant?
>
> MR. ROFFINO [Defense Counsel]: I believe Mr. Velayos and I are in agreement, there is nothing we can say to the Court to sway the

Court one way or the other in the decision.

(R. Vol. 25, p. 12).

In aum, Mr. Parker received virtually no representation at sentencing. The jury recommended, and the Court imposed, a sentence of death. Important and needed mitigating evidence was available. It would have made a difference. Counsel's failures undermine confidence in the result.

Defenee counsel were equally inadequate with their handling of the area of mental health at the penalty phaee. Prior to trial, and before the attorneys who represented Mr. Parker at trial became involved in the case, Mr. Parker was examined by a psychiatrist. In his report, the psychiatrist explained that Mr. Parker's:

> [A]pparent lack of awareness of what took place back in 1978, indicates the poeeibility that he was in an altered state of consciousness, because of drug abuse, mainly cocaine...
>
> In view of the poaeibility that he was seriously intoxicated and functioning in a toxic state, due to drug and alcohol problems, which he is reported to have had, it may well indeed be that he was not sane and competent at the alleged time of the alleged offense, because of massive drug misuse and a severely toxic condition. If, indeed, it can be demonstrated that he waa in such a state, then we are dealing with a person who may have been temporarily insane, not knowing right from wrong nor the nature or consequences of his behavior, because of his severe intoxication, and acting in a disinhibited [sic] uncontrolled fashion. However, reports presented up to this point, do not make much mention of hie being in a severely intoxicated toxic state, although it is suggested by materiale presented.

(Letter of Dr. Arthur T. Stillman, dated September 15, 1981)(PC-R. 267-70).

Norman Parker has a history of drug and alcohol abuse, His substance abuse began during his military service in Korea, and continued up until the time of the Offense. The doctor's concerns were well-founded. Yet, the attorneys failed to provide the doctor with the available evidence regarding their client's background -- as they would later fail to provide the jury with such evidence -- and even failed to talk to the doctor.

Dr. Stillman further discussed Mr. Parker's poor childhood and "disadvantaged life" in his report, but no mental health evidence was developed. The doctor'e concerns were well-founded: poverty made Mr. Parker's upbringing dismal. Dr. Stillman had quite a bit to tell the jury that would

have influenced their sentencing recommendation. But due to counsel's ineffective handling of the penalty phase, and their failure to interview family members, no such evidence waa presented.

Mr. Mervis and Mr. Aaron, the defense attorneys who investigated Mr. Parker's case prior to their departure from the Public Defender's Office, contacted Dr. Stillman and asked that he examine Mr. Parker. When defense attorneys Roffino and Velayos took over the ease, they ignored Dr. Stillman, the mental health information that he had developed, and all mental health questions. As they testified, the penalty phase fell through the cracks. An intern for Mr. Velayos contacted Dr. Stillman and requested a report, which arrived during the guilt phase of the trial in letter form. This letter noted preliminary findinge, and flagged additional information that Dr. Stillman needed to complete his evaluation (PC-R. 1639). Neither Mr. Velayos nor Mr. Roffino talked to Dr. Stillman about his evaluation, they did not discuss any possible mitigation circumstances with Dr. Stillman, and they provided him with no information -- despite the fact that his report cried out for further information (information which was readily available). Dr. Stillman testified at the evidentiary hearing that no one, not the former attorneys, not Mr. Roffino nor Mr. Velayos, ever provided additional material to him, but that ha would have had quite a bit to aay about Mr. Parker if he had bean asked, including the fact that Mr. Parker suffers from brain damage (PC-R. 1661).

Mr. Roffino testified at the evidentiary hearing that he did not recall any conversation8 he might have had with Dr. Stillman, but he did remember that he did not provide the additional information requested in Dr. Stillman's report:

> Q. Now, Dr. Stillman had, in fact, been retained by Mr. Mervis and Mr. Aaron? Would that be a fair understanding?
>
> A. That was my understanding, yes.
>
> Q. In terms of the information that Dr. Stillman requested in that report; did you provide that information to him?
>
> A. Not to my knowledge.
>
> Q. Would there be a tactical or strategic reason for not following up on Dr. Stillman's suggestion that this type of

information --

* * *

THE COURT: Okay.
Mr. Nolas, I'm not sure which of the information you're talking about, but it has to go to the drug abuse problem?

MR. NOLAS: Yes, that.

THE WITNESS: As to the drug abuse problem, I have no recollection of providing additional information to Dr. Stillman from that which had been provided by Mr. Aaron and Mr. Mervis.

(PC-R. 1567-68).

Q. You indicated you don't recall any specific conversation with Dr. Stillman. Do you recall providing him with any records, military, school, affidavits, anything?

A. No. I'm pretty sure that I did not provide anything specifically to Dr. Stillman in terms of records after I became involved in the case.
My only concern about, you know, how much I -- if I discussed the case with him, has to do with my general knowledge of what -- where he was coming from in the case. And I just can't distinguish what I learned from Mr. Aaron versus what 1 may have learned from Dr. Stillman and that's why I just can't recall specific conversations with him.

(PC-R. 1609-19).

Mr. Roffino was then aeked if there were any etrategic or tactical reason for not supplying requested information to Dr. Stillman, to which he replied:

A. I wouldn't know of any reason why you wouldn't want to tell the doctor everything he needed to know, no.

(PC-R. 1568). Mr. Roffino could not recall whether or not he even talked to Dr. Stillman, or whether he relied solely on a discussion with the previous public defenders.

Q. You indicated that the negative aspect of Dr. Stillman's report, at the time, out-weighed the positive aspect as I recall it?

A. It was my understanding, yee.

Q. Can you tell me whether that understanding was based on first-hand discussions with Dr. Stillman?

A. I can't say for sure, because I don't remember whether or not I discussed this directly with Dr. Stillman.
I believe it was based on the discussion with his previoue attorney, most likely Mr. Aaron.

(PC-R. 1607-08). Dr. Stillman's report, of course, was not provided to

counsel until after Mr. Aaron and Mr. Mervis had removed themselvea from the case. Thus, the prior attorney would have had little to say about Dr. Stillman; Dr. Stillman had not then completed an evaluation and had not yet prepared any report. Mr. Velayos, who was, according to Mr. Roffino, supposed to be in charge of the penalty phase, explained at the evidentiary hearing that they did not receive Dr. Stillman's report until the guilt phase of the trial had begun:

> A. ... Along the line I learned that Mr. Parker had been examined by a Dr. Stillman. I don't remember when, and I don't remember how.
>
> Q. Let me show you a document that has been marked in theae proceedings.
> Mr. Velayos, let me show you a document that's been submitted as Defense Exhibit 1 and ask you if you can identify that for us, please (indicating)?
>
> A. Yes, I have seen this before several times, once yesterday and once in my office.
> I remember reading this in my office a long time ago.
>
> Q. And that is a letter from Dr. Stillman?
>
> A. It is a letter from Dr. Stillman ...
>
> Q. Did you, in fact, receive that correspondence at some point prior to Mr. Parker's trial?
>
> * * *
>
> Q. So, that was received right around the trial?
>
> A. During the trial.

(PC-R. 1804-05). Mr. Velayos had absolutely no contact with Dr. stillman:

> Q. Do you recall talking to Dr. Stillman?
>
> A. No. I don't think so.
>
> Q. When you received that letter you indicate you, in fact, read it?
>
> A. Yes.
>
> Q. Did you do anything else?
>
> A. I decided not to call Dr. stillman.
>
> Q. Did you do anything else in terms of actually doing something in termr of after you read that letter?
>
> A. No.
>
> Q. Do you recall contacting Dr. Stillman, asking him to

clarify what he was talking about, anything along those lines?

A. NO.
I had no contact with Dr. Stillman. I am fairly certain about that.

Q. After you read that letter?

A. Let me aay something. You're talking about, you know --

Q. I know.

A. -- eight years ago, and --

THE COURT: Just to the best of your recollection.

THE WITNESS: To the best of my recollection I don't think I contacted Dr. Stillman at all.
Apparently the contact with Dr. Stillman waa made by my intern who probably called Dr. Stillman and said, look, sand me a letter. That is why the letter was addressed to him.
I don't remember talking to him at all.

BY MR. NOLAS:
Q. Did you talk to Mr. Aaron or Mr. Mervis after you received the letter from Dr. Stillman?

A. No.

Q. Do you recall why Mr. Mervis and Mr. Aaron wanted Dr. Stillman to see Mr. Parker?

A. I want to tell you that I don't recall talking to Mervis or Aaron at all about this case.

Q. About this case?

A. That is correct.
I think any contact was handled by Mr. Raffino [sic].
We might talk in general ways like, how's it going and things like that but, I mean, specifically, I don't remember talking to anyone at all.

Q. But, you didn't talk to them specifically about the letter?

A. No. Definitely not.

(PC-R. 1807-09).

Mr. Velayos testified that after reading the letter from Dr. Stillman, he did not pureue mental health information further, and did not talk to Mr. Parker's family with regard to gathering information to provide to Dr. Stillman or any other mental health professional, and did not provide Dr. Stillman with any further information of any kind:

Q. Did you ever ask either of those individuals, anyone in Mr.

Parker's family, for any information to provide to Dr. Stillman?

A. No.

Q. And you already indicated you didn't provide Dr. Stillman with any records or anything along those lines?

A. That, I don't -- I don't know whether we provided him with some records or not. I don't know.

Q. Do you recall ever providing him with school records?

A. I don't -- I don't remember now, but, you know, I didn't request Dr. Stillman to see Mr. Parker.

I became aware sometime during the proceedings or during the presentation of the case, in fact, Dr. Stillman had seen Mr. Parker, so I don't know what Mervis provided Dr. Stillman.

I don't think Raffino [sic] provided anything to him, because I think I was -- I think --

Dr. Stillman -- Dr. Stillman saw Mr. Parker during the time that Mr. Aaron and Mr. Mervis were representing Mr. Parker, so I really don't know what information they gave to him.

(PC-R. 1816-17).

Both Mr. Velayos and Mr. Roffino testified that if they had had evidence of mental health mitigating circumstances in Mr. Parker's case they would have used it (PC-R. 1846; 1569); yet neither of them pursued the requests for information contained in Dr. Stillman's report. Indeed, neither of them talked to Dr. Stillman about his evaluation of Mr. Parker, and they did not receive a report from him until the guilt phase had already begun.

When Dr. Stillman testified at the evidentiary hearing, he verified that he was provided with virtually no information about Norman Parker. The only information he received was from Mr. Mervis and Mr. Aaron. They sent him two prison psychological reports about Mr. Parker and the indictment:

Q. Now, based on -- was any other information provided to you at the time?

A. No, nothing written that I know of.

Q. Those two prison evaluations?

A. Yes.

Q. The indictment and your examination?

A. My examination.

Q. Of Mr. Parker?

A. Yes.

(PC-R. 1637-8). Dr. Stillman was not even aware that Mr. Velayos and Mr. Roffino were ever involved with Mr. Parker's case. And he never received any further information from them, or from anyone, even after he sent out his report:

> Q. (By Mr. Nolaa): ... After you sent that letter out there, did any of Mr. Parker'e lawyers contact you?
>
> A. No, not that I recall.
>
> Q. Did anybody provide you any information regarding Mr. Parker after you sent that letter out?
>
> A. After, no.
>
> Q. After you received that initial letter with those two reporte from Mr. Mervis and Mr. Aaron, and also indicated the indictment, was there anything else at all regarding Mr. Parker given to you?
>
> A. No.

(PC-R. 1662-3).

The testimony at the evidentiary hearing clearly established that trial counsel's performance waa deficient. The attorneys inherited Mr. Parker's case at the last minute, with little time to prepare for trial, and thus focueed their attention on the guilt/innocence phase. Each attorney thought the other was responsible for preparing the penalty phase. No decision waa made as to which attorney would conduct the penalty phaee until the midet of trial. Neither attorney talked to Mr. Parker's family members; neither attorney talked to Dr. Stillman. There was simply no investigation or preparation for the penalty phase. This is deficient performance, which, as discussed below, substantially prejudiced Mr. Parker.

B. PREJUDICE

The teetimony and evidence presented in the trial court also established that trial counsel's failures prejudiced Mr. Parker. The evidence established numerous significant mitigating factors, both statutory and nonstatutory, and certainly undermines confidence in the outcome of Mr. Parker's penalty proceedings.

Members of Mr. Parker's family testified at the evidentiary hearing regarding his deprived and miserable childhood, the head injuries he suffered

as a child and his serious drug and alcohol abuse problems. James Parker, Jr., Mr. Parker'e cousin (PC-R. 1715), testified that Norman wae not raised by hi0 own parents because Norman's own father spent little time with him (PC-R. 1720), and hie mother had a drinking problem (PC-R. 1712). After Norman came back from being in the Army, he was "disappointed" with the way he had been treated (PC-R. 1722). Norman began using heroin and barbiturates (PC-R. 1723), which changed him into being a person "under pressure" (PC-R. 1724). When Norman used drugs, he waa "confused" and "[f]rustrated" (PC-R. 1735), and was "like a Dr. Jeckell/Mr. Hyde" (PC-R. 1736). Norman, however, had concerns for his younger brother. He would warn James not to use drugs because they would "destroy life just like his" (Id.). Norman was using drugs until he left for Washington, D.C., in 1978 (PC-R. 1725).

Doris Rozier, another cousin (PC-R. 1741), testified she had known Norman since childhood and that she and Norman were raised together by their grandmother (PC-R. 1744). Ms. Rozier described two serious accidents Norman had as a child. Once, when Norman was about two, some adults were throwing him up in the air and dropped him. Norman "went unconscious" (PC-R. 1744). When Norman was 12 or 13, a train hit him while he was riding his bicycle (Id.). After that accident, Norman was "[d]efinitely" different: "The guy kind of acted weird-like, and all of a sudden, sometimes he'll be okay and sometimes he just was like spaced out, you know. We all assumed it was from the accident from the train" (PC-R. 1745).

Ms. Rozier also testified regarding how Norman's parents neglected him:

Q Do you know Norman's parents?

A Yea, I did.

Q What was his mother like?

A Well, I hate to say it in front of him, but I guess I have to. She was a little heavy on the sauce, you know, like to drink to liquor and everything. And she would get kind of intoxicated a lot. She stayed intoxicated most of the time. Hardly ever she -- sometimes she was kind of sober, but she used to like to hit the bottle a lot. She always hit the bottle all the time.

Q Did she -- go ahead.

A And my uncle [Norman's father] -- well, he a was pretty boy and he was a womanizer, and he loved to dress well. As a matter of fact, he dreseed well all the time. I never saw him dirty. His hands and his nails and everything wae clean. And he just liked the women, liked to go out and have gun [sic] with women.

So he never took up time with Norman. He come by to my grandmother'e house and see him, something like that, hit him a couple of times and my grandmother tell him he did something. He would etrike him, you know, and that was it. And then he would leave.

Q Did either of his parents, Norman's parents raise Norman?

A My grandmother did.

Q And neither of them spent much time with him?

A No. Definitely, they didn't.

(PC-R. 1746-47).

Ms. Rozier also described Norman's drug use and how it affected him:

Q Do you know if Norman ever used drugs or alcohol?

A Yes. And he drank.

Q How do you know that he drank?

A Well, I smelt it on his breath sometimes when we used to talk.

As far as the drugs now, he did use drugs.

Q How do you know that?

A Because I saw the tracks on his arms. One night we were out at a night club, when I touched his arm, he said, "OW," because -- and his arm was swollen. Needle marks was in there. I don't know whether he was main-lining. Like I said, I don't know whether he was main-lining or skin-popping, but I assume he was ehooting up because there was marks and the arm was swollen that big (indicating).

Q Do you know what kind of drugs he was using?

A During that time, mostly was shooting up heroin.

. . . .

Q Did he seem to act differently when he was using drugs?

A Oh, sure.

Q How did he act?

A well, he was -- How could I say it? He was -- he just -- he wasn't Norman. He was a totally different person. He had a

different conversation. The conversation, he would start on something and go to something else and go to something else. He never finished something out like a conversation. He would always jump to something, another topic or something like that. And then again, when I saw him again, I guess after the drug wore off and he was okay, he sit down and we could talk and just hold a convereation. He would always jump to something, another topic or something like that. And then again, when I saw him again, I guess after the drug wore off and he was okay, he sit down and we could talk and just hold a conversation. But when he was on the drugs, you knew he was on the drugs. His eyes, you know, was glary and everything and just -- Conversation just wasn't right. The conversation wasn't right. The conversation was just a little dense, you know, little -- he just couldn't finish nothing out when he started. And just -- I'm just -- he just would say he's sick and tired of everything, and he felt one time -- I felt like he was going to commit suicide, really. I didn't say this to you all, but he gave me that impression because he said he was just tired of living, he just wanted to die. I don't know.

(PC-R. 1747-49).

Norman was also strongly affected by hie military service.

> And when he went in the army and came out of the army, he just eeemed different. Be wasn't the same person anymore. He was totally different then. His moods had changed, He didn't hardly talk much. Didn't talk too much to the family. He etayed to himself for awhile, and then he would come around. He just always would hold hie head down in his hands all the time. I never know why. I would ask him. He just nod his head and say there is nothing wrong, cuz, and nod hie head and eomething like that.

(PC-R. 1751).

Patricia Ann Hacker, also a cousin (PC-R. 1770), testified that she had known Norman all her life and had known him well since 1965 (Id.). Norman was raised by hie grandmother and uncle, and loved his family very much (PC-R. 1770-71). Norman used to talk to the kids in the neighborhood about the importance of going to school and staying away from drugs (PC-R. 1771).

Jacquelyn Parker, Norman's sister (PC-R. 1861), testified that she and her two sisters were raised in Liberty City by their grandmother, while Norman was raised in Opa-Locka by his grandmother (PC-R. 1862). Their mother did not raise the children because "she had a problem drinking" (Id.). The children saw their father "very seldom" (PC-R. 1863).

Inell Parker, also a cousin (PC-R. 1882), testified that Norman's mother drank a lot when Norman was growing up (PC-R. 1883-84). Norman was raised by hie grandmother and uncle (PC-R. 1884). Inell Parker left the area, and when she came back in 1965, Norman was just getting out of the military to get a

job (PC-R. 1884-85). In the eubsequent years, Norman hung around with people in the neighborhood who were known to use drugs (PC-R. 1885-87).

In addition to the family membere' testimony presented at the evidentiary hearing, numerous affidavits of family members and friends were presented which also described Mr. Parker's abysmal childhood and hie drug addiction (PC-R. 278-330). None of this information made its way to Mr. Parker's sentencing jury or judge because defense couneel failed to look for it. This history establishes valid mitigation, It also should have been provided to a mental health expert.

Dr. Stillman's initial impression of Mr. Parker, after evaluating him, included significant mitigating information which a capital sentencing jury should be allowed to consider:

> A. I had the impression that Mr. Parker was an addicted person who had misused substances, and that the substances had been related to what one might refer to anti-social acte that invariably eomehow that was a connection between substance abuse and things that he got involved with. Even if there was just a couple of beers, that would be enough for certain people to set them off. It just seems some there was eomething wrong with the way he preaented material, its fragmented nature, its disconnection. There just seemed to be something wrong.
>
> As I said, I could not delineate exactly, because that comes out of experience. From the experience, I know that there was something wrong with this man, that one had to look into hie drug and alcohol abuse, because it might lead us to other conclusions, which would be important.
>
> Back in '81, we were seeing then the beginnings of the cocaine holocauet in Miami, and I was already familiar with other substancae. And ae it turns out, Mr. Parker didn't always report things too well for various reasons, which I can go into later. And that tended to play down things, even though he was arrested €or drunkennese and so on, all apparently part of the record.
>
> So it just became evident in my examination of him, which took, I believe, longer because of the length of this report and the density of it. I know that I took a lot of time with him, and it just seemed to me there was more to this case that met the eye.
>
> And I was trying to flag the idea that there should be more investigation into his condition with regard *to* drug and alcohol abuse and possible therefore leading to other findings which eventually became evident with error,

(PC-R. 1638-39). If Mr. Roffino and Mr. Velayos had followed up on the requests for information flagged in the letter from Dr. Stillman, they would have uncovered vital mitigating information.

Concerning the reference to anti-eocial personality in hie letter, Dr.

Stillman explained at the evidentiary hearing:

> Q. Now, at the time, did you make a finding that Mr. Parker suffered from an anti-social personality disorder?
>
> A. No.
> I aaid he veered or leaned in that direction, but almoet everybody who is into the drug and alcohol scene leans in that direction. If they didn't when they started, they do when they're along the way. The alcohol and drug scene is an anti-social scene to begin with. And if you get into that, once you're kind of hooked, as they say. So part of it is an anti-social kind of activity.
>
> Q. Just anti-aocial behavior?
>
> A. Yeah.
> I felt he had a personality disorder, but it wasn't specifically anti-social personality. I thought he had some difficulties in other areas, including the fact he was probably quite depressed, and that he had a lot of anxiety areas which was [al]luded to b[y] Dr. Herr, which I think had to do with his whole role as a man and identity and *so* on.

(PC-R. 1639-40). Dr. Stillman explained that he requested additional information in two or three different ways in his report because of "the way Mr. Parker conducted himself, his fragmentation of thinking" during the examination; "[t]here was a scattering of material that didn't follow exactly. It's called fragmentation. There was some fragmentation of thoughts and ideas. I couldn't quite grasp the continuity one would expect with that intellectual ability" (PC-R. 1641).

Dr. Stillman also had the impression from his initial evaluation that Mr. Parker suffered from brain damage (PC-R. 1645). This was another reason why he requested additional information:

> Q. (By Mr. Nolas): Why did you specifically request information involving a history of substance abuse?
>
> A. Well, it's a lengthy history of substance abuse and invariably with the lengthy history of eubetanco abuse and the kind of impulsive behavior that came out a number of arreet and so on, and alcohol abuse, which he was arrested for, it just seemed to me that there may well be some organic brain syndrome which is hidden. And if it was in the frontal lobe, you wouldn't pick it up with intelligence, and you wouldn't pick it up just with the general examination. It will just have subtle things that are involved that should be looked into.

(PC-R. 1642-43).

Dr. Stillman was not provided with the information he requested until post-conviction proceedings were initiated. The history that was provided

(also introduced at the hearing) included sworn statements from family members that Mr. Parker was thrown in the air as an infant and dropped on hie head, resulting in profuse bleeding and unconsciousness (PC-R. 1644). At a later date, Mr. Parker was hit by a train and again rendered unconscious (PC-R. 1644). His school records demonetrate "a declining record of CDF, and gradual withdrawal from school in the tenth grade. He didn't like echool. I guess he didn't like school, because he didn't do well in school'' (Pc-R. 1644-5). Mr. Parker's impulsivity had woraened by the time he came back from service in Korea, where he used intoxicating substances, mainly heroin (PC-R. 1645). Dr. Stillman summarized:

> There just was -- there just was a lot of information which pointed in one direction, and that is he really has brain damage. And that brain damage, although suspicious in the beginning, with additional information became obvious and this should have lead to other investigations.

(PC-R. 1646). Dr. Stillman did not receive this vital information until after the sentencing jury had made their recommendation and the judge had sentenced.

> Q. When were you first provided with this information that we're juet referring to?
>
> A. I believe the early part of this year.
>
> Q. And specifically, do the affidavits that you refer to present the history that you requested in that 1981 report?
>
> A. Yea. That presents a lot of history of his drug and alcohol abuse, but it had additional information which would have been extremely valuable to know and important to know, and that is the head injuries he Buffered.
> Unconsciousness doesn't leave -- always leave a mark of some kind.
>
> Q. In terms of substance abuse, what does that history present?
>
> A. Well, the history, if you take it in the longitudinal view first, that he had a growing, increasing sensitivity in hyper and over-reaction to these foreign substances, which not only would he then be out of contact with reality for periods of time, but it would imply that it would take smaller amounts to produce a larger effect. And it infers that in it was these substances that would add to the brain damage on the scarring which had already been there.
>
> Q. When you say substances, what kind of substances are you referring to?
>
> A. Heroin, cocaine, marijuana, alcohol, hallucinogens. Any foreign substances that interfere with consciousness will

damage brain tissue.

No matter what anybody says, that's a conclusion I've come to, which has been corroborated over the years. Even so-called marijuana isn't innocent. It too produce [sic] brain damage if used in excess or in large quantities over short periods of time or small quantities over large periods of time. It produce [sic] personality change even in short quantities in short periods of time.

So we know all of this, and I have written about thie in a journal which was produced by the Starting Place every month in the preeident's corner. I wae the president them. [sic]

I always made note of these things, especially as the information wae gathered over the years, and warned about cocaine, which I already saw what it does.

So heroin, cocaine, marijuana are payotee (phonetic) hallucinogsne, eueh as mushrooma, which I think Mr. Parker haa used in the part, according to the recent history that I got.

Q. Was Mr. Parker using these substances excessively throughout his life?

A. I think that he used them excessively.

If you use them €or months at a time, especially alcohol and cocaine, that's excessive. Well, let's put it this way, theae are not natural substances and even a small amount if exceeeive. It will effect the body one way or another. May be not permanent right away, but he has been a user. And shocking as it may seam, even when he was incarcerated, he was able to get ahold of Demerol, Darvon and inject it and so on.

(PC-R. 1646-48). Dr. Stillman explained further that this information strengthened and corroborated hia original impressions:

Q. You've had a recent opportunity to see Mr. Parker?

A. Yea.

Q. Anything in that recent examination that undermines what is reflected in the records that you've been provided with or, that is, doesn't fit with your original examination?

A. Well, no. I think my recent examination corroborates what I have found that he still is a little fellow and tries to make a good impression and tries to appear outgoing, but underneath it he has many serious problems, including brain damage.

Q. Now, had you been provided with this information in 1980/81, would you have been able to formulate an opinion as to whether Mr. Parker suffered from extreme emotional disturbancee at the time of the offense, assuming, in fact, he was guilty?

A. Yes. I believe that would have been far more definitive in my statements concerning the fact that he had organic brain syndrome and my request would have been for further investigation *of* another kind.

(PC-R. 1648-49). Dr. Stillman's testimony would have been very important at the penalty phaae of Mr. Parker's trial. He would have testified to a number

of atatutory and nonstatutory mitigating circumstances, had the attorneys only provided him with the information he sought at the time. For example:

> Q. To a reasonable degree of psychiatric certainty, could you relate to us what your opinion would have been had you been provided with this information ae to whether Mr. Parker suffered from extreme emotional distress at the time of the offense?
>
> A. Organic brain eyndrome, which under the influence of the substances, even of a small quantity, would have rendered him insane and incompetent in as far as a space of time. And at the alleged time of the alleged offense, whether he was in Miami or Washington, he would have been in that state. Because of information that I have, he had been using substances in Washington just a8 he used it in Miami. And he sold and dealt in drugs in order to get money to use. That's what his -- what he did and to live, I guese.
>
> MR. WAKSMAN: Judge, I have an objection. Counsel kept telling us that ineanity, incompetency were not --
>
> THE COURT: The questioned [sic] was asked, not in those terms, but answered that way. The question was asked in regard to extreme emotional distress.
>
> MR. NOLAS: I can rephrase that, your Honor. I think my question is rather poorly phrased.
>
> Q. (By Mr. Nolas): Dr. Stillman, to a reasonable degree of psychiatric certainty, assuming that Mr. Parker is guilty of the offense --
>
> A. All right.
>
> Q. Would his capacity to conform his conduct to the requirement of Law have been substantially impaired?
>
> A. Yes, they would have been.
>
> Q. Can you tell us why?
>
> A. Because he has had a longstanding and growing and worsening organic brain eyndrome. And he was a user of substance and that small amount of substance would produce a large effect that would interfere with hie consciousness, with his judgement, with his abstract reasoning, with his discriminative reasoning, with his insight, with serious functions so that he could not project consequence and so on.
>
> Q. And would that impair him if it had been a substantial impairment?
>
> A. Yes. I think it would have been sizeable by the time I saw him in '81.
>
> Q. And again --
>
> A. '80. Sorry, 1980.
>
> Q. Again, we're assuming Mr. Parker is guilty at this point.

A. Even if he were guilty, it doesn't change the fact that there is a natural history through every condition. And if you take it step-by-step, the natural history of what happened to this man, you'll have to arrive at this conclusion.

Q. And taking that, that history, taking his level of functioning, is that -- does that rise to the level of an extreme emotional disturbance?

A. Yes, mental.

Q. Immense?

A. Mental, emotional disturbance.

Q. Mentally?

A. Probably behavioral to emotional and behavioral.

Q. Had you been provided with this information at the time of Mr. Parker's trauma [sic] back in 1981, is there anything you could have told the jury and the Court about the effects of his history of substance abuse on his behavior throughout his adult life?

A. Yes.
I could have given information as to the fact that eubstance abuee in a brain damaged person have, just by definition, almost produces a serious impairment so that this person could not function within normal limits. Even small amounts of subatance abuse or even certain medications or even anxiety aggression with their biochemical change in the brain could produce abnormal reactions in brain damaged people.

Q. To a reasonable degree of psychiatric certainty, is Mr. Parker a substance abuser?

A. He was a substance abuser.

Q. Was?

A. I don't know if he is now or not.

Q. Does he --

A. Although, I have same question about the prison and jails these days, but that's another story.

Q. Does he suffer from substance abuse to a reasonable degree of psychiatric certainty?

A. Yes. He's suffering now as a result of substance abuse leading to the point where he could not -- he doesn't have control over certain elements, such as, low frustration, high degree impulse activity and so on.

Q. And to a reasonable degree of psychiatric certainty, is Mr. Parker brain damaged?

A. Yes.

Q. Does his history reflect that?

A. Yes, he is, and will be so for the rest of his life.

Q. Is there an interrelation between the substance abuse and brain damage?

A. Yes.

Q. Can you describe what that is please?

A. Well, the substances are known to end concentration, cause brain damage. At first, mentally and transitory, but eventually permanent, and of course worsening with scarring and eventually becwmee permanent.

Now, if you add to it the history here, the organic brain damage resulting from head injuries, then we're now of far more complicated situation. He was knocked unconscious twice. It's mentioned once by being dropped on his head, and once according to the information by being hit by a train. So we're talking about a person who starts out with a lower reserve and the reserve is depleted even more by virtue of substances that were used and abused.

Q. Now, you mentioned earlier Mr. Parker [has problems] with impulse control. You're also familiar with the fact he has a violent history?

A. Yes.

Q. Is that type of behavior something that could be explained by the conditions that you've been telling us about?

A. Oh, yes.

When you're dealing with brain damaged individuals, and add this drug abuse or alcohol abuse, even a current temporary basis added on top of the already permanent condition, such persona as an all brain damaged perswn, regardlees of the cause of the brain damage, ends up with lowered frustration tolerance and increase impulse activity so that their self-control become even more difficult. They may walk away from many situations, that's possible. But with the -- in many situations they cannot. There is a tendency for them to have what is referred to on the street as a short fuse. It takes a great, great deal more effort for such a person to control themselves than it does the average person. If they do, then it's because they've learned they have to. The fact that they can is to their credit, if they can do it.

But invariably, my experience with many workmen's compensation cases of brain damage, not unlike what Mr. Parker hae, is that in marital situations, for example, in friendehips, they fly off the handle easily. They can't hold on to jobs. They can't handle relationships. And I've constantly had couples that I'm seeing which I try to either deal with the wife or the husband, help them be aware that the person who is damaged isn't doing this out of meanness or because they intend to. They can't help it. It's beyond their control. It's part and parcel of organic brain syndrome.

So that we have this kind of situation so that the appearance of violence is really the loss of control. Since the seat of impulse control is the cortex of the brain and at the cortex of the brain is damaged anyway. Then the impulse control is reduced. And the greater the damage, the greater the reduction of impulse control.

THE COURT: What proof is there he had any type of brain damage?

THE WITNESS; Besides the history and the findings of violent behavior?

THE COURT: Well, if you just look at that, then you can say anyone who act in a violent capacity has brain damage.

THE WITNESS: No, but where you have brain damage --

THE COURT: What proof is there?

THE WITNESS: We had proof of cortical damage twice.

THE COURT: Where is that proof?

THE WITNESS: Well, from his family.

THE COURT: Tell me what it is. What did they say.
THE WITNESS: He wae unconscious.

THE COURT: Just that he was unconscious?

THE WITNESS: That has been known to indicate where you have unconsciousness, you invariably have some brain damage.

. . . .

THE WITNESS: [And] a long history of drug abuse.

THE COURT: Did you test him in anyway?

THE WITNESS: He wae tested, your Honor. But subsequently I didn't rely on that, but I do know --

THE COURT: What tests were performed?

THE WITNESS: Your neuropeychological test.

THE COURT: Who does those?

THE WITNESS: Joyce Carpenter.

THE COURT: That's a family name?

MR. NOLAS: For the record, Mr. Parker has been tested by a number of people. I can represent to your Honor. But as I've been saying for the last two weeks, the claim is based on Dr. Stillman and what we're presenting.

THE COURT: Well, are the test [sic] positive or negative?

THE WITNESS: They showed up brain damaged.

MR. WAKSMAN: Objection. Hearsay.

. . . .

Q. (By Mr. Nolas): Dr. Stillman, how does a psychiatrist go about examining for brain damage in a patient?

A. Well, you do what is known as mental status examination.

Q. And what does that entail? Bow do you do that?

A. Well, it's €or the psychiatrist. It's not -- unlike the routine physical examination by the average physician who starts with the top of the head, with the eyes, nose, throat, chest, heart, lunge, goes down the body. Psychiatrist starts outside with the general appearance and how the person appears and their self-care and how they stand and sit and walk and you work inward, so to speak.

And there is an area where memory and orientation and certain functions, including the organization of the materials. The logic of the person. It's how they present information.

There is no phrase that really puts that together exactly. It's just out of the experience.

Q. And --

A, So that in the process you not only get to know the person, you get the feel of the person. And it's a combination of those things that lead you to suspect there is something wrong and you ask €or further information.

. . . .

Q. And did you conduct such an examination of Mr. Parker back in 19801

A. Yes, I did.

Q. would it be fair for me to characterize your testimony as an indication you, in that evaluation, saw initial brain damage?

A. I saw indication of what I thought may well be brain damage and or toxicosis at the alleged time of the alleged offense. As I said, whether he was in Washington or in Miami, and I don't know.

Q. Can a psychiatrist reach a conclusion to a reasonable degree of psychiatric certainty on issues such as this without independent -- without and independent history, without independent background about a patient?

A. I don't think you can reach a conclusion of the person's situation without *it.*

In this, this kind of case, it's clear Mr. Parker did not give adequate information about his own history. And I believe that, in itself, was part and partial of his condition at the time.

Q. And as you indicated, that information, you've have an opportunity to review various pieces of information regarding Mr. Parker's history?

A. That's correct.

Q. Does that fall into place with what you saw in your initial examination?

A. Yes. It substantiates and corroborates the signs and the whole tender of the case as I saw it then.
Too bad it wasn't all done then.

Q. And the opinions you're providing us today is to a reasonable degree of psychiatric certainty?

A. Yes.

Q. Did -- do you know who Mr. Velayoe and Mr. Roffino are?

A. I know them as Public Defenders of the Public Defender's Office. I don't know Mr. Roffino too well. I know Mr. Velayoe from past yeara, yes.

Q. Were you aware of the fact that they were involved in Mr. Parker's case?

A. No.

Q. Did anybody ever give you a call or return your correspondence to aay anything to you regarding that letter back in 1981?
Let me rephrase that.

* * *

Q. (By Mr. Nolas): ... After you sent that letter out there, did any of Mr. Parker's lawyers contact you?

A. No, not that I recall,

Q. Did anybody provide you any information regarding Mr. Parker after you aent that letter out?

A. After, no.

Q. After you received that initial letter with those two reports from Mr. Mervis and Mr. Aaron, and also indicated the indictment, was there anything else at all regarding Mr. Parker given to you?

A. No.

(PC-R. 1649-1663).

Dr. Stillman would also have provided information to the jury that Mr. Parker was not capable of forming the mental state necessary to commit a cold, calculated or premeditated offense:

Q. Given the deficits that Mr. Parker haa that you've described to us, to a reasonable degree of psychiatric certainty, could Mr. Parker form the mental state necessary to commit a cold, calculating, premeditating offense?

* * *

THE WITNESS: There are, at present, enough indicatione by my examination of more recent vintage that indicates that this man could not have, I think the word form proper intent or properly

formed intent at that time. Especially since I believe at that time he wae not only brain damaged, but also under the influence of substance at that given time....

So that at that time, he could not have formed, properly formed an intent or planned an understanding of the consequence of behavior and so on.

(PC-R. 1666-67).

To rebut Dr. Stillman's testimony, the State called Dr. Leonard Haber, a psychologist. However, in many respects, Dr. Haber corroborated Dr. Stillman's diagnosis that Mr. Parker suffered and suffers from brain damage, and that Mr. Parker could not validly be diagnosed as an antisocial personality. If anything, the account of Dr. Haber demonstrated why thie case does involve important mental health mitigation which the sentencing jury should have heard.

Dr. Haber testified that he administered the Bender Gestalt Visual Test to Norman Parker and that the teet, which is a screening test €or brain damage, indeed did show signs of brain damage (PC-R. 1917;1923; 1925-6;1962). Further, Dr. Haber testified that the history of head injuries suffered by Mr. Parker and related by his family could be the cause of the brain damage, as could his abuse of drugs. During direct examination by the State, Dr. Haber testified:

Q. Can you tell us what your mental status or psychological examination consists of?

A. Yes, sir.
It consisted of a psychological interview, mental atatue examination.
The administration of the Bender Gestalt Visual Test.

Q. The Bender Gestalt test attempts to tests you or let you learn -- teats the examinee?

A. The Bender Gestalt Visual-Motor Test is a test which is used as a screening procedure to look €or evidence of mental functioning, visual-motor ability, hand-eye coordination.
It may reflect mental disorder, mental disarray. It may reflect organic brain dysfunction. And it reflects personality by the way in which the material you utilize reproduces the issue of memory and recall, and gives some clinical evidence relative to all of the above. Possibly gives such evidence.

Q. What does memory have to do with organic brain dysfunction or brain damage?

A. Memory impairment is one of the characteristics of

organic dysfunction.

Q. Were you examining Mr. Parker to see if there were any signs of current brain damage?

A. I did, a0 part of the examination, look for clinical evidence.
well, as evidence in the Bender Gestalt tests, as to possible organic brain damage.

Q. If someone had brain damage ten years ago would you expect to be able to find it now?

A. It's not always found in clinical examinations.
It'e not always found in peychological tests, but if it were extensive and documented ten years ago, it would be clearer than it would be now.

Q. Based upon your examination of Mr. Parker did you find any signs of current brain damage?

A. I found some possible soft signs... .

A. Well, soft signs are soft signe.
It would be akin to if you are looking for evidence of a fire. If you find a rag or can of gasoline someplace it's a soft sign. It means with that you could have a fire.

(PC-R. 1914-17). Dr. Haber noted in his testimony that Mr. Parker's family had related that Mr. Parker had suffered from two head injuries, and that these types of head injuries "could lead to brain damage" (PC-R. 1919). When questioned by the Court, Dr. Haber noted that these head injuries are a strong indication of the possibility of brain damage:

THE COURT: Excuse me for interrupting.
What were the soft signs that you found?

THE WITNESS: That I found?

THE COURT: Right.

THE WITNESS: I found in his history what I would call a soft sign, even though it raises a strong possibility that there would be some disorder, if, in fact -- and these are all reports. We don't know if the facts are correct.
There are facts there was a severe head injury, and that is certainly a strong indication of the possibility of brain damage. That is certainly a strong possibility.
There are two such incidents reported in the old history, one relative to a train and one relative to being dropped on hia head. So either of those could be considered to be indicators from the history.
There was a third indication given, but I believe it took place in Washington, D.C. It might have followed the alleged offense, so I don't know if it would relate, but, yet, it was another poasibility because of a reported injury to the head by way of a strong blow, a contusion, which would certainly be another indication.

(PC-R. 1925-27).

Dr. Haber explained the signs of brain damage further during cross-examination:

Q. Now, you indicated that the examination itself reflected soft signs of brain damage?

A. I indicated that on the Bender Gestalt test there were some soft signs. Yes, sir.

Q. And there were also some soft signs on the recall part of it?

A. Less, but there were some. Less.

Q. Would the word diffused brain damage be sort of fitting with soft signs, something along those lines?

A. It is more common that the eoft signs are aseociated with diffuse, rather than localized or focused brain damage.

Q. The other day when -- yesterday, in fact, Ms. Naylor and I discussed this with you in your office, the Bender, for example, and the rest *of* your examination.
You were very honest and cooperative with us in giving us your findings.
You indicated at that time, and I think -- let me just run by same of thoee.
You said there were some indications of hand tremors?

A. Yes, air.

Q. And that is a soft sign, diffuse sign?

A. It could be a number of things. It could be a sign of something else, too. As I said, fatigue.

Q. That word -- you also indicated that there were contact difficulties, I believe was the word you used.

A. Yes.

Q. Is that another soft sign, possible diffuse brain damage?

A. It could be.

Q. You also indicated there was comprehension during the examination.

A. Yes, sir.

Q. What is that. What is "comprehension"?

A. We were drawing the figures in size.
When you reproduce them so they are smaller than what is shown to you in the instructions, as to what you see, the comprehension or the reduction in size can suggest someone can have some significant --

Q. That is also another sign of brain damage?

A. Possible.

* * *

Q. Now, you indicated that the Bender is a screening device?

A. Yes, sir.

Q. And it screens far brain damage?

A. Yes, air, among other things, and intelligence.

Q. And during that screening device you saw indicia of brain damage. Is that fair to eay?

A. I say -- I think what I testified to was that the only indication, other than the history, that I saw of any possible brain damage with soft signs was in that portion of the Bender Geetalt test. That is what I said.

Q. And also the history if a sign of brain damage?

A. Yes, air. Maybe it is possible.

(PC-R. 1962-66). Despite all the signs of brain damage, as indicated by Mr. Parker's history of head injuries and as reflected by a psychological test deeigned to screen €or brain damage, and despite the fact that Dr. Haber was examining Mr. Parker specifically €or the purpose of testifying with regard to Dr. Stillman's findings, Dr. Haber did not conduct further tests to determine the extent of the brain damage:

Q. Sure.
Did you, in taking those signa -- taking what the Bender Gestalt reflects, did you conduct any further testing for brain damage?

A. No, sir.

Q. No further psychological testing?

A. NO, sir.

Q. Are there better devices to assess brain damage on an individual than the Bender Gestalt?

A. Yes, sir.

Q. Which one are those?

A. There are many; a whole battery.

Q. Why don't you --

A. There are many.

The Wechsler Adult Intelligence Scale is frequently used. There are at least a dozen that are well-designed to do this. I saw no reason to do them, but they could be used.

(PC-R. 1969-79; see also PC-R. 1976-77). Dr. Haber also explained at the evidentiary hearing that the functioning of the brain was not hie specialty, and indicated that he could only give general answers to questions about the brain (PC-R. 2013-14).

Dr. Haber then etated that Mr. Parker suffers from an anti-social pereonality disorder (PC-R. 1949; 1978). On cross-examination, however, Dr. Haber explained that this diagnosis was the result of a single question asked during the entire examination, and not the result of any psychological testing. The etatement, as he admitted, could be supported by none of the requisite facts:

> Q. You indicated that you formulated an opinion that Mr. Parker has an anti-social personality.
>
> A. Yes.
>
> Q. Did you give him any personality tests?
>
> A. I gave him an interview and took a history, which is a way, you know, which you diagnose his disorder not by a teat, but I did use a screening test question which is a tremendously considered by clinicians €or anti-social personality disorders. And there was a positive or significant response to these tests, which is typical of persons with such a disorder.
>
> And there was one question that I asked of him in the conduct *of* this entire examination. There was one specific judgment queetion I asked in the context of the examination, indicating that Mr. Parker would behave in an anti-social manner. He could, in fact, take someone else's property.

(PC-R. 1978-79). Dr. Haber admitted that he had not found information to substantiate the criteria for a diagnosis of an anti-social personality disorder ae required by the Diagnostic and Statistical Manual of Mental Disordera (DSM-IIIR)' (PC-R. 1982-95) and that the criteria in the DSM-IIIR had to be affirmatively found before such a diagnosis could be made (PC-R. 2009). Inetead, Dr. Haber relied on the 1981 general statement in Dr.

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[1]Dr. Haber explained that the DSM-IIIR is "a Diagnostic and statistical Manual put forth by psychologists and psychiatrists ... to standardize the diagnostic techniques in the field, to give some criteria" (R. 2010).

Stillman's report (PC-R. 1990). Dr. Haber did concede that Dr. Stillman did not etate that the criteria for making this diagnosis were met (PC-R. 1993), and noted that he did not rely on any conclusions that Dr. Stillman may have reached (PC-R. 2013). Dr. Stillman, as he had earlier testified, had never found that Mr. Parker had an antisocial personality disorder, but no one asked him the needed questions at the time of trial or sentencing.

Dr. Haber's testimony only serves to substantiate what Dr. Stillman, had he been provided with information that he requested, would have testified to at Mr. Parker's original trial. Mr. Parker suffers from brain damage, as a result of an abysmal childhood, several severe head injuries, and substantial drug and alcohol abuse. The sentencing jury heard none of this, due to the ineffective assistance of counsel at trial.

Norman Parker served in the military -- the jury never heard this. Norman Parker had a family -- the jury never learned this. Norman Parker is emotionally and mentally impaired -- the jury never saw this. Norman Parker grew up in an abysmal environment, an environment plagued by racism and poverty -- the jury was never informed of this. That upbringing affected his later conduct -- no one explained this. Counsel did not even pursue readily available mental health mitigating information, although the expert wrote to counsel requesting information. Counsel did not seek a report from Dr. Stillman until the guilt phase had begun, and even after they received Dr. Stillman's letter, they ignored the red flags in the report and never even discussed Mr. Parker with Dr. Stillman. This case truly fell through the cracks.

C. CONCLUSION

Without reaching the question of deficient performance (PC-R. 1455), the circuit court denied relief, determining that counsel's omissions did not prejudice Mr. Parker. Although recognizing that the mitigating evidence preeented at Mr. Parker's penalty phase was "sparse" (PC-R. 1453), the lower court found that the testimony of the family members did not establish prejudice becauee they had not had much contact with Mr. Parker in the time

immediately preceding the murder. However, this Court has unequivocally held that childhood trauma is valid mitigation, see, e.g., Campbell v. State, 571 So. 2d 415, 419 n.4 (Fla. 1990); Holeworth v. State, 522 So. 2d 348 (Fla. 1988), as is a history of substance abuse. See, e.g., Burch v. State, 522 So. 2d 810 (Fla. 1988). The lower court also discounted Dr. Stillman's testimony that Mr. Parker suffers from brain damage, ignoring the State's expert'a testimony which confirms Dr. Stillman's conclusion, Brain damage, too, it valid mitigation. See. e.g., State v. Sireci, 536 So. 2d 231 (Fla. 1988). Further, Dr. Stillman testified to the presence of two statutory mitigating factors. See Fla. Stat. sec. 921.141(6)(b, f). Mr. Parker's jury was provided none of this evidence. The failures here significantly undermine confidence in the outcome of the sentencing proceedings, and relief is proper.

ARGUMENT II

NORMAN PARKER WAS DENIED HIS FOURTH, FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE HE DID NOT RECEIVE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL.

During the guilt-innocence phase of his capital trial, Mr. Parker was deprived of hie right to the effective assistance of counsel. This violation of Mr. Parker's sixth amendment rights prejudiced him in the gravest of ways -- it resulted in his capital conviction and sentence of death. Mr. Parker's trial attorneys' performance, in its entirety, was deficient and undermines confidence in the results of the guilt-innocence and penalty phases.

A. THE CIRCUIT COURT ERRED IN DENYING AN EVIDENTIARY HEARING

The Circuit Court allowed an evidentiary hearing on counsel's ineffective assistance during the capital sentencing proceedings. However, the lower court summarily denied Mr. Parker's claim that he was denied the effective assistance of counsel at the guilt/innocence phase without conducting any type *of* hearing, without adequately discussing whether the motion failed to state valid claims for Rule 3.850 relief (it does), and without adequately explaining why the files and records conclusively showed that Mr. Parker is entitled to no relief (they do not). Indeed, the record

supports Mr. Parker'e claim.

The lower court's summary denial of thie claim was incorrect. The claim was of the type plainly requiring evidentiary resolution of facts that are not "of record." As thie Honorable Court's precedents and Rule 3.850 itself make clear, 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 prieoner 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. Parker's motion alleged facte which, if proven, would entitled him to relief. The files and records did not "conclusively show that [he] is entitled to no relief," and the trial court's summary denial of thie claim, without an evidentiary hearing, was therefore erroneous.

In O'Callaghan, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance of counsel claim were not "of record." See also Vaught v. State, 442 So. 2d 217, 219 (Fla. 1983). This Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearings. See, e.g., Zeialer v. State, 452 So. 2d 537 (Fla. 1984); Vaught; Lemon; Squires; Gorham; Smith 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. Parker was (and is) entitled to an evidentiary hearing, and the trial court's summary denial of this claim was erroneous.[2]

B. MR. PARKER WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT PHASE OF HIS CAPITAL TRIAL

In Strickland v. Washington, 466 U.S. 668 (1984), the Supreme Court held

[2]Mr. Parker presented numerous other clams which alleged, inter alia, ineffective assistance of counsel and which the trial court also summarily denied. These claims also require an evidentiary hearing, and are discussed in subsequent portions of this brief.

that couneel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 668 (citation omitted). Strickland v. Washinaton requires a defendant to plead and demonstrate: 1) unreasonable attorney performance, and 2) prejudice. In his Rule 3.850 motion, Mr. Parker pled each. Given a full and fair evidentiary hearing, he can prove each. He is entitled, at minimum, to an adequate evidentiary hearing on this claim.

Trial counsel failed to litigate substantial suppression issues and failed to properly investigate, prepare, and present Mr. Parker's defense. There is much more than a reasonable probability that, but for counsel's unproffesional errors, the reeult of the proceeding would have been different. Confidence in *the* outcome of the proceedinge is undermined. Strickland v. Washinaton, 446 U.S. at 694.

1. Failure to Litigate Identification Issue

Three witnesses testified at trial identifying Mr. Parker as one of the two perpetrators of the offense at issue. Mr. Parker's defense was alibi -- that he was in Waehington, D.C., at the time of the alleged offense. The witnesses' "identification" of Mr. Parker as the perpetrator, therefore, was a central issue at trial. Yet, the legality of the "identification" was never tested by the defense, and never eetablished by the State, because Mr. Parker'e attorneys incomprehensibly withdrew Mr. Parker's motion to suppress identification evidence.

> We have a motion to auppress lineup, showup, photographic or other pretrial confrontation. At this time, your Honor, I would formally withdraw that motion. We will not proceed on that motion.
>
> THE COURT: All right.

(R. Vol. 10, p. 4).

David Ortigoza, Luis Diaz, and Sylvia Arana identified Mr. Parker as the perpetrator. Those identifications were all based entirely on an 11-year-old photograph of Mr. Parker that was shown to these witnesses by the police during a "photo-lineup." Mr. Parker looked nothing like the photograph -- as even the trial testimony indicated. However, on the basis of that

"identification", Mr. Parker was indicted, tried, and convicted of capital murder.

The "photo-lineup" procedures employed in this case were a classic example of an unduly euggestiva photo-array. Mr. Parker's photograph waa included among five other individuals whose appearance was strikingly dissimilar to his. In fact, Mr. Parker's own photograph showed an individual whose appearance barely resembled his appearance in 1978-79. The out-of-court "identifications" were not trustworthy. The consequent in-court identifications were substantially "tainted."

At trial, the witnesses contradicted themselves and each other regarding the description of the perpetrators and the incident itself. For example, Mr. Parker was described as wearing a blue shirt, then a white shirt. One witnese indicated that he wore a "goatee" while another witnese explained that he had no "beard" but wore a "Fu Man Chu mustache". Hie eye8 are described as green, then brown.

All three witnesses were white. Mr. Parker is black. The perpetrators were observed in a highly volatile atmosphere. Although such identification0 are clearly suspect, see Brigham, Law and Human Behavior, IV, pp. 315-22 (1980); Gorenstein and Ellsworth, Journal of Applied Psveholoav, 65(5), pp. 616-22 (1980); Lavarakes and Mayzner, Perception and Psychophysics, 20, pp. 475-81 (1976); Luce, Psvcholoav Today, November, 1974, pp. 105-08, the identification procedures employed and the reliability of the witnesses' out-of-court and in-court identifications (the central evidence connecting Mr. Parker to the offense) were never tested in this case. Mr. Parker's attorneye ineffectively "waived" that crucial motion.

Had the motion been properly litigated, the results of the proceedings would have been different, €or the identifications would have been suppreseed. Reliability is the "lynchpin" of any identification. Manson v. Brathwaite, 432 U.S. 98 (1977). These identifications were not reliable. Yet, they were not challenged because counsel were ineffective.

The specific (and, in this case, critical) facts respecting the

"identification" issue were never developed; the attorneys failed to litigate the issue. Coneequently, the five factors enumerated by the United Statee Supreme Court as factors to be assessed in determining whether or not identification testimony is reliable have never been tested in this case, becauee Mr. Parker was denied the effective aasietance of counsel. See Neil v. Biggers, 409 U.S. 188 (1972) (holding that five factors to be assessed are: 1) the witnees' opportunity to observe; 2) the witness' degree of attention; 3) the accuracy of the prior description; 4) the witness' level of certainty; 5) the length of time between the offense and the confrontation); see also Manson v. Brathwaite, supra (same).

Mr. Parker was prejudiced in the gravest of ways: patently inadmissible evidence was introduced against him during his capital trial, evidence directly resulting in his conviction and sentence of death. Without thie evidence, the State would never have been able to prove its case. Yet, the evidence came in, because Mr. Parker did not receive effective representation. Mr. Parker was denied his essential sixth amendment right to effective counsel, see Kimmelman v. Morrison, 106 S.Ct. 2661 (1986), and an evidentiary hearing was necessary in order for this claim to be properly resolved. The trial court, however, declined to allow an evidentiary hearing. Mr. Parker's allegations demonstrate that confidence in the result is undermined becauee of counsel's failures, and warrant the granting of an evidentiary hearing.

2. **Failure to Litigate "Fruit of the Poisonous Tree" Issue**

The trial court suppressed physical evidence obtained from Mr. Parker by District of Columbia police officers during a patently illegal search, seizure, and arrest. See State v. Parker, 399 So. 2d 24 (Fla. 3d DCA 1981) (affirming suppression order).[3] After that illegal seizure, Mr. Parker wae taken into custody and numerous statements were elicited by District of Columbia and, later, Florida law enforcement officers. Physical evidence "connecting" Mr. Parker to the instant case was also obtained. All of this

[3]Mr. Parker was represented by different assistant public defenders at the suppression proceedings than thoae who later represented him at the pretrial, trial and sentencing proceedings.

evidence was tainted by the initial unlawful eearch and seizure. Wona Sun v. United States, 371 U.S. 471 (1963). It should have never been introduced. However, the evidence wae introduced against Mr. Parker at trial becauee hie attorneys ineffectively failed to present any "fruit of the poisonous tree" argument. See Kimmelman v. Morrison; Smith v. Wainwright, 777 F.2d 609 (11th Cir. 1985); Goodwin v. Balkcom, 684 F.2d 794 (11th Cir. 1982) (finding ineffective assistance because of counsel's failure to litigate "fruit of poisonoua tree" issue).

Mr. Parker has asserted that counsel's failure to litigate the issues wae not (could not have been) based on any tactic or strategy, but was based on ignorance of the law. An evidentiary hearing was and is necessary for the claim to be properly resolved. The trial court, however, declined to allow one. The trial court erred in this respect, and this Court should allow evidentiary resolution.

3. Ineffective Presentation of Alibi Defense

Mr. Parker's defense at trial was that he was in Washington, D.C., when the alleged offenee occurred. Ample evidence was available to support that defense -- as Mr. Parker eubmitted below, witnesses were available who would have established that Mr. Parker was in the District of Columbia at the exact time and date of the offenee. However, none of these witnesses were called. Rather, the attorneys presented their "alibi" defense primarily on the basis of the perpetuated testimony of witnesses who could not fully "place" Mr. Parker in Waehington at the time of the offense.

These alibi witneseee were not the only ones available. Other, better witnesses existed. As Mr. Parker pled, they would have corroborated the fact that Mr. Parker was in Washington, D.C., throughout the summer of 1978. Some would have established that he was in Washington, D.C., on July 18, 1978 -- the day of the alleged offense. At least ten other euch alibi witnesses existed and should have been called, yet they never were. The trial court declined to allow an evidentiary hearing on this aspect of Mr. Parker's claim. Evidentiary resolution is appropriate, and Appellant respectfully

requests that this Court allow it.

Courta have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 596 F.2d 1214, 1217 (5th Cir. 1979); see also Chambers v. Armontrout, 907 F.2d 825, (8th Cir. 1990)(in banc); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989); Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective representation is the independent duty to investigate and prepare"). Likewiee, courts have recognized that in order to render reasonably effective assistance an attorney must preeent "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thus, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).[4]

Even if counsel providee effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assietance in his or her performance in other portions of the trial. Washington v. Watkins, 655 F.2d 1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d 991, 994 (5th Cir. 1979)("sometimes a single error

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'Counsel have been found to be prejudicially ineffective €or failing to impeach key State witnesses with available evidence, Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial teatimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to prevent introduction of evidence of other unrelated crimes, Pinnell v. Cauthron, 540 F.2d 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.2d 1113 (1st Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963; and for failing to interview witnesses who may have provided evidence in support of a defense, Chambers v. Armontrout, 907 F.2d at 828-30.

is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washinaton; Kimmelman v. Morrison.

The errors committed by Mr. Parker's counsel warranted Rule 3.850 relief. Each undermined confidence in the fundamental fairness of the guilt-innocence determination. The allegations were sufficient to warrant an evidentiary hearing. See O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); Lemon v. State, 498 So. 2d 923 (Fla. 1987); see also Code v. Montgomery, 725 F.2d 1316 (11th Cir. 1983).

In United States v. Cronic, 466 U.S. 648 (1984), the United States Supreme Court explained that the purpose of the right to counsel was to assure a fair adversarial testing. 466 U.S. at 656-57 (judicial.proceedings which lose their adversarial character because of failures by counsel violate the sixth amendment). See also Hardina v. Davis, 878 F.2d 1341 (11th Cir. 1989).

Mr. Parker was deprived of his right to a fair adversarial testing of his guilt or innocence. Prejudice is apparent: had trial counsel properly litigated the suppression issues and properly presented the alibi defense, there is more than a reasonable probability of a different result. Accordingly, an evidentiary hearing is required. Thereafter, Rule 3.850 relief should be granted.

ARGUMENT III

MR. PARKER WAS CONVICTED OF CAPITAL MURDER AND SENTENCED TO DEATH ON THE BASIS OF STATEMENTS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Parker was arreeted in Washington, D.C. on August 23, 1978, in connection with the shooting of a man in a local bar. He was arraigned for that crime on August 24, 1978, and counsel was appointed on that same date.

On August 29, 1978, Detectives Pontigo and Lopez from the Metro-Dade (Miami) Police Department travelled to Washington to interrogate Mr. Parker (R. Vol. 11, pp. 5-6). Dade County had filed a detainer for Mr. Parker in regards to the Miami homicide with the Washington, D. C. authorities on August 25, 1978. Detective James Greenwell of the Washington, D. C. Police

Department transported Mr. Parker from the district jail to the U.S. Attorney's Office where Pontigo and Lopez had arranged to conduct their interrogation *of* Mr. Parker (R. Vol. II, pp. 6, 23-24). While in route to the U. S. Attorney's Office, Mr. Parker reminded Detective Greenwell of the previous court-appointment of an attorney, and asked if he could have that attorney present for the interview with the Miami detectivee. Detective Greenwell told Mr. Parker in response not to worry about it, that it would be straightened out later (R. Vol. II, p. 24). Again, before entering the interview room, Mr. Parker informed Greenwell that he desired to see his attorney. Again, Greenwell'a response was that those matters could be straightened out in the interview room (Id.). Moreover, Greenwell then told Mr. Parker that he should talk to the detectives, because he could help himself by doing SO (R. Vol. II, p. 25).

Upon Mr. Parker's entry into the interrogation room, Detective Pontigo advised him of his constitutional rights, and had him sign a waiver form (R. Vol. II, p. 7). Greenwell was present when Mr. Parker signed the waiver, and himself signed the form as a witness, along with Detectives Pontigo and Lopez.

Det. Pontigo then asked Mr. Parker if he was represented by an attorney. Mr. Parker replied that he was and gave the attorney's name. Mr. Parker believed the Metro-Dade officers were there to discuss his escape from the Opa Locka work release center (R. Vol. II, p. 25). He was under this impression because when Lopez and Pontigo introduced themselves to him, they said, "We have your parole papers," and "Why did you leave?" (R. Vol. II, p. 26). This belief is confirmed by Det. Pontigo, who testified that the first thing they talked about wae Mr. Parker's escape from Dade County (R. Vol. II, p. 11). The focus of the interrogation, however, soon moved to the Miami homicide, and several incriminating statements were elicited. These statements were used against Mr. Parker at his trial, and in fact became central to that proceeding.

The fifth, sixth and fourteenth amendments to the United Statee Constitution prohibit compelled self-incrimination and the extraction of

statements in violation of the right to counsel. Miranda v. Arizona, 384 U.S. 436 (1966), held that custodial interrogation must be preceded by advice to the accuaed that he/she haa the right to remain silent and the right to the presence of an attorney. 384 U.S. at 479. After such advice is given, if the accused indicates he/she wiehea to remain silent, interrogation must cease; if he/she indicates a desire for counsel, interrogation must cease until couneel is provided. Id. at 474, 86 S. Ct. at 1627.

In Edwards v. Arizona, 451 U.S. 477 (1981), a bright line teat was developed. After an accused haa invoked hie right to have counsel preeent during cuetodial interrogation, no further interrogation can take place until counsel is provided, unless the accused himself/herself initiates it. A valid waiver of the right to counsel cannot be established merely be showing that the accused responded to police-initiated custodial interrogation, even if further advice of rights is given. Of course, there is no question here as to whether Mr. Parker initiated the interrogation -- he clearly did not. Norman Parker had the right to have couneel present at the interrogation by Pontigo and Lopez. His right wae violated, and he is entitled to relief.

A. MR. PARKER'S STATEMENTS WERE NOT ADMISSIBLE

under Edwards v. Arizona, 451 U.S. 477 (1981), once an accused invokes his right to have counsel present during custodial interrogation, not only must interrogation immediately cease, see Miranda; Michigan v. Mosely, 423 U.S. 96, 104 (1975), but it may not be reinitiated by law enforcement without counsel preeent:

> . . . [A]lthough we have held that after initially being advised of his Miranda righta, the accused may himself validly waive his rights and respond to interrogation, the Court hae strongly indicated that additional safeguards are necessary when the accused asks €or counsel; and we now hold that when an accuaed hae invoked his right to have counsel present during cuetodial interrogation, a valid waiver of that riaht cannot be established by showing only that he responded to further police-initiated custodial interroaation even if he ha5 been advised of hie riahts. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interroqation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-85 (citations omitted)(emphasis added).

There is no question here but that Norman Parker invoked his right to counsel prior to the interrogation at issue. He bad initially invoked it at his arraignment on the Washington, D.C., charges, and had had counsel appointed. Detectives Greenwell, Pontigo, and Lopez were all aware that Mr. Parker had invoked his right, and had had counsel appointed, but nevertheless initiated interrogation and procured a waiver. Their actions in obtaining the statements, and the subsequent admission of the statements at trial, violated the fifth and sixth amendments, as well as Edwards.

The violation of Mr. Parker's fifth, sixth and fourteenth amendment righte was even more stark, however: Mr. Parker again asserted his right to couneel immediately prior to the interrogation, but the invocation was again ignored. Again, all interrogative efforts should have ceased at that point, and not been reinitiated until counsel was notified. Law enforcement initiated the interrogation, procured Mr. Parker's waiver, and elicited atatemente.

It matters not that Mr. Parker formally waived his rights after the interrogation was initiated. Under Edwards, the waiver is invalid:

> a valid waiver of that right cannot be established by showing only that [the accused] responded to further police-initiated custodial interrogation even if he has bean advised of his righte.

Edwarde, 451 U.S. at 484. Nor does it matter that the accused executes a written, rather than an oral waiver:

> In Edwards . . . we rejected the notion that, after a suspect's request for counsel, advise of rights and acquiescence in police-initiated questioning could establish a valid waiver . . . . written waivers are insufficient to justify police-initiated interrogation after the request for counsel in a Fifth Amendment analysis . . .

Michigan v. Jackson, 106 S. Ct. 1406, 1410-11 (1986).

This issue was raised on Mr. Parker's direct appeal as a violation of both Miranda and Edwards. Although Edwards did not exist at the time of the pretrial suppression hearing, it was issued before Mr. Parker'e initial direct appeal brief waa filed. While Mr. Parker's direct appeal was pending, but before oral argument, the United States Supreme Court decided Solem v. Stumes,

465 U.S. 638 (1984), which held that Edwards would not be retroactively applicable to cases pending on collateral review at the time it was iseued. Mr. Stumes was appealing a federal district court's denial of his petition for a writ of habeae corpus at the time Edwards issued, and thue it was not retroactively applied to hie case. Id. Mr. Parker, however, unlike Mr. Stumes, wae and is entitled to relief under Edwards. Edwards was applicable to thie claim on direct appeal, and would have been applied by this Court but for appellate counsel's ineffectiveness, This Court should now reach thie issue, apply the appropriate standard, and grant Mr. Parker the relief to which he is entitled.[5]

After law enforcement initiated their interrogations, Mr. Parker signed waivers. Thie Court relied on those "waivers" to deny relief on direct appeal. Parker v. State, 456 So. 2d at 441 ("defendant voluntarily waived his Miranda rights and agreed to talk to the Metro-Dade police without hie counsel present"). However, "[w]ritten waivers are insufficient to justify police-initiated interrogations after a request for counsel," Jackson, 106 S. Ct. at 1410-11, or after the right to counsel has attached. Id.; see also Edwards, 451 U.S. at 484. It is also settled that no waiver can be established by the fact that Mr. Parker eventuallv responded to the questioning. See Jackson, 106 S. Ct. at 1410 n.9; Brewer v. Williams, 430 U.S. 387 (1977); Edwards, 451 U.S. at 484 n.8.

The United States Supreme Court has had several opportunities to apply Edwards, in cases which indicate that this Court's direct appeal disposition of the claim was erroneous. Thus, it is now clear that it is of no moment that the formal judicial proceedings which had in fact been initiated against

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'Edwards and Miranda aside, this case involves flagrant and fundamental violations of bedrock sixth amendment principles. Formal judicial proceedings had been initiated against Mr. Parker, he had been arraigned, and the rixth amendment right to counsel had attached. The court had in fact appointed counsel for Mr. Parker at his arraignment. Law enforcement was well aware that Mr. Parker was represented by counsel, but nevertheless proceeded to interrogate him without notifying and without the presence of counsel. See Michigan v. Jackson, 106 S. Ct. 1404, 1409 (1986). Norman Parker asserted his right to counsel. Law enforcement nevertheless initiated questioning. The resulting statements were flatly inadmissible.

Mr. Parker prior to the elicitation of the etatements at issue here did not involve the Florida offense. Arizona v. Roberson, 108 S. Ct. 2093 (1988). Even if counsel had not in fact been appointed, the bright-line rule set out in Edwards makes it clear that after a person in custody has requeated counsel, he is not eubject to further interrogation until counsel is made available to him. "Whether a contemplated reinterrogation concerns the same or a different offense, or whether the same or different law enforcement authorities are involved in the second investigation, the same need to determine whether the suspect has requested counsel exists." Roberson, 108 S. Ct. at 2101. See also McNeil v. Wisconsin, 111 S. Ct. 2204 (1991). Further, it is of no significance if the officer conducting the improper interrogation does not know that the defendant has requested counsel. Roberson, 108 S. Ct. at 2101. Hare, of course, the Miami officers did know Mr. Parker had requested counsel, as one such request was made in their presence. In Minnick v. Mississippi, 111 S. Ct. 486 (1990), the Supreme Court again reaffirmed the bright line rule of Edwards, holding that interrogation could not occur after a request €or counsel unless eounael waa present at the interrogation. All of these cases demonstrate that Mr. Parker was subjected to interrogation in violation of constitutional guarantees and that his statements were inadmissible.

B. INEFFECTIVE ASSISTANCE OF COUNSEL

This Court's direct appeal and habeas corpus opinions in Mr. Parker's case suggest that trial counsel failed to preserve this claim for appellate review by failing to pose a timely objection to the admission of Mr. Parker's statements at trial. In this regard counsel rendered prejudicially ineffective assistance. See Kimmelman v. Morrison, 106 S. Ct. 2574 (1986).[6] Trial counael'a performance was deficient in this respect, €or counsel's omission wae founded on no tactic or strategy -- nor could it be. An evidentiary hearing on this issue should be held, and thereafter Rule 3.850

[6]This prejudicial omission of counsel in Mr. Parker's case is in fact strikingly similar to the errors of the attorneys in Kimmelman v. Morrison and Goodwin v. Balkcom.

relief granted.

ARGUMENT IV

THE TRIAL *COURT'S* CONSTITUTIONALLY DEFICIENT FELONY MURDER INSTRUCTION WAS FUNDAMENTAL ERROR WHICH VIOLATED MR. PARKER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

The State'e theory in this case was felony-murder: that the decedent was killed to further a sexual battery committed during the course of a robbery. In hie closing argument, the prosecutor at length explained to the jury that the State need not Drove premeditated murder but could rest its proof of guilt on felony-murder (see generally, R. Vol. 23, pp. 1211, et seq.). Similar comments had been made to the jurors throughout the proceedings.

The trial court specifically instructed the jury on premeditated murder (R. Vol. 23, pp. 1312-13). Immediately after that instruction, the trial court instructed the jury on felony-murder. The trial court's entire instruction on thie issue, involving the State'e primary theory of prosecution, was as follows:

> The second method of proving first degree murder is by the felony murder rule.

(R. Vol. 23, p. 1313).

Nothing in the trial court's instructions defined felony-murder or explained what the elements of felony-murder were. The jury was left to its own devices to discern the elements of the theory of prosecution on which the State substantially and primarily relied.

In Franklin v. State, 403 So. 2d 975 (Fla. 1981), this Court held that the failure to instruct fully and accurately on the elements of felony murder was fundamental error. Accord State v. Jones, 377 So.2d 1163 (Fla. 1979). In Franklin, the error was raised for the first time on direct appeal. Neverthelese, this Court held that where a conviction is sought on the "dual theories of premeditation and felony murder and there is error because the trial judge fails to instruct on the underlying felony, the conviction can stand only if the error is harmlees.... The reviewing court must be satisfied beyond a reasonable doubt that the failure to so instruct was not prejudicial and did not contribute to the defendant's conviction." Franklin, 403 So. 2d at

976.

In Mr. Parker's caee, instructions on robbery and sexual battery, the underlying felonies, were given. However, the jury was never instructed how to find felony murder from these felonies. During the instruction conference, the instruction on felony murder was discussed:

> MR. WAKSMAN [PROSECUTOR]: that the death occurred as a consequence of while the defendant was engaged in the commission of or attempt to commit. then I have a blank, and I have penciled in sexual battery and robbery.

(R. Vol. 22, p. 1105). However, as discuseed above, the only instruction actually aiven was: "the second method of proving first degree murder is by the felony murder rule." No reasonable juror could be expected to discern the elements of felony murder from such an instruction. The jurors were left to their own devices to define what felony murder was. In failing to define and to instruct on the elements necessary for felony murder the trial court violated Franklin, and Mr. Parker's rights to a fundamentally fair and reliable capital jury trial.

After instructions, the jury returned a general verdict of guilt which did not indicate what theory it relied upon. The jury could well have convicted, and probably did convict, Mr. Parker on the "felony-murder" theory, as the prosecutor time and again urged. Yet, the jurors knew nothing of the elements of felony-murder, for the trial court gave them no such instruction. The jury, not knowing the elements, could not have determined whether thoee elements were proven beyond a reasonable doubt. Mr. Parker's conviction therefore atands in stark violation of the most rudimentary of due procese rights. See In re Winship, 397 U.S. 358 (1970); Mullaney v. Wilbur, 421 U.S. 684 (1975); cf. Bryant v. State, 412 So. 2d 347 (Fla. 1982). Furthermore, under the eighth amendment's heightened due process scrutiny, Beck v. Alabama, 447 U.S. 625 (1980), the trial court's fundamental error in its instructions to the jury simply cannot be allowed to stand.

At sentencing, the harmful effects of the felony-murder instruction were compounded. The jury was called on to determine whether "the murder for which it had convicted Mr. Parker was committed while the 'defendant was engaged in'

a robbery or sexual battery." The jury was also called on to determine whether the murder was committed €or pecuniary gain. The jury's deliberations with regard to these issues were substantially infected by misleading, arbitrary, capricious, and unreliable factors -- the wholly deficient felony-murder instruction.

The errors herein at issue are classic examples of fundamental constitutional error, as this Court has made explicit. See Franklin; Jones. As such, the issue must be determined on the merits and relief must be granted at this time -- fundamental constitutional error must be corrected whenever the issue is preeanted -- whether on appeal or in post-conviction proceedings. See, e.g., Dozier v. State, 361 So. 2d 727, 728 (Fla. 4th DCA 1978); Flowers v. State, 351 So. 2d 387 (Fla. 1st DCA 1977); Nova v. State, 439 So. 2d 255, 261 (Fla. 3rd DCA 1983); Cole v. State, 181 So. 2d 698 (Fla. 3rd DCA 1966).

No objection was made to this omission by trial counsel, as this Court noted during Mr. Parker's habeas corpus proceedings. Parker v. Dugger, 537 So. 2d 969, 971 (Fla. 1988). In this regard, trial counsel's failure was prejudicially deficient.' An evidentiary hearing on the issues of deficient performance and prejudice, and thereafter Rule 3.850 relief, are warranted.

The prosecution's case against Mr. Parker was premised on the felony murder rule. There was, in fact, never any true reliance on premeditation. In its opening statement, the State explained felony murder. This theme was repeated by the prosecution throughout the course of the proceedings. In closing arguments the prosecutor spoke briefly about premeditation, and then laid out his theory, arguing felony murder in detail:

> I have another way to also prove to you that he's guilty of first degree murder. I do not have to prove both.
>
> When you look at the Indictment, it will say, "Or did kill him from a premeditated design, or while engaged in the commission

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'See Atkins v. Attorney General, 932 F.2d 1430, 1432 (11th Cir. 1991)(failure to object to admission of evidence which was inadmissible under state law constituted ineffective assistance); Harrison v. Jones, 880 F.2d 1279, 1282 (11th Cir. 1989)(failure to challenge use of inadmissible prior conviction to enhance sentence constituted ineffective assistance); Murwhv v. Puckett, 893 F.2d 94, 95 (5th Cir. 1990)(failure to raise valid double jeopardy argument constituted ineffective assistance).

of a felony."

(ROA, Vol. 23, p. 1224-26). The judge, however, never explained to the jury what felony murder wae -- the jurors were left to their own devicee. If there wae any doubt of the thrust of the State's case, the trial judge, in her eentencing order found that the murder was committed in the course of felonies (R. Vol. 2, p. 445).

This was a felony-murder case. Despite this, as discussed above, no instruetion was given to the jury on the elements of felony murder.

The constitutional etandard recognized in In re Winship, 397 U.S. 358 (1970), was expressly phrased as one that protects an accused against a conviction except on "proof beyond a reasonable doubt . . . ." Subsequent cases diseuseing the reasonable-doubt standard have never departed from this definition of the rule or from the Winship understanding of the central purposes it serves. See, e.g., Ivan v. City of New York, 407 U.S. 203, 204 (1972); Lego v. Twomey, 404 U.S. 477, 486-87 (1972); Mullaney v. Wilbur, 421 U.S. 684 (1975); Patterson v. New York, 432 U.S. 197 (1972); Cool v. United Statee, 409 U.S. 100, 104 (1972). Winship presupposes as an essential of due procees that no person shall be made to suffer the onus of a criminal conviction except upon sufficient proof -- defined as evidence neceeaary to convince a trier of fact bevond a reasonable doubt of the existence of every element of the offense. Jackson v. Virainia, 443 U.S. 307 (1979). It is incomprehensible that a jury can be convinced "beyond a reasonable doubt of the existence of every element of the offense" if they have not been inetructed as to what the elements are. But that is exactly what we are faced with in Mr. Parker's case.

Thie Court has consistently held that it is fundamental error for a trial court to fail to properly instruct on the elements of felony murder in a felony murder case. In State v. Jones, 377 So. 2d 1163, (Fla. 1979), this Court explained:

> In the preeent case, there was a complete failure to give any instruction on the elements of the underlying felony of robbery. This was fundamental error. It is essential to a fair trial that the jury be able to reach a verdict based upon the law

and not be left to its own devices to determine what constitutes the underlying felony. Robles v. State.

Id. at 1165.

In Robles v. State, 188 So. 2d 789 (Fla. 1966), an insufficient instruction on the elements of burglary, the underlying felony, was given. This Court said:

> The jury is left to its own devices as to what constitutes breaking and entering and as to the character of the felonious intent that is required. As to the precise intent that appellant was alleged to have, these instructions fail to identify the felony that he allegedly intended to commit or even define the term "felony," in the abstract. It is true that the court agreed to give such instructions and the defendant's trial counsel agreed to prepare same but failed to do so. But this failure of counsel does not relieve the court of the duty to give all charges necessary to a fair trial of the issues. We hold that since proof of these elements was necessary in order to convict appellant under the felony-murder rule, the court was obligated to instruct the jury concerning them, whether or not requested to do so. Canada v. State, Fla.App.1962, 139 So.2d 753; Motley v. State, 1945, 155 Fla. 545, 20 So.2d 798; Croft v. State, 1935, 117 Fla. 832, 158 So. 454; 32 Fla. Jur. "Trial," sec. 186.

Id. at 793 (emphasis added). See also Ingram v. State, 393 So. 2d 1187 (Fla. App. 1981). Here, the constitutional infirmity was far worse: the trial court failed to define felony murder at all and wholly failed to explain to the jury what the elemente of felony murder were.

Neither can the constitutional ills herein at issue be deemed harmless beyond a reasonable doubt -- the State's case here was felony murder. There exists no reasonable basis upon which a gravely deficient felony murder instruction in such a case can be deemed "harmless". Harmless error analysis has never been applied to faulty felony murder instructions in prosecution8 founded upon or primarily founded upon felony murder. Cf. Jent v. State, 408 So. 2d 1024, 1031 (Fla. 1982).

Florida's courts, in fact, have consistently recognized that the failure to instruct on the elements of felony murder in a felony murder prosecution involves prejudicial, fundamental error. See, e.g., Brown v. State, 501 So. 2d 1343 (Fla. 3rd DCA 1987). The error is compounded where, as here, felony murder is not even defined. In a jury trial, the primary finders of fact are, of course, the jurors. United States v. Martin Linen Supply Co., 430 U.S.

564, 572-73 (1977).

Moreover, under the conetitutional standard, if there is any chance that Mr. Parker's jurors relied on felony-murder, then Mr. Parker's conviction must be set aside:

> And "[i]t has long been settled that when a case is submitted to the jury on alternative theories the unconstitutionality of any of the theories requires that the conviction be set aside, See, e.g., Stromberg v. California, 283 U.S. 359, 51 S.Ct. 532, 75 L.Ed. 1117 (1931)." Learv v. United States, 395 U.S. at 31-32, 89 S.Ct. at 1545-1546. See Ulster Countv Court v. Allen, 442 U.S., at 159-60, n.17, 99 S.Ct. at 2226, and at 175-176, 99 S.Ct., at 2234 (POWELL, J., dissenting); Bachellar v. Maryland, 397 U.S., at 570-571, 90 S.Ct. at 1315-1316; Brotherhood of Carpenters v. United States, 330 U.S., at 408-409, 67 S.Ct. at 782; Bollenbach v. United States, 326 U.S., at 611-614, 66 S.Ct. at 404-405.

Sandstrom v. Montana, 442 U.S. 510, 526 (1979). Here, there surely exists a likelihood that the jurors relied on the flawed instruction, as the State urged them to do.

The failure to adequately instruct a jury on the elements of the offense charged is as egregioue aa a directed verdict; such errors remove central issues from their rightful place in the jury's domain and deny the accused the right to a verdict as to hie guilt or innocence provided by the jury. See Rose v. Clark, 106 S. Ct. 3101, 3106 (1986). Such instructional deficiencies

> created an artificial barrier to the consideration of relevant . . . testimony . . . [and reduce] the level of proof necessary for the [state] to carry its burden.

Cool v. United States, 409 U.S. 98, 104 (1972). The deprivation of a capital criminal defendant's right to a jury verdict simply cannot be deemed "harmless" and much less so "harmless beyond a reasonable doubt." As the United States Supreme Court has explained:

> Of course, aa the Government argues, in a jury trial the primary finders of fact are the jurors. Their overriding responsibility is to stand between the accused and a potentially arbitrary or abusive Government that is in command of the criminal sanction. For this reason, a trial judge is prohibited from entering a judgment of conviction or directing the jury to come forward with such a verdict, see Sparf & Hansen v. United States, 156 U.S. 51, 105, 15 S.Ct. 273, 294, 39 L.Ed. 343 (1895); Carpenters v. United States, 330 U.S. 395, 408, 67 S.Ct. 775, 782, 91 L.Ed. 973 (1947), regardless of how overwhelmingly the evidence may point in that direction. The trial judge is thereby barred from attempting to override or interfere with the jurors' independent judgment in a manner contrary to the interests of the accused.

United States v. Martin Linen Supply Co., supra, 430 U.S. at 572-73. Thus,

> [a] defendant charged with a serioue crime has the right to have a jury determine his guilt or innocence, Duncan v. Louisiana, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968), and a jury's verdict cannot etand if the instructions provided the jury do not require it to find each element of the crime under the proper atandard of proof, Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979). Findings made by a judge cannot cure deficienciee in the jury's finding as to the guilt or innocence of a defendant resulting from the court's failure to instruct it to find an element of the crime. See Connecticut v. Johnson, 460 U.S. 73, 95, and n.3, 103 S.Ct. 969, 982, and n.3, 74 L.Ed.2d 823 (1983) (POWELL, J., dissenting); cf. Beck v. Alabama, 447 U.S. 625, 645, 100 S.Ct. 2382, 2393, 65 L.Ed.2d 392 (1980); Presnell v. Georgia, 439 U.S. 14, 99 S.Ct. 235, 58 L.Ed.2d 207 (1978); id., at 22, 99 S.Ct., at 239 (POWELL, J., dissenting).

Cabana v. Bullock, 106 S. Ct. 689, 696 (1986).

An argument that there is no error here because premeditation was also argued and could have been the basis €or the jury'e verdict rather than felony murder would totally ignore the United States Supreme Court caaelaw that when a case is submitted to the jury on alternative theariee the unconstitutionality of any of the theories requires that the conviction be set aside. See, e.g., Stromberg v. California, 283 U.S. 359 (1931); Leary v. United States, 395 U.S. 6, 31-32 (1969); Ulster County Court v. Allen, 442 U.S. 140, 159-60 n.17 (1979); Bachellar v. Marvland, 397 U.S. 564, 570-71 (1970); Bollenbach v. United States, 326 U.S. 607, 611-14 (1946); sandstrom v. Montana, 442 U.S. 862, 99 S. Ct. 2450 (1979).

> One rule derived from the Stromberg case is that a general verdict must be set aside if the jury was instructed that it could rely on any of two or more independent grounds, and one of those ground8 is insufficient, because the verdict may have rested exclusively on the insufficient ground. The eases in which this rule has been applied all involved general verdicts based on a record that left the reviewing court uncertain as to the actual ground on which the jury's decision rested. See, e.g., Williams v. North Carolina, 317 U.S. 287, 292, 63 S.Ct. 207, 210, 87 L.3d 279 (1942); Cramer v. United States, 325 U.S. 1, 36 n.245, 65 S.Ct. 918, 935 n.45, 89 L.Ed. 1441 (1945); Terminiello v. Chicago, 337 U.S. 1, 5-6, 69 S.Ct. 894, 896-897, 93 L.Ed. 1131 (1949); Yates v. United States, 354 U.S. 298, 311-12, 77 S.Ct. 1064, 1072-1073, 1 L.Ed.2d 1356 (1957).

Zant v. Stephens, 462 U.S. 862, 103 S. Ct. 2733, 2745 (1983).

The fact that the prosecution may have argued both premeditation and felony-murder does not cure the inadequate felony-murder instruction. There was not a total reliance on premeditation with only a passing reference to

felony-murder. Rather, the prosecution relied heavily on felony-murder, starting with voir dire.

> MR. WAKSMAN: Let me ask one question that I didn't ask yeeterday: The charge of first degree murder can be proven two different ways. The grand jury has alleged it both ways. They way he committed first degree murder by doing this or by doing that and her Honor will tell you that there are two ways of committing the crime of first degree murder. I think she will tell you one is by premeditation and I'm sure you're familiar about that. That's when you think about it, say I'm going to kill this person and kill them.
>
> The other way that the law says first degree murder can be committed, has nothing to do with premeditation. It saya if aomebody dies during the commission of a felony, a serious felony such as rape or robbery, if someone dies, whether you premeditated it or not, whether you think about it or not, as opposed -- €or argument sake -- the gun can go off accidentally, those are the two different ways that the State can prove someone guilty of first degree murder.
>
> Does anybody have any difficulty in following the second one, which is known as the felony murder rule? The first one I'm sure everybody understands and everybody could find someone guilty of it if they were satisfied beyond a reasonable daubt that they thought about it and wanted to kill someone.
>
> The second one, most of you may not have herd about it or if you heard about it, you might have some feelings about it. That's what I would like to know. It's called the felony murder rule.
>
> And if the Judge were to instruct you that it is first degree murder if someone dies while you're committing a felony even though you didn't intend for them to die -- I'm not saying that this happened in this case, I'm just giving that as an example -- could everybody here follow that rule of law?
>
> Now, you may not like it. You may think it's a foolish rule. You may think it's not right, but that's the law and you'll be sworn to follow the Law.
>
> Does anybody feel so badly against that rule that they just could not follow the law?
>
> Does anybody here think they didn't understand it the way I explained it?
>
> If you die, without premeditation, it could be an accident, it could be intentional, but someone dies while the Defendant is committing a serious felony, such as rape ok robbery. That's first degree murder.
>
> And the State naturally only has to prove it one way. We could prove it both ways, but the facts could only prove it one way and if the facts came out only felony murder -- let's assume you heard no evidence of premeditation, and I'm not saying that thia case is about -- I don't want to get into the facts, but assume you heard no evidence of premeditation and you only heard evidence that one of the victims of the robbery died while the Defendant was committing the robbery or while he was committing

the rape. That's felony murder rule.

Does anybody feel they could not follow that rule if they were so instructed by the Court?

(R. Vol. 14, pp. 141-4). Later in voir dire, the prosecutor repeated that he could prove first degree murder in either of two ways:

MR. WAKSMAN: Okay. Thank you.
Let me ask the whole panel one or two general questions.

The main charge in this case is first-degree murder. I believe Her Honor will tell you, and the Indictment is framed in the same words, that there's two separate ways to prove and two separate ways to commit first-degree murder.

The State only has to prove one of them. Without telling you which type we're going on, which type the evidence is going to ehow: One is premeditation, which merely means you think about it; you know what you are doing and you do it.

I think everybody probably understands what that is.

The second one is a way which you may or may not be familiar with. It's called a felony murder rule, which means if you're committing a serious felony like rape or robbery and one of the victims dies without regard to premeditation or not, it's first-degree murder. That's what the law is and that's not as easy a concept to understand as the premeditation.

And, once again, without telling you which of the two theoriee the State will be relying upon or whether or not we will be relying upon both, I would just like to know: Can all of you accept euch a rule of law if Her Honor were to instruct you it is first-degree murder if someone dies while you're committing a serious felony such as robbery or rape?

Ms. Isaacs, do you have difficulty accepting a concept like that?

HS. ISAACS: No.

MR. WAKSMAN: Do you understand that just to be hypothetical about it, the gun could have gone off accidentally while pointing it at someone, saying, "Give me your money," and if the Judge were to tell you that's first-degree murder, if you're satisfied beyond a reasonable doubt that that happened, would you be able to return a verdict of first-degree murder?

MS. ISAACS: Yes, but I'd have to be satisfied beyond a reasonable doubt.

MR. WAKSMAN: If this were a shoplifting case, you would have to be satisfied beyond a reaswnable doubt.

MS. ISAACS: That's right; no matter what it is.

MR. WAKSMAN: It doesn't matter what we're talking about.

When we deal with certain concepts, people may not understand that. They may not want to convict on a rule of law they don't

care about.

You may also hear evidence that it was premeditated.

My question as to the felony murder aspect: Is your mind open enough to accept that principle if Her Honor tells you that's the law?

. . .

You would be required to find him not guilty, but I''m just asking you about the felony murder rule.

If you were satisfied beyond a reasonable doubt that he was, in fact, committing a robbery or rape and one of the victims died, without any further discussion as to how the man died, it could have been premeditated, but I want to talk about the other one today.

Will you be able to accept the concept the Judge told you; that that's first-degree murder?

(R. Vol. 15, pp. 118-122).

In hi8 opening statement, the prosecutor outlined what he intended to prove -- that Julio Chavez was shot while Mr. Parker was perpetrating felonies (R. Vol. 16, p. 21)(see also R. Vol. 16, pp. 27-28)(arguing that guilt can be established under felony murder theory -- "while engaged in the perpetration" of felonies). In closing, the prosecutor reiterated the theme of proof of first degree murder in either manner, and strenuously argued for felony murder (R. Vol. 23, pp. 1224-26).

The jury verdict form was a general one. There is no way to know on what basis the jury found first-degree murder. Since there was constitutional error in the felony-murder instruction, Mr. Parker's conviction must be set aside.

Likewise, this issue cannot be denied on the basis of a harmless error analysis. See Yates v. Evatt, 111 S. Ct. 1884 (1991). A criminal defendant shall not be convicted "except upon sufficient proof -- defined as evidence necessary to convince a trier of fact beyond a reasonable doubt of the existence of every element of the offense." Jackson v. Virginia, 443 U.S. 307 (1979). To find that there was sufficient evidence of felony-murder presented to the jury such that an unconstitutional instruction is harmless error is the same as directing a verdict against the defendant. But it is incontestable

that directed verdicts cannot be entered against criminal defendants. United States v. Martin Linen Supply Co., 430 U.S. 564, 572-73, 97 S. Ct. 1345, 1355, 51 L.Ed.2d 642 (1977); Carpenters v. United States, 375 F.2d 135, 148 (CA5 1967); Sandstrom v. Montana, supra, 99 S. Ct. at 2455 n.5. In addition, the Supreme Court has held that "in any event an unconstitutional jury instruction on an element of the crime can never constitute harmless error, see aenerallv, Carpenter v. United States, supra, 330 U.S. at 408-09; Bollenbach v. United States, 326 U.S. at 614, 615." Sandstrom, 99 S. Ct. at 2460.

This error requires reversal for a new trial that comports with due process. An evidentiary hearing is required on trial counsel's ineffectiveness in failing to object to the deficient instructions. Mr. Parker's conviction and eentence of death stand in violation of the fifth, sixth, eighth and fourteenth amendments, and relief is proper.

ARGUMENT V

MR. PARKER WAS DENIED HIS FUNDAMENTAL FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS BY THE TRIAL COURT'S FAILURE TO INSTRUCT ON LESSER INCLUDED OFFENSES ALTHOUGH MR. PARKER HAD MADE NO RECORD WAIVER OF SUCH INSTRUCTIONS.

In Brown v. State, 206 So. 2d 377 (Fla. 1968), this Court interpreted Fla. Stat. Section 919.16 to require a trial judge to instruct a jury on every lesser offense necessarily included in the offense charged. This is true even though the proof might satisfy the trial judge that the more serious offense was proved. The Court went on to note that the accused there was entitled to an instruction on larceny because that offense is necessarily included in the crime of robbery. Accord State v. Washington, 268 So. 2d 901 (Fla. 1972); Ravner v. State, 273 So. 2d 759 (Fla. 1973); Harris v. State, 438 So. 2d 787 (Fla. 1983). As the Court explained in Harris, a trial court's failure to instruct on lesser included offenses is not subject to harmless error analysis -- such errors are fundamental and per se harmful.

As thia Court also explained, the Harris holding was consistent with the standard set forth in Beck v. Alabama, 447 U.S. 625 (1980). There, the U.S. Supreme Court held that a death sentence may not constitutionally be imposed after a jury verdict of guilt of a capital offense if the jury was not

permitted to consider a verdict of guilt on a lesser included offense:

> While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process, the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard. That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense -- but leaves some doubt with respect to an element that would justify conviction of a capital offense -- the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction.
>
> Such a risk cannot be tolerated in a case in which the defendant's life is at stake. As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:
>
> "[D]eath is a different kind of punishment from any other which may be imposed in this country.... From the point of view of the defendant, it is different in both its severity and its finality. From the point of view of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. It is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." Gardner v. Florida, 430 U.S. 349, 357-358, 97 S.Ct. 1197, 1204, 51 L.Ed.2d 393 (opinion of Stevens, J.).
>
> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotion," we have invalidated procedural rules that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to rules that diminish the reliability of the guilt determination. Thus, if the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, Alabama is constitutionally prohibited from withdrawing that option from the jury in a capital case.

In Harris, this Court set forth the standard pursuant to which the right to jury instructions on necessarily included lesser offenses can be waived by a defendant. However, the Court held that the waiver must be expressly made by the defendant himself:

> But, for an effective waiver, there must be more than just a request from counsel that these instructions not be given. We conclude that there must be an express waiver of the right to these instructions by the defendant, and the record must reflect that it was knowingly and intelligently made,

Id. at 797 (emphasis in original).

In Mr. Parker's trial, the instruction conference was held in chambers directly after Mr. Parker testified. After the conference began, the Bailiff came into chambers and asked if the defendant could "go back." Defense

counsel stated that he needed to check with Mr. Parker to see if he would waive hie presence at conference; he then left the room to check. Defense counsel re-entered chambers and stated, "The defendant waives his preeence" (R. Vol. 22, p. 1101). The rest of the instruction conference then proceeded. During that conference the defense attorney waived an instruction on the lesser included crime of theft (R. Vol. 22, p. 1130), lesser includeds under sexual battery (R. Vol. 22, p. 1133), and waived robbery without a firearm (R. Vol. 22, p. 1150). Mr. Parker was not there. No record waiver from the defendant was had in this case. Mr. Parker was thus denied his rights under Beck and the fifth, sixth, eighth, and fourteenth amendments: "The trial judge hae no discretion in whether to instruct the jury on a necessarily lesser included offense. Once the judge determines that the offenee is a necessarily lesser included offense, an instruction must be given." Harris, 438 So. 2d 932 (emphasis aupplied). Clearly Mr. Parker's rights to instructions on lesser offenses could not have been waived by defense counsel. A valid waiver cannot be had without the accused's express and personal waiver. Harris. There was no such on the record waiver here. In Mr. Parker's ease, the record indicates that Mr. Parker was not even present at the instruction conference, and there is no indication whether or not defense counsel had talked to him about waiving the instructions and whether he had any input into that decision, or whether he even knew about it.

Harris itself involved more than the lesser includeds for the first-degree murder:

> The colloquy between the trial judge and appellant's counsel reflects the following:
>
> > MR. WILLIAMS: For the record, pursuant to conversatione with our client, we have decided and at thia time we would be asking for no lessers and we ask that it be sent to the jury as charged.
> >
> > THE COURT: So the record is clear, You are nwt asking far any lessers under the firet-degree murder, any lessers under burglary nor any lesser under the armed robbery charge?
> >
> > MR. WILLIAMS: No.
> >
> > THE COURT: Is that correct?

MR. WILLIAMS: *Yes.*

Harris, 438 So. 2d at 795 (emphasie added).

Death cases are different. And the rules that govern them are different, In Mr. Parker's case the rules were not complied with.

In failing to fully and properly litigate this claim, trial couneel rendered prejudicially ineffective assistance, see Kimmelman v. Morrieon, and the circuit court erred in failing to conduct an evidentiary hearing on this claim.

Mr. Parker waa denied hie rights to a fundamentally fair and reliable capital trial and sentencing determination. This issue involves fundamental error and ineffective assistance of counsel, and relief is proper.

ARGUMENT VI

FLORIDA'S COURTS HAVE INTERPRETED "COLD, CALCULATED, AND PREMEDITATED" IN *AN* UNCONSTITUTIONALLY OVERBROAD MANNER, HAVE APPLIED THIS AGGRAVATING CIRCUMSTANCE UNCONSTITUTIONALLY AND OVERBROADLY TO THIS CASE, IN VIOLATION OF THE EIGHTH *AND* FOURTEENTH AMENDMENTS, *AND* THE APPLICATION OF F.S. SECTION 921.141(5)(I) IN THIS CASE VIOLATED DUE PROCESS AND EX POST FACTO CONSTITUTIONAL PROTECTIONS.

A. OVERBROAD APPLICATION

In Gregg v. Georgia, 428 U.S. 153 (1976), the United States Supreme Court found the Georgia death sentencing scheme to be constitutional an its face. The Court there faund sentencing discretion "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." Id. at 189. This was becauee the statute "focus[ed] the jury's attention on the particularized nature of the crime and the particularized characteristics of the individual defendant." Id. at 206. Contemporaneous with its decision in Gregg, the Court upheld the Florida death penalty scheme for virtually identical reasons. Proffitt v. Florida, 428 U.S. 242 (1976).

An aggravating circumetance performs the crucial function in a capital sentencing echems of narrowing the class eligible for the death penalty. It is a standard established by the legislature to guide the sentencer in choosing between life imprieonment and the imposition of death. An aggravating circumstance is in essence a legislative determination that a particular murder with the circumstance present is different, and that this difference reasonably justifies "the imposition of a more severe sentence." Zant v. Stephens, 462 U.S. 862 (1983).

The narrowing function of an aggravating circumstance requires that such a circumstance be capable of objective determination. The aggravating circumstance must be described in terms that are interpreted and applied understandably. It must provide guidance and direct the sentencer's attention to a particular aspect of a killing that justifies the death penalty. The Supreme Court, in fact, has ruled that an aggravating circumstance cannot stand when it is so vague that it fails to adequately channel the sentencing decieion. Maynard v. Cartwriaht, 108 S. Ct. 1853 (1988); Godfrey v. Georgia,

446 U.S. 420 (1980).

The cold, calculated and premeditated aggravating circumstance has been defined as requiring a careful plan or a pre-arranged plan. Rogers v. State, 511 So. 2d 526 (Fla. 1987); Mitchell v. State, 527 So. 2d 179 (Fla. 1988). This aggravating circumstance has been applied to cwntract murders and witness elimination murders, or when the facts ehow a substantial period of reflection and thought by the killer. Harmon v. State, 527 So. 2d 182 (Fla. 1988).

In thie case, the jury was not instructed on the limiting construction of thie aggravating factor, and the trial judge improperly found this aggravating circumstance. The facts show that Mr. Chavez was shot during a robbery and that possibly he waa shot to facilitate the sexual battery of his girlfriend. The facts indicate an unplanned action to silence Mr. Chavez, who was asking the robbers repeatedly not to hurt hia girlfriend. These facts do not justify the application of thie "heightened" premeditation aggravating factor.

This Court held that the cold, calculated and premeditated aggravating Circumstance wae improperly found in Harmon, where the murder occurred in the course of a robbery and was susceptible to conclusions other than finding it waa committed in a cold, calculated, and premeditated manner. The testimony at that trial was that the two co-defendants did not discuss killing anyone prior to the robbery, and Harmon's cellmate testified that Harmon told him that when during the course of the robbery the victim spoke his name, he became frightened. Similarly, there was no testimony in Mr. Parker's trial that a killing was planned, and the shot occurred quickly after Mr. Chavez spoke to the robbers. As in Harmon, this shooting was spontaneous and *not* planned.

This aggravating circumstance was overbroadly applied and overbroadly affirmed on direct appeal. The issue should now be revisited and relief should be granted.

B. EX POST FACTO

At the time of the offenses committed herein, the cald, calculated and

premeditated aggravating circumstance, F.S. Section 921.141(5)(i), wae not in existence. Its application in this case therefore violated Mr. Parker's constitutional rights.

Section 921.141(5)(i), as enacted, states the following:

> The capital felony was a homicide and was committed in a cold, calculated, and premeditated manner.

Sec. 921.141(5)(i), Fla. Stat. The addition of this factor to Florida's capital sentencing statute occurred when the Florida Legislature enacted Chapter 79-353, Laws of Florida. This law became effective on July 1, 1979, after the offenses herein. The Senate Staff Analysis and Economic Impact Statement explains the reason that the Legislature enacted this provision:

> Senate Bill 523 amends subsection (5) of s. 921.141, Florida Statutes, by adding a new aaaravatina circumetance to the list of enumerated ones. The effect of the new aggravating circumstance would be to allow the jury to consider the fact that a capital felony (homicide) was committed in a cold, calculated and premeditated manner without any pretense of moral and legal justification.

The staff report explained that in two cases, Riley v, State, 366 So. 2d 19 (Fla. 1978) and Menendez v. State, 368 So. 2d 1278 (Fla. 1979), this Court had clearly found that a trial court determination that a murder was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification did not constitute an aggravating factor under Florida's capital sentencing statute as it then existed.

Additionally, just after the enactment of the statute, this Court revised its opinion in Maaill v. State, 386 So. 2d 1188 (Fla. 1980)(revised opinion). In its revised opinion, the Court specifically deleted its prior statement that a "cold, calculated design to kill constitutes an especially heinous, atrocious, or cruel murder." The change made by the Court in response to Mr. Magill's motion for rehearing on that very point demonstratee that such evidence never supported independently the finding of any of the original eight aggravating factors.

Similarly, in Lewis v. State, 398 So, 2d 432, 438 (Fla. 1981), the Court, consistent with its statements in Riley, Menendez, and demonstrated by the revision of Maaill, observed that premeditation, which was "cold and

calculated and stealthily carried out," was not evidence relevant to any of the original eight aggravating factor8 in the statute and that an aggravating factor based on that finding was invalid under Florida law. It is therefore clear that prior to the enactment of Chapter 79-353, Laws of Florida, this Court would not allow an aggravating factor based solely on facts showing "a cold, calculated design to kill" to stand as the foundation for any of the original eight aggravating factors.

In Miller v. Florida, 107 S. Ct. 2446, 2451 (1987), the United States Supreme Court set out the test for determining whether a criminal law is ex post facto. In so doing, the Supreme Court, for the first time, harmonized two prior court decisions, Dobbert v. Florida, 432 U.S. 282, 97 S. Ct. 2290 (1977), and Weaver v. Graham, 450 U.S. 24, 101 S. Ct. 960 (1981):

> . . . Ae was etated in Weaver, to fall within the ex post facto prohibition, two critical elements must be present: First, the law "must be retrospective, that is, it must apply to events occurring before its enactment" and second, it must disadvantage the offender affected by it." Id., at 29. We have also held in Dobbert v. Florida, 432 U.S. 282, that no ex post facto violation occurs if a change does not alter "substantial personal rights," but merely changes "modes of procedure which do not affect matters of substance." Id., at 293.

Miller, supra, at 2451. Under the resulting new analysis, it is now clear that sec. 921.141(5)(i) operated as an ex post facto law in Mr. Parker's case.

A law is retrospective if it "appl[ies] to events occurring before its enactment." Weaver v. Graham, 101 S. Ct. at 964. The relevant "event" is the crime, which in Mr. Parker's case occurred prior to the legislatively enacted change to sec. 921.141(5). As Miller explained, retrospectivity concerns address whether a new statutory provision changes the "legal consequences of acte completed before its effective date." Miller v. Florida, 107 S. Ct at 2451 (citations omitted). The relevant "legal consequences" include the effect of legislative changes on an individual's punishment for the crime of which he or she has been convicted. See Miller v. Florida, 107 S. Ct. at 2451 (citations omitted).

The change in the sentencing statute in this instance did change the legal consequences at sentencing: Mr. Parker's trial judge became empowered

to consider and apply an additional statutory aggravating factor. As the Court demonstrated in its Riley, Menendez, and Lewis decisions and implied by the revision of its opinion in Magill, under the prior statute, facts solely demonstrating heightened premeditation would never have supported the finding on an aggravating factor. Only after enactment of Chapter 79-353 did such facts take on an independent legal consequence. Section 921.141(5)(i) is therefore retroepective.

Combs v. State, 403 So. 2d 418 (Fla. 1981), held that the addition of sec. 921.141(5)(i) to the capital eentencing procedure did not constitute an ex post facto law because it did not disadvantage the defendant:

> What, then, does the paragraph add to the statute? In our view, it adds the requirement that in order to consider the elements of a premeditated murder as an aggravating circumstance, the premeditation must have been "cold, calculated and . . . without any pretense of moral or legal iustification." Paragrawh (i) in effect adds nothina new to the elements of the crime for which petitioner stands convicted but rather adds limitations to those elements for use in aqaravation, limitations which inure to the benefit of a defendant.

Id. at 421. In arriving at this decision, the combs court erred because it never conducted a complete and proper analysis of the new law. The Combs court merely observed that the new law limited the use of premeditation at the penalty phase. The court, however, did not examine the challenged provieion to determine whether it operated to the disadvantage of a defendant as the Miller decision now clearly requires. See Miller v. Florida, 107 S. Ct. at 2452. In Miller, the Supreme Court examined both the purpose for enactment of the challenged provision and the change that the challenged provieion brought prior to the statute to determine whether the new provision operated to the disadvantage of Mr. Miller. Id. In applying that analysis to the challenged proviaion at issue here, it is clear that the new provision is "more onerous than the prior law" (Dobbert v. Florida, 97 S. Ct. at 2299) because it substantially disadvantages a capital defendant. Id.

When the legislature enacted Chapter 79-353, it expressly intended to add to Florida's capital sentencing statute an additional statutory aggravating factor. Specifically, the drafters of the legislation wanted to address

concerns created by this Court in its decisions in Menendez and Riley. They expressly intended for the new provision to enhance the probability of imposing death on a capital defendant by adding an aggravating factor which could be found by a jury and judge based solely on facts showing that a murder wae committed in a cold, calculated and premeditated manner.

AO explained above, prior to enactment of this legislation, this court had refused to allow such facts, etanding alone, to justify the finding of any of the eight original aggravating factors. Id. Thus, the purpose of the new legislation was expressly aimed at enhancing the probability of a death sentence and thereby disadvantaging a capital defendant.

The change which the new law brought to the sentencing statute operates to the dieadvantage of a capital defendant. In Mr. Parker's case, the jury considered and relied on and the trial judge applied the new aggravating factor and gave it substantial weight in making the determination that death was the appropriate sentence.

Under the Law in effect at the time of the murder in this case, the trial judge would not have been empowered to increase the probability of a death sentence in this manner because Florida sentencing law strictly limits consideration of aggravating factors to those enumerated in the statute. See e.g. sec. 921.141 (5). The Combs court recognized this principle, but failed to give it proper significance for purposes of *ex* post facto analysis. See Combs v. State, 403 So. 2d at 421. The weiaht given to an aggravating factor greatly affects the determination of whether a capital defendant receives life or death, as does the cumulative weight accorded all aggravating factors found in imposing a death sentence (see e.g. Section 921.141), but the Combs decision did not address this issue. Under Miller, this omission is error.

If a disadvantage caused by the effect of a new law is purely speculative, it is not onerous for purposes of *ex* post facto analysis. See Dobbert v. Florida, 97 S. Ct. at 2299 n. 7. But, the increased exposure to a death sentence identified above is demonstrably not speculative under Florida's capital sentencing procedures. In Miller, the Supreme Court

rejected the respondent's argument that a change in the sentencing statute for non-capital defendants was not disadvantageous simply because a defendant could not demonstrate "definitively that he would have gotten a lesser sentence." Miller v. State, 107 S. Ct. at 2452.

Similar to the Miller defendant, Mr. Parker was subjected to the probability of a more enhanced eentance at trial because of the new law. In this instance, however, the more severe sentence was death instead of life. He was therefore "substantially disadvantaged" by a retrospective law. The change to the capital eenteneing etatute operates in an additional manner to subetantially dieadvantage Mr. Parker.

The third part of the Miller analysis requires examination of the see. 921.141(5)(i) to determine whether it alters a substantial right. Miller v. Florida, 107 S. Ct. at 2452. As explained previously, Florida law limits the consideration of aggravating factors to those enumerated in the capital sentencing etatute. This limitation affects the "quantum of punishment" that a capital defendant can receive because a jury and judge must determine whether or not statutory aggravating circumstances outweigh any mitigating circumstances before arriving at a verdict of life or death. The right to limitation was altered when the jury was allowed to consider and the judge, by operation of the new law, applied an additional statutory aggravating factor.

For the foregoing reasons, the law as applied to Mr. Parker at his sentencing hearing was ex post facto, and his sentence of death is therefore void. Miller v. Florida, 107 S. Ct. 2446 (1987). Since aggravation was found, and mitigation should have been found, reversal is necessary.

Miller v. Florida did not exist at the time of Mr. Parker's trial and direct appeal. The Miller opinion substantially changed the ex post facto analysis previously applied to claims such as Mr. Parker's under the federal constitution. Miller v. Florida is a substantial, retroactive change in law sufficient to require that the merits of Mr. Parker's claim be reviewed in this proceeding. See, e.g., Downs v. Dugger, 514 So. 2d 1069 (Fla. 1987); Tafero v. State, 459 So. 2d 1034, 1035 (Fla. 1984); Witt v. State, 387 So. 2d

922, 929 (Fla. 1980).

The discussion presented above demonstrates that Rule 3.850 relief would be more than proper in this action since Mr. Parker was denied his fifth, sixth, eighth, and fourteenth amendment rights. Trial counsel failed to properly litigate these claims, and thus provided ineffective assistance of counsel. An evidentiary hearing and, thereafter, relief are appropriate.

ARGUMENT VII

MR. PARKER WAS DENIED HIS BIGHTS TO *AN* INDIVIDUALIZED AND FUNDAMENTALLY FAIR *AND* RELIABLE CAPITAL SENTENCING DETERMINATION AS A RESULT OF *THE* PRESENTATION OF CONSTITUTIONALLY IMPERMISSIBLE INFORMATION WHICH WAS IRRELEVANT *TO* ANY AGGRAVATING CIRCUMSTANCE.

Mr. Parker was charged with the murder of Julio Chavez, during a drug deal gone bad. During the course of the proceedings, however, the prosecutor repeatedly brought the jury's and judge's attention to the fact that Julio's girlfriend, Silvia Arana, who was also the alleged victim of sexual assault, had no knowledge of any alleged drug use on the part of her boyfriend or his roommates. This began with the opening statement and was repeated during the testimony of David Ortegoza and Diaz, Julio's roommates, as well as Silvia's awn testimony.

For example, on direct examination, David Ortegoza was questioned as follows:

> Q. Had anybody ever used any cocaine in her presence, in your house?
>
> A. No, sir.
>
> Q. Did you ever tell her that you were selling cocaine?
>
> A. No, eir.
>
> Q. In your presence, did Luis Diaz *ever* tell her that he was selling cocaine?
>
> A. No, air.
>
> Q. In your preeence, did Julio Chavez ever tell her he was selling cocaine?
>
> A. I don't know.
>
> Q. I said, in your preeence.
>
> A. No, sir.

Q. To the beat of your knowledge, she didn't know what was going on?

A. That's right.

(R. Vol. 16, p. 68). Likewise, during direct examination of Silvia Arana, who wae a 24 year old nursing student at the time of trial, the following was elicited:

Q. At anytime, when you were there, was any cocaine ever used in your presence?

A. NO.

Q. Did you ever see them sell any cocaine in your presence7

A. No, I did not.

Q. Were you aware at the time that they may have been engaging in the sale of cocaine?

A. No.

Q. Were you using any cocaine?

A. No.

(R. Vol. 18, pp. 450-1). Silvia was thus portrayed as a completely innocent young woman, who had no idea of any alleged drug dealing tendencies on the part of her boyfriend, who was also referred to at least once as her fiance, and who was allegedly killed by Mr. Parker.

In the presentence investigation, which the sentencing court reviewed, Silvia made the following statement:

Victim: Silvia Arana, states that, "he had no right to be living. He took a life and should suffer €or it. He deserves something more than life in prison, something more severe. I think he deserves the electric chair."

In the penalty phase, the prosecutor presented the testimony of Julio's father to the sentencing judge:

MR. WAKSMAN [PROSECUTOR]: Is there anything you would like to say to the Court now, knowing that at this point Your Honor has to determine what the appropriate sentence is?

MR. CHAVEZ [VICTIM'S FATHER]: Well, it is hard for me to express my feelings right now because I am the father of the victim. I am 60 years old.

This is the first time in my life I am in the Courtroom. After these three years there is no way to stop the sadness and the cry for my wife and me every single day. I don't think forever there would be happiness in our lives.

> This 60 year old that I have, this is the first time I want somebody to be dead. Not only because he killed my son but what I think there are so many good people on the street exposed to people. There are so many children, good people maybe get killed €or people like him. I don't hate, but I Love human beings and I want the good human beings to be alive.
>
> Your Honor, as I said, it is hard for me to keep talking.

(R. Vol. 25, p. 5)

After this statement, the prosecutor also urged that a sentence of death be imposed on the basis of comments in the pre-sentence investigation by Mr. Arana, and noted that Mrs. Chavez was in the Courtroom, but did not wish to speak. Mr. Chavez also made an additional statement in the presentence investigation. There he stated his belief that hie son never had any involvement with drugs, that his son had asked his two roommates, Diaz and Ortegoza, to move out if they were going to be involved with drugs, and that they were about to do so. Mr. Chavez also stated that his wife and several of their friends all believed that Mr. Parker should receive the electric chair.

In pronouncing her sentence, the trial court specifically noted that she had "considered the remarks that were made at this [sentencing] hearing . . ." (R. Vol. 25, p. 14). It is clear that the trial judge considered the remarks made by Julio Chavez's father at the sentencing hearing.

The type of evidence and State argument described above was obviously introduced and used for one purpoee -- to obtain a capital conviction and sentence of death because of impermissible factors. This was patently unfair and violated Mr. Parker's rights to a fundamentally fair trial and to a reliable and individualized capital sentencing determination. The list of aggravating circumstances in Florida's capital sentencing statute is exclusive, and no other factors are permitted to be considered. In fact, the State's arguments for death involved an obvious attempt to impermissibly aggravate the homicide and justify a death sentence on the basie of this impermissible information.

The proceedings involved in this case led to an unreliable and arbitrary result, and violated due process, the eighth amendment and the Florida constitution. This issue is properly before this Court, and Rule 3.850 relief

is proper. Mr. Parker is entitled to a new sentencing hearing. Moreover, Mr. Parker respectfully submits that trial counsel rendered prejudicially ineffective assistance in failing to fully and properly object and to fully litigate theee issues. An evidentiary hearing should have been granted.

ARGUMENT VIII

MR. PARKER'S DEATH SENTENCE RESTS UPON AN UNCONSTITUTIONAL AUTOMATIC AGGRAVATING CIRCUMSTANCE, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Parker was charged with first-degree murder in the fallowing manner: murder from a premeditated design to effect the death of the victim, or while engaged in the perpetration of or in an attempt to perpetrate sexual battery and robbery, in violation of Florida Statute 782.04. Section 782.04 is the felony murder statute in Florida. Liahtbourne v. State, 438 So. 2d 380, 384 (Fla. 1983). This charge therefore included both premeditated and felony murder.

The State's case for guilt rested entirely on, and the State's arguments almost entirely focused on, felony murder. The jury then returned a general verdict of guilt. Clearly this was a felony murder case.

If felony murder was the basis of Mr. Parker's conviction, then the subsequent death sentence is unlawful. This is so because the death penalty in this case was predicated upon an unreliable automatic finding of a statutory aggravating circumstance -- the very felony murder finding that formed the basis €or conviction. Automatic death penalties upon conviction of first-degree murder violate the eighth and fourteenth amendments. Sumner v. Shuman, 107 S. Ct. 2716 (1987). In this case, felony murder was found as a statutory aggravating circumstance. ("The evidence at trial, specifically the testimony of the three surviving victims, shows that NORMAN PARKER, JR. murdered Julio Chavez in the course of committing both an Armed Robbery and a Sexual Battery." (R. 445)). The sentencer was entitled automatically to return a death sentence upon a finding of guilt of first degree (felony) murder. Under such circumstances, every felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which,

under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is created which does not narrow. "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983). In short, if Mr. Parker was convicted for felony murder, he then faced statutory aggravation for felony murder.

The United States Supreme Court addressed a similar challenge in Lowenfield v. Phelwe, 108 S. Ct. 546 (1988). Unlike the Louisiana and Texas laws discussed in Lowenfield, the operation of Florida law in this case did not provide constitutionally adequate narrowing at either phase, because, unlike the statute at issue in Lowenfield, conviction and aggravation in Mr. Parker's case were predicated upon a non-legitimate narrower -- felony-murder.

Trial counsel failed his client by not properly litigating this unconetitutional error. The circuit court erred in failing to conduct an evidentiary hearing on the ineffective assistance of counsel issue raised here. Relief is proper.

ARGUMENT IX

MR. PARKER'S SIXTH, EIGHTH, *AND* FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL *COURT'S* REFUSAL TO INSTRUCT THE JURY THAT TEE COURT COULD IMPOSE CONSECUTIVE SENTENCES ON THE OFFENSES ON WHICH MR. PARKER WAS CONVICTED~WHICH COULD *ALSO* HAVE BEEN ORDERED TO BE SERVED CONSECUTIVELY TO MR. PARKER'S EARLIER F'LORIDA *AND* WASHINGTON, D.C., CONVICTIONS, THUS MISINFORMING AND MISLEADING THE JURY IN FAVOR OF VOTING FOR DEATH, AND VIOLATING MR. PARKER'S RIGHTS TO *AN* INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION.

Mr. Parker's jury was misled and misinformed. The trial court instructed the jury that the alternative to a sentence of death would be "life imprisonment, without possibility of parole for 25 years" (See, e.g., R. Vol. 24, p.83). The jury, however, wae never informed that that waa not the only available alternative to a sentence of death -- i.e., that the Court could sentence Mr. Parker to consecutive eentencee of imprisonment for the murder and the underlying felonies, and that these eentencee could have been ordered to be served consecutively to the two previous convictions €or which Mr. Parker was serving life sentences. The Court, eventually, did sentence Mr. Parker consecutively to the maximum available terms (R. Vol. 25, p.19).

Defense counsel did in fact request that the Court provide the jury with such an instruction (R. Vol. 22, p. 1152). The Court refused.[8] The prosecutor then vehemently argued to the jury that the "life sentence" alternative to death did not mean that "[h]e's not getting out" (R. Vol. 24, pp.66-68), and that "if life meant life" there would have been no homicide in thie case.

The Court's refusal to instruct on the "consecutive sentences" alternative made these misleading prosecutorial arguments abundantly credible to the jury. (No curative instruction was provided.) The jury was thus misinformed as to the alternatives to a death sentence, and misled into voting death -- i.e., the trial court's failure to instruct provided credence to the prosecutor's misleading arguments €or death. In fact, the trial court's refusal to appropriately instruct the jury on the option of consecutive

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[8]In failing to fully and properly object and to fully and effectively litigate this claim, counsel rendered prejudicially ineffective assistance.

sentencing (an option that was exercised in this case) was itself misleading: facing sentencing in a case involving a defendant with a serious record, the jury was led to believe that only two options were open -- death or a twenty-five year minimum. In failing to instruct, as requested, on the lawful, legitimate "third option," the trial court unconstitutionally skewed the jury towards death. See Beck v. Alabama, 447 U.S. 633 (1980). The jury deciding whether Norman Parker should live or die was misinformed. Cf. California v. Ramos, 463 U.S. 992 (1983).

Nothing was told to the jury with regard to the third option (consecutive sentences). As the United States Supreme Court has held in a related context, failing to provide a capital jury with the information neceseary to properly and fairly render a verdict, "inevitably [] enhance[s] the risk" of an unwarranted sentence of death. Beck v. Alabama, 447 U.S. 633, 637 (1980). The "risk" of an unwarranted death sentence under such circum- stances is as intolerable as the risk of an unwarranted convic- tion which the Supreme Court discussed in Beck. Id. at 633.

The erroneous failure to instruct undeniably placed "artificial alternatives" before the jury, California v. Ramos, 463 U.S. 992, 1007 (1983), and served to mislead and misinform the jury in violation of the sixth, eighth and fourteenth amendments. See Caldwell v. Mississippi, 472 U.S. 320 (1985). Doubtleea, the flawed instructions provided the jurors with misinformation of constitutional magnitude, a risk which, in a capital case, is simply intolerable. Beck; Caldwell.

Moreover, such an instruction interfered with the jury's ability to properly assess whether death was an appropriate penalty for Mr. Parker -- it interfered with their ability to properly assess both aggravation and mitigation. Cf. Hitchcock v. Duaaer, 107 S. Ct. 1821 (1987). This Court has made clear that accurate instructions are a prerequisite to the constitutional validity of any sentence of death. See, e.g., Floyd v. State, 497 So. 2d 1211, 1215-16 (Fla. 1986); Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986). Were, the instructions were inaccurate, and when compounded by the

prosecutor's argument, cf. Caldwell, misled the jury.

The jury was not provided with the information needed to make a reliable and rational decision on the issue of whether a sentence of death was appropriate in this case. Consequently, the trial court's refusal to instruct on consecutive sentences may well have persuaded the jury to sentence Mr. Parker to death in order to avoid setting him free. See Beck v. Alabama, 447 U.S. 625, 643 (1980). A death sentence obtained as a result of such misinformation simply does not comport with the reliability requirements mandated in capital cases. Beck: see also Caldwell; Hitchcock, supra.

Mr. Parker's sentence of death is neither reliable nor individualized. Accordingly, because Mr. Parker's fifth, sixth, eighth, and fourteenth amendment rights to a reliable capital jury verdict, and to a reliable and individualized capital sentencing determination have been violated, he is entitled to the relief he seeks.

ARGUMENT X

THE TRIAL COURT'S FAILURE *TO* ASSURE MR. PARKER'S PRESENCE IN COURT DURING PARTS OF HIS CAPITAL TRIAL VIOLATED THE FIFTH, SIXTH, EIGHTH *AND* FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Parker was not present during various important stages of the capital proceedings (e.g., R. Vol. 22, pp. 1101-1163; Vol. 23, pp. 1336-1338). At no point during the proceedings waa a proper waiver of the accused's right to be present obtained. In fact, Mr. Parker never validly waived his right to be preeent before the tribunal charged with deciding whether he should live or die.

The right to presence during a capital proceeding is non-waivable. Proffitt v. Wainwriaht, 685 F.2d 1227, 1258 (11th Cir. 1982); Diaz v. United Stateg, 223 U.S. 442 (1912); Hopt v. Utah, 110 U.S. 574 (1884). Even if the right to presence could be waived, this record is devoid of any facts which would support a constitutionally valid waiver of that right. Illinois v. Allen, 397 U.S. 337 (1970); Johnson v. Zerbst, 304 U.S. 458 (1938). In fact, the trial court failed to make any specific record findings whatsoever regarding the issue of waiver. Nor could it, for Mr. Parker never knowingly

and intentionally relinquished his right to be present. See, e.g., Francis v. State, 413 So. 2d 1175, 1178 (Fla. 1982); Johnson v. Zerbst, supra.

Accordingly, Mr. Parker was denied his fifth, sixth, eighth, and fourteenth amendment rights. Defense counsel rendered ineffective assistance of counsel in failing to assure that Mr. Parker was present at all critical stages of his capital prosecution. An evidentiary hearing was not allowed on this claim, and should be granted.

ARGUMENT XI

THE PROCEEDINGS RESULTING IN MR. PARKER'S CONVICTION AND SENTENCE OF DEATH WERE INFECTED BY THE USE OF TWO UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTIONS IN VIOLATION OF MR. PARKER'S FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

In sentencing Mr. Parker to death, the trial court relied on a previous murder conviction obtained against Mr. Parker in 1967 (Case No. 2325, Dade County Circuit Court) (see, e.g., R. Vol. 2, p. 444 [sentencing order]), and on a eecond-degree murder and assault conviction obtained against Mr. Parker on April 26, 1979 (Case No. F-4304-78, District of Columbia Superior Court) (see, e.g., R. Vol. 2, pp. 444-45). The trial court instructed the jury on the Fla. Stat. sec. 921.141(5)(a) and (b) aggravating circumstances. The State presented evidence regarding Mr. Parker'e previous convictions. The State then argued extensively that a sentence of death was appropriate because of Mr. Parker's record.

The use of those convictions to establish that the death penalty wae appropriate deprived Mr. Parker of his eighth and fourteenth amendment rights, for those convictions were obtained in violation of Mr. Parker's fifth, sixth and fourteenth amendment rights. Therefore, those convictions should never have been ueed to aggravate the instant offense. See Johnson v. Mississippi, 108 S. Ct. 1981 (1988). Mr. Parker has filed a separate Rule 3.850 motion challenging the 1967 Dade County conviction (Case No. 2325), and is pursuing post-conviction pleadings in the District of Columbia challenging that conviction. A brief discussion of the issues raised with respect to those previous convictions is presented immediately below,

A. The District of Columbia Conviction

Mr. Parker's 1979 second-degree murder conviction in the District of Columbia was obtained in stark abrogation of his sixth and fourteenth amendment rights to the effective assistance of counsel. Among the specific instances of gross ineffectiveness on the part of his District of Columbia court-appointed attorney which Mr. Parker would prove at a hearing are the following:

> i. No motion to suppress the sole item of physical evidence which "connected" Mr. Parker to that offense (a gun illegally obtained from Mr. Parker's residence) was ever filed or litigated. Such a motion, respecting the identical illegal eearch -- the identical gun -- was litigated prior to Mr. Parker's 1981 Florida trial. The gun was suppressed. The suppression order was affirmed on the State's appeal. State v. Parker, 399 So.2d 24 (Fla. 3d DCA 1981). As the Third District Court of Appeal's opinion makes unmistakably clear, the warrantless search at issue was patently illegal. 399 So. 2d at 30. The failure of counsel to properly litigate this issue in the District of Columbia cannot be excused. Counsel was ineffective, and his ineffectiveness substantially prejudiced Mr. Parker. See Kimmelman v. Morrison, ___ U.S. ___, 106 S.Ct. 2661 (1986).
> ii. Mr. Parker was represented by an attorney who prepared and presented no discernible defenoe whatsoever. For example, counsel failed to provide the prosecution with any notice of intent to rely on an insanity defense. On the first day of trial, counsel announced that he wished to present such a defense. The Court, of course, denied the attorney'e request as untimely. No legitimate defense was then prseented.
> iii. No motions whatsoever were filed challenging the legality of statements obtained from Mr. Parker which were then introduced at trial. These statements were open to challenge on fifth and sixth amendment grounds, as well as on the obvious ground that they were the "fruits" of an illegal search and seizure. Cf. State v. Parker, supra. Again, counsel's inexcusable omission substantially prejudiced Mr. Parker. See Kimmelman v. Morrison, supra.
> iv. On appeal only one issue was raised -- the sufficiency of the evidence to support the conviction. Even from a review of the Superior Court Clerk's file, it is apparent that a number of other issues were preeented by this trial. None were litigated on appeal. Appellate counsel's omissions resulted in a deprivation of Mr. Parker's sixth amendment rights.

B. The 1967 Dade County Conviction

Mr. Parker's 1967 Dade County conviction was obtained in clear abrogation of the sixth and fourteenth amendments to the United States Constitution. Mr. Parker filed a Motion to Vacate Judgment and Sentence challenging his conviction in that 1967 Dade County case (No. 2325). That motion, appended to the 3.850 motion in this case and incorporated herein,

presented the prima facie predicate for Mr. Parker's claim for relief.

C. The Trial Court Should Have Conducted A Hearing

The trial court erred in declining to allow an evidentiary hearing on theae issues. As Mr. Parker submitted before the trial court, these issues involved ineffective assistance of counsel -- without a tactic or strategy, and because of ignorance of the law, counsel failed to challenge the use of these prior convictions on the basis of their unconstitutionality when the State sought to employ them as aggravation in this case and also failed to independently challenge them. A valid claim for relief was stated and an evidentiary hearing wae appropriate.

ARGUMENT XII

MR. PARKER'S FIFTH, SIXTH, EIUHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S REFUSAL TO PROVIDE THE JURY WITH A CIRCUMSTANTIAL EVIDENCE INSTRUCTION.

Much of the State's case against Mr. Parker was based on circumstantial evidence. The only direct evidence connecting Mr. Parker to the alleged offense came from the testimony of three witnesses who identified Mr. Parker on the basis of an ll-year-old photograph. The credibility of these witneeaee was at issue throughout the proceedings.

Mr. Parker's trial attorneys requested that the Court instruct the jury on "circumstantial evidence" (R. Vol. 22, p. 1140; Vol. 23, p. 1174). The trial court refused. Defense counsel noted their objection (R. Vol. 23, p. 1332; see also p. 1309).

There can be no doubt that in a case such as this, where the State rests a aubstantial portion of its case an circumstantial evidence, a trial court's refueal to provide any instruction on how the jury is to coneider, review, weigh, and use such evidence in its deliberations is error. Neither can there be any doubt that such error is one of constitutional magnitude. The failure to provide any instruction on circumstantial evidence denied Mr. Parker the right to have the jury adequately determine whether the State had proved his guilt beyond a reasonable doubt. See In re Winship, 397 U.S. 358 (1970); Cool v. United States, 409 U.S. 98, 104 (1972). The court's refusal may well have

enhanced the risk of an unwarranted conviction and, where a defendant's life is at stake, such a risk cannot be tolerated. Beck v. Alabama, 447 U.S. 625, 637 (1980). Moreover, the trial court's failure to instruct created a "substantial risk" that the jury was denied the opportunity to entertain a reasonable doubt, Clark v. Taao, 676 F.2d 1099, 1105 (6th Cir. 1982), and that the jury may never have adequately and fairly examined the evidence concerning the elements of the crimes charged. See Connecticut v. Johnson, 103 S.Ct. 969, 978 (1983); see also Mullaney v. Wilbur, 421 U.S. 684 (1975). Finally, the trial court's refusal may well have "serve[d] to pervert the jury's deliberatione concerning the ultimate question whether in fact [Norman Parker was guilty of murder]." Smith v. Murray, 106 S.Ct. 2661, 2668 (1986)(emphasis supplied).

An instruction was necessary. The failure to give the instruction was fundamental error. some instruction on circumstantial evidence was warranted. None wae given. Consequently, Mr. Parker was denied his fifth, sixth, eighth, and fourteenth amendment rights. Relief is appropriate.

ARGUMENT XIII

MR. PARKER WAS DEPRIVED OF HIS RIGHT TO A FAIR AND RELIABLE SENTENCING DETERMINATION, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH *AND* FOURTEENTH AMENDMENTS, BECAUSE THE JURY'S SENSE OF RESPONSIBILITY WAS DIMINISHED *AND* COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN FAILING TO OBJECT OR LITIGATE THE ISSUE.

The death sentence imposed on Mr. Parker is constitutionally unreliable because the jurors's sense of responsibility for sentencing was unconstitutionally diminished. Defense counsel, without a tactic or etrategy, failed to object or otherwise litigate the issue, and thus rendered ineffective assistance.

At the penalty phase of Mr. Parker's capital trial, the trial court initially instructed the jury that their sentencing decision was advisory only and that the judge would make the "final" sentencing decision (R. Vol. 24, pp. *5-6*, 81-82).

Throughout its concluding instructions, the court noted time and again that the jury would be providing only an "advisory sentence," and a sentence that

the jury would only "recommend to the Court" (see, e.g., R. Vol. 24, pp. 82, 84, 85, 86).

At no time during the penalty phase did the trial court instruct or even inform the jury of the substantial deference Florida Law places on the jury's verdict. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). As this Court has explained, "[i]t is appropriate to stress to the jury the seriousnese which it should attach to its recommendation...[t]o do otherwise would be contrary to Caldwell v. Mississippi and Tedder v. State." Garcia v. State, 492 So. 2d 360, 367 (Fla. 1986) (citations omitted). No such instructions were provided in this case.

The harmful effects of the penalty phase instructions were accentuated by the court's own earlier instructions at guilt-innocence. There, the court instructed the jurors that

> The penalty is for the Court to decide. You are not responsible for the penalty in any way because of your verdict. . .

(R. Vol. 23, p. 1320), and that

> It is the Judge's job to determine what a proper sentence would be if the defendant is guilty.

(R. Vol. 23, p. 1327).

The harmful effects of these misleading instructions were further accentuated by comments made by the Court and prosecutor throughout the trial and sentencing proceedings (R. Vol. 14, pp. 63-64, 80). Such comments had an obvious impact on the jurors -- from the initial stages of voir dire their sense of responsibility was diminished (see, e.g., R. Vol. 15, p. 60; Vol. 14A, p. 102). Again, no instructions were provided at any point during the trial or sentencing proceedinge which explained to the jury the deference which their sentencing determination was to have.

Mr. Parker was sentenced to death on the recommendation of a jury whose senee of responsibility was substantially diminished. Defense counsel's failure to object and seek proper instructions was based on no tactic or estrategy. It constituted prejudicially deficient performance. Because Mr. Parker's sentence of death stands in violation of the sixth, eighth, and

fourteenth amendments, an evidentiary hearing and relief are warranted.

ARGUMENT XIV

MR. PARKER WAS DENIED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BY UNCONSTITUTIONAL BURDEN SHIFTING AT SENTENCING.

Mr. Parker's eentencing jury was specifically instructed that Mr. Parker bore the burden of proof on the issue of whether he should live or die. The trial court then itself used this uneonetitutional standard when it imposed sentence.

At eentencing, the court instructed the jury that a sentence of death was warranted if mitigating circumstances did not outweiah aggravating circumstances (R. Vol. 24,, pp. 6, 81-2, 83). The cwurt then applied thie constitutionally erroneous standard itself when imposing sentence (R. Vol. 2, p. 446; Vol. 25, p. 18).

Thus, the court shifted to Mr. Parker the burden of proof on the issue of whether he should live or die. This unconstitutional burden-shifting violated Mr. Parker's due process rights under Mullaney v. Wilbur, 421 U.S. 684 (1975). See also Sandstrom v. Montana, 442 U.S. 510 (1979). Moreover, the application of this unconstitutional standard at the sentencing phase violated Mr. Parker's rights to a fair sentencing determination, i.e., one which is not infected by arbitrary and capricious factors, and was correct under state law. See Aranao v. State, 411 So. 2d 172 (Fla. 1982); State v. Dixon, 383 So. 2d 1 (Fla. 1973). This standard also interfered with the consideration of mitigation, allowing only for consideration of mitigation which outweighed aggravation. Cf. Penry v. Lvnaugh, 109 S. Ct. 2934 (1989).

The harmful effects of these erroneous instructions were compounded by the prosecutor's arguments at eentencing. Time and again, the prosecutor informed the jury that the burden rested with the accused (e.g., R. Vol. 24, pp. 58, 59, 66). Similar comments were made to the jury by the prosecutor and the trial court throughout the proceedings.

These errors, individually and cumulatively, resulted in a denial of Mr. Parker's fifth, sixth, eighth and fourteenth amendment rights. Mr. Parker was

deprived of rights which, even in any ordinary misdemeanor, are mandated as a matter of fundamental fairness. See In re Winship, 397 U.S. 358 (1970). His death aentenee resulted from a proceeding at which the "truth-finding function" was "substantially impair[ed]." Ivan v. City of New York, 407 U.S. 203, 205 (1972). His sentence of death therefore cannot be allowed to stand. Counsels' failure to properly litigate this issue is ineffective assistance of counsel. Relief is proper.

ARGUMENT XV

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING *AND* CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Parker's sentencing trial was erroneously instructed on the vote neceeeary to recommend a sentence of death or life. The law of Florida is not that a majority vote is necessary for the recommendation of a life sentence; rather, a six-eix vote, in addition to a seven-five or greater majority vote, is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983). However, Mr. Parker's jury throughout the proceedings was erroneously informed and instructed that, even ta recommend a life sentence, its verdict must be by a majority vote (R. Vol. 24, pp. 84, 86; Vol. 14, pp. 63, 152; Vol. 14A, p. 103). These erroneous instructions are also the type of misleading information condemned by Caldwell v. Mississippi, 472 U.S. 320 (1985). As in Caldwell, the instructions here fundamentally undermined the reliability of the sentencing determination, for they created the risk that the death eentence was imposed in spite of factors calling for a less severe punishment, in violation of the most fundamental requirements of the eighth amendment.

Mr. Parker may well have been sentenced to die because his jury was misinformed and misled. Such a procedure creates the substantial risk that a death eentence was impoeed in spite of factors calling for a less severe punishment. Lockett v. Ohio, 438 U.S. 586, 605 (1978). wrongly telling the jury that it had to reach a majority verdict "interject[ed] irrelevant

considerations into the fact finding process, diverting the jury's attention from the central issue" of whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). The erroneous instruction may have encouraged Mr. Parker's jury to reach a death verdict for an impermissible reason -- its incorrect belief that a majority verdict waa required. Mr. Parker has been denied hie fifth, sixth, eighth, and fourteenth amendment righte. Relief is proper.

ARGUMENT XVI

MR. PARKER'S FIFTH, SIXTH, EIGHTH, *AND* FOURTEENTH AMENDMENT RIGHTS WERE DENIED BY TEE WRONGFUL EXCLUSION OF POTENTIAL JURORS.

During jury selection, a number of jurors who would have been fully able to obey the law, the Court's instructions, and their oaths were excluded solely because they expressed some reservations concerning the death penalty. In Adams v. Texas, 448 U.S. 38 (1980), the Supreme Court held that a juror's opposition to capital punishment is not a basis €or disqualification unless it prevents the juror from imposing the death penalty despite the juror's belief that the evidence beyond a reasonable doubt warrants such a penalty. Adams, 448 U.S. at 44. Witherspoon v. Illinois, 391 U.S. 510 (1968), and Adams have been violated when trial courts have excluded for cause prospective jurore who simply expreeesd conscientious scruples against the death penalty. Granviel v. Estelle, 655 F.2d 673 (5th Cir. 1981); Alderman v. Austin, 663 F.2d 558 (5th Cir. 1981).

The trial court's excueals for cause in the instant case present no less a violation of Witherspoon and its progeny. Counsel's failure to properly litigate thie claim is ineffective assistance of counsel. Mr. Parker haa been denied his fifth, sixth, eighth and fourteenth amendment rights. He is entitled to the relief he seeks.

ARGUMENT XVII

MR. PARKER'S EIGHTH *AND* FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE TRIAL COURT'S FAILURE TO ADEQUATELY, FAIRLY, AND FULLY CONSIDER NONSTATUTORY AND STATUTORY MITIGATING EVIDENCE.

In sentencing Mr. Parker to death, the trial court ruled that "there is no evidence of any mitigating circumstances set forth in the statute or of

mitigating circumstances of any nature whatsoever" (R. Vol. 2, p. 446). However, evidence regarding mitigating circumetancee was preaent. Such circumstances included letters submitted respecting Mr. Parker's behavior ae a model prisoner, residual doubt about guilt, Mr. Parker's unswerving position that he was innocent, the fact that the jury recommendation of death was not unanimous, and the inherent contradictions in the State's case. Apparently none of this was considered and weighed by the Court.

Coneequently, Mr. Parker was denied his eighth and fourteenth amendment rights. See Lockett v. Ohio, 438 U.S. 586 (1978); Eddinas v. Oklahoma, 455 U.S. 104 (1982); Skipper v. South Carolina, 106 S. Ct. 1669 (1986); Magwood v. Smith, 791 F.2d 1438 (11th Cir. 1986); Harvard v. State, 486 So. 2d 537 (Fla. 1986). Defense counsel should have objected. Their failure to litigate this issue before the trial court is ineffective assistance of counsel. Relief is proper.

CONCLUSION

Appellant, based on the foregoing, respectfully urges that the Court vacate his unconstitutional capital conviction and death sentence and grant all other relief which the Court deems just and equitable.

Respectfully submitted,

for Gail E. Anderson
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by United States Mail, first class, postage prepaid, to Ralph Barreira, Aeeiatant Attorney General, Department of Legal Affairs, 401 N.W. Second Avenue, Suite 921N, Miami, Florida 33128, this 16th day of September 1991.

Gail E. Anderson
Attorney
At

Supreme Court of Florida

FRIDAY, OCTOBER 4, 1991

NORMAN PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

CASE NO. 73,935

Appellant's Motion to File Initial Brief in Excess *of* Page Limitations is granted and Appellant's Initial Brief of ninety-two (92) pages was received by this Court on September 16, 1991.

Appellee's Answer Brief shall be served on or before October 15, 1991.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

TC
cc: Gail E. *Anderson,* Esquire
Billy H. Nolas, Esquire
Julie D. Naylor, Esquire
Ralph Barreira, Esquire

IN THE SUPREME COURT OF FLORIDA

CASE NO. 73,935

NORMAN PARKER,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

no obj. filed as of 10-1-91

MOTION TO FILE INITIAL BRIEF
IN EXCESS OF PAGE LIMITATIONS

Appellant, NORMAN PARKER, applies to this Court for permission to file his initial brief in excess of the page limit set by Fla. R. Crim. P. 9.210(a)(5) and states as follows:

1. Mr. Parker is a death-sentenced individual appealing the Circuit Court's denial of his Motion to Vacate Judgment and Sentence pursuant to Fla. R. Crim. P. 3.850. This appeal involves an extensive record of substantial legal and factual complexity.

2. The present request is made in good faith, with consideration of the specific requirements of this case, and with deference to and appreciation of the administrative needs and policies of this Court. The request is made in order to fulfill our ethical duty to our client and because an expanded brief is essential to a full consideration of the merits of this appeal. The present request is made only within the context of the specific requirements of this capital appeal. An examination of

the brie by the court wil demonstrate that the requested length is not unreasonable in this case.

WHEREFORE, Appellant respectfully requests leave to file his accompanying initial brief.

Respectfully submitted,

for Gail E. Anderson
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Gail E. Anderson
Attorney