IN THE

SUPREME COURT OF FLORIDA

CASE NO. 77,645

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SONNY BOY OATS, JR.,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

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APPEAL FROM THE CIRCUIT COURT OF
THE FIFTH JUDICIAL CIRCUIT, IN
AND FOR MARION COUNTY, FLORIDA

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# INITIAL BRIEF OF APPELLANT

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LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

SUSAN HUGINS ELSASS
Staff Attorney
Florida Bar No. 0854573

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

COUNSEL FOR APPELLANT

## PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Oats' motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3.850. The circuit court summarily denied relief on several claims. A hearing was held on several other claims, after which the court again denied relief. This appeal follows.

Citations in this brief shall be as follows: the record on appeal concerning the original court proceedings shall be referred to as "R. ___" followed by the appropriate page number. The record on appeal from the resentencing shall be referred to as "R2. ___." The record on appeal from the Rule 3.850 proceedings shall be referred to as "PC-R. ___." All other references will be self-explanatory or otherwise explained herein.

## REQUEST FOR ORAL ARGUMENT

Mr. Oats has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. A full opportunity to air the issues through oral argument would be more than appropriate in this case, given the seriousness of the claims involved and the stakes at issue.

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## STATEMENT OF THE CASE AND THE FACTS

On January 30, 1980, Sonny Boy Oats was indicted for first degree murder and robbery (R. 1521-1522).[1] Drs. Gonzalez, Natal and Carrera examined Mr. Oats for competency and sanity. Defense counsel did not advise the doctors of his specific concerns regarding Mr. Oats' competency. The doctors were not asked to evaluate for the presence of mitigating factors. A jury trial was held on February 2-6, 1981 (R. 1-1114). The jury, on February 6, 1981, found appellant guilty of first degree murder and robbery with a firearm (R. 1109, 1617-1618). The jury, on February 10, 1981, was instructed on six aggravating circumstances (R. 1274) and rendered an advisory sentence of death (R. 1275).[2] The court, on the same day, issued its findings of fact identifying six (6) aggravating circumstances and one (1) mitigating circumstance. The court found that the jury's advisory sentence of death should be imposed (R. 1675-1677). The trial court then adjudged appellant guilty of first degree murder and sentenced him to death.

On February 23, 1984, this Court rendered its opinion affirming the judgment of conviction but setting aside the sentence of death and remanding this cause to the trial court for entry of a new sentencing order in accordance with the views expressed in the opinion. This Court determined that the trial court had erred in its application of three (3) of the

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[1]At Mr. Oats' trial, evidence was presented that Donald and Adell Williams were also involved in the homicide, but were not charged (R. 1042, 1068, 1203). Additional evidence was presented in the Rule 3.850 hearing concerning the involvement of these individuals (PC-R. 3520-21).

[2]The jury was not advised that Mr. Oats was mentally retarded with an I.Q. of between 57 and 61. Nor was the jury aware that in light of the mental retardation, mental health experts believed 1) that Mr. Oats' capacity was substantially impaired; 2) he had an extreme mental disturbance; and 3) he was under the substantial domination of another. The jury did not hear this evidence because trial counsel neglected to ask available mental health experts to evaluate for the presence of mental health mitigation. Counsel did present the testimony of Dr. Carrera who had not evaluated for mitigation, and thus he was unprepared to identify any mitigation. At the Rule 3.850 hearing, Dr. Carrera testified had he been asked to evaluate for mitigation and had he been provided background materials he would have testified to the presence of statutory mitigation. Similarly, Drs. Gonzalez and Natal indicated in the Rule 3.850 proceedings that they had evaluated Mr. Oats in 1980 for competency and sanity, but that they had not been asked to evaluate for mitigation. Had they been asked they would have testified to the presence of statutory mitigation.

aggravating circumstances found. It was on this basis that a new sentencing was ordered. Oats v. State, 446 So. 2d 90 (Fla. 1984).

Prior to resentencing, Mr. Oats filed a motion to impanel a jury for an advisory recommendation and a motion for life (R2. 1756-1761). Both of these motions were eventually denied by the trial court. Mr. Oats also filed an objection to sentencing on the grounds that he was presently insane (R2. 1762-1765).[3] In this motion, Mr. Oats also requested that the trial court appoint three (3) experts to examine and evaluate the accused and to testify as to his present mental condition (R2. 1765). Counsel indicated Mr. Oats' condition had deteriorated over the intervening years and warranted further examination. The objection was overruled and the request to appoint experts was denied by the trial court at the sentencing hearing (R2. 1784-1869).

On April 26, 1984, a hearing was held on the motions and sentencing was had before the Honorable William T. Swigert, Circuit Judge, Fifth Judicial Circuit, In and For Marion County, Florida (R2. 1784-1869). Following this hearing at which Mr. Oats' motions were denied and objections to proceed to sentencing were overruled, the trial court accepted the jury's death recommendation and sentenced Mr. Oats to death by electrocution (R2. 1864-1865). The trial judge adopted the written findings of fact in support of the death sentence which had been prepared by the Office of the State Attorney prior to the hearing (R2. 1767-1769, 1857-1865). In doing so, the trial court found four (4) aggravating circumstances: (1) that the appellant had previously been convicted of another felony involving the use or threat of violence; (2) that the crime was committed while the appellant was engaged in the commission of a robbery; (3) that the offense was committed for the purpose of avoiding or preventing a lawful arrest; and (4) that the crime was committed in a cold, calculated and premeditated manner without any pretense of moral or legal justification (R2. 1767-1768). The trial court also found

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[3]Counsel testified at the Rule 3.850 hearing that his intent was to obtain mental health assistance and another determination of Mr. Oats' competency in light of his mental deterioration in the time since the original trial. Counsel's use of the word "insane" as opposed to "incompetent" was inadvertent.

that the mitigating circumstance that the appellant was only twenty-two (22) years of age at the time of the offense had been established (R2. 1768). The court adjudicated the appellant guilty and sentenced him to death (R2. 1770-1774). However, once again no evidence of Mr. Oats' mental retardation was presented.

This Court then affirmed the death sentence. Oats v. State, 472 So. 2d 1142 (Fla. 1985). This Court found that trial counsel had failed to cite the correct statutory provision in order to secure the assistance of a mental health expert. As a result, this Court found no error in the denial of mental health assistance because trial counsel had cited the wrong court rule. This Court also concluded that a new jury sentencing had not been required when it struck three of the aggravating factors previously considered by the jury even though at least one mitigating factor had been before the jury.

Mr. Oats filed his Rule 3.850 Motion to Vacate on October 7, 1987. The Governor signed a warrant for Mr. Oat's execution on April 18, 1989. The State Response to Mr. Oats' Rule 3.850 Motion was filed May 26, 1989. On June 5, 1989, the circuit court entered its order staying the execution, and by further order of August 16, 1899, that court granted a limited evidentiary hearing.

Numerous witnesses testified at the evidentiary hearing. Mr. Oats presented testimony and reports by seven (7) mental health experts, including the three competency experts who had evaluated him prior to trial. These experts challenged Mr. Oats' original competency, the failure to have his competency reevaluated at resentencing, and further established statutory mitigation. Several of Mr. Oats' family members testified to substantial nonstatutory mitigation. The State presented the testimony of one psychiatrist and one psychologist, together with the testimony of several Florida State Prison correctional officers. The State conceded in its post-hearing memorandum that Mr. Oats "scored 61 and 57 on the intelligence tests and has 'deficits in adaptive functioning'" and that Mr. Oats was mentally retarded ("No doubt about that")(PC-R. 3242, 3248). Yet, Mr. Oats' jury had

not been advised of these significant mental deficiencies.

After hearing the evidence and reviewing the parties' post-hearing memoranda, the circuit court denied relief in an order dated November 21, 1990. In denying relief, the circuit court concluded that there was no "reasonable possibility" that the mental health mitigation would have affected "the jury's recommendation" (PC-R. 3320). However, no consideration was given to the fact that the jury had been given improper aggravation or that the jury could have premised a binding life recommendation on the mental health mitigation.[4] The circuit court also held that defense counsel's statement that he failed to contact the mental health experts and seek an evaluation as to the presence of mitigation did not establish deficient performance (PC-R. 3321). However, not only did defense counsel testify to this failure to investigate readily available mitigation, so did the mental health experts. All three experts agreed: counsel failed to ask for an evaluation of the mitigation, and had he done so, statutory mitigation would have been found.[5]

From the denial of Rule 3.850 relief, this appeal was perfected.

**INTRODUCTION**

The State has agreed that Mr. Oats is mentally retarded (PC-R. 3248). His full scale I.Q. varies between 57 and 61 (PC-R. 245, 3473).[6] The record clearly establishes that Mr. Oats is a mentally impaired individual ("No doubt about that") (PC-R. 3248), whose death sentence rested upon complete ignorance of mental retardation, there was a failure to understand the significance of mental retardation on the part of trial counsel, the prosecutor, and the

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[4]The proper standard is whether the unpresented mental health mitigation could have provided a basis for a binding life recommendation. Certainly four (4) statutory mitigating factors and a plethora of nonstatutory mitigating factors could have easily led to a binding life recommendation.

[5]Absolutely no competent evidence exists in the record to support the judge's conclusion. It is clear that the mental health experts were not asked to evaluate for mitigation. Obviously, the investigation into mental health mitigation did not occur.

[6]In Penry v. Lynaugh, 109 S. Ct. 2934 (1989), mental retardation was at issue. There, Mr. Penry's I.Q. tested between 50 and 63. In that case, the Court held the sentencer must have "a vehicle [] to give mitigating effect to [] mental retardation." 109 S. Ct. at 2949.

courts.[7]

> Mental disease, mental retardation, and the full range of abnormal conditions affecting mental and emotional processes should be familiar to all who administer the criminal justice system. Even persons untrained in such matters recognize the mental and emotional distress exhibited by many mentally ill or mentally retarded persons detained in police custody, arraigned and tried in criminal courts, or incarcerated in jails or prisons. No informed observer can fail to reflect upon the prevalence of significant mental abnormalities exhibited by detainees, defendants, and convicts. Many underprivileged persons caught up in the criminal process suffer the further disadvantages of mental affliction or retardation. This does not mean, however, that mental illness and retardation in any of their variegated forms are criminogenic. Nor does it suggest a demonstrable causal relationship between mental illness or retardation and criminal acts. Millions of law-abiding Americans suffer from and seek help for a wide range of mental and emotional problems.
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> How, then, can we account for the prevalence of psychic abnormality observed by police, prosecutors, jailers, judges, and clinicians involved with the administration of criminal justice? There is no certain explanation. Clearly the economically, educationally, and mentally disadvantaged are disproportionately represented at all stages of the criminal justice process; the rate of disproportionality appears to remain relatively constant.
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> . . .
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> This century has seen noteworthy progress in the scientific understanding of mental illness in all its manifestations. Yet there seems to be general agreement among the most informed mental health and mental retardation experts that we are merely on the frontier of knowledge about the human mind. Nonetheless, relatively recent scientific achievements have been noteworthy. The development and wide-scale use of psychotropic medications has led to dramatic changes in the treatment of the severely mentally ill, particularly the movement toward deinstitutionalization. That movement, in turn, has had a profound effect on public attitudes toward mental illness and, indirectly, has affected the administration of criminal justice.
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> Psychiatrists and psychologists have played important roles within criminal justice institutions for many years. Yet the alliance between psychiatry and the law has not been a happy one. Partially because of their training, practitioners within these two great professions frequently hold diametrically opposite views. This is not, of course, always the case, but one may generalize by stating that the law teaches its practitioners to assess responsibility, while psychiatrists, psychologists, and other mental health professionals tend to be determinists who "explain" behavior rather than "blaming" persons for it. Thus, to a great extent these two major professions lack a common vocabulary and a common purpose. This is ironic inasmuch as both are, at heart, helping professions.

ABA Criminal Justice Mental Health Standards, Introduction (1989).

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[7]In fact, counsel knew something was amiss and sought mental health assistance at the resentencing. However, the trial court denied the request.

Ignorance of mental health issues is not new, but under the basic tenets of death penalty jurisprudence, such ignorance, and the capricious results it engenders, is unconstitutional.

> Death 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 (1977)(citations omitted).

This view was reiterated in Woodson v. North Carolina, 428 U.S. 280 (1976):

> Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.

Woodson, 428 U.S. at 305 (emphasis added).

This rationale applies to both the sentencing and guilt-innocence phases of a capital defendant's trial:

> To insure that the death penalty is indeed imposed on the basis of "reason rather than caprice or emotions," 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.

Beck v. Alabama, 447 U.S. 625, 638 (1980)(emphasis added).

Where mental health issues are present in a capital penalty phase proceeding, access to the confidential assistance of a mental health expert is mandated:

> Without a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor. In such a circumstance, where the consequences of error is so great, the relevance of responsive psychiatric testimony so evident, and the burden on the State so slim, due process requires access to a psychiatric examination on relevant issues, to the testimony of the psychiatrist, and to assistance in preparation at the sentencing phase.

Ake v. Oklahoma, 470 U.S. 68, 84 (1985).

In a capital penalty phase proceeding, the sentencer must be "provided a

vehicle [ ] to give mitigating effect to [a defendant's] mental retardation." Penry v. Lynaugh, 109 S. Ct. 2934, 2949 (1989). Here, that did not occur. At trial and at sentencing, no one knew Mr. Oats was mentally retarded with an I.Q. in the 57 to 61 range. No mental health evaluation was conducted under Ake to determine Mr. Oats' level of functioning and to present to the judge and jury the mental retardation in order to insure an individualized sentencing.

As this Honorable Court will see in the following arguments, Mr. Oats, a socially deprived, brain-damaged, substance-abusing mentally retarded person was sentenced to death in violation of these constitutional imperatives. Consideration was not given to how Mr. Oats' retardation intersected with the issues at his trial and sentencing.

The State has conceded the relevance of Mr. Oats' mental condition in this cause. The State's Closing Memorandum Regarding Petitioner's Rule 3.850 Claims, states:

> Under the DSM-III criteria, the defendant falls in the mildly mentally retarded area. No doubt about that.

(PC-R. 3248).[8]

> The defendant certainly has learning and communicative deficits, and may have diffuse organicity, i.e. brain damage.

(PC-R. 3250).

> As for the defendant's background, he was certainly disadvantaged and suffered severe beatings as punishment for misbehavior.

(PC-R. 3251).

Yet, counsel was denied access to a confidential mental health expert's assistance in order to test and evaluate Mr. Oats' mental retardation as it related to issues in the case.[9] The requisite testing did not occur, and

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[8]Again, the word "mild" was also used to describe the retardation at issue in Penry. I.Q. scores between 55 and 70 are labeled mildly mentally retarded. Penry, 109 S. Ct. at 2941 n 1. Under Penry the Eighth Amendment requires sentencer consideration of mild mental retardation as a mitigating factor which may warrant a life sentence.

[9]These issues were not limited to the presence of mitigating factors. They included the voluntariness and knowingness of the Miranda waiver and competency (continued...)

counsel did not have the necessary tools to develop and present the evidence.

Clear indications of mental retardation were evident throughout these proceedings. Counsel knew something was amiss. At resentencing, counsel (who had represented Mr. Oats at trial) tried to obtain mental health assistance. However, counsel failed to understand the difference between competency and insanity, and thus failed to properly phrase the request. His request was made under Rule 3.740 which provided for the discretionary appointment of mental health experts as opposed to Rule 3.210 which provided for mandatory appointment. Counsel's ignorance directly led to this Court's affirmance of the trial court's denial of a confidential mental health expert. Oats v. State, 472 So. 2d 1143 (Fla. 1985). In this case, confusion reigned as to the meaning of "competency" and "insanity" and the relationship between these concepts and mental retardation and mental health mitigation. Because trial counsel was sloppy in his terminology and because the trial court did not understand the significance of Mr. Oats' mental condition, Mr. Oats lost his rights under Ake and Penry.

What was desperately needed in this case, as in many others, is some understanding of mental health issues. If the legal professionals were trained in these issues, they would understand that homicidal behavior by a mentally retarded person is often the product of the unique incapacities produced by mental retardation. Mentally retarded individuals do not fully or accurately understand the complex world in which they live. As a result they are continually subject to frustrations and confusions that the nonretarded never face, and their limitations further handicap them in coping with this stress. See Handbook of Mental Illness in the Mentally Retarded 7 (F. Menolascino & J. Stark, eds. 1984). The mentally retarded lack the impulse controls of a nonretarded person, and are particularly prone to impulsive, unthinking action. Moreover, as in this case, "the mentally retarded person might accompany perpetrators or actually commit a crime on impulse or without

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[9](...continued)
in 1981 and in 1984 after counsel noticed substantial deterioration in the four years since the prior competency evaluation.

weighing the consequences of the act." Ellis & Luckasson, Mentally Retarded Criminal Defendants, 53 Geo. Wash. L. Rev. 414, 428-431 (1985). The mentally retarded person generally has great difficulty suppressing strong feelings of frustration. Mercer & Snell, Learning Theory Research in Mental Retardation, 94-141 (1977). Often, a mentally retarded person will express this frustration as an aggressive overreaction to external stimuli. Mentally retarded persons are also subject to control and manipulation by others. Finally, the mentally retarded tend to have "incomplete or immature concepts of blameworthiness and causation." Ellis and Luckasson, supra, at 429 & n.78.

In a different context, the Supreme Court recognized as much in City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985). "[I]t is undeniable," the Court explained, "that those who are mentally retarded have reduced ability to cope with and function in the everyday world." Id. at 442. Precisely because of their "reduced ability to cope with and function in the everyday world," the mentally retarded are uniquely unfit for the imposition of capital punishment. Given the increased susceptibility to confusion and frustration, the propensity to act out the frustration, and the diminished ability to control such impulsive behavior on the part of the mentally retarded, their culpability simply cannot be judged by the same standards applicable to the nonretarded. These disabilities preclude the mentally retarded from forming the "highly culpable mental state" that the Florida Supreme Court's consistent precedents require as a predicate for imposing a death penalty. Many jurisdictions have also recognized as much. See, e.g., State v. Hall, 125 N.W.2nd 918, 926-927 (1964); State v. Behler, 146 P.2d 338, 343 (1964); Commonwealth v. Green, 151 A.2d 214 (1959).

A death sentence has been held constitutionally permissible only if it serves a legitimate phenological purpose. Only two such purposes may be potentially served by the death penalty, however: retribution and deterrence. Gregg v. Georgia, 428 U.S. 153, 183 (1976). Condemnation of the retarded serves neither purpose.

Retribution may be served only if the condemned is sufficiently culpable

to be sentenced to death, for the principle of retribution is defined as society's need to "impose upon criminal offenders the punishment they 'deserve' . . . ." Gregg, 428 U.S. at 183 (emphasis supplied). Thus, whether the imposition of death furthers the goal of retribution "very much depends upon the degree of [the defendant's] culpability." Enmund v. Florida, 458 U.S. 782, 800 (1982). To be sufficiently culpable to warrant the death sentence, it is required that one convicted of murder must be personally responsible for the murder. Id. at 800-801. And one may be personally responsible only if the homicide is the equivalent of an act of "intentional wrongdoing," Id. at 800 -- an intentional act undertaken by one who rationally and fully understands that it is morally wrong. "Deeply ingrained in our legal tradition is the idea that the more purposeful is the criminal conduct, the more serious the offense, and therefore, the more severely it ought to be punished." Tison v. Arizona, 481 U.S. 137, 156 (1987).

Mental health professionals tell us that the homicidal behavior of the mentally retarded person is just the opposite of such conduct. It is, prototypically, triggered by a lack of rational, mature understanding of events in the external world. Founded on diminished reason, the criminal actions of the mentally retarded are immune to mediation and restraint once triggered. Such acts are thus the antithesis of a volitional, fully informed choice, presumably made by one who rationally, maturely, and intelligently understands why a homicide is neither justified nor excusable. The urge to inflict the most severe punishment on the most culpable offenders -- the urge for retribution -- cannot be justified by the condemnation of the mentally retarded. As the Supreme Court held in Thompson v. Oklahoma, 108 S. Ct. 2687 (1988):

> In Gregg we concluded that "an expression of society's moral outrage at particularly offensive conduct," retribution was not "inconsistent with our respect for the dignity of men." Given the lesser culpability of the juvenile offender, the teenager's capacity for growth, and society's fiduciary obligations to its children, this conclusion is simply inapplicable to the execution of a 15-year-old offender.

108 S. Ct. at 2699 (citation and footnote omitted).[10] The same concerns apply to the mentally retarded.

Similarly, deterrence may be served only if the killer is one who has presumably chosen to kill despite an intelligent understanding of the wrongfulness of the killing. It has been held that "carefully contemplated murders" may be deterred by the execution of killers who commit similar crimes, but killers who "act in passion" cannot be similarly deterred. Gregg v. Georgia, 428 U.S. at 185-86. Plainly, a homicide committed by a retarded person is like one committed "in passion" and can be no more deterred than such homicides. Again, the Thompson court spoke to deterrence in the context of juveniles sentenced to death:

> With respect to those under 16 years of age, it is obvious that the potential deterrent value of the death sentence is insignificant for two reasons. The likelihood that the teenage offender has made the kind of cost-benefit analysis that attaches any weight to the possibility of execution is so remote as to be virtually nonextistent. And, even if one posits such a cold-blooded calculation by a 15-year-old, it is fanciful to believe that he would be deterred by the knowledge that a small number of persons his age have been executed during the 20th century.

Thompson, 108 S. Ct. at 2700. The same analysis applies to mentally retarded capital defendants such as Mr. Oats.

Finally, the execution of the mentally retarded must be rejected, for the retarded, unlike any other group of people in this society, are pushed into inappropriate behaviors that sometimes lead to homicide by the very failure of society to provide the support necessary to reduce their vulnerability to such behavior. See generally, Ellison & Luckasson, supra. Mr. Oats' is precisely such a case. The mentally retarded cannot be blamed to the extent of taking their lives for their homicidal behavior. "[S]uccmbing to the [] frailties inherent in the human condition necessarily constitute[s] mitigation." Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990). Unlike nonretarded people, mentally retarded persons cannot, on their own, learn the skills necessary to avoid such behaviors. Their homicides are, in a very

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[10] In fact, Mr. Oats' I.Q. established a mental age of twelve, well below the chronological age cut off established in Thompson.

direct sense, a reflection of the failure of a civilized society to meets its obligations. To condemn such persons is to reject human decency at the most fundamental level. To condemn such persons by the extraction of the ultimate penalty is to violate the eighth and fourteenth amendments. However, Mr. Oats was so condemned because neither the jury, the judge, nor this Court on direct appeal was provided with the evidence necessary to fulfill their respective roles in the capital sentencing process. No consideration has been given to the mitigating effect of Mr. Oats' mental condition. As a result, his death sentence stands in violation of Eighth and Fourteenth Amendment, as well as Art 1 § 17 of the Florida Constitution.

**SUMMARY OF ARGUMENTS**

1. Mr. Oats was deprived of his constitutional right to the assistance of a confidential mental health expert because trial counsel rendered deficient performance which prejudiced Mr. Oats. Although he knew that Mr. Oats was mentally deficient, trial counsel, without strategy or tactic, failed to present available statutory and nonstatutory mitigation evidence at penalty phase. Counsel's failure was the product of ignorance of the law and inadequate investigation of the available mitigation. Three court-appointed competency experts testified at the evidentiary hearing that trial counsel never sought their assistance with mitigation, but that if he had, they all would have found substantial statutory mitigation. Four additional mental health experts, and several lay witnesses, corroborated the mitigation evidence at the evidentiary hearing. Mr. Oats was prejudiced because his sentencing judge and jury were never able to consider the presence of four strong statutory mitigators, and numerous nonstatutory mitigators. His sentence is thus unreliable.

2. Trial counsel rendered ineffective assistance at trial, sentencing and resentencing as a result of the failure, without a strategy or tactic: to properly argue his motion to suppress Mr. Oats' statements, to challenge the original competency findings, to develop the defense of voluntary intoxication, to challenge Mr. Oats' shackling at trial, to investigate and

prepare a case in mitigation for penalty phase, to properly challenge improper court instruction and prosecutorial comment to the jury. Counsel failed to investigate. Counsel was not prepared. Counsel was ignorant of the law. These errors establish that Mr. Oats' conviction and sentence were unreliable.

3. Mr. Oats was resentenced when he was incompetent. Due to counsel's ignorance of the law, he failed to properly seek mental health assistance. The trial court erred in denying Mr. Oats his rights to competency evaluation.

4. The jury's sense of responsibility for its sentencing decision was improperly diminished under Caldwell v. Mississippi, 472 U.S. 320 (1985).

5. Mr. Oats was denied his Eighth Amendment rights when his jury was improperly instructed on aggravating factors.

6. The cumulative effects and capricious results of constitutionally infirm ignorance of mental health issues on the part of trial counsel, the prosecutor and the courts deprived Mr. Oats of his rights under the sixth, eighth and fourteenth amendments.

## ARGUMENT I

**DUE TO DEFENSE COUNSEL'S INEFFECTIVENESS MR. OATS WAS DENIED HIS RIGHTS TO EFFECTIVE AND ADEQUATE MENTAL HEALTH ASSISTANCE UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

A criminal defendant is entitled to expert psychiatric assistance when the State makes his or her mental state relevant to guilt-innocence or sentencing. Ake v. Oklahoma, 470 U.S. 68 (1985). What is required is an "adequate psychiatric evaluation of [the defendant's] state of mind." Blake v. Kemp, 758 F.2d 523, 529 (11th Cir. 1985). In this regard, there exists a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Fessel, 531 F.2d 1275, 1279 (5th Cir. 1979). When mental health is at issue, counsel has a duty to conduct proper investigation into his or her client's mental health background. Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Counsel must assure that the client is not denied a professional and professionally conducted mental health

evaluation. See Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984); Fessel; Mason v. State, 489 So. 2d 734 (Fla. 1986).

A qualified mental health expert serves to assist the defense "consistent with the adversarial nature of the fact-finding process." Smith v. McCormick, 914 F.2d 1153, 1157 (9th Cir. 1990). See also Liles v. Saffle, 945 F.2d 333 (10th Cir. 1991). Under Florida law, an indigent defendant is entitled to an appointed mental health expert to assist in the preparation of a defense. Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla. 1 DCA 1991). The mental health expert also must protect the client's rights, and violates these rights when he or she fails to provide competent and appropriate evaluations. State v. Sireci, 502 So. 2d 1221, 1223 (Fla. 1987). The expert also has the responsibility to obtain and properly evaluate and consider the client's mental health background. Mason, 489 So. 2d at 736-37.

Florida law made Mr. Oats' mental condition relevant to guilt/innocence and sentencing in many ways: (a) specific intent to commit first degree murder; (b) diminished capacity; (c) competency; (d) insanity; (e) knowingness and voluntariness of Miranda waiver; (f) statutory mitigating factors; (g) aggravating factors; and (h) myriad nonstatutory mitigating factors. Mr. Oats was entitled to professionally competent mental health assistance on these issues. Ake v. Oklahoma.

**A. DEFICIENT PERFORMANCE**

In State v. Michael, 530 So. 2d 931 (Fla. 1988), this Court found that where counsel is on notice of a defendant's disturbed mental condition and fails to obtain a mental health evaluation for the presence of mitigation, deficient performance is established. See State v. Lara, 581 So. 2d 1288 (Fla. 1991). Here, counsel testified at the evidentiary hearing that although he knew Mr. Oats had a mental disturbance, he never asked the three court-appointed competency evaluators, Drs. Carrera, Gonzalez and Natal, to evaluate for the presence of mitigation, and that his failure to do so was not the

result of any tactic or strategy:

Q. Now, you had Dr. Carrera testify at the original sentencing proceedings?

A. Yes.

Q. And he testified, if I may characterize it as to some of the information that was reflected in his report?

A. Yes.

Q. Did you make any effort to develop and prepare expert testimony from Dr. Carrera as to the statutory mitigating factor relating to whether the defendant's capacity to conform his conduct to the requirements of law was substantially impaired?

A. No.

Q. Was there any tactical or strategic reasoning for that?

A. No.

Q. Did you attempt to develop or prepare with Dr. Carrera expert testimony concerning the statutory mitigating factor concerning whether the defendant suffered from an extreme mental or emotional disturbance at the time of the offense?

A. No.

Q. Was there a tactical or strategic reason for that?

A. No.

Q. Did you attempt to develop or present expert testimony from Dr. Carrera relating to the statutory mitigating circumstances concerning domination of the defendant during the time of the offense?

A. No.

Q. Was there a tactical or strategic reasoning for that?

A. No.

(PC-R. 806-07).

Counsel further testified that he did not prepare mental health mitigation at resentencing, and that his failure to do so was not the result of any tactic or strategy:

Q. Did you develop or present any mental health mitigating evidence at the re-sentencing? In other words, did you call an expert?

A. No.

* * *

Q. Mr. Fox, did you develop -- present statutory or non-statutory mental health mitigation at the re-sentencing proceeding?

A. No.

Q. Was there a tactical or strategic reason for not doing that?

A. No.

Q. Was there something that you were afraid of that Dr. Carrera would have said that would have been harmful?

A. No, nothing that would be harmful. I just felt that my request of the Court would be more favorably received, and further evaluations and experts would be appointed and would be developed.

(PC-R. 815-16).

Q. If you had had the benefit of -- You indicated, at the original sentencing, if you had had the benefit of the statutory mental health mitigation --

A. Yes.

Q. -- at the re-sentencing, if you would have had that, you would have used it?

A. Yes.

Q. Would that have been an important part of your argument?

A. Yes. It was the theme, I think, of my argument throughout.

(PC-R. 819).

Counsel indicated that in 1984 he had tried to obtain the confidential assistance of a mental health expert; however he cited the wrong rule:

Q. You didn't cite Rule 3.210 or Rule 3.211, the two competency rules, and you didn't request the confidential evaluation of Rule 3.216.

Was there any tactical or strategic reason for that?

A. No. The failure to request the confidential expert was probably a result of my unfamiliarity with that particular rule. But I didn't feel then, and I don't feel now, that there was any tactics involved in limiting the scope of what the Court knew about his mental status.

* * *

Q. Let me just talk about the competency evaluation. As his attorney at the time of the 1984 re-sentencing, did you in good faith believe that Mr. Oats was not competent to go forward with the re-sentencing?

A. Without a doubt.

Q. You, however, did not request -- I don't know if you reviewed the Florida Supreme Court opinion in the case; they chastised you for not requesting a competency evaluation under Rule 3.210 or Rule 3.211.

Was there a tactical or strategic reason for not saying those rules?

A. No. That was -- if you had asked me, without reviewing the record of the Supreme Court opinion, I would have told you that I asked for a competency evaluation. I mean, that is what I felt that I was doing.

Q. Were you trying to get that across to the Court that this man needs an expert evaluation?

A. Yes. And what supports that in the record is my recitation of things which I think pointed to his mental insufficiency, whether you call it competency or sanity or -- that was the issue that I wanted to address.

(PC-R. 801-03).

Q. Did you, during that portion of the proceeding where you indicated that Mr. Oats was insane -- you know -- you listened to him -- you know.

Did you ever say to the Judge: "I want the confidential defense expert to assist me at the penalty phase"?

A. No.

Q. Was there a strategic or tactical reason for that?

A. No.

Q. Did you ever say to the Court: "I want an expert appointed to develop statutory mental health mitigation, confidential or not. I want somebody to look at the statutory mitigating mental health factors."

A. No.

Q. Was there a tactical or strategic reason for that?

A. No.

Q. Did you at any point in the proceedings, in the original sentencing or the re-sentencing, ask for an expert's assistance in challenging aggravating factors from the --

A. No, neither one.

Q. Was there a tactical or strategic reason for that?

A. No. And on the re-sentencing, I didn't make those specific requests that you just asked of me about appointing a confidential or a competency expert.

But I felt that that was the relief I was seeking from

the Court -- further professional mental health evaluation of this man for purposes of, hopefully, presenting it later.

Q. So, in your mind, you were just trying to say, "Get me an expert"?

A. Right.

Q. "Let him see this guy"?

A. Yes. And failing that: "Judge, you talk to him right now in this courtroom and you will -- that will help you decide on my motion."

Q. You indicated that his level of functioning was low. You indicated, was the lowest of any other client you have represented.

A. Yes.

(PC-R. 817-88).

Counsel further noted his failure to obtain assistance as to the voluntariness and knowingness of the Miranda waiver was not tactical.

Q. At the original trial, did you ever ask for an expert opinion on whether Mr. Oats had the capacity to knowingly voluntarily waive mandatory rights and give a confession?

A. No.

Q. Was there a tactical or strategic reason for that?

A. No.

* * *

A. Based on the things that contained in your question, as well as the motion to suppress his statement, I felt that he was not -- he did not freely and voluntarily waive his Miranda rights, or knowingly and intelligently waive those rights and, thereafter, freely and voluntarily give a statement.

I felt there were things within the statement that, to me,and to this day still seem to be inducements by law enforcement to get him to speak.

Now, there again, greater authorities have disagreed with me, but that is what I felt very strongly about. Although the mental health angle of that waiver or statement was not stressed, the free and voluntary nature and the knowingly and intelligent waiver was.

Q. Why did you not pursue, if there is a reason for mental health evidence on that issue?

A. There is no reason. That is just simply concentrating on the law, if you will, and the way the statement was given. And I sort of discounted or under-emphasized his mental influences on there.

(PC-R. 819-21).

Here, each of the three doctors who saw Mr. Oats in 1980 -- Dr. Carrera, Dr. Gonzalez, and Dr. Natal -- confirm Mr. Fox's testimony that he did not seek their opinions other than competency and sanity.[11] However, they each would have provided testimony at the time of the original sentencing proceeding demonstrating that the statutory mental health mitigating factors and a great deal of nonstatutory mitigation (arising from Mr. Oats' mental retardation, brain damage, substance abuse, and other intellectual/emotional deficits) existed in this case. The testimony of Dr. Carrera and Dr. Gonzalez was presented at the evidentiary hearing, and the affidavits of Dr. Gonzalez and Dr. Natal.[12] The accounts of all three original doctors were consistent: Mr. Oats is significantly impaired and the statutory mental health mitigators (e.g., extreme mental/emotional disturbance, substantially impaired capacity to conform conduct to the requirements of law, and others, see §921.141, Fla. Stat.) apply to this case. None of the three originally retained doctors wavered in any way on their accounts in this regard. Their accounts were consistent and were corroborated by the evidence from lay witnesses which demonstrated Mr. Oats' life-long intellectual deficits, substance abuse, and other psychological/emotional problems.[13] Their accounts on the statutory mental health mitigating factors was not open to attack -- then or now.[14] The doctors corroborated Mr. Fox's testimony that

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[11]In denying Rule 3.850 relief, the circuit court did not address the doctors' confirmation of Mr. Fox's testimony that he did not consult with the doctors regarding Mr. Oats' mental retardation.

[12]Because of illness, Dr. Natal could not attend the hearing and testify, and his account was thus provided in affidavit form. Dr. Gonzalez testified by telephone.

[13]Most of these mitigation witnesses were never heard originally because, without a tactic or strategy, counsel failed to pursue their accounts. The testimony that was originally given was unprepared and unsound. This minimal preparation and presentation cannot withstand constitutional scrutiny. Cunningham v. Zant, 928 F.2d 1006, 1017 (11th Cir. 1991). See Argument II.

[14]The accounts of Dr. Gonzalez, Dr. Carrera, and Dr. Natal were also confirmed by the independent testing and evaluations of Dr. Carbonell, Dr. Phillips and Dr. Krop. Six (6) qualified doctors participated in post-

(continued...)

he failed to advise and consult with them regarding Mr. Oats' retardation and how it related to the issues in the case.

The Affidavit of Fausto A. Natal, M.D., stated that "at no time did Mr. Fox request that my evaluation encompass the presence of mitigating factors." (PC-R. 5576). Moreover,:

> Had Mr. Fox requested that I provide conclusions about the mitigating factors in 1980, I would have found within a reasonable degree of psychiatric certainty that with respect to the murder and robbery charge that Mr. Oats, due to defective intelligence, as reflected in Dr. Krop's evaluation, acted under considerable domination by his companions. This mitigating factor was in fact suggested by my own report regarding the ABC offense and was fully applicable to the murder-robbery offense as well. It is well known, as is reflected in the literature, and confirmed by my own professional experience in conducting evaluations, that individuals with low IQ are easily suggestible. Regrettably, since I was not provided with this information in 1980, and was not asked to questions or provided materials then, I cannot fully formulate opinions addressing the forensic issues in this case today. I would note that given Mr. Oats' intellectual and organic impairments it is likely that Mr. Oats ingestion of alcohol and drugs and his interacting with others could easily have risen to the substantial domination mitigating factor in Mr. Oats' case.
>
> Likewise, if I had been provided with the results of intelligence and neuropsychological testing I would have found that Mr. Oats, to a reasonable degree of psychiatric certainty, had diminished capacity in regards to his ability to conform his conduct to the requirements of the law. Once again this finding would be particularly applicable given that Mr. Oats was under the influence of alcohol and drugs.
>
> Moreover, had I been presented with findings regarding Mr. Oats' intelligence in 1980, in addition to the report of Dr. Carrera, which was available but which was not provided to me, I would have found that Mr. Oats' "age" to be that approximating a 12 year old rather than his chronological age of 22. In addition, Mr. Oats' impairment and ingestion of drugs and alcohol have been relevant to the question of whether he was mentally or emotionally disturbed at the time of the offense.
>
> * * *
>
> I have also been provided with a transcript of the 1984

---

[14](...continued)
conviction evaluations -- three who were involved originally and three who evaluated Mr. Oats at the time of the Rule 3.850 proceedings -- all of whom explained that Mr. Oats is brain damaged, mentally retarded, psychologically impaired, and that the statutory mental health mitigating factors applied in this case. The lay testimony corroborated the doctors' accounts, as did other evidence introduced. All six (6) doctors are not wrong.

More importantly, however, the issue at this juncture in whether the jury could have returned a binding life recommendation had counsel presented the testimony of Drs. Gonzalez, Carrera, and Natal.

resentencing proceedings in this case and was alarmed to find that Mr. Fox believed Mr. Oats' condition had deteriorated to the extent that he believed Mr. Oats no longer able to proceed with judicial proceedings. Had I been advised of Mr. Fox's concerns in 1984 I would have requested that I re-evaluate Mr. Oats. I regret that the failure of such a request at that time leaves me unable to express an opinion as to whether or not Mr. Oats was competent to proceed.

(PC-R. 5576-78).

Rafael J. Gonzalez, M.D., was another of the original competency experts. He testified at the evidentiary hearing that defense counsel never sought his mitigation evaluation, and that he would have been willing to assist with Mr. Oats' defense:

[Q.] Do you recall if you spoke to Mr. Fox, Mr. Oats' trial attorney at the time of your evaluation?

A. Oh. I don't remember talking to him but I sent him the evaluation addressed to his office of the Public Defender.

Q. Did Mr. Fox ever pick up the phone, call you, write you a letter, come to your office and talk to you and ask you any questions about your mental health evaluation of Mr. Oats?

A. No, sir.

Q. Did Mr. Fox ever ask you whether there were any additional items of information that you may need in conducting an evaluation?

A. No. I was not asked by Mr. Fox.

Q. Did Mr. Fox ever ask you whether testing, be it neuropsychological testing, intelligence testing, psychological testing, any type of testing of Mr. Oats, did he ever ask that that be conducted?

A. No. I was not asked by Mr. Fox.

Q. Did he ever ask whether such testing would have been appropriate or necessary in this case?

A. No. I was not.

Q. You saw Mr. Oats one time? Is that correct?

A. Yes, sir.

Q. Okay. And you were not asked to see him again, were you?

A. (Unintelligible.)

Q. I'm sorry, Doctor. And you were not asked to see him again after that -- after you saw him the one time?

A. Exactly. I was not asked to see him again.

Q. Did you have any contact whatsoever with Mr. Fox after you saw Mr. Oats?

A. No, sir. I did not.

(PC-R. 2650-51).

Dr. Gonzalez was not provided with any background information on Mr. Oats, other than self-report:

[Q.] When you originally evaluated Mr. Oats were your provided with his school records by anyone?

A. No particular records say as -- was -- I evaluated him at the local jail but I was provided with no information, no background information, no police or jail medical records. Police records were not there, school, for example, transcripts, some statements from relatives or any kind of a history like social, family or educational history were not available.

(PC-R. 2647).

Based upon the mitigation information he was provided by post-conviction counsel, Dr. Gonzalez testified that four mitigating factors applied:

Q. Okay. Now, in the affidavit that you provided, Doctor, you discussed four statutory mitigating factors in Mr. Oats; case. Do you recall those?

A. Yes, sir.

Q. Did Mr. Fox ever ask you initially to consider mitigation at all?

A. No, sir. He never contacted me and requested information concerning mitigation factors (unintelligible) --

Q. If --

THE COURT REPORTER: I --

MR. NOLAS: -- he --

THE COURT REPORTER: -- didn't --

MR. NOLAS: -- had --

THE COURT REPORTER: -- hear the last --

MR. NOLAS: -- con -- I -- I'm sorry. Doctor, the last two or three words you said, we missed those.

THE WITNESS: Yeah. He never contacted me concerning the existence or nonexistence of any of the mitigating factors.

BY MR. NOLAS:

Q. Now, had Mr. Fox contacted you and asked you either to assist him in developing mitigating factors or discussed those with him or anything at all about mitigating factors, would you

have told him that you would not have been willing to assist him?

A. Oh. No, sir. I would have been willing to assist in that. I probably would have requested probably a second, you know, interview with the client and with more proper background information.

Q. Had Mr. Fox requested your assistance in developing mitigation would you have requested psychological, neuropsychological, neurological-type testing of Mr. Oats?

A. Yes, sir. I would have requested neurological and neuropsychological evaluations.

Q. What about intelligence testing? Would that have also been something that would --

A. Yes.

Q. -- have been --

A. It would --

Q. -- requested?

A. -- have been included in there. You know, when I'm saying neuropsychological, I think a psychological testing had to be involved then.

Q. Right. You're -- you're correct. The test battery includes in -- intelligence testing.

Now, if you could, just -- just play this lawyer game with me for a minute and try to move yourself back in time to the time of your evaluation in 1980.

Had Mr. Fox requested then that you provide an opinion to him concerning whether Mr. Oats was extremely emotionally disturbed at the time of the offense, actually whether to a reasonable degree of psychiatric's probability or certainly he suffered from an extreme mental or emotional disturbance, would you have been able to assist him in that regard?

A. Yes, sir. I think so.

* * *

Q. But Mr. Fox never asked you about that?

A. No, sir.

* * *

Q. Now, the last question I asked was about a substantially impaired capacity to conform conduct to the requirements of the law and just for the benefit of the record you indicated that you would have been able to formulate an opinion in that regard that Mr. Oats was to a reasonable degree of certainty so impaired but that Mr. Fox never asked? Is that sort of in a nutshell a fair summary?

Doctor?

A. Yes.

Q. I'm sorry. Did -- did you catch my last question?

A. Yes. I thought I answered it. Yes. I made the statement yes.

* * *

[Q.] My next question has to do, you discussed in the affidavit that, had you been asked originally, you also could have formulated the opinion and that Mr. Oats was substantially dominated by another during the time of the offense and that that mitigating factor also applied? Do you recall saying that in the affidavit?

A. Yes, sir. I think he was under the influence of a -- of, you know, other people, what is called substantial domination by others. I think it was the co-defendant.

Q. And finally you also indicated in the affidavit that had Mr. Fox asked you originally you also could have formulated the opinion that given the fact Mr. Oats' impairments reduce him below his chronological age, age would have been a significant mental health-type mitigating factor in this case?

A. Yes, sir. I think that was the fourth mitigating factor based on the material -- the material I was -- I received, I think he was substantially functionally and developmentally impaired and he came -- tested quite below his chronological age of 22.

Q. Now, on each of these four factors Mr. Fox never asked you anything originally? Is that --

A. No --

Q. -- correct?

A. -- sir.

THE COURT REPORTER: I didn't hear that.

BY MR. NOLAS:

Q. I'm sorry. Doctor, could you repeat the last answer?

A. No, sir.

(PC-R. 2658-64). Together with Mr. Oats' age factor, this mental health expert believed that a total of four statutory mitigating factors existed in this case.[15]

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[15]Dr. Gonzalez also testified that there was substantial questions regarding Mr. Oats' competency in 1984:

Q. Okay. We -- did you have an opportunity recently to review certain transcripts concerning Mr. Fox telling the Court that (continued...)

Frank Carrera, III, M.D., was the third original competency expert. He, too, was not provided with any background information from defense counsel:

> Q. Did Mr. Fox provide you --
>
> Do you know who Ronald Fox is?
>
> A. Yes.
>
> Q. And he was Mr. Oats's [sic] attorney at the time?
>
> A. Yes.
>
> Q. Did he provide you with any information concerning Mr. Oats' history,his records, school records, incarceration records, anything at all regarding Mr. Oats' history?
>
> A. No, he did not.

---

[15](...continued)
Mr. Oats is, quote, insane, unquote?

> A. Yes, sir.
>
> Q. And therefore that he should not be sentenced? Do you recall that, Doctor?
>
> A. Well, I re -- I'm recalling, yeah, reading that material.
>
> Q. Okay. In 1984 -- let me just move you ahead now to 1984 -- did Mr. Fox ever call you and ask you to help him at all or to render any kind of opinion concerning what he was observing in Mr. Oats' behavior?
>
> A. No, sir. I was not contacted by Mr. Fox at all at any particular moment.
>
> Q. Had he done so would you have been willing to assist in 1984?
>
> A. Yes, sir. I would have been willing to -- to assist him.
>
> Q. Now, given what Mr. Fox said concerning Mr. Oats and given what you knew back then about Mr. Oats, would a competency evaluation by a mental health professional been appropriate in 1984?
>
> A. Oh. No doubt about it, sir. Yes. It would have been appropriate.
>
> Q. And can you just briefly summarize for us why you say that?
>
> A. Because the mental status of the patient in 1980, you know, I think he could have been deteriorated in this four years of incarceration. I think another evaluation would have been in order. I'm talking about a psychiatric evaluation --

(PC-R 2666-67).

* * *

[Q.] Did Mr. Fox provide you with Mr. Oats' jail records, or records of his incarceration at the jail?

A. No, he did not.

Q. Did you, at the time of the initial proceedings, did you have access to that information yourself?

Did you get that information independently of Mr. Fox?

A. No, I did not.

(PC-R. 851-52).

He, too, was not asked, but would have been willing to explore mitigation:

Q. At the time of the initial proceedings, did Mr. Fox ask you, or ask you to develop and formulate an opinion concerning a mitigating factor of whether the capital felony was committed while the defendant was under the influence of mental or emotional disturbance?

A. No, he did not.

Q. Had he asked you to develop that type of mitigation, would you have been willing to do that?

A. Yes.

Q. And you have indicated -- you have had a chance to review your initial evaluation and test on him?

A. Yes.

Q. To a reasonable degree of psychiatric probability, would it be fair to say that at the time of the offense Mr. Oats was suffering from an extreme mental disturbance?

A. Yes, I do believe so.

Q. Additionally, at the time of the proceedings, did Mr. Fox ask you to formulate an opinion and assist him with developing mitigation concerning whether or not at the time of the initial proceedings -- at the time of the offence -- I'm sorry.

Well, the factor in which the defendant's capacity to appreciate the criminality of the conduct to conform the conduct to the law, did Mr. Fox ask you to assist him in developing evidence concerning that being a factor?

A. No, he did not.

Q. Had he done so, would you have been able to -- would you have been willing to assist him in that regard?

A. Yes.

Q. To a reasonable degree of psychiatric probability,

could it be said that Mr. Oats's capacity to appreciate the criminality of his conduct, or to conform his conduct to the requirements of law, was impaired at the time of the offense?

A. Yes, I believe so.

Q. Was there any extreme impediment, anything you would have said to Mr. Fox: "No, I don't want to deal with those two statutory mental health mitigating circumstances, I can't help you with those"?

A. I don't believe so.

Q. He just never asked?

A. That is correct.

Q. Do you recall whether or not, before the penalty phase, Mr. Fox asked you to assist him in developing evidence concerning the non-statutory mitigating factors?

In other words, he -- did he go to you and say, "What do I do in terms of developing a penalty phase, can you advise me from the point of view of a mental health professional?"

A. No, he did not.

* * *

Q. Have you had opportunity to review some transcripts of what transpired at that proceeding?

A. Yes, I have.

Q. In conformity with what you just said, Doctor, let me indicate to --

MR. NOLAS: Your Honor, for the record, it is page 1,174 of the original sentencing. This was a question by Mr. Fox to you, originally.

BY MR. NOLAS:

Q. "Doctor, did you inquire into areas which may have answered that question for you relating to the statutory mental health mitigating factors?"

And your answer at that time: "I did not."

The next question was: "Was that one of the questions you were appointed by the Court to answer?"

And your answer was: "No."

Is that consistent with your recollection today?

A. Yes, it is.

Q. So, nobody asked you to look at the statutory mental health mitigating factors, not the Court, not the State, no one?

A. No one.

(PC-R. 853-56).

On cross-examination at the evidentiary hearing, Dr. Carrera reiterated that Mr. Oats suffered from extreme mental disturbance at trial, and that his capacity to conform his conduct was substantially impaired:

> Q. But, Doctor, I still -- it still lingers in my mind that you did say he was under extreme emotional distress.
>
> A. Yes.
>
> Q. And that he could not conform himself to the requirements of the law?
>
> A. I believe so.
>
> Q. In both times of the commission of the offense?
>
> A. Yes.
>
> Q. And you are testifying to that today?
>
> A. Yes.
>
> Q. But that was not your opinion back then?
>
> A. I was not directed to look at that back then.
>
> Q. So you did not explore that back then?
>
> A. That's correct.
>
> Q. And you obtained your present-day opinion, then, from some other resource, some other source; is that correct?
>
> A. No. Well, from reviewing and re-focusing from my original examination, based on the mitigating circumstances and the statute and reviewing that information, plus the additional reports that have been provided for my review.
>
> Q. What other reports in the interim period, what other reports have been provided for your review, sir?
>
> A. Well, sir, I had the chance to review five volumes that were provided for me that included items such as the Florida Supreme Court opinion of February of 1981. Statements by Mr. Oats, December 24, 1979. The penalty phase and sentencing by the Judge in February of 1981. The Florida Supreme Court opinion, re-sentencing of April of 1985. Re-sentencing hearing of April of 1984. Judgment and sentencing, April of 1984. Appendix to Motion to Vacate. Chemical analysis of liquid paper. Munroe Regional Medical Center medical records. Florida State Prison medical records. Florida State inmate records. Florida Department of Corrections records. Florida Parole and Probation records. My testimony. My evaluation. The reports of Dr. Gonzalez and Dr. Natal. The evaluation by Drs. Charles and Leonard Haber. The Department of Corrections records of Mr. Oats' father, and those of his brother, as well as -- including in these materials are psychological testing reports by Dr. Kropp, and also a report from Dr. T. M. Phillips.

Q. And based on all of that, you now have an opinion as to those two statutory mitigating factors?

A. Yes.

(PC-R. 864-65).

Mr. Oats had a constitutional right to a mental health expert "who [would] conduct an appropriate examination and assist in evaluation, preparation and presentation of the defense." Ake, 470 U.S. at 83. He was denied this critical assistance because counsel failed to ask for the assistance. In State v. Michael, this Court found a failure to seek an evaluation of mental health mitigation in virtually identical circumstances constituted deficient performance. This failure constituted ineffective assistance. See State v. Lara, 581 So. 2d 1288 (Fla. 1991). In fact, in both Lara and Michael relief was granted because trial counsel, without tactic or strategy, failed to present available statutory and non-statutory mental health mitigation at the penalty phase. The evidence in Mr. Oats' case goes well beyond the evidence of mitigation presented at the Lara and Michael evidentiary hearings.

In 1981, Mr. Fox meant to present mental health mitigation; he called Dr. Carrera. However, he neglected to telephone Dr. Carrera in advance and advise him to evaluate Mr. Oats for mental health mitigation. Because of counsel's failure to prepare, Dr. Carrera was unprepared; he had not conducted an evaluation of Mr. Oats' mental retardation. Had counsel asked for the requisite evaluation, Dr. Carrera would have been able to identify statutory mitigation. In 1984, Mr. Fox meant to obtain a confidential mental health evaluation as mitigation, but unfortunately he failed to ask for it under the right to court rule. Clearly, counsel's failure was not tactical.

The situation, here, is virtually identically to that in Cunningham v. Zant, 928 F.2d 1006, 1018 (11th Cir. 1991):

> Finally, trial counsel presented no evidence regarding Cunningham's mental retardation and made no reference to it in their closing argument. At the state habeas hearing, trial counsel conceded that they had not subpoenaed the records from Central State Hospital concerning Cunningham's psychiatric evaluation. Rather, they merely reviewed copies of the records that were made available to them by the district attorney. Trial

> counsel did not recall that the Central State Hospital personnel had diagnosed Cunningham to be mildly mentally retarded. Accordingly, their decision not to present such evidence cannot be deemed tactical. Accordingly, we find that, in light of the ready availability of this evidence and in the absence of a tactical justification for its exclusion, the failure by trial counsel to present and argue during the penalty phase any evidence regarding Cunningham's mental retardation, combined with their failure to present and argue readily available additional evidence regarding Cunningham's head injury, his socioeconomic background, or his reputation as a good father and worker, fell outside the range of professionally competent assistance.

(Footnote omitted).

Mr. Oats' case is also similar to that in Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991), where counsel failed to investigate for mental health mitigation when he was on notice that mental health disturbances existed. There, the Court concluded:

> When counsel makes a decision not to further investigate, that decision is only reasonable to the extent professional judgment makes the limitations placed on further investigation reasonable in the circumstances. Strickland, 466 U.S. at 690-91, 104 S.Ct. at 2066. We will not fault a reasonable strategy not to investigate further if it is based on sound assumptions. Pickens, 714 F.2d at 1467. Here is was not a reasonable strategy that led counsel not to investigate, but lack of thoroughness and preparation. "Counsel can hardly be said to have made a strategic choice against pursuing a certain line of investigation when s/he has not yet obtained the facts on which such a decision could be made." Chambers, 907 F.2d at 835 (quoting United States v. Gray, 878 F.2d 702, 711 (3rd Cir.1989)).

937 F.2d at 1308.

The situation, here, is very similar to that in Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), where deficient performance was found when trial counsel failed to investigate and present evidence of Mr. Brewer's mild retardation at a capital penalty phase proceeding:

> In our opinion, defense counsel's failure to investigate the mental history of a defendant with low intelligence demonstrates conclusively that he did not "make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors." Id. We note that since Brewer's bifurcated trial was the first one under Indiana's new death penalty scheme, we view the state judge's refusal to grant a continuance for the purpose of inquiring into Brewer's psychiatric history to have been a far more significant problem (albeit one not asserted to us) than errors we sometimes view and classify as merely harmless. Even a cursory investigation of Brewer's mental history would have revealed the following: a) Brewer received several shock therapy treatments at age 10; b) he had brain damage (apparently as a result of blows to the head as a young boy) and

> was classified as mentally defective; c) at age 11, Brewer was evaluated as "fixated at a very dependent and infantile level, a level of development that comes prior to any real concern or ability to control impulses, in short, self control"; and d) at age 12 Brewer's I.Q. was rated from 58 to 67, depending on the test. Although the district court stated that Brewer "was mildly retarded having a I.Q. of 76" on the basis of a report from Dr. Vargus (a state-court appointed psychologist) submitted prior to sentencing, the record reveals that another evaluation performed by the same psychologist some 7 months later resulted in a score of 68, an I.Q. more consistent with that attributed to Brewer at age 12.
>
> Defense counsel's failure to investigate Brewer's mental history appears even more egregious when viewed in conjunction with the testimony of the court-appointed psychologist at the hearing on the Belated Motion to Correct Errors. The psychologist testified that Brewer "was like a little sheep to people he liked or considered his friends..... He needs companionship and took [sic] it any way he could." Dr. Vargus further testified that Brewer is so easily led that while "there might be times when somebody told him to jump off a 10-story building, he might not. But if it had been a companion or a certain friend, he would most likely go along with it.... We are subject to the influence of other people. He is especially susceptible to that." (Emphasis added). If the jury has been presented with this evidence of Brewer's tendency to be influenced by others, it might well have decided that he was under the influence of Kenny Brooks during the crime spree or that Brewer was simply not the type of individual, because of his impaired mental capacity, who deserved the death sentence.

935 F.2d at 857-58.

Here, the circuit court's decision that counsel's performance was not deficient is not supported by competent evidence. State v. Michael, 530 So. 2d at 930 (trial court's decision must be based "on competent substantial evidence"). See Sireci v. State, 587 So. 2d 450, 453 (Fla. 1991)(circuit court's resolution of Rule 3.850 proceeding must be "supported by competent, substantial evidence"). However, the evidence below was undisputed: Mr. Fox did not obtain an evaluation of Mr. Oats' mental retardation (beyond competency and sanity) as it related to the mental health issues presented in the case. Moreover, the circuit court did not identify any valid tactical or strategic reason for this failure. Under the law (Michael, Lara, Cunningham, Kenley, Brewer) the undisputed facts constituted deficient performance.[16] The circuit court failed to properly apply the law to the undisputed facts. Counsel's performance was deficient.

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[16]The State in its post-hearing memorandum never even contested that deficient performance was present in this case. (See PC-R. 3243-41).

B. **PREJUDICE**

The remaining question is whether Mr. Oats suffered prejudice by the failure to investigate and present Mr. Oats mental retardation. The question of prejudice is a legal one entitled to no deference. Stano v. Dugger, 921 F.2d 1125, 1149 (11th Cir. 1991)(in banc). The issue is whether a reasonable probability exists of a different outcome but for counsel's deficient performance. This is a question of law. It is not the defendant's burden to show the nondisclosure "[m]ore likely than not altered the outcome in the case." Strickland v. Washington, 466 U.S. 688, 693 (1984). The Supreme Court specifically rejected that standard in favor of a showing of a reasonable probability. A reasonable probability is one that undermines confidence in the outcome. Confidence is undermined in the outcome when the trial cannot be "relied on as having produced a just result." Harris v. Reed, 894 F.2d 871, 879 (7th Cir. 1990).

Moreover, in applying the Strickland test consideration must given to the fact that:

> [I]n adjudicating a claim of actual ineffectiveness of counsel, a court should keep in mind that the principles we have stated do not establish mechanical rules. Although those principles should guide the process of decision, the ultimate focus of inquiry must be on the fundamental fairness of the proceeding whose result is being challenged.

Strickland, 466 U.S. at 696.

This Court held in Michael that prejudice has been shown in a capital proceeding where there is an "inability to gauge the effect" of counsel's omission which constituted deficient performance. 530 So. 2d at 930. See State v. Lara, 581 So. 2d 1288, 1289 (Fla. 1991) ("had such evidence been presented, the jury might well have recommended a penalty other than death").

A capital sentencing must be individualized and focused on the defendant's personal culpability:

> Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged

> background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987)(concurring opinion).

Penry v. Lynaugh, 109 S. Ct. 2934, 2947 (1989). Here, the judge and jury knew nothing of Mr. Oats' mental retardation. The sentencers thus could not assess Mr. Oats' personal culpability. Prejudice is apparent.

Because "[t]he primary purpose of the penalty phase is to insure that the sentence is individualized by focusing the particularized characteristics of the defendant [,]" when trial counsel fails "to provide [mitigating] evidence to the jury, though readily available, trial counsel's deficient performance prejudice[s the defendant's] ability to receive an individualized sentence." Cunningham v. Zant, 928 F.2d 1006, 1019 (11th Cir. 1991) (citations omitted). In Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991), it was explained:

> It is also clear that Blanco was prejudiced by counsels' failure to put on any mitigating evidence during the penalty phase. The jury recommended a death sentence by a vote of eight to four. As in Armstrong v. Dugger, [833 F.2d 1430 (11th Cir. 1987),] evidence was available concerning Blanco's impoverished childhood, epileptic seizures, and organic brain damage. As in Armstrong, [833 F.2d at 1434,] "[t]he demonstrated availability of undiscovered mitigating evidence clearly met the prejudice requirement."
>
> . . . .
>
> Given that some members of Blanco's jury were inclined to mercy even without having been presented with any mitigating evidence and that a great deal of mitigating evidence was available to Blanco's attorneys had they more thoroughly investigated, we find that there was a reasonable probability that Blanco's jury might have recommended a life sentence absent the errors.

Blanco, 943 F.2d at 1505 (footnotes omitted). Mr. Oats may have received votes for mercy even though the jury heard nothing about his retardation and the presence of statutory mitigating factors.[17] As in Blanco, and Armstrong, "[t]he demonstrated availability of undiscovered mitigating evidence clearly met the prejudice requirement." See Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991).

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[17]Trial counsel sought to have the jury polled on its sentencing recommendation votes, but his motion was denied by the trial court (R. 1277).

Here, because of counsel's deficient performance mental evaluations of Mr. Oats' mental retardation and its impact upon issues at trial were not conducted. As already set out, the doctors appointed in 1980 would have concluded statutory mental health mitigation was present, if only they had been asked. They also had grave concerns about the knowingness of Mr. Oats Miranda waiver and his competency at the 1984 resentencing. Had they been asked to evaluate these issues there is a reasonable probability of a different outcome. See Argument II, infra.

These doctors could have identified four statutory mitigating factors, in addition to a wealth of non-statutory mitigation. On direct appeal, three of the six aggravating factors considered by the jury were struck. Certainly, a properly instructed jury could have chosen to return a life recommendation under the circumstances. Cf. Penry v. Lynaugh. Had the jury returned a life recommendation, that recommendation would have been binding regardless of the circuit court judge's view of the evidence. Hall v. State, 541 So. 2d 1125 (Fla. 1989).[18]

Moreover, consideration must also be given to the fact that additional expert testimony would have been available had counsel investigated. At the Rule 3.850 hearing other mental health experts testified and corroborated the findings of Drs. Gonzalez, Carrera, and Natal.

Harry Krop, Ph.D., administered neuropsychological and psychological tests to Mr. Oats. His findings and conclusions are dramatic and clear:

> Personality testing reflects a naive individual who uses poor judgment in his planning and goal setting. In general, he is not viewed as a violent individual but he can certainly be manipulated by others and easily influenced to engage in actions that would be typically ego-alien to him. There is no evidence of a psychotic process, mood disorder or significant emotional disturbance. The results of the testing are consistent with a past history of alcohol and drug abuse, organic brain damage and mental retardation.
>
> Summary and Conclusions:
>
> This is a thirty-year-old, single black male who was raised in an

[18]The circuit court in denying Rule 3.850 relief failed to apply Hall. The jury could easily have found Mr. Oats' mental retardation and the presence of four statutory mitigating factors warranted a life recommendation.

extremely pathological and emotionally deprived environment. He was physically abused to a severe extent and this abuse led to his running away from home on a number of occasions. Mr. Oats turned to drugs and alcohol at an early age and, in addition to the regular street drugs, also became addicted to Liquid Paper. This substance contains various chemicals that can easily lead to organic brain dysfunction when used chronically. At the present time, he does not display evidence of significant emotional disturbance but there are strong indications and evidence of an organic brain syndrome. This dysfunction most likely was exacerbated by his chemical abuse. His past records suggest that cognitive processes have certainly deteriorated from those at an earlier age. Presently he is functioning in the mild range of mental retardation. Based on the current testing, it is likely that this dysfunction and level of functioning existed at or about the time of the alleged offense as well as at the time of his criminal proceedings. It is likely that Mr. Oats would have had great difficulty in assisting his counsel at the time of his trial. He is unable to relate events in a coherent and rational manner. He lacks the ability to abstract and make difficult judgments. His vocabulary is extremely limited and he does not understand language used to describe legal proceedings. He does not have a rational or factual understanding of the legal proceedings surrounding his case. His significant short and long-term memory deficits render him helpless to disclose to counsel pertinent facts surrounding the offense, to realistically challenge prosecution witnesses and to testify relevantly. People with Mr. Oats' level of impaired intelligence are easily led and, as in his situation, would lack the intellectual capability to act in their own best interests under stress. He is not able to conceptualize long-term consequences of his decisions to give statements to law enforcement personnel. His organic brain damage, coupled with his retardation, leave him easily influenced and manipulated in resisting instructions and requests by authority figures. These mental deficits also produce behavior and decisions that may not be in his own best interests. Although it is difficult to determine his sanity at the time of the offense, it is extremely likely that Mr. Oats lacked the capacity to conform his conduct to that required by law. His judgment is significantly impaired because of organicity and would have deteriorated dramatically when intoxicated. He does not understand long-term consequences of his actions because of his severely compromised intellect. Mr. Oats' mental deficits, his history of severe abuse as a child, and his intoxicated state are relevant factors to consider in understanding his behavior at the time of the offense. He would have experienced extreme emotional distress, lacked the ability to respond in an appropriate and acceptable manner, failed to understand long-term consequences of his actions, and not possessed judgment to act rationally.

In conclusion, this evaluation finds that Mr. Oats suffers from significant organic brain damage as evidenced by compromises in almost all cognitive areas. He particularly shows an impoverished memory and overall intellectual functioning is retarded. Considering Mr. Oats' severely abusive and deprived childhood, he has made a relatively good adjustment to his current incarceration and should continue to function without presenting any significant management problems.

(PC. 3474-75).

Robert T.M. Phillips, M.D., Ph.D., examined Mr. Oats and reviewed

numerous records, affidavits, test results and reports. Dr. Phillips testified at the evidentiary hearing that Mr. Oats lacked the capacity to conform his conduct to the law, that Mr. Oats suffers emotional disturbance secondary to mental retardation, that Mr. Oats was most likely dominated by his co-defendant, and that Mr. Oats' mental deficiencies preclude his ability to premeditate.

Q. Are you familiar with the statutory mental health mitigating factors in Florida?

A. In this State, yes. I am.

Q. And in fact I have requested that you assess those factors in Mr. Oat's case?

A. That's correct.

Q. Were you able to formulate an opinion to a reasonable degree of psychiatric certainty as to whether or not Mr. Oats at -- Mr. Oats' capacity to conform his conduct to the requirements of law was substantially impaired at the time of the offense?

A. Yes. I was.

Q. Can you relate to us what that opinion is, please?

A. My opinion is within a reasonable degree of medical certainty that Mr. Oats' lacked the substantial capacity to conform his behavior to the requirements of the law primarily because of, in large measure, many of the instances I have just detailed, but in brief again, because of the presence of an underlying biologic constitutional history of mental retardation, further complicated by both a personality organization and a history of significant brain injury from both toxic substances and by closed and open head trauma, all of which contribute directly to the presence of organic brain damage that leave him in a state of diminished mental capacity.

Q. Is there anything about the facts of the offense, anything reflected by the records that would suggest to you that possibly Mr. Oats during the offense was able to overcome his impairment?

A. Nothing.

Q. Were you able to assess whether to a reasonable degree of medical or psychiatric certainty Mr. Oats at the time of the offense suffered from an extreme mental or emotional disturbance?

A. Yes. I was.

Q. And could you relate to us what you --

A. Again I believe that he certainly suffers from an emotional disturbance that is secondary to his mental retardation, to his pre-imminent use prior to the time of the instant up to and including, I think, the hours before the act, historically, and

also the longstanding history, developmentally, of substance abuse, coupled with the neurologic evidence of internal brain damage secondary to head trauma, all of which contributed to my opinion with regard to that mitigating circumstance.

Q. And in your opinion, would he fall into the statutory criteria?

A. Yes. He would.

Q. Is there any evidence after the offense that would reflect that Mr. Oats was impaired?

A. I am not sure I fully understand your question.

Q. During the course of his interrogation by law enforcement officers, Mr. Oats indicated that he was suffering from severe headaches. Is that of any relevance?

A. I think it's of significant clinical relevance in light of his known use of trichlorethylene which, as I stated previously, will, as an almost consistant byproduct, produce headaches, vertigo, dizziness, et cetera; by virtue of the fact that he has consumed large quantities of alcohol; by virtue of the fact that he is reported to have consumed an amphetamine-like substance and all of the substances which he had been physiologically abusing would be certainly consistant with state of use and/or withdrawal at the proximate time in which he would have been interrogated -- that he would have been interrogated, rather, that would be consistent with a clear indication that he was still impaired.

* * *

Q. To a reasonable degree of medical or psychiatric certainty were you able to form an opinion as to whether Mr. Oats may have been dominated by another personality during the offense, that he would -- could have been under the domination of another?

A. That's always a very difficult question to answer if you're not there but it is frequently a question that is asked of forensic experts when they retrospectively study behavior in a case such as this.

I think the most persuasive element of that particularly statutory circumstance, vis-a-vis his mental retardation, makes that mitigating circumstances consistant with the diagnosis of mental retardation.

As stated previously, mentally retarded persons, more frequently than not, are generally subject to the domination of others as part of their driving dynamic to not be retarded.

I think it --

Q. What does that mean?

A. Well, you know, again, as I tried to describe and as evidenced in my examination, when you ask Mr. Oats certain kinds of questions for which he does not have the appropriate answer, he will give you some answer in an effort, not only to save face but also to please you, to be accepted, because he would rather not

deal with your non-acceptance.

I think in a societal context it is not infrequent for mentally retarded persons to be driven by this very same dynamic in a way that in which they seek to be accepted and, as such, will do what others tell them.

I cannot tell you with impunity that that is what Mr. Oats did.

I can tell you within a reasonable degree of medical certainty that someone who suffers from the clinical condition such as Mr. Oats is at a considerably higher degree of probability of behaving in that fashion because of the diagnosis that he carries.

Q. Given Mr. Oats' impairments as you have related them to us were you able to formulate an opinion to a reasonable degree of medical of psychiatric certainly as to whether Mr. Oats is the kind of person who could premeditate, plan ahead, see the consequences of his actions? Form a specific intent is what we call it as lawyers.

A. It's my opinion, within a reasonable degree of medical certainty, that Mr. Oats lacks the intellectual capacity to truly formulate with any degree of specificity well-conceived and executed plans.

He rather tends to act far more on impulse driven both by his emotion, sometimes overridden by the illicit substances which he may have on board but, by in large, it's a moment-to-moment kind of decision-making process.

That may at superficial review appear to have some degree of premeditation and planning but on careful examination, based on his cognitive dysfunction, it is much more likely that this is an individual who lives from moment to moment and day to day without any great degree of planning.

(PC-R. 33-38).

Dr. Phillips further testified that significant nonstatutory mitigation was present in Mr. Oats' history.

[A] It is in this area, developmentally, that Mr. Oats has had an extremely unfortunate developmental history that I think has contributed significantly to his personality disorder; to wit: This is an individual who did not have the benefits of growing up with his natural parents and who, throughout his early adolescence -- earlier than that -- his early youth was somewhat confused as to why he had a different name from the individuals that he felt were his parents and yet never really pressed the issue or never got a direct answer.

In fact, it's my recollection that it was not until he was in approximately the eighth grade in a rather unceremonious manner that he was called to the principal's office in his school and introduced to his parents or introduced to the people who were his parents along with his younger brother.

Those kinds of issues are traumatic in and of

themselves, but if one couples with that kind of history, the history of the kind of environment in which Mr. Oats grew up, you begin to see the relevance of the environmental impact of -- of his existence on his development; to wit: This is a young man who was physically abused by his aunt who was the female figure parenting him through much of his developmental history.

There are reports that have indicated that his aunt did not infrequently beat him with anything and everything she could get her hands on, including fan belts, including broom handles.

There was one episode reported by a family member that he was struck in the head by a hoe, the handle of a hoe.

He was frequently denied appropriate nutritional meals. The aunt would not infrequently cook a reasonable and well-balanced meal for her husband but her husband did not come home until long after the children had been fed and the children were fed quite a different bill of fair. Often much less than what the husband had been provided, frequently without the benefit of meat or protein, all of which I think are absolutely essential to a developing brain from a neurological standpoint, let alone the impact that will have on someone's view of themself in terms of a developmental history.

There is a report which is corroborated by his brother that frequently they would go to the city dumps to gather discarded food, I believe, for the hogs that they had on the -- the farm where they lived and one episode that he recounted to me was having found an empty bucket or partially consumed bucket of Kentucky Fried chicken which he and his brother began to -- to eat until they recognized that they were infested with maggots and that did not deter them from finishing the meal.

So I think those kinds of gross sociological deprivations impact very significantly on someone's character development and, additionally, the nutritional issues, which need to be addressed in the face of someone who is young and developing, are equally as important in terms of potential neurologic dysfunction.

I think all of that is then further compounded by the issues of trauma, brain injury, abuse and retardation.

If you take each and every one of those issues independently, they have significant impact on one's clinical formulation.

When you line these things up in concert, the clinical evidence which is before you is essentially overwhelming.

Q. Now, you indicated that there is a history of severe beatings in Mr. Oats' case?

A. That's correct.

Q. Were you able to discern what the cause was for that? Was Mr. Oats misbehaving or was there any way you could shed any light on that?

A. It's always difficult to comment on that in the

absence of -- of interviewing the purported abuser, but from what I can gather in my experience of interviewing individuals who have been subjected to such abuse and certainly that which is corroborated by the materials which I have been provided, it would appear that there is very little in his behavior as a child that warranted the way in which he was mistreated and I would submit to you that there is nothing that would warrant a child being tied up and beaten with a fan belt, whether they had done something wrong or not.

(PC-R. 16-19).

Joyce Lynn Carbonell, Ph.D., evaluated Mr. Oats. She administered objective tests and did a clinical interview. Dr. Carbonell found that Mr. Oats' capacity to conform was substantially impaired due to his mental retardation, substance abuse, brain damage, problems with impulse control, and lack of a supportive environment to overcome the effects of his mental retardation.

Q. Now, based on your evaluation of Mr. Oats, your consideration of records and accounts and the accounts of individuals you spoke to and your testing, were you able to formulate an opinion as to whether at the time of the offense Mr. Oats' capacity to conform his conduct to the requirements of the law were substantially impaired?

A. Yes.

Q. Can you relate to us what that opinion was?

A. I think that his ability to conform his conduct to the requirements of the law was substantially impaired.

Q. And can you tell Judge Angel why you say that? What -- what is there, both historically to support that and what did you consider significant to that? What -- why do you say that?

A. Well, for starters, he is mentally retarded. It is true that not everyone who's mentally retarded would have similar problems but he did not have any kind of environmental support that would mitigate the effects of his retardation. He was also drinking. He was using drugs. He was with other people and he's been -- he's been described in his prison records as a dependent personalty [sic] who will be a follower -- will follow other people and he's also mentally retarded.

He would have some problems with impulse control. His frustration and all of those things lead him to be substantially impaired. He's also brain damaged and that will give him other problems.

(PC-R. 266-67).

Dr. Carbonell further found that Mr. Oats suffered from extreme mental disturbance based upon his mental retardation, lack of achievement, brain

damage and abusive background.

Q. Were you able formulate an opinion as to whether or not at the time of the offense Mr. Oats suffered from an extreme mental or emotional disturbances?

A. Yes. I mean, he's -- being mentally retarded is in his case an extreme mental disturbance. He's not only mentally retarded, he lacks any kind of achievement that's commensurate with his level of retardation. He's brain damaged. He comes from a very abusive and tumultuous background.

So he not only had the retardation but he had no way of coping with it; that is, you can have some environmental affects on those kinds of things in terms of the kind of functioning a person has.

Q. I'm sorry?

A. If you take someone who -- who is retarded and put them in a much better and more supportive environment and with a family situation that is better, they will function better and they will do better with some special training, with some special education, with all of these things and none of that was here.

Q. Is there anything whatsoever in Mr. Oats' history to reflect that there was any kind of intervention?

A. No. There's nothing that indicates intervention.

Q. And by intervention I mean special schooling and --

A. No records to indicate that he was in any kind of special schooling, that he was taken to a mental health center. In fact, records -- you know, that -- what's indicated by most people who knew him as a child is that his aunt did not take him anywhere even when he was injured. They essentially used home -- home remedies for him.

(PC-R. 267-69).

Dr. Carbonell also concluded that Mr. Oats was subject to domination by others.

Q. Were you able formulate an opinion as to whether, given Mr. Oats' makeup at the time of the offense, he was the type of person who was subject to the influence of others?

A. All the information about retarded people indicates that they are likely to please or want to do what other people want them to do, more likely to go along and essentially want to be accepted. It's -- they want to pass for normal and one of the ways they try to do that is by going along with what other people say or other people want them to do to try and be one of the crowd or one of the guys and I think you -- you essentially have that in this case.

You also have the things noted in his history from years before. I think from back in, probably, about '76 that he was a dependent person who was very likely to follow others and that was noted a number of years before this current incident.

(PC-R. 269).

Dr. Carbonell found that Mr. Oats' mental condition precluded his ability to specifically premeditate.

> Q. Now, are you familiar with the facts of the offense?
>
> A. Yes.
>
> Q. Were you able formulate an opinion as to whether at the time of the offense Mr. Oats could form premeditation or what we lawyers call a specific intent?
>
> A. To have a specific intent, you would have to have planned, thought it out, considered what he was going to do and, no. I don't think he had specific intent in that sense.
>
> Q. Does Mr. Oats have the ability to reasonably plan ahead, to perceive the consequences of his conduct, to foresee long-term results of what he may or may not do?
>
> A. No. I mean, he clearly has plenty of incidents where he doesn't at all foresee what the consequences of his conduct are going to be.

(PC-R. 269-70).

Dr. Carbonell also concluded that a wealth of significant nonstatutory mitigation was present in Mr. Oats' background and history.

> Q. Let me start with Mr. Oats' earlier days and tell us what -- what was that all about?
>
> A. Well, he had a very -- I suppose the best way to describe it is -- disturbed upbringing. He was transferred from his parents, eventually ended up with an aunt and an uncle who were both -- who were abusive. The uncle apparently was not abusive but was relatively absent. The aunt by Mr. Oats' report, by his brother's report and by another aunt's report was severely abusive to him: beat him consistently, horded food to the point where they had to get garbage, subjected them to --
>
> Q. Garbage meaning what?
>
> A. Go to the garbage pail and eat garbage out of the garbage pail --
>
> Q. I'm sorry. Go ahead.
>
> A. -- eat food that had been thrown out. They were fairly chronically abused. Mr. Oats believes he took the brunt of it. I believe his brother also agrees he was more abused than the others. He was beaten with cords, power cords; was hit in the head with the cane, one time hard enough to spilt his head open. He was not taken for any treatment for any of those injuries.
>
> He also reports that his aunt was having affairs with other people and, although he didn't know what was going on at the time, he would be taken along and told to sit in the back seat.

He attended school, did -- did poorly, had a great deal of difficulty, particularly as he got older. The school principal, I believe, sent a letter at one point saying he got along well with other students. He was suspended once, stayed in school until the 10th grade. He ran away from home eventually, from his aunt and uncle's house after one time when she was beating him fairly severely.

He had previously to that found out that his aunt and uncle were not his real parents. They had always been presented to him as his real parents and when he was approximately 12 or 13, his real parents came to the school where he and his brother were in school and introduced themselves and your real parents and he apparently became very upset, wanted to go live with them and could not. When he ran away from his aunt's at approximately age 16 or 17, he ran to his parents in Ocala and lived with them from them on.

* * *

Q. During his youth did Mr. Oats suffer from any impairments.

In other words --

A. Yeah.

Q. -- was he --

A. He was retarded.

Q. -- mentally retarded before --

A. Yeah.

Q. -- the age of 10?

A. Of course. He was retarded. He was enuretic until probably -- it's been reported until probably he was about 12-years old. He had trouble functioning in school. He reports having some, what he calls, falling-out spells. After the incident where he was hit in the head with the cane, he had reported fairly consistent headaches and those continued to this day. It's in almost all of his records you'll see somewhere that he has headaches.

Q. And that type of -- I'll just call it -- outburst behavior, such as the incident with the chicken, is that consistent with a person suffering from mental retardation?

A. Yes. I mean, one of the problems with people with mental retardation is that they have trouble coping with certain kinds of tasks. They may become easily frustrated particularly if the environment is not good, particularly if the environment is not essentially helpful for them, supportive for them or structured for them, that many times the tasks that they were asked to do and just simply the world they confront is beyond there [sic] capabilities. It is very difficult for -- for someone to deal with this world. It's a very complex thing with that little intellectual functioning.

Q. Was Mr. Oats impaired developmentally?

A. Yes. I mean it's -- it's clear from early on he was having problems. His IQ starting in the first grade were very low and his family reports that he was doing very poorly.

Also his, the -- the pattern of scores he gets on the tests is consistent with a developmental kind of impairment in that there is virtually no scatter.

(PC-R. 260-64).

Vincent P. O'Hara, the Program Director for Chemical Dependency Counseling, Inc., a large treatment program in Jacksonville, Florida, testified at the Rule 3.850 hearing regarding Mr. Oats' substance abuse problem (PC-R. 566-669). Mr. O'Hara, who has treated over 3,500 alcoholics and addicts and has been qualified as an expert witness in over 30 cases, in state and federal courts, testified that Mr. Oats' abuse of alcohol and inhalants had substantial and profound effects on the mental functioning of Mr. Oats. Mr. O'Hara explained the "huffing of liquid paper" by Mr. Oats' would have caused brain damage over and above his mental retardation. Mr. O'Hara concluded:

Whether or not Mr. Oats was mentally competent at the time of the offence. Given what we now know regarding his:

-- Mental Retardation, O.B.S. and the drugs he was using, this is at least questionable - I recommend that you refer him to a competent authority for re-evaluation.

-- Ability to give assistance to his counsel, this is questionable because of Mental Retardation and O.B.S. - Again refer to a competent authority.

-- Waiving his rights. Given his Mental Retardation and O.B.S., statements regarding his pliant personality and his confused state as a result of the "short term effects" of the drug inhalation, I am of the opinion that his capacity to knowingly and voluntarily waive his right to counsel and to waive his right to remain silent was, at the very least, seriously impaired.

-- Mitigating Circumstances. I am of the opinion that this brain damaged mental retard, who at the time of his offence was under the influence of several drugs qualifies for consideration of mitigating circumstances by reason of being under extreme mental and emotional disturbances as caused by the use of antagonistic drugs at the time of the offence. I am further of the opinion that the capacity of the client to appreciate the criminality of his conduct and to conform his condition to the requirements of the law was substantially impaired.

(PC-R. 3490).

The wealth of substantial mental health mitigation which was available,

but not presented because counsel failed to investigate, undermines confidence in the outcome. This mitigating evidence is of greater quantity and quality than that at issue in State v. Michael, State v. Lara, Blanco v. Singletary, Cunningham v. Zant, Horton v. Zant, Kenley v. Armontrout, and Brewer v. Aiken. As in all of those cases, prejudice exists as a matter of law.

Moreover, confidence is undermined even if presentation of mitigation opens doors for rebuttal. As explained by the Eleventh Circuit:

> It does not appeal that injecting Harris' character as an issue during sentencing was fraught with danger. Although the prosecutor told the jury that Harris committed murder while on parole, the introduction of evidence about Harris's character would have allowed the state to further explore the appellant's other felony convictions as well as his dishonorable discharge from the Army. Nevertheless, on this record we cannot conclude that effective counsel would have made a strategic decision to forego testimony about Harris' good character merely because its use would have permitted the state to add some prior unlawful acts to the proof already in the case. Indeed, one of Harris' lawyers conceded that he would have used the evidence had he known about it. Testimony about the appellant's good character constituted the only means of showing that Harris was perhaps less reprehensible than the facts of the murder indicated. Because we find that a reasonable probability exists that a jury hearing this evidence would have recommended life, Harris suffered prejudice from counsel's errors.

Harris v. Dugger, 874 F.2d 756, 764 (11th Cir. 1989)(footnote omitted).

C. **CONCLUSION**

In sum, Mr. Oats was denied his fifth, sixth, eighth, and fourteenth amendment rights. In conflict with Ake, Mr. Oats was sentenced to death in violation of his due process and equal protection rights. Counsel's deficient performance resulted in the violation of these rights. Evidence which would have made a significant difference went unpresented: substantial statutory and nonstatutory mitigation could and should have been established; aggravating factors should have been undermined. Important, necessary and truthful information was twice withheld from the tribunal charged with deciding whether Mr. Oats should live or die. This deprivation violated Mr. Oats' rights. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978).

At the evidentiary hearing the expert and lay testimony and corroborating documentary evidence presented by Mr. Oats established a total

of four (4) statutory mitigating circumstances (extreme mental/emotional disturbance, substantially impaired capacity to conform conduct to requirements of law, substantial domination of another, and age) and a veritable wealth of nonstatutory mitigating factors (Mr. Oats' background as an abused child, the family's extreme poverty, his brain damage, mental retardation, diminished capacity, lack of premeditation, learning disabilities, and substance abuse). None of these factors were fairly considered by the judge and jury charged with deciding whether Mr. Oats should live or die. Given what this case involves, there is more than a reasonable probability that introduction of such evidence would have affected the result, and confidence in the outcome at sentencing is undermined. Strickland v. Washington; State v. Michael; State v. Lara. There was no strategy or tactic behind counsels' failure to present this evidence. As a result of counsels' deficient performance, Mr. Oats was denied the individualized and reliable sentencing determination which the eighth amendment requires.

Here, had trial counsel conducted a reasonable investigation and properly obtained the assistance of a mental health professional in advance they would have been able to present a very powerful case in mitigation. See Cheshire v. State, 568 So. 2d 908, 912 (Fla. 1990)("Events that result in a prisoner succumbing to the passions or frailties inherent in the human condition . . . must be considered by the sentenc[er]."). A compelling case for a life sentence could have and would have been presented. Counsels' neglect deprived the jury of substantial evidence and documentation regarding Mr. Oats' substantially impaired mental health. Confidence in the outcome at sentencing is undermined, and this sentence of death is not sufficiently reliable to satisfy the eighth amendment.

The trial court erred in denying relief. This Court must act to uphold Mr. Oats' constitutional rights and grant Rule 3.850 relief.

**ARGUMENT II**

**MR. OATS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT ALL PHASES OF HIS TRIAL, SENTENCING AND RESENTENCING, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

A criminal defendant is entitled to a fair trial. As the United States Supreme Court has explained:

> . . . a fair trial is one which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding.

Strickland v. Washington, 466 U.S. 668, 685 (1984). In order to insure that an adversarial testing, and hence a fair trial, occurs, certain obligations are imposed upon defense counsel. Defense counsel is obligated "to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Strickland, 466 U.S. at 688. Here, Mr. Oats was denied a reliable adversarial testing. Mr. Oats attorney failed his client. Strickland requires a defendant to plead and show: 1) unreasonable attorney performance, and 2) prejudice. Courts have repeatedly ruled 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), vacated as moot, 446 U.S. 903 (1980); Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc). See also 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"); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989). Likewise, courts have recognized that in order to render reasonably effective assistance an attorney must present "an intelligent and knowledgeable defense" on behalf of his client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). An attorney is responsible for presenting legal argument consistent with the applicable principles of law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Counsel is prejudicially ineffective for failing to function as the government's adversary, Osborn v. Shillinger, 861 F.2d 612, 625 (10th Cir. 1988); for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, 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); for 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); and for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963. Counsel have been found prejudicially ineffective for failing to impeach key State witnesses with available evidence. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). See also Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Horton v. Zant, 941 F.2d 1449 (11th Cir. 1991). See also Kimmelman v. Morrison, 477 U.S. 365 (1986).

In Mr. Oats' case, his counsel failed to insure an adversarial testing and a reliable outcome. Each of the errors committed by Mr. Oats' counsel is sufficient, standing alone, to warrant relief. Each undermines confidence in the fundamental fairness of the proceedings. As a result of counsel's errors no adversarial testing occurred.

**A. PRE-TRIAL PROCESS**

**1. Suppression issue.**

Counsel sought suppression of Mr. Oats' incriminating statements to law enforcement officers. However, at the January 21, 1981, hearing on the motion to suppress, counsel failed to effectively cross-examine the officers to show that Mr. Oats' significant mental deficiencies precluded voluntary, knowing and intelligent waiver of his Miranda rights. (R. 1296-1395). Counsel also failed to obtain the assistance of a mental health expert who could explain the effect of Mr. Oats' mental deficiencies on his ability to knowingly and intelligently waive his Miranda rights. At the evidentiary hearing, counsel testified:

> Q. At the original trial, did you ever ask for an expert opinion on whether Mr. Oats had the capacity to knowingly voluntarily waive mandatory rights and give a confession?
>
> A. No.
>
> Q. Was there a tactical or strategic reason for that?
>
> A. No.

* * *

Q. Were his mental health impairments, as you perceived them one of the important things you were trying to get to the Court, from your perspective?

A. Yes.

(PC-R. 819-20).

A. Based on the things that contained in your questions, as well as the motion to suppress his statement, I felt that he was not -- he did not freely and voluntarily waive his Miranda rights, or knowingly and intelligently waive those rights and, thereafter, freely and voluntarily give a statement.

* * *

Q. Why did you not pursue, if there is a reason for mental health evidence on that issue?

A. There is no reason.

(PC-R. 821).

* * *

Q And you indicated yesterday that you did not develop or present mental health evidence concerning Mr. Oat's capacity to validly waive Miranda rights and give statements?

A Correct.

(PC-R. 1011-12).

Q Was there a tactical or strategic reason for that?

A No. No.

* * *

A I am now aware of it.

(PC-R. 1013).

The officers acknowledged Mr. Oats' trouble reading the rights form (R. 1343) and Mr. Oats' frequent complaints of severe head pain (R. 1310; 1319; 1344). Thus, counsel was alerted to Mr. Oats' mental deficiencies. Counsel did not develop this evidence. He did not secure the assistance of a mental health expert in analyzing Mr. Oats' mental condition and its impact on his ability to understand and waive Miranda rights.

Counsel further erred in not responding to the court's stated concerns as to whether Mr. Oats was "normal." Twice during the hearing, the court

commented on this "standard":

> THE COURT: Was he acting in a normal-type way?

(R. 1314).

> THE COURT: I think if he said he appeared normal to him as a normal individual.

(R. 1330). Counsel failed to inform the court of the appropriate legal standards and of Mr. Oats' substantial mental impairments. This prejudiced his client's cause. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990). Counsel failed to know the law and understand the need for mental health assistance as to the motion to suppress.

Three mental health experts were appointed by the trial court to examine Mr. Oats' competency to stand trial and insanity at the time of the offense. All three experts submitted reports to the court. (PC-R. 3453-56; 5252-53; 5257-58). Counsel contacted none of these experts on Mr. Oats' behalf; he had no strategy or tactic for his failure. (See Argument I). In their pre-trial reports, all three experts had reported Mr. Oats' mental deficiencies and substance abuse: Dr. Natal spoke of Mr. Oats' being dominated, of his substance abuse, physical abuse and childhood trauma, and low intelligence. (PC-R. 3453-56). Dr. Carrera acknowledged Mr. Oats' substance abuse, headache problems, memory problems, and found this 22 year old defendant to have a mental age of 12 years. (PC-R. 5252-53). Dr. Gonzalez reiterated Mr. Oats' memory problems, substance abuse and "marginal" intelligence. (PC-R. 5257-58).

At the evidentiary hearing, defense counsel testified:

> Q. At the original trial, did you ever ask for an expert opinion on whether Mr. Oats had the capacity to knowingly voluntarily waive mandatory rights and give a confession?
>
> A. No.
>
> Q. Was there a tactical or strategic reason for that?
>
> A. No.

(PC-R. 819).

The inquiry into the validity of a waiver has two distinct dimensions.

First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion or deception. Second, the waiver must have been made with a full awareness both of the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the "totality of the circumstances surrounding the interrogation" reveal both a free choice and the requisite level of comprehension may a court properly conclude that the Miranda rights have been waived. Moran v. Burbine, 475 U.S. 412 (1986). See Arizona v. Fulminante, 111 S. Ct. 1246 (1991). In particular, "[t]he determination of whether there has been an intelligent waiver . . . must depend in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused." Johnson v. Zerbst, 304 U.S. 458, 464 (1938); Miranda v. Arizona, 384 U.S. 436, 475 (1966) (applying the Johnson v. Zerbst standard to waiver of Miranda rights). The accused's mental state is the critical factor. But here the accused's mental state was never properly investigated by trial counsel. But for counsel's deficient performance, there "would have [been] a reasonable chance of success." Harrison v. Jones, 880 F.2d 1279, 1283 (11th Cir. 1989). Substantial evidence is available from mental health experts that Mr. Oats did not knowingly and intelligently waive his Miranda rights. Accordingly, Mr. Oats' conviction must be reversed and his statement suppressed.

**2. Competency to stand trial**

Although defense counsel believed Mr. Oats to be incompetent, he failed to properly litigate this issue.[19] At the Rule 3.850 hearing, counsel testified:

> Q. Did you have concerns about his competency to undergo a judicial criminal prosecution?
>
> A. Consistently.

---

[19]Mr. Fox testified that he also failed to use proper semantics in seeking a competency determination in 1984 prior to the resentencing. However, in 1980 Mr. Fox failed to advise the appointed experts of Mr. Oats' inability to provide any assistance to counsel. The experts have testified that this information would have called for further testing and evaluation and raises substantial doubt about Mr. Oats' competency.

(PC-R. 762).

Q. Can you tell us, from your initial contacts with him what it is that raised those concerns?

A. Well, I don't know how specific I can be about things that happened prior to the trial. But just in general, in discussing the case with him, and the circumstances that he found himself in, his response to the situation, if you will, was, in my experience, highly unusual to say the least.

(PC-R. 763).

Well, Sonny's reaction was really none of those. It was nothing that I had really dealt with before. Was not -- maybe the best way to characterize it: It was not even responsive, in my view, to what was going on.

(PC-R. 764).

. . . whenever I wanted to talk about the case or get assistance from him on what the facts were, that he may know . . . he would talk about . . . things that did not relate.

(PC-R. 765).

. . . he had no appreciation of the difference between first-degree, second-degree, or even accusable justifiable homicide, that sort of thing.

* * *

The lesser included offenses, I always felt that he didn't understand the significance of that. It was more or less maybe a kind of "all or nothing" thing.

I think he knew he was in jail. He was accused of murder. And they were trying to impose the death penalty on him. And that would be, in my opinion, that was the most that he understood about the significance of the charges.

(PC-R. 766).

But as far as a verdict as charged, or a lesser included, or multiplicity of verdicts, and aggravating circumstances, he didn't understand that.

(PC-R. 767).

So, he appreciated there were two sides. But as far as contesting the State's evidence or presenting his own evidence that may undermine or mitigate the State's evidence, I don't think he had any appreciation of that.

(PC-R. 768).

. . . I couldn't keep him on the subject. I could never keep him focused on what we were primarily concerned with as his lawyers.

* * *

. . . this guy was in the worst circumstances and he was the most

polite and most friendly to me of any client I have ever had.

(PC-R. 769).

The facts surrounding the offense that we became aware of, we became aware of from the State's evidence or from a discovery of evidence provided by the State.

* * *

. . . he was not capable of holding back or trying to orchestrate anything like that.

* * *

I didn't feel that he was manipulating me, and I have been manipulated by many.

(PC-R. 770).

[Q.] Did he assist you in any way in preparing, planning a defense?

A. None whatsoever. . . .although we sought input from Sonny, we didn't get any.

* * *

It was just like a non-participant in the planning.

(PC-R. 772).

. . .he didn't understand the significance of his situation, the charge, or how to challenge the State's case.

* * *

He was always very polite to all of the attorneys. . . .

But, then, during the presentation of evidence he was distracted maybe, or maybe more interested in the family sitting back in the courtroom, and he would be sort of ignoring what was coming from the witness stand and talking to his family in the courtroom.

(PC-R. 774).

Q. Did you and Mr. Burke talk to him about that?

A. Yes.

* * *

. . . During another part of the testimony, I think he got agitated at the prosecutor's cross-examination and blurted out in open court -- was critical of the prosecutor.

(PC-R. 775).

. . . he cannot maintain a continuous train of thought. . . . We were very fearful of putting him on the stand for what he may say, because he didn't understand the process.

He didn't appreciate what was good for him or bad for him, or otherwise. Plus, he would jump from subject to subject and talk about any number of things.

(PC-R. 776).

Q. What about his capacity to cope with the stress of incarceration, prior to trial?

A. Well, there again I think not so much my contact with him as his behavior in the jail, prior to trial, and all of the incidents down there -- well, "escape" sort of comes to mind immediately, as well as setting the jail cell on fire and things of that kind.

(PC-R. 777).

. . . his reaction to incarceration was more extreme than anybody I ever represented.

* * *

. . . I didn't have any difficulty getting along with him. I had difficulty communicating with him.

. . . But at no time could I get anything from him to help me.

(PC-R. 778).

I have a son who will be six in April and I would have a daughter who is eight months old. Mr. Oats could compete with my daughter, but I think my son would walk away. I would feel, in interviewing my son and talking to him, he could help me more in presenting a defense than Sonny Boy Oats could.

(PC-R. 779).

. . . But he was going to address the audience and, I think, primarily his family.

* * *

. . . but I think the Court sort of suggested that Jim Burke and I tell Sonny that he can't make a speech to his family.

(PC-R. 781).

However, counsel failed to express these very specific concerns and difficulties to the mental health professionals appointed to evaluate Mr. Oats' competency to stand trial. Had he done so, the appointed experts would have had substantial concerns about Mr. Oats' competency to stand trial.

Dr. Gonzalez testified that in light of Mr. Fox's statements regarding his difficulties with Mr. Oats, reasonable and substantial questions exist as to Mr. Oats' competency in 1980-81, before and during his initial trial:

A. Well, I -- when I made the evaluation in 1980,

actually I didn't have any information on Mr. Fox, whether he could communicate or not.

Q. Right. In 1980 Mr. Fox didn't tell you any of these things --

A. That --

Q. -- did he?

A. With the statements that hr [sic] made before, he couldn't. What is striking is that he took years to realize it.

Q. Right. And now today you have been privy to those statements, have you not?

You -- you've seen those statements now?

A. Yes.

Q. Are those statements from Mr. Fox concerning the difficulties that he had with Mr. Oats relevant to the competency question?

A. Well, I think they were relevant to the question that -- of competency.

Q. But he never told you that back then?

A. No.

Q. You indicated your original assessment was whether Mr. Oats could assist in his defense. Do you -- do you remember that testimony?

A. Yes.

Q. And you just indicated, I think, Mr. Fox didn't tell you anything about his view on that?

A. Exactly.

Q. Did you in your report or in your evaluation of Mr. Oats conduct an assessment of his competency under the 11 point McGerry criteria or were you looking at that restricted question that you were called on to answer?

A. I was looking just at that particular question.

Q. Okay. Had Mr. Fox told you the difficulties that he had with Mr. Oats such as the statements that you've seen today can you tell us today what types of questions you would have asked Mr. Oats, what type of further things you'd have done as a result of that?

A. What type of questions I would have asked about his inability to -- to communicate with Mr. Fox?

Q. Yeah, if you knew back then what --

A. Well --

Q. -- Mr. Fox --

A. -- I'd have asked questions about -- from Mr. Oats concerning the -- the interviews, the nature of the interviews, the number of the interviews conducted by the attorney, what kind of environment and what kind of mood he was and, you know, how he was affected by the interview itself. I would have done a lot of -- a lot of questioning, yes.

Q. And -- but that was not done originally?

A. It was not done.

Q. And is it fair to say that had you known then what Mr. Fox's account was, had he picked up the phone and told you, that you would have had Mr. Oats tested neurolo -- neuropsychologically and psychologically?

A. If I had a bearing for -- I probably would have conducted further interviews with the client.

Q. Okay. And since that was not done back then can you sort of -- can you do that today without actually doing it, without doing the testing and without talking to Mr. Oats again?

A. Well, it is difficult for me to make a statement like -- like that, you know, but I -- I couldn't do that at this point.

Q. Okay. Should --

A. A lot can happen. A lot of time's gone by.

Q. Should these things, the testing, the further questions, the review of background information, should these things have been done back in 1980 originally?

A. Yes, sir. That usually should have been the first information we should have received prior to evaluation of the client.

(PC-R. 2737-39).

However, in 1980, Mr. Fox had provided Dr. Gonzalez with no information concerning Mr. Oats, never discussed mental health issues with Dr. Gonzalez, and never called him as a witness at the trial, sentencing, or resentencing proceedings (PC-R. 2672). Counsel's failure to contact Dr. Gonzalez and provide him with the available information clearly prejudiced Mr. Oats.

Similarly, Dr. Carrera was not provided with significant information concerning Mr. Oats (PC-R. 858-59). He testified that it was not possible for him to go back in time and re-do an examination for competency under the 11-point criteria, because competency fluctuates (PC-R. 860). He testified that it was not possible to conduct a nunc pro tunc determination of Mr. Oats'

competency.

Finally, Dr. Natal also noted that information should have been provided to him by defense counsel, that there were important questions about Mr. Oats' competency which were not resolved because counsel failed to provide the necessary information. Mr. Oats' competency should have been more fully evaluated at the time, and substantial doubts that cannot now be resolved exist:

> As I stated, however, because I did not have testing results of Mr. Oats and was not provided with background materials, materials about the offense, nor asked questions by counsel concerning my forensic evaluation or concerning the mental health mitigating factors at the time of my original evaluation, I find it impossible to provide opinions on the potential forensic issues in this case today.
>
> I have also been provided with a transcript of the 1984 resentencing proceedings in this case and was alarmed to find that Mr. Fox believed Mr. Oats' condition had deteriorated to the extent that he believed Mr. Oats no longer able to proceed with judicial proceedings. Had I been advised of Mr. Fox's concerns in 1984 I would have requested that I re-evaluate Mr. Oats. I regret that the failure of such a request at that time leaves me unable to express an opinion as to whether or not Mr. Oats was competent to proceed.

(PC-R. 5578).

Mr. Fox acknowledged that he failed to provide the experts with information and records concerning Mr. Oats, and that he failed to ask the experts any questions or to call them in when Mr. Oats' condition deteriorated during the original trial and sentencing proceedings or at the time of the 1984 nonjury resentencing (PC-R. 810-12). As noted previously, Mr. Fox testified that Mr. Oats was at the very bottom as compared to any other client he has represented (PC-R. 797), and that Mr. Oats failed on each of the 11-point criteria (PC-R. 763-79). Mr. Fox also testified that Mr. Oats could not understand the proceedings and was of no use in aiding counsel or assisting in the preparation of a defense (PC-R. 778). See Scott v. State, 420 So. 2d 595, 597 (Fla. 1982) (An expressed doubt regarding the defendant's competency by defense counsel is an important factor to be considered in competency determinations, and testimony regarding defense counsel's difficulty in dealing with a client is directly relevant to the competency

determination).

In Mason v. State, 489 So. 2d 734 (Fla. 1986), this Court was presented with a case where a competency hearing had not been conducted even though a mental health expert had examined the defendant and had not noted a competency problem. There, as here, the mental health expert at the time of the evaluation had not been provided with and did not consider all the information necessary for a fair and full competency determination. This Court concluded that the information the expert had not received presented a bona fide doubt as to Mr. Mason's competency to proceed. In Mr. Oats' case, the information which the experts did not have originally, as they so testified, established bona fide doubts about the defendant's competency.

However, here counsel failed to assure that Mr. Oats' competency was fully and properly assessed. Because of counsel's failure, confidence is undermined in the reliability of the outcome. Had counsel raised his competency concerns in a proper fashion, a competency determination could have been conducted addressing the bona fide and substantial doubts regarding Mr. Oats' competency. The three competency examiners agree the outcome of Mr. Oats' competency determination would have been in serious doubt. The situation is identical to that presented in Mason; the experts did not have the necessary information to do a reliable competency determination.

The lay and documentary evidence introduced at the hearing clearly established the longstanding nature of Mr. Oats' significant psychological deficits, and corroborated the accounts of Drs. Carrera, Gonzalez, Natal, Carbonell, Phillips, and Krop, and the results of the psychological and neuropsychological testing that were detailed at the Rule 3.850 hearing concerning Mr. Oats. Dr. Carbonell and Dr. Krop conducted extensive testing, and these doctors as well as Dr. Phillips all reviewed the records which Mr. Fox did not provide to Drs. Carrera, Gonzalez, and Natal. Drs. Carbonell, Phillips, and Krop (the former two through testimony; the latter in his report) all testified that competency is difficult to evaluate retrospectively, but that given Mr. Oats' impairments and the evidence

available from the time of the original proceedings and the 1984 resentencing, there are substantial doubts about Mr. Oats' competency during those proceedings. Drs. Carrera, Natal, and Gonzalez, who saw Mr. Oats then, and Drs. Krop, Carbonell, and Phillips all agree that the question of Mr. Oats' competency was never properly resolved originally and that substantial questions exist.

The circuit court denied Rule 3.850 relief without addressing counsel's failure to advise the experts of Mr. Oats' inability to assist counsel in preparing a defense. Similarly, the circuit court did not address the fact that the experts did not know of Mr. Oats' I.Q. of 57 to 61 at the time of their competency evaluation.[20] The experts did not know of Mr. Oats' history of strange behavior as related by his family, or of the history of severe beatings by his aunt. This information, unknown to the experts, according to the experts and according to case precedent, established substantial and bona fide doubts about Mr. Oats' competency and warranted full and careful consideration. The circuit court erred as a matter of law in concluding otherwise.

There is no question that this record is replete with evidence raising bona fide doubt about Mr. Oats' competency at the time of the 1980 proceedings. "Should the trial court find, for whatever reason, that an evaluation of [the defendant's] competency at the time of the original trial cannot be conducted in such a manner as to assure [the defendant] due process of law, the court must so rule and grant a new trial." Mason v. State, 489 So. 2d 734, 737 (Fla. 1986). Here, there is a substantial record of Mr. Oats' lack of competency, while there is absolutely no credible evidence, given the doubts about competency and the difficulty of a retrospective evaluation discussed by Drs. Carrera, Gonzalez, Natal, Phillips, Krop and Carbonell, that it can be said in good faith that Mr. Oats was competent. Defense counsel knowing of Mr. Oats' severe mental deficiencies failed to obtain the

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[20]In Mason, similarly the competency evaluators did not know of Mr. Mason's mental retardation. Mr. Mason's full scale I.Q. was found to be 66.

appointment of a mental health expert to assist with Mr. Oats' defense and to properly advise counsel of the significance of Mr. Oats' mental deficiencies. Counsel's failure was one of ignorance.[21] Mr. Oats was prejudiced.

Because of the substantial doubts, it is clear that a retrospective evaluation of Mr. Oats' competency cannot be undertaken in a manner that comports with due process, and that relief is therefore warranted.[22] Under Mason and Hill, a new trial must be ordered.

**B. TRIAL**

**1. Intoxication.**

At the time of Mr. Oats' trial, the law of Florida was clear that murder and robbery are specific intent crimes. Mr. Oats' taped confession played to the jury, discussed his use of alcohol and controlled substances at the time of the offense. This evidence warranted providing the jury with the standard instruction regarding voluntary intoxication:

> (c) Voluntary drunkenness or intoxication (impairment of the mental faculties by the use of narcotics or other drugs) does not excuse nor justify the commission of crime, but intoxication (impairment of the mental faculties by the use of narcotics or other drugs) may exist to such an extent that an individual is incapable of forming an intent to commit a crime, thereby rendering such person incapable of committing a crime of which a specific intent is an essential element. When the evidence tends to establish intoxication (impairment of the mental faculties by

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[21]As to his failure in 1984 to seek a competency evaluation, Mr. Fox explained he did not understand the difference between "competency" and "sanity." He further explained:

> In fact, I can't tell you that I was even aware of the confidential expert rule at the time.

(PC-R. 803).

[22]Moreover, the circuit court's rejection of Mr. Oats claim erred as a matter of law. There is no question that counsel did not advise the experts regarding his concerns in 1980, and that counsel in 1984 failed to use the term "competency" and invoke Rule 3.210. These facts are not in dispute. The legal issue is: was counsel's conduct deficient performance. This circuit court erred in concluding that the Sixth Amendment is satisfied when counsel fails to appraise experts evaluating competency of facts material to that question ("Mr. Oats seems incapable of understanding the process and assisting counsel in representing him"). Similarly as a matter of law, the Sixth Amendment cannot be satisfied when counsel is ignorant of the difference between "competency" and "sanity" and thus fails to protect the defendant's right to be proceeded against only when competent. See Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

> the use of narcotics or other drugs) to this degree, the burden is upon the state to establish beyond a reasonable doubt that the defendant did, in act, have sufficient use of his normal faculties to be able to form and entertain the intent which is an essential element of the crime.

Florida Standard Jury Instruction in Criminal Cases, Second Edition (The Florida Bar) 2.11(c).

The Florida Supreme Court has reaffirmed this century old rule:

> Voluntary intoxication is a defense to the specific intent crimes of first-degree murder and robbery. Bell v. State, 394 So. 2d 979 (Fla. 1981); State ex rel. Goepel v. Kelly. 68 So. 2d 351 (Fla. 1953). A defendant has the right to a jury instruction on the law applicable to his theory of defense where any trial evidence supports that theory. Bryant v. State, 412 So. 2d 347 (Fla. 1982); Palmes v. State, 397 So. 2d 648 (Fla., cert. denied, 454 U.S. 882, 102 S.Ct. 369, 70 L.Ed.2d 195 (1981). Moreover, evidence elicited during the cross-examination of prosecution witnesses may provide sufficient evidence for a jury instruction on voluntary intoxication. Mellins v. State, 395 So. 2d 1207 (Fla. 4th DCA), review denied, 402 So. 2d 613 (Fla. 1981).

Gardner v. State, 480 So. 2d 91, 92-93 (Fla. 1985)(emphasis added).

Reasonable effective counsel would have been aware of Mr. Oats' substance abuse problem and the need to present additional evidence explaining the effects of drugs and alcohol upon Mr. Oats' ability to form specific intent -- an obvious area in which the assistance of a mental health expert was needed. Yet no expert was asked to evaluate or testify at trial regarding the effects of excessive drug and alcohol abuse on Mr. Oats, a mentally retarded and organically brain damaged individual. Clearly, a defense premised upon Mr. Oats' inability to form specific intent was viable; it was a defense counsel failed to investigate despite substantial and available evidence that voluntary intoxication was present during the time of the alleged murder. Counsel's failure to present this defense or to have an expert evaluate the possibility of the defense during guilt phase deprived Mr. Oats of his constitutional right to present a defense as guaranteed by the sixth and fourteenth amendments. See Washington v. Texas, 388 U.S. 14, 17 (1967); Chambers v. Mississippi, 410 U.S. 284, 285 (1973). As testimony established at the evidentiary hearing, an expert's testimony would have demonstrated that Mr. Oats could not entertain the specific intent or state of mind essential to proof of first degree premeditation murder or felony murder

due to his state of intoxication. A fair adversarial testing did not occur.

Moreover, defense counsel never sought an instruction on voluntary intoxication defense. Florida courts have consistently held that a voluntary intoxication defense must be pursued by competent counsel if there is evidence of intoxication, even under circumstances in which trial counsel explains in post-conviction proceedings that he or she "did not feel defendant's intoxication 'met the statutory criteria for a jury instruction.'" Bridges v. State, 466 So. 2d 348 (Fla. 4th DCA 1985). The key question is whether the record reflects any evidence of voluntary intoxication. Gardner v. State, 480 So. 2d 91 (Fla. 1985). Family members testified at the evidentiary hearing. The original police and mental health reports indicate substance abuse -- but counsel failed to develop this evidence. There was evidence of voluntary intoxication, but counsel failed to properly pursue this evidence and request the instruction.

Here, without any strategic or tactical reason by counsel not to present expert evidence, the jury and court were kept in the dark, and did not receive important, available evidence regarding the issue of intent. The jury and court did not know of Mr. Oats' special mental conditions which rendered him more susceptible to the effects of alcohol, nor did they learn that, given his condition, Mr. Oats could not form intent to premeditate. The jury received no instruction that alcohol intoxication could even be considered on the question of whether Mr. Oats was capable of forming a specific intent. In short, there was no adversarial testing of the issue. Counsel's performance was prejudicially deficient, and confidence is undermined in the outcome. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989); Moffett v. Kolb, 930 F.2d 1156 (7th Cir. 1991). Rule 3.850 relief is warranted.

**2. Shackling.**

Defense counsel failed to properly challenge the prejudicial effect of shackling. Counsel failed to know the law and zealously protect Mr. Oats' rights. See Holbrook v. Flynn, 475 U.S. 560 (1986); Estelle v. Williams, 425 U.S. 501 (1976); Woods v. Dugger, 923 F.2d 1454 (11th Cir. 1991); Norris v.

Risley, 918 F.2d 828 (9th Cir. 1990); Spain v. Rushen, 883 F.2d 712 (9th Cir. 1989); Elledge v. Dugger, 823 F.2d 1439 (11th Cir. 1987).

Mr. Fox testified at the Rule 3.850 proceedings:

> Q. Was Mr. Oats shackled during the proceedings?
>
> A. Mr. Oats was restrained like no other defendant I have ever seen in any courtroom anywhere. He was fitted with leg braces so his legs would not bend at the knees. Those braced legs were shackled together, and the tables in the courtroom remained enclosed underneath to block the jurors' view of that restraint.

(PC-R. 794).

> Q. As Mr. Oats' attorney, as a person who had contact with him in representing him, did you have the impression that the shackling affected him?
>
> A. Well, it affected him to the extent that it influenced the appropriateness of his courtroom behavior. He couldn't stand up when he wanted to. He couldn't walk when he wanted to. He couldn't move when he wanted to.
>
> And, of course, we stressed to him not to let the jury see all that restraint because of the prejudicial impact it would have. Other than that, I don't know that there was an effect on him.

(PC-R. 795-96). Obviously, the shackling impacted on Mr. Oats' affect and demeanor before the jury deciding his fate. Yet, counsel failed to act. Relief is proper.

**C. PENALTY PHASE**

1. As explained at the evidentiary hearing, trial counsel failed to prepare for the penalty phase because his focus was on the guilt phase:

> A. . . . When you are up to your ass in alligators, it's hard to remember that you came there to drain the swamp. . . .
>
> * * *
>
> . . . And our first line of defense was to the charge itself. And probably in hindsight, I would say we concentrated too much energy on that.

(PC-R. 812-13).

> Q. . . . Did the original sentencing proceeding in Mr. Oats' case -- not the re-sentencing -- did it get the attention that you believed it deserved, from your perspective at the time?
>
> * * *
>
> A. No.

(PC-R. 814).

* * *

A: I was distracted by the issues of the guilt innocence phase of the case.

(PC-R. 1064).

The circuit court in denying relief did not dispute whether Mr. Fox had prepared for the penalty phase pretrial (PC-R. 3321). This fact could not be disputed. All of the competent evidence corroborated Mr. Fox' testimony. Penalty phase investigation did not occur in advance of the trial. The circuit court merely determined that as a matter of law that the Sixth Amendment is not violated by the failure to investigate pretrial. However, the failure to prepare a case in mitigation until after a guilty verdict has been determined to constitute ineffective assistance of counsel. Blanco v. Singletary, 943 F.2d 1477 (11th Cir. 1991). The circuit court erred as a matter of law.

The state and federal courts have expressly and repeatedly held that trial counsel in a capital sentencing proceeding has a duty to investigate and prepare available mitigating evidence for the sentencer's consideration. Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985). Trial counsel here did not meet these rudimentary constitutional standards. Cf. Thomas, 796 F.2d at 1325. As explained in Tyler:

> In Lockett v. Ohio, the Court held that a defendant has the right to introduce virtually any evidence in mitigation at the penalty phase. The evolution of the nature of the penalty phase of a capital trial indicates the importance of the jury receiving accurate information regarding the defendant. Without that information, a jury cannot make the life/death decision in a rational and individualized manner. Here the jury was given no information to aid them in the penalty phase. The death penalty that resulted was thus robbed of the reliability essential to assure confidence in that decision.

Id. at 743 (citations omitted)(emphasis added).

Counsel's highest duty is the duty to investigate, prepare and present the available mitigation. Where counsel unreasonably fails in that duty, the defendant is denied a fair adversarial testing process and the results of the

proceeding are rendered unreliable. State v. Lara, 581 So. 2d 1288 (Fla. 1991); Stevens v. State, 552 So. 2d 1082 (Fla. 1989); Bassett v. State, 451 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988). See also Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989)(at a capital penalty phase, "[d]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the jury on any mitigating factors"); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991)(an attorney is charged with knowing the law and what constitutes relevant mitigation).

Decisions limiting investigation "must flow from an informed judgment." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). "An attorney has a duty to conduct a reasonable investigation." Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). See also Cunningham v. Zant, 928 F.2d 1006, 1016 (11th Cir. 1991). No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, Brewer v. Aiken, or on the failure to properly investigate and prepare. See Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991); Kimmelman v. Morrison, 477 U.S. 365 (1986). Mr. Oats's capital conviction and sentence of death are the prejudice resulting from counsel's failure to investigate. Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989).

Mr. Oats' defense counsel were not prepared for penalty phase. Counsel presented the testimony of Dr. Frank Carrera without any preparation and without affording Dr. Carrera an opportunity to evaluate for mitigating circumstances. As a result, Dr. Carrera did not identify mitigation in his testimony, but would have with the proper preparation. Clearly, counsel's failure precluded the presentation of evidence of the presence of statutory mitigation. Counsel also presented testimony from four of Mr. Oats' family members. However, here, as in Cunningham v. Zant,[23] the testimony presented

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[23]In Cunningham, trial counsel presented three lay witnesses at the penalty phase to testify regarding mitigation in Cunningham's background. However, counsel had failed to adequately prepare for this testimony and learn of the wealth of mitigation available. The Eleventh Circuit reversed the resulting (continued...)

failed to provide the jury with critical and necessary insight into Mr. Oats' background and establish mitigation which cries out for a life sentence. The weak examination of these witnesses and counsel's misdirected closing argument demonstrate counsel's ineffectiveness in preparing for the crucial sentencing phase. This was the result of counsel's unreasonable failure to conduct a thorough, independent investigation into Mr. Oats' background or to secure a competent, informed psychiatric evaluation of Mr. Oats for sentencing purposes. (PC-R. 1010; 1069; 1088)(see Argument I).

Dr. Carrera evaluated Mr. Oats at the direction of the Court and addressed only the questions of Mr. Oats' competency to stand trial and his sanity at the time of the offense (R. 1150). As Dr. Carrera's testimony at sentencing reveals, he obtained the background information he used in his evaluation solely from Mr. Oats and a few reports which "focused more on material around the time of his arrest than it did on any . . . past history material" (R. 1165). Dr. Carrera testified at the evidentiary hearing that Mr. Fox never discussed mitigation with him despite the fact that he was called to testify during penalty phase (PC-R. 853).

Defense counsel failed to investigate Mr. Oats' background thoroughly and to provide Dr. Carrera with detailed independent accounts of the effect that years of physical abuse and alcohol and drug abuse had on Mr. Oats. Counsel never even questioned Dr. Carrera at sentencing as to either statutory or non-statutory mental mitigating factors, thus ignoring the entire purpose of the proceeding. Instead, defense counsel awkwardly danced around these potentially life-saving issues, never getting to the heart of the matter: that Mr. Oats is a mentally disturbed individual (R. 1159-1164). On the state attorney's cue, counsel then rehashed with Dr. Carrera the M'Naghten question of whether the defendant knew right from wrong at the time of the offense, a question completely irrelevant to the sentencing procedure and one which confused Dr. Carrera (R. 1170-1173).

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[23](...continued)
death sentence because counsel's deficient performance rendered the death sentence unreliable.

Had counsel performed reasonably and given Dr. Carrera the background materials he needed to do a thorough and proper evaluation of Mr. Oats, asked Dr. Carrera to address statutory and nonstatutory mitigating factors, and effectively questioned Dr. Carrera, the jury's advisory recommendation very likely would have been for a life sentence. Dr. Carrera testified at the evidentiary hearing that he would definitely have found two statutory mitigating factors.[24] (PC-R. 853-54). In addition, background materials would have provided Dr. Carrera with a basis for testifying as to nonstatutory mitigation.

Pertinent background material proven at the evidentiary hearing established that Mr. Oats has now and had then severe mental deficiencies. He is mentally retarded to a significant degree and he has significant brain damage. As the result of years of relentless physical abuse, he was under the influence of extreme mental or emotional disturbance and, due to his damaged brain and abuse of drugs and alcohol before and on the night of the murder, he was not able to conform his conduct to the requirements of the law. Trial counsel all but ignored the role that alcohol and drug abuse played in Mr. Oats' emotional disturbance and his ability to conform his conduct to the law. Counsel made a passing reference in closing argument at sentencing to Mr. Oats' drug and alcohol use, but never emphasized, as reasonable and effective counsel would, that Mr. Oats was under the influence of numerous mind-altering substances the night of the crime.

Four of Mr. Oats's relatives testified at sentencing: his brother, Freddie Lee Oats; his sister, Vernitta Gant; his aunt, Edith Johnson; and his mother, Willie Mae Oats. These witnesses, and other potential witnesses which were not called, were mitigation goldmines, which, in the hands of effective counsel, would have supported findings of numerous nonstatutory factors, findings of the two mental health statutory mitigating factors, and a finding

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[24]These would be in addition to the one statutory mitigating factor of age found by the trial court. Dr. Carrera did not express an opinion as to substantial domination. Both Drs. Natal and Gonzalez would have also found this fourth statutory mitigating factor.

under Fla. Stat. 921.41 that: (e) The defendant acted under extreme duress or under the substantial domination of another person.

Rather than effecting a coherent strategy for the use of these witnesses, counsel questioned them vaguely and without direction and clearly was ill-prepared for their answers. Vernitta Gant's testimony was sketchy at best and, essentially, useless. She had almost nothing to say based on firsthand knowledge (See R. 1174-80).[25] If counsel even talked to Ms. Gant before calling her to testify, it is certainly not apparent from her testimony.

Before Freddie Oats testified, counsel did not talk to him about his testimony.

> After Sonny went to Ocala, I hardly saw him anymore. When I found out he was charged with robbery and murder, I couldn't believe it. I could never see him doing those things. None of Sonny's attorneys ever talked with me about Sonny. I went to part of his trial, I think the sentencing part, because My [sic] aunt, Edith Johnson, told me to go in case I would need to testify. I did get called to testify, I think by Sonny's lawyer. I was glad because I wanted the jury and the judge to know about what Sonny had been through in his life. When I was sitting in the courtroom and testifying on the stand, I noticed that all the people on the jury were white. That's one thing I couldn't understand about the trial.

(PC-R. 3528-29). Counsel's failure to prepare Freddie before he testified is inexplicable. Freddie was the only person to testify who had grown up with Mr. Oats, who knew firsthand the unthinkable ordeals Mr. Oats had been through, and who could provide the judge and jury with the most compelling account of Mr. Oats' torture by his aunt. Because of counsel's unreasonable and ineffective failure to interview or prepare witnesses, Freddie's testimony was weak and did not adequately detail the atrocities he and his brother had experienced. (R. 1188-95).[26]

Freddie had much more to say, and he did so at the evidentiary hearing. His testimony covered seventy-six (76) pages of transcript (PC-R. 678-754),

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[25]The sentencing judge found no mitigation was established by Ms. Gant's testimony.

[26]The sentencing judge found no mitigation was established by Freddie Oats' testimony at the penalty phase.

compared the seven (7) pages at trial. His brother, Sonny, was a slow learner. (PC-R. 682). He would mumble to himself, and rock back and forth. (PC-R. 684; 733). "[I]t was like he was in another world" (PC-R. 685).

Q. So you recall, then, that when Sonny was eight to nine, that he had difficulty following directions at home?

A. Yes.

Q. And he was having trouble in school?

A. Yes, he was.

Q. How about, as time went on, as you both got a little older, did you notice any changes?

A. Yes. Because it would be times where he would go into the room and he wouldn't want to be with us and stuff, and he would just sit down in the room and he would just rock. And he would go into himself, and then he snapped, and sometimes he would be himself and sometimes he wouldn't.

Q. You say he would rock?

A. Yes. He would just sit there and rock in the chair. He would be mumbling to himself. And then he would snap right out of it.

Q. So, what did you do when he would get into this -- whatever?

A. Sometimes I would just look at him and back off from him. Then sometimes I would ask him, "What is wrong?" And he wouldn't say anything. He would just walk off from us.

Q. Did he ever try to explain to you what was going on?

A. No.

Q. How did he appear to you during those times?

A. Well, at the time, he appeared like he was hyper. It was like kind of hard to describe because it was like he was in another world or something. It was like nobody existed around him at that time.

(PC-R. 684-85).

They drank beer together from the age of 7-8 years old. (PC-R. 688; 717-718). His brother was whipped with fan belts and extension cords; he was tortured. (PC-R. 735).

Q. When Sonny and you lived with you aunt and uncle -- you mentioned that Sonny had difficulty following directions?

A. Yes.

Q. What kind of punishment would he get from -- you

know -- if he didn't follow directions right, what would be his punishment?

A. He would get whippings with extension cords. We would get whipped with fan belts. And it was like the punishment would last anywhere from two to three weeks.

Q. Now, you said "we." Did you get punished that way, too?

A. No.

Q. What was the difference.

A. Well, the difference was like, to me, my punishment was like light. His was like torture. It was like I may not -- can't go fishing with my father that week-end or something. Stay home.

But his punishment - he would get whippings.

Q. Were you able to follow the directions of your aunt when she asked you to do things?

A. Yes, I did.

(PC-R. 693-94).

His brother's head was split open from a beating. (PC-R. 736). His brother could not tolerate alcohol. (PC-R. 723). His brother passed in school only because his work was done by the witness. (PC-R. 740-42; 744-45). Freddie also testified about Sonny Boy's confusion over who his real parents were:

Q. When do you remember that happening? How old would Sonny have been?

A. It was when we were in the fifth grade. And at the time, we didn't know who our parents was. And my father -- my real father came out and he said he was our father, and I told him that I didn't believe it because I never knew I had a real father.

Q. Now, when you talk about your real father, who are you referring to?

A. Sonny Boy Oats, Senior.

Q. Go ahead.

A. And Sonny had found out. He told both of us at the same time. Then it was like he wanted us to go home with him, and I wouldn't go. And Sonny wanted to go, but it was like after he found out that Sonny Boy Oats was our father. And he told my aunt about it. And it was like she didn't want him to know about it.

Q. She didn't want Sonny --

A. No. Because he wanted to leave and go with him, and

she didn't want him to know. And my uncle, he was like he could have -- you know -- but it was like she ruled the family. It was her way. And ever since then, he just changed. Everything just changed.

Q. Who changed?

A. After he found that his real father was Sonny Boy Oats -- nobody had told him anything.

Q. Was it after that time that you noticed that Sonny would rock and do that?

A. Yes.

Q. Did you ever notice that before?

A. No.

Q. So, after --

A. After that --

Q. -- he learned about your father?

A. Yes. After that, things just changed.

Q. Did he have those sorts of times, the rocking and that sort of thing, only once? Or did he --

A. He did it a lot until the time he left back in 1972, I guess.

Q. You mentioned your uncle.

A. Right.

Q. What was your relationship like with him?

A. Well, me and him were real close. It was like -- you know -- we would go fishing and hunting and we did a lot of things together. But, he never did. Mom mostly kept him home, with punishment. She made him do housework, do things that females would do, and he never did get a chance to go out and do things that me and my father would do.

Q. Did you get the feeling that he would have liked to have done that?

A. Yes. He was good at it, because he could hunt better than we could. He could fish better than we could. But he just didn't have the opportunity to go out that much.

Q. And that -- you said he would be kept home -- was that some sort of punishment?

A. Yes.

(PC-R. 685-87).

Freddie explained how he and Sonny Boy came to be raised by their aunt:

Q. Well, Mr. Oats, when you said "I never knew I had a real father," what did you mean by that?

A. Well, at that time when -- up until I was in the fifth grade, I was never told that I had a father on the outside. I always thought my aunt and uncle was my father and mother, because I always called them Mom and Dad.

They never told me or him that we -- my step-sisters, they was in the same shoes we were in, and they never -- she never told us, or he never told us, "Y'all got a daddy on the outside, y'all got a mommy on the outside." We had to find this out from other people.

And it was kind of a money dispute, where my father had let us stay with my aunt. And then when he got ready to come back and get us, they wanted to charge five hundred dollars to get us back. And they didn't have the money. My real peoples didn't have the money.

So, my aunt didn't want to step over and say -- give us up. So, some kind of way, the sheriff's office in Palatka, Florida -- a guy named Walt Patterson, he turned us over to my aunt and uncle some kind of way. It worked out like that.

(PC-R. 752-53).

The testimony at sentencing of Willie Mae Oats, Sonny's mother, was also short.[27] Mrs. Oats discussed Sonny Boy's constant headaches and bizarre behavior (R. 1200). She also testified he had seen a doctor to get help, but that even afterward "his head still bothered him." (R. 1201). Mrs. Oats' testimony was important for establishing the statutory mitigating factors of substantial domination and extreme mental or emotional disturbance. But counsel failed to tie her testimony in with those factors, or with nonstatutory mitigating factors, either at sentencing or by providing her unique information to the competency experts who examined her son. Without that tie, the sentencing judge found Mrs. Oats testimony had established no mitigation. Counsel's unreasonable omissions were prejudicially harmful to Sonny Boy. Counsel unreasonably failed to investigate, develop, and present the overwhelming number of mitigating factors present in this case. Had counsel talked to Mrs. Oats pretrial he could have provided the significant evidence to a mental health expert.

Mrs. Oats also surely caught counsel by surprise with her revelation on

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[27]The sentencing court found no mitigating circumstances were established by her testimony at trial.

cross examination:

> Q. Well, the Jury said he shot her in the face. Do you think that was right?
>
> A. I don't think he did it by hisself 'cause Adell was with him.
>
> Q. Do you think it was right that he shot that man in the head out at the ABC?
>
> A. He didn't shoot the man out there to the -- whatever you say, ABC Liquor Store, because Adell was with him, and he came to the house and told me out of his own mouth that he shot the man and that he dropped the gun 'cause he had on gloves and he got scared and run, and that Sonnie Boy picked up the gun. He come to my house and told me that out of his own mouth. I didn't ask him for it.

(R. 1203)(emphasis added).[28] Again this was significant information for a mental health expert to know as Dr. Gonzalez stated at the evidentiary hearing. It helps establish the statutory mitigating factor of substantial domination.

An additional and important witness not called at trial was Mr. Oats' sister, Idella Russ. She testified at the evidentiary hearing and provided a riveting account of Sonny Boy's history. She indicated her brother, Sonny, was slow:

> A. Sonny Boy, he was slow. When we used to have to come home and study, he would -- Mama would tell us to open our books and study. Instead of studying, he would hold his head down and he would asleep [sic], and after he would go to sleep, Mamma would have to wake him up. By that time it would be bedtime.
>
> He never would get a chance to study, and when he got in trouble he would always try to beat -- when he got suspended, he would always try to beat it -- beat it home so my mom couldn't get it, and I read some of his report cards where he was slow.
>
> The teacher tell my parents to show him that he need to be caught up in reading and math and stuff, and my mom never did have time to sit down and train him how to do this. So when we sat down and study, all did he [sic] was sleep.
>
> He was always slow. He wouldn't never hardly do anything, take time enough to do anything, and when we would go to church on Sundays, he would take the shortest verses in the Bible to learn because he wasn't any good at learning long verses like me and his other brother was.

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[28]In fact, additional evidence was available from Sonny Boy's sister regarding the involvement of others in the homicide and their domination of Sonny Boy, but counsel had failed to investigate and learn of this evidence.

* * *

Q. In his Bible school class when the teacher would call on Sonny and ask him to answer a question or something like that, do you recall anything of those occasions, things happening like that, being in his class when his teacher called on him?

A. His mind seem like he would go completely blank. If he was called on on the spur of the moment and you would ask him something, he acts as if he had no idea what you was talking about.

(PC-R. 1653-54).

He was dominated by others. (PC-R. 1658-59; 1687). He seldom asked others for help:

Q. And his own personal problems, would he come to talk to you about personal problems, too, things about, you know, other than school?

A. Only personal problems he would come to us about when we knew all three of us was going to get a beatin', and we used to pray that -- that Mamma forget to beat us, and we used to have to tell him, you better pray that Mamma don't beat you. He used to start praying, but seemed like he just got to the point where he didn't care.

(PC-R. 1658).

They were quite poor, and worked in the fields as children. The children were not allowed to have friends:

Q. Why was that? Why weren't other children coming over to play with y'all or to play with Sonny and things like that? Was there a reason why y'all just went to school and came straight home afterwards?

A. Well, my mother, she was very strict. She never did like for us to have company at the house when she wasn't there, plus we had work to do.

Every day we got out of school, we had to -- they had to feed the animals. Sonny Boy and Freddie were responsible for feeding the hogs, dogs and chickens, and I was responsible for keeping the house, and sometime their work didn't get done so I would try and help them.

Q. Did Sonny have any friends that you knew of when y'all were growing up?

A. None but him and Freddie.

Q. Was this because your mom just wouldn't let people come over?

A. She just wouldn't let them.

(PC-R. 1662). Their aunt, with whom she and Freddie and Sonny lived, would

beat them severely:

Q. I know that -- that some of this is hard for you to talk about in terms of some of the things that your mother did but could -- could you give us an idea of the kind of punishment that your mom would use against the children while y'all were growing up?

A. Ah -- we used to get beatins' that turned into welts all over our backs, and she used to beat us with extension cords, palmetto limbs, cord handles, home made scrubs, and washing machine fan belt.

Q. And what was that for? I mean, why would you get these kinds of beatings? Did she have any reason behind any of this?

A. I guess because when Lores had taught us to steal, she thought that was the punishment we deserved, and she started beatin' us with those things.

Q. And when you say your mom -- your mom would beat you, would she beat Sonny too?

A. Yes.

Q. Did you watch Sonny get beaten by your mom?

A. Yes.

Q. Did you see Sonny get hit by palmetto branches, by fan belts, by straps?

A. Yes.

Q. You how long would these beatings last? Can you give us an idea how long she would hit you with these items for?

A. About ten to 15 minutes.

A. And where would -- well, was -- would there be anything that -- that she would do before she beat you with these things?

A. Yes. She would have us to take off all our clothes, and she would tie our hands behind our back with baby diapers and tie our feets together and tie a baby diaper around our mouth to keep us from hollering.

Q. And then she would proceed to beat you with these different things?

A. Yes.

* * *

[Q.] Did she have a punishment, a special punishment that she would do that had to do with fire?

A. Yes.

Q. Could you tell us about that, please?

A. The had that you take stuff with, she would put it over -- turn the stove on and put your hand over it.

Q. Put your hand in the fire?

A. Yes, and beat the back of your hand till it swells up.

(PC-R. 1663-64).

A. Ah -- yes. She used to beat us about to -- you had to soak in a bathtub of water, or either she would beat the boys between their legs.

Q. Why would she beat the boys between their legs?

A. She said that was the tenderest part of their body.

(PC-R. 1666).

Their aunt would lock the food away from the children:

Q. Yes, sir. Ma'am, were their other things that your mom did -- that you mother did to try and control you and Sonny Boy?

A. Yes. The older we got, the worser things got. She got where that she would lock her room up and put the food in a room. She would lock the telephone so that we couldn't use the telephone, and the food, we couldn't eat until she got ready for us to eat, and the food that we wanted to eat, the boys had to go out in the woods and cook it, so if she got home they would be out in the woods so if she come in the house first they had time to throw it away before she got to them.

* * *

A. We used to walk around hungry a lot. It's just that my mom, she got to the point where I guess she thought we ate too much, and she would take the food and lock it up in her room. We used to pick the locks to get food out of there and go into the woods and cook it and eat it.

(PC-R. 1667-68).

Sonny got the worst of the abuse:

Q. You said that Sonny was the recipient of some of the beatings that your mom was passing out.

Was there a reason why -- why Sonny was singled out for some of these beatings?

A. Sonny, he was the -- he was so quiet and he didn't like the way my mom was treating my dad. He felt like my dad was so good of a man that he didn't deserve to be messed over, so he went to my dad and told my dad that, you know, your wife messing over you. Why are you working like this.

Q. When you say, "messing over," what do you mean by that?

A. Having an affair with another man.

Q. And Sonny told Mr. Adams that?

A. Yes. He was sitting -- we was sitting out in the yard and he just -- both of them sitting down and he say, you out there working every day and she out messing around, and he say why you do this. So my daddy got mad with him and throwed him against the side of the house.

Q. Got mad with Sonny?

A. Yes, and said, "Don't you ever talk to my wife like that. If you got something to tell her, you tell me."

Q. And how did your mom treat Sonny after that when she heard of that, that this had been told to your father?

A. Well, my dad told her if he catch her he would kill her, and I don't know whether my dad hit her after that or what, but she had it in for Sonny, and seemed like she would lay stuff down just so she would have a reason to beat him, to make up for what he told my dad.

(PC-R. 1668-69).

Sonny's mind wandered:

A. Very few things Sonny was able to follow through on.

Q. Why was that, ma'am?

A. Well, Sonny was -- he was the quiet type. You never knew what was bothering him. And when you tell him something to do, he act like his mind was somewhere else. It wasn't what you was telling him. It was somewhere else.

(PC-R. 1671).

However on one occasion he responded to the beating:

Q. During some of these beatings in which my client, Mr. Oats, was being beaten by Mrs. Adams, did you ever hear Sonny say things to Mrs. Adams?

A. Yes. One time she -- she was beating him, and he got so many beatings until it seemed like he got immune to them, so he say, "Kill me. If you going to kill me, just go ahead and kill me. God damn it, just kill me."

(PC-R 1675).

However, too much was expected of Sonny:

[Q.] Was Sonny ever asked to do chores that he was unable to do?

A. Yes.

Q. Could you tell us a little bit about that, ma'am?

A. Sonny was more like an indoors person. He liked to clean house, and -- but he like to clean it when he got ready; not when he was forced to do it. And just like we would wash dishes,

we would half-wash them, and at night she would wake us, pull the cover off of us and beat us, snatch the cover off and beat us and we would be up there washing dishes and she would be steady beating you in the back.

Q. She would wake you up at night? Could you explain that to us?

A. We have our chores to do, and she'll come home and see the work hasn't finished. Instead of making us do it then, she would wait until we go to sleep at night, and about one or two o'clock at night she would snatch the cover off and start beating us and we had to go back and we wash the dishes and she stand up behind you beating you in the back.

Q. Were there other reasons why Sonny couldn't do his chores?

A. Sonny was -- he just like he just needed help and didn't nobody want to help him.

Q. And what would happen when Mr. Oats -- when my client couldn't do his chores? What would happen to him?

A. He would get a beating.

(PC-R. 1676-77).

The children found out in their teens that their natural parents were not the people who raised them. (PC-R. 1672). Their aunt beat Sonny with a hoe handle. (PC-R. 1675). Her brother liked going to school because he was not beaten there. (PC-R. 1683). 1690). Her brother had problems understanding what others would say. (PC-R. 1699-1700). Her brother could not learn a trade. (PC-R. 1712-1713).

Still more mitigation was missed; counsel also failed to call Shirley Oats. She would have testified that:

I have two full brothers, Sonny Boy and Freddie Lee Oats, and two full sisters, Vernitta and Narvillia Oats. Me and Narvillia grew up with my mother and father. Vernitta lived with one of our aunts. Sonny Boy, Jr. and Freddie Lee lived with Aretha Mae and Cleveland Adams. Cleveland Adams was my father's brother, but he is dead now.

When Sonny was about sixteen, he ran away from Aretha Mae and Cleveland. He told me, Narvillia and our mama about how Aretha Mae had treated him. He said she had beat him over and over and he couldn't take it anymore. She had hit him in the head more than once and left bad scars. I remember combing his hair for him once and in the middle of his head was a long scar from where Aretha Mae had hit him in the head with a hoe handle.

My uncle Cleveland told me and mama that he didn't like the way Aretha Mae was doing Sonny when he wasn't around. He said she was knocking him around and beating him. But he never did

anything about it.

When Sonny came to live with us, he didn't drink or take any drugs. He only smoked cigarettes. It used to be that he wouldn't even take aspirin for a headache. If he was sick, mama had to beg and plead with him to go to the doctor. Sonny hurt himself once when he fell through a porch. He was afraid to take drugs for the pain. Instead, he would roll from one side to the other at night because of the pain. He couldn't sleep laying down, so he would just sit up in the chair.

It wasn't until Sonny started hanging around Donnie Williams that he got into drugs. Donnie started him smoking marijuana and doing I don't know what else. I just know that Donnie was real bad for Sonny. Sonny would do anything you asked him. He was the type to follow behind somebody. If somebody asked him to do something, he would do it. Donnie was real involved in drugs. And he was always coming by to get Sonny to go places with him. I told Sonny not to go with him because he was only trouble, but Sonny didn't have many friends and Donnie paid attention to him when Donnie wanted something from him.

When Sonny smoked marijuana, he couldn't handle it too well. If he smoked much at all, he would get queasy and sick to his stomach and pass out. When he's passed out from pot, he's out for at least two hours. I know, because I've tried to wake him up. He goes out cold. I don't know if his system can't take it or what.

Sonny was a nice person. He was easy to get along with and very quiet. He was always doing something for our mama. If he only had a couple of dollars, he would take it and buy something for her, a card or a little gift. When Sonny fell through the porch, he got some money in a settlement. He took the money and paid his doctor bills. Then he took what was left and spent it on his family. He paid some bills for mama and gave her some money for herself. He gave me money and he gave some to my other two sisters. He bought a bunch of baby gifts for Vernitta's baby, like booties and blankets and toys, and he had a baby shower for Vernitta. He invited all her friends. I cooked food for the shower. That's the only time I ever saw a man give a woman a baby shower.

Sonny was really good to us, just as sweet as he could be. That's why I don't understand how he could be involved in anything like a murder. After I had kids, I decided to finish high school. I was attending Forest High School and Sonny stayed around the house to watch my kids. He would do anything for them. He spent hours with them in the park. He was fun to be around and he was a goodhearted man.

* * *

When Judge Swigert sentenced Sonny to death, my mom passed out in the courtroom. We found out later that she had a heart attack. She was in critical condition for three days. Judge Swigert said right there in court when she passed out, "She ain't doing nothing but putting on and acting." He didn't hide that he hated the Oats family.

The night that the lady at the country store got killed, Donnie Williams, Adell Williams, a guy named Robert, and two other

guys came over to pick up Sonny. Sonny said they were going to Dunnellon and he was going to take his stereo radio because the radio in Donnie's car didn't work. I told Sonny not to go because Donnie would just get him in trouble. Donnie came and knocked on the door and asked if Sonny was ready to go. I wouldn't let Donnie in the house because I didn't like him or trust him. I saw Donnie, Robert and Adell with black leather gloves on. Donnie was driving the car and he gave Sonny a marijuana cigarette. I knew that Sonny didn't know what he was getting into. Since Sonny got sent to death row for killing that woman, I've heard Robert walking around bragging about Sonny doing a stretch for him. I heard him telling his friends that, but he didn't know I heard him. When I asked him what he meant, he said he didn't mean nothing.

(PC-R. 3517-21).

Yet still another witness was available but not contacted. Counsel failed to call Sonny's father to testify. Sonny's father would have testified:

Sonny Boy, Jr. was born in Bunnell, Florida on May 25, 1957, at a doctor's house on the beach. I don't remember the doctor's name, but there was a midwife there to deliver Sonny. Sonny was a good baby, but my wife told me he didn't act just right. She said he acted like he was a little off mentally. She told me he acted like he was scared all the time, like he was nervous.

My wife, Willie Mae Oats, and me stayed together about eighteen months after Sonny was born. Then she went off to Gainesville and left our children, Vernitta, Sonny, and Freddie Lee with me. She took Shirley and Narvillia with her. I didn't have anyone to see after the children while I was working so I took them to my sister, Lula Jenkins, in Bunnel on the weekends. Vernitta stayed there all the time. Lula had her own kids to handle, too, so Freddie and Sonny went to live with my brother, Cleveland Adams, and his wife, Aretha Mae, in Palatka, Florida.

Willie Mae and me got back together and we went to pick up our children. When we went to get Freddie Lee and Sonny, Aretha Mae refused to give them to us unless we paid her a lot of money. We didn't have much money and I didn't want to fight her about it, so we left the boys there. Aretha Mae had put the the [sic] boys on welfare and was getting regular checks for them. I found out later that she wasn't using the money on them, but she was keeping it for herself.

When Sonny was in about the eighth grade, I went with Willie Mae to his school to see him and Freddie Lee. We told them we were their parents. Sonny and Freddie were scared and didn't want to believe us, but they could see the truth. Sonny wanted to go with us, but I told him I would come back later to talk to Cleveland and Aretha Mae about taking him. A couple of years later, Sonny ran away for good from my brother's and came to stay with his mother, Willie Mae. I was separated from Willie Mae again by then, but Sonny worked for me some.

When Sonny came back, I noticed he acted strange. I asked Willie Mae if she noticed anything different about him. She said there was something wrong with Sonny Boy's head, that he wasn't

> acting right. I told her to ask him if anything happened to him at Aretha Mae's. Sonny told her that Aretha Mae beat him and one time knocked him in the head with a piece of stovewood. He didn't want Willie Mae to tell me because he was afraid I would say something to Aretha Mae. The next time I saw Aretha Mae, at my mother's funeral in October 1979, I asked her why she hit Sonny in the head, was he bad with her or something. She said, no, he didn't give her any trouble. She wouldn't deny hitting him and she wouldn't say why she did it.
>
> Sonny worked with me some in pulpwood and in my tree surgeon business. He was a good worker. He always did what I told him to or what anyone else told him to, but when I would tell him how to do something he was slow in catching on. He would have to repeat what I told him before he really understood it. He got easily confused with directions. Some days his head hurt him so bad that I wouldn't take him to work with me. He wanted to work and he worked hard when he did, but his head just gave him so much trouble he couldn't work steady for me. His mother said he would sit around the house and not go anywhere. He couldn't make decisions for himself about what to do. He would wait for someone to come around and tell him what to do or where to go.

(PC-R. 3531-33).

Because counsel failed to investigate, a wealth of mitigation was not presented to the jury. The evidence was compelling, was riveting, and would have result in a life recommendation, had the jury heard it.

Counsel's closing argument at the penalty phase reflected the lack of direction in Mr. Oats' sentencing case. Counsel rambled through the little testimony that had been offered, failing to connect any of it more than tentatively to mitigating factors. A special jury instruction was given:

> Mental disturbance which interferes with but does not obviate the defendant's knowledge of right or wrong may be considered under the mitigating circumstances.

(R. 1253) Unfortunately, counsel never tied that instruction concretely to sentencing testimony or to the statutory mitigating circumstances to which it related: extreme mental or emotional disturbance, impairment of ability to conform conduct to the requirements of law, and substantial domination. In fact, the last factor, substantial domination, counsel posed more as a rhetorical question than as a consideration in mitigation:

> . . .And so when Adell says, "Well, I'm going to leave you out here unless you go through with it," what do you think that conjured up in his mind? Being left in the woods again. So he goes through with something; and when it's all over, what's he do? "I turned the money over to Adell. I didn't want none of it. Adell said, 'Here, keep twenty-five.'" Under the domination of another?

(R. 1261) (emphasis added)

That is all counsel said about substantial domination. Of course, he had not investigated that mitigating factor and could not be an effective advocate regarding it. Apparently, counsel threw it in for good measure, as he did offhand comments about extreme mental or emotional disturbance and the capacity of the defendant to appreciate the criminality of his conduct (See R. 1261-62). Counsel would not have had to rely on his own lack of expertise in mental mitigation at closing argument had he been reasonable and effective in seeing that his client was given a proper and thorough psychiatric evaluation. All the post-conviction mental health experts were clear on this. (See Argument I).

Additionally, defense counsel did not challenge repeated improper court instruction and prosecutorial comment to the jury on its role in sentencing (See Argument __) and on the stated requirement that a majority vote was needed for a life recommendation. (PC-R. 3604; 3759; 3760; 3761). See Rose v. State, 425 So. 2d 521 (Fla. 1982); Harich v. State, 437 So. 2d 1082 (Fla. 1983).

Evidence regarding Mr. Oats' sad history and mental disabilities "constituted the only means of showing that [Mr. Oats] was perhaps less reprehensible than the facts of the murder indicated." Harris v. Dugger, 874 F.2d at 764. Prejudice is apparent. Mr. Oats was sentenced to death by a judge and jury which heard little of the available mitigation which would have allowed an individualized capital sentencing determination. "Counsel's performance may be found ineffective if s/he performs little or no investigation." Kenley v. Armontrout, 937 F.2d 1298, 1304 (8th Cir. 1991). Because Mr. Fox failed to pursue, develop, and present mitigation, Mr. Oats did not have an individualized sentencing. Blanco; Cunningham; Middleton; Harris. Confidence is undermined in the outcome. There is a reasonable probability that but for counsel's unreasonable omissions the result would have been different. The circuit court's analysis was in error. It failed in its legal analysis to apply the well-established law to the facts:

investigation did not occur, and as a result, the jury did not have a wealth of mitigation which warranted a life recommendation. A new sentencing must now be ordered.

**D. RESENTENCING**

At resentencing, trial counsel had the rare second chance to represent his client, Mr. Oats, effectively and not as he had the first time. Counsel had the chance to do more. He did less.

Even the Florida Supreme Court noted counsel's ineffectiveness in requesting expert assistance under the wrong rule, Fla. R. Crim. P. 3.740:

> . . . [T]he narrow issue before this Court is whether the trial court abused its discretion by refusing to appoint experts to examine the defendant when the only evidence of defendant's possible insanity is the defense counsel's unsupported suggestion that defendant is not presently sane. We hold it did not.
>
> The clear language of the rule requires the court to find "reasonable ground" for believing the defendant is insane. This rule differs materially from Florida Rule of Criminal Procedure 3.210, which requires the court to appoint experts when defense counsel (or the state) files a written motion suggesting defendant may be incompetent to stand trial. Rule 3.740 also differs from Florida Rule of Criminal Procedure 3.216, which requires the court to appoint an expert to consult with the defense if defense counsel has reason to believe defendant may have been insane at the time of the offense. Rules 3.210 and 3.216 clearly remove all discretion from the trial court and require it to rely upon representations of defense counsel, without more.

Oats v. State, 472 So. 2d 1143, 1144 (Fla. 1985).

The Court had to go by what counsel offered, which was less than counsel had offered at the first sentencing. The outcome under such circumstances was inevitable. Reasonable counsel would have done more. Had counsel done his job, the outcome would have been different. He could at least have ensured that Mr. Oats was examined by a competent expert, who, if given the information readily available to counsel, would have provided a host of mitigating factors, statutory and nonstatutory, for the Court to consider, as experts testified at the evidentiary hearing. (See Argument I).

This case is very similar to Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991), where the court found

> [I]n light of the ready availability of this evidence and in the absence of a tactical justification for its exclusion, the failure by trial counsel to present and argue during the penalty phase any evidence regarding Cunningham's mental retardation, combined with

> their failure to present and argue readily available additional evidence regarding Cunningham's head injury, his socioeconomic background, or his reputation as a good father and worker, fell outside the range of professionally competent assistance.

928 F.2d at 1018 (citations omitted). See also Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987).

The trial court order denying 3.850 relief is erroneous under the case law cited and under the facts presented at the evidentiary hearing. Mr. Oats presented substantial competent evidence in support of his ineffectiveness claims (including the testimony of his trial counsel, which was not challenged by any rebuttal state evidence). Confidence in the outcome of these proceedings is more than doubtful. Relief is proper.

**ARGUMENT III**

**MR. OATS WAS NOT COMPETENT TO BE RESENTENCED; TRIAL COUNSEL FAILED TO SEEK DETERMINATION OF MR. OATS' COMPETENCY TO PROCEED BECAUSE OF HIS IGNORANCE OF THE LAW. MR. OATS WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AND DEPRIVED OF HIS RIGHTS UNDER THE FOURTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.**

Competency claims are classic Rule 3.850 issues. See Hill v. State, 473 So. 2d 1253 (Fla. 1985); Mason v. State, 489 So. 2d 734 (Fla. 1986). Substantial, competent evidence presented in this case demonstrated that at the time of re-sentencing Mr. Oats suffered from a variety of disorders which rendered him incompetent to proceed. These disorders included brain damage, mental retardation, learning disabilities, and diminished intellectual functioning. However, counsel failed to insure that his client would not undergo a prosecution while incompetent.

This Court has previously noted that competency is dynamic and may change during the course of the criminal process. Pridgen v. State, 531 So. 2d 951 (Fla. 1988). As a result, the trial court along with counsel must monitor the defendant's behavior for changes which call into question any prior competency determination. "If, at any material stage of a criminal proceeding, the court of its own motion [] has reasonable ground to believe that the defendant is not mentally competent to proceed, the court shall immediately enter its order setting a time for a hearing to determine the defendant's mental condition [] and shall order the defendant to be examined

by no more than three [] experts." Rule 3.210, Florida Rules of Criminal Procedure.

At resentencing, defense counsel sought to obtain court review of Mr. Oats' insanity under Rule 3.740, Florida Rules of Criminal Procedure (R2. 7-29). Counsel offered no evidence in support of his Rule 3.740 motion, although he alerted the court to Mr. Oats' many mental health problems. Counsel noted a significant deterioration in Mr. Oats' condition since the prior proceedings four years earlier.. Counsel did not seek to have Mr. Oats' competency evaluated pursuant to Rules 3.210 and 3.216, Florida Rules of Criminal Procedure. At the evidentiary hearing, counsel testified that his failure to seek a competency evaluation rather than an insanity determination was the result of his ignorance of the law:

> Q. And you cited actually Rule 3.740 during your presentation at [resentencing]?
>
> A. Yes.
>
> Q. You didn't cite Rule 3.210 or Rule 3.210 and Rule 3.211, the two competency rules, and you didn't request the confidential evaluation of Rule 3.216.
>
> Was there any tactical or strategic reason for that?
>
> A. No. The failure to request the confidential expert was probably a result of my unfamiliarity with that particular rule.

(PC-R. 801).

> . . . Nor, in hindsight, it may have been better to say, "Well, I want a re-determination of his competency, which had been previously determined, as well as a determination of his sanity."
>
> Of course, on further reflection, now having looked back over this record, I would say that I want a psychiatric or psychological input as to aggravating-mitigating circumstances. . . .
>
> * * *
>
> Q. . . . As his attorney at the time of the 1984 re-sentencing, did you in good faith believe that Mr. Oats was not competent to go forward with the re-sentencing?
>
> A. Without a doubt.
>
> * * *
>
> Q. Was there a tactical or strategic reason for not saying those rules [3.210 or 3.211]?

A. No. . . that is what I felt that I was doing.

(PC-R. 802).

. . . whether you called it competency or sanity or -- that was the issue that I wanted to address.

* * *

. . . In fact, I can't tell you that I was even aware of the confidential expert rule at the time.

(PC-R. 803).

A. See, this case is a continuing evidence of my naivete as to the system.

(PC-R. 804).

Q. You indicated there was no tactical or strategic or any other type of reasoning for not citing those two rules indicated by the Florida Supreme Court?

A. No. And the reason -- I can say that without hesitation -- I was not afraid of him knowing anything about him, about his mental status. I wanted to fully explore, and I felt the factual recitation for the record was adequate to make that point.

(PC-R. 806).

This Court reviewed whether the circuit court erred in denying mental health assistance in its opinion on direct appeal of Mr. Oats' resentencing. Oats v. State, 472 So. 2d 1143 (Fla. 1985). This Court clearly noted defense counsel's error. Id. at 1144. The Court found that the circuit court had discretion under Rule 3.740 to reject counsel's request for mental health evaluations. This Court specifically noted that, had the request been made pursuant to Rule 3.210, appointment of experts would have been mandatory. On direct appeal, of course, the Court could not and did not consider the error in terms of ineffective assistance of counsel. The record did not include uncontested testimony that counsel was unaware of the distinction between "competency" and "sanity" and the difference between Rule 3.740 and Rule 3.210. This appeal is the first opportunity this Court has for determining whether Mr. Oats' resentencing counsel was prejudicially ineffective in his failure to properly raise Mr. Oats' competency at resentencing.

What this Court also did not know on direct appeal was that mental health experts believed that Mr. Oats' deterioration raised substantial doubts

about his competency to stand trial in 1984. Dr. Gonzalez, who evaluated Mr. Oats in 1980, testified at the Rule 3.850 hearing.

> Q. Okay. In 1984 -- let me just move you ahead now to 1984 -- did Mr. Fox ever call you and ask you to help him at all or to render any kind of opinion concerning what he was observing in Mr. Oats' behavior?
>
> A. No, sir. I was not contacted by Mr. Fox at all at any particular moment.
>
> Q. Had he done so would you have been willing to assist in 1984?
>
> A. Yes, sir. I would have been willing to -- to assist him.
>
> Q. Now, given what Mr. Fox said concerning Mr. Oats and given what you knew back then about Mr. Oats, would a competency evaluation by a mental health professional been appropriate in 1984?
>
> A. Oh. No doubt about it, sir. Yes. It would have been appropriate.
>
> Q. And can you just briefly summarize for us why you say that?
>
> A. Because the mental status of the patient in 1980, you know, I think he could have been deteriorated in this four years of incarceration. I think another evaluation would have been in order. I'm talking about a psychiatric evaluation --
>
> Q. And so are there substantial --
>
> A. -- and --
>
> Q. I'm sorry, Doctor. I didn't mean to cut you off. Go ahead.
>
> A. -- and some of the -- if some previous psychological testing would have been done I think it should -- should have been revised as well as probably some of them repeated.
>
> * * *
>
> [Q] What about his competency in Court? Were there substantial doubts about that?
>
> A. His competency to stand trial, you mean, or --
>
> Q. Yeah. In 1984 when Mr. Fox asked for an evaluation.
>
> A. About his behavior in Court -- in Court for his competency to stand trial?
>
> Q. His competency in -- in 1984 to stand the judicial proceeding. Remember, Mr. Fox said that Mr. Oats was insane, that --

A. Yes --

Q. -- he couldn't --

A. -- sir.

Q. -- deal with him?

Are -- are those the kind of things that to a mental health professional will raise substantial doubts calling for an evaluation?

A. I think that, you know, the evaluation was in order at that time --

Q. Okay.

A. If he felt that he was on -- you know, that the attorney -- the defendant wasn't able to communicate or to help in his assistance.

Q. Now --

A. Does that answer your question?

Q. Yes. It does, Doctor. Thank you.

Now, based upon the information that you have now reviewed, the historical information concerning Mr. Oats, the information you mentioned concerning his developmental impairments and so on and so forth, is it possible for you to go back in time to the time of your original evaluation in 1980 or to 1984 and to tell us whether you can now reassess Mr. Oats' competency? Can -- can you do that today sort of taking yourself back in time?

* * *

A. In '84, I probably would have agreed that, you know, the man could not be of assistance in his own defense.

Q. Uh-huh.

A. In 1984, I said, I probably would have agreed that the man -- the defendant would not have been able to assist in his own defense.

Q. Okay. And so there are questions concerning both 1984 and 1980 as to competency? Is that fair?

A. Yes, sir.

Q. Okay. Could you resolve those questions today, you yourself?

A. With all this information that I have in my hands, I probably would have had -- would have to ask the opportunity of reevaluating the competency of the defendant --

Q. Okay.

A. -- on a face-to-face evaluation but --

Q. And none of that information was provided to --

A. Just the --

Q. -- you originally?

A. Just the facts that I've been provided, I have read, I can state that, yes, I think that it is an up-to-date observation that all these mitigating factors exist.

Q. Okay. But what I was saying, Doctor, is originally you were not provided with any of this --

A. That's what --

Q. -- information?

A. -- I'm saying. You know, at the time I didn't have basic information that would have, you know, had a lot to say concerning the -- you know, further evaluations and determination at that time of the capacity to help in his own defense and appreciate the criminality of his acts.

Q. Okay. Mr. Fox did not even -- did Mr. Fox even tell you his view of Mr. Oats, what he thought about his dealing with Mr. Oats as --

A. I didn't --

Q. -- a lawyer?

A. -- hear you. I'm sorry.

Q. I'm sorry.

A. I was contacted by the jail people saying there was an evaluation requested and I went to jail to perform the evaluation, submitted a written report and I never heard from him.

Q. Okay. Okay. Should psychological, neuropsychological, intellectual testing of those kinds of areas have been done given what you know about Mr. Oats back at the time of the trial?

A. Yes. It should have been done the information would have been available at that time (sic).

(PC-R. 2666-72).

Similarly Dr. Natal stated:

I have also been provided with a transcript of the 1984 resentencing proceedings in this case and was alarmed to find that Mr. Fox believed Mr. Oats' condition had deteriorated to the extent that he believed Mr. Oats no longer able to proceed with judicial proceedings. Had I been advised of Mr. Fox's concerns in 1984 I would have requested that I re-evaluate Mr. Oats. I regret that the failure of such a request at that time leaves me unable to express an opinion as to whether or not Mr. Oats was competent to proceed.

(PC-R. 5578).

Dr. Carrera also agreed that, in light of counsel's expressed concerns about Mr. Oats' deterioration in his mental function in 1984, a redetermination of competency was in order:

> Q. Now, you indicated that you had an opportunity to look at some transcripts from the 1984 proceeding. Let me just read you one little snippet from that transcript. This is Mr. Fox speaking to the Court.
>
> "I personally had the occasion to represent Sonny Boy Oats in this case, which was the trial of this cause which was held in excess of three years ago."
>
> He is talking about the 1984 case.
>
> Now, I additionally had the opportunity and privilege, I may add, to represent him in Case Number 79-1358, in the re-trial, which was February of 1982, which was a little over two years ago. Based upon my personal contact with him, and I submit to you I have had as much as anyone, I have reason to believe that he was insane at the time, and I have reason to believe that he is insane now. I have had conversations with him at the
>
> A. That is correct. I would have to re-examine him.

(PC-R. 856-57).

"A person accused of a crime who is mentally incompetent to stand trial shall not be proceeded against while he is incompetent." Fla. R. Crim. P. 3.210. It violates due process to prosecute someone when that person may not have the ability to meaningfully participate in the proceedings which will subject him to a loss of liberty or, as here, his life. This fundamental unfairness is prohibited by the sixth, eighth and fourteen amendments to the United States Constitution, by parallel state constitutional provisions, and by the Florida Rules of Criminal Procedure. Dusky v. United States, 362 U.S. 402 (1960). Procedures which fail to provide adequate resolution of competency issues violate the Due Process Clause of the Fourteenth Amendment. Pate v. Robinson, 383 U.S. 375 (1966).

The law regarding the necessity of a competency determination when reasonable grounds exist is clear and well-settled. This Court has summarized the principles of state and federal law in Nowitzke v. State, 582 So. 2d 1346, 1349 (Fla. 1990):

> Under both Florida and federal law, it is well settled that due process prohibits a person accused of a crime from being proceeded against while incompetent. Lane v. State, 388 So.2d

1022, 1024-25 (Fla. 1980)(and cases cited therein). Florida Rule of Criminal Procedure 3.210 unambiguously requires the trial court to order a competency examination and conduct a hearing when it "has reasonable grounds to believe that the defendant is not mentally competent to proceed." This obligation is a continuing one.

In Pridgen v. State, 531 So.2d 952 (Fla. 1988), we quoted from Drope v. Missouri, 420 U.S. 162 (1975), where the United States Supreme Court recognized:

> Even when a defendant is competent at the commencement of his trial, a trial court must be alert to circumstances suggesting a change that would render the accused unable to meet the standards of competence to stand trial.

Pridgen, 531 So.2d at 954 (quoting Drope, 420 U.S. at 180-81. We then noted:

> Florida court have also held that the determination of the defendant's mental condition during trial may require the trial judge to suspend proceedings and order a competency hearing. Scott v. State, 420 So.2d 595 (Fla. 1982); Holmes v. State, 494 So.2d 230 (Fla. 3d DCA 1986). See Lane v. State, 388 So.2d 1022 (Fla. 1989) (Finding of competency to stand trial made nine months before does not control in view of evidence of possible incompetency presented by experts at hearing on eve of trial).

The basic principles are clear. When there are reasonable grounds to believe a defendant may be incompetent, the court must conduct a competency hearing. The fact that the defendant has been evaluated and found to be competent several years before trial, does not relieve the court of this duty. Where there are reasonable grounds but additional evaluations are requested and refused, relief as to conviction and sentence is appropriate. Boggs v. State, 575 So. 2d 1274 (Fla. 1991). Here, counsel failed to inform the trial court that he did not think Mr. Oats was competent; he meant to, but used the word "insane" instead. As a result of counsel's failure to use the correct semantics, his request was denied, and this Court affirmed on appeal. Counsel's performance was deficient. Kimmelman v. Morrison; Atkins v. Attorney General.

Moreover, Mr. Oats was prejudiced by counsel's ignorance. Fretwell v. Lockhart, 946 F.2d 571 (8th Cir. 1991). Had the proper request been made, the mandatory language of Rule 3.210 would have applied. The circuit court's denial of Rule 3.850 relief was premised upon an appearance of competency and

this Court's ruling during the second direct appeal (PC-R. 3319). However, this Court has held that the question is not whether a defendant seemed competent during a trial. See Hill. The question is whether in post-conviction it is shown that there were reasonable bona fide grounds suggesting that the defendant may not have been competent to proceed. Specifically the Court has noted:

> The trial court found that Bishop testified coherently and was adroit in explaining eye-witness testimony; that he withstood severe and long cross-examination, and that approximately one month before the trial a psychiatric evaluation determined that Bishop had no mental disorder. On the basis of this evidence, the court of appeals held that there was substantial evidence upon which the trial court could find that Bishop was competent to stand trial. The United States Supreme Court, however, found this evidence insufficient. . . . This decision stands for the principle that the trial court must conduct a hearing on the issue of a defendant's competency to stand trial where there are reasonable grounds to suggest incompetency.

Hill, 473 So. 2d at 1256(emphasis added). Hill was a Rule 3.850 action like Mr. Oats' proceedings here.

Unrefuted evidence was adduced at the evidentiary hearing demonstrating that Mr. Oats was mentally retarded and that his condition deteriorated during the four years before the resentencing. Counsel had reasonable concerns about Mr. Oats' competency in 1984. Under these circumstances a competency determination should have been conducted, and would have had to occur had counsel performed adequately. Mr. Oats' case is identical to Hill. There, as here, an indigent capital defendant challenged his competency to stand trial in a 3.850 motion. There, as here, trial counsel failed to adequately pursue the issue.

Ignorance of the law amounts to prejudicially ineffective assistance of counsel. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). In Strickland v. Washington, 466 U.S. 668 (1984), the U.S. Supreme Court held that counsel has "a duty to bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process." Id. at 688. Mr. Oats' counsel candidly admitted at the evidentiary hearing that he could not and did not have the skill and/or knowledge with which to represent Mr. Oats on the issue of his competency at resentencing. Under Florida and federal law, counsel's

ineffectiveness clearly prejudiced Mr. Oats' constitutional rights. Strickland, Dusky, Harrison, Nowitzke.

Confidence must be undermined in the outcome by counsel's deficient performance. The three mental health experts, who had evaluated Mr. Oats in 1980, all agree substantial and bona fide doubts exist as to Mr. Oats' competency in 1984. Dr. Gonzalez indicated that "I probably would have agreed that, you know, the man could not be of assistance in his own defense" (PC-R. 2670). Both Drs. Natal and Carrera agree that substantial doubt existed as to Mr. Oats' competency, and that a nunc pro tunc determination could not now be conducted. The circumstances require the same relief as in Hill.

Counsel failed to seek a competency hearing for his client due solely to his ignorance of the law. Without any rational inquiry or justification, counsel abandoned and failed his client with regard to the critical issue of his competency to proceed. The substantial, competent evidence presented in the lower court fully satisfied both prongs of Strickland. Rule 3.850 relief must be afforded, and a new sentencing ordered.

## ARGUMENT IV

**MR. OATS' SENTENCE OF DEATH RESTED ON INSTRUCTIONS AND ARGUMENTS *WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THE JURY'S SENSE* OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS. DEFENSE COUNSEL'S FAILURE TO OBJECT AND ADEQUATELY LITIGATE THIS ISSUE WAS INEFFECTIVE ASSISTANCE OF COUNSEL.**

Caldwell v. Mississippi, 472 U.S. 320 (1985), invokes the most essential and basic eighth amendment requirements of a death sentence -- that such a sentence be individualized (i.e., based on the character of the offender and circumstances of the offense), and that such a sentence be reliable.

> [I]t is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere. This Court has repeatedly said that under the Eighth Amendment "the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination." California v. Ramos, 463 U.S., at 998-999, 103 S.Ct., at 3451. Accordingly, many of the limits that this Court has placed on the imposition of capital punishment are rooted in a concern that the sentencing process should facilitate the responsible and reliable exercise of sentencing discretion.

Caldwell, 472 U.S. at 329.[29]

Caldwell principles apply to Florida's capital sentencing procedure. Dugger v. Adams, 109 S. Ct. 1211 (1989); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 109 S. Ct. 1353 (1989); Harich v. Dugger, 844 F.2d 1464 (11th Cir. 1988); Garcia v. State, 492 So. 2d 360 (Fla. 1986). In Dugger v. Adams, the United States Supreme Court held that Caldwell error was not new law in Florida but was found in early Florida case law - Pait v. State, 112 So. 2d 380 (Fla. 1959); Blackwell v. State, 79 So. 731 (1918). Dugger v. Adams, 109 S. Ct. at 1215-16. Thus, a knowledgeable counsel had basis for objecting. Unfortunately, Mr. Oats' counsel was not informed and thus rendered deficient performance.

Incessant impermissible disparagement of the jury's sentencing function occurred at voir dire, closing argument and, penalty phase argument. With respect to the latter, the prosecutor, recommended the jury return a death verdict:

> THE PROSECUTOR: I recommend that you bring back ... death.

(R. 1245). Such statements that relieve a capital jury of its "awesome responsibility," render a death sentence unreliable and require reversal. Caldwell v. Mississippi, 105 S.Ct. 2633 (1985).

In front of the entire venire and with several ultimate jurors in the jury box, Mr. Oats' prosecutor egregiously debased the jury's sentencing function, in precisely the same manner condemned and requiring relief in Caldwell. Perhaps the starkest example was during the prosecutor's closing argument, when he invited the jury to abdicate their role in Florida's capital sentencing scheme in favor of the judge:

> THE PROSECUTOR: The consequences of your verdict are ultimately decided and on the shoulders of Judge Swigert.

(R. 1023). In the penalty phase the same theme was again stressed to the jury.

> THE PROSECUTOR: Remember this is only an advisory sentence

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[29] Caldwell applies to Mr. Oats because his sentence of death did not become final until after the decision in Caldwell was issued.

the ultimate responsibility for the sentence rests with the Court. (R. 1245).

Comments that impermissibly diminished the jury's responsibility saturated the voir dire proceedings as well. Two ultimate jurors were exposed to the following:

> THE PROSECUTOR: You understand that you're not really making the ultimate decision, because if you find him guilty you make a recommendation and the court makes that decision.

(R. 123).

The same misinformation was repeated again and again as the prosecutor questioned his way through the venire (R. 120, 121, 123, 124, 132, 133, 134, 135, 138, 140, 141, 143, 315). The ultimate effect of these prosecutorial statements was to thoroughly misinform the venire as to their role in Mr. Oats' trial. This became apparent when venire persons began to ask questions of the prosecutor; with five other ultimate jurors sitting, the following colloquy took place:

> ROBERTS: [ultimate juror]: I thought [the penalty phase] did not concern us?
>
> THE PROSECUTOR: [explanation of bifurcated trial] At that time you would go back to into the jury room and render an advisory decision to the judge. This would be where you recommend mercy or death. Ultimately the person that imposes the punishment will be the judge. Your recommendation is not binding. It's just one more factor that he considers. Do you understand now sir?
>
> ROBERTS: Yes Sir.

(R. 308).

The message that the prosecutor stressed over and over again to the venire was "don't worry about the penalty phase, the judge is not bound by your decision," thereby diminishing the judge's role and misinforming the venire as to Florida law.

Completely absent from the record and jury instructions is any mention that the jury recommendation is binding on the trial judge and may be rejected "only if the facts 'are so clear and convincing that virtually no reasonable person could differ.'" Harich v. Wainwright, 813 F.2d 1082, 1100 (11th Cir. 1987) quoting Tedder v. State, 322 So. 2d 908, 190 (Fla. 1975). Here, the

prosecutor fanned the flames of impermissible derogation of the jury's duties, trivializing the sentencing function itself:

> THE PROSECUTOR: This is a little bit more serious than [a DWI case].

(R. 135).

> THE PROSECUTOR: [to prospective juror employed as a local radio personality]. Okay. So that if you had to sit here for a couple of days on this jury, it wouldn't be a life or death situation with your radio station?

(R. 352). These statements can hardly be described as communicating to the jury the seriousness of the jury's advisory role.

In flagrant violation of Caldwell, the prosecutor told the jury that the judge, a higher, wiser, and "paid" authority imposes sentence, not the jury:

> Remember this: This is only an advisory sentence. The ultimate responsibility for the sentence rests with the Court. The Court -- That's what he's paid for. He judging all of the past history, this case, he will impose the sentence....

(R. 1245)(emphasis added).

The court likewise failed to communicate to the jury "the gravity of its sentencing decision," as witnessed by the court's charge to the jury and comments made during the penalty phase. Compare Donnelly v. DeCristoforo, 416 U.S. 637 (special pains and strong curative instruction given to correct misinformation). Prior to the penalty phase the court stated to Mr. Oats' jury:

> THE COURT: The punishment for this crime is either death or life imprisonment. The final decision as to what punishment shall be imposed rests solely with the Judge of this Court, which is myself in this however, the law requires that you, the Jury, render the Court an advisory sentence as to what punishment should be imposed upon the Defendant.

(R. 1115)(emphasis added).

In charging the jury during the guilt/innocence phase, the judge read the following:

> THE COURT: The punishment provided by law for murder in the first degree is life or death, as may be determined by the Court at a later proceeding.

(R. 1985) and see also (R.1652). Significantly, the jury was given a written set of instructions to review during deliberations.

It is clear that both the judge and the prosecutor were unaware of the significance of the jury's sentencing recommendation. Under Florida law, the jury's recommendation is binding unless there is no reasonable basis for it. Defense counsel failed to educate the judge to this law. Defense counsel had no strategic reason for his inaction.

> Q Let me ask you a couple of additional questions. During the Court's -- I'm sorry. During the course of Mr. Oat's proceedings the prosecutor and the judge made certain statements to the jury concerning its role, that its role was merely advisory, that they would just be giving an opinion to the Court, that they would not have the ultimate sentencing determination.
>
> You did not object to any such comments from prosecutor or the Court?
>
> A Correct.
>
> Q And you did not request an instruction under the Tedder Standard?
>
> A Correct.
>
> Q Was there a tactical and strategic reason for that?
>
> A No. That was -- that would be explained by probably ignorance of that aspect of the law.

(PC-R. 1011-12).

Longstanding Florida law established that the comments to the jury were in error. Trial counsel was ineffective for not objecting to the prosecutorial and judicial comments and judicial instruction. See Pait, 112 So. 2d at 383-84 (holding that misinforming the jury of its role in a capital case constituted reversible error); Breedlove v. State, 413 So. 2d 1 (Fla. 1982). Counsel's failure to object was deficient performance under Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991), and Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990), which clearly prejudiced Mr. Oats. No tactical decision can be ascribed to counsel's errors. Counsel stated at the evidentiary hearing that he was ignorant of the law. He deprived Mr. Oats of the effective assistance of counsel and his sixth and eighth amendment rights.

Under Florida's capital statute, the jury has the primary responsibility for sentencing. In Hitchcock v. Dugger, 481 U.S. 393 (1987), the United States Supreme Court held that instructions for the sentencing jury in Florida

were governed by the eighth amendment. To foster the notion that a capital sentencing judge has the sole responsibility for the imposition of sentence, or is in any way free to impose whatever sentence he or she sees fit, is a misstatement of the law. See Mann, 844 F.2d at 1450-55 (discussing the critical role of the jury in Florida capital sentencing scheme). The judge's role, after all, is not that of the "sole" or "ultimate" sentencer. While Florida requires the sentencing judge to independently weigh the aggravating and mitigating circumstances and render sentence, the jury's recommendation, which represents the judgment of the community, is entitled to great weight. McCampbell v. State, 421 So. 2d 1072, 1075 (Fla. 1982). The jury's sentencing verdict may be overturned by the judge only if the facts are "so clear and convincing that virtually no reasonable person could differ." Tedder, 322 So. 2d at 910. Mr. Oats' judge, however, did not believe that the jury's determination meant much, as his comments to the jury reflect. The judge obviously believed what he told the jury -- that he was free to impose whatever sentence he wished. This was error.

Mr. Oats' sentence of death is neither "reliable" nor "individualized". The judge failed to know and honor Florida law. Mr. Oats' counsel failed to object and attempt to educate the judge to the proper standards. As a result, Mr. Oats was denied his rights under the eighth and fourteenth amendments. Relief is proper.

## ARGUMENT V

**MR. OATS' SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS WERE VIOLATED BY THE PROSECUTOR'S ARGUMENT TO PROVE TWO OTHERWISE UNSUPPORTED AGGRAVATING FACTORS, AND BY THE COURT'S ERRONEOUS STANDARD IN APPLYING AGGRAVATING FACTORS.**

The manner in which the jury and judge were allowed to consider the aggravators provided for no genuine narrowing of the class of people eligible for the death penalty, because the terms were not defined in any fashion, and a reasonable juror could believe all murders to be heinous, atrocious or cruel. Mills v. Maryland, 108 S. Ct. 1860 (1988). Jurors must be given adequate guidance as to aggravating circumstances. Maynard v. Cartwright, 108 U.S. 1853 (1988).

Recently, the Supreme Court explained its Maynard holding:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facets of the sentencing process. It is not enough to instruct the jury in the bare terms of an aggravating circumstance that is unconstitutionally vague on its face. That is the import of our holdings in Maynard and Godfrey.

Walton v. Arizona, 110 S. Ct. 3047, 3056-57 (1990).

In Florida a capital jury and judge both act as sentencers in the penalty phase. Because the jury's factual determinations are binding so long as a reasonable basis exists, it must be regarded as a sentencer. In fact, that was the holding in Hitchcock v. Dugger, 481 U.S. 393 (1987); Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988); Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988) (en banc), cert. denied 109 S.Ct. 1353 (1989); Hall v. State, 541 So. 2d 1125 (Fla. 1989).

Here, the jury was not told what was required to establish the aggravators at issue here. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Cochran v. State, 547 So. 2d 528 (Fla. 1989); Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Mr. Oats' jury was not advised of the limitations on the aggravating factors. The prosecutor improperly argued improper and unconstitutional constructions of the aggravators (R. 1118-19; 1237-38; 1240). The trial court's sentencing order reflects the improper standard for aggravating circumstances, (R. 1677-79), as this Court held in striking three aggravators. Oats v. State, 446 So. 2d 90 (Fla. 1984). Rule 3.850 relief is required.

Under Florida law, aggravating circumstances "must be proven beyond a reasonable doubt." Hamilton v. State, 547 So. 2d 630 (Fla. 1989). Florida law also establishes that limiting constructions of the aggravating circumstances are "elements" of the particular aggravating circumstance. "[T]he State must prove [the] element[s] beyond a reasonable doubt." Banda v. State, 536 So. 2d 221, 224 (Fla. 1988). Unfortunately, Mr. Oats' jury received no instructions regarding the elements of the aggravating circumstances submitted for the jury's consideration. Its discretion was not channeled and limited in conformity with Cartwright. The improper argument

and instructions on aggravators prejudiced Mr. Oats because his sentencing jury simply could not know how to analyze the aggravating circumstances. See Cartwright; Hall. The resulting death recommendation was tainted by this error. Relief is proper.

**CLAIM VI**

**MR. OATS' CASE WAS FRAUGHT WITH PROCEDURAL AND SUBSTANTIVE ERRORS, WHICH CANNOT BE HARMLESS WHEN VIEWED AS A WHOLE SINCE THE COMBINATION OF ERRORS DEPRIVED HIM OF THE FUNDAMENTALLY FAIR TRIAL GUARANTEED UNDER THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS.**

Due process is guaranteed by the constitution:

> [Our] decisions underscore the truism that "[d]ue process," unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances.' Cafeteria Workers v. McElroy, 367 U.S. 886, 895 (1961). '[D]ue process is flexible and calls for such procedural protections as the particular situation demands.' Morrissey v. Brewer, 408 U.S. 471, 481 (1972). Accordingly, resolution of the issue whether the administrative procedures provided here are constitutionally sufficient requires analysis of the governmental and private interests that are affected. Arnett v. Kennedy, 416 U.S., at 167-68 (Powell, J., concurring in part); Goldberg v. Kelly, 397 U.S. 254, 263-266 (1970); Cafeteria Workers v. McElroy, 367 U.S., at 895. More precisely, our prior decisions indicate that identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." See, e.g. Goldberg v. Kelly, 397 U.S., at 263-71.

Mathews v. Eldridge, 425 U.S. 319, 334-35 (1976)(emphasis added).

Mr. Oats contends that he did not receive the fundamentally fair trial to which he was entitled under the eighth and fourteenth amendments. See Derden v. McNeel, 938 F.2d 605 (5th Cir. 1991). It is Mr. Oats' contention that the process itself has failed him. It has failed because the sheer number and types of errors based upon ignorance of mental illness, when considered as a whole, virtually dictated the sentence that he would receive.

Mr. Oats has demonstrated that ignorance of mental health issues has permeated this process. While there may be means for addressing each individual error, the fact is that addressing these errors on an individual

basis will not afford adequate safeguards against an improperly imposed death sentence -- safeguards which are required by the Constitution.

Mr. Oats contends that numerous and varied violations occurred at all stages of his trial and resentencing. These claims have been raised in direct appeal or are currently being raised. However, these claims should not only be considered separately. Rather, it is Mr. Oats' contention that these claims should be considered in the aggregate, for when the separate infractions are viewed in their totality it is clear that Mr. Oats did not receive the fundamentally fair process to which he was entitled under the Eighth and Fourteenth Amendments. Derden v. McNeal, 938 F.2d 605 (5th Cir. 1991). The numerous constitutional claims in this motion, together with those raised on in the two direct appeals, show that this case is fundamentally flawed.

In Jones v. State, 569 So. 2d 1234 (Fla. 1990) this Court vacated a capital sentence and remanded for a new sentencing proceeding before a jury because of "cumulative errors affecting the penalty phase." Id. at 1235 (emphasis added). In Allett v. Hill, 422 So. 2d 1047, 1050 (4th DCA 1982), the district court, in the context of a civil action, held that the combined effect of three errors made by the trial court, though probably harmless if viewed individually, required reversal and remand for retrial on all issues.

The Supreme Court has consistently emphasized the uniqueness of death as a criminal punishment. Death is "an unusually severe punishment, unusual in its pain, in its finality, and in its enormity." Furman, 408 U.S. at 287 (Brennan, J., concurring). It differs from lesser sentences "not in degree but in kind. It is unique in its total irrevocability." Id. at 306 (Stewart, J., concurring). The severity of the sentence "mandates careful scrutiny in the review of any colorable claim of error." Zant v. Stephens, 462 U.S. 862, 885 (1983). Accordingly, the cumulative effects of error must be carefully scrutinized in capital cases.

A series of errors may accumulate a very real, prejudicial effect. The burden remains on the state to prove that the individual errors did not affect

the verdict, and more importantly, that the cumulative impact of these errors did not affect the verdict. In Mr. Oats' case, 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.

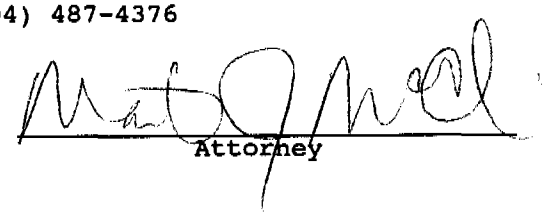
Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

MARTIN J. MCCLAIN
Chief Assistant CCR
Florida Bar No. 0754773

SUSAN HUGINS ELSASS
Staff Attorney
Florida Bar No. 0854573

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

By: 
Attorney

## 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 Barrier, Ruth Bryan Owen Rhode Building, Dade County Regional Service Center, 401 NW Second Avenue, Suite 921N, Miami, FL 33128 this 7th day of January, 1992.