IN THE SUPREME COURT OF FLORIDA

CASE NO. 76,377

MILO A. ROSE,

Appellant,

v.

STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE SIXTH JUDICIAL CIRCUIT COURT,
IN AND FOR PINELLAS COUNTY, STATE OF FLORIDA

INITIAL BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court's denial of Mr. Rose's motion for post-conviction relief. The motion was brought pursuant to Fla. R. Crim. P. 3850. The circuit court denied Mr. Rose's claims following a limited evidentiary hearing.

The following symbols will be used to designate references to the record in this instant cause:

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

"PC" -- Record on 3.850 Appeal to this Court

All other citations will be self-explanatory or will be otherwise explained. It ehould be noted at the outset that the circuit clerk included the Rule 3.850 Appendix in the record on appeal, but did not paginate the Appendix.

REQUEST FOR ORAL ARGUMENT

Mr. Rose has been sentenced to death. The resolution of the issues involved in this action will therefore determine whether he lives or dies. This Court has not hesitated to allow wral argument in other capital cases in a similar procedural posture. A full opportunity to air the issues through oral argument would be more than appropriate in this caee, given the seriousness of the claims involved and the stakes at issue, and Mr. Rose through counrel accordingly urges that the Court permit oral argument.

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STATEMENT OF THE CASE

In October of 1982, Milo Rose resided with Barbara Richardson. Mr. Rose, Ms. Richardeon and her son, Butch, were drinking companions. All three drank heavily and conetantly. On October 18, 1982, Butch Richardson was found dead. A concrete cinder block had been dropped on hie head. Mr. Richardson's blood alcohol content measured 0.19 percent (R. 857).

Milo Rose was indicted by a Pinellas County Grand Jury on October 26, 1982, charging him with the murder of Butch Richardson. Trial counsel, Darryl Roueon, was appointed on March 31, 1983, to replace prior counsel. Terry Weet Cobb, an attorney who shared office apace with Mr. Rouson, agreed to "help out" (PC. 935). As the trial date neared, Ms. Cobb found that Mr. Rouson was "unavailable" and placing "responsibility" for Mr. Rose's caee on her shoulders (PC. 936). The weekend before the trial began, Ms. Cobb ceased her involvement in the case:

> I just was not at all prepared or competent or experienced enough to be repreeenting anybody in a criminal ease, much less a capital case, and I felt like I was being pushed into that direction more and more, and I waa not interested in having that happen.

(PC. 935-36).

Trial commenced on June 28, 1983, and concluded on June 30, 1983. At the beginning of the trial, Mr. Rouson sought a continuance becauee he was unprepared. However, the Continuance was denied. During the guilt phase, Mr. Rose sought to have Mr. Roueon removed from his case. Mr. Rouson responded, "I cannot stand, in good faith, before thie Court at thie time and state that I can continue in the purest form of representation that he deserves and he is entitled to under the current law and under the Constitution" (R. 914). Thereupon, the circuit court judge and Mr. Rouson retired to chambers for "in camera" discussion. Mr. Rose was excluded from these proceedings. During the in camera discussion, Mr. Rouson told the judge Mr. Rose was not innocent. ("He told me [Judge Schaeffer] that he was having a problem with whether or not he felt his client was still -- was innocent" (PC. 812). Mr. Roueon was not sure whether this would inhibit hie performance. After what "[s]ome people might think that was juet subtle arm-twisting" by the judge, Mr. Rouson told the judge he could set aside his feelings and continue to

represent Mr. Roee (PC. 861). Judge Schaeffer recalled reminding Mr. Rouson of his "ethical oath" which would require "vigorous representation as you would if you thought he was innocent" (PC. 813). After Judge Schaeffer'e references to the "ethical oath," Mr. Roueon announced he would remain on the case. Mr. Rose thereafter was found guilty as charged.

Following the guilty verdict, Mr. Roueon sought time to prepare for the penalty phase. Mr. Rouson had never been involved in a capital case before. The court delayed the proceedings from July 1, 1983, until July 5, 1983. Mr. Roueon called an experienced criminal trial lawyer, Pat Doherty, and explained that he had no mitigation to present and had up to that point made no efforte to locate any (PC. 928). Mr. Doherty indicated his willingness to assist and even be co-counsel (PC. 930). Mr. Doherty did not again hear from Mr. Rouson until after the penalty phase had been conducted. Penalty phase was on July 5, 1983, and the jury recommended death. Mr. Rose was sentenced to death on July 8, 1983. On direct appeal, this Court affirmed the conviction and sentence. Rose v. State, 472 So, 2d 1155 (Fla. 1985).

an October 2, 1987, Mr. Rose filed his Motion to Vacate Judgment. An amendment waa filed on August 2, 1988. The trial court summarily denied moat of the Rule 3.850 claims, but ordered a limited evidentiary hearing as to those claims concerning ineffective assistance of eouneel in penalty phase only, and a single claim relating to Caldwell v. Mississippi, 472 U.S. 320 (1985). The hearing and argument were conducted on September 7-9 and 12, 1988. The trial court denied all relief on January 25, 1990. As to penalty phase ineffective assistance claim, the order atated: "Counsel, of necessity therefore, had to rely more on direction given him by hie client than counsel would in the usual case with sufficient time to investigate and prepare" (PC. 562). Thereafter, this appeal from the circuit court's denial of the Rule 3.850 motion was perfected.

SUMMARY OF ARGUMENT

1. Mr. Rose was denied a meaningful, individualized capital sentencing hearing because of his trial counsel Darryl Rouaon's complete and unreasonable failure to prepare and preeent compelling, readily available mitigation, and to

rebut the State's proof. These errors by trial counsel rendered his repreeentation below ineffective and violated Mr. Rose's righte under the eixth, eighth and fourteenth amendments. With the guilty verdict in this case, trial counsel moved for a continuance of the penalty phase with the confession that he was unprepared and had made no effort to secure any witnesses on behalf of Mr. Rose. He further disclosed that ehort of three rather obvioue mitigation witnesses "I'm at a loss right now to come up with names." (R. 1102-05). After the guilty verdict trial couneel Rouson contacted experienced Pinellas County capital attorneys in a panic state, admitted he had done nothing and aeked for help. He then failed to follow up on offers of assistance. Roueon presented a pitiful amount of mitigation when routine investigation would have provided extensive testimony of Mr. Rose's having grown up in an abusive, alcoholic, extremely dysfunctional family; of Mr. Rose's life long struggles with hie own severe alcoholism and drug addiction; of Mr. Rose's head injuries; and of Mr. Rose's past positive conduct as an older brother, husband and father. Rouson also failed to provide this important background material to mental health profeseionala whose evaluations were not reliable and complete without it. Hers trial counsel was also deficient in other areas. Had counsel performed properly there is every reasonable probability of a different outcome. Rule 3.850 relief and a new penalty phase proceeding is proper.

2. Mr. Rose's rights to due proceea and equal protection under the fifth, sixth, eighth and fourteenth amendments were violated, because the mental health expert retained to evaluate him failed to conduct a profeeeionally competent and appropriate evaluation, thus depriving him of a fair, individualized and reliable capital eentencing determination. Dr. Vincent Slomin, Jr. testified at the 3.850 evidentiary hearing that he did not puraue some mitigation because he wae not allowed adequate time for testing as to the effects of alcohol on Mr. Rose's brain. Rouson here failed to insure that Mr. Rose had the benefit of an adequate evaluation by not insuring that Dr. Slomin had adequate time and failing to provide him neceeeary background information. Rule 3.850 relief and a new penalty phase are proper.

3. Defenee counsel conducted himself at trial in such a way as to deny Mr.

Rose a zealous advocate in violation of his sixth, eighth, and fourteenth amendment righte. Besides being unavailable to his client before trial and unprepared in the course of it, Roueon met with the trial court in chambere, off the record, and without the presence of Mr. Rose. This followed a request during the trial by Mr. Rose that he be appointed a new attorney. At the 3.850 hearing the judge stated that Rouson told her during this closed door interview that he doubted Mr. Rose's innocence and that these doubts undermined the vigorousness of his defense. Rouson testified at the hearing that he had increasing doubts as to his ability to represent Mr. Rose effectively, that he doubted Mr. Rose's innocence, and that he could not bring himself to even like Mr. Roee any longer. The trial transcripts reflect similar sentiments by Rouson just before the trial court denied Mr. Rose's request for new counsel. Rouson's deficient performance reflects his lack of commitment to his client and undermines confidence in the outcome of this trial. Mr. Rose's conviction and death sentence ehould be vacated.

4. Rouson's deficient knowledge of basic facts in this case so undermined his ability to represent Mr. Roae at the guilt phase of this trial that he provided ineffective representation, in violation of his sixth, eighth, thirteenth and fourteenth amendment rights. From the outset it was obvious that blood found on Mr. Rose's clothea and that of the victim would be crucial evidence. Rouson failed to inform himself of the proper procedure for gathering blood eamples for testing to use in critical cross examination, resulting in a complete failure to vigorously test the State's proof. He unreasonably failed to secure a blood expert for the defense to assist his preparation and to testify as to the correct procedure for gathering blood samples for teeting. He further failed to inform himself of the succession of conflicting and inconsistent statements made by four critically important eyewitnesses to the murder €or use in impeachment. Nor did he secure an expert to testify on the unreliability of such testimony. Again, ae a result of Rouson's unreasonable Lack of preparation important State evidence was not put to the test. The jury never was shown the defects in the State's case because of counsel's lack of familiarity with the facts. An evidentiary hearing and relief are proper.

5. Rouson failed to inveatigate available lay and expert testimony on Mr. Rose's intoxication €or use in a myriad of relevant legal issues, in violation of Mr. Rose's sixth, eighth, and fourteenth amendment rights. Mr. Rose was charged with first degree murder, a specific intent crime, where proof of intoxication could negate an essential element the State wae required to prove. Intoxication could also go to bath atatutory and non-atatutory mitigation. Easily obtainable testimony both as to Mr. Rose's intoxication the night of the crime and his aevere alcoholism waa available to Rouson. He was ineffective €or failing to inveatigate, present and properly argue the intoxication issue. An evidentiary hearing and relief are proper.

6. Mr. Rose's death sentence is unconstitutionally disproportionate in comparison with other Florida cases in which life sentences resulted, and such arbitrary application of the death sentence violates the eighth and fourteenth amendments. This conclusion is unavoidable in light of the extensive mitigation preaented at the 3.850 hearing but which trial counsel ineffectively failed to inveetigate, develop and present. Mr. Rose's death sentence should be vacated.

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

8. The jury was erroneously instructed that under Florida law Mr. Rose bore the burden of proving a life sentence was warranted.

9. Mr. Rose's jury was erroneously instructed that a majority vote was required in order to recommend mercy.

10. The jury instructions regarding and trial court's aseessment of the heinous, atrocious or cruel aggravating and cold, calculated and premeditated factors wae inadequate under Mavnard v. Cartwriaht.

11. The sentence rests upon an unconstitutional automatic aggravating circumstance.

ARGUMENT I

MR. ROSE WAS DENIED A MEANINGFUL, INDIVIDUALIZED CAPITAL SENTENCING PROCEEDING BECAUSE OF COUNSEL'S UNREASONABLE FAILURE TO PREPARE AND PRESENT COMPELLING, AVAILABLE MITIGATION, AND TO REBUT THE STATE'S PROOF, IN VIOLATION OF MR. ROSE'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Under Strickland v. Washington, 466 U.S. 668 (1984), a defendant must plead: (1) unreasonable attorney performance and (2) prejudice. Mr. Rose sufficiently presented facts on each prong below, and the lower court erred in denying thia claim. The Supreme Court has emphasized the importance of focusing the jury's attention on "the particularized characteristics of the individual defendant." Id. at 206. See also Penry v. Lynaugh, 109 S. Ct. 2934 (1989). Court# have therefore expreesly and repeatedly held that trial counsel in capital sentencing proceedings has a duty to inveatiaate available mitigating evidence before deciding whether or not euch evidence ahould be preeented. Bassett v. State, 541 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Harris v. Duaaer, 074 F.2d 756 (11th Cir. 1989); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988); Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988); Tyler v. Kemp, 755 F.2d 741, 745 (11th Cir. 1985); Blake v. Kemp, 758 F.2d 523, 533-35 (11th Cir. 1985); Thomas v. Kemp, 796 F.2d 1322, 1325 (11th Cir. 1986). Moreover, counsel has a duty to know the law and make proper objection8 to admissible evidence. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Trial counsel here did not meet these standards, and Mr. Rose is entitled to relief on this claim.'

Trial counsel had conducted no investigation into Mr. Rose's background until the guilty verdict wae returned. He then had to ask for a continuance:

> THE COURT: Do you want to go ahead and set the second phase for tomorrow morning?
>
> * * *
>
> MR. ROUSON: Judge, that doesn't give me much time to try to at least prepare for an adequate sentencing advocacy so I can present Mr.

'In denying relief, Judge Schaeffer etated: "Counsel, of necessity therefore, had to rely more on direction given him by his client than counsel would in the usual case with sufficient time to investigate and prepare" (PC. 562). Judge Schaeffer thus conceded that there was insufficient time to inveetigate and prepare for penalty phaee proceedings in thia case. Apparently, Judge schaeffer concluded that Milo Rose waived his right6 to have adequate investigation and preparation by insisting on a speedy trial. However, no inquiry was ever made of Mr. Roee of record either before or after the guilty phase as to whether he wanted to waive effective representation of counsel at the penalty phaee and/or sufficient time to investigate and prepare for the penalty phase proceedings. Certainly, under Anderson v. State, 574 So. 2d 87 (Fla. 1991), a majority of thia Court believe an of-record-inquiry is necessary to establish a knowing, intelligent, and voluntary waiver of an individualized eentencing.

Rose in the beat light possible. And mitigating factors, I need to contact the pevcholoaist and see if he is available.

THE COURT: Well, now, I don't mean to butt in the middle of your record, but I do need to tell you I get aggravated when I sit down and talk with lawyers informally on how we'll proceed on something, we all sit down and figure it out. Yesterday when we left, we decided this. Now all of a eudden, you change your mind.

MR. ROUSON: Judge, I thought when we left yesterday, you aaid you were inclined to prabably set sentencing €or Tueeday. We had diecueaed

THE COURT: Sentencing after the jury's recommendation -- what I said --

MR. ROUSON: Oh, okay.

THE COURT: -- whatever the jury's recommendation, I wae not inclined to sentence on the epot.

MR. ROUSON: All right, Judge, I was assuming something. I wasn't in my thoughts. I waa thinking past the second phase, is what I was thinking. But I have no problem going through the second phaee of it tomorrow morning. I was thinking sentencing more than anything else. The jury, if they come back with a recommendation tomorrow, I'm assuming there is still the possibility we will set sentencing itself €or like Tueeday.

THE COURT: Either that, or I might even order a PSI, even though, you know, I may or may not. I don't know.

MR. ROUSON: Judge, I didn't mean to sound like I was going back on anything but -- but, in my thinking --

THE COURT: I don't want to deny you the right to have adequate time, either. But I juet thought we more or less aettled this.

MR. ROUSON: That is what we talked about, Judge. That is what we talked about.

THE COURT: Are you going to be prepared for the sentencing phase in front of the jury which is where you would present any mitigating circumstances and be prepared to argue against any aggravating circumstancee tomorrow?

MR. ROUSON: Judge, I will do my beet. Can we do something like atart it at eleven, as opposed to eight-thirty, or can we atart it in the afternoon, say at one, as opposed to the first thing in the morning? Or must we start at nine o'clock?

THE COURT: We don't have to. Who is it you need?

MR. ROUSON: Well, I want to contact the psychologist, talk with him. I want to talk with Barbara Richardsoq.

THE COURT: Is that a witness?

MR. BARTLETT: The victim's mother.

THE COURT: Can't you have her here in the morning?

MR. BARTLETT: She is totally uncooperative with us. We have no control over her whataoever. Be subpoenaed her €or trial. We couldn't get service on her.

THE COURT: You can talk to her.

MR. ROWSON: Yea, I know where ehe livea. I have been there, so I can get in touch with her.

THE COURT: You can talk to the psychiatrist this afternoon?

MR. ROWSON: Yes, Judge.

THE COURT: Is he going to be able to tell you something rea1 faet? Who else do you need now to posribly call as a witnesa?

MR. ROUSON: Judge, I have to reflect upon it. I thought about it already, and there is another gentleman that was attending AA with Mr. Rase who has been very favorable towards him and his progress and thinga like that, and I would probably try to call him this afternoon, also, and have him here. Short of those three people, the psychiatrist, Mrr. Richardson and this guy Tom something with AA, I'm at a loss right now to come up with names.

(R. 1102-05)(emphasis added).

At the hearing below, Mr. Roee presented Patrick Doherty aa an experienced capital defenee lawyer who had observed Mr. Rose's trial counsel, Darryl Roueon. After the guilt verdict was returned, Mr. Rose's trial counsel called Mr. Doherty in a panic and asked "what ehould I do?" Mr. Doherty indicated Mr. Roueon did not know what to do next. Mr. Doherty testified, "I basically aaked him what kind of testimony he had to put on in the penalty phase, and my underatanding was that -- my recollection is he told me he had none" (PC. 928). Mr. Roueon gave no indication that any investigation or preparation €or the penalty phase had been done. Mr. Doherty testified that preparation for penalty phase in a case such as Mr. Rose's would take an absolute minimum of two weeks to prepare:

Q. How long or how much time is generally necessary to do that, or what did you envision when you were talking to him?

A. Of course, you should have done that pre-trial, obviously, but I thought that if we dropped everything, if we did nothing else but this and the two or [sic] us worked on it all day long every day, we might be able to pull it together in a couple of weeks, with luck. You did need a lot of break8 along the way. The people you wrote to for medical records would need to respond immediately and things like that, but it could be done in a couple of weeks.

Q. When you indicate "we", what were you envisioning in that regard?

A, I was going to help him.

Q. Would you enter an appearance?

A. Yes.

Q. In preparing for a penalty phaae in this instance, did you believe it was necessary to have two people to do the work in order to get it done?

A. Two people working all day, every day, for two weeks, with luck, could get it done.

Q. How advisable is it to ever have capital litigation dons by one attorney?

A. The answer to that is it is not advisable at all. I did it four or five times when I first started practicing law, but that is because I was ignorant. I think it is incredibly -- it is not the thing to do.

Let me put it that way.

You cannot cover all the bases with just one person in trial, for this very reason. If the person geta convicted of a first degree murder and you are surprised, as Darryl expressed to me he was aurprieed, then you have to go into a penalty phase.

The advocate who hae asked the jury to find this person not guilty has lost a certain amount of credibility. It would be wise to get another person to do the penalty phaae, other than the person who argued for his innocence.

Q. You would have the attorneys switch primary responsibility, then?

A. Yee.

Q. You indicated he was surprised by the guilty verdict. In connection with preparing for the penalty phase, did he indicate that it had caused him any problems as far as not expecting a penalty phaae to occur?

A. Yes. I don't think we expected a penalty phaae, and that is why he was calling me in kind of a panic, wae that he didn't expect it.

(PC. 930-932). Mr. Dwherty went on to teetify that he had represented difficult, uncooperative clients and that thie should not affect the necessary background preparation (PC. 932-933). Mr. Doherty's testimony was unrefuted by the State in any way.

Aesietant Public Defender John Eide, part of Mr. Roee's initial defense team, also testified. His ten year's public defender experience included a dozen first degree murder trials (PC. 918). He encountered Mr. Roee's trial counsel the night of the guilty verdict:

Q. Can you explain the circumetances of that?

A. Well, I believe it wae the night he got the verdict on the guilt phase, and I was home and received a call from either the bar tender or a friend of mine at this bar, which is four blocks from where I live on the beach, and they said two Black gentlemen were down there in suits asking for my address, and being loath to give them my address, not knowing the purpose, I told them I would be down there.

I came down there, and it was Darryl Rouson and Charles Felton.

Q. Did you have a conversation with them at that point in time?

A. I recall speaking with Darryl there at Shadracks regarding the penalty phase.

Q. Can you indicate what the discussion wan with reference to the penalty phase?

A. As I have indicated before, this had been quite a while, and all I can recall is that he sought my aseistance in presenting the penalty phaae.

Q. Did he indicate to you what had been done up to that point?

A. If he did, I can't specifically recall it. I know that there was very little to present. There wasn't a great wealth of penalty phase information that he had.

(PC. *919-920).*

Mr. Wayne Shipp, an experienced death penalty attorney who first investigated thin ease, had been prepared to assist at penalty phaee. He testified at the hearing below (PC. 938-997), including as followe:

Q. In looking €or the possible mitigating circumstances, what specifically are you looking for?

A. Well, first off, obviouely, you are trying to find out if a person has a psychological problem that can be documented; whether or not thev are a aubetance abuser; whether ox not they had been abused as a child or come from an unstable background. Things that explain his course of conduct, so as not to make it look as --

People don't take lightly to other people killing people, and you have to be able to -- my personal theory was whether this conduct or aberration was a matter of genetics or environment or a combination of both which caused him not to be able to abide by the rules of society.

Q. Do you also try to anticipate what the aggravating circumstances are that the State may be seeking?

A. Yes.

Q. What preparation did you do along those lines?

A. I think most of theee are pretty well specified and they were pretty limited, at least at that time, what we would call aggravating circumetances, and maybe you can look at the facts and circumstances surrounding the crime and determine whether or not they exist.

(PC. 943-44)(emphasis added).

He admitted to us that he was an alcoholic and had been attending AA a couple of months prior to this, obviously not on a regular basis, and that I probably would have at that time asked to have monies appropriated so he could have a psychological -- an alcohol induced EEG because of the extremely violent things that occurred when Mr. Rose, apparently, was intoxicated.

Q. You would be looking for some sort of organicity or brain damage?

A. Yes.

Q. In terms of the evidence that Mr. Rose wae intoxicated on the night in question, would you have used it with reference to the mitigating cireumetances in this case?

A. Obviously that is a mitigating circumstance, and I think that as the case had progreseed, I would have subpoenaed those people in the bar, possibly €or the purpose of that hearing, at least the bartender who had some idea of how much he had had to drink.

Q. Would it also have been something for you to be looking at with reference to any of the aggravating circumetances?

A. Well, I think if -- I think it counteracts the cold, calculated and premeditated, because that is more than the premeditated first degree murder. It requires a deeper thought and reflex, I believe, and I think that would be helpful with that.

Q. With reference to presenting the intoxication, how much of a problem, in your experience, has it been when you have got a client that claims he didn't do it and wasn't there? Does that prevent you from presenting the evidence?

A. In the penalty phase?

Q. Yes.

A. No. In fact, in my experience with Mr. Rose, he didn't say he wasn't in the general area, so I don't see how that would have been a problem. He admitted to at least being in the general area of the bar in that neighborhood.

Q. How important is the defendant's Cooperation in terms of digging up the background information?

A. Well, obviously, there is some cooperation needed, but I know that we at least had Mr. Rose's parents' names and addresses and we knew who hie brother was, and at least parents sometimes can supply a better early history than the person, himself, and obvioualy you need their cooperation, but you can get a lot of it without their cooperation from the family members if they give you at least that much.

Q. Can you usually find some sort of a paper trail?

A. Yes. Usually you start out with the birth records, possibly hospital records for the birth; find out if they were a forceps baby. Through the school records find out how they conducted themselves there; find out if they had any psychiatric treatment. The parents usually know about major injuries and the hospital they were treated at there.

You can get a goad deal of information about a person.

(PC. 948-50).

A. Our investigators had spoken to Mr. Rose's (AA) sponsor in Clearwater.

Q. How useful would that have been at the penalty phase?

A. Obviously for me to say how ueeful it is is pretty hard. I can't say what the jury is going to consider or not consider, but it would have been a witness, from what I have read in the thing, who probably would have had nicer thinge to say about Milo than the jury had heard for two or three days prior to that, and talk about hie attempts to rehabilitate himself.

(PC. 954). Mr. Shipp believed that testimony about Mr. Rose as having given blood earlier in the day was important:

Q. Was that eomething that was significant with reference to the intoxication?

A. I know that the concentration of alcohol in the blood -- Mr. Roee had given a pint of serum that day, and I think the amount a person consumes, just common sense, even working with some DUI cases, that probably would affect his blood alcohol to the extent it could have taken less alcohol to give him the higher blood alcohol.

Q. Is that something you would have discussed with an expert?

A, I would hope so.

Q. Now, in this case, in addition to the evidence of Mr. Rose's intoxication, were you able to find anything with reference to the eye-witneeses and their opinions of the assailant's intoxication?

A. I can remember I have looked at those recently, and at least a couple of the eve-witnesses mads the etatement to each other. "Look, Just a couple of drunks," and they indicated to our investigators that the two individuals thev saw were etumblina or staggering.

Q. Would that have been important information with reference to the penalty phase and using it in presenting it to the jury?

A. Obviously, that is other evidence of the individuals and assailant's condition at the time. If the jury found Mr. Rose guilty, obviously they consider him the assailant, and I think they would have to obviously coneider that.

(PC. 956-957). Mr. Shipp testified that trial counsel's failure to prepare on alcoholism as mitigation until after the guilty verdict was unreasonable:

Q. In consulting with other attorneye, or in consulting with Mr. Eide, would you have waited until after the guilty verdict before consulting with them with reference to the penalty phase?

A. I think that is standard practice to assume that the verdict is going to be guilty and to be prepared to proceed immediately thereafter.

(PC. 980).

Mr. Rouson never obtained the wealth of information that Mr. Shipp possessed. In fact, he wae so unaware of its importance and the substantial amount of effort involved in preparing a penalty phase that he left that work until after the guilty verdict was returned. He testified in the Rule 3.850 hearing below:

> Q. Do you recall contacting any of Mr. Rose's family members prior to commencement of the trial?
>
> A. No.
>
> * * *
>
> Q. What could family members do?
>
> A. Well, you're asking me to epeculate, of course. I assume you want -- the family members could testify about his childhood, could testify about knowing him all hie life, could teetify about the blow to his head that he received when he was eleven years old.
>
> I mean family members can testify from peraonal experience, knowledge, about his background, hie social habits, familiar habits.
>
> * * *
>
> Q. Did you ever take it upon yourself to contact them directly?
>
> A. No, I didn't.
>
> Q. Did you know that hia brother David Rose had been involved in one of the cases that waa being uaed as an aggravating circumstance?
>
> A. Yea, I did.
>
> Q. Did you know how to get in touch with the family if you had wanted to?
>
> A. I believe David could have been found. I think he waa in the system at the time. The others I had no addresses on and Milo was not even sure of addresses €or some of his family if I recall correctly.
>
> Q. Okay. But you did not contact David in order to Bee if he would be of any aeaiatance?
>
> A. No, I didn't.

(PC. 839-841).

Trial counsel's testimony at the hearing as to what he did do to prepare for penalty phase after the guilty verdict was in makes it clear how much he did not do at all or in a timely fashion:

> Q. What do you recall that you were able to do or not do during that time period [between the guilt and penalty phaaea] in preparation for -- first, what did you get done and were there things that you wanted to get done that you weren't able to?

A. Well, I did contact Dr. Slomin. I did contact Barbara Richardson. I did contact Mre. Singletary. I did speak with my client. I did research the instructions €or the penalty phaae. I did prepare direct examination for the witnesses I intended to call. I did look through the trial. and my notes of what happened and tried to determine what of that I could pull out and use in mitigation €or the penalty phase.

I did consult with various people, friende, fellow attorneye. What I didn't do was delay it three years. I mean there's always thinge that you can think back in retroepect that you didn't do that you could have done or would have done or ehould have done.

* * *

Q. How about school recorde, medical recorde, anything along those lines?

A. Yes, I guees certainly if I had more time in between the guilt phase and the penalty phase it would have been nice to have those things.

Q. Do you think you could have done them before the guilt phase?

A. Yes, it's possible.

(PC. 864-867).

At the Rule 3.850 hearing, various family members testified to Mr. Rose's drug and alcohol abuse dating back to childhood, the severely dysfunctional alcoholic home he grew up in, set out elsewhere in this brief, his sadistic and abusive parente, and severe head trauma he experienced.

Mr. Rose's older cousin, Mrs. Linda Kravec, testified that as the oldeet child Mr. Rose was often left in charge of several family membera whose parents were drunk. All the children, including Mr. Rose, were cuseed and verbally abused for no apparent reason:

Q. Can you tell the Court what Milo's mother is like?

A. My Aunt Mary, as a child for me growing up, was a very domineering person. She had a bad temper. she also drank a lot.

Q. Explain what you mean by "drank a lot."

A. Whenever they were down to visit or we went to visit them when they lived in Illinois, my parents and Milo's parenta would go out and leave us, all the kide, alone; me being the oldeet at the time, I was baby-sitter, and they would come back and they were drunk, and I'm talking drunk, and at timee there were arguments, if either one of us kids did or did not do something we were supposed to do, or the adults would argue among themselves, and the language was never nice.

Q. What kind of Language would they use?

A. My aunt has been known to cuss everyone and anyone. She would

call us no-good sons-of-bitches. She would call us bums, no-goods. We weren't worth anything, and it waen't just directed at her own kids, but directed at myself and my brother and sister.

Q. It was directed at her own children, also?

A. Correct.

Q. Including Milo?

A. Correct.

Q. How frequently would ehe be verbally abusive to him?

A. Any time ahe wae drinking or she wae mad about something.

Q. What did it take to bring on that kind of reaction?

A. You never knew. You really never knew. One minute she would be fine, and the next minute she would explode.

Q. That didn't depend on what anyone else had done?

A. Not necessarily.

Q. Did you know anyone else in Milo's family that had a drinking problem?

A. My uncle does.

Q. Not that I can honestly say other than my father. My father was an alcoholic.

* * *

Q. Would you say that Milo's parents were eupportive of him?

A. No.

Q. And what were they?

A. I would use the terminology "out of sight out of mind."

* * *

Q. Were Milo's parents ever physically abusive to him?

A. Yes.

Q. And can you explain that?

A. They had come to visit us. I was probably about ten or eleven. Milo was eight or nine, nine or ten, in that area, and we had barbecued in the back yard. It took like seven hours to put together the barbecue grill because all four adults had been drinking since shortly after they had gotten up €or the day.

They had gone fishing, and they came back, and Milo did something or said something. I keep thinking that he said something like -- he was told to do something, and he said no, or didn't do it right away like he was suppose to, and he got slapped, and it was not the first time.

It was like when Milo was around, he waa being ridden all the time. There had been occaeione in that weekend here that my father came to Milo's defense; told my aunt to leave him alone and get off his back.

Q. Waa your family supportive of Milo?

A. No.

* * *

Q. So you wouldn't eay that Milo's family was particularly a close, loving family?

A. Quite the contrary, no.

(PC. 999-1004). Mrs. Kravec also testified that Mr. Rose never knew his biological father. Mr. Rose waa raised by a man not hie father. He has only recently learned the real father's identity (PC. 1010).

Mr. Rose's younger brother, David Rose, also tertified at the Rule 3.850 hearing. He testified that Mr. Rose left this dyefunctional home when he was about 15. The brother described a family of arguing, fighting drunkards where the children "always hid" to avoid the violence:

Q. When you were growing up, what were your parents like?

A. They were drinkers, They drank a lot. They argued, you know.

Q. Was the arguing and drinking connected in anyway?

A. That's why they were arguing, drinking.

Q. When they were arguing, did they get physical?

A. Yes, a few times.

Q. Can you explain that?

A. They would fight. I mean really fight.

Q. Fight with each other?

A. Yes.

Q. With the kids?

A. We alwaya hid.

(PC. 1013).

Q. When would your parents argue? How would the fights end up?

A. I guess punches being thrown, you know. A few times I had to pull them apart because my father would end up leaving for a while, you know.

Q. When you eay leaving €or a while, how long?

A. A few days.

Q. And you indicated that your mother was the one who would discipline you and sometimes would beat you. Did that leave injuries or marke or anything like that?

A. Bruises. She used to hit us for losing fights, too, when we was [eic] younger.

Q. Can you explain that?

A. If somebody beat us up, she would hit us and tell us to go out there and hit them back, you know.

(PC. 1017).

When their parente left the house to drink, Mr. Roee was left to baby-sit and he acted reeponsibly (PC. 1015-1016). The brother recalled their mother as the primary disciplinarian: "My mom would alwaye send us to the basement and come down there and beat us" (Pc. 1016).

They were never cloee to their father and the brother did not recall any expreeeione of love or care being exchanged between them. "My dad is pretty cold at times" (PC. 1023). The father did not provide for the physical needs of the family and they would sometimes have to seek food from neighbors (PC. 1016–1017). The father wae absent so much he had no relationship with his children:

Q. Did Milo have a very good relationship with your parents? Were they cloee? How would you describe them?

A. They tried. They fought a lot, but they tried.

Q. Did Milo understand that they were trying?

A. I don't know. My dad is kind of funny. He would etay in his room most of the time. If he wasn't in hie room, he waa out at a bar. It's hard to have a relationship when he ain't there, you know. He's not the kid (sic) of guy to go out and throw the ball with you or nothing, you know.

(PC. 1019).

This family and early childhood experience left Mr. Rose with a severe alcohol and drug problem according to his brother:

Q. When you were growing up, what were your parente like?

A. They were drinkera. They drank a lot. They argued, you know.

Q. Was the arguing and drink ng connected in anyway?

A. That's why they were arguing, drinking.

Q. When they were arguing, did they get physical?

A. Yes, a few times.

Q. Can you explain that?

A. They would fight. I mean really fight.

Q. Fight with each other?

A. Yes.

Q. With the kids?

A. We always hid.

* * *

Q. Did they drink a fair amount or lot of the time?

A. Yea, drank a lot.

Q. Looking back on it, do you think they had a drinking problem?

A. Yes.

Q. Do you have a drinking problem?

A. Yes, I just don't drink, you know.

Q. Why is that?

A. Because something always happens when I start drinking; I start arguing and fighting. It just takes the first one.

* * *

Q. How about the other children, the other kids in the family? Did they have drinking problems?

A. My little brother does. My sister, she don't [sic] drink. She's kind of like alienated from the family. She's out in Texas.

Q. How about Milo?

A. He drank a lot.

Q. Did he seem to have a problem controllina his drinking?

A. Yes, just like me. You start with the first one, and that is hard to -- you just don't quit after the first one. You just don't ao out and have a couple of drinks. You drink all night.

Q. Now when you were growing up and your parents would be drinking, where did they drink?

A. Well, sometimes they drank at the house, and other times they went out to bare.

* * *

Q. When would your parents argue? How would their fights end up?

A. I guess punches being thrown, you know. A few times I had to pull them apart because my father would end up leaving for a while, you know.

Q. When you say leaving €or a while, haw long?

A. A few days

* * *

Q. Do you recall when Milo began drinking, anything along those lines?

A. When he was about 15 or 16.

Q. And how do you recall that?

A. I was at home and got a phone call, and they said Milo waa drunk, and he was getting in fights at some guy's house, and they wanted my dad to come over and pick him up.

From what I heard, my dad got over there and he was drunk and got in a fight with my dad, and my dad couldn't handle him, so they called the law.

Q. How soon after that did Milo leave home?

A. It wasn't much longer. I think he waa in reform school. I remember him being in reform school for a long time.

Q. In addition to alcohol, do you know what, if any, drugs Milo did?

A. Yes. Just acid, crystal methadrene, speed, marijuana, alcohol; whatever everybody else waa using.

Q. Do you have any idea why Milo was drinking and doing the drugs that he did?

A. I don't know. Maybe trying to escape reality.

Q. Do you recall anything about miffing glue?

A. Yes, they caught him in the basement one time.

(PC. 1013-15, 1017, 1019-20).

The brother testified to extended illnesses suffered by Mr. Rose in childhood and to neighborhood children picking on him over this as well as about hie dark complexion, an obvioue reference to illegitimacy. Mr. Rose was sensitive about both subjects:

Q. When you were growing up, do you remember Milo being sick?

A. Yes, years ago. I wae pretty small.

Q. What kind of memories do you have of that?

A. Juet around Chrietmae-time I remember him getting a bunch of models because he was bedridden for a long time, you know.

Q. Do you know what the eickneae was that he had?

A. Rheumatic fever. I remember him being laid up for a long time. They even got a longer cord on the phone €or him to put in hi8 room. He was laid up a long time.

Q. Do you recall any of the kids in the neighborhood or at eehool giving Milo a difficult time for being sickly or anything like that?

A. They talked about it behind hie back.

Q. Wae he eensitive about that?

A. Yes.

Q. How about hie complexion? He'e dark complected. Wae that something he was sensitive about?

A. Yes. He waa talked about and if you were talking about him, you were talking about hie mother, too.

(PC. 1017-18).

The brother testified as to Mr. Rose's marriage and two children. He recalled Mr. Roee "wae a good father" (PC, 1021). He worked as a plumber, had a house, and was "doing good" (PC. 1024). However, the key wae Milo's alcohol uee; sober Milo was a good person.

At another time the brother recalled Mr. Roee getting drunk in a bar where he was badly pistol whipped in a fight, requiring stitches. Another time a drunk Mr. Roee was hospitalized from a car accident where he hit a parked tar truck while doing 45-50 miles per hour:

Q. Do you know anything about Milo being pistol-whipped at one time?

* * *

Q. What did you observe?

A. He needed stitches. He was in pretty bad ehape. He was all black and blue and swollen when I saw him.

Q. Did you, at some point in time, get information ae to what had occurred to him?

A. Well, he told me what happened?

* * *

Q. What did he tell you?

A. He was going to the bar, and he wouldn't let him in becauee he was too drunk, and he tried to get in anyway, and the guy hit him in the head with a pistol a couple of timee.

He got pretty messed up in the car wreck he was in, too, with a couple of my buddies.

Q. Do you know when that was?

A. It was what, three years ago.

Q. Was it before the trial?

A. Yea.

Q. Were you around at that point in time?

A. I just left. They were in a different car. I wae in my own car.

Q. And did he end up in the hospital afterwards?

A. For a while, yes. They all got messed up. He hit a parked car -- truck dropping tar. It was atopped, and he must have been going 45 or 50 miles per hour. All of them got messed up real bad.

Q. And did you visit him in the hospital?

A. Yes.

Q. Were you able to obeerve what kind of injuries he suetained?

* * *

[sic] like a road map. Him [sic] and the other guye, it was -- it took some stitches to put them back together. It was real bad.

(PC. 1025-28).[2]

The brother was never contacted by Milo's trial attorney. Had counsel but contacted him, the brother would have testified to these things (PC. 1030). The brother did not previously know that hie testimony might be valuable in Milo's capital murder trial (PC. 1038). No one explained that he could help.

Another cousin of Mr. Rose's, Cheryl Stark, also testified in the Rule 3.850 hearing. She recalled Mr. Rose's mother wae "real strict about the way kids behave; the way they act. In her eyes children are to be seen and not heard at all." On family visits "she would always be really angry and irritable with Milo, more so than she did Janice or Edward or David [Milo's siblings]" (PC. 1043-1044). When the

[2]The transcript is missing the beginning to the last answer in the preceding quote.

mother was drunk, which was "most of the time," she was verbally abusive to the children, calling them namee:

> Q. Was she verbally or physically abusive of the kids?
>
> A. I've only seen her be verbally abueive of any of her children when she was drunk, but she was drunk moat of the times I saw her, moet of the time.
>
> Q. What kind of thinge would ehe aay to them?
>
> A. She would tell them they were no-good bums, and she called them names.
>
> Q. What kind of names?
>
> A. She called them son-of-a-bitches of baatards. Bastarda was her favorite word.
>
> Q. Did they have to do something in particular for her to act that way towards them?
>
> A. Not always, no.
>
> Q. What would bring her reaction? What would stir her reaction?
>
> A. Little things like if the kids didn't want to be hugged or kissed when she would come in from drinking and they would try to pull away. She would get really irritable and start cussing them out and everything, because they didn't seem to want her affection or her love.

(PC. 1044). Her husband, Mr. Rose's stepfather, was also verbally abusive to the children (PC. 1045).

Ms. Stark waa also available to trial counsel and willing to testify had she been asked (PC. 1046). However, Milo's trial attorney never contacted her. A8 a result, the jury did not hear what she could relate regarding Milo's background.

A mental health expert, Dr. Slomin, was appointed to examine Mr. Rose. On June 24, 1983, he prepared his report; this a mere four (4) days before trial. Dr. Slomin, a psychologist, testified at the Rule 3.850 hearing:

> Q. Subsequent to that, did you have further contact with Mr. Rouson and receive any additional information after writing your report and before the trial?
>
> A. Nothing in a written report. I met the following Saturday, or it may have been a Sunday, with Mr. Rouson and hie associate at the time -- I believe it was Terry West -- to discuss the outcome of the testing, the evaluation, and to discuss possible mitigating circumstances that we might enter into the penalty phase, if and when that occurred.
>
> * * *
>
> We discussed the chronic use of alcohol and drugs, which may be a

mitigating cireumatance.

> Upon reflection, it waa decided that it would not -- that voluntary ingestion of alcohol or drug abuse wae not necessarily a good defense in a mitigating defenee. Another one was that there was reeearch being done at the time -- I believe it was at Perry Point Hospital in Maryland, the Veteran's Administration Hospital -- that certain individuals under the influence of alcohol have irregular brain wavea, and they stimulate aggressive behavior. This had been ruled out due to the trial taking place approximately 48 hours from that time.

(PC. 1215-17).

Later in his testimony, Dr. Slomin again acknowledged that due to the shortage of time mitigation was not presented:

> Q. In retrospect, we had discuseed the possibility, due to the long-term subetance abuse, the possibility of some organic brain syndrome, but my teeting and his recall at the time when I spoke to him ruled that out.
>
> The other option was the possibility of a pathological electroencephalogram under the influence of alcohol, and that was discussed, but, again, due to the time, I did not have that information.

(PC. 1252).

Dr. Krop, who evaluated Mr. Rose for the Rule 3.850 proceedings, testified that with an adequate background inveetigation and adequate time €or mental health testing, a wealth of mitigation could be identified in Mr. Rose's case:

> Q. In evaluating Mr. Rose, what did you find?
>
> A. Well, in terms of just eome descriptive data to summarize Mr. Rose's background, I would say that he derivee from an extremely unstable background. He was not raised by his biological father, although in my discussion with Mr. Rose, it appears he didn't know that this person was not his biological father for quite a while.
>
> It is clear from discussions with a number of family members and affidavits, that Mr. Rose's parents were alcoholics. There was considerable emotional abuse, some physical abuse, but I would say the abuee waa more or less more of the emotional. and verbal nature than physical, although I would expect that Mrs. Rose, the mother, would be viewed as a child abuser, at leaet by the current atandards, in terms of the physical beatings she gave Mr. Rose.
>
> He wae viewed as different by his parents. Some of the comments they made -- they made some very derogatory comments. They talked about the color of his skin. They talked about him being their nigger. They talked about him being the black sheep of the family, and there was a tremendous amount of derogatory and critical statements about Mr. Rose when he was growing up.
>
> That type of discrimination was also compounded by some peer and some self discrimination in that Mr. Rose, himeelf, viewed himeelf as different, and this would be expected based on the parents' perception of him and some of the verbal abuse he received.

He was a very sickly child. He was a produce [sic] of forceps delivery. The records, I understand, the varioua information I reviewed, euggests that it was a very difficult delivery. Mrs. Rose, apparently, was unconscious at the time of the birth, and it was a very difficult delivery to have, and, thue, forceps delivery was required.

He was sickly in terms of he had rheumatic fever. There was suspected polio when he was younger. He had a number of high fevera. He had mumps when he was, I believe, seven or eight years old. He was in the hospital, I think, about nine or ten -- I'm sorry. He wae in the hospital €or a significant period of time. I believe the record suggests six months or longer in which he waa running a high fever and had convulsions. The record shows that he had a 105 or 105 [sic] fever.

It is not clear how long he ran this fever, but he did have convuleione when he had fever.

When he was seven or eight yeare old, he had an incident in which a nail wae driven into his akull. As he wae growing up, he apparently wae fairly popular in echool; participated in various athletic activitiee; wae wn the track team and was fairly popular, particularly associating with various -- the Jock8 or athletes in the echool.

It is not totally clear when he etarted drinking and using druge, but it looks like from the records and hie recall and talking to family members, that he began using drugs and sniffing glue around the age of 12, and drinking around that same age, and at that juncture he developed into a chronic pattern of drug abuse and alcohol abuse resulting in heroin addiction, ehooting up.

He finally received some type of treatment in a drug abuea program in which, I believe, he was involved in a residential program for several months; I believe three months. At that time, they were treating heroin addiction by substituting it with methadone maintenance, and he became addicted to methadone and required in-patient or residential treatment, but from the record, I can't see any other drug treatment or alcohol treatment other than his participating on an intermittent basis in AA.

I don't see anything in his history in terms of psychiatric treatment or other evidence of mental illness in his growing up.

He quit school in, I believe, the tenth grade. One of the things, Mr. Rose wanted to do was join the military. He attempted to join the military. He attempted to join the military, but was not allowed to because he had a problem with his testicle. He was born with a malformation or descending testicle which also precipitated his feeling of viewing himself as different from other people in terma of his masculinity.

Around the age of 16 or 17, he started getting into criminal trouble. He etarted getting involved in terms of problems with the police, and etarted, I believe, his first incarceration when he was about 17 years old, according to the records I have, and from that time on, it pretty much was a vicious circle in which he opted to get into various legal conflicts and engaged in illegal and anti-social activitiee.

From the records I have reviewed and from Mr. Rose's reports, apparently mast, if not all, of the anti-social behavior that he engaged in at the age of 17 or so was ueually associated with alcohol or drug abuse.

According to family members, Mr. Rose -- any type of fighting he got involved in usually included bar fights or other types of fights which led to -- which were aesociated with the alcohol and drug abuse.

In terms of his education, as I say, he dropped out of school in the tenth grade. He indicated that he waa not generally in trouble in achool. As far as his vocational hietory, he had one job €or about three years. He indicates that he was never fired from a job, although certainly because of his drinking, he either stopped going in and quit or possibly may have been laid off, but he generally would quit or not go in.

He was never fired because of any interaction or peraonalty [sic] conflicts with the individual that was his supervisor.

I would eay that is a summary of his background and history that essentially led up to the illegal involvement throughout his life.

He married once. The first time -- well, his first serious relationehip, his first marriage, was to a woman who wae older than he. I believe he had two children, and although he didn't marry her, he had a very heavy and intense involvement with, I believe her name was, Mrs. Richardeon, the mother of the victim in the case. She was also significantly older than Mr. Rose, and from other people's description, moat likely an alcoholic as well, and it is certainly not unusual for a child of an alcoholic parent to gravitate to be involved with other alcoholics, and becauee of the injuries and various dependency needs, Mr. Rose generally gravitated to women who were older than he, Mra. Rose being eignificantly older than he was, and that relationehip had its upa and downs.

Just around the time this incident occurred, he had been involved with her and stopped going to AA, and that relationship, also, I think, precipitated hie not working. This was something that was, I think, a product of a pathological relationship that he had with this woman.

That would pretty much summarize the descriptive or historical data that I had in terms of his background leading up to the current incident.

The psychological testing ahows that Mr. Rose if functioning in the average range of intelligence. He has a verbal IQ of 97, a performance IQ of 100, and a full-scale IQ of 98. What is significant over in the testing is that Mr. Rose showed significant deficits in certain eub-tests of the WAIS arc. That is significant in terms of personalty [sic] as well as cognitive deficits in terms of making a diagnosis of possible brain damage. Mr. Rose, of the 11 sub-tests which are included in the WAIS, scored on the average or slightly above average in 8 of the 11 area. Theee would typically show what the person's true intellectual abilities are and what the potential is.

On three of the aub-teete, he showed significant decremente. One of the decrements were on the eub-tests which have to do with recall, having to do with remembering numbers and be able to have short-term memory and concentration.

For example, on the digit epan, which is a sub-test which the examiner gives the patient a series of numbers. For example, I would say five, eight, two and the patient would be expected to recall thoee numbers. In Mr. Rose's case he scored a four on that particular sub-test. He did very poorly. Four is essentially in the mild mental retardation range and very significant and not expected in a person with

average intellectual recall ability.

He had scores of six on two other sub-teats, one being the digit eymbol sub-test, which is a measure of perceptual or peychomotor speed, Concentration or ehort-term memory and had some of the same factor8 included in the digit span sub-teet, and he also scored a six on comprehension, which is a sub-teet measuring a person's social judgment.

On the other teete, and I will primarily give the reeulte here. The facial recognition teat, which is a memory test, but a visual memory test, the person is asked to look at twelve faces, and then he is given some intervening tasks, such as a psychomotor task or something to basically distract him for one to two minutes. He is then given another card which contains 24 pictures, and he is asked to pick out the 12 pictures that he saw earlier,

Normal is nine or above out of twelve. An individual, generally, with average intellectual ability, should be able to pick out nine out of twelve items. Of course, six a pereon can get just by chance. Mr. Rose did very poorly on that teet and got seven out of twelve, and this would be in the significant range, and also consistent with a diagnosis of brain damage.

Mr. Rose's Bender-Gestalt was quite good. He was shown cards with designs on them and asked to copy them. This is not a memory test, but a copying test which measures perception motor, and he did well on the teat, and the results were consistent with the tests Dr. Slomin gave which shows good perceptional motor ability.

The other teat was the Wecheler Memory Scale, which is a test of various memory abilities. He scored an 89, which is lower than a parson should have with average intellectual ability. He showed deficits in certain areas and did well in other areas.

In a logical memory test, which is, again, a short-term memory aesesement, he is read a paragraph with about for of five sentences in it of a story and asked immediately to repeat the details of that story. A person with average intellectual ability should be able to recall an average of ten details. He recalls an average of five details, which showe deficite in Short-term memory and concentration.

The digit span, which is similar to the digit span test on the WAIS, is one in which he is told to recall a series of numbers. He did poorly on that test.

He did very well on two other tests. He did well on a teat of visual retention. When I showed him certain designs similar to the ones on the Bender but asked him to recall them, he was able to do that and he was also able to recall associative pairs. If I gave him a pair of worde such ae metal, iron, baby, cries, some easy and some difficult, he did well on the particular sub-test.

The final test I gave him was called the Ray Auditory Verbal Learning Test. This is giving him a series of words and aeking him to immediately recall the word afterwarde. He scored within normal limits on this eub-teat. Then I gave him -- this is a second sub-teat, and that Ray teat, in which I gave him the paragraph which includes the words that he had just learned, and he did very well on that as well.

In conclusion, based on the findings of the neuro-psych testing I did, because he does well on motor perception ability, there is some evidence, in my opinion, of some degree of organic brain damage. It is

difficult to determine exactly the nature of the brain damage. It is difficult to determine the ideology of the brain damage, but certainly the evidence euggests there is minimal brain damage existing, most likely in the right temporal lobe area, but that would need to be documented further in neurological and objective types of testing.

In terms of ideology and terms of explanation as to why he is brain damaged, there are several possibilities. ne was born with a forcepa delivery, and there is alwaye a high probability of brain damage with forcepa delivery. This is a procedure which is rarely used any more.

There was a nail driven into hie head. There was the time when he ran 104 or 105 degree fever with convulsions, which is also associated with temporary or permanent brain damage. Chronic alcohol or drug abuse, which can lead to brain damage, and he had an automobile accident about a year prior to the incident, itself, but I would eay that that probably did not either result in brain damage. It is possible that it exacerbated the problem, but since these deficits were Been earlier than that, most likely the cause of the organic problem would have been one of the other things I mentioned.

In terms of final diagnosis, I would diagnose Mr. Rose, from the DSM-III or DSM-III-R, as chronic alcohol abuser, possibly a dependent personality disorder, but essentially the most primary diagnosis would be organic brain ayndrome and, also, the chronic alcohol and drug abuse.

(PC. 1079-91).

In addition, Dr. Krop stated:

Q. I believe that you discussed, aleo, the relationship between the brain damage and the alcohol. Do they have an additive effect on each other?

A. I think the research showa that persons with brain damage are more susceptible to the effecte of alcohol or drug abuse, just like a peraon who is, for example, taking psychotropic medication or any other prescription medication, they are warned not to drink becauee of the unpredictable behaviors that might result.

Usually a person who is on certain kinds of medication might take one drink and that would have the effect of perhaps having three or four drinks, and they are warned not to do that.

Because of the nature of his particular brain damage, it is really difficult for me to say what the exact effect would be. I can only indicate again, generally, that persona with organic brain damage are more susceptible to an intoxicated state or, perhaps, the unpredictable effect of alcohol on that given individual. In this given case, I can't be any more specific than that.

Q. In terms of intoxication in this case, what did you find that indicated that Mr. Rase was intoxicated on the night of the offense?

A. Well, there were several indications that he was intoxicated. First of all, he reported from his ability to remember and going through the chronology of his behavior that -- I tried to add up as best I could in terms of the amount of alcohol he had, and it appears that from five o'clock on, which was the time, I believe, that he left the plasma center, he probably had about 20 beers. He can

remember certain specific numbers and aleo sharing pitchers with other people at various bars, but from the time he first went to a bar, which was about after five, until the time he indicated he went home, he probably had about twenty beers. That is the best eatimate I could come up with for the information I had.

I underetand from reading the testimony from two of the witnesses, one of the individuals who claim that Mr. Rose wanted them to alibi for him, he indicated he was not intoxicated. However, the police reports indicated -- and that was several houre later when he was waked up and arreeted for the first time -- the police indicated he had a strong smell of alcohol on his breath, and they had other indications in terms of that he was drinking. I don't think they concluded he was intoxicated, but I think they concluded he had been drinking heavily.

There were some other individuals who had watched him drinking and observed him drinking, from the teetimony, and from the other information that I reviewed, apparently he was obeerved to be drinking throughout the night.

I don't know if anybody came up with, again, a specific amount that he drank, but also, consistent with hie own behavior pattern and alcohol use on a regular basis -- which Mrs. Richardson aleo indicated that when he drinks he drinke "X" number of beers -- I would indicate that he probably had about twenty beers, and that would certainly be sufficient to cause intoxication of an individual.

Q. With reference to the intoxication, are you at all familiar with how significant it would be after having given plasma?

A. Since I know that Mr. Rome had given plasma that day, and also from what I could gather in terme of his report, that is he had not eaten significantly that day, I tried to determine myself, what kind of effect that would have, and I could not come up with any research which conclusively shows the effects the giving of plasma would be. There is literature on blood and how giving blood and being hungry, not having food in your stomach, certainly intensifies the intoxication effect, but giving plasma, per se, I couldn't find any research which shows that.

Q. In any case, besides mitigating factors there are aggravating circumstances. Were you able to review and reach any conclusions with reference to the cold, calculated premeditation?

A. I would say that I could not reach a conclusion. However, I can speak in terms of a peraon who is intoxicated, a person who suffers from brain damage in which poor judgment, irrational thinking and so forth exists, there is a less likelihood of an individual being able to form that particular intent and developing a behavior pattern which is cold and calculated.

I guess from the information I reviewed, it was very difficult for ma to determine what the individual -- whether it was Milo or someone elee. Of couree, Milo is still denying his involvement in the offense. It is very difficult to determine the rationality of the actual behavior.

From what I can tell from the teetimony of the three or four witnesses who observed the behavior, they indicated that the perpetrator said something like, "Get up, Pig. Get up." Be got up and went out and found a brick and came back and hit the victim with the brick three, four, six timee, depending on who was teetifying.

> There seems to be some inconeietency in terms of why an individual would be trying to get a person to get up and go and kill him. There seems to be an irrationality in terme of that conclueion, although there may be information I don't have in terms of that connection.
>
> Also, in talking to Milo, from his camaraderie with the victim during the day, helping him out during the day -- helping in terms of a fight and so forth -- I did not see the rationality of Milo at that point in time killing him.
>
> So if, in fact, Milo is guilty of this crime, irrationality may be a subject of a function of his drinking, of the brain damage, and some of the other factors that I have referred to.

(PC. 1103-08).

A reasonable investigation of obvious and available mitigation did not occur, through no tactic or strategy. As a result, a wealth of mitigation wae not presented. An individualized sentencing did not occur. This should not be a death penalty caee. There is a reasonable probability that but for counsel'e unreasonable omissions, the reeult of this ease would have been different.

ARGUMENT II

MR. ROSE WAS DEPRIVED OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, AS WELL AS HIS RIGHTS UNDER THE FIFTH, SIXTH, AND EIGHTH AMENDMENTS, BECAUSE THE MENTAL HEALTH EXPERT RETAINED TO EVALUATE HIM BEFORE TRIAL FAILED TO CONDUCT A PROFESSIONALLY COMPETENT AND APPROPRIATE EVALUATION, IN THE DEPRIVATION OF MR. ROSE'S RIGHTS TO A FAIR, INDIVIDUALIZED, AND RELIABLE CAPITAL SENTENCING DETERMINATION.

A criminal defendant is entitled to expert psychiatric assistance when the State makes hie or her mental etate relevant eentencing. Ake V. Oklahoma, 470 U.S. 68 (1985). What is required is an "adequate peychiatric 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 payehiatrie assistance and minimally effective repreeentation of counsel." United States v. Fessel, 531 F.2d 1278, 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, see. e.g., O'Callaghan v. State, 461 So. 2d 1354, 1355 (Fla. 1984), and to aeeure that the client is not denied a professional and professionally conducted mental health evaluation. See Fessel; Mason; Mauldin v. Wainwright, 723 F.2d 799 (11th Cir. 1984).

The expert appointed in this case, Dr. Vincent Slomin, Jr., testified that

mitigation wae not pureued because of a lack of adequate time (PC. 1215-17). Dr. Slomin stated:

> The other option was the poseibility of a pathological electroencephalogram under the influence of alcohol, and that was discussed, but, again, due to the time, I did not have that information.

(PC. 1252).

The fourteenth amendment mandates that an indigent criminal defendant be provided with an expert who undertake his or her task, and who undertakes that task in a profeeeional manner. Ake. An appointed psychiatrist must render "that level of care, skill, and treatment which is recognized by a reasonably prudent similar health care provider as being acceptable under similar conditions and circumstances." Fla. Stat. sec. 768.45(1) (1983). In his or her diagnosis, an expert is required to exercise a professionally recognized "level of care, skill, and treatment." The expert is required to adhere to procedures that experts in the field deem neceesary to render an accurate diagnoeie. Olschefsky v. Fischer, 123 So. 2d 751 (Fla. 3d DCA 1960). Dr. Slomin did not exercise, nor even approximate, the requisite professional level of care, skill or treatment because he had inadequate time. The eituation is akin to circumstantial ineffective assistance of counsel. See United States v. Cronic, 466 U.S. 648 (1984).

Florida law also provides for a right to professionally adequate mental health aseietance. See. e.g., Mason; cf. Fla. R. Crim. P. 3.210, 3.211, 3.216; State v. Hamilton, 448 So. 2d 1007 (Fla. 1984). Once established, the state law interest is protected against arbitrary deprivation by the federal due process clause. Cf. Hicks v. Oklahoma, 447 U.S. 343, 347 (1980); Vitek v. Jones, 445 U.S. 480, 488 (1980); Hewitt v. Helms, 459 U.S. 460, 466-67 (1983); Meachum v. Fano, 427 U.S. at 223-27. In this case, both the state law interest and the federal right were arbitrarily denied.

Substantial mitigation wae also lost because of Dr. Slomin's flawed evaluation -- an adequate client history would have made obvious the substantial mitigation present in this case. When considered in the context of an adequate mental health evaluation, Dr. Slomin could have established and buttressed overwhelming statutory and nonstatutory mitigating factors.

The duty to protect the client's right to profeseionally adequate mental health aeeistance does not rest solely with the mental health profeeeional. Trial counsel muet diecharge significant responsibilities as well. See Blake; Fessel; O'Callaghan. Here, couneel failed in that duty. He failed to obtain the expert'e appointment in a timely fashion. He neither obtained nor provided the expert with any of the wealth of available information regarding Milo Rose's background. No records were obtained or provided; no first-hand accounts from those who had come into contact with Mr. Rose were made known to the expert. Trial counsel failed to take any of the eteps neceseary to assure that his client would receive the expert mental health assistance to which he waa entitled.

Mr. Rose wae denied his fifth, sixth, eighth, and fourteenth amendment righte. Consequently, Mr. Rose was tried and eentenced to death in violation of his due process and equal protection rights. Ake. At sentencing, a profeaeionally adequate evaluation would have made a significant difference: substantial etatutory and nonetatutory mitigation would have been established; aggravating factors would have been undermined.

ARGUMENT III

DEFENSE COUNSEL DID NOT REPRESENT MR. ROSE AS A ZEALOUS ADVOCATE, IN VIOLATION OF MR. ROSE'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

At one point during the trial, Mr. Rose aought to discharge his attorney. Couneel sought leave to withdraw and told the court he could no longer act as an advocate:

> [DEFENDANT:] And I have other grounds for dismissal of my attorney, since I have not seen him since April 8 or April 7 when he repreeented me before your Honor, until June 26. Phone calls were not returned. That another person had tried to contact him, Mrs. Barbara Richardson, and phone calls were not returned to her, either. Up until April 8 to June 26, I had no recollection what was happening in my case. I had given him my inveetigative reporte which he would not return up until then. I have not read any depositions other than one police officer's deposition, which is Detective Fire's. He told me all depositions were taken. I find out that one deposition hasn't been taken, that was of an eyewitneee.
>
> I don't feel that I am being adequately defended at this point, and I have more if I would just relax and be able to bring them up. They have not allowed me to bring a pencil and paper with me. I can use pencil and paper here, but it's only in the courtroom, only in the courtroom, and it's not -- it's not -- it's not -- um -- it's not conducive to me to keep my train of thought on the other matters and be able to refer to it in reference, as if I did if I were alone or in

another state.

. . . .

[Whereupon, the jury is excused for the evening.]

BAILIFF: The jury is out of the hearing of the Court.

THE COURT: If I might see counsel briefly in chambers, then, Mr. Rose, I'll hear you tomorrow morning. I don't need the Court personnel. You are excused until eight-thirty.

[Whereupon, Court stande in recess for the evening.]

* * *

(PC. 902-903, 909).[3]

The next day at trial, the Court again took up Mr. Rose's motion a5 to new counsel:

> THE COURT: Mr. Rose, I have done some research and I have asked others to help me with this reeeareh, and it indicates, sir, that you are not entitled to the lawyer of your choice. You are entitled to a capable lawyer. And I can't help but remind you, Mr. Rose, you had the Public Defender's Office. You aeked them be dismissed. They were. You had another lawyer and asked that lawyer be diamiesed or that lawyer moved to withdraw. That was granted. I am not certain the record will bear me out on this, but this is either your fourth or fifth lawyer.
>
> Coneequently, I am going to deny that request, finding while you have a right to have a lawyer appointed to repreaent you, you do not under the law as it exists today have the right to decide who that lawyer will be. So that will be denied.
>
> . . . .
>
> THE COURT: Mr. Rouson, is there anything you wish to say?
>
> MR. ROUSON: Well, quite frankly, Your Honor, I would reiterate the points he mentioned. I ask for mistrial based On the arounda he mentioned.
>
> I would also like to make a motion to the Court to withdraw from further representation of Mr. Rose in these proceedinge. It appears to me that we have reached a definite and distinct and identifiable impasse in terme of theory of defense, in terms of trial strategy and

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[3]Mr. Rose's complaints about Mr. Rouson being unavailable before the trial were verified by Terry West Cobb's testimony at the Rule 3.850 hearing. She testified:

> I remember Darryl being unavailable or out of town close to the time of trial, and a lot of people getting anxious trying to get ahold of him, the state attorneye, and me being involved at that time trying to talk with these people and, you know, answer whatever questions they had. That is basically my recollection.

(PC. 936). As a result of Mr. Rouson's abeences and dependence upon Ms. Cobb to prepare the case, she ceased to participate the weekend before the trial commenced.

techniquee, and in terms of whether my client has any confidenee in my continued representation of him in thie particular case. I think that these are grounds for irreconcilable differences. I think for me to continue at this time, understanding the expressions that he hae made, both to me and in open court, these expression have, in a aenae, tainted my outlook in this case and I cannot stand, in good faith, before thie Court at this time and state that I can continue in the purest form of representation that he deservee and he is entitled to under the current law and under the constitution.

I would ask the Court at this time to either declare a mistrial or allow me to withdraw from thie case and let Mr. Rose proceed pro se or let him proceed with other appointed counsel.

Judge, I know of no other way to express what I'm saying other than I believe there have been instancee in the law where counsel has been allowed to withdraw at a stage in the proceedinge such as thie, especially where he feels that all confidence have been destroyed between him and his client, and where there is a definite and distinct and identifiable impaeee in differences between how this case ahould be preeented before the jury.

. . . .

THE COURT: The fact you all have differencee, do you feel like you can properly exercise what you believe, as a trained lawyer, to be the proper etrategy in this trial from here on ta its duration, despite what he believes you should do?

MR. ROUSON: Your Honor, we would be extending that proposition to its outer limits if I were to etand before the court and say that I feel that I can do that.

THE COURT: I don't understand what you just said.

MR. ROUSON: What I'm saying is that I feel like I would be straining myself in terms of my outlook, my belief in the case, my continued representation in terms of effective cross-examination of witnesses if I were to continue, understanding what I know now. I don't know that I can provide for him the fairest and the unbiased and untainted representation that he is entitled to and that he desires. I don't know that I can do that.

The Court is asking me to ulace, in a sense, out of my mind and proceed almost as if it never hawwened with the case, and I'm wondering whether or not it's humanly possible and then legally possible for me to do that.

. . . .

MR. ROUSON: Judge, I believe I can make that decision. I believe that to make that decision, to even be in a posture of making it, creates other conflicts.

I think it createe an ethical conflict as to whether I can continue with theories of defense in this case. We said that I am ineffective. He said that I'm inefficient. And while I might beg to differ with the evidence that was available in this case, if he has lost confidence in my abilitiea, I know that and I recognize that and that is on my mind. And to tell the Court that I can continue to argue before those twelve people hia innocence, to tell the Court that I can stand at that etand and question, croes-examine witnesses, or even vresent some evidence,

and to do that in the fairest way wosaible, nreservina what he is entitled to, I can't do that, Judge.

THE COURT: All right, Court will be in recess for ten minutes.

(Whereupon, a recess was taken.)

(R. 912, 914, 917).

At this point an extended off-the-record conversation was had between the Court and trial couneel. Mr. Roee was not present. Eecauee it was not recorded, it was not of record at the time of the direct appeal. At the Rule 3.850 hearing trial Judge Sehaeffer etated:

> ...He [Mr. Rouson) told me that he waa having a problem with whether or not he felt hie client was still -- wae innocent. He felt that might give him some problems. Whereupon I said, "Mr. Rouson, your ethical oath would require you to -- even if you knew he was guilty, would require you to put forth the same vigorous representation as you would if you thought he was innocent.
>
> My next recollection is telling him to think about that, too, because if he wae telling me because he had some bad feelings toward his client or felt his client would nt be innocent any longer, that that would in any way undercut his repreeentation, I would again let him off the case. And he came back and said he resolved those things and that was not one of the problems.

(PC. 812-13).

Mr. Rouson teetified:

> A. I recall being accused by my client of being ineffective. I recall him making statements that he lost confidence in me. We went in chambers to discuss my motion to withdraw, which was an oral motion before the court in the proceedings, during the proceedings.
>
> I recall the discussion going like, "Well, we -- Darryl, you -- baeically, we've come this far." You know, "What is it, why do you really want to withdraw?"
>
> I recall explaining that I felt that there were real differences between theories of etrategy, theories of defense of what my client wanted me to do, with him losing his confident in me. I was beginning to doubt myself at that point and whether or not I could effectively continue and advocate for him in the vufest form. I was beginning to doubt myself.
>
> * * *
>
> I recall making thoee balances, thinking about all those things. I recall that being part of the discussion. "Well, can you do it? Can you overcome? Do you think you can?" It wae left up to me. The decision waa, you know, "If you just -- if you can't do it, then I'm going to let you off. You can withdraw. But think about these things."
>
> I remember going through that internally and mentally myself. You know, "Can I do this? Do I even like my client? does he like me?" And I recall resolving all of that with the idea of, well, this is a

defendant in the criminal system of the United States of America. He deserves a fair hearing, a fair trial, and a good defense. I can do that. I can do that €or him. And I recall making that decision myself to continue with that case.

At various timee in the trial and prior to trial I had doubts about his own guilt or innocence. And I think that's natural. I think when any lawyer is looking at the evidence of the trial, whether he is a defense lawyer or the prosecutor on a case, if he is looking purely at the evidence and he's building his eaae, at some point you begin to wonder -- I'm sure prosecutors have done it -- you wonder if the person is really guilty when you proeecute them sometimes based on the evidence.

Thoee thoughte entered my mind and they entered my mind prior to trial and during the trial at different points. I don't recall that being a specific topic of discussion in chambers, but I cannot deny it if someone said, "Hey, this is what we did." Okay. Well, fine. Everyone doesn't remember everything that happened.

I remember the big, salient factor was that I made a decision to continue on that caee. I made the decision that I could overcome my feelinge, the differences that I had with my client, that he had with me, and that I could give him the defense that he deserved. And I expressed that to the judge and I continued on the case.

Q. A couple of follow-up questions. In connection with the feelinge that you had, one of the things that you mentioned was that Mr. Roee was making accusations against you indicating that you were ineffective or something along those lines. Was that affecting you? Was that upsetting you at that point in time when you made the motion to withdraw?

A. Well, yeah. I mean -- I don't know many trials you've done, but, you know, you could be in the middle of trial and your client leana over to you or writes a note to you and says you're messing up and you think your doing the best job this side of Canada. And that little note might affect your feelings for the next ten minutes in that caae. Here I am fighting my heart out and doing this and that and he aays -- What does he know about the law or the procedure? Then you have to understand that he's not versed in it and he may not understand why you didn't object or why you didn't do thie or do that, and overlook that and continue your job.

And at that point, yes, I was -- I feel like I was affected emotionally. You know, to be a trial lawyer you have to be emotional. You have to know when to raise your voice, when to get excited, when not to. And I was affected. But I think I was able to resolve all that.

Q. And one of the other things that you indicated was a concern, and I'm not sure I understand if it wae a rpecific concern at that point in time, was doubt about Milo's guilt or innocence. Was that one of the things that war affecting you at that point in time?

A. It probably was along with other things. I mean the innocence wae a big issue. It was a big issue. He maintained it. I tried to support it the beet I could. I even made up a sign, you know, "Mr. Rose is innocent," and displayed it in front of the jury. It wae a big issue. And I'm sure I thought about it at different times and I probably thought about it right then.

Q. One other thing that I recall that you mentioned was the

question of your liking or disliking Mr. Rose. Was that something else that wae troubling for you at that point in time?

A. Yeah.

Q. Now, when you went in chambers did you feel strona -- that you were being strong-armed?

A. Well, some people -- I guess some judges will sit back and more or less tell you thie is how it is going to go and you either accept thie or you don't. That didn't happen in chambers with Judge Schaeffer.

I recall her in a sense being more or lese in the questioning role, posing questions to me for me to think about and answer and resolve. You know, it just depende on how you look at it. Some people might think that was subtle arm-twisting. I think the ultimate reality was the decision wae left up to me. I was given the option. I was given the out and I didn't choose it.

Q. Then ultimately you decided -- is it fair to say you decided to put all these other feelings aside and continue on?

A. That's right. But I have to say that though -- I think it's supported in the record -- you know, that -- I think I used the ward "strange" -- you know, you are human and whether you can alwaya put thoee feelings aside or not. You know, that's what the jury is charged with, laying feelings of sympathy aside. But do they always do it? I did my beet to do it. I informed the court that I would do that. I told Mr. Rose that I would do that and I tried to do it.

(PC. 856-861).

Thereupon, the following occurred on the record after the in-camera discussion:

THE COURT: All right, the Court had the opportunity to reflect on the matters raised by both counsel and the defense and the defendant. And the Court is going to rely on a very recent Supreme Court case, Morris v. Sharp decision, which it looks like it is at 103 S. Ct. 1610. In that particular case, the Supreme Court was faced with a similar issue where the defense lawyer and the defendant apparently could not get along during the course of the trial and the defendant wished his lawyer to be dismissed. That was denied and the Supreme Court not only said that was correct, but further it stated that the sixth amendment, which, of course, is the right to counsel, does not guarantee meaningful relationships between the accused and his counsel. I think that is where we are in this particular case, that the counsel and the defendant perhaps do not have a meaningful relationship or as meaningful a relationahip as they had in the past. However, the Supreme Court apparently believes that the sixth amendment does not guarantee that relationahip to a defendant.

Further, the Court wished to put on the record that during the recess, the Court had an in camera discussion with defense counsel regarding the assertion of an ethical problem. The Court makes a finding at this time that that is not accurate at this point in time. There is not an ethical conflict. And consequently, there is no reason why thia case cannot proceed. So the motion is denied.

(R. 922-23).

At thie off-the-record in-camera confeeeional trial, couneel disclosed hie personal doubts and euepicione about hie client. He clearly abandoned Mr. Roee, he renounced his role as Mr. Rose's advocate and protector. This was done not to a disinterested stranger, but to the judge who would later sentence Mr. Roee to die at the hands of the State. Mr. Rose was not present, nor did he have in any real sense an advocate present on hie behalf.

There can be no question that a criminal defendant has a right to be present "at the stages of his trial where fundamental fairness might be thwarted by his absence." Francis v. State, 413 So. 2d 1175, 1177 (Fla. 1982). The United States Supreme Court has explained:

> [e]ven in situations where the defendant is not actually confronting witneeees or evidence against him, he haa a due proceea right "to be present in his own person whenever hie preeence has a relation, reasonably aubetantial, to the fulness of his opportunity to defend against the charge.

Kentuckv v. Stincer, 482 U.S. 730, 745 (1987)(citation omitted).

Here, Milo Roee was excluded from a hearing where defense counsel revealed hie concern that Mr. Rose was guilty of murder to the judge who waa to later sentence Mr. Rose. Certainly, Mr. Roae was not given an opportunity to reapond to trial counsel's charges. Mr. Rose was not able to explain that Ms. Cobb withdrew from any participation in Mr. Rose's case because of Mr. Rouson's unavailability and failure to prepare. Certainly, conducting the in-camera discussion in Mr. Rose's absence thwarted fundamental fairness.

Moreover, there was no one representing Mr. Roee at the in-camera discussion. There wae no advocate on hie behalf to challenge Mr. Roueon'e accusation that Mr. Roae was guilty. Mr. Roee was entitled to counsel at all critical stages.[4] Certainly, it would have been improper for the prosecuting attorney to have gone into the judge's chambers without either the defendant or hie counsel and opine to the judge, "I think Mr. Roee is guilty." It is no more fair that instead it was defense counsel who made the communication.

The Eleventh Circuit recently held:

---

[4]A critical stage occurs when "potential substantial prejudiee to [a]defendant's rights inheres in [a]particular confrontation." United State v. Wade, 388 U.S. 218, 227 (1967).

> As the United states Supreme Court held in united States v. Cronic, 466 U.S. 648, 104 S.Ct. 2039, 80 L.Ed.2d 657 (1984), the right to the effective assistance of counsel is recognized not €or its own sake, but becauee of the effect it has on the ability of the accused to receive a fair trial. Id. at 658, 104 S.Ct. at 2046. Accord Strickland v. Washinaton, 466 U.S.668, 689, 104 S.Ct. 2052, 2065, 80 L.Ed.2d 674 (1984)(purpse of effective aseistance of couneel guarantee is to ensure that criminal defendants receive fair trials). Cronic represents a narrow exception which the Supreme Court has carved out of the general rule that a petitioner claiming ineffective aeeistance of counsel must demonetrate that he was prejudiced by errors in his counsel's performance. Stone v. Dugger, 837 F.2d 1477, 1479 (11th Cir. 1988); Smith v. Wainwright, 777 F.2d 609, 620 (11th Cir. 1985), cert. denied, 477 U.S. 905, 106 S.Ct. 3275, 91 L.Ed.2d 565 (1986); Chadwick v. Green, 740 F.2d 897, 900 (11th Cir. 1984). The Supreme Court has found constitutional error without any showing of prejudice when counsel was either totally abeent or prevented from assisting the accused during a critical stage of the proceedings, Cronic, 466 U.S. at 659 & n. 25, 104 S.Ct. at 2047 & n. 25, or if counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Id. at 659 & n. 26, 104 S.Ct. at 2047 & n. 26.

Hardinq v. Davis, 878 F.2d 1341, 1345 (11th Cir. 1989).

Trial counsel further failed in his "overarching duty to advocate the defendant's cause," Strickland v. Washington, 104 S. Ct. 2052, 2065 (1984). Counsel's disclosures to the trial court, outside the presence of his client, were "not simply poor strategic coices; he acted with reckless disregard for his client's best interests and, at time, apparently with the intention of weaken his client's case." Osborn v. Shillinger, 861 F.2d 612, 629 (10th Cir. 1983). Here, trial counsel's "publicly chastising a client is evidence of ineffectiveness," Osborn, 861 F.2d at 628.

It is not reasonable to believe that the court did not reflect back on trial counsel's disclosures -- which Mr. Rose waa denied any apportunity to rebut becauee he did not know of them -- when she made the decieion to sentence Mr. Rose to death in the electric chair. The evils of this closed confessional between the judge and trial counsel are every bit as dangerous as other secrets imparted to a sentencing court in a capital case. "Assurances of secrecy are conducive to the transmission of confidences which may bear no relation to fact than the average rumor or item of gossip, and my imply a pledge not to attempt independinet verification of the information received." Gardner v. Florida, 97 S. Ct. 1197, 1205 (1977). As in Gardner, "there is no basis for presuming that the defendant himself made a knowing and intelligent waiver," 97 S. Ct. at 1206, of his right to be present and respond

to thaee damaging dieclosuree by hi0 counsel. The reeult of these disclosures is the same as that in Gardner:

> We conclude that petitioner waa denied due process of law when the death sentence wae imposed, at least in part, on the basis of information which he had no opportunity to deny or explain.

97 S. Ct. at 1207.

Trial counrel'r lack of zeal on behalf of hi5 client, his highly inappropriate disclosures "in camera" to the trial court, and the denial of any opportunity of Mr. Roee to respond to them violated his rights under the eixth, eighth and fourteenth amendments.

ARGUMENT IV

MR. ROSE WAS DEPRIVED OF EFFECTIVE ASSISTANCE OF COUNSEL DURING THE GUILT PHASE THOUGH TRIAL COUNSEL'S DEFICIENT KNOWLEDGE OF BASIC FACTS AND CONTRARY TO THE SIXTH, EIGHTH, THIRTEENTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The lower court summarily denied Mr. Rose's guilt phase claima of ineffective assistance of counsel without conducting any type of hearing, without adequately diacuesing whether the motion failed to state valid claims for Rule 3.850 relief (it doea), and without adequately explaining why the files and records conclusively showed that Mr. Roee is entitled to no relief (they do not). Indeed, the record supports Mr. Rose's claims.

The lower court's summary denial of Mr. Rose's guilt phase ineffective assistance claim was incorrect. The claim was clearly of the type requiring evidentiary resolution of facts that are not "of record." Questions of trial counsel's deficient performance at both the guilt phases of trial were all prsmented by the motion to vacate and involved matters that must be dealt with in an svidentiary hearing.

As thie Honorable Court's precedents and Rule 3.850 itself make clear, a Rule 3.850 movant is entitled to an evidentiary hearing unless "the motion and the filee and the records in the case conclusively show that the prisoner is entitled to no relief." Fla. R. Crim. P. 3.850; Lemon v. State, 498 So. 2d 923 (Fla. 1986); State v. Crews, 477 So. 2d 984 (Fla. 1985); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984); State v. Sireci, 502 So. 2d 1221 (Fla. 1987); Mason v. State, 489 So. 2d 734

(Fla. 1986); Squires v. State, 513 So. 2d 138 (Fla. 1987); Gorham v. State, 521 So. 2d 1067 (Fla. 1988). Mr. Rose's motion alleged facte which, if proven, would entitle him to relief. The files and records did not "conclusively show that [he] is entitled to no relief," and the trial court's summary denial of this claim, without an evidentiary hearing, was therefore erroneous.

Mr. Rose is entitled to an evidentiary hearing with respect to these claims: there are no files and records which conclusively show that he will neeeaearily lose. Here, the lower court failed to attach portions of the record which "conclusively show that the prisoner is entitled to no relief . . ." Fla. Crim. P. 3.850; Lemon. An evidentiary hearing is proper. The lower court attached no portion of the record which supports its ruling. This case involves matters that are not "of record," and the circuit court erred in denying an evidentiary hearing and in summarily denying the motion to vacate. Facts not "of record" are at issue in this case; eueh facts cannot be resolved now by this Court, as there is no record to review. The lower court erred in declining to allow factual, evidentiary reeolution.

In O'Callaghan, this Court recognized that a hearing was required because facts necessary to the disposition of an ineffective assistance of counsel claim were not "of record." See also, Vaught v. State, 442 SO. 2d 217, 219 (Fla. 1983). Thie Court has not hesitated to remand Rule 3.850 cases for required evidentiary hearinge. See, e.g., Zeialer v. state, 452 So. 2d 537 (Fla. 1984); Vauaht; Lemon; Squires; Gorham; Smith v. state, 382 So. 2d 673 (Fla. 1980); McCrae v. State, 437 So. 2d 1388 (Fla. 1983); LeDuc v. State, 415 So. 2d 721 (Fla. 1982); Demps v. State, 416 So. 2d 808 (Fla. 1982); Aranao v. State, 437 So. 2d 1099 (Fla. 1983). These cases control: Mr. Rose was (and is) entitled to an evidentiary hearing on this claim.

In Strickland v. Washinaton, 466 U.S. 668 (1984), the Supreme Court held that counsel has "a duty to bring to bear such ekill and knowledge as will render the trial a reliable adversarial testing process." 466 U.S. at 688 (citation omitted). Strickland v. Washinaton requires a defendant to plead and demonatrate: (1) unreasonable attorney performance and (2) prejudice. In his Rule 3.850 motion, Mr.

Rome pled each. Given a full and fair evidentiary hearing, he can prove each. He is entitled, at a minimum, to an adequate evidentiary hearing on these claims.

Mr. Rose was arrested after being awakened from hie sleep because he generally fit the deecription of the perpetrator and, more importantly, he had blood on his clothing and his arms (R. 954). The fact that Mr. Rose had blood on his clothes and on his person became a prominent feature of the trial. It was the only physical evidence ueed by the State to link Mr. Roae to the crime:

> *Q:* Did you notice anything else about him at that time?
>
> A: Yes, I noticed he had blood on hi6 clothing, alao on hie arms.

Detective Fire (R. 954).

> . . . he stated they had been involved in a fight, and he broke up a fight between Butch and another male. And that is the result of the blood being on him. I aeked him how many times he was punched. He aaid once in the nose. I told him that here was blood all over shirt, arms and legs, how could that be from a bloody nose? And he stated that he didn't know, he couldn't answer that.

Detective Fire (R. 959).

> Q: Would you describe for me what was on his clothing?
>
> . . . .
>
> A: Blood.
>
> *Q:* Where?
>
> A: On his shirt, on the pants, and there waa a few drops on the back of the pants.
>
> *Q:* Have you seen many people have noeebleeds?
>
> A: Many.
>
> *Q:* Is each identical?
>
> A: Umm, no, they're not.
>
> *Q:* Does each have the same slow flow or amount of blood that may come down from the nose?
>
> A: It comes down. Tears come down.
>
> *Q:* The question concerns the quantity of flow. Does each one you have seen appear to have the same amount of blood or flow of blood?
>
> . . . .
>
> At I can't testify to that.
>
> Q: Okay, you don't know?

A: No.

Detective Fire (Cross R. 970-71).

Q: Okay, do you also know, from your investigation, air, whether any blood samples of the victim were taken along with the victim's hair samples?

A: Yea, it wae.

Q: okay, and can I -- what was the purpoee of that?

A: To compare, to see if any of the blood on the defendant's clothing could have been from the victim.

. . . .

Q: Did Technician Bowers take blood samples from the defendant?

A: He took blood samples, splatterings on his arms.

Q: Yes.

A: He uaed the same swab to take several blood samples from several parte of the body, and --

Q: Okay, just for what you're saying, is there a splot here, a splot here, a splot here, and he took the awab and went here, here and here?

A: Correct.

Q: Okay.

A: Each awab -- each -- there should have been a swab uaed for each time he took a sample.

Q: Okay, my next question would have been is that correct procedure?

A: His procedure was not correct, no.

Q: So we have an effect of mixina the blood, is that correct?

A: Correct.

Detective Firs (Redirect, R. 985-987)

Q: Did you notice anything unusual about Milo's appearance when you went upetairs?

A: He had a bloody noae, and he had some blood on one of his hands.

Rebecca Borton (R. 893).

The State did not introduce any scientific evidence which proved that the blood on Mr. Rose was that of the victim, Butch Richardson. However, the jury waa carefully, and improperly, led to this conclusion. The State showed that there were

extensive blood aplattera caused by the manner of killing the victim **(R. 1055).** The State claimed that the blood swabs taken from the person of Mr. **Roee** was "messed up" becauee **it** waa "mixed":

> Defenee counsel raised a couple issues that I want to addreee in the course of his cross-examination. There was blood taken off the defendant. That is true, there was. You also know that the technician taht took **it** did **it** wrong. He mixed the blood. **He** messed uw the evidence.

(State's closing argument, **R.** 1054)(emphasis added)(see Detective Fire, Redirect **R 985-87.**)

The repeated references to the blood on Mr. Rose combined with Detective Fire's unsubstantiated aesertion that there was too much blood present for the source to be a bloody nose, provided very strong inculpatory evidence. It appeared that the **blood** had to be from the victim, Robert Richardson, Jr. No plausible explanation waa offered by the defense.

However, the explanation trial counsel was looking for **was** right in front of him obtainable upon proper investigation. But because he had not diligently prepared €or this case he did not notice or did not underetand the Tampa Regional Crime Laboratory report prepared by Crime Lab Analyst **Kathy M.** Guenther **(3.850** App. O). That report contains incredible exculpatory evidence. The lab report prepared by Ms. Guenther indicates that all blood typed from **Mr.** Rose's person and items allegedly carried by him had one blood type, "O". The blood from **Mr.** Richardson, and from all exhibits from the scene which contained **blood** which wae analyzed for type, were one blood type, "A".

When **ABO** type ***O*** blood is mixed with any other type, the other type is detected.

> When **ABO** type ***O*** **blood is** mixed with any other type, the other type is detected, The absorption-elution, antigen-antibody testing system used in thia case detects the blood group antigen factors of **A,** B and **H.** Detecting only the **blood** group factor **H** results in the conclusion that blood **group *O*** is present. If either the factor **A** or B were present, then the resulting conclusions would be that **blood** group **A** or **B** respectively was preeent. If both of the factore **A** and **B** were present, then the resulting conclusion would be that blood group **AB** wae preaent.

(Affidavit of Forensic Scientist Dale Nute, Rule **3.850** App. **P).**

There **was no** "mixed" blood on Mr. Rose:

While using one swab to take several samples from different parts of **a**

> suspect's body is not the beat procedure, it did not result in any "mixing" of Mr. Rose's and Mr. Richardson's blood according to the analyeie conducted by the Tampa Regional Crime Lab. Aseuming that the blood typing done at the Tampa Regional Crime Laboratory is correct, the results indicate that Mr. Robert Richardeon had ABO blood type "A" (exhibit 1, liquid blood sample).
>
> All blood samples taken from Mr. Rose (cotton swab) and items he had on him (paper tissues and receipt from blood plasma bank) typed ABI type "O" when analyzed. No ABI type "A" blood was found anywhere on Mr. Rose or obiects in hie possession.

Id.

To keep out very strong exculpatory evidence the State intentionally miestated the evidence, mieleading the jury, Mr. Rouson and the Court:

> There is no reaeonable basie to believe that the blood swabbed from Mr. Rose's person was anything other than his own blood. "Mixing of blood" is apparently disproven by the physical evidence.

(Affidavit of Forensic Scientist H. Dale Nute, Rule 3.850 App. P). In light of this information, it is understandable why the blood spatters on the shirt and pants were never typed and why the State is still adamantly opposing defendant's request to obtain acceee to the defendant's clothing, now in the evidence locker at the Clerk's office. (See Motion To Release State's Exhibits, filed September 29, 1987).

Trial counsel failed to challenge Detective Fire's blatantly incorrect etatement of the value of the blood taken from Mr. Rose's arm. Because of trial counsel's lack of knowledge and preparation, the jury and the Court never knew that the evidence was not "messed up"; that a crime lab eerologist had examined the evidence; and that the lab results provided, in Mr. Rouson's reinforced words, "pretty strong evidence" (R. 1065). It is "pretty strong evidence", but of innocence, not guilt.

Impeachment of the testimony of the four (4) eyewitnessee was critical to the defense. Counsel lacked the ability, or knowledge of the case, to point out the many glaring inconsistencies in the "eyewitness" testimony. Couneel was not prepared and as a result, Mr. Rose was prejudiced.

Catharine (Cat) Bass was the mainstay of the State's case. She testified first and provided the atrongest eyewitness testimony. At trial she testified that: The girls were sitting on her car in front of the Maetridge residence (R.702). She noticed two men walking on the west side of Garden Avenue coming toward Jones Street

(R. 703). Next ehe noticed them on the other side of Garden Avenue walking the other direction (toward Draw Street), they were just wandering back and forth down the block (R. 704). She heard a sound like glaae breaking, saw one man on the ground, feet toward her, with one leg propped up, the other leg down, the other man standing near him (R. 705). The girls were about 200 feet from where the victim was lying (R. 711). On croee-examination Me. Bass indicated that she may have told Detective Luchan they were 30 feet away, but believes it is more than that (R. 721). The men were almost centered between two (2) street lights (R. 711). The area waa well lit (R. 712). The man still standing (perpetrator) crossed Garden Avenue and walked toward Drew Steet, turned and called to the reclining man, returned to the reclining man, then wandered around a vacant field behind the reclining man (victim)(R. 705). The perpetrator returned to the victim and waa carrying a cement block. She teetified that a corner wae missing from the cement block, from which the prosecution "assume(d) you could see clearly?" She assured him she could (R. 712). The perpetrator raised the block above his head and threw it down on the victim. She heard a "thunk" as it hit the victim. The victim rolled to one side. The perpetrator threw the block down on the victim about four (4)times before she was able to react (R. 707). She told Melisea Mastridge to call the police and Maryanne Hutton to get her keys (R. 708). She and Mr. Haywood looked €or the perpetrator in her car, but to no avail (R. 708). She made an in-court identification (R. 710). She described the perpetrator:

> He had on a black t-shirt with a white deaign on it, block lettering. At the time, it looked like lettering like a Jack Daniel's deaign, something in whits blocks onto a black t-ehirt. Light-colored jeans. And I believe light or white-colored tennis shoes.
>
> . . . .
>
> Um, dark hair, facial hair, unkept hair, ragged down to hie -- down to hia ehouldere.
>
> . . . .
>
> Somewhat dark. (complexion)

(R. 710). On cross-examination, ehe elaborated on her description, maintaining that she could make out facial features that night: "Somewhat dark complexion, facial hair, a muetache, possibly a small beard" (R. 723) and "dark complexion and dark

eyes" (R. 724). After the police came to the scene, ahe went to the police station and gave a statement and picked Mr. Rose ae the perpetrator when shown a photo pak of five pictures (R. 713-14):

> Q: And was there any doubt in your mind when you picked that photograph out, that was the person you had seen?
>
> A: No, sir.

(R. 715). Next she identified the cement block; anewering that she did recognize it because the corner was missing (R. 716).

Catharine Bass' trial testimony is a classic example of a witness filling in gape and adopting new facts as she learns them. The facts as sworn to by Ms. Bass were of her or someone's creation, not obeervation, and trial counsel's duty was to show this to the jury. Her prior statements if revealed to the jury would have established that. But once again counsel had failed to investigate and prepare.

A few minutes after the crime, all of the eyewitneesea collaborated to give the first officer at the scene, Patrolman McKenna, a description of the perpetrator. The perpetrator was described as: "w/m (white male), long black or dark hair, dark blue ahirt, light colored blue jeans, 5' 10 - 6' 0, possibly a mustache. (Rule Rule 3.850 App. Q). In a statement given to Detective Walther, Ma. Bass described perpetrator as: "22-30 yeara, dark hair, shoulder length, with a black tee shirt and a white design in front of it, with a square shape. She indicated it wae possibly a Jack Daniels deaign. She advised that this subject was very skinny, about 150-60 lbs, and was wearing what she believed to be white tennis shoes and baggy pants." (Rule 3.850 App. Q). On October 18, 1982, the perpetrator seen by Catharine Baas had no facial features, the eyes no color, no beard, no mustache, although the group description did include a "possible" mustache. The perpetrator had on baggy pants (no color). At trial the perpetrator became Mr. Rose as he appeared in the photo pak -- dark complexion, dark eyes, muataehe and beard, and most incredibly, "the face is the same" (R. 733). The baggy pants were not brought out -- the photo does not include Mr. Rose's legs.

On October 18, 1982, Cat Bass could not tell if the perpetrator hit the victim on the first throw (Det. Walther, Rule 3.850 App. 0-2)(O. McKenna, Rule 3.850 App. *0-8)*:

> **Q:** Now, you couldn't see whether the subject throwing the brick, in your terms, actually hit the peraon?
>
> **A:** The firet time? No, I couldn't tell.

(R. 243). In fact, that night ehe thought he missed him (Det. Walther, Rule 3.850 App. 0-2)(O. McKenna, Rule 3.850 App. *0-8).* Victim rolled to hie left eide after the block waa thrown the first time and before it was thrown the eecond time (Det. Walther, Rule 3.850 App. 0-3).

At trial:

> **A:** . . . he held it completely over his head and pitched it downwards. He didn't drop it. I didn't hear anything from the man on the ground. There wae a thunk as the cinder block hit, the man on the ground rolled a bit to one side, and then rolled back over and both of his legs were down at that point.

(R. 707). The new version was complete with sound effecte, "thunk." Immediately after the homicide, Ms. Bass did not tell either Officer McKenna or Detective Walther that the victim's knee was raised up, not lying flat (Rule 3.850 App. *0).* This crucial alleged fact first appeared June 27-28 (R. 705-707).

October 18, 1982, the perpetrator cast the block down toward the victim four times (in the description of events given to Detective Wather, Rule 3.850 App. *0-2* to 3) and "at least four" times in recounting the evente to Officer McKenna (McKenna Report, Rule 3.850 App. 0-8). At trial the perpetrator threw the block down eight *(8)* or nine times:

> I watched him do this about seven, poaeibly eight times, before the next-door neighbor, Mr. Hayword, came out of hie front door and yelled at the man.
>
> The man with the cinder block in his hands turned around and stopped, pitched it down one more time . . . .

(R. 708).

At trial, Me. Baas had absolutely no doubt of her identification of the perpetrator (R. 715). She adamantly maintained that ahe had experienced no problem making a positive identification from the photo pak (R. 715, 733). Detective Luchan reports: "She otated that ehe could not positively state that this was the suspect, but ehe felt very confident in her selection and eetimated her selection to be 90% certain. (Luchan Report, Rule 3.850 App. 0-8).

Trial counsel could have constructed an effective erose-examination thoroughly

impeaching the reliability of Ma. Bass. However, because he failed to properly prepare by collecting, reading, and presenting the prior inconsistent statements, hie performance was deficient. As a reeult, Mr. Rose was prejudiced. The circumetancee are virtually identical to thoee in Nixon V. Newsome, 888 F.2d 112 (11th cir. 1989), wherein the Eleventh Circuit ordered a new trial because counael failed to have neceseary transcript to impeach important witness. Other witnaaeea could have been uaed to impeach Me. Bass.

Trial counesl failed to impeach the assertion that Miss Base could see the crime taking place so clearly that ehe could tell that a corner of the cement block wae missing. Miss Baaa approached the crime scene and looked at the victim after he was aeeaulted (R. 709). she certainly saw the block a few feet away. This explaine her apparent ability to describe the block and the victim. Maryanne Hutton, who did not approach the victim after the crime am she did not want to see him, could not describe him (Police Dept. Interview of Hutton, Rule 3.850 App. O, pp. 11-12) and did not describe the block.

Miss Baee observed two men walking northbound on Garden Avenue, coming from Drew Street (R. 703). The two men the other eyewitnesses saw were walking southbound on Garden Avenue, toward Drew Street. Maryanne Hutton told Detective Luchan that the men were southbound on Garden Street (Hutton Police Interview, Rule 3.850 App. O). Melissa Mastridge alao saw the men walking toward Drew Street (Mastridge Police Interview, Rule 3.850 App. O)(R. 736). Trial counael didn't notice the fact that Ms. Base had the men walking down the street in the wrong direction.

Like Cat Baes, Maryanne noticed that the victim wae lying with one knee up, the other leg down and that he rolled a bit to one side (R. 758). She too should have been impeached. It wasn't until trial or preparation €or trial that she noticed this:

Luchan: Did the person on the ground scream?

Hutton: Never once.

Luchan: No sound, or nothing?

Hutton: No noise from, like a person saying anything, a voice. Nothing.

Luchan: It's common sense, though, you'd yell or eomething if you . . .

Hutton: No, he didn't do anvthing.

(Hutton Police Interview, Rule 3.850 App. 0-11). Trial counael conducted no impeachment of this "new" evidence.

Melissa Maatridge was unable to identify Mr. Rose as the perpetrator. In the suppression hearing she testified that she could easily eliminate the other photos in the photo pak on general characteristics alone:

> When I narrowed theae down, it waa because it was the only one out of theae five pictures it could be. Out of -- like I couldn't say poeitively that it wae him, but out of these five pictures, he was the only one that it could be becauee of his deecription, you know, what he looked like.

(R. 488).

This would have been very helpful to the defenee at trial. In hie closing argument trial counsel "asserted" that Ms. Maatridge established this at trial:

> Now, if you draw on your common sense and experiences, you might agree with me and you might say that in order for a photo-pak to be a fair array, okay, each person, each picture, each photograph should have an equal chance of being selected. That is what it is all about, isn't it? Don't select somebody becauee we euggest them to you. That is what it's all about, each photograph. You heard Catherine Bass and Melissa Maatridge say they could go, you know, right -- they could easily distinguish the othere easily. One was heavier. One had brown hair. This is no challenge.

(R. 1060). She could have. She should have. But ahe did not because she was not asked the question (R. 734-54). For no strategic reason, counsel failed to aak the important and necessary queetion.

Trial counsel failed to establish the most crucial factor in the eyewitness identifications; how far they were from the scene of the crime.

Mr. Haywood eaid they were close:

> Q: Okay, how far was it from here to where you were, an approximation, if you can?
>
> A: Fifty to aeventy-five feet, at the most.

(R. 776).

Me. Bass said they weren't so close:

> Q: All right now, what is the distance from where the victim was laying to where you girls were, approximately?
>
> A: About two hundred feet.

However, the proeecution promised: "Okay, I will not hold you to it, because I know you had not measured, but just roughly?

A: About two hundred feet.

(R. 711-12)

Trial counsel impeached Ms. Bass:

Q. Did you ever tell Detective Luchen that you were about thirty feet away while thie incident wae happening?

A: I don't know.

Q: Do you remember what you told Detective Luchen that night?

A: I have not looked over the exact words of any statement of that night. It wae a rather confusing night.

Q: To say the least?

A: Yee. If I had said thirty feet, that is highly possible. If I have to stop, after thinking about how long the distance is, I would have eaid it wae areater than that.

(R. 721)(emphasis added).

Crime scene technician Velong testified at trial, but no one bothered to aek how far the eye witnesees were from the crime (R. 802-820), a credibility determinant of some import. The witnesses were not thirty (30) feet from the ecene. They were not fifty to eeventy-five feet, at most. They were at approximately one hundred and forty-one feet, almost half the length of a football field away. A careful examination of Verlong's crime scene diagram would have established the distance:

1. My name is Paul Harvill and I am employed as an inveetigator with the Office of Capital Collateral Representative (CCR).

2. Attached are two copies of a diagram of the scene done on June 23, 1983 by Technician Verlong of the Clearwater Police Department. The second copy has wavy lines added to indicate each side of a triangle used to determine the distance the witnesses were from the crime scene.

3. In order to determine the approximate dietance from the witnesses to the crime ecene, the following calculations were made: Disregarding the inches, the distance between the location of the street light on Jonee Street and the northeaetern corner of Garden Avenue and Jones Street is 83 feet. I have labeled thie distance as Side "A". Side "B" extends from the location of the body to the northeastern edge of the pavement of Jones where Side "A" ends. This distance is 115 feet. The 115 foot measurement was determined as follows. The diagram indicates that the distance from Drew Street to Jonee Street is 296 feet, 8 inches. Jones Street ie 24 feet wide according to Rich Novo-Mesky of the Engineering Department of the City of Clearwater. 296 feet + 24 feet = 320 feet. The crime scene was 205 feat from the corner

of Drew Street. 320 feet (the dietance from Drew Street to Jones Street) - 205 feet (the distance of crime scene from Drew Street) = 115 feet (the diatance of crime scene from the northeaet corner of Jones street).

4. To determine the length of Side "C" (the distance of the witneaaes from the crime scene), we ueed the Pythagorean theorem. Since side "A" squared plus side "B" squared equals side "C" squared, the result is that the length of Side "C" is approximately 141 feet.

(Rule 3.850 App. R).

Couneel was ineffective, and prejudicially eo, for his unreasonable failing to impeach testing and challenge evidence, in violation of the sixth, eighth, and fourteenth amendments. Couneel failed to consult or retain an expert in eyewitness identification. Certainly, such an expert not only could have provided invaluable testimony, but also would have greatly assisted defense counsel in planning hie motion to euppreaa lineup identification and in preparing cross-examination of the "eyewitness" at trial. Counsel failed to research this area. A number of books could have explained the various problems associated with eyewitness identification.

Coneiderable research has been dona by experts in the field. A review of the publications show0 the wealth of available information. See, e.g., Wells and Loftua, Eyewitness Testimonv: Psvcholoaical Perspectives (1984); Lloyd-Bostock and Clifford, Evaluatina Witneas Evidence: Recent Psychological Research and New Perspectives (1983); Sobel, Evewitness Identification Leqal and Practical Problems (2d ed. 1983); Loftus, Eyewitness Testimony (1979); Brigham, "The Ability of Prospective Jurors to Estimate the Accuracy of Eyewitness Identification," 7 Law and Human Behavior 19 (1983). These experts recognize that "photo-biased identification," an identification made after the viewing of a photograph, creates inherent risks of a misidentification. Some of the beet research an that has een done at the University of Nebraeka, and the finding there is that the chances of a mistaken identification rise to approximately 20 percent when the subject's photograph produces on the subsequent identification makea the person in that second viewing seem more familiar. See, e.g., Loftus, supra. However, counrel failed to prepare and discover the wealth of valuable information which could have been ueed to undermine the reliability of the eyewitnees identification.

Counsel generally failed to adequately represent Mr. Roee. He had too little

time to prepare, as noted by his request for a Continuance at the beginning of the trial. Ineffective assietance of couneel may arise from the cfrcumstancaa surrounding a trial. United States v. Cronic, 466 U.S. 648 (1984). The question is whether counsel's noted reasons for a continuance are circumstances that are so likely to prejudice the accused that prejudice may be presumed. Cronic, 466 U.S. at 657.

Counsel premised his request for a continuance upon his failure to learn of a material defenee witness until the morning of the trial, his failure to depoee the State's eyewitnesses in advance of the trial, and his failure to obtain statements made by the State's witnesses (R. 262). Counsel waa clearly unprepared to subject "the prosecution's case to . . . the crucible of meaningful adveraarial testing." Cronic, 466 U.S. at 656. A comparison of the prior atatements of the State's witnesses to their trial testimony shows couneel clearly and obviously failed to adequately impeach them. See Depositions of Luchan, Mastridge, Borton, Poole, Bass and Hutton, and their trial testimony. Counsel's performance was deficient and Mr. Roee was prejudiced as a result. Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983).

For example, Poole testified at trial that Mr. Rose eaid he would tell the police he had been with Poole and Borton. Poole was not aaked regarding his teetimony during a depoeition in which ha indicated that Mr. Rose had never asked him and Borton to establish an alibi for him (R. 228). Another example waa the tsetimony of Borton wherein she eaid Mr. Roee had claimed to have killed Butch or at least made him a vegetable. Defense couneel did not impeach Borton with her depoeition teetimony wherein she stated it wae she, and not Mr. Rose, who brought up the possibility of Butch being a "vegetable",

Counsel also failed to object to improper closing arguments by the State. The prosecutor in hie closing deliberately mierepresented the teetimony at the trial, informing the jury that all four (4) eyewitnesses who had testified at trial positively identified Milo Rose, and defense counsel failed to correct the error (R. 1029). The proeecutor also brought to the jury's attention that there was evidence that it, the jury, did not know, but that would be discloeed to the judge in a

preeentence investigation report (R. 1056). Implicit in this statement ia the prosecutor's repreeentation that he knew this information that the jury did not and would not know, and that the jury should trust him and convict. Under United Statee v. Young, 470 U.S. 1 (1985), such an argument was improper and violative of due process. Couneel should have objected and at the very Least had the jury inetructed to disregard. This failure to object was ineffective assistance of counsel. It wae premised upon ignorance of the law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989).

Courte have repeatedly prwnwunced 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 ae moot, 446 U.S. 903 (1980). See also Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(in banc); United States v. Gray, 878 F.2d 702 (3rd Cir. 1989). See also Goodwin v. Balkcom, 684 F.2d 794, 805 (11th Cir. 1982)("[a]t the heart of effective repreeentation is the independent duty to investigate and prepare"). Likewise, courte have recognized that in order to render reasonably effective aeeistance an attorney must present "an intelligent and knowledgeable defense" on behalf of hi5 client. Caraway v. Beto, 421 F.2d 636, 637 (5th Cir. 1970). Thue, an attorney is charged with the responsibility of presenting legal argument in accord with the applicable principles of law. Harriaon v. Jones, 880 F.2d 1279 (11th Cir. 1989).[5]

Even if couneel provides effective assietance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective aeeistance in his or her performance in other portions of the trial. Washinaton v. Watkins, 655 F.2d

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'Counsel have been found to be prejudicially ineffective €or failing to impeach key State witnesses with available evidence, Nixon v. Neweome, 888 F.2d 112 (11th Cir. 1989); for failing to raise objections, to move to etrike, or to seek limiting instructions regarding inadmiseible, 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), or taking actions which result in the introduction of evidence of other unrelated crimes committed by the defendant, United States v. Bosch, 584 F.2d 1113 (let Cir. 1978); for failing to object to improper questions, Goodwin v. Balkcom, 684 F.2d at 816-17; for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963; and for failing to interview witnesses who may have provided evidence in support of a partial defense, Chambers v. Armontrout, 907 F.2d at 828-30.

1346, 1355, rehearing denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the baeie of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so eubatantial that it alone causes the attorney'e aseistance to fall below the Sixth Amendment standard"); Strickland v. Washington; Kimmelman v. Morrison.

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

ARGUMENT V

DEFENSE COUNSEL UNREASONABLY FAILED TO INVESTIGATE AND PRESENT AVAILABLE EXPERT AND LAY TESTIMONY REGARDING INTOXICATION AND ITS MYRIAD RELEVANT LEGAL RAMIFICATIONS, IN VIOLATION OF MR. ROSE'S SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS.

Counsel was also ineffective in failing to investigate, pureue and present evidence of voluntary intoxication. However, the circuit court refused to hold a hearing on this claim as it relates to the guilt phase of Mr. Rose's trial. Alcoholism and alcohol intoxication is traditionally relevant in firet-degree murder cases. Fir&-degree premeditated murder is a specific intent crime: the State must prove beyond a reasonable doubt that the accused premeditatedly intended to kill. Voluntary intoxication is a "defense" to any specific intent crime, including premeditated murder, becauee intoxication may prevent the formation of specific intent.

When intoxication is raieed by the evidence during the trial of a specific intent crime, the jury must be instructed that intoxication can be considered a bar to conviction. At the time of Mr. Rose's trial in 1982, the law of Florida wae clear that premeditated murder was a specific intent crime, and that an appropriate jury instruction was required when intoxication was raised.

Counsel wae ineffective in inveetigating, presenting, and properly arguing the intoxication issue. Trial counsel did no or grossly inadequate inveetigation in this caee, wae unreasonably derelict in his preparation, and at certain points in the proceeding was effectively absent. The following trial record information is illustrative of trial counsel's ill-conceived and worse performed preparation. This was trial counsel's first capital case (PC. 831). Although totally unprepared for trial, trial counsel recklessly proceeded to trial on June 27, 1983. On that morning, trial counael filed a written motion for continuance (R. 262-263), oral argument begins (R. 483); admitted that while the state sent him discovery April 26, 1983, and he probably received it a day or two later, he conducted no depositions until June 10, 1987 (R. 461), Rebecca Borton (R. 205), Mark Poole (R. 219) and Melissa Maatridge (R. 179)); took depositions of two "eyewitnesses" the dav of trial (Catherine Bass (R. 235) and Maryanne Hutton (R. 247)) and never took the deposition of a fourth eyewitness, Carl Haywood (R. 777). A mental health expert for the defense was not obtained until June 23, 1983, four (4) days prior to trial (R. 231-232) and trial counsel provided him no background information (PC. 846-847). On the morning of trial, counsel had no idea what his defense would be. Trial couneel first indicated that he wished additional time to notify the State that he intended to rely upon an insanity defense (R. 262-63), then he decided not to pursue that defense (R. 471). Counsel had refueed to consult with defendant regarding hie defense until the evening of trial. From April 7 or 8 until June 26, trial counsel had not seen the defendant, nor returned phone calla made to trial couneel on behalf of Mr. Rose (R. 902-903). As the trial progressed, it became painfully obvious that trial couneel was learning about this caee as the witnesses testified. Trial counsel was not ready for any phase of the trial and was totally ineffective because of his lack of preparation.

An intoxication "defense" requires inveetigation efforts and preparation, with the aesistance of a competent, independent defense mental health expert. Trial counsel'e unreasonable failure of investigation will be discussed first; hie unreaeonable failure to properly utilize experte will be discussed second.

Witnesses as to intoxication the night of the murder could have been found with

very little effort:

> 1. I, Paul Harvill, am an investigator employed by the State of Florida at the Office of the Capital Collateral Representative (CCR), 225 West Jeffereon Street, Tallahassee, Florida 32301.
>
> 2. Calvin Plyler, according to Clearwater Police Department reporte, saw Robert "Butch" Richardson and Milo Rose in Mano's Pub the evening of October 18, 1987. Mr. Plyler also identified the body of Mr. Richardson. I located Mr. Plyler by phone in the Kannapolis, North Carolina area.
>
> 3. Mr. Plyler stated to me that he used to work at Mano's Pub, although on the evening of October 18, 1982 he was not working and was at Mano's Pub and Angel's Place during the evening. Ha said that when he saw Robert (Butch) Richardeon and Milo Roee at Mano'a Pub, "they were really smashed and still drinking" when he left the bar about 9:00 to 9:30 pm. They had been "drinking all day". Butch and Milo were run out of Mano's Pub because they became too drunk.
>
> 4. Mr. Plyler did not talk with any attorneye concerning the case; he spoke only with a detective.

(Rule 3.850 App. F). It was unreasonable and prejudicial for counsel not to find Mr. Plyler.

Second, current counsel apoke with Barbara Richardson. She stated:

> 4. We just didn't have a lot of money. Maybe because of this, or for whatever reaaon, Milo was drinking a lot then. He had stopped going to AA about three weeks before.
>
> 5. October 18, 1982 aeemed like any other day, until late that night, when I was told that Butch had been killed. I stayed home that day. Butch, Milo, Mark Poole and Becky Borton left the house that morning. That was the last time I saw Butch alive. I didn't see Milo again until later that evening. Mark and Becky came back about an hour after they left. They had been drinking. Mark and Becky left again a short time later. They came back with Milo later that night. Butch was not with them.
>
> 6. When they came back, I wondered where Butch was. No one eeemed to know. I could tell that Milo had been drinking again. <u>He was very drunk</u>. Soon after coming home, Milo paeaed out on our bed with hie clothea on. The only time that Milo went to bed with his clothes on is when he would pass out.

(Rulle 3.850 App. G). It wae unreasonable and prejudicial for trial couneel not to inveetigate and present this testimony. Moreover, Mr. Rose's prior couneel has provided an affidavit detailing the abundance of voluntary intoxication evidence he had developed which Mr. Rouson did not pursue:

> 1. My name is Wayne Shipp. I am a member, in good standing, of the Florida Bar and am currently engaged in private practice in the law firm of Alan, Shipp, and Flanagin, 2950 5th Avenue N., St. Petereburg, Florida 33712. I have been a criminal defense attorney for ten years.
>
> 2. I wae formerly employed as an assistant public defender for

the Sixth Judicial Circuit, in Pinellas County, Florida. I wae working in this capacity from February 1979 to July 1985.

3. Shortly after Mr. Roee wae arrested for the October 18, 1982 homocide of Robert (A.K.A. Butch) Richardson, Jr., I became involved in his case. The Office of the Public Defender was appointed to repreeent Mr. Rose and Ron Eide and I were assigned the case. Ron and I were members of the six to eight person capital team organized by the Chief Assistant Public Defender, Tony Rondolino. While we did other typee of cases, we specialized in capital cases. This group was organized to cope with the epecial knowledge and skills required to litigate capital cases.

4. I deposed several witnesses in Mr. Rose's case and wae kept informed of the progress of the inveetigation conducted by the public defender investigators.

5. In January, 1983 the Office of the Public Defender withdrew becauee of a conflict of intereat and private counsel was appointed to repreeent Mr. Roee. Mr. Rose was represented by two private attorneys who eubeequently withdrew. Darryl Rouson wae then appointed in the spring of 1983 and did represent Mr. Roee at trial.

6. Although I was lead couneel and had done or eupervieed the initial investigation of this case and Mr. Roueon wasn't appointed until. about six montha after the crime occurred, Mr. Rouson did not contact me to discuss the case in any detail. I did talk to Mr. Rouson as I used to see him fairly often, and we may have exchanged a passing word or two, but we never had any substantial. discussion concerning thie case. Our office had offered to assist Mr. Roueon ae we knew he had never tried a capital case before. Mr. Rouson never availed himself of our offer.

7. I was able to watch part of the trial and remember wishing that Mr. Roueon had talked to me. In particular, two things stood out. I know that we had documented from the witnesses we talked to that Mr. Roee had had at least twenty (20) beers the day of the crime. Intoxication could have been proven, not just allowed.

8. I also waa eurprieed and disappointed that Mr. Roueon put on a peychologiet who was poorly prepared and made very damaging statement6 about Hr. Rose.

(App. E).

While trial couneel did belatedly seek a peychological evaluation of Mr. Rose, he testified that hie primary intereat was "Just knowing if he could stand trial and whether or not he could effectively or meaningfully assist me" (PC. 844). This was the first time trial counsel had ever used a court-appointed mental health expert (PC. 846). He did not give the psychologist any background material (PC. 847). He failed to develop the evidence necessary for expert to testify as to voluntary intoxication and its impact on Mr. Roee'e ability to form specific intent. Because of counsel's failure to investigate and develop thin defense, the jury did not hear critical evidence. Confidence is undermined in the outcome. Certainly, an

evidentiary hearing was required.

Had counsel adequately repreeented Mr. Roee, he could have preeented a mental helth expert'e opinion:

> Based on Mr. Rose's behavior and alcohol/drug consumption the day of the incident, it is this examiner'e opinion that Mr. Rose was unable to control his conduct and most likely experienced a black-out at the time of the offense. He was likely extremely confused and in a severely intoxicated state, thus indicating that hie judgment would have been significantly impaired. He was under considerable emotional strain and this most likely affected his judgment and actions at that time. In view of my testing and evaluation, it is certainly likely that if Mr. Rose committed this offense, he did so in a highly intoxicated condition, and he was not able to form the specific intent to kill. This is especially probable if Mr. Rose's history indicative of brain damage is accurate.

(Rule 3.850 App. H).

Mr. Roee was entitled to counsel who effectively addreesed the intoxication and mental health issues. Had trial counsel performed reasonably, there is a reasonable probability that the result in this case would have been different. This Court must remand €or an evidentiary hearing on this issue.

ARGUMENT VI

A DEATH SENTENCE IN THIS CASE IS DISPROPORTIONATE PUNISHMENT, IN COMPARISON WITH OTHER FLORIDA CASES IN WHICH LIFE SENTENCES RESULTED, AND SUCH ARBITRARY APPLICATION OF DEATH VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

If one accepts the guilty verdict, the following is true: Witneeees saw who they said waa Mr. Rose and Mr. Richardson apparently drunkenly walking down the street (R. 717). They had been drinking together (R. 957). Richardson had a .19 blood alcohol level. He was the adult son of Mr. Rose's laver (R. 293, 297, 298, 1299, 1300). Richardson had tried to kill his mother (R. 130). Richardson waa jealous of Mr. Rose, and Mr. Roae felt threatened by him (R. 1304). Mr. Rose became angry after they had become involved in a bar fight (R. 959). When Richardson fell down in the street and would not get up, Mr. Rose found a concrete block nearby and struck him several times (R. 704-708, 737-39, 757-59). Richardson may have been unconscious after the first blow.

The United States Supreme Court recently wrote while overturning a Florida death sentence on what amounted to proportionality grounds:

> If a State haa determined that death should be an available penalty for certain crimes, then it must administer that penalty in a way that

> can rationally distinguieh between those individuals for whom death ie an appropriate sanction and those for whom it is not. Spaziano v. Florida, 468 U.S. 447, 460 (1984). The Constitution prohibits the arbitrary or irrational impoeition of the death penalty. Id., at 466-467. We have emphasized repeatedly the crucial role of meaningful appellate review in ensuring that the death penalty is not impoeed arbitrarily or irrationally. See, e.g., Clemons, supra, at ___(citing caaee); Greaa v. Georgia, 428 U.S. 153 (1976).

Parker v. Dugger, 111 S. Ct. 731, 739 (1991).

In plain English, the goal of proportionality review is that similarly situated defendante receive similar eentencee, that the proceee be rational and not capricious, and that the ultimate sentence which the State can exact from a criminal be reserved for the most severe of murdere. That is not what is happening in Mr. Rose's case. A death sentence on this record is clearly inconsistent with a multitude of other decisions by this Court. This death sentence is arbitrary and capricioue.

This Court conaidered a proportionality claim as part of Mr. Rose's direct appeal. Rose v. State, 472 so. 2d 1155, 1159 (Fla. 1985). However, at that time the Florida Supreme Court, as was the case with the trial court, did not have the benefit of substantial mitigation which was not inveetigated or preeented due to the ineffectiveness of trial counsel. Theee matters are discussed elsewhere in this brief and are incorporated into this argument by specific reference.

Thie Court may not now "ignore the evidence of mitigating circumetances in the record," Parker, 111 S. Ct. at 739. Here the trial court, as in Parker, simply failed to addreaa the substantial mitigation presented in the Rule 3.850 hearing below. The Court's Order of January 25, 1990, is silent about the eubstantial, completely unrebutted testimony concerning Mr. Rose's childhood and teenage experience of abuee and deprivation at the hande of hie severely alcoholic parenta, and hie resulting chemical dependency. This is contrary to the requirements of Campbell v. State, 571 So. 2d 415 (Fla. 1990), which overturned a death eentence with very similar mitigation in the record.

Mr. Rose was a chronic alcoholic and there was substantial unrebutted testimony of his extreme intoxication at the time of the murder. The Florida Supreme Court recognized such substance abuse can warrant a reduction of a death sentence to life imprisonment. Penn v. State, 16 F.L.W. S117 (Fla., January 15, 1991); Ross v.

State, 474 So. 2d 1170 (Fla. 1985); and Caruthers v. State, 465 So. 2d 496 (Fla. 1985). A defendant'e intoxication and history of alcoholism warranted reversal of an override. Cooper v. State, 16 F.L.W. 5375 (Fla. 1991). Buford v. State, 570 So. 2d 923 (Fla. 1990); Holsworth v. State, 522 So. 2d 348 (Fla. 1988); Fead v. State, 512 So. 2d 176 (Fla. 1987); Malloy v. State, 382 So. 2d 1190 (Fla. 1979). Yet, Mr. Rose is arbitrarily and capriciouely singled out for execution.

In addition to chronic alcoholism, thie Court has considered other disabilities when evaluating the proportionality of a death eentence and has often held that they are inconsistent with exacting the ultimate penalty. Fitzpatrick v. State, 527 So. 2d 809 (Fla. 1988), where the victim was a deputy sheriff attempting to rescue two hostages during a robbery; Thompson v. state, 456 So. 2d 444 (Fla. 1984); and Jones v. State, 332 So. 2d 615 (Fla. 1976).

The victim in this tragedy was the son of Mr. Rose's lover and the three (3) lived together. Teetimony relied upon to arrive at the guilty verdict established tension and conflict in the dysfunctional household. The Florida Supreme Court has recognized that domestic conflicts produce "hot blood" killings where death eentences are not proportionate, even when the jury recommends death. Penn; Wilson v. State, 493 So. 2d 1019 (Fla. 1986); Ross; and Blair v. State, 406 So. 2d 1103 (Fla. 1981). The Court has overturned death eentences in the face of a jury life recommendation where the killing had a domestic setting. Douglas v. State, 575 So. 2d 165 (Fla. 1991); Downs v. State, 574 So. 2d 1095 (Fla. 1991); Fead; and Tedder v. State, 322 So. 2d 908 (Fla. 1975). Yet, even with the obvious domestic context of thie killing, Mr. Roee is arbitrarily and capriciouely singled out for execution.

The victim here had a blood alcohol level of .19 at the autopsy (R. 857) and had passed out from alcohol at the time of his death. He was likely not conecious from the first blow and may have been medically alive only a matter of minutee -- "minutee being general and nonspecific, not knowing if it is three to five, eight, et cetera" (R. 847) -- from the fatal blow. While the murder as deecribed was certainly offensive, nothing in thie record euggeeta that the victim suffered any pain or wae even aware of his fats. And yet Mr. Rose received a death sentence €or it, a penalty that should be reserved for the most aggravated homicides. This

contraeta aharply with the extremely brutal murder8 where this Court has found a death eentence was not proportional. Fitzpatrick, where a deputy sheriff was murdered by a man holding two hostages as human shields during the course of a robbery; Wilson, where a violent family fight saw a man kill hie father with a shot to the forehead, shoot his mother several times with a pistol, and stab his five-year-old couein to death with a pair of scissors; Ross, where the victim wae savagely beaten to death with fists, feet and a hammer, fallowed by sexual intercouree with the body; and Rembert v. State , 445 So. 2d 337 (Fla. 1984), where the victim wae beaten with a club and took several hours to die.

In override cases, this Court hae found a life eentence was justified in spite of extreme brutality and pain inflicted on the victim. Douglas v. State, where after being kidnapped, the victim wae forced to have eexual intercourse with hie wife, was beaten so forcefully on the head with a rifle that the stock ahattered, then shot to death with hie horrified wife watching; Downs, where a mother and her children were terrorized at gunpoint before she was grabbed by the hair and shot in the head point blank while holding her two children; Buford, where a aeven-year-old girl was raped and murdered by an alcoholic man; Amazon v. State, 487 So. 2d 8 (Fla. 1986), where an eleven-year-old child frantically tried to summon help on the telephone before being repeatedly and fatally stabbed along with her mother; Pichardson v. State, 437 So. 2d 1091 (Fla. 1983), where a man was beaten to death with a fence-post over an extended time and so savagely that blood spattered the walls and floor of hie home; Malloy, where two victims were kidnapped and driven around from 2:30 a.m. until their deaths before 5:30 a.m.; Burch v. State, 343 So. 2d 831 (Fla. 1977), where there was an attempted rape of the victim before she died with the infliction of 35 or 36 puncture wounds; Jones v. State, 332 So. 2d 615 (Fla. 1976), where a woman was raped, then bled to death from "frenzied" multiple stab wounds, 38 of which were called "significant"; Tedder, where a mother and her infant child were terrorized before the infant's grandmother was shot, inflicting wounds that took 28 days to kill her; and Swan v. State, 322 So. 2d 485 (Fla. 1975), where a burglary victim wae so badly beaten and choked that she died a week later.

Because death is a unique punishment, "It is neceseary in each case to engage

in a thoughtful, deliberate proportionality review to consider the totality of circumatancee in a case, and to compare it with other capital cases." Porter v. State, 564 So. 2d 1060, 1064 (Fla. 1990). This Court wrote in Booker v. State, 441 So. 2d 148, 152 (Fla. 1983), "In State v. Dixon, 283 So. 2d 1, 10 (Fla. 1973), cert. denied sub nom. Hunter v. Florida, 416 U.S. 943, 94 S. Ct. 1950, 40 L. Ed.2d 295 (1974), we atated that review by this Court guaranteed that a similar result would be reached under similar circumetancee in other caeee." See also Brown v. Wainwright, 392 So. 2d 1327, 1331 (Fla. 1981):

> The eecond aspect of our review proceaa is to ensure relative proportionality among death eentencea which have been approved statewide. After we have concluded that the judge and jury have acted with procedural regularity, we compare the case under review with all paet capital cases to determine whether or not the punishment is too great. Proffitt v. Florida, 428 U.S. 242, 96 S. Ct. 2960, 49 L.Ed.2d 913 (1976); State v. Dixon, 283 So. 2d 1 (Fla. 1973), cert. denied, 416 U.S. 943, 94 S. Ct. 1950, 40 L.Ed.2d 295 (1974). In those cases where we found death to be comparatively inappropriate, we have reduced the sentence to life imprisonment. See Malloy v. State, 382 So. 2d 1190 (Fla. 1979); Bureh v. State, 343 So. 2d 831 (Fla. 1977); Jones v. State, 332 So. 2d 615 (Fla. 1976).

Each of the above cases is horrible. Each involves suffering and pain in excess of anything demonstrated in this record, and yet each of the perpetrators above serves a life sentence while Mr. Roee is scheduled to die in the electric chair. It is as if Mr. Rose drew the black marble in some macabre criminal justice system lottery. When weighed against other holdings of this Court, it is not proportionate, it is arbitrary and capricioue, in clear violation of the eighth and fourteenth amendments and the standards adopted by thie Court. See Parker.

Elsewhere in thie brief, there is a discussion of substantial mitigation which was not presented at trial as a result of the ineffectiveness of trial counsel. Thie includes his heaving drinking the day of the murder, his severe alcoholism, the deprived and distorted childhood he endured growing up in a dysfunctional alcoholic home, and hie paet positive demonstrations ae a husband and father. When these are considered, the death sentence is even more dieproportionate. This is not a death penalty cane. Rule Rule 3.850 relief is warranted.

ARGUMENT VII

MR. ROSE'S SENTENCING JURY WAS REPEATEDLY MISLED BY INSTRUCTIONS AND ARGUMENTS WHICH UNCONSTITUTIONALLY AND INACCURATELY DILUTED THEIR SENSE OF RESPONSIBILITY FOR SENTENCING IN VIOLATION OF THE EIGHTH AND

FOURTEENTH AMENDMENTS. COUNSEL WAS INEFFECTIVE IN FAILING TO LITIGATE THIS ISSUE.

In Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), relief was granted to a capital habeae corpus petitioner presenting a Caldwell v. Mississippi claim involving proeecutorial and judicial comments and instructions which diminished the jury's sense of responsibility and violated the eighth amendment in the identical way in which the comments and instructions discussed below violated Mr. Rose's eighth amendment rights. Milo Roae should be entitled to relief under Mann, for there is no discernible difference between the two cases. Anything less would result in the totally arbitrary and freakish imposition of the death penalty and violate the eighth amendment principles.

Throughout Mr. Rose's trial, the court and prosecutor frequently made statements about the difference between the jurore' responsibility at the guilt-innocence phase of the trial and their non-responsibility at the sentencing phaee (R. 549-51, 555-56, 575, 582, 586, 629, 642-43, 659-60, 1055-56, 1230, 1335, 1359). In preliminary instructions to the jury in the penalty phase of the trial, the judge emphatically told the jury that the decision as to punishment was hie alone. After closing arguments in the penalty phase of the trial, the judge reminded the jurors of the instruction they had already received regarding their lack of responsibility for aentencing Mr. Roee, but noted that the "formality" of a recommendation was required.

Counsel's failure to object to the adequacy of the jury's instructions and the impropriety of prosecutor's comments was deficient performance arising from counsel's ignorance of the law. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). The intimation 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, irrespective of the aentencing jury's own decieion, is inaccurate, and is a misstatement of the law. The jury's sentencing verdict may be Overturned by the judge only if the facts are "so clear and convincing that virtually no reaeonable person could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1975). Mr. Rose's jury, however, war led to believe that its determination meant very little. Under Hitchcock v. Dugger, 481 U.S. 393 (1987), the senteneer was erroneously

inetructed. Hitchcock was a change in law warranting Rule Rule 3.850 coneideration of thie claim.

In Caldwell, the Court held "it is constitutionally impermissible to rest a death sentence on a determination made by a eentencer who has been led to believe that the responeibility for determining the appropriateness of the defendant'e death lies elsewhere." 472 U.S. at 328-29. The same vice is apparent in Mr. Rose's Case, and Mr. Rose is entitled to the same relief. This Court must vacate Mr. Roee'e unconetitutional eentence of death.

ARGUMENT VIII

THE SENTENCING COURT SHIFTED TO MR. ROSE THE BURDEN OF PROOF ON THE ISSUE OF WHETHER HE SHOULD LIVE OR DIE, AND RELIEVED THE STATE OF ITS BURDEN OF PROOF AT SENTENCING, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing jury must be:

> [T]old that the state must establish the existence of one or more aggravating circumstances before the death penalty could be imposed...
>
> [S]uch a eentence could be given if the state showed aggravating circumstances outweiahed the mitigating circumstances.

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard wae never applied at the penalty phase of Mr. Rose's capital proceedings. To the contrary, the burden was shifted to Mr. Roee on the queetion of whether he should live ok die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Hitchcock v. Duaaer, 481 U.S. 393 (1987); and Maynard v. Cartwright, 108 S. Ct. 1853 (1988). Mr. Rose's jury war unconstitutionally instructed, as the record makes abundantly clear (see R. 1359).

Under Hitchcock, Florida juries must be instructed in accord with the eighth amendment principles. Hitchcock conetituted a change in law in this regard. Under Hitchcock and its progency, an objection, in fact, wae not necessary. Mr. Rose's eentence of death is neither "reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury and the judge from aaseaeing the full panoply of mitigation contained in the record. The Court must vacate Mr. Rose's unconatitutional sentence of death.

ARGUMENT IX

THE ERRONEOUS JURY INSTRUCTION THAT A VERDICT OF LIFE MUST BE MADE BY A MAJORITY OF THE JURY MATERIALLY MISLED THE JURY AS TO ITS ROLE AT SENTENCING AND CREATED THE RISK THAT DEATH WAS IMPOSED DESPITE FACTORS CALLING FOR LIFE, AND MR. ROSE'S DEATH SENTENCE WAS THUS IMPOSED IN VYOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The jury in Mr. Rose's eentencing trial was erroneously instructed on the vote necessary to recommend a sentence of death or life. As decisions of this Court have made clear, the law of Florida is not that a majority vote is necessary for the recommendation of a life eentence; rather, a six-six vote is sufficient for the recommendation of life. Rose v. State, 425 So. 2d 521 (Fla. 1982), cert. denied, 471 U.S. 1143 (1985); Harich v. State, 537 So. 2d 1082 (Fla. 1983), cert. denied, 465 U.S. 1051 (1984). However, Mr. Rose's jury was erroneously informed that, even to recommend a life sentence, its verdict had to be by a majority vote. These erroneous instructions are like the misleading information condemned by Caldwell v. Mississippi, 472 U.S. 320 (1985), and Mann v. Dugger, 844 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 109 S. Ct. 1353 (1989), bacauee they create "a misleading picture of the jury's role." Caldwell, 472 U.S. at 342 (O'Connor, J., concurring). As in Caldwell, the inatructions here fundamentally undermined the reliability of the aentencing determination, for they created the risk that the death sentence was imposed in spite of factors calling for a less severe punishment, in violation of the moat fundamental requirements of the eighth amendments.

There can be no question that the jury charged with deciding whether Mr. Rose ehould live or die was erroneously instructed. The State incorrectly told the jury during voir dire a majority wae required (R. 550, 556, 586, 629). The trial court erroneouely instructed the jury that a majority vote was necessary for recommending either life imprieonment or a death sentence (R. 1362-63). The incorrect statements that the jury had to reach a majority verdict "interject[ed] irrelevant coneideratione into the fact finding process, diverting the jury's attention from the central issue" of the whether life or death is the appropriate punishment. Beck v. Alabama, 447 U.S. 625, 642 (1980). Hitchcock v. Dugger, 481 U.S. 393 (1987), eetabliehed Florida juries must be correctly instructed. This waa a change in law. This error by itself undermined the reliability of the jury's aentencing

determination; however, it must a100 be analyzed in conjunction with all the other incorrect jury instructions and the total effect on Mr. Rose's sixth amendment right to a fair trial. For each of the reasons discussed above, this Court should vacate Mr. Rose's unconstitutional aentence of death.

ARGUMENT X

THE FLORIDA SUPREME COURT HAS INTERPRETED "ESPECIALLY HEINOUS, ATROCIOUS, OR CRUEL" AND "COLD, CALCULATED AND PREMEDITATED" IN AN UNCONSTITUTIONALLY OVERBROAD MANNER, AND THE JURY INSTRUCTIONS IN THIS CASE FAILED TO ADEQUATELY CHANNEL THE JURY'S DISCRETION, IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS.

The manner in which the jury and judge were allowed to consider "heinous, atrocioue or cruel" and "cld, calculated and premeditated" 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 any murder to be heinous, atrocioue or cruel, and cold, calculated and premeditated. Mills v. Maryland, 108 U.S. 1853 (1988).

Recently, the Supreme Court explained its holding in Maynard:

> When a jury is the final sentencer, it is essential that the jurors be properly instructed regarding all facete of the sentencing procees. It is not enough to inetruct the jury in the bare terme 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 Walton, the Arizona capital scheme did not provide for a jury in the penalty phaae of a capital trial. Thus, the Court's conclueion that no error occurred in Walton is not controlling here. That is because in Florida a jury in the penalty phase returne a verdict recommending a eentence. The jury's verdict is binding ae to the presence and weight of aggravating circumstances as well as the eentence recommended unless no reasonable person could have reached the jury's conclusion. Hallman v. State, 560 So. 2d 223 (Fla. 1990). See Ferry v. State, 507 So. 2d 1373 (Fla. 1987)("The fact that reaaonable people could differ on what penalty should be imposed in this case renders the override improper.") The Florida standard €or an override is exactly the same standard that the United States Supreme Court adopted for federal review of a capital sentencing decision. In Lewis v. Jeffers, 110 S. Ct. 3092, 3102-03 (1990 , the Supreme Court etated:

Rather, in determining whether a state court's application of ite conetitutionally adequate aggravating circumstance waa so erroneous as to raise an independent due proceee or Eighth Amendment violation, we think the more appropriate standard of review is the "rational factfinder" standard established in Jackeon v. Virginia, 443 U.S. 307 (1979). We held in Jackson that where a federal habeaa corpus claimant allegee that hie etate conviction is uneupported by the evidence, federal courte must determine whether the conviction wae obtained in violation of In re Winship, 397 W.S. 358 (1970), by asking "whether, after viewing the evidence in the light most favorable to the proeecution, any rational trier of fact could have found the essential elements of the crime beyond a reaeonable doubt." 443 U.S., at 319 (citation omitted); see also id, at 325 ("We hold that in a challenge to a state criminal conviction brought under 28 U.S.C. Section 2254 -- if the settled procedural prerequisites for such a claim have otherwiee been satisfied -- the applicant is entitled to habeas corpue relief if it is found that upon the record evidence adduced at trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt")(footnote omitted). The Court reasoned:

> "This familiar standard gives full play to the responsibility of the trier of fact fairly to resolve conflicte in the testimony, to weigh the evidence, and to draw reaaonable inferences from basic fact to ultimate facte. Once a defendant has been found guilty Of the crime charged, the factfinder's role as weigher of the evidence is preaerved through a legal conclueion that upon judicial review all of the evidence is to be considered in the light most favorable to the prosecution." 443 W.S., at 319 (footnote omitted).

These consideratione apply with equal force to federal habeae review of a state court's findings of aggravating circumstances.

The significance of this is that certainly a federal court conducting the review mandated by Lewis v. Jeffers cannot be regarded as the sentencer. In Florida, therefore, the courts, which review the jury's recommendation in order to determine whether it ha8 a "reasonable basis" and whether a "rational factfinder" could have reached the jury recommendation, are not replacing the jury as sentencere for eighth amendment purpoeee. In Florida, a capital jury and judge both act as sentencere in the penalty phase. Becauea the jury's factual determinations are binding so long as a reasonable basis exists, it must be regarded as a sentencer. In fact, that wae the holding in Hitchcock v. Dugger, 481 U.S. 393 (1987); Jackson v. Duaaer, 837 F.2d 1469 (11th Cir. 1988); Mann v. Dugger; a44 F.2d 1446 (11th Cir. 1988)(en banc), cert. denied, 109 S. Ct. 1353 (1989); and Hall v. State, 541 So. 2d 1125 (Fla. 1989). Hitchcock was a change in law.

The issue raised by Mr. Rose's claim is identical to that raised in Mavnard v. Cartwright, 108 S. Ct. 1853 (1988). Oklahoma's "heinous, atrocious, or cruel" aggravating circumetance wae founded on Florida's counterpart, see Cartwright v.

Maynard, 802 F.2d 1203, 1219, and the Florida Supreme Court's conatruction of that circumstance in State v. Dixon, 283 So. 2d 1 (Fla. 1973), was the conatruction adopted by the Oklahoma courts. Under the Cartwright decision, Mr. Rose is entitled to relief.

Here the jury war not told what war required to establish thsae aggravatore. See Rhodes v. State, 547 So. 2d 1201 (Fla. 1989); Cochran v. State, 547 So. 2d 528 (Fla. 1989); Hamilton v. State, 547 So. 3d 630 (Fla. 1989). In the preeent case, as in Cartwriaht, the jury inetructions provided no guidance regarding the "heinous, atrocious or cruel" aggravating circumetance. The jury was simply told: "the crime for which the Defendant is to be sentenced was sepecially wicked, evil, atrocioua or cruel" and "the crime for which the Defendat is to be sentenced was commited in a cold, calculated and premeditated manner without any pretense of moral or legal justification" (R. 1360). No further explanation of the aggravating circumetance waa given. At eentencing, the trial judge found that "heinous, atrocious and cruel" and "cold, calculated and premeditated" applied to Mr. Rose's case.

Where an aggravating factor is etruck in Florida, a new sentencing must be ordered unless the error was harmleaa beyond a reaeonable doubt. Error before a eenteneing jury must be reversed where the record contained evidence upon which the jury could reaeonably have based a life recommendation. Ball v. State, 541 So. 2d 1125, 1128 (Fla. 1988) ("It is of no significance that the trial judge etated that he would have impoaed the death penalty in any event. The proper atandard is whether a jury recommending life imprisonment would have a reaeonable basis for the recommendation.") Mitigation wae before the jury which could have served as a reasonable basis for a life recommendation. Mr. Rose is entitled to relief under the standards of Maynard v. Cartwriaht.

ARGUMENT XI

THE INTRODUCTION OF NONSTATUTORY AGGRAVATING FACTORS SO PERVERTED THE SENTENCING PHASE OF MR. ROSE'S TRIAL THAT IT RESULTED IN THE TOTALLY ARBITRARY AND CAPRICIOUS IMPOSITION OF THE DEATH PENALTY IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

In considering whether the death penalty constitutsa cruel and unusual puniehment in violation of the eighth amendment, Justice Brennan wrote:

> In determining whether a punishment comports with human dignity, we

> are aided alao by a second principle inherent in the clause--that the State muet not arbitrarily inflict a severe puniahment. This principle derives from the notion that the State does not respect human dignity when, without reason, it inflicts upon some people a severe punishment that it does not inflict upon others. Indeed, the very worda "cruel and unusual punishments" imply condemnation of the arbitrary infliction of aevere punishments. And, as we now know, the English history of the Clause reveals a particular concern with the establiahment of a aafeguard againat arbitrary punishments. See Granucci, "Nor Cruel and Unueual Punishments Inflicted:" The Original Meaning, 57 Calif.L.Rev. 839, 857-860 (1969).

(footnote omitted). Furman v. Georgia, 408 U.S at 274, 92 S. Ct. at 2744 (Brennan, J., concurring).

When then faced with a challenge to Florida's capital sentencing achome, the Supreme Court found that it passed constitutional muater:

> While the various factore to be conaidered by the sentencing authorities do not have numerical weighte assigned to them, the requirements of Furman are satisfied when the sentencing authority'e discretion is guided and channeled by requiring examination of specific factore that argue in favor of or againet impoeition of the death penalty, thus eliminating total arbitrariness and capriciousness in its impoaition.
>
> The directions given to judge and jury by the Florida statute are sufficiently clear and precise to enable the various aggravating circumstances to be weighed against the mitigating ones. As a result, the trial court's aentencing discretion is guided and channeled by a system that focuaea on the circumatancea of each individual homicide and individual defendant in deciding whether the death penalty is to be imposed.

Gregg v. Georgia, 96 S. Ct. at 2969.

Thus, aggravating circumstances specified in the statute are exclusive, and no other circumstances or factors may be used to aggravate a crime for purposes of the imposition of the death penalty:

> This Court, in Elledge v. State, 346 So. 2d 998, 1003 (Fla. 1977) stated:
>
> > We must guard againet any unauthorized aggravating factor going into the equation which might tip the scales of the weighing process in favor of death.
>
> Strict application of the sentencing etatute is necessary because the aentencing authority's discretion must be "guided and channeled" by requiring an examination of specific factors that argue in favor of or againat imposition of the death penalty, thus eliminating total arbitrariness and capricioueness in its imposition. Proffitt v. Florida, 428 U.S. 242, 258, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976).

Miller v. state, 373 So. 2d 882, 884 (Fla. 1979). See also Riley v. State, 366 So. 2d 19 (Fla. 1979) and Robinson v. State, 520 So. 2d 1 (Fla. 1988 .

Several nonstatutory aggravating factors were preaented to the sentencing jury in Mr. Rose's case. Evidence was admitted over objection that Mr. Rose had committed prior offenses for which he had not been convicted and that a charge of parole violation remained pending. Mr. Rose challenged thie on appeal, but the Florida Supreme Court ruled that there waa no error because the sentencing court did not rely on the evidence of non-statutory aggravatora in the sentencing order.

However, since thie case was decided on direct appeal, Hitchcock v. Dugger, 481 U.S. 393 (1987), wae decided. Hitchcock was a change in law which recognized that the jury muet be treated ae a aentencer €or eighth amendment purposes. Accordingly, this Court neede to readdress the issue and consider the impeact on the jury. Since the jury may have relied on impermissible evidence, Rule Rule 3.850 relief is warranted.

CQNCLUSION

On the basis of the arguments presented herein, Mr. Rose respectfully submits that he is entitled to an evidentiary hearing on the guilt phase issues and a new penalty phase in the trial court. Mr. Rose respectfully urgee that this Honorable Court remand to the trial court €or such proceedings, and that the Court set aside hie unconstitutional conviction and death sentence.

Respectfully eubmitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by first class, United States Nail, postage prepaid, to Peggy Quince, Assistant Attorney General, Office of the Attorney General, Westwood Building, 7th Floor, 2002 North Lois Avenue, Tampa, Florida 33607, this 10TH day of June, 1991.

Attorney