IN THE SUPREME COURT OF FLORIDA

CASE NO. 77,367

GREGORY MILLS,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

ON APPEAL FROM THE CIRCUIT COURT OF
THE EIGHTEENTH JUDICIAL CIRCUIT, IN AND FOR
SEMINOLE COUNTY, FLORIDA

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

Mr. Mills conclusively established at the Rule 3.850 evidentiary hearing that he is entitled to relief based upon the failure of trial counsel "to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances." Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). The evidentiary hearing record establishes that defense counsel conducted no investigation for the penalty phase: defense counsel obtained no prior records regarding Mr. Mills; defense counsel did not interview Mr. Mills or his family members regarding mental health issues; defense counsel did not obtain a mental health evaluation of Mr. Mills. The State has pointed to no testimony of defense counsel indicating to the contrary: the State has not said that defense counsel obtained Mr. Mills' prior records, nor that defense counsel interviewed Mr. Mills or his family members regarding mental health issues, nor that defense counsel gave any thought to mental health mitigation. The record also establishes that if defense counsel had obtained Mr. Mills' prior records and had interviewed Mr. Mills or his family members regarding mental health issues, counsel would have sought a mental health evaluation regarding mitigation and would have presented mental health mitigation to the jury and judge. Again, the State has pointed to no testimony of defense counsel indicating to the contrary. Finally, the record also establishes substantial statutory and nonstatutory mental health mitigation which would have provided more than a reasonable basis for the jury's life recommendation. Again, the State has pointed to nothing in the record to the contrary: the State presented no rebuttal evidence at the evidentiary hearing, does not contend that the statutory mental health mitigating factors were not established, and concedes that "[Mr.] Mills has come forward with some mitigation" (Answer at 22). In short, the record establishes Mr. Mills' entitlement to relief.

A. DEFICIENT PERFORMANCE

The State's Answer argues that neither of the attorneys who represented Mr. Mills, Thomas Greene and Joan Bickerstaff, was deficient under Strickland

v. Washington, 104 S. Ct. 2052 (1984) (Answer at 19). While the State writes that "[i]t is almost always possible to imagine a more thorough job being done than was actually done" (Answer at 23), this statement implies that some investigation was done to begin with. In Mr. Mills' case, it is not too difficult to imagine a more thorough investigation being done than what was actually done, considering that Ms. Bickerstaff found out she was handling the penalty phase less than forty-eight (48) hours before its commencement (R. 40-42), and Mr. Greene knew that his responsibility in the case ended at the guilt/innocence verdict (R. 8). As the attorneys testified, no attorney conducted any investigation for the penalty phase (see Initial Brief, pp. 8-19 [quoting testimony]). As they also testified, the attorneys had no strategy or tactic for failing to conduct this investigation: Mr. Greene testified that if he had been responsible for the penalty phase, he would have investigated and presented the matters discussed at the hearing; had she had time, Ms. Bickerstaff would have done the same (see Initial Brief, pp. 19-33 [quoting testimony]).

In its Answer, the State provides a laundry list of evidence that was adduced at the evidentiary hearing, including prior reports by Dr. Austin and Dr. Fumero attached to a pre-sentence investigation, a scar on Mr. Mills' forehead, MMPI test results from Mr. Mills's juvenile records, testimony from Dr. Dee and Dr. Carbonell concerning the existence of organic brain damage, a speedy trial motion filed in another case, and family member testimony regarding childhood accidents where Mr. Mills injured his head (Answer at 10). According to the State, however, counsel was not ineffective for failing to discover this information and present it to the judge and/or the jury. Mr. Mills will specifically address three of the evidentiary matters discussed by the State, and relies on his Initial Brief not only to supplement the following discussion, but also to address the State's other arguments.

1. Prior Reports by Dr. Austin and Dr. Fumero

At the evidentiary hearing, both Mr. Greene and Ms. Bickerstaff were shown a medical report by Dr. Luis Fumero dated October 5, 1973, and one by

Dr. Carl Austin, dated November 14, 1974. Both of these reports were readily available to defense counsel had they investigated, yet Mr. Greene testified that he neither obtained nor reviewed these reports (R. 21); Ms. Bickerstaff likewise testified that she did not have the benefit of these medical evaluations (R. 49).

The State's Answer contends that the reports of Dr. Austin and Dr. Fumero "contained only negative information" (Answer at 11). This is an inaccurate analysis of the information contained in these reports. Dr. Austin's report indicates that Gregory Mills "has a strongly fatalistic attitude about his life going from bad to worse . . . It is my impression that an intensive rehabilitation and treatment program in a controlled environment could help this boy" (R. 940). In spite of this assessment by Dr. Austin the State argues that "[t]his would hardly indicate to an attorney that Mills <u>might have</u> an extreme emotional disturbance" (Answer at 12)(emphasis added). The State makes this argument despite the fact that Mr. Greene (R. 36), Ms. Bickerstaff (R. 53), and Mr. Ford (R. 441), unequivocally indicated that Dr. Austin's report would have triggered a mental health examination of Gregory Mills.

The State also summarily concludes that Dr. Fumero's report was "even less helpful" than Dr. Austin's evaluation (Answer at 12). Incredibly, despite the fact that Dr. Fumero's report recommended an EEG to rule out brain dysfunction and prescribed 25 mg. of Mellaril three (3) times a day, the State concludes that, even if counsel had the benefit of the report, it "would not raise a red flag" (Answer at 12). The State argues this in spite of the fact that Mr. Greene (R. 22), Ms. Bickerstaff (R. 50), and Mr. Ford (R. 440), all testified that Dr. Fumero's report would have initiated a mental health evaluation of Gregory Mills.

Unrebutted and unequivocal testimony at the evidentiary hearing established that both of these reports would have signalled defense counsel, in the words of the State, "that [Gregory] Mills might have an extreme emotional disturbance" (Answer at 12) and would have triggered a mental health

evaluation. The State offered no evidence to the contrary.

2. **Prior MMPI Test Results**

During the course of the evidentiary hearing, collateral counsel introduced a 1976 MMPI which was located in Mr. Mills' juvenile records, records which were never obtained by Mr. Greene, Mr. Ford, or Ms. Bickerstaff (R. 24, 53, 439). The State contends that "[t]he behavioral problems Mills might have as outlined in the MMPI are not the type that would scream out 'brain damage'" (Answer at 12)(emphasis in original). The State cites no case which indicates that, in order for a mental health evaluation to assist trial counsel in developing and presenting mitigation evidence, such an evaluation must "scream out" a particular diagnosis. The State writes that "[e]ven though the MMPI computer analysis says to 'consider psychiatric evaluation' the succeeding information would not raise a red flag" (Answer at 12-13). Although it is true that the analysis states, as the Appellee points out, that the profile should be interpreted "with caution," (R. 1102), the State fails to complete the sentence as written in the MMPI analysis:

> Interpret profile with caution. Patient admits a large number of unusual experiences, feelings or symptoms. May have significant psychiatric problems.

(R. 1102)(emphasis added).

According to Mr. Greene, the MMPI test results, had he obtained them, in conjunction with the prior evaluation of Dr. Fumero, had he obtained it, would indicate that a mental health evaluation was necessary in Mr. Mills' case (R. 24). Ms. Bickerstaff responded that the type of information contained in the MMPI would "absolutely" have triggered an evaluation (R. 53). Mr. Ford likewise testified that the MMPI summary indicating psychiatric problems was a "red flag" and if he had seen it, it would have signalled the necessity of a mental health evaluation for mitigation (R. 442). Yet she and Mr. Greene did not obtain the juvenile records, and indeed made no effort to develop statutory or nonstatutory mental health mitigation evidence (R. 54).

Thus, all the witnesses on this issue testified that this 1976 MMPI, had someone obtained it, would have triggered a mental health examination,

especially when considered together with the prior undiscovered reports of Dr. Fumero and Dr. Austin. Trial counsel, however, without a tactical or strategic reason, failed to obtain and analyze Mr. Mills' juvenile records, thereby neglecting to utilize the wealth of mental health mitigation at their disposal.

3. Trial Attorney Testimony That Mental Health Mitigation Would Have Been Presented Had It Been Investigated and Developed

The State's Answer glosses over the extensive testimony by the trial attorneys that they would have presented mental health mitigation to the jury and judge had such evidence been investigated and developed. As the attorneys testified, mental health mitigation would have been entirely consistent with their penalty phase and sentencing arguments and would have gone a long way toward explaining and humanizing Mr. Mills. Despite recognizing that trial counsel's performance must be examined "from counsel's perspective at the time" (Answer at 9), the State ignores the trial attorneys' testimony about their perspective and substitutes its own speculation.

Mr. Greene testified if he had had evidence of statutory mental health mitigation, he would have presented that evidence at judge sentencing (R. 27). Indeed, as the State recognizes, Mr. Greene "did argue impaired capacity to the trial judge" (Answer at 11), but had no evidence to support that argument. As Mr. Greene testified, evidence of statutory mental health mitigation would not have been inconsistent with his arguments to the judge and would have been helpful (R. 18, 27-38).

Regarding Ms. Bickerstaff, the State argues that presentation of mental health mitigation would have been inconsistent with her penalty phase arguments (Answer at 15-17). However, Ms. Bickerstaff clearly and unequivocally testified to just the opposite: she testified that there was "absolutely no[]" question that had she had evidence of mental health mitigation, she would have presented it (R. 57). Such evidence would not have been inconsistent with her penalty phase arguments (id.), and she had no tactical or strategic reason for failing to present it (R. 58). Ms. Bickerstaff further testified that Dr. Dee's report and the affidavits of

family members were not inconsistent with her penalty phase arguments (R. 59-60). Had she had Dr. Dee's report, she would have used it at the penalty phase (Id.).

The State's arguments are totally contrary to the record. Trial counsel testified that they had no strategic or tactical reason for failing to present mental health mitigation. Viewing their performance "from counsel's perspective at the time (Answer at 9), it is clear trial counsel's performance was deficient.

B. PREJUDICE

The State argues that prejudice has not been established because "[t]he jury did not base the recommendation on mitigation. They exercised a jury pardon based on residual doubt and sympathy" (Answer at 20)(emphasis in the original). The State also argues, "saying a defendant was extremely emotionally disturbed and substantially unable to appreciate the criminality at the time he committed the crime would destroy the residual doubt argument" (Answer at 21). Extreme emotional disturbance and substantially impaired capacity to appreciate the criminality of conduct are valid mitigation, Fla. Stat. sec. 921.141(6)(b), (f), which a capital jury is instructed to consider as mitigating factors. This Court has held that residual doubt is not valid mitigation. Valid mitigation was available to preclude an override.

The State does not contend that statutory and nonstatutory mental health mitigating factors were not established at the evidentiary hearing. Indeed, the evidence of mental health mitigation was substantial and unrebutted. Rather, the State contends that presentation of mental health mitigation would have allowed the State to present evidence regarding other crimes committed by Mr. Mills (Answer at 20-21). The State is engaging in pure speculation: at the penalty phase, as the State recognizes (Answer at 21), the State attempted to introduce such evidence to rebut the "no significant criminal history" mitigating factor, but the court refused to admit such evidence. The State does not now explain how mental health mitigation would have altered this ruling. Nor does the State address the fact that the trial judge knew about

Mr. Mills' prior criminal history. Evidence regarding Mr. Mills' mental health impairments would have reduced the negative implications of this history, as defense attorney Greene testified (R. 27).

The State also argues that "[t]he evidence presented by the family [at the evidentiary hearing] is cumulative to that presented at the penalty phase <u>with the exception of the information about the head injuries which could be a 'red herring' anyway</u>" (Answer at 23)(emphasis added). In order for testimony to be cumulative, there has to have been some testimony on the issue in question to begin with. The State characterizes the testimony of Arlington Mills and Dianetta Alexander at the penalty phase as "character and background" testimony (Answer at 23). Their penalty phase testimony, however, did not address Mr. Mills' medical history nor the two accidents he suffered in which he received severe head injuries. Nor did it even begin to scratch the surface regarding the home environment in which Gregory Mills was reared, not to mention the physical, verbal, and emotional abuse wrought by his mother and father. This line of testimony by no means would have been cumulative to what was actually said at the penalty phase or the judge's sentencing hearing.

The State concedes that the testimony about the head injuries was not cumulative, yet it goes on to make the unfounded statement that this information "could be a 'red herring' anyway" (Answer at 23). While it may be true that neither Dr. Dee nor Dr. Carbonell was able to pinpoint whether Gregory Mills' organic brain damage was caused by one or both of these childhood accidents,[1] the etiology of his brain damage is not at issue here. Had trial counsel inquired into or investigated Mr. Mills' background, they would have learned of these incidents and therefore this would have raised the

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[1]Dr. Dee testified that he could not be certain what caused Mr. Mills' brain damage. Numerous factors and events could have caused the damage: a difficult pregnancy, an anemic mother, fetal alcohol syndrome, or the head trauma (R. 105). Dr. Carbonell also testified that she could not pinpoint the etiology of Mr. Mills' brain damage, although she did believe that, given his family history, he had some brain damage at birth (R. 238). Moreover, his mother's drinking during her pregnancy also damaged Mr. Mills (R. 239). Because of the global nature of his brain damage, Dr. Carbonell testified that it was entirely possible that Mr. Mills' brain damage was the result of fetal injury, and the later head trauma only exacerbated this condition (R. 256).

Appellee's "red flag." Counsel simply failed to do so, thereby inexcusably and unjustifiably failing to investigate and "to develop and present evidence that would tend to establish statutory or nonstatutory mental mitigating circumstances." Mills v. Dugger, 559 So. 2d 578, 579 (Fla. 1990). Had they known of the head injuries, they would have been aware of yet another indication that should have triggered a mental health evaluation and a further investigation in order to properly prepare for the sentencing phases of Mr. Mills' trial. That investigation would have produced the significant mental health mitigation presented at the evidentiary hearing and discussed in Mr. Mills' initial brief (Initial Brief, pp. 38-51). The mental health evidence establishes that Mr. Mills was prejudiced by counsel's failures to investigate and prepare.

C. CONCLUSION

The State has failed to acknowledge that trial counsel have a duty to investigate the existence of potential mitigation evidence. See Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989); Eutzy v. Dugger, 746 F.2d 1492, 1497 (N.D. Fla. 1989), aff'd, No. 89-4014 (11th Cir. 1990); Middleton v. Dugger, 849 F.2d 491, 493 (11th Cir. 1988). Despite unrebutted and extensive testimony to the contrary, the State argues that "both Ms. Bickerstaff and Mr. Greene zealously advanced the best interests of their client" (Answer at 24). Both attorneys testified that no investigation and no development of mitigation evidence was even considered, much less carried out. The fact that Mr. Greene "had no reason to suspect insanity or incompetency" (Answer at 11), certainly does not excuse his failure to investigate possible mental health mitigation.[2] Although Mr. Greene did not participate in the penalty phase, he

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[2]In discussing the mental health mitigating factors found at Fla. Stat. §941.141 (6)(e) and (f), this Court has recognized that:

> A defendant may be legally answerable for his actions and legally sane, and even though he may be capable of assisting his counsel at trial, he may still deserve some mitigation of sentence because of his mental state.

Perri v. State, 441 So. 2d 606, 609 (Fla. 1983). In fact, Mr. Greene testified at the evidentiary hearing that his role was limited to the guilt/innocence phase of Mr. Mills' trial, and after he concluded that he had no reason to suspect

did represent Mr. Mills at the sentencing, which took place eight (8) months after the penalty phase. Moreover, Ms. Bickerstaff, the attorney who did represent Mr. Mills at the sentencing phase, had less than forty-eight (48) hours notice to prepare.

Regarding this issue, this Court's precedent is clear:

> "It is beyond cavil that an attorney who fails altogether to make any preparations for the penalty phase of a capital murder trial deprives his client of reasonably effective assistance of counsel by any objective standard of reasonableness." Blake v. Kemp, 758 F.2d 523, 533 (11th Cir.), cert. denied, 474 U.S. 998 (1985). At the very least, any evidence presented and any plausible arguments made to the trial court could have provided the trial court with a basis to follow the jury's recommendation of a life sentence. We find that trial counsel's inaction at the penalty phase of the trial amounted to a substantial and serious deficiency measurably below the standard for competent counsel.

Stevens v. State, 552 So. 2d 1082, 1087 (Fla. 1989)(emphasis added). Counsel's highest duty is the duty to investigate, prepare, and present available mitigation. Where counsel fails in this regard, counsel's performance is deficient, the defendant is denied a fair adversarial testing process, and the results of the proceedings are rendered unreliable. See Stevens; Bassett v. State, 451 So. 2d 596 (Fla. 1989); State v. Michael, 530 So. 2d 929 (Fla. 1988); Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988). Even a superficial reading of the record in this case reveals that Mr. Greene's and Ms. Bickerstaff's performance fell far below the level of "zealously advanc[ing] the best interests of their client" (Answer at 24).

The testimony adduced at the evidentiary hearing conclusively established that a reasonable investigation would have uncovered mitigating evidence. The prior medical reports of Dr. Fumero and Dr. Austin were attached to Pre-Sentence Investigation (PSI) reports that Mr. Mills had pending in the Public Defender's Office itself (R. 19-21). The MMPI administered in 1976 was located in Mr. Mills' juvenile records, yet no attempt was made to obtain these critical reports, as was reflected in the hearing testimony (R. 24, 25). Mr. Mills' sister, Dianetta Alexander, and

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insanity or incompetence, he "wouldn't have done anything past that point" (R. 17).

grandfather, Arlington Mills, both voluntarily appeared at the penalty phase, yet were never questioned about potential mental health mitigation. Ms. Alexander also was present, again not under subpoena, at her brother's sentencing -- again she was not asked about mental health mitigation. Counsel was simply deficient for failing to conduct a reasonable investigation, and no tactical or strategic choice was offered by counsel to explain their neglect. This situation violates the most basic and fundamental precepts of capital sentencing:

> The United States Supreme Court has relentlessly emphasized that in capital cases, the sentencer must make an individualized decision based on both the circumstances of the offense and the character and propensities of the offender. Lockett v. Ohio, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978); Gregg v. Georgia, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); Woodson v. North Carolina, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); see also Harris v. Dugger, 874 F.2d 756 (11th Cir. 1989); Armstrong v. Dugger, 833 F.2d 1430 (11th Cir. 1987). The sentencer may not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record that a defendant proffers as a basis for a sentence less than death. Woodson, 428 U.S. at 305, 96 S.Ct. at 2991, 49 L.Ed.2d at 961. The type of evidence proffered by Eutzy's current counsel is consistent with the types of evidence considered by courts to be relevant mitigating evidence. See Skipper v. South Carolina, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986)(evidence that petitioner was well-behaved and well-adjusted in prison was relevant mitigating evidence); Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed.2d 1 (1982)(state trial judge's refusal to consider defendant's family history and emotional disturbance in mitigation in death penalty sentencing held violative of eighth and fourteenth amendments); Harris, 874 F.2d at 762-64 (new sentencing required where counsel failed to investigate and present the mitigating testimony of family members and minister describing Harris as a decent, loving man whose life was important to them); Armstrong, 833 F.2d at 1432-34 (writ issued where counsel failed to investigate and present mitigating evidence of petitioner's childhood poverty, irregular school attendance caused by petitioner's need to supplement family income, epileptic seizures, and history of nonviolence).

Eutzy, 746 F. Supp. at 1498.

The State repeatedly argues that the testimony of Mr. Greene and Ms. Bickerstaff was made with the benefit of hindsight, and "[t]hat current counsel, through hindsight, would now do things differently is not the test for ineffectiveness" (Answer at 18). What the State has failed to recognize is that counsel were not offering opinions, clarified with the benefit of hindsight, as to whether or not they should have done something. They simply

testified about what they had and had not done, what their understanding of their roles was, and what their perspective of the case was. Counsel also simply testified that had they obtained or seen certain documentation, this information would have led them to discover mental health mitigation. Their testimony clearly and conclusively established that counsel's omissions were not the result of a tactical or strategic choice, but resulted from a failure to investigate and prepare. The transcript of the evidentiary hearing testimony so indicates.

The State also argues that defense counsel were not deficient because the jury recommended life (Answer at 13, 14). This argument is inconsistent with the law. The fact that counsel obtained a life recommendation does not preclude the possibility that his or her performance was deficient. Success at the penalty phase does not per se translate into effective performance. Stevens.

The State further advances the argument that the trial court's order denying post-conviction relief was supported by competent, substantial evidence (Answer at 25)(citing State v. Lara, 581 So. 2d 1288 (Fla. 1991), and State v. Michael, 530 So. 2d 929 (Fla. 1988)). Mr. Mills does not dispute that the proper standard of review to be applied in analyzing a trial court's findings in a Rule 3.850 proceeding is the 'competent substantial evidence' test. See State v. Michael, 530 So. 2d 929 (1988); State v. Bolender, 503 So. 2d 1247, 1249 (Fla. 1987). What Mr. Mills does dispute is the State's wholly unsubstantiated and conclusory statement that "[i]n the present case, the trial court's order is also supported by competent, substantial evidence" (Answer at 24).

The 3.850 evidentiary hearing transcript consists of over six hundred (600) pages of testimony from the attorneys, mental health experts, and family members. The State presented no witnesses or rebuttal evidence. The record establishes that trial counsel conducted no investigation for the penalty phase and would have presented mental health mitigation had they developed such evidence. The record also conclusively demonstrated that Mr. Mills

suffered from a substantially impaired capacity to conform his conduct to the requirements of the law and from an extreme mental/emotional disturbance at the time of the offense. The mental health experts also explained that Mr. Mills' level of functioning, given his impairments, was well below that of his chronological age of 22 at the time of the offense. The experts also testified to an extensive amount of nonstatutory mitigation. The trial court made no findings that the doctors' accounts were unreliable or not credible. The court, without reason or explanation, cast aside the crucial recommendation of Dr. Fumero that Mr. Mills be tested to rule out brain damage, and simply concludes that there was nothing to indicate the existence of mental mitigating factors. In spite of uncontroverted evidence to the contrary, the State argues that the court's conclusion is supported by competent substantial evidence. Even a cursory reading of the evidentiary hearing testimony reveals that this is simply not so; no competent, much less substantial, evidence was adduced to support the trial court's conclusion that there was nothing to indicate the existence of mental health mitigation.[3] The reason that no mental health mitigation was presented to the jury or trial judge was not that none existed. Counsel was simply deficient in not fulfilling their duty to investigate mitigation; had they done so, a wealth of mitigation would have been discovered.

This case involves a judicial override of the jury's life verdict, where, on direct appeal, this Court invalidated three of the six aggravating factors relied upon by the trial court in imposing death. Mills v. State, 476 So. 2d 172, 178 (Fla. 1985). In such circumstances, the availability of and counsel's failure to present this mitigation is vital. Had such mitigation been presented, it could not be said that "the facts suggesting a sentence of death [are] ... so clear and convincing that virtually no reasonable person

[3]In fact, the judge's own order belies the contention that there was nothing to indicate the existence of mental mitigation. The trial court specifically mentioned the "earlier report pertaining to the defendant that recommended testing to rule out minimal brain dysfunction," yet inexplicably goes on to conclude that "notwithstanding" this report, there was nothing to indicate the existence of mental mitigating factors.

could differ." Tedder v. State, 322 So. 2d 908, 910 (Fla. 1976). Because the trial judge in this case found no mitigation when in fact mitigation did exist, "confidence in the trial judge's decision to reject the jury's recommendation is undermined. . . . At that point it cannot be said that no reasonable person could differ as to the appropriate penalty." Stevens, 552 So. 2d at 1087 (citations omitted). In Mr. Mills' case,

> The trial judge . . . overrode the jury's recommendation based on a record which he said contained no mitigating circumstances. Because the standard which applies in jury override cases is very strict, because there indeed were mitigating circumstances which cannot be characterized as insubstantial and which could have been presented had counsel investigated and chosen to do so, and because the aggravating circumstances do not clearly outweigh these mitigating circumstances, the court's confidence in the judge's decision to reject the jury's recommendation is undermined.

Eutzy, 746 F. Supp. at 1500. This is precisely the posture of Mr. Mills' case, and the Eutzy reasoning is directly on point. Had the mental health mitigation been presented, there is every reasonable possibility "the jury could have found all these factors and might have concluded that the mitigation outweighed the aggravation," Burch v. State, 522 So. 2d 810, 813 (Fla. 1988), the Tedder test would not have been met, the trial judge would not have overridden the jury's life recommendation and had the trial judge imposed death, this Court would have reversed on direct appeal. Confidence in the outcome of Mr. Mills' sentencing proceeding is undermined. This Court cannot now "gauge the effect," Michael, 530 So. 2d at 930, of counsel's omissions, and resentencing is required.[4]

CONCLUSION

Based upon the foregoing, the Initial Brief, and the Rule 3.850 record, Mr. Mills respectfully requests that this Court set aside his override death

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[4]The proper remedy in Mr. Mills' case is resentencing before the judge. This Court has consistently held that where constitutional error occurs in capital sentencing proceedings but the jury recommended a life sentence, the defendant should continue to receive the benefit of the jury's life recommendation and be resentenced before the judge alone. See Stevens, 552 So. 2d at 1088; Thomas v. State, 546 So. 2d 716, 717 (Fla. 1989); Burr v. State, 550 So. 2d 444, 446-47 (Fla. 1987); Zeigler v. Dugger, 524 So. 2d 419, 421 (Fla. 1988); McCrae v. State, 510 So. 2d 874, 881 (Fla. 1987); see, also, Buford v. State, 570 So. 2d 923 (Fla. 1990).

sentence and remand this case for a judicial resentencing.

I **HEREBY CERTIFY** that a true copy of the foregoing has been furnished by United States Mail, first class postage prepaid, to all counsel of record on February 12, 1992.

Respectfully submitted,

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