IN THE

SUPREME COURT OF FLORIDA

CASE NO. 77,865

TODD MICHAEL MENDYK,

Appellant,

v.

THE STATE OF FLORIDA,

Appellee.

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

REPLY BRIEF OF APPELLANT

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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

SUSAN HUGINS ELSASS
Staff Attorney
Florida Bar No. 0854573

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

COUNSEL FOR APPELLANT

PRELIMINARY STATEMENT

The State in its brief asserts that Mr. Mendyk's legal arguments in his initial brief are not couched in identical language to his Rule 3.850 motion and that therefore the arguments should be disregarded. Rule 3.850 requires a statement of the facts which establish the basis of a claim. The facts which give rise to Mr. Mendyk's claims were alleged in the Rule 3.850 motion.

Mr. Mendyk's counsel did not simply repeat the Rule 3.850 pleadings in the initial brief because the Court has previously indicated its dissatisfaction with briefs that are merely reformatted Rule 3.850 motions. Accordingly, the legal language used is obviously not identical. However, the claims presented are the same. The facts were presented to the circuit court, and the circuit court chose to deny the motion without permitting briefing or argument.[1]

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[1]In fact, argument was scheduled but cancelled with no notice to Mr. Mendyk's counsel. Counsel showed up prepared to fully argue why relief was appropriate on the basis of the facts alleged, and was informed that Ms. Kellie Nielan, Assistant Attorney General, had failed to contact Mr. Mendyk's counsel regarding cancellation of the hearing. See Appendix A attached to this brief.

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RESPONSE TO STATE'S STATEMENT OF THE CASE

Mr. Mendyk rejects the State's Statement of the Case because it is incomplete and contains irrelevant and argumentative statements. Contrary to the State's assertions, Mr. Mendyk's initial brief includes a factual recitation as required by the rules of appellate procedure. The relevant facts to an appeal from the denial of Rule 3.850 relief are those which are contained in the Rule 3.850 motion and which establish the basis for the Rule 3.850 claims. The State completely ignores the critical facts in this case. Mr. Mendyk's trial setting was advanced eleven (11) days with only three (3) days' notice. The trial setting precluded Mr. Mendyk from having both attorneys present for the commencement of his trial (R. 2-4). The prosecutor sandbagged the defense with false evidence and made a mockery of Brady (R. 5-7; PC-R. 729). Counsel without Mr. Mendyk's consent admitted guilt and argued in the guilt phase that Mr. Mendyk should rot in jail for life (R. 1163). No penalty phase investigation was conducted by counsel and as a result, the prosecution duped a susceptible defense counsel into presenting no mitigating evidence. These are the relevant facts which the State failed to address in its brief.

The State ignores the outrageous farce that constituted Mr. Mendyk's trial, and simply urges in its statement of the facts that the crime precludes consideration of Mr. Mendyk's claims. However, as the Eleventh Circuit has recently stated, a capital defendent has a "constitutional right to a fair trial regardless of . . . [the crime]." Heath v. Jones, No. 90-7671, slip op. at 9 (11th Cir. August 26, 1991).

ARGUMENT I

THE CIRCUIT COURT'S SUMMARY DENIAL OF MR. MENDYK'S MOTION TO VACATE WITHOUT AN EVIDENTIARY HEARING WAS ERRONEOUS AS A MATTER OF LAW AND FACT.

The State argues that the trial court fully complied with the law before summarily denying Mr. Mendyk's motion to vacate. The record does not support this conclusory allegation. As this Court has mandated:

> [U]nless 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.

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

In this case, the trial court did not comply with Hoffman. Either the specifics of the record must be attached (they were not), or the rationale must exist without such attachments (it does not).[2] Rule 3.850 allegations must be treated as true unless rebutted by the record. Mills v. Dugger, 559 So. 2d 578 (Fla. 1990). The record simply does not rebut Mr. Mendyk's claims and supporting evidence. Relief is warranted. Gorham v. State, 521 So. 2d 1067 (Fla. 1988); Lemon v. State, 498 So. 2d 923 (Fla. 1986); O'Callaghan v. State, 461 So. 2d 1354 (Fla. 1984).

The State also argues that the documentation presented as Mr. Mendyk's offer of proof should not be considered. The offer of proof was filed three weeks before the order denying relief was entered. In Smith v. Dugger, 565 So. 2d 1293 (Fla. 1990), this Court found presentation of an offer of proof in a motion for rehearing timely. The motion to vacate and the offer of proof establish that an evidentiary hearing is required.

ARGUMENT II

MR. MENDYK'S CAPITAL TRIAL AND SENTENCING PROCEEDINGS WERE RENDERED FUNDAMENTALLY UNFAIR AND UNRELIABLE, AND VIOLATED THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS, WHEN THE PROSECUTION WITHHELD MATERIAL AND EXCULPATORY EVIDENCE AND DELIBERATELY AND KNOWINGLY PRESENTED AND USED FALSE EVIDENCE AND ARGUMENTS IN ORDER TO INTENTIONALLY DECEIVE THE JURY, THE COURT AND DEFENSE COUNSEL.

The prosecution's suppression of evidence favorable to the accused violated due process. The prosecutor must reveal to defense counsel any and all information that is helpful to the defense, whether that information relates to guilt/innocence or punishment, and regardless of whether defense counsel requests the specific information. Brady v. Maryland, 373 U.S. 83 (1963). Here, these rights, designed

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[2]For example, in denying Mr. Mendyk's Brady and ineffectiveness claims, the circuit court made no reference to the record. The presiding judge was not the trial judge. There is no indication he even read the record in the six (6) days between his assignment to the case and his decision to deny relief. The order of assignment dated February 12, 1991, is attached as Appendix A. The February 18, 1991, letter memorializing the law clerk's phone call announcing a decision is attached as Appendix B.

to prevent miscarriages of justice and ensure the integrity of fact-finding, were abrogated:

> A Brady violation occurs where: (1) the prosecution suppressed evidence; (2) the evidence was favorable to the defendant; and (3) the evidence was material to the issues at trial. See United States v. Burroughs, 830 F.2d 1574, 1577-78 (11th Cir. 1987, cert. denied, 485 U.S. 969, 108 S. Ct. 1243, 99 L.Ed.2d 442 (1988). Suppressed evidence is material when "there is a reasonable probability that. . . the result of the proceeding would have been different" had the evidence been available to the defense. Pennsylvania v. Ritchie, 480 U.S. 39, 57, 107 S. Ct. 989, 1001, 94 L.Ed.2d 40 (1987) (quoting United States v. Bagley, 473 U.S. 667, 682, 105 S. Ct. 3375, 3383, 87 L.Ed.2d 481 (1985)) (plurality opinion of Blackmun, J.).

Stano v. Dugger, 901 F.2d 898, 899 (11th Cir. 1990)(en banc).

The material withheld from Mr. Mendyk included: handwritten notes from the state attorney's filed dated 4/17/87,[3] Frantz's post-sentence report, reports and notes relating to Cousins, Mr. Mendyk's Lake County Jail records indicating he was on psychotropic medication during his trial, a handwritten memo in the state attorney's file dated 4/17/87 and police reports. In addition, Mr. Mendyk stated that the State presented false testimony and evidence relating to Mr. Frantz and Mr. Cousins. The State challenged each of the constitutional (United States and Florida) and Fla. R. Crim. P. 3.220 violations in a conclusory non-record manner.

The State's first defense for the withholding of information was that the State is not required to actively assist the defense and there is no Brady violation where exculpatory evidence is equally accessible to the defense and the prosecution. The State relied on this rationale to justify the nondisclosure of its evidence of Mr. Mendyk's substance abuse at the time of the offense, Mr. Mendyk's suicidal ideation and use of psychotropic medication while in jail and a state investigator's "psychological report." The State reasoned that all this information would certainly have been known to Mr. Mendyk as part of his life history.

The inability to recall details is a symptom of substance abuse. Thus, it should not be expected that Mr. Mendyk, who was more wasted than Frantz, should recall the latest time and amount of drug consumption. Mr. Mendyk's trial counsel

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[3]In the Rule 3.850 motion, Mr. Mendyk alleged what these notes said in pertinent part (PC-R. 73). In its brief, the State disputes the accuracy of the allegations. However, until an evidentiary hearing the allegations must be taken as true. Lightbourne v. Dugger, 549 So. 2d 1364 (Fla. 1989).

was unaware until cross-examination of Frantz that Mr. Mendyk and Frantz had taken drugs up to 2:00 a.m., the time that they drove to the Presto store (R. 1025). The prosecutor continued to argue that no drugs were taken after 11:30 p.m. to midnight. Just as it is deficient performance and prejudicial for defense counsel to rely on their mentally ill client as in Hull v. Freeman, 932 F.2d 159, 169 (3rd Cir. 1991), and Foster v. Dugger, 823 F.2d 402, 407 (11th Cir. 1987), it is equally unreasonable and prejudicial for the State to rely on a mentally ill accused to consult and reveal all material and exculpatory information found in his life history. Mr. Mendyk's substance abuse was material evidence that could have negated not only Mr. Mendyk's specific intent (relating to charges of premeditated murder and kidnapping) but the aggravator of cold, calculated and premeditated.

It is equally unreasonable and prejudicial for the State to expect a mentally ill and suicidal Mr. Mendyk to "consult" with his counsel and relay information regarding State Attorney Hogan's monitoring of Mr. Mendyk's use of psychotropic medication during trial. The State's responsibilities for disclosure of Mr. Mendyk's drug use during trial were not lessened by Mr. Mendyk's demands for sedation, and in fact should increase because Mr. Hogan was directly responsible for the amount of medication administered to a mentally ill Mr. Mendyk. The use of psychotropic drugs during trial would certainly have been material information in a competency hearing and penalty phase (to show Mr. Mendyk was mentally ill and the State was treating him as such). The State asserted that Mr. Mendyk did not present the issue of competency to the trial court (Answer Brief at 40); however, this is in error. In his Rule 3.850 motion, Mr. Mendyk alleged that the prosecutor's actions precluded inquiry by defense counsel into Mr. Mendyk's competency (PC-R. 71-72).

The State used its awareness of Mr. Mendyk's mental illness evinced by its investigator's psychological report to improperly extort statements from Mr. Mendyk. This report is certainly material exculpatory and/or impeachment evidence of the improper coercion and the extraction of involuntary statements from Mr. Mendyk. Mr. Mendyk could have used this evidence to impeach Detective Decker's testimony of noncoercion at the suppression hearing and at trial.

The State's argument attempts to justify nondisclosure because defense counsel is obligated to investigate and know. However, the State ignores the fact that the defense did not investigate and know, and thus there was no adversarial testing. Under Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986), relief is thus warranted.

The State also reasoned that the withholding of impeachment evidence regarding Frantz would not have affected the outcome because "it was quite clear that he had given a statement, entered a plea, and was testifying to save his own skin." (Ans. Br. 34). In Smith v. Wainwright, a reversal was required because:

> The conviction rested upon the testimony of Johnson. His credibility was the central issue in the case. Available evidence would have had great weight in the assertion that Johnson's testimony was not true. That evidence was not used and the jury had no knowledge of it. There is a reasonable probability that, had their original statements been used at trial, the result would have been different.

799 F.2d at 1444. Mr. Mendyk's case is virtually the same.

Frantz's trial testimony was that drugs did not play a role in this crime and that Mr. Mendyk could "function." However, notes from the State Attorney's file revealed many additional facts about drug use and Todd Mendyk being more wasted than Frantz (PC-R. 700-03). There were "material inconsistencies" between these notes and Frantz's trial testimony. See Spaziano v. State, 570 So. 2d 289 (Fla. 1990). In addition, Frantz's testimony at his sentencing was that drugs had ruined his life (PC-R. 838). In addition, Tom Hogan allowed Frantz to testify as to Todd's sobriety and Frantz's nonparticipation in the crime despite his own notes reflecting substantial drug use and Decker's belief that Frantz was more responsible than he admitted. Frantz's participation in the crime would have been material impeachment evidence to show the extent of Frantz's motive to testify and to challenge Ralph Decker's trial testimony. Further equal participation would have given rise to mitigation in the form of disparate treatment. Had defense counsel known of this available impeachment evidence and not presented it because he believed adequate impeachment had already occurred, ineffective assistance would have occurred. Harris v. Reed, 894 F.2d 871 (7th Cir. 1990). Similarly, the State's failure to disclose denied Mr. Mendyk an adversarial testing.

The State also threatened the defense and prejudiced the judge with the proffer of false testimony during penalty phase. The State arranged to have Mr.

Cousins, Mr. Mendyk's co-defendant in South Carolina, testify that satanism was involved in that crime when in fact it was not. Mr. Mendyk passed a polygraph test and his charges from that crime were dropped. Despite its awareness of the false testimony, the State alleged it had no duty to disclose because Mr. Mendyk "would have been well aware of his involvement in the South Carolina incident" (Answer Brief at 39).[4] The State is painfully ignorant of the law. Prosecutors have a duty not to knowingly present false evidence:

> The principles that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. As stated by the New York Court of Appeals in a case very similar to this one, People v. Savvides, 1 N.Y.2d 554, 557, 154 N.Y.S.2d 885, 887, 136 N.E.2d 853, 854-855:
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> > "It is of no consequence that the falsehood bore upon the witness' credibility rather than directly upon defendant's guilt. A lie is a lie, no matter what its subject, and, if it is in any way relevant to the case, the district attorney has the responsibility and duty to correct what he knows to be false and elicit the truth. *** That the district attorney's silence was not the result of guile or a desire to prejudice matters little, for its impact was the same, preventing, as it did, a trial that could in any real sense be termed fair."

Napue v. Illinois, 360 U.S. 264, 269-70 (1959).

The United States Supreme Court has explained "[a] new trial is required if 'the false testimony could . . . in any reasonable likelihood have affected the judgment of the jury.'" Giglio v. United States, 405 U.S. 150, 154 (1972). This means that reversal is required unless the error is harmless beyond a reasonable doubt. United States v. Bagley, 473 U.S. 667, 679 n.9 (1985).[5]

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[4]The State also argues that this issue should have been brought on direct appeal. However, because the State did not disclose that the evidence was false, the defense did not establish the falsity on the record and thus the claim could not have been presented then. It was not "of record" at the time of the direct appeal.

[5]The State conveniently ignores that harmless beyond a reasonable doubt is the applicable standard to the State's use of false evidence.

ARGUMENT III

MR. MENDYK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE SENTENCING PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Defense counsel presented no evidence during penalty phase. There is simply no tactical reason why any trial attorney, who offered no guilt/innocence defense, could fail to present ample available mitigation.[6] Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991); Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Such failure amounts to ineffective assistance of counsel. Cunningham; Brewer. In Stevens v. State, 552 So. 2d 1082 (Fla. 1989), this Court held trial counsel has a duty to develop and present mitigating evidence. See Kubat v. Thieret, 867 F.2d 351, 369 (7th Cir. 1989) ("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"). Failure to do so requires re-sentencing. Here, trial counsel failed to even contact key mitigation witnesses. This was deficient performance. The cumulative effect of this and other errors clearly undermines confidence in the outcome. Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987). The State does not understand that mitigation serves specific constitutional purpose -- reliability and individualized sentencing. See Penry v. Lynaugh, 109 S. Ct. 2934 (1989); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). Personal culpability must be determined for each individual capital defendant, regardless of the circumstances of the crime. See Penry. This is critical under the guarantees of the eighth and fourteenth amendments:

> "[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."

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[6]The State argues the fact that, since the mental health expert's report on guilt phase issues mentions facts which could have constituted mitigation, "counsel was well aware of this potential mitigating evidence." Answer Brief at 52. However, as set out in the Rule 3.850 motion, this report went to the guilt phase attorney and not to the penalty phase attorney who was unaware of the mental health expert's "potential" findings. Counsel never pursued or investigated mitigation.

> California v. Brown, 479 U.S. 538, 545, 107 S. Ct. 837, 841, 93 L.Ed.2d 934 (1987)(concurring opinion). Moreover, Eddings makes clear that it is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing sentence. Hitchcock v. Dugger, 481 U.S. 393, 107 S. Ct. 1821, 95 L.Ed.2d 347 (1987). Only then can we be sure that the sentencer has treated the defendant as a "uniquely individual human bein[g]" and has made a reliable determination that death is the appropriate sentence. Woodson, 428 U.S., at 304, 305, 96 S. Ct., at 2991, 2992. "Thus, the sentence imposed at the penalty stage should reflect a reasoned moral response to the defendant's background, character, and crime." California v. Brown, supra, 479 U.S., at 545, 107 S. Ct., at 841 (concurring opinion)(emphasis in original).

Penry, 109 S. Ct. at 2947.

The State also argues that the mitigation could not have outweighed the aggravation (Answer Brief at 56). However, that is not the correct standard of review. The correct standard of review is whether the mitigation would have established a reasonable basis for a life recommendation. Hall v. State, 541 So. 2d 1125 (Fla. 1989). See Brewer v. Aiken. Here, it would have.

Mr. Mendyk never received what justice demands -- an individualized sentence. Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985). Relief is proper.

ARGUMENT IV

MR. MENDYK 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 WHO EVALUATED MR. MENDYK WAS NOT PROVIDED WITH THE NECESSARY BACKGROUND INFORMATION AND WAS NOT ASKED TO EVALUATE FOR THE PRESENCE OF MITIGATION OR INTOXICATION NEGATING SPECIFIC INTENT.

Defense counsel presented no evidence during penalty phase. In his motion to vacate and his offer of proof, Mr. Mendyk detailed the wealth of background information available to counsel, and thus to his mental health expert, if counsel had but investigated and prepared (See Argument IV).

The trial court directed the defense mental health expert, George W. Barnard, M.D., to consider only the issues of competency to stand trial and insanity at the time of the crime (R. 1361-1364). Trial counsel did not ask for mitigation assistance (PC-R. 946). Had he been asked, Dr. Barnard would have been able to assist the defense with issues of thought disorder and substance abuse, among others (PC-R 1366-69.) The law is clear that Mr.

Mendyk is entitled to such assistance. Ake v. Oklahoma, 470 U.S. 68 (1985); Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991); Smith v. McCormick, 914 F.2d 1153 (9th Cir. 1990); State v. Michael, 530 So. 2d 929 (Fla. 1988);[7] Garron v. Bergstrom, 453 So. 2d 405 (Fla. 1984); Hall v. Haddock, 573 So. 2d 149 (Fla. 1 DCA 1991). The trial court erred, and counsel was ineffective for both failing to challenge this error and for failing to provide Dr. Barnard with the ample available mental health mitigation.

ARGUMENT V

MR. MENDYK WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT THE GUILT-INNOCENCE PHASE OF HIS TRIAL, IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

Mr. Mendyk's trial counsel entered a not guilty plea, and thus Mr. Mendyk was entitled to a fair trial. In Francis v. Spraggins, 720 F.2d 1190 (11th Cir. 1983), defense counsel was held to be ineffective because they conceded their client's guilt despite the entering of a not guilty plea and concentrated on a line of argument better directed at penalty phase (his client deserved life imprisonment). The State argued that Mr. Mendyk's counsel would have looked like a buffoon and lost his credibility had he attempted to argue that Mr. Mendyk did not commit these crimes (Answer Brief at 62); however, this does not justify conceding guilt to preserve credibility for penalty phase.[8] Spraggins, 720 F.2d at 1194. In its brief, the State never even addresses Spraggins. This Court in Nixon v. State, 572 So. 2d 1336 (Fla. 1990), considered the argument that guilt could not be conceded without a showing on the record that the defendant knowingly and voluntarily consented to the trial strategy. This Court in Nixon was unable to rule on this issue because the evidentiary hearing record was unclear on whether the defendant consented to concede guilt and seek leniency. Nixon, 572 So. 2d at 1339-40.

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[7]In fact, in Michael relief was granted in identical circumstances. Michael requires that, at the very least, an evidentiary hearing be afforded on this claim.

[8]It is certainly hard to believe counsel was trying to maintain credibility for a penalty phase in which no evidence was presented. The State is trying to create a strategy where there was none. This is improper. See Harris v. Reed.

Here there has been no hearing on this point. The abandonment of Mr. Mendyk by his counsel mandates Rule 3.850 relief.

If, as the State asserts, "in light of the evidence" (Answer Brief at 62) Mr. Mendyk's only guilt defenses were Mr. Mendyk's mental health, then it was ineffective for Mr. Mendyk's counsel to fail to pursue this avenue. Henderson v. Sargent, 926 F.2d 706 (8th Cir. 1991); Chambers v. Armontrout, 907 F.2d 825 (8th Cir.)(en banc), cert. denied, 111 S. Ct. 369 (1990). Mr. Mendyk's trial counsel could have attempted to shift some of the blame on Frantz and pursued a defense based on Mr. Mendyk's mental health. Mr. Mendyk's "counsel's decision not to investigate and pursue this evidence cannot be justified as a strategic decision." Henderson, 926 F.2d at 711. Deficient performance occurs where "counsel's failure to present or investigate . . . results not from an informal judgment, but from neglect." Harris v. Dugger, 874 F.2d 756, 763 (11th Cir. 1989). At the very least, Mr. Mendyk's mental health should have been fully investigated as part of "trial preparation" to challenge the voluntariness of his statements.

Mr. Mendyk's thought disorder (schizophrenia) and history of substance abuse may have not risen to the level of insanity in Dr. Barnard's opinion; however, if properly investigated it would have raised substantial questions about Mr. Mendyk's competence to stand trial, the voluntariness of his statements and his mental health at the time of the offense (voluntary intoxication).

In addition, Mr. Mendyk's trial counsel's failure to learn of Mr. Mendyk's suicidal ideations and taking of psychotropic drugs in jail during his trial was either a Brady violation by the State or ineffective assistance of counsel for failing to perform an independent investigation of Mr. Mendyk's mental health, Hull v. Freeman, 932 F.2d 159 (3rd Cir. 1991); Foster v. Dugger, 823 F.2d 402, 407 n.16 (11th Cir. 1987), cert. denied, 487 U.S. 1241 (1988). See Griffin v. Lockhart, 935 F.2d 926 (8th Cir. 1991). It is ineffective assistance of counsel for Mr. Mendyk's trial counsel to solely rely on a mentally ill Mr. Mendyk for mental health information. Mr. Mendyk's

request for and taking of drugs while in jail would have caused his defense counsel to fully investigate Mr. Mendyk's mental health and competence. Mr. Mendyk's counsel was ineffective in not knowing this information and arguing Mr. Mendyk's incompetence. Smith v. Wainwright, 799 F.2d 1442 (11th Cir. 1986).

Mr. Mendyk's defense of voluntary intoxication was supported by Frantz' deposition (PC-R. 774-834), state attorney's notes that "Todd more wasted than [Frantz]" (PC-R. 702), Eddie Craven's affidavit and Mr. Mendyk. It is well settled in Florida law that voluntary intoxication is a defense where specific intent is an element of the crime. Gurganus v. State, 451 So. 2d 817 (Fla. 1984). Mr. Mendyk was charged with not only felony murder based on a general intent crime (sexual battery), but also premeditated murder and kidnapping. In Heddleson v. State, 512 So. 2d 957 (Fla. 4 DCA 1987), the court held that it was proper for the circuit court to deny a voluntary intoxication instruction as to sexual battery but not as to kidnapping and a new trial was ordered. In addition, a voluntary intoxication instruction would be appropriate for the charge of premeditated murder, because premeditated murder is clearly a "specific intent crime." See Edwards v. State, 428 So. 2d 357 (Fla. 3rd DCA 1983).

The voluntary intoxication instruction could have negated the charges of premeditated murder and kidnapping in many if not all of the jurors' minds, thus leaving Mr. Mendyk with only a conviction based on felony murder with an underlying general intent felony.[9] At the very least, the negation of these specific intent crimes would have certainly affected the penalty phase of Mr. Mendyk's trial. Since voluntary intoxication may defeat the intent element of these crimes, it would follow that the aggravator of cold, calculated and premeditated would not have been found and the jury may have recommended life because of no mental culpability.

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[9]There was no physical evidence of the sexual battery as the State relied mostly on the improperly seized statements from Mr. Mendyk and Frantz.

Mr. Mendyk's counsel failed to object to and challenge the improper prosecutorial comments in the guilt phase closing argument. The State seems to be oblivious to the fact that the failure to object may constitute deficient performance. Numerous courts have held a failure to object to specific error was deficient performance. Kimmelman v. Morrison, 477 U.S. 365 (1986); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989); Murphy v. Puckett, 893 F.2d 94 (5th Cir. 1990); Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991). Where the failure to object constitutes deficient performance, reversal is required where the defendant had a reasonable chance of succeeding on the objection or on appeal if the objection was overruled. Harrison; Atkins.

Mr. Mendyk was abandoned by his counsel and material, critical mental health issues were not investigated nor presented to the jury. Thus, Mr. Mendyk did not receive a fair trial, and Mr. Mendyk was left defenseless against the State in violation of his constitutional rights.[10] When an adversarial testing did not occur because of Brady violations and/or counsel's deficient performance, Rule 3.850 relief is mandated. State v. Michael, 530 So. 2d 929 (Fla. 1988).

ARGUMENT VI

ACCESS TO THE FILES AND RECORDS PERTAINING TO MR. MENDYK IN THE POSSESSION OF THE CERTAIN STATE AGENCIES HAVE BEEN WITHHELD IN VIOLATION OF CHAPTER 119, FLA. STAT., THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, THE EIGHTH AMENDMENT, AND THE CORRESPONDING PROVISIONS OF THE FLORIDA CONSTITUTION.

The State has failed to understand the requirements of the Florida Public Records Act. The Hernando County Sheriff has withheld an unedited videotape; it was the edited version which was used at trial. Mr. Mendyk continues to seek Chapter 119 disclosure of the unedited videotape.

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[10]The State tries to argue that Mr. Mendyk has abandoned certain ineffective assistance claims. See Answer Brief at 28. However, clearly the State has just simply failed to read the initial brief. See initial brief at 55.

The request to the Parole Commission was made by telephone on January 3, 1991, and memorialized by letter on January 24, 1991, after defense counsel went on a wild goose chase on account of misinformation from the Parole Commission. These facts are of record (PC-R. 1217-18). Further, the letter to the Parole Commission was timely presented to the trial court as item 48 in Mr. Mendyk's offer of proof.

The Pasco County Sheriff has never complied with sec. 119.011(3)(c) - (3)(d), Fla. Stat. (1991). An in camera hearing is required. Jennings v. State, 16 F.L.W. 452 (Fla., June 13, 1991).

Contrary to the State's claim, sec. 119.07(2)(b), Fla. Stat. (1991), applies to civil, not criminal, actions. Additionally, principles of statutory interpretation dictate that sec. 119.07(3)(d), Fla. Stat. (1991), must be read in conjunction with the dictates of Sec. 119.011(3), Fla. Stat. (1991).

ARGUMENT VII

THE RECENT DECISION OF MINNICK V. MISSISSIPPI, 111 S. CT. 486 (1990), ESTABLISHES THAT THIS COURT ERRONEOUSLY DECIDED MR. MENDYK'S DIRECT APPPEAL AND AS A CONSEQUENCE, MR. MENDYK HAS BEEN DEPRIVED OF THE RIGHTS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

Mr. Mendyk and the State agree that this issue was raised on direct appeal. However, Minnick v. Mississippi, 111 S. Ct. 486 (1990), establishes that this Court erred in its analysis of Edwards v. Arizona, 451 U.S. 477 (1981). In Edwards v. Arizona, the United States Supreme Court held that once an accused requests counsel, all interrogation must cease and no further police-initiated interrogation can occur unless an attorney has been made available to the accused. On April 9, 1987, Mr. Mendyk requested counsel; however, Detective Ralph Decker failed to honor Mr. Mendyk's request and obtained a subsequent statement that day. On April 10, 1987, at 8:30 a.m., Mr. Mendyk first met with his public defender. After this brief meeting with his attorney, and without the attorney's presence, Decker improperly seized other statements from Mr. Mendyk.

In Mendyk v. State, 545 So. 2d 846 (Fla. 1989), this Court mistakenly reasoned that the admissibility of the April 9, 1987, statement was not at issue because of

these other subsequent statements (even though they were not admitted into evidence). This Court held that any error would have been harmless beyond a reasonable doubt. This was error in light of the United States Supreme Court's holding in Minnick v. Mississippi, 111 S. Ct. 486 (1990), that an accused is constitutionally entitled to an attorney's presence (and not merely a consultation) before there can be any police-initiated, post-request interrogation. Mr. Mendyk's subsequent unconstitutionally-seized statements which were not and could not be introduced at trial did not render the improper admission of his April 9, 1987, statement harmless beyond a reasonable doubt. Minnick implicitly overrules this Court's ruling on direct appeal. Thus, this claim is properly present in Mr. Mendyk's post conviction pleadings.

ARGUMENT VIII

DEFENSE COUNSEL WAS INEFFECTIVE IN NOT OBJECTING TO THE PROSECUTOR'S INFLAMMATORY, EMOTIONAL AND IMPROPER COMMENTS, TO JURY INSTRUCTIONS, AND TO SECURITY MEASURES WHICH VIOLATED THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS.

The State avers that Mr. Mendyk's claims of ineffective assistance of counsel for failure to object to 1) improper prosecutorial comments and arguments, 2) improper jury instructions in both guilt/innocence and penalty phases; and 3) improper security measures, are procedurally barred. This is a misunderstanding of the law, since issues of ineffective assistance of counsel are properly raised in Rule 3.850 motions. Meeks v. State, 382 So. 2d 673 (1980). The failure to object may constitute deficient performance when confidence is undermined in what the outcome would have been either at trial or on direct appeal if an objection had been registered. Atkins v. Attorney General, 932 F.2d 1430 (11th Cir. 1991); Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). Further, the cumulative effects of ineffective assistance of counsel and improper jury instructions do establish prejudice. Magill v. Dugger, 824 F.2d 879 (11th Cir. 1987).

A review of the trial exhibits clearly shows a total of thirty-six (36) -- not "what appears to be three" -- photographs of the victim were presented to the jury. The presentation of such a large number of inflammatory photographs prejudiced Mr. Mendyk by impermissibly distracting the jury. Czubak v. State, 570 So. 2d 925 (Fla. 1990). Counsel also alleged in the 3.850 motion and in the initial brief that Mr.

Mendyk's trial counsel should have vigorously litigated the issue. Had he done so, the pictures would have been excluded or a reversal would have occurred on direct appeal. Therefore, Mr. Mendyk was prejudiced.

CONCLUSION

For each of the foregoing reasons and those stated in his initial brief, the denial of each of Mr. Mendyk's Rule 3.850 claims was erroneous. This Court should reverse and remand the case for an evidentiary hearing on the claims.

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 3, 1991.

LARRY HELM SPALDING
Capital Collateral Representative
Florida Bar No. 0125540

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

SUSAN HUGINS ELSASS
Staff Attorney
Florida Bar No. 0854573

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

By: _____
Counsel for Appellant

Copies furnished to:

Kellie A. Nielan
Assistant Attorney General
210 North Palmetto Avenue
Suite 447
Daytona Beach, FL 32114