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IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,038

WILLIE MITCHELL, JR.,

Appellant/Cross-Appellee,

v.

STATE OF FLORIDA,

Appellee/Cross-Appellant.

APPEAL FROM THE CIRCUIT COURT OF THE THIRTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR HILLSBOROUGH COUNTY

ANSWER BRIEF OF CROSS-APPELLEE AND REPLY BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. 0187786

THOMAS H. DUNN
Assistant CCR
Florida Bar No. 871753

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

Counsel for Appellant

PRELIMINARY STATEMENT

This brief replies to the State's Answer Brief regarding the guilt phase issues raised in Mr. Mitchell's initial brief.

The State in its brief has challenged the circuit court's ruling that a new sentencing before a jury must be held. This brief answers the State's argument, and explains why a resentencing in fact was properly ordered.

In this brief, the record on direct appeal is cited as "R. ___" with the appropriate page number following thereafter. The record on appeal of this Rule 3.850 proceeding is cited as "PC-R. ___." Other references used in this brief are self-explanatory or otherwise explained.

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STATEMENT OF THE CASE

The State does not contest the Statement of the Case contained in Mr. Mitchell's initial brief. Therefore, Mr. Mitchell continues to rely upon his previous Statement of the Case.

SUMMARY OF THE ARGUMENT

I. Mr. Mitchell did not receive a fair adversarial testing of the prosecution's case at his capital trial due to his counsel's ineffective assistance and because of the State's failure to disclose material exculpatory evidence. The trial court's conclusion that counsel's performance was substandard was supported by competent evidence. The court's legal conclusion that there was no prejudice was in error.

II. The State failed in its duty to disclose material and exculpatory information, and in fact presented false and misleading evidence in violation of the fifth, sixth, eighth and fourteenth amendments.

III. Newly discovered evidence, which would have changed the outcome had it been presented to the jury, shows that Mr. Mitchell's conviction and sentence were unreliably obtained.

IV. The circuit court properly found ineffective assistance of counsel at the penalty phase of Mr. Mitchell's trial which warrant a resentencing. Mr. Mitchell's trial counsel testified that he was not prepared to proceed to penalty phase; that he had not obtained from Mr. Mitchell's family a life or family history and that he had in fact conducted no background investigation in preparation for Mr. Mitchell's penalty phase. The State stipulated to family affidavits and mental health reports detailing the wealth of available mitigating evidence concerning Mr. Mitchell. Under the circumstances, the circuit court correctly concluded that counsel's performance was deficient and as a result, Mr. Mitchell was prejudiced.

V. The sentencing court erred by failing to independently weigh aggravating and mitigating circumstances, contrary to Mr. Mitchell's fifth, sixth, eighth and fourteenth amendment rights.

VI. The cold, calculated, and premeditated aggravating circumstance was applied to Mr. Mitchell's case in violation of the eighth and fourteenth amendments.

VII. Mr. Mitchell's sentence of death was based upon misinformation of constitutional magnitude in violation of the eighth and fourteenth amendments.

VIII. Mr. Mitchell's sentence of death was based upon an unconstitutionally obtained prior conviction and therefore also on misinformation of constitutional magnitude in violation of the eighth and fourteenth amendments.

IX. Mr. Mitchell's judge and jury were improperly inflamed by the prosecutor's closing argument; and counsel's performance was deficient for not registering an objection.

ARGUMENT I

MR. MITCHELL WAS DENIED A FAIR ADVERSARIAL TESTING OF THE PROSECUTION'S CASE THROUGH THE INEFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS CAPITAL TRIAL, THROUGH THE STATE'S NONDISCLOSURES OF MATERIAL EXCULPATORY EVIDENCE, AND THROUGH THE STATE'S USE OF FALSE OR MISLEADING EVIDENCE AND ARGUMENT, CONTRARY TO THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The State in its brief conceded that the circuit court found trial counsel's performance deficient at the guilt phase of Mr. Mitchell's trial. The State, however, argues that the deficiency finding was "based solely upon counsel's failure to demand the State complete the laboratory tests on a hair found in the truck and on scrapings taken from the victim's fingernails." State's Brief at 4. The State does not provide a record cite for this contention because a record cite does not exist. The circuit court did not limit its finding of deficient performance to one specific act. Trial counsel's performance was deficient in numerous respects, and the circuit court so found.

The circuit court found deficient performance of counsel because counsel failed to know of the discovery provided to him by the State, failed to investigate it, and failed to present it to the jury (PC-R. 337-40). In fact, trial counsel testified that the discovery shown to him at the evidentiary

hearing was important evidence of Mr. Mitchell's innocence which should have reached the jury. However, according to the State, counsel had been provided with this discovery, and the circuit court so found. Counsel had all the necessary tools to present a wealth of evidence to support Mr. Mitchell's claim of innocence, yet counsel failed to insure an adversarial testing.

The circuit court after listening to the evidence at the evidentiary hearing made credibility determinations and found trial counsel's failure to pursue the evidence of Mr. Mitchell's innocence was deficient performance. At trial, counsel's theory of defense was that Bivens or some other homosexual attacked and killed Mr. Shonyo. However, counsel's efforts to investigate Bivens were hampered by his failure to read the disclosed police reports and obtain Bivens correct name.[1] Not surprisingly, counsel failed to discover useful information regarding Bivens. Counsel also failed to note the Fort Lauderdale matchbooks found in Mr. Shonyo's vehicle, and the fact Bivens had just returned from Fort Lauderdale at the time he reportedly found the body (PC-R. 44-46). Counsel failed to learn of the homosexual prostitutes, including Bivens, who frequented the area of Mr. Shonyo's employment (PC-R. 274-79). Counsel testified that all of this was important evidence consistent with the theory of the defense which was crucial for the jury to hear in deciding Mr. Mitchell's guilt. Yet counsel did not learn of this evidence. Clearly, counsel failed to investigate and pursue a wealth of critical evidence supporting the theory of defense presented to the jury. The circuit court correctly found this to be deficient performance. See Harris v. Reed, 894 F.2d 871 (7th Cir. 1990) (counsel's failure to present evidence supporting opening statement which counsel gave to the jury was deficient performance). Counsel failed Mr. Mitchell in not discovering and presenting the wealth of

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[1]Trial counsel mistakenly investigated Bivens under the name "James Boone" (PC-R. 27).

evidence implicating Mr. Bivens as the murderer and exonerating Mr. Mitchell.[2]

The remaining question in light of the circuit court's factual determinations is whether Mr. Mitchell suffered prejudice by the failure to pursue and present evidence of Mr. Mitchell's innocence. The question of prejudice is a legal one entitled to no deference. The issue is whether a reasonable probability exists of a different outcome but for counsel's deficient performance. 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 at 879.

The circuit court found defense counsel's performance deficient in failing to investigate and prepare. As a result of that deficient performance, the jury was prevented from hearing all the facts regarding Bivens which make him a very likely suspect. Yet, trial counsel had identified Bivens to the jury as the likely killer. Bivens, a prostitute, worked the area of Mr. Shonyo's employment (PC-R. 279-80). The jury did not know that. Bivens had been seen in the area before. One of the State's witnesses, if asked, would have told the jury this. At that time, Bivens had teeth; in all likelihood partial dentures (PC-R. 315). The jury was led by the prosecutor to believe that Bivens had no front teeth and no dentures which could have caused the bite mark left on Mr. Shonyo's arm because at trial six

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[2]The State argues that the actions taken by trial counsel offset his omissions and render his performance acceptable. However, as has been repeatedly held, one specific omission may alone constitute performance. Kimmelman v. Morrison, 477 U.S. 365 (1986); Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). However, here counsel made numerous significant blunders. He failed to adequately review the discovery and pursue the wealth of exculpatory evidence contained therein. No actions taken by trial counsel could offset the failure to present critical evidence to the jury.

months later he did not wear his dentures to court.[3] The jury knew nothing of the unexplained presence in Mr. Shonyo's truck of Fort Lauderdale matchbooks, and thus could not infer a link to Bivens who had hours before returned from Fort Lauderdale (PC-R. 44-46). The jury did not know that Bivens' clients were always white middle aged men, like Mr. Shonyo; that Bivens always had his sexual encounters in parked vehicles frequently driven to the area he lived, where Mr. Shonyo's body was found (PC-R. 35-38). Finally the jury did not know that Bivens carried a knife during his sexual encounters which he always kept handy (PC-R. 788). In Harris v. Reed, deficient performance was found to be prejudicial where it precluded the jury from hearsay evidence which supported defense counsel's opening statement. "When counsel failed to produce the witnesses to support [opening statement], the jury likely concluded that counsel could not live up [to] the claims made in the opening." 894 F.2d at 879. See Anderson v. Butler, 858 F.2d 16 (1st Cir. 1988).

Besides Bivens, the jury knew nothing of the warehouse area and the troubles associated with the prostitution and gay bathhouses. This was critical information in evaluating the defense's theory someone else did it in a homosexual rage. It also provided an additional link to Bivens who Ms. Amato testified was in the neighborhood before the homicide (PC-R. 279-80).

In addition to the critical evidence the jury did not hear about other suspects, there was critical and exculpatory evidence the jury did not hear about Mr. Mitchell. This was a case in which evidence of Mitchell's guilt of murder was entirely circumstantial. In affirming the conviction and sentence, this Court noted that "[n]either the knife nor the bloody shirt Mitchell wore on May 1 was ever found," 527 So. 2d at 180 (emphasis added). This Court's conclusion that the verdict of guilt was supported by competent substantial evidence was based upon testimony of dried blood on the knife which supposedly the State never recovered. Id. at 181. This Court also relied upon evidence

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[3]In fact, Dr. Briggle, the State's forensic expert, indicated that the bite impressions on the victim could have been made by someone wearing partial dentures (PC-R. 29).

that Mitchell was "covered with blood" and was found in possession of Walter Shonyo's wristwatch, "which, presumably, was removed from the body," in reaching this conclusion. Id. Obviously this Court believed these facts constituted important and critical links in the chain of circumstantial evidence. However, there was evidence unrevealed to the jury and to this Court that negated these facts as links in the chain of circumstantial evidence.

The knife seen in Mr. Mitchell's possession had in fact been recovered by the police (PC-R. 64-65).[4] The blade was too short to have caused Mr. Shonyo's injuries. Further, it had been tested for the presence of blood with negative results; this completely rebutted the State's claim that the knife was the murder weapon and was covered with blood (PC-R. 68-75).

Clearly, there was evidence to show there was no blood on the knife in Mr. Mitchell's possession. Yet, the jury never knew that fact.[5] Moreover, this Court relied on that false evidence in affirming: "a witness testified that he saw a small pocketknife with dried blood near where Mitchell slept

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[4]The State argues that there is no proof that the knife recovered was the knife seen in Mr. Mitchell's possession. However, "Mr. Harden described the knife as being silver with a two-to-three inch blade. According to Harden, the blade would close at the handle. The handle fell on the floor on its side and he took note that it was missing the plastic handle on the side which faced up (PC-R. 68)." At the evidentiary hearing, trial counsel noted that the knife in question matched the description Harden gave (PC-R. 69).

At trial, a police report was introduced which referred to a knife testing negative for blood. The prosecutor argued that defense counsel had no evidence indicating that the knife testing negative for blood was the knife Harden saw (R. 558). However, the knife which tested negative for blood perfectly matched a description of the knife seen in Mr. Mitchell's possession. Obviously, counsel's failure to present the available evidence was seized upon by the State. The fact that the knife fit the description of a knife with a broken handle was very significant.

[5]The State feebly argues in its brief that the blood could have been cleaned off the knife by Mr. Mitchell (State's brief at 9). However, the absence of blood increases the chances that it was not the murder weapon and Mr. Mitchell, who possessed the knife, did not commit the murder. Trial counsel testified had he known the test results, he would have presented the evidence to the jury. As it was, the jury did not know that no blood was found on the knife and could hardly be a coincidence.

after the murder." Mitchell, 527 So. 2d at 181.[6] Certainly the fact that the knife had been found and that subsequent testing demonstrated there was no blood on it was highly exculpatory evidence breaking the chain of circumstantial evidence necessary to sustain the conviction.[7]

Counsel did not look at the knife prior to trial (PC-R. 68). At the motion hearing trial, counsel learned for the first time that this knife had only a 2" blade (PC-R. 65, 69). Had counsel adequately investigated, he would have known this critically material fact and could have presented this evidence at trial. Dr. Diggs, the State's pathologist, testified at trial the victim's wounds were consistent with a knife that had at least a 4" blade (R. 206). The length of blade of this knife (two inches) is clearly inconsistent with the wounds inflicted on the victim. Due to counsel's failure to investigate, none of this critically material evidence was ever presented to the jury. It should have been. Confidence must be undermined in the results of Mr. Mitchell's trial.

The State introduced testimony by Gloria Harden that the knife had dried blood on it (R. 91). This testimony was directly refuted by the results of the State's own forensic examination (PC-R. 75; see Exhibit 9, Item 17).

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[6]This Court also believed the knife was never found. Mitchell, 527 So. 2d at 180.

[7]The State contends that Mr. Mitchell failed in his burden of proof to prove that the knife was the knife seen in Mr. Mitchell's possession (the State's Brief at 9). Mr. Mitchell would not have had to prove at trial that the knife tested for the presence of blood was the one in Mr. Mitchell's possession; he only had to raise a reasonable doubt about his guilt. Similarly in the post-conviction, it is not Mr. Mitchell's burden to prove that the knife, which tested negatively for blood, was the one seen in Mr. Mitchell's possession. Mr. Mitchell's burden was to show deficient performance. The circuit court found trial counsel's failure to review the discovery and notice that a knife, matching perfectly the description given of the one in Mr. Mitchell's possession, tested negatively for the presence of blood. The question now is whether this piece of evidence, if presented at trial, along with the other evidence counsel ineffectively failed to present, renders the trial proceeding unreliable. Harris v. Reed. This is a legal question, and this Court after reviewing the record must conclude the guilty verdict is unreliable.

Counsel failed to adequately investigate, to learn the facts, and to present this critical exculpatory evidence to the jury.[8]

The jury was deprived of the opportunity to consider significant facts regarding Bivens, Club Tampa, the putative murder weapon, Mr. Mitchell's clothing, etc., due to counsel's complete failure to adequately investigate the facts. The circuit court found deficient performance. However, in light of the wealth of exculpatory evidence not considered by the jury, confidence is undermined in the outcome. Moffett v. Kolb, 930 F.2d 1156 (7th Cir. 1991); Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991). Mr. Mitchell was denied a fair adversarial testing of the critical issues in his case. Unpresented evidence implicating another (Bivens) and additional unpresented evidence exculpating Mr. Mitchell undermine confidence in the outcome of the trial. Relief is mandated.

ARGUMENT II

MR. MITCHELL WAS DENIED A FAIR ADVERSARIAL TESTING WHEN MATERIAL EXCULPATORY EVIDENCE WAS NOT DISCLOSED TO DEFENSE COUNSEL IN VIOLATION OF BRADY V. MARYLAND AND WHERE FALSE OR MISLEADING EVIDENCE AND ARGUMENT WAS PRESENTED TO THE JURY, CONTRARY TO HIS RIGHTS UNDER THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State argues that it did not fail to disclose exculpatory evidence; defense counsel simply failed to use the evidence. In Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986), the Eleventh Circuit found that the exculpatory evidence had been disclosed, but nevertheless granted relief because the exculpatory evidence was not presented to the jury and an adversarial testing did not occur. Specifically in Smith, the Court ruled counsel's failure to present the disclosed exculpatory evidence was ineffective assistance.

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[8]The State notes that a piece of the handle which matched the knife was found in Mr. Shonyo's vehicle (State's Brief at 10). The State, after arguing the knife may not have been the one in Mr. Mitchell's possession, tries to have its cake and eat it too by arguing that it was the same knife and that further implicates Mr. Mitchell. However, Mr. Mitchell testified and admitted stealing it from the abandoned truck. The fact that part of the knife (the missing handle plate) was found in Mr. Shonyo's truck, but no blood was present on the knife, only further corroborates Mr. Mitchell's testimony that he stole it from the abandoned truck, but that he did not kill Mr. Shonyo.

Here the circuit court specifically determined that the exculpatory evidence was disclosed; however, defense counsel failed to investigate and present this evidence. To the extent that this Court disagrees that disclosure occurred, Mr. Mitchell's claim would be that the State's nondisclosure undermines confidence in the outcome. On the other hand, if this Court accepts the circuit court's determination that Mr. Mitchell's counsel failed to adequately review the discovery and investigate leads contained therein, Mr. Mitchell contends in Argument I, supra, that, under Smith v. Wainwright, confidence is undermined in the outcome and relief is mandated.

Again, a wealth of material was not investigated and presented to the jury. As a result, confidence is undermined in the outcome.[9]

ARGUMENT III

NEWLY-DISCOVERED EVIDENCE ESTABLISHES THAT MR. MITCHELL'S CAPITAL CONVICTION AND SENTENCE WERE CONSTITUTIONALLY UNRELIABLE AND IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State asserts that "there is absolutely no evidence linking Bivens to the murder of Walter Shonyo." (State's Brief at 19). The State conveniently ignores the fact that Bivens found the body, reported it to his sister, and then disappeared.[10] The defense at trial was that Bivens or some other homosexual did the murder. Obviously, there was evidence linking Bivens to the murder. He was a witness called to testify by the State that he was the first to find the body. Yet a wealth of evidence was not discovered and presented which implicated Bivens. This evidence would have supported the defense's contention that Bivens did more than find the body, he put it there

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[9]The State argues rap sheets are not admissible and therefore there was no prejudice (State's Brief at 17). However, the rap sheet would have led to reverse Williams Rule evidence which was admissible.

[10]Bivens was a male prostitute known to work the area where Mr. Shonyo was killed. Bivens had been seen at the trucking company when Mr. Shonyo worked. A short time before the murder, Bivens had been arrested during a trick in the vehicle of another middle-aged white male and an open knife was found concealed underneath him. Matchbooks from Ft. Lauderdale were found in the truck and Bivens had just returned from Ft. Lauderdale. Bivens lived in the area where the body was found.

after killing Mr. Shonyo when Bivens lost control in the course of a trick. The newly discovered evidence warrants relief. A miscarriage of justice occurred which must be corrected.

ARGUMENT IV

MR. MITCHELL WAS DEPRIVED OF THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE PENALTY PHASE OF HIS CAPITAL TRIAL BY COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE, PREPARE AND PRESENT AVAILABLE MITIGATING EVIDENCE.[11]

Absolutely no evidence was presented by trial counsel at the penalty phase of Mr. Mitchell's capital trial. At the Rule 3.850 hearing, trial counsel testified:

Q. You proceeded to penalty phase --

A. Yes.

Q. -- the same day as the jury returned its verdict?

A. Yes.

Q. Were you prepared to proceed to penalty phase?

A. No.

Q. How were you not prepared?

A. My doctors were not available.

Q. Had you, in fact, given any thought to the preparation of the penalty phase?

A. Limited.

Q. Were you surprised that you proceeded directly to penalty phase?

A. Yes.

Q. You indicated that your doctors were not available?

A. That's correct.

Q. Were your doctors contacted?

A. Yes, but not by me.

Q. Who contacted them?

A. Mr. Ray Hernandez.

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[11]The circuit court granted relief on this claim. The State has challenged the circuit court's action in its cross-appeal. Thus, this Argument is in answer to the State's contention.

Q. And did you have a conversation with Mr. Hernandez concerning his conversation with the doctors?

A. Yes.

Q. And, in fact, you relayed that to the jury on the record?

A. Yes. Mr. Hernandez, by the way, works for my office.

Q. Okay. And, in fact, did you put on any evidence in the penalty phase of Mr. Mitchell's case?

A. I don't recall. I don't think so.

Q. Did you provide any background information to -- strike the question.

Could you identify who the doctors were first that were involved in Mr. Mitchell's case?

A. I think one of them was Arturo Gonzalez. Dr. Gonzalez is a psychiatrist, and I am not sure.

Q. Dr. Merin?

A. Sid Merin.

Q. Did you provide Dr. Merin or Dr. Gonzalez with any background information concerning Mr. Mitchell?

A. Independent recollection, I don't recall.

Q. Did you discuss with Mr. Mitchell's family his background and his life history?

A. No.

Q. Why did you not do any of that, Mr. Lufriu?

A. To begin with, I thought -- I felt that I was going to win.

Q. Win at the guilt-innocence phase?

A. Yes.

Secondly, I figured when that was over, there would be ample time to worry about gathering up the history. I can probably do that in twenty-four hours, forty-eight hours, and present it and by that time my doctors would be available.

That's it. That's all I got to say.

Q. And the end result was that you didn't present any?

A. No, that's correct.

Q. What was the jury recommendation in this case?

A. I believe it was death.

Q. Do you remember how many voted for death?

A. I think it was seven to five or something like that.

Q. And a 6/6 vote would have meant life?

A. Recommendation, yes.

Q. Had you -- if you had the opportunity to do it over again, what would you do differently?

A. Well, I would have had everything prepared. I would have had the history, family history.

I don't know if I could have possibly controlled the doctors. I don't, you know, if they are going to leave, they are going to leave, and they left.

Q. Would you have subpoenaed them?

A. I'm not too sure that I didn't.

Q. Would you have provided them with background information?

A. Yes.

* * *

Q. This was the first penalty phase that you ever faced where a client was facing the death penalty?

A. And the last.

Q. Why the last, sir?

A. Because I won't do it again.

Q. Do you recall if Mr. Mitchell was in the military?

A. Yes.

Q. And do you recall what kind of discharge he got?

A. No, sir.

Q. Were you ever aware that, in fact, he got a psychiatric discharge from the military?

A. I don't recall.

Q. Is that the kind of information that you would have wanted to give to mental health experts?

A. I think it's relevant.

Q. In fact, I think you have already testified to this, Mr. Lufriu, and I don't mean to be repetitive. Did you do any background investigation in preparation for Mr. Mitchell's penalty phase of his capital trial?

A. No.

(PC-R. 95-100).

In Strickland v. Washington, 466 U.S. 668 (1984), the 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." 466 U.S. at 688 (citation omitted). Courts have repeatedly pronounced that "[a]n attorney does not provide effective assistance if he fails to investigate sources of evidence which may be helpful to the defense." Davis v. Alabama, 569 F.2d 1214, 1217 (5th Cir. 1979), vacated as moot, 466 U.S. 903 (1980). 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). "[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 attention of the jury on any mitigating factors." Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). "In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986). An attorney is charged with knowing the law and what constitutes relevant mitigation. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Moreover, counsel has the duty to ensure that his or her client receives appropriate mental health assistance, State v. Michael, 530 So. 2d 929 (Fla. 1988); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's level of mental functioning is at issue, and when the client cannot fend for himself. Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991). Defense counsel's failure to investigate and present available mitigation constitutes deficient performance. State v. Lara, 16 F.L.W. 3306 (Fla. 1991).

Mr. Mitchell's trial counsel failed his capital client. Counsel testified at the Rule 3.850 hearing that he did not "do any background investigation in preparation for Mr. Mitchell's penalty phase" (PC-R. 100).

He failed to have the mental health experts present to testify despite his desire to present their testimony. The circuit court found deficient performance. As a result, the wealth of significant mitigating evidence which was available and which should have been presented was not presented. No tactical motive can be ascribed to an attorney whose omissions are based on lack of knowledge, or on the failure to properly investigate and prepare. Cunningham; Harris; Middleton. Mr. Mitchell's sentence of death is the resulting prejudice:

> The primary purpose of the penalty phase is to insure that the sentence is individualized by focusing the particularized characteristics of the defendant. Armstrong, 833 F.2d at 1433 (citing Eddings v. Oklahoma, 455 U.S. 104, 112, 102 S. Ct. 869, 875, 72 L.Ed.2d 1 (1982)). By failing to provide such evidence to the jury, though readily available, trial counsel's deficient performance prejudiced Cunningham's ability to receive an individualized sentence. See Stephens, 846 F.2d at 653-55; Armstrong, 833 F.2d at 1433-34.

Cunningham, 928 F.2d at 1016.

Proper investigation and preparation would have resulted in evidence establishing a compelling case for life on behalf of Mr. Mitchell. A wealth of mitigating information was available to trial counsel in this case. Mr. Mitchell, however, was sentenced to death by a jury that did not have the benefit of the fruits of a thorough investigation. This was far from an individualized capital sentencing proceeding.

Without objection by the State, evidence of substantial and compelling statutory and nonstatutory mitigation was admitted into evidence during the Rule 3.850 hearing (PC-R. 230-32).[12] Mr. Mitchell proffered the evidence which he was prepared to present. All of the affidavits and reports were admitted into evidence

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[12]In fact, the State at the evidentiary hearing indicated it had no desire to listen to all the evidence Mr. Mitchell "could have presented" at trial:

> MR. BENITO: As to second phase, now we have briefly gone over what they could have presented. If I wanted the court to, and I don't want to, you can sit and listen to all this evidence they could have presented.

(PC-R. 340-41).

(PC-R. 331-332; 333-335; Exhibits 31, 32, 35, 36, 39-44, PC-R. 895-897, 898-899, 909-919, 928-941, 978-1004).

Dr. Sidney Merin was engaged by the defense counsel in 1986 to evaluate Mr. Mitchell. At the time of his initial evaluation, he was given only one page of a police report. He stated that had he been provided with adequate background information, such as that provided by collateral counsel which he had since reviewed, he would have conducted appropriate neuropsychological testing and would have been able to testify to the effects of child abuse, substance abuse and other mental deficits. All of these factors he noted as relevant to mitigation, both statutory and nonstatutory (PC-R. 895-897, Exhibit 31).

Dr. Arturo Gonzalez had also been engaged by defense counsel to evaluate Mr. Mitchell in 1986. He was asked to determine sanity at time of the offense and competency to stand trial. Had he been requested, he would have been able to testify to mitigation on behalf of Mr. Mitchell, particularly in relation to substance abuse at the time of the offense (PC-R. 898-899, Exhibit 32).

A subsequent evaluation by Dr. Peter Macaluso was admitted into evidence (PC-R. 909-919, Exhibit 35). After conducting an evaluation which also took into consideration data concerning Mr. Mitchell's background, he concluded that Mr. Mitchell suffers from the disease of chemical dependency, psychoactive substance abuse disorder, psychoactive substance induced organic mental disorder producing severe disorientation, panic paranoia, hysteria, depression, feelings of depersonalization, audio and visual hallucinations, delusional states and toxic psychosis. He further diagnosed organic brain syndrome. Combined, the toxic affects of substance abuse produce marked global cognitive impairment with marked diminution of judgment, perceptions and insight which predicated states of partial/total blackouts. He concluded that Mr. Mitchell was in a state of extreme emotional and mental impairment and lacked the capacity to make reasonable judgments regarding the criminality of his conduct and conformity to the law. Dr. Macaluso's report discussed Mr. Mitchell's history in considerable detail:

> Willie Mitchell, Jr., is a forty-year old Negro male, born on October 22, 1949, in Tampa, Florida. He was born out of wedlock and raised by his maternal grandparents. The grandfather was extremely abusive to Willie, often causing much physical harm.

Mr. Mitchell has a family history of alcoholism on both his maternal and paternal sides. An uncle died from alcoholic liver disease.

Willie Mitchell's history of chemical dependency begins in the seventh grade when he was approximately thirteen years old, he began drinking wine on the weekends. This quickly progressed to drinking daily during the school day resulting in truancy and poor scholastic achievement.

At the age of seventeen, Mr. Mitchell enlisted in the Navy and a short time later was discharged upon the recommendation of a psychiatrist. After his discharge from the Navy, his intake of alcohol quickly increased to daily drinking of approximately one-fifth of hard liquor per day. Mr. Mitchell also began consuming other drugs during this period of time. These included LSD, hallucinogenic mushrooms and marijuana. By the time he was twenty-three years old, he was consuming large amounts of marijuana and alcohol on a daily basis along with barbituates, Quaaludes and amphetamines. Beginning approximately around 1975, his daily living pattern included smoking marijuana beginning upon arising in the morning and continuing throughout the whole afternoon and evening and drinking after work until one or two a.m. in the morning.

Approximately around 1979, Willie began snorting cocaine and this quickly progressed to injecting IV[13] cocaine on a daily basis. Often multiple drugs were injected which included IV cocaine, heroin, and amphetamines. During this time he was using approximately two to three hundred dollars of cocaine per day. In 1981, he was incarcerated for burglary after a failed attempt to obtain money to buy cocaine. Beginning in 1986, Mr. Mitchell began using crack cocaine "every day all day."

This pattern of alcohol and drug taking continued up until the time of the incident with which Mr. Mitchell is charged. During the day which Mr. Mitchell was charged with murder, he began his day by smoking marijuana and started drinking alcohol at approximately 4:30 in the afternoon. He consumed large quantities of beer at the Blue Diamond, Broadway and Boston bars and also consumed a half pint of hard liquor. He was also smoking crack cocaine.

Mr. Mitchell's alcohol and drug taking resulted in characteristic life problems. He would often have severe blackouts and became involved in burglary and theft in order to obtain money for his cocaine dependency. His blackouts began at around the age of sixteen and became increasingly severe resulting in one instance of being arraigned on a criminal charge and being unaware of the particular charge until it was read to him by the judge. Various life problems also followed including auto accidents secondary to intoxication, fights, numerous break-ups of relationships and his marriage, loss of jobs and significant psychiatric impairment, including suicidal ideation and audio and visual hallucinations. Mr. Mitchell also experienced increased tolerance to his drugs, especially alcohol and marijuana which resulted in hematemesis (vomiting blood) and severe withdrawal syndromes.

(PC-R. 911-13).

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[13]Intravenous.

Dr. Macaluso concluded:

1. Willie Mitchell continued to use alcohol and drugs in an obsessive/compulsive manner despite adverse life consequences. His compulsivity and excessiveness to drug and alcohol taking continued despite severe physical problems (hematemesis), accidents, despite significant depression and audio and visual hallucinations along with severe paranoia and despite significant loss of interpersonal relationships, loss of jobs and severe legal problems.

2. Willie Mitchell's alcohol and drug taking resulted in severe blackouts.

3. Willie Mitchell has a strong, positive family history of chemical dependency.

4. Willie Mitchell's extensive alcohol and drug taking are independently corroborated by the statements of various individuals acquainted with Mr. Mitchell and his criminal record of drug and alcohol related arrests.

5. Willie Mitchell sustained significant head trauma as a child when he was struck in the head by an ax by another child and when he was hit in the head with a brick by his grandfather as a child; in addition he had a serious car accident.

6. Willie Mitchell sustained significant physical and emotional abuse as a child from the hands of his grandfather as independently corroborated by the affidavits of Raymond David Coles and Elroy Carlos Coles.

7. Recent psychological evaluations reveal that Willie Mitchell suffers from brain damage and borderline intelligence.

8. During times of incarceration, when he is not in an alcohol and drug laden environment, Willie Mitchell's social interaction, initiative and drive for employment are consistently noteworthy.

9. Willie Mitchell has a history which indicates grand mal seizures and within a reasonable degree of medical probability temporal lobe seizures as evidenced by the affidavit of Raymond David Coles.

10. Recent psychological evaluations as evidenced by the report of Dr. Glenn R. Caddy show indications that Mr. Mitchell suffered from reduced intellectual functioning and diffuse brain damage.

After careful review and analysis of the pertinent records in this case and after a thorough evaluation of Willie Mitchell, it is my expert medical opinion that:

1. Willie Mitchell suffers from the disease of Chemical Dependency, as defined as the continued obsessive/compulsive use of alcohol and drugs despite ensuing adverse life consequences, (DSM-III-R), psychoactive substance abuse disorder, psychoactive substance induced

organic mental disorder. Willie Mitchell was drug addicted. His drugs of choice were alcohol, marijuana and cocaine (especially the crack form of cocaine). These drugs taken in combination produce severe disorientation, panic paranoia, hysteria, depression and feelings of depersonalization along with audio and visual hallucinations, delusional states and toxic psychosis. Willie Mitchell's Disease of Chemical Dependency is severely advanced as to produce severe withdrawal syndromes and marked blackouts. While intoxicated, significant decreases in judgment, perception and insight along with global cognitive impairment are experienced. Global impairment is the general overall impairment of higher mental functioning, i.e., impairment and inability to form adequate judgments, perceptions and insights, inability to make associations and to reason arbitrarily. These states would have occurred while Mr. Mitchell was under the acute and prolonged effects of alcohol and drugs.

2. Presently, Willie Mitchell is suffering from brain damage and organic brain syndrome. This comes within a reasonable degree of medical probability, is chemical and toxic in origin and is the direct result of his advanced and severe disease of chemical dependency and significant head trauma as a child.

3. During the time of the incident of which Willie Mitchell is charged, he was under the prolonged and acute toxic effects of massive amounts of the addictive drugs of cocaine, marijuana and large quantities of alcohol.

4. The prolonged and acute toxic effects of these addictive chemical, within a reasonable degree of medical certainty, produce marked global cognitive impairment, along with marked diminition of his judgment, perceptions and insight, which predicated the state of partial/total blackouts.

5. As a direct result of Willie Mitchell's advanced and severe Disease of Chemical Dependency and in conjunction with the marked global impairment, Willie Mitchell was, at the time of the incident with which he is charged, in a state of extreme impairment.

6. Further, as the direct result of Mr. Mitchell's advanced and severe Disease of Chemical Dependency, together with its accompanying state of involuntary intoxication and subsequent global impairment, Willie Mitchell, at the time of the incident in which he is charged, was lacking the capacity to make reasonable judgments regarding the criminality of his conduct and conformity to the standards of the law. Further, this constellation of Mr. Mitchell's Disease of Chemical Dependency, involuntary intoxication and marked global impairment resulted in Mr. Mitchell suffering from extreme emotional and intellectual disorder at the time of the incident with which he is charged and he was incapable of appreciating the long term consequences of his actions. Indeed, Mr. Mitchell presently is suffering from intellectual and cognitive impairment.

(PC-R. 914-81).

Mr. Mitchell was also evaluated by Dr. Glenn Caddy, whose report and findings were admitted into evidence at the Rule 3.850 hearing (PC-R. 928-941, Exhibit 36).[14] After conducting neuropsychological testing as well as conducting an evaluation and reviewing background materials, Dr. Caddy concluded that Mr. Mitchell's judgment was significantly impaired as the result of the combined effects of alcohol and/or drugs, brain dysfunction, borderline intellect. Specifically, Dr. Caddy found brain damage ("these limitations appear to be mainly at the higher levels of cognitive process")(PC-R. 940). He also concluded that Mr. Mitchell's capacity to conform with the requirements of the law was impaired.[15] Further, Dr. Caddy found Mr. Mitchell's mental state, his history of abuse and over-control as a child, his alienation from his parents, his lack of treatment for profound substance abuse, his personality and neuropsychological deficits all provide nonstatutory mitigation worthy of serious consideration (PC-R. 941).

The affidavits of family members and friends, each of whom would have testified on behalf of Mr. Mitchell had they been contacted by defense counsel, describe Mr. Mitchell's upbringing and character and were proffered and admitted into evidence without objection by the State (Exhibits 39-44, PC-R. 978-1004). Mr. Mitchell was essentially abandoned by his father and mother in childhood and raised by his grandparents who were older and unable to provide him with love and attention. His grandfather was impatient, intolerant and physically brutal, beating him across the head and body "like an animal" and on one occasion striking him in the head and knocking him unconscious for ten minutes. Mr. Mitchell was also struck in the head with an

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[14]Page 10 of Dr. Caddy's report was inadvertently deleted from the record. The entire report is attached hereto.

[15]Once a reasonable quantuum of evidence is presented showing impaired capacity, it is for the jury to decide whether it shows "substantial" impairment. Stewart v. State, 558 So. 2d 416 (Fla. 1990). Where the evidence shows that a defendant had a substantial mental condition such as retardation; history of serious substance abuse and severe emotional deprivation resulting in an emotional age of 12 to 13, it is error to reject mental status as a mitigating factor. Nibert v. State, 574 So. 2d 1059 (Fla. 1990). Campbell v. State, 571 So. 2d 415 (Fla. 1990); Waterhouse v. Dugger, 522 So. 2d 341 (Fla. 1988); Mines v. State, 390 So. 2d 332 (Fla. 1980).

ax as a child. Since then, Mr. Mitchell suffered intense and frequent headaches. He also began to suffer strange blackouts and seizures. Despite his upbringing, he exhibited compassion for people and animals (PC-R. 978-80). When his step-father was dying of cancer, Willie moved in to care for him, carrying his stepfather to the bathroom, bathing and feeding him until he died (PC-R. 983-991, 997, 1000). Willie attempted to steer his half-brother away from trouble and to help him avoid the mistakes Mr. Mitchell had made in life (PC-R. 992-995). There were consistent reports of Mr. Mitchell's severe history substance abuse and the adverse affects on his behavior (PC-R. 981, 989, 993-94, 1003). Evidence of Mr. Mitchell's deplorable upbringing, his mental and emotional deficiencies, his compassionate and caring nature, and his history of substance abuse all would have provided compelling statutory and nonstatutory mitigation sufficient to support a recommendation of life. See Ross v. State, 474 So. 2d 1170 (Fla. 1985); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Burch v. State, 522 So. 2d 810 (Fla. 1988); Amazon v. State, 487 So. 2d 8 (Fla. 1986); Cheshire v. State, 568 So. 2d 908 (Fla. 1990).

Mr. Mitchell's trial counsel requested that the court appoint two mental health experts to evaluate Mr. Mitchell merely two days before the trial began. One expert was unable to complete his evaluation until four days after Mr. Mitchell had already been sentenced to death. The experts evaluated Mr. Mitchell only as to sanity and competency. The only background they were provided by counsel was one page of a two-page police report summarizing the circumstances of the offense. When the court asked Mr. Lufriu if he had any witnesses to present, Mr. Lufriu said, "Your Honor, my two witnesses, two doctors I had, are not available." (R. 604)(emphasis added). In a "statement" to the jury, Mr. Lufriu indicated that he had not even spoken to the doctors himself, but related to the jury what his associate had told him concerning what the doctors had told his associate (R. 619-21). However, statements of counsel are not evidence, and the jury was so instructed. Moreover, defense counsel obviously wished to present this mitigating evidence to the jury.

Thus, for no tactical or strategic reason, the jury was not provided with evidence of the available mitigation.

The judge and jury never knew that, in spite of his childhood in a dysfunctional and abusive family and in spite of trying to cope with his undiagnosed brain damage and limited intellectual functioning, Mr. Mitchell tried very hard to succeed. He made constant attempts to maintain employment. He did not engage in antisocial behavior as a child and had no juvenile record other than running away from his grandfather and one nonjudicial petty theft offense for stealing a lawn mower so he could start a lawn service business. Predictably, Mr. Mitchell eventually succumbed to substance abuse; he drank heavily and became a polydrug abuser. According to those who knew him, Mr. Mitchell was a nonviolent person. He was also an unusually concerned person who cared for his dying stepfather by carrying him, clothing him and diapering him while he died a lingering death of cancer.

Had trial counsel or the mental health experts done adequate investigation, conducted testing, gathered records, and interviewed witnesses, there would have been substantial and compelling evidence of brain damage, borderline intellectual functioning, a history of substance abuse, intoxication at the time of the offense, and child abuse, all of which could and should have been presented to the judge and the jury. At the same time, trial counsel should have demonstrated Mr. Mitchell's consistent efforts to overcome these handicaps by constantly seeking employment, his good behavior in jail, and by devoting himself to the care of his terminally ill relative. Counsel could have established statutory and nonstatutory mitigating circumstances. The circuit court properly found prejudice as a consequence of counsel's failure to investigate.

There was no tactical or strategic reason for not presenting mental health mitigation to Mr. Mitchell's jury. Counsel failed to make a timely, adequate investigation therefore no tactical motive can be ascribed for failure to present any mental health mitigation. Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989). In addition to the mental health expert, counsel failed

to interview family members for penalty phase purposes. Waiting until the last minute to prepare for a capital sentencing proceedings is plainly not reasonable attorney performance. Strickland v. Washington. It was counsel's first preparation for a penalty phase. This is a case of prejudicially deficient performance. Because of the failure to prepare in advance, prejudicially ineffective assistance has been established in this case. Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). See also State v. Lara, 16 F.L.W. S306 (Fla. 1991).

Mr. Mitchell is entitled to a new sentencing proceeding because no reliable adversarial testing occurred. Strickland v. Washington; United States v. Cronic, 466 U.S. 654 (1984); Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986). Due to counsel's failure to conduct any investigation and due to the failure to have the mental health experts testify, available evidence was not presented at the penalty phase. Counsel's deficient performance deprived Mr. Mitchell of substantial evidence of statutory and nonstatutory mitigating factors. The prejudice is manifest.[16]

Where counsel's failure to develop significant mitigating evidence is due to a failure to adequately prepare, a new sentencing is required. In Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985), a new sentencing was required because counsel "went into the sentencing phase without any idea whether there was or was not mitigating evidence available." Here as in Blake, defense counsel unreasonably waited until the last minute. See also State v. Lara, 16 F.L.W. S306 (Fla. 1991) (affirming the trial court's ruling that counsel's performance was deficient, in part, because of his focus on the guilt phase at the expense of the sentencing phase); Cunningham v. Zant, 928 F.2d at 1019 (counsel's failure to investigate prejudiced defendant's right to individualized sentencing). In Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989), the Eleventh Circuit held that because there was no "informed judgment"

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[16]Again, in this case the death recommendation was by a seven-to-five vote. Certainly the failure to present any mitigation in light of the wealth of mitigation which was available creates an unreliable death recommendation. The wealth of available mitigation may have easily caused one additional juror to vote for life.

to forego penalty phase investigation and preparation, ineffective assistance of counsel was established. Similarly, in Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988), the Eleventh Circuit explained that the question is whether the failure to uncover mitigation was the product of "a tactical choice by trial counsel." 849 F.2d at 493 (emphasis in original). In State v. Michael, 530 So. 2d 929 (Fla. 1988), this Court found ineffective assistance in the failure to obtain a mental health expert's opinion regarding available mitigation.

There was no strategy or tactic behind counsel's failure to present mitigating evidence. As a result of counsel's deficient performance, Mr. Mitchell was denied the individualized and reliable sentencing determination which the eighth amendment requires. As the Eleventh Circuit held in Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985):

> Certainly [petitioner] would have been unconstitutionally prejudiced if the court had not permitted him to put on mitigating evidence at the penalty phase, no matter how overwhelming the state's showing of aggravating circumstances. See Lockett v. Ohio, 438 U.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978) (plurality opinion); Bell v. Ohio, 438 U.S. 637, 642, 98 S.Ct. 2977, 2980, 57 L.Ed.2d 1010 (1978). Here, [counsel's] failure to seek out and prepare any witnesses to testify as to mitigating circumstances just as effectively deprived him of such an opportunity. This was not simply the result of a tactical decision not to utilize mitigation witnesses once counsel was aware of the overall character of their testimony. Instead, it was the result of a complete failure--albeit prompted by a good faith expectation of a favorable verdict--to prepare for perhaps the most critical stage of the proceedings. We thus believe that the probability that Blake would have received a lesser sentence but for his counsel's error is sufficient to undermine our confidence in the outcome.

758 F.2d at 535 (emphasis added).

Defense counsel failed to develop significant mental health mitigation. In Harris, the Eleventh Circuit noted:

> [T]he prejudice component in Strickland requires close scrutiny. It is critical to the reliability of a capital sentencing proceeding that the jury render an individualized decision. Gregg v. Georgia, 428 U.S. 153, 206, 96 S.Ct. 2909, 2940, 49 L.Ed.2d 859 (1976); Woodson v. North Carolina, 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976); Lockett v. Ohio, 438 U.S. 586, 605, 98 S.Ct. 2954, 2965, 57 L.Ed.2d 973 (1978); Armstrong v. Dugger, 833 F.2d 1430, 1433 (11th Cir.1987). Thus, the jury's attention should be focused on the "particularized nature of the crime and the particularized characteristics of the individual defendant." Gregg, 428 U.S. at 206, 96 S.Ct. at 2940. In this

> case, the sentencing jury knew much about the crime, having just convicted Harris of a brutal murder, but little about the characteristics of the defendant.

Harris, 874 F.2d at 763.

Counsel's neglect deprived the jury of substantial evidence regarding Mr. Mitchell's deprived background and impaired mental health. Here, as in Harris and Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987), there was mental health mitigation which counsel, without a tactic, simply failed to timely investigate, develop and present. Here, as in Armstrong, "[t]he demonstrated availability of undiscovered mitigating evidence clearly met the prejudice requirement." Id., 833 F.2d at 1434, citing Strickland v. Washington. Confidence in the outcome at sentencing is undermined and this sentence of death is not sufficiently reliable to satisfy the eighth amendment. Relief was appropriate. The circuit court's ruling must be affirmed.

ARGUMENT V

THE SENTENCING COURT ERRED BY FAILING TO INDEPENDENTLY WEIGH AGGRAVATING AND MITIGATING CIRCUMSTANCES, CONTRARY TO MR. MITCHELL'S FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.[17]

Mr. Mitchell's sentence of death was illegally imposed because the Court failed to perform its statutorily and constitutionally mandated function of independently weighing aggravating and mitigating circumstances before imposing Mr. Mitchell's death sentence. The guidelines enacted by the legislature require the court to conduct an independent assessment of the propriety of the jury's recommendation if the penalty jury advises the Court to impose a death sentence. Fla. Stat. §921.141(3). The Court, when sentencing Mr. Mitchell to death, failed in its duty to play an independent role in the sentencing process. Not only did the court fail to independently weigh aggravating and mitigating circumstances, it relied upon the Office of the State Attorney to prepare its findings in support of the death penalty.

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[17]The claim was presented in the Rule 3.850 motion and was mooted by the circuit court's decision to grant relief. To the extent that the State argues that the grant of relief was error, this issue provides an alternative basis supporting 3.850 relief.

Documents disclosed by the State pursuant to Fla. Stat. §119.01 clearly show that the trial court's sentencing order was prepared by the State. This establishes that the trial court failed to independently weigh the aggravating and mitigating circumstances at the original sentencing proceeding. Moreover, this is newly-discovered evidence cognizable in a Rule 3.850 proceeding. Richardson v. State, 546 So. 2d 1037 (Fla. 1989); Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

The fundamental precept of the Florida Supreme Court's and the United States Supreme Court's modern capital punishment jurisprudence is that the sentencer must afford the capital defendant an individualized capital sentencing determination. The Supreme Court has therefore consistently held that the trial judge must engage in an independent and reasoned process of weighing aggravating and mitigating factors in determining the appropriateness of the death penalty in a given case. Patterson v. State, 513 So. 2d 1257 (Fla. 1987). In this case the trial court merely adopted the findings by the State. The judge here did not even recite findings into the record and ask a party to write them out. The judge here recited no findings at all -- the findings were prepared by the State.

This constituted sentencing error because the court failed to engage in independent assessment of the appropriate sentence. See, Magwood v. Smith, 791 F.2d 1438, 1449 (11th Cir. 1986); Proffitt v. Florida, 428 U.S. 242 (1976). See also, Ross v. State, 388 So. 2d 1191, 1197 (Fla. 1980); Tedder v. State, 322 So. 2d 908 (Fla. 1975). Because this error has only been discovered in the post-conviction process, it was not of record on appeal. It is, therefore, cognizable now and warrants 3.850 relief.

ARGUMENT VI

THE COLD, CALCULATED, AND PREMEDITATED AGGRAVATING CIRCUMSTANCE WAS APPLIED TO MR. MITCHELL'S CASE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[18]

On direct appeal in Mr. Mitchell's case, the Florida Supreme Court invalidated the application of the "cold, calculated and premeditated" aggravating circumstance because the medical examiner testified that the number of stab wounds and the force with which they were delivered were consistent with a killing consummated by one in a rage. A rage is inconsistent with the premeditated intent to kill someone, and there was no other evidence of premeditation. Mitchell v. State, 527 So. 2d 179, 182 (Fla. 1988). Thus, this aggravating circumstance was erroneously applied by Mr. Mitchell's jury and judge. Under Maynard v. Cartwright, 108 S. Ct. 1853 (1988), the overbroad application of aggravating circumstances violates the eighth amendment. As the record in its totality reflects, the sentencing jury never applied the "heightened premeditation" limiting construction of the cold, calculated aggravating circumstance, as required by Maynard v. Cartwright. The jury was never even advised of the need for "heightened premeditation." Therefore, there is an unacceptable risk that this aggravating factor caused one of the seven jurors voting for death to conclude death was warranted under the court's instructions. Accordingly, resentencing before a properly instructed jury is required. See Omelus v. State, 16 F.L.W. §457 (Fla. 1991) (resentencing required where jury improperly considered an aggravating factor that the circuit court rejected and specifically did not consider.)

Because Mr. Mitchell's jury did not have the benefit of the narrowing definition set forth in Rogers v. State, 511 So. 2d 526 (Fla. 1987), his sentence violates the eighth and fourteenth amendments. Mr. Mitchell was entitled to the benefit of the Rogers rule. Not only was the jury improperly

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[18]The claim was presented in the 3.850 motion and was mooted by the circuit court's decision to grant relief. To the extent that the State argues that the grant of relief was error, this issue provides an alternative basis supporting Rule 3.850 relief.

instructed on this aggravating factor, the aggravating factor itself should never have been submitted to the jury for consideration in the weighing process, as this Court determined on direct appeal. See Omelus. Florida law requires the jury to weigh the aggravating circumstances against mitigating evidence. Mr. Mitchell's jury was so instructed. The Florida Supreme Court has produced considerable case law regarding the import of instructional error to a jury regarding the mitigation it may consider and balance against the aggravating circumstances. Mikenas v. Dugger, 519 So. 2d 601 (Fla. 1988). The striking of this aggravating factor required resentencing. Omelus. The "harm" before the jury is plain -- a jury's capital sentencing decision, after all, is not a mechanical counting of aggravators and involves a great deal more than that, a reasoned weighing process. Consideration of an improper aggravating factor skewed the balancing process. Valle v. State, 502 So. 2d 1225 (Fla. 1987). There is a reasonable probability, and an unacceptable risk, that the jury's 7-5 recommendation of death was the product of the jurors' consideration of this factually unsupported aggravating factor in the weighing process.

Rule 3.850 relief is warranted under Hitchcock v. Dugger, 481 U.S. 393 (1987); Maynard v. Cartwright and the eighth amendment. The circuit court should be affirmed on the basis of this error.

ARGUMENT VII

MR. MITCHELL'S SENTENCE OF DEATH WAS BASED UPON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[19]

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a non-capital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude." See Johnson v. Mississippi, 108 S. Ct. 1981 (1988). As articulated in Zant v. Stephens, 462 U.S. 879 (1983)

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[19]The claim was presented in the Rule 3.850 motion and was mooted by the circuit court's decision to grant relief. To the extent that the State argues that the grant of relief was error, this issue provides an alternative basis supporting Rule 3.850 relief.

this rule is absolute and does not depend upon the presence or absence of other aggravating or mitigating factors for its application. Reconsideration of the sentence is required. See Tucker, 404 U.S. at 448-449; Lipscomb v. Clark, 468 F.2d 1321, 1323 (5th Cir. 1972).

At Mr. Mitchell's penalty phase proceeding, the following occurred:

> MR. BENITO: Your Honor, at this time I would move into evidence a certified copy, State's Exhibit 45, a certified copy of the defendant's prior conviction on April 5, 1971, of robbery.
>
> THE COURT: I will note the defense objection. It will be received.
>
> [State's Exhibit 45 was received.]
>
> MR. BENITO: That is all I have, Judge.

(R. 613).

State's Exhibit 45 was in fact not a copy of the Defendant's prior conviction on April 5, 1971, of robbery. It was a receipt for Mr. Mitchell's arrival at the Reception and Medical Center at Lake Butler, Florida. It noted that Mr. Mitchell had been sentenced to twenty (20) years for the crime of robbery. It was not, as represented by the State, the judgment and sentence.

As long as 50 years ago, the United States Supreme Court established the principle that a prosecutor's knowing use of false evidence violates a criminal defendant's right to due process of law. Mooney v. Holohan, 294 U.S. 103 (1935); see also Giglio v. United States, 405 U.S. 150 (1972). The Fourteenth Amendment's due process clause, at a minimum, demands that a prosecutor adhere to fundamental principles of justice: "The [prosecutor] is the representative . . . of a sovereignty . . . whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done." Berger v. United States, 295 U.S. 78, 88 (1935). A prosecutor not only has the constitutional duty to alert the defense when a State's witness gives false testimony, Napue v. Illinois, 360 U.S. 264 (1959); Mooney v. Holohan, supra but also to correct the presentation of false state witness testimony when it occurs. Alcorta v. Texas, 355 U.S. 28 (1957). The State's use of such evidence violates due process whether it relates to a substantive issue, Alcorta, supra, the credibility of a State's witness, Napue; Giglio v.

United States, 405 U.S. 150, 154 (1972), or interpretation and explanation of evidence, Miller v. Pate, 386 U.S. 1 (1967); such State misconduct also violates due process when evidence is manipulated. Donnelly v. DeChristoforo, 416 U.S. 637, 647 (1974).

Here, the only evidence supporting the aggravating circumstance of a prior crime of violence was improperly admitted and considered. It was misleading evidence. Since no other evidence was introduced to support this aggravating circumstance, this aggravating factor must be stricken as it was in Johnson v. Mississippi, supra. Moreover, trial counsel's failure to catch this error was deficient performance which prejudiced Mr. Mitchell. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

Since previously one other aggravating factor was stricken, a new sentencing is required. Cumulatively, the error cannot be found harmless beyond a reasonable doubt. In Florida, the Supreme Court normally remands for resentencing when aggravating circumstances are invalidated. See, e.g., Alvin v. State, 548 So. 2d 1112 (Fla. 1989); Schafer v. State, 537 So. 2d 988 (Fla. 1989); Nibert v. State, 508 So. 2d 1 (Fla. 1987); cf. Rembert v. State, 445 So. 2d 337 (Fla. 1984).

Rule 3.850 relief was appropriate. Mr. Mitchell's sentence of death violated the eighth amendment as explained in Johnson v. Mississippi. This error is cognizable in 3.850 proceedings because of trial counsel's deficient performance in not making the error of record and thus preserved for appellate review.

ARGUMENT VIII

MR. MITCHELL'S SENTENCE OF DEATH WAS BASED UPON AN UNCONSTITUTIONALLY OBTAINED PRIOR CONVICTION AND THEREFORE ALSO ON MISINFORMATION OF CONSTITUTIONAL MAGNITUDE IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.[20]

In United States v. Tucker, 404 U.S. 443, 447-49 (1972), the Supreme Court held that a sentence in a non-capital case must be set aside as a violation of due process if the trial court relied even in part upon "misinformation of constitutional magnitude," such as prior convictions without counsel that were unconstitutionally imposed. A death sentence be set aside if the sentencing court relied on a prior unconstitutional conviction as an aggravating circumstance supporting the imposition of a death sentence. Johnson v. Mississippi, 108 S. Ct. 1981 (1988).

Here, the judge and jury relied on Mr. Mitchell's prior robbery conviction to establish the "prior crime of violence" aggravating circumstance upon which his death sentence was based. The sentencing court found that aggravating circumstance. However, the prior conviction was obtained in violation of the Constitution. The court record in that prior case reflected on its face that no final order was ever entered. No judgment and sentence was formally filed. Its use in imposing death violated the Eighth and Fourteenth Amendments. Johnson v. Mississippi, supra. Johnson is new case law cognizable in a Rule 3.850 proceeding. Moreover, due to trial counsel's deficient performance this error was never made of record and preserved for appellate review. See Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991). As a result, this claim is cognizable in Rule 3.850 proceedings. The circuit court's grant of relief must be affirmed.

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[20]The claim was presented in the Rule 3.850 motion and was mooted by the circuit court's decision to grant relief. To the extent that the State argues that the grant of relief was error, this issue provides an alternative basis supporting Rule 3.850 relief.

ARGUMENT IX

MR. MITCHELL'S JUDGE AND JURY WERE IMPROPERLY INFLAMED BY THE PROSECUTOR'S CLOSING ARGUMENT; AND COUNSEL'S PERFORMANCE WAS DEFICIENT FOR NOT REGISTERING AN OBJECTION.[21]

The State called the victim's son, Bruce Shonyo, during their case-in-chief under the guise that he was needed to connect the items Mr. Mitchell stole from the truck to his father, the victim (R. 114-119). This was wholly unnecessary since Mr. Mitchell admitted taking the items from the truck. This fact was not at issue. What was at issue was the State's desire to put Bruce Shonyo, a Tampa Police Officer, on the stand in full uniform to elicit sympathy from the jury; he was referred to as "officer" during his testimony (R. 114). Although wholly irrelevant to the case, trial counsel unreasonably failed to object. The State asked the son of the victim such irrelevant questions as:

> Q: How long have you been with the Tampa Police Department?
>
> A: Approximately five-and-a-half years.

(R. 115). The State inquired into the age, length of marriage and number of children of the victim (R. 120).

During the guilt phase closing argument the prosecutor again informed the jury that the victim was a family man (R. 502). This fact is not relevant to any issue at bar. In disregard of the constitution, the prosecutor ended his guilt phase argument with:

> Ladies and gentlemen, during the course of this trial, three people -- three people -- have sat at that defense table. I have sat over there. I've not sat there alone. I have sat there with Walter Shonyo. Every time there is a mention about homosexual activity, every time there is a mention about anal intercourse, and every time there is a mention about oral intercourse, every time there is a mention about semen in the anus, Mr. Shonyo winced and Mr. Shonyo angered and Mr. Shonyo gripped the edge of the table.
>
> He is not here to tell you what happened in that truck that night, but the evidence has told you what happened, and now you can tell him you know what happened, and you can tell him that by coming back in this courtroom, looking him straight in the eye and

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[21]The claim was presented in the Rule 3.850 motion and was mooted by the circuit court's decision to grant relief. To the extent that the State argues that the grant of relief was error, this issue provides an alternative basis supporting Rule 3.850 relief.

> saying, "You're guilty, Mr. Mitchell. You're guilty as charged in the two-count indictment of the armed robbery and the first-degree murder of Walter Shonyo."
>
> Tell him you know what happened in that truck. Thank you, ladies and gentlemen.

(R. 570-72). This inflammatory argument violates longstanding Florida law. Jones v. State, 569 So. 2d 1234 (Fla. 1990); Taylor v. State, 16 F.L.W. 5469 (Fla. 1991).[22] It also violates the fifth, sixth and eighth amendments. Cunningham v. Zant, 928 F.2d 1006, 1020 (11th Cir. 1991). However, trial counsel made no objection.

During penalty phase argument the state said:

> If Walter Shonyo had had a choice to go to jail for life rather than die, what choice would Mr. Shonyo have made? People want to live. Walter Shonyo did not have that choice, and you know why he didn't have that choice? Because this man decided for himself that Walter Shonyo should die.

(R. 629).

Moreover, counsel's failure to object to the prosecution's improper argument and his failure to oppose inadmissible evidence was deficient performance under Atkins v. Attorney General, 932 F.2d 1439 (11th Cir. 1991). Had an objection been imposed, a reversal would have been required on appeal as it was in Taylor. Accordingly, Mr. Mitchell was prejudiced by the failure to object. Rule 3.850 relief was therefore also required of the basis of this claim. The circuit court's grant of relief must be affirmed.

CONCLUSIONS

The Circuit Court's finding that trial counsel's performance at the guilt phase of the trial was substandard is supported by substantial, competent evidence. That finding is also entitled to this Court's deference and should not be disturbed.

The Circuit Court erred, however, as a matter of law and fact in its conclusion that trial counsel's substandard performance was not prejudicial at

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[22]The prosecutor in Taylor was Mike Benito, the same person who prosecuted Mr. Mitchell. His argument in both cases was virtually the same and equally improper.

the guilt phase, and this part of its Order should be reversed and relief granted.

The Circuit Court, however, was correct in finding prejudice at the penalty phase. The Circuit Court's grant of resentencing was factually and legally correct, and well supported by substantial evidence.

I HEREBY CERTIFY that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 25, 1991.

Respectfully submitted,

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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

JUDITH J. DOUGHERTY
Assistant CCR
Florida Bar No. 0187786

THOMAS H. DUNN
Assistant CCR
Florida Bar No. 871573

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

By: _____
Counsel for Appellant/Cross-Appellee

Copies furnished to:

Candance Sunderland
Assistant Attorney General
Westwood Building, 7th Floor
2002 North Lois Avenue
Tampa, Florida 33607