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

REPLY BRIEF OF APPELLANT

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PRELIMINARY STATEMENT

This proceeding involves the appeal of the circuit court'e denial of Mr. Rose's motion for post-conviction relief. The circuit court denied Mr. Rose's claims following an evidentiary hearing. In this brief, the record on direct appeal is cited as "R. ___" with the appropriate page number fallowing thereafter. The record on appeal of this Rule 3.850 proceeding is cited ae "PC-R ." Other references used in this brief are eelf-explanatory or otherwise explained.

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STATEMENT OF THE CASE

The State has not contested Mr. Rose's Statement of the Case eet forth in his initial brief. Accordingly, Mr. Rose continues to rely upon that Statement of the Case.

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, EIUHTH AND FOURTEENTH AMENDMENT RIGHTS.

The circuit court did not find adequate performance on the part of Rouson, the trial counsel. The circuit court in fact found insufficient investigation and preparation. The circuit court did not find deficient performance under the Strickland standard because the circuit court blamed Mr. Rose for counsel's inadequate investigation and preparation.[1] In its order of January 25, 1990, the circuit court simply found that Mr. Rose had not established prejudice as required by the Strickland v. Washinaton, 466 U.S. 668 (1984).[2]

The State in its brief assumed adequate investigation and preparation and ignored the uncontested and damning testimony of Patrick Doherty and John Eide (PC-R. 928, 920). Both testified that Rouson was totally unprepared €or the penalty phase. In fact, Rouson confirmed that he undertook no pre-verdict preparation or investigation of mitigation for the penalty phase on law or facts (R. 1102-05). In addition, Mr. Doherty and Mr. Eide's testimony described Rouson as completely unaware of the law governing mitigation in

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[1]As to deficient performance the circuit court stated: "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-R. 562). Obviously the circuit court found that trial counsel had insufficient time to investigate and prepare. Certainly, the Rule 3.850 record supports that finding.

[2]The State, in its brief, argues a reversal is only required where "there is a high probability" of a different outcome but for counsel's deficient performance (Appellee's brief at 4). The State is wrong. In Strickland it was held that a reversal is required where confidence is undermined in the outcome. It was not Mr. Rose's burden, as the State alleges (Appellee's brief at 5), to prove that the results of the proceedings would have been different. In Strickland the Supreme Court specifically rejected that etandard.

penalty phase and having no witnesses to present. In fact Rouson waa aware enough of the looming disaster to be in a panic. Clearly no penalty phaee investigation and preparation was done prior to the guilty verdict.

A capital defense attorney has an affirmative obligation to investigate mitigation. "[D]efense counsel muet make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors." Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989). Failure to present mitigating evidence is ineffective assistance where the failure results from inadequate preparation and investigation. Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991). Defense counsel is not released from this obligation because he represents a client some are prepared to dismiss as difficult. In fact, this Court has held that counsel is obligated to present mitigation and argue in favor of a life sentence regardless of the client's wishes in order to insure an adversarial testing. Klokoc v. State, 16 F.L.W. 5603 (Fla. 1991). Moreover, "difficult" clients are more likely to have mental problems which create the likelihood of mitigation that needs to be investigated and presented. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991), and Hull v. Freeman, 932 F.2d 159 (3rd Cir. 1991). Here Rouson's inexperience and lack of familiarity with the law of mitigation in capital cases resulted in his failure as penalty phase counsel. Available mitigation was not presented to the jury.[3]

In Brewer, an experienced defense attorney was faced with a client who because of his dysfunctional family background and extensive mental health history was manipulative. In Brewer, as with Mr. Rose, the problem was compounded by a trial court's refusal to allow adequate time for admittedly late penalty phase preparation. However, the Seventh Circuit found ineffective assistance which warranted a new sentencing proceeding:

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[3]The State seems to be arguing "difficult" clients waive mitigation by virtue of their behavior. This Court has previously held that a waiver of mitigation must be clearly set forth on the record and shown to be knowing and intelligent. Anderson v. State, 574 So. 2d 87 (Fla. 1991). No such waiver is present in Mr. Rose's case.

In Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989), cert. denied sub nom., Kubat v. Greer, ___ U.S. ___, 110 S. Ct. 206, 107 L.Ed.2d 159 (1989), we held that:

> "Viewing the performance of couneel solely from the perspective of strategic competence, we hold that defense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors. Mitigating factors brought out at trial might be emphasized, a coherent plea for mercy might be given, or new evidence in mitigation might be presented. But counsel may not treat the sentencing phase as nothing more than a mere postscript to the trial. While the Strickland threshold of professional competence is admittedly low, the defendant's life hanga in the balance at a capital sentencing hearing. Indeed, in some cases, this may be the stage of the proceedings where counsel can do his or her client the most good."

(Emphasis added). In our opinion, defense counsel's failure to investigate the mental history of a defendant with low intelligence demonstrates conclusively that he did not "make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors."

935 F.2d at 857. Unlike Mr. Roee's situation, a pre-sentence investigation in Brewer brought out much of this mitigation and it was considered, though rejected, by the trial court.[4] The Seventh Circuit held "[w]e are unpersuaded that the sentencing judge's consideration of the mitigating factors precludes prejudice to the defendant," 935 F.2d at 858, and granted relief:

> We hold that defense counsel's almost complete lack of investigation into Brewer's mental and family history and thus lack of knowledae reaardina it as well a5 his failure to argue mitigating factors to the jury constitute ineffective assistance of counsel sufficient to undermine our confidence in the outcome of the jury's death penalty recommendation.

935 F.2d at 860, emphasis added.

The State argues that counsel's claim that Mr. Rose precluded timely investigation into penalty phase matters somehow insulates counsel's performance from review. However, trial counsel is not releaeed from his professional obligations because he is blindly following the expressed desires of his client. So acting "constitutes an abdication of counsel's professional

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[4]Brewer was tried in Indiana, a state which follows Tedder and permits jury overrides.

obligations." Hull, 932 F.2d at 168. Rationalizing that Rouson was somehow released from his professional obligations because of his difficult client makes an illusion of the Sixth Amendment. "[I]n a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227, 1233 (10th Cir. 1986). "Just as a reviewing court should not second guess the strategic decisions of couneel with the benefit of hindsight, it should also not construct strategic defenses which counsel doee not offer." Harris v. Reed, 894 F.2d 871, 878 (7th Cir. 1990). The failure to investigate was not a strategic decision. It resulted according to counsel because Mr. Roee was fixated on his innocence. However, Mr. Rose did not waive presentation of mitigation. Anderson v. State, 574 So. 2d 87 (Fla. 1991).[5] In fact, trial counsel was able to present the limited mitigation developed over a weekend unencumbered by Mr. Rose. Moreover, since Mr. Rose was in jail pending trial, there was absolutely no way he could have prevented counsel from timely investigating mitigating evidence. Counsel had the means to investigate he simply chose not to do so.

No matter how guilty or difficult, Mr. Rose "had a constitutional right to a fair trial," Heath v. Jones, No. 90-7671, Slip Op. at 9 (11th Cir., Aug. 26, 1991). No amount of rationalizing can avoid the fact that Rouson's investigation and development of substantial mitigation on behalf of Mr. Rose was next to nonexistent and extremely prejudicial.

The trial court erred in its application of the "Strickland test" to Mr. Rose's case. The Strickland test €or prejudice requires only a "reasonable probability" that the proceeding was unreliable:

> On the other hand. we believe that a defendant need not show that counsel's deficient conduct more likelv than not altered the outcome in the case.
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> * * *
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> Even when the specified attorney error results in the omission of certain evidence, the newly discovered evidence standard is not an apt source from which to draw a prejudice

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'Moreover, Mr. Rose did not waive his right to effective counsel. Yet, Mr. Rose did not receive the benefit of timely investigation and preparation of mitigation.

> standard for ineffectiveness claims. The high standard for newly discovered evidence claims presupposes that all the essential elements of a presumptively accurate and fair proceeding were present in the proceeding whose result is challenged. Cf. United States v. Johnson, 327 U.S. 106, 112, 66 S.Ct. 464, 466, 90 L.Ed. 562 (1946). An ineffective assistance claim asserts the absence of one of the crucial assurances that the result of the proceeding is reliable, so finally concerns are aomewhat weaker and the appropriate standard of prejudice should be somewhat lower. The result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot be ehown by a preponderance of the evidence to have determined the outcome.
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> * * *
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> The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.

(466 U.S. at 694-95)(emphasis added).

The correct Strickland inquiry is as follows:

> (1) were there omissions of fact due to counsel's ineffectiveness (466 U.S. 693).
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> (2) were those omissions due to a strategy decision or to a lack of investigation or preparation.
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> (3) if the omissions were a strategy decision mads after competent preparation and investigation then it raises a "strong presumption" that the strategy decision was correct (466 U.S. 689).
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> (4) However, if the omission of fact was due to a failure to investigate, the court must apply a lower standard to the prejudice analysis (466 U.S. 694).
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> (5) In making a prejudice finding where there was a failure to investigate the court should grant relief "even if the errors of counsel cannot be shown by a preponderance of the evidence to have determined the outcome." A defendant need only show that confidence in the outcome has been undermined. A defendant need not show that counsel's deficient conduct more likely than not altered the outcome (466 U.S. at 693-94).

In Mr. Rose's case, the trial counsel failed to present evidence of mental mitigating factors and additional personal and family mitigation due to his failure to investigate and prepare.[6] He failed to pursue evidence of intoxication and to attack the allegation that the offense was cold and

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[6]The State alleges that counsel did investigate (Appellee's brief at 12). However, that was not until after the guilty verdict was returned. Trial counsel's investigation merely covered the weekend between the guilt and penalty phases and was not complete or adequate.

calculated. He did not make a strategy decision not to put on the evidence. The trial court erred in finding no prejudice. Mr. Rose need only show that confidence is undermined in the outcome, that the jury recommendation is unreliable. The question is not whether the judge would still have imposed death, but whether the evidence would have been sufficient to return a binding life recommendation.

The correct etandard of proof has been applied in countleas cases. See State v. Lara, 16 F.L.W. S306 (Fla. 1991)(Even though the defendant was uncooperative and the witnesses reluctant, this did not justify failure to investigate the defendant'e background, utilize expert witnesses or "virtually ignore" the penalty phase of the trial.); State v. Michael, 530 So. 2d 929 (Fla. 1988)(Trial counsel was ineffective for failure to investigate and prepare available mental health evidence for the penalty phase. The inability to gauge the effect of this omission undermined the courts confidence in the outcome)[7]; Stevens v. State, 552 So. 2d 1082 (Fla. 1989)(A new sentencing is required when counsel fails to investigate, and as a result, substantial mitigating evidence is never presented to the judge and jury); Bassett v. State, 541 So. 2d 596 (Fla. 1989)(Bassett received resentencing because counsel failed to discover material nonstatutory mitigation evidence relating to defendant'e tendency to be dominated by others); Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989)(Defense counsel cannot make a strategy decision without a prior investigation); Cunninaham v. Zant, 928 F.2d 1006 (11th Cir. 1991)(Ineffective assistance of counsel exists where evidence of mitigation is readily available and counsel inexplicably fails to present and argue the evidence); Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1989)(A tactical decision not to present mitigating evidence cannot be made without adequate investigation); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989)(An attorney whose omissions are based on lack of knowledge cannot have made a atrategy decision); Nixon v. Newsome, 888 F.2d 112 (11th Cir. 1989)(No tactical motive

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'Although there was eubstantial jury vote €or death at his original trial, John Michael received a unanimous jury recommendation for life at his resentencing.

can be ascribed to an attorney who failed to properly investigate and prepare); and Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(en banc)(Only if adequate investigation had been conducted, may counsel make a reasonable tactical decision); Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991)(Deficient performance occurs when lack of follow-up investigation results becauee counsel was not thorough in his preparations.)

In Knight v. Dugger, 863 F.2d 705 (11th Cir. 1988) the Eleventh Circuit held:

> The State argues that the Lockett error was harmless in this case because so many aggravating factors were found (four) that no amount of non-statutory mitigating evidence could change the result in this case. No authority has been furnished for this proposition and it seems doubtful that any exists. The State'e theory, in practice, would do away with the requirement of an individualized sentencing determination in cases where there are many aggravating circumstances. It is this requirement, of couree, that is at the heart of Lockett and its progeny. *See* Lockett v. *Ohio,* 438 &.S. 586, 604, 98 S.Ct. 2954, 2964, 57 L.Ed.2d 973 (1978)("in capital cases the fundamental respect for humanity underlying the Eighth Amendment requires consideration of the character and record of the individual offender and the circumstances of the particular offense . . .," quoting *Woodson v. North Carolina,* 428 U.S. 280, 304, 96 S.Ct. 2978, 2991, 49 L.Ed.2d 944 (1976)).

863 F.2d at 710. Mitigation was not presented because of counsel's failure to timely investigate. As a result, the death sentence is unreliable because Mr. Rose did not receive an individualized sentencing. Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). The trial court's failure to consider that the jury could have returned a binding life recommendation on the basis of the evidence presented at the Rule 3.850 hearing. Therefore, the proceedings are unreliable, and confidence is undermined in the outcome.

Relief is warranted on the basis of this claim, The trial court's finding of no prejudice is in error.

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 RIGHT TO A FAIR, INDIVIDUALIZED AND RELIABLE CAPITAL SENTENCING DETERMINATION.

The thrust of the State's response to this claim is that the appointment of a warm body with a license as a mental health professional, without regard to the competence of the particular evaluation in question, meets conetitutional requirements. The requirement of professional adequate assistance by a mental health expert as defined in Ake v. Oklahoma, 470 U.S. 68 (1985) and Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990) has recently been applied by the Eleventh Circuit in Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991).[8] Although, licensed mental health experts testified, the court found their performance waa inadequate:

> The district court found that Dr. Habeeb was a "qualified," "independent psychiatrist." This may have been the case, but Dr. Habeeb did not provide the constitutionally requisite assistance to Cowley's defense. Ake holds that psychiatric assistance must be made available for the defense. This assistance may include conductina "a professional examination an issued relevant to the defense," presenting testimony, and assisting "in preparing the cross-examination of a State's psychiatric witnesses."
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> x * *
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> Dr. Poythress, Cowley's mental health expert during the federal habeas proceedings, stated:
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> > [Habeeb's] evaluation was inadequate in terms of depth and scope, and the testimony [contained] conclus[o]ry as opposed to descriptive or formulative kinds of information about Mr. Cowley.
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> * * *
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> In short, Dr. Habeeb provided little if any assistance to the defense. As the Ninth Circuit has recently noted, "The right to psychiatric assistance does not mean the right to place the report of a 'neutral' psychiatrist before the court; rather it means the right to use the services of a psychiatrist in whatever capacity defense counsel deems appropriate . . . ."

Cowlev v. Stricklin, 929 F.2d 640, 644 (11th Cir. 1991)(emphasis in original).

The trial court erred in Mr. Rose's case in noting that "the Defendant would not allow his counsel to request an expert until the 11th hour" (PC-R. 563). The decision to obtain a mental health expert is a decision that rests with counsel, not the client. Moreover, this Court's opinion in Klokoc v.

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[8] Cowley v. Stricklin would seemingly reject the reasoning of the opinion in Clisby v. Jones, 904 F.2d 1047 (11th Cir. 1990), opinion vacated 920 F.2d 720 (1990), so heavily relied upon by the State.

State, 16 F.L.W. S603 (Fla. 1991), establishes that counsel has a duty to insure an adversarial testing despite his client's wishes.

In Mr. Rose's case, the mental health expert also did not have critical elements needed to arrive at an accurate evaluation and relief should also result.[9] As with any other constitutionally based holdings, Ake means nothing if only the appearance of compliance is held to be adequate as the State argues. The rights guaranteed must be met in substance as well. Mr. Rose did not receive substantial compliance with Ake. Both guilt phaee and penalty phase relief is called for.

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.

The State's response to this argument is that Rouson's lack of zeal is excusable because Mr. Rose was supposedly a difficult client, and besides Rouson said he didn't lack for zeal so that's the end of the discussion. After quoting at length from Rouson's testimony at the evidentiary hearing the State rather hopefully dismisses the claim with the statement that "there is no indication" Rwuson lacked zeal. (Appellee's Answer Brief, at 22-26). In its order denying Rule 3.850 relief the trial court says only that it was "satisfied" Rouson had acted as a zealous advocate (PC-R. 561).

However, there is much more at issue than either the State or the circuit court have acknowledged. Defense counsel and the trial court had an off-the-record ex parte discussion concerning whether counsel's belief that Mr. Rose may be guilty would interfere with his zeal. The circuit court engaged in "subtle arm-twisting." The questions that arise are: Who represented Mr. Rose in this tête-à-tête? Why wasn't Mr. Rose present? And since when can a defense counsel inform the ultimate sentencer that he

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[9]The State argues that Dr. Krop's consideration of family affidavits was somehow improper (Appellee's brief at 18). However, Dr. Krop testified this was an accepted practice in the profession, and the State presented no contrary evidence. Moreover, the affidavits themselves could have been admitted at the penalty phase since hearsay is admissible in such a proceeding.

believes his client is difficult and perhaps guilty? Rouson's testimony reveals serious problems in the attorney-client relationship which diminished Rouson'a efforts as Mr. Rose's advocate. There can be little question that in his ex parte conference with the trial court -- ex parte in that Mr. Rose was not allowed to participate, had no one to speak on his behalf where his own lawyer was saying damning things about him to a judge who would eventually impose a sentence on him, and had no one to even report to him the contents of the discuseion about him -- Rouson harmed the interests of his professional obligation to Mr. Rose. "Evidently, (Rouson) was not aware of the fact that hie client had a constitutional right to a fair trial regardless of his client's guilt." Heath v. Jones, No. 90-7671, slip op. at 9 (11th Cir. Aug. 26, 1991).

The State cites not one single case in the entirely of its argument on this issue. This is significant because it shows that the conduct at issue here has not and cannot be sanctioned. It is never alright for defense counsel to confide ex parte in the sentencing judge that his client is not only difficult but probably guilty.

The situation here is most akin to that in Osborn v. Shillinger, 861 F.2d 612 (10th Cir. 1988). There counsel learned of prosecutorial *ax* parte communication with the judge which indicated that Osborn was a ringleader. Counsel, however, did nothing to combat that, and in fact reported to the sentencing judge what a difficult client Oeborn was. Osborn's conviction and death sentence were reversed because counsel failed to effectively represent Osborn and insure an adversarial testing. Rouson's behavior was just as egregious; it too warrants a reversal of Mr. Rose's conviction and sentence of death.

The situation here requires a reversal in order to provide Mr. Rose with an advocate who will insure an adversarial testing. Mr. Rose's conviction and sentence of death must be reversed.

ARGUMENT IV

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

The issue here is simple, Mr. Rose is entitled to an evidentiary hearing on his ineffective assistance at guilt phase claims. An evidentiary hearing must be held "unless the motion or files and records in the case conclusively show that the movant is entitled to no relief," State v. Crews, 477 So. 2d 984, 984-85 (Fla. 1985), emphasis added, citing O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984). When denying an evidentiary hearing a circuit court must do something more than utter the words "the record conclusively shows that counsel, in the short time he was afforded to prepare this trial, adequately and effectively represented his client," (PC-R. 563).

> (The defendant) also has alleged claims of ineffective assistance of counsel and the failure of counsel to be preeent when (the defendant) testified in the separate trial of his co-conspirator.
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> Without reaching the merits of any of these claims, we nevertheless believe that a hearing is required under Rule Rule 3.850. In its summary order, the trial court stated no rationale €or its rejection of the present motion. It failed to attach to its order the portion or portions of the record conclusively showing that relief is not required and failed to find that the allegations were inadequate or procedurally barred.
>
> ...unless the trial court's order states a rationale based on the record, the court is required to attach those specific parts of the record that directly refute each claim raised.
>
> We thus have no choice but to reverse the order under review and remand €or a full hearing conforming to Rule 3.850.

Hoffman v. State, 571 so. 2d 449, 450 (Fla. 1990).

The trial court's order here does not meet the requirements of Hoffman. The circuit court denied an evidentiary hearing on this claim merely stating: "The record conclusively shows that counsel, in the short time he was afforded to prepare this trial, adequately and effectively represented his client" (PC-R. 563). Mr. Rose has sufficiently plead ineffective representation at guilt phase to require a full evidentiary hearing on his claims. The circuit court's order does not comply with Hoffman. This Honorable Court cannot fairly pass on his claim without full record evidentiary development or

adequate explanation why an evidentiary hearing was not held. A remand back to the trial court with instructions €or a full evidentiary hearing must follow.

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.

Once again, the State attempts to skirt this issue by arguing that Rouson was excused from investigating or preparing in any way because some saw his client as difficult. Consequently, the State argues, no hearing On this post-conviction claim was necessary. This is offered as adequate cover €or Rouson's failures in preparation and investigation of this and all other issues, including:

> Although totally unprepared for trial, trial counsel recklessly proceeded to trial on June 27, 1983.
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> On that morning, trial counsel 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 depoeitions until June 10, 1987 (R. 461), Rebecca Borton (R. 205), Mark Poole (R. 219) and Melissa Mastridge (R. 179); took depositions of two "eyewitnesses" the day 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 €or 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 counsel 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 refused to consult with defendant regarding his defense until the evening of trial. From April 7 or 8 until June 26, trial counsel had not seen the defendant, nor returned phone calls made to trial counsel on behalf of Mr. Rose (R. 902-903).
>
> As the trial progressed, it became painfully obvious that trial counsel was learning about this case as the witnesses testified. Trial. counsel waa not ready €or any phase of the trial and was totally ineffective because of his lack of preparation.

In fact, the State's claim that Mr. Rose was a difficult client doee not clothe the professionally naked Rouson. Rouson still had an obligation to

investigate his case, to prepare on the law and the facts, and consider the possibilities in an informed exchange with his client. "[I]n a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227, 1233 (10th Cir. 1986). This included intoxication issues which Rouson ignored, along with other basic preparation. If Mr. Rose was a demanding and unhappy client, it was because of Rouson's nonexietent preparation and lack of professionalism.[10]

There was no strategic justification for Rouson's failure to even explore intoxication evidence and his failing to prepare in any respect until the absolute laet minute. Such truncated preparation, which precluded his even considering "a viable theory of defense, falls outside the wide range of professionally competent assistance," Harris v. Reed, 894 F.2d 871, 070 (7th Cir. 1989), citing Montaomerv v. Peterson, 846 F.2d 407, 412 (7th Cir. 1988); United States ex rel. Cosey v. Wolff, 727 F.2d 656 (7th Cir. 1984); Chambers v. Armontrout, 885 F.2d 1318, 1323 (8th Cir. 1989); and Smith v. Wainwriaht, 741 F.2d 1248, 1254 (11th Cir. 1984). See also Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Compare this record with Wright v. State, 16 F.L.W. S597 (Fla. 1991). The mental and physiological effects of alcohol consumption and addiction on a defendant should be the province of experts. When confronted with the issue, defense counsel runs great risk in substituting hie lay judgment for that of informed experts. See Hull v. Freeman, 932 F.2d 159, 168 (3rd Cir. 1991).

The State further attempts to dismiss the claim by stating that the record reflects Mr. Rose'e consuming but five beers. (State's Answer Brief at 33.) In truth, the post-conviction record reflects far more.[11] Eyewitnesses described the victim and perpetrator as stumbling and staggering like a couple of drunks (PC-R. 956-957). Mr. Rose was involved with alcoholics anonymous at

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[10]Moreover, how difficult could Mr. Rose have been. Rouson did not see him from April 7 until June 26, the day before the trial began.

[11]Since an evidentiary hearing was not allowed on thio claim, thie record is in the form of allegations in the motion and supporting affidavits.

the time of the crime (PC-R. 948, 954). Previous counsel testified they could document a minimum of 8-10 beers and a series of altercations in bare the afternoon of the crime. However, Mr. Rouson failed to pursue this area with prior counsel and did not investigate the matter on his own. Dr. Krop, a mental health expert, testified that he found evidence of organic brain damage, which would compound the effect of alcohol (PC-R. 1079-91, 1103-08).

On this record the State's dismissal of Rouson's failure to inveetigate the intoxication issue was error. At the very least, an evidentiary hearing was required on the issue. The files and records do not conclusively establish that Mr. Rose is entitled to no relief. Moreover, the circuit court's order does not conform to the requirements set forth in Hoffman v. State, 571 So. 2d 449 (Fla. 1990). A remand is required.

CONCLUSION

Baaed upon the foregoing and upon the discussion presented in Mr. Rose's Initial Brief, this Court should grant a new trial on the basis of trial counsel's ex parte conference with the sentencing judge, a full evidentiary hearing on his guilt phase claims because the present record reflects colorable claims for relief based on ineffective assistance of counsel. This Court should also grant penalty phase relief on the existing record based upon ineffective assistance of counsel, Ake violations, proportionality of sentence, and other claims presented.

I HEREBY CERTIFY that a true copy of the foregoing Reply Brief has been furnished by United States Mail, first class postage prepaid, to all counsel of record on September 19, 1991.

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