IN THE SUPREME COURT OF FLORIDA

CASE NO. 78,462

TIMOTHY CURTIS HUDSON,

Appellant/Cross-Appellee,

v.

THE STATE OF FLORIDA,

Appellee/Cross-Appellant.

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

ANSWER BRIEF OF CROSS-APPELLEE AND REPLY BRIEF OF APPELLANT

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\RY STATEMENT

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

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

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

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REPLY TO STATEMENT OF FACTS

Mr. Hudson continues to rely upon his statement of the case as set forth in his initial brief and upon the facts set forth throughout that brief. However, he must challenge certain representations set forth by the State in their original brief. Mr. Hudson here addresses those points.

The public defender was appointed to represent Mr. Hudson, who was already in custody, on June 27, 1986 (R. 777). The case was assigned to Assistant Public Defender Rayburn Stone. Trial was scheduled to begin on January 26, 1987, Mr. Stone, who apparently was still handling the case by himself, did not arrange for a mental heath evaluation until January 8, 1987. just sixteen days before the jury was to be selected, and he provided no significant background material to assist in the evaluation. Assistant Public Defender John N. Conrad came onto the case to handle penalty phase after the mental health expert was obtained (PC-R. 21). All guilt phase decisions continued with Mr. Stone (PC-R. 38). Mr. Conrad recalled that the guilt phase theory of defense was diminished capacity -- "that Mr. Hudson lacked the mental capacity to form the specific intent to commit the crime" (PC-R. 39) -- and they hoped for a verdict of second degree murder without understanding that Florida law did not allow for such a defense.

At no point did trial counsel make an effort to determine what the testimony of Gerald Bembow, the source of the public defender's conflict, might be:

> A. I don't remember ever talking to Gerald Bembow or seeing in my notes anywhere where our investiaator had talked to Gerald Bembow.

(PC-R. 230)(emphasis added). Mr. Stone without investigating assumed Gerald Bembow to be "a harmful State witness" (PC-R. 230).

Nothing in the testimony of Anthony and Gerald Bembow at the evidentiary hearing below -- testimony they were prepared to present at trial had they just been asked -- suggested "evidence that the defendant was building up his courage in order to make the attack" (State Brief at 9). Anthony understood Mr. Hudson's actions to be evidence his cocaine addiction had gotten worse because he approached Anthony for more drugs. which was unusual conduct, and they did "two

dime lots" together (PC-R. 352-54). Anthony had earlier testified to Mr. Hudson's unusually paranoid, nervous, and aggressive reaction to cocaine, and that the effects of the drug stayed with him much longer than with most people (PC-R. 349-52). Gerald Bembow likewise testified to Mr. Hudson's paranoia and fear while under the influence of cocaine, as well as it's long lasting effects in his system (PC-R. 363-66). Gerald saw Mr. Hudson the afternoon of the murder and, while he did not see him use cocaine, observed that he was obviously "high" and when they again encountered each other about 11:30 p.m. "I could tell he had been smoking more drugs, because he was higher" (PC-R. 366-68). In fact, Mr. Hudson was so much under the influence of crack that Gerald asked him to stay for the night. "Because he was high. And I felt like he should have slept it off, try to sleep it off because I observed he was very high." Mr. Hudson insisted on leaving anyway and was angry with Gerald for not accompanying him (PC-R. 368-69).

Dr. Bob Berland is a forensic psychologist and a witness at both the trial and post conviction hearing. His testimony at trial was that he first evaluated Mr. Hudson "in the Hillsborough County Jail on January 8 of this year (1987), on the 9th, again on the 22nd of January of this year" (R. 392). This for a death penalty set to begin on January 26, 1987, and where Dr. Berland's testimony began on January 28, 1987. Dr. Berland found that that Mr. Hudson suffered from paranoid schizophrenia -- which he also called a "paranoid psychoactive disorder." Based on post conviction background information not provided to him before trial he could more confidently diagnose the schizophrenic condition and "organic personality syndrome" (P-R. 274-75). These mental conditions produced a disproportionate and extreme reaction to cocaine use which Dr. Berland had been unaware of and unable to testify to at trial. His interviews with those who witnessed Mr. Hudson in this condition, like the Bernbow brothers, proved to be significant additional data:

> Q. How is that significant?
>
> A. Well, I have a whole lot of evidence from different witnesses that the defendant uniformly responded in this extreme fashion to the presence of cocaine. The evidence, particularly from Mr. Bembow, is that the defendant was intoxicated severely with cocaine during the time period immediately preceding the offense.

So, given that the defendant appears to have had, normally, a fairly lengthy or lasting response, as people with brain damage who have disordered brains, whether it be from inherited disorder or from brain damage, their reaction to drugs is normally much longer than the average person who is intoxicated. It would suggest that, strongly suggest, that he was significantly under the influence of cocaine at the time of the offense. That was something I was unaware of orisinally.

(PC-R. 275)(emphasis added).

At guilt phase of the 1987 trial, Dr. Berland had been asked about intoxicants and could not give an answer because he had none of the basic information provided to him by post conviction counsel:

Q. You had no evidence before you in your research or reviewing the reports that he was, referring to Timothy Hudson, he was on cocaine or alcohol at the time he committed this murder, did you?

A. I have no information in either direction.

(PC-R. 419)(emphasis added).

The State's brief dismisses any difference between Dr. Berland's testimony at trial without the benefit of background material and during post conviction with it, as a merely a matter of being more forceful (at 9). In his post conviction testimony, Dr. Berland in fact made it clear it was not nearly as simple as the State suggests:

A. ...The issue is, how contaminated his rational and deliberative thought processes were by psychotic symptoms. And the evidence that I have now indicates he was a lot more severelv disturbed than I realized at the time of this offense.

And, so, that would enhance the likelihood that given the standard I used at that time, that I would have said he could not rationally and deliberatively form a specific intent, that he suffered from an extreme mental and emotional disturbance and that he was substantially impaired in his ability to conform his conduct to the requirements of law.

Maybe I am missing something. It seems to me the evidence I have now strongly reenforces the opinions I gave then and the issue is, simply, I think it would have been a vastly more understandable and persuasive presentation than the more speculative one that I had to give because I had no direct information about the crime nor had I any information about his use of cocaine or the affects of cocaine on him.

(PC-R. 310-11)(emphasis added).

In granting penalty phase relief, the circuit court made factual findings which are ignored in the State's brief. The circuit court found:

> It is inexplicable to this Court why the office of the public defender which had been representing the Defendant for five to six months waited until three weeks before the Defendant's trial to assign an attorney with no previous capital murder experience to start preparing for penalty phase (EH 19-20). Further exacerbating this situation is the fact that a mental health expert was not retained to assist counsel until about the same time (EH 23-24).
>
> Based on this sequence of events penalty phase counsel was cleary "hurried" in his preparation and was "uncomfortable with the time constraints, considering the magnitude of the case" (EH 33)(emphasis supplied).' Indeed, penalty phase counsel had never been confronted with such a limited period of time to prepare any type of felony case, "much less a first-degree murder" (EH 33). The gravity of this situation is best summed up by penalty phase counsel's testimony at the evidentiary hearing. Although he testified he was as prepared as he could have been under the circumstances, he stated:
>
> > In reflecting back on the case and the way the case was presented to me, i certainly felt uncomfortable professionally with proceeding with the penalty phase, based on the limited amount of time that I had to prepare.
>
> (EH 41)(emphasis supplied).
>
> As a result, a significant and substantial amount of time was not spent on investigating the Defendant's background as to drug addiction (EH 45). While it was true that penalty phase counsel's statement in that regard was predicated on what the Defendant and his parents had told him,' it is clear to this Court based on the record that there was other independent evidence available to penalty phase counsel relating to mitigating evidence which he did not pursue (EH 54-74). And, he had discovered this available evidence, it was the type of information he would have "definitely" presented to the mental health expert (EH 74). Accord, State v. Lara, 16 F.L.W. S306 (May 9, 1991).
>
> But even more egregious is penalty phase counsel's testimony that he "did not actively. . . pursue any evidence or witnesses concerning the [Defendant's] drug problem" outside the talking to the Defendant. Indeed, he relied "primarily" on evidence developed during the guilt-innocence phase relating to the Defendant's "mental capacity or incapacity" (EH 88).
>
> Accordingly, the Court finds and concludes that the Defendant was rendered ineffective assistance of counsel at the penalty phase of his trial.

(PC-R. 807-08).

Footnotes six and seven provided:

> **6.** Although trial counsel made a motion to continue which was denied by the trial court approximately two weeks before the trial (R. 797-7981, there is no

showing that the Defendant was responsible for the belated entry into his case of penalty phase counsel and he should not be penalized for that situation. Indeed, the Defendant enlisted the aid of his father to have someone from the public defender's office come see him after his arrest (EH 380-81).

7. However, the record indicates that penalty phase counsel may not have been as probing as he should have been in his interview with the Defendant's father as to the Defendant's drug addiction problem (EH 383-384).

(PC-R. 813).

SUMMARY OF THE ARGUMENTS

I. Gerald Bembow was listed by the State as a person with material and relevant information regarding the charged offense. Mr. Hudson's trial counsel advised the trial court and Mr. Hudson that counsel had previously represented Gerald Bembow and that counsel was burdened with a conflict. Mr. Hudson did not waive the conflict, and in fact, asked to have counsel removed. The trial court denied the request. The State then chose not to present Gerald Bembow as a witness. However, defense counsel, because of his conflict, never spoke to Gerald Bembow and never learned what relevant information he possessed, As a result, Mr. Hudson was denied conflict free representation and deprived of the benefit of exculpatory evidence. A new trial must be ordered.

II. Counsel unreasonably failed to investigate Mr. Hudson's drug usage and how it could be used as a defense at the guilt phase of his trial. Ample evidence was available and could have been used in an effort to convince the jury to convict of the lesser offense, second degree murder. As a result, Mr. Hudson was prejudiced by counsel's deficient performance.

III. Trial counsel failed to obtain a timely and adequate mental health evaluation of Mr. Hudson. Had counsel performed reasonably, mental health testimony supporting a voluntary intoxication defense would have been available. This testimony would have resulted in a second degree murder conviction; at the very least confidence is undermined in the reliability of the verdict in the absence of the available expert opinion. Accordingly, a new trial must be ordered.

IV. The circuit court ruled that penalty phase counsel's performance was deficient, and that, as a result, a wealth of mitigating evidence was not presented to the jury nor in the direct

appeal record. The circuit court, accordingly, granted a new penalty phase proceeding. However. the circuit court should have gone further and simply imposed a life sentence. This is because, had the additional mitigating evidence been contained in the record on direct appeal, this Court would have imposed a life sentence in the course of its proportionality review. Accordingly, this Court should order a life sentence imposed now.

V. The circuit court correctly found ineffective assistance of counsel and awarded Mr. Hudson penalty phase relief. Trial counsel failed to timely investigate and failed to timely obtain the assistance of mental health expert. This was deficient performance which prejudiced Mr. Hudson, in that additional and compelling mitigation was not presented the jury or the judge or via the record to this Court on appeal.

VI. Mr. Hudson was denied his sixth, eighth and fourteenth amendment rights to a fair and impartial jury when the trial court refused to excuse jurors for cause when they indicated they would automatically vote for death.

VII. Mr. Hudson's death sentence was the product of unconstitutionally invalid jury instructions and the improper application of statutory aggravating circumstances in violation of his eighth and fourteenth amendment rights.

VIII. The trial court's unconstitutional shifting of the burden of proof in its instructions at sentencing deprived Mr. Hudson of his rights to due process and equal protection of law, as well as his rights under the eighth and fourteenth amendments.

ARGUMENT I

MR. HUDSON WAS DENIED HIS FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENT RIGHTS BECAUSE OF THE PUBLIC DEFENDERS OFFICER'S CONFLICT OF INTEREST.

The State rather hopefully argues that because Gerald Bembow was withdrawn as a state witness that the public defender's conflict had ceased to exist, (State's Brief. at 151. In support of their position the State relies upon a quote from Smith v. White, 815 F.2d 1401, 1404 (11th Cir. 1987)(emphasis added):

> Appellants must make a factual showing of inconsistent interests and must demonstrate that the attorney made a choice between possible alternative courses of action, such as eliciting (or failing to elicit) evidence helpful to one client, harmful to the other. If he did not make such a choice, the conflict remained hypothetical.

See also Porter v. Wainwright, 805 F.2d 930, 939 (11th Cir. 1986), and Stevenson v. Newsome, 774 F.2d 1558, 1561 (11th Cir. 19851, U.S. cert denied, 106 S. Ct. 1476 (1986).

The State's reasoning is faulty; the conflict is obvious. Trial counsel had a choice between investigating what his former client, Mr. Bembow, knew about his present client's situation or refusing to learn what Mr. Bembow knew. Guilt phase decided not to learn what Gerald Bembow might have to say:

> Q. I understand, sir. Did you talk to Gerald Bembow?
>
> A. I don't remember ever talkins to Gerald Bembow or seeing in my notes anvwhere where our investigator had talked to Gerald Bembow.
>
> Q. Do you know why?
>
> A. It, I would have to, I would have to guess. Gerald --
>
> Q. Guessing doesn't help Judge Lazzara. doesn't help me and it doesn't help Mr. Benito.
>
> A. I don't know.
>
> * * *
>
> Q. You know what Gerald Bembow would have said, Mr. Stone?
>
> A. Do I know what he would have said? No, I don't know what he would have said.
>
> Q. Do you always make tactical decisions before investigating what a witness could say?
>
> A. Do I always make tactical decisions? No. I don't always make tactical decisions.
>
> Q. But you did in this case?
>
> A. If the auestion is, did I decide to not put Gerald Bembow on without personally talking to him, the answer is, yes. I decided not to put Gerald Bembow on without first talkins to him. I have not recollection of ever talking to him.

(PC-R. 230-33). This in spite of the fact that Gerald Bembow's testimony would have been valuable to voluntary intoxication defense. The evidence counsel would have elicited about his former client's drug sales and use with this current client, Mr. Hudson, would have injured the position of his former client. Their former client was protected by the fact that both defense lawyers failed to investigate and present what he had to say, but Mr. Hudson was injured. (It should be noted that the circuit court below has already found prejudice at penalty phase based on this failure to investigate (PC-R. 807-10)).

The State's brief observes that guilt phase counsel "testified that he would have only gone for the voluntary intoxication instruction if he had strong evidence of severe intoxication rather than just a friend saying that Hudson had done coke before the murder (HR. 221)." It is now obvious that Gerald Bembow's testimony went well beyond "a friend saying that Hudson had done coke before the murder" (State's Brief at 17). It was testimony of severe cocaine addiction and it's wildly disproportionate impact on Mr. Hudson's undeniably damaged brain. The State's argument ignores the value of mental health testimony in a defense of either voluntary intoxication or trial counsel's imagined Guraanus theory.

An actual conflict took place here between the interests of Mr. Hudson and Mr. Gerald Bembow. Counsel did not interview Mr. Bembow. An unconflicted attorney would have at least talked to a material witness. Accordingly, Mr. Hudson has shown an actual conflict of interest. Porter v. Wainwright, 805 F.2d 930 (11th Cir. 1986). The Court must order a new trial for Mr. Hudson with representation by counsel free of conflicts.

ARGUMENT II

MR. HUDSON WAS DEPRIVED OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS TO THE EFFECTIVE ASSISTANCE OF BY HIS ATTORNEY'S FAILURE TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT AMPLY AVAILABLE EVIDENCE IN SUPPORT OF A VOLUNTARY INTOXICATION DEFENSE.

The mere mouthing of the magic words "tactical decision" does not convert guilt phase counsel's rash, uninformed choices into something reasonable after the fact. Deciding not to call potentially key witnesses without determining what they could say, rejecting the most reasonable

theory of defense supported by witnesses you have failed to interview, then latching onto another defense contrary to decades of established case law cannot be considered reasonable tactical decisions.

The issue of whether trial counsel failed to investigate potential testimony from the Bembow brothers out of fear of the conflict raised in Argument I, or because they failed to know the applicable law of voluntary intoxication/diminished capacity raised in this argument, is not important. It is more likely that trial counsel's irresponsible last minute preparation of the case had more to do with gaps in preparation than anything. Certainly the circuit court found this delay "inexplicable" (PC-R. 607). The bottom line is that this jury was never given this information and confidence in the outcome of the proceedings -- a guilty verdict for first degree murder -- is seriously undermined. Smith v. Wainwrinht, 799 F.2d 1442 (11th Cir. 1986).

Perhaps the most relevant case on Mr. Hudson's situation is Chambers v. Armontrout, 907 F.2d 825 (8th Cir. 1990)(in banc). In both cases trial counsel relied on a defense that conceded the homicide but relied on other defenses -- self defense for Mr. Chambers and voluntary intoxication far Mr. Hudson. In both, a key witness to the events leading up to the crime. and in Mr. Chambers the crime itself, was not called by guilt phase counsel. In Chambers, without talking to the witness, the attorney "concluded that [the witness] was not a credible witness." 907 F.2d at 830. The Court in Chambers ruled such a conclusion absent investigation was not reasonable.

Here, trial counsel testified similarly:

> Q. ... Did you talk to Gerald Bembow?
>
> A. I don't remember ever talking to Gerald Bembow or seeing in my notes anywhere where our investigator had talked to Gerald Bembow.
>
> * * *
>
> A. I can tell you that I considered Gerald Bembow a harmful State witness.
>
> Q. In what sense, sir?
>
> A. What I was trying to develop was that Mr. Hudson did not premeditate the violence. And, yet, both Gerald and Anthony talked about things that Mr. Hudson told them and an object that he had, I think one of them described it as a

knife, one described it as something that may, general description, it could have been a knife. I thought that both of those items could be used against Mr. Hudson to show some type of planning to do violence.

(PC-R. 230-31).

This lack of investigation was confirmed by Gerald Bembow who was surprised that no one from the defense ever asked what he knew about Mr. Hudson (PC-R. 371), by Anthony Bembow who was not contacted by anyone from the defense (PC-R. 356), by his sister who knew a great deal about Mr. Hudson's drug habit but was never approached by the defense team (PC-R. 181), and by his father whom trial counsel did consult but who was never asked about drugs and as a layman had no idea of their legal significance (PC-R. 381-84).

The Eighth Circuit ordered relief for Mr. Chambers on this nearly identical situation finding that trial counsel's failure to investigate was not a reasonable tactical decision, but was unreasonable substandard attorney conduct. As with Mr, Hudson, the Chambers court found that trial counsel had unreasonably rejected the one defense available to him in light of his actually having killed the victim, as well as finding the failure to investigate the witness being unreasonable given the seriousness of the charge, and the relative ease with which trial counsel could determine what his testimony would have been. Furthermore, in Chambers trial counsel had even discussed the problem with his client who signed a pretrial statement in which stated he agreed with trial counsel's decision not to call the witness at trial.

Mr. Hudson's trial counsel here engaged in an inadequate investigation as to both the law and the testimony of his defense. Counsel's "strategic choices made after less than complete investigation are reasonable professional judgments precisely to the extent that reasonable professional judgments support the limitations on investigation." Strickland v. Washinaton, 466 U.S. 668, 691 (1984) (emphasis added). A failure to thoroughly investigate, especially in death penalty cases, has consistently been held to be ineffective assistance of counsel. Lee v. United, States. 939 F.2d 503 (7th Cir. 1991): Kenley v. Armontrout, 937 F.2d 1298, 1303-04 (8th Cir. 1991); Futch v. Dugger, 874 F.2d 1483, 1486 (11th Cir. 1989); Foster v. Duager, 823 F.2d 402,

405 (11th Cir. 1987); Mitchell v. Kemp, 762 F.2d 886, 888-89 (11th Cir. 1985); and Goodwin v. Balkcom, 684 F.2d 794. 817 (11th Cir. 1982), "In the totality of circumstances of this case, counsel's lack of investigation and general attitude, when taken together, deprived (Mr. Hudson) of the zealous representation due any client, even those accused of committing atrocious acts." Compare also Workman v. Tate, 957 F.2d 1339, 1344-46 (6th Cir. 1992), where a new trial was granted based upon trial counsel's failure to interview or call "the two people Workman was with during the events which precipitated his arrest" 957 F.2d at 1345.

The failure to investigate possible defenses is especially damaging here because it was coupled with counsel's failure to understand the applicable law concerning voluntary intoxication as a defense. Harrison v. Jones, 880 F.2d 1279 (11th Cir. 1989). In rejecting this claim, the circuit court failed to comment on this misreading of the law (PC-R. 806). In its Answer Brief, the State misreads Guraanus, or perhaps chooses to ignore the critical elements of the opinion. The State argues that guilt phase counsel's decision was reasonable: "Instead of presenting a voluntary intoxication defense, counsel chose to present a 'diminished capacity defense' as outlined by this Court in Gurganus, infra." The problem with this reasoning is that counsel failed to investigate and learn the facts of Mr. Hudson's case. This was unreasonable.

Likewise, the State's hopeful dismissal of the substantial testimony presented below as "not substantial", State Brief at 19, cannot withstand scrutiny, A woman he lived with testified at length to Mr. Hudson's longstanding addiction to crack cocaine and how it substantially directed his personality toward violence and paranoia (PC-R. 142-67). A sister testified to his sinking into cocaine addiction and how it destroyed his life while the two of them resided together (PC-R. 170-89). His father confirmed the drug use and that trial counsel had failed to pursue it with him (PC-R. 379-94). Two others, men very familiar with the effects of crack on themselves and others, making them able to testify to the substantially greater impact it had on Mr. Hudson (PC-R. 349-79). Not only did one of the Bembows observed Mr. Hudson ingest cocaine shortly before the murder but they testified to his behavior which showed him to be even more under the influence

than was normal for him. These witnesses went unchallenged by any other witness. Two expert witnesses, a forensic psychologist (PC-R. 258-3431, and a psychiatrist with a specialty in addictions (PC-R. 399-455) also testified to his severe addiction and how Mr. Hudson's mental disabilities substantially exaggerated the effects of the drug, a condition substantiated by the first three witnesses. While the State here attempts to dismiss this evidence as slight. at the hearing the State was so concerned about its accumulated impact that they were prepared to stipulate to it in order to cut off the testimony (PC-R. 343-46). Nothing about this body of testimony was insubstantial.

The circuit court erred in denying Mr. Hudson guilt phase relief, Trial counsel was ineffective for failing to investigate and develop the obvious voluntary intoxication defense here, especially in light of the ignorance of the law regarding voluntary intoxication as a defense and confidence in the outcome is undermined. Mr. Hudson is entitled to 3.850 relief and a new trial.

ARGUMENT III

MR. HUDSON WAS DENIED A COMPETENT MENTAL HEALTH EXAMINATION IN VIOLATION OF HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS. AND DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN THEIR FAILURE TO SECURE A MINIMALLY ADEQUATE AND TIMELY MENTAL HEALTH EVALUATIONS.

The requirement of adequate professional 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 been applied by the Eleventh Circuit in Cowley v. Stricklin, 929 F.2d 640 (11th Cir. 1991).[1] Although, licensed mental health experts testified. the court found their performance was 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

[1] Cowley v. Stricklin would rejected the reasoning of the opinion in Clisby v. Jones, 904 F.2d 1047 (11th Cir. 1990). opinion vacated 920 F.2d 720 (1990). In fact, the Eleventh Circuit's in banc decision recently issued specifically indicated that trial counsel bears a burden in insuring the adequacy of an expert's assistance. Clisby v. Jones, 960 F.2d 925, 934 n.12 (11th Cir. 1992).

include conductinn "a professional examination on issued relevant to the defense." presenting testimonv. and assisting "in preparing the cross-examination of a State's psvchiatric witnesses."

* * *

Dr. Poythress, Cowley's mental health expert during the federal habeas proceedings, stated:

> [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.
>
> * * *
>
> 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 . . . ."

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

The State's argument ignores that counsel's failure to timely request the appointment of an expert and provide the expert with access to necessary information constitutes the underpinnings of Mr. Hudson's claim. There is a "particularly critical interrelation between expert psychiatric assistance and minimally effective representation of counsel." United States v. Edwards, 488 F.2d 1154, 1163 (5th Cir. 1974). Such expert testimony is of diminished value when it is incomplete in that it is based on partial information, as was the case here.

In deciding this issue, it is not enough to compare the trial and post conviction testimony of the mental health expert. One must also consider the defenses not explored by trial counsel because he did not have the benefit of confidential consultation with a fully informed expert. Consideration must be given to the evidence not presented -- both expert **and** lay witnesses which substantiated the expert -- as well as counsel's argument not presented to Mr. Hudson's jury because of poor use of the expert, The timely retention of a mental health expert and adequate backgrounding of him are the foundation of a defense based on mental disabilities which guilt phase counsel here claimed he relied upon. Yet counsel completely failed to prepare that expert. His performance was ineffective.

Mr. Hudson's conviction of capital murder is prejudice. Dr. Berland repeatedly testified in post conviction that his trial testimony would have been more authoritative, convincing, and persuasive at trial had he had this necessary background. "If I am able to bring to the jury a lot of information from people who have no personal stake in the outcome of the trial that, in fact, his behavior is radically different when he is under the influence of cocaine, then I am making a very different argument to the jury in a more forceful argument" (PC-R. 280).

The circuit court erred in denying Mr. Hudson guilt phase relief. This Court must order a new trial.

ARGUMENT IV

THE CIRCUIT COURT SHOULD HAVE GRANTED MR. HUDSON'S MOTION FOR SUMMARY JUDGMENT AND ENTERED A SENTENCE OF LIFE IN PRISON.

Based upon the substantial mitigation which penalty phase counsel had failed to develop and present, and based upon the 4-3 decision of this Court affirming the death sentence on proportionality grounds on a record that did not include the substantial newly developed mitigation, Mr. Hudson moved for the imposition of a life sentence (PC-R. 807-10). The trial court denied that request.

The State now argues such denial was proper because there is no authority for granting a life sentence in Rule 3.850 proceeding and that therefore the circuit court's options are limited to ordering a new penalty phase proceeding before a new jury. This is simply not so, as this Court itself has held. Scott v. Duaaar, 17 F.L.W. 545 (Fla. July 23, 1992)(life sentence imposed in Rule 3.850 proceeding).

As the State points out, Rule 3.850 provides:

> . . . If the court finds . . . that the sentence imposed was not authorized by law or is otherwise open to collateral attack . . . the court shall vacate and set the judgment aside and shall discharge the prisoner or resentence him or arant him a new trial or correct the sentence as may appear appropriate.

(emphasis added). The plain language of the rule provides alternative remedies in a penalty phase case are (1) resentencing Mr. Hudson to life, which would have been the result of granting the

motion at issue, (2) grant him a new penalty phase proceeding, or (3) "correct the sentence as may appear appropriate." which here would again require the imposition of a life sentence. Here the trial court misunderstood the law and denied Mr. Hudson's motion in the mistaken belief that it did not have the authority to grant it.

The State has argued their right to a "clean slate" before a new jury under the authority of Preston v. State, 17 F.L.W. S252, 253 (Fla. April 16, 1992), and Kina v. Dugger, 555 So. 2d 355, 358 (Fla. 1990). However, Scott v. Duager, specifically repudiates the State's argument that new facts may not warrant the summary entry of a life sentence. Here the State had every opportunity to rebut Mr. Hudson's numerous post conviction mitigation witnesses through cross-examination and through the presentation of their own witnesses. The record will show minimal cross-examination that left most testimony unchallenged and a complete absence of State witnesses. The State also candidly acknowledges there was "a question concerning the sufficiency of the evidence" to support a death sentence at Mr. Hudson's trial to begin with. (State Brief at 26-27.)

In cases like Mr. Hudson's where the record clearly establishes that this Court's proportionality review will require a life sentence, all interest in judicial economy call for the imposition of the final sentence at the earliest possible time. The Circuit Court of Hillsborough County, and to a much larger extent this court, is greatly burdened by the time, cost, and human energy required to resolve the literally hundreds of death penalty cases that clog the system. The delays in capital cases that are so often complained of are as much the result of their great numbers as any other factor. The circuit court and this court need to be alert to the opportunity to quickly dispose of what is obviously a life case in the interests of judicial economy. In fact, this court case recently has done so.

In Scott v. Dunaer, this Court reviewed the denial of 3.850 relief by the Pinellas County Circuit Court. Like Mr. Hudson, Scott included facts relatively unique to 3.850 proceedings. This court recognized the extremely remote possibility that a new death sentence would be affirmed and directed a life sentence. "Based upon this record, this Court probably would have found Scott's

a.

death sentence inappropriate had Robinson's life sentence been factored into our review on direct appeal," at 7. This court held "We vacate Scott's death sentence and remand for imposition of a life sentence without eligibility for parole for twenty-five years," at 10.

The same result should follow here. On this record and considering the earlier 4-3 vote of this Court on the proportionality of Mr. Hudson's death sentence, this Court probably would have found Mr. Hudson's crime warranted a life sentence without eligibility for parole for twenty-five years. Since the trial court here clearly did not understand its power to impose a life sentence at this juncture, and since this Court has recognized the appropriateness of doing so without conducting a new penalty phase under certain facts, this Court should remand to the circuit court with directions to impose a life sentence.

ARGUMENT V

THE CIRCUIT COURT CORRECTLY FOUND INEFFECTIVE ASSISTANCE OF COUNSEL AND AWARDED MR. HUDSON PENALTY PHASE RELIEF.

"[D]efense counsel must make a significant effort, based on reasonable investigation and logical argument, to ably present the defendant's fate to the jury and to focus the attention of the jury on any mitigating factors." **Kubat v. Thieret**, 867 F.2d 351, 369 (7th Cir. 1989). "In a capital case the attorney's duty to investigate all possible lines of defense is strictly observed." Coleman v. Brown, 802 F.2d 1227 (10th Cir. 1986). An attorney is charged with knowing the law and what constitutes relevant mitigation. Brewer v. Aiken, 935 F.2d 850 (7th Cir. 1991). Moreover, counsel has the duty to ensure that his or her client receives appropriate mental health assistance, State v. Michael, 530 So. 2d 929 (Fla. 1988); Blake v. Kemp, 758 F.2d 523 (11th Cir. 1985); Mauldin v. Wainwrioht, 723 F.2d 799 (11th Cir. 1984), especially when, as here, the client's level of mental functioning is at issue. Kenley v. Armontrout, 937 F.2d 1298 (8th Cir. 1991). Defense counsel's failure to investigate and present available mitigation constituted deficient performance. Mitchell v. State, 595 So. 2d 938 (Fla. 1992); State v. Lara, 581 So. 2d 1288 (Fla. 1991).

In granting Mr. Hudson penalty phase relief the circuit court observed "It is inexplicable to this court why the office of the public defender which had been representing the Defendant for five

or six months waited until three weeks before the Defendant's trial to assign an attorney with no previous capital murder experience to start preparing for penalty phase." The court noted: "Further exacerbating this situation is the fact that a mental health expert was not retained to assist council until about the same time" (PC-R. 807). (The public defender was appointed on June 26, 1986, and penalty phase counsel was brought into the case sometime *after* the mental health expert who began his work on January 8, 1987, for a trial beginning January 26, 1987, (R. 777, PC-R.21)). The court concluded that penalty phase counsel was "clearly 'hurried'", was "uncomfortable professionally" with what he had to accomplish in so short a time, and that "it is clear to this Court based on the record that there was other independent evidence available to penalty phase counsel relating to mitigating evidence which he did not pursue" (PC-R. 807). In particular, the court found "even more egregious is penalty phase counsel's testimony that he 'did not actively . . . pursue any evidence or witnesses concerning the (Defendant's) drug problem' outside of talking to the Defendant. indeed, he relied 'primarily' on evidence developed during the guilt-innocence phase relating to the Defendant's 'mental capacity or incapacity'" (PC-R. 808). The court determined that such penalty phase testimony would have effected the recommendation of the jury. the sentence ultimately awarded by the trial court, and the holding of the Florida Supreme Court which affirmed the death sentence on proportionality with a 4-3 vote without benefit of the additional testimony. Hudson v. State, 538 So. 2d 829, 831-33 (Fla. 1989) (PC-R. 808).

The State in conclusory terms claims that the circuit court "erred in finding that counsel's performance was deficient." State Brief at 31. No argument is presented addressing the circuit court's specific findings of fact regarding counsel's failure to timely investigate. The State seems to believe counsel's presentation of some mitigation precludes a deficient performance findings. If that is the State's argument, the State is asking this Court to overrule Cunningham v. Zant, 928 F.2d 1006 (11th Cir. 1991).

Where as here, the circuit court found that counsel failed to timely obtain an expert, gather readily available independent evidence, and "pursue any evidence or witnesses concerning [Mr. Hudson's1 drug problem" (PC-R. 808), counsel's performance as a matter of law was deficient. Bates v. Dugger, 17 F.L.W. 541 (Fla. 1992). The State's vague contrary assertion must be rejected.

Powerful testimony as to Mr. Hudson's severe cocaine addiction and its exaggerated effect on him was available and was presented below by post conviction counsel. This included the testimony of his former fiancee Becky Collins, Anthony and Gerald Bembow who had used drugs with and observed their impact on him, his sister Debra Hudson, in addition to the value of their observations to mental health experts assisting the defense. This evidence establishes the prejudice to Mr. Hudson which flowed from counsel's deficient performance. The additional mitigating evidence from both lay and expert witnesses would have tipped the scales in favor of a life sentence.

Becky Collins was called as a State witness in the guilt phase of the trial (R. 239-261). She was not called at penalty phase and not used by the defense to develop Mr. Hudson's serious drug problem. This in spite of the fact she discussed "his drug addiction" extensively in a January 12, 1987 deposition conducted by guilt phase counsel. Ms. Collins was Mr. Hudson's former fiancee. The two had lived together for six months while he worked steadily. Had counsel investigated, he could have presented substantial mitigation through Ms. Collins. According to her, Mr. Hudson was a considerate person and they enjoyed a good relationship. Then Mr. Hudson began spending time with a cocaine user and Ms. Collins noticed a dramatic change in him (PC-R. 143-145).

> Q. What was happening? What brought about this change?
>
> A. Oh, when we were living in the apartment complex he became friends with another tenant there that liked to use cocaine, and this tenant would ask him to go and purchase or take him to where he could get some.
>
> And he started being with this person more. And I saw a bit of a change in him myself. I didn't know at that time if he was using.

* * *

A. He became more hyper. He couldn't sit still, and he was on the go all the time.

Q. Okay.

A. And he had to leave the house and come back. Just couldn't be still.

+ * *

Q. Okay. How did you find out that he was usina crack cocaine?

A. He started -- he would get me to take him to places that I knew they were selling druqs. and he was getting money from me, borrowing money from me.

He quit working, and he wasn't interested in working anymore.

* * x

Q. **Okay.** Did you notice that Tim's cocaine use, did it gradually progress to get worse or was he just suddenly doing a lot? Did you have any idea earlier on?

A. It was -- I would say it gradually got worse. He probably started with the tenant at the apartment complex, and then as we moved from there he was just in the street all the time.

Q. What about Tim's chanaes as he got more and more involved in usinq crack?

A. He would become angry real easy. I had never seen him angry like that before. Even when I would raise mv voice it would anaer him.

Q. Okav. Did you trv to talk to him about it?

A. Yes, I tried to. When he seemed to be real hyper or when he would already be annrv. I couldn't say anvthinn to him too much. It would iust anger him more, and he would get more angry.

* * *

Q. Okav. Did there come a Doint in time where you felt he was addicted to it just from your observations?

A. Yes.

Q. Whv is that?

A. He would call me and want to talk, but before our talk was over with or sometime during that talk he would stop me and want me to go take him some place to Dick up some, and want money from me and call me and want monev from me, asking me for monev.

* * *

Q. Okay. Had he become abusive at times, when he was on cocaine, with you?

A. Yes. He would become angry, and I would try to talk with him, and he would hit me and tell me to shut up.

He would take me somewhere and leave me and take my car and stay gone all night or -- a couple incidents he stayed a couple of days.

Q. Had he ever treated you like that in the first couple of months of the relationship?

A. No, he didn't.

Q. Okay. Were you afraid of him when he was on crack?

A. Yes, I was, very much.

Q. Okay. When did you finally tell Tim that you didn't want to have anything to do with him; that the relationship just wasn't going to work?

A. It was, I think February or March of 1986. I had just taken enough and didn't want to deal with it anymore, and I was trying to tell him.

You know, I didn't want to see him anymore if he couldn't try to help himself and get off of drugs. I just couldn't deal with it.

(PC-R. 145-50)(emphasis added). Ms. Collins continued to have contact with Mr. Hudson in the period leading right up to the murder. She recognized that he continued to be heavily drug involved in that period.

Q. Did Tim continue to try to talk to you and contact you to come and see him?

A. Yes, he would.

Q. Okay. How often?

A. Almost every day or every other day, at least.

Q. Was he still under the influence of drugs during that period?

A. Yes, because he would call me and sound sincere on the phone and I want to talk, and I would go and get him and later on he would have me to go drop him off where I knew the drugs were being sold.

Q. Okay. So there were even times when you agreed to see him in hopes that you two could work something out?

A. Yes.

Q. Okay. Ms. Ewing was killed on the night of or the morning of the 17th, 18th of June 1986, is that correct, the best you can remember?

A. Yes.

Q. Okay. Had you had contact with Tim up through that period?

A. Yes, I had.

Q. What kind of contact?

A. He was calling me on the phone, and I had stopped receiving his calls. I wouldn't pick up the phone.

I had an answering machine, and I would just let him leave the message. or he wouldn't leave a message. He would just keep saying my name and tell me to pick up the phone. He knew I was there.

Q. Did he still sound like the Tim strung out on crack cocaine?

A. Yeah. He still frightened me, his voice. I didn't want to talk to him anymore.

Q. Didn't sound like the Tim you had first met?

A. No.

(PC-R. 152-154)(emphasis added).

Q. Okay. Is it safe to say that these changes in his behavior seemed to get worse as you realized he was doing crack cocaine?

A. Yes, I would say so.

Q. Okay. He became a different Person?

A. Yes.

(PC-R. 166)(emphasis added).

Mr. Hudson's sister, Debra Hudson, also closely observed his drug addiction:

Q. Okay. Did there come a time when you realized that Tim was involved in drugs?

A. Yes.

Q. Do you remember when that was?

A. Around 1986.

Q. Okay. What did you notice about Tim that made you realize that he was into drugs?

A. Because he wouldn't -- he wouldn't bathe for days. He didn't keep himself up, and he was like paranoid.

His eyes would be real large, and he couldn't sit still. He had to be on the go all the time.

Q. Do you know what kind of drugs he was using at that time?

A. Crack.

Q. How do you know that?

A. Because I would find the crack cans in the bathroom where he had been in there using them.

* * *

Q. Okay. What was Tim's mood like when he was on crack? How was it different than it was when he wasn't?

A. He would get upset about things. He didn't want to be bothered. He didn't talk to us.

Q. Okay. You indicate in your affidavit he was paranoid. What do you mean by that?

A. Like scared. Like somebody was after him or watching him or something.

Q. Okay. Was he asking you for money during that time?

A. Yes.

Q. Your mom?

A. Uh-huh.

Q. Your dad?

A. I'm not sure about him, because I didn't live with him.

Q. Okay. You indicated in your affidavit that he was a crazy person when he was on cocaine. What do you mean by that?

A. Because anything -- if you would say something to him and set him angry, he would try and fight or something.

Q. Became violent?

A. Uh-huh.

Q. Do you recall the day before the crime occurred when Ms. Ewing was killed?

A. Yeah.

Q. Do you remember the day itself?

A. Uh-huh.

Q. Did you see Tim on that day?

A. Yeah.

Q. When did you see Tim?

A. Well, when he woke up.

Q. Okay.

A. That morning.

Q. That morning?

A. Uh-huh.

Q. Okay. The morning before she was killed?

A. Uh-huh, yeah.

Q. Okay. what, if anything, did you and Tim talk to each other about?

A. Nothing really. Later on that day he asked me for ten dollars.

Q. Okay. Did he tell you what he was doing with the ten dollars?

A. At first he wouldn't, but I said, "If you don't tell me what you're going to do with it, I won't give it to you." And then he said he was going to buy him a bit.

Q. What's a bit?

A. I guess a bit of crack.

Q. Okay. did you give it to him?

A. Yes.

(PC-R. 175-179)(emphasis added). She went on to describe Mr. Hudson's return to her home the morning after the murder, still showing the effects of the cocaine:

Q. It appeared to you he was (high)?

A. Yeah. His eyes were all stretched out. He was like acting like he was paranoid.

(PC-R. 180). Debra Hudson was never contacted by Mr. Hudson's lawyers, but she would have been willing to cooperate had they done so (PC-R. 181).

Two of the most useful witnesses on Mr. Hudson's drug addiction were Anthony and Gerald Bembow. They are brothers who were also Mr. Hudson's cousins who grew up with him. They lived near Hudson. They sold and also used crack cocaine extensively with him in 1985 and 1986 (PC-R. 349, 353-55, 363). Anthony Bembow first saw Mr. Hudson use crack in 1986 (PC-R. 360). He testified as to his observations of Mr. Hudson while on cocaine:

Q. How often during that period would you say you used crack cocaine with Mr. Hudson?

A. Just about every time we run across one another, we would set hish.

Q. How many times would that be? Once a month? Once a week? Approximately, you know?

A. As many times as we see one another. Frequently.

Q. I mean, what in your mind, what is frequently?

A. Maybe three, three times a week. Just whenever we see one another.

Q. Have you ever smoked crack cocaine with other people?

A. Yes, I have.

Q. Other than Mr. Hudson?

A. Yes. I have.

Q. What affects did you observe that cocaine, crack cocaine, had on Mr. Hudson?

A. Paranoia, that he would, wants you to be quiet, not say nothing. Listen. Think somebody is after him, you know. That is about the best I could put that.

Q. Would you say that in your observations his reaction to cocaine was any different than the reactions you would see in yourself?

A. No, it wasn't normal as to where it would be with me or anybody else. It would be a little bit worser.

Q. Why do you say that?

A. By the actions from when we smoked together. The way that he would act as far as, you know, looking out, wanting everybody to be quiet or what not.

Q. Any change in his mood when he was on crack cocaine?

A. Yes. it was.

Q. How so7

A. From being normal to, like, just the only way I could put that is paranoia, not acting normal like normal people would act after smokins crack.

Q. Well. was he Quicker to anger under cocaine?

A. Yes.

* * *

A. As far as getting upset, yes.

Q. Okay. Upset over things that wouldn't upset you?

A. Minor things. Minor things that as to where we would smoke, as to where it would be normal, it would be exceedingly further with him.

* * *

Q. Do you recall the night that Mollie Ewina was killed?

A. I do.

Q. Had Mr. Hudson's crack cocaine problem gotten any worse during that time frame. from your observations?

A. I would say, ves.

Q. Why would you say that?

A. Because at the time, the dav that I seen him, Tim never had ever approached me and asked to aet high. And that particular dav he had asked to get high when he had first seen me. That wasn't, you know, normally he would wait and let me offer or something like that.

Q. He came out and asked for it that day?

A. Yes.

Q. Do you recall when it was during that day that you saw Mr. Hudson?

A. It was earlier during the day. around maybe 5:00, 6:00.

Q. In the afternoon?

A. Yes.

* * *

Q. Okay. Did you see Mr. Hudson use cocaine?

A. Yes.

Q. At that time? And wha used cocaine with Mr. Hudson?

A. I did.

Q. Crack cocaine?

A. Crack cocaine.

Q. Do you know how much you two used at that time?

A. Approximately total in dollars probably twenty dollars worth, two dime lots.

Q. Just the two of you smoking it?

A. Yes.

* * *

Q. Was he high when you left him?

A. Yes. he was.

* * *

Q. What was he doing? What was his reaction at the time?

A. Quiet at the time. We wasn't talking very much. Just getting high, to get it over with.

Q. And you left?

A. And I left.

Q. There was, you say, around six o'clock in the evening?

A. Yes.

Q. When I asked you to describe Mr. Hudson's reaction to cocaine. you said it was different than normal people. Did you mean different than most people that you saw smoking crack cocaine?

A. That is true. That is correct,

(PC-R. 349-356)(emphasis added). Anthony Bembow was not contacted by Mr. Hudson's lawyers, but had they done so he was willing to testify to these matters (PC-R. 356).

Gerald Bembow also testified at the 3.850 hearing that he was with Mr. Hudson in 1985-1986:

Q. During that time period did you ever have the opportunity to smoke crack cocaine with Mr. Hudson?

A. Yes.

Q. How often would you say that you smoked crack cocaine with Mr. Hudson?

A. Maybe approximately three times a week.

Q. Would it be typical for you two to smoke crack cocaine every time you got together?

A. Yes.

Q. During that period of time you were selling crack cocaine; is that right?

A. Yes.

Q. What kind of reaction did Mr. Hudson have to crack cocaine? What were your observations?

A. Very, very paranoia. It was, you know, in my experience using the drug, I never seen anyone react the way he did on it. And it was, he was a different person.

Q. How so? In your terms what can you tell the Judge about your observations?

A. He was, like, paranoid and afraid of his surroundings or someone hurting him or somethins like that. He just reacted totally different from anybody I ever Seen using the drug.

Q. Did you ever see him get argumentative or mad for no reason while under the influence of crack cocaine?

A. Not really mad but upset if you moved around or something like that. He would like things to be quiet and everybody still.

Q. So he would react to movement?

A. Right.

Q. To sound?

A. Right.

Q. How would he react?

A. Jump you. Scared. paranoia. real bad.

Q. Is it safe, you have seen other people use crack cocaine?

A. Yes.

Q. Is it safe to say that everyone reacts to crack cocaine? Your behavior chanaes to some extent?

A. Riaht. But his was, his, the way he chanaed was like nothina I ever saw before, you know. in my experience in smoking crack. And I, you know, it was very, very paranoia. Frightening.

Q. How many different people, approximately, would you say you have smoked crack cocaine with?

A. I can't give a number. Plenty.

Q. Quite a few?

A. Yes.

Q. You noticed a profound difference, though, in the way Mr. Hudson reacted?

A. Yes.

Q. From your observations how bad was Mr. Hudson's crack problem during the time frame of June 19867

A. I think it was sort of bad. He was, he smoked it pretty bad.

Q. In fact, you were interviewed by a Detective Black, were you not?

A. Yes.

Q. As a matter of fact, you told Detective Black that Mr. Hudson had a bad cocaine, crack cocaine problem?

A. Yes.

Q. Do you recall the night that Miss Ewing was killed?

A. Yes.

Q. Did you see Mr. Hudson on that day?

A. Yes.

* * *

Q. And what were your observation of Mr. Hudson when you saw him during the late afternoon of that day?

A. He was, I could tell he had been getting hiah.

Q. And how could you tell that he was aettina hiah?

A. Because I, I have known him all my life and I knew him when he wasn't hiah and when he was. And I could tell, you know, by looking at him, he was hinh.

* * *

Q. Did he come back later?

A. Yes, he come back around eleven, 11:30, something like that.

Q. And do you recall what kind of condition Mr. Hudson was in when you saw him at approximately, say, 11:00, 11:30 that night?

A. Yes. I could tell he had been srnokina more druss, because he was higher.

Q. What do you mean, smokina more drugs?

A. Crack. I mean, he was hiah. He was nervous. And his eves were biq and glassy.

Q. How long was he with you at that time; do you recall?

A. I think about five minutes, five, ten minutes.

Q. And you indicated to the police, in fact, he asked you to go some place with him; is that correct?

A. I think so. And my ex-girlfriend asked me to come inside, and that is when I went inside. I asked him to spend the night, but he told me he was going.

Q. Why did you ask him to spend the ninht?

A. Because he was high. And I felt like he should have slept it off, try to sleep it off because I observed he was very hiah.

Q. In fact, he indicated in the report that he got upset with you when you wouldn't go with him?

A. Yes, he was, he was angry because he was hinh and I knew it.

* * *

Q. When you get high on crack cocaine, there's an initial high; is that correct?

A. Yes.

Q. How long does that last, in your experience?

A. About ten, fifteen minutes,

Q. And are you back to normal, then, after ten or fifteen minutes?

A. Most people are.

Q. Okay.

A. But --

Q. What about Mr. Hudson, as far as your observations?

A. I think the high last lonser on him, because mv experience around him, it affected him a lot different than other people I know.

Q. Had you ever asked Mr. Hudson to sleep it off before?

A. No.

Q. Why did you that night?

A. Because I could tell he was very high.

(PC-R. 363-370)(emphasis added)(see also PC-R. 377). Gerald Bembow testified that he was so struck by Mr. Hudson's reaction to crack that he broke his own habit as a result. "I got to thinking about Tim and I knew him all my life. He is a good person. And I know this. And I seen how it affected him. And I tried to straighten my life out now, you know, because of what happened with him and his situation" (PC-R. 372). Gerald Bembow was in prison at the time of Mr. Hudson's trial. He was brought back to Tampa for it, but did not testify. He was surprised that no one contacted him on behalf of Mr. Hudson (PC-R. 371).

Mr. Hudson's father, Daniel M. Hudson, was approached by penalty phase counsel and did actually testify. However, penalty phase counsel failed to develop the drug addiction issue with him. The father testified at the December hearing:

Q. Now, Mr. Conrad talked to you about testifying for Timothy; is that correct?

A. Yes.

Q. And do you recall what he asked you about Timothy?

A. It was just like I said, vaguely, way back there, I can't remember word for word. But he asked me things, you know, about how was he when he was coming up different things like that. Then he even told me to just talk about Tim. And I started talking and, you know, saying the things that I can remember about him coming up, what he liked to do and, you know, places we went. Things that we done together.

* * +

Q. Did vou ever mention to him the fact that you became aware that Tim was having a drug problem?

A. No, I don't think it even sot that far.

Q. Did YOU not mention that because YOU didn't want to cooperate with Mr. Conrad?

A. No, it wasn't the idea I didn't want to cooperate with him. I just never was asked the auestion of that nature.

Q. Were you aware that that kind of information may have been relevant to Mr., to your son's trial?

A. I am not good at the word "relevant."

Q. At that time did you --

THE COURT: Did you think it might be important to his trial?

BY MR. DUNN:

Q. That would be useful to a jury, mavbe, he was having a drug nroblem?

A. I was thinking it might hurt.

Q. You didn't volunteer that?

A. I didn't volunteer it.

Q. Had Mr. Conrad asked you about that stuff, would you have hesitated to tell him about it?

A. Just what he wanted to know, I told him.

Q. You had no reason to withhold that from him, did you?

A. No.

(PC-R. 381-384)(emphasis added). There is little dispute at the post conviction hearing as to Mr. Hudson's cocaine addiction. After the testimony of Collins and Debra Hudson the State was prepared to stipulate to the observations of the Bembow brothers as set out in their affidavits (PC-R. 343-46).

Post conviction counsel presented substantial additional testimony of Mr. Hudson's severely dysfunctional family, his mother's alcoholism, and a childhood lived in poverty, instability, and a lack of adult supervision. Penalty phase counsel had failed to develop any of this mitigation in the three weeks he had to prepare and was ineffective as a result. While the circuit court did not discuss these points with the same detail as it did the drug addiction, they also support the determination that penalty phase counsel was ineffective and that relief was appropriate.

Witness Collins testified that in the course of her relationship with Mr. Hudson she learned how much he suffered from his family experience:

> Q. What kind of relationship did Tim have with his family?
>
> A. Oh, at first I thought he had a good relationship with his dad, because of the first time he hit me I had went and got his father and he came all the way to the apartment and talked to him a long time.
>
> But later on Tim made comments about he hated his father, and he didn't want to even talk to him or -- he just stated he hated his father.
>
> Q. Did he ever indicate to you why?
>
> A. He would talk about his, you know, father and mother divorcing or splitting up, and about his sister and brother living over there with his mom.
>
> He seemed in a way to kind of be concerned about how they were living.
>
> Q. Okay. Was he troubled about his parents' divorce?
>
> A. Yes. I can tell a little bit that he seemed like it bothered him quite a bit about it.
>
> But there wasn't really too much time that he talked about it with me.
>
> Q. Did you learn that his mother had a problem also?
>
> A. Yes, I did.

Q. What kind of problem did his mom have?

A. She drank alcohol quite regular. At least every time I saw her.

Q. Okay. Every time?

A. Yeah.

Q. She was drinking or drunk?

A. She was drinking. Maybe once or twice I might have saw her drunk, but she usually sat around the house or went in her room when we were there.

(PC-R. 150-152).

Mr. Hudson's experience with his family was verified by his sister, Debra Hudson, who also testified:

Q. It was okay. Did you have a good home life?

A. No.

Q. Did there come a point in time when your mom and dad split up?

A. Yes.

Q. Do you remember how old you were when that happened?

A. I think I was about seven.

* * *

Q. That would have made Tim about ten years old at the time?

A. Yes.

Q. Okay. How did it affect the family?

A. We were all upset about it.

Q. Prior to the divorce, who was the person in your family. which parent, who was the person that did the disciplining and tried to keep everyone in order, your mom or your dad?

A Well, my mom would try, but when she couldn't, she would go to my father.

Q. Was he pretty effective in trying to keep things going in the right direction within the family?

A. Yeah.

Q. Okay. What happened when your mom and dad split up and your dad left home? What happened as far as your mom's ability to discipline?

A. She lost control of us.

Q. Okay. How did Timmy -- did you notice anything about your brother Timothy that changed after the divorce?

A. He got distant. He wouldn't come home after school, and he would stay none for days. We would have to go look for him and stuff.

Q. Okay. Did you notice a change in his attitude?

A. Yeah. He wouldn't listen to my mother.

Q. Okay. Now, your dad lived close to you; is that correct?

A. Yes.

Q. Okay. Is it safe to say though that although you had contact with your dad he wasn't in the home dealing with discipline problems and helping out; is that correct?

A. Yeah, that is correct.

Q. Okay. Does your mom have a problem?

A. Yeah, drinking problem.

Q. Okay. How long has she had that?

A. Since I can remember. At the time of their divorce.

Q. Since back then?

A. Yeah.

Q. Okay. How -- did that in any way affect her ability to keep the household together?

A. Yes.

Q. How so?

A. Because she would -- when she was under the influence she wouldn't be able to tell us -- we wouldn't listen. She would say it, but we wouldn't listen.

Q. How often was she under the influence?

A. Just about every day.

Q. Okay. What was she drinking?

A. Vodka.

Q. Okay. Every day?

A. Yes.

Q. How often? Like at dinner? All the time?

A. All day long.

Q. Okay. Morning?

A. Morning, night.

Q. Okay. After your dad moved out of the house, did Tim have a hard time relating to him?

A. Yeah.

Q. What, if anything, did you notice about that?

A. He didn't want anybody to tell him -- to discipline him or tell him anything.

Q. Was he close to your dad after your dad moved out?

A. No.

Q. Is there anyone else in your family besides your mom and Tim whose had a problem with drugs or alcohol?

A. My two older brothers. One is Lorenzo. He had a problem with heroin. And Larry. He had the drinking problem and the crack problem.

Q. Okay. There's some indication that your brother Larry started drinking at an early age?

A. Yeah.

Q. Do you have any knowledge about that?

A. No.

Q. Is your mom still drinking?

A. Yes.

Q. All the time?

A. Yes.

Q. Morning, noon, and night?

A. Yes.

Q. Okay. Do you think that had any effect whatsoever on Tim?

A. Yes.

Q. How so?

A. Because he didn't want to be around her when she was drinking.

Q. Did he stay away from home a lot?

A. Yeah.

Q. How young was he when he was staying away from home?

A. I can't remember the exact age, but he was in elementary school.

Q. At or near the time of the divorce then?

A. Uh-huh.

(PC-R. 171-75)(emphasis added). The sister testified that she had lost all respect for her mother because of the drinking problem (PC-R. 185-186).

Mr. Hudson's father also testified at the evidentiary hearing on this topic:

Q. You had a rough beginning of your marriage, you and your wife had an rough time of it?

A. Yes, we did.

Q. When you were first married, you were both migrant workers?

A. Yes.

* * *

Q. Go ahead.

A. We were citrus pickers. Lots of people call it orange pickers. We would pick oranges maybe seven to eight months out of the year. Then we migrate to New York to pick apples, strawberries prunes, pairs, or whatever. And then we would come back. And we done that to keep the, to survive, because after the fruit season was over, if you didn't leave there, you didn't have a job. So that's what she and I did for awhile. And we tried to make ends meet, you know. But we had six kids at that time. And it was hard. But we had to do without a lot of things to make it, but we made it.

Q. Things got better in '68; you got a job?

A. Yes. When I got a job at Westinghouse here in Tampa, things were a little better. I had a lot of time, more time, not a lot of time, to spend with the kids, carry them places, things like that.

Q. During the times you and your wife were married, you spent time with your children?

A. When we were married, yes. **Yes.** After I came over here.

Q. When were you divorced, sir; do you recall?

A. ? -- either '73 or '74, somewhere along there. I think.

Q. Do you recall approximately how old Timothy was?

A. About ten years, I would imagine. When we divorced?

Q. Yes?

A. I think he was born in '64. I think he was ten years old.

Q. Your wife had a drinking problem, didn't she?

A. I found out, yes.

Q. How bad is her drinking problem?

A. Now? Bad.

Q. How bad was it back when you split up?

A. I can't say exactly how bad, but she was drinking. But then it progressed, after we split up. Then it got worse, her drinking problem got worse.

Q. Now, when you split up, you still had lived several doors down from your wife and children; is that correct?

A. Yes.

Q. During your marriage who was the disciplinarian? Who took care of keeping the kids in line and disciplining?

A. I had to do that.

Q. What happened when you left the house?

A. Well, it just look like she lost complete control of the children because she never did like to discipline them. And she was quite easy on that. And she just looked like she was losing control on them. And I would talk to her about it, you know. Well, I just let her run her business the best she could. When it came to really disciplining, she came to me, really, for most of it, you know.

Q. She had problems once you left the house?

A. Yes.

Q. With the children?

A. Yes.

Q. With all the children?

A. Yes.

Q. In fact, Timothy is not the only son that has had a problem with drugs or alcohol?

A. No.

Q. Lorenzo, also?

A. Yes.

Q. And Larry?

A. Larry.

Q. What was your wife drinking?

A. At first?

Q. Yes.

A. I think started off with beer. And then it progressed right on down to Vodka. I think that is what she drink now. Vodka.

Q. Her drinking is quite constant?

A. It is constant, as far as I can see. I am not there every day. But --

Q. Right.

A. When I do see it, it's constant.

Q. Did you notice your divorce affected Timothy in any way?

A. Yes, I think it did. I am quite sure it did. It affected all the children.

Q. Why do you say Timothy, in particular?

A. Because Timmy and I would, well, we was kind of tight, I call it, you know. I mean, we was together as much as we could be. I would go to his baseball games, not football games but baseball, what not. And we would talk sometime. He would want to know why I didn't stay with them, you know.

> Questions like that, And "Are you going to come back home and be with us?" Things like that.
>
> And I just know he was upset because I was upset for twenty years because I hadn't seen my father. He never done things with me, carried me places. So I knew it was an upset to him, you know.

(PC-R. 384, 386-90). In the context of all these family problems the father testified that Mr. Hudson first went to "jail" at age 17 (PC-R. 394).

Mr. Hudson's trial counsel failed him, The circuit court correctly found deficient performance. As a result, a wealth of significant mitigating evidence which was available and which should have been presented was not presented. No tactical motive can be ascribed to an attorney whose omissions are based on last minute preparation, lack of knowledge, and an the failure to properly investigate and prepare. Bates; Lara; Mitchell. Mr. Hudson's sentence of death is the resulting prejudice:

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

Cunningham, 928 F.2d at 1016.

Proper investigation and preparation would have resulted in evidence establishing a compelling case for life on behalf of Mr. Hudson. A wealth of mitigating information was available to trial counsel in this case. Mr. Hudson, however, was sentenced to death by a jury, a judge, and this Court (on direct appeal) without the fruits of a thorough investigation. This was far from an individualized capital sentencing proceeding.

Evidence of Mr. Hudson's dysfunctional family, his mental and emotional deficiencies, and his history of cocaine abuse all would have provided compelling statutory and nonstatutory mitigation sufficient to support a recommendation of life. See Ross v. State, 474 So. 2d 1170 (Fla. 1985); Holswarth v. State, 522 So. 2d 348 (Fla. 1988); Burch v. State, 522 So. 2d 810 (Fla. 1988); Amazon v. State, 487 So. 2d 8 (Fla. 1986); Cheshire v. State, 568 So. 2d 908 (Fla. 1990). This record clearly

supports the circuit court's awarding of penalty phase relief. This Court must affirm the decision to vacate the death sentence. However, as set out in Argument IV, this Court should order a life sentence imposed.

ARGUMENT VI

MR. HUDSON WAS DENIED HIS SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT RIGHTS TO A FAIR AND IMPARTIAL JURY WHEN THE TRIAL COURT REFUSED TO EXCUSE JURORS FOR CAUSE WHEN THEY INDICATED THEY WOULD AUTOMATICALLY VOTE FOR DEATH.

Here, jurors indicated they would automatically vote for death if Mr. Hudson was convicted of first degree murder. Prospective juror Seamon expressed strong feelings about the death penalty, saying it should be imposed with every conviction for premeditated murder (R. 75). When the trial court refused to excuse Seamon for cause (R. 79) counsel was forced to use a peremptory challenge (R. 80). Prospective juror Mortello likewise drew a peremptory challenge from Hudson's trial counsel (R. 99-121, 123).

But inexplicably, trial counsel failed to challenge juror Fowler who expressed strong feelings in favor of the death penalty:

> **[DEFENSE COUNSEL]**
>
> Q. Do either of you have any strong feelings about the death penalty? Mr. Wofford?
>
> A. No, I have no strong feelings about it.
>
> Q. Ms. Fowler?
>
> A. I believe in it, I feel more strongly about carrying out the sentence than I do the sentence itself.

(R. 177). Mr. Hudson's trial counsel completely failed to follow up that exchange in any way whatsoever. Counsel unreasonably failed to question juror Fowler further. There was no challenge for cause and no peremptory challenge. Thus, juror Fowler was selected almost by default as the twelfth member of the panel (R. 179). Further compounding the result of this ineffective representation, juror fowler became the foreperson (R. 496-500).

The United States Supreme Court has recently held:

> A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions as the instructions require him to do. Indeed, because such a juror has already formed an opinion on the merits, the presence of absence of either aggravating or mitigating circumstances is entirely irrelevant to such a juror, Therefore, based on the requirement of impartiality embodied in the Due Process Clause of the Fourteenth Amendment, a capital defendant may challenge for cause any prospective juror who maintains such views. If even one such juror is empaneled and the death sentence is imposed, the State is disentitled to execute the sentence.

Morgan v. Illinois, 112 S. Ct. 2222, 2231 (1992).

Counsel have been found to be prejudicially ineffective for failing to impeach key State witnesses with available evidence; for failing to raise objections, to move to strike, or to seek limiting instructions regarding inadmissible, prejudicial testimony, Vela v. Estelle, 708 F.2d 954, 961-66 (5th Cir. 1983); for failing to object to improper prosecutorial jury argument, Vela, 708 F.2d at 963; and for failing to interview witnesses who may have provided evidence in support of a partial defense, Chambers v. Armontrout.

Even if counsel provides effective assistance at trial in some areas, the defendant is entitled to relief if counsel renders ineffective assistance in his or her performance in other portions of the trial. Washinaton v. Watkins, 655 F.2d 1346, 1355, rehearins denied with opinion, 662 F.2d 1116 (5th Cir. 1981), cert. denied, 456 U.S. 949 (1982). See also Kimmelman v. Morrison, 106 S. Ct. 2574 (1986). Even a single error by counsel may be sufficient to warrant relief. Nelson v. Estelle, 642 F.2d 903, 906 (5th Cir. 1981)(counsel may be held to be ineffective due to single error where the basis of the error is of constitutional dimension); Nero v. Blackburn, 597 F.2d at 994 ("sometimes a single error is so substantial that it alone causes the attorney's assistance to fall below the Sixth Amendment standard"); Strickland v. Washington, supra; Kimmelman v. Morrison, supra.

Such is the case here. Mr. Hudson is entitled to 3.850 relief from his trial counsel's ineffective representation during jury selection. A resentencing must be ordered.

ARGUMENT VII

MR. HUDSON'S DEATH SENTENCE WAS THE PRODUCT OF CONSTITUTIONALLY INVALID JURY INSTRUCTIONS AND THE IMPROPER APPLICATION OF STATUTORY AGGRAVATING CIRCUMSTANCES IN VIOLATION OF HIS EIGHTH AND FOURTEENTH AMENDMENT RIGHTS.

Mr. Hudson's jury failed to receive complete and accurate instructions defining the aggravating circumstances in a constitutionally narrow fashion. The jury was told to consider aggravating factors that failed to narrow and channel discretion. As a result, the jury was given unbridled discretion to return a death recommendation. Specifically relying upon the tainted death recommendation, the judge sentenced Mr. Hudson to death,

Mr. Hudson was charged with first-degree murder: "Murder from a premeditated design to effect the death of" the victim in violation of Florida Statute **782.04.** An indictment such as this which "tracked the statute" charges both premeditated and felony murder. Lightbourne v. State, 438 So. 2d **380, 384 (Fla. 1983).** In this case, it is likely that Mr. Hudson was convicted on the basis of felony murder. Since felony murder was the basis of Mr. Hudson's conviction, the use of the underlying felony as an aggravating factor violated the Eighth Amendment. This is because the aggravating circumstance of "in the course of a felony" was not "a means of genuinely removing the class of death-eligible persons and thereby channeling the jury's discretion." Stringer v. Black, **112** S. Ct. **1130, 1138 (1992).** In this case, felony murder was found as a statutory aggravating circumstance. The murder was committed while the defendant was engaged in the commission of a burglary or robbery. Unlike the situation in Lowenfield v. Phelps, **484** U.S. **231 (1988),** the narrowing function did not occur at the guilt phase, Thus, the use of this non-narrowing aggravating factor "create[d] the possibility not only of randomness but of bias in favor of the death penalty." Strinner, 112 S. Ct. at 1139.

The sentencing jury was instructed that it "must" consider the underlying felony as an aggravating circumstance which justified a death sentence. Everv felony-murder would involve, by necessity, the finding of a statutory aggravating circumstance, a fact which, under the particulars of Florida's statute, violates the eighth amendment: an automatic aggravating circumstance is

created which does not narrow ("[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty . . . ." Zant v. Stephens, 462 U.S. 862, 876 (1983)). "[L]imiting the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action." Mavnard v. Cartwright, 486 U.S. 356, 362 (1988). In short, since Mr. Hudson was convicted for felony murder, he then faced statutory aggravation for felony murder. This is too circular a system to meaningfully differentiate between who should live and who should die, and it violate the Eighth and Fourteenth amendments.

Recently the Wyoming Supreme Court addressed this issue. The Court in Enabern v. Mever, 820 P.2d 70 (Wyo. 1991) found the use of an underlying felony both as an element of first degree murder and as an aggravating circumstance to violate the eight amendment:

> In this case, the enhancing effect of the underlying felony (robbery) provided two of the aggravating circumstances which led to Engberg's death sentence: (1) murder during commission of a felony, and (2) murder for pecuniary gain. As a result, the underlying robbery was used not once but ***three*** times to convict and then enhance the seriousness of Engberg's crime to a death sentence. *All* felony murders involving robbery, by definition, contain at least the two aggravating circumstances detailed above. This places the felony murder defendant in a worse position that the defendant convicted of premeditated murder, simply because his crime was committed in conjunction with another felony. This is an arbitrary and capricious classification, in violation of the ***Furman/Gregg*** narrowing requirement.
>
> Additionally, we find a further ***Furman/Gregg*** problem because both aggravating factors overlap in that they refer to the same aspect of the defendant's crime of robbery. While it is true that the jury's analysis in capital sentencing is to be qualitative rather than a quantitative weighing of aggravating factors merely because the underlying felony was robbery, rather than some other felony. The mere finding of an aggravating circumstance implies a qualitative value as to that circumstance. The qualitative value of an aggravating circumstance is unjustly enhanced when the same underlying fact is used to create multiple aggravating factors.
>
> When an element of felony murder is itself listed as an aggravating circumstance, the requirement in W.S. 6-5-102 that at least one "aggravating circumstance" be found for a death sentence becomes meaningless. ***Black's Law Dictionary, 60*** (5th ed. 1979) defines "aggravation" as follows:
>
> > "Any circumstance attending the commission of a crime or tort which increases its guilt or enormity or adds to its injurious consequences. but ***which is above and beyond the essential constituents of the crime or fortitself."*** (emphasis added)

> As used in the statute. these factors do not fit the definition of "aggravation." The aggravating factors of pecuniary gain and commission of a felony do not serve the purpose of narrowing the class of persons to be sentenced to death, and the *Furman/Gregg* weeding-out process fails.

820 P.2d at 89-90.

Wyoming, like Florida, provides that narrowing occur at the penalty phase. See Stringer v. Black. The use of the "in the course of a felony" aggravating circumstance was unconstitutional where the conviction was for felony murder. As the Ensberg court held:

> [W]here an underlying felony is used to convict a defendant of felony murder only, elements of the underlying felony may not again be used as an aggravating factor in the sentencing phase. We acknowledge the jury's finding of other aggravating circumstances in this case. We cannot know, however, what effect the felony murder, robbery and pecuniary gain aggravating circumstances found had in the weighing process and in the jury's final determination that death was appropriate.

820 P.2d at 92.

This error cannot be harmless in this case.

> [W]hen the sentencing body is told to weigh an invalid factor in its decision, a reviewing court may not assume it would have made no difference if the thumb had been removed from death's side of the scale. When the weighing process itself has been skewed, only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence.

Strinser, 112 S. Ct. at 1137.

Here, the jury was instructed to consider this aggravating circumstance. There is no way at this juncture to know what a properly instructed jury would have done, particularly in light of the wealth of mitigation. Espinosa v. Florida, 112 S. Ct. 2926 (1992), held that Florida sentencing juries must be accurately and correctly instructed regarding aggravating circumstances in compliance with the eighth amendment. The jury instructions here constitutes Eighth Amendment error.

Where improper aggravating circumstances are weighed by the jury, "the scale is more likely to tip in favor of a recommended sentence of death." Valle v. State, 502 So. 2d 1225 (Fla. 1987). "A vague aggravating factor used in the weighing process is in a sense worse, for it creates the risk that the jury will treat the defendant as more deserving of the death penalty than

he might otherwise be by relying upon the existence of an illusory circumstance." Strinaer v. Black, 112 S. Ct. at 1139. The jury, here, was left with the open-ended discretion found to be invalid in Furman v. Georgia, 408 U.S. 238 (1972), and Mavnard v. Cartwriaht. The error cannot be harmless beyond a reasonable doubt.

ARGUMENT VIII

THE TRIAL COURT'S UNCONSTITUTIONAL SHIFTING OF THE BURDEN OF PROOF IN ITS INSTRUCTIONS AT SENTENCING DEPRIVED MR. HUDSON OF HIS RIGHTS TO DUE PROCESS AND EQUAL PROTECTION OF LAW. AS WELL AS HIS RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS.

A capital sentencing jury must be:

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

State v. Dixon, 283 So. 2d 1 (Fla. 1973)(emphasis added). This straightforward standard was never applied at the penalty phase of Mr. Hudson's capital proceedings. To the contrary, the burden was shifted to Mr. Hudson on the question of whether he should live or die.

Shifting the burden to the defendant to establish that mitigating circumstances outweigh aggravating circumstances conflicts with the principles of Mullaney v. Wilbur, 421 U.S. 684 (1975), Jackson v. Dugger, 837 F.2d 1469 (11th Cir. 1988), cert. denied, 108 S. Ct. 2005 (1988), and Dixon, for such instructions unconstitutionally shift to the defendant the burden with regard to the ultimate question of whether he should live or die. In so instructing a capital sentencing jury, a court injects misleading and irrelevant factors into the sentencing determination, thus violating Espinosa v. Florida, 112 S. Ct. 2926 (1992). Mr. Hudson's jury was unconstitutionally instructed, as the record makes abundantly clear.

Under Espinosa, Florida juries must be instructed in accord with the eighth amendment principles. Esninosa constituted a change in law in this regard. In other words, for eighth amendment purposes, the jury is a sentencer too. This was a retroactive change in law, and thus, this issue is cognizable now in Rule 3.850 proceedings. Mr. Hudson's sentence of death is neither

"reliable" nor "individualized." This error undermined the reliability of the jury's sentencing determination and prevented the jury from assessing the full array of mitigation presented by Mr. Hudson. For each of the reasons discussed above the Court must vacate Mr. Hudson's unconstitutional sentence of death.

CONCLUSIONS

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

The Circuit Court erred, however, as a matter of law and fact in its conclusion that trial counsel's substandard performance was not prejudicial at the guilt phase, and this part of its Order should be reversed and relief granted.

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

CERTIFICATE OF SERVICE

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 August 5, 1992.

Respectfully submitted,

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